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**Getting to the Root of the Problem:
How Biden’s “Root Causes Initiative” Can Bypass the Title 42 Immigration Dilemma**
By: Randolph Portugal¹

Introduction

The Coronavirus (Covid-19) pandemic knew no bounds when it brought unique challenges to immigrants and two presidential administrations and pitted public health and U.S. immigration policies against one another.² Even prior to the outbreak of Covid-19, the Trump administration brought forth a near ruthless campaign against immigration and established the most stringent restrictions in modern times.³ Soon after the outbreak, the Trump administration raced to place a sweeping series of measures in response to the crisis – particularly under a health policy guise.⁴ In the process, the Trump administration advanced its longstanding immigration goals, including summarily ending asylum at the U.S.-Mexico border.⁵ More specifically, the Trump administration invoked 42 U.S.C. § 265, also known as Title 42, which allows the United States government to temporarily block noncitizens from entering the country “when doing so is required in the interest of public health.”⁶ Trump’s reasoning for implementing Title 42 was to prevent the spread of Covid-19 among migrants in crowded border patrol stations.⁷

¹ *J.D. Candidate*, 2023, Seton Hall University School of Law; B.A., 2012, The College of New Jersey.

² Muzaffar Chishti & Sarah Pierce, *Crisis within a Crisis: Immigration in the United States in a Time of Covid-19*. MIGRATION POLICY INSTITUTE, (July 16, 2020), <https://www.migrationpolicy.org/article/crisis-within-crisis-immigration-time-covid-19>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Nina B. Witkofsky, *Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf.

⁷ *President Donald J. Trump Is Taking Necessary Safety Measures at the Border to Prevent Further Spread of the Coronavirus*. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, Mar. 20, 2020, <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-taking-necessary-safety-measures-border-prevent-spread-coronavirus/>.

Until recently, the Biden administration has been much more active in trying to unravel the Trump's administration actions on immigrations via a series of executive orders.⁸ Nevertheless, the Biden administration is struggling to articulate a clear vision for its border policy, and many of its actions have been mostly reactive. In fact, the current administration has continued the Trump administration's policy of automatically expelling unauthorized border crossers without screening them for asylum eligibility.⁹ Moreover, under the Title 42 policy and within a year of his administration, President Biden has carried out 990,000 expulsions, which was more than double of the 460,000 expulsions that the Trump's administration carried out.¹⁰ Despite President Biden's stance in trying to lift Title 42 due to Covid-19's waning, the current administration seems to embrace the Trump-era policy by expanding it.¹¹ In October 2022, the Department of Homeland Security (DHS) announced it would use Title 42 to turn away Venezuelans present at the border – nixing asylum for a nationality that has become one of the largest populations to seek refuge in the U.S. following years of instability in their home country.¹²

This paper explores the Trump administration's onslaught against legal immigration using Title 42, President Biden's regressive stance in terminating Title 42, and the Biden administration's "Root Causes Initiative" as a more permanent solution to the migration surge happening at the United States-Mexico border. Political viewpoints revolving Title 42 have sparked intense debates between Republicans and Democrats on whether ending the policy is

⁸ Muzaffar Chishti & Jessica Bolter, *Biden at the One-Year Mark: A Greater Change in Direction on Immigration than Is Recognized*. MIGRATION POLICY INSTITUTE, (May 25, 2022), <https://www.migrationpolicy.org/article/biden-one-year-mark>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Rebecca Beitsch & Rafael Bernal, *Biden Embraces Trump's Title 42 with Expansion to Venezuela*. THE HILL, (Oct. 18, 2022), <https://thehill.com/latino/3693444-biden-embraces-trumps-title-42-with-expansion-to-venezuela/>.

¹² *Id.*

justified and whether immigration officials are prepared to handle an expected increase in migrants at the border should Title 42 be lifted.¹³ The immigration issue at the border, as complicated as it is, have conservatives and liberals agreeing that ending Title 42 would be a terrible mistake and accuse the Biden administration of not having a clear plan in place to deal with the surge in migration; meanwhile there are other leading Democrats like Senate Majority Leader Chuck Schumer calling the policy “draconian” and “inhumane.”¹⁴ Still, in the midst of these political arguments lie the legal arguments for and against lifting Title 42.¹⁵ In May 2022, a federal judge ruled that restrictions must stay in place to avoid a “wave of illegal migration and drug trafficking” that would affect twenty-four states.¹⁶

However, what is even more alarming are the surges of migrants arriving at the United States-Mexico border which reached a rate at an all-time high, with United States authorities detaining 1.7 million people during the fiscal year ending in September 2021.¹⁷ Of these individuals, more than 655,000 are from Mexico, and another 700,000 are from El Salvador, Guatemala, and Honduras – collectively known as the “Northern Triangle.”¹⁸ Up until September 2021, border patrol agents expelled over one million migrants, relying on Title 42 for

¹³ Catherine E. Shoichet, *What Is Title 42? How It Changed Things at the Border, and Why It's Sparking Debate*. CNN, (May 20, 2022), <https://www.cnn.com/2022/04/26/politics/title-42-explainer-cec/index.html>.

¹⁴ *Id.*

¹⁵ See e.g., *Louisiana v. Ctrs. for Disease Control & Prevention*, No. 6:22-CV-00885, 2022 U.S. Dist. LEXIS 91296, at *17 (W.D. La. May 20, 2022) (holding that the CDC’s decision to terminate its prior Title 42 orders were subject to judicial review); *Texas v. Biden*, 589 F. Supp. 3d 595, 623 (N.D. Tex. 2022) (holding that because Texas has a significant interest in maintaining the health and safety of their state; therefore . . . the public has an “interest in stemming the flow of illegal immigration . . . the public interest favors an injunction).

¹⁶ Myah Ward & Jonathan Lemire. *Judge Blocks Biden Administration from Lifting Title 42 Border Policy*. POLITICO, (May 20, 2022), <https://www.politico.com/news/2022/05/20/judge-blocks-biden-administration-from-lifting-title-42-border-policy-00034195>.

¹⁷ Nick Miroff, *Border Arrests Have Soared to an All-Time High, New CBP Data Shows*, WASH. POST, (Oct. 20, 2021), https://www.washingtonpost.com/national/border-arrests-record-levels-2021/2021/10/19/289dce64-3115-11ec-a880-a9d8c009a0b1_story.html.

¹⁸ Eileen Sullivan & Miriam Jordan, *Illegal Border Crossings, Driven by Pandemic and Natural Disasters, Soar to Record High*, N.Y. TIMES, (Oct. 22, 2021), <https://www.nytimes.com/2021/10/22/us/politics/border-crossings-immigration-record-high.html>.

justification.¹⁹ Due to the political, legal, and international repercussions stemming from the effects of Title 42's implementation, it is imperative for the Biden administration to act swiftly and effectively in balancing the interests of all parties involved, but particularly more so the migrants escaping poverty and economic inequality, fleeing pervasive crime and corruption, and seeking asylum in the United States²⁰ to finally assuage any concerns and fears that United States citizens and political players have regarding the surge of migrants.²¹

There are four parts to this paper. The first two are dedicated to the policy responses that both the Trump administration and the Biden administration have implemented regarding immigration, specifically Title 42 and its relationship to the pandemic. Specifically, Part I examines the Trump administration's perspective on immigration and how his outlook on migrants influenced the way he handled migration surges at the border via the Migrant Protection Protocols and Title 42. Part II assesses the Biden administration's response to immigration at the border and the United States' "return to form" for granting assistance to asylum seekers. Part III focuses on the Biden administration's use of Title 42 and its effects on migrants. Finally, Part IV examines the origin of migration and the United States "Root Causes Initiative" to combat the underlying reasons for why migration occurs – particularly corruption, crime, and poverty in the Northern Triangle. To conclude, this paper will provide the status of Title 42 as of November 2022 and will reinforce the proposal that attacking root causes of migration is best to bypass the Title 42 dilemma. Resolving the main causes of mass migration from Central America will be more efficient in deterring migrants from coming to the United States-Mexico border and will

¹⁹ *Id.*

²⁰ United States National Security Council (NSC), *U.S. Strategy for Addressing the Root Causes of Migration in Central America*, (July 29, 2021).

²¹ Catherine E. Shoichet, *What Is Title 42? How It Changed Things at the Border, and Why It's Sparking Debate*. CNN, (Nov. 20, 2022), <https://www.cnn.com/2022/11/16/politics/title-42-blocked-whats-next-explainer-cec/index.html>.

hopefully alleviate a migration crisis that consistently becomes the epicenter of major political debate, but more importantly, assist thousands of people whose lives hang in the balance.²²

I. Trump's Immigration Stance and Response to Covid-19 at the Border

Immigrants often have a distinctively negative image in popular culture.²³ Although the Immigration and Nationality Act (INA) of 1952 has not officially defined the term “illegal alien,” this phrase figures prominently in popular debate over immigration.²⁴ “Illegal aliens” are branded as lawbreakers, intruders, and undesirables we want excluded from society.²⁵ The very use of “illegal aliens” consistently imposes a bias in the speaker.²⁶ By stripping people of their humanity, the terminology helps rationalize the harsh treatment of undocumented immigrants under immigration laws.²⁷ To make matters worse, the courts have refused to intervene to halt the excesses of the political process.²⁸ Periodic waves of harsh exclusions and deportation campaigns existed through the United States’ immigration laws and their enforcement.²⁹ Restrictionist measures, like the Chinese exclusion laws, the discriminatory national origins quotas system, and sporadic deportation campaigns that target Mexican nationals, are monuments to times when anti-immigrant sentiment carried the day in the political process.³⁰

A. Trump's Immigration Policies

Anti-immigrant rhetoric was central to the election of President Trump and remained a defining feature of his presidency.³¹ At the beginning of his 2016 campaign, he denigrated

²² See Schoichet, *supra* note 13.

²³ Kevin R. Johnson et al., UNDERSTANDING IMMIGRATION LAW (3rd ed. 2019).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 34.

²⁹ *Id.*

³⁰ *Id.*

³¹ Steffie Woolhandler et al., *Public Policy and Health in the Trump Era*, 397 THE LANCET COMMISSIONS 719–721 (2021), [https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(20\)32545-9.pdf](https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(20)32545-9.pdf).

immigrants from Mexico as rapists, drug dealers, criminals, invaders, parasites, terrorists, and encouraged his followers to embrace this dehumanizing perspective.³² Mexicans were not the only ones being spoken poorly of but President Trump has spoken harshly about other migrants groups immigrants including Central Americans, Haitians, and others.³³ The consequences have sometimes been lethal, even within the United States, as in the case of a mass shooting of Latinx shoppers at a Texas Walmart store in August, 2019.³⁴ The shooter, who told police he had targeted Mexican people, had posted a manifesto parroting President Trump's anti-immigrant rhetoric.³⁵

The Trump's administration's anti-immigrant policies spanned every stage of the immigration process, from entry and integration within the United States to detention and deportation.³⁶ President Trump began to implement draconian enforcement of existing immigration laws and promulgated new anti-immigrant policies upon assuming office.³⁷ Trump drew on the migration and apprehension trends at the United States Southern border to

³² *Id.*

³³ See, e.g., Josh Dawsey, *Trump Derides Protections for Immigrants from "Shithole" Countries*, WASH. POST, (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.3434cc016439; Janell Ross, *From Mexican Rapists to Bad Hombres, The Trump Campaign in Two Moments*, WASH. POST, (Oct. 20, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/?utm_term=.27306c3d84fe.

³⁴ See Woolhandler, *supra* note 31, at 719.

³⁵ *Id.*

³⁶ *Id.* at 720.

³⁷ *Id.* (In fact, just 7 days after his inauguration, President Trump issued an executive order entitled Protecting the Nation from Foreign Terrorist Entry into the US, which he termed a Muslim ban. This ban, which is redolent of the Chinese Exclusion Act that outlawed immigration from China and, later, other Asian nations until 1943, prohibited travelers from seven Muslim-majority countries (Iran, Iraq, Libya, Somalia, Syria, Sudan, and Yemen) from entering the USA. He subsequently extended the policy, banning immigration from six additional countries (Myanmar, Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania). At the time that President Biden rescinded the immigration ban on Jan 20, 2021, it applied to nearly one-quarter of the population of the African continent. Additionally, Trump also progressively lowered the quota of refugees admitted to the USA. Consequently, fewer refugees have been resettled than at any time since 1980 and the USA is no longer the world's top country for refugee admissions.)

manufacture policies that specifically targeted Latino communities.³⁸ Stephen Miller, one of President Trump’s immigration policy architects, worked with several nativists organizations, including the Federation for American Immigration Reform and the Center for Immigration Studies, whose goals are to reduce the migration of non-Whites to the United States.³⁹ Miller advocated for actions such as “zero tolerance,” ultimately implemented in May 2018, that inhumanely separated children from their parents seeking asylum at the United States-Mexico border.⁴⁰

In January 2019, the DHS, under the Trump administration, announced and implemented another draconian policy known as the “Migrant Protection Protocols” (MPP), but which was commonly referred to as the Remain in Mexico Program.⁴¹ The MPP required asylum-seekers to “remain in Mexico” for the duration of their legal case and allowed them to enter the United States only for initial processing and subsequent court appointments rather than have them processed in the United States safely with family members.⁴² Under Trump, more than 71,000 asylum seekers were sent back to Mexico to await court hearings, with 29,000 still pending when President Trump left office in January 2021.⁴³ Even though migrants who were sent back to Mexico did not go back to the countries they were fleeing from, the MPP policy became deadly as it delivered asylum seekers into the hands of cartels and corrupt Mexican government agents

³⁸ Stephanie L. Canizales & Jody Agius Vallejo, *Latinos & Racism in the Trump Era*, 150 THE MIT PRESS 750–164 (2021), <https://www.jstor.org/stable/48691409>

³⁹ *Id.* at 154.

⁴⁰ *Id.* See also Jean Guerrero, *Hate Monger: Stephen Miller, Donald Trump and the White Nationalist Agenda*, HARPERCOLLINS PUBLISHERS. (2019) (The demonization of migrants is to Miller what the border wall is to Trump: a tool with which to mobilize the base. With it, he sold cruelty and castigation toward brown youths; separating migrant children from parents; revoking protections for people brought to the US as children; incarcerating teenagers with tenuous ties to MS-13 and more. Trump said “alien minors” were a great cost to life.)

⁴¹ Priscilla Solano & Douglas S. Massey, *Migrating Through the Corridor of Death: The Making of a Complex Humanitarian Crisis*, 10 JOURNAL ON MIGRATION AND HUMAN SECURITY 147–172 (2022), <https://journals.sagepub.com/doi/pdf/10.1177/23315024221119784>

⁴² *Id.*

⁴³ *Id.* at 159.

who kidnap, rape, torture, traffic, and extort them and their family members.⁴⁴ During the two years that the Trump administration implemented MPP, there were at least 1,544 reported cases of violent attacks against people returned to Mexico and forced to wait in danger for their immigration court proceedings.⁴⁵

Based on the above statistics, the MPP unequivocally violates international human rights law by denying refugees their legal right to seek asylum in the United States, while exposing people to extortion and violence as they await hearings in Mexico.⁴⁶ Returning asylum seekers and migrants to Mexico under MPP is dangerous and inhumane, if not a death sentence since these migrants have been brutally murdered.⁴⁷ Overall, President Trump's rhetoric and policies reinforce the idea that Latino asylum seekers are unworthy of entry to the United States and of access to rights and citizenship, and they manufactured a humanitarian crisis at the border by detaining children and families on U.S. soil in facilities likened to cages and under deplorable conditions, subjecting them to abuse, and creating border refugee camps.⁴⁸

B. Trump's Covid-19 Response

Using MPP, the Trump Administration had already taken steps to turn away families seeking safety.⁴⁹ Nevertheless, after the novel Coronavirus was detected in Wuhan, China in December 2019, Trump's first action in response to the Covid-19 Outbreak was to implement a travel ban on non-U.S. citizens or residents coming from China.⁵⁰ In mid-March, the Trump administration

⁴⁴ *Any Version of "Remain in Mexico" Policy Would Be Unlawful, Inhuman, and Deadly*, HUMAN RIGHTS FIRST, (2021)

⁴⁵ *Id.*

⁴⁶ *See* Canizales & Vallejo, *supra* note 37, at 159.

⁴⁷ *See supra* note 44. (A Salvadoran asylum seeker was killed in Tijuana in November 2019 after DHS returned him to El Salvador under MPP.)

⁴⁸ *Id.*

⁴⁹ *How the Trump Administration Is Using Covid-19 to End Asylum*, THE IRC, (2020) <https://www.rescue.org/article/how-trump-administration-using-covid-19-end-asylum>.

⁵⁰ *See* Chishti & Pierce, *supra* note 2.

implemented the unprecedented closures of the United States land borders with Mexico and Canada, invoking little-known, decades-old statutes that give the federal government sweeping powers during public health threats and national emergencies.⁵¹ Thus, the Trump Administration relied on Title 42 of the 1944 Public Health Services Act which permits surgeon general to suspend the entry into the United States of persons from certain countries when he “determines that by reason of the existence of any communicable disease in a foreign country there is a serious danger of the introduction of such disease into the United States” and the suspension is “required in the interest of the public health.”⁵²

Using this public health statute, the director of the federal Centers for Disease Control and Prevention (CDC), Robert Redford, issued an order temporarily barring the entry of asylum seekers and others arriving at the border without prior authorization to enter.⁵³ “The danger to the public health that results from the introduction of such persons into congregate settings at or near the borders is the touchstone of this order,” wrote Redfield, citing the “serious danger” of the transmission of the Covid-19 virus to ports of entry and Border Patrol facilities.⁵⁴ Nevertheless, the United States was not alone in barring asylum seekers, a number of other countries, including Canada, Greece, and Hungary, have similarly suspended some or all asylum applications during the pandemic’s inception.⁵⁵ Despite these other nations following suit, the Trump Administration had used Title 42 of the U.S. Code to strip asylum-seekers of legal protections, forcibly returning them to communities that were dangerous just as the Trump administration’s MPP did.⁵⁶ In fact, over 2,000 children have been returned to large and unsafe cities as unaccompanied minors

⁵¹ *Id.*

⁵² *Id.*; 42 U.S.C. § 265.

⁵³ See Witkofsky, *supra* note 6.

⁵⁴ See Chishti & Pierce, *supra* note 2.

⁵⁵ *Id.*

⁵⁶ *Id.*

under this process in the ensuing months of Title 42 being implemented.⁵⁷ Nevertheless, on November 18, 2020, a Washington, D.C. federal judge blocked the Trump Administration from deporting any more unaccompanied migrant children who arrived at the United States-Mexico border.⁵⁸

Despite this ruling, the Trump administration still did not back off from its threat to deport any unauthorized immigrants located anywhere in the US standing firm on his anti-immigration rhetoric.⁵⁹ Nevertheless, under pressure from lawmakers and advocates, United States Immigration and Customs Enforcement (ICE) announced it would temporarily adjust its protocols away from randomized enforcement and it would instead focus on public-safety risks and individuals subject to detention based on criminal grounds.⁶⁰ This was something perceived as hopeful for most of the estimated eleven million unauthorized immigrants in the U.S. since it seemed like they would be shielded from enforcement.⁶¹ Nevertheless, Ken Cuccinelli, the second in command at the DHS, undercut this announcement immediately and lead the overall immigrant population into confusion.⁶² Cuccinelli took to Twitter and indicated that ICE would not be prevented from enforcement outside newly designated priorities.⁶³ Three days after this priority shift, the immigrant detainee population rose to 38,058 individuals, just thirty-nine percent of whom were convicted criminals – the other remaining sixty were asylum seekers or

⁵⁷ Andrew Cohen & Lauren-Brooke Eisen. *Immigration Detention and Covid-19*. BRENNAN CENTER FOR JUSTICE, (Jan. 7, 2022), <https://www.brennancenter.org/our-work/research-reports/immigration-detention-and-covid-19>.

⁵⁸ *Id.*; P.J.E.S. v. Wolf, 502 F. Supp. 3d 492, 520 (D.D.C. 2020).

⁵⁹ Nicole Narea, *Trump's Policies Are Putting Vulnerable Immigrants at Risk as Coronavirus Spreads*, VOX, (Mar. 19, 2020), <https://www.vox.com/2020/3/19/21184081/trump-coronavirus-immigration-enforcement-courts-ice>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

unauthorized immigrants awaiting their hearings in immigration court exacerbating the spread of Covid-19 in congested detention centers.⁶⁴

The sixty percent of individuals detained in ICE detention centers without criminal convictions were stuck in limbo as ICE had not announced any plans to release immigrants.⁶⁵ Lawmakers and advocates have been calling for their release, especially for detainees who were older or had underlying health conditions that made them more susceptible to the virus.⁶⁶ Despite these calls for ICE to cease detaining immigrants in large numbers, ICE did not issue uniform guidance on the precautions its detention centers when congregating migrants in mass at the start of the pandemic.⁶⁷ It was not until April 2020, where a federal judge in California ordered ICE to “identify and track” every person in ICE detention at an elevated risk of complications from Covid-19 as the number of confirmed positive cases reached 220 among those in ICE custody and thirty confirmed cases among ICE employees working in detention facilities.⁶⁸

Ultimately, migrants who were subject to Title 42 could not contest their expulsion on the grounds that they would face persecution in the country to which they will be expelled.⁶⁹ United States Customs and Border Protection (CBP) stopped processing all asylum seekers seeking humanitarian protection who arrived at ports of entry at the southern border.⁷⁰ Like those

⁶⁴ See Chishti & Pierce, *supra* note 2.

⁶⁵ See Narea, *supra* note 59.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Hannah Hagemann, *Federal Judge Orders Ice to Consider Releasing Detainees at High Risk for Covid-19*. NPR, (Apr. 21, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/21/839470122/federal-judge-orders-ice-to-consider-releasing-detainees-at-high-risk-for-covid> (In his opinion, United States District Judge Jesus Bernal wrote that ICE has “likely exhibited callous indifference to the safety and wellbeing of [detained immigrants at risk.] The evidence suggest systemwide inaction that goes beyond a mere ‘indifference of medical opinion or negligence’”).

⁶⁹ *A Guide to Title 42 Expulsions at the Border*, AMERICAN IMMIGRATION COUNCIL, (June 14, 2022), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border#:~:text=Title%2042%20has%20led%20to%20the%20mass%20expulsion%20of%20thousands,reopen%20to%20those%20seeking%20asylum.>

⁷⁰ *Id.*

detained, this left nearly 15,000 people in limbo who had been waiting on lists for an opportunity to request asylum at ports of entry.⁷¹ There was only one very limited exception to Title 42 for people who “spontaneously” inform CBP officers that they feared being tortured in the country to which they would be expelled.⁷² Yet, to receive an official screening by an asylum officer for exemption under that provision, the CBP officer had to have first determined that the claim was “reasonably believable.”⁷³ Thus, From March 2020 through September 2021, only 3,217 people were screened for torture prior to being expelled, and only 272 people were granted an exemption and permitted to seek asylum.⁷⁴ Through the end of April 2022, the Border Patrol carried out more than 1.87 million expulsions and from April 2020 through April 2022, 60.5% of encounters at the U.S.-Mexico border led to an expulsion.⁷⁵

Like with Trump’s MPP, asylum seekers expelled back to Mexico are often targeted by criminal cartels for violence and extortion.⁷⁶ Through surveys and public media coverage, advocates have reported that nearly 10,000 acts of violence were committed against migrants when they were expelled back to Mexico under Title 42.⁷⁷ For example, hundreds of parents, fearing for the lives of their children, have chosen to self-separate and send their children across

⁷¹ Stephanie Leutert, et al., *Metering and COVID-19*, UNIVERSITY OF TEXAS AT AUSTIN STRAUSS CENTER FOR INTERNATIONAL SECURITY AND LAW, (April 2020), <https://usmex.ucsd.edu/files/MeteringCovid-19.pdf>.

⁷² Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately — Ignoring Asylum Law*, PROPUBLICA, (April 2, 2020), <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>

⁷³ Camilo Montoya-Galvez, *Few Migrants Processed Under Title 42 Border Policy are Screened for U.S. Protection*, CBS NEWS, (Oct. 14, 2021), <https://www.cbsnews.com/news/immigration-title-42-border-policy-migrants-screened-us-protection/>.

⁷⁴ *Id.*

⁷⁵ *See supra* note 69.

⁷⁶ *Id.*

⁷⁷ *Marking Two Years of Illegal, Inhumane Title 42 Expulsions: Nearly 10,000 Violent Attacks on Asylum Seekers and Migrants*, HUMAN RIGHTS FIRST, (Mar. 17, 2022), <https://humanrightsfirst.org/library/marking-two-years-of-illegal-inhumane-title-42-expulsions-nearly-10000-violent-attacks-on-asylum-seekers-and-migrants/>

the border alone, knowing they will be safer in the United States than in northern Mexico.⁷⁸ Although some asylum seekers are expelled back to their home countries, the end result is the same – expelled migrants return to the very same circumstances that caused them to flee persecution in the first place.⁷⁹ For instance, over 7,000 Haitians have been expelled back to Haiti after arriving at the U.S. border since September the previous year.⁸⁰ Other asylum seekers have been expelled to southern Mexico, where the Mexican government then expels them to Guatemala in a process of “chain expulsions.”⁸¹ The United Nations has expressed concerns that this practice of “chain expulsion” constitutes a violation of international law.⁸²

Despite claims that Title 42 was necessary to deter mass migration, it actually had the counter-productive effect of considerably increasing the number of arrests at the southern border.⁸³ That is because, under Title 42, individuals who were expelled to Mexico would, within hours after being apprehended, simply try again for a second or third time in hopes of getting through and finally escaping the inhumane conditions in their home countries.⁸⁴ In fact, some migrants have made dozens of failed attempts to cross the border and had been turned back under Title 42 each time.⁸⁵ Ironically enough, this increase in apprehensions have involved mostly

⁷⁸ *Id.* Geneva Sands, *Families are 'Self-Separating' in Mexico After Being Expelled from the US*, *Border Patrol Says*, CNN, (April 6, 2021), <https://www.cnn.com/2021/04/06/politics/families-self-separating-mexico-border-patrol/index.html>.

⁷⁹ *See supra* note 69.

⁸⁰ *Id.* Nick Miroff, *Sharp Decline in Haiti Deportation Flights as Fewer Migrants Cross U.S.-Mexico Border*, WASHINGTON POST, (Oct. 6, 2021), https://www.washingtonpost.com/national/border-haitians-deportation-flights/2021/10/06/3e439952-26b5-11ec-a6ad-9ee7deda7f34_story.html.

⁸¹ *Id.* Kevin Sieff, *Mexico Has Pushed Hundreds of Migrants Expelled from the U.S. on to Guatemala, Stranding Them in a Remote Village Far from Their Homes*, WASH. POST, (Aug. 10, 2021), <https://www.washingtonpost.com/world/2021/08/10/mexico-deport-guatemala/>

⁸² *UNHCR Alarmed Over US 'Expulsion Flights' to Southern Mexico*, U.N. HIGH COMMISSIONER FOR REFUGEES (Aug. 11, 2021) <https://news.un.org/en/story/2021/08/1097612>.

⁸³ *See supra* note 69.

⁸⁴ *Id.*

⁸⁵ Kate Morrissey, *Mexican Adults are Crossing the Border Again and Again in Attempts to Reach the United States*, SAN DIEGO UNION-TRIBUNE, (July 11, 2021), <https://www.sandiegouniontribune.com/news/immigration/story/2021-07-11/mexican-adult-migrants>.

single adults who were not seeking asylum in the first place.⁸⁶ Before the pandemic began, only seven percent of people arrested at the border had crossed the border more than once; however, by October 2020, thirty-eight percent of all people arrested had crossed the border multiple times that year.⁸⁷ From the beginning of 2021 through April 2022, there were over 900,000 “repeat encounters,” which means that one in three border encounters was of a person on their second or higher attempt to cross the border.⁸⁸

There is no doubt that Title 42 was highly controversial when President Trump implemented it. Based on the rhetoric and messaging behind MPP and Title 42, it is evident that the primary purpose of the policy was not to protect public health, but to advance the Trump administration’s political goal of cracking down on unauthorized immigration at great human cost. Title 42 was meant to slow infection rates at the border, but instead it was used to manage migration. Title 42 has impacted the lives of hundreds of thousands of migrants who are, in essence, trapped in Mexico – many of which are living in shelters or camps along the border and relegated to informal work if they can find work at all.⁸⁹ Unfortunately, many of them have nowhere to go at all since gang violence, climate-related challenges, and economic instability due to the pandemic were all contributing factors in their decisions to flee from their home countries in the first place.⁹⁰ Title 42 has been an absolutely ineffective border management tool which only cause higher repeat crossing rates and caused negative enforcement outcomes.⁹¹ The Title 42 era, especially under the Trump administration, has essentially been a boon to cartels and smugglers

⁸⁶ Nick Miroff, *As U.S. Expels Migrants, They Return, Again and Again, Across Mexico Border*, WASH. POST, (Aug. 8, 2020), https://www.washingtonpost.com/immigration/migrants-border-repeatcrossings/2020/08/08/2fdbd97c-d9bf-11ea-b9b2-1ea733b97910_story.html.

⁸⁷ *Id.*

⁸⁸ See Witkofsky, *supra* note 6.

⁸⁹ *Id.*

⁹⁰ See Witkofsky, *supra* note 6.

⁹¹ Danilo Zak, *42 Border Solutions That Are Not Title 42*. NATIONAL IMMIGRATION FORUM, (May 13, 2022), <https://immigrationforum.org/article/42-border-solutions-that-are-not-title-42/>.

at the border and it inevitably returned vulnerable migrants into dangerous conditions where thousands have been victims of kidnappings, tortures, rapes, and violent assaults.⁹² Under the Trump Administration, Title 42 has failed to treat incoming migrants with dignity and did very little to create a secure and orderly border. Nevertheless, the incoming Biden administration's approach showed promise as it looked to both manage the migrant flows and change the situations on the ground that force people to leave their home countries.⁹³

II. The Biden Administration's General Stance on Immigration

In President Biden's first press conference, he had a solid understanding of the reasons why migrants were emigrating to the U.S. He told reports that migrants flee home countries due to climate-related issues, lack of food, and gang violence – something that the Trump administration disregarded when he implemented Title 42 to control migration.⁹⁴

Biden's changes to policies governing interior enforcement regarding arrests, detentions, and removals inside the U.S, have been some of its most sweeping and impactful.⁹⁵ Within two weeks of assuming the presidency, the Biden administration issued new interim immigration enforcement guidelines, instructing ICE officer to limit enforcement to those who pose a national security risk, have been convicted of certain crimes, or who recently entered the country illegally.⁹⁶

⁹² *Id.*

⁹³ Shannon K. O'Neil, *Migrants at the U.S. Border: How Biden's Approach Differs from Trump's*, COUNCIL ON FOREIGN RELATIONS, (Feb. 17, 2021), <https://www.cfr.org/in-brief/migrants-us-border-how-bidens-approach-differs-trumps>

⁹⁴ "Remarks by President Biden in Press Conference." *The White House*, The United States Government, 27 Mar. 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/25/remarks-by-president-biden-in-press-conference/>.

⁹⁵ See Chishti & Bolter, *supra* note 8.

⁹⁶ Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, (Feb. 18, 2021), <https://www.ice.gov/doclib/news/library/speeches/210513johnson.pdf>

Biden’s immigration stance clearly distinguished itself from the Trump administration in which virtually all estimated eleven million unauthorized immigrants were considered a priority for removal – which, again, instilled fear into the lives of immigrant families.⁹⁷ Homeland Security Secretary Alejandro Mayorkas also issued final enforcement guidelines.⁹⁸ Although these guidelines set out the same priority groups as from the previous administration, there was some added flexibility in which ICE officials were instructed to make individualized enforcement decisions based on the totality of circumstances and taking into consideration “aggravating” and mitigating factors in each case.⁹⁹ This approach was markedly and conceptually different from the enforcement priorities issued by any prior administration by focusing on the individual and not on the crime.¹⁰⁰ This ensures that noncitizens with decades-old criminal convictions would not be prioritized for deportation.¹⁰¹

Even beyond the restructuring of ICE enforcement, DHS had also established guidelines limiting immigration enforcement against specific populations, in specific locations, and in specific situations.¹⁰² For example, ICE officers have now been instructed generally not to arrest or detain pregnant, postpartum, or nursing individuals; they are also not take enforcement actions against noncitizens who are applying for immigration benefits based on their status as crime victims.¹⁰³ Mayorkas has also instructed DHS immigration agencies – ICE, U.S. Citizenship

⁹⁷ See Chishti & Bolter, *supra* note 8.

⁹⁸ Mayorkas, Alejandro N. Mayorkas, *Guidelines for Enforcement Actions in or near Protected Areas*, DEPARTMENT OF HOMELAND SECURITY, (Oct 27, 2021), https://www.dhs.gov/sites/default/files/publications/21_1027_opa_guidelines-enforcement-actions-in-near-protected-areas.pdf.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See Chishti & Bolter, *supra* note 8.

¹⁰³ *ICE Directive 11032.4: Identification and Monitoring of Pregnant, Postpartum, or Nursing Individuals*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE). (July 1, 2021),

(USCIS) and CBP – to ensure that deported noncitizens who served in the U.S. armed forces can return to the U.S. if these agencies have determined that they were “unjustly removed.”¹⁰⁴

In another policy reversal, the Biden administration ended the Trump administration’s ICE’s “business raids” by discontinuing mass worksite operations seeking out migrants.¹⁰⁵ Such “business raids” ultimately resulted in nearly 30,000 administrative arrests of unauthorized immigrants since the year 2000.¹⁰⁶ In addition, Mayorkas has incentivized unauthorized immigrants to report exploitative employment practices, by directing DHS agencies to offer legal protections such as deferred action to those who come forward.¹⁰⁷ Finally, the Biden administration ended long-term family detention, in use since 2001, repurposing family detention centers to only hold single-adults and was able to close down centers that purportedly violated individuals’ civil rights and centers that faced allegations of medical abuse of female detainees.¹⁰⁸ However, despite all these positive measures towards immigration, President Biden continues to utilize Title 42.¹⁰⁹

III. The Biden Administration’s Continued Use of Title 42

After quickly reversing a number of Trump-era policies related to immigration, the Biden administration has continued to struggle with large numbers of migrants arriving at the border and has face legal challenges and setbacks.¹¹⁰ Within the first 100 days of his administration,

¹⁰⁴ *DHS, VA Announce Initiative to Support Noncitizen Service Members, Veterans, and Immediate Family Members.* DEPARTMENT OF HOMELAND SECURITY, (July 2, 2021), <https://www.dhs.gov/news/2021/07/02/dhs-va-announce-initiative-support-noncitizen-service-members-veterans-and-immediate>.

¹⁰⁵ See Chishti & Bolter, *supra* note 8.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Title 42 Border Expulsions: How Biden and the CDC’s Misuse of Public Health Authority Expels Asylum Seekers to Danger.* PHYSICIANS FOR HUMAN RIGHTS (May 20, 2021), <https://phr.org/our-work/resources/title-42-border-expulsions-how-biden-and-the-cdcs-misuse-of-public-health-authority-expels-asylum-seekers-to-danger/>.

¹¹⁰ *Biden Administration Continues Efforts to Change Immigration Policy Amidst Surges of Migrants and Court Losses*, CAMBRIDGE UNIVERSITY PRESS, (Jan 14, 2022), [https://www.cambridge.org/core/services/aop-](https://www.cambridge.org/core/services/aop-cambridge-)
[cambridge-](https://www.cambridge.org/core/services/aop-cambridge-)

President Biden specifically had to deal with national security crises regarding Covid-19 and the increased number of refugees and asylum seekers coming mostly from the Northern Triangle countries and southern Mexico.¹¹¹ Regardless, the Biden administration reportedly planned to end its reliance on Title 42, before changing course over the summer of 2021 due to surging arrivals and the Covid-19 Delta variant.¹¹² DHS has repeatedly emphasized that “Title 42 is not an immigration authority, and its continued use is dictated by CDC and governed by the CDC’s analysis of public health factors.”¹¹³ Mayorkas said in September 2021, “Title 42 is . . . a public health authority to protect the American public, to protect the communities along the border, and to protect the migrants themselves.”¹¹⁴

On May 23, 2022, Title 42 was set to end.¹¹⁵ For more than two years, DHS had used this Trump-era policy to block asylum at U.S. ports of entry and to continuously expel asylum seekers to grave dangers without allowing them to apply for U.S. asylum.¹¹⁶ However, on May 20, 2022, a federal court in Louisiana preliminarily enjoined a decision by the CDC to terminate its prior Title 42 orders, and the court directed the United States government to continue the Title 42 policy.¹¹⁷ At the same time, a ruling by the D.C. Circuit Court of Appeals prohibiting DHS from using Title 42 to expel asylum-seeking families “to places where they will be persecuted or

[core/content/view/F2C31925C7F9A6869CD3A0D23A43477B/S0002930021000713a.pdf/biden-administration-continues-efforts-to-change-immigration-policy-amidst-surges-of-migrants-and-court-losses.pdf](https://www.dhs.gov/core/content/view/F2C31925C7F9A6869CD3A0D23A43477B/S0002930021000713a.pdf/biden-administration-continues-efforts-to-change-immigration-policy-amidst-surges-of-migrants-and-court-losses.pdf)

¹¹¹ Terrence M. Garrett, *COVID-19, Wall Building, and the Effects on Migrant Protection Protocols by the Trump Administration: The Spectacle of the Worsening Human Rights Disaster on the Mexico-U.S. Border*, ADMINISTRATIVE THEORY & PRAXIS (Apr. 9, 2020), <https://doi.org/10.1080/10841806.2020.1750212>.

¹¹² Nick Miroff, *Along Mexico Border, Covid Spike and More Migrant Families Stall Plans to End Title 42 Expulsions*, WASH. POST, (July 28, 2021), https://www.washingtonpost.com/immigration/title-42-biden-border-covid/2021/07/28/aecca526-efa7-11eb-ab6f-b41a066381df_story.html.

¹¹³ U.S. Dep’t of Homeland Sec. Press Release, *DHS Statement on Updated CDC Order* (Aug. 2, 2021), <https://www.dhs.gov/news/2021/08/02/dhs-statement-updated-cdc-order>.

¹¹⁴ *Id.*

¹¹⁵ *The Nightmare Continues: Title 42 Court Order Prolongs Human Rights Abuses, Extends Disorder at U.S. Borders*, HUMAN RIGHTS FIRST, (2022)

¹¹⁶ *Id.*

¹¹⁷ *Id.*

tortured” went into effect on May 23, 2022.¹¹⁸ Despite these seemingly dueling Title 42 judicial decisions, DHS retains clear authority to except individuals from Title 42 and should remain obligated under United States refugee law and binding treaty commitments not to return anyone—whether a family, adult, or child—to persecution or torture, as the legal rationale of the D.C. Circuit Court decision confirms.¹¹⁹ Nevertheless, CBP continues to turn away attempting to request asylum at United States ports of entry without screening them for asylum, stranding them in Mexico facing life-threatening dangers.¹²⁰

Since President Biden came into the office, his administration has used Title 42 to block or expel asylum-seeking families and adults from countries like Cameroon, Cuba, El Salvador, Ethiopia, Ghana, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Nigeria, Russia, Somalia, Venezuela, and Yemen.¹²¹ According to reports, there have been at least 492 violent attacks, including kidnappings, rapes, torture, physical assaults, and verbal threats, against asylum seekers turned away or stranded in Mexico during the current administration.¹²² On March 12, 2022, the CDC exempted children Title 42 due to pressure and litigation.¹²³ Nevertheless, parents stranded in northern Mexico were forced to make the difficult decision to send their children to the United States alone, as that was the only way they could ensure their safety, effectively causing new family separations and increasing the number of unaccompanied

¹¹⁸ *Id.*; *Mem. Op. at 58*, *Huisha-Huisha et al. v. Mayorkas*, No. 1:21-cv-00100-EGS (D.D.C. Sept. 16, 2021)

¹¹⁹ *Id.*

¹²⁰ *See supra* note 115. (Asylum seekers stranded in danger in Mexico unable to request protection at ports of entry include: a gay asylum-seeking couple who were previously expelled under Title 42 and given the “option of being separated or of being expelled together;” a Mexican attorney who was kidnapped and tortured by a cartel that severed two of his fingers; and a Cameroonian nurse stranded in Mexico where she has faced discrimination and abuse by Mexican police.)

¹²¹ *See supra* note 109.

¹²² *Id.*

¹²³ *Title 42 Termination with Respect to Unaccompanied Noncitizen Children*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/media/releases/2022/s0311-title-42-termination.html>.

children in custody.¹²⁴ As of March 2022, over 1.6 million single adults, nearly 200,000 individuals in a family unit, and nearly 16,000 unaccompanied minors have been expelled cumulatively under Title 42.¹²⁵

IV. The Root Causes of Migration and The Potential Resolve

Despite the consequences of Title 42, migrants have not stopped trying to cross the United States-Mexico border – a detail people on both sides of the political debate have pointed to, with very different arguments.¹²⁶ Those who support Title 42 point to border arrests as they argue how essential the pandemic policy has been for blocking mass illegal immigration.¹²⁷ Those who oppose the policy argue official statistics about encounters at the border inflate the severity of the situation, because the data include people crossing the border multiple times; in fact, they argue Title 42 has caused more border crossings.¹²⁸ However, if Title 42's continuance or termination will produce the same result of mass migration, then what is the solution? Before considering the potential resolve, it is important to know the history and underlying reasons why mass migration occurs from the Northern Triangle countries.

A. The Origins of Central American Migration

Central America migration emerged from civil wars and counterinsurgency operations that crested in the 1980s as part of the United States strategy of Soviet Containment.¹²⁹ Mass migration has roots in Guatemala when a coup covertly organized by the Central Intelligence

¹²⁴ See *supra* note 115.

¹²⁵ Drishti Pillal & Samantha Artiga; *Title 42 and Its Impact on Migrant Families*, KAISER FAMILY FOUNDATION, (May 26, 2022), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/title-42-and-its-impact-on-migrant-families/>.

¹²⁶ Catherine E. Shoichet, *What Is Title 42, and What Happens Now that a Federal Judge Has Blocked It?*, CNN, (Nov. 16, 2022), <https://www.cnn.com/2022/11/16/politics/title-42-blocked-whats-next-explainer-ccc>

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Aviva Chomsky, *Central America's Forgotten History: Revolution, Violence, and the Roots of Migration*, BEACON PRESS, (2021). <http://www.beacon.org/Central-Americas-Forgotten-History-P1650.aspx>.

Agency (CIA) deposed democratically elected President Jacobo Arbenz to arrest the spread of “communism” in the region in 1954.¹³⁰ In subsequent years, with support from the United States, the Guatemalan regime undertook a campaign of genocidal military suppression that fell heavily on the indigenous Mayan population, causing many to flee northward to the United States.¹³¹ In El Salvador, during the 1980s, the United States also armed and trained death squads in the name of fighting communism.¹³² The resulting violence and its economic disruptions brought about the widespread displacement of people from the countryside and poor urban neighborhoods, leading to mass migration to the United States.¹³³ Since both Guatemalans and Salvadorans were fleeing nations ruled by right-wing regimes supported by the United States, politically, they could not be accepted as refugees or asylum seekers and were compelled to enter without authorization, joining Mexicans as part of the growing undocumented population.¹³⁴ Honduras was inevitably involved into the cycle of violence in the late 1980’s when the Reagan Administration used it as a staging area for counterinsurgency operations in El Salvador and Guatemala and later as a base for recruiting, training, and equipping an army of “Contras” to invade Nicaragua to overthrow the leftist Sandinista regime.¹³⁵

Interestingly enough, Prior to 1980, there was little migration from Central America to the United States, either documented or undocumented.¹³⁶ During the 1970s, legal immigration

¹³⁰ Gordon L. Bowen, *U.S. Foreign Policy toward Radical Change: Covert Operations in Guatemala, 1950–1954*, LATIN AMERICAN PERSPECTIVES, (1983), <https://doi.org/10.1177/0094582X8301000106>.

¹³¹ Luis Roniger, *US Hemispheric Hegemony and the Descent into Genocidal Practices in Latin America*, (2010), <https://www.routledge.com/State-Violence-and-Genocide-in-Latin-America-The-Cold-War-Years/Esparza-Huttenbach-Feierstein/p/book/9780415664578>.

¹³² Cynthia J. Arnson, *Window on the Past: A Declassified History of Death Squads in El Salvador*. In *Death Squads in Global Perspective*, PALGRAVE MACMILLAN, (2000), <https://link.springer.com/book/10.1057/9780230108141>.

¹³³ See Solano & Massey, *supra* note 41, at 149.

¹³⁴ Douglas S. Massey, et al., *Explaining Undocumented Migration to the U.S.*, INTERNATIONAL MIGRATION REVIEW, (2014), <https://journals.sagepub.com>.

¹³⁵ See Solano & Massey, *supra* note 41, at 149.

¹³⁶ *Id.*

from the Northern Triangle averaged just 5,000 entries per year.¹³⁷ During the 1980s the figure rose to more than 13,000 per year and reached 18,000 in the 1990s.¹³⁸ In 1980, on the eve of the US intervention, the number of undocumented Salvadorans and Guatemalans living in the United States was estimated at just 38,000 and 30,000, respectively, with the number of Hondurans being too small to estimate.¹³⁹ Ten years later the undocumented populations had risen to 298,000 Salvadorans, 118,000 Guatemalans, and 42,000 Hondurans; and in 2018 the respective numbers reached 730,000, 620,000, and 450,000.¹⁴⁰

Although the civil wars ended in the late 1980s and the rate of undocumented out-migration peaked, migration from the region never returned to the status quo ante.¹⁴¹ Civil warfare was replaced by gang violence and the region's economies never recovered from the destruction of the 1980s.¹⁴² To escape these conditions, migrants continued to head northward, but unlike those who departed in the 1980s these later migrants had ties to friends and relatives living north of the border they could draw upon to gain entry and settle.¹⁴³ Although the United States cannot be held solely responsible for Central America's problems, it nonetheless played a central role in rendering economic turmoil and civil violence endemic throughout the region.¹⁴⁴

B. Biden's Potential Resolve: The "Root Causes Initiative" on Corruption

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Robert Warren & Jeffrey S. Passel, *A Count of the Uncountable: Estimates of Undocumented Aliens Counted in the 1980 United States Census*, DEMOGRAPHY, (1987), <https://doi.org/10.2307/2061304>.

¹⁴⁰ Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015–January 2018*. OFFICE OF IMMIGRATION STATISTICS, US DEPARTMENT OF HOMELAND SECURITY, (2021), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/UnauthImmigrant/unauthorized_immigrant_population_estimates_2015_-_2018.pdf.

¹⁴¹ See Solano & Massey, *supra* note 41, at 150.

¹⁴² *Id.*

¹⁴³ See Massey, et al., *supra* note 134.

¹⁴⁴ See Solano & Massey, *supra* note 41, at 150.

Seeing as the United States instigated the mass migration problem from the Northern Triangle Countries in the first place, it is only fair that the United States becomes a part of the solution. On February 2, 2021, President Biden issued an Executive Order to implement a multi-pronged approach toward managing migration throughout North and Central America.¹⁴⁵ President Biden had committed to working closely with civil society, international organizations, and the Northern Triangle governments to establish a comprehensive strategy for addressing the causes of migration in the region; build, strengthen, and expand Central and North American countries' asylum systems and resettlement capacity; and increase opportunities for vulnerable populations to apply for protection closer to home.¹⁴⁶ At the same time, the United States will enhance lawful pathways for migration to the nation and will restore and strengthen its asylum system, which had been badly damaged by policies enacted in the previous four years (of the Trump administration) that contravened the nation's values and caused needless human suffering to those involved.¹⁴⁷

For the Biden administration, one thing is certain: persistent instability and insecurity in Central America have gone on for too long.¹⁴⁸ The Biden administration has made clear its conviction that corruption lies at the root of many critical foreign policy challenges, including irregular migration throughout Central America.¹⁴⁹ On May 4, 2021, in response to the Executive Order, the United States Agency for International Development (USAID) launched the Northern Triangle Task Force (NTTF) to ensure a coordinated, unified, bold, and creative approach to

¹⁴⁵ Exec. Order No. 1401086 FR 82672021 WL 394763(Pres.)

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *U.S. Strategy for Addressing the Root Causes of Migration in Central America*, NATIONAL SECURITY COUNCIL, (July 21, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf>

¹⁴⁹ *Strategic Approach to Combating Corruption in Northern Central America*, USAID, (Apr. 11, 2022), https://www.usaid.gov/sites/default/files/documents/04-06-22_Interagency_Reviewed_USAID_Strategic_Approach_to_Combating_Corruption_in_Northern_Central_America.docx.pdf

addressing the causes of irregular migration.¹⁵⁰ The NTTF is overseeing USAID’s implementation of the July 21, 2021, Strategy for Addressing the Root Causes of Migration in Central America (“Root Causes Strategy”).¹⁵¹ Among other elements, the Strategy highlights the importance of combating corruption, strengthening democratic governance, and advancing the rule of law.¹⁵²

The USAID has made clear that corruption is a key driver of migration from the Northern Triangle countries.¹⁵³ In the face of rampant corruption, individuals face an uncertain future, view opportunities as limited, and are more inclined to seek livelihoods elsewhere.¹⁵⁴ In El Salvador, for example, a survey of Salvadoran migrants found that 70 percent of the individuals cited economic opportunity and violence/insecurity as primary reasons for leaving.¹⁵⁵ Moreover, the quality of democracy – with corruption as a key factor – influences intentions to migrate.¹⁵⁶ Findings from initial analysis supported by USAID/Honduras found that being unsatisfied with democracy increases intentions to migrate between seven to ten percent compared to individuals satisfied.¹⁵⁷ Finally, research conducted in 2021 indicates that victims of corruption (measured by having been asked for a bribe) in Guatemala and Honduras, are twenty-three percent and thirteen percent, respectively, more likely to have intentions to migrate than non-victims.¹⁵⁸

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Central American Migration: Root Causes and U.S. Policy*, CONGRESSIONAL RESEARCH SERVICE, (Mar. 31, 2022), <https://sgp.fas.org/crs/row/IF11151.pdf>

¹⁵⁶ *See supra* note 149.

¹⁵⁷ *Id.*

¹⁵⁸ *2021 AmericasBarometer Core Questionnaires*, VANDERBILT UNIVERSITY, (2021), <https://www.vanderbilt.edu/lapop/ab2021/AB2021-Core-Questionnaire-v17.5-Eng-210514-W-v2.pdf>.

Corruption, coupled with Coronavirus, undercut progress on economic opportunity, citizen's trust in their governments and the independence of judicial systems.¹⁵⁹ As seen during the Covid-19 pandemic, governments all too often fail to provide needed services to their citizens and lack of government investment in infrastructure, education, health, and civilian security has hobbled advancement.¹⁶⁰ Through its agencies, the United States plans to partner with civil society and independent media so these organizations can maintain their critical oversight role of government entities that are rich with rampant impunity.¹⁶¹ The Biden administration has three lines of efforts to help alleviate corruption, and hence migration, in the Northern Triangle nations: 1) strengthening democratic institutions to improve governance and rule of law; 2) prioritizing an anticorruption agenda; and 3) improving administration of public resources.¹⁶²

1. Strengthening Democratic Institutions

The Biden administration plans to work with nations in the Northern Triangle to promote reform agendas across all branches of government, so that government better serves all citizens.¹⁶³ To tackle the root of migration, the United States will promote a merit-based, independent process for nomination and selection of justice and oversight officials, and establish anti-corruption norms limiting immunity of officials from prosecution and banning candidates for office with disqualifying criminal records.¹⁶⁴ In addition, the Biden administration will provide adequate funding to judicial institutions so they can better serve their citizens in which to this instilling trust into the people of each respective nation.¹⁶⁵

¹⁵⁹ *See supra* note 149.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

Transparency will also be crucial.¹⁶⁶ The Biden administration will work with partners to promote transparency in electoral systems through reform and enforcement of electoral campaign finance rules and open list systems to allow for direct representation.¹⁶⁷ The United States will also empower independent audit and oversight institutions to monitor use of public funds, and promote transparency in government processes, including open government mechanisms and the promotion of open data.¹⁶⁸ One of the objectives of strengthening the democratic institutions of each nation is to bring trusted actors into key roles in oversight bodies, including in legislative committees to reach the end goal of improving, not just transparency, but efficiency of the governing bodies.¹⁶⁹ Finally, the Biden Administration will partner with the private sector, civil society and independent media so they have the tools, knowledge, and networks needed to safely identify government neglect and abuse, raise awareness, demand accountability, and advocate for necessary reforms and regulations to promote transparency among the governing bodies.¹⁷⁰

2. Prioritize an Anticorruption Agenda

The Biden administration vows to work regionally, bilaterally, and unilaterally to root out corruption and enhance transparency across the nations.¹⁷¹ Relying on civil society and media organizations, the United States will expand support for NGOs and other entities in the region focused on governance promotion to encourage local leadership of such efforts and foster resiliency and sustainability.¹⁷² On a more prosecutorial level, the United States will work with partners to develop and implement a variety of anti-corruption tools aimed at preventing,

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

detecting, investigating, and ultimately punishing corruption at all levels and in all branches of the government.¹⁷³ Furthermore, the Biden administration will press governments to strengthen transparency, accountability, and the rule of law by implementing financial sanctions and visa restrictions on government officials who do not abide by the strategy being set forth.¹⁷⁴

3. Improve administration of Public Resources

In furtherance of combatting corruption, the Biden administration plans to improve administration of public resources by working with each nations' governments to establish proper budgeting, management, and use of public resources at the local and national levels to enhance service delivery for the countries' citizens, including in underserved areas and vulnerable populations.¹⁷⁵ The United States will also help improve government finances by working with governments to review fiscal policy to identify gaps and incongruences in taxation, and opportunities to progressively expand the tax base, incentivizing individuals and businesses to move into the formal economy and to transition public procurement to a competitive, transparent, and merit-based system to curb political influence and diminish the opportunities for corruption.¹⁷⁶

C. Biden's Potential Resolve: The "Root Causes Initiative" on Crime

Many migrants flee from the Northern Triangle countries to escape gang extortion, recruitment, and violence.¹⁷⁷ Violent gangs, some funded by drug cartels and often with the collusion of government officials, prey upon vulnerable youth and effectively control large

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Jill Marie Gerschutz-Bell, *Root Causes of Migration, Development, and US Aid to Northern Triangle States*, UNIVERSITY OF DAYTON SCHOOL OF LAW (Sept. 2022), <https://journals.sagepub.com/doi/epub/10.1177/23315024221119789>

territories.¹⁷⁸ Nearly one in ten Hondurans and Salvadorans experience extortion simply to remain in their homes or run their businesses.¹⁷⁹ Forced conscription – in which gangs demand that a youth join their gang or be killed – leaves many with no choice but to flee.¹⁸⁰ Of the 404 children interviewed for UN High Commissioner for Refugees’ (UNHCR’s) Children on the Run study, over half of those who stated that they left to reunite with family, for opportunities, or deprivation also cited violence, including “violence in society predominantly by armed criminal actors, and abuse in the home.”¹⁸¹ Fifty-eight percent of the children surveyed had conveyed concerns that would require international protection.¹⁸² The Northern Triangle countries experience some of the highest rates of violence in the world and the coronavirus pandemic and natural disasters have only exacerbated these attacks along with economic vulnerabilities.¹⁸³

Obtaining clear and meaningful commitments from partners to tackle corruption and support transparency is a foundational element for sustainable progress across the criminal justice systems of Central America¹⁸⁴ Like with the initiative to tackle corruption, the Biden administration has three lines of efforts to help address crime, and hence migration, in the Northern Triangle nations: 1) professionalize security forces; 2) counter organized crime; and 3) build safe communities.

1. Professionalize Security Forces

The Biden administration intends to support the development of well-trained civilian law enforcement and other security forces that can provide effective, accountable services with

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *See supra* note 149.

respect for the rule of law and human rights.¹⁸⁵ The United States plans to work with civilian law enforcement so that they have the resources and capacity to assume full responsibility for civilian security, enabling the drawdown of military from policing roles.¹⁸⁶ In addition, one of the aims is to also improve civilian policing.¹⁸⁷ The United States will work with governments to target resources at the most pressing security challenges, while ensuring intelligence-led and community policing concepts are introduced and implemented nationwide, designed to increase dialogue, and trust with populations, and establish community-based solutions to crime that respect human rights.¹⁸⁸ Finally, the Biden administration will work with governments to build accountability into security forces through initiatives to support audit and oversight functions to root out and address misconduct and poor performance.¹⁸⁹

2. Counter Organized Crime

The United States will work with governments to increase capacity of law enforcement and other security forces to address the unique transnational and national threats to the region, such as drug trafficking, gangs, extortion, smuggling, corruption, and money laundering, including through vetted and specialized units, regional cooperation, and legislative reform to increase penalties for organized crime.¹⁹⁰ More importantly, the Biden Administration aims to build trusted partners.¹⁹¹ The United States will work with and expand vetted and specialized units to build capacity to address complex crimes, including human and drug trafficking, and ensure trusted partners that can work with the United States and others in the region.¹⁹² Lastly, the

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

United States will promote coordination and information sharing among countries in the region to address transnational crime, including to combat narcotics and other illicit trafficking.¹⁹³

3. Build Safe Communities

To alleviate the crime problem most effectively in the Northern Triangle nations, the Biden administration work with governments, law enforcement, community organizations, and others to build trust between the community and government, prevent crime, and provide alternatives to youth considering a life of crime.¹⁹⁴ To do this, partnership between the United States, local government, civil society, and private sector actors will involve initiatives to be engaged in employment and educational opportunities.¹⁹⁵ The United States will also work with municipalities and community organizations to increase the availability of safe spaces, such as parks and youth centers, and improve the safety of public transportation, so that citizens can engage in economic and social life without fear.¹⁹⁶ Lastly, the Biden administration will work with governments and civil society to support offenders' efforts to disengage from gangs and reintegrate into communities by addressing trauma, community resiliency, education and economic opportunity, and case management services.¹⁹⁷

V. Conclusion

On November 15, 2022, Judge Emmet Sullivan of the U.S. District Court for the District of Columbia found that Title 42 to be “arbitrary and capricious in violation of the Administrative Procedure Act.”¹⁹⁸ Judge Sullivan faulted the CDC “for its decision to ignore the harm that could

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Huisha-Huisha v. Mayorkas*, Civil Action No. 21-100 (EGS), 2022 U.S. Dist. LEXIS 207282, at *50 (D.D.C. Nov. 15, 2022).

be caused” by issuing the policy and held that the CDC failed to consider alternative approaches.¹⁹⁹ Judge Sullivan concluded that the policy did not rationally service its purpose, given that Covid-19 was already widespread throughout the United States when it was rolled out.²⁰⁰ In other words, the government cannot use the Coronavirus pandemic as justification to expel migrants anymore.²⁰¹

Still, regardless of whether Title 42 is implemented or not, there still exists the root causes of mass migration from Central America. It is imperative for the Biden administration to follow through with its “Root Causes Initiative” so that the migration problem and the inhumane conditions that asylum seekers are going through can be resolved. Without getting to the root of the problem, it is only a matter of time before another migration crisis befalls the United States-Mexico border.

¹⁹⁹ See Schoichet, *supra* note 126.

²⁰⁰ *Id.*

²⁰¹ *Id.*