

# Beyond a Border Solution



MAY 2023

How to Build a  
Humanitarian  
Protection System  
That Won't Break



# Beyond a Border Solution

## How to Build a Humanitarian Protection System That Won't Break

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# Executive Summary and Introduction

**F**or generations, the United States has been a place of safe haven for people seeking freedom and safety. In 1980, Congress passed the Refugee Act, codifying basic refugee protections into law and enshrining a global commitment to asylum which emerged from the tragedy of the Holocaust. In the decades since then, hundreds of thousands of refugees and asylees have been granted status, strengthening communities around the nation, contributing economically, and enriching the national fabric.

But in the 21st century, a global displacement crisis is affecting nearly every country in the world. Multiple nations across the Western Hemisphere have become destabilized due to a wide variety of factors, including rising authoritarianism, political assassinations, natural disasters, powerful transnational criminal organizations, climate change, and the global socioeconomic shocks of the COVID-19 pandemic. The end result is humanitarian migration at levels far above what the 20th-century system can handle.

Presidential administrations of both parties have failed to meet this challenge. Instead of an orderly, humane, and consistent approach to humanitarian protection and border management, we have been left with a dysfunctional system that serves the needs of no one: not the government, border communities, or asylum seekers themselves.

Today, the U.S. government faces an enormous challenge. The number of asylum seekers seeking to enter each day is significantly higher than the number the United States can process at official border crossings. The location and manner of crossings varies widely

across the border, often changing unpredictably based on misinformation, rumor, or the demands of powerful transnational criminal organizations which maintain control over many of the migration routes with a bloody fist. The system is constantly at risk of bottlenecks and overcrowding, building the perception of chaos at the border. And inside the United States, underfunding, neglect, and deliberate sabotage have left the adjudicatory process in shambles.

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**1.3M**

pending asylum applications, and the average asylum case in immigration court now takes

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from start through a final hearing.

The failure to build a modern and functional system of humanitarian protection extends throughout the asylum process. There are currently over 1.3 million pending asylum applications, including roughly 750,000 in immigration courts and over 600,000 at U.S. Citizenship and Immigration Services (USCIS). The average asylum case in immigration court now takes 4.25 years from start through a final asylum hearing, leaving those with meritorious claims stuck in legal limbo and those whose claims are denied facing the prospect of deportation after they have already put down roots in the United States. Decades-old laws require asylum seekers to wait months to gain work authorization, leaving communities inside the United States to step in and help people get on their feet.

Rather than making a sustained investment into building a better system, past presidential administrations have attempted over and over again to instead use aggressive enforcement- and deterrence-based policies in hopes of reducing the number of people who are permitted to apply. The failure of this approach is manifest: No one thinks that the problem has been solved or even alleviated. Making matters worse, constant shifts in policy due to international negotiations, federal litigation, and border agents' own discretion make it virtually impossible to articulate what the current policy towards asylum seekers at the southern border actually is.

Crucially, there is still hope. Restoring our humanitarian protection systems and breaking the cycle of crises and crackdowns is not only possible, but within reach. However, to do so, we need a major shift in thinking and policymaking. Politicians must abandon a fantasy of short-term solutionism and acknowledge that only sustained investment over a period of time can realistically address these 21st century challenges. **Therefore, short-term action must focus on establishing a viable path towards a better system. In the long term, with significant investment, we can create a flexible, orderly, and safe asylum process.**

Rebuilding a functional system does not require a radical overhaul of U.S. immigration law. Nor will it lead to open borders. Even if every recommendation in this report is implemented, those without meritorious claims will still be deemed ineligible for relief and ordered deported. But taking that reality seriously also obligates the government to get it right — and ensure that no one is deported to a country where they will be persecuted. Adherence to the rule of law means both that those who seek to live here agree to abide by the government's rulings, and in return that the government upholds our longstanding commitment to respect human rights and international humanitarian agreements as well as provide a fair day in court for all those who seek it.

Creating and funding a flexible, orderly, and safe asylum system will reduce both irregular entries and unjust outcomes. Investment in dedicated humanitarian processing infrastructure at the border and in receiving communities will reduce unexpected fiscal burdens, limit strain on law enforcement resources, and improve human rights. Moreover, a humanitarian protection system that is purged of arbitrary delays and inconsistent outcomes will produce fairer and more expeditious results. Asylum seekers with meritorious claims will be more likely to prevail when provided with a meaningful opportunity to present them. Conversely, a fair, transparent, and expeditious asylum process may reduce claims from those without meritorious cases, and those who are denied will be more likely to accept negative results from a fair and transparent process.

A revitalized modern humanitarian protection system will also dampen political backlash to the concept of asylum in a time of rising anti-migrant sentiment. While overall support for providing asylum continues to poll above 50 percent, chaotic scenes at the border have dampened public support for asylum. And while some critics will oppose any measures that permit asylum seekers to enter the country, the right to seek asylum is central to this country's historical commitment to welcoming those fleeing persecution and to most Americans' understanding of their nation as a global and moral leader. Turning away from asylum seekers would be a more radical break than improving the system to support them.

## RECOMMENDATIONS

To begin the work on creating a viable path towards a better system, we provide the following recommendations:

- 1** **Expand Customs and Border Protection's (CBP) Office of Field Operations' capacity to process asylum seekers** at ports of entry in a timely, orderly, and fair manner, and publicize this route.
- 2** **Surge resources to U.S. Border Patrol** to improve humanitarian processing and transportation of migrants, to reduce overcrowding and abuses, and to free up agents to carry out other law enforcement duties.
- 3** **Establish a Center for Migrant Coordination** to coordinate federal, state, and local efforts to support newly arrived migrants and reduce impacts on local communities.
- 4** **Grow federal support** for case management alternatives to detention to help migrants navigate the asylum system.
- 5** **Revamp asylum processing at USCIS** to keep up with both affirmative asylum backlogs and the new border processing rule.
- 6** **Begin clearing immigration court asylum backlogs** through the use of prosecutorial discretion.
- 7** **Construct noncustodial regional processing centers** where federal agencies are co-located with nongovernmental organizations (NGOs) to carry out processing, coordinate release, and provide effective case management for newly-arrived migrants.

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- 8 **Execute the termination of Title 42** once legally permitted, allowing a return to normal immigration law.

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  - 9 **Fund a right to counsel** in immigration court to ensure a fair process for individuals seeking asylum.

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  - 10 **Create a Federal Emergency Management Agency (FEMA)-based Emergency Migration Fund** to provide for a flexible and durable response during times of high migration.

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  - 11 **Increase legal immigration pathways** through congressional overhaul of immigration laws and executive expansion of existing pathways.

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  - 12 **Build domestic and international refugee and asylum processing capacity in Latin America** with the support of the United Nations High Commissioner for Refugees (UNHCR) and the international community.

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  - 13 **Bring asylum law into the 21st century**, lifting harmful anti-immigrant laws passed in the 1990s and moving past a post-World War II framework for asylum.

Through these recommendations, we believe the United States government can create a system for asylum processing that is flexible, orderly, and durable, respects the rights of asylum seekers, inspires confidence in the American public, and ensures that the United States remains a beacon of safety. Such a system will not only ensure that the United States lives up to its promises, but also ensure greater stability across Latin America by reducing the power of gangs and cartels and promoting human rights throughout the region.

This is undoubtedly an enormous challenge. There is no perfect solution. It will require compromises. However,

the last decade of inhumane and failed deterrence policies has shown us there is no real alternative. Only through bolstering meaningful access to humanitarian protection can we move forward towards a more just, humane, and fair future. This is the only way to ensure that both migrants and the United States remain safe and free.

We cannot fix the whole system tomorrow. But what we do tomorrow can help set up a future in which the asylum system is not broken again in three, ten, or twenty years.

# Principles and Beliefs Behind These Recommendations

**W**e believe that solutions must be practical, flexible, and rooted in the lived reality of the previous decades of border policies.

The United States' humanitarian obligations are nonnegotiable. Therefore, these recommendations are predicated on certain bedrock principles and understandings:

- The creation and maintenance of a flexible, modern, humanitarian protection system that must respect the right to seek asylum, serve U.S. national interests and promote human rights globally.
- There is no simple solution to address irregular migration, as people migrate for a wide variety of reasons, both voluntary and involuntary.
- All people have the right to seek asylum and are entitled to due process and a meaningful opportunity to present a claim for relief.
- A fair asylum system should provide meaningful legal and integration support to migrants seeking protection to reduce the risk of an erroneous denial leading to persecution.
- The United States has a responsibility to maintain border security. However, migration at the border should not be viewed solely through the lens of enforcement, but rather through a broader lens that also considers U.S. foreign policy interests and domestic commitments to the rule of law.
- The best proven methods of achieving a long-term reduction in irregular crossings involve increasing access to legal immigration pathways and addressing the root causes of migration.

## RECOMMENDATION 1

# Expand CBP Office of Field Operations' Capacity to Process Asylum Seekers at Ports of Entry

## Background

When a person seeking asylum arrives at the border, they are often faced with a choice: attempt to seek asylum at a port of entry or attempt to seek asylum by crossing between ports of entry and presenting to a Border Patrol agent. Crucially, neither of these options is the “right way” or the “wrong way” to seek asylum. The Immigration and Nationality Act is clear that any person who is “physically present in the United States, or who arrives in the United States (whether or not at a designated port of arrival ...), irrespective of [their] status, may apply for asylum.”<sup>1</sup> Similarly, the 1951 United Nations Refugee Convention provides that “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened [by persecution], enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”<sup>2</sup>

As a practical matter, however, seeking asylum is generally better for all parties when done at a port of entry. Individuals who present themselves at a port of entry can be more expeditiously processed by the government without requiring the redirection of law enforcement resources. Those who present at a port of entry generally face fewer risks than those who cross the border between ports of entry and are more likely to avoid cartel smugglers. And travel through ports of entry reduces potential impacts on border communities and limits perceptions of chaos associated with crossings between ports of entry. Yet despite this clear benefit, accessing asylum at ports of entry remains highly difficult for many migrants, even after the Biden administration reversed many of the Trump-era policies restricting access to asylum, as demand for access has been consistently above supply for years.

For the last five years, migrants have been unable to consistently walk to a port of entry and request asylum. From April 2018 to March 2020, the Trump

administration imposed border-wide “metering” at ports of entry,<sup>3</sup> artificially and unlawfully<sup>4</sup> restricting the number of migrants who could access the asylum process each day. While metering originally began in 2016 under President Obama at the Tijuana/San Ysidro port of entry and was briefly imposed across the border in winter 2016, the use of metering declined in 2017 following a significant drop in the number of people seeking asylum in the first months of the Trump administration.<sup>5</sup> The reinstatement of metering in April 2018 led to the growth of haphazard “waitlists” in Mexican border cities, with thousands of people waiting, some upwards of six months, just to begin the asylum process.<sup>6</sup>

While CBP often publicly justified metering on limited capacity, in 2020, the Department of Homeland Security (DHS) Office of Inspector General (OIG) reported that Customs and Border Protection officers had repeatedly misrepresented the processing capacity of ports of entry across the border, with officers observed falsely telling migrants that the port was at capacity even though there were multiple empty processing rooms available.<sup>7</sup> The report further found that in 2018, DHS Secretary Kirstjen Nielsen secretly authorized CBP to artificially limit the number of individuals able to seek asylum each day.<sup>8</sup> Despite signing this memo, Secretary Nielsen subsequently falsely testified to Congress that the agency had made no changes to asylum processing at ports of entry and in fact was engaged in efforts to increase processing capacity.<sup>9</sup>

After the pandemic hit and the Trump administration implemented Title 42 in March 2020,<sup>10</sup> asylum processing at ports of entry ground to a virtual halt for two years as metering waitlists froze in place and CBP began refusing to take almost any migrants at ports of entry. As a result, the asylum system became nearly impossible to access without crossing the border between ports of entry and seeking out a Border Patrol agent—and even then, many asylum seekers were expelled under Title 42 without asylum processing. This had the counterproductive effect of incentivizing irregular border crossings and encouraging some migrants to try to evade detection.

In November 2021, DHS Secretary Alejandro Mayorkas formally rescinded Secretary Nielsen’s memorandum authorizing metering.<sup>11</sup> The same day, Acting CBP Commissioner Troy Miller formally rescinded similar CBP guidance and directed ports of entry along the southern border to “consider and take measures, as operationally feasible, to increase capacity to process undocumented noncitizens at Southwest Border POEs, including those who may be seeking asylum and other forms of protection.”<sup>12</sup>

As of 2023, the ports of entry have reopened to migrants—somewhat. Under Title 42, DHS has always had the ability to exempt migrants from Title 42 for humanitarian reasons.<sup>13</sup> This authority was rarely used for the first two years of Title 42, except for on a limited basis through a partnership with a small number of NGOs in summer 2021.<sup>14</sup> But starting in spring 2022, DHS began expanding the use of these Title 42 humanitarian exemptions at ports of entry in order to gradually restart the asylum process. The number of individuals exempted from Title 42 at ports of entry rose from an average of 266 per day in May<sup>15</sup> to 743 per day in December<sup>16</sup>—a 159 percent increase (see Figure 1). Throughout 2022, this exemption process was largely operated through NGOs and lawyers in Mexico and the United States acting as intermediaries to submit humanitarian requests to CBP.<sup>17</sup>

**FIGURE 1: TITLE 42 HUMANITARIAN EXEMPTIONS BY PORT OF ENTRY, MAY 2022 TO MARCH 2023**

**SPRING 2022** - DHS begins expanding the use of Title 42 humanitarian exemptions at ports of entry



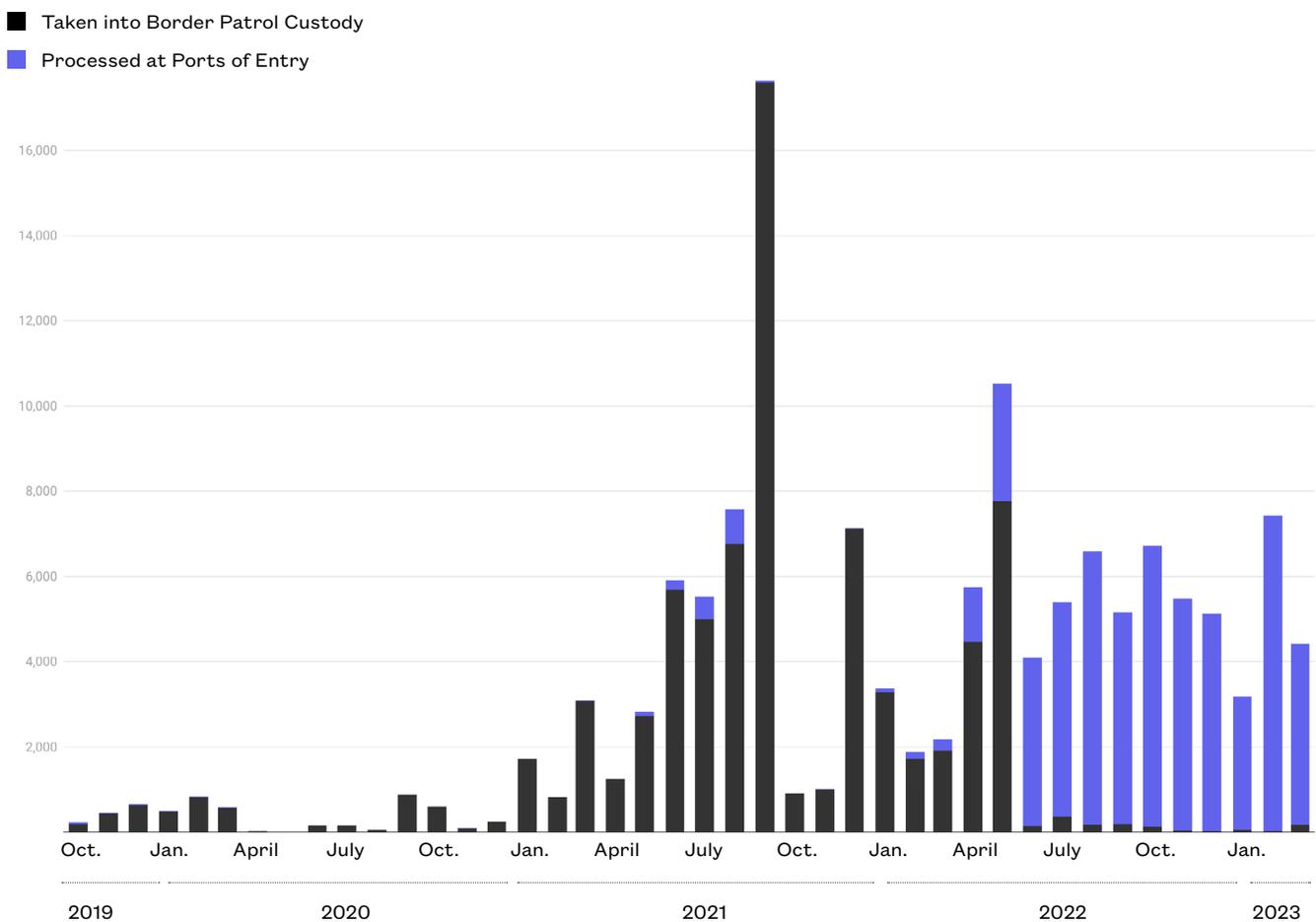
**Source:** Defendants Monthly Status Reports, Louisiana v. Centers for Disease Control & Prevention, No. 6:22-cv-00885 (W.D. La, filed Apr. 9, 2022).

The effect of this exemption process has been dramatic. Its impact on one nationality in particular—Haitians—has shown enormous success and provided hard evidence that increased asylum capacity at ports of entry can reduce the number of people crossing between ports of entry.

of 6,591 in October.<sup>18</sup> This increased ability to access asylum at the ports of entry dramatically shifted Haitian migration patterns. The number of Haitians taken into Border Patrol custody dropped over 99 percent in a matter of months, falling from a high of 7,762 in May 2022 to just 21 in February 2023 (see Figure 2).<sup>19</sup>

Since the exemption process began expanding in 2022, Haitians have been among the most likely to receive humanitarian exemptions at ports of entry. Throughout the spring, the number of Haitians processed under Title 8 at ports of entry rose from 268 in March to a peak

**FIGURE 2: HAITIAN MIGRANTS PROCESSED AT PORTS OF ENTRY VS. TAKEN INTO BORDER PATROL CUSTODY, FISCAL YEAR 2020 THROUGH MARCH 2023**



**Source:** U.S. Customs and Border Protection, “Nationwide Encounters,” <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

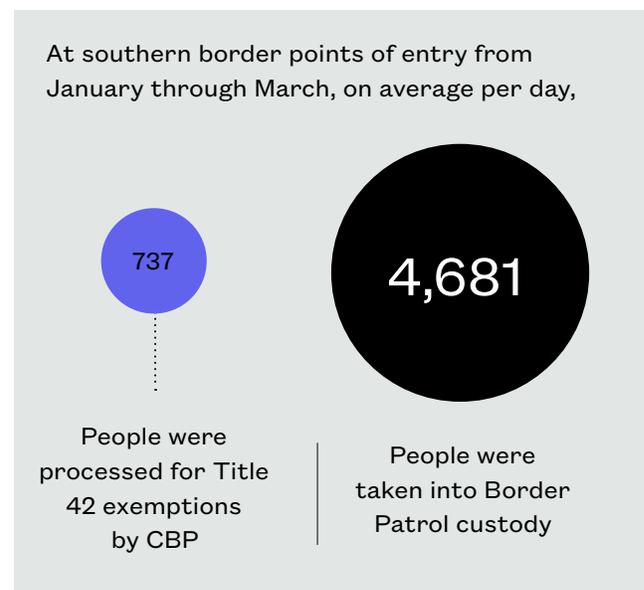
In January 2023, CBP replaced the NGO-led exemption process with the use of a mobile application known as “CBP One” that requires migrants to schedule appointments at select ports of entry across the border to be considered for an exemption to Title 42.<sup>20</sup> CBP One is intended to be the primary method by which migrants can seek such exemptions at ports of entry while Title 42 remains in place.

Through March 2023, CBP One appointments were available at eight different ports of entry along the U.S.-Mexico border: San Ysidro and Calexico in California, Nogales in Arizona, and El Paso, Eagle Pass, Laredo, Hidalgo, and Brownsville in Texas.<sup>21</sup> Use of the app to schedule appointments is also restricted to individuals who are within a limited geographic area that currently extends south to Mexico City but no further.<sup>22</sup>

The initial rollout of CBP One has been plagued with technical glitches and design flaws. Demand for appointments has far outpaced supply, forcing migrants to compete for rare appointment slots—while abundant technical glitches<sup>23</sup> put individuals without consistent Wi-Fi at a marked disadvantage.<sup>24</sup> In the initial weeks of the program, the app was only available in English and Spanish, causing difficulty for speakers of other languages.<sup>25</sup> Individuals over the age of five making appointments are required to take a photo through the app as part of a “liveness test,” but at least initially, the app had difficulty recognizing the faces of darker-skinned migrants, affecting Haitian migrants in particular.<sup>26</sup> Those lucky enough to evade all these pitfalls still have to wait weeks for their appointments.<sup>27</sup> CBP has notably made many technical fixes and adjustments to the app in the first two months of its use, but at least one migrant has already been murdered while waiting.<sup>28</sup>

The new exemption process has in some cases prompted families to self-separate, as larger families struggle to obtain an appointment when slots are limited. Limited availability of appointments at certain ports of entry have led some individuals to take appointments in other locations potentially thousands of miles away, requiring migrants to travel through dangerous territory along northern Mexico where kidnappings are common. And for those individuals without a functioning smartphone, there are few if any options other than begging for help.

Today, more asylum seekers are being admitted through southern border ports of entry than any time in the last decade. However, capacity for port of entry processing remains far below demand. From January to March, CBP processed an average of 737 people per day for Title 42 exemptions.<sup>29</sup> During that same period, an average of 4,681 people were taken into Border Patrol custody per day.<sup>30</sup> Many migrants have reported that they have been waiting fruitlessly for months to obtain an appointment through CBP One.<sup>31</sup> There is growing frustration in Mexico over the lack of appointments, and some migrants have given up hope and decided to cross between ports of entry instead.<sup>32</sup> As a result, CBP’s efforts to channel migrants to ports of entry risks a significant setback if the agency cannot rapidly increase processing capacity and reduce the inequities involved with an appointment system that resembles a lottery system.



## Recommendations for Executive Action

The federal government should take all measures necessary to rapidly increase processing capacity at ports of entry, fix the serious problems within the CBP One app, re-institute an alternate, non-app-based path to access the asylum process at ports of entry along the southern border, and continue to heavily advertise the availability of a safer and easier method of accessing protection at ports of entry. By offering a safe, legal, and accessible method of entry to migrants, the government can reduce irregular entries, limit the exploitation of migrants by profit-seeking transnational criminal organizations (TCOs) and local gangs which often require migrants to pay crossing fees, and provide a more orderly process for the U.S. government itself.

The initial effort should address infrastructure and logistics needs. To meet the growing demand for CBP One and access to asylum at ports of entry, DHS should redirect as many available resources and as much personnel as possible to the Office of Field Operations in order to expand available appointments and reinstate processing at more ports of entry along the southern border beyond the eight that are currently available through the CBP One app process.

Considering CBP One's technical flaws, limited availability, and privacy concerns,<sup>33</sup> and consistent with Acting CBP Commissioner Miller's November 2021 memo providing that "asylum seekers or others seeking humanitarian protection cannot be required to submit advance information in order to be processed at a Southwest Border land POE,"<sup>34</sup> the use of CBP One must not become the sole required tool in order to access asylum.<sup>35</sup> DHS must ensure that alternate methods of accessing the asylum process at ports of entry exist beyond CBP One, including physical access for asylum seekers who arrive at the ports of entry in urgent need. To the extent that NGOs are involved in any alternate process, DHS should seek to provide direct funding to mitigate the very high costs of safe operation in northern Mexico.

As CBP prepares for the transition away from Title 42 in May 2023, it should gradually resume alternate forms of asylum processing at all ports of entry for individuals

who cannot access the CBP One appointment process. By the time Title 42 ends and the government resumes processing of all arriving asylum seekers under Title 8 (normal immigration law), CBP should already have a process in place to respond to asylum seekers physically arriving at ports of entry without an appointment. This could include everything from working with the Mexican government to expand physical port-of-entry infrastructure on the Mexican side of the border, to kiosks installed at the port of entry which migrants could use to schedule an appointment or begin pre-processing if CBP is at full capacity.

In the immediate future the agency should prioritize technical and policy fixes to the CBP One app. This includes addressing any remaining issues the app has with accepting darker-skinned migrants, expanding the number of languages in which the app is available, and expanding appointment slots so that families can avoid any need to self-separate.

Given DHS OIG's 2020 report that CBP has in the past falsely represented its processing capacity at ports of entry, the Secretary should task both DHS OIG and the DHS Office for Civil Rights and Civil Liberties (CRCL) with closely monitoring this expansion of asylum processing capacity, to ensure that the agency is using all available resources to carry out this mission.

DHS should focus its additional resources first on the ports of entry where exemption processing is already highest: San Ysidro, El Paso, Brownsville, and Hidalgo (see Figure 1).

As DHS ramps up processing at ports of entry, it should simultaneously continue and expand its ongoing messaging campaign encouraging people seeking asylum to come to the ports of entry rather than crossing between them. Note that messaging is a component—not a solution in itself. No amount of encouragement to seek asylum at ports of entry will be sufficient if the process remains slow and inaccessible to the average migrant.

Simultaneously, the State Department should coordinate with the government of Mexico, UNHCR, and the International Organization for Migration to further increase shelter capacity on the Mexican side of the border through competitive grants, additional

funding sources, municipal resources, and security assurances. Safe housing options on the Mexican side of the border would also reduce the pressure on individuals who feel compelled to cross between ports of entry.

In addition, the State Department should work with Mexico to increase security around the ports of entry, with a focus on preventing cartels from usurping or controlling any part of this process and protecting vulnerable asylum seekers.

## **Recommendations for Congressional Action**

To ensure that CBP's Office of Field Operations can carry out these recommendations, Congress should provide significant emergency funding for CBP to hire sufficient new permanent or contract staff to ensure that expansive asylum processing at ports of entry is viable, scalable, and not disruptive to other CBP business at ports of entry. Such funding should come with sufficient oversight to ensure the funds are not used for enforcement purposes, such as "hardening" ports of entry to make them physically inaccessible to asylum seekers or turning away asylum seekers at the "limit line" before they reach U.S. soil.

Congress must also invest in the agency's permanent physical infrastructure at ports of entry. This includes both increased use of technology to minimize overall processing time and increase overall throughput of individuals seeking asylum at ports of entry, as well as expanded physical infrastructure at ports of entry, including holding areas, waiting rooms, and other locations where CBP can carry out any individualized screening and processing requirements.

## RECOMMENDATION 2

# Improve Border Patrol's Capacity for Humanitarian Processing

## Background

Given the restrictions on access to ports of entry described above, over the last decade the vast majority of asylum seekers arriving at the U.S.-Mexico border have instead crossed between ports of entry and turned themselves in to Border Patrol agents. This has posed a significant challenge for the federal government, and in particular the Border Patrol. The agency has traditionally viewed itself as a national security and law enforcement agency, not a humanitarian processing agency.<sup>36</sup> The majority of the agency's physical infrastructure was designed for processing Mexican adult migrants who could be rapidly transferred out of Border Patrol custody, not families and children. And as exemplified by a 2019 Facebook group scandal where Border Patrol agents were discovered to be posting dehumanizing and vile content about migrants,<sup>37</sup> the agency's shift towards a more humanitarian mission has engendered backlash among some agents who are hostile towards migrants.

Over the last decade, the Border Patrol has consistently failed to process high numbers of asylum seekers in a humane manner while simultaneously carrying out the

agency's law enforcement mission without disruption. This situation has proven unacceptable to all sides of the debate.

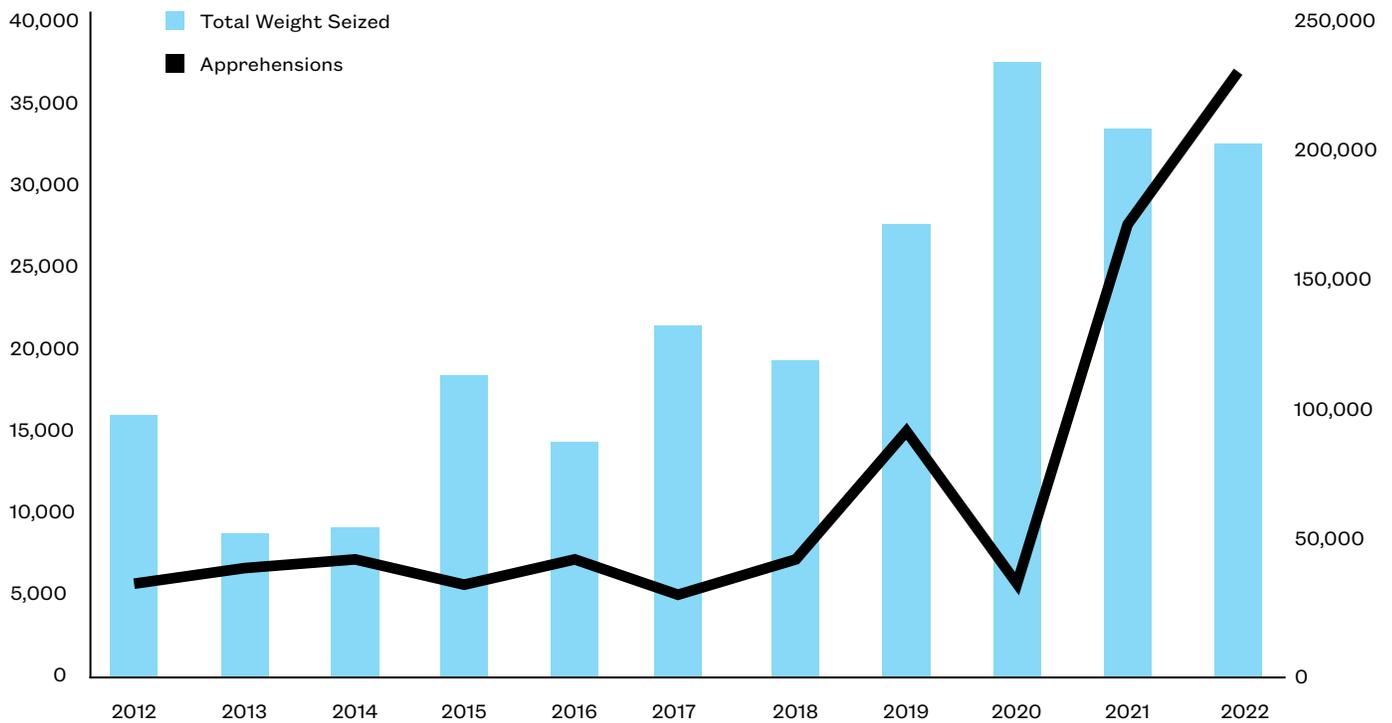
Those who focus on the Border Patrol's duty to process arriving asylum seekers highlight Border Patrol's failure to process applicants for humanitarian protection in a humane and orderly fashion. For example, overcrowding and mistreatment of asylum seekers in Border Patrol facilities has been common for years, leading to multiple children dying in Border Patrol custody in 2019.<sup>38</sup> Until the late 2010s, nearly all individuals held in Border Patrol custody were routinely denied access to basic hygienic needs such as soap and toothbrushes<sup>39</sup> and often forced to sleep in crowded cells nicknamed *hieleras* (iceboxes)<sup>40</sup> or *perreras* (dog kennels).<sup>41</sup>

After outrage and successful litigation,<sup>42</sup> conditions have improved significantly in recent years, although problems remain and overcrowding continues to be a concern during times of high arrivals.<sup>43</sup> Today, most migrants taken into custody by the Border Patrol are sent to dedicated "processing centers" or "soft-sided facilities" that offer a higher level of care than in the past.

Those who focus on the Border Patrol’s law enforcement duties argue that the agency has been stretched thin due to the significant amount of processing required by humanitarian migration, as compared to those who are not seeking asylum. For example, Border Patrol sources have indicated that completing court appearance paperwork for a single individual or family can take 60-90 minutes per person or family group,<sup>44</sup> meaning that thousands of agents are spending significant time completing paperwork and managing coordination with Immigration and Customs Enforcement (ICE), transportation, and release of migrants rather than patrolling in the field. Border Patrol sources also frequently assert that increased humanitarian processing is a cause of increased “got-aways”<sup>45</sup> and leak this non-public data to the media on a regular basis.

Others, including the Border Patrol’s own union, have argued that processing asylum seekers has led to a reduction in the agency’s ability to seize drugs coming across the border. Anecdotal evidence suggests that the cartels have used large migrant crossings to distract agents in at least some circumstances.<sup>46</sup> However, as Figure 3 demonstrates, there is no clear correlation between migrant apprehensions and overall hard drug seizure weight, suggesting any such impact is limited. The overwhelming majority of hard drugs come through ports of entry, often smuggled in passenger vehicles and commercial traffic.

**FIGURE 3: HARD DRUG\* SEIZURES BY BORDER PATROL, COMPARED WITH BORDER PATROL APPREHENSIONS, FISCAL YEARS 2012 THROUGH 2022**



\* “Hard drugs” refers to cocaine, methamphetamine, heroin, and fentanyl

Source: U.S. Customs and Border Protection, “Nationwide Encounters,” <https://www.cbp.gov/newsroom/stats/nationwide-encounters>; U.S. Customs and Border Protection, “Drug Seizure Statistics,” <https://www.cbp.gov/newsroom/stats/drug-seizure-statistics>.

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*The overwhelming majority of hard drugs come through **ports of entry**, often smuggled in passenger vehicles and commercial traffic.*

After taking office, the Biden administration prioritized policies and measures that are intended to reduce the possibility of the kind of dangerous overcrowding that occurred in 2019. This has led CBP to prioritize the creation of programs which allow for shortened processing at the border, including the short-lived and disastrous “Notice to Report” process under which individuals were released from CBP custody with only a notice asking them to appear at any ICE office for further processing.<sup>47</sup> This was later replaced with “Parole + [Alternatives to Detention],” which allowed Border Patrol agents to release individuals on parole rather than issuing them a notice to appear in court whenever Border Patrol detention centers reached certain measures of overcrowding.<sup>48</sup> The use of Parole + ATD largely ended in early 2023 following an agreement with Mexico that permitted the expulsion of certain nationalities back to Mexico, and in March 2023 the Parole + ATD program was vacated by a federal court in Florida.<sup>49</sup>

Both programs, while arguably successful in reducing overcrowding, have created other processing difficulties inside the United States. ICE does not have procedures in place to expeditiously issue notices to appear for hundreds of thousands of people released at the border, and as a result there are more people required to check in with ICE than ICE can check in. Through February 2023, “nearly 600,000” migrants released at the border since March 2021 still had not been issued a notice to appear in court.<sup>50</sup> And as of March 2023, the ICE office in New York City was reportedly “fully booked through

October 2032” for ICE check-in appointments, meaning some migrants may be forced to wait years just to begin the court process.<sup>51</sup>

## Recommendations for Executive Action

Increasing humanitarian processing capacity is an important way to prevent migrants from being deprived of their rights in Border Patrol custody and to permit agents to specialize in specific law enforcement tasks distinct from humanitarian processing. Just as Border Patrol today has specialized search and rescue units and specialized tactical units, it could stand up specialized humanitarian processing units, supported by Border Patrol Processing Coordinators, while other agents specialize in detection and apprehension of migrants and smugglers who seek to evade authorities.

If adequately funded, increasing processing capacity can be done in a variety of ways. First, CBP should hire more Border Patrol Processing Coordinators, a new civilian position created in recent years.<sup>52</sup> Processing coordinators carry out non-law-enforcement duties which were previously carried out by Border Patrol agents themselves, including:<sup>53</sup>

- Receiving and processing migrants taken into custody from the arresting Border Patrol agent.
- Transporting migrants from the field to a processing center and keeping track of their personal property through inventorying and tagging.
- Carrying out mandatory welfare checks on individuals held in Border Patrol custody and maintaining administrative paperwork relating to anyone held in Border Patrol custody.
- Facilitating Border Patrol contacts with other federal components and agencies.

The first processing coordinators were deployed in April 2021.<sup>54</sup> By September 2021, there were 160 Border Patrol Processing Coordinators deployed across the entire border.<sup>55</sup> This grew to “nearly 1,000” by December 2022.<sup>56</sup>

The agency still struggles with overcrowding, most recently experiencing significant overcrowding in December 2022.<sup>57</sup> This suggests there are still not enough processing coordinators deployed across the border to process the current number of arriving asylum seekers in an efficient and humane manner.

In the immediate term, during times of high arrivals, DHS should actively cross-detail as many people as possible to be processing coordinators, while increasing hiring. CBP should consider increasing the wages paid to processing coordinators to boost hiring, retention, and professionalism, since processing coordinators are paid at a GS 05-06 level (\$35,000-\$51,000).<sup>58</sup> Similar changes may be necessary for the position of Border Patrol Agent itself, where hiring has consistently been difficult for years.

DHS should also ensure that it identifies locations for additional temporary soft-sided facilities that can be operational by May 11, 2023, when Title 42 is set to end, to avoid overcrowding should the number of arriving migrants increase substantially.

DHS should also prioritize efforts to lower the amount of time required to process arriving migrants. This can be done through a full shift to electronic processing for migrants taken into Border Patrol custody including the long-anticipated switch to electronic A-Files and in-transit processing of I-213s and notices to appear. Ensuring that all individuals who are encountered by CBP have their initial notices to appear issued by that agency will also reduce pressure on ICE offices inside the country which have been forced to take on a far greater initial processing role than in the past.

Finally, DHS should also work to ensure that any transportation contracts for lateral decompression and community release are in place prior to the May 11 date on which Title 42 is set to end. The agency should be prepared for a wide variety of scenarios to ensure that they can respond flexibly should migration increase beyond expected levels.

## Recommendations for Congressional Action

In order to increase the overall number of processing coordinators, Congress should fund a substantial increase in the agency's humanitarian processing budget. However, given the Border Patrol's problematic history when it comes to allocating spending—and watchdog reports that CBP spent millions of dollars allocated by Congress for humanitarian “consumables” (such as food, bedding, and hygiene items) on things like new ATVs and HVAC repairs<sup>59</sup>—any increase in funding and support to the agency must also come with effective oversight. Congress should not provide a blank check to the agency for “migrant processing,” and any appropriations should come with mechanisms to ensure that the agency properly manages any funding and personnel increases.

Specifically, Congress should task the Government Accountability Office (GAO) with auditing the Border Patrol's use of any funds directed specifically towards humanitarian processing of migrants, as well as the agency's ongoing use of funding for new Border Patrol Processing Coordinators. The funding should come with specific restrictions preventing the agency from redirecting it to other line items. As part of any agreement to provide these funds, Congress should direct CBP to carry out a study on further ways to make long-term policy and infrastructure improvements to the front end of humanitarian processing.

Congress should continue to appropriate funding specific to other aspects of CBP's humanitarian processing responsibilities, including the further hiring of contract or permanent medical personnel to ensure that individuals taken into Border Patrol custody are in good health and do not need emergency medical assistance. To the extent that the agency needs some new physical infrastructure and transportation capacity, Congress should work to provide specific, targeted funding towards those requests, ultimately reducing the agency's reliance on costly contractors with poor track records of migrant care.<sup>60</sup>

## RECOMMENDATION 3

# Establish a Center for Migrant Coordination

## To Bring Together Federal, State, and Local Resources and Support and Facilitate Migrant Integration

### Background

When migrants arrive in the United States and are taken into custody by CBP, and then released at the border or from a detention center, they often need immediate assistance in obtaining transportation to their ultimate destination. In some relatively rare circumstances, migrants may not have an ultimate destination and need support finding a place to live while they go through the asylum process. And once migrants arrive at their ultimate destination, they often lack local knowledge of how to navigate their ICE check-ins, court dates, and other responsibilities.

Over the last decade, the responsibility for assisting migrants in these circumstances has fallen almost exclusively to nonprofit organizations and receiving communities. At the border, a network of shelter providers has assisted hundreds of thousands of people released from CBP and ICE custody. In some locations, NGOs operate in close conjunction with local CBP and ICE officials to coordinate releases. At other times, ICE and CBP have released people at gas stations, bus stops, and other locations far from shelters, forcing NGOs and state and local officials to scramble to respond and ensure that people are not left on the streets without resources or assistance. Coordination

between NGOs and state and local officials is often the sole responsibility of local CBP and ICE field offices and is not centralized in any way.

In 2022, the need for a federal response became particularly apparent following the arrival of thousands of migrants who did not know anyone in the United States and were in acute need of emergency shelter. This was exacerbated by politically-motivated actions taken by the states of Texas, Arizona, and Florida to transport tens of thousands of migrants to Democratic-led cities such as New York, Chicago, Philadelphia, and Washington, D.C.<sup>61</sup> Mayors of these cities have subsequently called for federal help.<sup>62</sup>

Congress has responded to some of this need through the provision of funding to assist NGOs and state and local governments which have had to expend resources to assist migrants, initially through the Federal Emergency Management Agency (FEMA) Emergency Food and Shelter Program (EFSP).<sup>63</sup> In December 2022, Congress created a new “Shelter and Services Program” to replace EFSP sometime in 2023 and provided \$800 million for “grants or cooperative agreements with state and local governments and nongovernmental organizations.”<sup>64</sup>

The provision of money alone will be insufficient to resolve the larger coordination needs of responding to high levels of migration. State and local governments want more than just funding, they want the federal government to lead a centralized response.<sup>65</sup>

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## *State and local governments want more than just funding, they want the federal government to lead a centralized response.*

This is not the first time that DHS has recognized the need to centralize a response to the situation at the border. DHS created the “Southwest Border Coordination Center” in 2022,<sup>66</sup> which brings together headquarters officials from across the agency to standardize processing and improve coordination among different field offices and Border Patrol sectors. The official purpose of this center is to “coordinate planning, operations, engagement, and interagency support.”<sup>67</sup> The Southwest Border Coordination Center has produced an extensive planning document for interagency coordination of responses to increased numbers of border crossings through 2022.<sup>68</sup>

### **Recommendations for Executive Action**

The current situation at the border requires an all-of-government approach that includes direct coordination with external stakeholders and impacted communities. We propose the creation of a Center for Migrant Coordination housed within DHS that is designed to bring together DHS components, the Office of Refugee Resettlement (ORR), state and local governments, and NGOs across the border and in receiving communities,

with the goal of standardizing practices and procedures for migrant release, transport, and assistance.

Communities at the border and inside the United States should have a single point of contact within DHS and ORR to answer questions about migrant assistance, learn about and apply for any affirmative grants or reimbursement programs to assist migrants, and obtain information and guidance about the asylum process. DHS and ORR should proactively reach out to receiving communities and arrange regular listening sessions to further understand the needs of each community and help them apply for any available assistance.

The Center for Migrant Coordination could also work directly with refugee resettlement organizations and existing nonprofit organizations serving new immigrants (which often have extensive local experience in integrating individuals into their communities), in developing strategies around integration and post-arrival support. Initial funding for the center should come from DHS general funds, with the agency seeking Congressional appropriations for future operations. Any funds should come with restrictions ensuring that they are used solely for the purposes of this center and cannot be reprogrammed for enforcement purposes.

The creation of this center would assuage concerns from state and local officials that they have been left out of the loop about migration and encourage enhanced coordination between stakeholders throughout the system, reducing inefficiencies and further bolstering support for the asylum system.

### **Recommendations for Congressional Action**

Congress should provide funding in the FY 2024 budget, and on an ongoing basis in future years, to support the work of the Center for Migrant Coordination. In its initial year of funding, Congress should provide at least \$10,000,000 to hire new staff, establish initial priorities and procedures, and begin outreach and coordination between DHS and receiving communities.

Congress should also consider passing authorizing language to formalize the role of the Center for Migrant Coordination. It could place the center within the DHS

Office of the Secretary and provide authorization for a Director of Migrant Coordination who will oversee the center's mission: coordination and support for DHS's work to standardize release policies, education and collaboration with stakeholders in receiving communities, coordination with ORR and other agencies, and any other duties as may prove necessary.

Congress should also consider funding the Center for Migration Coordination to work with nonprofit organizations and local governments to establish local outreach centers for migrants going through the asylum process. These local outreach centers could be modeled off European integration and reception centers, which offer classes in local languages, assist migrants in obtaining employment authorization, and provide guidance in the asylum process for those that need it. If properly funded, these local outreach centers could bridge the gap between expanding case management programs operated by ICE (which generally provide referrals only) and the limited capacity of some support programs to accommodate increased demand without additional funding.

## RECOMMENDATION 4

# Revamp Asylum Processing at USCIS

## Through Targeted Funding and Modifications to the New Asylum Rule

### Background

Since Congress created the modern expedited removal system in 1996, asylum officers have had a key role in processing asylum seekers. Initial “credible fear” and “reasonable fear” interviews for asylum seekers processed under expedited removal are statutorily assigned to specialized adjudicators trained in asylum law, known as asylum officers.<sup>69</sup> These same officers, who today are part of USCIS’s Refugee, Asylum, and International Operations Directorate (RAIO), are also responsible for adjudicating so-called “affirmative” asylum applications that are filed directly with USCIS for individuals who (with the notable exception of unaccompanied children) are not going through the removal process.<sup>70</sup>

The Trump administration attempted to systematically tear down and rebuild RAIO into a core component of its anti-asylum policies. These actions including firing RAIO’s Obama-era leader John Lafferty,<sup>71</sup> setting the refugee cap to its lowest level in history,<sup>72</sup> replacing USCIS asylum officers with Border Patrol agents given a single course in asylum law,<sup>73</sup> and pushing out conscientious asylum officers, some of whom resigned in protest when asked to carry out policies they believe violated human rights.<sup>74</sup> Today, despite increased hiring

from the Biden administration, it is widely understood that there are still not enough asylum officers to carry out both credible fear interviews and affirmative asylum interviews.

Throughout FY 2022, the affirmative asylum backlog grew by more than

**16k** cases per month,

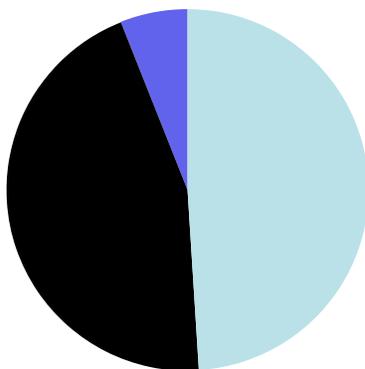
topping **600k** for the first time.<sup>75</sup>

In May 2022, the Biden administration began piloting an alternate asylum process that first refers most asylum seekers to asylum merits interviews with USCIS asylum officers instead of immigration court. Under this rule, the administration will treat a credible fear interview as a full application for asylum, rather than forcing individuals to separately file a formal asylum application with the immigration court to begin the asylum process. Individuals who pass this credible fear interview under

the new rule would then be referred to an asylum officer at USCIS for an “asylum merits interview” that is supposed to occur within 60 days of the credible fear interview. At the asylum merits interview, the asylum officer could grant or deny asylum. If the asylum officer grants asylum, then the person would receive asylum immediately. If the asylum officer denies asylum, the individual would be referred to an immigration judge for an expedited form of removal proceedings which are intended to be completed in a timeframe between 60 to 135 days.

The results of this initial pilot have been mixed. Of the 3,825 people put through the alternative asylum process from June 2022 through January 2023, just 253 (6.6 percent) were granted asylum at either the asylum merits interview or in front of an immigration judge, whereas 1,871 (48.8 percent) were ordered removed after failing a credible fear interview.<sup>75</sup> The remaining 1,711 people either had their cases temporarily suspended or dismissed, or were still waiting for at least one part of the process.

**ALTERNATE ASYLUM PROCESS PILOT RESULTS**



■ ORDERED REMOVED. . . . .48.8%  
■ TEMPORARILY SUSPENDED,  
DISMISSED, OR WAITING . . . . .44.6%  
■ GRANTED ASYLUM . . . . .6.6%

As currently promulgated, these regulations are highly concerning.<sup>76</sup> Early evidence with the program shows that rapid adjudication timelines push asylum seekers through the process too fast, often without adequate access to counsel.<sup>77</sup> Nevertheless, we believe that many components of the rule are worth keeping, such that the rule can be salvaged and made a core part of future asylum processing should the agency makes the required changes.

**Recommendations for Executive Action**

DHS should respond to comments submitted following the interim final rule implemented in May 2022 by extending the timeline for adjudication of asylum claims under the rule. As currently envisioned, the rule is designed to put people through the entire asylum process within six months, including an asylum merits interview and immigration court review of a denial. In the current environment of overstressed legal services and limited integration support, six months is insufficient time for most people to find a lawyer and prepare for an asylum claim, especially given the inability to obtain work authorization during this period. Whether the new asylum rule can comport with due process is entirely contingent on an extension of the time period to a more reasonable length, such as at a minimum one year.

In a fair and transparent system where asylum seekers can more readily obtain legal support and don’t have to choose between basic needs and their asylum claims, cases may well take less than a year—and potentially even less than six months. But that is not the system under which this rule was issued. Therefore, unless these concerns are addressed in the final version of the rule, the rule will likely fail in its attempt to balance due process with expediency.

We support the provision of the regulation which eliminates the requirement that individuals file a separate application for asylum (Form I-589)—a process which can take a significant amount of time, and which confuses many people who believe they have already applied for asylum. Similarly, the asylum hearing process, under which individuals who pass a credible

fear interview have their initial asylum claims reviewed by USCIS rather than the immigration court system, could permit USCIS to adjudicate asylum cases from the border much more rapidly, reducing immigration court backlogs and permitting people to obtain permanent status in a much more rapid timeframe.

Given that USCIS faced a 605,000-case affirmative asylum backlog through the end of Fiscal Year 2022,<sup>78</sup> to make this new process work, the government should focus on staffing the RAIO with sufficient asylum officers to carry out this new rule. With the \$250 million that Congress provided to USCIS for backlog reduction in the FY 2022 budget,<sup>79</sup> USCIS should focus significant resources on hiring enough asylum officers to ensure that individuals put through the asylum hearing process receive an initial decision in their asylum case within a year or less.

In carrying out the asylum rule, USCIS must ensure fair and consistent processing of asylum claims through a system that ensures applicants are educated about the process and able to fully participate. As a result, access to counsel and to legal orientation is essential.

USCIS should also explore the possibility of carrying out asylum merits interviews at locations other than the 12 Asylum Offices located around the country, such as USCIS Field Offices. Applicants should not be forced to travel hundreds of miles to have their claims heard. For individuals with counsel, USCIS should consider the possible use of video teleconferencing for asylum hearings, but only with the explicit consent of the applicant.

## Recommendations for Congressional Action

Congress should explore a permanent funding stream for USCIS asylum adjudication.

At the time that USCIS was created as a purely fee-funded agency in 2003, the agency's humanitarian mission only constituted a small fraction of its overall work. Today, the significant costs of operating the agency's humanitarian programs are almost entirely

subsidized by those applying for other immigration benefits.

The Biden administration indicated in its January 2023 USCIS fee rule that the full cost of funding the asylum processing rule would be over \$425 million.<sup>80</sup> The fee rule proposes funding this program, as well as addressing existing asylum backlogs, by levying a \$600 Asylum Program Fee surcharge over 700,000 employment-based visa petitioners and beneficiaries each year.

Because humanitarian programs operated by USCIS are in the national interest, these adjudications are best funded by Congress, not those seeking another immigration benefit from the agency. Given the ongoing need to fund asylum processing at USCIS and make this new program work, Congress should continue to appropriate funds for USCIS that permit it to fund the asylum program without drawing on the Immigration Examination Fees Account, thereby allowing the agency to avoid imposing an Asylum Program Fee.

## RECOMMENDATION 5

# Grow Federal Support for Case Management Alternatives to Detention

## To Help Migrants Navigate the Asylum System

### Background

Since the Reagan administration, the number of people held in immigration detention centers nationwide has risen from nearly zero to a peak of over 55,000 in FY 2019. Yet despite this massive increase, there are still more noncitizens that DHS could detain in any given month than there are detention beds to hold them. As a result, immigration agencies have long exercised their discretion to establish policies allowing for the release of some individuals on orders of supervision, release on their own recognizance, or through alternate programs.<sup>81</sup>

Since the late 1990s, immigration enforcement agencies have increasingly developed additional so-called “alternatives to detention” (ATD) programming for individuals who the agencies determined did not need to be detained. The first of these programs, the Appearance Assistance Program, was operated by the Vera Institute of Justice beginning in 1997 and continuing through to 2000.<sup>82</sup> This pilot program revealed that noncitizens placed into an ATD program were not only likely to

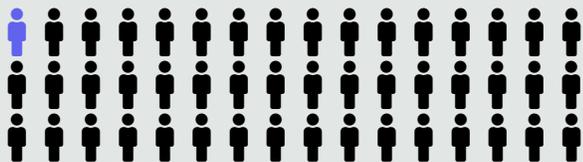
appear in court, but also that the government could save significant money through ATD programs, which were significantly cheaper than full detention.<sup>83</sup>

In 2004, ICE began the Intensive Supervision Appearance Program (ISAP).<sup>84</sup> From the beginning, this program has been operated through a contract with BI Inc., a wholly-owned subsidiary of private prison company GEO Group.<sup>85</sup> Today, the ISAP program is on its fourth iteration (known as ISAP IV), still operated by BI Inc. Over the last two decades, ISAP has expanded from a few thousand people on its docket to over 375,000 in December 2022.<sup>86</sup>

Despite this growth, ATD services still cost the federal government a fraction of what it pays for immigration detention. In FY 2023, Congress provided ICE’s ATD program \$442 million to carry out its programming for hundreds of thousands of people, while ICE’s Custody Operations division received \$2.9 billion (over 550 percent more) to operate a detention system to hold an average of 34,000 people a day.<sup>87</sup> According to ICE itself,

the current ISAP program costs the US government \$4.01 per day for each person enrolled,<sup>88</sup> compared to \$192.65 per day to hold someone in a contract detention facility.<sup>89</sup>

For every person sent to an ICE detention center, ICE can enroll 48 people in an ATD program.



The majority of people placed through ISAP IV are enrolled in a program known as “SmartLINK,” in which individuals are provided a customized smartphone which contains electronic monitoring software.<sup>90</sup> Individuals on SmartLINK are required to carry their phone with them at all times and use it to check in with ICE, as well as to use the app’s facial recognition software to confirm their location. However, not all individuals are enrolled in SmartLINK, and some people are still required to wear GPS ankle bracelets, which many organizations have criticized as invasive, harmful, and stigmatizing.<sup>91</sup>

The ISAP IV contract also provides “extended case management services” in which BI Inc. “case managers” assist noncitizens with finding local services to help them navigate the immigration process. These services were first introduced to ICE’s ATD programs following the success of the Family Case Management Program (FCMP), a short-lived pilot program that ran from January 2016 through June 2017.<sup>92</sup> Over a year, FCMP provided over 950 families access to case managers who could help them understand the complicated immigration court and ICE check-in processes, as well as assist them in navigating a new country through referrals to pro bono legal services, housing, medical care, English language classes, and more.<sup>93</sup> By the time the Trump administration shut down the program, 99 percent of FCMP participants had complied with every ICE check-in and court appearance requirement, a

resounding success. Within a few years after that, ICE incorporated case management services into the ISAP contract.

Unfortunately, investigations into the case management services provided by BI Inc. under the ISAP IV contract have revealed overwhelmed case managers handling over 300 cases per person, lack of individualized attention, and a system which provides case management in name alone.<sup>94</sup>

Advocates have also criticized the ISAP IV program for failing to act as a true alternative to detention, instead operating to allow a subsidiary of a private prison company to surveil and monitor a population which would be unlikely to be sent to detention in the first place. Others have also critiqued the agency for lacking uniform standards by which ATDs are “escalated” (in which a person is subject to stricter conditions due to lack of compliance or other reasons) or “de-escalated” (in which a person has conditions lifted or is disenrolled from the ATD program entirely).

The United States is not alone in increasing the use of ATDs following an increase in numbers of migrants seeking asylum. Countries across Europe have implemented a variety of different ATD models. Multiple studies carried out internationally have confirmed that case management ATDs are effective at both ensuring compliance and helping stabilize newly arrived migrants in an unfamiliar country.<sup>95</sup> These studies have also shown that community-forward programming can be even more effective than compliance-forward programming, helping individuals to take charge of their own case and navigate the immigration system with confidence.<sup>96</sup>

ATD services continue to evolve and improve. In FY 2021, Congress first funded the creation of a new Case Management Pilot Program (CMPP), to be operated by CRCL within DHS and funded through FEMA, rather than through ICE. The program is also managed by a board made up of CRCL and various nonprofit organizations. CMPP is designed to route case management services directly through community-based nonprofit organizations which are more familiar with the services available to immigrants and better equipped to assist new immigrants.<sup>97</sup>

As Title 42 is set to lift, and more people are likely to be released, there is a critical need for DHS to expand its case management services in response. These services will permit DHS to best ensure compliance with immigration court and ICE check-in requirements while also helping ensure that migrants are able to integrate into new communities with a minimum of disruption.

## Recommendations for Executive Action

DHS should establish a universal and consistent standard for escalation and de-escalation to an ATD program and provide clear guidance to the public on the application of those standards. As the agency expands ATD programming, it should carefully study the results of the Case Management Pilot Program, incorporating best practices developed through CMPP into as many other ATD programs as relevant. ICE should also expand access to community-based NGO case management services, ending case management programs operated in close conjunction with ICE and implementing a more flexible system that works with local community organizations to help newly-arrived migrants better navigate the unique challenges presented in each location. Shifting case management support to nonprofit organizations may also alleviate issues with high caseloads by spreading services across a broader coalition of organizations, many of whom have indicated that the primary obstacle they face towards expanding case management services is lack of funding.<sup>98</sup>

DHS should also complete its move away from ankle monitors and the most restrictive forms of compliance-based ATDs which can interfere with integration and

trust in case management as a process. While the government undoubtedly has an interest in compliance, FCMP and CMPP have shown that compliance does not require surveillance and in many circumstances can be achieved through community-based intervention and assistance.

## Recommendations for Congressional Action

Congress should continue to fund the Case Management Pilot Program as well as increase funding for community-based case management alternatives to detention programs. Currently, CMPP has been funded at a total of \$40 million spread over several fiscal years, which is only enough to operate a small pilot program serving a few thousand people as an initial test. In future years, Congress should steadily increase this funding so that CMPP can be built up organically in a robust manner.

Congress should also mandate a GAO study on ATD best practices, which shall include the study of international case management alternatives to detention and the ways in which ICE ATD programs can incorporate the most salient and effective aspects of those models.

Finally, Congress should consider addressing some of the most pressing needs of individuals going through case management services, which includes lifting the restrictions on asylum seeker work authorization. Individuals are most likely to be able to successfully comply with government reporting requirements when they can support themselves, and that includes the ability to work.

## RECOMMENDATION 6

# Begin Clearing Immigration Court Backlogs

Through the Use of Prosecutorial Discretion and Administrative Closure

## Background

Over the last decade, the immigration court backlog has grown over 530 percent, rising from 327,693 cases through September 2012 to 1,874,336 cases through January 2023.<sup>99</sup> During that period, the number of immigration judges adjudicating cases only rose 137 percent, from 267 to 659.<sup>100</sup> There are now over 2,840 cases per immigration judge, compared to less than 1,250 per judge in 2013 (see Figure 4). With the current pace of arrivals at the U.S.-Mexico border, the immigration court backlog will likely continue to grow unless radical new action is taken.

FIGURE 4: PENDING CASES PER IMMIGRATION JUDGE, BY FISCAL YEAR



**Source:** Executive Office for Immigration Review, "Pending Cases, New Cases and Total Completions," <https://www.justice.gov/eoir/page/file/1242166/download> (Washington, DC: U.S. Department of Justice, data generated January 2023); Executive Office for Immigration Review, "Immigration Judge (IJ) Hiring," in Adjudication Statistics (Washington, DC: U.S. Department of Justice, data generated January 2023), <https://www.justice.gov/eoir/page/file/1242156/download>.

In FY 2022, immigration judges completed 313,849 cases, an all-time record.<sup>101</sup> However, that year 706,640 new cases were filed in immigration court, increasing the overall backlog by nearly 400,000 despite record completions.<sup>102</sup> Even if completions continued at the current rate, and even if the pace of new arrivals plummeted and new cases dropped to their lowest level in the last 15 years (193,006 in FY 2015), it would still take 16 years to clear the backlog. Even if not a single new case was added to the system, it would take more than five and a half years for the backlog to be cleared.

This is why, although hiring judges and streamlining proceedings will help to slow the growth of the backlog, these incremental measures alone will not shrink the backlog in any reasonable period of time. To increase efficiency, reduce the amount of time that it takes for asylum claims to be resolved, and make a better use of taxpayer resources, the federal government can and must consider policies to clear the current backlog of cases without individualized adjudication of every single claim.

As of January 2023, the immigration court backlog was more than

**1.87M**  
**cases**

and even if no new cases were added, it would take more than **five years** to clear at the current rate.

## Recommendations for Executive Action

Despite court decisions restricting Secretary Mayorkas' authority to set enforcement priorities for DHS, the executive branch retains significant authority to implement policies that could help to reduce the backlog in a timely manner. These include the use of prosecutorial discretion to terminate or administratively close nonpriority cases. The Biden administration has announced that it is rethinking regulations promulgated by the Trump administration (and struck down in court) that ended administrative closure,<sup>103</sup> and should implement those proposed changes as soon as possible.

The ICE Office of the Principal Legal Advisor (OPLA) should create a process accessible to all people—represented or not—through which individuals can request ICE OPLA consent to the administrative closure or termination of their case. Such requests should be considered in the interest of justice or where the respondent is prima facie eligible for a benefit with USCIS—even if that benefit can only be obtained years in the future, such as through a visa petition with a multi-year wait.

This process could help the immigration courts focus on priority cases and reduce waiting times in immigration court, thereby reducing the amount of time that it takes to adjudicate new cases. The administration should proactively initiate prosecutorial discretion whenever possible, rather than requiring respondents to initiate the request. Notably, the administration's ease in carrying this out will depend significantly on the result of the Supreme Court's decision in a case challenging Secretary Mayorkas' enforcement priorities memorandum.<sup>104</sup>

In exercising prosecutorial discretion, the government should ensure that individuals have a say in whether they want to proceed with their cases. The April 2022 memo<sup>105</sup> from ICE Principle Legal Advisor Kerry Doyle endorsed dismissing thousands of low-priority cases, instead of administrative closure. This has left some individuals in a worse state, causing the loss of work authorization and requiring the refiling of asylum applications at USCIS. Efforts to reduce backlogs by terminating cases over the objection of respondents who

wish to proceed with their cases have the potential to do significant harm, while exacerbating backlogs elsewhere in the system.

The use of administrative closure for prosecutorial discretion could also come with an individualized grant of deferred action in appropriate humanitarian cases, including where the closure would jeopardize an individual's ability to provide for themselves. However, given the litigation risks surrounding major changes to deferred action, DHS should also explore the creation of a regulation under which individuals whose cases are administratively closed can apply for work authorization.

Simultaneously, the Executive Office for Immigration Review (EOIR) should encourage immigration judges to administratively close or terminate cases in the interest of justice where the respondent is prima facie eligible for another form of relief granted by USCIS.

## Recommendations for Congressional Action

With an immigration court backlog nearing two million, it may be time to admit that there is no way to resolve the immigration court backlogs through executive action alone. The best and fastest way to clear the backlogs and reset the immigration court system is to pass a path to permanent legal status for undocumented immigrants present in the United States. Absent congressional action, there is no short-term means to clear the immigration court's bloated backlogs.

However, Congress can still take actions to restore integrity to the immigration court system and fix some of the systemic issues which led to the backlog's explosive growth over the last decade. This includes systematic underfunding. The Trump administration spent over \$14 billion on border wall construction (\$4.47 billion of which came from direct Congressional appropriations and the rest was diverted from other agencies)<sup>106</sup> at a time when entire immigration courts were only given \$2.18 billion (from FY 2017 through FY 2020). In other words, the federal government spent over six times the amount it spent on adjudication of asylum claims to build a border wall which did nothing to deter asylum seekers. Therefore, if Congress does not create a path to legal status, it should at the very least massively increase

the resources available for the asylum adjudication system.

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*The best and fastest way to clear the backlogs and reset the immigration court system is to pass a **path to permanent legal status** for undocumented immigrants present in the United States.*

## RECOMMENDATION 7

# Construct New Regional Processing Centers for Migrants

## Background

Prior recommendations have focused on expanding organizational capacity for border agencies as well as creating new policies and systems to expedite processing. However, processing at the border must occur at a physical location, and there is widespread agreement that the current physical infrastructure in place at the border is insufficient to address modern humanitarian flows. This is largely because much of the border infrastructure was designed for the primary challenge of processing Mexican single adults migrating to the United States for work, who could historically be processed and returned to Mexico within a matter of hours. Today, much of this physical infrastructure is out of date.

When Central American families first began seeking asylum in large numbers in 2014, they were nearly all taken to Border Patrol facilities not designed for children and asylum seekers. Overcrowding in Border Patrol stations has been a frequent problem during times of high migration and has persisted across multiple presidential administrations.<sup>107</sup>

In response to these concerns, litigation, and Congressional exhortation in early 2019 to adopt “more permanent plans” to improve the treatment of migrants

in custody,<sup>108</sup> CBP has made changes. The agency has invested in the construction of multiple “soft-sided” facilities, temporary structures designed to alleviate overcrowding without requiring new permanent construction.<sup>109</sup> However, the temporary nature of these facilities makes them at best a stopgap measure, and soft-sided facilities are not a substitute for permanent infrastructure which is custom-designed to address challenges relating to the efficient, safe, and humane processing of protection claimants.

Today, Border Patrol facilities still operate largely outside the public eye, without any right of access for lawyers, loved ones, or organizations that assist migrants. There is not even a way for people outside of a Border Patrol facility to know if a specific person is held inside,<sup>110</sup> leaving some people out of contact with their loved ones for days at a time.<sup>111</sup> For many migrants, Border Patrol custody is still the place where a dream of freedom becomes a world of jail cells — where a single legal error, a word mistranslated, or a procedure not followed can mean the difference between safety or harm.

Current border infrastructure is also designed to respond only to the needs of Customs and Border Protection, and there is often no physical space permitting systematic collaboration with other agencies

that play a role in border processing, such as ORR or ICE, or with nonprofit organizations which can assist migrants after release. Other agencies that play a role in migrant processing often do not have any interactions with migrants until after they have already left CBP custody. This can have a negative impact not just on migration management, but also on migrants, and especially unaccompanied children who arrive at the border with an accompanying non-parental relative. Advocates have long called on the government to embed ORR caseworkers in CBP facilities so that the agency can ensure that accompanying non-parental relatives can be designated as a child's formal legal sponsor, avoiding costly and harmful separations.<sup>112</sup>

In recognition of the value of multi-agency processing, the FY 2022 omnibus appropriations bill provided \$150 million to DHS to construct two permanent facilities near the border. This allocation provides an opportunity to design facilities that can help CBP and ICE better integrate their operations, thereby reducing costs and time spent in CBP custody for individuals while returning agents to other critical duties.<sup>113</sup> It

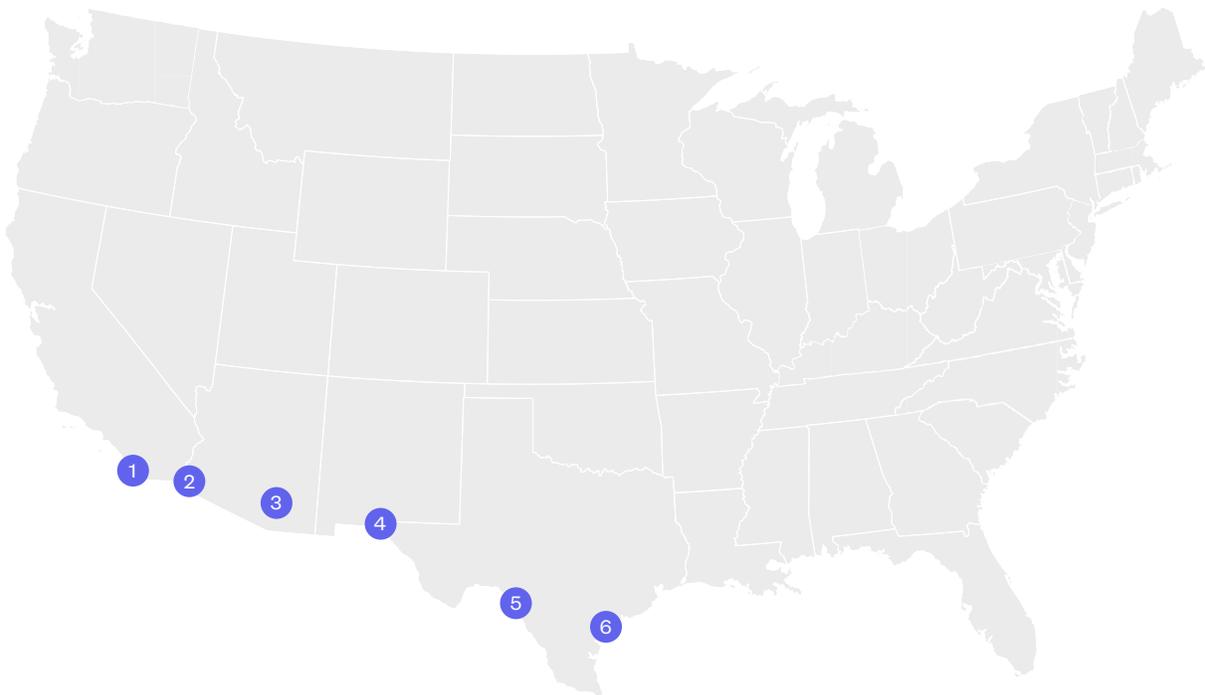
remains unclear where DHS intends to build these new permanent facilities.

## Recommendations for Executive Action

Congress's acknowledgment that new permanent infrastructure is needed is a positive development. However, two facilities alone are likely insufficient for current migratory flows. Therefore, we propose that CBP build at least six new facilities in the following Border Patrol sectors:

1. San Diego Sector
2. Yuma Sector
3. Tucson Sector
4. El Paso Sector
5. Del Rio Sector
6. Rio Grande Valley

### PROPOSED SIX NEW FACILITIES IN BORDER PATROL SECTORS



Once migrants are taken into CBP custody, the agency should transfer them to one of these regional processing centers for the first step in their journey through the asylum process. These processing centers should be semi-custodial facilities designed to centralize DHS processing of migrants and provide critical education for migrants on the U.S. asylum process and their compliance obligations. Individuals would only be held in custody for necessary initial CBP and ICE processing, and then be released to the non-custodial portions of the facilities for the provision of services and further support.

These facilities must be constructed in a way that provides dignity and humane conditions for all who go through them, with beds, showers, access to phones, hot food, and other similar essentials built into the facility. When a migrant first arrives at a regional processing center, they would be kept in CBP custody for initial processing, including the collection of biometrics, database checks, and the initial interview process by CBP (creation of an I-213). Individuals could be held in DHS custody at this point for a maximum period of 72 hours, or no longer than is necessary to complete initial processing, whichever is shorter. After CBP identifies a person as an unaccompanied child, ORR (co-located at the facility) would carry out any required trafficking screening and begin the sponsorship and placement process for unaccompanied children as soon as possible. Should any child arrive with a family member who is not a parent or legal guardian (thus requiring the child to be designated as unaccompanied), ORR could work to ensure that the accompanying adult is designated the child's sponsor, thereby ensuring no family is separated.

If the person or family indicates a desire to seek asylum, they would be transferred to the non-custodial side of the facility after processing is complete for an orientation about the asylum process, to be carried out by nonprofit organizations. Although this portion of the process would be optional, families and others seeking asylum would be strongly encouraged to remain at the facilities for at least 48 to 72 hours to provide sufficient time for orientation to the U.S. immigration and asylum systems.

Ideally, nonprofits co-located on site would assist people in finding transportation to their ultimate destinations

and begin the process of case management. If no such nonprofit can be located, then officials at the center should establish a transportation and case management protocol to assist the most vulnerable to travel to their ultimate destination. For those migrants who do not have an intended location, the federal government should coordinate with receiving communities to ensure that a person can travel to a location where they will be able to get on their feet in a short period of time through the provision of emergency direct assistance. Any contracts issued through this process should be open and go through a standard procurement process, like the process by which Legal Orientation Program providers in ICE detention are contracted.

Notably, if there is no political will for entirely non-custodial processing options post-CBP, under the new asylum procedures regulation some individuals may go through the credible fear process in these facilities. We believe that credible fear screenings carried out at the border are inherently flawed and will likely lead to many individuals with strong asylum claims being prevented from accessing the asylum process. However, if the government should nonetheless move forward with an expansion of credible fear processing at the border in a regional processing center, DHS should at the very minimum ensure that:

- Life and death legal interviews must not take place without counsel. Therefore, all those given credible fear interviews must be provided full counsel for their interview at the earliest moment in the process, not just access to legal orientation. Any person who cannot afford their own counsel should be provided one by the federal government. Attorneys must be permitted in-person access if requested, and virtual access otherwise.
- No credible fear interviews should be carried out without providing the asylum seeker an orientation to the credible fear process and sufficient time to physically and mentally prepare for the interview, which should be at minimum 72 hours.
- If immigration judge review is also carried out at the facilities by EOIR, judges must be physically located at the regional processing centers and carry out the review in person.

- Individuals must be permitted to wear their own clothing and present themselves with dignity throughout the process. CBP should also make every effort to ensure that individuals are not separated from their belongings (within reasonable limits and excluding contraband), given that many migrants arrive at the border while carrying physical evidence relating to their asylum claims.
- DHS must implement a screening process to ensure that individuals with heightened vulnerabilities or mental competency concerns are not forced to go through the credible fear process at the border and are instead given alternate options to access the asylum process.

In the FY 2022 omnibus spending bill, Congress appropriated \$150 million for two Joint Processing Centers to be operated by DHS.<sup>114</sup> These facilities are currently intended to be opened in the Del Rio and Yuma sectors. We believe that DHS should model these Joint Processing Centers on the principles we have laid out in this section.

Importantly, in building and operating these facilities, the administration must ensure robust oversight of these facilities and their operations. DHS should task the Office of Immigration Detention Oversight (OIDO) to establish a permanent oversight position at each facility. Similarly, DHS should ensure that OIDO and CRCL are able to provide recommendations during the initial planning phase, and that CRCL continues to monitor the facility.

## Recommendations for Congressional Action

The \$150 million included in the FY 2022 omnibus required DHS to develop “Department-wide requirements and operating procedures for Joint Processing Centers” and to “design facilities that can help CBP and ICE better integrate their operations.” Congress should follow up on this appropriation in subsequent appropriations bills by clarifying the purpose of these joint processing centers to align with the recommendations included in this section, expanding their use beyond CBP and ICE.

In authorizing the construction of these processing centers, Congress must ensure that there is robust oversight of the procurement process and the operation of these facilities. This should include, at a minimum, a requirement that the GAO audit the process of designing and building these facilities and study the operation for the first year. Congress should also require that DHS OIG actively monitor the operation of the facilities in their first year and during subsequent periods, including unannounced inspections. Congress should consider the creation of a formal DHS/NGO working group on regional processing centers to formalize the role of NGO feedback in the planning, construction, and operation of these facilities.

## RECOMMENDATION 8

# Execute the Termination of Title 42 Once Legally Permitted

## Background

Since March 2020, the United States has carried out over 2.5 million expulsions under Title 42,<sup>115</sup> an obscure 1893 public health law that the Trump administration invoked in response to the COVID-19 pandemic.<sup>116</sup> Individuals who are expelled under Title 42 are almost entirely denied a chance to seek asylum or any humanitarian protection, barring a limited exception for individuals who affirmatively and spontaneously assert a fear of torture in the country to which they would be expelled that is deemed reasonable by the processing Border Patrol agent.<sup>117</sup>

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*Individuals who are expelled under Title 42 are almost entirely denied a chance to seek asylum or any humanitarian protection.*

Title 42 has not only had a deleterious impact on the right to asylum, it has also failed as a border management policy. As senior government officials (including the Border Patrol Chief) have acknowledged, Title 42 has led to a massive increase in repeat border crossings.<sup>118</sup> Since Title 42 began, nearly one in every three border encounters was of a person on their second or higher failed attempt to cross the border, accounting for more than 1.25 million repeat border encounters in total.<sup>119</sup> Some individuals have crossed the border dozens of times. Data produced under the Freedom of Information Act reveals that one person was caught and expelled 71 times in 2021, including one 24-hour period where the person was expelled four times.<sup>120</sup> As a result, “encounter” numbers inflated by Title 42 paint a distorted picture of the number of people crossing the border.

Title 42 has also severely impacted the ability of migrants to seek asylum in a safe and orderly manner by restricting access to the ports of entry as a method to seek asylum. Many asylum seekers, facing an indefinite wait for Title 42 to end and unable to remain in dangerous conditions in northern Mexico, choose instead to cross the border and turn themselves in to the Border Patrol. This further increases the strain on DHS and drives up perceptions of chaos.



*La Joya, TX, USA - May 26, 2021: A Central American woman and her son who crossed the Rio Grande River to request asylum wait with other families to be processed by the Border Patrol. Photo by Vic Hinterlang.*

Ending Title 42 will not only reduce the overall number of repeat crossings, but it will also help restore a functional asylum system that is accessible at the ports of entry. Further extending Title 42, on the other hand, is a guarantee of continued border chaos.

Currently, Title 42 will sunset on May 11, the date on which the COVID-19 public health emergency is set to expire.<sup>121</sup> However, the GOP states whose lawsuit kept Title 42 in effect have indicated that they intend to take legal action to prevent the Title 42 from terminating on that date.<sup>122</sup>

The Biden administration has indicated that, when Title 42 terminates (on May 11 or a future date), it intends to surge resources to the border to increase Title 8 processing of asylum seekers. Specifically, the administration plans to significantly increase the use of expedited removal, and institute a new regulation creating a “rebuttable presumption” against asylum for any individual (1) who does not enter (a) at a port of entry via CBP One or (b) through a parole program and (2) who has not previously applied for and been denied asylum in a transit country.<sup>123</sup> Although the administration has repeatedly rejected parallels to the

Trump administration’s unlawful 2019 “asylum transit ban,” the proposed regulation mirrors the Trump-era ban in many significant ways.<sup>124</sup>

In January 2023, the Border Patrol conducted a test of post-Title 42 processing for Mexican nationals which involved the resumption of pre-expedited removal “voluntary return” practices from the 1990s, in which “approximately 11,000” Mexican nationals were offered the option of being placed into full removal proceedings (likely while detained) or the chance to voluntarily return to Mexico without receiving a deportation order.<sup>125</sup> Reportedly, only 292 individuals declined voluntary return.<sup>126</sup> CBP has previously labeled voluntary returns a “least effective and efficient” deterrence policy,<sup>127</sup> yet in practice it would allow the administration to mostly replicate the effect of Title 42 for Mexican nationals.

## Recommendations for Executive Action

Despite the impending end to Title 42, there is bipartisan concern that DHS is not ready for its termination, which has led members of Congress to offer legislation delaying the end of Title 42 until DHS is operationally

ready to transition back to normal immigration processing.<sup>128</sup> While not all concerns may have been offered in good faith, the administration should work to address any lingering concerns by pursuing and allocating further funding through the FEMA EFSP and Shelter and Services Program to provide critical humanitarian and logistical support in receiving communities and at the border and beyond.

In preparation for Title 42's end, the administration should expand international actions taken against smuggling networks and other bad actors who prey on vulnerable migrants, as well as step up work to address dis- and misinformation. It will also be imperative to implement the previous recommendations for increased processing capacity at the ports of entry and elsewhere, to ensure that overcrowding is kept to a minimum and CBP's normal operations are not disrupted.

Once Title 42 is lifted, there may be a significant but temporary increase in arrivals, given the current number of migrants waiting south of the border. To prepare for this temporary increase, DHS should arrange for decompression flights and buses away from the border to receiving communities, engaging in full and transparent coordination with those communities.

Importantly, asylum must not be sacrificed on the altar of "bringing numbers down." The Biden administration must not adopt the proposed asylum transit ban or any other harsh anti-asylum measure in response to the end of Title 42. Similarly, the Biden administration should not return to rapid asylum adjudication while in detention at the border (including any version of the Trump-era Prompt Asylum Claim Review or Humanitarian Asylum Review Programs), something which began on a pilot basis in April 2023.<sup>129</sup> Nor should it

restart family detention, as other reports have indicated it is considering.<sup>130</sup>

## Recommendations for Congressional Action

Congress should consider providing supplemental appropriations to CBP, with appropriate safeguards, to address resource constraints faced by the Biden administration in the leadup to Title 42's termination. The resource demand on the agency is likely to be significant, and DHS's finances are reportedly strained already.<sup>131</sup> The agency will likely need to hire a significant number of contractors for transportation, medical care, and other necessities, at considerable cost. A supplemental funding bill could ensure that CBP can afford these measures without a disruption to other vital agency missions.

## RECOMMENDATION 9

# Fund Representation

## For Individuals Facing Deportation Who Cannot Afford to Pay a Lawyer

### Background

The asylum process is complicated and difficult even for the most well-educated layperson to understand. Asylum seekers themselves often struggle to navigate the system. Many individuals with meritorious claims are denied asylum solely because they were forced to proceed without legal representation. Representation alone can significantly increase the chance that a person wins their case.<sup>132</sup> Unfortunately, as of February 2023 just 40.6 percent of respondents in removal proceedings were represented by a lawyer.<sup>133</sup> And while increased case management services for asylum seekers may help those who can't afford a lawyer find pro bono or nonprofit attorneys, referrals aren't helpful if those lawyers have no capacity to take additional cases.



40.6%

of respondents in removal proceedings were represented by a lawyer as of February 2023.

Even the act of filing an asylum application itself can be difficult without a lawyer. For individuals who are not placed through the Biden administration's new asylum program, filing an application requires completing Form I-589, Application for Asylum and/or Withholding of Removal, in English, and generally within the first year of arrival. The difficulty of completing this task without a lawyer is indicated by the fact that 78 percent of individuals who successfully file an asylum application in removal proceedings are represented by counsel.<sup>134</sup>

Access to counsel also serves important governmental interests. It has been shown to ensure compliance with obligations imposed on individuals released at the border, such as appearing in court.<sup>135</sup> It can reduce costs to the government by decreasing the need for continuances while immigrants seek counsel or prepare applications, reducing the overall number of hearings necessary to bring a case to completion.<sup>136</sup> Access to counsel can also help migrants and receiving communities, by providing people a powerful advocate on their side who can help them navigate unfamiliar bureaucratic systems. When combined with increased case management services as discussed above, access to counsel will help migrants participate fully in the asylum process while maintaining a higher level of stability in their personal lives.

## Recommendations for Executive Action

In 2022, the Biden administration announced that it would expand grants through ORR for direct legal representation for unaccompanied children released from custody. These grants will allow the administration to ensure that thousands of children who might otherwise be unable to find a lawyer will be able to obtain one. As this program ramps up through 2023 and beyond, the government should carefully study its empirical effects and ensure that any successes are tracked and incorporated into future counsel programs.

The Biden administration should consider a similar pilot program for vulnerable individuals in immigration court. This could potentially occur through an expansion of the National Qualified Representation Program which currently provides limited representation for individuals held in detention who have mental capacity issues. The goal should be to build greater support for direct representation in immigration court through a meaningful study of the benefits and costs of providing such representation. We anticipate that it will cost the federal government less money in the long term to provide funded counsel for indigent immigrants than to have cases pending for long periods of time and requiring multiple hearings before any ultimate decision is made.

DHS and the Department of Justice should consider proactively reaching out to the private sector to build support for pro bono counsel models. Similarly, the agencies should work to support state and local governments which are considering adopting their own paid counsel programs.

## Recommendations for Congressional Action

Unfortunately, there are simply not enough immigration lawyers currently available to take cases of newly arrived asylum seekers, especially pro bono or low bono.<sup>137</sup> Government-funded counsel for indigent immigrants is the only viable option to both increase the available supply of immigration lawyers and ensure that asylum seekers are able to navigate the complicated asylum

system effectively. Congress should, at minimum, create a pilot program to provide vulnerable individuals in removal proceedings access to counsel.

Once a network of legal services providers has been established through this pilot program, Congress should increase funding for the program to build capacity and eventually create a nationwide access to counsel program for individuals facing removal who cannot afford a lawyer. In the interim, states and local governments should continue to innovate by establishing their own programs guaranteeing a right to counsel, such as in New York City and Colorado.

Government-funded counsel is not a panacea. Structural issues in asylum law and the removal system will continue to impede asylum seekers' ability to achieve safety. However, given the severe consequences of an erroneously denied asylum application (and subsequent removal order), the United States should work to ensure that all individuals have a fair day in court.

## RECOMMENDATION 10

# Establish a FEMA-Based Emergency Migration Fund

## Background

One of the United States' biggest challenges in responding to extraordinary migration events at the border has been a lack of funding, especially regarding transportation and care of asylum seekers and unaccompanied children.<sup>138</sup> Agencies have been required to spend significantly more funding than necessary to build temporary facilities, hire contractors, and respond to increased migration through emergency spending that cuts into the agency's normal budget priorities.

While EFSP and the new Shelter and Services Program provide flexible funding sources for NGOs and state and local governments, no similar fund exists for the federal government itself. This has required DHS to repeatedly shift money from other sources to fund emergency requirements or go to Congress seeking emergency funding. Any additional Congressional funding is often delayed and subject to politicization, and thus less flexible than necessary.

Concern about the agency's consistent trouble accessing funding during times of high migration is not new, and some proposals have already been put forward to address this issue. For example, in 2019, the Bipartisan Policy Center proposed the creation of an "Immigration FEMA," which would not only permit the government to unlock specific funding during times of high migration

but would also unlock other immigration-related authorities to expedite asylum processing.<sup>139</sup>

## Recommendations for Congressional Action

To address these fiscal uncertainties for DHS and ORR, Congress should create an emergency migration fund that permits FEMA to distribute emergency funds to local governments, NGOs, and possibly DHS or the Department of Health and Human Services itself when necessary. This fund, which should be renewable by Congress, will ensure that the agencies are no longer required to return to Congress for emergency supplemental appropriations on a routine basis. This will promote longer-term stability at DHS for migrant processing and will help agencies switch from a reactive position to a proactive one.

However, unlike the proposed "Immigration FEMA," this fund should have restrictions to ensure that it is not used for detention, enforcement, deportations, or any form of expedited asylum processing. Instead, these funds should only be used for humanitarian processing, transport, and other similar measures. Congress should require DHS to certify that the funds are not used for supplemental enforcement, but instead to respond to increased processing challenges.

## RECOMMENDATION 11

# Create New Legal Pathways to Immigration

## Background

People choose to cross the southern border for a wide variety of reasons. Many are fleeing dangerous situations in their homelands and view this country as a place where they can be safe, even though the asylum system is a narrow one and the protections it offers excludes many people who legitimately fear for their lives. Others may not have a fear of persecution in their home countries, but instead are just seeking a better life and opportunity in the United States—something that has brought tens of millions of people to this country over the last century.

But would those individuals choose to cross the border irregularly if they had another option? Studies have consistently shown that increased access to alternative migration avenues to immigrate through lawful channels will reduce demand to migrate through irregular pathways.<sup>140</sup> However, for the overwhelming majority of migrants seeking to come to the United States, no legal pathways are available.

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*For the overwhelming majority of migrants seeking to come to the United States, **no legal pathways are available.***

Unfortunately, despite the urgent need for reforms, the United States has not made any major changes to the legal immigration system since the Immigration Act of 1990. In the decades since then, backlogs and delays have proliferated throughout the system. As a result, the small number of people who qualify to obtain immigration status in the United States often must spend thousands of dollars and years of effort to obtain permission to immigrate. The United States will not thrive if we continue to use a 20th century immigration system to deal with 21st century problems. Faced with a lack of legal pathways, it is no surprise that many people choose to migrate through other means.

Targeted parole programs and alternate pathways can reduce the need for irregular migration and benefit individuals who are seeking safety or a better life in the United States but do not have any method of accessing the country other than the asylum system at the southern border. This has been demonstrated by the success of programs like Uniting for Ukraine. In the first seven months after the program was unveiled in April 2022, more than 171,000 Americans agreed to sponsor a Ukrainian for parole, 121,000 applications were granted, and 85,000 Ukrainians entered the country as parolees.<sup>141</sup>

Further building on that success, in January 2023 the Biden administration announced a new program with equal promise for the private sponsorship of refugees, known as the Welcome Corps.<sup>142</sup> This concept is not new; since 1979, Canada has run its Private Sponsorship of Refugees program to permit community groups and Canadian citizens to volunteer to provide up to a year of financial and integration support to new refugees.<sup>143</sup> The Welcome Corps will complement the traditional U.S. refugee resettlement process by allowing groups of at least five individuals to individually sponsor a refugee already approved under the U.S. Refugee Admissions Program, agreeing to financially support them and help them adjust to life in the United States during their first year.<sup>144</sup>

However, parole or formal refugee status should not become a substitute for asylum. In January 2023, the Biden administration announced a reciprocal agreement with Mexico allowing DHS to expel up to 30,000 Venezuelans, Cubans, Haitians, and Nicaraguans per month to Mexico under Title 42, in exchange for the United States agreeing to admit 30,000 of those nationals per month through parole.<sup>145</sup> This followed a more limited program aimed specifically at Venezuelan migrants which began in October 2022. Under both programs, any individual who crosses the border of Panama, Mexico, or the United States without permission is barred from seeking parole.<sup>146</sup>

The Biden administration has touted a 97 percent drop in Border Patrol crossings for individuals subject to these new restrictions.<sup>147</sup> It remains to be seen whether this impact will be long-term.

As shown by Figure 5 the impact of this “carrot and stick” approach on Venezuelans has been significant. Border Patrol apprehensions of Venezuelan migrants dropped 96 percent from 33,749 in September 2022 to 1,451 in January 2023. However, the overall number of Venezuelans encountered remained steady at approximately 15,000 from November 2022 through February 2023 as Venezuelans increasingly sought asylum at ports of entry or arrived through the humanitarian parole program. This has largely shown the success of the program at reducing irregular entries, while maintaining alternate paths for arrivals.

#### UNITING FOR UKRAINE PROGRAM - CASE STUDY

From April through November 2022,

**171,000**

Americans agreed to sponsor a Ukrainian for parole

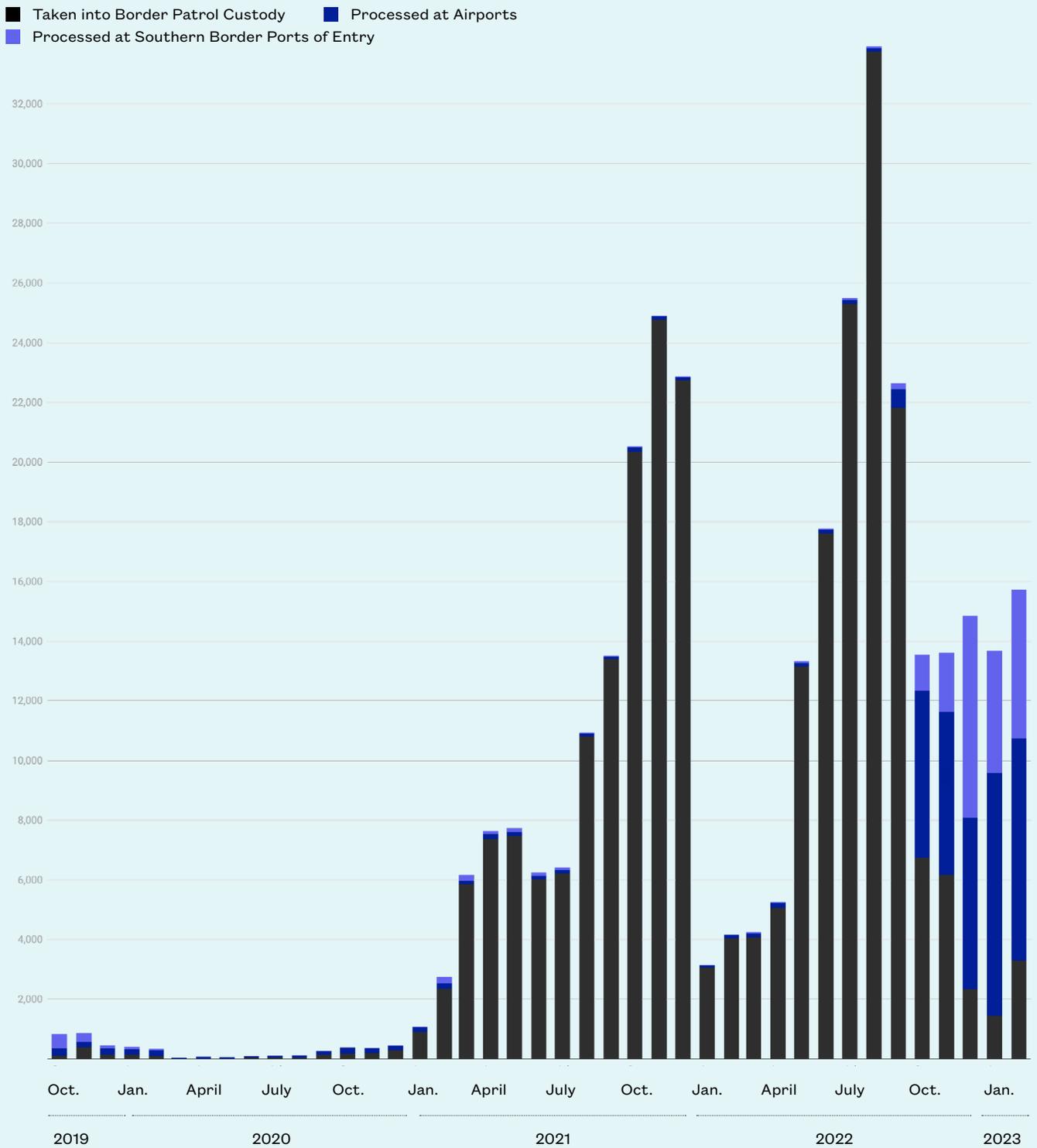
**121,000**

Applications were granted

**85,000**

Ukrainians entered the country as parolees

**FIGURE 5: ENCOUNTERS OF VENEZUELAN MIGRANTS BY LOCATION OF PROCESSING**



Source: U.S. Customs and Border Protection, "Nationwide Encounters," <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

In January 2023, a coalition of Republican-led states sued the Biden administration, seeking to terminate the program as unlawful.<sup>148</sup> As a result, the long-term health of the program remains considerably uncertain.

## Recommendations for Executive Action

The Biden administration should continue to expand and operate humanitarian parole programs to offer individuals alternate paths to enter the United States, without making these pathways contingent on Title 42 or other restrictions on migrants. The Biden administration should consider expanding parole programs for other purposes that provide significant public benefit, which may involve exploring proposals to create dedicated partnerships with state governments to provide opportunities for immigrants to come to the United States in specific areas with legitimate labor needs.<sup>149</sup> By creating options to migrate to the United States without having to travel through incredibly dangerous territories controlled by TCOs, the government can simultaneously starve these organizations of potential revenue while reducing irregular migration and offering a safer and more stable method for individuals to come to the United States to seek protection or simply a better life.

However, parole cannot be the only option, as it is vulnerable to legal and political challenges and can be terminated at any time. DHS should also expand the availability and oversight of temporary work visas, including the H-2B and H-2A visa programs. This would allow more individuals to temporarily migrate to the United States for work prior to returning to their home countries. In December 2022, DHS expanded overall H-2B visas by an additional 64,716 visas for FY 2023.<sup>150</sup>

DHS should continue to increase the overall number of H-2B visas available in FY 2024 and continue to target those visas to countries with the highest levels of arrivals at the U.S.-Mexico border. In doing so, it should develop strategies to educate potential beneficiaries of this legal pathway and provide support for those who wish to come to the United States and who may qualify under the H-2B category to ensure full utilization of any expansion.

## Recommendations for Congressional Action

To offer an alternative to irregular migration, the United States should pursue a twofold strategy to increase both temporary and permanent pathways for legal immigration. Congress should create additional temporary worker programs that would permit individuals to travel to the United States temporarily to work legally (and include strong worker protections). Congress should also work to clear longstanding backlogs in the immigrant visa process that prevent individuals from moving permanently to the United States.

Providing viable means for all types of migrants to legally come to the US would reduce irregular migration while also creating conditions for a boost to the U.S. economy.<sup>151</sup> At a time of significant labor shortages in the United States, expanding access to legal immigration would be a strong net benefit to the United States. And without congressional action, there is only so much that any one president can do.

Temporary parole programs should also be replaced with more permanent programs authorized by Congress. Without any kind of path to permanent legal status, those individuals who enter through a temporary program are forced into a state of limbo, at a net cost to the individuals and to the United States. However, parole remains an important flexible authority for any presidential administration in the future to deal with migration issues, so Congress should ensure that this authority remains available to the executive branch and expansive enough to permit the kind of parole programs currently in operation.

Congress should also act to provide a permanent path to legal status for those individuals who are already in the country either undocumented or as part of a temporary humanitarian program. At a minimum, Congress should act to lift the current 180-day waiting time for work authorization for individuals who apply for asylum, as well as provide a statutory means by which any individual in the country on a humanitarian status can apply for work authorization.

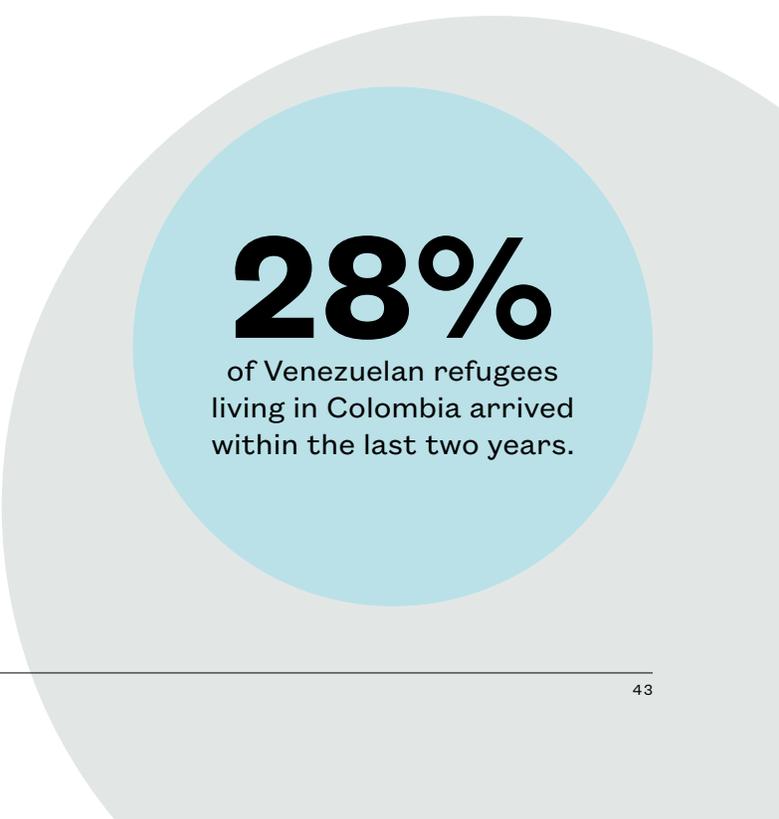
## RECOMMENDATION 12

# Expand Domestic and International Refugee and Asylum Processing Capacity in Latin America

With the Support of UNHCR

## Background

The United States is not the only nation that has witnessed a significant expansion of asylum and refugee applications in recent years. In 2021, Mexico recorded the highest number of asylum applications in the history of the country.<sup>152</sup> Similarly, Costa Rica recorded an unprecedented increase in Nicaraguan asylum seekers in 2021, as political oppression in that country has driven thousands to leave and seek safety elsewhere.<sup>153</sup> In South America, more than seven million refugees have left Venezuela in recent years, with millions remaining in surrounding countries under various forms of legal status.<sup>154</sup> Colombia is currently hosting almost 2.5 million Venezuelan refugees, with 700,000 arriving in the last two years alone.<sup>155</sup>



**28%**

of Venezuelan refugees living in Colombia arrived within the last two years.

In June 2022, the United States signed the Los Angeles Declaration on Migration and Protection, a historic hemispheric agreement reached with 21 different nations.<sup>156</sup> The declaration acknowledges that “irregular international migration requires a regional approach,” and emphasizes a “spirit of collaboration, solidarity, and shared responsibility among States.”<sup>157</sup> However, despite talk of “a shared approach,” on a per capita basis the United States accepts far fewer refugees than many other countries in the region.

Currently, the Biden administration has committed to accepting just 20,000 refugees from Latin America and the Caribbean in FY 2023 and FY 2024.<sup>158</sup> Through funding for the United Nations and the International Organization for Migration, the United States does provide some support to other countries which house migrants and refugees. However, “migration assistance” often takes the form of efforts to enhance border security and immigration enforcement measures in transit countries.

## Recommendations for Executive Action

Unlike the United States’ deterrence-first policies, other countries have offered temporary residence and a path to legal status for millions of refugees residing in their countries.<sup>159</sup> The State Department, or another relevant government agency such as the U.S. Agency for International Development, should fund and support similar actions in countries throughout the region which would permit millions of people leaving their countries due to displacement to seek protection without having to make the long journey here. The provision of basic shelter and services to refugees in the region would help to maintain the stability of surrounding countries and then allow refugees to return to their original homes more easily when the conditions forcing them to leave have been resolved. The federal government can and should increase funding for refugee integration efforts in countries throughout the region, working with UNHCR to provide viable alternatives to traveling to the United States.

However, these efforts must not detract from the United States’ ongoing commitment to accept more refugees. As the Biden administration works to meet its ambitious refugee resettlement goals, the State Department should work with UNHCR to expand access to the U.S. Refugee Admissions Program (USRAP) in Latin America. Because U.S. refugee processing takes years, investing in the expansion of USRAP processing in Latin America will be necessary to increase capacity to carry out refugee determinations in the region.

## RECOMMENDATION 13

# Bring Asylum Law into the 21st Century

## Background

Modern asylum and humanitarian protection laws are built off the framework of the 1951 United Nations Convention Relating to the Status of Refugees.<sup>160</sup> Conceived in the years following the Holocaust, the Refugee Convention and the later 1967 Protocol Relating to the Status of Refugees<sup>161</sup> define asylum and refugee protection narrowly to include only those individuals who are subject to persecution on account of “race, religion, nationality, membership in a particular social group, or political opinion.”<sup>162</sup> When the United States codified asylum into law in the Refugee Act of 1980, it adopted this framework, limiting asylum only to individuals who fall within those categories.<sup>163</sup>

In the modern era, there are many people seeking humanitarian protections in the United States who may not qualify under this narrow definition, either because of the identity of their persecutors or because the harms they are fleeing do not fall within this framework (as interpreted by administrative and federal courts). Under domestic asylum law, immigration judges may simultaneously conclude that a person is likely to be killed if deported to their home country, and that the person nevertheless does not qualify for asylum because they will be killed for the wrong reason, or by the wrong person.

Other countries have recognized these gaps and adopted expanded definitions of refugee status. For example, 14 countries, including Mexico, have adopted provisions

of the 1984 Cartagena Declaration of Refugees which includes additional grounds for refugee protections for individuals who have “fled their country because their life, safety, or freedom was threatened by generalized violence, foreign aggression, internal conflict, massive human rights violations, or other circumstances that have gravely disturbed public order.”<sup>164</sup>

## Recommendations for Executive Action

Given the shifting nature of humanitarian protection applicants arriving to the United States in the 21st century, it is time for this country to lead the world once again by expanding its definition of refugee status to include a broader group of people fleeing harm, including survivors of gender-based violence.

A current or future presidential administration could accomplish some of this task through regulations adopting an expanded definition of the term “particular social group,” a famously nebulous term of art which incorporates everything from sexual orientation<sup>165</sup> to clan membership<sup>166</sup> to status as a victim of domestic violence unable to leave a marriage.<sup>167</sup>

In February 2021, President Biden issued an executive order calling for DHS to propose within 270 days a regulation to redefine “particular social group” to better align with international standards.<sup>168</sup> Unfortunately, two years later, this regulation has yet to be published. We

strongly urge the Biden administration to finally publish this regulation and expand the definition of particular social group to include grounds of protection for individuals facing gender-based violence, among other groups.

## **Recommendations for Congressional Action**

However, regulatory changes can only go so far. Congress should also act to either expand the qualifications for asylum or adopt alternate forms of humanitarian protections that address growing issues like global climate change. At the same time, Congress should lift procedural obstacles to a fair day in court imposed as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), including provisions of law stripping federal courts of their ability to hear legal challenges to many aspects of the enforcement and removal system that affect asylum seekers.<sup>169</sup>

Current asylum and immigration laws are too narrow and often fail to protect the rights of the most vulnerable. Without major legal changes to address these issues, presidential administrations can only do so much. In order to restore a rights-respecting process at the border and for asylum seekers in general, Congress should expand the 1980 Refugee Act and lift the draconian limitations on judicial review included in IIRIRA.

# Conclusion

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Over the last decade, the number of people displaced from their homes has grown to record levels throughout the entire world, with 31.7 million refugees and asylum seekers and 53.2 million internally displaced people globally by the end of 2021.<sup>170</sup> Climate change and extreme weather events are more likely than not to further increase the number of displaced people. The United States is far from the only, or even the most common, country in which displaced people are seeking refuge in the 21st century. But despite the tremendous power and wealth of the federal government, and the importance of the country's self-image as a haven for the dispossessed and a "beacon of freedom" to people around the world, the United States has so far abdicated leadership in facing this challenge.

We have spent the last decade doubling down on ineffective and increasingly cruel deterrence-based policies rather than responding to the changing realities at the border. Billions of dollars that could have been spent on building adjudicatory capacity has instead been spent on border walls and other measures which have completely failed to address the underlying problems.

If we change our approach—if the United States abandons the deterrence-focused mindset in favor of managing humanitarian flows in safe, fair, efficient, and predictable ways—we can regain that leadership. Not only will the United States better manage its own borders, but it can demonstrate to other countries what a functional system looks like — in the long run, giving asylum seekers more options to resettle in than they currently have.

Going forward, we must respond to increased migration through a massive increase in asylum processing at ports of entry, additional support to CBP's humanitarian processing between ports of entry, backlog reduction

throughout the system, and funding for USCIS and the immigration court system to expand access to counsel and protect due process while providing an orderly and efficient pathway to protection. In the medium and long term, we must focus on building permanent humanitarian processing capacity at the southern border, further expanding asylum processing within USCIS to prevent the growth of new backlogs, creating flexible funding for emergency migration events, increasing legal migration pathways, and addressing the root causes of migration.

Key to all these solutions is a need to be flexible and to respond from a processing-first viewpoint, designed to reduce the arbitrariness and confusion that currently exist at the border. Rather than focus only on temporary reductions of the number of people crossing the border, we need to address the longstanding shortfalls of the system and be prepared to accept higher numbers of migrants in a humane and orderly fashion.

The United States has done much harder things than this. The key is acknowledging the problem we are trying to solve: rebuilding a functional humanitarian system at the border and beyond.

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