

Seeking Asylum Somewhere Over the Rainbow: The Long-Term Effect of Southern Border Restrictions Upon LGBTQ+ Asylum Seekers

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I. INTRODUCTION

A trans woman from Honduras fled through southern Mexico to seek asylum in the United States when three men raped her and left her for dead with a slit through her neck and chin.¹ While she lived to tell her story, hundreds of others have not.² From 2009 to 2017, at least two hundred and sixty-four LGBTQ+ individuals were murdered in

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¹ Kate Morrissey, *Congressmember Highlight LGBTQ Asylum Seekers' Struggles in Visit to Border*, CONGRESSMAN DR. RAUL RUIZ (May 9, 2022), <https://ruiz.house.gov/media-center/in-the-news/congressmembers-highlight-lgbtq-asylum-seekers-struggles-visit-border>.

² *Id.*

Honduras alone.³ This community in Central America is no stranger to this horrifying reality, so the possibility of seeking asylum in the United States, where queer rights are protected, is the light at the end of the tunnel. But the United States has not made asylum the accessible avenue it should be. Now, restrictive policies threaten to turn refugees away at the border, back into the hands of violence and murder. The United States is said to be the land of the free and the home of the brave, but when it comes to seeking refuge on that land, the brave men and women of the LGBTQ+ community never get the chance to fight to be free.

Noncitizens who desire to seek safety on United States soil have, at least on paper, access to a tool to fulfill that wish. Under a process called “asylum,” those who have suffered past persecution or have a well-founded fear of future persecution in their country of origin due to their race, religion, nationality, membership in a particular social group (PSG), or political opinion may apply for protection.⁴ The PSG category includes those who fear harm because of their gender or sexuality within the LGBTQ+ community, since a large number of countries around the globe continue to criminalize queer expression, even sometimes resulting in the death penalty.⁵ Identifying as LGBTQ+ in most parts of the world is highly dangerous, and the trip to the United States is often a risky one.⁶ But the potential to obtain residency, and thus protection, under the Constitution by way of receiving asylum makes the journey appear worthwhile. It is not until refugees reach the border, close enough to taste freedom, that they are hit with ruthless restrictive policies that ultimately inhibit their asylum access.

³ Anastasia Moloney, *Terrorized at Home*, *Central America's LGBT People Flee for Their Lives: Report*, THOMAS REUTERS FOUND. (Nov. 27, 2017, 12:52 PM), <https://www.reuters.com/article/us-latam-lgbt-rights/terrorized-at-home-central-americas-lgbt-people-to-flee-for-their-lives-report-idUSKBN1DR280>.

⁴ 8 U.S.C. § 1158 (2022).

⁵ Michael Kareff, *Constructing Sexuality and Gender Identity for Asylum Through a Western Gaze: The Oversimplification of Global Sexual and Gender Variation and its Practical Effect on LGBT Asylum Determinations*, 35 GEO. IMMIGR. L. J. 615, 619–20; *Map of Countries that Criminalize LGBT People*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/> (last visited Mar. 24, 2024).

⁶ See Missing Migrants Project, *Migration Within the Americas*, INT'L ORG. FOR MIGRATION, <https://missingmigrants.iom.int/region/Americas> (last visited Mar. 24, 2024) (“Since it started recording in 2014, Missing Migrants Project has recorded the deaths of over 2,980 who have died trying to cross the border from Mexico into the United States. . . Violence along the route - ranging from murder to physical abuse and sexual violence - is the second most common cause of death in the region, accounting for more than [ten percent] of recorded deaths and disappearances.”).

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42 U.S.C. §§ 265 and 268 (Title 42) was implemented amid the COVID-19 pandemic to close the United States' borders to immigrants seeking entry.⁷ The United States masked the regulation as a health safety measure, but in reality, the statute discriminated against vulnerable populations seeking safety by asylum.⁸ The order contained an exemption for individuals on a case-by-case basis, which allowed border officials to consider safety and humanitarian concerns at their discretion.⁹ But there are countless stories told by LGBTQ+ asylum seekers proving that border officials rarely used that discretion, opting to send the vulnerable community back into the cruel hands of countries that deem their lifestyle illegal.¹⁰ The following discussion of Title 42 is paramount, regardless of its current status, because of the devastation it has caused along the border and the influence it has since had on decisions made by United States leaders.

This Comment focuses on the effects of statutory expulsions on LGBTQ+ immigrants seeking asylum at the southern border. Additionally, this Comment argues that, to ensure the health and safety of LGBTQ+ asylum seekers, the Legislative and Executive branches must advocate for their heightened protection. Part II will discuss the history of immigration and asylum for the LGBTQ+ community and the evolution and abuse of restrictive policies like Title 42 by recent presidential administrations. Part III then analyzes first-hand accounts of LGBTQ+ experiences in Latin American countries, particularly from people affected by Title 42, as well as the opinions of officials and United States citizens who support restrictive asylum policies. Finally, Part III of this Comment then proposes that the Legislature deem LGBTQ+ asylum seekers exempt from these restrictive policies to provide restitution for the historical discrimination thrust onto the community and to protect them from the physical and mental dangers they face due to expulsion.

II. BACKGROUND: FROM *BOUTILIER* TO BIDEN, THE GENERATIONAL DISDAIN

⁷ Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65,806.

⁸ *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border> (May 25, 2022).

⁹ Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65,806.

¹⁰ *US: LGBT Asylum Seekers in Danger at the Border*, HM. RTS. WATCH (May 31, 2022, 12:54 AM), <https://www.hrw.org/news/2022/05/31/us-lgbt-asylum-seekers-danger-border>.

TOWARDS QUEER IMMIGRATION

This section will discuss the LGBTQ+ community's history within the realm of immigration. It will then consider how Title 42, the most notable culprit in discriminatory border expulsions, was transformed from public health law into an asylum-seeker expulsion process by the Trump Administration. Finally, this section will present how the Biden Administration handled Title 42 and other subsequent policies.

A. History of LGBTQ+ Immigration and Asylum

Throughout history, the LGBTQ+ community has encountered many obstacles in the fight for immigration rights. The barriers directed toward this community were formally erected in the early 20th Century with the passing of the Immigration Act of 1917.¹¹ Under this act, LGBTQ+ migrants were coined as "sexual perverts" and prohibited from entering the United States.¹² From there emerged decades-long discriminatory legislation, including the view of queer individuals as communist sympathizers and thus a national threat during the "red scare."¹³

Congress passed the Immigration and Nationality Act (INA) in 1952, excluding all "persons afflicted with psychopathic personality."¹⁴ This provision encompassed homosexuals, who were considered to have mental disorders during that time.¹⁵ For example, in *Boutilier v. I.N.S.*,¹⁶ Clive Boutilier was a twenty-one-year-old Canadian national who moved to the United States in 1955 and later applied for naturalization.¹⁷ Upon application, Boutilier revealed that he had been arrested for sodomy and had a consistent history of homosexual relationships during the years before his entrance into the United States.¹⁸ The Supreme Court upheld his deportation based on the notion

¹¹ Immigration Act, 39 Stat. 874 (1917).

¹² Logan Bushell, "Give Me Your Tired, Your Poor, Your Huddled Masses"—Just as Long as They Fit the Heteronormative Ideal: U.S. Immigration Law's Exclusionary & Inequitable Treatment of Lesbian, Gay, Bisexual, Transgendered, and Queer Migrants, 48 GONZ. L. REV. 678, 680.

¹³ *Id.*

¹⁴ Immigration and Nationality Act, Pub. L. No. 82-414, § 212, 66 Stat. 163 (1952).

¹⁵ See Logan Bushell, "Give Me Your Tired, Your Poor, Your Huddled Masses"—Just as Long as They Fit the Heteronormative Ideal: U.S. Immigration Law's Exclusionary & Inequitable Treatment of Lesbian, Gay, Bisexual, Transgendered, and Queer Migrants, 48 GONZ. L. REV. 673, 681 (citing to language within the American Psychiatric Association's 1952 Diagnostic Manual of Mental Disorders).

¹⁶ *Boutilier v. I.N.S.*, 387 U.S. 118 (1967).

¹⁷ *Id.* at 119.

¹⁸ *Id.* at 119–20.

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that Congress, with its plenary power to control immigration, originally intended for LGBTQ+ immigrants to be considered psychopathic and thus ineligible to gain citizenship.¹⁹ Boutilier was ultimately forced to leave his long-term male partner, with whom he shared an apartment.²⁰

Ten years later, the courts introduced a new term, “sexual deviancy,” to exclude homosexuals in a way that it did not deem as “unconstitutionally vague.”²¹ It was not until 1990 that Congress formally eliminated the INA’s exclusionary terms and held that sexual orientation was no longer a basis for barring entry.²² It must be noted, however, that from 1993 to 2010 a positive HIV status, a health condition heavily associated with the gay community, was grounds for inadmissibility into the country.²³

The Refugee Act of 1980, an amendment to the Immigration and Nationality Act, codified the United States’ commitment to protecting refugees.²⁴ This amendment established the authorization of the Attorney General to “grant asylum if an alien is unable or unwilling to return to her country of origin because she has suffered past persecution or has a well-founded fear of future persecution on account of ‘race, religion, nationality, membership in a particular social group, or political opinion.’”²⁵ Status as a member of the LGBTQ+ community is not explicitly included within the statute, so many queer asylum seekers state their claim under the PSG category. Early case law on asylum established the interpretation of this group to include persons who share a “common, immutable characteristic . . . such as sex, color, or kinship ties.”²⁶

That interpretation was subsequently tested in the 1990 case of *Matter of Toboso-Alfonso*.²⁷ In that case, Toboso-Alfonso applied for asylum and withholding of removal on the basis that he feared persecution for being a homosexual in Cuba.²⁸ While his asylum claim

¹⁹ *Boutilier*, 387 U.S. at 122; Bushell, *supra* note 12, at 684.

²⁰ *Boutilier*, 387 U.S. at 120.

²¹ Bushell, *supra* note 12, at 687.

²² Bushell, *supra* note 12, at 687.

²³ Immigration Equality, *People Living with HIV*, IMMIGR. EQUAL. (June 3, 2020), <https://immigrationequality.org/legal/legal-help/people-living-with-hiv/>.

²⁴ Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980).

²⁵ Michael Kareff, *Constructing Sexuality and Gender Identity for Asylum Through a Western Gaze: The Oversimplification of Global Sexual and Gender Variation and its Practical Effect on LGBT Asylum Determinations*, 35 GEO. IMMIGR. L. J. 615, 619-20.

²⁶ *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

²⁷ *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 819 (BIA 1990).

²⁸ *Id.* at 820.

was denied by the immigration judge's discretion due to Toboso-Alfonso's criminal record, the judge found him to be a part of a PSG and awarded him withholding of removal.²⁹ The Immigration and Naturalization Service appealed, contending that Toboso-Alfonso did not meet his burden of proof and that homosexuals were not considered a PSG.³⁰ In its argument, the Service stated that the socially deviant behavior of homosexual activities was not enough to establish a PSG.³¹ The Board of Immigration Appeals stated, however, that Toboso-Alfonso's testimony and evidence expressed that it was his status as a homosexual, and not a specific activity, that resulted in governmental actions against him in Cuba.³² The Service's appeal was ultimately dismissed.³³

Toboso-Alfonso was the first time that status as an LGBTQ+ member was formally considered part of a PSG for purposes of seeking asylum. But fitting one of the protected groups is only half the battle. Asylum seekers must then establish that they have experienced persecution or have a well-founded fear of persecution because of their membership in a PSG.³⁴ LGBTQ+ asylum applicants face an extensively high burden to establish this claim,³⁵ and yet asylum is a form of relief that is discretionary, not mandatory.³⁶ This broad standard has given the branches of the United States government the ability to implement restrictive measures based on asylum for any reason they deem fit.

An example of the large discretionary power held by United States Immigration Courts came in 1997 with the case of *Pitcherskaia v. I.N.S.*³⁷ In *Pitcherskaia*, Russian native Alla Pitcherskaia applied for asylum on the basis that she was persecuted or feared persecution based on her political support of gay rights and her membership in a particular social group as a lesbian.³⁸ While in Russia, Pitcherskaia was arrested and

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 822.

³² *Id.*

³³ *Toboso-Alfonso*, 20 I. & N. Dec. at 823.

³⁴ Kareff *supra* note 25, at 621.

³⁵ See Kareff *supra* note 25, at 621 ("PSG[] asylum applicants must establish a prima facie case that they have: (1) a well-founded fear of persecution (2) based on past persecution or risk of persecution in the future if returned to the country of origin (3) because of the applicant's membership in a PSG wherein (4) the persecutor is a government actor and/or a non-governmental actor that the government is unable or unwilling to control.").

³⁶ Kareff *supra* note 25, at 622.

³⁷ *Pitcherskaia v. I.N.S.*, 118 F.3d 641 (9th Cir. 1997).

³⁸ *Id.* at 643.

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beaten multiple times on account of her sexual identity.³⁹ She was deemed a “suspected lesbian” after having visited her ex-girlfriend, who was forced to endure electric shock treatment at a psychiatric institution.⁴⁰ Pitcherskaia was required to attend “therapy” sessions, where she was prescribed sedative drugs and hypnotized.⁴¹ Both the Immigration Judge and the Board of Immigration Appeals (“BIA”) denied Pitcherskaia’s asylum claim.⁴² They found that her claims did not constitute persecution within the meaning of the INA, since the militia and institutions intended to “cure” her, not “punish” her.⁴³ She was luckily able to appeal to the Ninth Circuit Court of Appeals, which reversed and remanded the BIA’s denial of asylum and held that punishment was not a mandatory aspect of proving persecution.⁴⁴

If it were not for Pitcherskaia’s ability to appeal her asylum claim to a higher court, the immigration system would have immediately left her deportable and vulnerable to her home country, failing her just like it has failed LGBTQ+ asylum seekers before and after her case. More recent failures have come in the form of general restrictions on the asylum process. Since at least 2016, Customs and Border Protection has implemented a metering policy, even though there exists no federal statute regulating their ability to do so.⁴⁵ Metering limits the number of asylum seekers at the ports of entry and forces those who have not crossed the boundary line to wait in Mexican border cities for as long as six months until it is their turn.⁴⁶ The Trump Administration imposed even more restrictive measures, including the Migrant Protection Protocol (MPP), the Prompt Asylum Claim Review (PACR), and the “safe third country” agreements with Central America.⁴⁷

MPP, more casually known as the “Remain in Mexico” program, forced asylum seekers to stay in Mexico while immigration officials

³⁹ *Id.* at 644.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 645.

⁴³ *Pitcherskaia*, 118 F.3d at 645.

⁴⁴ *Id.* at 647–48.

⁴⁵ The Department of Homeland Security’s “Metering” Policy: Legal Issues, CONG. RSCH. SERV. 1, 2.

⁴⁶ Neela Ghoshal, “Every Day I Live in Fear” Violence and Discrimination Against LGBT People in El Salvador, Guatemala, and Honduras, and Obstacles to Asylum in the United States, HUM. RTS. WATCH 1, 26 (2020).

⁴⁷ *Court Ordered Reimplementation of the Migrant Protection Protocols*, DEP’T OF HOMELAND SEC., <https://www.dhs.gov/archive/migrant-protection-protocols> (last visited Mar. 24, 2024); 86 F.R. 8267 (2021); 84 F.R. 63994 (2019).

reviewed their claims.⁴⁸ Vulnerable groups were exempt from this rule on a case-by-case basis, but the LGBTQ+ community was not included in that exemption.⁴⁹ MPP included some of the most dangerous places in Mexico, such as Tamaulipas, in the agreement to hold asylum seekers who already feared for their lives in their home countries.⁵⁰ PACR, on the other hand, was essentially a fast track for removal proceedings of asylum seekers.⁵¹ Asylum seekers subject to the program were held in detention centers for the entire process and were often denied basic rights in their proceedings, such as access to counsel, evidence, and family members.⁵² This often discouraged LGBTQ+ people from speaking truthfully about their experiences.⁵³

Finally, former President Trump entered into agreements with Guatemala, El Salvador, and Honduras in which the U.S. would turn away asylum seekers who passed through one of the three countries before entering, requiring them to seek asylum in the first Central American country.⁵⁴ The United States already had a “safe third country” agreement with Canada.⁵⁵ There was a large difference, however, between the agreement with Canada and the agreements in Central America, centered around the idea of the third country’s ability to provide safe and adequate asylum relief.⁵⁶ As is discussed below in Section III, Subsection A, Guatemala, El Salvador, and Honduras are not, and have never been, safe places for LGBTQ+ refugees to seek asylum.⁵⁷

⁴⁸ Neela Ghoshal, “Every Day I Live in Fear” *Violence and Discrimination Against LGBT People in El Salvador, Guatemala, and Honduras, and Obstacles to Asylum in the United States*, HUM. RTS. WATCH 1, 26 (2020).

⁴⁹ *Id.*

⁵⁰ Lori A. Nessel, *Enforced Invisibility: Toward New Theories of Accountability for the United States’ Role in Endangering Asylum Seekers*, 55 U.C. DAVIS, 1513, 1525–26 (2022) (stating that the danger presented in Tamaulipas is so grave that the US has travel warnings urging Americans who do choose to visit to have prepared a will and designated family members to handle negotiations when faced with kidnappers).

⁵¹ Neela Ghoshal, “Every Day I Live in Fear” *Violence and Discrimination Against LGBT People in El Salvador, Guatemala, and Honduras, and Obstacles to Asylum in the United States*, HUM. RTS. WATCH 1, 26 (2020).

⁵² Lori A. Nessel, *Enforced Invisibility: Toward New Theories of Accountability for the United States’ Role in Endangering Asylum Seekers*, 55 U.C. DAVIS, 1513, 1529 (2022).

⁵³ Neela Ghoshal, “Every Day I Live in Fear” *Violence and Discrimination Against LGBT People in El Salvador, Guatemala, and Honduras, and Obstacles to Asylum in the United States*, HUM. RTS. WATCH 1, 26 (2020).

⁵⁴ Peniel Ibe, *The Dangers of Trump’s “Safe Third Country” Agreements in Central America*, AM. FRIENDS SERV. COMM. (Jul. 28, 2020), <https://www.afsc.org/blogs/news-and-commentary/dangers-trumps-safe-third-country-agreements-central-america>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Infra* p. 114.

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Donald Trump's agreement with these countries did not have LGBTQ+ asylum seekers' best interests in mind, but nothing screams "disregard for refugee wellbeing" quite like the sweeping exclusionary policy he would later impose.

B. The Transformation of Title 42

The Trump Administration implemented a broad restrictive policy disguised as an attempt to protect the United States from infection by COVID-19: Title 42.⁵⁸ Title 42 is part of the Public Health Service Act ("PHSA"), established in 1944 under the Roosevelt Administration.⁵⁹ Before Title 42's enactment, federal quarantining power took the form of excluding immigrants suffering from contagious diseases, to prevent infection from yellow fever, cholera, and the plague.⁶⁰ Section 265 formally granted federal health authorities, with approval from the President, the power to prohibit persons from a foreign country with the existence of a communicable disease entrance into the United States.⁶¹ The use of this section in years past has been rare but prevalent in solidifying federal health authorities' broad discretion when implementing the PHSA.⁶² Title 42's prior responsibility of preventing entry and quarantining individuals coming from areas with spikes in infectious diseases is a stark contrast to its use following the COVID-19 pandemic: restricting everyone from entrance along the United States-Mexico land border.⁶³

⁵⁸ Although the end of the COVID-19 public health emergency will likely automatically end the use of Title 42 at the southern border, it is important to give the background of such an infamous tool used to commit countless border expulsions to argue that LGBTQ+ asylum lives are still at risk. There is a good chance that supporters of such tools will advocate for their reimplementation, as will be later discussed within this Comment. See *Explainer: Title 42 and What Comes Next at the Border*, NAT. IMMIGR. FORUM (Feb. 1, 2023), <https://immigrationforum.org/article/explainer-title-42-and-what-comes-next-at-the-border/#:~:text=On%20January%2029%2C%20the%20Biden,Title%2042%20at%20the%20border.>

⁵⁹ Sarah Rosen, *"Trump Got His Wall, It Is Called Title 42"; The Evolution and Illegality of Title 42's Implementation and its Impact on Immigrants Seeking Entry into the United States*, 14 NE. U. L. REV. 229, 236–37.

⁶⁰ *Id.* at 237.

⁶¹ 42 U.S.C. § 265.

⁶² Rosen, *supra* note 59, at 238.

⁶³ Reynaldo Leaños Jr., *COVID-19 at the Border: Unprecedented Use of Law Expels Migrants 'As Quickly as Possible'*, TEX. PUB. RADIO (July 28, 2020, 10:02 AM), <https://www.tpr.org/border-immigration/2020-07-28/covid-19-at-the-border-unprecedented-use-of-law-expels-migrants-as-quickly-as-possible>.

Following former President Trump's 2016 election, his administration immediately began brainstorming ways to limit access to immigration.⁶⁴ Multiple news sources reported that Donald Trump's advisor, Stephen Miller, sought legal justifications for halting asylum by employing Title 42 during a 2019 mumps outbreak.⁶⁵ Shaw Drake, an attorney with the American Civil Liberties Union of Texas, was quoted saying, "Trump's border and immigration policy was very much led by Stephen Miller. . . They had spent their entire administration searching for mechanism after mechanism to cut off access to asylum at the border."⁶⁶

March 2020 then brought the unprecedented COVID-19 pandemic, and along with it came an array of regulations to attempt to stop the spread and keep the country safe. The Trump Administration jumped at the opportunity to dust off Title 42 and ordered the Centers for Disease Control and Prevention (CDC) to invoke the act on March 20 to protect the public's health from the incoming of infected individuals at the Ports of Entry.⁶⁷ The order, which denied access to anyone seeking entrance through Canada's or Mexico's borders, was extended indefinitely on May 19, 2020.⁶⁸ Title 42 did not apply to United States citizens and lawful permanent residents, but rather solely to those whom the order refers to as "covered aliens."⁶⁹

Title 42 immediately expelled all persons at the border and either sent them to Mexico or returned them to their countries of origin.⁷⁰ Although it applied to both borders and anyone entering, regardless of country of origin, the enforcement of Title 42 primarily impacted the Latin American countries of Mexico, Guatemala, Honduras, and El Salvador.⁷¹ The order justified the blanket expulsion process on the idea that COVID-19 risks would be heightened due to lengthy processing procedures and a lack of medical resources from the Ports of Entry and

⁶⁴ Rosen, *supra* note 59, at 233.

⁶⁵ René Kladzyk, *Timeline: How Title 42 Came to be Used on Asylum Seekers*, EL PASO MATTERS (Oct. 8, 2021), <https://elpasomatters.org/2021/10/08/timeline-how-title-42-came-to-be-used-on-asylum-seekers/>.

⁶⁶ *Id.*

⁶⁷ Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65,806.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 LOY. L. REV. 121, 151.

⁷¹ Rosen, *supra* note 59, at 241.

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Border Control.⁷² The CDC also noted Border Control's inability to perform proper infection control procedures, such as COVID-19 testing, vehicle disinfection, and quarantining large numbers of immigrants.⁷³ Section III, subsection B mentions below that United States health professionals have largely debunked these justifications for Title 42's implementation.

The order did contain a provision stating one more exemption to expulsions, which includes certain persons based on considerations of public health, public safety, and humanitarian concerns.⁷⁴ Along with this provision included the widely noted, yet narrowly applied, exemption to Title 42 protecting people who "spontaneously" inform officers of their fear of torture upon expulsion.⁷⁵ On its face, this exemption seemed like the perfect match for asylum seekers, particularly those identifying as LGBTQ+. In reality, clear evidence showed a complete lack of application of the provision for most at-risk groups seeking asylum.⁷⁶ The Biden administration announced in March 2022 that, considering the war on Ukraine, Ukrainians would be exempt from expulsions at the border on a case-by-case basis.⁷⁷ As necessary of a step as the exemption for Ukrainians was, it only furthered the fact that Title 42 was a harmful barrier to those in desperate need of United States protection.⁷⁸ Over 2.3 million expulsions were carried out after the 2020 implementation of Title 42, and so long as it remained in effect, the number continued to rise.⁷⁹

⁷² Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65,806.

⁷³ Rosen, *supra* note 59, at 244.

⁷⁴ Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65,806.

⁷⁵ *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (May 25, 2022), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>.

⁷⁶ Rosen, *supra* note 59, at 243.

⁷⁷ Dan Friedman, *The Plight of Ukrainian Refugees Highlights the Problem of Title 42*, HIAS (Mar. 24, 2022), <https://hias.org/news/the-plight-of-ukrainian-refugees-highlights-the-problem-of-title-42/>.

⁷⁸ *Id.*

⁷⁹ Adam Liptak, *Chief Justice Roberts Briefly Halts Decision Banning Border Expulsions*, N.Y. TIMES (Dec. 19, 2022), <https://www.nytimes.com/2022/12/19/us/politics/title-42-scotus-immigration-asylum.html>.

C. *New Administration, Same Old Anti-Asylum Sentiment*

The election of President Joe Biden brought with it an array of promises to reform the United States immigration process.⁸⁰ President Biden's plan explicitly expressed that he would work to end the policies enacted by the Trump Administration and he had notably put in the effort to fulfill a portion of that promise.⁸¹ But the new administration hit many speed bumps during their well-intentioned efforts.

In 2021, the Biden Administration and the Secretary of Homeland Security announced the end of MPP by issuing a memo, only to be forced to re-implement the program when two states fought against the termination.⁸² Both a federal judge for the United States District Court for the Northern District of Texas and the Fifth Circuit held that the termination of MPP violated the INA, thus reinstating the program in late 2021 through a nationwide injunction.⁸³ This sparked the case of *Biden v. Texas*.⁸⁴ The Supreme Court held "that, under the INA, the Secretary of Homeland Security has a discretionary authority to return a noncitizen to a foreign contiguous territory. However, the implementation of MPP is by no means mandatory under the statute."⁸⁵ The holding in *Biden v. Texas* was a giant win for the administration because it restricted district courts from ever ordering an injunction to re-implement MPP, regardless of whatever litigation continues to ensue.⁸⁶

The Biden Administration then began a tug-of-war with the judiciary to end Title 42⁸⁷ expulsions as it did with MPP. Starting in

⁸⁰ Jens Manuel Krogstad & Ana Gonzalez-Barrera, *Key Facts About U.S. Immigration Policies and Biden's Proposed Changes*, PEW RSCH. CTR., <https://www.pewresearch.org/fact-tank/2022/01/11/key-facts-about-u-s-immigration-policies-and-bidens-proposed-changes/> (Jan. 11, 2022).

⁸¹ *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN HARRIS DEMOCRATS, <https://joebiden.com/immigration/> (last visited Feb. 27, 2024).

⁸² Elizabeth Carlson, et. al., Supreme Court Holds that Biden Administration's Termination of the Migrant Protection Protocols Did Not Violate the Immigration and Nationality Act Authors, CATH. LEGAL IMMIGR. NETWORK, INC. (Aug. 24, 2022), <https://cliniclegal.org/resources/litigation/supreme-court-holds-biden-administrations-termination-migrant-protection#:~:text=In%20early%202021%2C%20the%20Biden,forced%20to%20re%2Dimplement%20MPP.>

⁸³ *Id.*

⁸⁴ *Biden v. Texas*, 142 U.S. 2528 (2022).

⁸⁵ Carlson, *supra* note 82; *see* Biden, 142 S. Ct. at 2541 (emphasizing the statute's use of "may," connoting discretion).

⁸⁶ Carlson, *supra* note 82.

⁸⁷ October of 2022 revealed a contradiction in the Biden Administration's plan to eliminate Title 42. The administration announced that Venezuelan asylees, along with

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February 2021, President Biden issued an executive order, and the CDC published notice of a temporary exemption for unaccompanied minors from Title 42, which became a permanent exception in March 2022.⁸⁸ The following month, the CDC released an order to end Title 42 expulsions entirely, which was halted by a preliminary injunction set by a Louisiana district court.⁸⁹ In addition to this injunction, members of Congress introduced several bills to codify and maintain the use of Title 42 expulsions.⁹⁰

Fast forward to November 2022, a federal district court ruled in favor of ending Title 42 expulsions.⁹¹ This ruling was further backed by the United States Court of Appeals for the District of Columbia Circuit in December, which declined to delay the cancellation despite requests from multiple Republican state officials.⁹² The Court of Appeals stated that, unless a Supreme Court decision superseded it, Title 42 was set to be terminated before 2023.⁹³ Not long after that decision was finalized, nineteen Republican-led states filed an emergency application requesting that the justices grant a stay on the previous order.⁹⁴ The

those from Nicaragua, Cuba, and Haiti, would be expelled upon reaching the border and sent to Mexico. Mexico was pressured by the Biden administration to take this growing wave of migrants at the southern border. Below Mexico, the country of Panama received an influx of up to 1,606 asylum seekers per day. Of the migrants Panama has received, eighty percent were Venezuelans, who had to endure a treacherous walk through the Darien Gap jungles once expelled from the U.S. border. *See* Dan Katz & Yvette Benavides, *Biden Administration Extending Title 42 Migrant Expulsions, Says Mexican Government*, HOUS. PUB. MEDIA (Oct. 12, 2022, 12:28 PM), <https://www.houstonpublicmedia.org/articles/news/politics/immigration/2022/10/12/434958/biden-administration-extending-title-42-migrant-expulsions-says-mexican-government/>.

⁸⁸ *See generally* 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 (Mar. 17, 2022); Zefitret Abera Molla, *Ending the Title 42 Expulsion Policy Is the Right Thing to Do*, CTR. FOR AM. PROGRESS (Apr. 6, 2022), <https://www.americanprogress.org/article/ending-the-title-42-expulsion-policy-is-the-right-thing-to-do/>.

⁸⁹ *Featured Issue: Border Processing and Asylum*, AM. IMMIGR. LAW. ASS'N, <https://web.archive.org/web/20220818074731/https://www.aila.org/advo-media/issues/featured-issue-border-processing-and-asylum> (July 19, 2022).

⁹⁰ *Id.*

⁹¹ Camilo Montoya-Galves, *Court Rejects GOP States' Request to Delay End of Title 42 Border Expulsions*, CBS NEWS (Dec. 17, 2022, 8:25 PM), <https://www.cbsnews.com/news/court-rejects-gop-states-request-to-delay-end-of-title-42-border-expulsions/>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Liptak, *supra* note 79.

Supreme Court majority appeared to agree with the states' rationale that lifting Title 42 would bring an unmanageable wave of illegal crossings at the border because, on December 19, 2022, Chief Justice Roberts issued an administrative stay to keep Title 42 in effect.⁹⁵

The Biden Administration then tried for a third time to end the use of Title 42 by filing a brief before the Supreme Court, which addressed Congress's intent to terminate the public health emergency on May 11, 2023.⁹⁶ The public health emergency's end meant Title 42 would be rendered moot.⁹⁷ But the end of Title 42 did not mean the end of all asylum restrictions, because the brief later explained that the administration would issue a proposed rule once attempted by the Trump Administration.⁹⁸ The rule called for the officials to turn away asylum seekers at the southern border if they passed through a third country during transit and did not request asylum in that country.⁹⁹ The "transit ban," as immigration rights advocates deemed it, bore a striking resemblance to the exclusionary tactics of Title 42.¹⁰⁰ Even if it is not in use, Title 42's influence continues to lurk across the southern border.

III. ANALYSIS: THE POWERLESS, THE POWERFUL, AND A PLEA FOR PROTECTION

This section explores the experiences of LGBTQ+ asylum seekers under the control of Title 42. It then reviews public opinion of asylum restrictions and the dangerous effect that restrictive measures like Title 42 can have on the future of asylum. This section concludes with a proposal for the exclusion of LGBTQ+ asylum seekers from future

⁹⁵ Liptak, *supra* note 79; Arizona, et al. v. Alejandro Mayorkas, Secretary of Homeland Security, et al., No. 22A544 (U.S. 2022).

⁹⁶ Adam Isacson, *Weekly U.S.-Mexico Border Update: Post-Title 42 Asylum Block, House Hearing, Migrant Deaths*, WOLA (Feb. 10, 2023), [https://www.wola.org/2023/02/weekly-u-s-mexico-border-update-post-title-42-asylum-blocks-house-hearing-migrant-deaths/#:~:text=The%20U.S.%20government's%20COVID%2D19,from%20the%20U.S.%2DMexico%20border](https://www.wola.org/2023/02/weekly-u-s-mexico-border-update-post-title-42-asylum-blocks-house-hearing-migrant-deaths/#:~:text=The%20U.S.%20government's%20COVID%2D19,from%20the%20U.S.%2DMexico%20border; see generally); see generally Brief for the Federal Respondents, State of Arizona, et al. v. Alejandro N. Mayorkas, Secretary of Homeland Security, et al., No. 22-592 (U.S. Feb. 2023).

⁹⁷ Adam Isacson, *Weekly U.S.-Mexico Border Update: Post-Title 42 Asylum Block, House Hearing, Migrant Deaths*, WOLA (Feb. 10, 2023), <https://www.wola.org/2023/02/weekly-u-s-mexico-border-update-post-title-42-asylum-blocks-house-hearing-migrant-deaths/#:~:text=The%20U.S.%20government's%20COVID%2D19,from%20the%20U.S.%2DMexico%20border>.

⁹⁸ *Id.*

⁹⁹ Mexican asylum seekers would not be subject to the new ban, because they would not pass through another country before reaching the border. *Id.*

¹⁰⁰ *Id.*

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border restrictions to promote the United States as a safe space for the community and provide restorative justice for the historical discrimination that they have faced.

A. *Border Expulsions: Real Effects on Real People*

Expulsions to Mexico or their country of origin have posed, and continue to pose, a great risk to LGBTQ+ asylum seekers' health and safety. Instead of receiving due process and protection from the United States to which they are entitled, LGBTQ+ asylum seekers are either returned to the very fear they sought refuge from or sent to Mexico, which presents dangers for the gay community.¹⁰¹ Border agents received no consequence for making these expulsions despite the exceptions within Title 42 for at-risk asylum seekers.¹⁰²

Human Rights Watch conducted interviews with LGBTQ+ asylum seekers in Ciudad Juárez and Mexico City, Mexico to give the public a first-hand account of what horrors have occurred due to Title 42 expulsions.¹⁰³ Many asylees report that they avoid approaching the border because they fear expulsion to their country of origin or Mexico.¹⁰⁴ Those who did approach the border, recounted that they were turned away at the border even after expressing to officials that they fear torture, abuse, and persecution due to their sexual or gender identity.¹⁰⁵ Once turned away, LGBTQ+ asylum seekers were left without proper access to shelter, food, water, or healthcare, particularly for those living with HIV or needing hormonal treatment.¹⁰⁶ On top of that, these individuals faced the risk of abuse, mental anguish, and sometimes death at the hands of unwelcoming people at the border and in the Latin American countries to which they were sent.¹⁰⁷ The following stories are the real experiences of LGBTQ+ asylum seekers who faced this harsh reality.

¹⁰¹ *US: LGBT Asylum Seekers in Danger at the Border*, HM. RTS. WATCH (May 31, 2022, 12:54 PM), <https://www.hrw.org/news/2022/05/31/us-lgbt-asylum-seekers-danger-border>.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *US: LGBT Asylum Seekers in Danger at the Border*, HM. RTS. WATCH (May 31, 2022, 12:54 PM), <https://www.hrw.org/news/2022/05/31/us-lgbt-asylum-seekers-danger-border>.

In July 2021, Mexican state police beat Kayla R.,¹⁰⁸ a transgender woman who fled Guatemala.¹⁰⁹ An immigration official promised her that if she reported the crime, she would be given a one-year humanitarian visa.¹¹⁰ That promise was never fulfilled, and once she reported the crime, border control returned her to Guatemala.¹¹¹ Kayla attempted to return to the United States border in March 2022, but criminals with machetes threatened and robbed her.¹¹²

José M. fled death threats in Honduras due to his identity as a gay man.¹¹³ He stated that he feared staying in Mexico due to extortion and violence from officials and shelters.¹¹⁴ Many shelters did not offer him refuge because of his sexual identity, forcing him to either sleep on the streets of Mexico or attend religious services to avoid being left homeless.¹¹⁵ While trying to enter the United States in March 2021, Mexican immigration officials required everyone on his bus to pay a bribe or be barred from entering.¹¹⁶ After expressing fear of returning to Mexico due to the abuse at shelters he had experienced, United States officials expelled José and forced him to throw away all of his belongings.¹¹⁷ Border officials are known to throw away migrants' possessions for apparent health and safety reasons, even including identifying documents, medication, and sentimental memorabilia.¹¹⁸

In February 2022, gay couple Adolfo H. and Gerardo C., fled Cuba and El Salvador to seek asylum in the United States.¹¹⁹ Along their journey through Mexico, the couple faced extortion by Mexican immigration agents.¹²⁰ Once at the border, they were told that, because they were not married, only Adolfo could seek asylum, or they would be

¹⁰⁸ Names within the following stories were changed to protect the interviewees' identities.

¹⁰⁹ *US: LGBT Asylum Seekers in Danger at the Border*, HM. RTS. WATCH (May 31, 2022, 12:54 PM), <https://www.hrw.org/news/2022/05/31/us-lgbt-asylum-seekers-danger-border>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *US: LGBT Asylum Seekers in Danger at the Border*, HM. RTS. WATCH (May 31, 2022, 12:54 PM), <https://www.hrw.org/news/2022/05/31/us-lgbt-asylum-seekers-danger-border>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

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expelled together.¹²¹ This proposition by United States border officials was false, however, because they had the authority to let both men in.¹²² Border officials even forced the men to stop holding hands or touching each other while they were in custody.¹²³ The couple was ultimately expelled to Mexico, where they got married in hopes of having a future chance at asylum.¹²⁴

The above atrocities occurred due to border restrictions to thousands of LGBTQ+ asylum seekers daily and did not diminish once the seekers were turned away from the border and faced the vast lands of Latin America. If returned to their country of origin, refugees run a high risk of facing the abuse from which they fled, and the same stands true should they be sent to Mexico. From the year 2014 to 2023, 2,841 LGBTQ+ people were killed in Latin American countries due to their sexuality and gender orientations.¹²⁵

Over the past decade, Mexico has made monumental strides with the legalization of LGBTQ+ marriage and the recognition of the community's equality across all of its states.¹²⁶ Regardless of what state law has dictated, however, around eighty percent of Mexico's population identify as Catholic, a religion often attributed with more conservative marriage and gender ideals.¹²⁷ Thus, despite being legally recognized, two-thirds of LGBTQ+ migrants in Mexico experience violence from prejudice towards their identities.¹²⁸ In 2019, at least one hundred and seventeen queer people were killed within Mexican borders, only lowering in recent years likely due to fewer interactions between individuals because of the COVID-19 pandemic.¹²⁹

¹²¹ *US: LGBT Asylum Seekers in Danger at the Border*, HM. RTS. WATCH (May 31, 2022, 12:54 PM), <https://www.hrw.org/news/2022/05/31/us-lgbt-asylum-seekers-danger-border>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *About*, SIN VIOLENCIA LGBTI, <https://sinviolencia.lgbt/> (last visited Mar. 24, 2024).

¹²⁶ Associated Press, *Same-Sex Marriage is Legalized in All of Mexico's States*, PBS (Oct. 27, 2022), <https://www.pbs.org/newshour/world/same-sex-marriage-is-legalized-in-all-of-mexicos-states>.

¹²⁷ Jessica Frankovich, *Mexican Catholicism: Conquest, Faith, Resistance*, BERKLEY CTR. (Mar. 22, 2019), <https://berkeleycenter.georgetown.edu/posts/mexican-catholicism-conquest-faith-and-resistance>.

¹²⁸ Letter from Michele Heisler, Med. Dir., Physicians for Hum. Rts., et. al., to The Honorable Xavier Becerra, Sec'y, Dep't of Health and Hum. Serv. (July 1, 2021) (on file with author).

¹²⁹ Oscar Lopez, *Mexico sees deadliest year for LGBT+ people in five years*, REUTERS (May 15, 2020), <https://www.reuters.com/article/idUSKBN22R37X/>.

During their interviews, the asylees told Human Rights Watch stories of such abuses in Mexico, such as one told by Mariana L., a lesbian from Honduras.¹³⁰ Cartel members kidnapped Mariana for ransom near the United States-Mexico border when she fled her home country in 2021.¹³¹ In a house of several other migrants, she was robbed, beaten, and forcibly photographed while naked until her sister paid a ransom of three thousand dollars.¹³² In another kidnapping story, a group of men took Erika L. and brothers Samuel B. and Martin G., all homosexual, once they arrived at the Mexico-Guatemala border.¹³³ These men raped Erika and beat the two brothers while forcing them to watch.¹³⁴

B. A Never-Ending Attack on Asylum: The Title 42 Effect

The United States enforced Title 42 during the COVID-19 pandemic to advance racist and xenophobic ideals rather than public health concerns.¹³⁵ Studies performed by Human Rights First showed that the Department of Homeland Security could release immigrants into the United States on parole while they awaited their proceedings, and Border Patrol could process asylees within two to three hours while holding them in spaces where safe social distancing is possible.¹³⁶ Additionally, ICE gave court documentation showing that, upon boarding their deportation flights, practically all asylum seekers tested negative for COVID-19.¹³⁷ The testing used by ICE produced results within fifteen minutes.¹³⁸ If the above facts were not enough to discredit the less than compelling interest in Title 42 border expulsions to protect United States health, leading public health experts explicitly wrote to the Biden Administration, calling the order “scientifically baseless and

¹³⁰ *US: LGBT Asylum Seekers in Danger at the Border*, HUM. RTS. WATCH (May 31, 2022, 12:54 AM), <https://www.hrw.org/news/2022/05/31/us-lgbt-asylum-seekers-danger-border>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Sarah Sherman-Stokes, Public Health and the Power to Exclude: Immigrant Expulsions at the Border, 36 GEO. IMMIGR. L. J. 261, 263–64 (2021); doi: <https://doi.org/10.2139/ssrn.3789134>.

¹³⁶ Sarah Rosen, “Trump Got His Wall, It Is Called Title 42”; *The Evolution and Illegality of Title 42’s Implementation and its Impact on Immigrants Seeking Entry into the United States*, 14 NE. U. L. REV. 229, 249–50.

¹³⁷ *Id.*

¹³⁸ *Id.* at 251.

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politically motivated.”¹³⁹ Experts suggested instead implementing evidence-based measures to ensure safety and promote immigration, such as providing routine testing, increasing vaccine access, and maximizing ventilation in processing centers.¹⁴⁰ But while these policies were doable, they cost supporters of Title 42 their surefire way of keeping out the people that they did not want in their country.

Stephen Miller, who served as Senior Advisor to Trump, stated in November 2019 that “ending migration from Central America is ‘[a]ll I care about.’”¹⁴¹ This mirrors the mindset of much of the United States Republican party. In a poll by POLITICO- Harvard T.H. Chan School of Public Health that examined the public’s attitude towards ending the use of Title 42, fifty-five percent of United States adults opposed President Biden’s plan to terminate the order.¹⁴² Additionally, the poll showed that forty-one percent of the public thought that future immigration should be decreased, with sixty-eight percent of Republicans validating that notion.¹⁴³ It should then come as no surprise that the Louisiana judge who filed the injunction to stop the Biden Administration from lifting Title 42 was appointed by former President Trump of the Republican party.¹⁴⁴

The Republican party instigated an additional attack on asylum seekers in September 2022.¹⁴⁵ Florida Governor Ron DeSantis paid for two flights to take asylum seekers from the state of Texas to Martha’s Vineyard, Massachusetts.¹⁴⁶ These asylees were falsely told that their destination would be Boston, where they would receive expedited work

¹³⁹ Monette Zard, *Press Release - Epidemiologists and Public Health Experts Implore Biden Administration to End Title 42 and Restart Asylum*, COLUM. UNIV. MAILMAN SCH. OF PUB. HEALTH (June 7, 2022, 12:14 PM), <https://www.publichealth.columbia.edu/research/program-forced-migration-and-health/press-release-epidemiologists-and-public-health-experts-implore-biden-administration-end-title-42>.

¹⁴⁰ *Id.*

¹⁴¹ Sherman-Stokes, *supra* note 135.

¹⁴² Robert J. Blendon et al., *The Public’s Priorities for COVID-19 in a Changing World*, POLITICO-HARV. T.H. CHAN SCH. OF PUB. HEALTH (May 2022), <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2022/05/Politico-HSPH-May-2022-pollreporttopline-051822.pdf>.

¹⁴³ *Id.*

¹⁴⁴ Uriel J. García, *Judge Blocks Biden Administration from Lifting Public Health Order Used to Quickly Expel Migrants*, THE TEX. TRIB. (May 20, 2022), <https://www.texastribune.org/2022/05/20/title-42-border-judge-ruling-migrants/>.

¹⁴⁵ Eve Zuckoff, *Migrants on Martha’s Vineyard Flight Say They Were Told They Were Going to Boston*, NPR (Sep. 15, 2022, 5:03 AM), <https://www.npr.org/2022/09/15/1123109768/migrants-sent-to-marthas-vineyard>.

¹⁴⁶ *Id.*

papers.¹⁴⁷ That promise was never fulfilled. Instead, the flights made stops in the red states of Florida and the Carolinas before bringing large groups of migrants to Martha's Vineyard, unbeknownst to the local authorities in Massachusetts.¹⁴⁸ DeSantis later released a statement attempting to justify his treatment of asylum seekers like cattle.¹⁴⁹ The statement read: "States like Massachusetts, New York[,] and California will better facilitate the care of these individuals who they have invited into our country by incentivizing illegal immigration."¹⁵⁰

Restrictive policies on asylum are not solely the Republican party's fault, nor are they a brainchild of former President Trump. These types of policies have existed within the United States immigration system since its inception, particularly harming the LGBTQ+ community. The Illegal Immigration Reform and Immigrant Responsibility Act was passed by Congress in 1996, which imposed additional bars to asylum, most notably the requirement that refugees file within one year of entering the United States.¹⁵¹ This has been unfairly prejudicial to LGBTQ+ asylum seekers since they are often unaware that their identity may form a basis for protection, and they may be hesitant to disclose details due to the persecution and abuse they experienced in their home countries.¹⁵² Asylum metering was used as early as 2016 under the Obama Administration, primarily targeting Haitians, requiring them to obtain a ticket from Mexican officials to get a spot in line for asylum.¹⁵³ Metering leaves those asylees in Mexico for weeks, months, or even years, risking their health and safety, such as described in the accounts of LGBTQ+ brutality in the subsection above.¹⁵⁴

What makes the policies enforced by the Trump Administration, and continued under the Biden administration, stand out from the restrictions that came before them is the idea that Title 42¹⁵⁵ was the first time in a long time that entire groups of citizens were turned away

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ 1-3 *Asylum Law Basics: 1. A Brief History*, IMMIGR. EQUAL., <https://immigrationequality.org/asylum/asylum-manual/asylum-law-basics-2/asylum-law-basics/> (last visited Mar. 23, 2024).

¹⁵² *Id.*

¹⁵³ *Metering and Asylum Turnbacks*, AM. IMMIGR. COUN. (Mar. 8, 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/metering_and_asylum_turnbacks_0.pdf.

¹⁵⁴ *Id.*

¹⁵⁵ Along with former President Trump's ban on Muslim entry, which is outside the scope of this Comment. See generally *Trump v. Hawaii*, 138 U.S. 2392, 2392 (2018).

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at the border for reasons unrelated to the substance of their immigration claim. The Chinese Exclusion Act of 1882 was enacted due to economic and cultural tensions, and racial discrimination.¹⁵⁶ It prevented Chinese laborers from entering the U.S. and prohibited existing Chinese immigrants from obtaining citizenship.¹⁵⁷ History has a habit of repeating itself, and it is no secret that Donald Trump's 2016 presidential campaign promised to "remove all avenues for immigrants seeking protection under the laws of the United States," and to "build a wall" along the Mexican border.¹⁵⁸ The COVID-19 pandemic provided former President Trump with an avenue to do exactly as he had promised. So, disguised as a protection for public health, the Trump Administration implemented a discriminatory barrier to restrict millions of human beings from seeking safety. Later down the line, hidden underneath President Biden's best efforts to end Title 42, was the transit ban.¹⁵⁹ This was yet another way to limit access and enforce "a death sentence for the poor, Indigenous, LGBTQ+, African, and other communities who don't have the luxury of buying a direct ticket to the United States."¹⁶⁰

To restate and reaffirm the facts above, there has never been any evidence that asylum seekers pose a public health threat to the United States.¹⁶¹ When vaccines began to roll out, and ports of entry were opened to visitors, both the Trump and Biden Administrations continued to deny asylum claims.¹⁶² As said by Sameera Hafiz, Policy Director for the Immigrant Legal Resource Center, "[t]his is proof that Title 42 was never about public health, but rather a racist double standard put in place by the Trump administration, and administered for months by the Biden administration, to keep migrants from Black and Brown countries out."¹⁶³

¹⁵⁶ *Chinese Immigration and the Chinese Exclusion Acts*, OFF. OF THE HIST., <https://history.state.gov/milestones/1866-1898/chinese-immigration> (last visited Mar. 24, 2024).

¹⁵⁷ *Id.*

¹⁵⁸ Rosen, *supra* note 59, at 233.

¹⁵⁹ Press Release, Welcome with Dignity (Feb. 8, 2023) (on file with author).

¹⁶⁰ *Id.*

¹⁶¹ *US: LGBT Asylum Seekers in Danger at the Border*, HM. RTS. WATCH (May 31, 2022, 12:54 AM), <https://www.hrw.org/news/2022/05/31/us-lgbt-asylum-seekers-danger-border>.

¹⁶² *Judge's Decision to Keep Racist Title 42 in Place Punishes Asylum Seekers*, IMMIGR. LEGAL RES. CTR. (May 20, 2022), <https://www.ilrc.org/judges-decision-keep-racist-title-42-place-punishes-asylum-seekers>.

¹⁶³ *Id.*

C. Proposal for Statutory Protections Amid an Unsure Future

It has only been thirty-two years since Congress ended the exclusion of gay immigrants from entering the United States in 1990.¹⁶⁴ Fifteen years before that policy change, a gay United States citizen, Richard Adams, was denied his petition for his Australian partner, Anthony Sullivan, to receive permanent residency.¹⁶⁵ The legal reasoning provided by the Immigration and Naturalization Service regarding the denial was that Adams “failed to establish that a bona fide marital relationship can exist between two faggots.”¹⁶⁶ In 2005, a visa officer stated that they denied a US citizen a visa for his same-sex partner because “they don’t give visas to fag couples.”¹⁶⁷

Today, immigration restrictions are not so explicit in their discrimination, but that does not make them any less harmful. As evidenced by the first-hand accounts stated above in subsection A, border expulsions put queer asylum seekers in grave danger.¹⁶⁸ Though legalized in most Latin American regions, identifying as LGBTQ+ is the basis for abuses such as rape, torture, and sometimes death at the hands of both immigration officials and criminals.¹⁶⁹ On top of that, queer asylum seekers often depend on medical and mental health services, such as hormonal or HIV treatment, and would likely be stripped from their ability to receive such care once expelled.¹⁷⁰ From the 1955 case of Clive Boutilier to the 2020 application of Title 42, the United States has consistently restricted queer asylum seekers from their legal place across the border.

The LGBTQ+ community’s past in immigration is dark, and the future does not look very bright either, seeing as how most United States citizens, lawmakers, and judges alike favor border restrictions. Former President Trump demonstrated how quick and easy it was for his administration to implement some of the most horrific restrictions the United States has seen in over one hundred years. Although the use of Title 42 was set to end along with the public health crisis, there is evidence that a large majority of Title 42 supporters that will likely

¹⁶⁴ Bushell, *supra* note 12, at 687.

¹⁶⁵ Bushell, *supra* note 12, at 674; *see also* Adams v. Howerton, 673 F.2d 1036, 1038 (9th Cir. 1982).

¹⁶⁶ Bushell, *supra* note 12, at 674.

¹⁶⁷ Bushell, *supra* note 12, at 674.

¹⁶⁸ *Supra* 0; *US: LGBT Asylum Seekers in Danger at the Border*, HM. RTS. WATCH (May 31, 2022, 12:54 AM), <https://www.hrw.org/news/2022/05/31/us-lgbt-asylum-seekers-danger-border>.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

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continue the fight for limitations on immigration access.¹⁷¹ That is why the United States must carve out an exemption for LGBTQ+ asylum seekers from these policies, to repair a broken past and promise a better future.

The Title 42 exemptions for unaccompanied noncitizen children and Ukrainians were previously mentioned within this Comment.¹⁷² While the circumstances under which these two groups would benefit from an exemption certainly differ from the circumstances felt by the LGBTQ+ community, the exemptions demonstrated that providing LGBTQ+ asylum seekers with that same protection would not be an unattainable feat for Congress. The history of unaccompanied children and Ukrainians seeking refuge cannot, and should not, be related to the history of LGBTQ+ asylum seekers. But in terms of restorative justice for gay immigrants, they deserve a pathway to obtain a fair chance of gaining access to the United States, which they historically have not had.

Reparative statutes and agreements are not unknown in the world of immigration law.¹⁷³ Two examples include the American Baptist Churches (ABC) Settlement Agreement¹⁷⁴ and the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA).¹⁷⁵ The ABC Settlement Agreement arose out of a case challenging the federal government's lack of protection and denial of asylum claims from Salvadorians and Guatemalans, who were categorized as economic refugees, in the 1980s.¹⁷⁶ Widespread protests and public pressure led to a settlement allowing applicants harmed by the Reagan Administration-led restrictions to have their cases reevaluated.¹⁷⁷ During reevaluation, the

¹⁷¹ *Explainer: Title 42 and What Comes Next at the Border*, NAT, IMMIGR. FORUM (Feb. 1, 2023), <https://immigrationforum.org/article/explainer-title-42-and-what-comes-next-at-the-border/#:~:text=On%20January%2029%2C%20the%20Biden,Title%2042%20at%20the%20border.>

¹⁷² *Supra* 0.

¹⁷³ The term "reparations" has purposely been avoided throughout this Comment, particularly out of respect for the special place it holds regarding slavery. While the statutory exemption proposed does resemble a reparations argument, it will not be labeled as such. See generally Subramanian Vincent, *Reparations: The Missing Chapter in America's "Pragmatic" Quest for Justice to African Americans*, MARKKULA CTR. FOR APPLIED ETHICS (Mar. 4, 2019), <https://www.scu.edu/ethics/all-about-ethics/reparations-the-missing-chapter-in-americas-pragmatic-quest-for-justice-to-african-americans/>.

¹⁷⁴ *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

¹⁷⁵ Haitian Refugee Immigration Fairness Act, 8 U.S.C. § 1255 (1998).

¹⁷⁶ Immigration History, *American Baptist Churches (ABC) Settlement Agreement*, IMMIGR. HIST., <https://immigrationhistory.org/item/abc-settlement-agreement/> (last visited Mar. 24, 2024).

¹⁷⁷ *Id.*

Salvadorian and Guatemalan refugees were permitted stays of deportation and were only allowed to be detained under specific circumstances.¹⁷⁸ This decision ultimately granted legal status to many asylum seekers who, before, experienced discrimination based on their nationality.

HRIFA was the formal acknowledgment of the Haitian refugee crisis.¹⁷⁹ In 1972, Haitians began arriving in the United States seeking refuge from Duvalier's dictatorship.¹⁸⁰ But the United States did not want to offend Duvalier, an anti-communist ally.¹⁸¹ So, the United States categorized the Haitians as economic migrants, made them ineligible to seek asylum, and placed them in detention centers, jails, and prisons to deter future Haitian migration.¹⁸² The year 1998 introduced HRIFA, an amendment to an immigration statute within the INA, which recognized the unequal treatment of Haitian refugees.¹⁸³ HRIFA required detained Haitians to be released and granted greater recognition of their refugee status so they could have a chance to obtain legal residency.¹⁸⁴

Like the previous examples, Congress must recognize the unequal treatment that LGBTQ+ asylum seekers have endured and award them with special protections so that they may have a chance to build a life within the United States. Any new legislative development on such a bipartisan issue as immigration will undoubtedly receive backlash. But the public must be informed that, just like the exemptions for unaccompanied children and Ukrainians, an LGBTQ+ exemption only protects from expulsion and does not provide a one-way ticket to citizenship. Using Title 42 as an example, United States Representatives who opposed the end of the expulsion mechanism reasoned that there was still a public health danger and would likely result in a flood of immigrants at an unmanageable level should the border open back up.¹⁸⁵ In their eyes, issuing too many exemptions to Title 42 would have brought the same concerns. The CDC explicitly determined, however,

¹⁷⁸ *Id.*

¹⁷⁹ Immigration History, *Haitian Refugee Immigration Fairness Act*, IMMGR. HIST., <https://immigrationhistory.org/item/haitian-refugee-immigrant-fairness-act/> (last visited Mar. 24, 2024).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Drishti Pillai & Samantha Artiga, *Title 42 and its Impact on Migrant Families*, KAISER FAM. FOUND. (May 26, 2022), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/title-42-and-its-impact-on-migrant-families/>.

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that Title 42 was no longer necessary thanks to vaccinations of migrants and heightened safety measures at the borders.¹⁸⁶

Additionally, an exemption for LGBTQ+ asylum seekers would likely not have led to an overwhelming flood onto the borders, since only a small percentage of asylum seekers use sexuality or gender identity as a basis for their claim. For example, from 2012 to 2017, there were only 11,400 asylum claims from LGBTQ+ refugees.¹⁸⁷ This exemption, whether applied to in the Title 42 context or any subsequent asylum ban, simply ensures that LGBTQ+ asylum seekers receive the due process of a hearing to which they are so entitled but would not automatically admit them into the country.¹⁸⁸

IV. CONCLUSION

LGBTQ+ asylum seekers are one of the most vulnerable communities to encounter United States borders. History has not been kind to the queer community, both in the world of immigration and otherwise. This Comment has listed ad nauseam the history of ignorance towards gay immigrants, and yet each new day brings another example of disregard for the community. In January 2023, United States border officials began allowing some asylum seekers to use a new mobile application to request border processing.¹⁸⁹ The migrants eligible to use the app can make an appointment with border officials where they will determine if they qualify under Title 42's humanitarian exemption.¹⁹⁰ These migrants will have to attest to a vulnerability listed within the application.¹⁹¹ These vulnerabilities include physical or mental illness, disability, pregnancy, and lack of safe

¹⁸⁶ CDC Public Health Determination and Termination of Title 42 Order, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/media/releases/2022/s0401-title-42.html> (Apr. 1, 2022).

¹⁸⁷ Ari Shaw, et. al., *LGBT Asylum Claims in the United States*, UCLA SCH. OF L. (Mar. 2021), <https://williamsinstitute.law.ucla.edu/publications/lgbt-asylum-claims/>.

¹⁸⁸ Gretchen Frazee, *What Constitutional Rights do Undocumented Immigrants Have?*, PUB. BROAD. NETWORK (June 25, 2018, 5:08 PM), <https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have>.

¹⁸⁹ Camilo Montoya-Galvez, *Border Officials Allow Asylum-Seekers to Request U.S. Entry Through Mobile App*, CBS NEWS (10:29 PM Jan.12, 2023), <https://www.cbsnews.com/news/asylum-seekers-migrants-can-request-u-s-entry-mobile-app/>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

shelter in Mexico.¹⁹² But there is one vulnerability not explicitly listed; identification as LGBTQ+.¹⁹³

The United States has a duty to protect asylum seekers fleeing persecution, and in a world where homosexuality is criminalized in sixty-nine countries, the LGBTQ+ community puts much faith in their safety within this country.¹⁹⁴ Title 42 put LGBTQ+ asylum seekers in dangerous situations by expelling them to Mexico or back to the country they were fleeing. Should Title 42 ultimately inspire the creation of future restrictive policies, it is pertinent that the Legislative and Executive branches explicitly exempt the LGBTQ+ identifying community from the punishments of immigration restrictions. The exemptions for unaccompanied children and certain Ukrainian asylum seekers have shown that Congress can implement these provisions without risk to United States safety. It is time for this country to own up for the pain and discrimination it has caused to queer immigrants. It is time for the Legislature to formally recognize the LGBTQ+ community as people facing extreme danger in their attempt to reach the southern border. It is time for the United States to finally protect LGBTQ+ asylum seekers.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Ari Shaw, et. al., *LGBT Asylum Claims in the United States*, UCLA SCH. OF L. (Mar. 2021), <https://williamsinstitute.law.ucla.edu/publications/lgbt-asylum-claims/>.