

March 27, 2023

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U.S. Department of Homeland Security

Ms. Lauren Alder Reid, Assistant Director  
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Via Electronic Submission: [www.regulations.gov](http://www.regulations.gov)

RE: Comments of Former Senior Officials of the Department of Homeland Security to the Department of Homeland Security and the Department of Justice, Notice of Proposed Rulemaking, “Circumvention of Lawful Pathways,” 88 FR 11704, DHS Docket No. USCIS-2022-0016 (Feb. 23, 2023)

Dear Mr. Delgado and Ms. Alder Reid:

We, the undersigned former senior officials of the Department of Homeland Security, submit these comments regarding DHS and DOJ’s February 23, 2023, Notice of Proposed Rulemaking (“NPRM”), 88 FR 11704.

## **I. Summary**

Starting with the name, “Circumvention of Lawful Pathways,” the proposed rule is an ineffective measure and empty gesture as America continues to reel from the greatest border crisis in our history. Despite its perceived enforcement provisions, this rule, if implemented, would allow most aliens to arrive at or between ports of entry, make fraudulent claims of fear to enter the U.S. or continue to utilize unlawful mass parole programs to accomplish the same. As the Biden Administration continues to steadfastly grip to its executive order on removing

barriers to immigration,<sup>1</sup> this proposed rule will do exactly that. The proposed rule may be framed as an enforcement tool to limit the number of aliens who will ultimately be able to receive asylum, however we are hard-pressed to find any examples of classes of aliens who will actually be kept out of the process under this rule.

To be clear, we remain in strong support of the so-called “Third Country Transit” Interim Final Rule issued in July of 2019.<sup>2</sup> The concepts of limiting eligibility for asylum based on means of entry and criteria surrounding that entry are appropriate methods of controlling migrant flows at the southwest border. The 2019 IFR did this in an effective manner without including a myriad of exemptions to effectively render it meaningless. Yet under the guise of an “orderly and humanitarian” asylum system and the misleading trope of reforming a broken immigration system, the Biden Administration has taken an open-borders approach and removed even the specter of immigration enforcement for those who flagrantly disregard our laws.

To justify this latest incursion on the integrity of our immigration laws, the Departments cite the Biden Administration’s own illegal immigration programs as triumphant victories worth emulation and attempt to convince the American people that these actions are necessary as Title 42 authority is ultimately terminated. What the Departments fail to mention is that the driving force behind the impending termination is the Administration itself. Additionally, the cited lack of available alternative pathways is likewise due to DHS and State Department action. The proposed rule ignores the burdens that it will place on the government entities charged with enforcing the immigration laws. It further fails to justify how the proposed rule will serve to dissuade any alien from attempting entry and how the new circumventions that it creates will not merely create additional incentives.

Procedurally, the NPRM fails to comply with regulatory requirements to fully assess the costs and administrative burdens of implementation. The lackluster analysis rests on the premise that only aliens will bear the cost of this implementation. This fails to take into account any start-up costs or operational costs and wholly ignores the costs to the immigration courts, to aliens with pending immigration matters, and to States and localities who must ultimately bear the burden of an influx of aliens. We would further note that the provided “analysis”

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<sup>1</sup> Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 2877 (Feb. 5, 2021).

<sup>2</sup> Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (Jul. 16, 2019) (to be codified at 8 C.F.R. parts 208, 1003, and 1208).

does not provide even an iota of cost estimate, making it nearly impossible to provide meaningful comment on the proposal.

In general, the timing for this proposed rule, on the heels of illegally created parole programs, will exacerbate the situation and will result in a substantial increase in aliens attempting entry, be it at, or between ports of entry. The changes do not amplify enforcement efforts and, quite the opposite, continue to signal to the world that the borders of the United States are open and porous.

### **I. The Proposed Rule Fails to Properly Justify its Policy Decisions**

The Administrative Procedure Act (“APA”) prohibits agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>3</sup> Furthermore, it requires agencies to provide notice of the proposed rule, an opportunity for comment, and statement of the basis and purpose of the final rule adopted.<sup>4</sup> Additionally, pursuant to the APA and caselaw, an agency must consider alternative options<sup>5</sup> as it ultimately must demonstrate that it is considering all important aspects of the problem.<sup>6</sup>

At the outset, the proposed rule is predicated on a false narrative. The executive summary opens with “[e]conomic and political instability around the world is fueling the highest levels of migration since World War II.”<sup>7</sup> This narrative provides for a discussion of the highest levels of illegal immigration massing at the U.S.-Mexico border as merely a by-product of global issues and completely eschews any responsibility of the Biden Administration itself. The Administration ignores the actions it has taken since day one to weaken border security, promote the influx of illegal immigration, and to remove integrity from the administration of both the legal immigration process (including asylum and credible fear measures) and overall enforcement of the laws.

Instead, the executive summary touts the successes of illegal mass parole programs and cites shifting migrant trends and demographics as the need to promulgate this rule. In support of the rule, the Departments utilize four main justifications. The proposed rule states, in relevant part:

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<sup>3</sup> 5 U.S.C. § 706(2)(A).

<sup>4</sup> *American Medical Ass’n v. Reno*, 57 F. 3d 1129, 1132 (DC Cir. 1995).

<sup>5</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983).

<sup>6</sup> *Id.* at 43.

<sup>7</sup> Circumvention of Lawful Pathways, 88 Fed. Reg. 11704 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

This condition is appropriately tailored to circumstances expected upon the lifting of the Title 42 public health Order, absent a policy change, including most notably (1) the additional number of migrants anticipated to arrive at the border following the eventual lifting of the Title 42 public health Order; (2) the severe strain of this anticipated influx of migrants would place on DHS resources; (3) the availability of lawful options for some migrants seeking protection, in the United States and elsewhere in the region; and (4) the Departments' recent experience showing that an increase in lawful pathways coupled with consequences for evading them can significantly – and positively – affected behavior and undermine smuggling operations.<sup>8</sup>

The four justifications present circular logic at its finest and the ensuing discussions make it appear that the Departments are handling the consequences of matters out of its control – a false pretense for the justification. The first three justifications are a direct result of overt actions taken by the Biden Administration as it attempts to address a crisis of its own making. The Departments' proposal is arbitrary and capricious because it is unnecessary, for it claims to solve a problem of its own making.

The proposed rule suggests that the Administration must address the immigration wave subsequent to a Title 42 termination but fails to note that the Administration is the one driving the termination. The Departments likewise fail to explain current historic numbers at the southwest border while Title 42 remains in effect. Since FY21, CBP has apprehended over 5.1 million aliens at the southwest border, over one million alone since October 2022.<sup>9</sup> We have witnessed mass migration since 2021 and yet the Departments only seem concerned with future waves due to a termination that is within the Administration's sole control. Dating back to April, 2022, DHS has been actively working to terminate the program and, but for court intervention, would have terminated it by May 23, 2022.<sup>10</sup> Since, on April 1, 2022, Secretary Mayorkas assured the American People that the Department of Homeland Security has “put in place a comprehensive, whole-of-government strategy to manage any potential increase in the number of migrants...increasing

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<sup>8</sup> Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11728 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

<sup>9</sup> U.S. Customs and Border Protection, *Southwest Land Border Encounters* (Mar. 10, 2023), <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

<sup>10</sup> U.S. Dep't of Homeland Sec., Statement by Secretary Mayorkas on CDC's Title 42 Order Termination (Apr. 1, 2022), <https://www.dhs.gov/news/2022/04/01/statement-secretary-mayorkas-cdcs-title-42-order-termination>.

our capacity to process...evaluate asylum requests, and quickly remove those who do not qualify for protection,” why is this rule needed?<sup>11</sup> It is worth noting that while DHS moves toward termination, on February 9, 2023, the Department of Health and Human Services again renewed the determination that a public health emergency exists.<sup>12</sup> More so than the termination itself, Secretary Mayorkas’ continued push to terminate Title 42 is one of the root causes of the border surge of the past two years. Yet the proposed rule makes no connection between the two.

The third justification suggests that the United States should be relying on its international partners within the region to stem the mass migration patterns that flow into the United States. As a preliminary matter, we support that goal and were happy to see it employed through the Migrant Protection Protocols (“MPP”) and the Asylum Cooperative Agreements (“ACA”) that were flourishing under the previous administration. The Biden Administration has summarily eliminated the ACA while significantly reducing (in an effort to stop it but for court intervention) MPP.

When discussing consideration of alternative approaches, the Departments suggest that MPP and ACA previously in place are not viable options and cannot be utilized at this juncture. With regard to MPP, the Departments assert that the “resources and infrastructure necessary...are not currently available,” and that “programmatic implementation...requires Mexico’s concurrence and support.”<sup>13</sup> On the latter point, the NPRM cites Mexico’s unwillingness to expand the program beyond current capacity limits. This point, however, is a consequence of DHS’ position on MPP, not in spite of it.<sup>14</sup> Beginning immediately after President Biden took office, DHS issued a memorandum suspending MPP enrollment<sup>15</sup> and followed with its first memorandum to terminate MPP.<sup>16</sup> That was followed by a second memorandum in October of 2021<sup>17</sup> and guidance for the continuation of MPP while under court order. More recently, on August 8, 2022, DHS released a statement

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<sup>11</sup> *Id.*

<sup>12</sup> Dep’t of Health and Human Serv., *Renewal of Determination that a Public Health Emergency Exists*, (Feb. 9, 2023), <https://aspr.hhs.gov/legal/PHE/Pages/COVID19-9Feb2023.aspx>.

<sup>13</sup> Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11731 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

<sup>14</sup> *Id.*

<sup>15</sup> Memorandum from David Pekoske, Acting Sec’y of Homeland Sec., Suspension of Enrollment in the Migrant Protection Protocols Program (Jan. 20, 2021).

<sup>16</sup> Memorandum from Alejandro N. Mayorkas, Sec’y of Homeland Sec. Termination of the Migrant Protection Protocols Program (Jun. 1, 2021),

[www.dhs.gov/sites/default/files/publications/21\\_0601\\_termination\\_of\\_mpp\\_program.pdf](http://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf).

<sup>17</sup> U.S. Dep’t of Homeland Sec., DHS Issues a New Memo to Terminate MPP (Oct. 29, 2021), <https://www.dhs.gov/news/2021/10/29/dhs-issues-new-memo-terminate-mpp>.

reiterating DHS' commitment to terminate MPP.<sup>18</sup> With DHS opposed to the program, it should be expected that Mexico would seize upon the opportunity to limit further participation and not make additional bedspace available. The diplomatic efforts undertaken by the previous administration to set up MPP no longer provide any sway for the Mexican government to engage given DHS' current position.

The Departments' first argument is likewise without merit. While we would concede that, at present, the enrollment numbers for MPP are low, we would disagree that this is indicative of MPP's capacity. CBP statistics for FY19 and FY20 prove that over 18,000 individuals were returned to Mexico to await their court dates.<sup>19</sup> While that number has dwindled substantially in recent months, again that is a consequence of DHS' position on MPP and not due to any lack of available resources.

The proposed rule further states that the alternatives found in Section 208(a)(2)(A) of the Immigration and Nationality Act related to safe third country agreements are likewise not viable. The NPRM finds that “[n]egotiating such agreements...is a lengthy and complicated process....”<sup>20</sup> However, under the previous administration, at least three such agreements were negotiated and finalized with at least one country already taking in individuals per the agreement. The Biden Administration fails to mention that the reason this would be a painstaking process currently, is that less than a month after President Biden took office, Secretary of State Blinken suspended and terminated all such existing agreements.<sup>21</sup> The Departments cannot state that this is not an available option when this Administration took the steps to remove it.

Additionally, the Departments find that, *assuming arguendo*, there was an interest in pursuing such an agreement, it would be impossible to negotiate one with the exact same substance of the herein proposed rule. The current language of 208(a)(2)(A) requires a bilateral or multilateral agreement where an “alien would have access to a full and fair procedure for determining a claim to asylum or

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<sup>18</sup> U.S. Dep't of Homeland Sec., DHS Statement on U.S. District Court's Decision Regarding MPP (Aug. 8, 2022), <https://www.dhs.gov/news/2022/08/08/dhs-statement-us-district-courts-decision-regarding-mpp>.

<sup>19</sup> U.S. Customs and Border Protection, *U.S. Border Patrol Migrant Protection Protocol returns through Paso Del Norte Port March 20, 2019 through August 13, 2020*, (undated), [https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/foia-mpp-statistics-march20-2019-to-august13-2020\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/foia-mpp-statistics-march20-2019-to-august13-2020_0.pdf).

<sup>20</sup> *Id.* at 11731-11732.

<sup>21</sup> U.S. Dep't of State, *Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras* (Feb. 6, 2021), <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras>.

equivalent temporary protection.”<sup>22</sup> The statute uses the terms “full and fair” which suggests that the procedures need not be the exact procedures available under U.S. protection law. In fact, the long-standing agreement with Canada is not predicated on the Canadian system being a carbon copy of U.S. protection law. The statutory language is unambiguous, leaving no room for adding additional requirements that are not present in the text. This argument is further belied by statements within the proposed rule itself touting regional governments that are implementing new mechanisms for providing protections to millions of migrants.<sup>23</sup> The Departments cannot have it both ways. Either governments in central and south America are taking great strides to shore up protection law in their respective countries or the Administration does not have confidence that bilateral or multilateral negotiations will provide for full and fair protections outside of the United States. The NPRM wrongly states what would be required and, accordingly, fails to adequately provide for consideration of this alternative.

The final justification is the successes of the recent expansion of parole programs as a “legal pathway” into the United States. This justification makes little sense as there has not been any evidence that the parole programs have, in fact, reduced illegal immigration. The NPRM cites the “innovative paroles processes for certain nationals” as a successful program that provides insight into how to decrease illegal border crossings.<sup>24</sup> However, the program, like all parole programs, are *ultra vires* and in direct conflict with the relevant provisions of law. The program has merely shifted the illegal flow of migrants from between the ports of entry to the ports of entry, where inadmissible aliens are paroled into the U.S. Supplanting one type of illegal immigration for another type does not make the program a success or lawful.

There is no ambiguity in the INA governing parole. Parole is available on a case-by-case basis only to aliens for “urgent humanitarian reasons or significant public benefit.”<sup>25</sup> Parole authority is appropriate where an alien has a critical humanitarian need or parole is deemed to be a significant public benefit to the United States. Additionally, parole is available only on a case-by-case basis with the government making a determination in each case. Nowhere in the INA does Congress provide the government with the authority to parole aliens *en masse* from a particular country or region simply because the alien has someone in the United States willing to sponsor them.

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<sup>22</sup> 8 U.S.C. § 1158(a)(2)(A).

<sup>23</sup> Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11730 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

<sup>24</sup> *Id.* at 11718

<sup>25</sup> 8 U.S.C. § 1182(d)(5)(A).

Additionally, the legislative history of parole authority, cited by the former INS in its initial regulation, makes clear that the intent was to exercise the authority in a narrow and restrictive manner. The original rule stated:

The drafters of the Immigration and Nationality Act of 1952 gave as examples situations where parole was warranted in cases involving the need for immediate medical attention, witnesses, and aliens being brought into the United States for prosecution. H. Rep. No. 1365, 82<sup>nd</sup> Cong., 2d Sess. at 52 (1952). In 1965, a Congressional committee stated that the parole provisions ‘were designated to authorize the Attorney General to act on an *emergent, individual, and isolated situation*, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside the limit of the law.’ 5 Rep. No. 748, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 17 (1965).<sup>26</sup>

This begs the question as to what authority was used to accomplish such a mass parole. If the legal authority does not exist, it is improper for the Departments to cite the programs as effective tools that warrant the promulgation of this proposed rule. Additionally, while “successes” such as these parole programs are enumerated as one of the stated justifications, the justification section of the NPRM fails to make any mention of them or further explain why it should be considered a justification.

Lastly, the Departments couple the successes of these illegal programs with the consequences for evading these parole “legal pathways” as a critical combination. As discussed in the subsequent section, the consequences found in this proposed rule are easily rebuttable and ultimately amount to no more than lip service. Even if the parole programs were lawful, there is simply no correlation between those programs and this rule.

## II. The NPRM Fails to Adequately Address Substantive and Procedural Questions

Under the guise of disincentives for entering the United States illegally, the proposed rule will, at best, have no substantive positive effect on the U.S. protection

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<sup>26</sup> Detention and Parole of Inadmissible Aliens; Interim Rule with Requests for Comments, 47 Fed. Reg. 30044 (Jul. 9, 1982) (codified in 8 C.F.R. parts 212 and 235) (emphasis added).

law and will, more likely, act to further incentivize aliens. While stated above that we support the concept of enforcement measures at the border to prevent asylum fraud, the sheer number and scope of exceptions provided for aliens under this rule make the rebuttable presumption practically meaningless. In short, the exceptions swallow the rule and, when dealing with family unity, have the effect of greatly incentivizing family units – both bona fide and not – to migrate to the U.S. in violation of section 212(a) of the INA. Ultimately, the rule benefits “asylum seekers” and attempts to create a false narrative that implementation will lead to more genuine claims by fewer individuals.

The crux of the proposed rule is the concept that a presumption of asylum ineligibility exists for any alien entering the United States who does not meet certain criteria. Specifically, the proposed rule requires that to be eligible for asylum one of three criteria must be met: (1) the alien must have appropriate documentation; (2) must present at a port of entry with a prescheduled appointment through the CBP ONE App; or (3) must have sought protection in a third country and received a final determination. The last criteria is akin to the Third Country Transit Rule, which likewise largely prohibited asylum eligibility for a non-contiguous alien who did not apply for protection in a country where such processes are available.<sup>27</sup>

The similarities to the previous rule end there, however. While this appears to be a strong measure to control migration along the southern border, it becomes apparent that the exceptions swallow the rule. We are left with the question of to whom this rule will actually apply once implemented. Of the three criteria, the one that we presume will most often be utilized is the prescheduled appointments. It is not likely that many aliens will suddenly obtain legitimate documentation and, if they were able to do so, they likely would not be applying for asylum but would be entering on a type of visa. This is an important distinction because credible fear procedures would not apply to an admitted alien (i.e. one that actually has a valid authorization). The third criterion may be used more often than the first but it is unclear to the extent that an alien would avail themselves of protection in Mexico and other nations in Central and South America. Whether they are being smuggled to the United States or make the journey on their own, the lack of resources and familiarity with the law will also make this criterion rarely met.

The proposed rule is clearly encouraging aliens to use the second criterion. A prescheduled appointment through the CBP ONE App is the most available option

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<sup>27</sup> Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11750-11752 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

for aliens with access to smart phones or other technology allowing them to contact the system. However, even this criterion is waived if the alien can demonstrate that “it was not possible to access or use the...system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.”<sup>28</sup> In essence, everything must align perfectly for this criterion to be the basis for the presumption of ineligibility. Relying on technology is itself a risky proposition as factors such as bugs within the app or lack of available cellular service or a reliable internet connection could all hamper an alien’s ability to successfully schedule an appointment. Additionally, while we do not have statistics on literacy rates of migrants, it would be fairly common to find migrants without a strong grasp of the English language. If language and literacy are included as prerequisites, this will likely include a far larger population of migrants who would overcome the rule’s presumption. Lastly, the catchall of “other or ongoing and serious obstacle” is left undefined in the regulatory text. As asylum officers and immigration judges will be trained on identification of the presumption, leaving a catchall which will seemingly be within the discretion of the adjudicator will allow virtually any reason to pass muster. This will result in the presumption being raised against hardly any alien crossing into the United States.

For those few aliens against whom the presumption will be raised, the proposed rule has fashioned it as a rebuttable presumption. Again, the exceptions and now the rebuttals swallow the rule itself. An alien may rebut the presumption when proving that the alien has a medical emergency, “faces an imminent and extreme threat to life or safety,” or meets the statutory definition of trafficking victims.<sup>29</sup> Of the three, the most concerning is the threat to life or safety. It is well-established that the trek to the United States is dangerous with more migrants killed or kidnapped each year. The dangers of the journey are further exacerbated with the influence of cartels and other criminal organizations that view smuggling migrants as a for-profit business without regard to their safety. From FY17 through FY21, CBP has reported over 1,700 migrant deaths.<sup>30</sup> FY21 had the most in a single year with 568 deaths.<sup>31</sup> Additionally, in that same time period, Border Patrol rescued over 8,400 individuals.<sup>32</sup> FY21 again saw the most rescues in a single year with

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<sup>28</sup> Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11750 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

<sup>29</sup> *Id.*

<sup>30</sup> U.S. Customs and Border Protection, *Border Rescues and Mortality Data* (Feb. 6, 2023), <https://www.cbp.gov/newsroom/stats/border-rescues-and-mortality-data>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

3,423.<sup>33</sup> These numbers only represent the deaths and emergencies reported by CBP, not other federal, state, and local agencies and it is unknown how many bodies have never been discovered. The journey to the southern border of the United States is inherently a journey where an alien will face extreme threats to life and safety from beginning to end. To add this as an exception is to exempt the entire population of migrants that have traveled with the assistance of smugglers and other criminal enterprises.

While the proposed rule claims to disincentivize illegal border crossers, the Department's provisions have instead created additional incentives to make the perilous journey either as unaccompanied children or with children in tow. In addition to the fact that the NPRM does not apply to unaccompanied children, the Department of Justice proposed rule requires granting asylum despite ineligibility in an effort to preserve family unity. In a relevant portion, the Department of Justice's proposed regulation states that "[w]here a principal asylum applicant is eligible for withholding...and would be granted asylum but for the presumption...and where an accompanying spouse or child ...does not independently qualify for asylum or other protections...the presumption shall be deemed rebutted."<sup>34</sup> Caselaw has long held that grantees of withholding of removal cannot receive derivative benefits for their spouses and children.<sup>35</sup> This provision seeks to sidestep that issue by granting full asylum status to the principal and family even if the principal alien cannot otherwise rebut the presumption. The Departments argue that the family consideration is sufficient to rebut the presumption and therefore the principal would be properly granted asylum. The practical application of this provision is to ultimately grant asylum to aliens not otherwise eligible to ensure derivation of benefits. This measure flagrantly disregards U.S. protection law and policy and is an offense to the rule of law.

On a larger scale, this provision belies the Departments' argument that the proposed rule disincentivizes illegal entrants. Instead, this provision will be viewed as the driving force as more aliens view the benefit of asylum as worth the risk of bringing children into the United States through these dangerous methods. If an alien is suddenly eligible for asylum simply by bringing in a family, it would be in the alien's self-interest to do so. This is comparable to issues of family detention under the *Flores* Settlement Agreement. As *Flores* was amended to apply to accompanied alien children, in addition to unaccompanied alien children, the rate of

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<sup>33</sup> *Id.*

<sup>34</sup> Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11752 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

<sup>35</sup> *Matter of A-K-*, 24 I. & N. Dec. 275 (BIA 2007).

family units encountered at the border rose exponentially.<sup>36</sup> Single adults who were likely to face detention upon entry received a get-out-of-jail card simply by bringing in children. Unaccompanied alien children also fear no repercussion from this proposed rule and it serves no purpose in dissuading their attempted entry. In fact, given that, as a group, they are exempted from the NPRM, this may further incentivize the perilous journey to the United States. In the instant case, we will see the same outcomes with a continued flow of unaccompanied children and a rise in family units who are not only seeking to be released from detention, but now have the chance of obtaining a pathway to citizenship simply by not coming alone.

While previous proposed rules and Interim Final Rules issued by the Biden Administration have been ostensibly focused on efficiencies and backlog reduction, the same cannot be said for the instant proposed rule. The Departments readily acknowledge that the time spent on each interview will increase with the addition of determining whether the presumption applies and, if so, whether the alien can rebut that presumption. The Departments fail however to recognize the burden that they are placing on immigration courts nationwide. As of the first quarter of FY23, there are over 1.8 million cases pending before the Executive Office for Immigration Review (“EOIR”) with 184,724 cases filed and only 100,790 cases completed during the first quarter.<sup>37</sup> This follows the trend of a growing backlogged docket that the courts cannot overcome. The recently implemented IFR on credible fear added strict requirements, including accelerated timetables, for cases falling under the IFR’s jurisdiction<sup>38</sup> which only adds to the confusion and inefficiency inherent in the system. With this proposed rule, immigration judges will now have to make several additional findings of fact to support a grant of asylum or withholding. Specifically, regardless of whether the judge is reviewing a credible fear determination or hearing the underlying case, the judge will have to determine whether the presumption exists and, additionally, whether it has been sufficiently rebutted. For an already overworked and understaffed court system, the addition of

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<sup>36</sup> *Flores v. Lynch*, No. CV 85-04544 DMG (Order entered Aug. 21, 2015). Please note that the Defendant in this matter has been updated with each administration. Accordingly, the case is presently docketed as *Flores v. Garland*. The U.S. Border patrol encountered 39,838 family units in FY15 and 77,674 in FY16 after the *Flores* Settlement Agreement was updated to recognize protections for accompanied minors. U.S. Customs and Border Protection, *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016* (Jun. 17, 2019), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>.

<sup>37</sup> . EOIR, *Executive Office for Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (Jan. 16, 2023), <https://www.justice.gov/eoir/page/file/1242166/download>.

<sup>38</sup> Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers 87 Fed. Reg. 18078 , 18223-18226 (Interim Final Rule Mar. 29, 2022) ((to be codified at 8 C.F.R. parts 208, 235, 1103, 1208, and 1235).

these requirements will wreak havoc on completion rates across the board. It is worth noting that, in light of the Departments' previous efforts to remove credible fear cases from the immigration courts in the IFR<sup>39</sup> (and NPRM<sup>40</sup> that preceded it), there is no justification in this proposed rule that explains why immigration backlogs are no longer a consideration.

Lastly, the Departments' NPRM sets up a sound principle in protection law that an alien fleeing for their life seek safety in the first safe country in which they arrive. Yet, the Departments then inexplicably sunset the application of this principle after two years. The NPRM attempts to propagate protection offered abroad, it welcomes and highlights international partners that are willing to provide protection in their respective countries and stem the migrant flows, it gives the appearance that if aliens don't avail themselves of these generous countries' protections, they will face a rebuttable presumption that they cannot seek asylum here in the U.S. It is therefore wholly inconsistent for the Departments to propose that the presumption sunset in two years.

The sunset makes it clear that this is a political fix to a public optics problem for the Biden Administration – and a thinly veiled one at best. The Departments are using this as part of the “quick fix” to make it appear that fewer illegal aliens are crossing the southern border between the ports. Meanwhile, the Administration continues to direct illegal aliens to travel through the ports of entry. Notably, the number of inadmissible aliens encountered at ports of entry has steadily risen for several months, but few look at or cite this data. The Departments have calculated that after two years, the Administration can claim victory and return to prior procedures.

The Departments have also failed to explain how the temporary nature of this proposed rule would operate in practice.<sup>41</sup> The government does not have the ability to simply turn on or off a switch with regard to an implementation roll out. Notice must be given of new procedures, any new documents that are required must go through the Federal Register in compliance with the Administrative Procedures Act, and government employees must be properly trained. In this matter, the latter

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<sup>39</sup> Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers 87 Fed. Reg. 18078 (Interim Final Rule Mar. 29, 2022) ((to be codified at 8 C.F.R. parts 208, 235, 1103, 1208, and 1235).

<sup>40</sup> Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46906 (proposed Aug. 20, 2021) (to be codified at 8 C.F.R. parts 208, 235, 1103, 1208, and 1235).

<sup>41</sup> Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11706 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

point provides the biggest challenges. There are three touchpoints with aliens under this rule: (1) CBP; (2) USCIS; and (3) EOIR. Each have new responsibilities and are required to review cases in a manner that is different from existing regulation and policy. The record must be created and maintained in a way by all components to ensure that the alien is placed in the right category with regard to the presumption and any rebuttal that he or she might have available. Specifically for USCIS and EOIR, extracting all relevant information in the record must be done systematically and while it may be similar to existing questions, training must be updated to reflect the proposed rule. As the Departments have determined that this should be a temporary rule, the time spent training and updating for implementation will cut directly into the limited time that the proposed rule is in effect, making it practically meaningless. Additionally, there is no indication of how the Departments would roll back the regulation should they determine at the appropriate time that it is no longer needed. It is unclear how that would affect aliens already in the pipeline – most likely awaiting a hearing before an immigration judge. Turning this off will be as problematic as implementation and will result in inequity in the treatment of aliens at every stage of the process.

### **III. The NPRM Fails to Adequately Consider the Administrative Burdens or Costs**

Pursuant to executive orders, the NPRM includes an economic analysis purporting to consider the cost of implementing this rule on the affected population as well as the government. This analysis is deficient as it fails to consider the actual administrative burdens that would be placed on USCIS, EOIR, or states and localities. The Departments should not rely on this document and should consider the additional factors as discussed herein.

The NPRM reduces its discussion of costs to a single paragraph where it states that “[t]he costs of the proposed rule primarily are borne by migrants and the Departments.”<sup>42</sup> The proposed rule further suggests that USCIS adjudicators might need additional time per case to determine the presumption’s applicability and whether it can be rebutted.<sup>43</sup> That is where the analysis ends, however. The proposed rule fails to provide any estimates on implementation or operating expenses and further fails to provide any specifics as to how migrants would bear

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<sup>42</sup> Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11748 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

<sup>43</sup> *Id.*

the monetary costs of this proposal. The document lacks any evidence to support that statement.

It is unfathomable that the Departments believe that their “analysis” is sufficient as it fails to provide even the slightest indication of what the expected costs would be associated with the rule. Beginning with DHS, there is no mention of what resources are required to implement the rule. While we understand that USCIS asylum officers would conduct the interviews, applying new standards and additional considerations in the interview will require training and training material. The training has a cost but it is not considered. Additionally, if these interviews will take more time, that should result in fewer interviews per officer per day. DHS must account for that in the cost and has failed to provide any indication of whether fewer interviews are acceptable or whether USCIS will increase the credible fear corps of asylum officers with officers that are presently handling other work. If the latter is true, then the analysis should include the cost to U.S. citizen petitioners and alien applicants who followed statutorily legal processes to apply for benefits. These individuals will be further delayed in receiving other benefits as adjudicators are reassigned to support this implementation.

Without understanding the estimated costs associated with implementation, it is impossible to figure out how USCIS will be able to pay for their role. The vast majority of USCIS funding comes from collection of the Immigration Examinations Fee Account (IEFA) paid into by individuals and entities seeking immigration benefits.<sup>44</sup> This is not a yearly appropriation, yet the Biden Administration has repeatedly sought and received appropriated funds to adjudicate asylum claims and reduce the backlog. If this NPRM leads to more asylum claims and a higher backlog, it is likely that USCIS may seek to ask Congress for an appropriation to implement this rule, thereby shifting the burden of cost to the American taxpayers. Even with fees likely to increase following publication of a new proposed fee rule, the likely costs of this proposed rule are unknown and cannot be accounted for in the amount already obligated by the USCIS’ budget office. Without a basic understanding of the costs or an estimate, there is no way to estimate the consequences of implementation. USCIS must guard against a violation of the Anti-Deficiency Act.<sup>45</sup> This act prohibits federal employees, or agencies, from making or authorizing expenditures from, or creating or authorizing obligations under, any appropriation or fund in excess of the amount available in the

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<sup>44</sup> 8 U.S.C. § 1356(m); See Department of Homeland Security, *United States Citizenship and Immigration Services Budget Overview: Fiscal Year 2022 Congressional Justification*, (undated), [https://www.uscis.gov/sites/default/files/document/reports/USCIS\\_FY\\_2022\\_Budget\\_Overview.pdf](https://www.uscis.gov/sites/default/files/document/reports/USCIS_FY_2022_Budget_Overview.pdf).

<sup>45</sup> 31 U.S.C. § 1341 *et. seq.*

appropriation or fund unless authorized by law.<sup>46</sup> Given the razor thin margins that USCIS is already experiencing and the 2020 drop in collections experienced as a result of COVID, in summer of 2020, USCIS was forced to issue furlough notices to over 70% of its federal employees or face an Anti-Deficiency Act violation.<sup>47</sup> Thankfully, receipts started to increase and USCIS was able to trim enough obligations to stave off a devastating furlough. The agency was forced, however, to implement rigorous hiring freezes to ensure that financial obligations could be met.<sup>48</sup> None of this is considered in the economic analysis. It is simply assumed that USCIS will be able to fund implementation, hire any staff that may be required, and still be able to meet all other legal and financial obligations. The economic analysis is severely lacking as it fails to recognize the specter of the Anti-Deficiency Act and the true ability to pay for costs under this proposed regulation.

CBP also will likely see costs associated with this proposed rule. While the CBP One App was launched in 2020, this rapid increase in usage will have considerable effect on its viability as a useful tool to control migration patterns. Through FOIA litigation, the American Immigration Council obtained documents showing the application has been thrust upon users without consideration of flaws or transparency. This rapid deployment for border management purposes will require training for Office of Field Operations as well as the need for constant updates and troubleshooting for the app itself and for the end users – both migrants and officers at the ports of entry.

The implementation would also have costs for EOIR as judges and staff would need to be trained on the new procedures and update court forms to reflect the findings of fact required under the proposed regulation. As cases under this rule would take longer to adjudicate, the backlog would likely increase, which must be included as a cost to not only the court system, but to the aliens presently awaiting their hearings. The burdens placed on EOIR under this rule simply haven't been acknowledged or fleshed out and, as a result, the NPRM is incomplete.

Lastly, the NPRM wrongly limits the affected population to only those migrants and, to a lesser degree, the government agencies responsible for its administration. Instead, the NPRM should have properly included an analysis of the effects on the U.S. citizen and immigrant populations with matters pending before USCIS or EOIR as the cost and time associated with those matters may change if resources

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<sup>46</sup> 31 U.S.C. § 1341(a)(1)(A).

<sup>47</sup> Nicole Ogrysko, *Furlough notice arrive for some 13,400 USCIS employees*, Federal News Network (Jun. 29, 2020), <https://federalnewsnetwork.com/workforce/2020/06/furlough-notices-arrive-for-some-13400-uscis-employees>.

<sup>48</sup> News Release, U.S. Citizenship and Immigration Services, *USCIS Averts Furlough of Nearly 70% of Workforce*, (Aug. 25, 2020), <https://www.uscis.gov/news/news-releases/uscis-averts-furlough-of-nearly-70-of-workforce>.

are focused on implementation of this rule. Additionally, the NPRM fails to recognize that immigration, especially when illegal immigration is incentivized, has a direct effect on states and localities, especially in border regions. States and localities often bear the brunt of costs of increased immigration along the border with regard to education, health care, public safety, and housing, among many others. In a recent opinion finding that the Biden Administration was liable for the influx of illegal immigration, Judge Wetherell noted that states, even those not along an international border, are severely impacted by the border crisis.<sup>49</sup> Even, *assuming arguendo*, that this rule would actually decrease immigration, to comply with EO 12866, the NPRM should have provided an analysis as these states and localities are absolutely effected parties to changes in immigration policy and law.

Ultimately, the analysis under 12866 fails to competently address the actual cost of implementation on USCIS, CBP, or EOIR and makes no mention of a larger effected population, instead relying on a statement with no supporting evidence. The analysis is ineffectual and cannot be viewed as satisfying the Departments' burden under 12866. Accordingly, the Departments should withdraw and abandon the proposed rule or, in the alternative, conduct a fulsome economic analysis as required by law and re-publish the NPRM to allow meaningful notice of and comment on these burdens.

#### **IV. Conclusion**

For the reasons set forth above – and for other related issues not listed here – we, the undersigned, strongly oppose this proposed rule and urge the Departments of Justice and Homeland Security to withdraw it.

Respectfully submitted,

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Mark Morgan, Former CBP Acting Commissioner

Ken Cuccinelli, Former DHS Acting Deputy Secretary

Tom Homan, Former ICE Acting Director

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<sup>49</sup> *Florida v. United States*, No. 3:21-cv-1066-TKW-ZCB (Ordered entered Mar. 8, 2023).