



User Name: Tebbie Fowler

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INTRODUCTION

This paper concerns the Biden administration's use of Title 42 of the Public Health Service Act to deny Haitian asylum seekers entrance into the United States. ²The Act allows the United States government to send these asylees back to Haiti without a hearing under the auspices of public health due to the Covid-19 pandemic. ³The policy is a renewal of a Trump administration tactic used to deny predominantly Mexican immigrants entrance into the United States. ⁴The focus of this paper though will be on how the Biden administration's policy is more than merely an extension of Trump-era policies, it is a continuation of discriminatory U.S. policies implemented to stanch the flow of Haitian immigrants, particularly refugees, since the 1970s. ⁵

Part I focuses on the modern U.S. strategy towards Haitian immigrants from the 1970s until today. The paper begins in the 1970s because this is when the first "boat people" arrived onto the shores of the United States. ⁶Haitian "boat people" are those who left their home country by boat for economic and/or political reasons. ⁷The

¹ Juris Doctor Candidate, Rutgers Law School, Class of 2023. This Note is dedicated to all those affected by our immigration system and to my mom who is a constant source of inspiration.

² Marisa Penalzoza, *Haiti faces Disasters and Chaos. Its People are most likely to be denied U. S. Asylum*, NPR (Oct. 16, 2021, 7:00 AM), <https://wamu.org/story/21/10/16/haiti-faces-disasters-and-chaos-its-people-are-most-likely-to-be-denied-u-s-asylum/>.

³ Ryan Bort, *Biden channels Stephen Miller to deport Haitian Asylum Seekers*, ROLLING STONE (Sept. 21, 2021, 11:38 AM), <https://www.rollingstone.com/politics/politics-news/biden-administration-title-42-haitian-refugee-expulsions-1229299/>.

⁴ *Id.*

⁵ Malissia Lennox, *Refugees, Racism, and Reparations: A Critique of the Haitian Immigration Policy*, *45 STAN. L. REV.* 687, 701 (1993).

⁶ Gilbert Loescher & John Scanlan, *Human Rights, U. S. Foreign Policy, and Haitian Refugees*, 26 J. INTERAMERICAN STUD. & WORLD AFFS. 313, 331 (1984).

⁷ Peter Gordon LaLime, *The Haitian Boat People: An Overview of the Present Situation Concerning Their Illegal Immigration to Florida*, MA TESOL COLLECTION. 339, 349-50 (1981), https://digitalcollections.sit.edu/ipp_collection/339/.

Nixon administration's strategy for denying these Haitians seeking refuge from both economic and political hardships included a purposeful backlog of deportation claims and shortening of asylum interviews which combined to overburden immigration attorneys. ⁸The administration, along with these denials of due process rights, used "the requirement of bond, detention [and], refusal of work authorizations" to bar [*27] Haitians from receiving asylum. ⁹The Carter administration undid some Nixon-era policies towards Haitian immigrants including allowing them to work and granting some asylum hearings. ¹⁰However, these changes were only temporary and eventually the Carter administration returned to many of the previous administration's tactics. This renewal involved "cancelling the work authorizations, resuming the detention of Haitian males, and expediting deportation hearings." ¹¹

The Reagan administration stopped prospective Haitian asylees even earlier, while the Bush and Clinton administrations continued and, in some respects, amplified Reagan's policy. ¹²

The Reagan administration had the Coast Guard interdict vessels carrying Haitian immigrants and return them to Haiti before they could have an asylum hearing. ¹³George H. W. Bush, Reagan's former vice president, continued a similar policy when he became president in 1989. ¹⁴He augmented the strategy by housing Haitian immigrants on Coast Guard ships as well as at a detention facility on Guantanamo Bay while continuing to deprive Haitian asylum seekers of many of their due process privileges. ¹⁵Despite initially criticizing the policy, President Clinton continued it during his two terms in office. ¹⁶Similar to the Biden and Trump administrations, the George H.W. Bush administration also used a health crisis (HIV and AIDS) to deny immigrants entry into the United States. ¹⁷

The deportation of Haitian migrants did not stop with the Bush administration. ¹⁸Despite the Obama administration's temporary cessation of deporting Haitians traveling to the U.S.-Mexico border [*28] following the 2010 Haitian earthquake, the Trump administration eventually reinstated previous deportation policies concerning Haitians. ¹⁹It also took steps to end Temporary Protected Status (TPS) for Haitian migrants that would have allowed them to both legally stay in the U.S. and apply for work permits. ²⁰The Trump administration policy which

⁸ Lennox, *supra* note 5, at 700-01.

⁹ Naomi Flink Zucker, *The Haitians versus the U. S. : The Courts as Last Resort*, 467 ANNALS AM. ACAD. POL. & SOC. SCI. 151, 152 (1983).

¹⁰ Loescher & Scanlan, *supra* note 6, at 338.

¹¹ *Id.*

¹² High Seas Interdiction of Illegal Aliens, Proclamation No. 4865, 3 C.F.R. 50 (1981), *reprinted in* [8 U.S.C. § 1182](#) app. at 1259 (1988) (authorizing interception of Haitian vessels and return of passengers to Haiti).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Lennox, *supra* note 5, at 717.

¹⁶ *BRIA 10 2 B Haiti and the Boat People*, CONST. RTS. FOUND., <https://www.crf-usa.org/bill-of-rights-in-action/bria-10-2-b-haiti-and-the-boat-people> (last visited Oct. 10, 2022).

¹⁷ Mary B.W. Tabor, *Judge Orders Haitians in Guantanamo Released*, N.Y. TIMES, June 9, 1993, at B4.

¹⁸ Opel Tometi, *Obama's contradictory stance toward black asylum seekers*, THE HILL (Sept. 28, 2016, 12:19 PM), <https://thehill.com/blogs/pundits-blog/immigration/298266-black-lives-matter-co-founder-obama-stance-on-black-asylum-is>.

¹⁹ *Id.*

arguably garnered the most scrutiny though was its use of Title 42 of the Public Health Service Act to deport primarily Mexican immigrants under the guise of health concerns related to the COVID-19 pandemic.²¹

Part II will discuss the Biden administration's continuation of the use of Title 42 to deport Haitians seeking asylum.²² I will illustrate how President Biden first disparaged former President Trump's immigration policy before incorporating one of its integral aspects.²³ I will also discuss why thousands of Haitians have made their way to the U.S. border seeking asylum. Additionally, this section will analyze the ways in which this policy fits with how previous administrations used both health crises and a reduction of due process rights to inordinately discriminate against Haitian asylum seekers.

Finally, Part III will discuss possible solutions to these discriminatory policies towards Haitian immigrants. One tactic includes the immediate revocation of Title 42 provisions as they relate to Haitian asylum seekers. Additionally, Congress needs to pass the Refugee Protection Act to increase rights for both asylees and refugees.

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I. USE OF TITLE 42 & BACKGROUND OF U.S. POLICIES TOWARDS HAITIAN IMMIGRANTS

Nixon administration

During the 1970s the first influx of 'boat people' started arriving in the U.S. from Haiti.²⁴ During this period almost 8,000 Haitian immigrants reached United States shores via watercraft.²⁵ By some estimates, more than 50,000 Haitians sought asylum during this period.²⁶ These migrants, unlike past Haitians coming to the U.S., were often from lower socio-economic classes but also fled due to political turmoil stemming from the dictatorship of Jean-Claude Duvalier (aka Baby Doc).²⁷

To deal with the increased influx of Haitian migrants, the United States issued policies that severely affected their asylum cases.²⁸ It first purposely allowed for a backlog of Haitian deportation claims.²⁹ By some estimates, this number reached as high as 7,000.³⁰ Additionally, the U.S. made it more difficult for asylees to state a viable claim

²⁰ Ted Hesson, *U. S. court allows Trump to phase out immigrant humanitarian protections*, THOMSON REUTERS (Sept. 14, 2020, 1:40 PM), <https://www.reuters.com/article/uk-usa-immigration-court-idAFKBN26530E>.

²¹ Nicole Narea, *Biden is quietly enforcing one of Trump's most anti-immigrant policies*, VOX (Apr. 21, 2021, 12:50 PM), <https://www.vox.com/policy-and-politics/22398712/biden-title-42-migrant-border-expel>.

²² *Id.*

²³ *Id.*

²⁴ Loescher & Scanlan, *supra* note 6, at 327.

²⁵ LaLime, *supra* note 7.

²⁶ Lennox, *supra* note 5, at 700.

²⁷ Loescher & Scanlan, *supra* note 6, at 330-31.

²⁸ *Haitian Refugee Ctr. v. Smith*, 676 F. 2d 1023, 1039-41 (5th Cir. Unit B 1982).

²⁹ *Id.* at 1029.

³⁰ *Id.*

which resulted in the overburdening of the case loads of both immigration attorneys and the judges who would hear their cases. ³¹These cumulative policies resulted in zero Haitian applicants receiving asylum status. ³²

The Nixon administration also implemented harsh measures to make the Haitian migrants' stay in the United States more difficult. ³³The main tactic used was that if a Haitian immigrant did not arrive in the United States with the requisite money to post bond they were incarcerated. ³⁴Even if an immigrant did manage to raise the necessary funding, the government denied them authorization to seek employment. ³⁵

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Carter administration

The Carter administration initially rolled back many of the more restrictive policies of the Nixon administration. ³⁶Actions included releasing Haitians from detention even if they were unable to pay the requisite bond and allowing them to receive work authorization. ³⁷The loosening of regulations led not only to an influx of Haitians seeking asylum status but also to a change in policy by Carter's Immigration and Naturalization Service. ³⁸INS rescinded the previously authorized work permits and began detaining Haitian men. ³⁹It also had judges decide about ten times more daily asylum cases than they had previously. ⁴⁰Additionally, the government disallowed Haitian immigrants' lawyers the opportunity to "speak on behalf of their clients" and when Haitian immigrants decided to navigate the legal system alone, the translations the government gave them were subpar or nonexistent. ⁴¹

Despite this, Haitian immigrants and their advocates found success in court when challenging these governmental policies. ⁴²Arguably, the most high profile case for Haitian immigrants was Haitian Refugee Center v. Civiletti. ⁴³The class action lawsuit involved 5,000 Haitians accusing the U.S. government of violating their due process rights and of discriminating against them on the basis of national origin. ⁴⁴The Court explained that while every Cuban who sought asylum via a hearing was granted it, not one Haitian was. ⁴⁵While some Haitians did receive

³¹ [Id. at 1031.](#)

³² [Id. at 1032.](#)

³³ Naomi Flink Zucker, *The Haitians vs. the U. S. : The Courts as last resort*. 467 ANNALS AM. ACAD. POL. & SOC. SCI. 151, 154 (1983).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Loescher & Scanlan, *supra* note 6, at 339.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 338-39.

⁴¹ *Id.* at 339.

⁴² *Id.*

⁴³ [503 F. Supp. 442 \(S.D. Fla. 1980\).](#)

⁴⁴ [Id. at 451.](#)

an asylum hearing, the Court, citing *Sannon v. United States*, found that INS officials often sought to send Haitian immigrants back to their country without that constitutionally protected right. ⁴⁶In short, the Court found "a systematic program designed to deport them irrespective of the merits of their asylum claims." ⁴⁷

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Reagan administration

The Reagan administration took an even more aggressive tactic towards Haitian immigrants. ⁴⁸Instead of imprisoning Haitian immigrants who could not pay their bond, Reagan officials opted to detain Haitians without giving them the opportunity to post bond. ⁴⁹The administration would often deny Haitians access to legal counsel while they were housed in decrepit facilities. ⁵⁰It also arrested any Haitian immigrant who applied for a work permit. ⁵¹Additionally, it had large closed-door hearings concerning whether to deport Haitians without allowing attorneys to participate. ⁵²

Perhaps the biggest change introduced by the Reagan administration was the interdiction of vessels carrying refugees before they reached the United States. ⁵³The policy (Executive Order 12323) was introduced in September 1981 and involved U.S. officials boarding vessels, checking if those aboard had the proper paperwork, and returning those who did not to their native land. ⁵⁴Upon their return to their home country, State Department officials were supposed to periodically monitor these Haitians to ensure they were not persecuted. ⁵⁵Despite government officials' statements to the contrary, ⁵⁶this monitoring was deemed impossible. ⁵⁷When the Reagan administration introduced this policy, it only focused on migrants from one country: Haiti. This occurred despite wording in the Refugee Act of 1980 which stated that all asylum applicants be treated the same. ⁵⁸

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Loescher & Scanlan, *supra* note 6, at 344.

⁴⁹ *Id.* at 345.

⁵⁰ *Id.*

⁵¹ *See id.*

⁵² *See id.*

⁵³ See Claire P. Gutekunst, *Interdiction of Haitian Migrants on High Seas: A Legal and Policy Analysis*, 10 YALE J. INT'L L. 151, 151 (1984).

⁵⁴ *See id.*

⁵⁵ See Letter from Doris Meissner, Acting INS Commissioner, to Gary Perkins, Chief of Washington, D.C. Mission of UNHCR, at 2 (Dec. 29, 1981)(on file with YALE J. INT'L L.).

⁵⁶ See, e. g., *1982 Coast Guard Hearings* (testimony of Rudolph W. Giuliani, Associate Attorney General) (explaining that he was made more comfortable in sending interdicted migrants back to Haiti by the U.S.'s ability to monitor returnees).

⁵⁷ The Haitian League for Human Rights, an independent group, has in the past been a target of continued harassment and violence. See M. Hooper, Critique of the State Department Report on Human Rights Practices in Haiti for 1980 (arguing that once Haitians were returned to Haiti there was virtually no ability to track them).

⁵⁸ See Gutekunst, *supra* note 53, at 161.

[*32] This policy, as with previous administrations' treatment of *Haitian migrants*, stood on legally dubious ground.⁵⁹ The Immigration and Nationality Act set the parameters for treatment of asylees.⁶⁰ Reagan's interdiction policy did not provide *Haitian* immigrants with counsel, the right to appeal, or other measures enshrined in the INA.⁶¹ Additionally, the interviews aboard the vessels did not meet the standards set by the United Nations High Commissioner for Refugees (UNHCR) which included requirements such as advice for prospective asylees on what steps they needed to take to become an asylee and the ability for the prospective asylee to appeal a denial of status to an appropriate trier of fact.⁶² These tactics led to officials deeming only 28 out of 23,000 Haitians as potential asylees.⁶³

George H. W. Bush administration

President George H.W. Bush, President Reagan's Vice President, initially continued many of the procedures from the previous administration but also introduced new schemes concerning *Haitian* immigrants.⁶⁴ The most prominent of these new maneuvers was the use of Guantanamo Bay, Cuba as a detention facility.⁶⁵ Following the coup of *Haitian* president Jean-Bertrand Aristide in September 1991, thousands of Haitians sought refugee status in the United States.⁶⁶ For about two weeks U.S. officials allowed Haitians to enter the U.S. to seek asylum.⁶⁷ That policy ended quickly and officials sent many of them, more than 12,000 at one point, to a naval base at Guantanamo Bay [*33] where they were detained indefinitely.⁶⁸ U.S. officials argued that because the refugees had not set foot on U.S. land they could not apply for refugee status.⁶⁹ The conditions at the base included inedible food and abusive medical care.⁷⁰ In addition, those who had HIV were isolated further and placed in a separate camp.⁷¹ In response to these conditions President Bush issued the Kennebunkport Order in May 1992.

⁵⁹ See 8 C.F.R. § 242.17(c) (1982).

⁶⁰ See Gutekunst, *supra* note 53, at 175.

⁶¹ See *id.*

⁶² See Letter from Gary Perkins, Chief of Washington, D.C. Mission of UNHCR, to Doris Meissner, Acting INS Commissioner (Oct. 27, 1981) (need for thorough interview to prevent such return) (on file with the YALE J. INT'L L.); see also W. Woodward, *Haitian* Migration Interdiction Operation 17-18 (unpublished House Coast Guard Subcomm. Staff Report on Study Mission to Haiti, Jan. 7-12, 1982) (on file with the YALE J. INT'L L.). Mr. Woodward observed the second interdiction, on Jan. 10, 1982. He reported that each interview, conducted through a Creole translator, lasted only one to two minutes. *Id.* at 19-20.

⁶³ Kim Ives, *How George H. W. Bush made Guantanamo a Prison, starting with Haitians*, HAITI LIBERTE (Dec. 12, 2018), <http://www.haitiliberte.com/how-george-h-w-bush-made-guantanamo-a-prison-starting-with-haitians/>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Michael Ratner, *How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation*, 11 *HARV. HUM. RTS. J.* 187, 190 (1998).

⁶⁸ Naomi Paik, *US Turned Away Thousands of Haitian Asylum Seekers and Detained Hundreds More in the 90's* (July 2, 2018), <http://www.latinousa.org/2018/07/02/us-turned-away-thousands-of-haitian-asylum-seekers-and-detained-hundreds-more-in-the-90s/>.

⁶⁹ Immigration and Naturalization Act § 208(a)(1), 8 *U.S.C. § 1158(a)(1)* (1996).

⁷⁰ Paik, *supra* note 68.

⁷²While continuing to interdict *Haitian* vessels on their way to the United States, the command immediately ordered the return of those interdicted boats to Haiti without conducting interviews to determine anyone's refugee status. ⁷³

Clinton administration

As a presidential nominee, Bill Clinton suggested he would immediately shut down the camp on Guantanamo Bay which [*34] imprisoned HIV-positive *Haitian* immigrants. ⁷⁴He also promised he would cease interdicting *Haitian* vessels: "If I were president, I would - in the absence of clear and compelling evidence that they weren't political refugees - give them temporary asylum until we restored the elected Government of Haiti." ⁷⁵As President, he reneged on his campaign promise and stated, "The practice of returning those who flee Haiti by boat will continue Those who leave Haiti by boat for the United States will be intercepted and returned to Haiti by the US Coast Guard." ⁷⁶He did not close the camp at Guantanamo Bay until a federal district court ruling that contradicted both the Bush and Clinton administrations' assertions that those in the camp were not due basic constitutional rights. ⁷⁷Eventually, by June 1993 the last of the *Haitian* immigrants left Guantanamo Bay. ⁷⁸Many suffered both physical and psychological damage from the more than two years housed at the facility. ⁷⁹

Trump administration

The Trump administration focused its attention on Haitians already living and working in the United States. ⁸⁰It decided in late 2017 that in 2019 it would no longer allow them to receive Temporary Protected Status (TPS). ⁸¹In

⁷¹ See *Refugees in Second Year at HIV Camp*, TAMPA BAY TIMES (Dec. 13, 1992), <https://www.tampabay.com/archive/1992/12/13/refugees-in-second-year-at-hiv-camp/>.

⁷² Exec. Order No. 12,807, 3 C.F.R. 303 (1992). The Kennebunkport Order reads: By the authority vested in me as President by the Constitution and the laws of the United States of America, ... and whereas: (1) The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, ... and to repatriate aliens interdicted beyond the territorial sea of the United States; (2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States; ... I, GEORGE BUSH, President of the United States of America, hereby order [the Secretary of State to direct the Coast Guard] as follows: (3) To return the vessel and its passengers to the country from which it came, or to another country, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent. (d) These actions, pursuant to this section, are authorized to be undertaken only beyond the territorial sea of the United States.

⁷³ Ives, *supra* note 63.

⁷⁴ Brandt Goldstein, *Clinton's Guantanamo*, SLATE (Dec. 21, 2005), <https://slate.com/news-and-politics/2005/12/clinton-s-guantanamo.html>.

⁷⁵ Nathan J. Robinson, *Haiti's Clinton Problem*, JACOBIN (Oct. 22, 2016), <https://jacobinmag.com/2016/10/haiti-clinton-guantanamo-hiv-aristide-constant>.

⁷⁶ *Id.*

⁷⁷ *Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028, 1045 E.D.N.Y. 1993).

⁷⁸ Ratner, *supra* note 67, at 217.

⁷⁹ Robinson, *supra* note 75.

⁸⁰ Sarah E. Baranik de Alarcon, David H. Secor & Norma Fuentes-Mayorga, "We Are Asking Why You Treat Us This Way. Is it Because We Are Negroes?" *A Reparations-Based Approach to Remediating the Trump Administration's Cancellation of TPS Protections for Haitians*, 26 MICH. J. RACE & L. 1, 2 (2020).

2010 the Obama administration had granted them TPS after a 7.0 earthquake devastated Haiti. ⁸²TPS is often given to those, who while not technically refugees, cannot return to their home country for reasons including natural disasters. ⁸³The [*35] Obama administration then repeatedly extended TPS until 2017. ⁸⁴The Trump administration attempted to rescind TPS for 59,000 Haitians by reasoning that: "Since the 2010 earthquake, the number of displaced people in Haiti has decreased by 97 percent [and] significant steps have been taken to improve the stability and quality of life for *Haitian* citizens, and Haiti is able to safely receive traditional levels of returned citizens." ⁸⁵Lawsuits fighting to protect TPS for Haitians allowed the policy to stay in place until the Biden administration's extension of it in May 2021. ⁸⁶

Trump's Use of Title 42

While President Trump's immigration policies certainly affected Haitians, his focus primarily concerned Mexicans crossing the United States' southern border. ⁸⁷In a speech given when he first announced his presidency on June 16, 2015, inside Trump Tower, he uttered, "When Mexico sends its people, they're not sending their best...They're sending people that have lots of problems, and they're bringing those problems with us [sic]. They're bringing drugs, they're bringing crime, they're rapists. And some, I assume, are *good* people." ⁸⁸Before the Covid-19 pandemic, Trump's rhetoric focused mainly on building a wall that stretched along the entire 2,000-mile border [*36] between Mexico and the United States for which he claimed Mexico would pay. ⁸⁹

Health concerns surrounding Mexican immigrants were also used by the Trump administration to justify denying them entry into the United States. ⁹⁰Trump advisor, Stephen Miller, first advocated using *Title 42, Section 265 of*

⁸¹ *Id.*

⁸² Press Release, Off. of the Press Sec'y, Statement from Homeland Sec. Sec'y Janet Napolitano on Temporary Protected Status (TPS) for *Haitian* Nationals (Jan. 15, 2010), <https://www.dhs.gov/news/2010/01/15/secretary-napolitano-temporary-protected-status-tps-haitian-nationals>.

⁸³ *Granting Refuge: Temporary Protected Status (TPS) for Haitians in the United States*, AM. IMMIGR. COUNCIL (Jan. 22, 2010), https://www.americanimmigrationcouncil.org/sites/default/files/research/Granting_Refuge_012210.pdf.

⁸⁴ See Extension and Redesignation of Haiti for Temporary Protected Status, [76 Fed. Reg. 29,000, 29,001](https://www.federalregister.gov/documents/2011/05/19/2011-05-19-extension-and-redesignation-of-haiti-for-temporary-protected-status) (May 19, 2011) (describing conditions leading to extension of TPS); Extension of the Designation of Haiti for Temporary Protected Status, [77 Fed. Reg. 59,943, 59,944](https://www.federalregister.gov/documents/2012/10/01/2012-10-01-extension-of-the-designation-of-haiti-for-temporary-protected-status) (Oct. 1, 2012); Extension of the Designation of Haiti for Temporary Protected Status, and Redesignation of Haiti for Temporary Protected Status, [79 Fed. Reg. 11,808, 11,809](https://www.federalregister.gov/documents/2014/03/03/2014-03-03-extension-of-the-designation-of-haiti-for-temporary-protected-status-and-redesignation-of-haiti-for-temporary-protected-status) (Mar. 3, 2014); Extension of the Designation of Haiti for Temporary Protected Status, [80 Fed. Reg. 51,582, 51,583](https://www.federalregister.gov/documents/2015/08/25/2015-08-25-extension-of-the-designation-of-haiti-for-temporary-protected-status) (Aug. 25, 2015); see also Complaint at 7-5, *NAACP v. U.S. Dep't of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239).

⁸⁵ Miriam Jordan, *Trump Administration Ends Temporary Protections for Haitians*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/us/haitians-temporary-status.html>.

⁸⁶ *US extends Temporary Protected Status for over 50,000 Haitians*, CHRISTIAN SCI. MONITOR (May 23, 2021), <https://www.csmonitor.com/USA/Justice/2021/0523/US-extends-temporary-protected-status-for-over-50-000-Haitians>.

⁸⁷ Adam Gabbatt, *Golden Escalator Ride: The Surreal Day Trump Kicked Off His Bid for President*, GUARDIAN (June 14, 2019), <https://www.theguardian.com/us-news/2019/jun/13/donald-trump-presidential-campaign-speech-eyewitness-memories>.

⁸⁸ *Id.*

⁸⁹ Miriam Valverde, *Donald Trump Promised to Build a Border Wall and Make Mexico Pay for It. That Didn't Happen*, POYNTER INST. (July 15, 2020), <https://www.politifact.com/truth-o-meter/promises/trumpometer/promise/1397/build-wall-and-make-mexico-pay-it/>.

⁹⁰ Caitlin Dickerson & Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html>.

the U.S. Code of the Public Health Service Act, in 2019 during a mumps outbreak at multiple immigration detention facilities in several states. ⁹¹Later in 2019 he also supported implementing the same provision during a flu outbreak at a number of Border Patrol stations. ⁹²The outbreak of the Covid-19 pandemic gave the administration its strongest justification to deny Mexican immigrants entry. ⁹³On March 20, 2020 the administration used a travel ban to suspend all "nonessential travel" at the U.S.-Mexico border. ⁹⁴Also on March 20, the Trump administration used the same section of the Public Health Service Act to justify the denial of entry to those who posed a threat of bringing disease into the United States. ⁹⁵

Because the order primarily affected those without proper travel documentation it essentially banned all asylum seekers from [*37] entering the United States. ⁹⁶The measure stopped 400,000 asylum seekers and unaccompanied minors from entering the United States. ⁹⁷Despite other outbreaks, this was the first time that an administration had used the measure to stanch the flow of immigrants and noncitizens from entering the United States. ⁹⁸

Other aspects of the Trump administration's use of Title 42 illustrate why it led to such a prohibitive ban on asylum seekers. First, the asylum seeker had to make "an affirmative, spontaneous and reasonably believable claim" to even be considered for asylum. ⁹⁹Second, there was no exemption made for asylum seekers who claimed to have

⁹¹ *Id.*

⁹² *Id.*

⁹³ **42 U.S.C. § 265.** Enacted in 1944 as part of the Public Health Service Act, the provision allows the government to limit entry to the United States where "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."

⁹⁴ Press Release, Chad Wolf, Acting Sec'y, Dep't of Homeland Sec., Joint Statement on US Mexico Joint Initiative to Combat the COVID-19 Pandemic (Mar. 20, 2020), <https://www.dhs.gov/news/2020/03/20/joint-statement-us-mexico-joint-initiative-combat-covid-19-pandemic>.

⁹⁵ Ctrs. for Disease Control and Prevention, Dep't of Health and Human Servs., "Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes," 85 Fed. Reg. 16,559, 16,564 (Mar. 24, 2020) [hereinafter CDC Rule], <https://www.federalregister.gov/documents/2020/03/24/2020-06238/control-of-communicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into>; see also 42 C.F.R. § 71.40 (2020) ("prohibiting the introduction of persons from designated foreign countries and places into the United States").

⁹⁶ In making clear that asylum-seekers are not welcome under this Order, the text states: "DHS has informed CDC that persons who are traveling from Canada or Mexico (regardless of their country of origin), and who must be held longer in congregate settings in POEs or Border Patrol stations to facilitate immigration processing, would typically be aliens seeking to enter the United States at POEs who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended near the border seeking to unlawfully enter the United States between POEs. This order is intended to cover all such aliens."

⁹⁷ 15,848 unaccompanied minors were expelled at the U.S. Southwest land border under Title 42 from FY 2020 thru FYTD 2021. See *Southwest Border Encounters*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration> [<https://perma.cc/X8HQ-RMV8>] (last updated Jan. 7, 2021). On November 18, 2020, the United States District Court for the District of Columbia granted a preliminary injunction enjoining the application of the CDC orders to unaccompanied minors. *P. J. E. S. v. Wolf*, Civ. Action No. 20-2245 (EGS), 2020 WL 6770508 (D.D.C., Nov. 18, 2020).

⁹⁸ See Lucas Guttentag, *Coronavirus Border Expulsions*, JUST SEC. (Apr. 13, 2020), <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>. The regulations under Section 362 and adjacent provisions (until the current emergency rule) confirm the statute's role as preventing the introduction of **goods** and authorizing the quarantine of people (both citizens and noncitizens). The regulations never before - in over seventy-five years - sought to use the statute as a substitute or mechanism for regulating admission under the immigration laws or for authorizing a noncitizen's deportation or return to their home country.

a well-founded fear of persecution based on race, nationality, political opinion, religion, or membership in a particular social group.¹⁰⁰

[*38]

II. BIDEN'S USE OF TITLE 42 AGAINST ***HAITIAN*** IMMIGRANTS

When Joe Biden began his presidential candidacy, he disparaged President Trump's immigration policies as discriminatory.¹⁰¹ Upon taking office though he continued many of the policies he earlier decried, including the use of Title 42 to deny entry to asylum seekers.¹⁰² In its first month and a half the Biden administration used the measure to deport hundreds if not thousands of ***Haitian migrants*** and asylum seekers.¹⁰³ The only difference between Trump's use and Biden's was who was targeted.¹⁰⁴ While Trump primarily focused on Mexican immigrants Biden used it against ***Haitian*** asylum seekers.¹⁰⁵ Biden's use of Title 42, as with Trump, disallows asylum seekers a constitutionally-mandated hearing before they are returned to their homeland under the pretext of health concerns related to the Covid-19 pandemic.¹⁰⁶ Additionally, both Trump and Biden focused on asylum seekers who attempted to cross the United States' southern border.¹⁰⁷ But before analyzing Biden's policy one must understand how and why thousands of Haitians made the approximately 2,000-mile journey from their homeland to the border in Del Rio, Texas.¹⁰⁸

[*39]

Reasons Haitians sought asylum in the United States

⁹⁹ U.S. Customs and Border Protection and U.S. Border Patrol, "Operation Capiro" Memo, <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html>.

¹⁰⁰ [8 U.S.C. § 1101\(a\)\(42\)](#).

¹⁰¹ Marc Caputo, *Biden blasts Trump's "racist invective" in immigration plan roll-out*, POLITICO (June 24, 2019), <https://www.politico.com/story/2019/06/24/joe-biden-trump-immigration-racist-1377518>.

¹⁰² Alex Thompson & Alexander Ward, *Top State adviser leaves post, rips Biden's use of Trump-era Title 42*, POLITICO (Oct. 4, 2021), <https://www.politico.com/news/2021/10/04/top-state-adviser-leaves-post-title-42-515029>.

¹⁰³ *Biden Admin Must End ICE's Mass Deportation of Haitians*, NYIC (Feb. 4, 2021), <https://www.nyic.org/2021/02/biden-admin-must-end-ices-mass-deportation-of-haitians/>.

¹⁰⁴ Ben Fox, *EXPLAINER: Biden uses Trump-era tool against ***Haitian Migrants****, ASSOCIATED PRESS (Sept. 20, 2021), <https://apnews.com/article/health-mexico-texas-immigration-coronavirus-pandemic-194bf94eda1f78b0e38b1e53f1adba66>.

¹⁰⁵ *Id.*

¹⁰⁶ Armando Garcia, et al., *What is Title 42? Amid backlash, Biden administration defends use of Trump-era order to expel ***migrants****, ABC NEWS (Sept. 26, 2021), <https://abcnews.go.com/US/title-42-amid-backlash-biden-administration-defends-trump/story?id=80149086>.

¹⁰⁷ Jonathan Blitzer, *How Biden came to Own Trump's Policy on the Border*, NEW YORKER (Oct. 6, 2021), <https://www.newyorker.com/news/daily-comment/how-biden-came-to-own-trumps-policy-at-the-border>.

¹⁰⁸ *Id.*

Natural disasters first spurred Haitians to make the long journey from Haiti to the U.S.-Mexico border. ¹⁰⁹On January 12, 2010, a devastating 7.0 magnitude earthquake struck the Caribbean nation. ¹¹⁰Along with causing an estimated quarter of a million deaths, the earthquake also displaced more than one and a half million people. ¹¹¹Additionally, according to the World Bank, the earthquake also devastated Haiti's economy by destroying the equivalent of 120 percent of the country's Gross Domestic Product (GDP). ¹¹²

Contemporaneous to the earthquake, Brazil was seeking workers to build stadiums in preparation for hosting both the upcoming Olympics and World Cup. ¹¹³So, Brazil granted thousands of Haitians work permits to assist with the construction. ¹¹⁴Despite this, after construction ceased, Brazil's recession forced many Haitians to leave the country. ¹¹⁵In 2017 alone more than 100,000 Haitians traveled to Chile. ¹¹⁶But then conservative Chilean president Sebastian Pinera changed the nation's immigration policies, making it harder for Haitians to attain permanent resident status in Chile. ¹¹⁷

[*40] Earthquakes continue to devastate Haiti's infrastructure. ¹¹⁸In 2018 a magnitude 5.9 tremor struck the island nation. ¹¹⁹Then in 2021 Haiti was hit by its strongest earthquake, a 7.2 magnitude temblor. ¹²⁰It killed at least 300, injured at least 1,800, and caused "extensive damage" to the country's infrastructure at a time when it was still recovering from the earthquake more than a decade earlier. ¹²¹

¹⁰⁹Mabinty Quarshie & Javonte Anderson, *Del Rio Migrant Crisis: How did so many Haitians end up at the Southern US border?*, USA TODAY (Sept. 21, 2021), <https://www.usatoday.com/story/news/politics/2021/09/21/what-led-haitian-nationals-migrating-u-s-southern-border/8419170002/>.

¹¹⁰ *Id.*

¹¹¹ UN Marks Anniversary of Devastating 2010 **Haitian** Earthquake, UN NEWS (Jan. 12, 2022), <https://news.un.org/en/story/2022/01/1109632#:~:text=At%20the%20time%2C%20some%20300%2C000,35%2Dsecond%2Dlong%20tremor.>

¹¹² Press Release, World Bank, Rebuilding **Haitian** Infrastructure and Institutions (May 3, 2019), <https://www.worldbank.org/en/results/2019/05/03/rebuilding-haitian-infrastructure-and-institutions>.

¹¹³Lindsay Fendt, *With Olympics over, Haitian workers are leaving Brazil for the US in big numbers*, THEWORLD (Oct. 4, 2016), <https://theworld.org/stories/2016-10-04/olympics-over-haitian-workers-are-leaving-brazil-us-big-numbers>.

¹¹⁴The Associated Press, *Brazil to Grant Work Visas to Haitians*, N.Y. TIMES (Jan. 10, 2012), <https://www.nytimes.com/2012/01/11/world/americas/brazil-to-grant-work-visas-to-haitians.html>.

¹¹⁵ *Supra* note 112.

¹¹⁶Caitlyn Yates, *Haitian Migration through the Americas: A Decade in the Making*, MIGRATION POL'Y INST. (Sept. 30, 2021), <https://www.migrationpolicy.org/article/haitian-migration-through-americas>.

¹¹⁷Patrick McDonnell & Jorge Poblete, *Haitians in Chile: Rough going for many prompts large-scale migration toward U. S.*, L.A. TIMES (Oct. 1, 2021), <https://www.latimes.com/world-nation/story/2021-10-01/chile-haitians-migration>.

¹¹⁸Steve Almasy, Daniel Silva Hernandez, Sara Mazloumsaki & Susannah Cullinane, *Magnitude 5.9 Earthquake Hits Northern Haiti*, CNN (Oct. 7, 2018), <https://www.cnn.com/2018/10/06/americas/haiti-earthquake>.

¹¹⁹ *Id.*

¹²⁰ *Haiti Struck by 7.2 Magnitude Earthquake*, BBC NEWS (Aug. 14, 2021), <https://www.bbc.com/news/world-latin-america-58215631>.

¹²¹ *Id.*

Hurricanes have also devastated the Caribbean nation. ¹²²Hurricane Sandy battered Haiti in 2012. ¹²³According to the UN, it damaged or destroyed at least 27,000 homes, while leaving hundreds of thousands of Haitians homeless or without anything to eat or drink. ¹²⁴Then in 2016 Haiti was ravaged by Hurricane Matthew. ¹²⁵The Category Four storm ended up killing 546 Haitians, affecting over two million more (about 20% of the nation's population), and damaging thousands of homes and other buildings. ¹²⁶Then in 2020 Hurricane Laura struck the Caribbean nation and killed at least 21 people. ¹²⁷

Political turmoil has also affected the Western Hemisphere's most impoverished nation. ¹²⁸On July 7, 2021, the country's President, Jovenel Moise, was assassinated. ¹²⁹Moise's murder caused the nation to plunge into a state of emergency. ¹³⁰It also resulted in the country being unsure who its leader was because the normal successor, the [*41] President of the Supreme Court, had also recently passed away from Covid-19. ¹³¹Additionally, before his assassination, Moise had failed to hold elections which resulted in many political positions remaining unfilled. ¹³²

Also, during this same period, there had been a spike in violence. ¹³³According to UNICEF violent crimes such as rapes and murders, especially against women and children, had increased 62% between September 2020 and February 2021. ¹³⁴It had gotten severe enough for the U.S. Department of State to issue an advisory strongly urging U.S. citizens to avoid traveling to the country because of an increased threat of violence. ¹³⁵

¹²² *Haiti: Hundreds of Thousands of People Affected by Hurricane Sandy*, OCHA (Nov. 2, 2012), <https://www.unocha.org/story/haiti-hundreds-thousands-people-affected-hurricane-sandy>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Rapidly Assessing the Impact of Hurricane Matthew in Haiti*, WORLD BANK (Oct. 20, 2017), <https://www.worldbank.org/en/results/2017/10/20/rapidly-assessing-the-impact-of-hurricane-matthew-in-haiti>.

¹²⁶ *Id.*

¹²⁷ Alex Ward, *Hurricane Laura was already a Devastating Storm before it reached the US*, VOX (Aug. 27, 2020), <https://www.vox.com/world/2020/8/27/21403926/hurricane-laura-haiti-dominican-republic-cuba>.

¹²⁸ Etant Dupaln, Gerardo Lemos, Ivana Kattasova & Caitlin Hu, *Haiti President Jovenel Moise Assassinated in Attack on his Residence*, CNN (July 8, 2021), <https://www.cnn.com/2021/07/07/americas/haiti-president-jovenel-moise-attack-intl/index.html>.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Press Release, UNICEF, *Rising Gang Violence in Haiti is Now Targeting Children, UNICEF Warns* (Apr. 15, 2021), <https://www.unicef.org/lac/en/press-releases/rising-gang-violence-haiti-now-is-targeting-children-unicef-warns#:~:text=Between%20September%202020%20and%20February%202021%2C%20the%20number,rapes%20and%20kidnappings%2C%20according%20to%20the%20United%20Nations>.

¹³⁴ *Id.*

¹³⁵ *International Travel, Country Information: Haiti*, U.S. DEPT' STATE BUREAU CONSULAR AFFS. <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Haiti.html> (last visited Nov. 23, 2022).

These more recent phenomena are interwoven with the reality that Haiti is the poorest country in the Western Hemisphere. ¹³⁶Approximately 60% of its population lives below the poverty line, with the country having an unemployment rate of approximately 40%. ¹³⁷The income stratification is stark with the bottom 20% of the population receiving barely more than one percent of the national income. ¹³⁸More than three-quarters of the population lives on about US \$ 2/day with 50% living on US \$ 1. ¹³⁹This reality has led to only around 60% to 80% of Haitians having steady incomes, with most barely surviving by working sporadically and receiving money from [*42] friends and family outside of the country. ¹⁴⁰These remittances make up a quarter of the nation's Gross Domestic Product. ¹⁴¹

Much of this abject poverty is the result of poor infrastructure. ¹⁴²The infrastructure problems have led to businesses finding difficulty operating within the country. ¹⁴³Additionally, these issues affect Haiti's citizens, with almost three-quarters of the population lacking electricity. ¹⁴⁴Haiti's healthcare problems only exacerbate these infrastructurally-derived difficulties. ¹⁴⁵

Outside intervention in Haiti's domestic affairs, including by the United States, has been an integral factor in Haiti's economic problems. ¹⁴⁶In return for economic aid from other countries, including the United States, the *Haitian* government has allowed these financial institutions in these foreign nations to set *Haitian* economic policies. ¹⁴⁷These measures have severely decreased wages, "privatized public enterprises, reduced public-sector employment, and curbed social spending to reduce fiscal deficits." ¹⁴⁸The policies have also led to Haiti having to rely overwhelmingly on imports to meet its citizens' food needs. ¹⁴⁹

¹³⁶ *The World Factbook*, CIA (2021), <https://www.cia.gov/the-world-factbook/countries/haiti/#economy>.

¹³⁷ *Id.*

¹³⁸ See Alex Dupuy, *Beyond the Earthquake: A Wake-Up Call for Haiti*, WESLEYAN ARGUS (Jan. 26, 2010), <http://wesleyanargus.com/2010/01/26/beyond-the-earthquake-a-wake-up-call-for-haiti/>.

¹³⁹ *Id.*

¹⁴⁰ Jonathan M. Katz, *Can Low-Paying Garment Industry Save Haiti?*, SAN DIEGO UNION TRIB., (Feb. 21, 2010), <https://www.nbcnews.com/id/wbna35508222>.

¹⁴¹ See Press Release, OECD, *Haiti Stands to Benefit from Integrating Migration Further into Sectoral and National Development Strategies*, Says new Joint OECD Development Centre-INURED Report (Aug. 8, 2017), <https://www.oecd.org/countries/haiti/haitistandstobenefitfromintegratingmigrationfurtherintosectoralandnationaldevelopmentstrategiessaysnewjointoecddevelopmentcentreinuredreport.htm>.

¹⁴² See Mario Silva, *Island in Distress: State Failure in Haiti*, 23 *FLA. J. INT'L L.* 49, 66 (2011).

¹⁴³ See Press Release, Int'l Trade Admin., *Haiti-Country Commercial Guide* (Aug. 3, 2022), <https://www.trade.gov/country-commercial-guides/haiti-market-challenges>.

¹⁴⁴ Dan Schnitzer, *Avoid the Old Poverty Traps*, FOREIGN POL'Y (Jan. 19, 2010), <https://foreignpolicy.com/2010/01/19/how-to-help-haiti-rebuild/>.

¹⁴⁵ Silva, *supra* note 142.

¹⁴⁶ Rocio Cara Labrador & Diana Roy, *Haiti's Troubled Path to Development*, COUNCIL ON FOREIGN RELS. (Sept. 9, 2022), <https://www.cfr.org/background/haitis-troubled-path-development>.

¹⁴⁷ Dupuy, *supra* note 138 at 2.

¹⁴⁸ *Id.*

Along with economic policies, the United States has also used its military to destabilize Haiti. ¹⁵⁰In 2004, the United States supported the opponents of Haiti's duly elected president, Jean-Bertrand Aristide, [*43] and led a United Nations force to install Gerard Latortue as the leader of the country. ¹⁵¹

All these factors have combined to force many Haitians to leave their home country, with an overwhelming number making the approximately 2,000-mile treacherous journey by any means necessary to the southern border of the United States to seek asylum. ¹⁵²

Biden's use of Title 42

As a candidate, President Biden, like President Clinton, promised to discontinue his predecessor's immigration policies. ¹⁵³Except for not expelling unaccompanied minors as his predecessor did, Biden has failed to do so. ¹⁵⁴Before his election, the 46th President stated he would "end Trump's detrimental asylum policies." ¹⁵⁵Biden vowed to preserve "the dignity of *migrants*" by ensuring "their legal right to seek asylum." ¹⁵⁶Instead, President Biden has continued one of President Trump's most controversial policies: Title 42. ¹⁵⁷In September 2021 a federal court found not only that the administration's use of the policy was illegal but also that *Haitian* asylees' lives were in danger if they were returned to Haiti. ¹⁵⁸Undeterred, the Biden administration appealed the decision in hopes of continuing to use Title 42. ¹⁵⁹The appeal resulted in a stay which allowed the administration to continue the policy. ¹⁶⁰

The Biden administration has defended its policy on public health grounds. A Biden spokesperson even posited that public health [*44] officials would assist in guiding "pandemic-related border closures." ¹⁶¹But the policy continues despite Director of the Center of Allergy and Infectious Diseases, Anthony Fauci, stating that immigrants were not a major factor in the spread of Covid-19 in the United States. ¹⁶²Additionally, the CDC under the Trump

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 3.

¹⁵¹ *Id.*

¹⁵² Dobbins, et al., *How Hope, Fear and Misinformation Led Thousands of Haitians to the U. S. Border*, N.Y. TIMES (Sept. 17, 2021), <https://www.nytimes.com/2021/09/17/us/haitians-border-patrol.html>.

¹⁵³ Press Release, Biden/Harris, *The Biden Plan for Securing our Values as a Nation of Immigrants* (on file with author).

¹⁵⁴ Lia Zhu, *Border Strains Leave Biden Promise Fraying*, CHINA DAILY (Jan. 13, 2022, 9:40 AM), <https://www.chinadaily.com.cn/a/202201/13/WS61df8307a310cdd39bc80c36.html>.

¹⁵⁵ *Supra* note 153.

¹⁵⁶ *Id.*

¹⁵⁷ Sarah Sherman-Stokes and Lindsay M. Harris, *Despite Promises, Biden Looks a Lot Like Trump on Border Issues*, BLOOMBERG L. (Oct. 20, 2021), <https://news.bloomberglaw.com/immigration/despite-promises-biden-looks-a-lot-like-trump-on-border-issues>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

administration could not find a public health reason to deny asylum seekers entry into the U.S. ¹⁶³This reasoning is reinforced by the fact that only 1.14% of asylum seekers in Mexico tested positive for Covid-19. ¹⁶⁴Additionally, a Trump administration official admitted that instead of focusing on asylees, a **better** use of resources would be to shift attention to the continuing spread of Covid-19 on the U.S. side of the border. ¹⁶⁵Shifting attention away from asylees is opposed by Republicans who have urged President Biden to continue the policy specifically because of its purported public health benefits. ¹⁶⁶

Biden's policy, though, has come at a political cost amongst his fellow Democrats. ¹⁶⁷According to Senate Majority leader and fellow Democrat Chuck Schumer, the policy "defies common sense." ¹⁶⁸Additionally, House Democrats blocked consideration of a bill (H.R. 471) that would have led to the strict enforcement of Title 42. ¹⁶⁹Biden's [***45**] policy towards asylees even led a member of his administration, Special Envoy to Haiti Daniel Foote, to resign. ¹⁷⁰

Biden's policy has not stopped **migrants** from attempting to cross the border. ¹⁷¹In the 2021 fiscal year, the Border Patrol encountered 1.7 million **migrants**, which is four times more than in 2020. ¹⁷²In November 2021 alone, agents at the southwest border came in contact with approximately 174,000 people. ¹⁷³In the fiscal year

¹⁶² Kelsey Vlamis, *Fauci said people blaming immigrants for the spread of Covid-19 in the US needed to 'face reality'*, YAHOO! NEWS (Oct. 3, 2021), <https://news.yahoo.com/fauci-said-people-blaming-immigrants-010849200.html>.

¹⁶³ Jason Dearan & Garance Burke, *Pence ordered borders closed after CDC experts refused*, ASSOCIATED PRESS (Oct. 3, 2020), <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae>.

¹⁶⁴ Sherman-Stokes & Harris, *supra* note 157.

¹⁶⁵ Matt Stieb, *Why is Biden still relying on an idea from Stephen Miller?*, INTELLIGENCER (Dec. 6, 2021), <https://nymag.com/intelligencer/2021/12/why-is-biden-still-relying-on-title-42-to-expel-migrants.html>.

¹⁶⁶ Susan Jones, *Republicans warn Biden, Lifting Title 42 "Will have a Dire Impact on the Crisis already engulfing our Southern Border"*, CNSNEWS, (July 19, 2021, 9:40 AM), <https://cnsnews.com/article/national/susan-jones/republicans-warn-biden-lifting-title-42-will-have-dire-impact-crisis>.

¹⁶⁷ Erin Doherty, *"Defies Common Sense": Schumer condemns Biden's deportation of Haitian asylum seekers*, AXIOS (Sept. 21, 2021), <https://www.axios.com/2021/09/21/schumer-condemns-deportation-planes-haitians>.

¹⁶⁸ *Id.*

¹⁶⁹ Sean Moran, *Democrats Block Motion to Quickly Deport Illegal Aliens*, BREITBART (June 29, 2021), <https://www.breitbart.com/politics/2021/06/29/democrats-block-motion-to-quickly-deport-illegal-aliens/>.

¹⁷⁰ Rafael Bernal, *Ex-special envoy: Biden's approach to Haiti a "recipe for disaster"*, HILL (Jan. 11, 2022, 6:02 AM), <https://thehill.com/latino/589099-ex-special-envoy-bidens-approach-to-haiti-a-recipe-for-disaster>.

¹⁷¹ *Record 1. 7 Million Migrants Arrested on Southern Border During 2021 Fiscal Year*, REUTERS (Oct. 20, 2021), <https://timesofsandiego.com/politics/2021/10/20/record-1-7-million-migrants-arrested-on-southern-border-during-2021-fiscal-year/>.

¹⁷² *Id.*

¹⁷³ Alex Rouhandeh, *Omicron, Title 42 Push Migrant Shelters in Tijuana to Their Financial Limits*, NEWSWEEK (Dec. 23, 2021, 5:08 PM), <https://www.newsweek.com/omicron-title-42-push-migrant-shelters-tijuana-their-financial-limits-1662817>.

that concluded September 30, 2021, there were 45,000 Haitians arrested at the U.S.-Mexico border, a 530% increase over the previous year.¹⁷⁴

So many immigrants are arriving in border cities that these cities' shelters are becoming overcrowded.¹⁷⁵ Much of the surge is due to unaccompanied minors.¹⁷⁶ This is partly because the Biden administration, unlike its predecessor, allows children arriving at the border by themselves entry into the U.S., with many of them ending up in Border Patrol custody.¹⁷⁷ These children spend an average of 107 hours in custody, more than the 72 hours legally allowed.¹⁷⁸ In the second week of March 2021 alone, more than 3,700 unaccompanied minors were in U.S. Border Patrol's custody.¹⁷⁹

[*46] When not in custody, refugees often face dire circumstances in border towns.¹⁸⁰ According to Human Rights First, since the beginning of the Biden administration, more than 6,300 asylum seekers in Mexico were the victims of violence in the first eight months of 2021.¹⁸¹ Between mid-July and mid-August 2021, 83% of asylum seekers who were returned to Mexico were victims of violence.¹⁸²

Despite these difficult circumstances, asylees who encounter border patrol officers are often met with an even harsher fate.¹⁸³ According to Human Rights Watch, Department of Homeland Security documents enumerate 160 incidents of abuse or misconduct of asylum applicants.¹⁸⁴ These incidents include "allegations of assault, sexual abuse, due process violations, denial of medical care, harsh detention conditions, and dehumanizing treatment at the border."¹⁸⁵ Individual claims include a child migrant allegedly molested by a Border Patrol officer.¹⁸⁶ This is in addition to viral images of Border Patrol agents whipping Haitian asylum seekers.¹⁸⁷

¹⁷⁴ Billy Binion, *Haitians Meet the New Deporter-in-Chief*, REASON (Feb. 2022), <https://reason.com/2022/01/13/haitians-meet-the-new-deporter-in-chief/>.

¹⁷⁵ Salvador Rivera, " *Wait in Mexico' revival generating confusion, unrest at overcrowded shelters in Tijuana*, BORDER REP. (Dec. 7, 2021, 4:42 PM), <https://www.borderreport.com/regions/california/wait-in-mexico-revival-generating-confusion-unrest-at-overcrowded-shelters-in-tijuana/>.

¹⁷⁶ Priscilla Alvarez & Kevin Liptak, *Biden's border strategy faces crucial test amid dramatic surge of migrant children*, CNN (Mar. 10, 2021, 6:10 PM), <https://www.cnn.com/2021/03/10/politics/biden-border-strategy-crucial-test-surge-children/index.html>.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Betsy Klein, Kate Sullivan, & Geneva Sands, *Biden administration rescinds Trump-era immigration policy to alleviate surge of unaccompanied minors*, CNN (Mar. 12, 2021, 12:50 PM), <https://www.cnn.com/2021/03/12/politics/biden-rescinds-trump-immigration-migrants-minors/index.html>.

¹⁸⁰ Albinson Linares, " *We Live in Fear': Over 6,000 Migrants in Mexico have been violently attacked*, NBC NEWS (Aug. 26, 2021, 1:12 PM), <https://www.nbcnews.com/news/latino/live-fear-6000-migrants-mexico-violently-attacked-rcna1783>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Press Release, Human Rights Watch, *US Records Show Physical, Sexual Abuse at Border* (Jan. 13, 2022), <https://www.hrw.org/news/2021/10/21/us-records-show-physical-sexual-abuse-border>.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

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III. SOLUTIONS

There are solutions that could remedy many of the issues Haitian asylees currently face when attempting to get legal status in the United States. First, would be the revocation of Title 42 due to its violation of refugee laws and treaties. Also, Congress must pass the Refugee Protection Act in order to increase asylees' and refugees' rights.¹⁸⁸

Revoking Title 42

Title 42 violates refoulement obligations in the Convention against Torture.¹⁸⁹ Article 3 of the Convention "categorically prohibits State Parties from expelling, returning, or extraditing any person, without exception, to any State where there are "substantial grounds for believing he would be in danger of being subjected to torture."¹⁹⁰ As identified earlier, Haitian refugees, because of both political turmoil due to the assassination of its president as well as heightened criminal activity in Haiti, are paradigmatic cases of individuals likely to face abuse if returned to their home country.¹⁹¹

Title 42 also is contrary to the United States refoulement obligations in the 1951 Refugee Convention.¹⁹² It "flatly prohibits State Parties from expelling or returning ("refouler") refugees in any manner whatsoever to the frontiers of territories where their life or freedom would be threatened."¹⁹³ This is true for Haitian refugees when one considers the apparent inability, because of the political turmoil, for the government to adequately protect asylees returning to Haiti.¹⁹⁴

There is also ample evidence that the U.S.'s obligations under Article 43 of the International Health Regulations (IHR) are also implicated by its Title 42 policy.¹⁹⁵ Article 43 emphasizes that "state- [*48] implemented health measures be based on "available scientific evidence."¹⁹⁶ There is no scientific evidence that justifies allowing documented immigrants to stay in detention facilities while disallowing undocumented immigrants from doing so.¹⁹⁷ Also, as stated previously one of the leading health experts in the country, Dr. Anthony Fauci, has stated that immigrants are not the driving force behind the Covid-19 pandemic.¹⁹⁸

¹⁸⁷ Bernd Debusmann, Jr., *Grim echoes of history in images of Haitians at US-Mexico border*, BBC NEWS (Sept. 23, 2021), <https://www.bbc.com/news/world-us-canada-58654351>.

¹⁸⁸ Refugee Protection Act, H.R. 5210, 116th Cong. (2019-2020), <https://www.congress.gov/bill/116th-congress/house-bill/5210>.

¹⁸⁹ Christina Schiciano, *"Illegal and Inhumane": An Analysis of Title 42's International Health Law Violations*, 59 COLUM. J. TRANS. L. 3 (2021).

¹⁹⁰ *Id.*

¹⁹¹ Dobbins, *supra* note 152.

¹⁹² Schiciano, *supra* note 189.

¹⁹³ *Id.*

¹⁹⁴ Press Release, UNHCR, UNHCR Calls on States to Refrain from Forced Returns of Haitians (Nov. 3, 2022), <https://www.unhcr.org/en-us/news/press/2022/11/6363acd64/unhcr-calls-states-refrain-forced-returns-haitians.html>.

¹⁹⁵ Schiciano, *supra* note 189.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

A separate aspect of Article 43 of the IHR is also implicated by the Biden administration's use of Title 42. ¹⁹⁹The measure declares "state-implemented public health measures "not be more restrictive of international traffic ... than reasonably available alternatives."" ²⁰⁰Some measures discussed include screening, quarantining, and contact tracing. ²⁰¹These are tactics that government officials could use instead of deportation if they truly had a fear of Haitian asylees spreading Covid-19. ²⁰²This is proven by the fact that these strategies are already used on unaccompanied minors at the U.S.-Mexico border as well as with Afghan refugees. ²⁰³

Article 42 of the IHR is also directly applicable to the administration's use of Title 42. ²⁰⁴It mandates the "non-discriminatory" use of health measures. ²⁰⁵Due to their place of birth, the U.S. government has treated Haitian asylees in an inferior manner. ²⁰⁶Haitian asylees are flown to their home country while Afghan refugees do not suffer the same fate. ²⁰⁷

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Passage of the Refugee Protection Act

Congress needs to pass The Refugee Protection Act (RPA). ²⁰⁸The bill, which applies to both refugees and asylees, includes provisions which would strengthen the legal rights of Haitian asylees. ²⁰⁹The first is the provision which states, "establishing a presumption that the least restrictive conditions necessary should be imposed in custody proceedings for asylum seekers, including release if appropriate." ²¹⁰This would bring U.S. law in line with already established international law and would make it much more difficult to deport Haitian asylees without legitimate cause. ²¹¹

A separate RPA provision would improve the safety of Haitian asylees in Mexico and other Central American countries who have not yet received legal authorization to enter the United States. It directs "the Department of State to help other governments increase their capacity to care for and accept refugees." ²¹²This provision would

¹⁹⁸ See Alison Durkee, *Fauci Says Immigrants Are "Absolutely Not' Driving Covid-19 Surge: "Let's Face Reality Here'*, FORBES (Oct. 3, 2021, 12:13 PM), <https://www.forbes.com/sites/alisondurkee/2021/10/03/fauci-says-immigrants-are-absolutely-not-driving-covid-19-surge-lets-face-reality-here/?sh=60501d67173d>.

¹⁹⁹ Schiciano, *supra* note 189.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See Refugee Protection Act of 2019, H.R. 5210, 116th Cong. (2019-2020).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

allow those countries to have the funding necessary to ensure that a large number of asylees, Haitian and otherwise, do not continue to be the victims of violence.

The final RPA provision that is needed would ease the burden on immigrant processing centers in the United States. ²¹³It would direct "the State Department to establish refugee processing centers in other countries in North and Central America." ²¹⁴This provision would have a twofold effect. ²¹⁵First, it would ease the burden on the already overextended processing centers in the United States. ²¹⁶Second, it would allow for better social distancing at these processing centers which would lessen the likelihood of Covid-19 spreading through the facilities. ²¹⁷

During his presidential campaign Joe Biden heralded himself as the opposite of Donald Trump. ²¹⁸He stated he wanted to bring **[*50]** fairness back to the immigration system. ²¹⁹These policies and others can go a long way towards fixing much of the mistreatment many immigrants, including Haitians, have faced for decades. ²²⁰It would show that President Biden will live up to his campaign promise to asylees, particularly Haitians who have been so harmed by Title 42.

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²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Annie Karni, *Biden Campaigned as the Anti-Trump*, N.Y. TIMES (Sept. 30, 2021), <https://www.nytimes.com/2021/09/30/us/politics/biden-trump-comparisons.html>.

²¹⁹ Kica Matos & Erica Bryant, *If Biden Truly Wants a More "Fair, Orderly, and Humane" Immigration System, He Needs to do These 6 Things*, VERA (Feb. 4, 2022), <https://www.vera.org/news/if-biden-truly-wants-a-more-fair-orderly-and-humane-immigration-system-he-needs-to-do-these-6-things>.

²²⁰ *Id.*