



January 25, 2022

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U.S. Department of Homeland Security  
2707 Martin Luther King Jr Ave SE  
Washington, DC 20528-0525

VIA ELECTRONIC FILING

**Re: Identifying Recommendations To Support the Work of the Interagency Task Force on the Reunification of Families; Request for Public Input**

Dear Ms. Anderson,

The Center for Immigration Studies (CIS) submits the following public comment to the U.S. Department of Homeland Security (DHS) in response to the Department's request for public input titled *Identifying Recommendations To Support the Work of the Interagency Task Force on the Reunification of Families*, as published in the Federal Register on December 10, 2021.<sup>1</sup>

CIS is an independent, non-partisan, non-profit, research organization. Founded in 1985, CIS has pursued a single mission – providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. CIS is the nation's only think tank devoted exclusively to the research of U.S. immigration policy informing policymakers and the public about immigration's far-reaching impact.

**I. INTRODUCTION**

The Immigration and Nationality Act (INA) sets the terms and conditions for an alien<sup>2</sup> to lawfully be admitted to the United States, either temporarily or permanently. For example, under

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<sup>1</sup> DHS Docket No. DHS-2021-0051, *Identifying Recommendations To Support the Work of the Interagency Task Force on the Reunification of Families*, 86 Fed. Reg. 70512 (Dec. 10, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-12-10/pdf/2021-26691.pdf>.

<sup>2</sup> In the Request for Public Input, DHS writes that it is “seeking comments from the public on recommendations for ways to minimize the separation of migrant parents and legal guardians and children entering the United States, consistent with the law.” The word “migrant” is not a statutory term under U.S. immigration. In separate rulemaking documents and other materials DHS has said, “For purposes of this discussion, USCIS used the term ‘noncitizen’ to be synonymous with the term ‘alien’ as it is used in the INA.” *See, e.g.*, 86 Fed. Reg. 53740. According to the Merriam-Webster dictionary, the term “synonymous” is defined as “having the character of a synonym” or “having the same connotations, implications, or reference”. *See* <https://www.merriam-webster.com/dictionary/synonymous>. Merriam-Webster further defines “synonym” as “a word that has the same meaning as another word in the same language” or “a word, a name, or phrase that very strongly suggests a particular idea, quality, etc.” *See* <https://www.merriam-webster.com/dictionary/synonym>. Section 101(a)(3) of the



## CENTER FOR IMMIGRATION STUDIES

current regulations<sup>3</sup>, aliens apprehended entering the United States illegally or without proper documents are subject to expedited removal<sup>4</sup>, allowing DHS to quickly remove them without placing them before an immigration judge (IJ) in removal proceedings under section 240 of the INA<sup>5</sup>. There is a notable exception to this quick-removal process if the alien requests asylum or claims a fear of harm if returned.<sup>6</sup> In that scenario, the alien is interviewed by an asylum officer

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Immigration and Nationality Act (INA) defines the term “alien” as “any person not a citizen or national of the United States.” available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-101.html>; see also Section 101(a)(22) of the INA (2021) (“The term ‘national of the United States’ means: (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”), available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-101.html>; *Miller v. Albright*, 523 US 420, 467 n. 2 (1998) (Ginsberg, J., dissenting) (“Nationality and citizenship are not entirely synonymous; one can be a national of the United States and yet not a citizen.”), available at: [https://scholar.google.com/scholar\\_case?case=16706312627647904855&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar#f31](https://scholar.google.com/scholar_case?case=16706312627647904855&hl=en&as_sdt=6&as_vis=1&oi=scholar#f31)]. Clearly, the legal term of art “alien” and the words “noncitizen” and “migrant” are not “synonymous” and DHS’s decision, at the direction of the Biden administration political appointees, to falsely equate the two deprives the public of specificity when discussing U.S. immigration law. In fact, DHS acknowledges these words are not synonymous in the very memorandum that orders personnel to cease using the legal term “alien”, with notable exceptions. See Robert Law, *Immigration Newspeak II – USCIS Edition*, CENTER FOR IMMIGRATION STUDIES (Feb. 16, 2021) (Alas, this illogical scrubbing of technical language has reached my former agency. As first reported by Axios (and confirmed by my sources), USCIS staff received a memo February 16 — dated February 12 — with the subject “Terminology Changes”.... Un-ironically, the memo contradicts itself by saying the guidance “does not affect legal, policy or other operational documents, including forms, where using terms (i.e., applicant, petitioner, etc.) as defined by the INA would be the most appropriate.” In the table replacing “alien” with “noncitizen” there is an associated footnote that reads, “Use noncitizen except when citing statute or regulation, or in a Form I-862, Notice to Appear, or Form I-863, Notice of Referral to Immigration Judge.” Translation: This cringe-worthy effort is a messaging gimmick.), available at: <https://cis.org/Law/Immigration-Newspeak-II-USCIS-Edition> ; Andrew Arthur, *Defining Immigrants, Noncitizens, Aliens, Nonimmigrants, and Nationals*, *Who’s Who in Immigration Law?*, CENTER FOR IMMIGRATION STUDIES (Jun. 26, 2017) (“So, citizens are nationals of the United States, but not all nationals are citizens. Therefore, the term “noncitizen” includes aliens and nationals who are not citizens. But, nationals are not subject to removal proceedings under section 240 of the INA, only aliens are; therefore, any case that discusses whether or an individual is to be removed, unless it is a case involving contested citizenship, relates to an ‘an alien’ not a ‘noncitizen’.”), available at: <https://cis.org/Arthur/Defining-Immigrants-Noncitizens-Aliens-Nonimmigrants-and-Nationals>. Curiously, the Department does not use “noncitizen” at all in this Request for Public Input but in several instances uses the vague, and overly broad “individual”, in place of alien.

<sup>3</sup> See 8 CFR § 235.3(b)(8) (2021), available at: <https://www.law.cornell.edu/cfr/text/8/235.3>.

<sup>4</sup> Section 235(b)(1) of the INA (2020), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>5</sup> Section 240 of the INA (2021), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>.

<sup>6</sup> See section 235(b)(1)(A)(ii) of the INA (2020) (“Claims for asylum. If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under [section 212(a)(6)(C) or 212(a)(7) of the INA] and the alien indicates either an intention to apply for asylum under [section 208 of the INA] or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).”); available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelimid>; id. at subpara. (B) (“Asylum interviews”).



## CENTER FOR IMMIGRATION STUDIES

(AO) to determine whether the alien has a “credible fear”<sup>7</sup>. The credible fear interview serves as a screening process to determine whether the alien *may be* eligible for asylum.<sup>8</sup>

Importantly, Congress mandated that aliens in expedited removal proceedings be detained: detained when apprehended<sup>9</sup>; detained pending an interview on a credible fear claim<sup>10</sup>; and detained pending a determination on any subsequent asylum claim<sup>11</sup>.

Yet, over the last 25 years, covering presidential administrations of both political parties, certain laws, policies, and judicial rulings have created enormous loopholes in our immigration laws that have encouraged economic migrants, including family units (FMUs) and unaccompanied alien children (UACs), to take the journey north to unlawfully cross our southern border.

A prime example is the 1997 *Flores* Settlement Agreement (FSA) which limited the amount of time DHS can detain UACs. Under the FSA, the government is required to release UACs within 20 days to parents, other close relatives, or a suitable guardian, for the pendency of the UACs claims to be in the United States.<sup>12</sup> In the event that a suitable guardian could not be identified, the agreement further stipulated that the UAC should be held in the “least restrictive” setting possible.<sup>13</sup>

Inexplicably, the U.S. Court of Appeals for the Ninth Circuit expanded the FSA in 2015 to include *accompanied* alien children.<sup>14</sup> Despite the clear language of the FSA,<sup>15</sup> the Ninth Circuit held that DHS cannot detain FMUs, meaning an adult alien with a relative child, for more than 20 days. With the stroke of a pen, the Ninth Circuit ignored the intent that formed the foundation of the FSA and disregarded the expedited removal process (described above) that Congress established to maintain order at the southern border.

In the interim, Congress passed a well-intentioned law to combat child trafficking known as the *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* (TVPRA). Unfortunately, in an effort to protect alien children Congress created an enormous loophole that allows UACs from non-contiguous countries (non-Mexican, non-Canadian) to exploit the asylum

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<sup>7</sup> 8 CFR § 235.3(b)(4) (2021), available at: <https://www.law.cornell.edu/cfr/text/8/235.3>

<sup>8</sup> See Andrew Arthur, *DHS/DOJ Propose Changes to Asylum Process at the Border, Boosting grants, slowing removals, facilitating releases of illegal migrants, and encouraging fraud*, CENTER FOR IMMIGRATION STUDIES (Aug. 18, 2021), available at: <https://cis.org/Arthur/DHSDOJ-Propose-Changes-Asylum-Process-Border>.

<sup>9</sup> Section 235(b)(1)(B)(iii)(IV) of the INA (2021) (“Mandatory Detention. Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>10</sup> *Id.*

<sup>11</sup> Section 235(b)(1)(B)(ii) of the INA (2021) (“Referral of certain aliens. If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.”), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>12</sup> *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Dec. 7, 2001).

<sup>13</sup> *Id.*

<sup>14</sup> *Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015).

<sup>15</sup> See *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44392, 44398-99 (Aug. 23, 2019) (detailing the history of the *Flores* Settlement Agreement).



## CENTER FOR IMMIGRATION STUDIES

system to gain entry into the country. Specifically, the TVPRA requires that the Department of Health and Human Services (HHS) “shall ensure, to the greatest extent practicable... that all unaccompanied alien children who are or have been in the custody of [DHS]... have counsel to represent them in legal proceedings or matters.”<sup>16</sup> The law further requires HHS “[t]o the greatest extent practicable” to make every effort to provide pro bono counsel for the UACs “who agree to provide representation to such children without charge.”<sup>17</sup>

At the time the Clinton administration entered into the FSA, there were very few UACs or FMUs being apprehended at the southern border, with an overwhelming majority of apprehensions being single adult males from Mexico. That quickly changed after the combination of the TVPRA and the expansion of the FSA made it nearly impossible for DHS to quickly repatriate most alien children, whether unaccompanied or accompanied, encountered at the border. Parents began paying coyotes and drug cartels to *smuggle* their children to the southern border, all but guaranteeing their release into the interior of the country. This is because DHS treated every alien child encountered at the border under the provisions of the TVPRA even though smuggling is different from trafficking and should not trigger the loophole discussed above.

Predictably, the number of UACs and FMUs began to skyrocket mostly involving illegal aliens from the Northern Triangle countries of Honduras, Guatemala, and El Salvador.<sup>18</sup> In FY 2015, the year the Ninth Circuit expanded the FSA, the number of FMUs apprehended by Border Patrol was just under 40,000. The total nearly doubled in FY 2016 and reached 107,212 in FY 2018.<sup>19</sup>

In an attempt to combat this humanitarian crisis, in 2018 President Donald Trump’s Department of Justice (DOJ) implemented a “zero tolerance” policy for FMUs apprehended at the southern border.<sup>20</sup> Under this policy, then-Attorney General Jeff Sessions directed DOJ attorneys to prosecute all adult aliens who had entered illegally between ports of entry and were subject to criminal prosecution, regardless if they were apprehended with minor children.<sup>21</sup> Consistent with the TVPRA, DHS placed any alien child who accompanied an alien adult charged with illegal entry into HHS custody.<sup>22</sup> The “family separation” that resulted was mandated by a separate federal law that prohibits the detention of minors in any institution in which the minor would have “regular contact with adult persons convicted of a crime or awaiting trial on criminal charges.”<sup>23</sup>

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<sup>16</sup> 8 U.S.C. § 1232.

<sup>17</sup> *Id.*

<sup>18</sup> U.S. Border Patrol, Total Family Unit Apprehensions By Month (FY 2013-2019), *available at* [https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29\\_1.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29_1.pdf).

<sup>19</sup> *Id.*

<sup>20</sup> Office of the Attorney General, Memorandum for Federal Prosecutors Along the Southwest Border, “Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a),” Apr. 6, 2018. The policy was not officially implemented until May 7, 2018.

<sup>21</sup> *Id.*

<sup>22</sup> *See* 8 U.S.C. § 1232.

<sup>23</sup> 18 U.S.C. § 5035.



The Trump administration poorly rolled out the “zero tolerance” policy and the public backlash was immediate and resounding. As a result, President Trump terminated the policy approximately six weeks after it was implemented.<sup>24</sup> Hampered by the inability to get out of the FSA and the discontinuation of the “zero tolerance” policy, the number of FMUs apprehended in FY 2019 skyrocketed to 473, 682.<sup>25</sup>

Subsequent to President Joe Biden’s inauguration, he issued Executive Order 14011, Establishment of Interagency Task Force on the Reunification of Families, that established the task force that is soliciting public input.<sup>26</sup> The policy statement in this Executive Order reads, “It is the policy of my Administration to respect and value the integrity of families seeking to enter the United States. My Administration condemns the human tragedy [sic] that occurred when our immigration laws were used to intentionally separate children from their parents or legal guardians (families), including through the use of the Zero-Tolerance Policy.”<sup>27</sup>

## II. MEASURES TO END FAMILY SEPARATION

### A. End Biden Administration Anti-Enforcement Policies

For all the rhetoric about “compassion” and “human tragedy”, it is Biden administration policies that are cruel, both to Americans and aliens who lack visas, and encourage family separation. In just one year, the Biden administration’s anti-enforcement policies have encouraged large-scale illegal immigration, resulting in the worst border crisis our country has ever experienced. Yet, instead of taking responsibility for securing the border and discouraging illegal immigration, the Biden administration continues to scapegoat Trump administration policies that attempted to enforce the immigration laws previous administrations had disregarded.

Family separation comes in multiple forms, though the Biden administration refuses to acknowledge the most obvious one. When an economic migrant sneaks across the border to unlawfully work in the United States while leaving his family behind in the home country, that is family separation. When the Biden administration refuses to apply Title 42’s expulsion authority for UACs and alien families make the decision to hand their children over to coyotes and smugglers to gain entry into the interior, that is family separation.

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<sup>24</sup> The White House, *Affording Congress an Opportunity to Address Family Separation*, Executive Order, June 20, 2018.

<sup>25</sup> U.S. Border Patrol, Total Family Unit Apprehensions By Month (FY 2013-2019), available at [https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29\\_1.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29_1.pdf).

<sup>26</sup> The White House, *Establishment of Interagency Task Force on the Reunification of Families*, Executive Order 14011, Feb. 2, 2021, available at <https://www.federalregister.gov/documents/2021/02/05/2021-02562/establishment-of-interagency-task-force-on-the-reunification-of-families>.

<sup>27</sup> *Id.*; see also Robert Law, *Biden’s Executive Actions: President Unilaterally Changes Immigration Policy*, CENTER FOR IMMIGRATION STUDIES, Mar. 15, 2021, available at <https://cis.org/Report/Bidens-Executive-Actions-President-Unilaterally-Changes-Immigration-Policy>.





Simply put, the Biden administration wants to respond to the problem of “family separation” without preventing the problem, despite the obvious horrors inflicted on the aliens who enter illegally. As the Center has previously pointed out upon the publication of this Request for Public Input, the “problem” is the “willingness of parents and guardians in those FMUs to enter the United States illegally with a child. Both the Federal Register notice and Mayorkas ignore the consequent responsibility that those parents and guardians bear for doing so.... None of the family separations about which Biden and Mayorkas complain would have occurred had the parents and guardians not decided to make the choice to come here. Once they make that choice, they bear most if not all the responsibility for the consequences, but Biden – both before the election and after the inauguration – acts as if the United States is solely to blame.”<sup>28</sup>

### **B. Eliminate the *Flores* Settlement Agreement**

In the absence of Congressional legislation, DHS and DOJ should promulgate regulations to address the *Flores* Settlement Agreement (FSA), to allow DHS to detain alien adults and children entering illegally in “family units” (FMUs), to comply with the detention mandates in section 235(b)(1) of the INA.

Briefly restating the history of *Flores*, in 2016, the Ninth Circuit issued an opinion interpreting the FSA in *Flores v. Lynch*<sup>29</sup> (*Flores I*). The circuit court in *Flores I* sustained an August 2015 order<sup>30</sup> by Judge Gee of the U.S. District Court for the Central District of California mandating the release of children in FMUs in 20 days. The practical effect of the circuit court’s order (as noted) was to require DHS to release all minors it apprehended within that 20-day period, regardless of whether they were UACs or instead entered illegally accompanied by adults in FMUs. To avoid “family separation”, accompanying adults in FMUs have been released as well (in most cases) since 2015. Consequently, the promise of a quick release from DHS custody has encouraged an untold number of alien adults to bring children with them when entering the United States illegally, in order to gain quick release.

In its bipartisan April 2019 Final Emergency Interim Report<sup>31</sup>, the Homeland Security Advisory Council’s CBP Families and Children Care Panel explained:

*There is a real crisis at our border. An unprecedented surge in family unit (FMU) migration from Central America is overwhelming our border agencies and our*

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<sup>28</sup> Andrew Arthur, *Mayorkas’s Curious Request for Comments on Minimizing ‘Family Separations’*, CENTER FOR IMMIGRATION STUDIES, Dec. 16, 2021, available at <https://cis.org/Arthur/Mayorkass-Curious-Request-Comments-Minimizing-Family-Separation>.

<sup>29</sup> *Flores v. Lynch*, 828 F.3d 898 (9<sup>th</sup> Cir. 2016), available at: [https://scholar.google.com/scholar\\_case?case=12780774456837741811](https://scholar.google.com/scholar_case?case=12780774456837741811).

<sup>30</sup> *Flores v. Lynch*, 212 F.Supp.3d 907 (C.D. Cal. 2015), available at: <https://www.leagle.com/decision/inadvfdco170904000560>.

<sup>31</sup> *Final Emergency Interim Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Apr. 16, 2019), at 1, available at: [https://www.dhs.gov/sites/default/files/publications/19\\_0416\\_hsac-emergency-interim-report.pdf](https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf).



*immigration system. This crisis is endangering children. **In too many cases, children are being used as pawns by adult migrants and criminal smuggling organizations solely to gain entry into the United States (U.S.).** Because 40% of the U.S. Customs and Border Protection (CBP), U.S. Border Patrol's (USBP) resources are currently absorbed in dealing with this crisis, **the USBP is not able to effectively manage its other border security missions -- apprehending migrants illegally seeking to evade detection, including criminal aliens and those who pose a public safety or national security threat, uncovering instances of trafficking, fraudulent family relationships and other criminal activity among this population, and monitoring the border for drug smuggling and other contraband.** To cover this gap, CBP will need to re-assign an increasing number of CBP officers stationed at ports of entry to assist the USBP in handling the surge in FMU migration.*

*The surge in FMU migration will continue to soar, endangering more and more children making the treacherous 2,000 mile trek to our border and crossing illegally into the U.S. at dangerous and remote areas between ports of entry (POE), **until the dynamics causing this trend are changed . . .***

\* \* \* \*

*As the findings in our report reflect, the large-scale influx of FMUs is new, having increased dramatically in the last year by 600%. Over 53,000 FMU were apprehended last month alone by the Border Patrol, and at the current trajectory, that number of FMU apprehensions is likely to exceed 500,000 in Fiscal Year (FY) 2019. (Emphasis added.)*

The panel was not too far off the mark in that interim report: In FY 2019<sup>32</sup>, Border Patrol apprehended 473,682 illegal aliens in FMUs. The number would have been much worse, except for the implementation of MPP<sup>33</sup> (more on that below) that fiscal year.

In its final emergency interim report, that panel concluded:

*By far, the major "pull factor" [encouraging migrants to enter illegally] is the current practice of releasing with a NTA most illegal migrants who bring a child with them. **The crisis is further exacerbated by a 2017 federal court order in Flores v. DHS expanding to FMUs a 20-day release requirement contained in a 1997 consent decree, originally applicable only to unaccompanied children (UAC). After being given NTAs, we estimate that 15% or less of FMU will likely***

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<sup>32</sup> *Southwest Border Migration FY 2019*, U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 14, 2019), available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>.

<sup>33</sup> *Migrant Protection Protocols (Trump Administration Archive)*, U.S. DEP'T OF HOMELAND SECURITY (last published Apr. 14, 2020), available at: <https://www.dhs.gov/archive/migrant-protection-protocols-trump-administration>.



*be granted asylum. The current time to process an asylum claim for anyone who is not detained is over two years, not counting appeals. (Emphasis added.)*<sup>34</sup>

Similarly, in its final report<sup>35</sup>, the panel explained:

*Panel members traveled to Guatemala and Honduras and received extensive briefings on both “push” and “pull” factors. **We assess that pull factors, especially the prompt release of migrants who bring a child, account for much of the huge increase in FMU migration over the past year.** Put differently there were no significant increases in level of crime, gang activity or poverty in the past year that account for the phenomenal rise in FMU migration from Guatemala and Honduras. (Emphasis added.)*

The final emergency interim report detailed how the current incentives encouraging aliens to enter illegally harmed not only CBP’s ability to perform its other vital national-security and law-enforcement duties, but endangered the aliens themselves, and traumatized the children used as “pawns”<sup>36</sup> in those FMUs to gain entry:

*Migrant children are traumatized during their journey to and into the U.S. The journey from Central America through Mexico to remote regions of the U.S. border is a dangerous one for the children involved, as well as for their parent. There are credible reports that female parents of minor children have been raped, that many migrants are robbed, and that they and their child are held hostage and extorted for money.*

\* \* \* \*

*Criminal migrant smuggling organizations are preying upon these desperate populations, encouraging their migration to the border despite the dangers, especially in remote places designed to overwhelm existing USBP infrastructure, and extorting migrants along the way, thereby reaping millions of dollars for themselves and the drug cartels who also charge money to cross the border.*

\* \* \* \*

*A substantial number of families and children are entering our country in remote areas of the border versus the POEs, enduring dangerous and terrifying crossings*

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<sup>34</sup> *Final Emergency Interim Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Apr. 16, 2019), at 1, available at: [https://www.dhs.gov/sites/default/files/publications/19\\_0416\\_hsac-emergency-interim-report.pdf](https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf).

<sup>35</sup> *Final Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Nov. 14, 2019), at 2-3, available at: [https://www.dhs.gov/sites/default/files/publications/fccp\\_final\\_report\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/fccp_final_report_1.pdf).

<sup>36</sup> *Final Emergency Interim Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Apr. 16, 2019), at 1, available at: [https://www.dhs.gov/sites/default/files/publications/19\\_0416\\_hsac-emergency-interim-report.pdf](https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf).





## CENTER FOR IMMIGRATION STUDIES

*in remote desert areas, across rivers, over fences, and through razor wire. These children increasingly require significant personal and medical care that exceeds the ability and capacity of CBP even with their current patchwork of contracted assistance. . . .*

\* \* \* \*

*FMUs illegally crossing our border consist of adults who are bringing a child with them, and most are being released into the U.S. with a NTA due to a shortage of detention capacity for FMUs.<sup>37</sup>*

The lesson to be learned from the FSA litigation is that as soon as a policy is enacted that makes it more likely that illegal aliens will be released from DHS custody, notwithstanding the detention mandates in section 235(b)(1) of the INA, the number of illegal aliens who enter to exploit that policy balloons.

### **C. Fully Re-Implement the Migrant Protection Protocols**

One of the most successful tools developed by the Trump administration to prevent economic migrants from exploiting the asylum system was the establishment of the Migrant Protection Protocols (MPP<sup>38</sup>, or Remain in Mexico). As DHS explained in its October 2019 assessment of the MPP program<sup>39</sup>:

*In the past nine months—following a phased implementation, and in close coordination with [the government of Mexico] —DHS has returned more than 55,000 aliens to Mexico under MPP. MPP has been an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system. . . .*

*Border encounters with Central American families—who were the main driver of the crisis and comprise a majority of MPP-amenable aliens—have decreased by approximately 80%.*

The obvious benefits of MPP are two-fold. First, denying FMUs the ability to be released into the interior of the country pending court dates many years in the future serves as a significant deterrent that prevents these aliens from taking the dangerous journey north. Second, for those

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<sup>37</sup> *Id.* at 6-7.

<sup>38</sup> See *Migrant Protection Protocols (Trump Administration Archive)*, U.S. DEP'T OF HOMELAND SECURITY (last published Apr. 14, 2020), available at: <https://www.dhs.gov/archive/migrant-protection-protocols-trump-administration>.

<sup>39</sup> *Assessment of the Migrant Protection Protocols (MPP)*, U.S. DEP'T OF HOMELAND SECURITY (Oct. 28, 2019), available at: [https://www.dhs.gov/sites/default/files/publications/assessment\\_of\\_the\\_migrant\\_protection\\_protocols\\_mpp.pdf](https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf).



FMUs who nonetheless subject themselves to the perils of the trip, MPP ensured family unity as the family was processed together while waiting in Mexico.

Yet, in its haste to undo all Trump immigration policies the Biden administration abruptly halted, then subsequently terminated, MPP. This move was not just bad policy, as it opened the floodgates for a surge of illegal aliens crossing the southern border, but it was an unlawful violation of the Administrative Procedure Act.

In issuing a permanent injunction of DHS's attempted termination<sup>40</sup> of MPP in *Texas v. Biden*<sup>41</sup>, Judge Matthew Kacsmaryk of the U.S. District Court for the Northern District of Texas found: "Any class-wide parole scheme that paroled aliens into the United States simply because DHS does not have the detention capacity would be a violation of the narrowly prescribed parole scheme in" section 212(d)(5)(A) of the INA.

In denying the government's request for a stay of Judge Kacsmaryk's injunction, the Fifth Circuit, in a *per curiam* decision<sup>42</sup>, went even further, holding:

*What the Government cannot do, the district court held, is simply release every alien described in [section 235 of the INA] en masse into the United States. The Government has not pointed to a single word anywhere in the INA that suggests it can do that. And the Government cannot claim an irreparable injury from being enjoined against an action that it has no statutory authorization to take.*

#### **D. Increase Family Detention Capacity**

A common refrain from the Biden administration justifying its refusal to enforce immigration law is that it lacks resources, both personnel and detention space. In its final emergency interim report, the bipartisan Homeland Security Advisory Council's CBP Families and Children Care Panel noted that ICE had detention space for just 2,500 aliens in FMUs.<sup>43</sup> In its final report, the panel explained why there were so few beds for FMUs: "A primary reason that ICE ERO did not and could not expand its capacity was lack of funding and the judicial enforcement of the *Flores*

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<sup>40</sup> See Memorandum, "Termination of the Migrant Protection Protocols Program", ALEJANDRO N. MAYORKAS, SECRETARY OF HOMELAND SECURITY (Jun. 1, 2021), available at:

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

<sup>41</sup> *Texas v. Biden*, No. 2:21-CV-067-Z (N.D. Tex. Aug. 13, 2021), available at:

<https://www.scribd.com/document/520115982/Federal-judge-s-ruling-on-Remain-in-Mexico>, stay pending appeal den. *Texas v. Biden*, No. 21-10806 (5<sup>th</sup> Cir. Aug. 19, 2021) (per curiam), available at:

<https://www.ca5.uscourts.gov/opinions/pub/21/21-10806-CV0.pdf>, stay pending appeal denied *Biden v. Texas*, 594 U.S. \_\_\_ (Aug. 24, 2021) (order in pending case), available at:

[https://www.supremecourt.gov/orders/courtorders/082421zr\\_2d9g.pdf](https://www.supremecourt.gov/orders/courtorders/082421zr_2d9g.pdf).

<sup>42</sup> *Texas v. Biden*, No. 21-10806, at 29 (5<sup>th</sup> Cir. Aug. 19, 2021) (per curiam), available at:

<https://www.ca5.uscourts.gov/opinions/pub/21/21-10806-CV0.pdf>, stay pending appeal denied *Biden v. Texas*, 594 U.S. \_\_\_ (Aug. 24, 2021) (order in pending case), available at:

[https://www.supremecourt.gov/orders/courtorders/082421zr\\_2d9g.pdf](https://www.supremecourt.gov/orders/courtorders/082421zr_2d9g.pdf).

<sup>43</sup> *Final Emergency Interim Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Apr. 16, 2019), at 7, available at: [https://www.dhs.gov/sites/default/files/publications/19\\_0416\\_hsal-emergency-interim-report.pdf](https://www.dhs.gov/sites/default/files/publications/19_0416_hsal-emergency-interim-report.pdf).



consent decree in July 2017 that had been expanded to include children accompanied by a parent.”<sup>44</sup>

Consistent with the recommendations in its final emergency interim report, the panel stated<sup>45</sup>: “CBP used Supplemental Funding to rapidly set up, staff and equip six Centralized Processing Centers (CPC), of which four were for FMUs, operated by the Border Patrol.” That gave Border Patrol space for an additional 2,000 migrants in FMUs.<sup>46</sup>

Despite the clear need for additional FMU detention space (and the panel’s recommendation that those aliens in FMUs be detained-- not indefinitely, but long enough for their asylum claims to be considered<sup>47</sup>), the administration’s FY 2022 budget request asks for, again, just 2,500 FMU detention beds.<sup>48</sup> The panel was clear that a “*Flores* fix”<sup>49</sup> is necessary to address the issue of illegal immigration by FMUs at the border in order to avoid the consequences to them and to our immigration system.<sup>50</sup> It is a gross error by the Biden administration to undermine detention capacity by failing to seek the resources it needs to properly house family units together. This is even more egregious given that the president’s party is in control of both chambers of Congress and would presumably follow his lead in appropriating such funds.

### E. Close the TVPRA Loopholes

As mentioned above, the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 was passed into law with the best of intentions. Unfortunately, the legislation was structured in a way that encouraged immigration fraud (exploiting the asylum system) instead of protecting alien children from trafficking. Case in point is section 235 of the TVPRA which says that if DHS encounters an unaccompanied child (UAC) from a “contiguous” country (Canada or Mexico), it must screen that child within 48 hours to determine if he or she has an asylum claim or has been trafficked. If the child does not fear return and has not been trafficked, the child can be sent back home.

If the UAC is from a non-contiguous country, however, DHS must transfer the child within 72 hours to the Department of Health and Human Services (HHS), even if the child has not been

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<sup>44</sup> *Final Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Nov. 14, 2019), at 27, available at: [https://www.dhs.gov/sites/default/files/publications/fccp\\_final\\_report\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/fccp_final_report_1.pdf).

<sup>45</sup> *Id.* at 8.

<sup>46</sup> *See id.* at 27.

<sup>47</sup> *See id.* at 19 n. 11 (“As noted, the Panel does not support and is not advocating for indefinite detention, but only sufficient time to rapidly process asylum claims”).

<sup>48</sup> *See* n. 189.

<sup>49</sup> *Final Emergency Interim Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Apr. 16, 2019), at 6, available at: [https://www.dhs.gov/sites/default/files/publications/19\\_0416\\_hsac-emergency-interim-report.pdf](https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf).

<sup>50</sup> *See Final Emergency Interim Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Apr. 16, 2019), at 5 (“Notably, until our asylum system is reformed and the restrictions of *Flores* relating to family

detention, which led to the widespread catch and release of FMUs, are removed, the pull factor of bringing a child will remain.”), available at: [https://www.dhs.gov/sites/default/files/publications/19\\_0416\\_hsac-emergency-interim-report.pdf](https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf).



trafficked and has no fear of return. HHS puts those children in shelters it runs or for which it has contracts, almost always for quick placement with a sponsor in the United States.

This inability to promptly return all non-trafficked alien minors, regardless of home country, predictably spurred families from Central America to send their kids on the dangerous journey north. There is no legitimate reason to treat alien children from Mexico and Canada differently than alien children from every other country in the world.

#### **F. Terminate the Unlawful DACA Executive Amnesty**

Another enormous pull factor for younger illegal aliens is President Obama's illegal executive amnesty program known as Deferred Action for Childhood Arrivals (DACA). In a three-page memorandum issued on June 15, 2012 by then-DHS Secretary Janet Napolitano entitled, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, the Obama administration created an executive amnesty program that largely mirrored the DREAM Act.<sup>51</sup> Under the guise of "prosecutorial discretion", DACA allowed illegal aliens could receive a deferral from removal *and* an employment authorization document (EAD, or work permit) if they met certain criteria.<sup>52</sup>

DACA is an unlawful Executive Branch usurpation of Congress. On July 16, 2021, Judge Hanen ruled on the merits that DACA is illegal.<sup>53</sup> In ruling DACA illegal, Judge Hanen wrote, "The decision to award deferred action, with all of the associated benefits of DACA status, is outside the purview of prosecutorial discretion."<sup>54</sup> He continued, "While the law certainly grants some discretionary authority to the agency, it does not extend to include the power to institute a program that gives deferred action and lawful presence, and in turn, work authorization and multiple other benefits to 1.5 million individuals who are in the country illegally."<sup>55</sup> Hanen concluded: "DACA is an unreasonable interpretation of the law because it usurps the power of Congress to dictate a national scheme of immigration laws and is contrary to the INA."<sup>56</sup>

Yet, the Biden administration is doubling down on this illegal immigration magnet by appealing the decision and even pursuing a DACA regulation in direct violation of Judge Hanen's order. While the current UACs or alien children from FMUs do not qualify for DACA, its mere existence encourages them to make the journey north under the belief that in the future some executive amnesty program will be created for them. It is not coincidental that the number of UACs apprehended at the southern border skyrocketed within two years of DACA's unveiling.

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<sup>51</sup> Memorandum from Janet Napolitano, Secretary, DHS (June 15, 2012), *available at* <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>52</sup> Memorandum from Janet Napolitano, Secretary, DHS (June 15, 2012), *available at* <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>53</sup> *U.S. v. Texas*, No. 1:18-cv-00068, 2021 WL 3025857 (S.D. Tex. July 16, 2021) (*Texas II*).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*



**III. CONCLUSION**

Family separation as a mechanism of immigration enforcement precedes the Trump administration, and, in some respects is mandated by various laws. The Biden administration's refusal to apply laws on the books because it dislikes them is unlawful and encourages more illegal immigration. Family separation also occurs intentionally when parents cross the border unlawfully (or overstay a visa) in order to obtain work in the United States while leaving the rest of the family behind in the home country. This is also the case when families intentionally hand over their alien children to smugglers and coyotes because of Biden administration policies that allow UACs into the country while FMUs are largely being turned away under Title 42. These parents bear responsibility for these decisions, but they are largely being enticed by the anti-enforcement policies of the Biden administration.

Instead of resorting to ad hominem attacks on former President Trump and his political team, the Biden administration could make meaningful progress in preventing the separation of alien families by strictly enforcing the immigration laws on the books and fully resuming MPP. President Biden should demand that Congress send him a bill that closes the loopholes discussed above and also provide the appropriated funds necessary to ramp-up detention capacity for FMUs. Lastly, the Biden administration should end DACA by dropping its challenge to Judge Hanen's injunction and discontinue all policies that reward illegal aliens with work permits.

Sincerely,

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