

ASYLUM UNDER ATTACK: RESTORING ASYLUM PROTECTION IN THE UNITED STATES

*Lindsay M. Harris**

ABSTRACT

The U.S. asylum system has endured four years of systematic attack. The Trump Administration attempted to dismantle the United States' system to protect asylum seekers through changes to case law, executive orders, presidential proclamations, internal agency guidance and sweeping regulatory changes, among other measures. The system largely ground to a halt after the Trump Administration co-opted the coronavirus public health crisis to effectively close the southern border to asylum seekers with its March 2020 Centers for Disease Control order. This catastrophic order was not even the last in a long line of the Trump Administration's efforts since assuming power to obliterate asylum protection. Building on the actions from 2017 forward, even in its waning days, the Trump Administration proposed and finalized numerous sets of regulations to undermine and eviscerate asylum protection.

A combination of public outcry and litigation halted or limited some of the Trump Administration's attempts to undermine asylum protection. Other policies went into effect and

* Associate Professor of Law, Director, Immigration & Human Rights Clinic, University of the District of Columbia – David A. Clarke School of Law, J.D. Berkeley Law School, L.L.M, Georgetown University Law Center. My thanks to Saba Ahmed, Jillian Blake, Shaw Drake, Karen Musalo, Jaya Ramji-Nogales, Aaron Reichlin-Melnick, Erica Schommer, and Shoba Sivaprasad Wadhia for sharing their insight. Thank you to my spouse, Brian R. Israel, for all the ways in which he made this possible for me to write this piece during a summer of pandemic-parenting in 2020 and to Maggie Harris for “Grandma School” and moving across the country to supervise remote learning from September to March. This article, and so much more, simply would not have been possible without that support. Thank you to Stephanie Brown for research assistance and to the editors of the Loyola Law Review for their diligence and thoughtfulness. Finally, I appreciate summer research funding from UDC Law. All errors are my own.

some remain in effect under the Biden Administration, with dramatic results. By tracing the sustained series of policies, regulations, and other actions taken by the Trump Administration against asylum seekers, this article not only bears witness to the attacks on the asylum system, but also offers a roadmap of policies to be undone by the Biden-Harris Administration. Taking into account the public commitments made by President Biden during his campaign and post-election on asylum issues, this article outlines the immediate and long-term actions that the Biden-Harris Administration must take. Initial actions by President Biden, including an Executive Order addressing asylum issues and the U.S. Citizenship Act of 2021 introduced in Congress are promising, but the “Covid ban” on asylum seekers under Title 42 of the Public Health Act remains in effect. This article sets forth what is necessary to not only right the wrongs committed by the Trump Administration, but to provide meaningful asylum protection and to reassume the United States’ role as the global leader in refugee protection.

TABLE OF CONTENTS

I. INTRODUCTION.....	123
II. THE DISMANTLING OF OUR ASYLUM SYSTEM AND WHAT MUST BE DONE TO RESURRECT IT	128
A. BORDER POLICIES CONSTRICTING ACCESS TO ASYLUM	130
1. METERING OF ASYLUM SEEKERS AT THE BORDER .	130
2. FAMILY SEPARATION AND THE ZERO TOLERANCE POLICY.....	133
3. MIGRANT PROTECTION PROTOCOLS.....	138
4. CHANGES TO THE EXPEDITED REMOVAL SYSTEM, INCLUDING PROMPT ASYLUM CLAIM REVIEW AND HUMANITARIAN ASYLUM REVIEW PROCESS	142
5. ASYLUM COOPERATIVE AGREEMENTS WITH GUATEMALA, HONDURAS, AND EL SALVADOR	146
B. CO-OPTING THE COVID-19 PUBLIC HEALTH CRISIS TO SHUT DOWN THE ASYLUM SYSTEM	150
C. ASYLUM BANS.....	156
1. ASYLUM BAN 1.0: BARRING ASYLUM SEEKERS ENTERING BETWEEN PORTS OF ENTRY	157
2. ASYLUM BAN 2.0 - TRANSIT BAN – BARRING ASYLUM TO INDIVIDUALS WHO TRANSITED THIRD	

COUNTRIES BEFORE ARRIVING AT THE SOUTHERN BORDER	158
D. ATTORNEY GENERAL DECISIONS CHANGING THE SHAPE OF ASYLUM LAW	160
F. BUREAUCRATIC SHIFTS TO MAKE LIFE MORE CHALLENGING FOR ASYLUM SEEKERS IN THE UNITED STATES	169
1. DEATH BY A THOUSAND PAPER CUTS: TECHNICAL REJECTIONS OF THE ASYLUM APPLICATION FORM.	170
2. ASYLUM FEE INCREASES	171
3. BARRIERS TO WORK AUTHORIZATION	173
4. BIDEN ON BUREAUCRATIC CHANGES TO THE ASYLUM APPLICATION PROCESS AND WORK AUTHORIZATION	175
F. SWEEPING CHANGES TO ASYLUM LAW THROUGH A COMPLEX WEB OF PROPOSED REGULATIONS AIMED AT UNDERMINING ASYLUM PROTECTION	177
III. CONCLUSION	184

I. INTRODUCTION

Historically, the U.S. has been a global leader in refugee protection. The U.S. has resettled more refugees than any other refugee-receiving nation, and also provided access to an asylum adjudication system to those fleeing persecution who independently made it to our borders. The U.S. refugee resettlement program and the asylum program are children of the same parents: the U.S.' international legal obligations under the Protocol to the UN Convention on the Status of Refugees¹ and the domestic implementing legislation in the form of the 1980 Refugee Act.² Refugee protection, for individuals fleeing persecution perpetrated by their own government or from which their government is unable to protect them, of course, remains enormously important.

1. Protocol Relating to the Status of Refugees art. 33, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

2. Refugee Act of 1980 § 101(a), Pub. L. No. 96-212, 94 Stat. 102 (1980).

This article will *not* address all the ways in which the Trump Administration undermined the refugee resettlement program,³ or indeed the broader immigration system,⁴ but will instead focus on the asylum system. The Biden-Harris Administration has clearly signaled a commitment to restoring and even expanding the U.S. commitment to refugees.⁵ Specifically, this article focuses on the treatment and protection of asylum seekers who are presently within or seeking admission to the United States. To be granted asylum, asylum seekers must meet the same definition as refugees – fleeing a fear of well-founded fear of persecution or past persecution account of one of five statutorily protected grounds: race, religion, nationality, membership in a particular social group, and political opinion.⁶

The Biden-Harris Administration will need to implement a long list of actions to restore asylum protection, but President Biden can and should take swift and strong action to protect asylum seekers.⁷ Biden committed to taking some of these steps in his public immigration platform, referring to Trump’s misallocation of resources and focus on “bullying legitimate asylum

3. See, e.g., Priscilla Alvarez, *America’s System for Resettling Refugees is Collapsing*, THE ATLANTIC, (Sept. 9, 2019), <https://www.theatlantic.com/politics/archive/2018/09/refugee-admissions-trump/569641/>.

4. See, e.g., Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes Under the Trump Presidency*, MIGRATION POL’Y INST. (2020) (cataloguing the changes throughout the immigration system made under the Trump Administration); see also Immigration Policy Tracking Project, <https://immpolicytracking.org/home/> (cataloguing all of the Trump era immigration policies)

5. *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN-HARRIS, www.joebiden.com/immigration (last visited Oct. 25, 2020) [hereinafter “Biden Immig. Platform”]; See Biden-Harris, Biden-Sanders Unity Task Force Recommendations (2020) 38-41, <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf> (last visited Oct. 25, 2020) [Hereinafter “Biden Sanders Unity Task Force Recommendations”]; Joe Biden, *My Statement on World Refugee Day*, MEDIUM (June 20, 2020) [Hereinafter “Biden Refugee Day Statement”].

6. 8 U.S.C. § 1101(a)(42)(A) (2018) (a refugee is defined as “any person who is outside any country of such person’s nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”).

7. See HUM. RTS. FIRST, WALKING THE TALK: 2021 BLUEPRINTS FOR A HUMAN RIGHTS-CENTERED U.S. FOREIGN POLICY 29 (2020), https://www.humanrightsfirst.org/sites/default/files/Human-Rights-First_2021-Blueprints_10122020.pdf.

seekers.”⁸ Using strong rhetoric, Biden referred to the “Trump-created humanitarian crisis at our border.”⁹ Biden spoke to reasserting “America’s commitment to asylum-seekers and refugees” and doing better to “uphold our laws humanely and preserve the dignity of immigrant families, refugees, and asylum-seekers.”¹⁰ Emphasizing the urgency of addressing this crisis, prior to inauguration Biden released not only his immigration platform,¹¹ and his agenda for the Latino Community,¹² but also the Biden-Sanders Unity Task Force Recommendations on immigration,¹³ along with other public statements on asylum protection.

U.S. asylum policy affects international standing and credibility in the human rights arena more broadly.¹⁴ To restore the protections and reputation of the U.S. asylum system, the Biden-Harris Administration has much work to do. Under the Trump Administration, the number of asylum applications dropped, while the percentage of denials dramatically increased:

In the final year of the Obama administration (fiscal year 2017), 120,815 asylum applications were filed in immigration courts by individuals facing deportation. In the first year of the

8. Biden Immig. Platform, *supra* note 5, at 3.

9. *Id.* at 1.

10. *Id.* at 2.

11. *Id.*

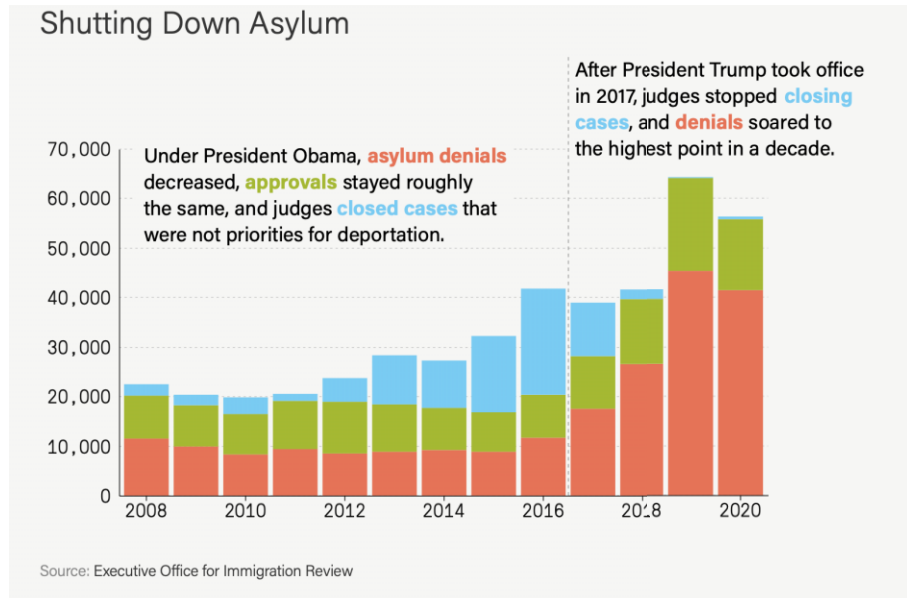
12. *The Biden Agenda for the Latino Community*, BIDEN-HARRIS, <https://joebiden.com/latino-agenda/> (last visited Jan. 31, 2021) [Hereinafter Biden Latino Agenda].

13. The Biden-Sanders Unity Task Force Recommendations are contained in a 110-page document that was the result of collaboration between the Biden team and Sanders supporters released in advance of the 2020 Democratic National Convention. See Caitlyn Oprysko, *Biden, Sanders Unity Task Force Releases Policy Recommendations*, POLITICO (July 8, 2020), <https://www.politico.com/news/2020/07/08/biden-sanders-unity-task-force-recommendations-353225>.

14. In July 2020, for example, the Canadian Constitutional Court found the 2004 safe-third country agreement between Canada and the United States invalid because the U.S. fails to provide meaningful protection to asylum seekers. See Canadian Council for Refugees, v. Minister of Immigr. Refugees & Citizenship, 2020 F.C.R. 770 (Can.); see also Amanda Coletta, *Canadian Courts Says Sending Asylum Seekers Back to the U.S. Violates Their Rights*, WASH. POST (July 22, 2020), https://www.washingtonpost.com/world/the_americas/canadian-court-says-border-agreement-with-us-violates-asylum-seekers-rights/2020/07/22/a8b3e908-cc3a-11ea-91f1-28aca4d833a0_story.html. Under the agreement, the U.S. and Canada shared mutual recognition of the other country as a safe place for asylum seekers to seek protection. It enabled Canada to send back potential asylum seekers who arrived at the Canada-U.S. border because they were obligated to pursue the claim in the country in which they first arrived.

Trump administration, the number fell to 110,469—an immediate signal that fewer migrants were able to seek asylum. By the end of 2018, immigration courts were denying asylum to 75 percent of applicants under guidance of the attorney general, compared to about 55 percent denials during the Obama era.¹⁵

This trend towards denying asylum claims is visually displayed below:¹⁶



Thus, chances of being granted asylum are now lower than ever.¹⁷ The Trump Administration achieved this outcome in

15. Bill Ong Hing, *Trump Has Achieved his Goal of Abolishing Asylum*, SLATE (Apr. 10, 2020), <https://slate.com/news-and-politics/2020/04/trump-asylum-coronavirus.html>; Jennifer Lee Koh, *Barricading the Immigration Courts*, 69 DUKE L. J. ONLINE 48, 55 (2020), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1076&context=dlj_online (in 2018 only 38% of all asylum claims decided were granted) (citing U.S. DEPT OF JUSTICE, STATISTICS YEARBOOK FISCAL YEAR 2018 26-27 (2018), <https://www.justice.gov/eoir/file/1198896/download> [hereinafter *2018 Statistical Yearbook*]). See also *Asylum Decisions and Denials Jump in 2018*, TRAC IMMIGRATION (Nov. 29, 2018), <https://trac.syr.edu/immigration/reports/539/>.

16. Graphic from Julia Preston, The Marshall Project, <https://www.themarshallproject.org/2020/11/23/biden-will-try-to-unmake-trump-s-immigration-agenda-it-wont-be-easy> (using statistics from <https://www.justice.gov/eoir/page/file/1248491/download>)

17. HUM. RTS. FIRST, FACT SHEET: GRANT RATES PLUMMET AS TRUMP ADMINISTRATION DISMANTLES U.S. ASYLUM SYSTEM, BLOCKS AND

various ways. While Congress writes the laws governing immigration, executive agencies interpret, implement, and enforce those laws. Trump used his deputies – the heads of executive agencies, including the Attorney General, to issue changes to internal agency guidance and new federal regulations to re-interpret existing laws, but he also acted himself through Executive Orders and “Presidential Proclamations.” Advocates challenged many of these actions through the federal courts, with mixed results. Remedying anti-asylum executive actions through the courts has limitations. First, legal challenges move slowly, with some negative policies remaining in effect for months or longer before a judicial remedy can block their effects. Second, immigration law is an exceedingly complex constellation of statutes, regulations, department memos and other policy making tools, meaning that Administrations with the aim of limiting asylum can do so in many ways likely to be upheld by the courts. Finally, Trump has packed the federal courts with partisan judges, appointing more than 200 federal judges over four years who will serve with lifetime tenure.¹⁸ While at times even these judges have struck down egregious immigration policies, the sheer number of Trump appointees means that the courts provide a haphazard path to remedy.

It has never been a more difficult time to gain entry into the United States to pursue an asylum claim. Likewise, it has never been more challenging to actually access that system by filing an application once here, to survive while that application is pending adjudication, and ultimately to be granted asylum. This article explores what the Biden-Harris Administration must do to roll back the harm done by the Trump Administration and to meaningfully restore access to asylum protection and insulate the system from future attacks.

DEPORTS REFUGEES (2020), <https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAsylumSystem.pdf>; Julia Preston, *Biden Will Try to Unmake Trump's Immigration Agenda: It Won't Be Easy*, THE MARSHALL PROJECT, (Nov. 23, 2020) <https://www.themarshallproject.org/2020/11/23/biden-will-try-to-unmake-trump-s-immigration-agenda-it-won-t-be-easy>

18. Russell Wheeler, *Trump's 200th Judicial Appointment: Less Than Meets the Eye*, BROOKINGS INST., (June 26, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/26/trumps-200th-judicial-appointment-less-than-meets-the-eye/>.

II. THE DISMANTLING OF OUR ASYLUM SYSTEM AND WHAT MUST BE DONE TO RESURRECT IT

The inauguration of Donald J. Trump heralded in an era of anti-immigrant sentiment and actions specifically focused on making seeking asylum more difficult. The sweeping changes to the asylum system, combined with regulatory changes at the granular level, cannot be overstated. Even in the months after this article was submitted for publication in August 2020 and throughout the editing phase, the asylum system was under attack and rapidly evolving with set after set of proposed and then hastily finalized regulations released, challenged in federal court, and often enjoined.¹⁹

Initially, the Trump Administration focused these changes on upending the process by which people access the asylum system at our southern border²⁰ but over time anti-asylum bureaucrats focused on sweeping changes to affect the asylum system as a whole.

This article describes these systematic attacks on the asylum system. In clearly delineating these actions, the article provides a roadmap to restore American leadership and reflect the American values of protecting the most vulnerable people.²¹ The article also highlights the ways in which our asylum system is vulnerable to attack and should be insulated in the future by systematic reform

19. See regulations section, *infra* 56-64.

20. See generally AM. IMMIGR. COUNCIL, POLICIES AFFECTING ASYLUM SEEKERS AT THE BORDER: THE MIGRANT PROTECTION PROTOCOLS, PROMPT ASYLUM CLAIM REVIEW, HUMANITARIAN ASYLUM REVIEW PROCESS, METERING, ASYLUM TRANSIT BAN, AND HOW THEY INTERACT (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf; see also U.S. COMM'N ON CIV. RTS., TRAUMA AT THE BORDER: THE HUMAN COST OF INHUMANE HUMAN RIGHTS POLICIES (2019), <https://www.usccr.gov/pubs/2019/10-24-Trauma-at-the-Border.pdf>. For an explanation of how the expedited removal process used to function at our southern border, which was far from ideal, see Lindsay M. Harris, *Withholding Protection*, 50.3 COLUM. HUM. RTS. L. REV. 1 (2019).

21. Americans themselves have spoken out en masse against the Trump Administration's proposed changes to asylum law, with many of approximately 88,000 individual and organizational comments speaking about the country's prior leadership and strength in refugee protection. See, e.g., *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, REGULATIONS.GOV (Jul. 15, 2020) <https://www.regulations.gov/document?D=EOIR-2020-0003-0001>. This roadmap focuses more specifically on the asylum system than some of the existing recommendations. More than 100 organizations, for example, released the "2021 Immigration Action Plan" aimed at "restoring human dignity, recovering the economy, reinforcing American values." See SQUARE SPACE, 2021 IMMIGRATION ACTION PLAN (2020), <https://bit.ly/2DUP2dm> [Hereinafter "2021 Immigration Action Plan"].

through legislation, including the creation of an independent immigration court system. This part discusses the myriad ways in which the Trump Administration has attacked the asylum system under six broad categories:

A. Border Policies Constricting Access to Asylum, including “metering,” family separation and the zero tolerance policy, Migrant Protection Protocols, Prompt Asylum Claim Review and Humanitarian Asylum Review Process, and Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador;

B. Co-opting the COVID-19 public health crisis to ban migrants and asylum seekers at the Southern Border and beyond, through the COVID-Ban and Title 42 expulsions;

C. Asylum “Bans” 1.0 (barring asylum seekers entering between ports of entry) and 2.0 (transit through a third country);

D. Attorney General Decisions Changing Asylum Law to curtail due process for asylum seekers, increasingly detain asylum seekers, and deny asylum protection to individuals fleeing gender and gang-related violence;

E. Bureaucratic shifts including charging a fee for asylum, restrictions on work authorization, and technical rejections of asylum applications;

F. Sweeping and comprehensive “Death to Asylum” regulations proposed and finalized in 2020, along with six other sets of regulations proposed in less than six months targeting due process and the immigration appellate system.

By discussing these changes, I examine the approach articulated by President Biden in his Immigration Platform,²² the Recommendations set forth by the Biden-Sanders Unity Task Force,²³ the Biden Agenda for Latino Communities,²⁴ and Biden’s June 2020 World Refugee Day statement.²⁵ For each category of detrimental changes made or attempted under the Trump Administration, I highlight steps the Biden-Harris Administration must take,

22. See *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN-HARRIS, www.joebiden.com/immigration (last visited Oct. 25, 2020).

23. See Biden Sanders Unity Task Force Recommendations, *supra* note 5.

24. Biden Latino Agenda, *supra* note 12.

25. Biden Refugee Day Statement, *supra* note 5.

beyond their stated commitments,²⁶ and early actions to meaningfully protect asylum seekers.

A. BORDER POLICIES CONSTRICTING ACCESS TO ASYLUM

Many of the Trump Administration's anti-asylum policies have centered on either blocking access to asylum at the border or deterring asylum seekers from seeking protection in the United States. These changes are discussed in this Part, beginning with "metering" of asylum seekers at the Southern Border, family separation and the zero tolerance policy, the Migrant Protection Protocols, the Prompt Asylum Claim Review and Humanitarian Asylum Review Process, and the Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador.

The Biden-Sanders Unity Task Force recommended ending policies that "deny protected entry to asylum seekers, put them at great risk, and destabilize our neighbors and the broader region. And we will end prosecution of asylum seekers at the border and policies that forced them to apply from 'safe third countries,' which are far from safe."²⁷ Acknowledging this broad goal, after describing the Trump-era policy at issue, each section of this Part of the article proposes what the Biden-Harris Administration must do, beyond initial actions in the months of January and February 2021, to remedy the harms wrought moving forward.

1. METERING OF ASYLUM SEEKERS AT THE BORDER

Prior to the Trump Administration even taking office, advocates at the border reported issues around the "metering" of asylum seekers.²⁸ The reports of this new practice were a foreshadowing of the evil to come. Metering refers to the process where, in the run up to the 2016 elections, Customs and Border Protection

26. As the 2021 Immigration Action Plan articulates, "But that roll back is not enough, [the Biden-Harris Administration] must also undo three decades of an enforcement-only approach to immigration policy with devastating consequences." SQUARE SPACE, 2021 IMMIGRATION ACTION PLAN 2 (2020).

27. Biden Sanders Unity Task Force Recommendations, *supra* note 5.

28. B. SHAW DRAKE ET AL., HUM. RTS. FIRST, CROSSING THE LINE: U.S. BORDER AGENTS ILLEGALLY REJECT ASYLUM SEEKERS 11 (2017), <https://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-linereport.pdf>; *see also* Harris, *supra* note 20.

officials began only processing a limited number of asylum seekers arriving at ports of entry per day.²⁹

In response, “lists” were created in Mexico and waiting asylum seekers obtained a number and then waited, often a period of six to twelve months, for their number to be called.³⁰ CBP is the largest law enforcement agency in the country and yet on some days, CBP accepted no asylum seekers into the United States at the various ports of entry along the southern border.³¹

As Jennifer Lee Koh explains:

[T]he metering policy reflects a deeply substantive revision of the asylum laws through its novel reading of the asylum statute as empowering state officials to prevent people from requesting asylum so long as they have not yet entered a port of entry. But metering is also accompanied by stark procedural flimsiness, resulting in decreased accountability, a minimal record of agency deliberation, and perceptions of illegitimacy.³²

Initially, the Obama Administration and later the Trump Administration denied that metering was even in effect, and later CBP lied about their capacity to process asylum seekers at the border.³³ Over the last four years, the practice has been challenged

29. Bianca Bruno, *Judge Certifies Class Action for Thousands of Asylum Seekers*, COURTHOUSE NEWS (Aug. 6, 2020), <https://www.courthousenews.com/judge-certifies-class-action-for-thousands-of-asylum-seekers/>.

30. The author’s own experience working with metered asylum seekers in Tijuana, Mexico, was that they were waiting, even before the COVID-19 pandemic, for 6-12 months. More information on the lawsuit challenging this practice is available here: <https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers/>; see also Cindy Carcamo, *Must Reads: For many waiting in Tijuana, a mysterious notebook is the key to seeking asylum*, SAN DIEGO UNION TRIB. (July 5, 2018), <https://www.sandiegouniontribune.com/news/california/la-me-asylum-seekers-notebook-holds-key-to-entry-20180705-story.html>. For information on lists at other border locations, see *Refugee Blockade: The Trump Administration’s Obstruction of Asylum Claims at the Border*, HUM. RTS. FIRST (Dec. 11, 2018), <https://www.humanrightsfirst.org/resource/refugee-blockade-trump-administration-s-obstruction-asylum-claims-border-december-2018>.

31. For additional discussion on metering, see Fatma Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 763-68 (2019); see Koh, *supra* note 15, at 34-47.

32. Koh, *supra* note 15, at 37.

33. *CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry*, Off. of Inspector Gen. (Oct. 27, 2020), <https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf>; *Customs and Border Protection Report Reveals*

and its very existence debated in the July 2017 lawsuit, *Al Otro Lado, Inc. v. Kelly*.³⁴ For asylum seekers and the attorneys attempting to represent them at the border, months may pass while the asylum seeker waits for her number to be called in order to go through only the first threshold step of claiming asylum in the United States. These delays were further exacerbated on March 20, 2020, when the White House made an opportunistic move to close the border completely, ostensibly in response to the COVID-19 pandemic.³⁵ Following the closure, CBP entirely stopped processing asylum seekers, waitlists began closing across the border, and many individuals still on the lists left the border region.³⁶ At the time of writing, this policy remains in effect.

Biden specifically committed to ending metering at the border.³⁷ In addition to ending this problematic practice, the Biden-Harris Administration will need to provide accommodations within asylum law for those affected by more than four years of the practice. To start, expediting the process and ensuring that the asylum seekers subjected to metering will not be affected by the other panoply of potential asylum law changes, discussed in this article, will be important. As recommended by the ACLU, the Biden-Harris Administration must take clear action to overhaul training within

Systemic Lies to Asylum Seekers and American Public, Hum. Rts. First (Oct. 30, 2020), <https://www.humanrightsfirst.org/press-release/customs-and-border-protection-report-reveals-systemic-lies-asylum-seekers-and-american>.

34. *Al Otro Lado, Inc. v. Kelly*, 2017 WL 10592130 (S.D. Cal. 2017). See Complaint, *Al Otro Lado, Inc. v. Kelly*, No. CV 17-5111-JFW, 2017 WL 10592130, at *43-48 (C.D. Cal. July 12, 2017); see also Hillel R. Smith, *The Department of Homeland Security's Reported 'Metering' Policy: Legal Issues*, CONG. RESEARCH SERV. (Aug. 13, 2019), <https://fas.org/sgp/crs/homesecl/LSB10295.pdf>.

35. See Cntrs. for Disease Control and Prevention U.S. Dep't of Health and Hum. Servs., Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16,559 (Mar. 20, 2020, extended on April 20 and May 19, 2020); see also Nick Miroff, *Under Trump Border Rules, U.S. has Granted Refuge to Just Two People since Late March, Records Show*, Wash. Post. (May 13, 2020), https://www.washingtonpost.com/immigration/border-refuge-trump-records/2020/05/13/93ea9ed6-951c-11ea-8107-acde2f7a8d6e_story.html.

36. See Stephanie Leutert & Savitri Arvey, *Metering Update*, STRAUSS CTR. FOR INT'L SEC. AND L. (2020), https://www.strausscenter.org/wp-content/uploads/MeteringUpdate_2001123-1.pdf.

37. *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN-HARRIS, www.joebiden.com/immigration (last visited Oct. 25, 2020) ("End the mismanagement of the asylum system, which fuels violence and chaos at the border" and identifying "metering" as a "disastrous policy").

CBP and to remove CBP officers from involvement in asylum processing and detention.³⁸

2. FAMILY SEPARATION AND THE ZERO TOLERANCE POLICY

Asylum seekers were catapulted into the national spotlight in April 2018. That was when the official implementation of former Attorney General Jefferson B. Sessions' zero tolerance and family separation policy began, following a secretive pilot project in El Paso in 2017.³⁹ Sessions announced that there would be "zero tolerance" for the prosecution of migrants "entering without inspection" (crossing the border without appropriate paperwork) and was specifically aware that this would result in the separation of very young children, including infants, from their parents.⁴⁰ Thus, adult asylum seekers who crossed the border between ports of entry were taken into criminal custody and separated from their children, who were designated as unaccompanied children and placed into the custody of the Office of Refugee Resettlement.⁴¹ This ignored international law concerns over the rights of asylum seekers to seek protection through irregular channels.⁴² Not only that, but the Trump Administration had already made it infinitely more difficult to seek asylum at the ports of entry given the metering policy in effect, discussed in the previous section of this Article.

38. ACLU's Immigration Policy Recommendations for the Biden-Harris Administration, Customs and Border Protection Accountability (last visited Jan. 14, 2021), <https://www.aclu.org/other/customs-and-border-protection-accountability>.

39. *President Donald J. Trump Is Acting to Enforce the Law, While Keeping Families Together*, WHITE HOUSE (June 20, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-acting-enforce-law-keeping-families-together/>.

40. Michael D. Shear et al., 'We Need to Take Away Children,' *No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html> (citing a report by the DOJ's own inspector general, making clear that "The department's single-minded focus on increasing prosecutions came at the expense of careful and effective implementation of the policy, especially with regard to prosecution of family-unit adults and the resulting child separations.").

41. *See Ms. L. v. U.S. Immig. & Customs Enft*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

42. *See, e.g.*, Marouf *supra* note 30, at 770-71 (outlining the international law concerns regarding prosecution of asylum seekers for unlawful entry); *see also* Jillian Blake, *Trump Administration's Family Separation Policy Violates International Law*, INTLAWGRRRLS (June 10, 2018), <https://ilg2.org/2018/06/10/trump-administrations-family-separation-policy-violates-international-law/>.

As a result of the “family separation” policy, images of children in cages flooded the media. National outrage led to protests and marches and eventually the June 2018 Presidential Executive Order ending the policy,⁴³ swiftly followed by its court-ordered termination.⁴⁴ In the months that followed, the public learned that the Trump Administration separated more than 5,000 children from their families.⁴⁵ Despite the end of zero tolerance, family separations continued to occur for reasons of supposed child welfare. For similar reasons, family separation existed on a much smaller scale prior to zero tolerance in April 2018⁴⁶ and continues to occur at several points in the immigration system.⁴⁷ More than two years later, in October 2020, the ACLU shared that the government still had not located the whereabouts of the parents of 545 children.⁴⁸ An Office of Inspector General report issued in January 2021 made clear the depth of the disregard for children and families, concluding that the “single-minded focus on increasing immigration prosecutions came at the expense of careful and appropriate

43. Exec. Order No. 13,841, 83 Fed. Reg. 29, 435 (June 20, 2018). For more discussion of the policy, see Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585, 604-06 (2019).

44. *Ms. L. v. U.S. Immig. & Customs Enft*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018).

45. Beth Van Schaack, *New Proof Surfaces That Family Separation Was About Deterrence and Punishment*, JUST SEC. (Nov. 27, 2018), <https://www.justsecurity.org/61621/proof-surfaces-family-separation-deterrence-punishment/>.

46. See, e.g., WOMEN’S REFUGEE COMM’N ET AL., *BETRAYING FAMILY VALUES: HOW IMMIGRATION POLICY AT THE UNITED STATES BORDER IS SEPARATING FAMILIES* (2017), https://www.lirs.org/assets/2474/lirs_betrayingfamilyvalues_feb2017.pdf (detailing the various ways in which families were being separated in 2016 and before).

47. See, e.g., THE YOUNG CRT., *FAMILY SEPARATION IS NOT OVER* (2020), <https://www.theyoungcenter.org/report-family-separation-is-not-over>; see Katie Shepherd, *The Government Said It Wouldn’t Separate Families at the Ports of Entry. It was Lying.*, IMMIGR. IMPACT (June 10, 2020), <https://immigrationimpact.com/2020/06/10/family-separation-port-of-entry/#.X5Wr3y9h2gR>; *Ms. L. v. U.S. Immig. & Customs Enft*, 415 F. Supp. 3d 980, 986-87 (S.D. Cal. 2020) (“Consistent with the Court’s class certification orders and preliminary injunction, Defendants have continued to separate parents and children crossing the border when there are concerns about parentage, the parent has a criminal history or communicable disease (or long-term medical need), or the parent is unfit or presents a danger to his or her child or others. During the initial reunification process of approximately 2,814 families, Plaintiffs reported Defendants had excluded only twenty-nine parents from the class based on the factors identified in the Court’s orders. Plaintiffs assert the number of parents who have since been excluded from the class in the year following issuance of the preliminary injunction stands at approximately 1,000.”)

48. Caitlin Dickerson, *Parents of 545 Children Separated at the Border Cannot Be Found*, N.Y. Times (Oct. 21, 2010), <https://www.nytimes.com/2020/10/21/us/migrant-children-separated.html>.

consideration of the impact of family unit prosecutions and child separations.”⁴⁹

More recently, in 2020, ICE gave detained families a choice between remaining in detention with their children indefinitely, facing the risk of exposure to COVID-19, or allowing for release of the children without their parents, leading to indefinite family separation.⁵⁰ ICE failed to comply with a summer 2020 order in the *Flores* case to release children from family detention centers within twenty-one days by releasing the children along with their accompanying parents.⁵¹ Instead, ICE has forced parents to choose between protecting their child from COVID-19, but being separated from their child, or remaining with the parent in detention.⁵² Also ostensibly due to the pandemic, the Trump Administration suspended processing of I-730 family reunification petitions for asylee and refugee relatives, exacerbating the prolonged separation of immediate family members.⁵³

On the campaign trail, Biden committed to ending family separation. Indeed, during the final presidential debate on October 23, 2020, Biden said that the policy “violates every notion of who we are as a nation.”⁵⁴ The Biden-Sanders Unity Task Force

49. OFF. OF INSPECTOR GEN., REVIEW OF THE DEPARTMENT OF JUSTICE’S PLANNING AND IMPLEMENTATION OF ITS ZERO TOLERANCE POLICY AND ITS COORDINATION WITH THE DEPARTMENTS OF HOMELAND SECURITY AND HEALTH AND HUMAN SERVICES (2021), <https://oig.justice.gov/reports/review-department-justices-planning-and-implementation-its-zero-tolerance-policy-and-its> (finding that the Office of the Attorney General “failed to effectively prepare for, or manage, the implementation of the zero-tolerance policy.”)

50. Katy Murdza, *Ice Tells Parents to Separate from Their Children or Risk Indefinite Detention Together*, *Immigr. Impact* (May 20, 2020), <https://immigrationimpact.com/2020/05/19/ice-binary-choice/#.X5WtFC9h2gR>.

51. The *Flores* Settlement was an agreement reached between the U.S. government and advocates for immigrant children in immigration custody that set up, in 1997, minimum standards for the treatment and care of children held by the U.S. in immigrant detention. See Settlement Agreement at 12–18, *Flores v. Reno*, No. 2:85-CV-04544 (C.D. Cal. filed Jan. 1, 1997), https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf.

52. Priscilla Alvarez & Geneva Sands, *Immigrant Families in Detention Have Until Friday to Make a Difficult Decision*, *CNN* (July 14, 2020), <https://www.cnn.com/2020/07/14/politics/immigrant-families-ice-detention/index.html>.

53. *Phased Resumption of Routine Visa Services*, U.S. DEPT. OF STATE (July 14, 2020), <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html>.

54. See *Biden Hits Trump on Migrant Family Separation Asylum Policies While Trump Touts Border Record*, *U.S. NEWS*, (Oct. 23, 2020), <https://www.usnews.com>

recommendations explicitly prioritize family reunification for children still separated from their families.⁵⁵ True to his campaign promise, Biden has set up an Interagency Task Force on the Reunification of Families, led by longtime advocate for immigrant women, girls, and families, Michelle Brané.⁵⁶

Beyond working to reunify the families separated under the zero tolerance policy and provide reparations, the Biden-Harris Administration must ensure no further *de facto* family separations through detention and deportation policies that separate parents from their children. This is in line with Biden's immigration platform, which commits to "enforcing our [immigration] laws without targeting communities, violating due process, or tearing families apart."⁵⁷

Specifically, Biden has signaled a commitment to exempt at least parent asylum seekers (entering with children) from prosecution for illegal entry and re-entry under 8 U.S.C. 1325 and 1326.⁵⁸ This exemption for asylum seekers should be made more broadly and *no* asylum seeker should be penalized for irregular entry, pursuant to article 31 of the Protocol to the UN Convention on the Status of Refugees.⁵⁹

Further, Biden must ensure that the Flores Settlement is honored in letter and spirit. The Flores Settlement sets forth the minimum standards of treatment and care for both accompanied and

/news/elections/articles/2020-10-23/biden-hits-trump-on-migrant-family-separation-asylum-policies-while-trump-touts-border-record.

55. Biden Sanders Unity Task Force Recommendations, *supra* note 5, at 39.

56. Women's Refugee Commission Press Release, *Brané to Head Up New Family Separation Task Force* (March 1, 2021), <https://www.womensrefugeecommission.org/press-releases/michelle-brane-tapped-for-biden-administration/>

57. Biden Immig. Platform, *supra* note 5.

58. *Id.* (signaling an end to "prosecution of parents for minor immigration violations").

59. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 156; *see also* Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, Cambridge Univ. Press (2003). In 1968, the United States signed on to the 1967 Protocol to the Refugee Convention, which incorporates Article 31 of the original Convention. The author also supports the decriminalization of border unauthorized border crossing more broadly. *See* Alex Samuels, *Julián Castro shifted the Democratic conversation about immigration reform. Can it help his bid?*, *Tex. Trib.* (Aug. 29, 2019), <https://www.texastribune.org/2019/08/29/julian-castro-immigration-reform-2020-presidential-candidacy/>.

unaccompanied immigrant and refugee children.⁶⁰ The Biden-Sanders Unity Task Force recommended that the detention of children should be “restricted to the shortest time possible, with their access to education and proper care ensured.”⁶¹ Biden’s immigration platform spoke specifically to the Trump Administration’s attempts to “circumvent the Flores agreement.”⁶² The Biden-Harris Administration should *end* family detention and create a new version of the Family Case Management Program (FCMP).⁶³

The detention of immigrant families was ended once under the Obama Administration in 2009 and yet resurrected by the same Administration in 2014.⁶⁴ Families need not be detained while they await adjudication of their claims.⁶⁵ Indeed, the studies show that over 99% of families appear at their removal proceedings when represented by counsel in a family case management program.⁶⁶ Biden must follow through on the promises made in his Latino Agenda and reinstate a new and improved version of the FCMP.⁶⁷ Not only this, but case management contracts should be awarded to experienced non-profit organizations well-equipped to welcome and support asylum seeking individuals and families while their claims are

60. See Settlement Agreement at 12–18, *Flores v. Reno*, No. 2:85-CV-04544 (C.D. Cal. filed Jan. 1, 1997); see also Lindsay M. Harris, *Learning in Baby Jail: Lessons from Law Student Engagement in Family Detention Centers*, 25 CLINICAL L. REV. 155 (2018); Lindsay M. Harris, *Contemporary Family Detention and Legal Advocacy*, 21 HARV. LATINO L. R. 135, 153 (2018).

61. Biden-Sanders Unity Task Force Recommendations, *supra* note 5, at 40.

62. Biden Immigration Platform, *supra* note 5.

63. WOMEN’S REFUGEE COMM’N, FAMILY CASE MANAGEMENT PROGRAM: WHY CASE MANAGEMENT CAN AND MUST BE PART OF THE U.S. APPROACH TO IMMIGRATION (2019), <https://www.womensrefugeecommission.org/research-resources/the-family-case-management-program-why-case-management-can-and-must-be-part-of-the-us-approach-to-immigration/>.

64. See Lindsay M. Harris, *Contemporary Family Detention*, *supra* note 60, at 135 (internal citations omitted).

65. See *id.* at 143.

66. See, e.g., WOMEN’S REFUGEE COMM’N ET AL., THE REAL ALTERNATIVES TO DETENTION (2019), <https://www.womensrefugeecommission.org/research-resources/alternatives-to-detention/>.

67. Biden Latino Agenda, *supra* note 12 (“Proven alternatives to detention and non-profit case management programs, which support migrants as they navigate their legal obligations, are the best way to ensure that they attend all required immigration appointments. These programs also enable migrants to live in dignity and safety while awaiting their court hearings – facilitating things like doctor visits, social services, and school enrollment for children. Evidence shows that these programs are highly effective and are far less expensive and punitive than detaining families.”).

adjudicated.⁶⁸ Case management should be de-coupled from enforcement and ideally housed outside of ICE and under another agency, potentially FEMA as a temporary measure or the Office of Refugee Resettlement under the Department of Health and Human Services as a long-term solution. The Biden-Harris Administration should partner with advocates to work towards solutions and to gain a robust understanding of what case management services are available and lacking for asylum seekers.⁶⁹

In circumstances where detention of families is absolutely necessary, the Biden-Harris Administration should insist on a return to the original three to five day limit on the detention of immigrant children, initially permitted by the original Flores Settlement.⁷⁰ The Biden-Harris Administration must move away from the approximately three weeks currently contemplated due to court orders in the *Flores* litigation over the prolonged detention of immigrant families.⁷¹ The harm to children from detention, even for short periods with their parents, is well-documented and must be avoided at all costs.

3. MIGRANT PROTECTION PROTOCOLS

On December 28, 2018, the Trump Administration announced the inaptly named “Migrant Protection Protocols,” which required asylum seekers from Spanish-speaking countries (with the addition of those from Brazil, who were added to the Protocols on January 29, 2020, the one-year anniversary of the first person being subject to MPP) to remain in Mexico while they await asylum

68. Refugee resettlement agencies including the International Rescue Committee, HIAS, Lutheran Immigrant and Refugee Services and others would be well-positioned to play this role, along with other organizations like DC-based AsylumWorks, a non-profit organization dedicated to meeting the non-legal needs of asylum seekers. *See, e.g.*, AsylumWorks, www.asylumworks.org (last visited Jan. 31, 2021).

69. American Immigration Council & Women’s Refugee Commission, *Community Support for Migrants Navigating the U.S. Immigration System* (Feb. 2021), https://s33660.pcdn.co/wp-content/uploads/2021/03/Community_Support_for_Migrants_Navigating_the_US_Immigration_System.pdf (sharing the results of a survey of more than 300 service providers nationwide working with immigrants released from detention).

70. *See* Settlement Agreement at 12–18, *Flores v. Reno*, No. 2:85-CV-04544 (C.D. Cal. filed Jan. 1, 1997).

71. *See Flores v. Lynch*, 212 F. Supp. 3d 907, 908 (C.D. Cal. 2015), *aff’d in part, rev’d in part*, 828 F.3d 898 (9th Cir. 2016).

hearings in the United States.⁷² This program forced at least 65,000 individuals to live in dangerous conditions on the Mexican side of the U.S.-Mexico border.⁷³ The human consequences of this policy are devastating. Human Rights First and other organizations documented more than 1,300 cases of targeted violence against MPP asylum seekers waiting in Mexico.⁷⁴ The due process consequences are similarly tragic – over 40,000 individuals in MPP were deported or ordered removed in absentia because they were unable to make it to their immigration court hearings on the U.S. side of the border.⁷⁵

MPP created extremely challenging barriers to basic protections that should be afforded to asylum seekers, including due process and access to counsel. Although MPP was contested in federal court⁷⁶ and successfully enjoined by the Ninth Circuit in March 2020, later that month the Supreme Court stayed the injunction, meaning that MPP remained in effect⁷⁷ until the Biden

72. See AM. IMMIGR. COUNCIL, POLICIES AFFECTING ASYLUM SEEKERS AT THE BORDER (2020), <https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border>.

73. Miriam Jordan, *Appeals Court Allows Remain in Mexico Policy to Continue Blocking Migrants at the Border*, N.Y. TIMES, (Mar. 4, 2020), <https://www.nytimes.com/2020/03/04/us/migrants-border-remain-in-mexico-mpp-court.html>.

74. HUM. RTS. FIRST, A YEAR OF HORRORS: THE TRUMP ADMINISTRATION'S ILLEGAL RETURNS OF ASYLUM SEEKERS TO DANGER IN MEXICO (2020), <https://www.humanrightsfirst.org/sites/default/files/MPP-aYearofHorrors-UPDATED.pdf>; see also HUM. RTS. FIRST, DELIVERED TO DANGER (2020) (recounting 1001 cases of murder, rape, kidnapping, torture, and other violent assaults of MPP asylum seekers as of Feb. 28, 2020), <https://www.humanrightsfirst.org/sites/default/files/PubliclyReportedMPPAttacks12.15.2020FINAL.pdf>; see also AM. IMMIGR. LAWS. ASS'N, AILA POLICY BRIEF: NEW BARRIERS AT THE BORDER IMPEDE DUE PROCESS AND ACCESS TO ASYLUM (2018), <https://www.aila.org/infonet/policy-brief-new-barriers-at-the-border>; see also HUM. RTS. FIRST, HUMANITARIAN DISGRACE: US CONTINUES TO BLOCK, EXPEL REFUGEES TO DANGER (2020), <https://www.humanrightsfirst.org/sites/default/files/HumanitarianDisgrace12.16.2020.pdf>.

75. HIAS, ROADMAP TO RECOVERY: A PATH FORWARD AFTER THE REMAIN IN MEXICO PROGRAM (2021), <https://www.hias.org/publications/roadmap-to-recovery>; see also YAEL SCHACHER, REFUGEES INT'L, BUILDING BETTER, NOT BACKWARD: LEARNING FROM THE PAST TO DESIGN SOUND BORDER ASYLUM POLICY 12 (2020), <https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/5fe0e658233dcd0cb3e355af/1608574555274/Yael+Border+Transition+Brief.pdf>; see also *Migrant Protection Protocols*, U.S. CUSTOMS AND BORDER PATROL, <https://www.cbp.gov/newsroom/stats/migrant-protection-protocols-fy-2020> (last visited Jan. 31, 2021).

76. See Complaint at 3, *Innovation L. Lab v. Nielsen*, No. 3:19-cv-0080Y7, 366 F. Supp. 3d 1110 (N.D. Cal. 2019).

77. *Innovation L. Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *stay granted*, 140 S. Ct. 1564 (2020).

Administration took office and suspended new enrollments in the program.⁷⁸ The Supreme Court was due to hear the case sometime in early 2021,⁷⁹ but the Biden Administration requested that the Court suspend consideration of the lawsuit in February and the Supreme Court granted that request in early March.⁸⁰

Under MPP, asylum seekers languish in Mexico as they await their day in court (further delayed by the Trump Administration's border controls in response to the COVID-19 pandemic).⁸¹ Levels of representation for this population are extremely low – TRAC (a non-profit organization that compiles data on immigration courts and agencies) estimates only 7% of MPP asylum seekers secure legal representation, compared to 60% of those with cases pending in the United States.⁸² Those lawyers who are representing asylum seekers in Mexico face seemingly insurmountable obstacles to maintaining a functional attorney-client relationship.⁸³ The stronghold that cartels wield in many of the border cities creates intense security concerns for attorneys traveling back and forth across the border, and restrictions imposed by U.S. immigration authorities can make meeting with clients before court on the U.S. side of the border almost impossible.⁸⁴

Beginning in March 2020, all hearings for individuals in MPP were indefinitely suspended during the COVID-19 pandemic. In

78. <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program>

79. Adam Liptak, *Supreme Court to Review 2 of Trump's Major Immigration Policies*, N.Y. TIMES (Oct. 19, 2020), <https://www.nytimes.com/2020/10/19/us/supreme-court-trump-wall-asylum.html>.

80. <https://www.scotusblog.com/case-files/cases/pekoske-v-innovation-law-lab/>

81. DHS Announcement to Stakeholders (June 16, 2020) (on file with author) (announcing that MPP hearings are postponed until July 22, 2020).

82. *Details on MPP (Remain in Mexico) Deportation Proceedings*, TRAC IMMIGR. (Dec. 2020), <https://trac.syr.edu/phptools/immigration/mpp/>; see also *Current Representation Rates*, EOIR (Jan 7, 2021), <https://www.justice.gov/eoir/page/file/1062991/download>.

83. See AM. IMMIGR. LAWS. ASS'N, POLICY BRIEF: QUESTIONS REMAIN AFTER AILA JOINS LAREDO TENT COURT TOUR (2020), <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-questions-remain-after-aila-joins> (lamenting a lack of transparency and due process concerns about the tent courts and port courts set up to adjudicate MPP cases).

84. Jack Herrera, *Lawyers Struggle to Remotely Represent Asylum-Seekers Stuck in 'Remain-in-Mexico' Program*, PRI'S THE WORLD (March 2, 2020), <https://www.pri.org/stories/2020-03-02/lawyers-struggle-remotely-represent-asylum-seekers-remain-mexico-program> (highlighting logistical challenges and safety issues for attorneys crossing the border to meet with asylum seekers in Mexico).

July 2020, the Executive Office of Immigration Review (EOIR) announced a policy for resuming the hearings but the strict criteria have not been met (and likely will not be until an end to the pandemic); hearings remain suspended at the time of writing.⁸⁵ Around 23,000 MPP cases are still pending, with 70% of those with postponed MPP hearings waiting in Mexico for a year or more.⁸⁶

True to his immigration platform,⁸⁷ President Biden is working to end MPP.⁸⁸ Although initial numbers of individuals affected by MPP being paroled into the U.S. are low and public health concerns paramount during the COVID-19 pandemic, the safety concerns on the Mexican side of the border necessitate swift action. As recommended by advocacy organizations, the Biden-Harris Administration seems committed to paroling into the U.S. all asylum seekers with pending cases who are waiting in Mexico.⁸⁹ In addition to allowing entry, the Administration must create and fund community-based programs to provide support to these asylum seekers who will largely be released to live with family or friends in the United States.⁹⁰

The Biden-Harris Administration must also create mechanisms to ensure that asylum seekers previously ordered removed after being subjected to MPP are allowed to re-present their claims in U.S. immigration courts.⁹¹ The Biden-Harris Administration

85. *Department of Homeland Security and Department of Justice Announce Plan to Restart MPP Hearings*, DEP'T OF HOMELAND SEC. (July 17, 2020), <https://www.dhs.gov/news/2020/07/17/department-homeland-security-and-department-justice-announce-plan-restart-mpp>.

86. *See also* HUM. RTS. FIRST, HUMANITARIAN DISGRACE: US CONTINUES TO BLOCK, EXPEL REFUGEES TO DANGER 4 (2020), <https://www.humanrightsfirst.org/sites/default/files/HumanitarianDisgrace12.16.2020.pdf>.

87. Biden Immig. Platform, *supra* note 5 (committing to ending the Trump Administration's "detrimental asylum policies . . . starting with Trump's Migrant Protection Protocols . . .").

88. <https://www.ktsm.com/news/border-report/exclusive-el-paso-to-get-25-to-30-asylum-seekers-per-day-once-u-s-rolls-back-mpp-program/>

89. More details on how exactly to do this are available within the Refugees International Report here: Yael Schacher, REFUGEES INT'L, BUILDING BETTER, NOT BACKWARD: LEARNING FROM THE PAST TO DESIGN SOUND BORDER ASYLUM POLICY 17-18 (2020), and also within the ACLU's Immigration Policy Recommendations for the Biden-Harris Administration, focused on asylum border policy. *See Restoring Asylum at the Border*, ACLU, <https://www.aclu.org/other/restoring-asylum-border> (last visited Jan. 31, 2021).

90. *See* 2021 Immigration Action Plan, *supra* note 20; *see also* American Immigration Council & Women's Refugee Commission Report, *supra* note 69.

91. HIAS, *supra* note 75, at 4.

should think creatively and expansively when it comes to asylum protection at the border. HIAS recommends that a certain number of asylum seekers at the border could be processed at consulates and allowed to enter as refugees.⁹² Advocates propose a number of measures to remedy the harm done to asylum seekers by Trump-era policies,⁹³ along with recommendations to prevent a return to similar policies in the future.⁹⁴

4. CHANGES TO THE EXPEDITED REMOVAL SYSTEM, INCLUDING PROMPT ASYLUM CLAIM REVIEW AND HUMANITARIAN ASYLUM REVIEW PROCESS

Congress created expedited removal in 1996 as a “streamlined” process whereby certain noncitizens can be removed from the United States without appearing before an immigration judge.⁹⁵ At the same time, Congress created safeguards to ensure that asylum seekers would be protected and allowed to exercise their Refugee Convention rights to seek asylum protection.⁹⁶ These safeguards, implementing Congress’ protections through regulation, require Customs and Border Protection officers to pose questions to all individuals apprehended in order to determine whether they may be an asylum seeker.⁹⁷ If appropriate, the CBP officer is required to refer the potential asylum seeker to USCIS for a credible or reasonable fear interview, which are meant to determine if they can establish the basis for an asylum case or other humanitarian protection.⁹⁸ USCIS provides guidance and lesson plans for asylum officers administering fear interviews, which the Trump administration quickly amended to make more restrictive in

92. *Id.* at 4. This would enable the individuals admitted as refugees to immediately be eligible for work authorization and assistance from a refugee resettlement agency, including HIAS, and would, as HIAS suggests, avoid increasing the immigration court backlog. *Id.*

93. *Id.* at 7-8.

94. *Id.* at 8 (recommending the issuance of regulations preventing the return of asylum seekers to contiguous territories, increasing overall refugee admissions, restarting the Central American Minors program, convening a Truth Commission to address the harms wrought by the Trump era immigration policies, and working with Congress on long term legislative solutions).

95. 8 U.S.C. §1225(b)(1)(A)(i) (2012).

96. *Id.*

97. *See Harris, supra* note 20, at 22-23.

98. *Id.*

February 2017⁹⁹ and again later in 2018,¹⁰⁰ and which was eventually struck down in fall 2020.¹⁰¹ In addition, the Trump Administration issued new guidance on the internal relocation of asylum seekers within the country of feared persecution which would have made it more difficult to pass a credible fear interview,¹⁰² and temporarily allowed Customs and Border Protection officers to conduct those interviews until that policy was enjoined by yet another federal court.¹⁰³

At the end of 2019, DHS introduced two new programs to hyper-expedite the processing of asylum claims at the Southern border: Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP).¹⁰⁴ While many of the details of these programs are murky, DHS has shared that PACR applies to individuals and families who are subject to the asylum transit ban, discussed below, which requires individuals to have sought asylum

99. See, e.g., Marouf, *supra* note 30, at 738-39 (discussing the February 2017 USCIS revised credible fear lesson plan, creating an arguably heightened standard for credible and reasonable fear interviews, leading to a lower grant rate).

100. See U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., MEMORANDUM: GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH MATTER OF A-B- (2018), (instructing asylum officers on *Matter of A-B-* and *Matter of W-Y-C-* and *H-O-B-*), <https://www.uscis.gov/sites/default/files/document/memos/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.PDF>. This USCIS guidance along with similar guidance issued by the Executive Office of Immigration Review, was struck down by the court in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D. D.C. 2018) which the D.C. Circuit on review upheld in part and reversed in part. See *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020) (upholding district court's injunction of two of the challenged provisions in the guidance as arbitrary and capricious but striking down the remaining two challenged issues).

101. *Kiakombua v. Wolf*, No. 19-cv-1872 (KBJ) (D. D.C. Oct. 31, 2020) (striking down the new guidance as an unlawfully high standard for asylum seekers to clear during initial asylum screenings”).

102. *Asylum and Internal Relocation Guidance*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (July 26, 2019), <https://www.uscis.gov/news/news-releases/asylum-and-internal-relocation-guidance>.

103. Molly O'Toole, *Border Patrol Agents, Rather than Asylum Officers, Interviewing Families for 'Credible Fear'*, L.A. TIMES (Sept. 9, 2019), <https://www.latimes.com/politics/story/2019-09-19/border-patrol-interview-migrant-families-credible-fear>; Eliot Spagat, *Judge Blocks Asylum Screening by Border Protection Agents*, WASH. POST (August 31, 2020), https://www.washingtonpost.com/health/judge-blocks-asylum-screening-by-border-protection-agents/2020/08/31/9ad0e132-ebbc-11ea-bd08-1b10132b458f_story.html.

104. Katie Shepherd, *DHS Reveals New Details of Secretive Asylum Programs PACR and HARP*, IMMIGR. IMPACT (Mar. 10, 2020), <https://immigrationimpact.com/2020/03/11/dhs-asylum-programs-pacr-harp/#.X5W6iS9h2gR>.

in other countries prior to coming to the U.S. for protection.¹⁰⁵ HARP applies to Mexicans arriving at the border as families.¹⁰⁶ Both policies were challenged in federal court and are highly problematic in terms of undermining access to counsel, giving only one calendar day to prepare for a credible or reasonable fear interview.¹⁰⁷ Individuals are also held in CBP custody in conditions that the ACLU describes as a “complete hollowing out” of the asylum screening process, with asylum seekers detained in “dangerous CBP facilities known as “hieleras” (or “iceboxes” for their freezing temperatures).”¹⁰⁸ Despite the challenges, PACR and HARP were both expanded in February 2020¹⁰⁹ and survived at least one legal challenge to date.¹¹⁰ Both PACR and HARP were suspended in March 2020 as a result of the COVID-19 pandemic and the creation of the Title 42 process at the border,¹¹¹ which is discussed in detail in detail Section B below.

Biden’s Immigration Platform references a commitment to ensuring oversight, training, and transparency of ICE and CBP activities.¹¹² This is important, but ICE and CBP officers should be entirely removed from participating in credible fear screening. Ultimately, the government should end expedited removal, which has been documented as deeply problematic time and time again for

105. *CBP Responds to Letter Regarding Concerns Over Truncated Asylum Programs Being Piloted In El Paso TX*, U.S. Customs and Border protection (Feb. 28, 2020), <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/cbp-responds-to-letter-regarding-concerns#:~:text=is%20not%20encrypted-,CBP%20Responds%20to%20Letter%20Regarding%20Concerns%20over%20Truncated%20Asylum,Piloted%20in%20El%20Paso%2C%20TX&text=CBP%20responded%20to%20a%20letter,to%20truncated%20asylum%20review%20processes>.

106. *Supra* note 104.

107. *See* Complaint at 3-5, *Las Ams. Immigrant Advoc. Ctr. v. Wolf* (D. D.C. Dec. 5, 2019).

108. *Ban on Attorney Access for Asylum Proceedings in Inhumane CBP Jails Key to Trump’s Attack on Asylum* ACLU (Feb 26, 2020), <https://www.aclu.org/news/immigrants-rights/ban-on-attorney-access-for-asylum-proceedings-in-inhumane-cbp-jails-key-to-trumps-attack-on-asylum/>

109. Tanvi Misra & Camila DeChalus, *DHS Expands Programs that Fast Track Asylum Processes*, ROLL CALL (Feb. 26, 2020), <https://www.rollcall.com/2020/02/26/dhs-expands-asylum-programs-that-fast-track-deportations/>.

110. *See Las Americas Immigrant Advocacy Center, et al v. Wolf*, No. 19-cv-3640 (KBJ) (D. D.C. 2020).

111. Jorge Loweree, Aaron Reichlin-Melnick and Walter Ewing, *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System* (Sept. 30, 2020), <https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system>.

112. *See* Biden Immig. Platform, *supra* note 5.

asylum seekers and others.¹¹³ In the meantime, consistent with the August 2020 preliminary injunction from San Diego immigration Judge Richard Leon, fully trained asylum officers should conduct credible fear interviews.¹¹⁴ Biden commits to “surge asylum officers to efficiently review the cases of recent border crossers and keep cases with positive credible-fear findings with the Asylum division.”¹¹⁵ Giving the asylum office the authority to fully adjudicate asylum applications for individuals with a positive credible fear determination would streamline the process and help to curtail the backlog in immigration court.

Biden must also specifically commit to ending PACR and HARP and repudiating any similar expedited asylum process conducted at the border. If the expedited removal process continues, USCIS under Biden should issue new guidance, making clear that the credible fear interview is a threshold-screening test, and that the threshold to establish potential asylum eligibility is low. The risks of wrongfully finding no credible fear are too high. In addition to ending PACR and HARP, the Biden-Harris Administration’s Department of Homeland Security must rescind the removal orders issued under the program and instruct officers that those orders should not be reinstated.¹¹⁶ The Biden-Harris Administration must also create mechanisms to ensure that asylum seekers subjected to PACR and HARP are allowed to re-present their claims in U.S. immigration courts.¹¹⁷

113. See Harris, *supra* note 20 (discussing reports from the U.S. Commission on International Religious Freedom, Human Rights Watch, Human Rights First, and others uncovering the deeply problematic implementation of expedited removal from its inception in 1996).

114. Daniel Wiessner, *Judge Blocks Border Patrol Agents from Conducting ‘credible fear’ interviews*, REUTERS (Aug. 31, 2020) <https://www.reuters.com/article/immigration-borderpatrol/judge-blocks-border-patrol-agents-from-conducting-credible-fear-interviews-idUSL1N2FX2DI>.

115. Biden Immig. Platform, *supra* note 5.

116. HUM. RTS. FIRST, WALKING THE TALK: 2021 BLUEPRINTS FOR A HUMAN RIGHTS-CENTERED U.S. FOREIGN POLICY 34 (2020). Reinstatement of expedited removal orders for asylum seekers who enter without inspection is another challenge to asylum protection that should be examined in detail. See Lindsay M. Harris, *Withholding Protection*, 50.3 COLUM. HUM. RTS. L. REV. 1, 50 (2019). (discussing reinstatement of removal as a barrier to meaningful protection and discussing the exercise of prosecutorial discretion along with the use of body worn cameras at the border to ensure that expedited removal processes are properly followed).

117. HIAS, *supra* note 75, at 4.

5. ASYLUM COOPERATIVE AGREEMENTS WITH GUATEMALA, HONDURAS, AND EL SALVADOR

Asylum law permits an exception to asylum being granted for individuals who could be protected by a safe third country through which they passed en route to the United States.¹¹⁸ This requires an agreement between the U.S. and another country where the asylum seeker's life or freedom would not be threatened on account of race, religion, membership in a particular social group, or political opinion, and where she would have access to a full and fair procedure for determining asylum eligibility or its equivalent.¹¹⁹ Prior to the Trump Administration, only one such agreement existed, between the U.S. and Canada, which has a fully functioning refugee determination system.¹²⁰ In recent years, through this "safe third country provision," the Trump Administration entered into attempts to outsource asylum seekers to countries in Central America's Northern Triangle – Honduras,¹²¹ Guatemala,¹²² and El Salvador.¹²³

118. See generally Susan Gzesh, "Safe Third Country Agreements" with Mexico and Guatemala Would be Unlawful, JUST SECURITY (July 15, 2019), <https://www.justsecurity.org/64918/safe-third-country-agreements-with-mexico-and-guatemala-would-be-unlawful/> (discussing 8 U.S.C. § 1158(a)(2)(A)).

119. For an in-depth discussion of safe-third country agreements, see María Teresa Gil-Bazo, *The Safe-Third Country Concept in International Agreements of Refugee Protection: Assessing State Practice*, 33 NETH. Q. HUM. RTS. 42 (2015).

120. See *supra* note 14 (explaining that the Canadian Constitutional Court recently found that agreement invalid because of U.S. failure to provide protection to asylum seekers).

121. DEP'T OF HOMELAND SEC., FACT SHEET: DHS AGREEMENTS WITH GUATEMALA, HONDURAS, AND EL SALVADOR (2019), https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf (reflecting that an ACA was signed with Honduras on Sept. 25, 2019); Molly Hennessey-Fiske & Molly O'Toole, *U.S. to Send Asylum Seekers to Honduras, Bypassing American System*, L.A. TIMES: WORLD & NATION (Dec. 16, 2019), <https://www.latimes.com/world-nation/story/2019-12-16/us-poised-to-send-asylum-seekers-to-honduras>.

122. Agreement on Cooperation Regarding the Examination of Protected Claims, U.S.-Guat., July 26, 2019, T.I.A.S. No. 19-1115.

123. DEP'T OF HOMELAND SEC., *supra* note 118 (reflecting that an ACA was signed with El Salvador on Sept. 20, 2019); Nick Miroff, *Trump Administration Reaches Deal to Send Asylum Seekers to El Salvador in an Effort to Deter Migrants from Entering the United States*, WASH. POST (Sept. 20, 2019), https://www.washingtonpost.com/immigration/trump-administration-reaches-deal-to-send-asylum-seekers-to-el-salvador-in-an-effort-to-deter-migrants-from-entering-the-united-states/2019/09/20/17350a16-dbbd-11e9-ac63-3016711543fe_story.html; Agreement Between the Government of the United States of America and the Government of the Republic of

Between November 21, 2019, and March 16, 2020, the U.S. transferred 939 Hondurans and Salvadoran asylum seekers to Guatemalan custody, the majority of them women and children.¹²⁴ The agreements with El Salvador and Honduras were just beginning the initial phases of implementation when the COVID pandemic hit the United States.¹²⁵ The policies were challenged in court and litigation was ongoing¹²⁶ until the Biden State Department suspended the agreements in February 2021.¹²⁷

Many asylum seekers are fleeing transnational criminal organizations, including Mara-Salvatrucha (MS-13) and M-18, which operate with near impunity across the porous borders in Central America.¹²⁸ Therefore, other Central American countries, where law enforcement systems are similarly ineffective, will not be able to protect asylum seekers.¹²⁹ Likewise, women and children are specifically at risk of cross-border targeting because of the deeply

El Salvador for Cooperation in the Examination of Protection Claims, 85 Fed. Reg. 83,597 (Dec. 22, 2020).

124. HUM. RTS. WATCH, DEPORTATION WITH A LAYOVER: FAILURE OF PROTECTION UNDER THE US-GUATEMALA ASYLUM COOPERATIVE AGREEMENT 3 (2020), <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative>.

125. *Id.* at 4, n.13; see also Nick Miroff, *El Salvador ready to accept asylum seekers sent from U.S. border, DHS says*, Wash. Post (Dec. 15, 2020), https://www.washingtonpost.com/immigration/el-salvador-asylum-us-border/2020/12/15/2a1f682a-3f2a-11eb-a402-fba110db3b42_story.html (sharing that the ACA with El Salvador was finalized); *U.S.: Abusive Transfers of Asylum Seekers to Guatemala*, HUM. RTS. WATCH (May 19, 2020), <https://www.hrw.org/news/2020/05/19/us-abusive-transfers-asylum-seekers-guatemala> (“Transfers of non-Guatemalans to Guatemala under the agreement were suspended on March 16, 2020 in response to the Covid-19 pandemic.”).

126. See generally Complaint at 1-6, *U.T. v. Barr*, No. 20-00116 (D. D.C. Jan. 15, 2020), <https://www.aclu.org/legal-document/complaint-ut-v-barr>.

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

128. See generally TAMARYN NELSON & HAJAR HABBACH, “IF I WENT BACK, I WOULD NOT SURVIVE.” ASYLUM SEEKERS FLEEING VIOLENCE IN MEXICO AND CENTRAL AMERICA (2019), https://phr.org/wp-content/uploads/2019/10/PHR-Asylum-Seekers-Fleeing-Violence-Report-October-2019_FINAL_English.pdf; Sofía Martínez, *Today’s Migrant Flow Is Different: Poverty has driven many previous waves of migrants from their homes. What’s new now is the rise of the gangs*, THE ATLANTIC: GLOBAL (June 26, 2018), <https://www.theatlantic.com/international/archive/2018/06/central-america-border-immigration/563744/>.

129. Robbie Whelan, *Why Are People Fleeing Central America? A New Breed of Gangs Is Taking Over*, WALL ST. J. (Nov. 2, 2018), <https://www.wsj.com/articles/pay-or-die-extortion-economy-drives-latin-americas-murder-crisis-1541167619>.

engrained ideology of *machismo* which underlies much violence against women and children in the region.¹³⁰ Similarly, LGBTQ+ asylum seekers face region-wide stigma and persecution.¹³¹ Even those asylum seekers who may not face a personalized risk based on their original reasons for fleeing their home countries are often targeted simply for being migrants in the region.¹³² None of the three countries have robust protection systems to process and provide meaningful protection to asylum seekers in the Northern Triangle countries of Guatemala, Honduras, and El Salvador.¹³³ Finally, the U.S. government has repeatedly warned its own citizens in recent years about a lack of safety and advised against travel

130. U.N. HIGH COMM'R FOR REFUGEES REG'L OFF. FOR THE U.S. & CARIBBEAN, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION, <https://www.unhcr.org/56fc266f4.html>; U.N. HIGH COMM'R FOR REFUGEES, WOMEN ON THE RUN: FIRSTHAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO (2015), <https://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>. In addition, "the Central America 4 Border Control Agreement between Nicaragua, El Salvador, Honduras, and Guatemala establishes free movement for its citizens across their borders." U.S. EMBASSY IN NICARAGUA: IMMIGRATION LAWS, <https://ni.usembassy.gov/u-s-citizen-services/citizenship-services/immigration-laws/> (last visited Oct. 25, 2020).

131. Molly Hennessy-Fiske, *For Transgender Migrants Fleeing Death Threats, Asylum In the U.S. is a Crapshoot*, L.A. TIMES: WORLD & NATION (Oct. 29, 2019), <https://www.latimes.com/world-nation/story/2019-10-29/trump-administration-returns-vulnerable-lgbt-asylum-seekers-to-mexico>; HRC Staff, *The Crisis at the Border is an LGBTQ Issue: Here's Why*, HUMAN RIGHTS CAMPAIGN (Nov. 30, 2018), <https://www.hrc.org/news/the-crisis-at-the-border-is-an-lgbtq-issue-heres-why> (discussing high levels of homophobia and violence against LGBTQ communities in Central America); see also HUMAN RIGHTS WATCH, "EVERY DAY I LIVE IN FEAR": VIOLENCE AND DISCRIMINATION AGAINST LGBT PEOPLE IN EL SALVADOR, GUATEMALA, AND HONDURAS, AND OBSTACLES TO ASYLUM IN THE UNITED STATES (2020), <https://www.hrw.org/report/2020/10/07/every-day-i-live-fear/violence-and-discrimination-against-lgbt-people-el-salvador#> (discussing the ways in which laws and policies fail to protect LGBT people from violence and discrimination).

132. See, e.g., ANNA GALLAGHER, CATHOLIC LEGAL IMMIGR. NETWORK, PUBLIC COMMENT OPPOSING PROPOSED RULES ON ASYLUM 39 (2020), <https://cliniclegal.org/resources/asylum-and-refugee-law/clinic-submits-comments-proposed-rule-would-gut-asylum-protections>.

133. See, e.g., HUM. RTS. WATCH, DEPORTATION WITH A LAYOVER: FAILURE OF PROTECTION UNDER THE US-GUATEMALA ASYLUM COOPERATIVE AGREEMENT (2020), <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative> (detailing problems accessing the Guatemalan asylum system, lack of support for asylum seekers in the process, and security concerns underlying reluctance to actually apply for asylum in Guatemala, and Guatemala's lack of capacity to provide meaningful protection); See *Asylum Cooperative Agreement Backgrounder*, JUST. FOR IMMIGRANTS, <https://justiceforimmigrants.org/what-we-are-working-on/asylum/asylum-cooperative-agreement-backgrounder/> (last visited Dec. 28, 2020).

within the region, demonstrating the known dangerous conditions to which migrants are continually subjected.¹³⁴

Although Biden did not explicitly commit to ending the Asylum Cooperative Agreements on the campaign trail, the same values driving Biden's commitment to end MPP¹³⁵ put an end to the ACAs. Biden's February 2, 2021 Executive Order instructed the Department of State to revisit the agreements¹³⁶ and a few days later, the State Department terminated to the agreements.¹³⁷ In ending the ACAs, Biden should reinstate the Central American Minors program (CAM), allowing for safe processing of unaccompanied children seeking safety in the U.S. and reunification with U.S. based family members.¹³⁸ Biden instructed the State Department to consider reinstating the CAM program in his February 2, 2021 Executive Order,¹³⁹ and the program is also part of the 2021 Citizenship Act introduced in February 2021.¹⁴⁰ The Biden-Harris Administration must create mechanisms to ensure that asylum seekers already subjected to the ACAs are now allowed to present their claims in U.S. immigration courts.¹⁴¹

Biden has publicly committed to reaffirming the U.S. commitment to supporting the Northern Triangle countries as they struggle to control transnational criminal organization and increase

134. See *Honduras Travel Advisory*, U.S. DEP'T OF STATE (June 24, 2019), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/honduras-travel-advisory.html>; *El Salvador Travel Advisory*, U.S. DEP'T OF STATE (Jan. 29, 2019), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/el-salvador-travel-advisory.html>; *Guatemala Travel Advisory*, U.S. DEP'T OF STATE (Feb. 28, 2019), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/guatemala-travel-advisory.html>; *Mexico Travel Advisory*, U.S. DEP'T OF STATE (Dec. 17, 2019), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>.

135. Biden Immig. Platform, *supra* note 5 (committing to ending the Trump Administration's "detrimental asylum policies . . . starting with Trump's Migrant Protection Protocols . . .").

136. Exec. Order No. 14010, 86 Fed. Reg. 8267, § 4(a)(ii)(D) (Feb. 2, 2021).

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

138. AM. BAR ASS'N, *ACHIEVING AMERICA'S IMMIGRATION PROMISE: ABA RECOMMENDATIONS TO ADVANCE JUSTICE, FAIRNESS, AND EFFICIENCY* 38 (2021).

139. Exec. Order No. 14010, 86 Fed. Reg. 8267, § 4(a)(ii)(D) (Feb. 2, 2021).

140. See Section 2207 Central American Minors Program.

141. HIAS, *supra* note 75, at 4.

access to opportunity, education, and work to lift citizens out of poverty,¹⁴² building this intention into the 2021 Citizenship Act.¹⁴³ These efforts are critically important, but must be paired with meaningful protections to those citizens that the Northern Triangle countries are not able to protect from harm themselves.

B. CO-OPTING THE COVID-19 PUBLIC HEALTH CRISIS TO SHUT DOWN THE ASYLUM SYSTEM

During the COVID-19 pandemic, Trump Administration officials have used the pandemic as an excuse to completely close the Southern Border to asylum seekers, despite a lack of any evidence indicating a heightened risk of infection from the asylum seeking population.¹⁴⁴ Under Title 42 of the Public Health Act, federal officials may exercise unique powers during a pandemic to respond to a public health crisis.¹⁴⁵ Sarah Sherman-Stokes has explored the Department of Homeland Security's use of this provision of law in 2020, in the ways outlined below.¹⁴⁶

In conjunction with an order under Title 42 issued by the Centers for Disease Control and prevention that we later learned was

142. The Biden Sanders Task force commits to addressing the “root causes of migration – violence and insecurity, poverty, pervasive corruption, lack of educational and economic opportunity, and the impacts of climate change.” BIDEN-HARRIS, BIDEN-SANDERS UNITY TASK FORCE RECOMMENDATIONS 41 (2020). Biden's immigration platform commits to pursuing a “comprehensive strategy to strengthen the security and prosperity of Central America in partnership with the people of that regions.” *Id.*

143. *See* Section 2101, Promoting the Rule of Law, Security, and Economic Development in Central America.

144. Miroff, *supra* note 35. The Administration's response to COVID-19 within the immigration system was lacking overall – it took several weeks for the Executive Office of Immigration Review to shut down immigration courts, and even then, they remained open for detained hearings and closed only a couple of weeks at a time. The asylum office closed on March 13 and re-opened with restrictions on June 4. Individuals remained detained by ICE and private prison contractors at the behest of ICE and advocates filed multiple lawsuits across the United States arguing for the release of those most vulnerable to the virus held in civil confinement. *See, e.g.*, UCLA's COVID-19 Behind Bars Data Project and César Cuauhtémoc García Hernández's blog tracking COVID detention litigation. *See also A Long Time Coming: How the Immigration Bond and Detention System Created Today's COVID-19 Tinderbox*, SETON HALL UNIV. SCH. L., IMMIGRANTS' RTS./INT'L HUM. RTS. CLINIC (Apr. 20, 2020), <https://law.shu.edu/docs/publications/clinics/how-immigration-bond-and-detention-system-created-todays-covid-19-tinderbox.pdf>.

145. 42 U.S.C. § 265 (1944); 42 U.S.C. § 268 (1953).

146. Sarah Sherman Stokes, *When Racist Immigration Policies Masquerade as Public Health: Continued Attacks on Central American Asylum Seekers*, 36 GEO. IMMIG. L.J. (forthcoming Fall 2021) (draft on file with author).

issued under express order from Vice President Mike Pence and Stephen Miller,¹⁴⁷ DHS announced on March 20, 2020, that it would bar entry to all migrants at the Southern Border ostensibly to limit the spread of coronavirus.¹⁴⁸ Under this so-called “Title 42 process,” adults, families, and even unaccompanied minor children would be either rapidly returned to Mexico within hours after apprehension or briefly detained and then “expelled” by plane to their home countries, without any opportunity to seek asylum status in the United States.¹⁴⁹ As a result of this policy, over 600,000 people,¹⁵⁰ including unaccompanied immigrant children,¹⁵¹ were returned to their country of origin without the typical due process afforded to asylum seekers.¹⁵² Lawsuits have been brought to challenge these Title 42 expulsions and the undermining of due process for asylum seekers during the pandemic.¹⁵³ As a result, the Trump Administration was enjoined from expelling unaccompanied immigrant children under Title 42,¹⁵⁴ and later the Biden Administration issued a policy exempting unaccompanied children,¹⁵⁵ but

147. Jason Dearan and Garance Burke, *Pence Ordered Borders Closed after CDC Experts Refused*, AP NEWS (Oct. 30, 2020), <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae>; see also by James Bandler et al., *Inside the Fall of the CDC*, PROPUBLICA (Oct. 15, 2020), <https://www.propublica.org/article/inside-the-fall-of-the-cdc>.

148. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060 (Mar. 20, 2020); see also Bill Ong Hing, *supra* note 15.

149. Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY, (Apr. 13, 2020), <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

150. See CBP, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, CBP (Jan. 7, 2021), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>; *FY 2020 Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, CBP (Nov. 20, 2020), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020>.

151. Caitlin Dickerson, *A Private Security Company Is Detaining Migrant Children at Hotels*, N.Y. Times, Aug. 16, 2020, Available at <https://www.nytimes.com/2020/08/16/us/migrant-children-hotels-coronavirus.html>.

152. Jason Dearan and Garance Burke, *supra* note 255; see also *Nationwide Enforcement Encounters*, *supra* note 258.

153. Texas Civil Rights Project v. WOLF et al, Docket No. 1:20-cv-02035 (D. D.C. July 24, 2020); G.Y.J.P. v. WOLF et al, No. 1:20-cv-01511, 2020 U.S. Dist. LEXIS 129513 (D. D.C. Jun 09, 2020); J.B.B.C. v. WOLF et al, Docket No. 1:20-cv-01509 (D. D.C. July 24, 2020).

154. Order, P.J.E.S. v. Wolf, 1:20-cv-02245-EGS-GMH (D. D.C. Nov. 18, 2020);

155. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC) ORDER UNDER SECTIONS 362

many more individuals, including asylum seekers remain subject to the policy.¹⁵⁶ In the first full month of the Biden Administration, more than 1800 migrants and asylum seekers were returned using the Title 42 policy.¹⁵⁷

As discussed above, the pandemic also led to the indefinite suspension of hearings for the asylum seekers waiting in Mexico pursuant to the Migrant Protection Protocols, and although the Department of Justice has outlined criteria for reopening the hearings, those criteria have not yet been met.¹⁵⁸ These measures make little to no practical sense given that millions of other individuals are still permitted to come back and forth across the border.

In addition to the conflicts with domestic law, the border closure to asylum seekers may violate the 2005 World Health Organization International Regulations, to which all 196 member states signed on.¹⁵⁹ The United Nations High Commission for Refugees has critiqued the decision to shut down the U.S. asylum seeker at

& 365 OF THE PUBLIC HEALTH SERVICE ACT (42 U.S.C. §§ 265, 268): (Feb. 11, 2021) <https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDCPauseNotice-ExceptfromExpulsion.pdf>

156. *Nationwide Enforcement Encounters*, *supra* note 258 (sharing that in each of the first three months of FY2021, DHS has expelled more than 60,000 people at the southern border using Title 42).

157. Monique O. Madan & Jacqueline Charles, *Biden team under fire for deportation uptick, backing Moise as Haiti tensions multiply*, Miami Herald (Feb. 5, 2021) <https://www.miamiherald.com/news/nation-world/world/americas/haiti/article249046215.html> (detailing the removal of more than 100 Haitians pursuant to Title 42).

158. Department of Justice and Department of Homeland Security Announce Plan to Restart MPP Hearings, DEP'T OF JUSTICE (July 17, 2020), <https://www.justice.gov/opa/pr/department-justice-and-department-homeland-security-announce-plan-restart-mpp-hearings> (including that states where MPP hearings are held, California, Texas, and Arizona, must have entered Phase 3 of their reopening plans, the Department of State and CDC must have lowered global health advisories to Level 2, and when DOS and CDC lower their global health advisories to Level 2 for Mexican border states).

159. See WORLD HEALTH ORG, INTERNATIONAL HEALTH REGULATIONS 1 (2005), <https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf;jsessionid=BF68B4A2EBC4F5B16E475896AE34EC10?sequence=1> (aiming to “prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.”).

the border as contrary to international law.¹⁶⁰ Indeed, UNHCR made clear in response to the COVID-19 pandemic that:

[I]mposing a blanket measure to preclude the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against refoulement, would be discriminatory and would not meet international standards, in particular as linked to the principle of non-refoulement.¹⁶¹

Some have sounded alarm bells that this dramatic move could mean the end of asylum in the United States.¹⁶² Others have explained that travel restrictions, unless handled very carefully, may cause a rush for travelers to move from one place to another quickly and lead to chaos which, arguably, helped spread the virus into communities not previously affected.¹⁶³ Martin and Bergman point out that travel restrictions may have some effect in controlling a pandemic, but are only effective if also accompanied “by other public health measures—such as social distancing, hygiene practices, testing, tracing and quarantine for those found positive.”¹⁶⁴ Without this, some of the strictest measures may be taken against migrants, and such travel restrictions, like this ban, “risked undercutting individual rights, and some resulted in scapegoating and discrimination, especially against already deprived and marginalized social groups.”¹⁶⁵ Martin and Bergman conclude that “travel bans can have devastating consequences for people seeking asylum or other protection from life-threatening situations.”¹⁶⁶ Most

160. Nina Lakhani, *US using coronavirus pandemic to unlawfully expel asylum seekers, says UN*, GUARDIAN (Apr. 17, 2020), <https://www.theguardian.com/world/2020/apr/17/us-asylum-seekers-coronavirus-law-un>.

161. U.N. High Commission for Refugees, Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response, (Mar. 16, 2020), <https://www.refworld.org/docid/5e7132834.html>.

162. Jack Herrera & Quito Tsui, *Could Covid-19 Mean the End of Asylum Law in the United States*, THE NATION, (June 3, 2020), <https://www.thenation.com/article/politics/coronavirus-refugee-asylum-law/>.

163. Greg Miller et al., *One final viral infusion: Trump's move to block travel from Europe triggered chaos and a surge of passengers from the outbreak's center*, WASH. POST (May 23, 2020), https://www.washingtonpost.com/world/national-security/one-final-viral-infusion-trumps-move-to-block-travel-from-europe-triggered-chaos-and-a-surge-of-passengers-from-the-outbreaks-center/2020/05/23/64836a00-962b-11ea-82b4-c8db161ff6e5_story.html.

164. Susan Martin & Jonas Bergman, *Shifting Forms of Mobility Related to COVID-19*, 8 (under review) (On file with author).

165. *Id.* at 8.

166. *Id.* at 13.

importantly, these bans pose little to no benefit to public health.¹⁶⁷ In 2020, more than 100 million pedestrians and passengers crossed into the U.S. over the Southern border, despite the pandemic.¹⁶⁸ If this can happen safely, the U.S. should be able to process the comparatively tiny number of asylum seekers safely by using social distancing, testing, and other measures.¹⁶⁹

Along with the COVID ban using Title 42 of the Public Health Act, on December 23, 2020, the Trump Administration issued final regulations¹⁷⁰ targeting asylum seekers using COVID-19 as a pretext.¹⁷¹ As Human Rights First has explained, the health-related rules could bar individuals from both asylum and withholding of removal, potentially even if those individuals were working in essential industries within the United States, such as healthcare, who have been exposed to COVID-19.¹⁷² Similarly, individuals who have contracted COVID-19 while awaiting adjudication of their asylum claims, within or outside an ICE detention center, could be barred, along with those arriving from or traveling through

167. Joanna Naples-Mitchell, *There Is No Public Health Rationale For A Categorical Ban on Asylum Seekers*, JUST SECURITY (April 17, 2020), <https://www.justsecurity.org/69747/there-is-no-public-health-rationale-for-a-categorical-ban-on-asylum-seekers/>; Joe Amon et al., *Letter To HHS Secretary Azar And CDC Director Redfield Signed By Leaders Of Public Health Schools, Medical Schools, Hospitals, And Other U.S. Institutions*, RELIEFWEB (May 18, 2020), <https://reliefweb.int/report/united-states-america/public-health-experts-urge-us-officials-withdraw-order-enabling-mass>.

168. Bureau of Transportation Statistics, *Border Crossing/Entry Data*, <https://www.bts.gov/browse-statistical-products-and-data/border-crossing-data/border-crossingentry-data>.

169. Human Rights First, et al, *Public Health Measures to Safely Manage Asylum Seekers and Children at the Border*, (May 2020), <https://www.humanrightsfirst.org/sites/default/files/PublicHealthMeasuresattheBorder.05.18.2020.pdf>

170. Security Bars and Processing, 85 Fed. Reg. 84, 160 (Dec. 23, 2020).

171. See, e.g., Scott Roehm, “*Trump’s Latest Assault on Asylum has Nothing to Do with National Security or Public Health*,” JUST SECURITY, (July 15, 2020), <https://www.justsecurity.org/71422/trumps-latest-assault-on-asylum-has-nothing-to-do-with-national-security-or-public-health/> (“Depending on the issue and its perceived electoral implications, COVID-19 is either a benign nuisance over which the country must stop fretting, or a catastrophic national emergency that presents an imminent and severe risk to everyone.”).

172. *Trump Administration Expands Health Pretext to Block Asylum Seekers*, HUMAN RTS. FIRST (July 8, 2020), <https://www.humanrightsfirst.org/press-release/trump-administration-expands-public-health-pretext-block-asylum-seekers>. This is, of course, in sharp contrast to France, where immigrant frontline workers in the COVID-19 pandemic are being rewarded with a faster path to citizenship. See *Covid: France Rewards Frontline Immigrant Workers with Citizenship* BBC NEWS (Dec. 23, 2020), <https://www.bbc.com/news/world-europe-55423257>.

countries outside the U.S. where COVID-19 is prevalent.¹⁷³ Finally, asylum seekers would be forced to show that they meet the standard for relief under the Convention Against Torture in the earliest stages of seeking protection and may be transferred to third countries without ever seeing an immigration judge.¹⁷⁴ The government would also potentially be able to extend the ban on asylum beyond COVID-19 to other conditions including gonorrhea, syphilis, and tuberculosis.¹⁷⁵ The Trump Administration's dramatic approach to preventing the spread of COVID-19 in the immigration context was in sharp contrast to its rather lackadaisical approach concerning protection of U.S. citizens.¹⁷⁶ The final regulations were due to go into effect two days after Joe Biden's inauguration on January 20, 2021.¹⁷⁷ The Biden-Harris Administration delayed the effective date for 60 days¹⁷⁸ and President Biden ordered the relevant agencies to develop procedures for processing of asylum claims at U.S. land borders "consistent with public health."¹⁷⁹

While Biden has commented on other ways in which the Trump Administration has used the COVID-19 pandemic to curtail immigration, he has not specifically spoken on the ways in which the Administration is using the pandemic to undermine asylum protection.¹⁸⁰ Biden has already reversed the Trump Administration's April 2020 pause on legal immigration,¹⁸¹ and critiqued

173. *Id.*

174. *Id.*

175. *Id.*

176. Roehm, *supra* note 275 ("Depending on the issue and its perceived electoral implications, COVID-19 is either a benign nuisance over which the country must stop fretting, or a catastrophic national emergency that presents an imminent and severe risk to everyone.").

177. Security Bars and Processing, 85 Fed. Reg. 84,160 (Dec. 23, 2020) (currently codified at 8 C.F.R. 208 (2021) and 8 C.F.R. 1208 (2021)).

178. Security Bars and Processing; Delay of Effective Date; RIN 1615-AC57, Docket No: USCIS 2020-0013; RIN 1125-AB08, A.G. Order No. 4975-2021.

179. Exec. Order No. 14010, 86 Fed. Reg. 8267, § 4(a)(i) (Feb. 2, 2021) (ordering the Secretaries of DHS, the Centers for Disease Control (CDC), and the Department of State (DOS) to work with international and non-governmental organizations to develop appropriate procedures).

180. John Whitesides & Ted Hesson, *Factbox: Trump and Biden Take Sharply Different Paths on Immigration*, REUTERS (July 20, 2020), <https://www.reuters.com/article/us-usa-election-immigration-factbox/trump-and-biden-take-sharply-different-paths-on-immigration-idUSKBN2611VD>.

181. Associated Press, <https://www.nbcnews.com/politics/immigration/biden-lifts-trump-era-ban-blocking-legal-immigration-us-n1258817>

Trump's June 2020 attempt to send international students back to their home countries,¹⁸² but has not made similar statements on the ban at the border or the July 2020 regulations aimed at excluding asylum seekers on public health grounds.¹⁸³ So far, pre-election the Biden campaign indicated that they will "direct the CDC and DHS to review this policy and make the appropriate changes to ensure that people have the ability to submit their asylum claims while ensuring that we are taking the appropriate COVID-19 safety precautions, as guided by the science and public health experts."¹⁸⁴ In line with recent statements and recommendations released by public health experts,¹⁸⁵ along with a call from over 60 members of Congress,¹⁸⁶ Biden must immediately act to re-open the border to asylum seekers and stop the harmful regulations from going into effect. Human Rights First and Refugees International have explored recommendations that take into account both the safety of asylum seekers along with protecting public health,¹⁸⁷ and the Administration should work to implement these recommendations.

C. ASYLUM BANS

Even pre-pandemic, "bans" were a favored tool throughout the Trump Administration¹⁸⁸ Through Presidential Proclamations,

182. John Whitesides & Ted Hesson, *Factbox: Trump and Biden Take Sharply Different Paths on Immigration*, REUTERS (July 20, 2020).

183. Montoya-Galvez, *supra* note 85 ("Mr. Biden's advisers did not address the Centers for Disease Control and Prevention (CDC) order the Trump administration has been using during the pandemic to expel border-crossers, including asylum-seekers, with little to no due process. Before Election Day, Mr. Biden's campaign told CBS News he would direct the CDC to review the policy, which has been challenged in court, to ensure migrants can have their asylum requests reviewed.").

184. Camilo Montoya-Galvez, *How Trump Officials Used COVID-19 to Shut U.S. Borders to Migrant Children*, CBS NEWS (Nov. 2, 2020), <https://www.cbsnews.com/news/trump-administration-closed-borders-migrant-children-covid-19/>.

185. *See, e.g., Public Health Experts Issue Recommendations to Protect Public Health and Lives of Asylum Seekers*, COLUM. MAILMAN SCH. PUB. HEALTH (Dec. 21, 2020), <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-issue-recommendations-protect-public-health-and-lives-asylum-seekers>.

186. Feb. 23, 2021, <https://www.dropbox.com/s/h96ndjuhnh6njy/Wilson%2C%20Meeks%2C%20Jayapal%2C%20Thompson%20Letter%20to%20Mayorkas.pdf?dl=0>

187. HUM. RTS. FIRST, *supra* note 7, at 37 (advocating for 14-day self-quarantine for asylum seekers along with other travelers to the U.S., providing adequate masks and hand sanitizer, screens, and space for social distancing in the asylum-seeking process); *see also* SCHACHER, *supra* note 74.

188. *See generally* SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP (2019); *see also* Eunice Lee, *Non-Discrimination*

executive orders, federal regulations, or a combination of the three, Trump has attempted to curtail access to asylum for individuals seeking protection at our southern border and beyond. This section will discuss what are known as Asylum Bans 1.0 and 2.0 (or “the transit ban”), both of which federal courts ultimately struck down.

1. ASYLUM BAN 1.0: BARRING ASYLUM SEEKERS ENTERING BETWEEN PORTS OF ENTRY

On November 9, 2018, the Trump Administration attempted to bar eligibility for asylum to individuals who entered the United States between ports of entry,¹⁸⁹ directly defying statutory language stating that all noncitizens within the United States may apply for asylum.¹⁹⁰ This also ignored the many obstacles to an asylum seeker actually presenting at ports of entry, including the above mentioned “metering” system, illegal turn backs at the border¹⁹¹ and wait times that stretch into several-month-long stints of perilous life at the border. This ban was enjoined through nationwide litigation under *East Bay Sanctuary v. Trump* and, at the time of writing, the preliminary injunction remains in effect.¹⁹²

While Asylum Ban 1.0 was blocked by the courts, the ban itself was yet another attempt by the Trump Administration to undermine protection for asylum seekers. Separately, regulations currently enjoined but previously set to go into effect on January 11, 2021, would have created a discretionary bar to asylum for

in Refugee and Asylum Law (Against Travel Ban 1.0 and 2.0), 31 GEO. IMMIGR. L. J. 459 (2017) (discussing the travel bans broadly).

189. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations, 83 Fed. Reg. 55,934, 55,939 (Nov. 9, 2018) (barring asylum to anyone in violation of Presidential Proclamation); Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661, 57,663 (Nov. 15, 2018) (temporarily suspending entry to any non-U.S. citizen or non-lawful permanent resident seeking to enter outside ports of entry).

190. 8 U.S.C. § 1158(1)(a) (2020) (“Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title”).

191. See Harris, *supra* note 20, at 50.

192. On February 28, 2020, the Ninth Circuit affirmed the preliminary injunction ordered by the district court in *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1284 (9th Cir. 2020); see also *O.A. v. Trump*, 404 F. Supp. 3d 109, 160 (D. D.C. 2019) (also raising a successful challenge to the ban); see also Sarah Sherman-Stokes, *supra* note 44, at 606; Koh, *supra* note 15, at 38-43.

asylum seekers who entered without inspection, attempting to achieve through regulation what the Trump Administration failed to do through Presidential Proclamation.¹⁹³

2. ASYLUM BAN 2.0 - TRANSIT BAN – BARRING ASYLUM TO INDIVIDUALS WHO TRANSITED THIRD COUNTRIES BEFORE ARRIVING AT THE SOUTHERN BORDER

In July 2019, the Trump Administration made yet another sweeping attempt, through new regulations, to ban certain categories of asylum seekers from accessing protection.¹⁹⁴ This bar targeted individuals arriving at the U.S.-Mexico border after July 16, 2019, who transited at least one other country and who cannot show that they have applied for and been denied protection in at least one other country.¹⁹⁵ This broad ban applied even to unaccompanied minors and children,¹⁹⁶ who are sometimes exempt from other arcane provisions of asylum law.¹⁹⁷ The only exceptions were for asylum seekers who could demonstrate that they were a victim of a “severe form of trafficking in persons,”¹⁹⁸ or that they had applied for protection in at least one other country and received a final denial of that protection, or Mexican asylum seekers generally. The ban did not apply to asylum seekers arriving at airports or at the U.S. Northern border with Canada.¹⁹⁹ Thanks to litigation efforts, the transit ban also did not apply to individuals who were “metered” when attempting to make an asylum claim at the U.S. Southern border prior to July 16, 2019.²⁰⁰

193. *See generally* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264 (proposed June 15, 2020) (currently codified at 8 C.F.R. pt. 208, 235, 1003, 1208, 1235). These regulations have been challenged in federal court *See* Complaint, Pangea Legal Services v. DHS, No. 3:20-cv-09253 (N.D. Cal. Dec. 21, 2020); Hum. Rts. First v. Wolf, No. 1:20-cv-3764 (D. D.C. Dec. 21, 2020); Immigration Equality v. DHS, No. 3:20-cv-09258 (N.D. Cal. Jan. 8, 2021)

194. *See generally* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (currently codified at 8 C.F.R. §§ 208, 1003, 1208).

195. *Id.*

196. *Id.*

197. *See generally* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 122 Stat. 5044 (2008).

198. 8 C.F.R. § 214.11 (2020).

199. *Id.*

200. *See* *Al Otro Lado v. McAleenan*, 423 F. Supp. 3d 848 (S.D. Cal. Nov. 19, 2019); *see also* AM. IMMIGR. COUNCIL ET AL., FEDERAL COURT’S PRELIMINARY INJUNCTION RESTORES ASYLUM ELIGIBILITY FOR ASYLUM SEEKERS TURNED BACK AT PORTS OF ENTRY BEFORE JULY 16, 2019: FREQUENTLY ASKED QUESTIONS (2020), <https://www.amimmigrationcouncil.org/2020/07/16/federal-court-preliminary-injunction-restores-asylum-eligibility-for-asylum-seekers-turned-back-at-ports-of-entry-before-july-16-2019-frequently-asked-questions/>

The transit ban was challenged in federal court²⁰¹ and eventually overruled in July 2020.²⁰² The ban was in place, however, for a year, and during that time dramatically undermined protection for asylum seekers at the border and within the U.S.²⁰³ The Trump Administration sought to impose the same ban by requiring travel through other countries before seeking asylum in the U.S. as a “significantly adverse” negative discretionary factor that adjudicators would be required to consider under another set of proposed regulations – known as the “death to asylum” regulations and discussed later in this article.²⁰⁴ Despite the interim rules being enjoined,²⁰⁵

[//www.americanimmigrationcouncil.org/sites/default/files/other_litigation_documents/challenging_custom_and_border_protections_unlawful_practice_of_turning_away_asylum_seekers_faq.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/other_litigation_documents/challenging_custom_and_border_protections_unlawful_practice_of_turning_away_asylum_seekers_faq.pdf).

201. See *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 935-36 (N.D. Cal. 2019) *aff'd* 964 F.3d 832 (9th Cir. 2020); see also *I.A. v. Barr*, No. 19-cv-02530, 2019 U.S. Dist. LEXIS 142234, (D. D.C. Aug. 21, 2019); *Capital Area Immigrants’ Rights Coal. v. Trump*, No. 19-cv-02117, 2019 U.S. Dist. LEXIS 123958, at *1-2 (D. D.C. July 24, 2019) (also challenging the ban’s application to unaccompanied children); *M.M.M. v. Barr*, No. 18-273 LEXIS 34136, at *1 (2d Cir. Oct. 27, 2020) (challenging new policies and directives in credible fear interviews, including the application of the transit ban); see also *Challenging Customs and Border Protection’s Unlawful Practice of Turning Away Asylum Seekers*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers> (last visited Jan. 31, 2021) (discussing the *Al Otro Lado* litigation and the plaintiffs’ success in securing an injunction of the transit ban being invoked against individuals subjected to metering prior to the ban’s effective date of July 16, 2019).

202. *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 857-58 (9th Cir. 2020).

203. Along with applying the bar to the wide-ranging population of asylum seekers the ban was intended to target, individual immigration judges erroneously applied the ban to those who should not be covered by this provision – including Mexican nationals and individuals who entered the U.S. prior to July 16, 2019, but filed their I-589 application for asylum after that date. USCIS asylum officers were instructed to apply this bar at the credible and reasonable fear interview stage. This is not usually the case under 8 C.F.R. Sec. 208.30(e)(5) (explaining that bars to asylum will be adjudicated in Section 240 proceedings in immigration court, rather than by the asylum officer). See also U.S. CUSTOMS AND IMMIGR. SERV., REFUGEE, ASYLUM, AND INTERNATIONAL OPERATIONS DIRECTORATE OFFICER TRAINING ASYLUM DIVISION OFFICER TRAINING COURSE: CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS 36 (2019), https://www.uscis.gov/sites/default/files/document/lesson-plans/Credible_Fear_of_Persecution_and_Torture_Determinations.pdf (“the mandatory bars to asylum and withholding of removal do not apply to credible fear determinations”); see also HUM. RTS. FIRST, ASYLUM DENIED, FAMILIES DIVIDED: TRUMP ADMINISTRATION’S ILLEGAL THIRD-COUNTRY TRANSIT BAN 1 (2020), <https://www.humanrightsfirst.org/sites/default/files/AsylumDeniedFamiliesDivided.pdf>.

204. See *infra*, 57-59.

205. *CAIR Coalition v. Trump* (D.D.C. June 30, 2020) (vacating the interim final rule due to a lack of notice and comment period on the proposed rule).

on December 17, 2020, the Trump Administration, in its waning window of power, went ahead and issued final regulations to enact the transit ban.²⁰⁶ This rule went into effect on January 19, 2021,²⁰⁷ but less than a month later, the Court in *East Bay Sanctuary Covenant v. Barr* granted plaintiffs' motion for a preliminary injunction.²⁰⁸ Biden came into office having promised to end restrictions on asylum seekers who have traveled through other countries.²⁰⁹ Accordingly, at the time of writing, the Biden Administration is reconsidering the rule, and Biden's February 2, 2021 Executive Order requires the Attorney General and DHS secretary to "promptly review and determine whether to rescind" the transit ban rule.²¹⁰

The Biden-Harris Administration must take steps to remedy the harms done by the transit ban imposed from July 2019 to July 2020 by the Trump Administration. This will require comprehensive training and clarity for asylum officers and immigration judges to not only be able to adjudicate ongoing cases, but also to consider ways to remedy removals that have been ordered as well as those already executed pursuant to the transit ban. The Administration should also ensure that asylum seekers subject to the ban but granted withholding of removal or relief under the Convention Against Torture, are allowed to expeditiously reopen their removal proceedings in order to permit an asylum grant.

D. ATTORNEY GENERAL DECISIONS CHANGING THE SHAPE OF ASYLUM LAW

The attacks on the asylum system have come on all fronts and from all agencies within the U.S. government at the behest of Trump and senior administration officials, including White House Senior Policy Adviser, Stephen Miller.²¹¹ The Attorney General

206. Security Bars and Processing, 85 Fed. Reg. 82,260 (Dec. 17, 2020) (to be codified at 8 C.F.R. 208 and 8 C.F.R. 1208).

207. Asylum Eligibility and Procedural Modifications, 85 Fed. Reg. 82,260 (Dec. 17, 2020).

208. N.D. Cal. No. 4:19-cv-04073 (Feb. 2021).

209. See Biden-Harris Campaign Platform, <https://joebiden.com/immigration> (promising to end Trump Administration anti-asylum policies, including those "imposing additional restrictions on anyone traveling through Mexico or Guatemala").

210. Exec. Order No. 14010, 86 Fed. Reg. 8267, § 4(a)(ii)(C) (Feb. 2, 2021).

211. Michael Shear & Maggie Habberman, *Trump's Temporary Halt to Immigration is Part of Broader Plan, Stephen Miller Says*, N.Y. TIMES (Apr. 25, 2020), <https://www.nytimes.com/2020/04/24/us/politics/coronavirus-trump-immigration-stephen-miller.html>; Molly Olmstead, *Stephen Miller: Stopping Asylum Seekers is "All I Care*

(AG) as head of the Department of Justice, wields authority over the Executive Office of Immigration Review, which houses the immigration courts and the Board of Immigration Appeals (BIA) and may certify a case to himself for review.²¹² As Fatma Marouf explains, AG certification of a case from the BIA to himself is a “political tool used to advance the President’s immigration policies.”²¹³

AG Sessions and the Trump era Attorney Generals who followed him used the certification tool with greater frequency than AGs under prior administrations.²¹⁴ Sessions exercised this power seven times in his twenty-one month tenure as AG.²¹⁵ In doing so he: (1) created a pathway to “pretermite” (summarily dismiss) asylum claims and undermine asylum seekers’ right to a full hearing;²¹⁶ (2) curtailed the use of administrative closure as a docket management tool for immigration judges;²¹⁷ (3) heightened the standard for the granting of continuances,²¹⁸ which permit time for asylum seekers and others to find legal representation;²¹⁹ (4) required asylum seekers to precisely delineate their membership in a particular social group(s) that drives their fear of persecution at

About,” SLATE (Feb. 21, 2020), <https://slate.com/news-and-politics/2020/02/stephen-miller-immigration-this-is-my-life.html>; Ellen Cranley, *Stephen Miller Said He Would Be Happy If Not a Single Refugee Came to the U.S.*, BUS. INSIDER (January 29, 2019), <https://www.businessinsider.com/stephen-miller-said-he-would-be-happy-if-not-a-single-refugee-came-to-us-2019-1>.

212. See 8 C.F.R. § 1003.1(h).

213. See Marouf, *supra* note 30, at 743 (citing Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841, 843-47, 920 (2016)).

214. *Id.* at 744.

215. Alison Frankel, *Jeff Sessions’ ‘Unprecedented’ Legacy in Immigration Court*, REUTERS (Nov. 8, 2018), <https://www.reuters.com/article/us-otc-sessions/jeff-sessions-unprecedented-legacy-in-immigration-court-idUSKCN1ND35C> (“[B]y using his authority over immigration courts in unusually aggressive fashion, former AG Sessions managed in less than two years to undo precedent for asylum seekers claiming to have been victims of violence or coercion; to cast doubt on pre-hearing release for asylum seekers in detention; and to restrict immigration judges’ ability to postpone a final reckoning for migrants facing deportation. That’s a notable legacy.”). This is also much more frequently than AGs during the Clinton and Obama Administrations, who used the power only 7 times in 8 years. Jeffrey S. Chase, *The AG’s Certifying of BIA Decisions*, OPINIONS/ANALYSIS ON IMMIGR. L. (Mar. 29, 2018), <https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions>.

216. *Matter of E-F-H-L*, 26 I.&N. Dec. 319, 324 (B.I.A. 2014), *vacated*, 27 I.&N.226 (A.G. 2018).

217. *Matter of Castro-Tum*, 271 I.&N. Dec. 271, 274, 283 (A.G. 2018).

218. *Matter of L-A-B-R*, 27 I.&N. Dec. 245, 245 (A.G. 2018).

219. Marouf, *supra* note 30, at 752.

a very early stage in the proceedings,²²⁰ and (5) undermined the ability of immigration judges and BIA members to terminate or dismiss cases.²²¹

AG William Barr also did not hesitate to certify decisions to himself on asylum issues. In April 2019, Barr ruled that asylum seekers entering without inspection in between ports of entry, much like asylum seekers who seek admission at ports of entry, will be held in detention without the opportunity for an immigration judge bond for the duration of their asylum proceedings.²²²

Four key AG decisions, one from Sessions, two from Barr, and another eleventh hour decision from Acting AG Jeffrey Rosen attempt to undermine asylum protection for individuals fleeing gender-based violence and targeting by transnational criminal organizations. In the summer of 2018, Sessions certified a case from the Board of Immigration Appeals to himself.²²³ In doing so, he overruled a precedential decision issued by the same Board, just four years earlier, in *Matter of A-R-C-G*.²²⁴ *Matter of A-R-C-G* had been the first precedential decision, coming after nearly two decades of litigation and advocacy, to recognize that a survivor of domestic violence could be granted asylum protection in the United States. Ms. A-B- is a woman from El Salvador fleeing domestic violence; AG Sessions used his power to reverse the grant of asylum she had received from the Board of Immigration Appeals.²²⁵ In doing so, he tried to create a blanket rule against granting asylum to individuals fleeing domestic violence or violence perpetrated by transnational criminal organizations.²²⁶ Within the decision he also attempted to elevate the standard for a government being “unwilling or unable” to protect its own citizens from persecution. Historically, this standard required that a government be unwilling or unable to protect its citizens from persecution, but Sessions interpreted this as requiring the government to actually condone the persecutory acts of private non-state actors or to be “completely

220. *Matter of W-Y-C- & H-O-B-*, 27 I.&N. Dec. 189 (B.I.A. 2018).

221. *Matter of S-O-G- & F-D-B*, 27 I.&N. Dec. 462 (A.G. 2018).

222. *Matter of M-S-*, 27 I.&N. Dec. 509 (A.G. 2019).

223. *Matter of A-B-*, 27 I.&N. Dec. 316 (A.G. 2018).

224. *Matter of A-R-C-G-*, 26 I.&N. Dec. 388 (B.I.A. 2014).

225. *Matter of A-B-*, *supra* note 168, at 316.

226. *Id.* at 320 (“Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”).

helpless” to prevent such acts.²²⁷ At the same time, Sessions tried to heighten credibility standards and encourage adjudicators to exercise their discretion not to grant asylum to individuals for a variety of reasons.²²⁸

Following *Matter of A-B-*, USCIS and EOIR issued guidance for implementing the decision, which was challenged in federal court. The district court overturned the guidance as arbitrary and capricious, at least as it applies to credible fear interviews.²²⁹ The D.C. Circuit upheld the district court’s finding that the new requirement that a government condone or be completely helpless to prevent persecutory acts was arbitrary and capricious.²³⁰ Similarly, the Circuit court found that the guidance requiring application of the law of the circuit, rather than the law most favorable to the asylum applicant, within the credible fear interview, was also an impermissible change.²³¹ On appeal, the government conceded that there was no general rule against domestic violence or gang cases, or that particular social groups containing the language “unable to leave” (a relationship) are always impermissible.²³² Accordingly, the Circuit court vacated those portions of the district court’s injunction.²³³ *Matter of A-B- I* (2018) remains in place generally, however, as a precedent decision for immigration judges throughout the country.²³⁴

Nevertheless, the Trump Administration did not give up the idea of quashing gender-based asylum claims after *Matter of A-B- I*. Indeed, Attorney General Bill Barr doubled down on the attack

227. *Matter of A-B-*, 27 I.&N. Dec. 316 (A.G. 2018) (citing *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) (The applicant must show that the government condoned the private actions “or at least demonstrated a complete helplessness to protect the victims”).

228. See Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585, 602-04 (2019) (discussing the *Matter of A-B-* decision); see also Theresa A. Vogel, *Critiquing Matter of A-B: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J. L. REFORM 343 (2019); see also Marouf, *supra* note 30, at 753; Laila L. Hlass, *Adultification of Immigrant Children*, 34 GEO. IMMIGR. L. J. 200 (p. 43-44 on SSRN) (2020).

229. *Grace v. Whitaker*, 344 F. Supp. 3d 95, 146 (D. D.C. 2018).

230. *Grace v. Barr*, 965 F.3d 883, 900, 903 (D. D.C. 2020).

231. *Id.*

232. *Id.* at 906.

233. *Id.* at 909.

234. The case has been limited in certain jurisdictions, including the Ninth Circuit. See *Diaz-Reynoso v. Barr*, 968 F.3d 1070 (9th Cir. 2020) (limiting A-B- in the 9th Circuit).

on female-identifying asylum seekers in September 2020, when he issued the *Matter of A-C-A-A-* decision.²³⁵ In that case, an immigration judge had granted asylum to an applicant, finding that she was persecuted by her parents on account of her membership in a “particular social group” of “Salvadoran females.”²³⁶ AG Barr emphasized the Board of Immigration Appeals should revisit *de novo* all aspects of the asylum claim and not accept the parties’ stipulations on any particular element of the asylum claim.²³⁷ AG Barr stressed the importance to “scrutinize where the asserted particular social group encompasses millions of persons in a particular society.”²³⁸ The decision stresses again the distinction between “private violence” and persecution and attempts to pretend that the well-documented dynamics of machismo in El Salvador are unfounded stereotypes.²³⁹ The *A-C-A-A-* decision represents another attempt to double down on gender-based asylum claims and yet another attack in the onslaught against women asylum seekers.²⁴⁰

Another AG decision, *Matter of L-E-A- II*, issued by Attorney General Barr in the summer of 2019 has also led to mass confusion and inconsistencies nationwide. The *Matter of A-B-* decision, like its kin, *Matter of L-E-A-*, issued by Attorney General Barr in the summer of 2019, has led to mass confusion and inconsistencies in adjudication nationwide. In *Matter of L-E-A*, AG Barr attempted to bypass circuit court precedent and severely restrict access to asylum for individuals seeking protection because of persecution on account of their membership in a family group.²⁴¹ In *Matter of L-E-A- II*, AG Barr overturned a decision issued just two years earlier.²⁴² The original 2017 decision had not granted asylum to the particular asylum seeker, a Mexican national who argued that a dangerous drug cartel threatened his life because of his relationship with his father.²⁴³ In denying asylum to this individual, based

235. See *Matter of A-C-A-A-*, 28 I.&N. Dec. 84 (A.G. 2020).

236. *Id.* at 84.

237. See *Matter of A-C-A-A-*, 28 I.&N. Dec. 84, 84 (A.G. 2020).

238. *Id.*

239. *Id.* at 91.

240. See Lindsay M. Harris, *Trump’s War of Attrition Against Women Asylum Seekers*, MS. MAG. (Oct. 8, 2020), <https://msmagazine.com/2020/10/08/trumps-war-of-attrition-on-women-asylum-seekers/>.

241. *Matter of L-E-A- II*, 27 I.&N. Dec. 581 (A.G. 2019); See also Jeffrey Chase, *L-E-A-, How Much Did the AG Change?*, JEFFREYSCHASE (Aug. 11, 2019), <https://www.jeffreyschase.com/blog/2019/8/11/l-e-a-how-much-did-the-ag-change>.

242. *Matter of L-E-A- II*, *supra* note 186, at 581.

243. *Matter of L-E-A-*, 27 I.&N. Dec. 40, 41 (B.I.A. 2017).

on a lack of nexus of the harm he feared to the protected ground, the Board of Immigration Appeals recognized, echoing all of the federal circuit courts who had spoken on the issue, that family constituted a particular social group – one of the five protected grounds under which an individual may seek asylum.²⁴⁴ The 2019 AG decision attempted to limit the application of family as a particular social group by explaining that most families will not be “inherently socially distinct.”²⁴⁵ Instead, Barr tried to set a new standard where family must stand out in society in some special way, perhaps requiring families to be like the Clintons, Kardashians, or Trumps, in order to be recognized as “socially distinct.” Whether or not Barr met his goal of limiting access to asylum for individuals fleeing persecution based on family membership remains to be seen. Following *Matter of L-E-A- II*, some immigration judges have continued to grant asylum on the basis of family status, while others have denied asylum on the same basis. Thus, the decision has certainly served to muddy the waters of asylum law.

With just three business days left in the Trump Administration, Acting AG Rosen, appointed on December 24, 2020, issued a new decision in *Matter of A-B- II*.²⁴⁶ This decision addresses three issues. First, the AG attempts to solidify a new standard for government inability or unwillingness to protect, claiming that the “complete helplessness” language from the 2018 *Matter of A-B-* decision is consistent with the existing standard and an “interchangeable formulation.”²⁴⁷ Second, the decision conflates two elements of the asylum definition – “persecution” and “government willingness or ability to protect,” ultimately contradicting well-established Supreme Court precedent interpreting the well-founded fear of persecution to require a reasonable possibility of harm, which could be as low as a 1 in 10 chance of harm.²⁴⁸ Third, the decision tries to elevate what it calls a “two-pronged” test to

244. *Id.* at 42.

245. *Matter of L-E-A- II*, *supra* note 186, at 589 (“[I]n the ordinary case, a nuclear family will not, without more, constitute a ‘particular social group’ because most nuclear families are not inherently socially distinct.”).

246. *Matter of A-B-*, 28 I.&N. Dec. 199 (A.G. 2021); in the interim *Ms. A-B-* was denied asylum on remand herself by the Immigration Judge and the BIA affirmed this on June 30, 2020. Email from Blaine Bookey, Legal Director Center for Gender and Refugee Studies (on file with author, Jan. 15, 2021).

247. *Id.* at 199.

248. *INS v. Cardoza Fonseca*, 489 U.S. 421 (1987) The likelihood of persecution should also be below the “more likely than not” standard articulated by the Supreme Court in *INS v. Stevic*, 467 U.S. 407 (1984).

determine the causal connection between persecution experienced or feared and the statutorily protected grounds for asylum.²⁴⁹ This decision was issued as this article went to print and it remains to be seen how it will affect asylum claims, but the author's belief is that this is intended to undermine claims for asylum applicants fleeing harm from non-state actors and arguing that they are members of particular social groups.

In addition to Trump AGs exercising the power to certify a decision and to undo prior Board of Immigration Appeals precedent, the Trump Administration has engaged in highly politicized appointment, assignment, and removal of immigration judges and Board of Immigration Appeals members.²⁵⁰ In July 2020, for example, the Trump Administration announced the appointment of forty-six new immigration judges, almost all of whom either had an immigration enforcement or prosecution background, or no immigration experience whatsoever.²⁵¹ One concerning appointment, for example, was Matthew O'Brien, the former research director of an anti-immigrant think tank, and another is Brandon Bolling, who was vocally anti-gay and anti-Muslim before being appointed as an immigration judge,²⁵² who has been vocally anti-immigrant.²⁵³

The Biden-Sanders Unity Task Force recommendations, along with Biden's immigration platform, commit to reversing "policies that prevent victims of gang and domestic violence, as well as

249. *Matter of A-B*, *supra* note 191, at 207-12.

250. *See* Fatma Marouf, *supra* note 30, at 728-33 (discussing politicized hiring, reassignment, and removal of IJs); *see also* Tanvi Mizra, *DOJ reassigned Career Members of Board of Immigration Appeals*, ROLL CALL, (June 9, 2020) (reassigning Board members who were appointed prior to Trump Administration), <https://www.rollcall.com/2020/06/09/doj-reassigned-career-members-of-board-of-immigration-appeals/>.

251. *EOIR, Notice: EOIR Announces 46 New Immigration Judges*, U.S. DEPT OF JUST. (July 17, 2020), <https://www.justice.gov/eoir/page/file/1295301/download>.

252. *Ex-FAIR Research Director Among 46 New Immigration Judges*, LAW 360 (June 20, 2020), <https://www.law360.com/legalindustry/articles/1293543/ex-fair-research-director-among-46-new-immigration-judges>.

253. *See e.g.*, Matt O'Brien, *The Truth About Zero-Tolerance and Family Separation, What Americans Need to Know*, FAIR (June 19, 2018), <https://www.fairus.org/issue/border-security/truth-about-zero-tolerance-and-family-separation-what-americans-need-know>; *see also* Noah Lanard, *He Defended Anti-Gay and Anti-Muslim Causes. Now He's an Immigration Judge*, MOTHER JONES (July 24, 2020), <https://www.motherjones.com/politics/2020/07/he-defended-anti-gay-and-anti-muslim-causes-now-hes-an-immigration-judge/> (highlighting that Brandon Bolling was also included in the new cohort of immigration judges).

LGBTQ+ people who are unsafe in their home countries from being eligible to apply for asylum.”²⁵⁴ This commitment should ensure that the AG decisions in *Matter of A-B- I & II*, *Matter of L-E-A- II*, and *Matter of A-C-A-A-* are reversed.²⁵⁵ Guidance to asylum officers and immigration judges must make clear that individuals fleeing gender-based and gang-based violence and harm from non-state actors should be considered along with all other asylum seekers. The Biden-Harris Administration should consider adopting UNHCR Guidelines on gender²⁵⁶ and gang related claims,²⁵⁷ and particular social groups more broadly,²⁵⁸ to insulate against future attacks on these types of claims.²⁵⁹ Passing the Refugee Protection Act would also go a long way in providing statutory protection for these categories of asylum seekers.²⁶⁰ President Biden ordered new regulations to be developed in his February 2, 2021 order.²⁶¹

254. *Id.* Biden Immig. Platform speaks to ending “Trump’s detrimental asylum policies” and specifically mentions members of the LGBT community as an “especially vulnerable group in many parts of the world.” (3) The Platform also centers restoring asylum eligibility for domestic violence, committing Biden’s DOJ to “reinstate explicit asylum protections . . . for domestic violence and sexual violence survivors whose home governments cannot or will not protect them.” Biden Immig. Platform, *supra* note 5.

255. The Biden Immigration Platform flags Trump’s attempts to “prevent victims of gang and domestic violence from receiving asylum” as a detrimental policy that will be discontinued. *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN-HARRIS, www.joebiden.com/immigration (last visited Oct. 25, 2020).

256. U.N. High Commission for Refugees, GUIDELINES ON INTERNATIONAL PROTECTION: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (May 7, 2002), <https://www.unhcr.org/3d58ddef4.pdf>.

257. U.N. High Commissioner for Refugees, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, (March 31, 2010), <https://www.refworld.org/docid/4bb21fa02.html>.

258. U.N. High Commission for Refugees, GUIDELINES ON INTERNATIONAL PROTECTION: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (May 7, 2002), <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>.

259. *See, e.g.*, Erica B. Schommer, *Commentary: Five Reforms to Restore and Improve Asylum System*, SAN ANTONIO EXPRESS (Oct. 4, 2020), <https://www.expressnews.com/opinion/commentary/article/Commentary-Five-reforms-to-restore-and-improve-15617553.php> (advocating for the U.S. to adopt UNHCR guidance on particular social group).

260. Refugee Protection Act H.R. 5210, 116th Cong., 1st Spec. Sess. (2019).

261. Exec. Order No. 14010, 86 Fed. Reg. 8267, §4(c)(ii) (Feb. 2, 2021) (ordering the relevant agencies to, “within 270 days of the date of this order, promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a “particular social group. . .”).

Beyond promulgating progressive regulations, the Biden-Harris Administration needs to, as the 2021 Immigration Action Plan proposed, “reimagine the role of the immigration courts.”²⁶² The lack of independent immigration courts leaves the immigration system vulnerable to the political whims of the executive branch. Case completion goals implemented by the Trump Administration, requiring the completion of 700 cases a year per Immigration Judge, undermine meaningful due process for asylum seekers and immigrants more generally.²⁶³ Beyond appointing new immigration judges and terminating immigration judges who never should have been appointed given clear bias against immigrants and asylum seekers, the Biden-Harris Administration must champion legislation to create an independent immigration court system in order to provide meaningful access to justice and due process for all.²⁶⁴ The Biden-Harris Administration will need to work with Congress to create an independent immigration court, not embedded within the executive branch (the Executive Office of Immigration Review is currently housed within the Department of Justice).²⁶⁵ None of these measures are currently included in the U.S. Citizenship Act of 2021.

To the extent that the Attorney General retains authority over the implementation of our immigration laws, the AG certification process should be revisited. The ABA Commission on Immigration recommends increasing notice, transparency, and opportunity for public comment and is in favor of revising the regulations to

262. See 2021 Immigration Action Plan, *supra* note 20; see also AM. BAR ASS'N, *supra* note 133, at 2-3 (recommending that Congress establish an independent Article I immigration court).

263. Martin Macias Jr., *Trump Administration Sued Over 'Anti-Immigrant' Immigration Courts*, COURTHOUSE NEWS, (Dec 18, 2019) <https://www.google.com/amp/s/www.courthousenews.com/trump-administration-sued-over-anti-immigrant-immigration-courts/>; see also Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NPR (Apr. 3, 2018), <https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges>.

264. HUM. RTS. FIRST, *supra* note 7 at 29, 46-47 (discussing the importance of creating an independent immigration court through legislation but in the meantime working to “remedy politicized hiring, conducting fair and increased hiring and reducing the backlog”).

265. See AM. BAR ASS'N COMM'N ON IMMIGR., REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf.

provide a time limit in terms of how far back an Attorney General can go in certifying a decision.²⁶⁶

The Biden-Sanders Unity Task Force recommendations state that detention of immigrants in general should be a “last resort, not the default,” and presumably this would mean correcting *Matter of M-S-* and the default detention of asylum seekers, along with much needed comprehensive reform, and indeed abolition, of immigration detention.²⁶⁷ The Task Force emphasizes investments in “more effective and cost-efficient community-based alternatives to detention,” as well as ending for-profit detention centers.²⁶⁸ Biden’s Immigration Platform specifically commits to ending for-profit detention centers and focusing on cost-effective alternatives to detention, including case management programs.²⁶⁹ Furthermore, the Task Force also states that a commitment to ensuring that “any facility where migrants are being detained is held to the highest standards of care and guarantees the safety and dignity of families.”²⁷⁰ The Biden-Harris Administration should make a more dramatic shift away from immigration detention, towards a presumption against detention, and ultimately, abolition.²⁷¹

F. BUREAUCRATIC SHIFTS TO MAKE LIFE MORE CHALLENGING FOR ASYLUM SEEKERS IN THE UNITED STATES

In addition to the well-publicized and sweeping actions that the Trump Administration took to curtail access to asylum, the Administration also, through minute regulatory changes and minor tweaks to bureaucratic processes, actively worked to make life more difficult for asylum seekers navigating the process. These measures ranged from finding new ways to reject the initial

266. AM. BAR ASS’N, *supra* note 133, at 8 (advocating for the amendment of 8 C.F.R. Sec. 1003.1(h) to provide notice of AG certification of a case and issue, to allow for public comment and briefing, to release underlying decisions, and to establish a time limit on AG certification of prior decisions).

267. See generally CÉSAR CUAUHTÉMOC & GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019).

268. Biden Sanders Unity Task Force Recommendations, *supra* note 5.

269. Biden Sanders Unity Task Force Recommendations, *supra* note 5 (specifically referencing Lutheran Immigrant and Refugee Services).

270. *Id.*

271. See, e.g., Schommer, *supra* note 204; see also 2021 Immigration Action Plan, *supra* note 20 (advocating for phasing out immigration detention and funding community-based case management programs instead); see also HUM. RTS. FIRST, *supra* note 7, at 39-41; see also AM. BAR. ASS’N, *supra* note 133, at 16-23 (advocating for a presumption against detention).

asylum application, to proposed increases in fees, to eliminating or delaying access to work authorization.

1. DEATH BY A THOUSAND PAPER CUTS: TECHNICAL REJECTIONS OF THE ASYLUM APPLICATION FORM

The Trump Administration made it more difficult to even get an asylum application actually “filed” and received. Around October 2019, attorneys began to experience high levels of persnickety rejections of the I-589 application form to apply for asylum.²⁷² The twelve-page form, available only in English, must be mailed to one of USCIS’ service centers.²⁷³ The rejections were Kafkaesque – rejecting a form solely because the asylum seeker only listed three siblings and failed to write “None” or “N/A” on the fourth blank line provided on the form.²⁷⁴ These rejections continued unabated in the midst of the COVID-19 pandemic – in late May 2020, for example, one attorney received a rejected asylum application solely because he wrote his client’s name in pen, rather than pencil, on the back of the two passport photographs submitted with the applications.²⁷⁵ In June 2020, reports surfaced of rejected I-589s because the form stated N-A (N dash A) instead of N/A (N hyphen A).²⁷⁶ Given that USCIS often took around six to eight weeks to issue a Notice of Deficiency, this also led to substantive delays for the asylum applicant in obtaining work authorization, an even longer wait for the interview, and complications meeting the one

272. Charles Davis, *Bureaucracy as a Weapon: How the Trump Administration is Slowing Down Asylum Cases: US Citizenship and Immigration Services is returning applications over the equivalent of failing to dot an I or cross a T*, GUARDIAN, (Dec. 23, 2019), <https://www.theguardian.com/us-news/2019/dec/23/us-immigration-trump-asylum-seekers>.

273. See *Application for Asylum and for Withholding of Removal*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/i-589> (last visited Feb. 1, 2021). The Trump Administration sought to make this form 16 pages long, with the regulatory changes proposed in June 2020.

274. Catherine Rampell, Opinion, *This latest trick from the Administration is one of the most despicable yet*, WASH. POST, (Feb. 13, 2020), https://www.washingtonpost.com/opinions/the-trump-administrations-kafkaesque-new-way-to-thwart-visa-applications/2020/02/13/190a3862-4ea3-11ea-bf44-f5043eb3918a_story.html.

275. Email correspondence with John Leschak, June 1, 2020 (on file with author).

276. Dree Collopy & Lindsay M. Harris, *USCIS Hypocrisy Reaches New Levels*, AILA THINK IMMIGR. BLOG, (June 30, 2020), <https://thinkimmigration.org/blog/2020/06/30/uscis-hypocrisy-reaches-new-levels/>; Catherine Rampell, Opinion, *Trump Wasted So Much Money Harassing Immigrants that His Immigration Agency Needs a Bailout*, WASH. POST (June 11, 2020), https://www.washingtonpost.com/opinions/trump-is-so-set-on-harassing-immigrants-that-his-immigration-agency-needs-a-bailout/2020/06/11/52c2ae06-ac1b-11ea-9063-e69bd6520940_story.html.

year filing deadline for asylum. Only after advocates challenged the policy in federal district court²⁷⁷ did USCIS agreed to suspend it after December 24, 2020.²⁷⁸

Under Secretary Mayorkas, the Biden-Harris Administration must ensure that applications delayed or rejected during the time period in which the Trump Administration was rejecting asylum applications are fairly treated moving forward.

2. ASYLUM FEE INCREASES

On April 29, 2019, President Trump issued a memo calling for regulations to further change the asylum-seeking process.²⁷⁹ The memo called for regulations that require asylum seekers to pay a fee to apply for asylum and also for their first work permit, and to deny work permits to immigrants who entered the United States between ports of entry without inspection.²⁸⁰

As a result, for the first time ever, USCIS proposed and finalized regulations creating a fee to apply for asylum.²⁸¹ Though a fairly modest sum of \$50, some asylum seekers would doubtless be unable to pay.²⁸² The Executive Office of Immigration Review aims to impose the same fee in immigration court where the applicant is applying for asylum as a defense to removal.²⁸³ In addition, on August 25, 2020, new regulations went into effect requiring asylum seekers, for the first time, to pay an \$85 biometrics fee for the

277. Complaint, *Vangala v. USCIS*, e 3:20-cv-08143 (N.D. Cal Nov. 22, 2020).

278. *AILA Practice Alert: USCIS Agrees to Stop Rejecting Applications and Petitions for Blank Spaces as of December 28, 2020*, AILA Doc. No. 20122100, Am. Immigr. Laws. Ass'n (Dec. 21, 2020), <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/uscis-blank-spaces>.

279. *Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System*, WHITE HOUSE (April 29, 2019), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/>.

280. *Id.* at Sec. 3.

281. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62,280 (Nov. 9, 2019).

282. Lindsay M. Harris & Joan Hodges-Wu, *Asylum seekers leave everything behind. There's no way they can pay Trump's Fee*, WASH. POST, (May 1, 2019), <https://www.washingtonpost.com/outlook/2019/05/01/asylum-seekers-leave-everything-behind-theres-no-way-they-can-pay-trumps-fee/>.

283. Executive office for Immigration Review; Fee Review, 85 Fed. Reg. 11,866, (Feb. 28, 2020).

processing of their work permit applications.²⁸⁴ These regulations have been enjoined by a District Court in Maryland, but only for members of two plaintiff organizations in the class action lawsuit challenging the new regulations.²⁸⁵

Proposed regulations from USCIS in January 2020 also contemplate a fee for asylum seekers for their first work permit, which has historically been free.²⁸⁶ The fee for an employment authorization document is currently \$410.²⁸⁷ Requiring an asylum seeker unable to work and ineligible for any federal (and usually no state) financial assistance to pay is illogical, unless specifically intended to make life more difficult for the asylum seeker. The final fee changes that would have gone into effect on October 2, 2020, would have increased the work permit application fee to \$550 and eliminated fee waivers for asylum seekers for work permits and adjustment of status applications.²⁸⁸ At the time of writing, two federal district courts issued nationwide injunctions to enjoin the fee changes from going into effect pending adjudication of the legal challenges to the final rules.²⁸⁹ The Trump Administration withdrew the Ninth Circuit's rules challenging the injunction of the USCIS fee increases.²⁹⁰

284. USCIS Rule Strengthens Employment Eligibility Requirements for Asylum Seekers, U.S. CITIZENSHIP AND IMMIGR. SEVS. (Jun. 22, 2020), <https://www.uscis.gov/news/news-releases/uscis-rule-strengthens-employment-eligibility-requirements-for-asylum-seekers>.

285. *CASA de Maryland v. Wolf*, No. 8:20-cv-02118-PX, 2020 WL 5500165 (D. Md., Sep. 11, 2020) (enjoining the rule only with regard to members of the Asylum Seeker Advocacy Project and Casa de Maryland. Both organizations have circulated information regarding how asylum seekers can become members). *See also* *AsylumWorks v. Wolf*, No. 1:20-cv-03815 (D. D.C. Dec. 22, 2020) (challenging the new biometrics fee requirement created by the new employment authorization regulations, among other provisions of the regulations).

286. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 4,243 (proposed Jan. 24, 2020).

287. *I-765, Application for Employment Authorization*, <https://www.uscis.gov/i-765>.

288. *Id.*

289. *ILRC v. Wolf*, No. 20-cv-05883, 2020 U.S. Dist. LEXIS 179599 (N.D. Cal. Sept. 29, 2020); *see also* *Northwest Immigrant Rights Project v. United States Citizenship and Immigration Services*, No. 19-cv-03283 2020 U.S. Dist. LEXIS 187410, (D. D.C. Oct. 8, 2020) (granting plaintiffs' preliminary injunction and enjoining final rules from going into effect on October 2, 2020, pending final adjudication of the lawsuit challenging the fee increases).

290. Order Regarding Mandate, *ILRC v. Wolf*, 4:20-cv-05883 (N.D. Cal. Jan 5, 2021), <https://www.courtlistener.com/docket/17465541/109/immigrant-legal-resource-center-v-wolf/>.

Another set of regulations, promulgated in final form to go into effect on January 15, 2021, would have implemented the \$50 fee to apply for asylum in immigration court.²⁹¹ These regulations were also challenged in federal district court and enjoined a few days after implementation.²⁹²

To insulate against future attempts to make asylum seeking more difficult by creating financial barriers to protection, the Biden Administration should consider introducing legislation to prohibit a fee for asylum and ensure that at least first-time work authorization applications are free.

3. BARRIERS TO WORK AUTHORIZATION

The ability to lawfully work is critically important for asylum seekers. Asylum seekers usually flee their home countries with limited resources, often using whatever financial resources they may have to secure their passage to the U.S. and frequently going into debt to do so. They arrive in the U.S. unable to work and generally ineligible for any federal or state financial assistance.²⁹³ Delaying work authorization makes asylum seekers more vulnerable to exploitative employment practices within the United States.²⁹⁴

291. See Executive Office for Immigration Review; Fee Review, 85 Fed. Reg. 82,750 (Dec. 18, 2020).

292. Memorandum & Order at 33, 35, CLINIC v. EOIR, No. 20-cv-03812 (D. D.C. Jan. 18, 2021) (On the asylum fee specifically, the Judge found that “Plaintiffs have not challenged that policy, and, given that the DHS fee is subject to not one but *two* nationwide injunctions, see *Nw. Immigrant Rts. Project*, 2020 WL 5995206; *Immigrant Legal Res. Ctr. v. Wolf*, No. 20-cv-5883, 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020), the court sees no pressing need to enjoin it here.”).

293. In general asylum seekers are ineligible for state assistance and struggle during the asylum-seeking period until they can access employment authorization. See generally, Lindsay M. Harris, *From Surviving to Thriving? An Investigation of Asylee Integration in the United States*, Vol. 40:29, N.Y.U. Rev. of Law & Social Change (2016). One notable exception is the state of Maine, where asylum seekers are eligible for state assistance. Kevin Miller, *Gov Mills Takes Emergency Steps to Allow Asylum Seekers to Qualify for State Assistance*, PORTLAND PRESS HERALD (July 18, 2019), <https://www.pressherald.com/2019/07/18/mills-takes-emergency-steps-to-allow-asylum-seekers-to-qualify-for-ga/>.

294. CTR. FOR GENDER AND REFUGEE STUDIES, ASYLUM PRIORITIES FOR THE NEXT PRESIDENTIAL TERM 4 (2020), https://cgrs.uchastings.edu/sites/default/files/CGRS%20Asylum%20Priorities%20-%20Next%20Term_Nov.%202020.pdf (“Harsh new restrictions on employment eligibility that turn a blind eye to asylum seekers’ need to support themselves have only exacerbated their vulnerability to labor trafficking and other workplace abuses, food insecurity, and homelessness, a policy that serves no one’s interests.”).

Since 1996, asylum seekers have been eligible to apply for a work permit 150 days after filing their asylum applications.²⁹⁵ Those applications were then adjudicated within thirty days.²⁹⁶ The Trump Administration promulgated final regulations to change this.

First, following new regulations, after August 21, 2020, USCIS no longer has to process asylum seeker EADs according to any specific timeline because the regulations removed the thirty-day processing timeline.²⁹⁷ Second, a separate set of regulations that went into effect on August 25, 2020, increased the time period during which an asylum seeker must wait to file for a work permit after submitting the asylum application from 150 to 365 days.²⁹⁸ This second set of more comprehensive regulations also created categories of asylum seekers who are now ineligible to obtain a work permit at all, including certain bars based on criminal convictions,²⁹⁹ as well as asylum seekers who enter without inspection (with limited exceptions), and those who file after the one-year filing deadline (with an exception for unaccompanied minors).³⁰⁰

These regulations, combined, mean that an asylum seeker must wait a full year after entry to apply for a work permit that will be issued whenever the agency feels like it, and almost all asylum seekers who enter the United States without inspection will be ineligible to apply at all. Advocates challenged both sets of regulations affecting employment authorization for asylum seekers in federal court.³⁰¹ The district court in Maryland enjoined the implementation of the new work permit regulations that would have gone into effect on August 21st and 25th, but only as applied to members of two plaintiff organizations, Casa de Maryland and the

295. See Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38,532 (codified at 8 C.F.R. 208 and 8 C.F.R. 274) (discussing prior standards).

296. See *Rosario v. USCIS*, 365 F. Supp. 3d 1156 (W.D. Wash. 2018).

297. 8 Fed. Reg. 37,502-37,546 (June 22, 2020) (eliminating 30-day deadline in 8 C.F.R. § 208.7(a)(1)).

298. See 8 C.F.R. §§ 208.3, 208.4 (2020).

299. *Practice Alert, Proposed Criminal Bars to Asylum: Intersection with New and Proposed Asylum Regulations*, NAT. IMMIGR. PROJECT NAT. LAWS. GUILD (July 9, 2020), https://ninpnl.org/PDFs/practitioners/practice_advisories/crim/2020_09Jul_prop-criminal-bars-asylum.pdf.

300. See 8 C.F.R. § 208.4 (2020).

301. *Complaint, Casa de Maryland et al., v. Wolf*, No. 8:20-cv-02118-PX, 2020 WL 5500165 (D. Md. Sep. 11, 2020).

Asylum Seeker Advocacy Project.³⁰² That litigation, along with a second suit challenging the regulations, is ongoing.³⁰³

4. BIDEN ON BUREAUCRATIC CHANGES TO THE ASYLUM APPLICATION PROCESS AND WORK AUTHORIZATION

Biden has made clear through broad language on the asylum program that he wants to support and welcome asylum seekers. A major part of that effort must be effectively engaging in re-orienting the United States Citizenship and Immigration Services back to its original welcoming mandate and humanitarian mission.

Under increasingly hostile and anti-immigrant leadership, USCIS has, from the top down, engaged in practices to undermine asylum applications. The USCIS under Biden must issue clear agency guidance to officers at service centers reviewing I-589 applications for asylum. The guidance must put an end to the highly technical rejections of asylum applications at USCIS. That standard should be generous – understanding that there is ample opportunity to correct any errors or omissions at the asylum interview. Congress should also play a role here, with appropriations and funding for USCIS conditioned on performance in resolving the extensive backlogs that have grown exponentially under the Trump Administration and ensuring timely issuance of work permits and green cards.³⁰⁴ The Biden-Harris Administration should also consider having USCIS asylum officers adjudicate asylum claims for individuals arriving and seeking asylum in the first instance.³⁰⁵

The recently introduced U.S. Citizenship Act of 2021 would reduce the waiting period for asylum seeker work authorization from 365 to 180 days again.³⁰⁶ This is a step forward but still far

302. *CASA de Maryland v. Wolf*, No. 8:20-cv-02118-PX, 2020 WL 5500165 (D. Md. Sep. 11, 2020); *see also* *AsylumWorks v. Wolf*, *supra* note 229.

303. *AsylumWorks v. Wolf*, *supra* note 229.

304. Alec Cook, *USCIS Wants \$1.2 Billion in Taxpayer Dollars. The Agency Should Do These 3 Things Before Getting a Bailout*, IMMIGR. IMPACT (June 17, 2020), <https://immigrationimpact.com/2020/06/17/uscis-funding-bailout/#.X5XkIC9h2gR>.

305. *See, e.g.*, Erica B. Schommer, *supra* note 204 (advocating for USCIS asylum officers to adjudicate claims in the first instance with referral to an immigration court as needed); *see also* HUM. RTS. FIRST, *supra* note 7, at 29, 45 (also advocating to increase USCIS asylum officer ability to resolve cases at the border); *see also* SCHACHER, *supra* note 74, at 19 (advocating for the same change to be made through a regulation empowering asylum offices to give a full asylum interview and to issue a full asylum grant).

306. *See* Section 4303 of the U.S. Citizenship Act of 2021.

from ideal as asylum seekers are still living in limbo, unable to support themselves and vulnerable to exploitation during this time period. A stronger solution lies in the Asylum Seeker Work Authorization Act of 2019, which reduces the waiting period to 30 days after the filing of the asylum application.³⁰⁷ Better still, the asylum application and work authorization application should be filed concurrently in one form with no waiting period.

Even with the 150-day waiting period to apply, which was accompanied by a 180 days period before which a work permit could actually be granted, realistically this means that by the time an asylum seeker has secured an attorney and submitted the asylum application, they are often unable to work until a year or more after the asylum application is filed. This leaves asylum applicants in limbo, at the mercy of good Samaritans and overstretched non-profit organizations within our communities, and vulnerable to exploitation by employers and others. The 150-day waiting period was instituted in 1996. While asylum applications have risen exponentially in recent years,³⁰⁸ no data actually suggests those higher numbers are because individuals are filing fraudulent asylum applications simply to receive a work permit months down the road. The Biden-Harris Administration should either revisit the overly punitive waiting period to allow asylum seekers to work to provide for themselves, or put in place federal assistance for asylum seekers while they await adjudication of their claims.³⁰⁹ This is especially important given the extreme backlogs at both the asylum office and the immigration courts³¹⁰ – it is critically important

307. HR 2813 - Asylum Seeker Work Authorization Act of 2019: <https://www.congress.gov/bill/116th-congress/house-bill/2813?s=1&r=14>.

308. Manuela Tobias, *Has there been a 1,700 percent increase in asylum claims over the last 10 years?*, POLITICO, (June 21, 2018), <https://www.politifact.com/factchecks/2018/jun/21/donald-trump/1700-percent-increase-asylum-claims/> (affirming that a close to 1700% increase in asylum applications over the period a decade is accurate, but explaining that this rise is due to a number of factors including humanitarian crises in Central America).

309. *See, e.g.*, YAEL SCHACHER, REFUGEES INT'L, BUILDING BETTER, NOT BACKWARD: LEARNING FROM THE PAST TO DESIGN SOUND BORDER ASYLUM POLICY 22 (2020) (“Biden should fulfill his promise of ‘dramatically increasing U.S. government resources to support migrants awaiting assessment of their asylum claims’ by asking Congress to appropriate funds to ensure that asylum seekers have access to housing and health, including mental health services.”).

310. *Immigration Court Case Completion Times Jump as Delays Lengthen*, TRAC (Dec. 21, 2020), <https://trac.syr.edu/immigration/reports/634/> (the immigration “court’s active backlog at the end of November 2020 reached 1,281,586.”).

that asylum seekers are permitted to work while they await the adjudication of their claims.

F. SWEEPING CHANGES TO ASYLUM LAW THROUGH A COMPLEX WEB OF PROPOSED REGULATIONS AIMED AT UNDERMINING ASYLUM PROTECTION

The executive branch issues regulations (or “rules”) through a procedure under the Administrative Procedure Act known as “notice and comment” allowing members of the public to submit their thoughts on proposed regulations within a certain period of time.³¹¹ The Trump Administration has issued proposed regulations directly affecting or including changes to the asylum system at least nineteen times,³¹² including the regulations on employment authorization and fees for asylum, as discussed above,³¹³ but also on the process more generally.³¹⁴

Rules proposed in December 2019 and issued in final form in October 2020,³¹⁵ for example, would have penalized asylum seekers for criminal convictions that are often a byproduct of fleeing from persecution, including using false documents, “illegal” entry or reentry, and harboring.³¹⁶ These regulations would also create broad criminal bars to asylum, allowing for no adjudicator discretion and relegating many asylum seekers to eligibility for lesser forms of protection with higher burdens of proof, such as withholding of removal and protection under the Convention Against Torture.³¹⁷ These regulations were challenged in federal district court and enjoined on November 19, 2020.³¹⁸

311. *A Guide to the Rulemaking Process*, OFFICE FED. REGISTER, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Feb. 1, 2021).

312. Asylum Working Group spreadsheet tracking regulations (on file with author); see also *Tracking the Trump Administration’s Midnight Regulations*, PROPUBLICA (Nov. 25, 2020), <https://projects.propublica.org/trump-midnight-regulations/>.

313. *Infra* pages 53-56.

314. See, e.g., Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69,640 (Dec. 19, 2019).

315. Executive Office for Immigration Review, Establishing Asylum Eligibility, 8 C.F.R. 208.13 (2020).

316. See also *AILA Comment on Proposed Rules on Bar to Asylum Eligibility*, AILA Doc. 20012231, AM. IMMIGR. LAWS. ASS’N (Jan. 17 2020), <https://www.aila.org/infonet/aila-submits-comments-on-proposed-rule-on-bars>.

317. *Id.*

318. *Breaking: Judge Stops Trump Administration Efforts to Bar*

On June 15, 2020, the Trump Administration proposed sweeping and dramatic regulations which would eviscerate asylum protection, with comments due just thirty days later on July 15, 2020.³¹⁹ In response, around 87,000 organizational and individual public comments were submitted critiquing various aspects of the behemoth 161 page notice of proposed rulemaking, including the asylum officer's union,³²⁰ members of Congress,³²¹ and a wide variety of civil society organizations.³²² Advocates penned powerful Op Eds critiquing the proposed regulations,³²³ and asylum seekers and those granted asylum joined the chorus.³²⁴

The regulations sought to codify the previously discussed unsuccessful attempts by the Trump Administration to bar asylum seekers who entered between ports of entry or who transited another country (Asylum Ban 1.0 and 2.0 discussed *infra*). They also

More from Asylum, IMMIGR. DEFENSE PROJECT (Nov. 19, 2020), <https://www.immigrantdefenseproject.org/wp-content/uploads/2020/10/Pangea-Legal-Services-v-dhs-11-19-20-tro.pdf>.

319. An organizational sign on effort led by the Tahirih Justice Center requested a 60-day comment period and garnered 502 signatures, without a response from the Administration.

320. Zolan Kanno Youngs, *Asylum Officers Condemn What They Call Draconian Plans by Trump*, N.Y. TIMES (July 15, 2015), <https://www.nytimes.com/2020/07/15/us/politics/asylum-officers-trump.html>.

321. See Comment from 70 members of Congress.

322. See e.g., Lynn Tramonte, *Push Back on Proposed Rule to Gut Asylum*, INTERFAITH IMMIGR. COALITION (June 26, 2020), <https://www.interfaithimmigration.org/2020/06/26/resources-to-act-push-back-on-proposed-rule-to-gut-asylum-today/>.

323. See, e.g., Nickole Miller, *Trump's New Rules Against Asylum Seekers Are Dire. They must be Challenged*, WASH. POST (June 16, 2020), <https://www.washingtonpost.com/opinions/2020/06/19/we-cannot-let-trump-administration-turn-this-countrys-back-asylum-seekers/>; Natalie Nanasi, "New Trump Immigration Regulations Would Devastate Refuge Pathways," THE HILL, (June 16, 2020), <https://thehill.com/opinion/immigration/502938-new-trump-immigration-regulations-would-devastate-refuge-pathways>; Philip G. Schrag, Op-Ed "The End of Asylum — For Now," THE HILL, (June 16, 2020), <https://thehill.com/opinion/immigration/502881-the-end-of-asylum-for-now>; Bill Frelick, "For World Refugee Day, the US plans to reject them all," THE HILL (June 20, 2020), <https://thehill.com/opinion/civil-rights/503507-for-world-refugee-day-the-us-plans-to-reject-them-all>.

324. Nene Bah & Lindsay Harris, "An American Mother on Asylum: Trump's New Rules Would Have Rewritten My Story," MS. MAG. (July 13, 2020), <https://msmagazine.com/2020/07/13/an-american-mother-on-asylum-trumps-new-rules-would-have-rewritten-my-story/>; Joan Hodges-Wu, *Protecting the U.S. Asylum System Means Saving Lives, Here's How You Can Help*, WASH. POST (July 15, 2020), <https://www.washingtonpost.com/opinions/2020/07/15/protecting-us-asylum-system-means-saving-lives-heres-how-you-can-help/> (sharing the story of Nigerian LGBT asylum seeker, Asuquo).

put into regulatory form the Attorney General decisions curtailing asylum for those fleeing gender-based harm and harm perpetrated by private actors, including *Matter of A-B- II* and *Matter of L-E-A-II*. The regulations further gut due process protections for asylum seekers in immigration court, including allowing for the pretermis-sion of claims before a meaningful day in court. The standards for credible and reasonable fear interviews at the border are further heightened, and confidentiality protections for information shared in asylum interviews are undermined.

The ways in which the proposed regulations seek to under-mine asylum protection, along with the racially motivated animus behind them, could be discussed in a book, rather than an arti-cle.³²⁵ Advocates hoped that the voluminous (more than 87,000) and substantive comments on the regulations, despite the short-ened 30-day time period for public comment, would slow down the rulemaking process. Nonetheless, the Trump Administration is-sued final rules on December 11, 2020, which were scheduled to go into effect on January 11, 2021.³²⁶ In response, three lawsuits were filed to challenge the regulations, with a nationwide injunc-tion being issued in two of those lawsuits on January 8, 2021.³²⁷ At the time of writing, the rules are enjoined and it remains to be seen how the Biden Administration will handle these regulations. On February 2, 2021, Biden ordered the relevant agencies to promul-gate regulations covering many of the same topics within 270 days.³²⁸

Around the same time that the “death to asylum” regulations were proposed, in July 2020, the Administration proposed another set of rules on Security Bars and Processing,³²⁹ again using the

325. Indeed, some of the comments against the proposed asylum regulations, including the author’s own, were quite lengthy. The Catholic Legal Immigration Network, Inc’s Comment was 101 pages long.

326. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80,274 (Dec. 11, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235).

327. Order Re: Preliminary Injunction, Pangea Legal Services v. DHS, No. 3:20-cv-09253 (N.D. Cal. Dec. 21, 2020); Immigration Equality v. DHS, No. 3:20-cv-09258 (N.D. Cal. Jan. 8, 2021).

328. Exec. Order No. 14010, 86 Fed. Reg. 8267, §4(c)(ii) (Feb. 2, 2021) (ordering the relevant agencies to, “within 270 days of the date of this order, promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a “particular social group. . .”).

329. Security Bars and Processing, 85 Fed. Reg. 41,201 (July 9, 2020) (to be codified at 8 C.F.R. §§ 208, 1208).

COVID-19 pandemic as a way in which to undermine asylum protection. These regulations are discussed in the previous section.³³⁰

The Administration's attacks on the asylum definition did not stop over the summer, but proceeded into the fall. On August 26, 2020, the EOIR proposed regulations to institute dramatic changes to the appellate immigration system.³³¹ The proposed rules were then finalized on December 16, 2020, and apply broadly to the immigration system. Changes include: (1) preventing the use of administrative closure by judges and board of immigration appeals members;³³² (2) preventing the BIA from remanding cases for further fact finding, and remanding in general,³³³ except in very limited circumstances;³³⁴ (3) expediting adjudication timelines to the detriment of fair consideration of cases;³³⁵ (4) enabling individual immigration judges to certify cases to the EOIR Director;³³⁶ and (5) creating simultaneous briefing by the parties and eliminating the opportunity to address arguments raised by the other side.³³⁷ Many of these provisions would pose special challenges for *pro se* immigrants and asylum seekers and also for attorneys who provide pro bono services, those at non-profit organizations and small firms, along with law school clinics, who often serve asylum seekers. These rules were challenged in federal court on January 11, 2021.³³⁸ At the time of writing, it remains to be seen whether either

330. See *supra* note 193.

331. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52,491 (proposed Aug. 26, 2020) (to be codified at 8 C.F.R. pts. 1003, 1240).

332. 85 Fed. Reg. at 52,492 (to be codified at 8 C.F.R. pt. 1003.1(d)(ii) and 8 C.F.R. pt. 1003.10).

333. 85 Fed. Reg. at 52,500 (to be codified at 8 C.F.R. pt. 1003.1 (d)(7)(iii), (iv)).

334. 85 Fed. Reg. at 52,496 (to be codified at 8 C.F.R. pt. 1003.1(d)(3)(iv); see also 85 Fed. Reg. at 52,511 (to be codified at 8 C.F.R. pt. 1003.1 (d)(7)(v)) (creating a double-standard for remand based on evidence the government presents but preventing remand for evidence presented by immigrants themselves); and 85 Fed. Reg. at 52,512 (to be codified at 8 C.F.R. pt. 1003.2(c)(3)(vii)) (removing time and number bars on motion to reopen for the government but retaining strict limits for noncitizens in immigration court).

335. See Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52,491, 52,511 (proposed Aug. 26, 2020) (to be codified at 8 C.F.R. pt. 1003.1 (e)(1), (8)).

336. 85 Fed. Reg. at 52,492 (to be codified at 8 C.F.R. § 1003.1(k)).

337. See 85 Fed. Reg. at 52,494 (to be codified at 8 C.F.R. § 1003.3(c)).

338. Complaint, CLINIC v. EOIR, No. 21-cv-094 (D. D.C. Jan. 11, 2021); see also Centro Legal de la Raza et al. v. EOIR, No. 21-cv-463 (N.D. Cal.) (bringing a challenge to the same set of rules).

district court will issue an injunction enjoining the rules, which went into effect on January 15, 2021, while the litigation is pending.³³⁹

On September 11, 2020, the Department of Homeland Security proposed rules around the collection of biometrics from immigrants more broadly, but which also affect asylum seekers specifically.³⁴⁰ In their comment, submitted in response to this set of proposed rules, the Center for Gender and Refugee Studies explained that the proposed rule's "onerous and unjustified biometrics collection requirements will lead to refugees who are fleeing a range of abhorrent persecutions that has long been recognized as meriting protection being needlessly returned to countries where they could be abused, sexually assaulted, or otherwise harmed, tortured, or killed."³⁴¹ CGRS, among other advocates, raised concerns regarding the privacy of asylum seekers.³⁴² Concerns exist regarding changes proposed to the family reunification process for asylees and refugees that will delay the process of bringing spouses and children of an approved asylee or refugee to the United States and perhaps force permanent separation.³⁴³ These rules have not yet been issued in their final form.

On September 23, 2020, the Executive Office of Immigration proposed yet another set of regulations on "procedures for asylum and withholding of removal."³⁴⁴ After another curtailed period for public comment of just thirty days,³⁴⁵ the final regulations were

339. Nadia Dreid, *DC Judge Baffled Why DOJ Won't Stay Immigration Court Rule*, Law 360 (Mar. 4, 2021) (discussing the DC based challenge to the BIA rules and Judge Leon's 15-day deadline for both sides to explain whether a stay of the rules pending the outcome of the litigation is appropriate).

340. DHS Docket No. USCIS-2019-0007, Request for Comments: Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, 85 Fed. Reg. 56,338 (proposed Sept., 11, 2020).

341. Center for Gender and Refugee Studies, Comment in response to Request Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, 85 Fed. Reg. 56,338 (proposed Sept. 11, 2020), DHS Docket No. USCIS-2019-0007 (submitted on Oct. 12, 2020).

342. *Id.*

343. See Comment from Lindsay M. Harris, Director of UDC Law Immigration & Human Rights Clinic (submitted Oct. 12, 2020) (on file with author).

344. Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 59,692 (proposed Sept. 23, 2020) (to be codified at 8 C.F.R. pts. 1003, 1208, 1240).

345. *Nearly 90 Organizations Join to Urge the Justice Department to Provide a 60-Day Comment Period to Respond to EOIR's Proposed Changes to Asylum and Withholding of Removal Procedures*, CATHOLIC LEGAL IMMIGR. NETWORK (Oct. 8,

published on December 16, 2020, and were scheduled to go into effect on January 15, 2021.³⁴⁶ These rules would significantly shorten the period in which an individual can apply for asylum, creating a fifteen-day deadline to submit an asylum application³⁴⁷ along with a receipt for the currently enjoined \$50 payment³⁴⁸ associated with that application. If this deadline is not met, the Immigration Judge will consider the application abandoned. This undermines the congressionally mandated one-year period in which an asylum seeker may file for asylum after entry without penalty. The new rules also require immigration judges to adjudicate most asylum applications within 180 days of the applications' filing, making it more difficult for asylum seekers to secure counsel or fully prepare their claims.³⁴⁹ The rule also requires judges to reject asylum applications for minor errors, including blanks or failure to write N/A or "none," in completing the I-589 application form.³⁵⁰ Finally, the rule fundamentally changes the role of the immigration judge by allowing judges to submit their own evidence in asylum proceedings, while also giving less weight to evidence coming from independent non-governmental organizations on human rights and country conditions.³⁵¹ These rules were challenged on January 8, 2021, and an injunction was issued just one day before the rules were scheduled to go into effect.³⁵²

2020), <https://cliniclegal.org/resources/federal-administrative-advocacy/nearly-90-organizations-join-urge-justice-department>.

346. Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 81,698 (Dec. 16, 2020) (to be codified at 8 C.F.R. pts. 1003, 1103, 1208, 1240).

347. See 85 Fed. Reg. at 81,698 (to be codified at 8 C.F.R. pt. 1208.4).

348. See Executive Office for Immigration Review; Fee Review, 85 Fed. Reg. 11,866 (proposed Feb. 28, 2020) (to be codified at C.F.R. pts. 1003, 1103, 1208, 1216, 1235, 1240, 1244, 1245).

349. See 85 Fed. Reg. at 81,698 (to be codified at 8 C.F.R. pts. 1003.10(b), 1003.29, 1003.31, and 1240.6).

350. See 85 Fed. Reg. at 81,698-99 (to be codified at 8 C.F.R. pt. 1208.3(c)(3)); see also *AILA Practice alert, Recent Final Rules Affecting Asylum, Withholding of Removal and Credible Fear/Reasonable Fear Determinations, and the Third Country Transit Ban*, AM. IMMIGR. LAWS. ASS'N (Dec. 23, 2020) ("...Form I-589 application will be considered incomplete if it does not include a response to each of the required questions contained in the form, is unsigned, is unaccompanied by the required materials, is not completed, is unaccompanied by any required fees or is not submitted in accordance with the form instructions. An incomplete application that is not corrected shall result in a finding that the application has been abandoned.").

351. See 85 Fed. Reg. at 81,710-11 (to be codified at 8 C.F.R. pt. 1208.12).

352. Complaint, *NIJC v. EOIR*, Case 1:21-cv-00056 (D. D.C. Jan. 8, 2021); see *Federal Court Halts Rule That Would Have Blocked Access to Asylum Process*, NAT. IMMIGRANT JUSTICE CTR. (Jan. 14, 2021), <https://immigrantjustice.org/press-releases/federal-court-halts-trump-rule-would-have-blocked-access-asylum-process>.

On November 27, 2020, the Trump Administration proposed additional regulations affecting immigration courts.³⁵³ The Tahirih Justice Center's comments in response to the sets of proposed rules stated that "the NPRM is nothing more than a pretext for lowering representation rates in immigration court and speeding deportations."³⁵⁴ This specific set of rules undermines due process protections for asylum seekers and other immigrants in removal proceedings by limiting motions to reopen and reconsider, and undermining the ability to request a stay of removal, among other measures.³⁵⁵ Another set of rules proposed on the same day would limit continuances to find attorneys by declaring that an immigrant only has forty days after an initial hearing to secure legal representation.³⁵⁶

In the waning days of the Trump Administration, the Department of Justice issued yet another final rule which changes the parameters of "administrative closure" – a tool used by immigration judges to manage and prioritize cases and their dockets.³⁵⁷ Despite litigation to challenge this rule at the time of writing, it is still in effect and continues to be enforced by the Biden Administration.³⁵⁸

Many of the commitments made by Biden throughout his immigration platform, along with the Biden-Sanders Unity Task Force recommendations, signal that a Biden-Harris

353. Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 Fed. Reg. 75,942 (proposed Nov. 27, 2020) (to be codified at 8 C.F.R. pts. 1001, 1003).

354. Tahirih Justice Center, Comments in Response to Department of Justice Executive Office for Immigration Review Notice of Proposed Rulemaking (NPRM): Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, EOIR Docket No. 18-0503; RIN 1125-AB01; Dir. Order No. 01-2021 (Dec. 26, 2020) ("[I]n the six sets of proposed or final regulations issued solely or jointly by EOIR in the last year that directly affect asylum applicants, there is not so much as a single major provision, or single legal change, that can fairly be construed as working in favor of the applicant.").

355. *Id.*

356. Katy Murdza, *How Two Proposed Rules Make it Harder for Immigration Judges to Manage Their Dockets*, (Dec. 3, 2020), <https://immigrationimpact.com/2020/12/03/leir-rules-immigration-judges/#.YDfE2y2cbwd>

357. *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, FEDERAL REGISTER (Dec. 16, 2020) <https://www.federalregister.gov/documents/2020/12/16/2020-27008/appellate-procedures-and-decisional-finality-in-immigration-proceedings-administrative-closure>

358. Victoria Nielsen & Jonathan Langer, *Trump's "Midnight Rule" Ties Immigration Judges' Hands*, Think Immigration (Feb. 19, 2021), <https://thinkimmigration.org/blog/2021/02/19/trumps-midnight-rule-ties-immigration-judges-hands/>

Administration would pull back at least some of these regulations, whether still in the works or issued. Jill Biden and Julissa Reynoso published an Op Ed critiquing the “Death to Asylum” regulations specifically as an effort to “strip away protections from those fleeing violence and oppression.”³⁵⁹ Recognizing the ways in which the “death to asylum” rule would also act as another “transit ban,” Biden and Reynoso expressed concern that the rules “would reduce the number of asylum seekers admitted into the United States and force judges to deny the claims — no matter how righteous — of those arriving at our border from countries beyond Mexico.”³⁶⁰ They noted that the proposed regulations would “make it nearly impossible for victims of domestic violence, gender-based violence or gang persecution to claim asylum.”³⁶¹

At the time of writing, the monster asylum regulations are enjoined nationwide and there are legal challenges to several other sets of regulations. In early February 2021, President Biden issued an Executive Order requiring the agencies to review regulations that may undermine fair adjudication of immigration benefits.³⁶² The Biden-Harris Administration should settle the legal challenges to these lawsuits and decline to defend the regulations in court. To the extent there are still harmful regulations that have gone into effect, the Biden-Harris Administration should consider the Congressional Review Act, which can be used within sixty days from when a regulation becomes final to review and overturn it via a simple majority in the House and Senate.³⁶³

III. CONCLUSION

From day one until their final hours in power, anti-immigrant Trump Administration officials did everything in their power, legal and otherwise, to undermine the system of protection for asylum

359. Jill Biden & Julissa Reynoso, *E Pluribus Unum is On the Ballot This November*, WASH. POST (July 7, 2020), <https://www.washingtonpost.com/opinions/2020/07/07/biden-administration-would-restore-humanity-our-asylum-policies/>.

360. *Id.*

361. Jill Biden & Julissa Reynoso, *E Pluribus Unum is On the Ballot This November*, WASH. POST (July 7, 2020).

362. <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-restoring-faith-in-our-legal-immigration-systems-and-strengthening-integration-and-inclusion-efforts-for-new-americans/>

363. For more information on the Congressional Review Act see *The Congressional Review Act (CRA): Frequently Asked Questions*, CONG. RESEARCH SERV. (Jan. 14, 2020), <https://fas.org/sgp/crs/misc/R43992.pdf>.

seekers. It is clear that Donald Trump himself believes asylum seekers to be dangerous and criminal,³⁶⁴ and enabled individuals within in his Administration with a laser-like focus on disabling and undermining asylum protection. This vilification of asylum seekers combined with xenophobic rhetoric led to policy after policy targeting the U.S. asylum system.³⁶⁵ During the COVID-19 pandemic, the Trump Administration not only succeeded in bringing the system to a grinding halt, but used this time to propose sweeping regulations to permanently undermine asylum protection.³⁶⁶ It is the responsibility of citizens and attorneys to push for the Biden-Harris Administration to fully realize our international, domestic, legal, and moral obligations to protect asylum seekers.

As discussed above, the largely broad strokes with which the Biden campaign articulated a vision for restoring and improving our system are positive. In many instances, Biden explicitly committed to reversing harmful Trump era policies. In others, he hinted at a commitment to go beyond simply repairing some of the harm done and restoring the status quo. Biden himself has stated that it is “not enough to simply reverse or dismantle the heartless policies of the Trump Administration. We need to look for ways to do better.”³⁶⁷ He also alluded to shortcomings of the Obama Administration on asylum and immigration policy more broadly and explained during the final Presidential Debate, “[w]e made a mistake . . . I’ll be President, not Vice President.”³⁶⁸

As this article went to print, Biden sent his immigration bill, the U.S. Citizenship Act of 2021 to the house of representatives.³⁶⁹ This broad piece of legislation aims to provide a path to citizenship for more than 11 million undocumented immigrants in the United

364. *Biden and Trump Spar over Immigration Policy and Families Separated at the Border*, CBS NEWS (Oct. 22, 2020), <https://www.cbsnews.com/video/2020-presidential-debate-trump-biden-debate-immigration-policy-and-families-separated-at-the-border/> (Trump refers to asylum seekers as “rapists” and “murderers.”).

365. See Tahirih Justice Center Comments on NPRM, *supra* note 331 at 3-7 (discussing the negative rhetoric consistently used by Trump throughout his Presidency to refer to immigrants and specifically asylum seekers).

366. Also, during this time period, the Department of Justice has focused on trying to undo a 2006 asylum grant. See *Matter of A-M-R-C-*, 28 I.&N. Dec. 7 (A.G. June 17, 2020).

367. Joe Biden, *My Statement on World Refugee Day*, MEDIUM (June 20, 2020), <https://medium.com/@JoeBiden/my-statement-on-world-refugee-day-fddb4abddfd5>.

368. *Trump and Biden Spar over Immigration Policy*, *supra* note 337.

369. *Biden’s Immigration Plan Would Offer Path to Citizenship For Millions*, NY TIMES (Mar. 8, 2021), <https://www.nytimes.com/live/2021/02/18/us/joe-biden-news>

States and also, importantly, focuses on humanizing our immigration system and the rhetoric around it, with a shift from the use of “alien” to “noncitizen.”³⁷⁰

A few provisions within the proposed Act address asylum specifically. Notably, family detention centers are not eliminated,³⁷¹ although the bill does call for the expansion of the Family Case Management Program along with the development of additional community-based programs as alternatives to detention.³⁷² The extended period to wait for work authorization put in place by the Trump Administration for asylum seekers discussed in section II, D. 3 *infra*, is scaled back down to 180 days.³⁷³ The problematic one year filing deadline for asylum is eliminated.³⁷⁴ The introduction of the possibility of appointed counsel for certain populations will also benefit asylum seekers. Section 4106 of the Act permits appointed counsel at government expense for children, particularly vulnerable individuals, victims of abuse, torture, or violence, pregnant and lactating women, and parents of U.S. citizen minor children.³⁷⁵

Implementing a progressive vision of radical hospitality for asylum seekers³⁷⁶ and moving beyond Trump-era attacks on our asylum system to restore and strengthen asylum protection is critical.³⁷⁷ Biden must take strong and swift action to protect asylum now in office as outlined above. In order to do this, the Biden-Harris Administration must be relentless in their pursuit of reform to

370. Kevin Johnson, *From ‘aliens’ to ‘noncitizens’ – the Biden administration is proposing to change a legal term to recognize the humanity of non-Americans* (Feb. 23, 2021), *The Conversation*, <https://theconversation.com/from-aliens-to-noncitizens-the-biden-administration-is-proposing-to-change-a-legal-term-to-recognize-the-humanity-of-non-americans-155693>

371. Note that the author has been consulting with Congressional offices to support the Shut Down Family Detention Act, which we anticipate being introduced in the coming weeks or months.

372. Sec. 4101, <https://lindasanchez.house.gov/sites/lindasanchez.house.gov/files/2021.02.18%20US%20Citizenship%20Act%20Bill%20Text%20-%20SIGNED.pdf>

373. Sec. 4303. As discussed above, this does not go far enough and legislators should instead look to the Asylum Seeker Work Authorization Act of 2019, which would cut the waiting period down to 30 days.

374. Sec. 4301; *see generally* Lindsay M. Harris *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 2016 *Wisconsin Law Rev.* 1185 (2017)

375. Sec. 4106, 295, 296.

376. The author credits DC organization AsylumWorks with the concept of radical hospitality. *See* <https://asylumworks.org/who-we-are/>

377. *See generally* SCHACHER, *supra* note 74.

insulate the asylum system from further attacks. This requires appointing high-level officials with a deep understanding of the asylum system and asylum seekers in order to carry out the necessary reform and to, as the Biden campaign itself aspires, “Build Back Better.”³⁷⁸ Appointing a Senior White House official, a “reverse Stephen Miller,”³⁷⁹ would be an appropriate first step to lead the charge in implementing the changes outlined in this article.

In addition to the commitments Biden has already made within his immigration platform and the specified actions he will take within the first 100 days of his Administration, most immediately Biden must end the Title 42 process, excluding asylum seekers on public health grounds. Following this, Biden must work with Congress to finally pass the Refugee Protection Act.³⁸⁰ Living up to the promises made within Biden’s agenda for Latino Communities,³⁸¹ the RPA would safeguard the asylum system from further attacks by providing clear guidance from Congress to protect asylum. This article has delineated other key areas in which Biden must act to protect asylum seekers beyond his stated campaign goals, including abolishing of metering asylum seekers at our southern border and providing remedies for asylum seekers affected by the practice. The Biden Administration should end the practice of expedited removal and should ensure that each asylum seeker has meaningful access to due process protections provided by the asylum office and the courts.

To prevent further family separation, Biden must act to ensure no further de facto family separations through operation of agency policies. His Administration must end family detention, and, where it is completely unavoidable, must closely adhere to the

378. See, e.g., Anil Kalhan, *Building Immigration Policy Back Better*, AM. CONSTITUTIONAL SOC’Y, at 7.2 (2020), https://www.acslaw.org/wp-content/uploads/2021/01/Kalhan_Whats-the-Big-Idea-Book-2020-26-31.pdf (“The new administration needs to be similarly relentless in making reversal of those same measures a high priority and should therefore appoint personnel who are committed to energetically seeing reforms through in their implementation.”)

379. Sam Peak & Jonathan Haggerty, *Uninstalling Stephen Miller*, THE BULWARK (Dec. 17, 2020) <https://thebulwark.com/uninstalling-stephen-miller/>

380. Refugee Protection Act, H.R. 5210, 116th Cong. (2019-2020).

381. Biden Latino Agenda, *supra* note 12 (“Biden will end these policies, starting with Trump’s Migrant Protection Protocols and Safe Third Country Agreements. And, he will work to enhance protections for victims of violence and abuse – including violence based on gender or sexual orientation, intimate partner and domestic violence, or violence at the hands of drug cartels – making it harder for future administrations to reverse asylum protections, as Trump has done.”).

spirit and the letter of the 1997 Flores Settlement, setting forth the minimum standards of care and treatment for immigrant children in detention. He should reinstate a robust version of the Family Case Management Program. Biden must create meaningful oversight of Customs and Border Protection and ICE officers throughout the country, and seriously consider abolishing these agencies along with immigration detention as a whole.³⁸² Biden must similarly create guidance and oversight for USCIS officers to restore the humanitarian side of immigration, reverse fee increases, and the regulations making it more difficult for asylum seekers to obtain work authorization.

Finally, the Biden-Harris Administration must make efforts to work *with* and not against asylum seekers and the advocates who stand alongside them. The Trump Administration presented an era in which asylum attorneys specifically have been called out and vilified.³⁸³ In an October 2017 speech, former Attorney General Sessions referred to “dirty immigration lawyers” who prepared clients with “magic words” to seek asylum.³⁸⁴ Trump himself critiqued immigration lawyers³⁸⁵ and former DHS Secretary Kirstjen Nielsen threatened to prosecute those who “coach” asylum seekers on “false claims.”³⁸⁶ Biden should commit to working with advocates to expand access to counsel³⁸⁷ and to ensure a robust asylum

382. Biden advisers have allegedly said that they “will explore alternatives to holding people in civil immigration detention, including by reviving and expanding case management programs designed to ensure immigrants attend their court hearings.” Camilo Montoya-Galvez, *supra* note 85. Not sure why FN 349 is separated with a line

383. For a deeper examination of the ways in which the asylum system itself, inherently traumatic, poses challenges for asylum seekers and their advocates, please see Lindsay M. Harris, *Asylum Attorney Burnout and Secondary Trauma*, 56 (4) Wake Forest L. R. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787163

384. Att’y Gen. Jeff Sessions, *Remarks to the Executive Office for Immigration Review*, DEP’T OF JUSTICE (Oct 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-deliversremarks-executive-office-immigration-review>.

385. *Remarks by President Trump on the Illegal Immigration Crisis and Border Security*, WHITE HOUSE (Nov. 1, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/> (“An alien simply crosses the border illegally, finds a Border Patrol agent, and using well-coached language — by lawyers and others that stand there trying to get fees or whatever they can get — they’re given a phrase to read.”).

386. Press Release, Dep’t of Homeland Sec. *Sec’y Nielsen Statement on the Arrival of the Central American “Caravan”* (Apr. 25, 2018).

387. AM. BAR ASS’N, *supra* note 133 (recommending universal access to counsel for all immigrants in removal proceedings).

system. Signs are promising in this regard following several meetings between members of the Biden transition team and immigration advocates, including the Asylum Working Group in late 2020.³⁸⁸ This should also include fulfilling campaign promises, including through the proposed U.S. Citizenship Act to ensure expanded access to counsel for immigrants and asylum seekers.³⁸⁹ Whether or not the Act becomes law, the Biden-Harris Administration should also complement and support state and local government efforts to increase access to counsel for immigrants and asylum seekers.³⁹⁰

Trump campaigned for and won the presidency using inflammatory anti-immigrant rhetoric and scapegoating immigrants for perceived ills plaguing the United States.³⁹¹ With that power, the Trump Administration wrought incredible damage on our immigration and asylum system. Although the task of undoing that damage may seem overwhelming, this article has outlined the specific harms perpetrated and mapped out concrete steps for the Biden-Harris Administration to take to restore our protection system for asylum seekers. As citizens, neighbors, advocates, scholars, allies, and congressional representatives, we must work together to hold the Biden-Harris Administration accountable for progressive promises made on the campaign trail, and more.

388. The author personally participated in this meeting with members of the Biden transition team focused on asylum, specifically.

389. See, e.g., Erica B. Schommer, *supra* note 204 (advocating for the appointment of counsel for asylum seekers); See generally Stephen Manning & Kari Hong, *Getting It Righted: Access to Counsel in Rapid Removals*, 101 MARQ. L. REV. 673 (2018); Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 42 (2015); see also Biden Latino Agenda (“As President, Biden will work to ensure that immigrants are not denied access to counsel and work with civil society organizations to establish funding to provide legal representation.”).

390. Lindsay M. Harris, *Withholding Protection*, 50.3 COLUM. HUM. RTS. L. REV. 1, at n. 211 (2019) (discussing efforts in New York and New Jersey to provide universal representation for immigrants within those locales).

391. See, e.g., Anil Kalhan, *Building Immigration Policy Back Better*, *supra* note 344, at 7.3 (“For years, Trump has dehumanized and incited supporters to scapegoat immigrants, often in openly racist terms, while his Republican Party allies have acquiesced or joined him with impunity. The new president and other administration officials should forcefully repudiate this toxic discourse and find creative ways to contribute—on a regular and ongoing basis—to the development of a fundamentally different discourse about immigrants and immigration in the years to come.”).