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Chevron: Fueling the Right Against Title 42 and the Denial of U.S. Asylum Rights

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Chevron: Fueling the Fight Against Title 42 and the Denial of U.S. Asylum Rights

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This Note was inspired by the questionable treatment of Haitian asylum seekers in Del Rio, Texas, where horseback U.S. officials charged at them using reins as whips, before immediately deporting them back to Haiti. The U.S. government justified its actions by claiming that Title 42 permits U.S. officials to prohibit the entry of individuals when there is a danger of introducing certain diseases, such as COVID-19. However, Title 42 conflicts with the United States' codified commitment to the principle of non-refoulment, prohibiting it from returning certain refugees to a country where their life or freedom would be threatened. Accordingly, the U.S. government is facing several lawsuits exposing Title 42's function of immigration regulation through alleged COVID-19 pretenses. Thus, this Note will breakdown the United States' displacement of the right to seek asylum by (1) analyzing U.S. treaty obligations through the lens of past Haitian refugee litigation and Haiti's current affairs and (2) evaluating the U.S. government's contention that Title 42 is entitled to deference under Chevron U.S.A. v. Nat. Res. Def. Council.

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* Student Writing Editor, University of Miami Inter–American Law Review, Volume 54; J.D. Candidate 2023, University of Miami School of Law; B.A. 2018, General Business, University of Florida, Heavener School of Business. This Note and my future legal career are thanks to the endless love and support of the Pierre-Paul family. To my fellow Haitians, descendants of the first black country to gain its independence, your strength and determination have inspired me and countless others. I am incredibly proud to be part of a nation that has and will continue to overcome great adversity. This one is for us.

I. INTRODUCTION

After crossing the Rio Grande River in Mexico and arriving in Del Rio, Texas, Mirard Joseph, with his wife Madeleine and their one–year–old daughter, were greeted by countless other Haitian migrants, who, like them, fled danger and instability in Haiti and traveled thousands of miles to the United States for safety.[1] For days, Mirard and Madeleine waited patiently in a makeshift encampment of 15,000 Haitian migrants for an opportunity to seek asylum,a process to which they are entitled under United States law.[2] Mirard's situation worsened, as U.S. officials in the encampment only provided minimal amounts of water and breadto his family and others

[1] Class Action Complaint for Injunctive and Declaratory Relief at 7, Haitian Bridge Alliance v. Biden, No. 1:21-cv-03317, 7 (D.D.C. Dec. 20, 2021) [hereinafter HBA Class Action Complaint].
[2] *Id.*; Refugee Act of 1980, Pub. L. No. 96-212, 208(a), 94 Stat. 102, 105 (1980). [hereinafter Refugee Act of 1980].

within the encampment.[3] As a result, Mirard crossed back to Mexico to seek the nourishment his family desperately needed. Upon his return, Mirard was met by U.S. Border Patrol agents who violently charged at him on horseback, whipped him with their horse reins, and dragged him through the river by the neck.[4]

Mirard and his family were then taken to a detention facility.[5] From there, Mirard and Madeleine were shackled, placed on a plane with their young daughter, and expelled back to Haiti.Neither Mirard nor his wife and daughter were allowed to apply for asylum.[6] Mirard recounts the events as "the most humiliating experience of my life. The second most humiliating moment was when they handcuffed and chained me to go back to Haiti."[7] In May 2021, the Department of Homeland Security ("DHS") extended Temporary Protected Status ("TPS") for Haitians currently living in the United States, acknowledging the political crisis and natural disasters making it unsafe for them to return to their home country.[8] However, this protected status does not apply to any new Haitian asylum seekers now entering the United States through its borders.[9]

Nonetheless, international and U.S. laws recognize the fundamental human right to seek asylum. The United States has ratified two treaties prohibiting the United States from returning individuals to countries where they risk persecution or torture: the 1967 Protocol Relating to the Status of Refugees ("1967 Protocol") and the 1984 Convention against Torture Other Cruel, Inhuman, or Degrading

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[3] HBA Class Action Complaint*, supra* note 1, at 7.

[4] *Id.*; *see also* Shannon Pettypiece, *Biden says officials seen chasing Haitians on horseback 'will pay'*, NBC NEWS (Sep. 24, 2021, 11:30 AM), https://www.nbcnews.com/politics/white-house/biden-says-officials-seen-chasing- haitians-horseback-will-pay-n1280032.

[5] HBA Class Action Complaint, *supra* note 1, at 7.

[6] *Id.*

[7] *Id.* at 8.

[8] Press Release, Department of Homeland Security, Secretary Mayorkas Designates Haiti for Temporary Protected Status for 18 Months (May 22, 2021), https://www.dhs.gov/news/2021/05/22/secretary-mayorkas-designates-haiti-temporary-protected-status-18-months.

[9] Nolan Rappaport, *Biden legally could let Haitian migrants in — and let them work — but should he?*, THE HILL (Sep. 24, 2021, 9:30 AM), https://thehill.com/opinion/immigration/573770-biden-legally-could-let-haitian-migrants-in-and-let-them-work-but-should.

Treatment or Punishment ("Convention Against Torture").[10] By accedingto these international human rights instruments, the United States is committing to respecting the right to seek asylum, specifically, the principle of non–refoulement.[11] The duty of non–refoulement prohibits countries from expelling or returning a refugee to a country where his life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group, or political opinion.[12] Today, nearly all countries are a party to at least oneinternational agreement affording the principle of non–refoulement.[13]

Despite these treaties, U.S. officials have been incompatibly enforcing Title 42, which now bars asylum seekers from entering the United States.[14] Title 42 contains the 1944 PublicHealth Services Act, which, as of recently, allows the U.S. government, specifically the "Surgeon General," to enforce regulations preventing the introduction of individuals with "communicable diseases" during certain public health emergencies.[15] Until now, Title 42 had never been used for immigrationpurposes.[16] The Trump Administration enforced Title 42 to prevent the spread of COVID–19 in border facilities and stations by sealing U.S. borders.[17] As currently interpreted by the United States, this public health law displaces existing immigration

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[10] *Advisory Opinion on the Extraterritorial Application of* Non-Refoulement *Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, UNHCR, 2 (Jan. 26, 2007), https://www.unhcr.org/4d9486929.pdf.

[11] *Id.*

[12] *Id.*

[13] David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non- Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV., 2 (1999).

[14] Ben Fox, *EXPLAINER: Biden uses Trump-era tool against Haiti migrants*, ASSOCIATED PRESS (Sep. 20, 2021) https://apnews.com/article/health-mexico-texas-immigration-coronavirus pandemic194bf94eda1f78b0e38b1e53f1adba66.

[15] 42 U.S.C. § 265 (1944).

[16] Sarah Sherman-Stokes, Public Health and the Power to Exclude: Immigrant Expulsions at the Border, 36 GEO. IMMIGR. L.J. 261, 269 (2021).

[17] Uriel J. Garcia, *Here's what you need to know about Title 42, the pandemic-era policy that quickly sends migrants to Mexico*, THE TEX. TRIBUNE (April 29, 2022) https://www.texastribune.org/2022/04/29/immigration-title-42-biden/

and international laws, which permit migrants to request asylum. Therefore, it is also eliminating mostdue process protections.[18] Accordingly, Title 42 explicitly reneges the United States' non–refoulement obligations to protect the most vulnerable populations from persecution, violence, and even deathin their home countries.[19]

Concerning the United States' international law obligations, the Trump Administration, after first enforcing Title 42 in March 2020, contended:

> The Administration's policy comports with our domestic law obligations concerning asylum seekers. As for our international obligations, the Supreme Courthas noted that neither the United States nor any State or municipality has any legalobligation to conform its conduct to international treaties that are not self–executing or otherwise implemented into domestic law by an Act of Congress.[20]

This suggestion rejects the notion that the Refugee Act of 1980 confirms the United States' obligations as a party to the 1967 Protocol and the 1951 Convention.[21] Further, Article 3 of the Convention Against Torture, which was codified through regulations disseminated under the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"),[22] provides two options to prevent refoulement:

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[18] *See* Fox, *supra* note 14.

[19] Christina Shiciano, *"Illegal and Inhumane": An Analysis of Title 42's International Health Law Violation*, COLUM. J. OF TRANSNAT'L L. (Oct. 25, 2021), https://www.jtl.columbia.edu/bulletin-blog/illegal- and-inhumane-an-analysis-of-title-42s-international-health-law-violations.

[20] Oana Hathaway, *The Trump Administration's Indefensible Legal Defense of Its Asylum Ban*, JUST SECURITY (May 15, 2020), https://www.justsecurity.org/70192/the-trump-administrations-indefensible-legal-defense-of-its-asylum- ban/.

[21] Harvard Immigration and Refugee Clinical Program, *Fulfilling U.S. Commitment to Refugee Resettlement: Protecting Refugees, Preserving National Security, & Building the U.S. Economy Through Refugee Admissions A Report of the Syrian Refugee Resettlement Project*, 5 TEX. A&M L. REV. 155, 167-68 (2018) (discussing that the United States is not to return refugees to circumstances in which their "life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group[,] or political opinion" under the Refugee Act of 1980).

[22] Trent Buatte, *The Convention Against Torture and Non-Refoulement in U.S. Courts*, 35 GEO. IMMIGR. L.J. 701,709 (2021).

withholding of removal and deferral of removal, which shouldbe unconditionally available without exception.[23]

Currently, two significant judicial challenges to Title 42 are pending before the U.S. District Court and the U.S.Circuit Court of Appeals for the District of Columbia.[24] In *Haitian Bridge Alliance v. Biden,* the plaintiffs challenged the denial of the right to seek asylum and the abuse faced by Haitian asylum seekers in Del Rio, Texas, perpetrated under the Title 42 process.[25] Likewise, in *Huisha–Huisha v. Mayorkas,* the families of asylum seekers and refugees, whom DHS detained under Title 42, sued the United States federal government for their failure to provide humanitarian protection.[26] Both suits allege violations of the Public Health Service Act of 1944, the Refugee Act of 1980, FARRA, the Immigration and Nationality Act, the Administrative Procedure Act, and the Convention Against Torture.[27] The parties also sought a declaration that the United States' enforcement of Title 42 was unlawful, an injunction preventing the United States from enforcing Title 42, and reasonable attorneys' fees.[28]

When analyzing whether an agency's interpretation of a statute is lawful, a framework originating in the Supreme Court case, *Chevron U.S.A. v. Nat. Res. Def. Council*, may assess whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable.[29] This approach is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill the statutory gaps.[30] Among other arguments against

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[23] *Id.*

[24] *See* Huisha-Huisha v. Mayorkas, 560 F. Supp. 3d 146 (D.D.C. 2021), *aff'd and remanded*, 27 F.4th 718 (D.C. Cir. 2022); Haitian Bridge All. v. Biden, No. CV 21-3317, 2022 WL 2132439 (D.D.C. June 14, 2022).

[25] Tess Helgren, *Haitian Bridge Alliance v. Biden*, INNOVATION L. LAB (Dec. 20, 2021),https://innovationlawlab.org/cases/haitian-bridge-alliance-v-biden/.

[26] *Huisha-Huisha v. Mayorkas*, ACLU (Jan. 29, 2022), https://www.aclu.org/cases/huisha-huisha-v-mayorkas.

[27] *See* HBA Class Action Complaint *supra* note 1, at 69-83; Class Action Complaint for Declaratory and Injunctive Relief, Huisha-Huisha v. Mayorkas, No. 1:21-cv-00100, at 2 (D.D.C. Jan. 2, 2021) [hereinafter *Huisha-Huisha Class Action Complaint*].

[28] *Huisha-Huisha Class Action Complaint, supra* note 27, at 22-23*;* HBA Class Action Complaint, supra note 1, at 90.

[29] Chevron U.S.A. v. Nat. Res. Def. Council., 467 U.S. 837, 843 (1984).

[30] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

a preliminary injunction in *Huisha–Huisha*, U.S. officials maintained that at minimum, Section 265 of Title 42 is ambiguous, and CDC's reasonable interpretation is entitled to *Chevron* deference.[31]

Despite DHS officials acknowledging that deported Haitian asylum seekers "may face harm" upon returning to their home country,[32] President Biden's Administration extended Title 42 in December 2021. Even if reinforced in U.S. federal courts,breaking such international law obligations can also bring international consequences and countermeasures in the form of international court judgments, holding the potential to underminethe trust of U.S. allies and treaty partners. Accordingly, any disposition involving the return or transfer from one country to another of an individual who may need international protection must encompass key refugee safeguards to avoid placing such individuals at risk of refoulement.

Therefore, Part II of this article will introduce the U.S. legal framework underlying non– refoulement, codified in Article 3 of the 1933 Convention Relating to the Status of Refugees, the 1951 Convention Relating to the Status of Refugees (1951 Convention), the 1967 Protocol, and the Convention against Torture. Part II will also discuss the context for Haitian asylum seekers' eligibility for non–refoulement in light of these statutory protections. Part III will begin with a discussion of past Haitian refugee litigation to contrast with the current application of Title 42. Part III will also analyze the arguments against Title 42 presented in *Huisha–Huisha v. Mayorkas* and *Haitian Bridge Alliance v. Biden* from a Chevron approach to offer a prediction on the disposition of the case. Finally, Part IV will demonstrate how President Biden's attempt to mitigate the consequences of Title 42 through the Remain in Mexico program still fails as a protection against refoulement.

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[31] Emergency Motion for Stay Pending Appeal and for an Administrative Stay Pending Disposition of the Stay Motion, Huisha-Huisha v. Mayorkas, No. 21-5200, at 18 (Sep.17, 2021).

[32] Hamed Aleaziz, *US Officials Are Deporting Haitian Immigrants Despite Knowing They May Face Danger*, BUZZFEED NEWS (Mar. 2, 2021, 3:54 PM), https://www.buzzfeednews.com/article/hamedaleaziz/us-deporting-haitian-immigrants-despite-dangers.

II. BACKGROUND

A. United States Adoption of the Principle of Non–Refoulement

i. The 1951 Convention and the 1980 Refugee Act

Due to fear of persecution and civil war millions of individuals flee from their homes and seek shelter in other countries for stability and a safe place for themselves and their families.[33] To protect the most fundamental human rights of any migrant or refugee, many countries, including the United States, have developed the principle of non–refoulement, deriving from the French word "refouler," meaning to drive back or repel.[34] Since 1975, the U.S. has resettled several million refugees, with nearly 77 percent being either Indochinese or citizens of the former Soviet Union.[35] U.S. annual admissions figures ranged from a high of 207,116 refugees in 1980 to recent lows in the last several years.[36] However, U.S. Border Patrol has reported around two million asylum seekers arriving at the U.S.–Mexico border in the 2021 fiscal year, more than quadruple the number of the prior year and the highest annual total on record.[37]

Article 3 of the 1933 Convention Relating to the International Status of Refugees ("1933 Convention") formally set forth the principle of non–refoulement for the first time.[38] The section in the 1933 Convention discussing non–refoulement states: "Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non–admittance at the frontier (refoulement), refugees who have been authorized to reside there legally, unless the said measures are dictated by

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[33] Weissbrodt & Hortreiter, *supra* note 13 at 1.
[34] *Id.* at 2 n.4.
[35] Audrey Singer & Jill H. Wilson, *Refugee Resettlement in Metropolitan America*, MIGRATION POL'Y INST. (Mar. 1, 2007), https://www.migrationpolicy.org/article/refugee-resettlement-metropolitan-america.
[36] *U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present,* MIGRATION POL'Y INST., https://www.migrationpolicy.org/programs/data-hub/charts/us-refugee-resettlement (last visited Feb. 2, 2022).
[37] John Gramlich & Alissa Scheller, *What's Happening at the U.S.-Mexico border in 7 Charts*, PEW RSCH. CTR. (Nov. 9, 2021), https://www.pewresearch.org/fact-tank/2021/11/09/whats-happening-at-the-u-s-mexico-border-in-7-charts/.
[38] Weissbrodt & Hortreiter, *supra* note 13, at 2.

reasons of national security or public order."[39] The 1933 Convention, while laying the groundwork for modern refugee law, had a narrow scope, as it only applied to specific refugees[40] and was only signed by eight States, not including the United States.[41]

However, future international agreements would have a broader scope.[42] The 1951 Convention and its subsequent amendment, the 1967 Protocol, now govern the application of international refugee regime law in domestic settings.[43] Before these instruments, the United Statesenacted provisions designating refugee status as "conditional entrants."[44] Moreover, the Displaced Persons Act of 1948 was the first significant post–war legislation allowing for the systematic resettlement of refugees in the United States,[45] assisting Europeans who had fled fascistor communist regimes during or at the end of World War II.[46] Other statutes allowed a stay of deportation under precise circumstances.[47] However, most of the statutory provisions werediscretionary, signifying that asylum seekers could not seek judicial remedies against the United States.[48]

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[39] *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, UNCHR (Jan. 31, 1994), https://www.refworld.org/docid/437b6db64.html.

[40] Convention Relating to the International Status of Refugees, ch. 1, art. 1, Oct. 28, 1933, CLIX 3663, 159 L.N.T.S. 3663 (applying only "to Russian, Armenian and assimilated refugees").

[41] Convention Relating to the International Status of Refugees, Oct. 28, 1933, League of Nations, Treaty Series Vol.CLIX No. 3663.

[42] *Comment: A Reconsideration of Haitian Claims for Withholding of Removal Under the Convention Against Torture*, 19 PACE INT'L L. REV. 287, 291 (2007).

[43] *American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a RefugeeCrisis*, 131 HARV. L. REV. 1399, 1399 (2018).

[44] *"Lawfully Present" Individuals Eligible under the Affordable Care Act*, NAT'L IMMIGR. L. CTR.,https://www.nilc.org/issues/health-care/lawfullypresent/ (last revised Jul. 2016).

[45] The Displaced Persons Act of 1948, Pub. L. 80-774, 62 Stat. 1010 (1948) (authorizing for a limited period of timethe admission into the United States of 200,000 certain European displaced persons (DPs) for permanent residence).

[46] *Id.*

[47] Migration and Refugee Assistance, 22 U.S.C. 36 §2601 (2002).

[48] *See* 8 U.S.C. §1252(a)(2)(B); I.N.A. § 242(a)(2)(B). (Denials of discretionary relief).

The 1951 Convention sets out state signatories' obligations towards refugees concerning their legal status and other various rights, including a prohibition against expulsion under most circumstances and an exemption from penalties for illegally entering a country.[49] The 1951 Convention was much more widely accepted than previous treaties, as one hundred and thirty–twostates signed it, compared to only eight states signing the 1933 Convention.[50] Further, the 1951 Convention now defined "refugee" as an individual with a:

> well–founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the countryof his nationality and is unable or, owing to such fear, is unwilling to avail himselfof the protection of that country; [or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or,owing to such fear, is unwilling to return to it];

This contrasts with previous international treaties, which were designed for specific humanitarian crises.[51]

Despite the expanded scope of protection afforded by the 1951 Convention againstrefoulement, a state could still deport a refugee if there is a well–founded fear that the refugee "committeda serious non–political crime outside the country of refuge prior to his

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[49] Convention Relating to the Status of Refugees, July 28, 1951, art. 31, 19 U.S.T. 6259, 6261, 189 U.N.T.S.
150, 152 (entered into force Apr. 22, 1954) [hereinafter 1951 Refugee Convention]; ("The Contracting States shall not impose penalties, on account of their illegal entry or presence").

[50] *What is the 1951 Refugee Convention—and How Does It Support Human Rights?*, ASYLUM ACCESS (Jul. 4, 2021), https://asylumaccess.org/what-is-the-1951-refugee-convention-and-how-does-it-support-human-rights/ ("At the time of its creation, the 1951 Refugee Convention was the most comprehensive codification of the international rights of refugees").

[51] 1951 Refugee Convention, *supra* note 49; *see also* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) ("If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees").

admission to that country asa refugee."[52] The 1951 Convention further provided, "the benefit of the present provision may not,however, be claimed by a refugee [sic] whom there are reasonable grounds for regarding as a danger to the security of the country in which he is."[53] Accordingly, during the 1951 Convention drafting negotiations, state delegates expressed that the principle of non–refoulement encompassedboth non–return and non–admittance protections.[54] With that in mind, Louis Henkin, the U.S. representative to the convention drafting conference, explicitly stated:

> Whether it was a question of closing the frontier to a refugee who asked admittance,or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedomcould be threatened.[55]

Later, the 1951 Convention was amended to the 1967 Protocol, removing some previous temporal and geographical restrictions on refugee classification, but still incorporating all the definitions and obligations contained in the 1951 Convention.[56] The United States joined the international refugee regime when it acceded to the 1967 Protocol, thereby takingon the 1951 Convention's obligations as well.

A decade later, Congress passed the Refugee Act of 1980[57] formally enacting the obligation of non–refoulement created by the

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[52] 1951 Refugee Convention, *supra* note 49.
[53] *Id.*
[54] *See* B. Shaw Drake et al., *Vanishing Protection: Access to Asylum at The Border*, 21 CUNY L. REV. 91, 100 (2017).
[55] THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL, 60 (Cambridge Univ. Press, 1st ed. 2011).
[56] *American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis*, 131 HARV. L. REV. 1399, 1401 (2018).
[57] *Fulfilling U.S. Commitment to Refugee Resettlement: Protecting Refugees, Preserving National Security, & Building the U.S. Economy Through Refugee Admissions A Report of the Syrian Refugee Resettlement Project*, 5 TEX. A&M L. REV.

1967 Protocol and 1951 Convention in the United States and granting the right for anyone within U.S. borders to apply for asylum.[58] Among other changes, the Refugee Act made it mandatory, rather than discretionary, for the U.S. Attorney General to withhold deportation of an asylum seeker "to a country if the Attorney General determines that such alien's life or freedomwould be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[59] Accordingly, the Refugee Act's language is analogous to the 1951 Convention and 1967 Protocol, which also define a refugee as a person who "owing to well–founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."[60]

By acceding to these instruments, the United States also "undertake[s] to co–operate with the Office of the United Nations High Commissioner for Refugees ("UNHCR") in the exercise of its functions,and shall in particular facilitate its duty of supervising the application of the provisions of the [1951 Convention]"[61] Accordingly, the Department of Homeland Security, the Executive Office for Immigration Review, and federal courts have often given deference to the UNHCR's definitions as laid out in its Handbook on Procedures and Criteria for Determining Refugee Status.[62] Although the Handbook is not binding authority, the Supreme Court has found that it provides "significant guidance" in determining the United States' obligations under the 1951 Convention and the 1967 Protocol.[63] As a result, the UNHCR Handbook is often cited by U.S.

155, 168-69 (2017); *see also An Overview of U.S. Refugee Law and Policy*, AM. IMMR. COUNCIL (Nov. 18, 2015), https://www.americanim-migrationcouncil.org /research/overview-us-refugee-law-and-policy.

[58] *See An Overview of U.S. Refugee Law and Policy*, *supra* note 57.

[59] Refugee Act of 1980, Pub. L. No. 96-212, 208(a), 94 Stat. 102, 105 (1980).

[60] 1951 Refugee Convention, *supra* note 49; *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

[61] 1951 Refugee Convention, *supra* note 49.

[62] Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and BeyondChevron*, 60 DUKE L.J. 1059, 1071–72 (2011).

[63] S*ee* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 439 n. 22 (1987).

administrative and federal court judges in their decisions interpreting U.S. asylum laws.[64]

ii. 1984 Convention Against Torture

The principle of non–refoulement in the 1951 Convention and the subsequent 1967 Protocol laid the foundation for the 1984 Convention Against Torture ("CAT").[65] From its origins in the 1970s to the final text adopted in 1984, the United States played an active role in drafting the CAT, exhibiting a pro–refugee sentiment to the international community.[66] Regarding its non–refoulement obligations in CAT Article 3, the United States submitted the following understanding: "[T]he United States understands the phrase, 'where there are substantial groundsfor believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'"[67] The Senate and Executive Branch added this understanding because they intended the non–refoulement obligationin CAT Article 3 to mirror its non–refoulement obligation from the 1951 Convention.[68]

With the enactment of the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Congress implemented the United States' ratification of the CAT.[69] Specifically, Section 2242 of FARRA sets out the United States' policy regarding non–refoulement under the CAT. Under Section 2242(a), "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture."[70] FARRA did not define torture, nor did it expressly prohibit refoulement or any other acts prohibited by CAT. Rather, the Congress called on executive branch agencies to prescribe regulations to implement the United States' obligations

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[64] *See id.*

[65] Henry Mascia, *Comment: A Reconsideration of Haitian Claims for Withholding of Removal Under the Convention Against Torture*, 19 PACE INT'L L. REV. 287, 293 (2007).

[66] Buatte*, supra* note 22 at 706.

[67] *Id.* at 708.

[68] *Id.*

[69] *Id.* at 709.

[70] *Id.*; Foreign Affairs Reform and Restructuring Act, Pub.L. No. 105–277, § 2242(a) (1998).

under Article 3 of the CAT.[71] Given U.S. immigration courts adjudicating between 18,000 and 26,000 CAT claims per year, along with many U.S. district courts' judgments interpreting CAT's regulations, CAT is likely one of the more litigated international instruments in the United States.[72]

B. Haitian Migrants' Eligibility for Asylum and Non–Refoulement

The merits of an asylum seeker's claim rest primarily on the danger the asylum seeker would face in their country of return. Further, an asylum seeker's fate often depends on which treaty the receiving country has ratified. Accordingly, the claims of two asylum seekers in different countries may result in different outcomes, even if they face the same degree of risk in their countries of return. Nonetheless, the United States should consider its non–refoulement obligations to Haitian asylum seekers under U.S. law by applying the obligations embedded in the 1967 Protocol and CAT, enactedinto U.S. law by the Refugee Act of 1980 and the FARRA.[73]

Haiti, the poorest country in the Americas,[74] is experiencing continued turmoil. A month after the abrupt assassination of Haitian President Jovenel Moïse, Haiti suffered a 7.2 magnitude earthquake, resulting in approximately 2,250 deaths and 13,000 injuries.[75] Following the earthquake, UNICEF reported that 1.2 million Haitian inhabitants were affected and that roughlyhalf a million Haitian children now have little access to shelter, potable water, healthcare, or

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[71] Buatte, *supra* 22 at 714.
[72] *Id.*
[73] *Fulfilling U.S. Commitment to Refugee Resettlement: Protecting Refugees, Preserving National Security, & Building the U.S. Economy Through RefugeeAdmissions A Report of the Syrian Refugee Resettlement Project*, 5 TEX. A&M L. REV. 155, 168 (2017).
[74] Constant Méheut & Selam Gebrekidan, *A magnet for exploitation: Haiti over the centuries.,* N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/07/07/world/americas/haiti-poverty-history.html.
[75] *Haiti Earthquake Situation Report #6*, INTERNAT'L MED. CORP (Oct. 12, 2021), https://reliefweb.int/sites/reliefweb.int/files/resources/IntlMedCorps-HaitiEarthquake2021_SitRep06.pdf.

food.[76] This development suggests a rougher road ahead for a country where U.N. agencies affirmed thatforty–six percent of the Haitian population was already experiencing severe hunger, one of the highest rates around the world.[77] However, Haiti's poverty is not the only issue causing its crippling living conditions. Haiti's gang violence is an increasing problem, recently escalating amid a political struggle for power between the late President Moïse and his rivals.[78]

President Moïse's regime exploited criminal organizations to terrorize neighborhoods well–known as opposition strongholds and silence the public's disapproval during massive street protests occurring over the past four years.[79] Prior to one of the most significant gang–related attacks in 2018, two senior officials from President Moïse's administration met with a rogue police officer and gang leader to plan and provide resources for the attack.[80] In a massacre that occurred in La Saline, a neighborhood playing a leading role in organizing protests against Moise, at least seventy–one people were killed, eleven women were raped, and 150 homes were looted and destroyed.[81] Recently, allied gang leaders started using police forces to strategically target neighborhoods containingmany polling stations used for electoral purposes.[82] Despite widespread international outrage, President Moise's regime failed to hold the significant perpetrators accountable, allowing them to continue acting with

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[76] *Over half a million children affected by Haiti earthquake*, UNICEF (Aug. 17, 2021), https://www.unicef.org/press-releases/over-half-million-children-affected-haiti-earthquake.

[77] *WFP Haiti Country Brief*, WORLD FOOD PROGRAMME (Oct. 2022), https://docs.wfp.org/api/documents/WFP0000145103/download/?_ga=2.214349719.1096706114.1670770579-1997200518.1670770579.; see also *Haiti: UN agencies warn of 'unabated' rise in hunger*, United Nations News (Mar. 22, 2022); https://news.un.org/en/story/2022/03/1114422.

[78] Summer Walker, *Gangs of Haiti: Expansion, power and an escalating crisis*, GLOBAL INITIATIVE (Oct. 17, 2022), https://globalinitiative.net/analysis/haiti-gangs-organized-crime/.

[79] Sarah Marsh, *'Descent into hell': Kidnapping explosion terrorizes Haiti*, REUTERS (Apr. 26, 2021, 6:08 AM), https://www.reuters.com/world/americas/descent-into-hell-kidnapping-explosion-terrorizes-haiti-2021-04-26/.

[80] *Killing with Impunity: State-Sanctioned Massacres in Haiti*, HARV. LAW SCHOOL INT'L HUM. RTS. CLINIC (Apr. 2021), http://hrp.law.harvard.edu/wp-content/uploads/2021/04/Killing_With_Impunity-1.pdf.

[81] *Id.*

[82] *Id.*

impunity.[83] This lack of justice has allowed a culture of non–accountability to grow, and continues to leave Haitian civilians extremely vulnerable to politically–motivated violence.

Consequently, Gédéon Jean, director of the Center for Human Rights Analysis andResearch, compares Haitian gangs to ISIS, stating, "[Haitian gangs] also have connections to politicians and ministries. But in the areas they control, they kill whoever they want, they rape whoever they want. You can compare these areas to war zones."[84] Further, a Haitian asylum seekerwas quoted stating, "This country has nothing to offer . . . If the president can be killed with his own security, I have no protection whatsoever if someone wants to kill me."[85] As a result, many Haitians have fled the island, seeking safety from persecution.

The United States is home to 705,000 Haitian nationals, out of roughly 1.8 million Haitians living outside their homeland.[86] For many Haitian migrants, the dangerous journey from their troubled home country to the United States spans a decade and thousands of miles through Latin America.[87] Nearly all Haitians reach the United States on a well–worn route: a flight to Brazil, Chile, or elsewhere in South America,[88] and then travel on foot and by bus across the Andes mountains and the Amazonian Basin to the U.S. border in

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[83] *Id.*

[84] Anthony Faiola, *Haiti Buries a President, but Its Long-Term Crisis Lives on*, WASH. POST (Jul. 23, 2021, 6:59 PM), https://www.washingtonpost.com/world/2021/07/23/haiti-gangs-violence-poverty-moise/.

[85] Dánica Coto & Joshua Goodman*, 'We need help': Haiti's interim leader requests US troops*, ABC NEWS (Jul. 10, 2021), https://abcnews.go.com/International/wireStory/haitis-interim-leader-requests-us-troops-78767154.

[86] Julie Watson et al., *Haitians' Trip to Texas Border Often Starts in South America*, ASSOCIATED PRESS, (Sep. 21, 2021, 8:00PM), https://www.bloomberg.com/news/articles/2021-09-21/haitian-journey-to-texas-border-starts-in-south-america#xj4y7vzkg.

[87] *Id.*

[88] Reuters Fact Check, Fact Check - *How Haitian migrants make their way to the U.S. border*, REUTERS (Sep. 24, 2021, 1:04 PM), https://www.reuters.com/article/factcheck-haiti-route/fact-check-how-haitian-migrants-make-their- way-to-the-u-s-border-idUSL1N2QQ1XB.

Mexico.[89] Some asylum seekers even cross eleven countries.[90] Haitian asylum seekers account being robbed, raped, and killed during their journey.[91] Now, once Haitian asylum seekers arrived at the U.S. border, they are immediately faced with the possibility of deportation.[92] The United States contends that the expelled Haitian asylum seekers were not legally coming into the United States.[93] However, Title 42 foreclosed the only legal protections available to them when arriving at U.S. borders.

III. ANALYSIS

After the U.S. military occupation of Haiti from 1915 to 1934 created an "economically crippled and politically bankrupt nation,"[94] the U.S. government provided ongoing support to theHaitian President Duvalier's regime. President Duvalier's decades of rule became known as "the most oppressive regime in the [western] hemisphere," resulting in the deaths of over 30,000 peopleand forcing hundreds of thousands of people to flee Haiti for the United States.[95] In response, the U.S. government blocked and returned many Haitian asylum seekers to harm and subjected others discriminatory immigration practices.[96] Currently, the Biden administration is repeating a long and shameful history of the United States'

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[89] Bernd Debusmann Jr, *Why are so many Haitians at the US-Mexico border?*, BBC NEWS (Sep. 24, 2021), https://www.bbc.com/news/world-us-canada-58667669.
[90] Will Grant, *Haitian migrants at US border: 'We've been through 11 countries'*, BBC NEWS (Sep. 24, 2021), https://www.bbc.com/news/world-latin-america-58673578.
[91] *Id.*
[92] Ben Fox, *EXPLAINER: Biden Uses Trump-Era Tool Against Haiti Migrants*, ASSOCIATED PRESS (Sep. 20, 2021) https://apnews.com/article/health-mexico-texas-immigration-coronavirus pandemic194bf94eda1f78b0e38b1e53f1adba66.
[93] *Id.*
[94] *Biden Administration's Dangerous Haitian Expulsion Strategy Escalates the U.S. History of Illegal and Discriminatory Mistreatment of Haitians Seeking Safety in the United States*, HUM. RTS. FIRST (Sep. 21, 2021), https://www.humanrightsfirst.org/resource/biden-administration-s-dangerous-haitian-expulsion-strategy-escalates-us-history-illegal.
[95] *Id.*
[96] *Id.*

discrimination against Haitians in the U.S. immigration system through its disregard of mandatory statutory protections.[97]

A. Previous U.S Anti–Haitian Immigration Litigation

As previously mentioned, the United States is no stranger to litigation surrounding Haitian refugees.[98] In *Haitian Refugee Center v. Ciiletti*, the plaintiffs, around 4,000 Haitian asylum seekers, brought a class action suit against U.S. government officials to obtain relief for alleged violations of their substantive and procedural asylum rights under the 1971 "Haitian Program."[99] The program jailed arriving Haitian asylum seekers and universally denied their asylum claims, despite knowing the atrocities Duvalier's regime was committing at the time.[100] Finding that the Haitian Program was discriminatory and that it violated the plaintiffs' rights to due process of law, the District Court for the Southern District of Florida enjoined DHS from expelling or deporting the plaintiffs and future asylum seekers until the court could review a detailed plan submitted by the government for the orderly and nondiscriminatory processing of the plaintiffs' asylum requests under the Refugee Act of 1980.[101] Although a procedural question formed the framework of Judge King's opinion, Judge King also extensively discussed the grave conditions in Haiti, proposing that "[n]o asylum claim can be examined without an understanding of the conditions in the applicant's homeland."[102]

Several decades later, when a military coup toppled Haiti's democratically elected government in 1991, thousands of Haitian

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[97] *Id.*

[98] *See, e.g.,* Raymond H. Brescia, *Through a Glass, Clearly; Reflections on Team Lawyering, Clinically Taught*, 61 N.Y.L. SCH. L. REV. 87 (2016); Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139 (1995); Andrew G. Pizor, *Comment, Sale v. Haitian Centers Council: The Return of Haitian Refugees*, 17 FORDHAM INT'L L.J. 1062 (1994).

[99] Margaret J. Wynne, *An Analysis of Haitian Requests for Political Asylum after Haitian Refugee Center v. Civiletti*, 33 HASTINGS L.J. 1501, 1513 (1982).

[100] *Id.*

[101] *Id.*

[102] *Id.* at 1514. This proposition has been advanced in other cases. See, e.g., Coriolan v. INS, 559 F.2d 993, 1002 (5thCir. 1977); Sovich v. Esperdy, 319 F.2d 21, 34 (2d Cir. 1963) (Moore, J., dissenting).

nationals fled to the United States.[103] President George H.W. Bush responded by instructing the U.S. Coast Guard to intercept vessels outside theterritorial sea of the United States and return undocumented asylum seekers to their country of origin or another country.[104] After the Coast Guard seized Haitian asylum seekers' makeshift boatsbeyond U.S. territorial waters, the Coast Guard initially processed them aboard their vessels, untilthe volume of cases forced their transfer to Guantánamo Bay Naval Base, Cuba, for a "screening"of their claims of political persecution without legal representation.[105] Once those facilities wereat capacity,[106] President H.W. Bush directed the Coast Guard to turn away Haitians without protection screenings.

Accordingly, in *Sale v. Haitian Centers Council*, an action was brought by variousorganizations and Haitian aliens challenging procedures[107] under the interdiction program concerning Haitians fleeing Haiti through international waters. The United States District Court, for the Eastern District of New York,granted a preliminary injunction, which was affirmed on appeal. Further, at the Supreme Court, Justice John Paul Stevens held that the U.S. statutory and treaty obligations of nonrefoulement "do not apply on the high seas." [108] The Court engaged in a detailed analysis of the 1951 Convention and the 1980 Refugee Act, noting various statements made during the preliminary negotiations of the 1951 Convention suggesting that the prohibition on refoulement covered only individuals

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[103] Patrick Gavigan, *Migration Emergencies and Human Rights in Haiti* (Sep. 30, 1997), https://www.oas.org/juridico/english/gavigane.html ("[T]he surprise coup in September 1991 opened the refugee floodgates").

[104] *See Sale v. Haitian Centers Council*, 509 U.S. 155, 158-59 (1993).

[105] Patrick G. Brady*, The Essex County Bar Association's Haitian Asylum Project: An Overview,* 167 MAR. N.J. LAW 45, 47 (1995).

[106] *Biden Administration's Dangerous Haitian Expulsion Strategy Escalates the U.S. History of Illegal and Discriminatory Mistreatment of Haitians Seeking Safety in the United States*, HUM. RTS. FIRST (Sept. 2021), https://www.humanrightsfirst.org/sites/default/files/BidenAdministrationDangerousHaitianExpulsionStrategy.pdf.

[107] *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) (arguing that the federal government violated due process rights to repatriate potential refugees back to possible political persecution or death, depriving them of liberty, and possibly life, without any legal representation).

[108] *Id.* at158-59.

actually in theterritory of a ratifying country.[109] Drawing parallels between the text of the 1980 Refugee Act andthe lower court's holding, the Court concluded that "expulsion" referred to a "refugee already admitted into a country" and that "return" would refer to a "refugee already within the territory but not yet resident there."[110]

Although Justice Stevens acknowledged the "moral weight" of the Haitian asylum seekers'claim, he still concluded, "[a]lthough the human crisis is compelling, there is no solution to be found in a judicial remedy."[111] Accordingly, the Court's strict approach highlights that "a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no morethan its general humanitarian intent."[112] Justice Blackmun also follows a textual approach in his dissent, but instead asserts that "the terms are unambiguous. Vulnerable refugees shall not be returned. The language is clear, and the command is straightforward; that should be the end of theinquiry."[113]

B. Title 42's Enforcement Resulting in the Mass Expulsion of Haitian Asylum Seekers

The most recent example of the United States' discriminatory immigration policies towards Haitian asylum seekers is the implementation of Title 42 under the Public Health Service Act ("The Act"). On March 20, 2020, as COVID–19 was spreading around the globe, the CDC issued an Emergency Interim Final Order ("EIFO"), suspending the entry of non–citizens withoutvalid documents traveling from Mexico or Canada to the United States.[114] Specifically, the EIFO, issued under Title 42 Section 265 of the U.S. Code of the 1944 Public Health Act, authorizes the Surgeon General to suspend the "introduction of persons or goods" into the United States on public

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[109] *Id.* at 188 (quoting Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 841 (D.C. Cir. 1987)).
[110] *Id.* at 182.
[111] *Id.*
[112] *Id.* at 183.
[113] *Sale v. Haitian Centers Council*, 509 U.S. 155, 190 (1993).
[114] *See* 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, 16,559, 42 C.F.R. § 71 (Mar. 24, 2020) [hereinafter CDC 2020 EIFO].

health grounds.[115] Consequently, the EIFO explicitly states that "the immediate suspension of the introduction of these aliens requires the movement of all such aliens to the country from which they entered into the United States, or their country of origin, or another location as practicable, asrapidly as possible."[116] Since the order specifically refers to migrants arriving at U.S. borders without documentation, the rule primarily affects asylum seekers fleeing from persecution at the southern borders of the United States.[117] As a result, DHS expelling migrants pursuant to the EIFOeffectively denies the possibility of migrants seeking asylum at U.S. borders.[118] While Title 42's enforcementbegan under former President Trump, President Biden has continued its use with an alarmingincrease towards Haitian asylum seekers.[119]

The Public Health Act of 1944 was drafted immediately following World War II, amidst concerns regarding soldiers returning with diseases from foreign countries due to the escalation of airplane travel,[120] The Act provides that the government may limit entry to the United States where "by reason ofthe existence of any *communicable disease* in a foreign country there is serious danger of the introduction of such disease into the United States."[121] Prior to the order, no regulation under the Act had been applied in an immigration context, let alone as a mechanism to deport noncitizens,[122]

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[115] *See id.*; *see also* 42 U.S.C. § 265 (1944).
[116] *See* CDC 2020 EIFO, *supra* note 114.
[117] *See A guide to Title 42 Expulsions at the border*, AM. IMMIGR. COUNCIL (Oct. 15, 2021), https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border.
[118] *Id.*
[119] *See* Ryan Devereaux*, In Targeting Haitians, Biden May Execute the Largest Mass Expulsion of Asylum-Seekers In Recent History*, THE INTERCEPT (Sep 21, 2021, 2:40 PM), https://theintercept.com/2021/09/21/biden-haiti-texas-del-rio-asylum/.
[120] Kathrine Vanderhook, *Origins of Federal Quarantine and Inspection Laws,* HARV. LIB. OFF. FOR SCHOLARLY COMMC'N (2002), https://dash.harvard.edu/bitstream/handle/1/8852098/vanderhook2.html.
[121] *Id*. at 61 (emphasis added).
[122] *See* Lucas Guttentag, *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY (Apr. 13, 2020), https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/ ("The regulation never before—in over seventy- five years—sought to use the statute as a substitute or mechanism

including during outbreaks caused by the SARS–COV epidemic in 2003 and the Ebola epidemic in 2014.[123] Further, Anthony Fauci, the United States' top federal infectious disease expert and President Biden's chief medical adviser, even declared that immigrants are "absolutely not"a "major reason why COVID–19 is spreading in the United States."[124] Other public health experts have expressed that the policy represents an attempt to "unethically and illegally exploit the COVID–19 pandemic to expel, block, and return to danger individuals seeking" and that in reality U.S. officials are capable of safely processing asylum seekers at the border.

In sum, the EIFO disregards the protections and procedures settled by the 1980 Refugee Act and Convention Against Torture, precluding its non–refoulement protections. In response to the enforcement of Title 42, the UNHRC has recently stated that a public health emergency cannotjustify "blanket measure[s] to preclude the admission of refugees or asylum seekers."[125] Since January 2021, DHS has specifically increased the rate of expulsions of Haitians under the Title 42 Process, resulting in over 40 expulsion flights to Haiti.[126] Through Title 42, President Biden expelled more Haitians during the first weeks of his administration than the entire prior year under President Trump.[127] As a result, asylum seekers have brought

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for regulating admission under the immigration laws or for authorizing a noncitizen's deportation or return to their home country.").

[123] *See* Centers for Disease Control and Prevention*, Severe Acute Respiratory Syndrome (SARS)*, CDC (last updated Dec. 6, 2017), https://www.cdc.gov/sars/index.html; Centers for Disease Control and Prevention, *2014- 2016 Ebola Outbreak in West Africa*, CDC (last updated March 8, 2019), https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html.

[124] CNN, *Fauci: Expelling Immigrants 'Not the Solution' to Stopping Covid-19 Spread* (Oct. 3, 2021), https://www.cnn.com/videos/politics/2021/10/03/sotu-fauci-on-covid-immigration-theory.cnn [hereinafter *Fauci interview*].

[125] *Covid-19 Crisis: Key Protection Messages*, U.N. HIGH COMM'R FOR REFUGEES (Mar. 31, 2021), https://www.un.org/ruleoflaw/wp-content/uploads/2020/05/UNHCR-Key-Protection-Messages.pdf.

[126] Camilo Montoya-Galvez, *U.S. expels nearly 4,000 Haitians in 9 days as part of deportation blitz*, CBS NEWS (Sep. 27, 2021, 9:28 PM), https://www.cbsnews.com/news/haiti-migrants-us-expels-nearly-4000-in-nine-days/.

[127] Julian Borger, *Haiti Deportations Soar as Biden Administration Deploys Trump-Era Health Order*, THE GUARDIAN (Mar. 25, 2021, 5:00 PM), https://www.theguardian.com/us-news/2021/mar/25/haiti-deportations-soar- as-biden-administration-deploys-trump-era-health-order.

several lawsuits against President Biden challenging the Title 42 expulsions and the undermining of due process for asylum seekers during the COVID–19 pandemic.[128]

C. Title 42 Challenged in U.S. District Courts

There's a significant class action pending before the United States District Court of the D.C. Circuit, *Haitian Bridge Alliance v. Biden*, in which plaintiffs are seeking injunctive relief and challenging the U.S. Secretary of Homeland Security and other federal government officials' enforcement of Title 42.[129] Plaintiffs were among thousands of Haitian asylum seekers who had fled the danger and instability in Haiti to seek protection in the United States.[130] Plaintiffs seek not only accountability for the Biden Administration's mass expulsion of Haitian asylum seekers, but also the government's inhumane treatment of the asylum seekers prior to deportation, as plaintiffs alleged that they were denied food, water, and medical care and suffered from extreme physical and verbal abuse.[131]

Plaintiffs filed suit on December 22, 2021; therefore, *Haitian Bridge Alliance* is in its preliminary stages.[132] Given the procedural history in similar cases involving Title 42's lawfulness, Biden's Administration will likely move for a preliminary injunction.[133] Therefore, when analyzing *Huisha–Huisha*, a case currently pending before the United States District Court of Appeal for the District of Columbia, an assessment can be made regarding the District Court's potential interpretation of Title 42's applicability towards asylum seekers.

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[128] *Title 42 Challenges*, CTR. FOR GENDER & REFUGEE STUD., https://cgrs.uchastings.edu/our-work/title-42- challenges (last visited Feb. 15, 2022).
[129] HBA Class Action Complaint, *supra* note 1, at 9.
[130] *Id.*
[131] *Id.*
[132] Haitian Bridge Alliance v. Biden, No. 1:21-cv-03317, (D.D.C. Dec. 20, 2021).
[133] *Title 42 Challenges*, CTR. FOR GENDER & REFUGEE STUD., https://cgrs.uchastings.edu/our-work/title-42-challenges (last visited Feb. 15, 2022).

D. Huisha–Huisha v. Mayorkas

In *Huisha–Huisha*, the plaintiffs, asylum seekers from countries "among the most dangerous in the world,"[134] sought relief against U.S. officials for violating the 1980 Refugee Act and FARRA Act of 1998 through U.S. officials' enforcement of Title 42.[135] Specifically, the plaintiffs allege that "there is no exception for public health in the asylum laws. [And that] [e]ven if there were a conflict with § 265 [of Title 42], the mandatory and later–enacted immigration protections [should] prevail."[136] On September 16, 2021, the D.C. District Court issued a preliminary injunction holding that the plaintiffs successfully demonstrated that they would likely suffer irreparable harm if they are deported back to their countries, given the limited opportunities available to pursue humanitarian claims under current laws.[137] Presiding Judge Sullivan further suggested, "[Title 42] as a whole does not contain a word about the power of the [CDC] to expel anyone who has come into the country."[138] While the ruling applies only to family asylum seekers, the court's analysis is clear that Title 42 does not imply nor authorize the removal of statutory asylum protections.

The next day, the Biden Administration appealed the District Court's decision and doubled down on its defense that immigration laws only apply in normally prevailing conditions during the absence of a rare public–health emergency, whereas Title 42 is an emergency public–health provision that applies only in specific, limited circumstances such as during the COVID–19 pandemic.[139] Further, President Biden's Administration also asserted that Section 265 of Title 42 is ambiguous under the *Chevron* standard, and therefore, the court should give deference to the U.S. officials' interpretation when enforcing the statute.[140] Two weeks later, the D.C. Circuit Court of

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[134] Huisha-Huisha v. Mayorkas, 560 F.Supp.3d 146, 159 (D.C. Cir. Sep. 16, 2021).
[135] Huisha-Huisha Class Action Complaint, *supra* note 27, at 44.
[136] Plaintiffs-Appellees' Opposition to Defendants appellants' Motion for Stay Pending Appeal and Administrative Stay, Huisha-Huisha v. Mayorkas, No. 21-5200, at 16 (Sep. 23, 2021).
[137] Huisha-Huisha Class Action Complaint, *supra* note 27, at 44-45.
[138] *Id.*
[139] Emergency Motion for Stay Pending Appeal, *supra* note 31, at 15.
[140] *Id.* at 18.

Appeals granted President Biden's Administration 's motionfor staying the injunction pending appeal,[141] thus allowing U.S. officials to continue expelling vulnerable families from the United States through its Title 42 policy. The appellate court did not provide any details for its reasoning, only stating that the United States has "satisfied the stringent requirements" for staying the lower court's order.[142] The D.C. District Court of Appealslater held oral arguments on January 19, 2022.[143]

E. Chevron Deference Analysis

As mentioned, the Biden Administration contends that the CDC's interpretation of Section265, enforced by the EIFO, is permissible and entitled to deference under the Supreme Court's holding in *Chevron*.[144] *Chevron* requires that a federal court accept a federal agency's constructionof a statute, even if the agency's reading differs from what the court believes is the best statutory interpretation. the Supreme Court's holding considered:

> If the intent of Congress is clear, that is the end of the matter; for the court, as wellas the agency, must give effect to the unambiguously expressed intent of Congress.If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[145]

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[141] Order, Huisha-Huisha v. Mayorkas, No. 21-5200, at 1 (D.C. Cir. Sept. 30, 2021).
[142] *Id.*
[143] Huisha-Huisha v. Mayorkas, No. 21-5200, 2021 WL 4206688 (D.D.C. Sept. 16, 2021).
[144] Emergency Motion for Stay Pending Appeal, *supra* note 31, at 15; Chevron U.S.A. v. Nat. Res. Def. Council., 467 U.S. 837*,* 842-43 (1984).
[145] Chevron, 467 U.S. at 842-43.

Accordingly, the Biden Administration argues that any consideration of Section 265 defining "the right to introduce" in an immigration context should reflect established principles governing the exclusion of aliens. Specifically, the Administration states that "the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political department,'"[146] and that courts must exercise the "greatest caution" in reviewing immigration–related decisions to avoid inhibiting the political branches. Moreover, it does not matter that the specific statute was enacted earlier than the more general statute.[147] A *Chevron* analysis can be applied to disentangle the interplay between "laws of equivalent dignity,"[148] and balance whether to resolve a perceived conflict by "carving out an exception from the more general enactment for the more specific statute."[149]

Recently, the Ninth Circuit Court of Appeals applied a *Chevron* analysis in an immigration law context against the Biden Administration.[150] *In East Bay Sanctuary Covenant v. Biden*, several legal services organizations representing asylum seekers sued President Biden and Executive Branch agencies and officials, challenging a new rule adopted by Department of Justice ("DOJ") and DHS that stripped asylum eligibility from every migrant who crossed into the United States a place other than a port of entry.[151] Applying *Chevron*, the Supreme Court advanced that federal courts are "the final authority on issues of statutory construction and must reject

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[146] Brief for Amicus Curiae Immigration Reform Law Institute in Support of Defendants – Appellants; Huisha-Huisha v. Mayorkas, No. 21-5200, at 10 (Oct. 28,, 2021);Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)); see also Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative.").

[147] See Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enactedstatute covering a more generalized spectrum."); Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961).

[148] Nitro-Lift Techs., LLC v. Howard, 568 U.S. 17, 21 (2012).

[149] Stewart v. Smith, 673 F.2d 485, 492 (D.C. Cir. 1982) (citing Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 228-29 (1957)).

[150] E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 669 (9th Cir. 2021).

[151] *Id.* at 658.; *see also* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,952 (Nov. 9, 2018) (codified at 8 C.F.R. §§ 208.13, 208.30).

administrative constructions which are contrary to clear congressional intent."[152]

Considering whether the DOJ's and DHS's rule conflicted with Congress's intent, the Supreme Court upheld the district court's holding that the rule was "not in accordance with law,"[153] as it was effectively a categorical ban on migrants who use a method of entry explicitly authorizedby Congress through the 1980 Refugee Act.[154] The Supreme Court recognized that "[i]t would be hard to imagine a more direct conflict" than the one presented here, stating that explicitly authorizing a refugee to file an asylum application because he arrived between ports of entry and then summarilydenying the application for the same reason "borders on absurdity."[155]

Moreover, the Supreme Court also held that the Attorney General's interpretation of Section 1158(a) is unreasonable in light of the United States' treaty obligations under the 1951 Convention and 1967 Protocol, as the district court discussed.[156] The Supreme Court reasoned that the DOJ's rule infringed on three codified statutory protections: the right to seek asylum, the prohibitionagainst penalties for irregular entry, and the principle of non–refoulement embodied in Article 31(1) of the 1951 Convention.[157] Specifically, the asylum provisions in the Refugee Act and the 1967 Protocol ensure both the safety of those already in the United States, or in the case of resettlement, the safety of refugees.[158] However, the DOJ's and the DHS's rule ensured neither.[159] Accordingly, the inconsistency between the rule and U.S. treaty commitments to non–refoulement risked the removal of asylum seekers with meritorious claims who could not petition for a withholding of removal or CAT relief.[160]

The Supreme Court's recent holding in *East Bay* may impact *Haitian Bridge Alliance* and *Huisha–Huisha* if both courts engage in a *Chevron* analysis. All three cases deal with U.S. officials' regulating immigration through statutes that allegedly conflict with the

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[152] Chevron U.S.A. v. Nat. Res. Def. Council., 467 U.S. 837*,* 843 n.9 (1984).
[153] E. Bay Sanctuary Covenant, 993 F.3d at 669; 5 U.S.C. 706(2)(A), 1158(a).
[154] E. Bay Sanctuary Covenant, 993 F.3d at 669-70.
[155] *Id.* at 670.
[156] *Id.* at 672.
[157] *Id.*
[158] *Id.* at 673.
[159] *Id.*
[160] E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 674 (9th Cir. 2021).

asylum procedures afforded by U.S. law. However, this analysis would differ from the Supreme Court's previous holding in *Sale*, which strictlyconstrued and applied the language of the 1951 Convention by demonstrating its inapplicability to extraterritorial Haitian asylum seekers.[161] The Supreme Court's holding in *Sale* also does not apply to the plaintiffs in *Haitian Bridge Alliance* and *Huisha–Huisha,* as they were positioned inside the United States before being captured and deported.[162]

Here, applying *Chevron* would require the courts in *Haitian Bridge Alliance* and *Huisha–Huisha* to evaluate the meaning, significance, and ambiguity of the suspension "introduction of persons" with"communicable diseases" in Section 265 of Title 42 through the lens of U.S. immigration and asylum law.[163] U.S. courts have yet to adjudicate this precise inquiry during the COVID–19 pandemic, encouraging consideration by the Supreme Court given the gravity of the consequences at risk and the novelty of the issues. Although the rule in question in *East Bay* was not based on a public health statute such as the CDC's EIFO in *Haitian Bridge Alliance* and *Huisha–Huisha*, both orders were implemented to stall the massive influx of asylum seekers, deprive themof the safety, and therefore violate their entitled protections under U.S. law.

Section 265 of Title 42 acknowledges the "serious danger of the introduction of such [communicable] disease."[164] However, COVID–19 has already been exponentially "introduced" across the United States, especially considering that two years have passed since its rise in March2020. This notion was hinted in *Sale*, where U.S. citizens were concerned with the spread of HIV by Haitian asylum seekers.[165] Further, COVID–19 is more prevalent in the United States than the countries asylum seekers are fleeing from.[166] As

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[161] Sale v. Haitian Centers Council, 509 U.S. 155, 158-59 (1993).
[162] HBA Class Action Complaint, *supra* note 1, at 1.
[163] 42 U.S.C. §265 (2011), online at https://www.govinfo.gov/content/pkg/USCODE-2011-title42/html/USCODE-2011-title42-chap6A-subchapII-partG.htm (last visited November 7, 2021).
[164] *Id.*
[165] Sarah Sherman-Stokes, Public Health and the Power to Exclude: Immigrant Expulsions at the Border, 36 GEO. IMMIGR. L.J. 261, 269 (2021).
[166] *Reported Cases and Deaths by Country or Territory*, WORLDOMETER, https://www.worldometers.info/coronavirus/#countries, (last visited Feb. 10, 2022).

such, Anthony Fauci, the United States' top federal infectious disease expert and President Biden's chief medical adviser, has said that "expelling [migrants] . . . is not the solutionto an outbreak."[167]

Without the EIFO, the Biden Administration asserted that individuals working at or near U.S. border facilities face the brunt of the "serious danger of the introduction of such [communicable] disease."[168] Following a recent holding where the D.C. District Court granted a preliminary injunction for plaintiffs, unaccompanied minors became exempt from Title 42.[169] As a result, Border Patrol began placing thousands of unaccompanied minors in holding facilities while they wait for a safe sponsor in the United States until their immigration case is decided by the courts.[170] Given the crowding in these facilities, President Biden Administration's self–contradicts itself when emphasizing the safety of individuals who are already "compromised" over the rights of individuals seeking freedom from violence.

Section 265 of Title 42, although amended several times within recent years, doesnot explicitly state a provision for overriding asylum laws.[171] Moreover, the repeatedly amended non–refoulement protections in the Refugee Act of 1980 do not carve out an exception for asylum seekers on U.S. soil with "communicable diseases" to apply for asylum.[172] Notably, Section 1182 of the Title 8 provides that an alien determined (in accordance with regulations prescribed by the Secretary of DHS) to have a communicable disease of public

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[167] Monette Zard, *Epidemiologists and Public Health Experts Reiterate Urgent Call to End Title 42*, COLUM. PUB. HEALTH, https://www.publichealth.columbia.edu/research/program-forced-migration-and- health/epidemiologists-and-public-health-experts-reiterate-urgent-call-end-title-42.

[168] Camilo Montoya-Galvez, *What is Title 42, the COVID border policy used to expel migrants?*, CBS NEWS (Mar. 19, 2022), https://www.cbsnews.com/news/title-42-immigration-border-biden-covid-19-cdc/.

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

[170] Brad Kramer, *Unaccompanied minors at the border: What's happening and how you can help*, BETHANY, https://bethany.org/resources/unaccompanied-minors-at-the-border-what-s-happening-and-how-you-can-help (last visited Feb. 20, 2022).

[171] 42 U.S.C. §265 (2011).

[172] Pub. L. No. 96-212, 208(a), 94 Stat. 102, 105 (1980).

health significance may not be admitted to the United States.[173] However, the key is that Title 8 requires the determination of whether an asylum seeker has such a disease. Congress favors due process as opposed to unsubstantiated deportations. For example in *Sale*, Haitian refugees were denied admission to the United States only after testing positive for HIV, despite qualifying for political asylum.[174] Therefore, when interpreting Congress's intent, the first prong of *Chevron*, Section 265 of Title 42 should not be given deference by U.S. officials to expel Haitian asylum seekers, without granting them due process rights and determining whether they have communicable disease through the right to apply to asylum first.

Although the Biden Administration attempts to dodge asylum laws by implying that Section 265 ofTitle 42 is exempt from immigration laws, the Convention Against Torture still demands an asylum seeker on U.S. soil's right to seek withholding of removal in any circumstance and not solely through the immigration adjudicative process.[175] Moreover, Title 42 includes a penaltiesprovision for violating Section 265, stating that "any person who violates any regulation . . . orwho enters or *departs from the limits of any quarantine station*, shall be punished by a fine of notmore than $1,000 or by imprisonment for not more than one year, or both."[176] Not only does theexistence of statutory penalties weaken the Biden Administration's argument that Congressintended for Title 42 to explicitly allow mass expulsions, but it also may stipulate an alternative process of quarantine, as the provision title "Penalties for violation of quarantine laws" suggests.[177]

The Ninth Circuit's holding in *East Bay* is particularly applicable to *Haitian Bridge Alliance* and *Huisha–Huisha* due to its emphasis on the location of the asylum seekers when detained. The Ninth Circuit recognized that a refugee's method of entering the country is "a properand relevant discretionary factor" in adjudicating

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[173] 8 U.S.C. §1182 (a)(1)(A) (2011) (inadmissible aliens).
[174] Kerry A. Krzynowek, *Haitian Centers Council, Inc. v. Sale: Rejecting the Indefinite Detention of HIV-Infected Aliens*, 11 J. CONTEMP. HEALTH L. & POL'Y 541, 553-554 (1995); *see also* Public Health and the Power to Exclude: Immigrant Expulsions at the Border, Sherman-Stoke *supra* note 16, at 269.
[175] Buatte, *supra* note 22 at 709.
[176] 42 U.S.C. §271 (2011).
[177] *Id.*

asylum applications under the 1980 Refugee Act,but "it should not be considered in such a way that the practical effect is to [flagrantly] *deny reliefin virtually all cases*."[178] In Justice Blackmun's dissent in *Sale*, he touches on this principle, highlighting the United States' obligation to protect those in its possession from harm, despite where they apply for asylum.[179] Accordingly, the courts in *Haitian Bridge Alliance* and *Huisha–Huisha* may highlight *East Bay*'s preservation of the Refugee Act's principles,[180] when considering the plaintiffs were also apprehended on U.S. soil and expelled. Nonetheless, Section 265 of Title 42 is silent on the expulsion of asylum seekers who have already entered or been "introduced" to the country.[181]As set forth by the Ninth Circuit Court of Appeals, a totality of the circumstances test should be used to evaluate the merits of an asylum seeker claim, rather than the outright denial of the opportunity to apply for asylum.[182]

Other recent judicial developments suggest a *Chevron* application's ineffectiveness for the defendants in *Huisha–Huisha* and *Haitian Bridge Alliance*.[183] Since *Chevron,* the Supreme Court has imposed additional limits on its holding, going beyond the two–step test by conceiving "*Chevron* Step Zero," an initial inquiry into whether the *Chevron* framework applies at all.[184] For example, the Supreme Court in *King v. Burwell* held that *Chevron* does not apply to an agency statutory interpretations involving "major issues," reasoning that Congress would not delegate questions of "deep 'economic and political significance"' to an agency without saying so expressly.[185] Therefore, President Biden Administration's contention that the COVID–19 pandemic is a "historic" and "unprecedented"[186] weakens their argument in a "*Chevron* Step Zero"

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[178] Matter of Pula, 19 I. & N. Dec. 467, 473 (B.I.A. 1987).
[179] Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 193 (1993) (Blackmun, J., dissenting)
[180] E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 672 (9th Cir. 2021).
[181] 42 U.S.C. §265 (2011).
[182] E. Bay Sanctuary Covenant v. Biden, 993 F.3d at 671.
[183] Kent Barnett & Christopher J.Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017).
[184] Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).
[185] King v. Burwell, 576 U.S. 473, 484-86 (2015).
[186] Defendants' Opposition to Plaintiffs' Motion For Partial Summary Judgment, Huisha-Huisha v. Mayorkas, No. 1:21-cv-00100, at 2 (D.D.C. Aug. 31, 2021).

analysis. Although Section 265 controls the "introduction of persons" with communicable diseases, an argument can be made that Congress did not expressly intend to use of a purported public health measure to deter immigration and restrict access to statutory and procedural protections as significant as the duty of non–refoulement.

Despite strong arguments against a *Chevron* deference, a study comprised of U.S. DistrictCourts detected that when the courts applied *Chevron*, they upheld the agency's regulation over 77% of the time, and over 81% of the time when the agency's interpretation is rendered in an adjudication.[187] Moreover, courts uphold immigration adjudications at a slightly lower rate, at justover 70% of the time.[188] Notably, in cases here the analysis proceeded to *Chevron* step two, in which a court decides whether a federal agency's interpretation is reasonable, U.S. District Courts ruled in favor of the agencyin more than 93% of cases.[189] As shown by the statistics above, a favorable *Chevron* analysis should be viewed as unlikely by plaintiffs suing U.S officials. However, the asylum seekers in *Huisha–Huisha* and *Haitian Bridge Alliance* should welcome *Chevron*, as President Biden's Administration's enforcement of Section 265 of Title 42 is not what Congress intended and is not being applied strictly given the statutory context surrounding it.

IV. TITLE 42 MITIGATION: BIDEN'S TERMINATION OF MPP REJECTED BY THE SUPREME COURT

Concerning Title 42's enforcement, President Biden had promised to end its application as soon as COVID–19 was no longer deemed a serious threat, but later contended that the spikes in cases in late December 2021 prevented him from doing so.[190] Nonetheless

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[187] *See* Richard Frankel, *Deporting Chevron: Why the Attorney General's Immigration Decisions Should Not Receive Chevron Deference*, 54 U.C. DAVIS L. REV. 547, 612 (2020); *see also* Kent Barnett & Christopher J.Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6-7 (2017).

[188] Kent Barnett & Christopher J.Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6-7 (2017).

[189] *See id.*

[190] Molly O'Toole, *Biden Promised Change at the Border. He's Kept Trump's Title 42 Policy to Close It and Cut Off Asylum*, LA TIMES (Mar. 19, 2021, 5:12

in June 2021, the Biden administration did make a "good–faith effort" to end a controversial policy barring the admission of asylum seekers into the United States.[191] Under the Migration Protection Protocol, also known as "Remain inMexico," asylum seekers wait in Mexico for an extended period until their immigration court date.[192] Asylum seekers are then instructed to return to a specific port of entry at a date and time for their next court hearing. However, on August 13, 2021, the U.S. District Court for the Northern District of Texas held in *Texas, Missouri v. Biden* that Biden's MPP termination was procedurally unlawful because the regulation did not comply with certain provisions in the Administrative Procedure Act.[193] Further, the Supreme Court refused to temporarily halt the order while it went through the appeals process.[194]

In response, the Biden administration formally reinstated the Remain in Mexico Program in December 2021 (MPP 2.0), and DHS began sending asylum seekers back to Mexico. Simultaneously, the CDC had again extended its Title 42 order, expelling certain migrants back totheir home countries instead.[195] However, when Remain in Mexico was reinstated, the Biden Administration made some distinct humanitarian changes from its first iteration ("MPP 1.0"). MPP

2.0 was expanded to now include all western hemisphere asylum seekers, excluding Mexicans.[196] In MPP 1.0, only migrants of Spanish–speaking countries and Brazilians were involved in MPP removals.[197] Accordingly, the new program now allows Haitians, along

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PM), https://www.latimes.com/politics/story/2021-03-19/a-year-of-title-42-both-trump-and-biden-have-kept-the-border-closed-and-cut-off-asylum-access.

[191] Nick Miroff & Arelis R. Hernández, '*Remain in Mexico' is Back Under Biden, With Little Resemblance to theTrump Version,* WASH. POST (Feb. 4, 2022), https://www.washingtonpost.com/national- security/2022/02/04/biden-mpp-mexico/.

[192] *The "Migration Protection Protocols"*, AM. IMMIGR. COUNCIL (Jan. 7, 2022), https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols.

[193] Texas, Missouri v. Biden, 20 F4th 928, 941 (5th Cir. 2021).

[194] *Id.*

[195] *Biden Administration Continues to Fail Asylum-Seekers as Title 42 Is Extended*, AMNESTY INT'L (Dec. 3, 2021), www.amnestyusa.org/press-releases/biden-administration-continues-to-fail-asylum-seekers-as-title-42-is-extended/.

[196] The "Migration Protection Protocols," *supra* note 192.

[197] *Id.*

with migrants and refugees from other Caribbean nations, to participate in MPP 2.0 for the opportunity to seek asylum as opposed to being subject to expulsion under Title 42.

Further, the most significant added reform in MPP 2.0 was expanding the process by whichan asylum seeker can be removed from the program due to fear of persecution or torture in Mexico.[198] Unlike MPP 1.0, MPP 2.0 now requires U.S. Border Patrol officers to ask every person in the program about their fear of returning to Mexico.[199] An asylum officer will then give a non–refoulement interview to those who fear persecution in Mexico.[200] In addition, MPP 2.0 will no longer actively prevent people from speaking to an attorney during the non–refoulment interview process, and each person will be given 24 hours prior to the interview to contact a lawyer.[201]

However, several human rights organizations suggest that the non–refoulement interviews held by CBP officers are problematic because asylum seekers are often not sufficiently informed of their purpose or implications.[202] Further, many asylum seekers do not know that they have the right to speak with an attorney before their non–refoulement interview.[203] Julia Neusner, an attorney representing asylum seekers, stated, "[p]eople didn't understand what the purpose of the interview . . . as a consequence those who had legitimate fear of being returned to Mexico were returned under the program," adding that several applicants who had been previously kidnapped or extorted by Mexican police were also enrolled in MPP.[204] These current issues are troubling, as experience with the first iteration of MPP shows that the program did not provide due process to migrants.[205] The lack of counsel, combined with the danger and insecurity that individuals face inMexico, likely make it difficult for anyone subject to MPP to successfully be granted asylum. By December of 2020, of the 42,012 MPP cases that had been completed

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[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] Jihan Abdella, *'Remain in Mexico 2.0': How Did the Trump-Era Policy Get Revived?,* ALJAZEERA, *(*Jan. 20, 22), https://www.aljazeera.com/news/2022/1/7/remain-in-mexico-how-did-a-trump-era-policy-get-revived.
[203] *Id.*
[204] *Id.*
[205] *Id.*

under MPP 1.0, only 521 people were granted relief in immigration court.

In addition, several human rights organizations also expressed extensive scrutiny concerning the safety of migrants in Mexico.[206] When MPP was first implemented, Mexico agreedto accept asylum seekers from the United States, provide for their safety while they wait in Mexico,and ensure that they would have access to work, health care, education, and the justice system.[207] However, the Human Rights Watch discovered that the Mexican government failed to provide these protections, leaving thousands of asylum seekers stranded and unable to support themselves or use basic services.[208] Moreover, many asylum seekers received no recourse when they suffered abuses from criminal cartels or Mexican authorities. Accordingly, Human Rights First stated that at least 1,544 migrants were murdered, robbed, kidnapped, or raped in Mexico under the previous practice of MPP.[209] As a result, most asylum seekers did not attend their scheduled hearings and abandoned their asylum claims altogether.

Mexican President Andrés Manuel López Obrador has denied any abuses taking place under MPP and is satisfied with its results.[210] Following the Supreme Court decision to reinstate MPP, Mexico's Foreign Ministry ambiguously expressed that the ruling was a "unilateral measure" over which "the Mexican government has no position," while also mentioning that Mexico is holding a "technical dialogue" with the Biden administration over immigration management.[211] Still, thousands of the asylum seekers removed to Mexico under MPP remain unaccounted for, having failed for unknown reasons to register with the UNHCR, despite the likelihood that they would have been able to enter the United States

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[206] *Restarting 'Remain in Mexico' a Travesty*, HUM. RTS. FIRST (Dec. 9, 2021), https://www.humanrightsfirst.org/campaign/remain-mexico.
[207] *Id.*
[208] *Id.*
[209] U.*S. Government Sending Asylum Seekers and Migrants to Danger*, HUM. RTS. FIRST (Feb. 19, 2021), https://www.humanrightsfirst.org/campaign/remain-mexico.
[210] *US: Supreme Court Ruling Endangers Asylum Seekers*, HUM. RTS. WATCH (Aug. 26, 2021),https://www.hrw.org/node/379763/printable/print.
[211] *Id.*

if they had done so.[212] Remain in Mexico thus compounds the current flaws of the Biden Administration's immigration management including, limited legal protection, barriers to legal representation, and lack of transparency. Therefore, Biden's termination of MPP fails as a method of mitigating the vile consequences of applying Title 42 and should encourage more refugee litigation.

V. CONCLUSION

Neither the 1967 Protocol nor the 1951 Convention require the United States to accept all asylum seekers. However, both treaties do ensure that refugees within and at each signatory's borders have rights and protections to apply for asylum if they fear persecution from their home country. The Biden Administration's public health justifications for the Title 42 Process are no more compelling now than at the start of the pandemic, primarily due to the wide availability of vaccines in the United States. Accordingly, President Biden's decision to extend Title 42, while simultaneously welcoming tourists into the United States, perpetuates a discriminatory message, presenting immigrants as vessels of disease. With *Haitian Bridge Alliance v. Biden and Huisha– Huisha v. Mayorkas*, a *Chevron* analysis would expose the flaws in the Biden Administration's arguments by highlighting the supremacy of asylum laws in the United States.

Therefore, U.S. courts should take a stance to protect the United States' international obligations to non–refoulement and asylum seekers. Whether Title 42 constitutes a violation of human rights or whether the Biden Administration is using the COVID–19 emergency as a pretext to reduce the inflow of migrants are crucial questions that U.S. courts must examine through the legalframework of maintaining the right to seek asylum. The CDC should not be permitted to regulate immigration, and the United States must no longer refuse to condone the enforceability of the international human rights obligations it accepts. Faced with an administration intent on scapegoating asylum seekers, those committed to the rule of law must remain steadfast in their effort to not convert the United States into a nation ruled by the ignorance of its own laws.

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[212] *Id.*