



# New Migration Management Policies in the Aftermath of Title 42

by Melissa Katsoris

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Migrants walk through a river in the inhospitable rainforest of the Darién Gap, Colombia, November 20, 2022. (Jan Sochor/Getty Images)

## Introduction

As of mid-2022, an estimated 20 million people were displaced in the Western Hemisphere.<sup>1</sup> The needs of this massive population are only growing and their migration, safety, and impact on communities in the region is becoming a priority for policymakers, especially in the United States. On April 27, 2023, the U.S. Departments of State (DOS) and Homeland Security (DHS) issued updated policies on migration management across the Western Hemisphere.<sup>2</sup> These policies will be implemented in coordination with regional partners, including the governments of Mexico, Canada, Spain, Colombia, and Guatemala. They are meant to facilitate safe migration across the region, prevent unauthorized crossings and congestion at the U.S. southern border, and create more pathways for people to legally enter the United States and other countries. However, they also put more restrictions on and disqualify many people from accessing asylum, impose harsh consequences for irregular migration, could make access to legal representation more difficult,

and may be challenging to implement due to increased staffing needs and existing case backlogs.

Below is an analysis of these new policies, their pros and cons, and the implications and legal precedent they will set for asylum, complementary pathways, and migration management for the United States and other countries.

## What is the policy context at the U.S. southern border?

Over the past several years, the Migrant Protection Protocols (MPP)<sup>3</sup> (also known as “Remain in Mexico”) and Title 42 border policy<sup>4</sup> prevented asylum seekers and other immigrants from crossing the border. MPP allowed border officers to send non-Mexicans seeking asylum at the border back to Mexico to await their U.S. immigration hearings. The Biden administration rescinded this policy in 2022. Title 42 allowed the U.S. government to temporarily block noncitizens from

## The punitive and welcoming aspects of these policies

### Punitive

**Create formal barriers by moving border control southward.** Limits on asylum will disqualify asylum seekers who do not follow certain rules, such as not seeking protection in countries of transit and failing to make appointments with the CBP One app.

**Enable practical barriers.** The technical issues and disfunction associated with the CBP One app and lack of available appointments are categorically preventing people from accessing asylum and other lawful pathways.

**Rush asylum seekers through the system.** Asylum seekers in expedited removal at the border must go through rapid processing procedures that will deprive them of due process and legal representation and serve as a deterrent to seeking asylum at the border.

**Increase risks.** Metering asylum seekers (compelling them to wait in Mexico to remain eligible for and seek asylum) exposes them to dangerous conditions, limits their access to due process, and serves as a deterrent to crossing the border irregularly.

### Welcoming

**Modest expansion of legal channels.** New lawful pathways give people more options to enter the United States (that can serve as alternatives to seeking asylum), including increased refugee admissions, family reunification programs, and humanitarian parole programs.

**Increase processing capacity.** More resources will be brought to the border, including redirecting immigration judges and asylum officers there, increasing transportation to ports of entry, and utilizing technical solutions like the CBP One app to make processing more efficient.

**Adopt a regional approach to address a regional problem.** Regional processing centers (RPCs) will be established throughout the Western Hemisphere, starting in Guatemala and Colombia, to help and process people seeking lawful pathways before they reach the border and prevent them from taking dangerous journeys there. The U.S. government is partnering with other countries to make pathways, processing, and transport to the United States, Canada, and Spain available at RPCs. This aims to make access to protection and pathways more efficient.

entering the United States in the interest of public health, even if they were seeking asylum. The previous administration implemented Title 42 in March 2020 at the onset of the COVID-19 pandemic, and the Biden administration continued to implement it thereafter. In total there were more than 2 million expulsions because of Title 42.<sup>5</sup> The policy expired on May 11, 2023, and the new policies detailed below are being implemented in part to prepare to return to previous processing procedures under Title 8.<sup>6</sup>

Title 42, MPP, as well as other push factors (including economic crises, climate emergencies, political turmoil, and persecution) prompting people to flee their countries has created over three years of pent-up demand and an increasing number of people at the border. With Title 42 restrictions lifted, news outlets have reported that smugglers are encouraging migrants to cross the border.<sup>7</sup> Immigration and border security is a politically charged issue worldwide and is a concern and priority

for all political parties. Governments in the region are under immense pressure to maintain “control” of migration flows throughout the Western Hemisphere and their borders.

## Changing the structure of incentives to come to the U.S. by limiting asylum and creating new pathways

For years, migrants from the Western Hemisphere who make the treacherous journey north to the United States have had limited pathways to enter the country legally. For many, asylum or irregularly crossing the border were their only options. This has created an overwhelming asylum backlog in the United States, which has reached over 1.5 million cases,<sup>8</sup> and a large network of illegal smuggling operations that profit from transporting migrants to the border and into the country



irregularly.<sup>9</sup> *The asylum system in the United States cannot be a catch-all migration solution.* The United States and other countries in the region are recognizing the need for alternative complementary pathways, such as labor, family, education, humanitarian parole, and temporary visa programs to alleviate the pressure on the asylum system.<sup>10</sup> Through these new policies, the administration is trying to change the structure of incentives to come to the United States. It is creating new pathways for people to not rely exclusively on asylum, but also increasing punitive measures and limiting access to asylum for those who cross the border irregularly or don't follow certain rules.

Below is an analysis of the recently released policies that the Biden administration is implementing to regulate asylum and create alternative pathways to reduce and prevent irregular migration at the border:

**Fast tracking adjudication for asylum seekers in expedited removal may increase efficiency but raises concerns about due process and fairness.**

The Biden administration has stated that one tool it intends to fully resource is the expanded use of expedited removal under Title 8 at the U.S. southern border. Certain noncitizens are subject to expedited removal without a hearing before an immigration judge, including noncitizens who crossed the border without authorization, used fraudulent documents at U.S. ports of entry, and arrived as stowaways.<sup>11</sup> If they indicate an intention to apply for asylum or express a fear of persecution or torture they are referred to U.S. Citizenship and Immigration Services (USCIS) asylum officers who conduct credible fear interviews (CFIs) to determine whether their claims are credible. If the officer determines that they are, these noncitizens are placed in removal proceedings (hearings before an immigration judge that determine whether they are eligible to remain in the United States) and must file an asylum application with the court.

The administration plans to speed up the process for expedited removal. Those who express a fear of persecution will be referred to a USCIS officer with specialized asylum training for a CFI and this interview would be scheduled within 24 hours. They would also only have that long to look for legal representation. To support faster processing, DHS plans to increase its holding capacity, install hundreds of phone lines and privacy booths for CFIs, and increase access to legal

representation. These interviews, immigration court review, and adjudication will be done while the asylum seeker is in U.S. Customs and Border Protection (CBP) custody with the intention to adjudicate cases as fast as possible. DHS and the Department of Justice (DOJ) are redirecting asylum officers and immigration judges nationwide to the border to achieve this goal.

A similar process was implemented in 2022 that aimed to process asylum claims of noncitizens subject to expedited removal more efficiently.<sup>12</sup> Implementation of the rule was paused in April 2023 to ensure there was enough infrastructure and operations to handle the new process ahead of the expiration of Title 42, but a DHS spokesperson stated that it would begin again soon.<sup>13</sup> Under this rule a CFI is treated as a full application for asylum. Those who pass would be given an asylum merits interview (where an asylum officer reviews their claim and determines whether to grant them asylum) within 60 days. If the officer denies their claim at the interview, the noncitizen would be placed in removal proceedings before an immigration judge and their asylum claim would be adjudicated within 60-135 days. Almost 4,000 people were put through this process between June 2022 and January 2023. Approximately 6 percent of them were granted asylum at their merits interview or by an immigration judge and almost 49 percent were ordered removed after their CFI.<sup>14</sup> The remainder had their cases temporarily suspended or dismissed.<sup>15</sup> These rapid adjudication timelines rushed people through the asylum process and many did not receive adequate access to legal representation as a result.<sup>16</sup> Although this process had mixed results, the administration is likely to implement it, or a modified version, again soon.

These policies have benefits:

- They help process cases faster, so asylum seekers won't have their cases pending for years. They can also get them out of custody in a timelier manner.
- USCIS asylum officers, who have more training and knowledge of the asylum process, adjudicate asylum claims and conduct CFIs, instead of border patrol agents.<sup>17</sup>
- They can help alleviate the immigration court backlog, which has reached over 2 million cases.<sup>18</sup> If USCIS asylum officers can adjudicate asylum claims that are raised as a defense to expedited removal

at the border this could decrease the number of cases that wind up in immigration court. Several organizations have recommended this already.<sup>19</sup>

They also have serious drawbacks:

- Rapid processing and adjudication will hinder asylum seekers' access to legal representation and due process. These policies depend on pro bono legal service providers to have the expertise and capacity for on-the-spot legal consultations and/or representation. But there is already a shortage of legal representation for immigrants nationwide and it will be difficult for asylum seekers to secure legal counsel so quickly.<sup>20</sup> Representatives already have trouble accessing and communicating with their clients in detention. Attorneys and accredited representatives will most likely not have enough time to get the proper signatures from clients and forms submitted to the government to be the representative of record before their CFI.
- Redirecting immigration judges and asylum officers to the border has the potential to worsen immigration court and asylum backlogs. This practice was already implemented by the previous administration with conflicting results, leading to disruptions in immigration judges' home dockets and postponement of thousands of cases nationwide.<sup>21</sup>
- Going through this process so fast and being in detention throughout it may exacerbate trauma for asylum seekers. Many just completed a treacherous journey to the U.S. southern border, and are likely feeling anxiety being in detention.<sup>22</sup> USCIS recognizes that symptoms of trauma-related conditions are made worse in these situations and can make an interview extremely difficult for a survivor of torture or other severe trauma.<sup>23</sup>

**Limiting access to asylum will likely not be enough incentive to stop people from irregularly crossing the border.**

The Biden administration made it clear that there will be consequences for asylum seekers who do not follow certain rules. The *Circumvention of Lawful Pathways* rule, also known as the "asylum ban" demonstrates this.<sup>24</sup> This policy aims to incentivize asylum seekers to seek entry at the U.S. southern border based on an appointment scheduling system through the phone application CBP One (see more detail on the app below).

Those who do not use preferred pathways to approach the U.S. southern border will be presumed ineligible for asylum, with limited exceptions.

This applies for 24 months (starting May 11, 2023) to asylum seekers entering the United States at its borders who:

- approach U.S. ports of entry without a CBP One appointment or using existing lawful pathways; or
- cross the border irregularly between ports of entry; and
- did not seek protection or asylum in a third country they traveled through on their way to the United States.

Under the new rule, access to asylum would be extremely limited for at least two years. There are few exceptions to this rule, including allowances for those who are facing imminent threats to their lives, are victims of severe forms of trafficking, or cannot access the CBP One application due to technical or other accessibility issues. The asylum seeker would have the burden of proving they are eligible for one of these defined exceptions and this would be hard to show. Without clearer guidelines, whether they do will be left to the discretion of border officers, which will likely lead to increased *refoulement* (the forced return of asylum seekers to countries where they may face persecution) rates at the U.S. southern border.

Those who do not meet these exceptions and are removed are subject to a five-year bar to reenter the United States and become ineligible for humanitarian parole processes available to Cubans, Haitians, Nicaraguans, and Venezuelans. The rule also meters asylum seekers (i.e. forcing asylum seekers to wait in Mexico to remain eligible for/seek asylum). However, this rule is, in theory, temporary and the administration characterizes it as an emergency measure intended to address an increasing number of people at the border that it anticipates after Title 42 is lifted. But even though these measures are set to expire after two years, the administration could extend or make them permanent.

Previously, noncitizens requesting asylum at the U.S. southern border would be subject to reinstatement of removal,<sup>25</sup> expedited, or standard removal proceedings. They were not disqualified from accessing asylum for irregular border crossings, not seeking asylum in other countries, or whether they chose to seek other legal

pathways into the United States. The new rule has striking similarities to the *Third Country Transit Ban*<sup>26</sup> the former administration implemented in 2019 that was ruled unlawful by a federal judge. This rule also prevented people from accessing asylum if they didn't first seek protection in another country they transited through and metered asylum seekers (forcing them to wait to seek asylum). Both of these measures were ruled unlawful in federal court because they prevent access to due process.

The punitive nature of the asylum ban is unlikely to deter migrants from coming to the U.S. southern border and crossing irregularly.<sup>27</sup> Many people from across the Americas are seeking asylum in the United States because they could not find a way to live if they remained where they were. Those who are forced to wait in Mexico to seek asylum face increasingly desperate situations trying to survive there.<sup>28</sup> This has been demonstrated after several years of implementing similar policies, such as Title 42 and MPP, that summarily restricted access to asylum at the U.S. southern border.<sup>29</sup> The United States continues to see increased numbers of asylum seekers and other migrants traveling towards the U.S. southern border despite these policy announcements.

**Doubling admissions of refugees from the Western Hemisphere is a step in the right direction to address the growing displaced population in the region.**

The administration's new policies include a commitment to double the number of refugee admissions from the Western Hemisphere that the United States committed to welcome as part of the *Los Angeles Declaration on Migration and Protection*. This means the United States endeavors to accept 40,000 refugees from across the Americas during FY 2023 and 2024.<sup>30</sup> This is a significant increase compared to the FY 2022 and previous 2023 refugee admissions allocation of 15,000 spots for refugees from Latin America and the Caribbean.<sup>31</sup> The Biden administration plans to increase resources and staffing for the U.S. Refugee Admissions Program (USRAP) throughout the Western Hemisphere to achieve this goal. The new regional processing centers (RPCs) detailed below will also help process this increased commitment.

This signals the Biden administration's commitment to and acknowledgement of the growing displaced and refugee populations in the Western Hemisphere. The refugee population in this region continues to increase

and reached over 690,000 in 2022.<sup>32</sup> The total displaced population in the region reached almost 20 million in 2022, a 17 percent increase from the previous year.<sup>33</sup> Humanitarian parole programs in the United States for Venezuelans, Nicaraguans, Cubans, and Haitians that accept 30,000 people per month from these regions will serve as an alternative pathway to those ineligible for admission through the refugee resettlement program.<sup>34</sup> However, they are not a substitute and are only available to people with enough resources to secure their travel to the United States and who have connections to people there who are willing to sponsor them. This will only start to address the growing needs of these increasing populations of displaced people in the Western Hemisphere. These programs are limited and only a fraction of this population will have access to them.

**Expanding family reunification programs will alleviate decades-long waits to enter the United States and may prevent irregular migration.**

DHS is creating new family reunification parole programs for Salvadorans, Guatemalans, Hondurans, and Colombians, and modernizing existing ones for Cubans and Haitians. The family reunification parole programs that were originally implemented for Cubans in 2007 and Haitians in 2014, were reintroduced in June 2022.<sup>35</sup> The new programs will allow noncitizens who already have an approved family-based petition to be paroled into the United States, even if they are not eligible to apply for a visa or green card based on these petitions due to Visa Bulletin restrictions. The Visa Bulletin is published by the DOS on a monthly basis and indicates whether nationals of certain countries can apply for a visa or green card based on the type of underlying immigration benefit or petition they are pursuing.<sup>36</sup> Due to these restrictions, some people need to wait between several months to over 20 years after filing their initial petitions to be able to apply for a visa or green card in order to enter the United States from abroad.

The expansion of these programs will allow more people to reunite with their family members in the United States in a more timely manner and provide them with work authorization and legal status in the United States until they can apply for their green card. It may also prevent people from these particular countries from entering the United States irregularly to avoid

the lengthy wait to be reunited with their families. This change also expands their options for admission to the United States and may serve as an alternative to making an asylum claim to speed up the process. These programs will create a larger workload for U.S. consulates and embassies in the above countries, but that can be alleviated by the RPCs, detailed below. However, there may be a lack of U.S.-barred attorneys and service providers in the region who have experience or knowledge of U.S. immigration law and policy to assist people who are eligible for these programs.

## **Moving U.S. border control southward**

The Biden administration's new policies will reconfigure migration management and increase resources and management of immigration processing south of the border. The policy intends to process noncitizens who are seeking entry through asylum and other pathways well before they make the treacherous journey to the U.S. southern border. The administration is partnering with other countries to share responsibility for migration management, launching processing facilities outside of the United States, and utilizing technology and other resources to organize and control migration at the border. Below are some of the measures the administration is taking to relieve the pressure building at the border and manage migration from countries of origin and transit.

**Regional Processing Centers (RPCs) could facilitate more efficient processing of immigrants before they reach the U.S. southern border.**

The United States along with other countries that signed the *Los Angeles Declaration on Migration and Protection* will establish RPCs in key locations across the Western Hemisphere, including Colombia and Guatemala to start. These RPCs will help facilitate peoples' entry to the United States, Canada, and Spain through lawful pathways, including the ones detailed above. People from the region will be able to make an appointment and visit RPCs to complete interviews and processing requirements before they travel to these countries.

These RPCs will help facilitate safer processing and transport to destination countries. But the intention behind them is to also reduce the number of people arriving at the border. They aim to prevent people

from making treacherous journeys through dangerous migration routes in the region, such as the Darién Gap, a dangerous stretch of jungle between Colombia and Panama that has become a common migration route between South and Central America. RPCs will help identify protection needs and facilitate refugee resettlement and immigration through lawful pathways. These centers could potentially prescreen and facilitate entry and processing for asylum seekers before they reach the U.S. southern border in the future too.

RPCs will need to be staffed adequately to handle the growing displaced population in the region. The people approaching these RPCs and applying for legal pathways in the United States, Canada, and Spain will also need access to legal assistance and representation to help them prepare their cases. This would require networks of nongovernmental organizations, service providers, and consular operations throughout the region. However, U.S.-barred attorneys who practice immigration law and accredited representatives who can provide advice and assist with applications for lawful pathways to these countries may be in short supply in these regions. The nature of the RPCs and the demand they will create could also lead to unauthorized practice of law by opportunists taking advantage of migrants who approach these centers. Nevertheless, the capacity to help and process people seeking these pathways to multiple countries under the same roof is a goal worth pursuing and could prove to be very efficient and useful for years to come.

**Mandatory digital procedures (through the CBP One app) may pose additional barriers to accessing asylum and lawful pathways.**

As of May 11, 2023, when Title 42 was lifted, migrants who are in Central and Northern Mexico, including those who were not able to cross the border under this policy, will be able to access the CBP One mobile application to facilitate their entry into the United States. They can use this app to make an appointment to present themselves at a port of entry and may be admitted into the United States if they are eligible for legal pathways or asylum. The CBP One app is a migration management tool that is purportedly designed to facilitate organized, efficient, and safe entry into the United States at the southern border.

The app has already been utilized since early 2023 to process Venezuelans, Nicaraguans, Cubans, and



Haitians who are eligible for humanitarian parole and those who were exempt from Title 42. However, people have been experiencing difficulties and glitches with the app such as issues capturing photos of people with darker skin tones, connectivity issues when downloading the app, and error messages when they try to submit documents.<sup>37</sup> They also had trouble making appointments due to lack of availability, which will most likely persist considering the anticipated increase of migrants at the border.<sup>38</sup> CBP is making efforts to fix these glitches in the app and make more appointments available. However, considering the new limits on asylum, detailed above, the stakes are high and securing an appointment through the CBP One app could determine whether people can access protection. Migrants have already reported that they've been waiting for months to secure an appointment through the app with no success.<sup>39</sup> Many have given up hope and decided to cross the border irregularly instead.<sup>40</sup>

These outcomes are counterintuitive to the administration's migration management goals to deter irregular border crossings. The conditions south of the border are continually deteriorating and lack of access to these appointments will likely result in irregular border crossings and an increase in smuggling and criminal operations that facilitate them.<sup>41</sup> Requiring asylum seekers to make appointments with this app is also a metering measure (as explained above) forcing them to wait in Mexico to access asylum in the United States. If people cannot access appointments via this app, they effectively are being blocked from accessing asylum. This interferes with the United States' due process and *non-refoulement* obligations under U.S. and international law.<sup>42</sup>

**Additional transportation capacity and funding for case management programs may not be enough to manage the number of people at the U.S. southern border.**

DHS anticipates that up to 14,000 migrants may attempt to cross the border daily following the expiration of Title 42.<sup>43</sup> DHS is increasing its air and ground transportation capabilities to transport migrants to less-congested border sections for processing, but to also ramp up immigration enforcement and deportation. There are only a few ports of entry at the border, and increased transportation will help get people to the one where they booked their CBP One appointment and facilitate processing. But deportations seem to be a higher priority

for the administration, as it dedicated \$2.7 billion to immigration enforcement and border security needs.

The administration will provide an additional \$15 million for a Case Management Pilot Program to provide legal representation and other resources to noncitizens for their immigration court proceedings. Even though the additional funds dedicated to case management will help promote fair and efficient adjudication of immigration cases at the border, it may not be sufficient. With additional pathways and RPCs abroad, there will be an even larger need for legal capacity to assist those who are eligible with their cases. Considering these needs, in the United States and abroad, sufficient legal capacity, transportation and access to CBP One appointments, and resources for asylum seekers and other noncitizens eligible for legal pathways will most likely be an issue going forward.

## Potential outcomes of these new policies

These new policies may have conflicting outcomes and there are several issues that policymakers should consider going forward:

**The new processes for expedited removal will lead to due process violations.** These processes aim to be more efficient, but rapid adjudication leaves practically no time for people to find legal representation and prepare for their cases. There is already a shortage of legal representatives that have the knowledge and experience to handle these cases on the spot. If people only have mere hours to secure legal representation before their CFI, many people will probably go through the process without it. Under the 14th amendment of the U.S. Constitution, everyone, including noncitizens, has a right to due process, including a fair and impartial hearing as well as legal representation. Legal representatives already have trouble accessing their clients in immigration detention and it could take several days for them to even meet with them or submit documents needed to represent their clients. Several studies have shown that immigrants with legal representation have much better outcomes than those who don't.<sup>44</sup> With CFIs being done within 24 hours of arrival, this effectively blocks noncitizens from accessing representation before their interviews that will most likely lead to negative outcomes for their asylum cases.

**The United States will not be able to uphold its *non-refoulement* obligations.** The new limits on asylum eligibility will interfere with the United States' *non-refoulement* obligations under U.S. law<sup>45</sup> and several international agreements including the 1951 Convention and 1967 Protocol relating to the Status of Refugees.<sup>46</sup> Prohibiting refugees from seeking asylum based on the way they entered the country they are seeking protection in also violates the Protocol. In addition, this presents due process concerns because the new rule is forcing asylum seekers to wait in dangerous conditions in Mexican border cities in order to remain eligible for and have access to asylum.

**Criminal and smuggling operations south of the border will thrive.** Restrictions on asylum and difficulty securing appointments with the CBP One app create perfect conditions for smuggling and criminal organizations in the region to thrive and profit off people's fear and desperation. After years of restrictive policies like MPP and Title 42 at the border, deteriorating conditions in Mexico push people into desperate situations that prompt them to turn to alternate forms of entry to the United States. Smugglers and criminal organizations have capitalized on the increasing migrant population that has been stalled for over three years.<sup>47</sup> The new restrictions on asylum will disqualify many people from seeking asylum and will most likely create more smuggling and criminal operations.

**Irregular border crossings by land and sea may increase.** As explained above, several of the Biden administration's efforts to deter irregular border crossings may backfire. If people cannot access asylum, make appointments with CBP One, or secure legal representation to pursue lawful pathways or protection, they will likely resort to irregular border crossings out of desperation. With so much focus on the U.S. southern border, migrants may also resort to other irregular methods of entry such as sea crossings. Although expansion of lawful pathways will help, it may not keep up with the demand of the growing displaced population in the Western Hemisphere.

**Increased demand for more legal capacity north and south of the border.** Considering the number of people expected to approach the border, new lawful pathways, expanded expedited removal, and new RPCs in the region, legal capacity and representatives will be in high demand. However, there is already a shortage of legal capacity in the United States and there may not be enough representatives to handle the overwhelming number of cases at the border and in the region. This may also create a breeding ground for opportunists engaging in the unauthorized practice of law to profit off this demand. This may be an issue for years to come, especially as these policies mature and the situation in the region develops.

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## About the author

Melissa Katsoris is the Editorial Manager of the HIAS Center for Refugee Policy and has a diverse background in migration policy and research through her work at the United Nations, law firms, and think tanks. Previously she worked for the Center for Migration Studies of New York and the Permanent Mission of Greece to the U.N. She is also a U.S.-barred attorney and has practiced immigration law for several years.



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