

ASYLUM, TITLE 42, & FEMALE FOREIGN NATIONALS

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INTRODUCTION

On March 11, 2020, the World Health Organization (“WHO”) announced that COVID-19 was a pandemic.¹ Nine days after the WHO’s proclamation, the Centers for Disease Control and Prevention (“CDC”) of the U.S. Department of Health and Human Services (“HHS”) released an order under 42 U.S.C. § 265.² The policy, also known as “Title 42,”³ restricted migration across United States borders in order to prevent the spread of COVID-19.⁴ Title 42 temporarily banned the entry of foreign nationals migrating from Canada or Mexico who would usually enter a congregate setting at a Border Patrol station or a land port of entry (“POE”) at the Northern or Southern border.⁵ The policy implicated foreign nationals who (1) appeared at POEs without adequate travel documents; (2) unlawfully entered; or (3) were apprehended in the pursuit of unlawful entry into the United States between POEs.⁶ The policy enumerated specific classes of individuals exempted from

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1. *WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 – 11 March 2020*, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

2. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060, 17060–61 (Mar. 26, 2020). The order said its authority derived from 42 U.S.C. § 265 and 42 U.S.C. § 268. *Id.* at 17061.

3. Leonardo Castañeda & Katie Hoepfner, *Five Things to Know About the Title 42 Immigrant Expulsion Policy*, AM. C. LS. UNION (Mar. 22, 2022), <https://www.aclu.org/news/immigrants-rights/five-things-to-know-about-the-title-42-immigrant-expulsion-policy>.

4. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060, 17061 (Mar. 26, 2020).

5. *Id.*

6. *Id.*

coverage, while permitting the U.S. Department of Homeland Security (“DHS”) to use discretion in making unenumerated exemptions for the common good.⁷ However, Title 42 did not create an exemption for asylum seekers.⁸ Instead, the United States violated legal obligations to provide an opportunity to apply for asylum and to forbear from expelling refugees to countries where they will face persecution.⁹ Though it affected all asylum seekers,¹⁰ Title 42 constituted a particularly adverse obstacle for women seeking asylum during the pandemic.¹¹

While COVID-19 spread worldwide, so did the “shadow pandemic” of violence against women.¹² Lockdowns due to COVID-19 contributed to rising rates of violence against women in Latin America, reflected in statistics such as “online searches for protection from gender-based violence [that] increased [thirty]-fold in El Salvador and Honduras.”¹³ Women from El Salvador, Guatemala, and Honduras had “fle[d] epidemic levels of violence, including gender-based violence” years prior to the pandemic.¹⁴ When Title 42 substantively barred asylum, women trying to escape sexual and gender-based violence in El Salvador, Guatemala, and Honduras struggled to find safety in

7. *Id.*

8. Ashley Binetti Armstrong, *Co-opting Coronavirus, Assailing Asylum*, 35 GEO. IMMIGR. L.J. 361, 368–69 (2021).

9. *E.g.*, *id.* at 366–68.

10. *E.g.*, *id.* at 364–66.

11. See, e.g., Reva Resstack, Liesl Schnabel & Megan O'Donnell, *The Biden Administration Must Do More to Support Survivors of Gender-Based Violence from the Northern Triangle* (Oct. 25, 2021), <https://www.cgdev.org/blog/biden-administration-must-do-more-support-survivors-gender-based-violence-northern-triangle>. “The pandemic has . . . disproportionately affected women and girls and significantly deepened existing gender inequalities around the world.” PRESIDENT JOSEPH R. BIDEN, JR., NATIONAL STRATEGY FOR THE COVID-19 RESPONSE AND PANDEMIC PREPAREDNESS 107 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/01/National-Strategy-for-the-COVID-19-Response-and-Pandemic-Preparedness.pdf>.

12. *The Shadow Pandemic: Violence Against Women During COVID-19*, U.N. WOMEN, <https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19> (last visited Mar. 17, 2024). Prior to COVID-19, one in every three women around the world was a survivor of sexual or physical violence, usually perpetrated by an intimate partner. *Id.*

13. Christine Murray, *Rising Violence Against Women in Latin America Confirms Fears of Abuses in Lockdowns*, REUTERS (June 9, 2020, 4:12 PM), <https://www.reuters.com/article/us-health-coronavirus-latam-violence-trf/rising-violence-against-women-in-latin-america-confirms-fears-of-abuses-in-lockdowns-idUSKBN23G2X6>. Femicide is “the murder of women because of gender.” *Id.* However, despite the COVID-19 pandemic, femicide or feminicide did not increase or decrease at a regional level in Latin America and the Caribbean. U.N. ECON. COMM’N FOR LATIN AM. & CARIBBEAN, BRINGING AN END TO VIOLENCE AGAINST WOMEN AND GIRLS AND FEMICIDE OR FEMINICIDE 5 (2022), <https://www.cepal.org/en/publications/68629-bringing-end-violence-against-women-and-girls-and-femicide-or-feminicide-key>.

14. U.N. HIGH COMM’R FOR REFUGEES, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO 2 (2015), <https://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>.

the United States.¹⁵ At the Southern border, U.S. Customs and Border Protection (“CBP”) failed to conduct asylum screenings for foreign nationals trying to pursue asylum at POEs, leaving foreign nationals to navigate the risk of harm in Mexico.¹⁶ DHS expelled foreign nationals crossing the border between POEs back to nations of persecution, while neglecting to provide asylum application and fear screening opportunities.¹⁷ For female foreign nationals escaping violence in Central America, the Southern border became another barrier to seeking protection.¹⁸

This Note investigates how Title 42 impacted female foreign nationals who were excluded from the United States while seeking asylum during the COVID-19 pandemic. Part I provides an overview of asylum law. Next, Part II explains the law and policy of Title 42. Then, Part III focuses on how Title 42 affected the safety of female foreign nationals. Finally, Part IV addresses topics in the policy realm.

I. WOMEN’S SAFETY IN THE CONTEXT OF ASYLUM LAW

A. *International Law & Asylum Law*

A critical distinction is that immigration and asylum are different modes of migration.¹⁹ Asylum law derives from international and domestic safeguards

15. Resstack, Schnabel & O’Donnell, *supra* note 11.

16. JULIA NEUSNER & KENJI KIZUKA, HUM. RTS. FIRST, THE NIGHTMARE CONTINUES: TITLE 42 COURT ORDER PROLONGS HUMAN RIGHTS ABUSES, EXTENDS DISORDER AT U.S. BORDERS 2 (2022), <https://humanrightsfirst.org/wp-content/uploads/2022/09/NightmareContinues.pdf>.

17. *Id.*

18. Paulina Villegas, *Central American Women Are Fleeing Domestic Violence amid a Pandemic. Few Find Refuge in U.S.*, WASH. POST (June 13, 2021, 8:00 AM), <https://www.washingtonpost.com/nation/2021/06/13/central-america-women-domestic-violence/>.

19. I credit Professor Monterrosa for emphasizing the significance of this distinction in the context of this Note. Family-based and employment-based immigration frameworks provide eligible foreign nationals with the entitlement to remain in the United States permanently. AM. IMMIGR. COUNCIL, HOW THE UNITED STATES IMMIGRATION SYSTEM WORKS 1–3 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/how_the_united_states_immigration_system_works_0.pdf. Immigrant visas grant foreign nationals the status of lawful permanent resident (“LPR”), which provides the opportunity to work and stay in the United States for a permanent period of time regardless of employment. *Id.* at 1. Immediate relatives, defined as U.S. citizens’ spouses, parents, and unmarried children under the age of twenty-one, benefit from unrestricted availability of visas. *Id.* LPRs can apply for citizenship following five years (or three years in certain cases) of residence in the United States. *Id.* Non-immigrant visas grant foreign nationals admission to the United States for a temporary period of time, for reasons such as foreign study, tourism, and temporary employment. *Id.* On the employment-based immigration side, employers can petition for foreign nationals to enter the United States and remain temporarily or permanently for work purposes. *Id.* at 3–4.

established for foreign nationals facing persecution.²⁰ By becoming a party to the 1967 Protocol to the 1951 Refugee Convention,²¹ the United States agreed to assume obligations to refugees.²² The Convention describes a refugee as an individual 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 [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country.²³

States to the Convention agree to uphold their obligations to refugees regardless of country of origin, race, or religion.²⁴

Additionally, the Convention forbids participating states from exacting penalties on refugees for unlawful presence or entry if they travel “directly from a territory where their life or freedom was threatened” and meet the conditions of appearing “without delay” before authorities and demonstrating “good cause” for such unlawful presence or entry.²⁵ Furthermore, the Convention provides that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”²⁶

Through the Refugee Act of 1980, Congress added international law’s designation of a “refugee” to the domestic immigration law of the United States.²⁷ Foreign nationals who qualify as refugees under international law are eligible for the protection conferred by asylum.²⁸ An individual who is granted

20. *E.g.*, AM. IMMIGR. COUNCIL, ASYLUM IN THE UNITED STATES 1 (2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states_0.pdf.

21. U.N. HIGH COMM’R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL 4, <https://www.unhcr.org/en-us/3b73b0d63.pdf>.

22. *See Glossary of Technical Terms Related to the Treaty Bodies*, OFF. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/treaty-bodies/glossary-technical-terms-related-treaty-bodies#op> (last visited Mar. 27, 2023). In international law, a convention is legally binding on all the states that assent to become parties to the instrument. *Id.* Treaties, conventions, and covenants have the same legal force. *Id.* A protocol is a legal instrument that supplements a treaty and requires separate ratification or accession. *Id.*

23. Convention Relating to the Status of Refugees, art. I(A)(2), July 28, 1951, 189 U.N.T.S. 137. The Convention became effective on April 22, 1954. *Id.* at Preamble n.1.

24. *Id.* at art. III.

25. *Id.* at art. XXXI, cl. 1.

26. *Id.* at art. XXXIII, cl. 1.

27. AM. IMMIGR. COUNCIL, *supra* note 20, at 1.

28. *Id.* The Attorney General or the Secretary of Homeland Security can grant asylum to a foreign national who applied for asylum if the Attorney General or the Secretary of Homeland Security adjudges that the foreign national is a refugee. 8 U.S.C. § 1158(b)(1)(A).

asylum, an asylee, receives the ability to apply for permanent residence in the United States and eventually pursue citizenship.²⁹ Asylees may apply for children and spouses to enter the United States as well.³⁰ However, a refugee does not automatically receive asylum, because this mode of protection against persecution is “discretionary.”³¹ Under the Refugee Act, an individual can gain the status of a refugee as an asylum seeker within the United States or as a resettled refugee outside the country.³²

8 U.S.C. § 1158 provides that “[a]ny [foreign national] who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such [foreign national]’s status, may apply for asylum.”³³ An applicant for asylum must prove that he or she is a refugee, in which one of the following categories was or will become “at least one central reason” subjecting the applicant to persecution: political opinion, membership in a particular social group, nationality, race, or religion.³⁴ In affirmative asylum, a foreign national who is not subject to removal proceedings applies for asylum with U.S. Citizenship and Immigration Services (“USCIS”).³⁵ Conversely, in defensive asylum, a foreign national files an application for asylum with an immigration judge with the Executive Office for Immigration Review (“EOIR”) within the U.S. Department of Justice (“DOJ”) as a defense while in removal proceedings.³⁶

In expedited removal, an immigration officer will order the removal of a foreign national deemed inadmissible without providing an opportunity for additional hearing or review.³⁷ However, the law carves out an exception in expedited removal for a foreign national who “indicates either an intention to apply for asylum . . . or a fear of persecution,” which entitles the foreign national to a referral for an interview with an asylum officer.³⁸ When an asylum officer carrying out the interview decides the foreign national exhibits a “credible fear of persecution,” then the foreign national is detained while the asylum application progresses.³⁹

If a foreign national reenters the United States without authorization following removal or voluntary departure, pursuant to an order of removal, then

29. AM. IMMIGR. COUNCIL, *supra* note 20, at 1.

30. *Id.*

31. *Id.*

32. *Id.*

33. 8 U.S.C. § 1158(a)(1).

34. *Id.* § 1158(b)(1)(B)(i).

35. AM. IMMIGR. COUNCIL, *supra* note 20, at 2.

36. *Id.*

37. 8 U.S.C. § 1225(b)(1)(A)(i).

38. *Id.* §§ 1225(b)(1)(A)(i)–(ii).

39. *Id.* § 1225(b)(1)(B)(ii). Credible fear of persecution refers to the existence of a “significant possibility” that the foreign national could demonstrate he or she is eligible for asylum. *Id.* § 1225(b)(1)(B)(v).

the previous order of removal will be reinstated.⁴⁰ However, if a foreign national has a fear of returning to the country to which he or she will be removed, then the foreign national is entitled to undergo a “reasonable fear” assessment in which an asylum officer completes an interview.⁴¹ The standard for “reasonable fear of persecution or torture” is the “reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal.”⁴² To be eligible for withholding of removal, an applicant must show that “life or freedom would be threatened in the proposed country of removal” on the basis of political opinion, membership in a particular social group, nationality, religion, or race.⁴³

The credible fear and reasonable fear procedures are safeguards that facilitate the compliance of the United States with the commitment under domestic and international laws to refrain from returning foreign nationals to nations that endanger life or freedom.⁴⁴ However, even with the foregoing asylum procedures in place, female foreign nationals are not always safe.⁴⁵

B. *Migrating as a Woman*

In recent years, domestic violence has pushed female foreign nationals toward the United States.⁴⁶ In 2014, the Board of Immigration Appeals (“BIA”) held that “the lead respondent, a victim of domestic violence in her native country, is a member of a particular social group composed of ‘married women in Guatemala who are unable to leave their relationship.’”⁴⁷ The respondent was married at seventeen.⁴⁸ The husband beat her, broke her nose, burned her with paint thinner, and raped her.⁴⁹ The police refused to intervene, and failed to arrest the husband after he physically attacked her, after which the husband threatened to kill the respondent if she requested subsequent help from the

40. 8 U.S.C. § 1231(a)(5).

41. 8 C.F.R. §§ 1208.31(a)–(c) (2022).

42. *Id.* § 1208.31(c).

43. 8 C.F.R. § 208.16(b) (2022).

44. AM. IMMIGR. COUNCIL, *supra* note 20, at 4.

45. *E.g.*, Resstack, Schnabel & O'Donnell, *supra* note 11. *See also* Cathy Hannabach, *Technologies of Blood: Asylum, Medicine, and Biopolitics*, 9 CULTURAL POL. 22, 23 (2013) (explaining that “[w]ithout their consent and often even without their knowledge, HIV-positive women refugees [from Haiti] were either sterilized or forcibly injected with Depo-Provera, a semipermanent form of birth control” on Guantánamo in the 1990s).

46. *E.g.*, Julia Westbrook, *How Mexico and Central America's Femicide Epidemic Drives and Complicates the Migrant Crisis*, NEW HUMANITARIAN (Feb. 27, 2020), <https://www.thenewhumanitarian.org/news-feature/2020/02/27/Femicide-migration-Central-America-Mexico-US-Mexico-women-violence>.

47. Matter of A-R-C-G-, 26 I&N Dec. 388, 388–89 (BIA 2014).

48. *Id.* at 389.

49. *Id.*

police.⁵⁰ The respondent persistently attempted to escape her relationship.⁵¹ The husband discovered the respondent and threatened to murder her unless she came back.⁵² When the respondent left for three months, the husband vowed to stop abusing her if she came home.⁵³ However, the abuse persisted upon the respondent's return.⁵⁴ The lead respondent and her three children, the minor respondents, escaped from Guatemala and then entered the United States without inspection in December 2005.⁵⁵ The mother sought asylum and withholding of removal, and the Immigration Judge deemed her a credible witness.⁵⁶

The Immigration Judge deemed the respondent ineligible for asylum and withholding of removal, citing criminal conduct rather than persecution as the underlying reason for abuse.⁵⁷ The respondent appealed, arguing that she was eligible for asylum based on the status of being a survivor of domestic violence.⁵⁸ Consequently, the BIA answered the question of “whether domestic violence can, in some instances, form the basis for a claim of asylum or withholding of removal.”⁵⁹ DHS accepted that the respondent proved her injury was equivalent to persecution and that the persecution derived from being a member of the “particular social group comprised of ‘married women in Guatemala who are unable to leave their relationship.’”⁶⁰ The BIA remanded the case after DHS urged that additional analysis was required prior to adjudicating the asylum claim.⁶¹

According to the BIA, “an applicant seeking asylum based on his or her membership in a ‘particular social group’ must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”⁶² The BIA reasoned that the respondent belonged to a group in which gender was the “common immutable characteristic”⁶³ and that marital status could also be an “immutable characteristic” when the relationship is

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 390.

58. *Id.*

59. *Id.*

60. *Id.* at 389.

61. *Id.*

62. *Id.* at 392 (citing *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014)).

63. *Id.* (citing *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985), *Matter of W-G-R-*, 26 I&N Dec. 208, 213 (BIA 2014)).

inescapable.⁶⁴ The group was “defined with particularity” given that the descriptors for the group (e.g., “women,” “married,” and “unable to leave the relationship”) were well-known in Guatemala as shown by the facts (i.e., the police’s response to the respondent).⁶⁵ Finally, “social distinction” was present in Guatemala’s cultural context of “machismo and family violence.”⁶⁶

When the CDC instituted Title 42 in March 2020, foreign nationals at the Southern border could be expelled and prevented from seeking asylum regardless of fear of persecution.⁶⁷ Between April 2020 and March 2022, approximately 1.8 million encounters with foreign nationals near the Southern border led to expulsions pursuant to Title 42.⁶⁸ The consequences of the deprivation of the opportunity to seek asylum were particularly dire for female foreign nationals.⁶⁹

II. THE LAW AND POLICY OF TITLE 42

A. Title 42

On March 20, 2020, the CDC instituted a rule pursuant to 42 U.S.C. § 265 that excluded asylum seekers.⁷⁰ The provision says:

Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, 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 such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert

64. *Id.* at 391–92.

65. *Id.* at 393.

66. *Id.* at 394 (quoting *Guatemala Failing Its Murdered Women: Report*, CAN. BROAD. CO. (July 18, 2006, 11:22 AM), <https://www.cbc.ca/news/world/guatemala-failing-its-murdered-women-report-1.627240>). The Attorney General overruled *Matter of A-R-C-G-* in June 2018. *Matter of A-B-*, 27 I&N. Dec. 316, 316 (U.S. Atty. Gen. 2018), *vacated by* 28 I&N. Dec. 307 (U.S. Atty. Gen. 2021). *Matter of A-B-* reinstated *Matter of A-R-C-G-* on June 16, 2021. *Matter of A-B-*, 28 I&N. Dec. 307, 307 (U.S. Atty. Gen. 2021).

67. AM. IMMIGR. COUNCIL, *supra* note 20, at 7.

68. John Gramlich, *Key Facts About Title 42, the Pandemic Policy That Has Reshaped Immigration Enforcement at U.S.-Mexico Border* (Apr. 27, 2022), <https://www.pewresearch.org/fact-tank/2022/04/27/key-facts-about-title-42-the-pandemic-policy-that-has-reshaped-immigration-enforcement-at-u-s-mexico-border/>.

69. See Resstack, Schnabel & O’Donnell, *supra* note 11.

70. Armstrong, *supra* note 8, at 369.

such danger, and for such period of time as he may deem necessary for such purpose.⁷¹

Title 42 “suspend[ed] the introduction” of anyone of any country of origin who was migrating from Canada or from Mexico who would have been placed in “a congregate setting” at a Border Patrol station or a POE bordering the United States on the basis of the hazard that COVID-19 posed to the nation’s public health.⁷² The populations subjected to this order were foreign nationals “seeking to enter the United States at POEs who do not have proper travel documents, [foreign nationals] whose entry is otherwise contrary to law, and [foreign nationals] who are apprehended near the border seeking to unlawfully enter the United States between POEs.”⁷³ The order specified that 42 U.S.C. § 265 and 42 U.S.C. § 268 empowered the Director of the CDC to temporarily prevent foreign nationals from being introduced into the United States when the foreign nationals were migrating from a country where a communicable disease was prevalent.⁷⁴ The policy exempted U.S. citizens, LPRs, and the spouses and children of those groups.⁷⁵ Members of the United States armed forces, affiliated personnel, and the spouses and children of those groups also received an exemption.⁷⁶ Further, the policy exempted foreign nationals appearing at a POE with proper documents and foreign nationals appearing at a POE who were covered by the visa waiver program and not facing travel restraints.⁷⁷

According to the CDC, the March 2020 order was an essential tool in preventing the spread of COVID-19 in land POEs and Border Patrol stations as well as inside the United States.⁷⁸ CBP, one of the agencies of DHS, oversees

71. 42 U.S.C. § 265. During 1966, the Surgeon General’s authority under § 265 went to HHS, then to the Director of the CDC. *Huisha-Huisha v. Mayorkas (Huisha-Huisha I)*, 560 F. Supp. 3d 146, 156 (D.D.C. 2021), *aff’d in part and rev’d in part*, 27 F.4th 718 (D.C. Cir. 2022).

72. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060, 17061 (Mar. 26, 2020).

73. *Id.*

74. *Id.*

75. *Id.* However, on March 20, 2020, the Department of State (“DOS”) began suspending visa services at consulates and embassies around the world, which entailed cancellations of visa appointments for both immigrant and nonimmigrant visas. JORGE LOWEREE, AARON REICHLIN-MELNICK, & WALTER A. EWING, AM. IMMIGR. COUNCIL, THE IMPACT OF COVID-19 ON NONCITIZENS AND ACROSS THE U.S. IMMIGRATION SYSTEM 5 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_impact_of_covid-19_on_noncitizens_and_across_the_us_immigration_system_0.pdf). Family-based immigrant visas for the relatives of LPRs and U.S. citizens fell under the purview of the suspension. *Id.*

76. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060, 17061 (Mar. 26, 2020).

77. *Id.*

78. *Id.*

the land POEs and Border Patrol stations that hold foreign nationals in crowded common spaces for time periods ranging from hours to days while waiting to be processed.⁷⁹ The order justified the suspension, in part, based on the logic that common spaces of the land POEs and Border Patrol stations lacked the capacity to support quarantine, isolation, and social distancing of people who had or could contract COVID-19.⁸⁰ Given that CBP sent severely ill people to local health care providers before the pandemic, the CDC reasoned that COVID-19 outbreaks in land POEs and Border Patrol stations could impair surrounding health care services or decrease access to health care within the United States while increasing local health care workers' COVID-19 exposure.⁸¹

On April 20, 2020, the CDC declared an extension of the order.⁸² A month later, on May 21, 2020, another extension plus an amendment of the order became effective.⁸³ The CDC amended the order to indicate that the migration restrictions were inclusive of coastal POEs and Border Patrol stations.⁸⁴ On October 13, 2020, the CDC's order replacing the March 2020 order became effective.⁸⁵ This new order justified migration restrictions on not just a communicable disease but a "quarantinable communicable disease."⁸⁶ Starting on July 16, 2021, the CDC exempted unaccompanied foreign national children from Title 42.⁸⁷

The CDC's order of August 2, 2021, replaced the order of October 2020.⁸⁸ The newer order extended the exceptions for unaccompanied foreign national children and "individuals on a case-by-case basis, based on the totality of the circumstances" while implementing another exception for DHS initiatives with CDC-endorsed public health safeguards.⁸⁹ CBP officers could exempt

79. *Id.*

80. *Id.*

81. *Id.*

82. Extension of Order Under Sections 362 and 365 of the Public Health Service Act, 85 Fed. Reg. 22424, 22425 (Apr. 22, 2020).

83. ROBERT R. REDFIELD, CTRS. FOR DISEASE CONTROL & PREVENTION, AMENDMENT AND EXTENSION OF ORDER SUSPENDING INTRODUCTION OF CERTAIN PERSONS FROM COUNTRIES WHERE A COMMUNICABLE DISEASE EXISTS 1, 12 (2020), https://www.cdc.gov/quarantine/pdf/CDC-265-Order-Renewal_5-19-20-p.pdf?ftag=MSF0951a18.

84. *Id.* at 1, 12.

85. Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65806, 65806 (Oct. 16, 2020).

86. *Id.*

87. Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children from the Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 38717, 38718 (July 22, 2021).

88. Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 42828, 42829 (Aug. 5, 2021).

89. *Id.*

individuals from the migration limitations “based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests.”⁹⁰ On March 11, 2022, the CDC ended the prior orders’ application to unaccompanied children.⁹¹ Less than a month later, the CDC announced that all the orders would be repealed, with an effective date of May 23, 2022.⁹²

B. Huisha-Huisha I

In September 2021, a group of families seeking asylum sued several federal government officials, including the Secretary of Homeland Security, for violating the Administrative Procedure Act (“APA”), the INA, the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”), and the Public Health Service Act of 1944.⁹³ The United States District Court, District of Columbia, granted the plaintiffs’ motion for class certification and motion for classwide preliminary injunction.⁹⁴ The court outlined the three main safeguards for asylum seekers in domestic law: (1) the Attorney General’s discretion over granting asylum to a refugee under 8 U.S.C. § 1158(b)(1)(A); (2) mandatory withholding of deportation of a foreign national who would be endangered by deportation due to certain characteristics; and (3) the *non-refoulement* of foreign nationals facing the risk of torture under FARRA.⁹⁵

The plaintiffs and the intended class members were families from nations “among the most dangerous in the world due to gang, gender, family membership, and other identity-based violence.”⁹⁶ At the time of the opinion, the plaintiffs were in detention and in DHS custody, rendering them expellable under Title 42.⁹⁷ They argued that before Title 42, they had an entitlement to claim asylum and other kinds of humanitarian relief and to the processes that Congress created to allow just adjudication of the right to stay in the United States.⁹⁸

90. *Id.* at 42841.

91. Public Health Reassessment and Immediate Termination of Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists with Respect to Unaccompanied Noncitizen Children, 87 Fed. Reg. 15243, 15244 (Mar. 17, 2022).

92. Public Health Determination and Order Regarding Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 87 Fed. Reg. 19941, 19941 (Apr. 6, 2022).

93. *Huisha-Huisha v. Mayorkas (Huisha-Huisha I)*, 560 F. Supp. 3d 146, 154 (D.D.C. 2021), *aff’d in part and rev’d in part*, 27 F.4th 718 (D.C. Cir. 2022).

94. *Id.* at 155.

95. *Id.* at 155–56.

96. *Id.* at 159 (quoting Pls.’ Mot. Prelim. Inj., ECF No. 57-1 at 31).

97. *Id.*

98. *Id.*

In assessing the motion for preliminary injunction, the court found the plaintiffs established a likelihood of success on the merits.⁹⁹ The plaintiffs claimed that the policy “exceed[ed] the authority granted by Congress” under § 265 given that neither § 265 nor Title 42 “purport[] to authorize any deportations, much less deportations in violation of statutory procedures and humanitarian protections, including the right to seek asylum.”¹⁰⁰ The court invoked *Chevron*’s procedure for the review of an agency’s construction of a statute that the agency administers:¹⁰¹ (1) apply statutory interpretation techniques to decide if the statute explicitly demonstrates congressional intent regarding the specific issue; and (2) if the statute is unclear as to the specific issue, then decide if the agency’s construction of the statute is allowable.¹⁰² If the agency’s construction of the statute is not “arbitrary, capricious, or manifestly contrary to the statute,” then the court will defer to the agency.¹⁰³

The court noted that the text of 42 U.S.C. § 265 was devoid of the term “expel” as well as synonymous terms.¹⁰⁴ Additionally, when a statute at issue involves the serious consequence of deportation, the court hesitates “to recognize an implied power of forced removal from the country.”¹⁰⁵ Further, Congress has been explicit in explaining the circumstances in which public health can prohibit a foreign national from staying in the United States (i.e., foreign nationals with infectious diseases posing a public health risk are inadmissible under 8 U.S.C. § 1182(a)(1)).¹⁰⁶ Thus, the court found that § 265’s plain language showed no intent to provide the Executive with the power of expulsion or removal of people from the United States, especially when considered along with various immigration statutes.¹⁰⁷ Additionally, the court reasoned that the surrounding provisions and the statute overall had no reference to an authority vested in the CDC over removal.¹⁰⁸

The plaintiffs argued they would suffer irreparable harm through expulsion without pursuing humanitarian protection under Title 42.¹⁰⁹ They claimed that when families undergo expulsion to Mexico, they can experience harm from cartels and gangs as well as struggle to secure safe shelter.¹¹⁰ The

99. *Id.* at 167.

100. *Id.* at 166–67 (internal quotes omitted) (quoting Pls.’ Mot. Prelim. Inj., ECF No. 57-1 at 17–18).

101. *Id.* at 167 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 837 (1984)).

102. *Id.* (citing *Chevron*, 467 U.S. at 842–43).

103. *Id.* (citing *Chevron*, 467 U.S. at 844).

104. *Id.*

105. *Id.* at 168.

106. *Id.* (citing *P.J.E.S. v. Wolf*, 502 F. Supp. 3d 492, 359 (D.D.C. 2020); and then citing 8 U.S.C. § 1182(a)(1)).

107. *Id.*

108. *Id.* at 169.

109. *Id.* at 171.

110. *Id.* at 172.

court determined the plaintiffs established a likelihood of irreparable harm without a preliminary injunction, because: (1) the plaintiffs and the intended class members could be expelled without applying for asylum or removal, then could be unable to access judicial relief after expulsion; and (2) the intended class members requested declaratory and injunctive relief that would void Title 42, and the injury caused by expulsion is not conducive to remediation.¹¹¹ Finally, the court determined the balance of the equities and the public interest called for an injunction by reasoning that: (1) illegal agency conduct does not serve the public interest;¹¹² and (2) the public interest requires protecting foreign nationals from removal to places of persecution.¹¹³

C. Huisha-Huisha II

On appeal, the D.C. Circuit “disagree[d], at least at this stage of the case” with the plaintiffs’ argument that Title 42 expulsions were unlawful, instead “find[ing] it likely that [foreign nationals] covered by a valid § 265 order have no right to be in the United States, and the Executive can immediately expel them.”¹¹⁴ However, the court recognized that 42 U.S.C. § 265 fails to specify the location to which the Executive may expel foreign nationals.¹¹⁵ The court reasoned that 8 U.S.C. § 1231 governs expulsion locations and prohibits the Executive from: (1) removing foreign nationals to a country where “life or freedom would be threatened” on the basis of political opinion, membership in a particular social group, nationality, race, or religion;¹¹⁶ or (2) expelling foreign nationals to a country posing a likelihood of torture to them.¹¹⁷ According to the court, the Executive removed the ability to seek asylum and alternative legal status from foreign nationals subject to Title 42, and § 1231 neither reinstated those protections nor prohibited the detention of foreign nationals while they waited for expulsion to a proper country.¹¹⁸

The court cited 8 U.S.C. § 1227(a)(1)(B), which provides that the government can deport a foreign national whose presence in the United States violates federal law.¹¹⁹ However, the INA vests foreign nationals with substantive and procedural rights to challenge removal.¹²⁰ The three substantive rights pertinent to the case were asylum, withholding of removal, and

111. *Id.* at 172.

112. *Id.* at 174.

113. *Id.* The court waived the injunction bond, then stayed the preliminary injunction for fourteen days upon the defendants’ urging. *Id.* at 176–77.

114. *Huisha-Huisha v. Mayorkas (Huisha-Huisha II)*, 27 F.4th 718, 721 (D.C. Cir. 2022).

115. *Id.*

116. *Id.* at 721–22 (quoting 8 U.S.C. §§ 1231(b)(1)–(3)(A)).

117. *Id.* at 722 (quoting 8 U.S.C. § 1231 note).

118. *Id.*

119. *Id.* at 724.

120. *Id.*

Convention Against Torture safeguards.¹²¹ Examples of procedural rights are the ability to oppose removal in front of an immigration judge and appeal to the BIA and a federal appellate court.¹²² The court reasoned that although the Executive may “render illegal the presence of [foreign nationals] who pose a public-health risk during a public-health emergency” under 42 U.S.C. § 265 and expel such foreign nationals under 8 U.S.C. § 1227(a)(1)(B), the Executive may not conduct expulsions to nations where foreign nationals will face persecution or torture under 8 U.S.C. § 1231(b)(3)(A) and note.¹²³

The D.C. Circuit found that the plaintiffs posed various “merits arguments” that were unlikely to succeed.¹²⁴ First, the plaintiffs argued that 42 U.S.C. § 265 was limited to prohibiting third parties (i.e., common carriers) from bringing property or people into the United States, such that “individuals who enter the country” were not subject to the provision.¹²⁵ The court reasoned that § 265’s ban on “the introduction of persons or property” extended beyond common carriers to encompass the entry of foreign nationals who could represent a public health risk.¹²⁶ Second, the plaintiffs claimed that § 265 does not grant the power to expel foreign nationals, even in the case that the provision was applicable to foreign nationals bringing themselves into the country.¹²⁷ The court said that the Executive may expel foreign nationals whose presence is unlawful under 8 U.S.C. § 1227(a)(1)(B), and the Executive had deemed unlawful the introduction of “covered” foreign nationals under 42 U.S.C. § 265.¹²⁸ Third, the plaintiffs argued that expelling foreign nationals without permitting them to apply for asylum is a violation of 8 U.S.C. § 1158(a)(1), which vests foreign nationals with the ability to apply for asylum prior to expulsion regardless of unlawful entry.¹²⁹ The D.C. Circuit’s response was that because asylum is discretionary, the Executive was using its

121. *Id.* The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that “[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture.” G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. III, cl. 1. (Dec. 10, 1984). An applicant is eligible for withholding of removal pursuant to the Convention Against Torture if he or she proves “it is more likely than not” that he or she would face torture if he or she were removed. 8 C.F.R. § 208.16(c)(2) (2022).

122. *Huisha-Huisha II*, 27 F.4th at 724.

123. *Id.* at 725.

124. *Id.* at 727.

125. *Id.*

126. *Id.* (quoting 42 U.S.C. § 265). As the court suggested, common carriers are capable of bringing people, and individuals are capable of bringing themselves. *Id.*

127. *Id.* at 728.

128. *Id.* at 729.

129. *Id.* at 730–31.

“discretion” to terminate asylum for the foreign nationals specified in the Title 42 order due to public health.¹³⁰

Though the court found the plaintiffs’ first three arguments were unlikely to be successful, it found that the plaintiffs showed a likelihood of success on the fourth argument that Title 42 was in violation of the two restrictions regarding the locations to which the Executive can expel foreign nationals.¹³¹ First, withholding of removal pursuant to 8 U.S.C. § 1231(b)(3)(A) is not a matter of discretion.¹³² The court found that 42 U.S.C. § 265 empowered the Executive to expel the plaintiffs, but that 8 U.S.C. § 1231(b)(3)(A) required expulsion to a country where the plaintiffs would be safe from persecution.¹³³ Second, under the Convention Against Torture, the Executive has no discretion to expel foreign nationals to countries where they face a likelihood of torture.¹³⁴ Thus, the plaintiffs demonstrated a likelihood of success on the merits that § 1231 restricts the locations to which the Executive may expel foreign nationals under Title 42.¹³⁵

The D.C. Circuit considered the other prongs of the preliminary injunction analysis to determine if the claims under § 1231 gave rise to relief.¹³⁶ The court found the following determinations of the district court were not abuses of discretion: (1) the plaintiffs would face irreparable injury without a preliminary injunction mandating the Executive to provide withholding of removal and Convention Against Torture safeguards; and (2) the balance of equities sided with the plaintiffs.¹³⁷ The Executive did not refute the fact that the plaintiffs would undergo irreparable harm upon expulsion to locations of persecution or torture.¹³⁸ As the court noted, “for covered [foreign nationals] who have already been forced to walk the plank into those places, the record is replete with stomach-churning evidence of death, torture, and rape.”¹³⁹

When considering the Executive’s public health rationale for border restrictions, the court said that Title 42 resembled a “relic” from a time without readily available pharmaceuticals, testing, or vaccines, rather than the situation of March 2022.¹⁴⁰ The court confirmed that the preliminary injunction did not

130. *Id.* (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987) (interpreting 8 U.S.C. § 1158(a))). The court reasoned that if Title 42 annulled the ability to seek asylum, then the “statutorily mandated procedures” through which foreign nationals apply for asylum would be “futile.” *Id.* at 731.

131. *Id.*

132. *Id.*

133. *Id.* at 732.

134. *Id.*

135. *Id.*

136. *Id.* at 733.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 734–35. This case was argued on January 19, 2022, and decided on March 4, 2022. *Id.* at 718.

prevent detention of foreign nationals preceding expulsion, but rather prevented expulsion to a country where foreign nationals will experience persecution or torture.¹⁴¹ The court affirmed in part the preliminary injunction and remanded the case.¹⁴²

D. Louisiana v. Centers for Disease Control & Prevention

On May 20, 2022, the United States District Court, Western District of Louisiana issued a preliminary injunction staying the termination of Title 42.¹⁴³ The twenty-four plaintiff states argued that the CDC: (1) violated the APA by terminating Title 42; and (2) ignored the potential consequences to immigration enforcement and to the states resulting from terminating Title 42.¹⁴⁴ Because the court determined the plaintiff states had a substantial likelihood of success from the CDC's violation of the APA's rulemaking procedures, the court did not determine if the CDC's conduct was arbitrary and capricious.¹⁴⁵

The court found the plaintiff states satisfied the irreparable harm requirement for the preliminary injunction, based on the following consequences of the termination order.¹⁴⁶ The government estimated that the rate of daily border crossings could rise up to 18,000 daily border crossings, which would constitute an increase of three-fold.¹⁴⁷ Additionally, the termination order could cause more processing of foreign nationals in DHS stations, potentially leading to "overcrowding in congregate settings."¹⁴⁸ Further, the court found that rising rates of border crossings would raise the plaintiff states' expenditure on education and health care, which were deemed nonrecoverable.¹⁴⁹ The court found that the plaintiff states would experience harm from the termination order and that they lost the opportunity to safeguard their interests through the APA-required notice and comment procedure.¹⁵⁰ According to the court, specific exemptions soften Title 42's effects on immigration and such exemptions have been utilized.¹⁵¹

141. *Id.* at 735.

142. *Id.*

143. *Louisiana v. Ctrs. for Disease Control & Prevention*, 603 F. Supp. 3d 406, 441 (W.D. La. 2022). On April 27, 2022, the court granted a temporary restraining order ("TRO") to uphold the status quo and forbid the defendants from carrying out the termination order before its stated effective date of May 23, 2022. *Id.* at 416. The court prolonged the TRO to continue until either the court's ruling on the Motion for Preliminary Injunction or May 23, 2022, whichever arrived earlier. *Id.* at 416–17.

144. *Id.* at 412.

145. *Id.* at 439.

146. *Id.* at 440.

147. *Id.*

148. *Id.* (quoting ECF No. 10-1 at 27).

149. *Id.*

150. *Id.*

151. *Id.*

In weighing the “balance of harms,” the court recognized the defendants’ claim that an injunction would force the Executive Branch to impose a constraining public health order contrary to the Executive Branch’s decision that the order is unnecessary.¹⁵² The court found the defendants’ claim was valid to the degree that Title 42 affects the functioning of the immigration system.¹⁵³ However, the court decided the balance of harms resulted in endorsing a preliminary injunction.¹⁵⁴ Finally, in considering the public interest prong, the court found the preliminary injunction would benefit the public interest in light of the consequences of the termination order on the plaintiff states and the demonstration that the CDC violated the APA.¹⁵⁵

E. Huisha-Huisha III

In November 2022, the United States District Court, District of Columbia declared Title 42 arbitrary and capricious, then enjoined it from being used for the plaintiff class members.¹⁵⁶ The plaintiffs claimed that the orders were arbitrary and capricious in part due to the CDC neglecting to address the injury that would befall people who were expelled.¹⁵⁷ From the defendants’ perspective, the only concern was whether public health necessitated an order under Title 42.¹⁵⁸ The court reasoned that the least restrictive means analysis necessitated evaluating the adverse effects of public health protocols that migrants would face.¹⁵⁹

Additionally, the court noted that the APA mandates agencies to use “reasoned decisionmaking,” with a corresponding standard of review in which courts ask whether the agency weighed “relevant factors” and whether “clear error of judgment” occurred.¹⁶⁰ The court found that the CDC should have evaluated the “relevant factor” of the effects of ending immigration proceedings

152. *Id.*

153. *Id.*

154. *Id.* at 440–41.

155. *Id.* at 441.

156. *Huisha-Huisha v. Mayorkas (Huisha-Huisha III)*, 642 F. Supp. 3d 1, 24–25 (D.C. Cir.), *stayed by sub nom. Arizona v. Mayorkas*, 214 L. Ed. 311 (2022) (mem.), *vacated by* 143 S. Ct. 478 (2022). The case uses the term “Title 42 policy” (defined as the procedure created by the CDC and executed through the CDC’s August 2021 order that supplanted the October 2020 order). *Id.* at 12.

157. *Id.* at 19.

158. *Id.*

159. *Id.* at 19–20. A Final Rule from 2017 established the following standard: “in all situations involving quarantine, isolation, or other public health measures, [HHS/CDC] seeks to use the least restrictive means necessary to prevent the spread of disease.” *Id.* at 17 (quoting Control of Communicable Diseases, 82 Fed. Reg. 6890, 6912 (Jan. 19, 2017) (to be codified at 42 C.F.R. pts. 70, 71)).

160. *Id.* at 19–20 (quoting *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020)).

for the foreign nationals implicated by the order.¹⁶¹ Thus, “[i]t is unreasonable for the CDC to assume that it can ignore the consequences of any actions it chooses to take in the pursuit of fulfilling its goals, particularly when those actions included the extraordinary decision to suspend the codified procedural and substantive rights” for foreign nationals searching for safety.¹⁶² Further, comments throughout the rulemaking process for the policy made the CDC aware that orders could lead to the expulsion of migrants into countries where the likelihood of assault, persecution, rape, or torture is immense.¹⁶³

Among the categories of people facing Title 42 expulsion were: (1) people who survived domestic violence as well as their children; (2) people who survived rape and sexual assault whose persecutors could attack, stalk, or murder them; and (3) people identifying as LGBTQ+ who face criminalization of their identities in their countries of origin or possible persecution if expelled to a country such as Mexico.¹⁶⁴ The district court found the CDC’s order to be arbitrary and capricious for neglecting the distress that the Title 42 orders could instigate.¹⁶⁵ Thus, the court vacated Title 42 and entered a permanent injunction to prevent the defendants from imposing the policy upon the class members.¹⁶⁶

F. Arizona v. Mayorkas

On December 19, 2022, the United States Supreme Court “stayed pending further order of the undersigned or of the Court” the District of Columbia’s order from November 15, 2022.¹⁶⁷ The Court subsequently stayed the district court’s ruling to vacate Title 42 on December 27, 2022.¹⁶⁸ In a dissenting opinion joined by Justice Jackson, Justice Gorsuch explained that although the states might take issue with the government’s administrative process, the states “do not seriously dispute that the public-health justification undergirding the Title 42 orders has lapsed. And it is hardly obvious why we should rush in to review a ruling on a motion to intervene in a case concerning emergency decrees

161. *Id.* at 20 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

162. *Id.* (citing *Huisha-Huisha v. Mayorkas (Huisha-Huisha II)*, 27 F.4th 718, 724–25 (D.C. Cir. 2022)).

163. *Id.*

164. *Id.*

165. *Id.* at 21.

166. *Id.* at 28. The court noted that the CDC had ended the August 2021 order and that Title 42 was active solely due to the United States District Court, Western District of Louisiana’s preliminary injunction of the termination. *Louisiana v. Ctrs. for Disease Control & Prevention*, 603 F. Supp. 3d 406, 441 (W.D. La. 2022). *Huisha-Huisha III* was also vacated by an order from September 7, 2023. *Huisha-Huisha v. Mayorkas (Huisha-Huisha IV)*, No. 22-5325, 2023 WL 5921335 (D.C. Cir. Sept. 7, 2023).

167. *Arizona v. Mayorkas*, No. 22A544, 2022 WL 17750015 (U.S. Dec. 19, 2022) (mem.), vacated by 143 S. Ct. 478 (2022).

168. *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022).

that have outlived their shelf life.”¹⁶⁹ In early February 2023, the Biden Administration filed a brief that provided: “[t]he anticipated end of the public health emergency on May 11, and the resulting expiration of . . . Title 42 . . . would render this case moot”¹⁷⁰ On February 16, 2023, the Supreme Court withdrew the Title 42 case from the calendar.¹⁷¹

III. FEMALE FOREIGN NATIONALS & PANDEMIC POLICIES

A. Motherhood During Title 42

On August 18, 2021, the Acting Commissioner of CBP issued a memorandum addressing pregnant women in the custody of CBP.¹⁷² The memorandum reported the CBP’s decision “that the treatment of women who give birth in CBP custody raises significant humanitarian and public health interests, and that these interests warrant serious consideration as part of a customs officer’s assessment of whether an exception to the Order, based on the totality of the circumstances, is warranted.”¹⁷³ The Acting Commissioner explained that because mothers who gave birth in the custody of CBP might need more health care services, expelling mothers might be harmful to maternal or infant health.¹⁷⁴ The memorandum recognized that expulsion could send mothers to areas where the infant’s safety and the mother’s recovery would be threatened.¹⁷⁵

The Acting Commissioner wrote that officers “should consider that the public health and humanitarian interests may weigh in favor of an exception from the Order for mothers” who gave birth in CBP custody and who need medical assistance.¹⁷⁶ Thus, the memorandum instituted a requirement that an officer consulted with a supervisor when the officer decided in light of the totality of the circumstances that a mother who gave birth in CBP custody and who needed medical assistance should be subject to expulsion.¹⁷⁷ Furthermore,

169. *Id.* at 479 (Gorsuch, J., dissenting).

170. Priscilla Alvarez & Ariane de Vogue, *Biden Administration Tells Supreme Court Title 42 Will End When COVID-19 Public Health Emergency Expires*, CNN, <https://www.cnn.com/2023/02/07/politics/title-42-biden-administration-public-health-emergency-expire/index.html> (Feb. 7, 2023, 11:17 PM).

171. Ariane de Vogue & Devan Cole, *Supreme Court Removes Oral Arguments over Title 42 Immigration Policy from Its Calendar*, CNN (Feb. 16, 2023, 2:29 PM), <https://www.cnn.com/2023/02/16/politics/supreme-court-title-42/index.html>. Arguments had been planned for March 1, 2023. *Id.*

172. Memorandum from Troy A. Miller, Acting Commissioner, U.S. Customs & Border Protection 1 (2021), <https://holdcbpaccountable.org/wp-content/uploads/2021/08/2021-08-18-dhs-cbp-pregnancy-childbirth-guidance.pdf>.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

the Acting Commissioner explained that CBP would implement a new practice of offering a health examination to all women in CBP custody who affirmatively indicated they were pregnant, as long as a health care worker was available.¹⁷⁸

Between March 2020 and early February 2021, at least eleven female foreign nationals were expelled to Mexico without receiving birth certificates for their newborn U.S. citizen children.¹⁷⁹ In July 2020, a Haitian woman came to the United States when she was nine months pregnant.¹⁸⁰ Her water broke while United States Border Patrol held her in custody.¹⁸¹ She gave birth in a hospital in Chula Vista, California, and was discharged with her newborn daughter after three days.¹⁸² Though the mother thought she would be able to join her family and seek asylum, CBP officers drove her across the border to Mexico.¹⁸³ She had traveled over a month, while pregnant, to cross the border.¹⁸⁴ CBP officers left the mother “across from the San Diego-Tijuana border, on the side of the road” without her U.S. citizen daughter’s birth certificate.¹⁸⁵ With no knowledge of what next steps to take, the mother and her newborn “slept right there on the street, on the other side of safety.”¹⁸⁶

The Supreme Court has held that due process applies to any foreign national inside the jurisdiction of the United States.¹⁸⁷ The Constitution prescribes that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”¹⁸⁸ Consequently, expelling new mothers violates due process.¹⁸⁹

178. *Id.*

179. Tanvi Misra, *Revealed: US Citizen Newborns Sent to Mexico Under Trump-Era Border Ban*, GUARDIAN (Feb. 5, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/feb/05/us-citizen-newborns-mexico-migrant-women-border-ban>.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL’Y REV. 303, 314 (2001). Coffey has argued that foreign nationals within the United States “have a due process right to seek asylum.” *Id.* at 306.

188. U.S. CONST. amend. V.

189. See, e.g., Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, JUST SEC. (Apr. 13, 2020), <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>. Title 42’s “summary expulsion authority . . . raises obvious procedural Due Process issues. [It] provides no procedure at all, authorizes expulsion without a hearing, [and] denies access to the statutory asylum screening and protection.” *Id.*

B. Asylum, COVID-19, & Violence Against Women

Domestic violence and violence from criminal organizations were factors influencing women from El Salvador, Guatemala, and Honduras to leave their countries in the years before COVID-19.¹⁹⁰ Additionally, women have experienced extortion, physical violence, sexual violence, and abduction along their path toward the United States.¹⁹¹ Once female foreign nationals cross the border, CBP or Immigration and Customs Enforcement (“ICE”) can hold them in detention throughout the asylum-seeking procedure.¹⁹² Detention can intensify the distress that female foreign nationals experienced within their countries of origin and during their journeys.¹⁹³

A number of areas in Latin America experienced a rise in violence against women when services (i.e., shelters) closed in the pandemic.¹⁹⁴ In the words of one stakeholder, “[i]t was a pressure-cooker stress where there was preexisting violence and then no escape route.”¹⁹⁵ A news article from June 2020 explained that reports of domestic abuse grew by fifty percent in Colombia.¹⁹⁶ In Venezuela, femicide escalated by sixty-five percent in April 2020.¹⁹⁷ The closing of borders and expulsions can lead foreign nationals to unsafe housing where they are at risk for gender-based violence.¹⁹⁸ Additionally, persecutors can discover and cause further injury to survivors of gender-based violence who await asylum procedures at the border.¹⁹⁹

The case of María de Jesús illustrates the difficulty of seeking safety in the United States during the pandemic.²⁰⁰ María de Jesús left Guatemala with her son following four years of sexual abuse, beatings, and humiliation perpetrated by her ex-boyfriend.²⁰¹ She employed a smuggler and traveled to the Southern border, hopeful that the Biden Administration would grant her entry into the United States as a survivor of domestic violence.²⁰² María de Jesús stated: “The only solution was to be far away where I didn’t feel scared

190. U.N. HIGH COMM’R FOR REFUGEES, *supra* note 14, at 15.

191. *Id.* at 43–44.

192. *Id.* at 45–46.

193. *Id.* at 47.

194. Villegas, *supra* note 18.

195. *Id.*

196. Murray, *supra* note 13.

197. *Id.*

198. SARA DUVISAC & IRENA SULLIVAN, OXFAM & TAHIRIH JUST. CTR., SURVIVING DETERRENCE: HOW US ASYLUM DETERRENCE POLICIES NORMALIZE GENDER-BASED VIOLENCE 2 (2022), https://webassets.oxfamamerica.org/media/documents/Oxfam_Tahirh_Surviving_Deterrence_English_2022.pdf.

199. *Id.*

200. Villegas, *supra* note 18.

201. *Id.*

202. *Id.*

every day.”²⁰³ She is one of many women from Central America who escaped domestic violence and appeared at the Southern border to discover a barrier to entry.²⁰⁴ While violence against women grew in Latin America, women who made it to the border were faced with the nebulosity of waiting.²⁰⁵

As of 2021, the majority of female foreign nationals seeking asylum in the United States had fled Central America.²⁰⁶ Advocates reported that a mere number of foreign nationals were granted entry for humanitarian purposes such as health issues or “imminent harm or risk of torture” during Title 42.²⁰⁷ Survivors of domestic violence at the border were often unlikely to receive protection amid Title 42’s constraints.²⁰⁸ They often remained in Mexico, living in overcrowded shelters or “tent cities,” with criminal groups or immigrant smugglers interfering in some cases.²⁰⁹ Additionally, other foreign nationals returned to the violence they sought to leave.²¹⁰

IV. THE ROLE OF POLICY

A. Women’s Health

Title 42 impeded upon foreign nationals’ ability to seek asylum under 8 U.S.C. § 1158(a)(1).²¹¹ Even though the Trump Administration established Title 42 for public health considerations, foreign nationals were detained in congregate environments prior to expulsion and were deported via airplanes with foreign nationals taken from detention units with outbreaks of COVID-19.²¹² Despite immigration relying upon a family or employer sponsor²¹³ and asylum deriving from an entitlement to protection as a refugee,²¹⁴ Title 42 was a governmental policy that restricted asylum to address the concern of unlawful immigration.²¹⁵ Meanwhile, asylum seekers have explained that the choice to escape from their countries results from having no other options.²¹⁶ In the words

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. Armstrong, *supra* note 8, at 366–67.

212. Lawrence O. Gostin & Eric A. Friedman, *Title 42 Exclusions of Asylum Seekers—A Misuse of Public Health Powers*, 4 J. AM. MED. ASS’N HEALTH FORUM 1, 2 (2023).

213. AM. IMMIGR. COUNCIL, *supra* note 19, at 3.

214. *E.g.*, AM. IMMIGR. COUNCIL, *supra* note 20, at 1.

215. *E.g.*, Armstrong, *supra* note 8, at 376–78. *See also* Guttentag, *supra* note 195 (arguing that Title 42 constituted a “shadow immigration expulsion regime”). I also credit Professor Rudy Monterrosa for raising this issue during one of our discussions.

216. Villegas, *supra* note 18.

of a woman who came to the United States from El Salvador, “I didn’t know anything about this country. I just knew it was a faraway place where people feel safe.”²¹⁷

The United States could implement a number of potential policies to help increase local protections for women in the Northern Triangle.²¹⁸ The U.S. House of Representatives endorsed a bill that permits the State Department to form agreements with the governments of El Salvador, Guatemala, and Honduras.²¹⁹ These “Women and Children Protection Compacts” should address and fund prevention initiatives.²²⁰ The United States should increase funding for initiatives such as health programs that target males, cash transfers benefitting individuals at risk, and prevention workshops for local leaders.²²¹ Additionally, the United States could provide funding for and form partnerships with female-directed organizations within El Salvador, Guatemala, and Honduras.²²² Data collection at the municipal level is another recommendation in light of the dearth of accurate data.²²³ Promoting women’s safety at the domestic level is the first way to prevent a flood of female asylum seekers escaping violence during a future pandemic.²²⁴

B. Pandemics

In terms of policy specific to a future pandemic, congressional amendment could ensure that Title 42 will never be implemented as an obstacle to asylum.²²⁵ Title 42 could also be restricted in its application for situations when “clear scientific evidence shows that border restrictions are necessary to prevent the introduction of a new disease into the US or to significantly alter the course of an existing disease.”²²⁶ Any usage of Title 42 should include routine evaluation of the policy on border security.²²⁷

As of 2019, more than ninety percent of hundreds of asylum seekers along the Southern border had friends or family members whom they could join within

217. *Id.* This woman is AB, of the case noted in footnote 72. Matter of A-B-, 27 I&N Dec. 316, 316 (U.S. Atty. Gen. 2018), *vacated by* 28 I&N Dec. 307 (U.S. Atty. Gen. 2021).

218. Resstack, Schnabel & O’Donnell, *supra* note 11. The Northern Triangle includes Honduras, Guatemala, and El Salvador. U.N. HIGH COMM’R FOR REFUGEES, *supra* note 14, at 2.

219. Resstack, Schnabel & O’Donnell, *supra* note 11.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *See id.*

225. Gostin & Friedman, *supra* note 218, at 2.

226. *Id.*

227. *Id.*

the United States.²²⁸ In a future pandemic, the United States should allow female foreign nationals escaping abuse to join their family or friends within the country, rather than subject them to expulsion.²²⁹ Alternatively, if women have no contacts, then the United States should assist them in securing protection at HHS domestic violence shelters that are federally funded by resources such as the Family Violence Prevention and Service Act (“FVPSA”), which carries no limitations based on immigration status.²³⁰

Finally, the United States should carve out safeguards specifically for female foreign nationals in its updated migration policies.²³¹ For example, through a mobile application called CBP One™, a foreign national can schedule an arrival time at a POE on the Southwest border.²³² To ensure women’s safety,²³³ the government should set aside a certain number of appointments for female foreign nationals. Additionally, as of May 11, 2023, the United States imposes “a rebuttable presumption that certain noncitizens who enter the United States without documents sufficient for lawful admission are ineligible for asylum, if they traveled through a country other than their country of citizenship, nationality, or, if stateless, last habitual residence.”²³⁴ The

228. Q&A: *US Title 42 Policy to Expel Migrants at the Border*, HUM. RTS. WATCH, (Apr. 8, 2021, 4:15 PM), <https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border>.

229. *See id.*

230. Office for Civil Rights, *Domestic Violence Fact Sheet - Access to HHS-Funded Services for Immigrant Survivors of Domestic Violence*, U.S. DEP’T HEALTH & HUM. SERVS. (June 8, 2020), <https://www.hhs.gov/guidance/document/domestic-violence-fact-sheet-access-hhs-funded-services-immigrant-survivors-domestic>.

231. *See generally, e.g., Fact Sheet: Notice of Proposed Rulemaking “Circumvention of Lawful Pathways”*, U.S. DEP’T HOMELAND SEC. (Feb. 21, 2023), <https://www.dhs.gov/news/2023/02/21/fact-sheet-notice-proposed-rulemaking-circumvention-lawful-pathways> (listing DHS’s actions, such as “putting in place a mechanism for all migrants to schedule a time and place to arrive in a safe, orderly and lawful manner at [POEs] via use of the CBP One mobile app”).

232. *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314, 31317 (May 16, 2023).

233. *See* DUVISAC & SULLIVAN, *supra* note 204, at 2 (arguing that “US asylum deterrence policies engender conditions that cause [gender-based violence (“GBV”)] to proliferate at the US southern border [partially] because . . . survivors of GBV who are fleeing persecutors at home face an increased risk of being found and re-harmed by such persecutors while waiting at the border”). An article explains that a woman who came from Venezuela to Mexico reported she had been unable to make an appointment using the application for a month. Joel Rose, *Illegal Border Crossings Are Down. One Big Reason Why Is Now Part of a Court Fight*, NPR (July 19, 2023), <https://www.npr.org/2023/07/19/1188438846/illegal-border-crossings-are-down-one-big-reason-why-is-now-part-of-a-court-figh>. When the article was written, “[u]p and down the border, roughly 100,000 migrants [were] waiting in camps and cities . . . hoping for a chance to seek asylum.” *Id.*

234. *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314, 31318 (May 16, 2023). The rebuttable presumption does not apply to foreign nationals of the foregoing description who “were provided appropriate authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process; presented at a POE at a pre-scheduled time or demonstrate that the mechanism for scheduling was not possible to access or use due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or sought asylum or other

presumption can be rebutted in certain cases, which include immense danger to health or safety.²³⁵ Further, this presumption can be rebutted in “other exceptionally compelling circumstances.”²³⁶ Given that a substantial proportion of women in the past demonstrated their likelihood of eligibility for some form of safety,²³⁷ the government should implement in practice a policy that rebuts this presumption for female foreign nationals.

CONCLUSION

History shows that female foreign nationals will continue to resist abuse and travel the treacherous path to the United States.²³⁸ As the latest migration policy allegedly based upon public health, Title 42 erased the entitlement to seek asylum under 8 U.S.C. § 1158(a)(1) and violated the duty of *non-refoulement*.²³⁹ Gender-based violence is unlikely to end without proactive policies in place in countries with the highest statistics of abuse.²⁴⁰ In a future pandemic, the United States must honor its international and domestic obligations against expelling female foreign nationals into places of persecution.²⁴¹ Updated migration policies²⁴² should also carve out safeguards for female foreign nationals.

protection in a country through which they traveled and received a final decision denying that application.” *Id.*

235. *Id.*

236. *Id.*

237. Eighty-two percent of females from the Northern Triangle and Mexico who underwent the credible fear assessment with an asylum officer were deemed to possess a substantial likelihood of showing they were eligible for asylum or Convention against Torture safeguards in Fiscal Year 2015. U.N. HIGH COMM’R FOR REFUGEES, *supra* note 14, at 2 n.2. The numbers behind the percentage were 13,116 of 16,077. *Id.*

238. *See id.* at 2.

239. *E.g.*, Armstrong, *supra* note 8, at 366–67.

240. Resstack, Schnabel & O’Donnell, *supra* note 11.

241. *E.g.*, *id.*

242. *See generally* Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31317–18 (May 16, 2023).