“Trump got his wall, it is called Title 42”; The Evolution and Illegality of Title 42’s Implementation and Its Impact on Immigrants Seeking Entry into the United States

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INTRODUCTION

On March 24, 2020, the Centers for Disease Control and Prevention (CDC) released an order entitled “Order Suspending Introduction of Persons from Countries Where a Communicable Disease Exists.”2 The order relies on Sections 362 and 365 of the Public Health Services Act (PHSA) for the unprecedented authorization of border officials to enforce broad expulsions of people attempting to enter the United States from Mexico and Canada.3 Approximately a month after publishing the order, the CDC extended it an additional thirty days, thus continuing to block individuals from entering the United States through the Mexico and Canada land borders without travel documentation.4 In May 2020, the CDC extended the order indefinitely.5 The order, known as “Title 42,” claims its enforcement “is necessary to protect the public health” from an increase in the danger of the introduction of Coronavirus Disease 2019 (COVID-19) into the land ports of entry (POEs), and the Border Patrol stations between POEs, at or near the United States borders with Canada and Mexico.6

Title 42 is one of many anti-immigration policies implemented during the Trump administration. Since the beginning of Donald Trump’s 2016 campaign for the Republican presidential nomination, he vowed to remove all avenues for immigrants seeking protection under the laws of the United States.7 Immigrants have the right to seek protection under both international law and United States statute.8 Within days of his inauguration

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6 Id. at 31,503.
former President Trump began issuing executive orders to withhold funds from sanctuary cities and ordered the blockage of immigrants and refugees from predominantly Muslim countries. Throughout the Trump administration, new policies were implemented or introduced for comment that chipped away at the pre-existing broken asylum and immigration framework. Title 42 was among a multitude of anti-immigrant policies including Executive Order 13769, known as “the Muslim Ban,” and the Department of Homeland Security’s (DHS) Migrant Protection Protocols,

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10 Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017). On January 27, 2017, one of the Trump Administration's first actions was to implement what is referred to as “the Muslim ban.” Fox News Channel, Rudy Giuliani Admits It Is a Muslim Ban, YOUTUBE, at 3:02 (Jan. 29, 2017), https://www.youtube.com/watch?v=aGOwEOTYHuE&t=175s. The first two executive orders banned travel to the United States “from seven predominantly Muslim countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—and suspended the resettlement of all Syrian refugees.” Muslim Travel Ban, IMMIGR. HIST., https://immigrationhistory.org/item/muslim-travel-ban/ (last visited July 20, 2021). The order faced many legal challenges, resulting in injunctions by district courts, ruling that the plaintiffs challenging the Order would likely succeed on their claims that the Order violated the First Amendment and Immigration and Nationality Act. See id.; Timeline of the Muslim Ban, ACLU WASH., https://www.aclu-wa.org/pages/timeline-muslim-ban (last visited Aug. 9, 2021); Muslim Ban Litigation, BRENNAN CTR. FOR JUST. (Apr. 25, 2018) (updated Feb. 3, 2020), https://www.brennancenter.org/our-work/court-cases/muslim-ban-litigation. The Order went through multiple changes, the third iteration of which expanded the list of barred travelers to include nationals from Venezuela and North Korea. Muslim Travel Ban, supra. On June 26, 2018, the Supreme Court ruled on this third version of the executive order ban, ruling 5–4 that the President had the proper authority to issue the executive order. Trump v. Hawaii, 138 S. Ct. 2392, 2408–10 (2018). The five-justice majority disagreed with the lower courts, finding that the plaintiffs were not likely to succeed in their claim that the Order was unconstitutional, and reversed the preliminary injunctions of the lower courts, allowing the third iteration of the order to go into effect. Id. at 2423; Ernesto Sagás & Ediberto Román, Build the Wall and Wreck the System: Immigration Policy in the Trump Administration, 26 TEX. HISP. J.L. & POL’Y 21, 28 (2020). For further information regarding how the asylum system is broken see David Frum, America’s Asylum System Is Profoundly Broken, ATLANTIC (July 3, 2019), https://www.theatlantic.com/ideas/archive/2019/07/why-americas-immigration-system-is-broken/593143/; Shalini Bhargava Ray, Optimal Asylum, 46 VAND. J. TRANSNAT’L L. 1215, 1229–31 (2013); Asylum in the United States, AM. IMMIGR. COUNCIL (June 11, 2020), https://www.americanimmigrationcouncil.org/research/asylum-united-states.
known as the “Remain in Mexico” policy.\textsuperscript{11} According to Linda Rivas, the Executive Director and Managing Attorney of Las Americas Immigrant Advocacy Center in El Paso, Texas, prior to the implementation of these policies, the processing of arriving undocumented persons by land border was somewhat standardized, though varied in part depending on where the apprehension and processing occurred.\textsuperscript{12}

This paper continues in four sections. Section I summarizes the relevant history of Title 42. Section II discusses the Trump Administration’s implementation of the Title 42 expulsion process and its impact on immigrants seeking protection in the United States through land POEs at


\textsuperscript{12} Telephone Interview with Linda Rivas, Exec. Dir. & Managing Att’y, Las Americas Immigr. Advoc. Ctr. in El Paso, Tex. (Aug. 23, 2021). In the early and mid-2010s, the Obama Administration built family detention facilities in Burkes County, Pennsylvania; Karnes City, Texas; and Dilley, Texas. See Family Detention, DET. WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/family-detention (last visited Aug. 9, 2021); Caitlin Dickerson, Border at ‘Breaking Point’ as More than 76,000 Unauthorized Migrants Cross in a Month, N.Y. TIMES (Mar. 5, 2019), https://www.nytimes.com/2019/03/05/us/border-crossing-increase.html. Some family units are sent to one of these facilities, which under law they are not meant to be at longer than twenty days; however, Immigration and Customs Enforcement (ICE) continues hold families for longer. Family Detention, supra; US: Trauma in Family Immigration Detention, HUM. RTS. WATCH (May 15, 2015), https://www.hrw.org/news/2015/05/15/us-trauma-family-immigration-detention-0; Caitlin Dickerson, U.S. Expels Migrant Children from Other Countries to Mexico, N.Y. Times (Oct. 30, 2020) (updated Mar. 15, 2021), https://www.nytimes.com/2020/10/30/us/migrant-children-expulsions-mexico.html. It is not clear how ICE/CBP determines which family units will be detained and which will be released into the U.S. to continue their immigration court proceedings while living with family or friends. Telephone Interview with Linda Rivas, supra. More recently in 2019, when the number of arriving family units was extremely high, during just one week in February 2019, an El Paso shelter received 3,600 migrants, and had to scramble to secure housing for these families. U.S. Expels Migrant Children from Other Countries to Mexico, supra.
or near the United States borders with Canada and Mexico. Section II also summarizes the Trump Administration’s and CDC’s reasoning regarding why Title 42 should supersede codified asylum law, the Convention Against Torture (CAT), and Withholding of Removal. Section III outlines the illegality of Title 42 due to its bad faith implementation and violation of sections of the Immigration and Nationality Act (INA), the Convention Against Torture (CAT), and the United States Constitution. Finally, Section IV concludes this note with a discussion of Title 42 expulsions under the Biden Administration, the future of Title 42 and recommendations to policymakers.

I. **History of Title 42**

This Section discusses the development of sections 362 and 365 of the PHSA and the continuous transfer of quarantine power from state and local authorities to the federal government and its agencies. As mentioned above, the CDC cites to sections 362 and 365 of the PHSA for implementation of the immigration removals. Yet, nowhere in the PHSA is the CDC or the Surgeon General permitted to override immigration law or implement immigration removals. The PHSA was established in 1944, and sections 362 and 365, the provisions at issue here, are now codified under 42 U.S.C. §§ 265 and 268, respectively. Today, these sections are referred to simply as “Title 42.” Section 362 of the PHSA states:

> Whenever the Surgeon General determines . . . 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, . . . 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.

Section 365 of the PHSA, which is qualified by section 362, states:

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15 *Id.*
(a) Any consular or medical officer of the United States, designated for such purpose by the Secretary, shall make reports to the Surgeon General, on such forms and at such intervals as the Surgeon General may prescribe, of the health conditions at the port or place at which such officer is stationed.

(b) It shall be the duty of the customs officers and of Coast Guard officers to aid in the enforcement of quarantine rules and regulations.\textsuperscript{16}

Sections 362 & 365 were established on July 3, 1944, under the PHSA by President Franklin D. Roosevelt.\textsuperscript{17} These provisions mostly consolidate a previous order which dates back to 1893, but also shifted authority from the President to the Surgeon General to “prohibit introduction.”\textsuperscript{18} In 1970, implementation authority shifted again, from the Surgeon General to the Secretary of Health and Human Services, who later delegated this authority to the CDC.\textsuperscript{19}

Federal quarantine power has evolved around an “intermittent series of deadly epidemics” from the colonial era through the passage of the PHSA, and afterwards through the PHSA’s continued modifications.\textsuperscript{20} This evolving power to protect against external threats of communicable disease gradually transferred from state and local authorities to the federal government.\textsuperscript{21} Records indicate that the federal government first became involved in quarantine measures in the 1790s, when it granted consent to the state of Maryland to impose a duty on vessels entering Baltimore’s district from international ports in order to pay for the costs of a health officer at the Port of Baltimore.\textsuperscript{22} Then, in 1891, Congress passed a law that provided for the exclusion of all “persons suffering from a loathsome or dangerous contagious disease,” in order to prevent the ingress of immigrants potentially carrying yellow fever, cholera, and the plague.\textsuperscript{23} Years later,

\textsuperscript{16} Id.
\textsuperscript{18} Guttentag, supra note 3.
\textsuperscript{19} Id.
\textsuperscript{20} Vanderhook, supra note 17, at 1.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 4–5.
\textsuperscript{23} Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084; Vanderhook, supra note 17, at 28.
the court affirmed the federal government’s power over quarantine law.\textsuperscript{24} In 1893, the court in\textit{ Minneapolis v. Milner} held that a state has the right to detain and inspect immigrants, even those from uninfected countries, as “\[t\]he inconvenience resulting to emigrants and travelers from being halted and subjected to examination and detention at state lines is of trifling importance at a time when every effort is required and is being put forth to prevent the introduction and spread of pestilential and communicable diseases.”\textsuperscript{25} While states have the right to implement their own public health legislation, if that legislation conflicts with a Congressional provision that is passed in compliance with the Constitution, the federal law will have “unobstructed operation.”\textsuperscript{26}

Courts have previously deferred to agencies’ discretion to assert authority over quarantine policy, such as Title 42. In\textit{ Louisiana v. Mathews}, the Food and Drug Administration (FDA) was challenged for an absolute ban it implemented pursuant to the PHSA on the sale and distribution of small turtles due to the turtles’ potential spread of communicable disease.\textsuperscript{27} The plaintiffs claimed that, because the FDA banned the interstate shipment of both infected and uninfected turtles, the FDA had exceeded its authority under the PHSA’s scope as they were only “authorized to prohibit . . . the interstate shipment of turtles which may spread communicable disease.”\textsuperscript{28} But, the court upheld the FDA’s ban because the plaintiffs failed to prove that the FDA’s ban would not improve the spread of communicable disease.\textsuperscript{29} In coming to this conclusion, the court also noted that federal health authorities are granted “broad, flexible powers” when implementing the PHSA.\textsuperscript{30}

While the CDC has the power to implement the PHSA, legal scholars argue that the agency’s present interpretation of the PHSA is unprecedented and is being applied as “a summary immigration expulsion process.”\textsuperscript{31} Theresa Cardinal Brown, the Managing Director of Immigration and Cross Border Policy at the Bipartisan Policy Center, stated:

\begin{quote}
In general, it’s been used in the past . . . to prevent entry, or to quarantine people after they arrive, but as far as I know, this is the first time it’s been used very broadly to apply strictly to people
\end{quote}

\textsuperscript{24} Id. at 88.
\textsuperscript{25} Minneapolis v. Milner, 57 F. 276, 279 (C.C.W.D. Mich. 1893).
\textsuperscript{26} Hennington v. Georgia, 163 U.S. 299, 309 (1896); Vanderhook, supra note 17, at 28. U.S. Const. art. VI, § 1, cl. 2.
\textsuperscript{28} Vanderhook, supra note 17, at 71–72.
\textsuperscript{29} See id. at 72.
\textsuperscript{30} Louisiana v. Mathews, 427 F. Supp. 174 at 176; see also Vanderhook, supra note 17, at 72.
\textsuperscript{31} See Guttentag, supra note 3.
entering between the Ports of Entry in the U.S.-Mexico land border.\textsuperscript{32}

Research on similar implementation of the PHSA sections 362 and 365 has not been located, and there is no widely known previous instance of implementation equivalent to the broad expulsion of all asylum seekers trying to enter by land border due to an international communicable disease, nor has case law referring to its legality been found.\textsuperscript{33}

\section*{II. The Trump Administration’s Use of Title 42}

This Section discusses the development of sections 362 and 365 of the PHSA and the continuous transfer of quarantine power from state and local authorities to the federal government and its agencies. Prior to the implementation of Title 42, many immigrants seeking protections presented themselves at an authorized POE while many other arriving undocumented persons (including asylum seekers) entered the United States outside a POE for a variety of reasons, such as by accident or because they were forced by a human smuggler.\textsuperscript{34} During the Trump presidency, most single adults were detained during the duration of their immigration proceedings, with some individuals being freed through bond, and very few others released

\begin{thebibliography}{999}
\bibitem{33} Guttentag, \textit{supra} note 3. While the PHSA §§ 362 and 365 has not been used to exclude broad swathes of people attempting to enter the United States prior to 2019, provisions of the Immigration and Nationality Act (INA) have long been used to exclude and stigmatize particular groups of people on health grounds. Leaños \textit{supra}; April Thompson, \textit{The Immigration HIV Exclusion: An Ineffective Means for Promoting Public Health in a Global Age}, 5 HOU. J. HEALTH L. & POL’Y 145, 151–153 (2005). For example, in 1987 HIV-positive non-citizens were excluded from entrance to the U.S. on health-related grounds under the INA until 2010. Thompson \textit{supra}, at 152–153; Susanna E. Winston & Curt G. Beckwith, \textit{The Impact of Removing the Immigration Ban on HIV-Infected Persons}, 25 AIDS PATIENT CARE & STDs 709, 709 (2011).
\end{thebibliography}
on parole. Some arriving family units were processed and released to complete their asylum process with their families in the interior of the country, while others were detained in family detention facilities in Texas and Pennsylvania. Lastly, unaccompanied noncitizen children (UNC) were sent to facilities run by the Office of Refugee Resettlement (ORR) until their sponsors (the adults who planned to care for them in the United States) were vetted by ORR and deemed safe and competent to care for the child during their asylum process. The two unprecedented polices, Remain in

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39 See J.S.G. ex rel. Hernandez, 2020 WL 1985041, at 8; WILLIAM A. KANDEL & LISA SEGHERTTI, CONG. RSCCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 8–10
Mexico and Title 42, entirely transformed this immigration process, thereby achieving the Trump Administration’s goal of ultimately closing the border to immigrants seeking protection. While DHS has not stated which countries of origin are meant to be included in the Remain in Mexico policy versus Title 42, the enforcement of the latter primarily impacted those from Mexico, Guatemala, Honduras, and El Salvador.⁴₀ Such disparate implementation of these policies is a result of the agreement between the United States and Mexico to allow immigrants from Mexico and the three Central American countries to be pushed back into Mexico, rather than their home countries under Title 42.⁴¹ The aforementioned countries were also likely targeted because they account for about eighty-five percent of all unauthorized border crossings.⁴² While other immigrant nationalities, such as Haitians, are subject to Title 42, they are more likely to be flown to their home country rather than deported to Mexico, regardless of their preference.⁴₃ While the government’s official purpose for the varied treatment is unknown, immigration data and United States policy indicates that Black immigrants, such as Haitians, are regularly subjected to greater structural barriers to entering the United States.⁴₄

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A. The Center for Disease Control and Prevention and the Department of Health and Human Service’s reasoning for the implementation of Title 42 expulsions

As of March 20, 2020, Title 42 was reportedly enforced “to protect the public health from an increase in the serious danger of the introduction of [COVID-19] into the land POEs, and the Border Patrol stations between POEs, at or near the United States borders with Canada and Mexico.” Paying no regard to asylum seekers’ congressionally-granted rights under United States treaty and ratified law, the order announced that particular arriving persons without permanent status or travel documents would be ineligible to enter the country. On April 22, 2020, the CDC extended the order that was issued on March 20, 2020, to remain in effect until May 20, 2020. On May 19, 2020, the CDC again amended the previous order by


Notice of Order Under Sections 362 and 365 of the Public Health Service Act


Extension of Order Under Sections 362 and 365 of the Public Health Service Act

indeed extending the suspension of all covered persons. Finally, on October 13, 2020, the CDC made minor modifications regarding Customs and Border Patrol’s (CBP’s) capacity to process asylum seekers.

Title 42 applies to persons traveling from Canada or Mexico who do not have proper travel documents and would otherwise make contact with a POE or Border Patrol station at or near the United States borders with Canada and Mexico. The government refers to all persons to whom Title 42 applies as “covered aliens,” but out of respect of the humanity of those covered under Title 42, this article will refer to them hereafter as “covered undocumented persons.” The order does not apply to United States citizens, lawful permanent residents, and their spouses and children, members of the United States military and associated persons, and individuals in the visa waiver program who are not subject to other travel restrictions and arrive at a POE. The order also claims that under the totality of the circumstances, DHS officers can exempt certain persons from expulsion, based on considerations including public safety, health interests, and humanitarian concerns. However, evidence demonstrates a lack of such exemptions for impacted vulnerable populations. This includes, for example, the large-scale expulsion of young children as well as at least eleven women who gave birth in United States custody and were then expelled to Mexico border towns with their newborn children. One mother even reported being deported to Mexico within minutes of being discharged from the hospital where she gave birth just a few days earlier. A CBP spokesman, Mathew Dyman, also implied that humanitarian concerns are not a serious consideration. When

49 Id.
51 Id.
53 Id.
55 Id. In National Immigration Litigation Alliance v. U.S. Customs and Border Protection, No. 1:2021-cv-11094 (D. Mass. filed July 1, 2021), Plaintiffs filed suit on July 1, 2021, for CBP’s failure to produce records “relating to policies, guidance, or statistics regarding the treatment of pregnant women in CBP custody,” and “mothers in CBP custody who have given birth within the United States within the last six months.” Complaint for Declaratory and Injunctive Relief at 1, Nat’l Immigr. Litig. All. v. U.S. Customs & Border Prot., No. 1:2021-cv-11094, ECF No. 1.
discussing Title 42’s enforcement, Dyman “said the emergency order applies to everyone, ‘no matter their disability or age.’”

In the order notice, the CDC alleged that Title 42’s application against covered undocumented persons, a particularly narrow population, is due to the lengthy processing procedures for covered undocumented persons and CBP’s lack of resources to safely process them. First, it refers to the prolonged processing time compared to United States citizens, lawful permanent residents, and other persons with travel documents. The CDC asserts that covered undocumented persons may spend hours to days in congregate areas compared to those with the documentation, who move quickly into the United States after contact with CBP and other travelers. The CDC believes that because of the lengthy processing time, there is greater risk of exposure to CBP personnel and fellow covered undocumented persons. As further justification, the CDC refers to CBP’s inability to perform proper infection control procedures for numerous immigrants. These procedures include consulting with local health professionals about whether the individual should be tested for COVID-19, disinfecting transportation vehicles, and coordinating with ICE to contain the spread of COVID-19 by quarantining exposed or infected individuals in small areas used to process covered undocumented persons. The CDC states that such infection control procedures would not be easy to scale for a large number of people, especially since only 46 out of 136 Border Patrol stations offer any medical services.

B. Implementation of Title 42 Against Single Adults and Family Units

From the start of Title 42 in March 2020 until February 2021, CBP expelled more than 637,000 immigrants seeking entrance into the United States to Mexico or deported them to their country of origin. Acting CBP

57 U.S. DEP’T OF HEALTH & HUM. SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION (CDC), supra note 13, at 1–2.
58 Id. at 2.
59 Id.
60 Id. at 2–3.
61 Id. at 12.
62 Id. at 11–12.
63 Id. at 12.
Commissioner, Mark Morgan, claimed in August 2020 that within two hours of their apprehension, immigrants were removed from the United States back into Mexico or were on their way to their country of origin. Morgan commented, “[w]e’re trying to remove them as fast as we can to not put them in our congregate settings, to not put them into our system . . . .”

CBP Officer and special operations supervisor, Rafael Garza, described the process for apprehensions in the borderland region of Laredo, Texas. Garza explained that the entirety of the process is conducted remotely in the field, and immigrants subjected to the process never have to step foot in their station, claiming: “[w]e apprehend them, we give them a face mask and I ask them if they’re feeling any symptoms, ‘No I’m fine, this and that,’ and then we process them remotely.” While less frequently reported, some families are detained in hotels by the private contractor company, MVM Inc. (MVM)—which the immigration authorities refer to as “transportation specialists”—and are then expelled to their country of origin.

For example, Verty, an immigrant from Haiti, stated that MVM repeatedly told him and his family that they were going to be taking a flight to Florida to be reunited with their families, stating, “I understood it was a deportation when I saw people arriving in handcuffs.”

The process which Verty and his family were subjected to was also applied against UNC.

C. Implementation of Title 42 Against UNC

Due to noncitizen children’s particular vulnerabilities and needs, their legal standard of care while in government custody is higher than that of single adults and family units. The standard was first evaluated by the

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66 Id.


68 Id.


70 Id.

71 See id.

72 William A. Kandel, Cong. Rsch. Serv., R43599, Unaccompanied Alien Children:
United States Supreme Court in 1993 in *Reno v. Flores*.\(^73\) In *Reno v. Flores*, the Supreme Court rejected the Plaintiffs’ challenge to the constitutionality of the Immigration and Naturalization Service’s (INS) practices regarding the care of UNC.\(^74\) However, while the case was on remand, the Clinton Administration and the plaintiff’s class counsel settled and devised an agreed upon standard.\(^75\) The settlement agreement established what is known as the “Flores Settlement,” which secured a “nationwide policy for the detention, release, and treatment of UNC in the custody of the INS.”\(^76\) The Flores Settlement favors family reunification of UNC with vetted family members in the United States and “creates a presumption in favor of releasing UNC and requires placement of those not released in licensed, non-secure facilities that meet certain standards.”\(^77\) It also established the necessary level of care while in immigration detention and created specified regulations on “food, clothing, grooming items, medical and dental care, individualized needs assessments, educational services, recreation and leisure time, counseling, access to religious services, contact with family members, and a reasonable right to privacy.”\(^78\)

Prior to March 2020, and to the use of Title 42, Central American UNC crossing into the United States by land borders were generally sent to ORR facilities overseen by the Health and Human Services.\(^79\) These facilities are required to be licensed, with schooling and maintenance according to the Flores Settlement standard.\(^80\) In 2019, most UNC were eventually released

\(\text{AN OVERVIEW 4–5 (2019).} \)

\(507 \text{ U.S. 292 (1993).} \)

\(\text{Id. at 294, 315; Defendants’ Response in Opposition to Plaintiffs’ Motion to Enforce Settlement of Class Action at 4, Flores v. Barr, 407 F. Supp. 3d 909 (C.D. Cal. 2019) (No. CV 85-4544), 2015 WL 13648967.} \)

\(\text{Defendants’ Response in Opposition to Plaintiffs’ Motion to Enforce Settlement of Class Action, supra note 74, at 4; The Flores Settlement, IMMIGR. HIST., https://immigrationhistory.org/item/the-flores-settlement/ (last visited July 3, 2021); see also CTR. FOR HUM. RTS. & CONST. L., https://www.centerforhumanrights.org/ (last visited July 3, 2021).} \)

\(\text{Flores v. Lynch, 828 F.3d 898, 901 (9th Cir. 2016) (internal quotations omitted).} \)

\(\text{Id. at 901, 903.} \)

\(\text{Id. at 903.} \)


from ORR care and placed with family or friends who served as sponsors while they awaited their day in court.  

Importantly, while the United States agreement with Mexico permits the return of Central American immigrants to Mexico under Title 42, it excludes the return of UNC, referred to as “single minors” by the Trump Administration. Despite this accord, however, the Chief of Border Patrol’s Rio Grande Valley sector acknowledged that non-Mexican minors were sent back alone into Mexico’s border cities where the kidnapping and human trafficking of Central American immigrants is a grave issue. 

The more common expulsion procedure of UNC under Title 42 was to detain them in hotels—sometimes for weeks—until their deportation when they would return them to their country of origin by plane. By holding the children in hotels, immigration authorities have made it basically impossible for lawyers or advocates to locate them before their return to the home countries from which they have fled. Immigration and Customs Enforcement (ICE) relied on MVM, whose employees received a mere two days of training to care for the minors, to carry out this work. CBP turned

settlement-agreement-what-to-know.aspx.

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81 Zak, supra note 79.
82 U.S. Expels Migrant Children from Other Countries to Mexico, supra note 12. The Trump administration began referring to migrant children who cross the border alone differently in October 2020 referring to them as “single minors” rather than “unaccompanied alien children” — reinforcing the notion that while the pandemic-related border closure is in place, such children are not eligible for the legal protections that would otherwise have been available to them. Id.
83 Bernal, supra note 41.
86 The private federal contractor, MVM advertises their services as “solutions” for “customer challenges.” Our Services, Effective Solutions that Yield Real Results., MVM Inc., www.mvminc.com/our-services/ (last visited July 29, 2021). MVM, a Virginia-based federal contractor has received contracts up to $248 million to transport immigrant minors since 2014. In 2018, MVM was under scrutiny for housing UNC in two Phoenix office buildings that had neither a kitchen nor shower, where children were said to bathe in sinks in the office building’s bathroom. See Aura Bogado, Immigrant Kids Held in Second Phoenix Office Seen Bathing in Sinks, WORLD (July 17, 2018), https://www.pri.org/stories/2018-07-17/exclusive-immigrant-kids-held-second-phoenix-office-seen-bathing-sinks. Previous employees of MVM have also claimed that while providing security for CIA overseas the personnel were poorly trained and had unresponsive senior management regardless of multiple complaints of weapons going missing. Siobhan
away and expelled nearly 13,000 UNC, and an “independent monitor appointed by a federal court to oversee the government’s compliance with the Flores Settlement agreement . . . revealed . . . that at least 577 UNC were detained . . . between March and July [2020].” Some children were “sent to overcrowded government shelters in Central American countries like Guatemala, others [were] totally out of reach of legal service providers, who have not been able to find them.” Reports indicate that children have had to borrow cellphones when they arrived at airports to look for their family members who may be willing to house them.

Elida, a Guatemalan mother who had been waiting for five months in the violent border city of Ciudad Juarez for her United States asylum hearing, decided to send Gustavo, her 12-year-old son with a disability, to cross into the United States alone out of desperation and fear for his safety in Mexico after a stranger attempted to take him from her. Elida watched her son walk into the United States with the understanding that he would be temporarily detained and then released to his grandfather (who lived in the United States) because of his age. Gustavo’s grandfather was alerted that he was in the country, yet Gustavo effectively vanished for a week and his Mother was left in the dark about his whereabouts. It was not until a Guatemalan news blog posted on Facebook stating that authorities were seeking to locate Gustavo’s parents that she learned of his rapid deportation. When Gustavo returned to live with his father, he refused to speak with his mother by phone, allegedly bursting into tears when his father gave him the phone, as Gustavo believed that his mother had abandoned him and forced

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89 U.S. Expels Migrant Children from Other Countries to Mexico, supra note 12.

90 Dwyer et al., supra note 12.

91 Id.

92 Id.

93 Id.
his return to Guatemala.\textsuperscript{94} For many advocates, these inhumane practices called into question the validity of the Trump Administration’s justification that Title 42 was necessary to protect public health.

D. Advocates and health professionals work to pull back the curtain of the Trump Administration’s claimed purpose of the Title 42 expulsions

1. The science on COVID-19 transmission does not match the policy enforcement

Since the beginning of the COVID-19 outbreak in the United States, former President Donald Trump made false claims of the virus’s level of dangerousness and its impact on the nation.\textsuperscript{95} International public health expert, Dr. Anthony So, stated that Title 42 is based neither in evidence nor in science, but is rather a political initiative that may “endanger[] tens of thousands of lives and . . . amplify dangerous anti-immigrant sentiment and xenophobia.”\textsuperscript{96} A former FDA deputy commissioner called Title 42 expulsions “a profound dereliction of duty for a CDC director,” adding that the policy “undermin[es] the purpose of having an agency that uses evidence to protect public health.”\textsuperscript{97}

According to Human Rights First, the assertions made by DHS that the CDC relied on as reasoning to enforce Title 42 contradict evidence released in unsealed documents in \textit{Al Otro Lado v. Wolf}.\textsuperscript{98} Human Rights First’s accumulated evidence contradicts CBP’s assertions by recognizing DHS’s ability to expeditiously release the covered undocumented persons on parole while they await their immigration court proceedings within the United States.\textsuperscript{99} The report by Human Rights First demonstrates that individuals do not need to be held in congregate settings for hours to days at a time.\textsuperscript{100}

\textsuperscript{94} Id.
\textsuperscript{97} Id.
\textsuperscript{98} 952 F.3d 999 (9th Cir. 2020); \textit{CDC Relied on False Assertions in Issuing COVID-19 Order Being Used to Illegally Override U.S. Asylum Laws}, HUM. RTS. FIRST 1 (June 2020), https://www.humanrightsfirst.org/sites/default/files/CDCReliedonFalseAssertionsinIssuingOrderUsedtoIllegallyOverrideAsylumLaw.pdf.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
able to process asylum seekers within two and a half hours, and in Hidalgo, Texas within two to three hours.\textsuperscript{101} Other POE demonstrated similar data.\textsuperscript{102} Human Rights First also presented evidence that CBP has multiple holding areas, such as passport control lobbies, secondary inspection, and “overflow” processing spaces where individuals could likely safely social distance while waiting to be processed.\textsuperscript{103}

As stated previously, the process for immigration processing of UNC is distinct from individuals over eighteen years old and family units.\textsuperscript{104} In recognition of UNC’s particular vulnerability, there is increased protection and regulation of UNC facilities.\textsuperscript{105} Despite this, however, UNC were not only expeditiously deported to their home countries, but also were deported to Mexico even when the United States government knew Mexico was not their home country.\textsuperscript{106} Deputy Director of the National Immigrant Rights Project at the ACLU, Lee Gelernt, stated that “[e]ven apart from the general illegality of Title 42, it is separately illegal under the immigration laws to expel a non-Mexican child to Mexico.”\textsuperscript{107} The acting CBP commissioner, Mark Morgan, stated that UNC cannot be housed at the standard ORR facilities while following social distancing measures because “[i]f we introduce these individuals to ORR, we’re defeating the entire purpose of Title 42, . . . [w]e’re still introducing these individuals into our system throughout and creating greater exposure risk to the American people.”\textsuperscript{108}

Further, court documentation and information given by ICE to congressional staff indicates that by the time UNC board their deportation flight, they have “virtually all” already tested negative for COVID.\textsuperscript{109} All migrants that test positive for COVID-19, including UNC, are required to remain in the United States.\textsuperscript{110} However, in November 2020, ICE officials stated that four children who were expelled to their country of origin,
Guatemala, tested positive for COVID-19. In May 2020, sixty-nine UNC in government custody tested positive for COVID-19 under the care of the Office of Refugee Resettlement, and the children were put into medical isolation.

Government agents administer tests in accordance with agreements that the Trump Administration made with foreign countries which “require that children test negative for COVID-19 before being sent back.” ICE utilizes rapid testing, which can produce results within 15 minutes. The administration’s testing policy seems to undermine the rationale that Title 42 is implemented to “prevent the introduction’ of COVID-19 into the United States,” and among CBP employees.

Lastly, an individual removed from the United States under Title 42 shared a statement regarding a procedure they witnessed by immigration officials that defies not only science, but also logic. As mentioned earlier, Verty, an immigrant from Haiti, was detained at a hotel with his family, including his one-year-old daughter. He claims government contractors gave him and his family cups of ice and told them to eat it incase their temperature is checked. It is likely that the immigration officers were pushing them to eat the ice in fear that if Verty or his family returned to Haiti with a temperature they would not be permitted into the country or could face other repercussions for causing an increased exposure risk to other Haitian nationals. Verty’s experience exposes the hollow reasoning of the CDC’s enforcement of Title 42 and the callous disregard the United States government is deploying against covered undocumented persons and their countries, by willingly deporting potentially sick asylum seekers to countries like Haiti that lack the healthcare and other infrastructure to adequately control the deadly pandemic. Importantly, the United States has played an integral role in the destabilization of Haiti’s economy and government, which has facilitated the country’s inability to meet such needs.

On September 22, 2021, Daniel Foote, the United States Special

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113 Lind & Kriel, supra note 88.

114 Id.

115 Merchant & Sanon, supra note 69.

116 Id.

117 See Ann Crawford-Roberts, A History of United States Policy Towards Haiti, MODERN
Envoy to Haiti, resigned in protest due to the treatment and expulsions of Haitian immigrants.\textsuperscript{118} In Foote’s resignation letter, he urged the United States Secretary of State to prioritize Haitian citizens’ demands and halt the United States’ ongoing interference in Haiti’s election process stating, “[t]he hubris that makes us believe we should pick the winner – again – is impressive. This cycle of international political interventions in Haiti has consistently produced catastrophic results.”\textsuperscript{119}

a. The unanticipated consequences of Title 42 enforcement that may be promoting the spread of COVID-19 through the United States & globally

i. *Title 42 rapid expulsions have caused increased recidivism and decreased regulation and oversight of entries by undocumented persons*

As mentioned above, the implementation of Title 42 has forced immigrants attempting to enter the United States to be expelled expeditiously, sometimes in as little as two hours.\textsuperscript{120} Many of those rapidly sent back to Mexico make multiple attempts to reenter the country.\textsuperscript{121} This is due to the implementation procedures of Title 42, which reduce the risk of detention or criminal prosecution for covered undocumented persons attempting to enter the United States without inspection. Immigration Attorney, Taylor Levy, compared this phenomenon to the 1990s-era immigration policies that were in place prior to section 1325—a federal law that criminalizes crossing into the United States outside of a POE—as Title 42 has caused more immigrants who enter without inspection to eventually reach the interior of the United States undetected by immigration officials.\textsuperscript{122} As of October 2020, data indicated that at least one-third of individuals taken into immigration custody were immigrants who were previously apprehended...
when attempting to enter the United States.\textsuperscript{123}

Title 42 also created a major shift of the migration patterns at the border. In 2019, the majority of the migrant population consisted of families, many of whom were willing to turn themselves in to border agents.\textsuperscript{124} Due to Title 42, however, desperate migrants are now attempting to enter the United States undetected by hiring human smugglers, widely known as “Coyotes.”\textsuperscript{125} Levy stated that because there are more migrants seeking services to cross into the United States, Coyotes are selling what they call “unlimited attempts” (in Spanish, \textit{intentos sin limites}) where they charge a rate for an unlimited number of attempts to enter the United States undetected until they are successful.\textsuperscript{126} Law enforcement agencies in southern Arizona have documented dangerous cases of migrants packed tightly into vehicles, primarily due to the rise in attempts to enter.\textsuperscript{127} Indeed, since the implementation of numerous enforcement policies put in place to curb the spread of COVID-19, including Title 42, CBP has observed a large uptick of human smuggling activity across the United States-Mexico border.\textsuperscript{128} The rise of human smuggling into the United States will mean more vulnerable immigrants will likely die or be harmed due to the dangerous methods the smugglers use to cross them while attempting to evade detection by immigration officials.\textsuperscript{129} Consequently, migrant deaths in 2021 will likely surpass those in fiscal year 2020. Border Patrol discovered 250 migrant bodies along the border in fiscal year 2020, and as of May of


\textsuperscript{124} U.S. Expels Migrant Children from Other Countries to Mexico, \textit{supra} note 12.

\textsuperscript{125} Rafael Carranza, \textit{As Border Wall Goes up, Southern Arizona Sees Spike in Human Smuggling}, \textit{AZCentral} (Nov. 30, 2020), https://www.azcentral.com/story/news/politics/border-issues/2020/11/30/border-wall-goes-up-southern-arizona-sees-spike-human-smuggling/3772462001/; see also Damia\’ S. Bonmati, \textit{A Day in the Life of a Coyote: Smuggling Migrants from Mexico to the United States}, \textit{UNIVISION News} (Dec. 21, 2016), https://www.univision.com/univision-news/immigration/a-day-in-the-life-of-a-coyote-smuggling-migrants-from-mexico-to-the-united-states. When an immigrant or asylum seeker wants to enter the United States by a land POE through Mexico, they cannot simply walk to the bridge or landscape outside of a POE to enter the U.S. This is because drug cartels own different portions of the border and will only allow an immigrant or asylum seeker to cross their territory with a human smuggler, known as a “Coyote,” after the Coyote has paid the cartel a bribe to cross the immigrant. If an immigrant attempted to cross without a Coyote, they may be kidnapped or killed. \textit{Id.}

\textsuperscript{126} Levy, \textit{supra} note 122.

\textsuperscript{127} See Carranza, \textit{supra} note 125.

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{Id.}
fiscal year 2021, 203 migrant bodies have already been found. Further, due to more migrants entering the United States without inspection, it is more likely that they could expose more of the population to the virus due to the lack of regulation and inability to enforce quarantine precautions.

ii. Immigrants expelled to Mexico and their countries of origin are returning with COVID-19, spreading the virus throughout their home countries

The governments of at least eleven countries have confirmed that deportees from the United States returned with COVID-19. The countries include Colombia, El Salvador, Guatemala, Haiti, India, Jamaica, Mexico, Romania, and elsewhere. Contrary to the almost universal testing of all UNC under Title 42, ICE stated that testing for COVID-19 is not a standard procedure, and not all immigrants are tested before being deported to their country of origin.

Guatemala, which has been hit particularly hard by the coronavirus, suspended acceptance of deportation flights from the United States in March 2020 in an attempt to pressure the United States to implement stricter health measures to screen deportees. Shortly after its implementation, however, Guatemala terminated the suspension due to pressure by the United States. Between March and September 2020, at least 331 deportees tested positive for COVID-19 after arriving in Guatemala, however, it is likely that the actual number of positive cases of deportees is higher due to the Guatemalan government’s testing limitations.

An analysis of data on United States


132 It is likely that the number of countries that have received deportees from the United States is a grave undercounting because the data information regarding the amount of deportees from the United States that tested positive for COVID-19, are dependent on the testing procedures of the country to which individuals are deported. Nicole Phillips & Tom Ricker, The Invisible Wall: Title 42 and Its Impact on Haitian Migrants, QUIXOTE CTR. 22–23, https://www.quixote.org/wp-content/uploads/2021/03/The-Invisible-Wall.pdf (last visited Oct. 3, 2021).

133 Id. at 22.


135 Id.

deportations to Guatemala demonstrates that when there “were tens of thousands of cases in the U.S. but only a handful in Guatemala,” and that United States deportations of Guatemalan nationals fueled the spread of the coronavirus in Guatemala.\footnote{Id.} According to Guatemalan Congresswoman Andrea Villagrán, sending deportees with COVID-19 to Guatemala—where many live in extreme poverty—has contributed to the spread of the virus, exacerbated by the country’s pandemic conditions, and is likely to cause more people to emigrate to another country, including the United States.\footnote{Id.} Meanwhile, other countries fully cooperated with accepting deportees due to pressure by former President Trump and his promises of humanitarian aid in exchange for compliance with United States immigration deportations and policies.\footnote{Id.}

b. Public health precaution or political strategic policy implementation?

Immigrant justice advocates, attorneys, and public health experts claim that the implementation of Title 42 expulsions was an enforcement beyond the PHSA’s true statutory purpose. The purpose of the PHSA was to allow acts “in the interest of the public health.”\footnote{See The Public Health and Welfare Act, 42 U.S.C. § 265.} However, the Trump Administration’s acts are better understood as a political initiative in preparation of the 2020 Presidential Election. Morgan Russell, a staff attorney with the ACLU Immigrants’ Rights Project, alleged that the Senior Advisor to former President Trump, Stephen Miller, had been looking into enforcing Title 42 even before the COVID-19 pandemic commenced.\footnote{Morgan Russell, Immigr. Rts. Project Immigr. Att’y, Immigrant Just. Idaho, Speaker at Asylum and Border Turmoil Panel Discussion at the 2020 Fall Immigration Skills Conference (Nov. 5, 2020); see also Q&A: US Title 42 Policy to Expel Migrants at the Border, HUM. RTS. WATCH (Apr. 8, 2021), https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border.} Miller was notorious for his isolationist ideology, and Russell claims that he had been strategizing since 2019 about how to suspend immigration through the Southern border altogether.\footnote{Russell, supra note 141; see also Sabrina Siddiqui, Meet Stephen Miller, Architect of First news/politics/immigration/2020/10/28/hundreds-deported-by-us-to-guatemala-during-pandemic-had-covid-19/5902239002/; https://www.latimes.com/world-nation/story/2020-04-24/trumps-message-to-latin-america-want-ventilators-help-us-with-immigration.}

\footnote{Id.}
In early March 2020, the Trump administration began to push the CDC’s Division of Migration and Quarantine to implement Title 42.\(^{143}\) However, Dr. Martin Cetron, who headed the Division of Migration and Quarantine, refused to do so because of a lack of a public health basis.\(^{144}\) Meanwhile, public health experts urged the administration to focus on a national mask mandate, enforce social distancing requirements, and increase contract tracers to determine how many individuals were exposed to the virus.\(^{145}\) Instead, former Vice President Mike Pence took matters into his own hands, and Pence’s top aide at the time, Olivia Troye, coordinated the White House Coronavirus Task Force.\(^{146}\) Vice President Pence, lawyers at Health and Human Services, and CBP directed the CDC director to close the United States’ borders to stop the spread of COVID-19, in contravention of advice from the CDC’s scientists who claimed “there was no evidence [doing so] would slow” the spread of the virus.\(^{147}\) However, Pence’s spokeswoman, Katie Miller, the wife of Trump’s senior policy adviser, Stephen Miller, denied that Pence directed the CDC on the issue.\(^{148}\)

According to Troye, the administration “placed politics above public health.”\(^{149}\) She stated, “[t]here was a lot of pressure on DHS and CDC to push this forward,” and that it “was a Stephen Miller special. He was all over that.”\(^{150}\) Ms. Troye’s view of the administration’s priorities ultimately caused her to resign from her position.\(^{151}\) Reports from a former health official support Ms. Troye’s interpretation. A health official involved with the process claimed that, “[t]hey forced us,” and “[i]t is either do it or get fired.”\(^{152}\) On March 20, 2020 during a coronavirus task force press briefing, Trump falsely stated that it was the CDC that exercised its authority to implement Title 42.\(^{153}\)

After the commencement of the Title 42 expulsions, Trump himself made multiple statements regarding the true intent of the policy. He “highlighted the decision to shut down the border as an argument for

\(^{143}\) Dearen & Burke, supra note 96.
\(^{144}\) Id.
\(^{145}\) Id.
\(^{146}\) Id.
\(^{147}\) Id.
\(^{148}\) Id.
\(^{149}\) Id.
\(^{150}\) Id.
\(^{151}\) See id.
\(^{152}\) Id.
\(^{153}\) Id.
his reelection in November 2020.\footnote{Id.} He also stated, “[I]t’s a great feeling to have closed up the border,” adding, “[n]ow people come in, if they come in, through merit, if they come in legally. But they don’t come in like they used to.”\footnote{Id.} He repeatedly boasted his ability to entirely close the border but did little to explain how sealing the border will improve the spread of COVID-19, especially when United States citizens continued to travel back and forth to locations such as England, where a new variant of COVID-19 was discovered.\footnote{See Isabella Grullón Paz, The Week in Covid-19 News: Reassuring Data on the AstraZeneca Vaccine, 24 States Are Inoculating Teachers and More., N.Y. Times (Feb. 6, 2021) (updated Apr. 9, 2021), https://www.nytimes.com/live/2021/02/06/world/covid-19-coronavirus/the-week-in-covid-19-news-reassuring-data-on-the-astrazeneca-vaccine-24-states-are-inoculating-teachers-and-more; Priscilla Alvarez, Health Experts Slam Trump Administration’s Use of Public Health Law to Close Border, CNN (May 18, 2020), https://www.cnn.com/2020/05/18/politics/border-closure-public-health/index.html.} Lee Gelernt referred to the implementation of Title 42 as “what the Trump administration has been trying to do for four years and they finally saw a window.”\footnote{Dearen & Burke, supra note 96.}

by stating, “I think that question is more political. It’s a matter of personal opinion, whether it’s six experts or six Border Patrol agents. I mean who are you going to trust . . . Just because they have an expert title in front of their thing.”\footnote{Leaños, supra note 32.}

The supervisor’s statements encapsulate Title 42’s impact as a harmful illusionary safeguard, which at its core is nothing more than a strategic political decision on the highly controversial matter of the right to seek asylum in the United States.

III. ILLEGALITY OF TITLE 42 IMPLEMENTATION AS IMMIGRATION EXPULSIONS

This Section will discuss the illegality of Title 42 due to its violation of multiple sections of the Immigration and Nationality Act (INA), the Convention Against Torture (CAT), and the United States Constitution. This article does not purport to examine the full list of laws which Title 42 violates.\footnote{This note does not discuss all the laws Title 42 violates in depth. Title 42 expulsions also likely violate the Trafficking Victims Protection Reauthorization Act of 2008, the Administrative Procedure Act and further constitutional law claims. See Azadeh Erfani, \textit{The Latest Brick in the Wall: How the Trump Administration Unlawfully ‘Expels’ Asylum Seekers & Unaccompanied Children in the Name of Public Health}, Nat’l Immigrant Just. Ctr. (Apr. 15, 2020), https://immigrantjustice.org/staff/blog/latest-brick-wall-how-trump-administration-unlawfully-expels-asylum-seekers, for further reading on how the use of Title 42 to expel asylum seekers is violative of the Trafficking Victims Protection Reauthorization Act (TVPRA). See Complaint for Declaratory and Injunctive Relief at 32–33, Poe v. Mayorkas, 1:2021-cv-10218 (D. Mass. filed Feb. 8, 2021), ECF No. 1, for further reading on how the use of Title 42 to expel asylum seekers is violative of the Administrative Procedure Act Protection (APA). See Guttentag, supra note 3, for further reading on how the current use of the PHSA to expel asylum seekers is being wrongfully implemented.}

A. Immigration and Nationality Act

The Immigration and Nationality Act (INA) establishes the legal procedures for processing undocumented persons who (1) arrive at a United States POE, (2) arrive outside of a POE, and (3) live in the interior of the United States undetected by ICE.\footnote{Brief for the Petitioners at 2, Mayorkas v. Innovation Law Lab, No. 19-1212, 2021 WL 2520313 (U.S. June 21, 2021), 2020 WL 7345489.}

The INA was passed in 1952 and has been amended many times since.\footnote{Immigration Law (U.S.) Research Guide, Geo. L. Libr. (June 3, 2021), https://guides.ll.georgetown.edu/c.php?g=273371&p=1824780; Immigration and Nationality Act (“INA”), Nat’l Paralegal Coll., https://nationalparalegal.edu/public_documents/} The act was later codified under Title 8
of the United States Code (U.S.C.) and incorporated into the Code of Federal Regulations (C.F.R.). It is now the United States’ primary immigration statute. The Refugee Act of 1980, an amendment to the INA defines a refugee as a person “who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” This definition was codified in a 1996 amendment to the INA under 8 U.S.C. § 1101(a)(42).

The existing enforcement of Title 42 is in violation of various parts of the INA, in particular 8 U.S.C. §§ 1158 and 1231(b)(3). Section 1158(a) establishes that every migrant must be granted an opportunity to apply for asylum. Known as the preeminent asylum law for arriving undocumented persons seeking protection, section 1158 states that “[a]ny alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien’s status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.” Additionally, section 1231(b)(3), known as statutory withholding of removal, prohibits the removal of an undocumented person to a country where their “life or freedom would be threatened . . . because of [their] race, religion, nationality, membership in a particular social group, or political opinion.”

By rapidly expelling immigrants who are seeking protection, Title 42 violates 8 U.S. Code §§ 1158 & 1231(b)(3). In East Bay Sanctuary Covenant v. Trump, the court held that “the Interim Final rule,” which functioned as an asylum ban, is patently inconsistent with § 1158, and deemed it an “attempted . . . end-run around Congress” by the executive branch. The United States Supreme

164 Id.
169 Id.
171 932 F.3d 742, 774 (9th Cir. 2018); Guttentag, supra note 3. The Interim Final Rule, also known as “the asylum ban,” was a presidential proclamation by President Trump which barred asylum for individuals who entered the U.S. across the southern border outside a POE. East Bay Sanctuary Covenant v. Trump (Amicus), NAT’L CTR. FOR LESBIAN RTS., https://www.nclrights.org/our-work/cases/east-bay-sanctuary-covenant-v-trump/ (last visited Feb. 17, 2021).
Court declined to stay the Ninth Circuit’s holding. Under the Interim Final Rule, individuals were able to apply for withholding of removal and CAT but not asylum. However, under Title 42 no eligible individuals can apply for protection, except a select few who may qualify for CAT.

As in East Bay Sanctuary Covenant, the executive branch worked around Congress’s established immigration statutory framework to create what has caused another pseudo ban on asylum using Title 42. The Trump Administration did so by pressuring the CDC to wrongfully enforce the PHSA as “a shadow immigration enforcement power,” which the Biden Administration continues to uphold as of the publishing of this article. The implementation of Title 42 and its harmful effect is therefore more expansive than the Interim Final Rule, and thus should also be struck down due to its corresponding violation of the Refugee Act of 1980.

B. The Convention Against Torture

The Convention Against Torture (CAT) is one of the foremost international human rights treaties dealing specifically with the issue of torture. The United Nations “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” obligates countries that have signed the treaty to prohibit and prevent the torture and “cruel, inhuman or degrading treatment or punishment” in all possible circumstances. According to Article Three of CAT, “[n]o State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being

172 Gutten tag, supra note 3.
174 Id.
177 Id.
subjected to torture.” On October 21, 1994, the United States ratified CAT. The United States Constitution states that treaties are “the law of the land,” and, therefore, the United States is obligated to comply with its provisions as it would for any domestic law. Indeed, Congress implemented the procedures for CAT under 8 C.F.R. §§ 208.16-18. The language in CAT is mandatory and binding, not simply a recommendation which the government can choose to follow at its discretion.

According to CBP guidance on the processing of immigrants and asylum seekers under Title 42, CAT is the only protection for which asylum seekers may be eligible. However, CBP officers are not to ask if arriving undocumented persons fear torture if returned to their country of origin or Mexico, rather, the onus lies on the asylum seeker to “make an affirmative, spontaneous and reasonably believable claim that they fear being tortured in the country they are being sent back to.” Border Patrol agents then have unilateral authority to determine if those claiming fear of torture should be referred for further assessment with an asylum officer.

Since the Trump Administration’s enforcement of Title 42 expulsions in March 2020, until April 2021, at least 637,000 immigrants were processed and expelled under the policy, and of those processed, only 1,897 asylum-seekers have been able to request protection under CAT. In 2016, however, 408,870 immigrants were apprehended by CBP at the Southwest border, and of those apprehended, 37,060 were able to request protection under CAT. The percentage differential is striking: in 2016 the percentage
of immigrants who requested relief under CAT was roughly 9.0% while in 2020, during the government’s implementation of Title 42, only 0.3% of covered undocumented persons did so.188 While migration trends often fluctuate and vary year to year, data indicates that civil and political unrest in the countries of origin from which the majority of migrants arriving in the United States come from has not improved.189 Rather, these countries have further destabilized, thereby likely increasing the number of persons that need to seek protection in the United States under CAT.190 Based on the decreased percentage of arriving migrants granted the opportunity to seek asylum since the implementation of Title 42 in March 2020, and the broad discretion that CBP has under Title 42, advocates rightfully believe that migrants expressing their fear of return to their countries of origin are being illegally deported to their home countries or to Mexico.191

Additionally, firsthand accounts of deportees who likely qualified for protection under CAT but were expelled under Title 42 further evidences the United States’ violation of CAT.192 For instance, a Haitian immigrant who goes by “Roseline,” fled Haiti after being raped and assaulted.193 Nonetheless, she was expelled to Haiti under Title 42 upon arriving to the United States and expressing her fear of return.194 Roseline was in such fear of returning to Haiti that she begged CBP agents not to return her, stating, “I begged [CBP agents] to be sent to Mexico . . . , but they said no

188 See id.; Montoya-Galvez, supra note 64.
189 Amelia Cheatham, Central America’s Turbulent Northern Triangle, COUNCIL ON FOREIGN RELS. (July 1, 2021), https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle.
191 See Q&A: US Title 42 Policy to Expel Migrants at the Border, supra note 141; O’Toole, supra note 173.
192 See Q&A: US Title 42 Policy to Expel Migrants at the Border, supra note 141.
193 Phillips & Ricker, supra note 132, at 31.
194 Id. at 31–32.
they were sending me to Haiti.” Since being expelled to Haiti, Roseline has been in hiding. Assault and rape are both viable forms of recognized past torture, and although Roseline expressed her fear of future torture, she was deported by CBP without the opportunity to speak with an asylum officer. A multitude of similar reports have been made. Human Rights First tracked reports of Haitian deportees who fled Haiti after experiencing “violence, instability, and persecution.” By rapidly expelling numerous individuals in fear of torture back to their home or to Mexico, the United States is violating its legal obligations under CAT.

C. Constitutional Law Violations

The extent of constitutional due process rights accorded to arriving undocumented immigrants and asylum seekers continues to be substantially disputed. However, “[r]epeatedly and consistently, the Supreme Court and the Ninth Circuit have held that non-citizens physically on U.S. soil have constitutional rights, including the right to due process of law.” This section will analyze the likely due process violations of covered undocumented persons expelled under Title 42 and the unconstitutionality of the executive’s implementation of the PHSA as a shadow immigration policy.

195 Id. at 32.
196 Id. at 31–32.
197 Phillips & Ricker, supra note 132, at 39–40; Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1079 (9th Cir. 2015); cf. Lopez-Galarza v. Immigr. & Naturalization Serv., 99 F.3d 954, 959 (9th Cir. 1996) (listing both rape and sexual assault as forms of persecution for asylum purposes).
1. Violation of Asylum Seekers’ Due Process Rights

Asylum law grants undocumented persons who arrive to the United States claiming either “an intention to apply to asylum” or “a fear of persecution” upon return to their home countries the right to a credible or reasonable fear administrative interview by an asylum officer.\(^{202}\) In this interview, the officer will determine whether the undocumented person “has a credible fear of persecution” and should, therefore, have the right to continue their application for asylum.\(^{203}\) Title 42’s current implementation against asylum seekers is unconstitutional because immigration officials expel immigrants claiming such fear of persecution in their home country without a credible or reasonable fear interview.\(^{204}\)

Like United States citizens, other “person[s]” within the United States are entitled to the constitutional protection of the Due Process Clause of the Fourteenth Amendment.\(^{205}\) The Supreme Court has staunchly held that “[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens,” and that the Due Process Clause “applies to all ‘persons’ within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent.”\(^{206}\) For undocumented immigrants who have barely set foot into the United States, however, these due process rights are inapplicable. Undocumented immigrants “on the threshold of initial entry” into the country are only entitled to those “rights regarding admission that Congress has provided by statute.”\(^{207}\)

In *Department of Homeland Security v. Thuraissigiam*, Thuraissigiam, an undocumented immigrant who was expelled from the United States after entering to seek asylum, argued that the federal statute under which he was expelled violated his due process rights.\(^{208}\) Thuraissigiam was stopped twenty-five yards after his entry into the United States, and after an asylum officer found “no evidence” that he was eligible for asylum, he was removed from the country.\(^{209}\) Finding that the respondent’s right to due process was not violated, the Supreme Court reiterated that newly arrived undocumented persons were not protected by the Due Process Clause, but instead only had

\(^{203}\) Id.
\(^{204}\) Phillips & Ricker, supra note 132, at 8, 26.
\(^{205}\) See U.S. Const. amend. XIV, § 1.
\(^{208}\) Id. at 1967, 1981.
\(^{209}\) Id. at 1967–68.
those due process rights as conferred by Congress.\textsuperscript{210} The Court noted that “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”\textsuperscript{211} The Supreme Court reversed the Ninth Circuit decision, finding that the Due Process Clause was inapplicable, and that Thuraissigiam did receive due process of law as provided by the statute.\textsuperscript{212}

While Thuraissigiam and its predecessors are generally against offering rights to arriving undocumented persons, the Court’s holding that arriving undocumented persons are entitled to only those rights which Congress confers could work in favor of asylum seekers who may otherwise be expelled under Title 42. The INA is a statute conferred by Congress and affords certain qualified individuals a right to seek admission to the United States.\textsuperscript{213} Under the Thuraissigiam rationale, then, it is possible that if Title 42 procedures were challenged as violating arriving immigrants’ rights under the INA, that the court may find Title 42 violative of asylum seekers’ “rights regarding admission that Congress has provided by statute.”\textsuperscript{214} Thus, Title 42 may violate asylum seekers’ due process rights as conferred under the INA.

Further, Title 42 is unconstitutional due to its violation of the Fifth Amendment right to due process by wrongfully allowing CBP officers to conduct CAT screenings. CBP agents have unchecked authority to determine whether immigrants who fear torture in their country of origin qualify for CAT.\textsuperscript{215} According to 8 U.S.C. § 208.16, an asylum officer has the authority to assess whether the individual seeking protection has a viable claim for CAT. In A.B.-B. v. Morgan, the court held that plaintiffs demonstrated a likelihood of success on the merits of their claim that allowing CBP agents to conduct asylum interviews violates the INA.\textsuperscript{216} It was due to the CBP agents’ lack of training and their inability to “conduct the interview in a non-adversarial manner,” for which the court granted the motion for preliminary injunction to seize conducting asylum interviews.\textsuperscript{217} When CBP agents conduct asylum interviews, asylum seekers are deprived of their right to due process of law as a result of CBP agents’ inadequate training to conduct the screenings and their inherent adversarial position as law enforcement personnel.

\textsuperscript{210} Id. at 1982.
\textsuperscript{211} Id. (quoting Ekiu v. United States, 142 U.S. 651, 660 (1892)).
\textsuperscript{212} Id. at 1983.
\textsuperscript{213} See supra Section III.A.
\textsuperscript{214} See Thuraissigiam, 140 S. Ct. at 1983.
\textsuperscript{215} Q&A: US Title 42 Policy to Expel Migrants at the Border, supra note 141.
\textsuperscript{216} No. 20-cv-00846, 2020 WL 5107548, at *1 (D.D.C. Aug. 31, 2020).
\textsuperscript{217} Id. at *6–8.
Title 42 also likely violates expelled persons’ due process right because of its arbitrary discriminatory implementation against asylum seekers and children.\textsuperscript{218} In \textit{Hampton v. Wong}, the United States Supreme Court ruled on a challenge to the validity of a regulation which “exclude[d] all persons except American citizens and natives of American Samoa from employment in most” federal employment positions.\textsuperscript{219} The Court held that this regulation by the United States Civil Service Commission, a federal agency, deprived the plaintiffs of their liberty without due process of law by arbitrarily applying discriminatory rules based on someone’s non-permanent resident status.\textsuperscript{220} In Title 42, the CDC limits the “Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists,” to an extremely narrow group of people by excluding:

- U.S. citizens and lawful permanent residents; members of the armed forces of the United States . . . and associated personnel, and their spouses and children; persons from foreign countries who hold valid travel documents and arrive at a POE; [and]
- persons from foreign countries in the visa waiver program who are not otherwise subject to travel restrictions and arrive at a POE.\textsuperscript{221}

The CDC provides no information regarding how only applying the order against asylum seekers and children improves public health, when all other exempt parties are not subject to the same restrictions regardless of whether they, too, are traveling from a country where a quarantinable communicable disease exists.\textsuperscript{222} Therefore, by the CDC discriminatorily targeting the “covered [undocumented persons],” it is depriving them an aspect of liberty, just as the CDC did against non-permanent residents in \textit{Hampton}.\textsuperscript{223}

Further, the \textit{Hampton} court held that “due process requires that the decision to impose that deprivation of an important liberty be made either at a comparable level of government or . . . that it be justified by reasons which are properly the concern of that agency.”\textsuperscript{224} The CDC is neither at a comparable level of government to authorize immigration law, nor is the CDC justified by reasons that concern its agency to surpass the immigration law framework, and enforce the broad expulsion of asylum seekers. United

\begin{itemize}
\item \textsuperscript{218} See Guttentag, supra note 3.
\item \textsuperscript{219} 426 U.S., 88, 90–91 (1976).
\item \textsuperscript{220} \textit{Id.} at 116–17.
\item \textsuperscript{221} U.S. Dep’t of Health & Hum. Servs., Ctrrs. for Disease Control & Prevention (CDC), supra note 13.
\item \textsuperscript{222} See id.
\item \textsuperscript{223} See \textit{id.}; \textit{Hampton}, 426 U.S. at 116.
\item \textsuperscript{224} \textit{Hampton}, 426 U.S. at 116.
\end{itemize}
States immigration law, including the INA and CAT, were implemented by Congress, and the CDC’s implementation of Title 42 as a federal agency is not a comparable level of government to Congress.\textsuperscript{225} Further, evidence shows that the CDC is not justified to implement Title 42 as a superseding law based on the reasons stated supra in the Section II.A. and II.D.

2. Implementation of Title 42 Expulsions is an Act of Executive Overreach

The implementation of Title 42 expulsions is an act of executive overreach by the federal government. According to the United States Constitution, immigration matters are meant to be established by Congress, not a federal agency.\textsuperscript{226} The PHSA lacks any language that designates the authority to supersede immigration law or grants the executive branch or a federal agency such power of expulsion.\textsuperscript{227} In \textit{Al Otro Lado v. Wolf}, the Ninth Circuit affirmed an injunction against the “metering” policy, in which asylum seekers were turned back at POEs regardless of having viable asylum claims.\textsuperscript{228} There, the court promoted the important “weighty” public interest “in efficient administration of the immigration laws at the border,” as well as “an interest in ensuring that ‘statutes enacted by [their] representatives’ are not imperiled by executive fiat.”\textsuperscript{229}

The court’s point must not be overlooked. A proper balance of power among the three branches of government is a foundational principal of the United States Constitution.\textsuperscript{230} As in \textit{Al Otro Lado}, in implementing

\textsuperscript{225} See Our History – Our Story, Ctrs. for Disease Control & Prevention, www.cdc.gov/about/history/index.html (Dec. 4, 2018) (explaining that the CDC is an operation of the Health and Human Services agency, a government agency that focuses on “health promotion, prevention, and preparedness.”). “An agency’s powers are granted by Congress in an ‘enabling act’ . . . and in other specific legislative grants of power. . . . An agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.” Administrative Law: Federal Agencies, FLA. STATE U. COLL. L. Rsch. Ctr. (Apr. 6, 2021), https://guides.law.fsu.edu/administrativelaw/agencies. Thus, among the hierarchy of U.S. government power, the CDC’s power stems from Congress.


\textsuperscript{228} 952 F.3d 999, 999 (9th Cir. 2020).

\textsuperscript{229} Id. at 1015; E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 779 (9th Cir. 2018) (quoting Maryland v. King, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers)).

Title 42, the executive branch has overstepped its power by surpassing the immigration statutory framework created by Congress to further its own political initiatives. In order to address the executive’s overreach of Title 42, the judiciary should step in to equalize the balance of powers.

**CONCLUSION**

The news of Joe Biden’s presidential victory against Donald Trump brought hope and celebration among the immigrant tent camps established along United States-Mexico border towns. These towns were filled with immigrants and asylum seekers who were expelled after seeking asylum in the United States under Title 42, returned to Mexico due to their placement into the Migrant Protection Protocols, and were awaiting their immigration hearing date in the United States.

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231 See Guttentag, supra note 3. But see Trump v. Hawai‘i, 138 S. Ct. 2392 (2018) (holding that President Trump fulfilled the INA provision that delegates authority to the President to regulate immigration if such lack of regulation would be detrimental to the interests and security of the U.S.).


233 See id.; Migrant Protection Protocols, supra note 11 (“Migrant Protection Protocols are a U.S. Government action whereby certain foreign individuals entering or seeking admission to the U.S. from Mexico—illegally or without proper documentation—may be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings . . . .”). On August 24, 2021, the Supreme Court declined the Biden Administration’s application for a stay of the injunction issued by the district court, noting that “[t]he applicants have failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious.” Joseph R. Biden, Jr., President of the United States, et al., Applicants v. Texas, et al., SUPREME COURT OF THE U.S. (Aug. 24, 2021), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a21.html. Consequently, the Administration must resume the Remain in Mexico policy.

President Biden’s inauguration, he revoked Executive Order 13780, known as “the Muslim Ban,” and has made strides to uphold his promises to end Migrant Protection Protocols, reunite the families that remain separated due to the Trump Administration’s Zero Tolerance Policy, and slow the expulsion of minors under Title 42. President Biden also suspended the implementation of a rule which would codify a statutory bar to eligibility for asylum and withholding of removal “based on emergency public health concerns generated by a communicable disease.” The rule was originally meant to be effective as of January 22, 2021, but the Biden Administration delayed its effective date to December 2021.

While the Biden Administration is making strides to reverse many of Trump’s anti-immigration policies, as of the publishing of this note, border officials continue to enforce Title 42 expulsions against single adults and families. A report of Title 42’s impact documents nearly 500 cases of violence against asylum seekers expelled under the Biden Administration.


Haitian asylum seekers—a population that has been historically discriminated under United States immigration law—continue to be particularly harmed by Title 42 under the new administration. In a few short weeks, the Biden Administration deported more Haitians than the Trump Administration did in an entire year. Lastly, President Biden continues former President Trump’s close dealings with Mexico by making an agreement that the United States will send Mexico surplus vaccines, and in exchange, Mexico has agreed to accept more families expelled from the United States under Title 42. The American Civil Liberties Union (ACLU) has filed numerous suits to block Title 42’s use to expel UNC and families. On November 18, 2020, in the ACLU’s case of *P.J.E.S. v. Wolf*, the District Court issued an order blocking the use of Title 42 to expel UNC. On January 29, 2021, however, a D.C. Court of Appeals stayed the order, thus allowing the expulsions of UNC to continue until the Biden Administration ceased the expulsions discretionarily in mid-March 2021. In *Huisha-Huisha v. Gaynor*, the D.C. District Court granted emergency orders prohibiting the deportation of several plaintiff families that were expelled under Title 42. A motion for class certification in *Huisha-Huisha* and a motion for preliminary injunction are currently pending.

The CDC’s present implementation of Title 42 against covered undocumented persons furthers an illusion of a policy that stops the spread

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245 No. 21-cv-00100 (D.D.C. filed Jan. 12, 2021); Title 42 Challenges, supra note 242.

246 Id.
of COVID-19, but in actuality is only being used to offer a dangerous mirage of containment. The United States government has a history of attaching anti-immigration policy with communicable disease, enacting these policies against a backdrop of xenophobia and “racist and eugenicist conceptions of disease.” There is a great deal of evidence that the CDC’s implementation of Title 42 against the specified population was due to pressure by the Trump Administration to implement their anti-immigrant political ideology rather than establish safe public health measures. The Biden administration continues to expel single adults and families under Title 42. Furthermore, like the Trump Administration, the Biden Administration’s actions conflict with the stated purpose of sections 362 and 365 of the PHSA.

In March 2021, ICE crammed a group of asylum seekers onto a plane from South Texas to El Paso after Mexican officials refused to accept the migrants expelled under Title 42. In response, United States authorities flew the asylum seekers to another section of the United States border and expelled them to a separate part of Mexico. By flying to a separate part


248 See id.; Caitlin Yoshiko Kandil, Asian Americans Report Over 650 Racist Acts Over Last Week, New Data Says, NBC NEWS (Mar. 26, 2020), https://www.nbcnews.com/news/asian-america/asian-americans-report-nearly-500-racist-acts-over-last-week-1169821. Professor Erika Lee, at the University of Minnesota states: “It’s a trope that dates back to the 1800s. During an outbreak of the bubonic plague in San Francisco in 1900, [Lee] said, Chinatown was blocked off and its residents were barred from leaving after the first case was traced to a Chinese immigrant living there. An outbreak of the plague similarly led to the quarantine of Chinatown in Honolulu.” Yoshiko Kandil, supra (quoting Erika Lee, Professor at the University of Minnesota).

249 See Q&A: US Title 42 Policy to Expel Migrants at the Border, supra note 141; O’Toole, supra note 173; Russell, supra note 141.


of the border it is likely that immigration officials and migrants were put at greater risk of COVID-19 due to the enclosed environment and recirculated airflow on the aircraft. Further, in June 2021, the Biden Administration continued the implementation of Title 42, but established two narrow routes to acquire an exemption to expulsions under the Title. The first track became available in late March 2021 and established a program which allowed thirty-five families to be let in daily. Prompted by the ACLU’s pending lawsuit against the Biden Administration for the continued use of Title 42, the program has the ACLU collect applications from organizations working with migrants and then submit them to CBP for consideration. The second track became available in May 2021 and permits 250 individuals deemed to be the most “vulnerable” to cross into the United States and pursue their claims. Six non-profit organizations were selected to work as a consortium to determine the most vulnerable cases to then be submitted to CBP for approval. Members of the consortium agreed to engage in the process based on the understanding that after July, Title 42 would be lifted. However, on August 2, 2021, the CDC issued an order that Title 42 expulsions 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 public health.”

253 Abdalla, supra note 250.
254 Id.
255 Id.
256 Id.
257 Id.
258 Id.
protest, at the end of July 2021, two organizations from the consortium, International Rescue Committee and HIAS, halted their work with the government in an attempt to pressure the Biden Administration to end Title 42 expulsions.\textsuperscript{260} Also, due to the ACLU’s litigation challenging Title 42 restarting, the Administration announced the exemptions related to the lawsuit were ending.\textsuperscript{261} As of August 23, 2021, Linda Rivas stated that other organizations involved in the consortium have begun to withdraw their assistance to process individuals under the exemption to Title 42, in hopes to pressure the Biden Administration to uphold their agreement to end the expulsions and because they do not want to be complacent in harm that is caused by the expulsions.\textsuperscript{262}

Immigrant rights advocates refer to the Biden Administration’s recent decision to indefinitely continue Title 42 expulsions—despite the government’s ability to process asylum seekers quickly under the exemption programs—as further evidence of its true purpose: a shadow immigration strategy rather than a public health policy.\textsuperscript{263} There are less inhumane measures that the Biden Administration must take immediately in order to uphold ratified international treaties, to uphold asylum law, and, in President Biden’s own words, to preserve our country’s “national conscience,” including “our long history of welcoming people of all faiths and no faiths at all.”\textsuperscript{264}

The following are several recommendations that can be implemented to ensure public health regulations are upheld to the highest standard while also meeting the United States’ legal duties owed to asylum seekers. First,


\textsuperscript{261} Meyer & Isacson, \textit{supra} note 237.

\textsuperscript{262} Telephone Interview with Linda Rivas, \textit{supra} note 12.

\textsuperscript{263} Borger, \textit{supra} note 240; Abdalla, \textit{supra} note 250.

\textsuperscript{264} Proclamation No. 10141, \textit{supra} note 234.
CBP should work with health professionals to screen asylum seekers, ensure that proper social distancing measures and personal protective equipment precautions are taken, add more screening, and implement potential quarantines for those exposed to the virus. Creative solutions to the lack of medical resources should be explored, such as rewarding United States Public Health Service Commissioned Corps employees with federal loan forgiveness to encourage prospective applicants. The Ready Reserve Corps may also assist if there is a shortage of healthcare professionals. Second, asylum seekers should be thoroughly and quickly processed and paroled to their family and/or friends within the interior of the United States until their immigration court proceedings. This way, asylum seekers can ensure they can adequately social distance and quarantine if necessary, thereby avoiding and slowing the spread of COVID-19 cases in CBP processing centers and immigration detention facilities. Third, international partnerships should be improved, particularly with nations that share a land border with the United States, as the United States can work with Mexico and Canada to ensure that sufficient precautions are taken due to the avid flow of persons between the two countries.

Fourth, use the Migrant Protection Protocols wind-down model, which involves admitting asylum seekers by the hundreds with the assistance of various United Nations agencies operating in Mexico, and rapid testing all asylum seekers before allowing them to enter the United States.

In conclusion, the use of the PHSA to implement the Title 42 asylum ban is an unprecedented overextension of executive power that is in violation of international and United States law. The CDC must immediately revoke the present use of Title 42, or the judicial system should step in to ensure a balance of power. Since those in power refuse to uphold our laws, we must take action to preserve Americans’ belief in our systems of law.

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