

CURRENT DEVELOPMENTS

15,000 HAITIAN MIGRANTS BENEATH A BRIDGE: A TALE OF ABUSIVE TITLE 42 POLICY IMPLEMENTATION

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INTRODUCTION

In September 2021, thousands of Haitian migrants attempting to cross the U.S.-Mexico border gathered into an encampment under the Del Rio International bridge.¹ The story gripped the nation as photos of Border Patrol Agents callously rounding up Haitian migrants on horseback evoked

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1. See Michelle Hackman, *Haitian Migrants Under Texas Bridge to Be Flown Back to Haiti*, WALL STREET J. (Sept. 18, 2021), <https://perma.cc/6E5Y-XRFS>.

comparisons to slave drivers rounding up their “property” and highlighted the dark history and legacy of slavery in the United States.² Despite the evident display of anti-Black racism and “bad press,” the Biden administration’s Department of Homeland Security (DHS) continued to use a Trump era mandate to turn away asylum seekers—many of them Haitian—under Title 42, citing the need to protect U.S. citizens from the spread of COVID-19.³ Outraged over the treatment of Haitian asylum seekers, Daniel Foote, the Special Envoy for Haiti, resigned his position in protest of the “inhumane, counterproductive decision to deport thousands of Haitian refugees back to their home country.”⁴ The use of Title 42 to expel Haitian asylum seekers is particularly egregious given the leaked DHS documents that show the agency understood that migrants flown back to Haiti would likely face harm given the political instability, rampant kidnapping, and wide-spread gang violence in the country.⁵

I. THE STORY OF HAITIAN MIGRANTS AND THE DEL RIO BRIDGE

Haiti—the poorest country in the Western Hemisphere⁶—has had a tragic last decade. On January 12, 2010, a devastating earthquake struck just outside of Port-au-Prince killing an estimated 200,000 people, injuring 300,000 others and leaving 1.5 million more homeless.⁷ After the earthquake, an estimated 143,000 Haitians migrated to Brazil with the hope of beginning a new life.⁸ The 2014 World Cup and the 2016 Olympic Games in Rio de Janeiro afforded employment opportunities for many of these migrants.⁹ Soon, however, job opportunities began to dry up in Brazil, and many Haitians began the long, arduous, trek north. These migrants then wound up in the encampment beneath the Del Rio bridge, hoping to cross the U.S.-Mexico border.¹⁰

In addition to migrants who had left Haiti because of the 2010 earthquake, many of the Del Rio bridge migrants emigrated in more recent years owing

2. See Bill Chappell, *U.S. Border Agents Chased Migrants on Horseback. A Photographer Explains What He Saw*, NPR (Sept. 21, 2021), <https://perma.cc/QKP8-Y38D>; see also *White Men On Horseback Rounding Up Haitian Refugees Is Vintage Americana*, S. FLA. TIMES, <https://perma.cc/HXY4-N4R8>.

3. See *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (Oct. 15, 2021), <https://perma.cc/8WB8-TNGB>.

4. See *Resignation Letter from U.S. Special Envoy for Haiti, Daniel Foote*, WASH. POST (Sept. 23, 2021), <https://perma.cc/6GAS-VSSC>.

5. See Hamed Aleaziz, *US Officials Are Deporting Haitian Immigrants Despite Knowing They May Face Danger*, BUZZFEED NEWS (Mar. 2, 2021), <https://perma.cc/VJ6R-ZNSY> (identified by a pseudonym for fear of reprisals in her country).

6. Rocio Cara Labrador & Diana Roy, *Haiti’s Troubled Path to Development*, COUNCIL ON FOREIGN RELATIONS (Sept. 17, 2021), <https://perma.cc/S3ZM-DWVX>.

7. See Elinor Aspegren, *‘Losses Will Be High’: How Haiti’s Earthquake Compares with Its 2010 Quake in Size, Devastation*, USA TODAY (Aug. 16, 2020), <https://perma.cc/Q6VW-HUSX>.

8. See Santiago Torrado, Rocío Montes, Lorena Arroyo, Carla, Jiménez, Jorge Galindo, *The Silent Exodus of Latin America’s Haitian Population*, EL PAIS (Aug. 11, 2021), <https://perma.cc/4PCS-HX5E>.

9. See *id.*

10. See Bernd Debusmann Jr, *Why Are So Many Haitians at the US-Mexico Border?* BBC NEWS (Sept. 24, 2020), <https://perma.cc/3TFM-BJ9R>.

to extreme gang violence in Haiti.¹¹ Gangs control more than half the country¹² and, as of June 25, 2021, an estimated 18,000 Haitians have left their homes due to criminal violence.¹³ With an epidemic of kidnappings and without security, some Haitians see little reason to stay in Haiti.¹⁴ The assassination of President Jovenel Moïse in July 2021 and the subsequent power struggle further exacerbated pre-existing political volatility and dysfunction.¹⁵ Gang violence in Haiti is so widespread that it is stupefying the fragile economy, shuttering schools and disrupting efforts to fight the COVID-19 pandemic.¹⁶

In addition to gang violence, Haiti suffered a 7.2 magnitude earthquake in August, just two days before suffering a direct hit by tropical storm Grace, which inflicted a combined toll of over 2,200 dead, 12,000 injured, and hundreds of thousands of people displaced.¹⁷ To make things worse, less than one-half of 1% of the population has received the first dose of COVID-19 vaccine.¹⁸ These factors along with the lack of opportunity in Haiti have undoubtedly increased the number of Haitians trying to seek asylum in the United States, which is an enshrined human right.¹⁹

In late January 2021, DHS arrested a 38-year-old woman named Marie, her husband, and their infant child for “illegally” crossing the U.S.-Mexico border.²⁰ She and her family had left Haiti in 2016, making the long circuitous journey to the Mexican border only for DHS to fly her back to Haiti where her journey first began.²¹ Before leaving Haiti, she had been kidnapped and raped.²² However, U.S. officials did not give Marie the opportunity to exercise her human right to seek asylum.²³ Now back in Haiti, Marie is in hiding to avoid being targeted again by rampant gang violence.²⁴ Marie is one of the thousands of Haitians who made the difficult journey north through South America, ultimately crossing the Rio Grande river, only for DHS to fly them back to Haiti.²⁵

11. *See id.*

12. *See* Ryan Dube & José de Córdoba, *Gangs Threaten to Tip Haiti into a Failed State*, WALL STREET J. (Oct. 19, 2021), <https://perma.cc/HWD7-S5NK>.

13. *See* Kejal Vyas, *Killing of Haiti's President Risks New Gang Violence in Caribbean Nation*, WALL STREET J. (July 18, 2021), <https://perma.cc/7EMS-BPYC>.

14. *See id.*

15. *See id.*

16. *See* *Haiti Sees Rise in Faith, Gang Violence after President Assassinated*, FOX 29 PHILA. (July 11, 2021), <https://perma.cc/5KQS-BN3D>.

17. *See* Karen Musalo, *Haitian Migrants at the Border: An Asylum Law Scholar Explains How US Skirts Its Legal and Moral Duties*, CONVERSATION (Sept. 24, 2021), <https://perma.cc/5QAF-KVUL>.

18. *See id.*

19. *See id.*

20. *See* Aleaziz, *supra* note 5.

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See* Jack Herrera, *Why 15,000 Migrants Ended Up in One Spot on the U.S.-Mexico Border*, POLITICO (Sept. 23, 2021), <https://perma.cc/5QUZ-788E>.

Nephtalie, another Haitian, left Haiti for Chile after the devastating earthquake in 2010.²⁶ Unable to find work in Chile and beset by anti-Black discrimination, Nephtalie and her husband decided to make the difficult trek north to the United States.²⁷ Their immensely strenuous journey included a long trek through mountains in Bolivia and Panama's Darién Gap, a 50-mile stretch of swamp and jungle too dense for any roads.²⁸ Several of Nephtalie's traveling companions were swept away during the river crossings. Nephtalie and her husband survived a three-day kidnapping in Columbia and her husband sustained a spinal injury from a hard fall in the Panamanian jungle.²⁹ They were both lucky to have survived the journey.

Exiled in Mexico and desperate for a glimmer of hope, Marie, Nephtalie, and thousands of Haitians believed a rumor circulating by word-of-mouth and social media.³⁰ Based on that rumor, they believed that U.S. immigration authorities were allowing people to seek asylum in Acuña, the Mexican city across from Del Rio.³¹ They also thought that September 16, Mexico's Independence Day—when Mexican authorities would be preoccupied—would be the best day to travel.³² The rumors gained traction in part because of President Biden's promises during the presidential election campaign to restore and revamp the U.S. asylum system.³³ However, the rumors turned out to be false, and with no place to go, the migrants—almost 15,000 in total—gathered on the U.S.-Mexico border beneath the Del Rio International Bridge.³⁴

II. THE RIGHT TO SEEK ASYLUM AND TITLE 42

On the morning of September 24th, DHS Secretary Alejandro Mayorkas announced at a White House press briefing that no migrants remained at the border camp under the Del Rio International Bridge.³⁵ According to Mayorkas, DHS had taken approximately 2,000 Haitian nationals back to Haiti on seventeen DHS organized repatriation flights, pursuant to Title 42.³⁶ More than 5,000 are being processed by DHS to determine if they should be placed in immigration removal proceedings or expelled through Title 42.³⁷ The rest—an estimated 8,000 people—returned to Mexico voluntarily.³⁸

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

33. *See Musalo, supra note 17.*

34. *See Press Briefing by Press Secretary Jen Psaki and Secretary of Homeland Security Alejandro Mayorkas*, WHITE HOUSE (Sept. 24, 2021), <https://perma.cc/YGL6-K9F3>.

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.*

Before the COVID-19 pandemic, international³⁹ and U.S. law⁴⁰ governed the right to seek asylum. Under U.S. law, the Homeland Security officials must grant migrants the opportunity to request asylum at the U.S. border or within U.S. territory.⁴¹ If asylum seekers prove they are escaping their homeland because of persecution due to race, religion, nationality, membership in a particular social group,⁴² or political opinion, they may be granted asylum.⁴³ Given the widespread gang violence and political instability in Haiti, the United States is obligated to grant many migrants asylum.

However, near the beginning of the COVID-19 pandemic, DHS began using Title 42—a public health law—to govern asylum seekers.⁴⁴ Drafted in 1944, the law provides the following provision:

[if] by reason of the existence of any communicable disease in a foreign country there is a serious danger of introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce persons and property is required in the interest of public health.⁴⁵

In practice, Title 42 bars asylum seekers from using international and U.S. protections in place before the pandemic.⁴⁶ Under this legal regime, migrants must fall under one of three exceptions to avoid being expelled under Title 42.⁴⁷ First, a migrant can claim that they have an acute vulnerability, such as a need for urgent medical care.⁴⁸ Second, they may argue that if they return to their homeland, they may be subject to torture.⁴⁹ Lastly, there is a technical exception; if the migrants exceed the DHS operational capacity they will also be—at least temporarily—free from Title 42.⁵⁰

Many migrants allowed to enter under the asylum standard for persecution remain unprotected because it is more onerous for a migrant to prove that they may be tortured if they return to their homeland than it is to prove persecution. First, the migrant must prove it is more likely than not that they will

39. *Asylum & The Rights of Refugees*, INT'L JUST. RESOURCE CTR., <https://perma.cc/4SBY-AGZH>.

40. *Asylum*, 8 U.S.C. § 1158.

41. *Id.*

42. *See* *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (defining a social group as a group of persons, all of whom share a common, immutable characteristic); *See also* *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014) (holding the group must be particular and socially distinct).

43. *See* 8 U.S.C.A. § 1158(b)(1)(B) (West) (granting asylum to refugees); *see also* 8 U.S.C.A. § 1101(42)(A) (West) (defining “refugee”).

44. *See* *Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 13, 2020), <https://perma.cc/M94P-A2WP>.

45. Title 42, U.S.C. § 265.

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

be tortured.⁵¹ Whereas to establish asylum, there need only be a 10 percent chance of persecution.⁵² Second, the migrant must prove that they may be tortured with “acquiescence of the government”—defined as awareness of the torture and failure to intervene.⁵³ Persecuted Haitians may not be able to satisfy this standard because their concern is harm from gangs—who control more than half the country⁵⁴—not the government. Accordingly, under Title 42, thousands of Haitian migrants who otherwise may be eligible for asylum protections as provided under U.S. and international law have been categorically denied the right to argue their case for asylum. Instead, they have either been flown back to Haiti or expelled into Mexico.⁵⁵

III. CRITIQUE ON USE OF TITLE 42

The Trump administration initially tried using Title 42 for migrant enforcement pre-COVID-19 to quell the influx of asylum seekers from Mexico; however, White House advisors and attorneys advised against it, given the lack of a health of crisis.⁵⁶ Critics point to this genesis as proof that use of Title 42 is racist, and rather than a solution to a health crisis, it is actually a pretext to control immigration.⁵⁷ While Trump may have tried to implement this policy before COVID-19 began, such action has no bearing on its current use during a pandemic. This is particularly true given that the Biden administration continues to implement Title 42.

A further critique of Title 42’s use is the discrepancy between implementation on migrants seeking asylum and the lack of the administration’s use of Title 42 on migrants entering the United States through other means. To the extent that this is indeed correct, such an argument does little to invalidate the government’s moral obligation to protect its citizens from communicable diseases. Lastly, and perhaps more persuasively, critics argue that stopping the spread of COVID-19 need not be done by barring asylum seekers’ basic human rights under international and U.S. law. Rather, as recommended by former Centers for Disease Control and Prevention (CDC) officials and other public health experts, the risks posed by COVID-19 and its variants can be mitigated through public health measures using safe procedures and practices

51. See *Relief Under CAT*, IMMIGR. EQUALITY, <https://perma.cc/P7VN-UA25> (last visited Nov. 14, 2021).

52. See *Elements of Asylum Law*, IMMIGR. EQUALITY, <https://perma.cc/T46N-JET5> (last visited Nov. 14, 2021).

53. See *Relief Under CAT*, *supra* note 51. An exception to the general rule defining acquiescence, the Ninth Circuit has found that “acquiescence” can include “willful blindness” by government officials so that the applicant is not required to prove “actual knowledge.” *Id.* Adopting a more expansive view would create more equitable outcomes under the torture standard for Haitians.

54. See Dube & de Córdoba, *supra* note 12.

55. See *Press Briefing by Press Secretary Jen Psaki and Secretary of Homeland Security Alejandro Mayorkas*, *supra* note 34.

56. See Karen Musalo, *supra* note 17; Q&A: *US Title 42 Policy to Expel Migrants at the Border*, HUM. RTS. WATCH (Apr. 8, 2021), <https://perma.cc/ZL93-4JQH>.

57. Musalo, *supra* note 17.

to process migrant groups.⁵⁸ This includes avoiding congregate settings, social distancing, testing, quarantine, and isolation, among other methods.⁵⁹ CDC deemed these measures to be effective for migrant children and they can be implemented for adults, as well.⁶⁰

IV. JUDICIAL RULING ON LEGALITY OF TITLE 42

On September 16, 2021, the U.S. District Court for the District of Columbia prohibited the use of Title 42 to expel asylum seekers.⁶¹ In their ruling for the migrant plaintiffs, the Court provided a robust legal analysis on Congress's statutory intent when drafting Title 42 USC § 265. Crucially, Title 42 lacked the terms "expel or any synonym term thereof."⁶² Additionally, the Court reasoned that since the issue of expulsion is of such devastating consequence, had Congress intended for such a serious remedy, they would have made their intent clear.⁶³ Similarly, the Court noted that the penalties discussed in Section 271, Penalties for Violation of Quarantine Laws should have been more severe than a \$1,000 fine or imprisonment had Congress intended CDC to have the extensive power to expel migrants.⁶⁴ Even more compelling evidence is that the aforementioned section categorizes Title 42 as "quarantine laws," implying that CDC was not granted more power than to enforce quarantine measures.⁶⁵ Lastly, when discussing measures that CDC may implement, the neighboring Section 264 allows for measures to "prevent the introduction, transmission, or spread of communicable diseases," without mentioning expulsion of migrants, evincing a lack of such congressional intent.⁶⁶ The Court stayed its own order to prohibit expulsion under Title 42 for fourteen days to allow the government an opportunity to appeal its decision.⁶⁷ On September 30, 2021, the Court of Appeals for the D.C. Circuit granted the government's motion for a stay pending appeal, thus allowing the government to continue expelling vulnerable families from the United States under its Title 42 policy.⁶⁸

58. See *Letter to CDC Director Walensky, HHS Secretary Becerra, and DHS Secretary Mayorkas on the August 2021 Title 42 Order*, PROGRAM ON FORCED MIGRATION AND HEALTH (Sept. 1, 2021), <https://perma.cc/3ZV4-SGTX>.

59. See *id.*

60. See *Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, U.S. DEP'T OF HEALTH & HUMAN SERVS. & CTRS. FOR DISEASE CONTROL & PREVENTION 12–13, <https://perma.cc/M9CU-B9KE>.

61. See *Huisha-Huisha v. Mayorkas*, 2021 WL 4206688, at *18 (D.D.C. 2021).

62. *Id.* at 11.

63. See *id.* at 12.

64. See *id.*

65. See *id.*

66. See *id.*

67. See *id.* at 18.

68. See *Title 42 Challenges*, CTR. FOR GENDER & REFUGEE STUDIES, <https://perma.cc/QZ9G-92TN> (last visited Nov. 14, 2021).

CONCLUSION

Many Haitian migrants are at the risk of persecution if DHS forces their return to Haiti. Thus, they are likely eligible for asylum under U.S. and international law. Using Title 42 to bar asylum seekers so as to “protect” U.S. citizens from communicable diseases is unnecessary given the ability to mitigate the spread of COVID-19 by using CDC-recommended methods of processing migrants. Additionally, from a legal perspective, the U.S. District Court for the District of Columbia held that Congress never intended Title 42 to be used to expel migrants. However, until the Court of Appeals for the D.C. Circuit hears the appealed case, the government is allowed to continue expelling migrants from the United States under Title 42, even though doing so violates the U.S. and international law of the right to seek asylum.