CENTER FOR IMMIGRATION STUDIES

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Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security
5900 Capital Gateway Drive
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RE: DHS Docket No. USCIS-2024-0006; A.G. Order No. 6053-2024: Securing the Border Final rule

Dear Mr. Delgado,

The Center for Immigration Studies (CIS) respectfully submits the following public comment to the U.S. Department of Homeland Security (DHS) and the U.S. Department of Justice (DOJ) in response to the agencies' final rule, as published in the Federal Register on October 7, 2024. *See Securing the Border*; DHS Docket No. USCIS-2024-0006; RIN: 1615-AC92.

CIS is a national, nonprofit, public-interest organization comprised of millions of concerned citizens who share a common belief that our nation's immigration laws must be enforced, and that policies must be reformed to better serve the national interest. CIS examines trends and effects, educates the public on the impacts of sustained high-volume immigration, and advocates for sensible solutions that enhance America's environmental, societal, and economic interests today, and into the future.

I. Background

The United States, under the Biden-Harris administration, has endured the worst border crisis in the nation's history. Since 2021, there have been more than 10.3 million encounters of inadmissible aliens nationwide and over 8.3 million encounters at the Southwest border, specifically. Of these encounters, U.S. Customs and Border Protection (CBP) have recorded more than 520,000 encounters of unaccompanied alien children (UACs) at the Southwest border. Moreover, 388 aliens on the terrorist watchlist have been apprehended between ports of entry (POEs) at both the Southern and Northern borders since fiscal year (FY) 2021.

These numbers do not include "got-aways," the term the CBP officers use to refer to aliens who are detected entering the United States illegally, but ultimately not apprehended. As of August 2024, at least 2 million known got-aways have evaded U.S. Border Patrol under this administration's policies.[1]

[1] U.S. House of Representatives Homeland Security Committee, *Border Crisis Startling Stats, More Than 1.3 Million Inadmissible Aliens Mass-Paroled Under the Biden & Harris' CBP One, CHNV Programs* (August 2024).

The administration's failure to effectively enforce the nation's immigration laws and deter illegal immigration has put public safety at risk. As of August 2024, 382 individuals whose names appear on the terrorist watchlist were stopped trying to cross the U.S.-Mexico border between ports of entry since FY 2021. So far this year, CBP has arrested at least 33,379 aliens with criminal convictions or outstanding warrants nationwide, including 478 known gang members.[2]

Moreover, nationwide border encounters by CBP's Office of Field Operations (OFO) at POEs increased more than 185 percent since August 2021.[3] This is in part because the Biden-Harris administration, to conceal the border crisis from the American public while continuing to permit the entry of inadmissible aliens into the United States, has created numerous programs to parole aliens into the United States. Since January 2023, 813,000 inadmissible aliens have successfully scheduled appointments to enter the United States using the Biden-Harris administration's CBP Mobile app appointment system.[4]

On June 3, 2024, President Biden signed a Proclamation authorized by section 212(f) and 215(a) of the Immigration and Nationality Act (INA) to restrict the admission of aliens across the southern border, "finding that because the border security and immigration systems of the United States are unduly strained at this time, the entry into the United States for certain categories of [aliens] is detrimental to the interests of the United States."[5] The Proclamation's suspension and limitation on entry will be in effect immediately after the Secretary of Homeland Security has found that there are have been a seven-consecutive-calendar-day average of 2,500 encounters or more, and will be discontinued 14 calendar days after a finding by the Secretary of Homeland Security that there has been a seven-consecutive-calendar-day average of less than 1,5000 encounters.[6]

The Departments use the term "emergency border circumstances" to refer generally to "situations in which high levels of encounters at the southern border exceed DHS's capacity to deliver timely consequences to most individuals who cross unlawfully into the United States and cannot establish a legal basis to remain in the United States," but more specifically: "the periods during which the Proclamation is intended to be in effect."

The Proclamation, during such times that the suspension and limitation on entry is in effect, applies to any aliens but expressly excludes:

- Any noncitizen national of the United States;
- Any lawful permanent resident of the United States;
- Any UAC, as defined in 6 U.S.C. § 279(g)(2);

[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] The White House, *A Proclamation on Securing the Border* (Jun. 4, 2024).
[6] *Id*.

- Any alien who is determined to be a victim of a severe form of trafficking in persons, as defined in 22 U.S.C. § 7102(16);
- Any alien who has a valid visa or other lawful permission to seek entry or admission into the United States, or presents at a port of entry pursuant to a pre-scheduled time and place (under the Biden administration's CBP One mass inadmissible entry scheme);
- Members of the United States Armed Forces and associated personnel, United Sates Government employees or contractors on orders abroad or their accompanying family members who are on their orders or are members of their household;
- Aliens who hold a valid visa or who have all necessary documents required for admission consistent with the requirements of 8 U.S.C. § 1182(a)(7), upon arrival at a port of entry;
- Aliens traveling pursuant to the visa waiver program as described in 8 U.S.C. § 1187;
- Inadmissible aliens who arrive in the United States at a southwest land border port of entry pursuant to "a process the Secretary of Homeland Security determines is appropriate to allow for the safe and orderly entry of [inadmissible aliens] into the United States,"
- Aliens who are permitted to enter by a CBP officer based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, urgent humanitarian, and public health interests at the time of the entry or encounter that warranted permitting the alien to enter; and
- Aliens who are permitted to enter by a CBP officer, due to operational considerations at the time of the entry or encounter that warranted permitting the noncitizen to enter.[7]

Immediately following the President's Proclamation, the Department of Homeland Security and the Department of Justice jointly issued the Securing the Border Interim Final Rule to "align the Department's border operations and applicable authorities with the Proclamation's policy and objectives."[8] The interim final rule established a regulatory bar to asylum eligibility that applies to certain individuals who unlawfully enter the United States during "emergency border circumstances," raises the screening standard for statutory withholding of removal and withholding and deferral of removal to "reasonable probability" during this period, and adjusts to a "manifestation of fear" procedures for expedited removal.[9]

President Biden issued a new 212(f) Proclamation on September 27, 2024 to replace his June 3, 2024 Proclamation. This strengthened the entry restriction by instead requiring that encounters between POEs must remain below 1,500 for 28 consecutive calendar days before the 14-

[7] *Id*.
[8] 89 Fed. Reg. 48710, 48715 (Jun. 7, 2024).
[9] *See* 89 Fed. Reg. 48710 (Jun. 7, 2024).

calendar-day waiting period is triggered. Biden also amended the proclamation to require DHS to include UACs when calculating the number of encounters for the purposes of Proclamation.

The Departments issued this new Securing the Border rule (final rule) to align the rule with the changes made in the September 27 Proclamation. Additionally, to ensure the rule can function even if the September 27 proclamation was rendered unlawful by a court order, DHS included a severability clause to insulate the rule.

The Proclamation and the Securing the Border rule follow the issuance of the Circumvention of Lawful Pathways rule.[10] This rule was issued by the Biden administration to address the end of the U.S. government's use of its Title 42 public health order, which was expected to cause a spike in illegal immigration across the southwest border to as high as 11,000 encounters daily.[11]

The rule, which became effective on May 11, 2023 and remains in effect and applies to aliens who enter the United States illegally during a two-year period, and imposes a rebuttable presumption of asylum ineligibility to aliens who fail to enter the United States lawfully, fail to seek protection in a country through which they transited through *en route* to the United States, or otherwise schedule their unlawful arrival to the United States with CBP prior to their arrival using the new-CBP One mobile application.[12] The rule does not affect an alien's eligibility for statutory withholding of removal or withholding or deferral of removal under the CAT regulations.

The rebuttable presumption does not apply to UACs or to aliens who meet a non-exhaustive list of exceptions. For example, an alien may "overcome the presumption" by demonstrating that "exceptionally compelling circumstances exist."[13] Such circumstances include, but are not limited to, at the time of entry, the alien or a family member with whom they are traveling: (1) faced an acute medical emergency; (2) faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or (3) was a victim of a severe form of trafficking in persons under 8 CFR 214.11(a).[14] Other, non-enumerated exceptional circumstances may, under an asylum officers discretion, qualify an alien for an exception to the presumption.[15] While there was a temporary drop in encounters immediately after issuance the rule, the rule has been ineffective to deter asylum abuse in the long term because of its extensive exceptions and easy to exploit loopholes.[16]

Both this final rule and the Circumvention of Lawful Pathways rule are watered-down versions of Trump administration policies that were enjoined by the U.S. District Court for the Northern

[10] 88 Fed. Reg. 31314 (May 16, 2023).
[11] *See* 88 Fed. Reg. 11704, 11706 (Feb. 23, 2023).
[12] *See* 88 Fed. Reg. 31314 (May 16, 2023).
[13] 8 C.F.R. § 208.33(1)(3)(i), 1208(a)(3)(i).
[14] 8 C.F.R. §§ 208.33(a)(3)(i)(A)-(C), (ii), 1208.33(a)(3)(i)(A)-(C), (ii).
[15] *Id*.
[16] *See* U.S. Customs and Border Protection, *Southwest Land Border Encounters* (last updated Jun. 2024).

District of California.[17] On November 9, 2018, President Trump issued Presidential Proclamation 9822, titled *Addressing Mass Migration Through the Southern Border of the United States*. Premised on the President's section 212(f) authority, President Trump suspended the entry of aliens across the Southwest border for 90 days, except for aliens who came through the ports of entry and for aliens with certain humanitarian claims. That same day, the Departments issued its own interim final rule restricting asylum eligibility from illegal entrants subject to this proclamation. This rule was called *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims.*[18]

The Trump administration later issued an additional interim final rule, titled *Asylum Eligibility and Procedural Modifications*, that restricted asylum eligibility from illegal border crossers who had either not applied for and been denied asylum or other protection in at least one country *en route* to the United States (if any one such country was a party to one of three relevant international treaties) or not qualified as victims of human trafficking.[19] This rule was also enjoined by this district court and ultimately invalidated by the Ninth Circuit on appeal.[20]

The Trump administration provided similar rationale for the need to implement this policy as the Biden administration did in 2023: to alleviate the mass illegal immigration crisis along the Southern border by discouraging the submission of fraudulent or otherwise meritless asylum claims. Unlike the Biden administration's Circumvention of Lawful Pathways rule, the Trump administration's rule did not include sweeping exceptions to its application and imposed a "bar to eligibility," rather than a "presumption against eligibility," to affected asylum applicants.

II. The Manifestation of Fear Standard is Consistent with the United States' International Refoulement Obligations and the INA and Should Be Permanently Adopted.

CIS disagrees with comments that assert that the manifestation of fear standard that is employed by this final rule violates the United States' international refoulement commitments or the INA. Further, CIS agrees with the Departments' assessment that it should be employed while broadly in the expedited removal process, including when the final rule is active.

The manifestation of fear standard is consistent with U.S. commitments under the 1967 Protocol relating to the Status of Refugees ("Refugee Protocol") (incorporating Articles 2 through 34 of the 1951 Convention relating to the Status of Refugees ("Refugee Convention")) and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

[17] *See E. Bay Sanctuary Covenant v. Garland, 994 F.3d 962 (9th Cir. 2020); E. Bay Sanctuary Covenant* v. *Barr,* 519 F. Supp. 3d 663 (N.D. Cal. 2021).
[18] *See* 83 Fed. Reg. 55934 (Nov. 11, 2018).
[19] *See* 84 Fed. Reg. 33829 (Jul. 16, 2019)
[20] *East Bay Sanctuary Covenant* v. *Biden,* 993 F.3d 640 (9th Cir. 2021).

Punishment (CAT).[21] Neither the 1967 Refugee Protocol nor the CAT is self-executing.[22] This means that these treaties are only enforceable to the extent that they have been implemented by legislation. To state this another way, the United States is only bound by its own statutes and regulations implementing these treaties. Under these commitments, the United States has an obligation (1) to not return aliens to countries where they would be persecuted on account of a protected ground; and (2) to not return aliens to countries where it is more likely than not that they would be tortured.[23]

The United States implements its nonrefoulement obligations under Article 33 of the Refugee Convention, via the Refugee Protocol, through the statutory withholding of removal statute at section 241(b)(3) of the INA – not the asylum statute.[24] Section 241(b)(3) provides that an alien may not be removed to a country where their life or freedom would be threatened because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. They are not implemented by the asylum statute, which provides that asylum is a discretionary benefit.[25]

Protection under CAT, on the other hand, is governed by the CAT regulations, authorized by the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA").[26] These regulations prohibit the United States from removing an alien to a country in which they are "more likely than not" to be tortured. Protection under CAT is granted either in the form of withholding of removal or deferral of removal.[27][28]

The manifestation of fear standard is also consistent with the statutory requirements governing expedited removal under section 235(b)(1)(A) of the INA. Specifically, that section states that, "If an immigration officer determines that an alien … who is arriving in the United States … is inadmissible…, the officer shall order the alien removed from the United States without further

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[21] While the Securing the Border rule does raise the screening standard for CAT claims in credible fear screenings from "significant possibility," the lowest standard of proof, to "reasonable probability," a higher standard that is still notably lower than "more likely than not," the final rule does not affect eligibility criteria for either form of CAT protection.

[22] *See Khan* v. *Holder,* 584 F.3d 773, 783 (9th Cir. 2009) (`[T]he [1967 Refugee] Protocol is not self-executing."); *Auguste* v. *Ridge,* 395 F.3d 123, 132 (3d Cir. 2005) (the CAT "was not self-executing").

[23] *See* Refugee Convention, 19 U.S.T. at 6276, 189 U.N.T.S. at 176 (outlining standard under the Refugee Convention); *Pierre* v. *Gonzales,* 502 F.3d 109, 114 (2d Cir. 2007) (outlining standard under the CAT).

[24] *See INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 426-27 (1999); *see also INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 440-41 (1987) (distinguishing between Article 33's non-refoulement prohibition, which aligns with what was then called withholding of deportation, and Article 34's call to "facilitate the assimilation and naturalization of refugees," which the Court found aligned with the discretionary provisions in section 208 of the INA). The Refugee Convention and Protocol are not self-executing. *E.g., Al-Fara* v. *Gonzales,* 404 F.3d 733, 743 (3d Cir. 2005) ("The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.").

[25] *See* INA 241(b)(3); 8 CFR 208.16, 1208.16; *see also INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 429-30 (1987) (discussing the statutory precursor to INA 241(b)(3), INA 243(h)); *INS* v. *Stevic,* 467 U.S. 407 (1984) (same).

[26] Public Law 105-277, 112 Stat. 2681-822.

[27] *See* 8 C.F.R. § 208.16, § 1208.16.

[28] *See* 89 Fed. Reg. 48710 (Jun. 7, 2024).

hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution." The statute does not require immigration officers to affirmatively ask every alien if they have a fear of return and does not require officers to undergo any specific procedure to determine whether an alien has "indicated … an intention" to apply for asylum.

Likewise, statute does not require that DHS screen any alien for protection under the regulations implementing CAT during the expedited removal process. Current regulations, however, generally include screenings for withholding or deferral of removal during the credible fear process.[29]

Under the manifestation of fear standard employed by the final rule, immigration officers are instructed to refer aliens to an asylum officer for a credible fear interview in the alien "manifests" a fear of return, expresses an intention to apply for asylum, or expresses a fear of return to the alien's country of origin or removal.[30] The manifestation standard, accordingly, removes the requirement that immigration officers ask every alien subject to expedited removal if they have a fear of persecution or torture and discontinues use of the Form I-867A and Form I-867B. These forms advise aliens of their right to an interview with an asylum officer and are used to ascertain whether a referral to asylum officer should be provided to an inadmissible alien.

CIS believes that this standard applies a reasonable interpretation of the phrase"…indicates an intention…" as used in section 235(b)(1)(A) of the INA. Additionally, because the standard does not require an alien to verbally communicate their fear to an immigration officer, because there are numerous signs, videos, and educational materials available in over 60 languages to aliens awaiting processing notifying aliens of their right to apply for asylum, and because immigration officers have been instructed and trained to detect non-verbal cues of legitimate fear of return, CIS believes the final rule and DHS policy include sufficient safeguards to mitigate the possibility that an alien will make it through the removal process without indicating either a fear of return or intent to apply for asylum.[31] Any potential language barrier issue would likely occur with the previous Form I-867A and Form I-867B process as well.

Accordingly, CIS does not believe that that the implementation of the manifestation of fear standard is likely to have a large impact on the number of aliens encountered between POEs who are ultimately referred to an asylum officer for a credible fear interview. CIS does, however, agree with the Departments' assessments that employing such standard will be beneficial to both increase efficiency in border processing and reduce the submission of frivolous or fraudulent asylum claims made by inadmissible aliens in the expedited removal process. To further these important goals, CIS recommends that this standard be always applied, not only when encounters exceed averages of 1,500-2,500 per day.

[29] 8 C.F.R. § 208.30.
[30] *See* new 8 C.F.R. § 235.15(b)(4).
[31] *See* 89 Fed. Reg. 81201, 81237.

III. The Departments Should Expand the Geographic Scope of the Circumvention of Lawful Pathways Rule to Include Coastal Borders.

CIS strongly agrees with the Departments proposal to expand the geographic scope of the Circumvention of Lawful Pathways rule to include aliens encountered at southern coastal borders by the U.S. Coast Guard (USCG) without regard to whether an alien has transited through Mexico. Strengthening the Circumvention of Lawful Pathways rule by aligning them with the geographic bounds of the Proclamation is critical to discourage migrants from engaging in maritime migration to avoid application of this asylum restriction. Given the strong arguments for the deterrence of maritime migration, however, CIS urges the Departments to extend the geographic scope to all coastal borders, not only to southern coastal borders.

Including all coastal borders in the application of these asylum restrictions is of critical importance. Migrant interdictions by USCG has increased significantly during the Biden-Harris administration. DHS reported in this final rule that in FY 2022, over 12,500 inadmissible aliens were interdicted by USCG and nearly 13,500 were indicted in FY 2023.[32] The Departments, however, have not reported the total number of interdictions or encounters for FY 2024, but noted that between FY 2017 and FY 2020, annual maritime interdictions never exceeded 3,600.[33]

CIS also requests that the Departments make public updated and historical data regarding maritime interdictions or encounters. While CBP posts data regarding nationwide encounters on its website, it does not delineate between land, airs, or sea arrivals – only arrivals by sector. The agency disclaims claims that, "Nationwide includes all modes of transportation."[34] This information also does not predate FY 2021. While Departments reported the number of annual maritime interdictions for FY 2022 and FY 2023 in the preamble of this final rule, the Departments did not make the data set they referenced public or make any breakdown by country of origin or demographics available to the public.[35] Understanding how the trends in maritime migration respond to evolving immigration policy is necessary to evaluate the effectiveness and consequences of such policies.

Maritime migration is exceptionally dangerous, as it imposes life-threatening risks for both migrants and DHS personnel. As the Departments explained, "Maritime migration poses unique hazards to life and safety to both migrants and DHS personnel. Human smugglers and [aliens] migrating to the United States continue to use unseaworthy, overly crowded vessels, piloted by inexperienced mariners, without any safety equipment-including but not limited to, personal flotation devices, radios, maritime global positioning systems, or vessel locator beacons. The USCG regularly interdicts [aliens] employing maritime migration in the Gulf of Mexico and Atlantic Ocean in makeshift, overcrowded vessels." Accordingly, the CIS believes it is urgent to

[32] 89 Fed. Reg. 81273-74.
[33] *Id*.
[34] U.S. Customs and Border Protection, *Nationwide Encounters* (Oct. 22, 2024).
[35] 89 Fed. Reg. 81273-74.

ensure that their broader immigration policies do not inadvertently encourage maritime migration and that there are adequate measures in place to deter such dangerous endeavors.

The need for policies deterring illegal immigration cannot be understated. As Raul L. Ortiz, the chief of the U.S. Border Patrol under President Biden, has explained under oath, the Biden-Harris administration's rescission of deterrence policies directly contributed to the severe increase in illegal immigration across the southern border since FY 2021. In his deposition, he stated, "…in my experience, we have seen increases when there are no consequences."[36] After being asked, "So if migrant populations believe that they're going -- there are not going to be consequences, more of them will come to the border? Is that what you're saying?" He responded that, "…if migrant populations are being told that there's a potential they may be released, that yes, you can see increases [in unlawful entries]."[37]

CIS emphasizes that applying the Circumvention of Lawful Pathways rule for coastal borders is also necessary to avoid creating an incentive for illegal immigration via maritime migration. Currently, such locations are covered by President Biden's 212(f) Proclamation and the Securing the Border rule. Excluding coastal borders, however, could allow migrants to avoid application of the asylum restrictions if they are able to enter the United States at a border via the Gulf of Mexico, Atlantic Ocean, or Pacific Ocean without ever transiting through Mexico.

IV. The Departments Should Extend the Applicability of the Circumvention of Lawful Pathways Rule.

CIS strongly believes that the Departments should extend the applicability of the Circumvention of Lawful Pathways rule. Currently, the Circumvention of Lawful Pathways rule applies to any alien who, *inter alia*, entered the United States from Mexico "between May 11, 2023 and May 11, 2025" and "[s]ubsequent to the end of the implementation of the Title 42 public health Order."[38] CIS recommends that, in addition to strengthening the rule by extending the geographic application of the rule to include coastal borders regardless of whether an alien transited through Mexico or another third country *en route* to the United States, and rescinding the rule's easy to exploit exceptions at 8 C.F.R. § 208.33(a)(2)-(3), that the Departments must make the Circumvention of Lawful Pathways rule permanent to deter illegal immigration to the United States by mitigating the potential for abuse of the asylum system.

The rationale the Departments put forward to justify the Circumvention of Lawful Pathways' presumption against asylum eligibility supports important, long-term goals to distribute the asylum burden to countries that can provide protection against persecution within the Western Hemisphere. As the Departments acknowledge, "Indeed, access to protection is more available now throughout the region than at any time in the recent past. This proposed rule takes account

[36] Ortiz Dep., Jul. 28, 2022, *Florida v. United States*, Case No. 3:21-cv—1066 (N.D. Fla. 2022).
[37] *Id*.
[38] 8 C.F.R. §§ 208.33(a)(1)(i)-(ii), 1208.33(a)(1)(i)-(ii).

of these regional efforts and is designed to promote their further development by demonstrating to partner countries and migrants that there are conditions on the United States' ability to accept and immediately process individuals seeking protection, and that partner countries should continue to enhance their efforts to share the burden of providing protection for those who qualify."[39]

Notably, the Government of Mexico has significantly expanded access to humanitarian protection through its Mexican Refugee Assistance Commission (COMAR) in recent years, and, as a result, has now "emerged as one of the top countries receiving asylum applications in the world."[40] As the Departments also reported, in 2021, COMAR received nearly 130,000 asylum applications—almost double the number of applications it processed in 2019, and the third most of any country in the world, after the United States and Germany.[41] Of those applications in 2021, COMAR granted asylum in 72 percent of cases; an additional two percent of applicants were granted complementary protection.[42]

Asylum seekers may also find their cases resolved significantly faster outside the United States. At the time the Circumvention of Lawful Pathways rule was proposed, the Departments reported that the average protection claim took COMAR 8-12 months to adjudicate – compared with numerous years in the United States.[43] Currently, the UNHCR reports that COMAR will take 45 to 100 business days to make a decision on an application, and in some cases, extend the deadline another 45 business days.[44] Egregiously, news reports indicate that some migrants have received immigration court hearing dates more than ten years following their arrival date in the United States.[45] The Departments previously reported that of all credible fear claims made in the United States between 2014 and 2019 (between five and nine years ago), 39 percent are still pending a final resolution.[46]

CIS also disagrees with commenters that argue that Mexico does not provide adequate asylum procedures or a sufficiently safe environment for asylum seekers. Reports from the U.S. Ambassador to Mexico from 2020 explained that reports of localized violence in particular areas of Mexico do not indicate security conditions in the country as a whole, which spans nearly 7,600,000 square miles.[47] As the Departments have acknowledged, "Discussions about

[39] *Id*. at 11730.
[40] *Id*. at 11721.
[41] *Id*.
[42] *Id*.
[43] *Id*.; *see also* U.S. Department of Homeland Security, Office of Immigration Statistics, Analysis of Enforcement Lifecycle data as of September 30, 2022.
[44] UNCHR, the UN Refugee Agency, Help Mexico, *How to Apply for Refugee Status in Mexico*, 2024 (last visited Nov. 5, 2024).
[45] Spagat, Elliot, AP News, *Immigrants waiting 10 years in US just to get a court date* (April 26, 2023).
[46] 88 Fed. Reg. 11704, 11716 (Feb. 23, 2023).
[47] *See* U.S. Department of State, U.S. Embassy and Consulates in Mexico, Memorandum from Christopher Landau, U.S. Ambassador to Mexico, on Mexico's Refugee System (Aug. 31, 2020).

conditions in Mexico oftentimes conflate the perils that refugees might face traversing across dangerous parts of Mexico *en route* to the United States with the ability to seek protection in a safe place in Mexico."[48] It is reasonable to conclude many migrants who voluntarily transit through Mexico and other signatory countries may be able to obtain adequate protection in these countries, especially considering that nationals from dozens of countries worldwide have been encountered in the border region after transiting through Mexico.

Additionally, limiting asylum eligibility to migrants who demonstrate the greatest need for protection is necessary to preserve the integrity of the immigration system. The continued maintenance of effective deterrence policies is essential to reducing illegal immigration into the United States, which has reached historic rates since 2021 and poses grave dangers to migrants, U.S. residents, and costs federal, state, and local taxpayers billions annually, while strengthening transnational criminal organizations. Until Congress closes loopholes in the asylum laws and implements effective fraud-deterrence policies, the asylum system will continue to be abused as a means for release into the United States. The U.S. government will be unable to obtain and maintain operational control of its borders unless effective deterrence policies are in place to discourage mass asylum fraud.

V. The Securing the Border Final Rule Continues to Permit a Reckless Level of Illegal Immigration Across the Southern Border.

The final rule continues to condone crisis levels of illegal immigration into the United States and asylum abuse. CIS strongly disagrees with the Departments' assessment that the final rule's numerical thresholds are adequate and appropriate to invoke application of the rule. In place of the rule's numerical thresholds, CIS recommends applying the final rule continuously (without regard to a numerical threshold) to deter asylum fraud and abuse. In the alternative, the Departments should include the number of inadmissible aliens encountered at POEs in addition to those encountered between POEs when determining whether the rule should be activated. This would include aliens who have scheduled appointments to appear at ports of entry through the CBP One Mobile App (or any subsequent scheduling system).

Moreover, CIS supports the Departments' decision to include UACs when evaluating whether a numerical threshold has been met. Because of their unique and acute vulnerabilities, the arrival of UACs imposes serious demands on the Departments resources and capabilities.[49] Excluding

[48] 85 Fed. Reg. 82260, 82271 (Jan. 19, 2021).

[49] "All UCs (regardless of whether they came from a contiguous country or a non-contiguous country) require a greater proportion of resources to process and hold safely in CBP facilities and merit inclusion in the threshold calculations to accurately reflect this reality. For example, UCs in CBP custody generally must be referred to the Department of Health and Human Services' Office of Refugee Resettlement and transferred to its care within 72 hours after determining that the noncitizen is a UC, absent exceptional circumstances. 8 U.S.C. 1232(b)(3); *see also* 6 U.S.C. 279. Because of this, UCs are generally prioritized for processing in CBP facilities. The processing and treatment of UCs also include a number of other unique legal and policy requirements, such as conducting a thorough screening for trafficking and any claims of fear of return. During their time in custody, UCs receive

UACs from the numerical threshold may recklessly create an additional pull factor for the continued smuggling of minors across the southern border.

As explained above, the President's June Proclamation was originally designed to only go into effect when encounters at the border exceed 2,500 per day and would be suspended when encounters drop below 1,500 per day 14 calendar days after DHS determines that there has been a seven-consecutive-day average of fewer than 1,500 encounters between ports of entries.[50] Now, the President's September Proclamation, which replaced the June 2024 Proclamation, requires that encounters remain below 1,500 encounters between POEs for 28 consecutive calendar days before the 14-calendar-day waiting period is triggered.[51] This final rule amends the Department's policy to align with the September 27 Proclamation's temporal thresholds but maintains the numerical thresholds.[52]

Accordingly, under the scheme proposed by this final rule, the Departments will tolerate up to 912,135 encounters between POEs a year (2,499 per day) without triggering application of the rule. It will also tolerate 41,972 encounters between POEs in a 28-day period after application of the rule has begun.

Concerningly, this count excludes consideration of any inadmissible alien that is paroled into the United States via any of the Biden-Harris administration's mass parole programs, including CNHV Parole, or any inadmissible alien encountered at a POE, regardless of whether that inadmissible alien has prior authorization from the Biden-Harris administration to be paroled into the United States. DHS currently accepts 1,450 CBP One appointments at POEs per day, or 529,250 inadmissible entries per year.[53] In total, this final rule could tolerate an astounding1,441,385 inadmissible aliens to enter the United States without triggering the application of the rule – and this number does not count inadmissible aliens who show up at POEs without an appointment.

Large numbers of inadmissible alien arrivals, however, divert significant resources from DHS operations for migrant processing. Inadmissible arrivals can be so disruptive at POEs that in 2016, under the Obama administration, CBP "began taking steps to prevent asylum seekers from entering port buildings or otherwise joining the inspection queue. In November 2016, DHS…

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medical screenings and child-appropriate activities and humanitarian supplies. They also must generally be held separately from unrelated adults, impacting CBP's holding capacity. This means that DHS must expend resources to quickly process, refer, and transfer UCs to the Office of Refugee Resettlement's care. This time-consuming and resource-intensive process must always be followed for UCs encountered at the southern border, regardless of whether emergency border circumstances are present." 89 Fed. Reg 81156, 81167 (Oct. 7, 2024).

[50] The White House, *A Proclamation on Securing the Border* (Jun. 4, 2024).

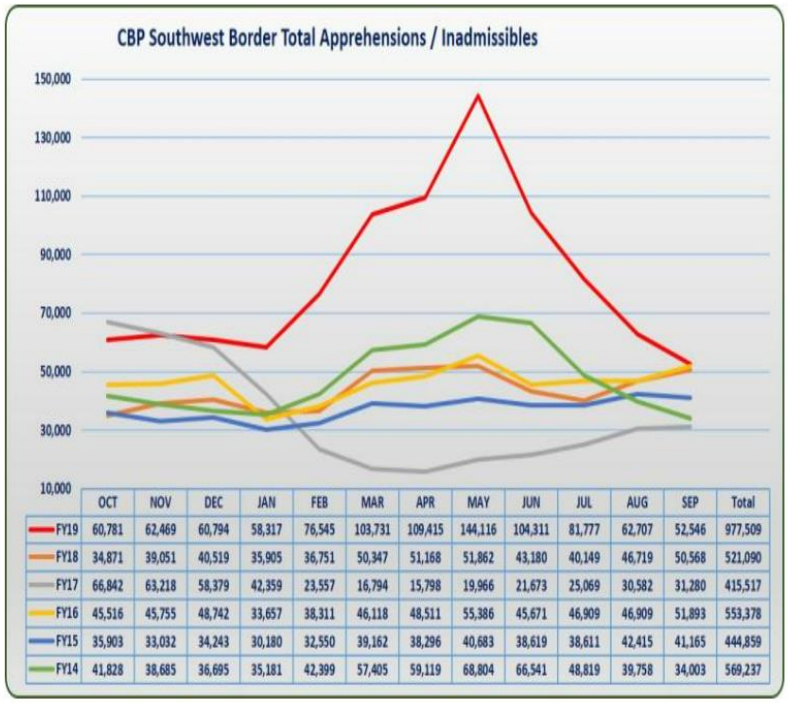
[51] Presidential Proclamation 10817—Amending Proclamation 10773 (Sept. 27, 2024).

[52] 89 Fed. Reg.

[53] U.S. Customs and Border Protection, *CBP One Appointments Increased to 1,450 Per Day*, U.S. Customs and Border Protection, June 30, 2023.

approved 'metering,' allowing border officials who deemed a port of entry to be at capacity to turn away all people lacking valid travel documents."[54]

When DHS's metering policy was challenged in court, the Departments argued that the practice was necessary to mitigate the significant disruption that the arrivals had on DHS operations. Specifically, the government states that metering was necessary because POEs "were often stretched to the limits, with ever-increasing numbers of aliens 'surpass[ing] the physical capacity' of various ports and 'result[ing] in a tremendous strain on all available local resources,' including personnel."[55] At this time, border encounters rarely exceeded 100,000 per month. Nevertheless, in 2019, Randy Howe, CBP's then-Executive Director for Operations in the Office of Field Operations, described this level of unauthorized migration as "unprecedented" and as representing the highest totals in well over a decade.



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
FY19	60,781	62,469	60,794	58,317	76,545	103,731	109,415	144,116	104,311	81,777	62,707	52,546	977,509
FY18	34,871	39,051	40,519	35,905	36,751	50,347	51,168	51,862	43,180	40,149	46,719	50,568	521,090
FY17	66,842	63,218	58,379	42,359	23,557	16,794	15,798	19,966	21,673	25,069	30,582	31,280	415,517
FY16	45,516	45,755	48,742	33,657	38,311	46,118	48,511	55,386	45,671	46,909	46,909	51,893	553,378
FY15	35,903	33,032	34,243	30,180	32,550	39,162	38,296	40,683	38,619	38,611	42,415	41,165	444,859
FY14	41,828	38,685	36,695	35,181	42,399	57,405	59,119	68,804	66,541	48,819	39,758	34,003	569,237

U.S. Customs and Border Protection

Howe's position is also consistent with former Obama administration officials' positions on border operations. Former Secretary of Homeland Security Jeh Johnson, who served as secretary from 2013-2017, told NBC in 2019 that 1,000 border crossings in a day is a "bad day" for DHS and that high of a number would put him in a "bad mood the whole day."[56] He added, "I know

[54] *Al Otro Lado v. Mayorkas*, Case Nos. 22-55988, 22-56036 (9th Cir. 2024).
[55] *Al Otro Lado v. Wolf*, Case No. 19-56417 (9th Cir. 2020).
[56] Ernst, Douglas, Washington Times, *Jeh Johnson says border crisis is real: 'I cannot begin to imagine' 4K apprehensions per day* (March 29, 2019).

that a thousand overwhelms the system."[57] This daily rate would equate to approximately 30,000 encounters a month or 360,000 a year (including POE arrivals).

Accordingly, CIS urges the Departments to amend the final rule to eliminate the recklessly high numerical threshold that must be triggered for the rule to apply to inadmissible alien's asylum applications and recklessly high numerical encounter threshold to end application of the rule. If the Departments decide to maintain the numerical thresholds for application of the final rule, CIS recommends that the Departments include the number of inadmissible aliens encountered at POEs in addition to the number of inadmissible aliens encountered between POEs.

The Departments are authorized to expand the final rule's asylum restriction beyond the scope of the September Proclamation. CIS reminds the Departments that it their authority to issue additional restrictions is not limited by the President's 212(f) Proclamation's terms, which limits entry into the United States. Section 212(f) of the INA authorize the President's to issue an entry restriction. The final rule, on the other hand, is a limitation on asylum eligibility and is authorized by sections 208(b)(2)(C) and (d)(5)(B) of the INA and the Department's discretionary authorities, *e.g.*, sections 103(a)(3), (g)(2), and 208(b)(1)A) of the INA.

Expanding the scope of the rule is consistent with the policy objectives the Departments articulated to the Ninth Circuit in litigation and would further DHS's statutory responsibility to obtain "operational control" over the border.[58] Importantly, these changes would also reduce the submission of fraudulent or frivolous asylum claims and strain on the entire asylum system.

VI. The Departments Must Implement Additional Deterrence Policies to Discourage Asylum Abuse and Illegal Immigration to the United States.

CIS strongly disagrees with the Department's statements that blame the border crisis on Congress's failure to appropriate additional funding to the Departments.[59] It is the Biden-Harris administration's consistent abdication of its border security and immigration enforcement responsibilities, rather, that has resulted in the sustained, high rate of encounters since 2021.[60]

DHS's failure to secure its border, deter illegal immigration, and detain inadmissible aliens who are subject to section 235 of the INA's mandatory detention provisions has significantly increased illegal immigration across the Southwest Land Border and strained the Departments resources. The availability of prompt release from detention and access to employment authorization has caused the number of encounters to skyrocket to historic levels since 2021.[61]

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[57] *Id*.
[58] Secure Fence Act of 2006, Pub. L. No. 109-367, § 2, 120 Stat. 2638 (2006).
[59] *See, e.g.,* 89 Fed. Reg. 48710, 48711 (Jun. 4, 2024).
[60] *See* Speaker of the House, Mike Johnson, *64 Times the Biden Administration Intentionally Undermined Border Security* (Jun. 2, 2024).
[61] U.S. Customs and Border Protection, *Southwest Land Border Encounters* (May 2024).

Over the past decade, most credible fear claims were determined to be meritless. When evaluating the expedited removal process, the Supreme Court noted that a random sampling of asylum claims found 58 percent possessed indications of fraud, while 12 percent were conclusively fraudulent.[62] Moreover, of the applicants determined to have a credible fear (or a significant possibility of establishing eligibility for asylum or withholding of removal), about 50% over the same 10-year period, ultimately did not submit an asylum application after their fear screening.[63] In 2019, a grant of asylum followed a credible fear determination just 15% of the time.[64]

Given these facts, CIS urges the Departments to adopt the following reforms to deter fraud and abuse of the asylum system, obtain control over the southern border, and deter illegal immigration into the United States. These policies will significantly reduce the resource strain mass illegal immigration is imposing on DOJ's Executive Office for Immigration Review, CBP, USCIS, and ICE resources and may significantly reduce processing times for aliens with legitimate fear claims.

A. End the Administration's Unlawful Use of Parole and Comply with the INA's Mandatory Detention Provisions

CIS strongly urges DHS to end its unlawful practice of paroling aliens into the United States when no individualized determination has been made that an "urgent humanitarian" reason or "significant public benefit" exists, as required by statute.[65] The strongest pull factor for illegal immigration to the United States is not the availability of asylum protection, of which few migrants are ultimately determined to be eligible, but rather the near guarantee of release from custody after the submission of a fear claim.[66] Once an alien is released on parole, they are eligible to apply for work authorization and, given contemporary immigration court backlogs, may remain in the United States for numerous years before their first immigration court date.[67]

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[62] *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. at 1959, 1967-68.
[63] *See* Executive Office of Immigration Review, *Adjudication Statistics: Rates of Asylum Filings in Cases Originating With a Credible Fear Claim* (Nov. 2018); *see also* 84 Fed. Reg. 33841 (noting that many instead abscond).
[64] *See* Executive Office of Immigration Review, *Asylum Decision Rates in Cases Originating With a Credible Fear Claim* (Oct. 2019).
[65] INA § 212(d)(5).
[66] *See Florida v. United Sates*, Case No. 3:21-cv-1066-TKW-ZCB (Mar. 8, 2023) (finding that, the Biden administration's parole policies have substantially contributed to the border crisis, stating "[DHS has] effectively turned the Southwest Border into a meaningless line in the sand and little more than a speedbump for aliens flooding into the country by prioritizing "alternatives to detention" over actual detention and by releasing more than a million aliens into the country – on "parole" or pursuant to the exercise of "prosecutorial discretion" under wholly inapplicable statute – without even initiating removal proceedings.")
[67] 8 C.F.R. § 274a.12; While the Department of Justice has not publicly shared data regarding how long recent arrivals must wait for their first immigration court hearing, in April 2023 AP reported and U.S. Rep. Henry Cuellar (D-Texas) stated that some recent migrants were asked to make their first appearance in immigration court in March

Congress has not delegated DHS authority, through section 212(d)(5) of the INA or any other provision in law, to permit the limitless admission of aliens defined solely by DHS's interpretation of "significant public benefit." No such provision in law exists. Rather, Congress has created a detailed and comprehensive scheme for regulating the admission and employment of aliens, including entrepreneurs, refugees, and familial relatives, into the United States.[68] Congress has also unambiguously mandated the detention of all migrants apprehended entering illegally and all aliens encountered at the ports of entry seeking admission to the United States who are not "clearly and beyond a doubt entitled to be admitted."[69]

Congress has tightly prescribed authority to DHS to parole aliens into the United States. The history of the parole statute is one of increasing tightening of its language in response to administrative overreach. Congress's actions have resulted in the restriction – not an expansion – of agency discretion.[70] Today, parole may only be granted: (1) temporarily, (2) "on a case-by-case basis," (3) for no others purpose than "urgent humanitarian reasons or significant public benefit," (4) if the parolee was in the "custody" of DHS at the time of the grant of parole, and (5) if the grant of parole is never ("shall not be") "regarded as an admission of the alien."[71] Further, section 212(d)(5) of the INA requires that an alien "be returned to the custody from which he was paroles" after the purpose of the parole has been satisfied.

Accordingly, using parole as a mechanism to release aliens subject to section 235(b)'s detention requirements from detention is contrary to law.[72] It is unreasonable to conclude that Congress regulated the admission, detention, and employment by aliens as carefully as it has, but also intended DHS to be able to use parole to admit an indefinite number of additional inadmissible aliens, in its sole discretion, and to allow them to engage in employment.[73]

B. Require Asylum Officers to Apply All of the Mandatory Bars to Asylum and Withholding of Removal at the Credible Fear Stage

2033 — a full decade out at the time it was reported. Spagat, Elliot, AP News, *Immigrants waiting 10 years in US just to get a court date* (Apr. 26, 2023).

[68] *See* 8 U.S.C. § 1101 et seq.

[69] INA § 235(b); *see Jennings v. Rodriguez,* 138 S. Ct. 830 (2018).

[70] As a response to agency abuse of discretionary parole, Congress included in the 1980 Refugee Act a prohibition the discretionary exercise of parole for any "alien who is a refugee," unless the Attorney General determined that "compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207." 8 U.S.C. § 1182(d)(5)(B). In 1996, Congress acted again to rein in agency abuse of discretion to parole aliens into the United States by authorizing discretionary grants of parole by "only" where additional conditions had been met.

[71] 8 U.S.C. § 1182(d)(5)(A).

[72] *See Florida v. United Sates*, Case No. 3:21-cv-1066-TKW-ZCB (Mar. 8, 2023).

[73] *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[H]ad Congress wished to assign ['a question of deep economic and political significance'] to an agency, it surely would have done so expressly."); *See also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes.").

CIS strongly recommends that DHS amend its recent proposed rule, *Application of Certain Mandatory Bars in Fear Screenings*,[74] to require USCIS asylum officers to apply **all** of the mandatory bars to asylum and statutory withholding of removal at the credible fear stage. Specifically, DHS should require asylum officers to determine (1) whether an alien is subject to one or more of the mandatory bars to being able to apply for asylum under section 208(a)(2)(B)-(D) of the INA, or the bars to asylum eligibility under section 208(b)(2) of the INA, including any eligibility bars established by regulation under section 208(b)(2)(C) of the INA; and (2) if so, whether the bar at issue is also a bar to statutory withholding of removal under section 241(b)(3)(B) of the INA and withholding of removal under the regulations implementing the Convention Against Torture (CAT).

Under the Center's proposed framework, if a mandatory bar to asylum applies, the alien should be screened only for statutory withholding of removal and withholding of removal under the CAT regulations. If the alien is subject to a mandatory bar to asylum that is also a mandatory bar to statutory withholding of removal, then the alien should be screened only for deferral of removal under the CAT regulations.

An alien in expedited removal proceedings who could establish a credible fear of persecution or reasonable possibility of persecution but for the fact that he or she is subject to one of the bars should receive a negative fear determination, unless the alien establishes a significant possibility (or reasonable possibility if DHS adopts the Center's recommendation to raise the screening standard for statutory withholding of removal and CAT protection, discussed below) of torture, in which case they should be referred to an immigration court with a Notice to Appear for full consideration of their claims by an immigration judge.[75] Aliens who receive negative credible fear determinations retain the opportunity to have that negative determination reviewed by an immigration judge.[76]

The *Application of Certain Mandatory Bars in Fear Screenings* rule, however, arbitrarily excluded the mandatory bar found at section 208(b)(2)(A)(vi) of the INA (i.e., the "firm resettlement bar"), which bars an alien from asylum eligibility if they have already been "firmly resettled" in a third country, or the bars to applying for asylum found at section 208(a)(2) of the INA. DHS has not adequately explained why it has chosen to allow asylum officers to apply the other bars to asylum and withholding of removal, but not the firm resettlement bar, which aligns

[74] 89 Fed. Reg. 41347 (May 13, 2024).
[75] On March 29, 2022, DHS issued a regulation, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 85 Fed. Reg. 80274 (Mar. 29, 2022), to allow asylum officers to refer aliens who receive positive credible fear determinations to USCIS for an "Asylum Merits Interview" for a final adjudication on their asylum application by an asylum officer, rather than to EOIR for section 240 removal proceedings. For reasons not discussed in this comment, CIS believes this regulation is poor policy and legally deficient. Accordingly, CIS does not recommend DHS utilize the procedures created under the regulation.
[76] *See* INA § 235(b)(1)(B)(iii)(III).

with Congress's overall intent to discourage forum shopping and "not to provide [aliens] with a broader choice of safe homelands, but rather, to protect [refugees] with nowhere else to turn."[77]

As the Departments jointly acknowledged in 2020, it is pointless, wasteful, and inefficient to adjudicate claims for relief in section 240 proceedings when it can be determined that an alien is subject to one or more of the mandatory bars to asylum or statutory withholding at the screening stage.[78] Applying all of the mandatory bars to aliens at the credible fear screening stage would eliminate removal delays inherent in section 240 proceedings that serve no purpose and eliminate the waste of adjudicatory resources currently expended in vain. These resources could instead be used to process and adjudicate claims from applicants that have a greater likelihood of success in their asylum application.

CIS also strongly disagrees with comments that argue that asylum officers will not be capable of assessing whether the bars apply at the credible fear stage. As DHS has already noted, asylum officers are "well trained in asylum law" and "already assess whether certain bars may apply to applications in the credible fear setting – they simply do not apply them under current regulations."[79] Credible fear determinations are themselves complicated and fact intensive inquires that asylum officers receive significant training to conduct.[80]

Moreover, because a credible fear interview is a screening, asylum officers only need to assess whether there is a significant possibility that an applicant can overcome the bars. As discussed above, the significant possibility standard is a low screening that merely requires the applicant to establish "a substantial and realistic possibility of succeeding" on their asylum applicant. USCIS has, at times, described as requiring a showing of "as little as a 10 percent change of persecution on account of a protected ground."[81] Additionally, an alien's testimony alone may be sufficient evidence to establish asylum or statutory withholding of removal eligibility.[82] Because testimony

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[77] *See Matter of B-R-*, 26 I&N Dec. at 122 (quotation marks omitted); *see also Matter of A-G-G-,* 25 I&N Dec. at 503 (explaining the purpose of the firm resettlement bar "is to limit refugee protection to those with nowhere else to turn").
[78] 85 Fed. Reg. 36264, 36272 (Jun. 15, 2020).
[79] 85 Fed. Reg. 80274, 80296; *See* Government Accountability Office, *Actions Needed to Strengthen USCIS's Oversight and Data Quality of Credible and Reasonable Fear Screenings* at 10 (Feb. 2020), ("In screening noncitizens for credible or reasonable fear …. [a] USCIS asylum officer is to determine if the individual has any bars to asylum or withholding of removal that will be pertinent if the individual is referred to immigration court for full removal proceedings."); U.S. Citizenship and Immigr. Serv., *Lesson Plan on Credible Fear of Persecution and Torture Determinations* at 31 (2019), ("Even though the bars to asylum do not apply to the credible fear determination, the interviewing officer must elicit and make note of all information relevant to whether a bar to asylum or withholding applies or not.").
[80] INA § 235(b)(1)(E), (defining an asylum officer as one who "has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under [INA 208], and … is supervised by an officer who [has had similar training] and has had substantial experience adjudicating asylum applications."); *see generally* 8 C.F.R. § 208.1(b) (covering training of asylum officers).
[81] *See I.N.S.* v. *Cardoza-Fonseca,* 480 U.S. 421, 431-32 (1987).
[82] *See Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987).

is already used as evidence to establish a part or whole credible fear claim in many cases, there is no reason to believe that an alien cannot also provide testimony establishing a significant possibility whether they are subject to a bar to asylum or withholding.

C. Utilize Section 235(b)(2)(C) of the INA or Reinstate the Migrant Protection Protocols (MPP)

CIS urges DHS to continue operation of section 235(b)(2)(C) of the INA and require certain arriving aliens to wait in Mexico pending their removal proceedings with an immigration judge in the United States as an alternative to detaining arriving aliens in the United States under section 235(b)(1) (governing "expedited removal" proceedings) or removal proceedings pursuant to section 235(b)(2)(a)(i). DHS's operation of MPP, which implemented section 235(b)(2)(C), has a proven track record to reduce illegal immigration across the southern border and successfully ended the 2019 border crisis. DHS should reinstate MPP to end the current crisis.

The availability of employment authorization with a pending asylum application, combined with "catch-and-release" policies that ensure most aliens can avoid detention and be released into the United States, provides a strong incentive for illegal border crosses, and once apprehended by DHS, for making a fraudulent or frivolous asylum claims and later disappear into the interior of the United States. By eliminating the possibility of release into the interior of the United States pending an alien's immigration court hearing, MPP eliminated the most significant pull factor for illegal border crossings. MPP also provides amenable aliens a significantly quicker avenue to an immigration hearing, where they may pursue a claim for any relief or benefits for which they may be eligible. Reducing the overall numbers of fraudulent and frivolous claims is critical to allow both DHS and DOJ to reduce their backlogs and allow legitimate asylum seekers access to benefits without unreasonable delays.

D. Rescind Restrictive Enforcement Priorities and Enforce Immigration Law in the Interior of the United States

CIS urges DHS to allow the U.S. Immigration and Customs Enforcement (ICE) to enforce immigration law by removing arbitrary limitations on who may be arrested or removed. DHS must immediately rescind its policy guidance: *Guidelines for the Enforcement of Civil Immigration Law,* September 30, 2021*; Memorandum on Worksite* Enforcement, October 12, 2021; *Rescission of Civil Penalties for Failure-to-Depart* policy, April 23, 2021; *Civil Immigration Enforcement Actions in or near Courthouses*, April 27, 2021. Relatedly, ICE Office of the Principal Legal Advisor (OPLA) should rescind its memorandum *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion*, Apr. 3, 2022, that instructs ICE attorneys to cancel cases in removal proceedings that do not meet the enforcement priorities outlined in Secretary Mayorkas's *Guidelines for the Enforcement of Civil Immigration Law* memorandum. Together, these policies

signal to the world that ICE will not strictly enforce the immigration laws of the United States against most aliens living in violation of these laws.

ICE has a Congressionally mandated role to enforce our immigration laws in the interior of the country. Preventing ICE officers from initiating enforcement actions serves no purpose aside to signaling to the world that the U.S. Government does not intend to enforce immigration laws. These policies not only threaten public safety and undermine the integrity of the immigration system, but also incentivize illegal immigration and wayward employers to hire unauthorized aliens. These policies must be rescinded immediately to reduce the significant and needless strains on the asylum system and restore order on our border.

E. Expand DHS's Use of Expedited Removal Proceedings

CIS also strongly urges DHS to expand its use of expedited removal procedures, governed by section 235(b)(1) of the INA. In the first half of FY 2024, CBP reported processing just 15% of encounters using expedited removal.[83] Expansion of expedited removal will both save DHS resources as well as discourage illegal immigration by 1) requiring that DHS detain migrants placed in expedited removal proceedings and 2) ensure the prompt removal of migrants who lack a credible fear of persecution or torture.

Congress created expedited removal procedures in section 235 of the INA to provide the executive an effective and efficient tool to address recent border crossers and process asylum claims. The Biden administration, however, has been reluctant to use expedited removal procedures in favor of unlawfully paroling aliens *en masse* out of detention and into the interior of the United States. This policy preference (i.e., the near guarantee of release from detention and availability of work authorization that a grant of parole provides) has, itself, encouraged illegal immigration to the United States on an enormous scale.[84]

F. Permanently Raise the Screening Standard for Statutory Withholding of Removal and Withholding or Deferral of Removal Under the Convention Against Torture Regulations to "Reasonable Probability."

CIS strongly recommends that DHS raise the screening standard from "significant possibility" to "reasonable probability" for all screenings of withholding and deferral of removal eligibility conducted during credible fear interviews. Applying a higher standard of proof to withholding and deferral of removal screenings is consistent with the INA, consistent with the United States' *nonrefoulement* obligations, and will reduce the strain of mass-asylum fraud of the asylum system. Moreover, because the standard for demonstrating eligibility for statutory withholding of removal and CAT protection ("more likely than not") is a notably higher standard than for asylum eligibility ("well-founded fear"), it is appropriate to apply the higher screening standard

[83] U.S. Customs and Border Protection, *Custody and Transfer Statistics* (May 28, 2024).
[84] *See Florida v. United Sates*, Case No. 3:21-cv-1066-TKW-ZCB (Mar. 8, 2023).

to reflect the difference in all cases, not just cases in which the recent regulatory restrictions on asylum eligibility apply.[85]

As the Departments explained in June, using an elevated screening standard for statutory withholding of removal and protection under CAT, "has allowed the Departments to screen out and swiftly remove additional noncitizens whose claims are unlikely to succeed at the merits stage."[86] Reducing the delta of aliens who receive positive credible fear determinations and aliens who are ultimately demonstrate eligibility for protection in the United States will promote the operational efficiencies, reduce strain on DHS operations, and allow aliens who have meritorious claims to receive protection sooner. Moreover, CIS agrees with the Departments' conclusion that, "Swiftly removing noncitizens without meritorious claims is critical to deterring noncitizens from seeking entry under the belief that they will be released and able to remain in the United States for a significant period."[87]

VII. Conclusion

CIS generally supports the promulgation of a policy that restricts asylum eligibility from inadmissible aliens who unlawfully cross the border between ports of entry. Such regulation is consistent with the INA, Congressional intent, and the United States' international nonrefoulement obligations. Importantly, it would also discourage illegal immigration into the United States by aliens who lack legitimate asylum claims.

CIS, however, believes that both the Securing the Borer final rule and Circumvention of Lawful Pathways must be strengthened to further the Departments' missions and mitigate the mass immigration crisis. CIS strongly recommends that the Departments:

- Expand use of the manifestation of fear standard;
- Expand the geographic scope of the Circumvention of Lawful Pathways rule to include coastal borders;
- Expand the application of the Circumvention of Lawful Pathways rule;
- Eliminate the recklessly high numerical threshold for application of the Securing the Border final rule, or, in the alternative, reduce the numerical threshold and include UACs and inadmissible aliens encountered at POEs when calculating whether such threshold has been met.

[85] *See* 64 Fed. Reg. 8474, 8485 (Feb. 19, 1999) ("Because the standard for showing entitlement to these forms of protection (a probability of persecution or torture) is significantly higher than the standard for asylum (a well-founded fear of persecution), the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher.").
[86] 89 Fed. Reg. 48710, 48746 (June 4, 2024).
[87] *Id*.

Finally, CIS urges the Departments to adopt additional deterrence policies to strengthen border security and the overall integrity of the asylum system, including:

- Ending the administration's abuse of parole and complying with section 235 of the INA's detention mandates;
- Utilizing DHS's authority under section 235(b)(2)(C) to return amenable inadmissible aliens to Mexico pending the duration of their immigration hearings;
- Requiring asylum officers to apply all of the mandatory bars of asylum and withholding of removal to credible fear screenings;
- Expanding DHS's use of expedited removal proceedings;
- Rescinding the Biden administration's interior non-enforcement policies; and
- Raising the screening standard for withholding of removal and deferral of removal to "reasonable possibility" in all cases for all credible fear cases.