

Undoing Trump-Era Immigration Policies: The End of Title 42 and the Future of U.S. Asylum Law

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I.	INTRODUCTION	70
II.	THE GLOBAL REFUGEE CRISIS	73
	A. <i>The Crisis at the U.S.-Mexico Border</i>	73
	B. <i>LGBTQ+ Asylum Seekers at the U.S.-Mexico Border</i>	74
III.	OVERVIEW OF U.S. ASYLUM LAW	76
	A. <i>A History of Restrictionist Rhetoric</i>	76
	B. <i>The Immigration and Nationality Act</i>	79
	C. <i>Deference to the Executive Branch</i>	81
	D. <i>Changes to Asylum Under the Trump Administration</i>	83
IV.	THE BIDEN ADMINISTRATION’S CIRCUMVENTION OF LAWFUL PATHWAYS RULE.....	86
	A. <i>Termination of Title 42 and the Trajectory of U.S. Asylum Law</i>	86
	B. <i>Accelerated Asylum Processing</i>	87
	C. <i>Third-Country Asylum Requirement</i>	88
	D. <i>Alternative Pathways for Asylum-Seekers</i>	88
V.	HUMAN RIGHTS IMPLICATIONS AND POLICY RECOMMENDATIONS	91
	A. <i>In General</i>	91
	1. Humanitarian Crisis	91
	2. Exclusive Reliance on CBP One: A Violation of International Law	92
	3. Due Process Concerns Associated with Accelerated Processing	92
	B. <i>Impact on LGBTQ+ Asylum Seekers</i>	93

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VI. CONCLUSION 95

I. INTRODUCTION

In 2022, capitalizing on the anti-immigrant sentiment reinvigorated under the Trump Administration, Texas Governor Greg Abbott chartered busloads of migrants to immigrant strongholds such as New York and Washington D.C.¹ Former Arizona Governor Doug Ducey, who spent \$82 million building a wall out of shipping containers along the southern border, joined suit.² Likewise, Florida Governor Ron DeSantis devised a plan culminating in two planeloads of migrants arriving on the island of Martha's Vineyard off the coast of Massachusetts.³ Denouncing these actions as "cruel, premeditated political stunt[s]," the Biden Administration urged Republicans to work with Democrats toward a "safe, [] orderly and humane" solution to the nation's immigration crisis.⁴ In fact, undoing Trump-era immigration policies was a central component of Biden's campaign trail promises.⁵ With respect to asylum specifically, President Biden promised "to restore [the United States'] . . . historic role as a safe haven for refugees and asylum-seekers."⁶

Immigration advocates, however, have criticized the Biden Administration for failure to make good on its promises.⁷ Trump's

1. Will Sennott et al., *With Faraway Migrant Drop-Offs, G.O.P. Governors Are Doubling Down*, N.Y. TIMES (Sept. 15, 2022), <https://www.nytimes.com/2022/09/15/us/desantis-abbott-migrants-immigration.html>.

2. *Id.*; Jack Healy, *One Governor's Border Wall Is Another Governor's Headache*, N.Y. TIMES (Dec. 19, 2022), <https://www.nytimes.com/2022/12/19/us/arizona-border-shipping-containers.html>.

3. Patricia Mazzei et al., *Florida Flies 2 Planeloads of Migrants to Martha's Vineyard*, N.Y. TIMES, <https://www.nytimes.com/2022/09/14/us/desantis-florida-migrants-marthas-vineyard.html> (last updated Sept. 16, 2022).

4. Kate Sullivan & Sam Fossom, *Biden Says Republicans Are 'Playing Politics with Human Beings' After DeSantis and Abbott Send Migrants to Martha's Vineyard and DC*, CNN, <https://www.cnn.com/2022/09/15/politics/white-house-republican-governors-migrants/index.html> (last updated Sept. 15, 2022, 9:14 PM).

5. John Burnett, *Biden Pledges to Dismantle Trump's Sweeping Immigration Changes—But Can He Do That?*, NPR (Sept. 14, 2020, 5:00 AM), <https://www.npr.org/2020/09/14/912060869/biden-pledges-to-dismantle-trumps-sweeping-immigration-changes-but-can-he-do-tha>. For more information on Trump-era immigration policies, see JESSICA BOLTER ET AL., MIGRATION POL'Y INST., *FOUR YEARS OF PROFOUND CHANGE: IMMIGRATION POLICY DURING THE TRUMP PRESIDENCY* (2022), <https://www.migrationpolicy.org/sites/default/files/publications/mpi-trump-at-4-report-final.pdf>.

6. Burnett, *supra* note 5.

7. Mike Kuhlenbeck, *Biden's Immigration Policies Are Failing*, PROGRESSIVE MAG. (Aug. 10, 2022, 3:43 PM), <https://progressive.org/magazine/biden-immigration-policies-fail-kuhlenbeck/>.

2025] *UNDOING TRUMP-ERA IMMIGRATION POLICIES* 71

controversial Title 42 policy⁸ remained in effect for over two years under the Biden Administration, expelling over 2.5 million migrants, including asylum seekers, at the southern border since its inception in March 2020.⁹ Although the Administration sought to discontinue Title 42 in the spring of 2022, which resulted in a series of legal challenges from Republican-led states, it was not terminated until May 2023.¹⁰ With the expiration of the Center for Disease Control's (CDC) national COVID-19 public health emergency on May 11, 2023, Title 42, which was allegedly implemented to prevent the cross-border spread of the COVID-19 virus, was terminated, rendering legal challenges to the issue moot.¹¹

In an attempt to manage the expected surge of encounters at the border following the end of Title 42, the Biden Administration promulgated a series of changes in its final rule, the Circumvention of Lawful Pathways.¹² Immigration advocates refer to the rule as the "Asylum Transit Ban" given that it introduces "a rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel."¹³ A far cry from restoring the United States' role as a safe haven, the policy requires asylum-seekers to seek refuge in countries that not only lack functioning asylum systems, but also fail to provide adequate protections against persecution to their own citizens with LGBTQ+ individuals facing

8. Under § 265 of Title 42 regarding the Public Health and Welfare, the Surgeon General may, in accordance with the regulations set forth by the President, "prohibit, in whole or in part, the introduction of persons and property from [foreign] countries or places" if the "Surgeon General determines that by reason of the existence of any communicable disease in a foreign country," that "there is serious danger of the introduction of such disease into the United States, and that [the] danger is [] increased by the introduction of persons or property from such country." 42 U.S.C. § 265.

9. Adam Liptak, *Supreme Court Cancels Arguments in Title 42 Immigration Case*, N.Y. TIMES, <https://www.nytimes.com/2023/02/16/us/politics/supreme-court-title-42-immigration.html> (last updated May 12, 2023).

10. See *id.*; Myah Ward, *Biden to Replace Trump Migration Policy with Trump-esque Asylum Policy*, POLITICO (Feb. 21, 2023, 6:39 PM), <https://www.politico.com/news/2023/02/21/biden-trump-migration-policy-asylum-00083873>.

11. See Liptak, *supra* note 9.

12. See Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023) (to be codified at 8 C.F.R. pts. 208, 1003, 1208), <https://public-inspection.federalregister.gov/2023-10146.pdf>. The final rule took effect on May 11, 2023, and was published on May 16, 2023. See *id.*

13. *Id.*; see also Elyssa Pachico, *New Asylum Transit Ban Is Dangerous and Shortsighted*, Am. Immigr. Council (May 10, 2023), <https://www.americanimmigrationcouncil.org/news/new-asylum-transit-ban-dangerous-and-shortsighted>.

increased risks on account of their sexual and/or gender identity.¹⁴ In the thirty-day comment period following the Biden Administration’s notice of proposed rulemaking (NPRM), immigration advocates voiced their disappointment, calling asylum a “bedrock principle protected by federal law [which][] should never be violated” and likening the proposal to the anti-asylum policies of the Trump Administration.¹⁵ Despite pushback from immigration advocates, the Administration retained even the controversial aspects of the proposed rule in its final version, raising various concerns for the future of U.S. asylum law, especially as it relates to the protection of vulnerable groups, including LGBTQ+ asylum seekers.¹⁶

Part II of this Comment provides a brief overview of the global refugee crisis before delving into the severity of the current situation at the southern border and the concerns LGBTQ+ asylum seekers face in particular. Part III then provides an overview of the history of U.S. asylum law, with a focus on the role of restrictionist rhetoric in the development of U.S. asylum law. This Part also contains an in-depth analysis of the Immigration and Nationality Act (INA) in its current form, the structural challenges that stem from immigration law being a form of administrative law, and the sweeping changes set forth under the Trump Administration. Part IV discusses the Biden Administration’s attempts to reverse Trump-era asylum policies before exploring the Administration’s changes to asylum law. Part V is dedicated to the human rights implications of the Administration’s policy changes, with a specific subpart allocated to the impact of these changes for LGBTQ+ asylum seekers. This subpart also provides policy recommendations for an improved asylum system that better balances the federal government’s concerns along the southern border and the interests of vulnerable persons seeking asylum, allowing the Biden Administration to return the United States to its role as a “safe haven.”

14. See *id.*; Priscilla Alvarez, *Biden Administration Rolls Out New Asylum Restrictions Mirroring Trump-Era Policy*, CNN, <https://www.cnn.com/2023/02/21/politics/asylum-policy-biden-administration/index.html> (last updated Feb. 21, 2023, 4:51 PM) (explaining the restrictive requirements of the Biden Administration’s rule and comparing the rule to Trump-era policies); see also Monica Malta et al., *Sexual and Gender Minorities Rights in Latin America and the Caribbean: A Multi-Country Evaluation*, 19 BMC INT’L HEALTH & HUM. RTS. 1 (2019) (focusing on the vulnerability of sexual and gender minorities in Latin America).

15. Alvarez, *supra* note 14.

16. Compare 8 C.F.R. § 208.33 (2023) with Circumvention of Lawful Pathways, 88 Fed. Reg. 11704 (proposed Feb. 23, 2023) (codified at 8 C.F.R. §§ 208, 1208).

2025] *UNDOING TRUMP-ERA IMMIGRATION POLICIES* 73

II. THE GLOBAL REFUGEE CRISIS

According to a report published by the United Nations Refugee Agency, there were 21.3 million refugees and 4.6 million asylum seekers globally in 2021.¹⁷ By the end of 2022, the number of refugees worldwide jumped to 29.4 million, and the number of asylum seekers rose to 5.4 million, figures that continued to climb to 30.5 million and 6.1 million by mid-2023.¹⁸ Conflicts in Ukraine, Afghanistan, Syria, Myanmar, the Democratic Republic of the Congo, and South Sudan alone have spurred the migration of more than fifty percent of these refugees.¹⁹ While refugees seek entry to the United States from a third-country due to persecution or fear of persecution on the basis of race, religion, nationality, political opinion or membership in a particular social group, asylum seekers apply within the United States or at ports of entry.²⁰

A. *The Crisis at the U.S.-Mexico Border*

Spurred by violence and economic hardship in their home country, migrants seeking better conditions embark on an arduous journey and attempt to cross into the United States at the U.S.-Mexico border. According to data provided by U.S. Customs and Border Patrol (CBP), migrant encounters at the U.S-Mexico border totaled 2,378,944 in fiscal year (FY) 2022, up from 1,734,686 in FY 2021.²¹ Under Title 42, the pandemic-era policy, CBP effectuated 1,079,507 expulsions at the southwest land border in FY 2022, up slightly from 1,063,526 in FY 2021.²² With Title 42's expiration on May 11, 2023, the Administration feared that daily migrant encounters would surge to between 16,000 and

17. *Refugee Data Finder*, UNHCR, <https://www.unhcr.org/refugee-statistics/download/?url=Jv512N> (last updated Oct. 24, 2023) (see table with yearly figures for refugees under UNHCR's mandate and asylum seekers).

18. *Id.*

19. International Organization for Migration, *World Migration Report 2024* 43 (Marie McAuliffe and Linda A. Ochoa eds. 2024), <https://brazil.iom.int/sites/g/files/tmzbd11496/files/documents/2024-05/world-migration-report-2024.pdf>.

20. Diana Roy et al., *How Does the U.S. Refugee System Work?*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/background/how-does-us-refugee-system-work-trump-biden-afghanistan> (last updated Mar. 26, 2024, 9:37 AM).

21. *Nationwide Encounters*, U.S. CUSTOMS AND BORDER PATROL, <https://www.cbp.gov/newsroom/stats/nationwide-encounters> (last updated Mar. 22, 2024) (adjusting the filters on the interactive chart for U.S. Border Patrol and Office of Field Operations Encounters by Area of Responsibility and Component to reflect encounters at the Southwest Land Border only yields the numbers cited).

22. *Id.*

18,000, a number that could buckle the system.²³ In an effort to reduce encounters at the border, the Department of Homeland Security (DHS) announced its Circumvention of Lawful Pathways final rule, effective May 11, 2023, encouraging migrants to avail themselves of “lawful, safe, and orderly pathways” to the United States.²⁴ While Secretary of Homeland Security Alejandro N. Mayorkas notes that the Biden Administration “has led the largest expansion of legal pathways for protection in decades,” immigration advocates maintain the rule falls short in many key respects, particularly as it relates to relief for LGBTQ+ asylum seekers at the border.²⁵

B. *LGBTQ+ Asylum Seekers at the U.S.-Mexico Border*

Despite a global trend toward decriminalizing consensual same-sex acts, as of 2023, sixty-four countries continue to criminalize homosexuality.²⁶ Even so, this number fails to fully capture the gravity of the harassment, violence, and discrimination LGBTQ+ persons experience on a daily basis in many parts of the world. Even countries that no longer criminalize same-sex conduct, such as El Salvador, Guatemala, and Honduras (“the Northern Triangle”), fail to adequately protect LGBTQ+ persons who are specifically targeted on the basis of sexual orientation or gender-identity.²⁷ LGBTQ+ asylum seekers from the Northern Triangle not only face a particularly high risk of violence and rejection from family members but also from gangs, which attempt to assert a particular social order.²⁸ Corruption within law enforcement and the discrimination and stigmatization the LGBTQ+ community faces in

23. Priscilla Alvarez, *Authorities Encountering Record Number of Migrants at the Border Each Day Amid Unprecedented Surge*, CNN (Dec. 22, 2023, 3:59 PM), <https://www.cnn.com/2023/12/22/politics/border-surge-record-amounts/index.html>.

24. *DHS and DOJ Finalize Rule to Incentivize Use of Lawful Immigration Pathways*, DEP’T OF HOMELAND SEC. (May 10, 2023), <https://www.dhs.gov/news/2023/05/10/dhs-and-doj-finalize-rule-incentivize-use-lawful-immigration-pathways>.

25. *Id.*; see Immigr. Equal. et al., Comment on the Proposed Rule by the Department of Homeland Security and the Executive Office for Immigration Review on Circumvention of Lawful Pathways (Mar. 27, 2023), https://immigrationequality.org/wp-content/uploads/2023/03/LGBTQ_Comment_NPRM-3_27_23.pdf.

26. *Homosexuality: The Countries Where It Is Illegal to Be Gay*, BBC (Mar. 31, 2023), <https://www.bbc.com/news/world-43822234>.

27. ARI SHAW ET AL., UCLA SCH. OF L. WILLIAMS INST., *LGBT ASYLUM CLAIMS IN THE UNITED STATES 2* (2021), <https://williamsinstitute.law.ucla.edu/publications/lgbt-asylum-claims/>.

28. *Id.* (citing “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 (Oct. 7, 2020), <https://www.hrw.org/report/2020/10/07/every-day-i-live-fear/violence-and-discrimination-against-lgbt-people-el-salvador>).

2025] UNDOING TRUMP-ERA IMMIGRATION POLICIES 75

these societies leads to underreporting and impunity for perpetrators of anti-LGBTQ+ violence.²⁹ The insecurity and severity of the violence LGBTQ+ persons face in the region—where instances of stoning, decapitation, burning, and impalement have been reported by the Inter-American Commission on Human Rights—have led many to flee their home country and seek asylum.³⁰

Moreover, in Venezuela, once a leader for LGBTQ+ rights in Latin America, 25,000 extrajudicial killings took place in 2019, including those of high-profile members of the LGBTQ+ community.³¹ Likewise, Brazil legalized same-sex marriage and enacted anti-LGBTQ+ discrimination laws, yet the political countermovement that has emerged as a result of the successes of the feminist and LGBTQ+ movement has fueled violence against the LGBTQ+ community.³² With contradicting policies and practices across parts of Central and South America, LGBTQ+ asylum seekers are faced with the difficult task of finding a country where they will truly be safe from persecution on account of their sexual orientation or gender identity.³³ For many, that means undertaking a dangerous journey to the U.S.-Mexico border. Between January 2007 and November 2017, USCIS conducted credible and reasonable fear interviews for 4,385 asylum applicants with LGBTQ+ status claims with 28%, 14.9%, and 12.1% of claimants coming from El Salvador, Honduras, and Mexico, respectively.³⁴

29. *Id.* (citing *Every Day I Live in Fear*, *supra* note 28).

30. *Id.* (citing INTER-AMERICAN COMM'N ON HUM. RTS., *VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX PERSONS IN THE AMERICAS* (2015), <https://www.oas.org/en/iachr/reports/pdfs/violenceigbtipersons.pdf>).

31. Taylor Hirschberg, *Venezuela's Secret: Crimes Against LGBTQ+ Migrants and Sex Workers*, OUT (Apr. 5. 2021, 8:05 AM), <https://www.out.com/print/2021/4/05/venezuelas-secret-crimes-against-lgbtq-migrants-and-sex-workers>.

32. Gerson Scheidweiler et al., *Unwelcome in Brazil: The Broken Promise to Venezuelan Refugees*, ALTS. HUMANITAIRES, <https://www.alternatives-humanitaires.org/en/2021/11/10/unwelcome-in-brazil-the-broken-promise-to-venezuelan-refugees/> (last visited Apr. 7, 2024).

33. *See id.*; Hirschberg, *supra* note 31.

34. SHAW, *supra* note 27, at 5, 7. Although the USCIS Asylum Office and the Executive Office for Immigration Review (EOIR) do not publish statistics on sexual orientation or gender identity claims by LGBTQ+ asylum-seekers, the Williams Institute conducted an analysis based on information obtained by NBC Out and data obtained from the USCIS Asylum Pre-Screening System as made available through the Freedom of Information Act (FOIA). *Id.*

III. OVERVIEW OF U.S. ASYLUM LAW

A. *A History of Restrictionist Rhetoric*

Although the Biden Administration champions the United States as a historic safe haven for refugees and asylum seekers,³⁵ an in-depth analysis of the history of U.S. immigration law provides a far bleaker image.³⁶ In fact, restrictionist rhetoric and race-based exclusions in U.S. immigration law date back centuries.³⁷ In the late nineteenth century, when the number of Chinese immigrants on the West Coast rose drastically in response to the Gold Rush, the federal government passed a series of exclusionary acts.³⁸ Specifically, in 1870, Congress extended the right of citizenship to individuals of African descent but explicitly denied the Chinese of this right.³⁹ Subsequent legislation, including the Page Act and the Chinese Exclusion Act, passed in 1875 and 1882 respectively, confirmed the dark reality that nativism was rampant in the United States.⁴⁰ Chinese and other Asian immigrants were not the only victims of race-based anti-immigrant legislation.⁴¹ As the U.S. population became increasingly diverse, the United States sought to preserve the northern and western European character of the nation, which led to the end of unlimited immigration and the implementation of the “national origins” system.⁴² The “national origins” system, which formed the foundation of our nation’s immigration system from 1924 to 1965, was implemented

35. See Burnett, *supra* note 5.

36. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111 (1998) (explaining a history racial exclusion in the United States and the intimate relationship between race and U.S. immigration law). The term “restrictionist” refers to laws and policies which have been implemented by the federal government that are designed to exclude or limit specific groups of individuals based on their national origin. *See id.* at 1115.

37. See *Fong Yue Ting v. United States*, 149 U.S. 698, 732-44 (1893) (Brewer, J., dissenting); *see also* Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L. J. 1455, 1461 (2022).

38. *See id.* at 1462; *see also* Michael Luo, *The Forgotten History of the Purging of Chinese from America*, NEW YORKER (Apr. 22, 2021), <https://www.newyorker.com/news/daily-comment/the-forgotten-history-of-the-purging-of-chinese-from-america>.

39. Compare Naturalization Act of 1870, Pub. L. 41-254, 16 Stat. 254-56, with Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (1882); *see also* Chae Chan Ping v. United States, 130 U.S. 581 (1889) (upholding the constitutionality of the Chinese Exclusion Act).

40. See Page Act of 1875, Pub. L. No. 43-141, 18 Stat. 477; Chinese Exclusion Act of 1882; *see also* Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101, 123 (2016).

41. See Deborah Anker, *U.S. Immigration and Asylum Policy: A Brief Historical Perspective*, 13 IN DEF. OF THE ALIEN 74, 76 (1990).

42. *Id.*

2025] UNDOING TRUMP-ERA IMMIGRATION POLICIES 77

with the intent to limit “the innately inferior new immigrants of eastern and southern Europe.”⁴³ Despite these limitations, no exceptions were made for refugees.⁴⁴

As the nativism crisis worsened during World War II, immigration restrictions intensified despite immense suffering.⁴⁵ The *St. Louis*, a German ocean liner carrying 937 passengers, most of whom were Jewish, was forced to return to Europe with all of its passengers after being rejected at the port of Miami in June 1939.⁴⁶ Over a quarter of those passengers died in the Holocaust.⁴⁷ By turning away thousands of Jewish refugees, history once again tells a tale that the United States has not been a historic safe haven for all refugees and asylum seekers.⁴⁸

The foundations of the modern legal framework for asylum developed largely in response to World War II as part of the broader international human rights movement, which surfaced in the wake of the war.⁴⁹ At the end of World War II, the United States emerged as an economic and military power.⁵⁰ Yet, it was not until 1948, three years after the end of the war, that Congress enacted any legislation to provide refuge for the one million displaced persons in Germany in the wake of the war.⁵¹ Even so, the June 1948 bill⁵² authorizing the admission of 200,000 displaced persons from Germany barred over ninety percent of Jewish survivors based on fears that they were Communist sympathizers or operatives.⁵³

43. Anker, *supra* note 41 (quoting Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981)).

44. *Id.*

45. *See id.*

46. Daniel A. Gross, *The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing That They Were Nazi Spies*, SMITHSONIAN MAG. (Nov. 18, 2015), <https://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/>.

47. *Id.*

48. *See* Burnett, *supra* note 5; Gross, *supra* note 46.

49. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948).

50. *See* Anker, *supra* note 41, at 77.

51. David Nasaw, *America Denied Refugees After the End of World War II—Just as We Are Today*, TIME (Sept. 17, 2020, 7:00 AM), <https://time.com/5889460/american-history-war-on-immigrants/>.

52. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948).

53. *Id.* Although President Truman signed a directive allowing for faster admission and change of status for some refugees in 1945, the impact of this directive was constrained by the national origins quota system because it provided strict immigration limits for foreign nationals most in need of assistance. Lily Rothman, *This Was President Truman’s Powerful Message on*

In 1952, the Immigration and Nationality Act (INA) was enacted, placing immigration and nationality laws under Title 8 of the United States Code.⁵⁴ Although the INA has been amended numerous times since, its original provisions maintained the less than admirable quota system and lacked refugee specific provisions.⁵⁵ Refugees were primarily admitted through ad hoc programs outside of the quota system until the 1965 Amendments, which replaced the quota system with a system based on preference categories and provided a permanent basis for the admission of refugees for the first time.⁵⁶

Moreover, in 1967, the United States ratified the Protocol Relating to the Status of Refugees (Protocol), a multilateral treaty requiring all signatories to incorporate the terms of the Protocol into its domestic law.⁵⁷ Yet, for thirteen years, the United States continued to apply its “ideologically biased ‘refugee’ provisions” in contravention of its international obligations.⁵⁸ It was not until the United States enacted the Refugee Act of 1980 that U.S. asylum and refugee law was brought into conformity with its international obligations.⁵⁹ The advances in asylum reform of the 1980s, however, were dampened by the anti-immigrant sentiment that pervaded the United States in mid-1990s, as evidenced by the passage of revised regulations in 1995 and the subsequent enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁶⁰

Why the U.S. Should Help Refugees, TIME (June 20, 2018, 4:30 PM), <https://time.com/5315575/truman-refugee-message-1947/>.

54. Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101); see *Refugee Timeline*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/refugee-timeline> (last updated Feb. 7, 2023).

55. See Immigration and Nationality Act § 101; see also *Refugee Timeline*, *supra* note 54.

56. *Refugee Timeline*, *supra* note 54.

57. G.A. Res. 2198 (XXI), Protocol Relating to the Status of Refugees (Dec. 16, 1966); NAT'L IMMIGR. PROJECT NAT'L LAWS. GUILD, 1 IMMIGR. L. AND DEF. § 13:2 (3rd ed. 2024). Although the United States is not a signatory to the 1951 United Nations Convention Relating to the Status of Refugees, its ratification of the 1967 United Nations Protocol Relating to the Status of Refugees binds the U.S. to same obligations set forth under the Convention with respect to the status and treatment of refugees. See *Refugee Timeline*, *supra* note 54.

58. NAT'L IMMIGR. PROJECT NAT'L LAWS. GUILD, *supra* note 57; see also REFUGEE TIMELINE, *supra* note 54.

59. NAT'L IMMIGR. PROJECT NAT'L LAWS. GUILD, *supra* note 57, at § 13:3; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 643 (1980) (codified at 8 U.S.C. §§ 1158, 1101(a)(42)).

60. NAT'L IMMIGR. PROJECT NAT'L LAWS. GUILD, *supra* note 57, at § 13:4; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1103).

2025] *UNDOING TRUMP-ERA IMMIGRATION POLICIES* 79

The anti-immigrant sentiment of the 1990s has not dissipated entirely. The rhetoric of former President Donald J. Trump and the role of immigration in the 2016 presidential election illustrates the opposite—that immigration remains a politically charged topic.⁶¹ While the statutory framework of U.S. immigration law remains largely unchanged since the 1990s, Congress and the President have been given broad powers to address immigration such that sweeping changes to immigration policy are possible with each administration.⁶²

B. The Immigration and Nationality Act

The INA, originally enacted in 1952 and amended numerous times since, continues to serve as the primary framework for U.S. immigration law.⁶³ As set forth in the INA, foreign nationals⁶⁴ who fail to adhere to government requirements regarding their entry and or continuous presence in the United States are subject to removal proceedings.⁶⁵ While most foreign nationals found within the interior of the United States who fail to meet these requirements are removable under the formal removal proceedings governed by INA section 240, some foreign nationals are subject to the expedited removal process established by the IIRIRA and codified in INA section 235(b)(1).⁶⁶ However, according to INA section

61. See Burnett, *supra* note 5.

62. See Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691, 709-12 (2014).

63. See Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101), <https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg163.pdf>; *Refugee Timeline*, *supra* note 54.

64. While there is a move away from the use of the term “aliens” in immigration law, the Immigration and Nationality Act uses the term “aliens” to refer to non-U.S. nationals. For purposes of this Comment, the term “foreign national” is used to refer to these individuals where use of the term will not create confusion. For the sake of clarity, the term “alien” is retained when referencing specific provisions of the INA.

65. See 8 U.S.C. §§ 1225, 1227, 1229(a); HILLEL R. SMITH, CONG. RSCH. SERV., *EXPEDITED REMOVAL OF ALIENS: AN INTRODUCTION* (2022), <https://crsreports.congress.gov/product/pdf/IF/IF11357>.

66. See 8 U.S.C. §§ 1225, 1229(a). Foreign nationals who are deemed inadmissible for either lack of valid entry documents or an attempt to procure admission to the United States through fraud or misrepresentation are subject to expedited removal proceedings set forth under INA section 235(b)(1). 8 U.S.C. § 1225. Immigration officials utilize the expedited removal process for the following categories of foreign nationals (“aliens” as defined by immigration regulations) who lack valid entry documents or attempt to enter the U.S. through fraud or misrepresentation: (1) at U.S. ports of entry; (2) who enter the U.S. “by sea without being admitted or paroled”, and who have spent less than two years in the U.S.; and (3) who are “apprehended within 100 miles of the U.S. border within [fourteen] days of entering the [U.S.]” without being admitted or paroled. SMITH, *supra* note 65.

235(b)(1), foreign nationals seeking relief from removal through asylum, withholding of removal and protection under the Convention Against Torture (CAT), are excepted from the expedited removal process.⁶⁷ Instead, officers must refer foreign nationals with asylum, withholding, or CAT relief claims for a “credible fear” interview.⁶⁸

According to the INA:

[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with this section [208(a)(1)] or, where applicable, section 1225(b) of this title.⁶⁹

Upon determining an alien is a refugee within the meaning of section 1101(a)(42)(A), who has applied for asylum in accordance with established requirements and procedures, the Secretary of Homeland Security (SHS) or the Attorney General (AG) may use their discretion to grant asylum.⁷⁰ This authority, however, has devolved to asylum officers in the Department of Homeland Security and immigration judges in the Department of Justice who directly adjudicate asylum claims.⁷¹

The term “refugee” means:

any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of

67. See 8 U.S.C. § 1225(b)(1); SMITH, *supra* note 65.

68. See 8 U.S.C. § 1225(b)(1); SMITH, *supra* note 65. Foreign nationals who are able to show a credible fear of persecution are placed in formal removal proceedings rather than expedited removal proceedings, allowing them to pursue asylum, withholding of removal and/or CAT protection. SMITH, *supra* note 65. In instances where an asylum officer does not find a credible fear of persecution, the foreign national may request review before an immigration judge. *Id.* If the immigration judge finds that the foreign national possesses a credible fear of persecution, the foreign national will then be placed in formal removal proceedings; if the foreign national is unable to establish a credible fear of persecution before an immigration judge, he or she will be subject to expedited removal. *Id.*

69. 8 U.S.C. § 1158(a)(1).

70. See 8 U.S.C. § 1158(b)(1)(A); For more information on the differences between affirmative and defensive asylum processes, see *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states> (last updated Sept. 13, 2023).

71. See *Adjudication by USCIS Asylum Officers: Explainer*, NAT’L IMMIGR. F. (Apr. 22, 2024), <https://immigrationforum.org/article/adjudication-by-uscis-asylum-officers-explainer/>.

2025] *UNDOING TRUMP-ERA IMMIGRATION POLICIES* 81

persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .⁷²

Applicants not only bear the burden of proving persecution (or fear of persecution) on account of one of the five protected grounds, but also that their application warrants the officer's positive discretion.⁷³ The statutory bars to asylum set forth in INA section 208(a)(2) pose additional obstacles to asylum-seekers.⁷⁴ Moreover, applications for aliens who fall within one of the enumerated categories under INA section 208(b)(2) will be mandatorily denied.⁷⁵ While claims based on race, religion, and nationality are not often litigated, claims stemming from membership in a particular social group and political opinion are more contested.⁷⁶ Foreign nationals who are unable to meet the eligibility requirements for asylum may seek relief from removal by applying for withholding of removal or protection under the Convention Against Torture.⁷⁷

C. *Deference to the Executive Branch*

If immigration statutes have not been revised since the 1990s, one might ask: how is it that immigration law changes so drastically with each administration? Given the absence of Congressional action, much of the recent changes in immigration law have been promulgated through

72. 8 U.S.C. § 1101(a)(42); *see* *Matter of O-Z & I-Z*, 22 I. & N. Dec. 23 (B.I.A. 1998) (establishing that, in aggregate, the harm suffered by the alien in Ukraine including repeated beatings, multiple handwritten anti-Semitic threats, and vandalization of his home on account of his Jewish nationality, rose to the level of persecution contemplated by the INA); *Matter of M-E-V-G*, 26 I. & N. Dec. 227 (BIA 2014) (holding that the requirement that a group have “social visibility” does not mean literal, ocular visibility, but rather that “social distinction”—that the group is perceived as a group and can be recognized as a discrete class of persons by society).

73. *See* 8 U.S.C. § 1158.

74. *See* 8 U.S.C. § 1158(a)(2). Statutory bars to asylum include: “Safe third country” bars for “alien[s] [who] may be removed, pursuant to a bilateral or multilateral agreement, to a country . . . in which the alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .”; an applicant who fails to demonstrate by “clear and convincing evidence” that he or she applied for asylum within one year of his or her arrival to the United States may not apply for asylum unless the applicant falls within one of the exceptions such as change in conditions in the applicant’s country or extraordinary circumstances; applicants who previously applied for and were denied asylum are barred from applying. *Id.*

75. *See id.*

76. *See* *Matter of A-R-C-G*, 26 I. & N. Dec. 388 (B.I.A. 2014); *Matter of A-B*, 28 I. & N. Dec. 307 (A.G. 2021); *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); *Matter of M-E-V-G*, 26 I. & N. Dec. at 228.

77. For additional information on withholding of removal, *see* 8 C.F.R. § 208.16 (2022). For details regarding protection under the Convention Against Torture, *see* 8 C.F.R. § 208.18 (2021).

executive orders and administrative rule making.⁷⁸ Although there has been a retreat from the plenary power doctrine in the years following the Cold War, it has not disappeared.⁷⁹ In fact, the U.S. Supreme Court decision in the 1889 case *Chae Chan Ping v. United States*, which held that as a sovereign nation the federal power to exclude noncitizens is extensive, set the precedent for the legal fight over the Trump Administration's travel bans.⁸⁰

While there are multiple explanations for the retreat of the plenary power doctrine in the modern era, including the universal application of Fourteenth Amendment protections, the expansion of the administrative state provides another angle worthy of discussion.⁸¹ In the late nineteenth century when the Chinese Exclusion cases were decided, the plenary power doctrine was used to immunize “executive [and] administrative officers acting within powers expressly conferred by Congress.”⁸² At this point in time, the discretionary decision-making power of such officers was limited.⁸³ In the years since, however, immigration law has become substantially more complex, resulting not only in increasingly broad grants of authority to administrative agencies but also in the development of a vast immigration bureaucracy.⁸⁴ To alleviate delegation concerns, the Court has largely turned away from the plenary power doctrine, opting instead for the application of sub-constitutional administrative law rules—at least when it comes to immigration decisions made by unelected officials.⁸⁵ However, the concerns related to “political accountability, deliberation, rationality, and fairness” of decisions promulgated by unelected officials do not, at least from a constitutional perspective, extend to immigration decisions set forth by Congress or the President.⁸⁶

78. See Adam Cox and Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009); see also Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 83-84 (2017).

79. Kim, *supra* note 78.

80. See *id.* at 84-85, 128-29; *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.”); see also *Trump v. Hawaii*, 585 U.S. 667 (2018) (affirming the executive authority to suspend entry of discretionary categories of noncitizens).

81. See Kim, *supra* note 78, at 87-89, 93-94.

82. *Id.* at 94 (quoting *Chae Chan Ping*, 130 U.S. at 660).

83. *Id.* at 95.

84. *Id.* at 95-96.

85. *Id.* at 104-105, 113.

86. *Id.* at 106.

2025] *UNDOING TRUMP-ERA IMMIGRATION POLICIES* 83

This distinction between the powers of Congress and the President and those of unelected officials provides context for an otherwise seemingly contradictory practice of both retaining and retreating from the plenary power doctrine in cases “involving immigrant detention, sexual orientation, procedural rights and national origin discrimination.”⁸⁷ Although the vast majority of immigration matters are decided by immigration officials and are therefore subject to judicial review, the Trump Administration’s excessive use of executive orders for matters related to immigration policy raised the question of whether courts will continue to shield the President’s actions from meaningful review.⁸⁸ In *Trump v. Hawaii*, the Supreme Court foreclosed “any meaningful judicial standard of review.”⁸⁹

D. Changes to Asylum Under the Trump Administration

Over the course of his presidency, Trump issued 472 executive actions related to U.S. immigration policy, with thirty-nine additional proposed actions that the Administration was unable to implement prior to leaving office.⁹⁰ These changes spanned a range of categories, including immigration enforcement, pandemic response, the granting of immigration benefits through U.S. Citizenship & Immigration Services, and humanitarian migration.⁹¹ With respect to humanitarian migration specifically, a series of interlocking policies—including the Migrant Protection Protocols, often referred to as the “Remain in Mexico” program, the Prompt Asylum Case Review (PACR), and Humanitarian Asylum Review Program (HARP)—severely limited opportunities for asylum seekers to enter the United States.⁹² The following paragraphs detail the ways in which the Trump Administration reduced protections for asylum-seekers and the ways in which the Biden Administration has both mirrored and abrogated certain Trump-era policies.

Under the Remain in Mexico program, asylum-seekers were required to wait in Mexico for hearings in U.S. immigration court, during

87. *Id.* at 115.

88. *See id.* at 128.

89. *Trump v. Hawaii*, 585 U.S. 667, 686 (2018) (quoting *Webster v. Doe*, 486 U.S. 592, 600 (1988)).

90. *See* BOLTER, *supra* note 5, at 1.

91. *Id.* at 1, 2 fig.1.

92. Muzaffar Chishti & Jessica Bolter, *Interlocking Set of Trump Administration Policies at the U.S.-Mexico Border Bars Virtually All from Asylum*, MIGRATION POL’Y INST. (Feb. 27, 2020), <https://www.migrationpolicy.org/article/interlocking-set-policies-us-mexico-border-bars-virtually-all-asylum>.

which time they were subjected to grave risks including kidnapping, extortion, and rape.⁹³ The lesser known PACR program, however, has also had a formidable impact on the removal process for non-Mexican nationals seeking humanitarian protections, including asylum. Under PACR, non-Mexican nationals seeking humanitarian protections remained in the custody of Customs and Border Patrol (CBP) rather than Immigration and Customs Enforcement (ICE), “effectively blocking access to attorneys in prepar[ation] for their credible/reasonable fear interviews.”⁹⁴ The HARP program, though targeted at Mexican nationals, was implemented with the same goal—processing humanitarian protection claims and removing those who fail to satisfy the necessary criteria within a ten-day period.⁹⁵ While the Biden Administration attempts to distinguish its plans for accelerated asylum processing, immigration advocates still have reservations, namely that the accelerated timeline prevents thorough case preparation.⁹⁶

The Trump Administration also undid progress in the area of asylum claims based on domestic violence.⁹⁷ In *Matter of A-B-*, former Attorney General Jeff Sessions overruled the precedential decision in *Matter of A-R-C-G-*, stating that victims of “private criminal activity” do not constitute a particular social group and thus could not form the basis of a particular social group for purposes of asylum or withholding eligibility.⁹⁸ Fortunately, the decision in *Matter of A-B-* was vacated by Attorney

93. AM. IMMIGR. COUNCIL, THE “MIGRANT PROTECTION PROTOCOLS”: AN EXPLANATION OF THE REMAIN IN MEXICO PROGRAM, 4 (2024), https://www.americanimmigrationcouncil.org/sites/default/files/research/migrant_protection_protocols_2024.pdf. Between the program’s inception in January 2019 and its initial suspension in January 2021 when Biden assumed the presidency, approximately 70,000 migrants were subject to the policy. *Id.* at 1. The program was reinstated from December 2021 to August 2022 and used to send an additional 7,505 migrants back to Mexico. *Id.*

94. DHS Begins Implementing the Prompt Asylum Claim Review Program, IMMIGR. POL’Y TRACKING PROJECT, <https://immpolicytracking.org/policies/trump-administration-testing-new-program-prompt-asylum-claim-review/> (last visited Apr. 9, 2024).

95. Chishti & Bolter, *supra* note 92.

96. See generally Azadeh Erfani, *Explainer: Biden Administration Plans for Rapid Deportation of Asylum Seekers Detained at the Border*, NAT’L IMMIGR. JUSTICE CTR. (Jan. 26, 2023), <https://immigrantjustice.org/staff/blog/explainer-biden-administration-plans-rapid-deportation-asylum-seekers-detained-border>.

97. Compare *Matter of A-B-*, 28 I. & N. Dec. 307, 308 (A.G. 2021), with *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 390 (B.I.A. 2014). In the precedential 2014 decision in *Matter of A-R-C-G-*, the Board of Immigration Appeals held that “‘married women in Guatemala who [were] unable to leave their relationship’ [could] constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal.” *Matter of A-R-C-G-*, 26 I. & N. Dec. at 388.

98. *Matter of A-B-*, 28 I. & N. Dec. at 308-09.

2025] *UNDOING TRUMP-ERA IMMIGRATION POLICIES* 85

General Merrick Garland in 2021, formally recognizing domestic violence as a potential basis for asylum once again.⁹⁹

In 2020, the Trump Administration invoked Title 42 in the name of a public health emergency.¹⁰⁰ As schools shut down, remote work took over corporate America, and authorities imposed mask mandates to curb the spread of COVID-19, the U.S. Department of Health and Human Services Centers for Disease Control and Prevention (CDC) took action to limit the entry of persons into the United States.¹⁰¹ Specifically, the order issued pursuant to Sections 362 and 365 of the Public Health Services (PHS) Act, codified under Title 42,¹⁰² authorized the Director of the CDC to:

suspend the introduction of persons into the United States when the Director determines that the existence of a communicable disease in a foreign country or place creates a serious danger of the introduction of such disease into the United States and the danger is so increased by the introduction of persons from the foreign country or place that a temporary suspension of such introduction is necessary to protect the public health.¹⁰³

The order temporarily suspending the entry of certain persons to the United States was subsequently amended and extended such that it would remain in effect until the Director of the CDC determined that further introduction of COVID-19 into the United States “ceased to be a serious danger to the public health.”¹⁰⁴ The Biden Administration’s attempts to terminate the application of Title 42 prior to May 11, 2023 were met with legal challenges from Republican-led states such that the case was set for oral arguments before the U.S. Supreme Court.¹⁰⁵ The U.S. Supreme Court, however, cancelled arguments for the case in early March 2023, following the CDC’s declaration of the end of the public health emergency that authorized officials to limit entry at the border.¹⁰⁶ During

99. *See id.*; Matter of A-B- III, 28 I. & N. Dec. 307 (A.G. 2021); Matter of L-E-A- III, 28 I. & N. Dec. 304 (A.G. 2021).

100. *See* 42 U.S.C. §§ 265, 268; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060 (March 26, 2020).

101. *See* Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. at 17060-61.

102. *See* 42 U.S.C. §§ 265, 268 (and their implementing regulations).

103. Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. at 17061.

104. *Id.*; Extension of Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 22424, 22425 (Apr. 22, 2020).

105. *See* Liptak, *supra* note 9; Arizona v. Mayorkas, 143 S.Ct. 478 (2022).

106. *See id.*; Letter from HHS Secretary Xavier Becerra to U.S. Governors on Renewing COVID-19 Public Health Emergency (PHE) (Feb. 9, 2023) (providing a ninety-day notice to

the approximately three year period it was in effect, Title 42 was used to expel over 2.5 million migrants at the border.¹⁰⁷

IV. THE BIDEN ADMINISTRATION'S CIRCUMVENTION OF LAWFUL PATHWAYS RULE

A. *Termination of Title 42 and the Trajectory of U.S. Asylum Law*

On May 11, 2023 Title 42 expired.¹⁰⁸ In the months approaching the expiration of the CDC's national COVID-19 public health emergency, officials warned of chaos at the border.¹⁰⁹ Yet, in the days immediately after Title 42 was lifted, many communities along the southern border did not see a substantial surge in border crossings.¹¹⁰ While it is unclear what lies ahead in the upcoming months, the Biden Administration's changes have been met with criticism from both sides of the aisle as well as legal challenges, most notably in *East Bay Sanctuary Covenant v. Biden*.¹¹¹ In the thirty-day public comment period, the Administration's proposed rule amassed 51,952 comments from non-governmental organizations and members of Congress.¹¹² Nevertheless, the final rule maintaining these changes took effect on May 11, 2023.¹¹³

governors that the U.S. Department of Health and Human Services planned to terminate the COVID-19 PHE on May 11, 2023).

107. Rebecca Santana, *Explainer: Will Immigration Surge as Asylum Rule Ends*, AP NEWS (Dec. 15, 2022, 1:21 PM), <https://apnews.com/article/public-health-immigration-asylum-54c11e091d464fe8d9272d607f6778f8>.

108. See Elizabeth Wolfe et al., *Some US Cities Along the Southern Border Say They Have Not Seen a Surge of Migrants Expected After Expiration of Title 42*, CNN, <https://www.cnn.com/2023/05/13/us/title-42-border-immigration-saturday/index.html> (last updated (May 13, 2023, 12:37 PM)).

109. *See id.*

110. *See id.*

111. See *Public Comments Urge Withdrawal of the Biden Administration's Proposed Asylum Ban*, HUM. RTS. FIRST (Apr. 20, 2023), https://humanrightsfirst.org/wp-content/uploads/2023/04/Asylum_ban_comments_summary.pdf; see also *East Bay Sanctuary Covenant v. Biden*, No. 23-16032, 2024 WL 2309476 (9th Cir. 2024).

112. Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31324 (May 16, 2023) (codified at 8 C.F.R. pts. 208, 1003, 1208), <https://www.govinfo.gov/content/pkg/FR-2023-05-16/pdf/2023-10146.pdf>; see also *Public Comments Urge Withdrawal of the Biden Administration's Proposed Asylum Ban*, *supra* note 111.

113. Circumvention of Lawful Pathways, 88 Fed. Reg. at 31314.

B. Accelerated Asylum Processing

The Biden Administration also expanded its reliance on expedited removal.¹¹⁴ The expedited removal process accelerates the asylum screening process in contravention of both Congressional and international law mandates.¹¹⁵ Under the Administration's expedited removal policies, asylum screening interviews may be conducted while individuals are detained by Customs and Border Patrol, with asylum officers granting or denying claims rather than immigration judges (IJs).¹¹⁶ In an attempt to distinguish the program from the Trump Administration's controversial PACR system, the Biden Administration emphasized the availability of legal counsel for individuals subject to screening interviews while detained by Border Patrol.¹¹⁷ Nevertheless, due process concerns related to adequate time for case preparation remain.¹¹⁸ Council 119 of the American Federation of Government Employees, which represents federal asylum officers, characterized the Biden Administration's proposed rule as "draconian," citing concerns that the rule could make officers "complicit in violations of U.S. and international law."¹¹⁹ Despite criticism received during the comment period, the government maintains that the rule does not violate due process and that neither due process nor the INA guarantee access to legal counsel for noncitizens in removal proceedings.¹²⁰

114. *Explainer | Too Fast for Fairness: "Expedited Removal" and the Family Expedited Removal Management Program*, NAT'L IMMIGR. JUST. CTR. (Jan. 11, 2024), <https://immigrantjustice.org/research-items/explainer-too-fast-fairness-expedited-removal-and-family-expedited-removal#:~:text=Expedited%20removal%20typically%20forces%20asylum,ankle%20shackles%20and%20house%20arrests>.

115. *See MA v. Mayorkas*, NAT'L IMMIGR. JUST. CTR. (Sep. 20, 2023), https://immigrantjustice.org/court_cases/ma-v-mayorkas.

116. Circumvention of Lawful Pathways, 88 Fed. Reg. at 31314-15; Quinn Owen, *Biden Admin Pauses Asylum Processing Changes for Migrants at Border*, ABC NEWS (Apr. 12, 2023, 8:18 PM), <https://abcnews.go.com/Politics/biden-admin-pauses-asylum-processing-migrants-border/story?id=98543305>.

117. Quinn Owen, *Biden Administration to Speed Up Asylum Cases, Expand Legal Resources at the Border*, ABC NEWS, (Apr. 7, 2023, 1:59 PM), <https://abcnews.go.com/Politics/biden-administration-speed-asylum-cases-expand-legal-resources/story?id=98431530>.

118. *See* Circumvention of Lawful Pathways, 88 Fed. Reg. at 31351-52.

119. Priscilla Alvarez, *"It Feels Like Groundhog Day": Federal Officials Frustrated by Whiplash as Biden Turns to Trump-Era Border Policies*, CNN (Apr. 12, 2023, 7:04 AM), <https://www.cnn.com/2023/04/11/politics/biden-border-policies-trump/index.html>.

120. *See* Circumvention of Lawful Pathways, 88 Fed. Reg. at 31351; *see also* Guerrier v. Garland, 18 F.4th 304, 313 (9th Cir. 2021) (explaining that *Thuraissigiam* clarified that "the due process rights of noncitizens who have not 'effected an entry' into the [United States] are coextensive with the statutory rights Congress provides").

C. *Third-Country Asylum Requirement*

One of the most controversial components of the rule is the imposition of a rebuttable presumption of ineligibility for asylum-seekers who have not “avail[ed] themselves of lawful, safe, and orderly pathways into the United States, or otherwise to seek asylum or other protection in another country through which they travel.”¹²¹ The presumption would not apply to noncitizens who are provided authorization to travel to the United States (1) “pursuant to a DHS-approved parole process;” (2) “presented at a [port of entry], pursuant to a pre-scheduled time and place, . . . if the noncitizen demonstrates [that he or she was unable to use or access CBP One]”; or (3) “sought asylum or other protection in a country¹²² through which the noncitizen traveled” which was ultimately denied.¹²³ This presumption of ineligibility may be rebutted by demonstrating, by a preponderance of the evidence, exceptionally compelling circumstances that they or a family member, as defined by the regulations, (1) “faced an acute medical emergency,” (2) “faced an imminent and extreme threat to [their] life or safety,” or (3) were a “victim of a severe form of trafficking in persons.”¹²⁴

D. *Alternative Pathways for Asylum-Seekers*

Migrants who are able to secure an appointment using the CBP One application will not be subject to the third-country refuge requirement.¹²⁵ According to U.S. Secretary of Homeland Security Alejandro Mayorkas, CBP One reflects only a “part of a broader effort to create a ‘safe and orderly’ way for migrants to request U.S. asylum.”¹²⁶ Mayorkas added that migrants will not be required to use CBP One “if they [can] prove they have an urgent medical condition or are fleeing imminent danger.”¹²⁷ Yet, this begs the question: what is “urgent” and what is “imminent”? In other words, who is defining these terms—what falls within the parameters of “urgent” medical care and “imminent danger” that will

121. Circumvention of Lawful Pathways, 88 Fed. Reg. at 31314.

122. Referring to any country the noncitizen traveled through that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees. *Id.* at 31321.

123. *Id.*

124. *Id.*

125. *Id.* at 31329.

126. Camilo Montoya-Galvez, *CBP One App Becomes Main Portal to U.S. Asylum System Under Biden Border Strategy*, CBS NEWS (Apr. 11, 2023, 6:00 AM), <https://www.cbsnews.com/news/cbp-one-app-us-border-asylum-biden/>.

127. *Id.*

2025] UNDOING TRUMP-ERA IMMIGRATION POLICIES 89

allow one to circumvent the CBP One application system? The subjective nature of this determination poses administrative difficulties with such broad discretion posing a substantial risk that asylum seekers with bona fide humanitarian concerns would be turned away.¹²⁸ There is a concern the most vulnerable are being excluded from the process; preferential treatment is being granted to those with the best smartphones and the most reliable internet service.¹²⁹ Moreover, CBP One is only accessible in English, Spanish, and Haitian Creole.¹³⁰ Customs and Border Patrol guidance on the use of CBP One instructs migrants to utilize their mobile devices' translation capabilities or free translation apps for further translation needs.¹³¹ Once again this means that certain groups and those with access to more advanced technology are at an advantage.

In response to widespread complaints following the launch of CBP One, the system was overhauled in early May 2023.¹³² The number of available appointments per-day across the border increased from 750 to 1,000 appointments, with appointments available throughout the course of the day rather than all at once.¹³³ Noting the dissatisfaction with the initial system's inability to prioritize appointments for those who have been waiting the longest, the revamped CBP One app's scheduling system is now said to take this into account.¹³⁴ Yet, across the border in Mexico, those desperately relying on the system, which now serves as the primary method for asylum-seekers, continue to be met with "system error"

128. *See id.*; Guadalupe Vasquez de Jesus, a widowed mother of three, fled southern Mexico after her husband was killed and her youngest son was hit by a stray bullet. *Id.* Unable to obtain medical care for her son who had bullet fragments lodged in his eye, Guadalupe and her children arrived at Paso del Norte seeking an exemption based on urgent medical need, only to be denied by border officials. *Id.* The family stayed in a shelter in Ciudad Juarez for two months during which time Guadalupe attempted to secure an appointment through the CBP One application system, though her efforts were fruitless. *Id.* It was not until 60 Minutes aired Guadalupe's story that lawyers intervened on her behalf that the family was permitted to enter the United States outside the CBP One program on humanitarian grounds. *Id.*

129. *See* Adam Isacson, Commentary, *How the Biden Administration May Keep Asylum Out of Reach After Title 42*, WOLA (Feb. 17, 2023), <https://www.wola.org/analysis/biden-asylum-after-title-42/>.

130. U.S. CUSTOMS AND BORDER PROT., CBP ONE: TIPS FOR USERS, https://www.cbp.gov/sites/default/files/assets/documents/2023-Feb/CBP%20One%20Tips%20for%20Users%20-%20English_1.pdf (last updated May 4, 2023).

131. *Id.*

132. Joel Rose & Marisa Peñaloza, *Migrants Are Frustrated with the Border App, Even After its Latest Overhaul*, NPR (May 12, 2023, 9:08 PM), <https://www.npr.org/2023/05/12/1175948642/migrants-are-frustrated-with-the-asylum-claim-app-even-after-the-latest-overhaul>.

133. *Id.*

134. *Id.*

messages.¹³⁵ The demand is simply too great and even the new system cannot meet the needs along the southern border.¹³⁶

Moreover, in March 2023, President Biden and Canadian Prime Minister Justin Trudeau reached an agreement on an expansion of the 2004 migration treaty, which essentially makes it impossible to claim asylum at the U.S.-Canada border.¹³⁷ Under its initial provisions, the treaty limited Canada's ability to turn back migrants seeking asylum at official ports of entry along the U.S.-Canada border.¹³⁸ Following the March agreement, however, Canadian officials are now permitted to turn back migrants at Roxham Road, a popular unofficial crossing point along the New York-Canada border.¹³⁹ In return, Canada has agreed to establish a new legal refugee program for 15,000 migrants fleeing Central and South America.¹⁴⁰ While the Canadian refugee program could help reduce crossings at the southern border, the reality is a program that provides for 15,000 migrants will have a negligible effect on a system where daily migrant encounters are expected to swell between 9,000 and 14,000 according to some estimates.¹⁴¹

With the swelling humanitarian crisis in Mexico, the Biden Administration has also launched a new process for Cubans, Haitians, Nicaraguans, and Venezuelans outside of the United States.¹⁴² As part of its efforts to minimize the number of migrants in limbo in northern Mexico, this program allows Cuban, Haitian, Nicaraguan, and Venezuelan nationals and their immediate family members to apply for advanced authorization to travel to and be paroled into the United States for a temporary period of up to two years if they “[h]ave a supporter in

135. *Id.*

136. *See id.*

137. See Michael D. Shear & Ian Austen, *U.S. and Canada Reach an Agreement on Diverting Asylum Seekers*, N.Y. TIMES (Mar. 23, 2023), <https://www.nytimes.com/2023/03/23/us/politics/us-canada-asylum-seekers.html>; *see also* 8 C.F.R. §§ 208, 1003, 1240 (effective Mar. 25, 2023) (amending the existing DHS and DOJ regulations to implement the Additional Protocol to the Agreement between the United States and Canada regarding cooperation in the examination of refugee status claims from third-country nationals).

138. *See* Agreement for Cooperation in the Examination of Refugee Status Claims from National of Third Countries, Can.-U.S., Dec. 5, 2002, T.I.A.S. No. 04-1229, <https://www.state.gov/04-1229>; *see also* Shear & Austen, *supra* note 137.

139. *See id.*

140. *Id.*

141. See Priscilla Alvarez & Phil Mattingly, *Biden Administration Prepares for Surge of Migrants Ahead of the Forced End of a Trump-Era Border Policy*, CNN (Dec. 14, 2022, 6:00 AM), <https://www.cnn.com/2022/12/14/politics/biden-administration-prepares-surge/index.html>.

142. *Process for Cubans, Haitians, Nicaraguans, and Venezuelans*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/CHNV> (last updated Apr. 1, 2024).

2025] UNDOING TRUMP-ERA IMMIGRATION POLICIES 91

the United States; [u]ndergo and clear robust security vetting; [m]eet other eligibility criteria; and [w]arrant a favorable exercise of discretion.”¹⁴³ The parole program will allow travel authorization for up to 30,000 individuals from these countries each month.¹⁴⁴ Currently, there is neither an annual cap on the overall number of beneficiaries for this program nor an anticipated end-date.¹⁴⁵

V. HUMAN RIGHTS IMPLICATIONS AND POLICY RECOMMENDATIONS

A. *In General*

1. Humanitarian Crisis

One does not have to look far to see the deplorable conditions migrants are living in. The humanitarian crisis in northern Mexico has only intensified as a result of the policies instituted by the United States along the U.S.-Mexico border as well as the violence and instability across Central and South America.¹⁴⁶ Under Title 42, exemptions were, at least in theory, available to those with physical or mental disabilities, pregnant women, migrants lacking safe and stable housing in Mexico, those under twenty-one and over seventy years of age, and those threatened or harmed in Mexico.¹⁴⁷ With respect to the exemption based on lack of safe and stable housing in Mexico, the question, however, becomes, what threshold applies? In theory, there is an exemption for migrants lacking safe and stable housing in Mexico and another exemption for those who are threatened or harmed in Mexico.¹⁴⁸ However, in practice, how can that be the case if Mexican authorities use excessive force to get migrants off of streets, Mexican detention centers are overcrowded, and detainees do not even have adequate access to

143. *Id.*

144. See *Frequently Asked Questions About the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/frequently-asked-questions-about-the-processes-for-cubans-haitians-nicaraguans-and-venezuelans> (last updated Oct. 11, 2023) (expand General Questions dropdown for full text).

145. See *id.*

146. See INT’L FED’N OF THE RED CROSS & RED CRESCENT SOC’YS, MEXICO AND CENTRAL AMERICA: MIGRATION CRISIS (July 25, 2023), <https://reliefweb.int/report/mexico/mexico-central-america-migration-crisis-emergency-appeal-no-mdr43008-operation-update-4>.

147. 42 U.S.C. §§ 265, 268; Isacson, *supra* note 129.

148. See 8 CFR §§ 208.33(a)(3), 1208.33(a)(3); see also Suzanne Gamboa, *Another Migrant Dies in Mexico Center Fire, Raising Toll to 40*, NBC NEWS (Apr. 4, 2023, 12:17 PM), <https://www.nbcnews.com/news/latino/another-migrant-dies-mexico-center-fire-raising-toll-40-rcna78145>.

drinking water?¹⁴⁹ In fact, in late March 2023, a fire broke out at the Mexican federal government's National Migration Institute (NMI) provisional detention center leaving forty dead and twenty-seven others injured.¹⁵⁰

2. Exclusive Reliance on CBP One: A Violation of International Law

The Biden Administration's reliance on the CBP One app raises fundamental concerns regarding not only access to asylum but also to privacy.¹⁵¹ While CBP One may offer the promise of a more orderly border process in the future, it should never serve as the exclusive means of seeking protection.¹⁵² To rely exclusively on CBP One would be a violation of international human rights law.¹⁵³ Moreover, documents obtained by the American Immigration Council pursuant to the Freedom of Information Act (FOIA) suggest that the federal government has increasingly relied on a flawed system "without much consideration of the app's inherent flaws or the need for transparency with regards to the app's functions."¹⁵⁴

3. Due Process Concerns Associated with Accelerated Processing

As noted previously, the Biden Administration's accelerated asylum processing rule poses vast due process concerns. The Administration's response to due process concerns—specifically, that the accelerated timeline for credible fear interviews, which are now to be conducted in

149. See Gamboa, *supra* note 148 (demonstrating the realities of the dangers migrants experience at the border and the subjective nature of the rebuttable presumption).

150. *Id.*

151. *Government Documents Reveal Information About the Development of the CBP One App*, AM. IMMIGR. COUNCIL (Feb. 28, 2023), <https://www.americanimmigrationcouncil.org/FOIA/government-documents-reveal-information-about-development-cbp-one-app>.

152. AMNESTY INT'L, USA: MANDATORY USE OF CBP ONE APPLICATION VIOLATES THE RIGHT TO SEEK ASYLUM 7 (2023), <https://www.amnesty.org/en/wp-content/uploads/2023/05/AMR5167542023ENGLISH.pdf>.

153. *Id.* at 5, 12.

154. *Government Documents Reveal Information About the Development of the CBP One App*, *supra* note 151. Apparent flaws include issues related to the system's ability to capture photos, especially for users with darker skin color, and the system's GPS location capabilities. *Id.* Further, CBP's informational webpage and DHS's Privacy Impact Assessment (PIA), often fail to reflect the most up to date information or concerns associated with the app's expansion. *Id.* The PIA is a required publication which details "potential privacy issues for all new or substantially changed technology that collects, uses, disseminates or maintains personally identifiable information, and how the agency plans to mitigate these issues." *Id.* The app, which was not created for data collection purposes, is now also used by Cuban, Haitian, Nicaraguan, and Venezuelan migrants to submit biometric information to CBP for country specific programs. *Id.*

2025] *UNDOING TRUMP-ERA IMMIGRATION POLICIES* 93

the days (or in some cases hours) of an asylum seeker's arrival in an environment that is not conducive to a positive CFI determination—is worrisome.¹⁵⁵ Disagreeing with commenters who raised due process concerns, the departments allege that the rule neither violates the Due Process Clause nor “impermissibly restrict[s] access to asylum.”¹⁵⁶ In their response, the departments cite the U.S. Supreme Court decision in *Department of Homeland Security v. Thuraissigiam*, which held that noncitizens encountered at or near the border have no constitutional rights regarding their applications for asylum.¹⁵⁷ While this approach may align with the Administration's desire for an “orderly” process, it is far from consistent with its characterization of the finalized rule as a “humane” option.

B. Impact on LGBTQ+ Asylum Seekers

While the above concerns apply to asylum-seekers generally, the third-country asylum requirement will pose grave challenges for LGBTQ+ asylum seekers in particular given the lack of protections for LGBTQ+ persons in many parts of Central and South America.¹⁵⁸ As noted above, common transit countries, including Mexico, are fundamentally unsafe for LGBTQ+ migrants seeking asylum and other protections.¹⁵⁹ While the rule grants a per se exemption for noncitizens facing an imminent and extreme threat to life or safety—including threats of murder, kidnapping, rape, and torture—a “generalized threat of violence” is not sufficient.¹⁶⁰ This narrow exemption fails to appreciate the vulnerability of bona fide LGBTQ+ asylum-seekers.¹⁶¹ At least 117 LGBTQ+ people were murdered in 2019 in Mexico alone.¹⁶² In response to the hostility LGBTQ+ asylum-seekers face, some attempt to pass as cisgender and straight and take other precautions, including making

155. See Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31329-31230 (May 16, 2023) (codified at 8 C.F.R. pts. 208, 1003, 1208), <https://www.govinfo.gov/content/pkg/FR-2023-05-16/pdf/2023-10146.pdf>.

156. *Id.* at 31349.

157. *Id.* at 31349, 31351; see also *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020).

158. See Hirschberg, *supra* note 31; Scheidweiler, *supra* note 32.

159. See *Immigr. Equal. et al.*, *supra* note 25, at 2.

160. *Id.* at 44.

161. *Id.*

162. *Id.* at 45 (citing *Violence in Mexico: 117 Members of the LGBT Community Were Murdered in 2019*, INFOBAE (May 15, 2020), <https://www.infobae.com/america/mexico/2020/05/15/violenciaen-mexico-asesinaron-a-117-integrantes-de-la-comunidad-lgbt-en-2019>).

extortion payments to reduce the threat of violence along their journey.¹⁶³ By living in hiding, LGBTQ+ asylum-seekers may reduce the threat of violence.¹⁶⁴ However, this may hamper their eligibility for asylum by limiting their ability to establish the existence of an imminent and extreme threat by a preponderance of the evidence.¹⁶⁵ In other words, LGBTQ+ asylum seekers are faced with the challenge of deciding between protection and proof.

As if those challenges were not enough, the rule also fails to mention what constitutes satisfactory evidence for purposes of this exemption or consider that oftentimes LGBTQ+ survivors of violence do not have the proof, language, or support needed to sufficiently establish the existence of an imminent and extreme threat.¹⁶⁶ While the “exceptionally compelling circumstances”¹⁶⁷ catch-all exemption casts a wider safety net for migrants seeking an exemption from the third-country refuge requirement, the high standard of proof coupled with a lack of clarity on what constitutes such circumstances will result in unfair denials.¹⁶⁸

Moreover, the Biden Administration’s rule marks a departure from prior practice by requiring asylum-seekers who receive negative determinations following their credible fear interview (CFI) to affirmatively request review from an IJ or be deported, “rather than the review being granted upon a failure to respond.”¹⁶⁹ By affirmatively requiring asylum-seekers to request IJ review, the rule further penalizes asylum-seekers with bona fide claims, especially as the majority of these individuals go through the system “pro se” without legal representation

163. *Id.*

164. *See id.*

165. *See id.* at 42, 45.

166. *Id.* at 45. Human Rights First has documented various instances where LGBTQ+ asylum seekers were turned away at the border despite being victims of multiple rapes, death threats (based on race, gender and sexual orientation and even when the asylum seeker “disappeared” by the same criminal enterprise), kidnapping, and threats from police officers. For additional details on LGBTQ+ asylum seekers being turned away at the border, *see* HUMAN RIGHTS FIRST, HUMAN RIGHTS STAIN, PUBLIC HEALTH FARCE (2022), <https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf>.

167. A noncitizen may rebut the presumption of ineligibility due to “exceptionally compelling circumstances” if the noncitizen can prove by a preponderance of evidence that they, or a family member they are traveling with, are faced with one of the following: (1) acute medical emergency; (2) imminent and extreme threat to life or safety, including rape, kidnapping, torture, or murder; or (3) a “victim of a severe form of trafficking in persons” as defined in 8 C.F.R. § 214.11(a). 8 C.F.R. § 208.33(a)(3).

168. *Immigr. Equal. et al.*, *supra* note 25, at 46.

169. *Id.* at 47; Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31354 (May 16, 2023) (codified at 8 C.F.R. pts. 208, 1003, 1208), <https://www.govinfo.gov/content/pkg/FR-2023-05-16/pdf/2023-10146.pdf>.

2025] *UNDOING TRUMP-ERA IMMIGRATION POLICIES* 95

and lack a comprehensive understanding of the complexities of U.S. immigration law.¹⁷⁰ Thus, the Administration's stance that IJ review sufficiently protects against wrongful denials does not hold.¹⁷¹ The Administration should return to its prior practice where IJ review need not be affirmatively requested. The Administration should also dedicate resources to ensure that migrants with negative CFI determinations have access to legal counsel as a means of ensuring meaningful review.¹⁷²

The Biden Administration's rule also fails to recognize parent-child relationships for LGBTQ+ families who are unable to legally bind themselves in countries where they are being persecuted on account of their gender identity and or sexual orientation.¹⁷³ Thus, the rule is discriminatory in its effect. The Administration should look not to the language of the rule but to the impact of the rule. By failing to account for the fact that same-sex marriage is not legally recognized nor protected in many countries where asylum-seekers flee from, LGBTQ+ asylum-seekers with de facto spouses, and who are de facto parents, are subjected to the rebuttable presumption, while family members of straight, cisgender applicants are afforded broader relief.¹⁷⁴ The Biden Administration should revise its rule so that family members of LGBTQ+ asylum-seekers benefit from the same protections as family members of straight, cisgender applicants. While the Administration maintains that it is committed to the equal treatment of *all* persons, asserting that vulnerable groups benefit by being disincentivized to embark on dangerous travel to the southern border, it is important to remember that intent and impact are not the same.¹⁷⁵

VI. CONCLUSION

While the Biden Administration has expanded legal pathways to the United States, its responses to comments related to due process concerns and the discriminatory impact of its policies on vulnerable populations, including LGBTQ+ asylum seekers, is worrisome. Going forward, the Administration should work to address these concerns such that individuals and family members with bona fide claims are not turned

170. Immigr. Equal. et al., *supra* note 25, at 53.

171. *Id.*

172. *See id.* at 53-54.

173. *Id.* at 55.

174. *Id.*

175. *See* Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31331-32 (May 16, 2023) (to be codified at 8 C.F.R. pts. 208, 1003, 1208), <https://www.govinfo.gov/content/pkg/FR-2023-05-16/pdf/2023-10146.pdf>.

away and ensure that LGBTQ+ families are provided with equal protections under the law in practice, not only in theory.