

ProBAR's Legal Department Staff continue to advocate for migrants impacted by the Title 42 policy and the suspension of the asylum process.

On March 20, 2020, Priscilla, ProBAR attorney, received a notification on her cell phone—a tweet announcing the implementation of Title 42 restrictions on immigration processing. “At first I was confused but then I read that it was COVID-related,” she reflects. The policy issued by U.S. Health and Human Services (HHS) and the Director for the Centers for Disease Control and Prevention (CDC) called upon a 1944 public health statute, referred to as Title 42, to issue a regulation that suspended the entry of certain noncitizens into the United States, citing concern over potential spread of the COVID-19 virus that at that time had no known treatment or vaccine ([HHS, 2020](#)).

Title 42

THE PUBLIC HEALTH AND WELFARE

§265. Suspension of entries and imports from designated places to prevent spread of communicable diseases

“Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.”

(July 1, 1944, ch. 373, title III, §362, 58 Stat. 704.)

The CDC’s order in turn empowered Customs and Border Protection (CBP) officers to expel noncitizens arriving at the border who ordinarily would have been processed into immigration proceedings. “It was clear that adults would be denied entry, making services for adults nearly impossible, but I was shocked when I learned children would also be turned away,” Priscilla says.

Without access to the asylum system, people at the Southwestern border seeking protection in the United States – including families and unaccompanied children – would be sent back to their home countries or to Mexico without an opportunity to present their claims. The announcement of Title 42 had effectively suspended the right for these people to seek asylum in the United States.

Title 42 at the Southern Border

Under international law, the ability to seek asylum is recognized as a human right ([UNHCR, 1951](#)). And when Congress created the system for claiming asylum in the United States through the [Refugee Act of 1980](#), it also incorporated an international definition of a refugee into U.S. immigration law. In the U.S. asylum system, individuals are provided with a chance to express fear to officials and either to be paroled into the United States with a notice to appear before the immigration court or an opportunity to describe the harm they fear in an interview with an Asylum Officer. If they have this credible fear interview (CFI) and pass, they will then be presented with a date to appear before a judge in adversarial court proceedings ([USCIS, 2021](#)). The asylum-seeker bears the burden of presenting convincing evidence of their own persecution and of arguing the validity of their fear, often without legal education or representation. It is a difficult and confusing process for those navigating it, but it creates a crucial pathway for seeking protection in the United States.

Under Title 42, U.S. government officials expel noncitizens encountered at the border rapidly, transporting them to Mexico or to their home country. Over a million adults and families so far, and initially thousands of unaccompanied children, have been almost immediately expelled ([CBP, 2021](#)). These individuals seeking protection are expelled without a court hearing or the opportunity to request a CFI, the first in a series of steps for seeking asylum. In instances where immediate expulsion is complicated by diplomatic or logistical considerations, CBP places people in detention facilities while arranging expulsions. For a period of time, some children were placed in rented hotels along the border in a perplexing legal limbo, under the care of DHS but not in approved licensed facilities equipped for the care of children and without access to legal services or the opportunity to pursue release to a sponsor in the U.S. For migrants held in these various forms of detention, they faced risk of COVID-19 exposure while simultaneously being cut off from the asylum system, and in many cases, legal services. “With all changes in policy,” ProBAR Director of Programs Brenda says, “the way they are described is very different than how they are implemented. Our biggest challenge is to provide an effective response despite those discrepancies.”

Obstacles and Adaptations to Legal Services

For asylum-seekers in search of a way to present their claims for protection, Title 42 also creates new barriers to accessing crucial legal information and assistance.

“Any time a new policy is announced, we have to think about what this means, how we are going to respond, and what is our strategy,” says Brenda. The need for creative ways to support asylum-seekers affected by changing immigration policies at our southern border was nothing new. The 2019 implementation of the Migrant Protection Protocols (MPP), or “Remain in Mexico” program first in San Diego, California, and later in Brownsville, Texas, had forced tens of thousands of asylum-seekers to await their asylum hearings from the Mexican side of the border. Before the pandemic and the implementation of Title 42, ProBAR staff, like attorney Corinne, travelled regularly to Mexico to meet asylum-seekers awaiting their hearings and assist them with information, representation, and pro se assistance. Now, as Title 42 prevented most newly arrived migrants from accessing the asylum system, the courts also indefinitely ceased adjudications of the cases for the over ten thousand migrants enrolled in MPP.

Attorney and HIAS Border Fellow Lindsay reflected, “The pandemic has impacted my work since the day I started at ProBAR.” Lindsay joined ProBAR in April 2020 to serve asylum-seekers in MPP. ProBAR staff were thinking creatively about how to deliver critical information to asylum-seekers unable to enter the U.S. Where prior to MPP, ProBAR might have offered legal orientations and representation to asylum-seekers who were already in the U.S., the team was now communicating with asylum-seekers in Mexico, responding to WhatsApp messages and calls requesting information and resources. Over a period of eight months, ProBAR staff presented live “charlas” on Facebook—video sessions accessible to those in Mexico who were awaiting reopening of the courts. These videos offered information about the immigration system, updates on changes in laws and policies, and explanations of how they affected migrants in Mexico. They also pointed to resources available to anyone seeking legal support. Private immigration attorneys

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and colleagues at other organizations in the Rio Grande Valley joined the effort, contributing their expertise. ProBAR staff also used creative methods to share recorded messages with graphics over WhatsApp. It was clear that there was a tremendous demand for reliable information and legal assistance among asylum-seekers subject to MPP.

And these alternative methods and educational tools that were created to share information pertinent to MPP were important when ProBAR staff could not reach migrants due to the unraveling of structures in the immigration system and rapid Title 42 expulsions. ProBAR staff built on these strategies to provide information and explanations about Title 42 as well, communicating virtually with asylum-seekers on the Mexican side of the border. And ProBAR has provided information and resource lists to individuals and families in Mexico who contact our organization following expulsion.



Pictured above are two slides from informational videos published on Facebook.

Meanwhile, the team has also been able to offer legal rights information and resources to the few individuals that are brought to U.S. Immigration & Customs Enforcement (ICE) detention facilities to await expulsion, despite the difficulties of connecting with those needing assistance. For this small group of asylum-seekers, there is the possibility of requesting a fear screening. “So when someone calls, we want to connect them to someone who can help them get a fear screening and help them file their own request or file on their behalf. Everyone on the team is aware of the imperative [for an immigrant] to express fear if they are afraid of returning home, or of returning to Mexico,” Corinne says. ProBAR staff continue to communicate the right to seek asylum based on fear of persecution to those in detention, despite the difficulties of making connections with these asylum-seekers given the speed of most expulsions.

Title 42 orders have not gone unchallenged, and advocates have brought several lawsuits on behalf of asylum-seekers. In one instance, as part of settlement negotiations in a lawsuit titled [Huisha-Huisha v. Gaynor](#), the ACLU negotiated an exemption process for Title 42 in coordination with immigration authorities. Under this process, nongovernmental organizations worked to identify individuals with acute vulnerabilities and referred these cases to the ACLU. Meanwhile, in the late spring and summer of 2021, international nongovernmental organizations began overseeing a Title 42 Consortium exemption process at the request of the U.S. government to identify particularly vulnerable individuals that may be eligible for exemption from Title 42 expulsion.

The exemption processes created an avenue for advocates to assist asylum-seekers in gaining access to the asylum process. Staff worked to identify when ProBAR might be able to assist an individual or family due to an existing vulnerability. Lindsay prepared applications that colleagues filed with the ACLU on behalf of individuals who may be eligible for exemption due to “extreme medical vulnerabilities, individuals who are a part of the LGBTQ community, or who, for example, were recently kidnapped in Mexico and escaped,” she says. If the application was accepted, the person was processed into the U.S. and then placed in immigration removal proceedings. “You are in immigration court and want to seek asylum,” Lindsay explains, “so now you have to defend your case. The government says you should be deported because you do not have valid documents to be in the U.S. You can defend your case by showing that you deserve asylum under U.S. law.” The Consortium exemption processes, however, halted in August 2021, and, as of now, there is no indication that a new process will be started.

The only remaining channel for an adult to seek asylum and avoid rapid expulsion under Title 42 is by humanitarian parole request. ProBAR staff assist in identifying individuals with acute vulnerabilities that may be candidates for a humanitarian parole request, and file those requests with CBP. The process for identifying individuals who may qualify is challenging. Corinne says, “emotionally, the burden [for the team] of talking to maybe 100 people and finding only 5 people or families that could cross... it’s really hard. It is emotionally difficult, you know?” However, staff have been able to identify potential candidates and successfully file humanitarian parole requests on behalf of individuals with acute vulnerabilities.

With limited opportunities for intervention on behalf of migrants, “It has been tricky recently,” Corinne says. “There are few rights that folks can assert in Title 42.” Luis, an attorney in ProBAR’s Legal Department, reiterates that Title 42 has made providing legal services extremely challenging and that at times, this inability to assist leads to a feeling of helplessness. And yet, staff continue to seek new opportunities to intervene and advocate on behalf of clients.

The Consequences of Title 42

As of November 2021, CBP estimates nearly 1.4 million expulsions have occurred as a result of the Title 42 policy ([CBP, 2021](#)). The consequences of this policy will never be known or understood to their full scope or scale. As expulsions are performed daily, Lindsay reflects, “people are being kidnapped, subject to trafficking, suffering horrific violence, and living in inhumane conditions in camps.”

There is no way to quantify or qualify the impact the public health policy has had on the hundreds of thousands of people subjected to it following their journey to the U.S. “There are days I sit back and think about how devastating it is. I talked to someone whose husband was tortured last week and I just...” Corinne’s voice trails off as she looks away.

“The pandemic was very serious and disruptive to our everyday lives, but with that in mind,” Corinne says, “I can fly to Paris, I can be in a bar without a mask, but someone fleeing for their life can’t claim asylum.”

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For ProBAR staff working on Title 42 resources, facilitating connections when possible, and submitting exemption requests, the reality of the policy’s consequences is top of mind. “There are folks from Nicaragua fleeing because they are persecuted for opposing the government, imprisoned now,” Luis says. And without a system for seeking asylum, these people are subjected to persecution in their home country or on their journey elsewhere.

“Everyone hears horrible, sad stories,” Lindsay says, “but we’re all lifting each other up. It’s definitely supportive.” In addition to the support structures that occur naturally in teams with shared values, ProBAR provides free wellness resources and self-care time to staff. The impact of the policy reaches into the lives of legal service providers and personnel finding ways to help and communicate the needs of those subjected to it. Because the policy does not allow for immigrants to have a voice and speak for themselves in the system, strong advocates are critical for communicating the impact of Title 42. “It’s so important to talk about it... to share what’s happening,” Corinne reiterates.

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Customs & Border Protection- Nationwide Encounters
2021

The Elusive End to Title 42

Title 42 was presented to the public in March 2020 to protect against the introduction of the COVID-19 virus and avoid placing individuals in congregate settings, like CBP processing facilities or ICE detention. Since then, the State of Texas has lifted capacity restrictions for public spaces and mask mandates. The Department of Homeland Security and State Department have lifted bans on leisure and business travel, and have begun permitting “non-essential travel,” to the U.S. And Title 42’s efficacy and necessity have faced repeated criticism by immigration advocates and public health experts. When asked about Title 42, White House Advisor Dr. Anthony Fauci has said, “that focusing on immigrants, expelling them...is not the solution to an outbreak” ([Forbes, 2021](#)). The United Nations High Commissioner for Refugees Filippo Grandi issued a statement in May 2021 appealing to the U.S. government to rescind the Title 42 policy and affirming that “protecting public health and protecting access to asylum, a fundamental human right, are fully compatible.” ([UNHCR, 2021](#)). Immigration advocates and legal firms continue to fight in court for the end of the policy, citing its harm to the migrant community. And yet the end of Title 42 remains elusive as the CDC recently published that the policy, “shall remain in effect until the CDC Director determines that the danger of further introduction of COVID-19 into the United States from covered noncitizens has ceased to be a serious danger to the public health” replacing previous guidance that emphasized the temporal nature of the policy ([CDC, 2021](#)).

Title 42 has now been in effect for 21 months. It continues to impact thousands of immigrants’ lives and the way immigration law is practiced every day. It continues to restrict immigrants’ access to due process and the asylum system protected by U.S. law. Grandi’s call for a policy that protects public health while also protecting

the right to seek asylum continues to await change that fully recognizes the rights and humanity of citizens and noncitizens. “I believe this will work out,” Priscilla says, “I don’t know if I could do this work if I didn’t believe humanitarian values would ultimately prevail.”

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-Priscilla, Attorney

At the time of publication, Title 42 remains in effect.

ProBAR offers additional resources for understanding Title 42 and its implications, including a newly published infographic. To access, [click here](#).

ProBAR is grateful for staff that continue to advocate for the rights of immigrants, including those recognized in this piece, and each of our team members who continue to inform, represent, and connect.

If you are interested in this work, we invite you to [join our team](#). ProBAR is actively hiring for Staff Attorney positions and Unaccompanied Children Legal Service Specialists, as well as other roles essential in supporting legal education, representation, and connections to services.

We encourage you to [sign up](#) for news & updates and information about opportunities to get involved.



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