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FAIR is a nonprofit public interest organization working to end illegal immigration and to set levels of legal immigration that are consistent with the national interest.



FEDERATION FOR AMERICAN IMMIGRATION REFORM

January 10, 2022

Carrie Anderson

Director of Policy for the Family Reunification Task Force
U.S. Department of Homeland Security
2707 Martin Luther King Jr Ave SE
Washington, DC 20528-0525

RE: Docket No. DHS-2021-0051, Identifying Recommendations
To Support the Work of the Interagency Task Force on the
Reunification of Families: Request for Public Input

Dear Ms. Anderson,

The Federation for American Immigration Reform (“FAIR”) respectfully submits the following public comment to the Department of Homeland Security (“DHS”) in response to the Department’s request for public input as published in the Federal Register on December 10, 2021. *See Identifying Recommendations To Support the Work of the Interagency Task Force on the Reunification of Families* (DHS Docket No. DHS-2021-0051).

I. Introduction

FAIR is a national, nonprofit, public-interest organization comprised of millions of 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. Our organization 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.

II. Background

Federal law and policies implemented over last 25 years have laid the groundwork for the current border crisis. Notably, the 1997 *Flores* Settlement Agreement (“FSA”) and subsequent, related court rulings restricted DHS’s ability to keep minors (including minors who are accompanied by an adult relative) in family



residential centers (“FRCs”) for periods longer than 20 days.¹ Under the FSA, the government must release unaccompanied alien minors, without unnecessary delay, to parents, other close relatives, or a suitable guardian, pending a determination of the unaccompanied alien minors’ claims to remain in the United States.² The agreement also reasonably stipulated that if there was no suitable relative or guardian to take custody, minors would be held in the “least restrictive” setting possible, and receive basic comforts and amenities.³

In 2015, the U.S. Court of Appeals for the Ninth Circuit extended this consent decree to include family units.⁴ As a result, DHS cannot detain any adult migrant arriving to the United States with a relative child in excess of 20 days. The agreement, however, is inconsistent with federal laws that require certain recent border crossers to remain in federal detention for the duration of their immigration court hearings. It also disrupted the careful scheme Congress explicitly created to manage border surges and encounters with alien minors.⁵

Further, Congress passed the *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* (“TVPRA”), signed by President George W. Bush, to curtail the heinous sex trafficking of children.⁶ But in an effort to protect minors who were being trafficked, the TVPRA opened the door for large-scale asylum abuse. The TVPRA requires that, with exception of Canadian and Mexican nationals, the Department of Health and Human Services (“HHS”) “shall ensure, to the greatest extent practicable...that all unaccompanied alien children who are or have been in the custody of [DHS]...have counsel to represent them in legal proceedings or matters.”⁷ HHS is also required “[t]o the greatest extent practicable” to make every effort to utilize the services of pro bono counsel “who agree to provide representation to such children without charge.”⁸

Consequently, DHS cannot turn most alien minors back at the border. Parents quickly realized that the TVPRA provided an opportunity to have their children smuggled to the United States with a near guarantee of release into their custody. Other parents abroad decided that the TVPRA was an opportunity to send their kids to the U.S. where they might be placed in the care of relatives already here in the hope that someday they would be able to join them. As a result, there was a near immediate increase in the number of family units and unaccompanied alien minors from non-contiguous countries arriving at the southern border.⁹ By FY 2018, the number of

¹ *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44392, 44398-99 (Aug. 23, 2019) (explaining the history of the *Flores* Settlement Agreement).

² *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Dec. 7, 2001)

³ *Id.*

⁴ See *Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015).

⁵ INA § 235.

⁶ Lisa Seghetti, Alison Siskin, Ruth Ellen Wasem, Congressional Research Service, *Unaccompanied Alien Children: An Overview* (Jun. 23, 2014).

⁷ 8 U.S.C. § 1232.

⁸ *Id.*

⁹ See U.S. Border Patrol, *Total Family Unit Apprehensions By Month (FY13-19)*, available at <https://www.cbp.gov/sites/default/files/assets/documents/2020->

aliens apprehended by Border Patrol claiming credible fear was 10-fold higher than in 2008, and 67 percent above FY 2017.¹⁰

The creation of the Deferred Action for Childhood Arrivals (“DACA”) program in 2012 further encouraged parents to send minors to the U.S. border. Although DACA does not bestow any benefits on minors who arrived after creation of the program, it nonetheless signaled that the United States government had no intention to enforce immigration laws against minors who entered the country. The program created the expectation that if the United States protects alien minors who had entered in the past, eventually that same obligation would apply to later arrivals. Moreover, the TVPRA provided unaccompanied alien minors with the opportunity to enter and remain in the United States, with no legal requirement to file an asylum application within a specific timeframe.¹¹ Consequently, the number of family units and unaccompanied alien minors arriving at the border continues to spike to unprecedented levels.¹²

Separations of family units at the border increased significantly in 2018 after the Department of Justice (“DOJ”) implemented a “zero tolerance” policy in response to the significant rise in illegal border crossings by family units.¹³ The policy mandated that DOJ prosecute adult migrants who had entered illegally between ports of entry and were subject to criminal prosecution, without previously recognized exceptions for adults traveling with children.¹⁴ A first illegal entry offense is a criminal misdemeanor, while any subsequent offense constitutes a felony under section 275 of the INA. Illegal entry is also a ground for inadmissibility under section 212 of the INA.

Consistent with the TVPRA, DHS was required to place any minor who accompanied an adult charged with illegal entry (or another criminal offense) into HHS custody.¹⁵ Family separation, in these situations, is required because federal law specifically prohibits the detention or

[Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29_1.pdf](#) (“[Family Unit] represents the number of individuals (either a child under 18 years old, parent or legal guardian) apprehended with a family member by the U.S. Border Patrol”); see also U.S. Customs and Border Protection, *Southwest Land Border Encounters* (Dec. 2021), available at <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

¹⁰ U.S. Customs and Border Protection, *Claims of Fear: CBP Southwest Border and Claims of Credible Fear Total Apprehensions/Inadmissibles (FY 2017/FY 2018)* (Dec. 10, 2018).

¹¹ INA § 208(a)(2)(E).

¹² U.S. Customs and Border Protection, *Southwest Land Border Encounters* (Dec. 2021), available at <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

¹³ Office of the Attorney General, Memorandum for Federal Prosecutors Along the Southwest Border, “Zero-Tolerance for Offenses Under 8 U.S.C. §1325(a),” April 6, 2018. The policy was implemented on May 7, 2018; U.S. Department of Justice, Office of Public Affairs, “Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration,” May 7, 2018.

¹⁴ *Id.*

¹⁵ 8 U.S.C. § 1232.

confinement of minors in any institution in which the minor would have “regular contact with adult persons convicted of a crime or awaiting trial on criminal charges.”¹⁶

Family separation at the border, however, was not created or initiated by the Trump administration,¹⁷ and the Trump administration canceled the “zero tolerance” policy just 44 days after it started.¹⁸ DHS reported that the agency referred an average of 21% of all illegal border crossing “amenable adults” for prosecution from FY 2010 through FY 2016.¹⁹ Since at least the Obama administration, DHS has maintained a policy to separate family units when it cannot determine the family relationship or otherwise verify identity; determines that the minor is being smuggled or trafficked or is otherwise at risk with the parent or guardian; or determined that the parent or guardian may have engaged in criminal conduct and refers them for criminal prosecution.²⁰ Neither the Obama nor the Biden administration, however, has made data available on the rate or total number of family separations stemming from illegal border crossings.

III. Reforms Needed To End Family Separation and the Border Crisis

FAIR urges DHS to end unnecessary family separation by closing loopholes in law and policy that encourage adult migrants to traffic children illegally across the border and encourage illegal immigration to the United States. The need for administrative deterrence is critical given the current crisis at the southern border, specifically the sharp increase of encounters with inadmissible aliens, a subsequent dramatic increase in requests for asylum relief, and the large number of meritless, fraudulent, and frivolous asylum claims that are straining the nation's immigration system.²¹

Respectfully, FAIR notes that DHS already has policies in place to ensure that family units are processed together in expedited removal or remain together if processed through the Migrant Protection Protocols (“MPP”) program. Nevertheless, family separation continues to occur in extreme circumstances where DHS determines separation from the accompanying adult relative necessary for the safety and well-being of the child or is required by law. FAIR strongly believes that the only way DHS can ensure family separations at the border never happen again is to close loopholes that reward adults who traffic children into the United States and end non-enforcement policies that encourage illegal immigration.

¹⁶ 18 U.S.C. § 5035.

¹⁷ U.S. Department of Homeland Security, *Myth vs. Fact: DHS Zero-Tolerance Policy*, press release, June 18, 2018; See Lori Robertson, “Did the Obama Administration Separate Families?”, FactCheck.org, June 20, 2018.

¹⁸ The White House, *Affording Congress an Opportunity to Address Family Separation*, Executive Order, June 20, 2018.

¹⁹ U.S. Department of Homeland Security, *Myth vs. Fact: DHS Zero-Tolerance Policy*, press release, June 18, 2018; See Lori Robertson, “Did the Obama Administration Separate Families?”, FactCheck.org, June 20, 2018.

²⁰ *Id.*

²¹ See *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. at 1959, 1967-68; Executive Office of Immigration Review, *Adjudication Statistics: Rates of Asylum Filings in Cases Originating With a Credible Fear Claim* (Nov. 2018); see also *Asylum Eligibility and Procedures*, 84 Fed. Reg. 33841 (Dec. 17, 2020).

A. Faithfully Reinstate MPP or Otherwise Implement Section 235(b)(2)(C) of the INA

FAIR strongly urges DHS to continue operation of INA § 235(b)(2)(C) 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 INA § 235(b)(1) (known as “expedited removal” proceedings) or removal proceedings pursuant to INA § 235(b)(2)(a)(i). DHS’s operation of MPP, which implemented INA § 235(b)(2)(C), has a proven track record in reducing illegal immigration across the southern border and successfully ended the 2019 border crisis.²²

The availability of employment authorization with a pending asylum application²³ in conjunction with “catch-and-release” policies provides aliens with a strong incentive to cross the border illegally and submit a fraudulent asylum claim. 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 faster avenue to an immigration hearing, where they are able to 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, conserve government resources, and allow legitimate asylum seekers access to benefits without unreasonable delays.

In addition to being poor immigration policy, DHS’s practice of paroling aliens into the United States en masse rather than utilizing its authority to return aliens under INA § 235(b)(2)(C) is unlawful.²⁴ The U.S. Court of Appeals for the Fifth Circuit recently ruled that by terminating MPP, DHS violated Congress’s statutory mandates in INA § 235, which requires DHS to either return inadmissible aliens to a contiguous territory (in the case of southern land border crossings: Mexico) or detain such aliens for the duration of their immigration court proceedings.²⁵

The court also held that DHS abused its statutorily-limited parole authority in violation of INA § 212(d)(5),²⁶ concluding that DHS’s use of parole is not a lawful exercise of non-enforcement or prosecutorial discretion.²⁷ The court described DHS’s parole abuse as, “not nonenforcement; it’s misenforcement, suspension of the INA, or both,”²⁸ and went as far as to describe the government’s legal position to be “as dangerous as it is limitless.”²⁹ Accordingly, the Fifth

²² U.S. Customs and Border Protection, *Southwest Land Border Encounters* (Dec. 2021), available at <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

²³ See INA § 208(d)(2).

²⁴ See *State of Texas v. Biden*, No. 21-10806 (5th Cir. 2021).

²⁵ *Id.* at 98-102.

²⁶ *Id.* at 98-106.

²⁷ *Id.* at 103-106.

²⁸ *Id.* at 106.

²⁹ *Id.* at 105.

Circuit maintained the district court's injunction requiring DHS to restart MPP until it regains control over the border.³⁰

B. End the 1997 Flores Settlement Agreement

The FSA and a subsequent federal court ruling prevent DHS from detaining unaccompanied minors or family units for longer than 20 days, which in given modern rates of family units making credible fear claims at the U.S.-Mexico border, is generally not sufficient time to receive an immigration court ruling.³¹ As a result, the Biden administration, refusing to use its authority to process aliens under MPP except as required by court order, unlawfully paroles most family units who cross the border illegally.³² Prospective migrants to the United States, including adults and criminal organizations, are aware of this loophole to U.S. immigration law.³³ Often, these inadmissible aliens disappear into the interior of the country without ever appearing before an immigration judge.³⁴

Consistent with DHS's longstanding position, a bipartisan DHS panel in 2019 confirmed that the likelihood of release from DHS custody is a primary pull-factor for aliens seeking to illegally cross the U.S. border to bring a child with them.³⁵ In its interim report, the panel urged DHS to take immediate action to roll-back the FSA, concluding:

Emergency legislation is needed that limits Flores to unaccompanied minors, but if such legislation is delayed, we recommend that this be done by emergency regulation that, because of the FMU migration crisis, dispenses with ordinary Notice and Rulemaking. The emergency regulation would recognize that, unlike UACs, in some cases FMUs must be held beyond 20 days in order to (1) determine whether there is an actual parental relationship, (2) establish identity, (3) conduct (an unhurried) credible fear interview, (4) make sure the child's healthcare is examined and any issues, especially communicable diseases are taken care of before release for the sake of the child and to assure public health is not threatened in interior urban areas to which the FMUs intend to alight upon release, (5) keep the FMUs intact if it is ineligible for asylum or otherwise, (6) schedule expeditious chartered repatriation for those who are subject to expedited removal, and/or (7) for those eligible after credible fear interview, and based on a release more time to effect a safe and orderly re-settlement. Whether a Flores roll-back is by emergency regulation or as part of emergency legislation, this recommendation is too important and too urgent to reducing risk to

³⁰ *Id.*, at 117.

³¹ *See Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015).

³² *See State of Texas v. Biden*, No. 21-10806 at 105-6 (5th Cir. 2021).

³³ Homeland Security Advisory Council, *Final Emergency Interim Report, CBP Families and Children Care Panel* (Apr. 2019), available at https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

³⁴ Jon Feere, Center for Immigration Studies, *Thousands of Aliens Released at the Border on the Honor System, DHS data show that around 80% don't report in* (Jul. 15, 2021), available at <https://cis.org/Feere/Thousands-Aliens-Released-Border-Honor-System>.

³⁵ Homeland Security Advisory Council, *Final Emergency Interim Report, CBP Families and Children Care Panel* (Apr. 2019), available at https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

accompanied children to be delayed any longer. The lives of children who will be making the treacherous journey are at risk.³⁶

Unnecessary family separations can only be permanently avoided with modification of the procedures established by this outdated contract. To accomplish this, DHS must reissue regulations to void the FSA and defend such regulation against litigation that is likely to repeat in the Ninth Circuit. Such regulation, like DHS's *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44392 (August 23, 2019), must generally permit DHS to detain accompanied alien minors with their adult relatives. A regulation must also ensure that accompanied alien minors are only given parole consistent with regulations governing parole for all other aliens: "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."³⁷ Current DHS regulations interpret the parole statute to only permit a grant of parole in cases of medical necessity or a law-enforcement need.³⁸

A new regulation, consistent with DHS's final rule published in 2019, must also allow U.S. Immigration and Customs Enforcement ("ICE") to establish family residential standards without the existence of state licensing. Most states only have licensing laws governing the housing of unaccompanied minors, but not minors who are accompanied by parents or adult relatives. Replacing the state licensing requirement with an alternative but equivalent federal licensing scheme is necessary to ensure that DHS has the resources and capacity to humanely detain family units who have recently crossed the border pending the duration of their immigration court proceedings. Such a regulation must comply with the relevant and substantive terms of the FSA regarding the conditions for custodial settings for minors, but, through federal licensing, DHS can provide the flexibility necessary to enhance public safety and enforce immigration laws given current challenges that did not exist when the FSA was executed.

Given the likelihood of continued litigation, DHS must also concurrently work with Congress to support legislation to supersede the FSA. A legislative solution terminating the Settlement Agreement or otherwise limiting the FSA's applicability to unaccompanied alien minors would ensure DHS is not forced to violate unrelated provisions of federal immigration law, such as INA § 235 and INA § 212(d)(5), by releasing family units from mandatory detention or separate families to accommodate resource limitations.

C. Increase DHS Family Detention Capacity

Unless DHS fully implements MPP to manage illegal immigration across the southern border, it must increase its family detention capacity in order to lawfully respond to the growing rate of family unit apprehensions at the southern border. Currently, DHS has just three FRCs, with a

³⁶ *Id.* at 9, n. 8.

³⁷ INA § 212(d)(5).

³⁸ *See* 8 C.F.R. § 235.3(b)(4)(ii), (b)(2)(iii).

combined detention capacity of just 3,326 people.³⁹ To put this in perspective, U.S. Customs and Border Protection (“CBP”) encountered over 42,726 family units in the month of October 2021 alone.⁴⁰

As explained above, DHS’s practice of paroling family units into the United States as a band aid to maintain family unity in light of the FSA is both unlawful and bad immigration policy. In December, the Fifth Circuit Court of Appeals determined that DHS’s use of parole to manage the large numbers of illegal border crossers was inconsistent with federal law.⁴¹ The INA only allows DHS to parole aliens on only a case-by-case basis for “urgent humanitarian or significant public benefit” reasons.⁴²

Accordingly, FAIR urges DHS to work with Congress and states to ensure DHS is able to detain all family units subject to mandatory detention under the INA in the United States in FRCs, maintain current policies that permit credible fear claims to be considered together, and eliminate the incentive for aliens to traffic children across the border. Maintaining custody of family units not placed in MPP will deter illegitimate asylum seekers and criminal aliens from exploiting loopholes in the asylum system to gain entry in the United States and inevitably overwhelming Border Patrol and the defensive immigration system.

D. Reunite Unaccompanied Alien Minors with the Families in their Home Countries

DHS must ensure that all inadmissible families and unaccompanied alien minors who arrive illegally and are ineligible to obtain a lawful immigration status are reunited safely at home, not in the United States. Repatriating and reuniting aliens in their home countries, rather than in the United States, is the most humane policy that maintains the integrity of the immigration system, consistent federal immigration law. Importantly, this policy would eliminate the incentive to send minors on the dangerous journey alone or with smugglers to illegally cross the southern border and will mitigate the humanitarian crisis that has unsustainably strained and diverted the immigration system’s limited resources.

E. Rescind Non-Enforcement Policies and Resume Worksite Enforcement

FAIR urges DHS to allow ICE to enforce immigration laws by removing arbitrary limitations on who may be arrested or removed. DHS must immediately rescind its recent policies: *Guidelines for the Enforcement of Civil Immigration Law*, September 30, 2021; *Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual*, October 12, 2021; *Rescission of Civil Penalties for Failure-to-*

³⁹ U.S. Immigration and Customs Enforcement, *Detention Management* (Dec. 2021), available at <https://www.ice.gov/detain/detention-management>.

⁴⁰ U.S. Customs and Border Protection, *Southwest Land Border Encounters* (Dec. 2021), available at <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

⁴¹ *State of Texas v. Biden*, No. 21-10806 (5th Cir. 2021).

⁴² INA § 212(d)(5).

Depart, April 23, 2021; and *Civil Immigration Enforcement Actions in or near Courthouses*, April 27, 2021.

ICE has a Congressionally-mandated role to enforce our immigration laws in the interior of the country. Preventing ICE officers from initiating audits and enforcement actions serves no purpose aside from signaling to the world that the U.S. Government does not intend to enforce immigration laws against the vast majority of aliens unlawfully in the United States. The Biden administration's 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 significant and needless strains on the asylum system and restore order on our border.

Furthermore, eradicating unauthorized employment is essential when it comes to enforcing immigration laws as a whole and eliminating pull factors for future illegal immigration into the United States. As Barbara Jordan, chairwoman of the Clinton administration's Commission on Immigration Reform and a civil rights activist, explained in 1994, "As long as U.S. businesses benefit from the hiring of unauthorized workers, control of unlawful immigration will be impossible."⁴³ For that reason, the Commission concluded that "both employer sanctions and enhanced labor standards enforcement are essential components of a strategy to reduce the job magnet."⁴⁴

Without engaging in widespread audits and enforcement actions, unscrupulous employers are emboldened to maintain unlawful employment practices and migrants are encouraged to enter the United States illegally. FAIR urges DHS to instead prioritize interior immigration enforcement to cut off the economic pull-factor for migrants to enter the United States illegally and thereby end family separation at the border.

F. Require Asylum Officers to Apply the Mandatory Bars to Asylum and the Convention Against Torture in Credible Fear Screenings

FAIR strongly urges DHS to defend and implement the reforms introduced by its final rule, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (Dec. 11, 2020) ("Global Asylum Rule"), which among many important updates and clarifications to the asylum process, requires U.S. Citizenship and Immigration Services ("USCIS") asylum officers to apply the mandatory bars to asylum and statutory withholding of removal at the credible fear stage. The reforms included in this rule will preserve DHS and DOJ resources by reducing the number of aliens in mandatory detention and increasing capacity to detain aliens, including family units, with a greater likelihood of success on their asylum claim. Specifically, DHS should require asylum officers to determine (1)

⁴³ Testimony of Barbara Jordan, Chair, U.S. Commission on Immigration Reform Before the U.S. Senate Committee on the Judiciary Subcommittee on Immigration and Refugee Affairs, August 3, 1994.

⁴⁴ *Id.*

whether an alien is subject to one or more of the mandatory bars to being able to apply for asylum under INA § 208(a)(2)(B)-(D), or the bars to asylum eligibility under INA § 208(b)(2), including any eligibility bars established by regulation under INA § 208(b)(2)(C); and (2) if so, whether the bar at issue is also a bar to statutory withholding of removal and withholding of removal under the regulations implementing the Convention Against Torture (“CAT”).

Over the past decade, the majority of credible fear claims were determined to be meritless. The Supreme Court noted, when evaluating the expedited removal process, that a random sampling of asylum claims found 58 percent possessed indications of fraud, while 12 percent were conclusively fraudulent.⁴⁵ 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.⁴⁶ In 2019, a grant of asylum followed a credible fear determination just 15% of the time.⁴⁷

With this reform in place, an alien who establishes credible fear of persecution or reasonable possibility of persecution but for the fact that he or she is subject to one of the bars that applies to both asylum and statutory withholding of removal should receive a negative fear determination. Under the reforms created by the Global Asylum Rule, if the alien establishes a reasonable possibility of torture, he or she would be referred to the immigration court for asylum-and-withholding-only proceedings.⁴⁸ In those proceedings, the alien would have the opportunity to raise whether he or she was correctly identified as being subject to the bar(s) to asylum and withholding of removal and also pursue protection under the CAT regulations.⁴⁹

As DHS and DOJ have jointly acknowledged, 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. Accordingly, applying those 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 adjudicate claims from applicants that have a greater likelihood of success in their asylum application and increase DHS’s capacity to maintain family units in mandatory detention.

⁴⁵ *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. at 1959, 1967-68.

⁴⁶ 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).

⁴⁷ See Executive Office of Immigration Review, *Asylum Decision Rates in Cases Originating With a Credible Fear Claim* (Oct. 2019).

⁴⁸ *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (Dec. 11, 2020) (“Global Asylum Rule”).

⁴⁹ *Id.*

G. Terminate the Unlawful DACA Program

DHS must immediately terminate the unlawful DACA program, which allows certain illegal aliens who arrived in the United States as minors to apply for a two-year forbearance of removal.⁵⁰ Recent judicial decisions have held that DACA violates both substantive and procedural requirements under federal law.⁵¹ The creation of the DACA program is also one of the strongest pull-factors that ignited recent border crises and encourages adults to traffic minors illegally into the United States. CBP began reporting unprecedented numbers of illegal border crossing of unaccompanied alien minors and family units in excess of single adult aliens after the U.S. Government began signaling an unwillingness to enforce immigration law against these populations.⁵²

While DACA limits eligibility to those who have resided in the United States since June 2007, the message being sent around the world is that illegal entry will be rewarded and unlawful presence will be made moot by executive action. This false promise is also exacerbated by amnesty legislation that is introduced to codify DACA protections but does not contain the same temporal limitations for aliens who entered the United States prior to their 18th birthday. Maintaining DACA through regulation to indefinitely delay enforcement of our immigration laws only perpetuates the problem.

The humanitarian crisis on the border remains a threat to national security, public health, wage levels and employment security, and poses unsustainable strains to DHS, DOJ and HHS resources. DHS's recent regulatory proposal⁵³ seeking to maintain DACA will not only continue to fuel the crisis on the Southern border, encourage the inhumane trafficking of minors, and have catastrophic impact on border security, but will also be *ultra vires*.⁵⁴ Accordingly, DHS should set aside DACA as a reckless immigration policy. This administration must impose policies to support the rule of law, discourage illegal immigration, and discourage traffickers from smuggling children into the United States.

⁵⁰ See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

⁵¹ See *State of Texas, et al., v. United States of America*, et al., 1:18-CV-00068, (S.D. Texas July 16, 2021) ("Texas II").

⁵² U.S. Customs and Border Protection, *Southwest Border Unaccompanied Alien Children FY 2014*, (Nov. 2015) available at <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014>.

⁵³ *Deferred Action for Childhood Arrivals*, 86 Fed. Reg. 53736 (Sept. 28, 2021).

⁵⁴ *Id.*

H. Maintain “Last In, First Out” Asylum Processing Priorities

USCIS should maintain its “Last In, First Out” asylum application processing priorities.⁵⁵ Aliens in expedited removal who make a credible fear claim may become eligible to receive work authorization in the United States after 180 days.⁵⁶ Giving priority to recent filings allows USCIS to promptly place such individuals into removal proceedings, which reduces the incentive to file for asylum solely to obtain an Employment Authorization Document (“EAD”). This approach, which had been used for nearly two decades, paused in 2014 and reinstated in 2018, also has allowed USCIS to decide qualified applications in a more efficient manner and allowed the agency to focus more resources on applications that are more likely to be meritorious as a result.⁵⁷

Most migrants arriving illegally at the U.S. border enter for economic reasons.⁵⁸ Assuring that recent arrivals are unlikely to receive an EAD as a direct result from making a fraudulent or frivolous asylum claim will cut off a significant pull-factor for asylum abuse at the border and reduce illegal immigration to the United States.

IV. Conclusion

FAIR urges DHS to end unnecessary family separation by closing loopholes in law and policy that encourage adult migrants to traffic children illegally across the border and encourage illegal immigration to the United States. To accomplish this, DHS must:

- **Faithfully reinstate MPP or otherwise implement section 235(b)(2)(C) of the INA;**
- **End the 1997 Flores Settlement Agreement;**
- **Increase DHS’s family detention capacity;**
- **Reunite unaccompanied alien minors with their families in their home countries;**
- **Rescind non-enforcement policies and resume worksite enforcement;**

⁵⁵ U.S. Citizenship and Immigration Services, USCIS to Take Action to Address Asylum Backlog (Jan. 31, 2018), available at <https://www.uscis.gov/archive/uscis-to-take-action-to-address-asylum-backlog>.

⁵⁶ INA § 208(d)(2).

⁵⁷ U.S. Citizenship and Immigration Services, USCIS to Take Action to Address Asylum Backlog (Jan. 31, 2018), available at <https://www.uscis.gov/archive/uscis-to-take-action-to-address-asylum-backlog>.

⁵⁸ In 2021, the Migration Policy Institute found that approximately 92 percent of individuals surveyed from El Salvador, Guatemala and Honduras who expressed a desire to migrate internationally cited economic reasons such as unemployment, the lack of money for food and basic necessities, the desire to send remittances and the need for a better job, salary or working conditions. Ariel G. Ruiz Soto et al., Migration Policy Institute, *Charting a New Regional Course of Action* 18-19 (Nov. 2021), available at https://www.migrationpolicy.org/sites/default/files/publications/mpi-wfp-mit_migration-motivations-costs_final.pdf.

- **Reform the asylum system and require officers to apply the mandatory bars to asylum and CAT in credible fear screenings;**
- **Terminate the unlawful DACA program; and**
- **Maintain “Last in, First Out” asylum processing priorities.**

The likelihood of prompt release from detention and the availability of employment authorization has caused the number of family units illegally crossing the border to skyrocket to crisis levels in the past decade and, most drastically, in 2021. If inadmissible aliens, however, are unable to be released into the United States until they are granted asylum and expect DHS to vigorously enforce immigration law, the number of apprehensions and fraudulent credible fear claims made by family units will drop significantly. The only way to permanently end family separation is to eliminate the pull-factors that encourage family units to enter United States illegally.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dan Stein', with a stylized flourish at the end.

Dan Stein
President
Federation for American Immigration Reform (FAIR)