

# Congress of the United States

## Washington, DC 20510

### Comments in response to “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers” 86 Fed. Reg. 46,906-46,950 (Aug. 20, 2021)

Dear Attorney General Garland and Secretary Mayorkas: the attached comments are in opposition to the proposed rule entitled “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers” published in the *Federal Register* at 86 Fed. Reg. 46,906-46,950 (Aug. 20, 2021) by the Department of Homeland Security and the Department of Justice.

#### I. Introduction

We are filing these comments on behalf of Senators Ron Johnson (R-Wisconsin), Mike Lee (R-Utah), John Barrasso (R-Wyoming), Marsha Blackburn (R-Tennessee), John Boozman (R-Arkansas), Mike Braun (R-Indiana), Tom Cotton (R-Arkansas), John Cornyn (R-Texas), Ted Cruz (R-Texas), Steve Daines (R-Montana), Lindsey Graham (R-South Carolina), Bill Hagerty (R-Tennessee), Josh Hawley (R-Missouri), John Kennedy (R-Louisiana), Cynthia Lummis (R-Wyoming), Roger Marshall (R-Kansas), Jerry Moran (R-Kansas), Rand Paul (R-Kentucky), Ben Sasse (R-Nebraska), Rick Scott (R-Florida), John Thune (R-South Dakota), Thom Tillis (R-North Carolina), Tommy Tuberville (R-Alabama), and Roger Wicker (R-Mississippi), and Representatives Andy Biggs (R-Arizona), Rick W. Allen (R-Georgia), Jodey C. Arrington (R-Texas), Brian Babin, D.D.S. (R-Texas), Jim Baird (R-Indiana), Dan Bishop (R-North Carolina), Jack Bergman (R-Michigan), Lauren Boebert (R-Colorado), Mo Brooks (R-Alabama), Ted Budd (R-North Carolina), Ken Calvert (R-California), John R. Carter (R-Texas), Madison Cawthorn (R-North Carolina), Ben Cline (R-Virginia), Michael Cloud (R-Texas), Andrew S. Clyde (R-Georgia), Eric A. “Rick” Crawford (R-Arkansas), Jeff Duncan (R-South Carolina), Louie Gohmert (R-Texas), Bob Good (R-Virginia), Paul A. Gosar, D.D.S. (R-Arizona), Marjorie Taylor Greene (R-Georgia), Glenn Grothman (R-Wisconsin), Andy Harris, M.D. (R-Maryland), Yvette Herrell (R-New Mexico), Jody Hice (R-Georgia), Doug LaMalfa (R-California), Debbie Lesko (R-Arizona), Tracey Mann (R-Kansas), Brian Mast (R-Florida), Tom McClintock (R-California), Mary E. Miller (R-Illinois), Barry Moore (R-Alabama), Ralph Norman (R-South Carolina), Scott Perry (R-Pennsylvania), Bill Posey (R-Florida), Matthew Rosendale, Sr. (R-Montana), Chip Roy (R-Texas), Pete Sessions (R-Texas), Victoria Spartz (R-Indiana), W. Gregory Steube (R-Florida), Van Taylor (R-Texas), Tom Tiffany (R-Wisconsin), Ann Wagner (R-Missouri), Randy Weber (R-Texas), and Steve Womack (R-Arkansas).

As duly elected members of Congress, we strongly oppose the proposed rule entitled “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers” (“proposed rule”). Your Departments requested comments related to the federalism effects that might result from implementation of this rule. In response, we express our grave concerns over the proposed rule’s

disregard for the laws enacted by Congress and the resulting encroachment on the horizontal separation of powers established by the Constitution of the United States.

The Constitution vests “[a]ll legislative Powers” in Congress.<sup>1</sup> The Executive Branch is tasked with “tak[ing] care that the laws be faithfully executed.”<sup>2</sup> By blatantly disregarding laws enacted by Congress, executive agencies inappropriately encroach on the legislative powers reserved solely to Congress. We find the modifications proposed in this rule to violate both the statutes passed by Congress and the principles of federalism, particularly concerning the use of the parole power in expedited removal; the shifting of the responsibility for adjudicating asylum applications in removal proceedings from the Department of Justice to the Department of Homeland Security; and the inexplicable disregard for the mandatory bars to asylum.

Those who do not learn from history are doomed to repeat it. For over a decade, failed immigration policies and the failure to faithfully implement the laws passed by Congress have created an immigration system where millions of illegal aliens have been released into the interior of the United States pending the adjudication of their asylum claims in removal proceedings. Aliens who have demonstrated credible fear, traditionally, have a low likelihood of ever being removed if they do not qualify for legal status (and most of them do not). Loopholes in our current immigration framework incentivize growing numbers of illegal aliens to migrate to the United States every month, as witnessed by the continuing crisis on our Southern Border. The proposed rule is a continuation of these failed policies and will serve as yet another massive “pull” factor designed to encourage more illegal immigration.

We oppose the proposed rule on a number of prudential grounds as well. The proposed rule would not advance the interests of the American people and would potentially cost taxpayers billions of dollars. The fact that it would fulfill the campaign promises of President Biden for open borders and lax immigration enforcement does not make it legally defensible; at most, that fact tells us why this administration is considering such a lawless step.

As the Constitution makes abundantly clear, changes in immigration law and policy must originate from Congress. The proposed rule is an unconstitutional violation of the separation of powers. The Departments should not implement the proposed rule and should instead work with Congress to enact meaningful legislation to address the many pull factors that have largely created the current crisis at our southern border.

## II. The Proposed Rule Circumvents Congress and Violates Statutes Passed by Congress

### A. Parole

Congress gave the Department of Homeland Security (“DHS”) limited authority to grant parole to aliens.<sup>3</sup> The proposed rule would inappropriately aggrandize that authority beyond the

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<sup>1</sup> U.S. CONST. art.1, § 1, cl.1.

<sup>2</sup> U.S. CONST. art.2, § 3, cl.1.

<sup>3</sup> 8 U.S.C. § 1182(d)(5).

scope authorized by Congress by allowing the DHS Secretary to grant parole when “detention is unavailable or impracticable (including situations in which continued detention would unduly impact the health or safety of individuals with special vulnerabilities).”<sup>4</sup> The Immigration and Nationality Act (“INA”) clearly limits the Secretary’s authority to grant parole and allows parole to be granted only “on a case-by-case basis for urgent humanitarian reasons or significant public benefit[.]”<sup>5</sup> Neither the unavailability nor the impracticality of detention qualify as either an urgent “humanitarian reason” or a “significant public benefit,” nor does the reality of either negate the directive given to your agencies from Congress. If Congress had intended to give the Secretary authority to grant parole during the expedited removal process for these reasons, it would have done so in the statute. It did not.

Instead, Congress *expressly* required aliens who have been found to have a credible fear of persecution “be detained for further consideration of the application for asylum.”<sup>6</sup> The INA is clear; the Secretary may not, by regulation, expand his authority to grant parole in contradiction of Congress’ clear direction. This proposed rule would do precisely that. Detaining aliens as required by statute will provide a more effective disincentive to filing fraudulent claims than speeding up the adjudication process.

Additionally, expanding the Secretary’s ability to grant parole to circumstances in which detention is either unavailable or impracticable would be contrary to the statutory requirement that parole be granted “only on a case-by-case basis[.]”<sup>7</sup> The proposed rule would create a categorical parole program that will result in aliens being paroled into the United States based on detention capacity, rather than on the Secretary’s determination that a particular alien should be paroled into the United States. Such a program would operate in direct violation of statute.

For the above-mentioned reasons, the provisions of the proposed rule related to parole must be removed from the final rule so as not to violate unambiguous federal law.

#### B. Any Changes to Law Should Be Made by Congress Through the Legislative Process, Not by Agencies Through the Rulemaking Process

The proposed rule seeks to transfer the process of adjudication of asylum claims raised in expedited removal proceedings from the Department of Justice to United States Citizenship and Immigration Services (“USCIS”). These changes are also plainly at odds with the law. At the time Congress passed the Homeland Security Act of 2002 (“HSA”), asylum claims raised during the expedited removal process were adjudicated by Immigration Judges. If Congress wanted Asylum Officers to adjudicate these asylum claims, it would have made that change in statute. However, section 451 of the HSA specifically enumerates the authorities that Congress intended USCIS to assume.<sup>8</sup> Those authorities do not include the authority to adjudicate asylum claims

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<sup>4</sup> Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46,906, 46,913, 46,946 (proposed Aug. 20, 2021) (to be codified at 8 CFR 235.3(b)(2)(iii), (b)(4)(ii)) (herein after referred to as “proposed rule.”).

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

<sup>6</sup> 8 U.S.C. § 1225(b)(1)(B)(ii).

<sup>7</sup> 8 U.S.C. § 1182(d)(5).

<sup>8</sup> Homeland Security Act of 2002, Pub. L. No 107-296, 116 Stat. 2135 (2002).

raised by aliens in expedited removal proceedings. Similarly, section 1101 of the HSA enumerates the authorities that Congress intended the Executive Office for Immigration Review (“EOIR”) to retain, including the authority to adjudicate asylum claims raised by aliens in expedited removal proceedings who have passed a credible fear screening.

The Conference Report for the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which established expedited removal, clearly states that “If the officer finds that the alien has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum under normal non-expedited removal proceedings.”<sup>9</sup> Section 240 of the INA, which governs non-expedited removal proceedings states: “An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”<sup>10</sup> These two provisions, when read in conjunction with the HSA, clearly articulate Congress’ intention that Immigration Judges—not *Asylum Officers*—should adjudicate the asylum claims made by aliens in expedited removal proceedings. It is inappropriate for your Departments to attempt to transfer authority from the Department of Justice to USCIS by regulation. Only Congress can make this change. If the Departments believe that this change is appropriate, they should work with Congress to amend the relevant statutes.

The proposed rule would make other significant changes to the expedited removal process which would further violate procedures required by Congress. For example, the proposed rule would change the adjudication process from an adversarial proceeding to a non-adversarial interview. It would also eliminate the requirement that the alien submit an application for asylum and replace the application with notes from the credible fear interview. These changes would significantly alter the expedited removal process and usurp Congress’ legislative functions.

### C. The proposed Rule Would Ignore Congress’ Mandatory Detention Requirement

The proposed rule accurately states, “The ability to stay in the United States for years waiting for an initial decision may motivate unauthorized border crossings by individuals who otherwise would not have sought to enter the United States and who lack a meritorious protection claim.”<sup>11</sup> However, instead of changing the current asylum process, the Departments should faithfully implement the law passed by Congress and detain all aliens seeking asylum protection while their claims are pending. Section 235 of the INA clearly states: “If the officer determines at the time of the interview that an alien has a credible fear of persecution . . . the alien shall be detained for further consideration of the application for asylum.”<sup>12</sup> The Departments should follow the law and comply with the statutory mandate requiring detention of all aliens claiming asylum. Following the mandatory detention requirement will provide a more effective disincentive to filing fraudulent asylum claims than the changes in the proposed rule.

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<sup>9</sup> H. REP. NO. 104-828, at 210, 216 (1996), available at <https://www.congress.gov/104/crpt/hrpt828/CRPT-104hrpt828.pdf>.

<sup>10</sup> 8 U.S.C. § 1229a(a)(1).

<sup>11</sup> Proposed rule, *supra* note 4 at 46,909.

<sup>12</sup> 8 U.S.C. § 1225(b)(1)(B)(ii).

#### D. Mandatory Bars Should be Applied During the Credible Fear Screening

Mandatory bars to asylum should be applied during the credible fear screening. Congress established certain mandatory bars to asylum in statute.<sup>13</sup> These mandatory bars exclude an alien from being eligible for asylum if: (1) the alien can be removed to and seek asylum in a safe third country; (2) the alien did not file an application for asylum; (3) the alien previously applied for asylum and the application was denied; (4) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; (5) the alien constitutes a danger to the community due to conviction of a particularly serious crime; (6) there are serious reasons to believe the alien committed a serious nonpolitical crime outside the United States before arriving in the United States; (7) the alien has ties to a terrorist organization, terrorist activity, Nazi persecution, genocide, torture, or extrajudicial killing; or (8) the alien was firmly resettled in another country prior to arriving in the United States.<sup>14</sup>

Aliens subject to those mandatory bars are not eligible for asylum and therefore cannot establish a significant possibility that they could establish eligibility for asylum; therefore, aliens who are subject to the mandatory bars should not be found to have a credible fear of persecution. Failing to apply the mandatory bars during the credible fear screening process would allow aliens who are statutorily ineligible for asylum to remain in the United States, despite the certainty of the asylum claim being rejected at a later date. This delay would directly contradict the stated goal of the proposed rule, which is to increase the efficiency of the expedited removal process, as these ineligible asylum claims unnecessarily contribute to the backlog of adjudications.<sup>15</sup> Not applying the mandatory bars during the credible fear screening is therefore contrary to the will of Congress as expressed in the INA.

#### E. Previous Executive Defiance of Asylum Laws Passed by Congress Led to Mass Illegal Migration

The failure to follow the statutory mandatory detention requirements while asylum claims are pending has created a massive incentive for illegal migration. A record number of illegal immigrants have come to this country based on their knowledge that they will most likely be released into the interior of the United States. As of August 2021, U.S. Customs and Border Protection (“CBP”) had apprehended more than 1.5 million illegal aliens in FY2021.<sup>16</sup>

The INA requires aliens in expedited removal to be detained during the entire adjudication process.<sup>17</sup> DHS generally complied with the statutory requirement to detain aliens in expedited removal until December 2009, when then-Director of U.S. Immigration and Customs Enforcement (“ICE”), John Morton, issued a directive directly contravening the plain

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<sup>13</sup> 8 U.S.C. § 1158.

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

<sup>15</sup> Proposed rule, *supra* note 4 at 46,909.

<sup>16</sup> U.S. CUSTOMS AND BORDER PROTECTION, SOUTHWEST LAND BORDER ENCOUNTERS, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last visited Oct. 12, 2021).

<sup>17</sup> 8 U.S.C. § 1225.

language of the law passed by Congress.<sup>18</sup> In general, the Morton memo directs ICE to release aliens who have received a positive credible fear assessment on parole under section 212(d)(5)(A) of the INA. The Morton memo declared that it was in the “public interest” to parole aliens who received a positive credible fear assessment.<sup>19</sup>

Following the issuance of the Morton memo, the number of credible fear claims skyrocketed. In FY2009, prior to the Morton directive taking effect, USCIS Asylum Officers completed 5,523 credible fear screenings.<sup>20</sup> That number grew to 8,926 in FY2010; 11,716 in FY2011; and 13,607 in FY2012.<sup>21</sup> The year-over-year total nearly tripled in FY2013 to 36,454. Asylum Officers completed 49,607 credible fear cases in FY2014; 47,928 in FY2015; 92,071 in FY2016; and 79,977 in FY2017.<sup>22</sup> That number jumped to 97,728 in FY2018.<sup>23</sup> By FY2019, Asylum Officers were adjudicating 102,204 credible fear claims.<sup>24</sup>

The skyrocketing numbers resulting from Morton’s willful abrogation of statute illustrate an undeniable reality: releasing aliens with pending asylum claims into the United States encourages more aliens to migrate illegally to the United States to make credible fear claims. Human smugglers are acutely aware of this loophole and exploit it with impunity. The Departments should not create by regulation yet another pull factor that will further encourage the misuse of the asylum process.

### III. Prudential Concerns

#### A. This Rule Would Fulfill a Biden Campaign Promise of Open Borders

The proposed rule would fulfill a Biden campaign promise for open borders and is a continuation of the administration’s failed border security strategy. During the first Democratic presidential primary debate on June 27, 2019, then-candidate Joe Biden asserted: “[W]e should

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<sup>18</sup> JOHN MORTON, ASSISTANT SEC’Y, U.S. IMMIGR. & CUSTOMS ENF’T, PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE, DIRECTIVE NO. 11002.1 (2009).

<sup>19</sup> DHS regulations governing parole describe five categories of aliens who may meet the parole standards as determined on a case-by-case basis (provided they do not present a security or flight risk): (1) aliens who have serious medical conditions where continued detention would not be appropriate; (2) pregnant women; (3) certain juveniles; (4) aliens who will be witnesses in judicial, administrative, or legislative, proceedings; and (5) aliens whose continued detention is not in the public interest. 8 C.F.R. § 212.5(b). The memo instructed ICE personnel, “when an arriving alien found to have a credible fear established to the satisfaction of [ICE] his or her identity and they he or she presents neither a flight risk not a danger to the community, [ICE] should, absent additional factors... parole the alien on the basis that his or her continued detention is not in the public interest.”

<sup>20</sup> U.S. CITIZENSHIP AND IMMIGR. SERVS., CREDIBLE FEAR WORKLOAD REPORT, [https://www.uscis.gov/sites/default/files/document/data/PED\\_CredibleFearWorkloadReport.pdf](https://www.uscis.gov/sites/default/files/document/data/PED_CredibleFearWorkloadReport.pdf) (last visited Oct. 12, 2021).

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

<sup>22</sup> *Id.*

<sup>23</sup> U.S. CITIZENSHIP AND IMMIGR. SERVS., CREDIBLE FEAR WORKLOAD REPORT SUMMARY: FY2018 TOTAL CASELOAD, [https://www.uscis.gov/sites/default/files/document/data/PED\\_CFandRFstats09302018.pdf](https://www.uscis.gov/sites/default/files/document/data/PED_CFandRFstats09302018.pdf) (last visited Oct. 12, 2021)

<sup>24</sup> U.S. CITIZENSHIP AND IMMIGR. SERVS., CREDIBLE FEAR WORKLOAD REPORT SUMMARY: FY2019 TOTAL CASELOAD, [https://www.uscis.gov/sites/default/files/document/data/Credible\\_Fear\\_Stats\\_FY19.pdf](https://www.uscis.gov/sites/default/files/document/data/Credible_Fear_Stats_FY19.pdf) (last visited Oct. 12, 2021).

*not be locking people up. We should be making sure we change the circumstance, as we did, why they would leave in the first place. And those who come seeking asylum, we should immediately have the capacity to absorb them, keep them safe until they can be heard.*”<sup>25</sup> This rule is a fulfillment of that promise, and it will result in continued surges of illegal immigrants at our southern border.

The President has certainly delivered on his promise: under his administration, CBP implemented widespread catch and release policies, in contravention of statutory mandatory detention requirements, and dispersed approximately 500,000 illegal aliens into the United States this calendar year.<sup>26</sup> In addition to those dispersed by DHS, this flow of illegal immigration has allowed over 344,000 known “got-aways”—individuals who evaded apprehension—to enter the United States illegally through August of fiscal year 2021.<sup>27</sup>

Through August 31, 2021, CBP had apprehended 1,323,597 migrants at the Southwest Border.<sup>28</sup> Over 102,000 apprehensions were of UAC, who are required by law to be transferred to HHS and ultimately released into the interior of the United States. Over 273,000 aliens were “processed from CBP custody” under Title 8, which includes aliens to be issued a notice to appear, notice to report, and paroled into the interior.<sup>29</sup> Finally, over 31,000 aliens were processed under “other outcomes” which includes CBP Office of Field Operations parolees and transfers to other Departments (other than ICE), including the U.S. Marshalls Service and state and local law enforcement entities. Between January 20, 2021 and September 25, 2021, ICE booked in over 150,000 aliens with CBP as the arresting agency. Of those, over 18,000 are currently detained, nearly 8,000 were removed (under the INA), and nearly 124,000 were processed, via either *alternatives to detention* or notices to appear.<sup>30</sup> All told, DHS has released nearly 500,000 aliens into the interior this calendar year. For the non-UAC, this is both inconsistent with statute and demonstrates the pull factors created when agencies ignore the explicit directions of Congress. This rule will only make the current crisis worse by encouraging countless others to risk the perilous journey to our Southern Border.

## B. The Proposed Rule Would Neither Save the American People Money, nor Alleviate the Backlog of Asylum Claims

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<sup>25</sup> NBC NEWS, FULL TRANSCRIPT: 2019 DEMOCRATIC DEBATE NIGHT TWO, SORTABLE BY TOPIC, <https://www.nbcnews.com/politics/2020-election/full-transcript-2019-democratic-debate-night-two-sortable-topic-n1023601>, (last accessed Oct. 12, 2021) (emphasis added).

<sup>26</sup> Aliens placed in expedited removal and 240 removal proceedings are required by law to be detained throughout the process.

<sup>27</sup> Email from CBP staff to Senate staff, Oct. 18, 2021 (on file with staff).

<sup>28</sup> Letter from Alice Lugo, Ass’t Sec’y for Legis’ Affairs, Dep’t of Homeland Security, to Sen. Ron Johnson, Ranking Member, Sen. Perm. Subcomm. on Investigations, Sept. 28, 2021 (on file with Subcomm.).

<sup>29</sup> Under a Notice to Report, the alien is not put into removal proceedings—as they would be had they been issued a Notice to Appear—and instructed to report to an ICE field office to receiving charging documents and initiate removal proceedings. As of July, 13 percent of aliens released under a Notice to Report had appeared to an ICE field office to receive charging documents. See Stef W. Kight, *Scoop: 50,000 migrants released; few report to ICE*, AXIOS, July 27, 2021, <https://www.axios.com/migrant-release-no-court-date-ice-dhs-immigration-33d258ea-2419-418d-abe8-2a8b60e3c070.html>.

<sup>30</sup> Email from DHS staff to Senate staff, Oct. 4, 2021 (on file with staff).

The proposed rule would significantly increase the costs of adjudicating asylum claims by requiring USCIS to retrain all its Asylum Officers. Low-end case load estimates of 75,000 cases annually would require USCIS to hire 800 additional employees and spend approximately \$180 million to implement the proposed rule.<sup>31</sup> High-end predictions of up to 300,000 cases annually result in a projected average annualized costs range between \$180.4 million to \$1 billion.<sup>32</sup> The proposed rule calculated the 75,000 caseload benchmark by averaging the annual number of credible fear screenings from FY2016 through FY2020.<sup>33</sup> However, previous year credible fear screening statistics are a useless metric for determining the implementation costs of this rule since credible fear screenings will skyrocket under this proposed rule.

Indeed, the proposed rule notes, “the Departments believe that to duly implement the proposed rule, additional resources would be required.”<sup>34</sup> The proposed rule plans to implement the new processes in phases “as the necessary staffing and resources are put into place.”<sup>35</sup> Even with such phased-in implementation, it is unclear whether USCIS would have the requisite funding necessary to implement the proposed rule. USCIS is a fee-for-service agency—it funds itself based on the fees it charges to individuals filing for immigration benefits. USCIS will not charge fees to asylum applicants going through the new process outlined in the proposed rule. Therefore, USCIS will not have the funds to pay for the requisite training and implementation of the new processes in the proposed rule.

The proposed rule argues that “phased implementation would also have an immediately positive impact in reducing the number of individuals arriving at the southwest border who are placed into backlogged immigration court dockets, thus allowing the Departments to more quickly adjudicate some cases.”<sup>36</sup> The effect of the increased migration would merely create a new backlog within USCIS. The proposed rule anticipates first implementing the new processes for certain non-detained family unit referrals, despite its admission that “USCIS capacity is currently insufficient to handle all family unit referrals under this new proposed process.”<sup>37</sup>

USCIS lacks the requisite staffing needed to take on this burden and the funding to process all of these new cases. This “robbing Peter to pay Paul” is an illusory gimmick designed ultimately to grant asylum more liberally. Between 2008 and 2019, Asylum Officers gave 83% of asylum applicants (I-862 cases) a positive credible fear assessment.<sup>38</sup> Of those cases which resulted in a hearing before an Immigration Judge, asylum was only granted 17% of the time.<sup>39</sup> While under the proposed rule, ostensibly, Asylum Officers would be applying the law and not making mere initial credible fear determinations, the numbers indicate the change of

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<sup>31</sup> Proposed rule, *supra* note 4 at 46,921.

<sup>32</sup> *Id.* at 46,923.

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

<sup>34</sup> *Id.* at 46,922.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS, CREDIBLE FEAR AND ASYLUM PROCESS: FISCAL YEAR (FY) 2008- FY 2019, <https://www.justice.gov/eoir/file/1216991/download>. Last accessed, October 12, 2021.

<sup>39</sup> *Id.*



final adjudicator from Immigration Judge to Asylum Officer would more than likely result in dramatic increases in unqualified grants of asylum. This is particularly true when we consider the lack of an adversarial process.

### C. This Rule Would not Advance the Interests of the American People

To ensure accountability to the people, the Founders of this nation entrusted elected members of Congress—not unelected bureaucrats—with the sole power to legislate. If members of Congress legislate in such a way as to betray a thoughtlessness or animosity towards the electorate, voters may accordingly respond by voting them out of office. However, this is not the case when unelected bureaucrats—tasked with a specific administrative focus based on their expertise—begin to craft law; with no checks on their decisions, it is only natural that the myopic focus of the agency will slowly overshadow the interests of the American people until their interests are not considered at all. This is sadly evidenced by this proposed rule, which entirely fails to serve the interests of the American people.

Not once in the analysis of the proposed rule are the interests of the American people even mentioned. To the contrary, this rule purports to transform the asylum process from an adversarial process to a non-adversarial process—thereby ensuring that the interests of the American public are never represented in the vast majority of these proceedings. To be sure, Americans do have an interest in these proceedings: citizens of this great nation generously wish to provide asylum to those who legitimately merit it. An adversarial process is designed to distinguish those who genuinely merit asylum from those who do not. By accepting flagrant abuse of the asylum system, we allow it to degrade into something Congress and the American people have not authorized and do not support.

Additionally, as acknowledged in the proposed rule, “Asylum is a *discretionary* benefit that *can be* granted by the Attorney General.”<sup>40</sup> We wish to provide an orderly process for approving legitimate asylum claims, such as applying mandatory bars in the initial screening process, as opposed to deferring those bars until much later in the process as required by the proposed rule. At the same time, we cannot forget that asylum is not a *right* that we bestow on any and every applicant. Consequently, the “due process” of the applicants cannot and should not overwhelm the interests of the American people to have aliens without legitimate asylum claims removed expeditiously without giving them, as proposed by this rule, five chances to achieve a more favorable ruling through various layers of review. The interests of the American people are best served by adversarial proceedings, the immediate application of mandatory asylum bars in the first interview, and fewer opportunities for appealing an unfavorable ruling.

### D. This Rule Should be Delayed Until After the Departments Determine Asylum Eligibility Pursuant to Executive Order 14010

The Departments should delay implementation of the proposed rule until the finalization of asylum-related regulations promulgated pursuant to Executive Order 14010. On its own, the proposed rule would completely overhaul the process by which aliens apply for asylum and serve

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<sup>40</sup> Proposed rule, *supra* note 4 at 46,912.

as a massive pull factor for aliens claiming asylum in the future. Congress should be allowed to understand how the Departments will determine asylum eligibility before the process is overhauled.

On June 16, 2021, Attorney General Garland vacated the decisions of prior Attorneys General decision which held, in general, that aliens fleeing domestic or gang violence are ineligible for asylum because they are not members of a “particular social group.”<sup>41</sup> Attorney General Garland determined that vacating these decisions was warranted in part because of the pending rulemaking over the “particular social group” definition.<sup>42</sup>

The Department of Justice and DHS have not yet issued proposed rules redefining the “particular social group” of asylum. We predict that the yet-to-be proposed rule will likely expand the definition of “particular social group” to include victims of domestic and gang violence. If that is indeed the case, the future rule will significantly alter asylum eligibility, potentially extending asylum to the entire populations of the Northern Triangle countries due to the prevalence of gang violence there. Expanding asylum eligibility to include these populations will serve as yet another massive pull factor and will encourage even more migration to an already overwhelmed system.

The proposed rule should be delayed until the Department of Justice and DHS issue the “particular social group” asylum rule. Since the proposed rule would completely overhaul the process by which aliens apply for asylum, Congress should be allowed to review the criteria the Departments will be using to determine asylum eligibility in the first place. Congress should have the opportunity to comment and, if necessary, to legislate on who is eligible for asylum before the agencies overhaul the process by which potentially millions of migrants will receive asylum.

#### IV. Legislative Fixes currently in Congress

It is very difficult to pass meaningful immigration reform in Congress, and yet, that is the only appropriate place to do so. Instead of contravening codified statutes and attempting to usurp the role of legislators, the administration must come to Congress to pass meaningful, discrete legislation to alleviate the crisis at our Southern Border. The administration has not proposed legislative solutions to this problem for Congress to consider; there are, however, proposals in Congress to address the current surges. The administration should push for these bills to go through the proper legislative process. What the administration cannot do is bypass Congress and enact new laws under the guise of rulemaking.

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<sup>41</sup> See Hillel R. Smith, Asylum Eligibility for Applicants Fleeing Gang and Domestic Violence: Recent Developments, Cong. Research Servs., Aug 6, 2021 <https://crsreports.congress.gov/product/pdf/LSB/LSB10617>; see also 28 I&N Dec. 307 (A.G. 2021); 28 I&N Dec. 304 (A.G. 2021).


<sup>42</sup> *Id.*

Congress is actively debating changes to the asylum process. Numerous legislative proposals are under consideration in both the House and the Senate.<sup>43</sup> The sheer abundance of these proposals demonstrate Congress' interest in asylum policy and disagreement on the path forward in immigration generally. Gridlock in Congress does not give executive agencies a free pass to overstep the legislative directives given to them by Congress. By doing so, the Departments only contribute to further gridlock and obstruct compromise on these issues. Given Congress' active interest and ongoing debate regarding asylum, it is completely inappropriate for the Departments to circumvent the legislative process by making rules which contravene laws already passed by Congress.

V. Conclusion

The proposed rule represents a blatant violation of the laws passed by Congress. It ignores the mandatory detention requirements of aliens claiming asylum through mass parole, violates the principles of separation of powers, and inappropriately shifts the roles of USCIS and EOIR. In a year when we have seen record apprehensions at the Southwest border, the proposed rule would serve as yet another pull factor for illegal migration, while failing to advance the interests of the American people. Accordingly, we consider the proposed rule to be illegal and unconstitutional. We strongly oppose the proposed rule and urge the Departments to work with Congress to make any changes to the immigration process through legislation.

Sincerely,



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<sup>43</sup> See, e.g., *Stopping Border Surges Act* (Introduced by Congressman Biggs in the House and Senator Lee in the Senate); *Secure and Protect Act* (Introduced by Senators Graham, Tillis, and Barrasso); *End the Border Crisis Now Act* (Senator Cotton); *Bipartisan Border Solutions Act of 2021* (Introduced by Senators Cornyn and Sinema). The listing of individual pieces of legislation does not represent an endorsement of a particular piece of legislation. Rather, the bills are included to illustrate the ongoing congressional debate on changes to the asylum process.

John Thune

John Barrasso

Rayburn

John Boozman

Bill Hagerty

Steve Daines

Tom Cotton

MS

Rand Paul

Stunt

Tom Tillis

Jerry Moran

Pat Toomey

R. W. Menall

John Tracy

Marsha Blackburn

Mike Braun

John Kennedy

Ben Sasse

Louis Gohmert

Tracy Mann

Andrew S. Clyde

Mo Brooks

Jody Hice

Ken Calvert

Paul A. Gosar

Van Taylor

Thomas P. Tiffany

Madison

Madison Cauthron

Victoria Sparks

James R. Baird

Anna M.D.

Bird Poy

Jack Bergman

Chas

Olesko

Glenn Gutman

Jeff Yuman

Lauren Bt

Carol

Mary E Miller

Rose Norman

Lyette Hull

Jan Bishop

Ted Bull

Rob W. Allen

Matthew M. KD, A.

Ernst

Sam Carter

John H. Clark

Mark Lee

Brian Bolin

Bob Ford

Gene Wagner

Ben Clive

Bruce Swain

John Z.



Randy K. Weber

Stacy W. Weber

Randy K. Weber

Margie Taylor Weber

Don L. Weber