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Committee on the Judiciary  
Subcommittee on Immigration Integrity, Security, and Enforcement  
“Presidential Power to Secure the Border”

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Testimony of Aaron Reichlin-Melnick  
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Chairman McClintock, Ranking Member Jayapal, and distinguished members of the Subcommittee:

My name is Aaron Reichlin-Melnick, and I currently serve as the Policy Director for the American Immigration Council, a non-profit organization that strives to strengthen the United States by shaping immigration policies and practices through innovative programs, cutting-edge research, and strategic legal and advocacy efforts grounded in evidence, compassion, justice and fairness. The Council works to strengthen America by shaping how America thinks about and acts toward immigrants and immigration and by working toward a more fair and just immigration system that opens its doors to those in need of protection and unleashes the energy and skills that immigrants bring.

The Council has long brought attention through research, advocacy, and litigation to ways in which the Department of Homeland Security (“DHS”) has responded to migrants at the border and inside the United States. Under the Obama administration, we helped bring a successful lawsuit against the Border Patrol’s Tucson Sector challenging unconstitutional conditions of confinement for adults and children.<sup>2</sup> Under the Obama and Trump administrations, we helped bring a successful lawsuit against U.S. Customs and Border Protection (“CBP”) for its unlawful policy of turning away asylum seekers at ports of entry, in part through a practice known as “metering.”<sup>3</sup> And under the Biden administration, we helped bring a lawsuit against Immigration and Customs Enforcement (“ICE”) for adopting policies preventing people in immigration detention from accessing their attorneys and against U.S. Citizenship and Immigration Services for delays in processing applications for provisional waivers of unlawful presence.<sup>4</sup> Our

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<sup>1</sup> Portions of this written testimony have been submitted during previous hearings, including a September 20, 2023 House Homeland Security Committee hearing entitled “The Financial Costs of Mayorkas’ Open Border,” a June 7, 2023 House Judiciary Subcommittee hearing entitled “The Border Crisis: Is the Law Being Faithfully Executed,” and an April 6, 2022 House Homeland Security Subcommittee hearing entitled “Examining Title 42 and the Need to Restore Asylum at the Border.”

<sup>2</sup> American Immigration Council, “Challenging Unconstitutional Conditions in CBP Detention Facilities,” .

<sup>3</sup> American Immigration Council, “Challenging Customs and Border Protection’s Unlawful Practice of Turning Away Asylum Seekers,” <https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers>.

<sup>4</sup> American Immigration Council, “Challenging the Government’s Barriers to Access to Counsel in Immigration Detention Centers,” <https://www.americanimmigrationcouncil.org/litigation/challenging-government-barriers-access-counsel-immigration-detention-centers>.

experience over the last decade has given us important insight into the powers—and limits—of presidential authority to “secure the border.”

I am grateful for the opportunity to be here today to help provide some perspective on the complicated reality of the application of immigration law at the southwest border.

Our immigration system is in crisis. As legal immigration has become increasingly inaccessible, and our asylum system increasingly backlogged, people around the world are getting the message that the only realistic way they will ever be able to come to the United States is through the southern border. Yet despite this challenge, policymakers continue to focus only on the U.S.-Mexico border itself, rather than addressing the broader problems with plague both our legal immigration system and our humanitarian protection systems. Policymakers of both parties have focused the majority of their attention on finding news way to crack down at the border, rather than making the broader fixes necessary to avoid yet another failed crackdown that may temporarily reduce arrivals but fail to solve the underlying problems. The last time Congress made any major changes to the asylum process was in 1996. The last time Congress made any major changes to our legal immigration system was in 1990. As I emphasized the last time I was here, we are facing 21st century challenges with a firmly 20th century system.

There’s no doubt that we need new laws. Today, Congress faces a choice: Do we do the one thing we haven’t tried and rebuild our broken asylum system, or do we kick the can down the road yet again? More asylum officers and more judges will help reduce backlogs, with the ultimate goal of delivering decisions (whether positive or negative) within a reasonable timeframe.

But we also need innovative thinking about restructuring the system for the modern challenges we face today. Our outdated humanitarian protection systems act as a barrier to migrant self-sufficiency while they go through the asylum process, leading to unnecessary and counterproductive fiscal strains on local governments. If migrants going through a multi-year court process could find jobs legally, many of them wouldn’t be forced to remain in shelters at high costs to local governments. And if the federal government played a leading role in coordinating migrant arrivals, cities could work together to share the temporary burden of helping migrants get on their feet while they go through the asylum process.

All of this requires more than just executive action. In 1977, President Carter delivered a message to Congress, explaining that border crossings had risen above an estimated 2.6 million per year and calling on Congress to provide new legal authority to address the border.<sup>5</sup> Over the 47 years since, presidents of both parties have made similar speeches. In 2006, President Bush addressed the nation and asked for “additional funding and legal authority” to “end ‘catch and release’ at the southern border once and for all.”<sup>6</sup> In 2014, the Obama White House emphasized that “Congress’s failure to act will undercut our ability to continue to effectively and efficiently address the situation at the border.”<sup>7</sup> In 2018, President Trump

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<sup>5</sup> President Jimmy Carter, *Undocumented Aliens: Remarks on Transmitting a Message to the Congress*, August 4, 1977, <https://www.presidency.ucsb.edu/documents/undocumented-aliens-remarks-transmitting-message-the-congress>.

<sup>6</sup> President George W. Bush, *President Bush Addresses the Nation on Immigration Reform*, May 15, 2006, <https://georgewbush-whitehouse.archives.gov/news/releases/2006/05/20060515-8.html>.

<sup>7</sup> The White House, Office of the Press Secretary, “The Obama Administration’s Government-Wide Response to Influx of Central American Migrants at the Southwest Border,” August 1, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/obama-administration-s-government-wide-response-influx-central-american->

remarked that “The only long-term solution to the crisis . . . , is for Congress” to act.<sup>8</sup> And just last week, President Biden called on Congress to pass “a comprehensive plan to fix the broken immigration system and to secure the border.”<sup>9</sup>

Despite nearly half a century of bipartisan agreement among presidents that Congress needs to legislate (with stark disagreements as to how), in recent months an unusual theory has taken root; that each of these presidents was wrong and all it requires is a stroke of the pen to “secure the border.” All President Biden must do, these commenters say, is to invoke a 1952 law, section 212(f) of the Immigration and Nationality Act (INA), (8 U.S.C. § 1182(f)), to “suspend the entry” of migrants at the border—after which, the theory goes, the border will be secured.

These arguments are fundamentally mistaken. They reflect a core misunderstanding of both the authority provided to the president under INA 212(f), and of the operational limitations that currently prevent *any* administration from applying a blanket asylum ban at the border. As the Supreme Court said in 1993, INA 212(f) cannot be used to take an action that is “clearly prohibit[ed]” by the UN Convention on Refugees.<sup>10</sup> And more recently, in 2018 the Supreme Court made clear that section 212(f) “does not allow the President to expressly override particular provisions of the INA.”<sup>11</sup>

Among the provisions that INA 212(f) cannot expressly override is the right to seek and apply for asylum. This limitation is not theoretical, either. On November 9, 2018, President Trump himself invoked INA 212(f) in an effort to ban asylum to all those crossing the southern border irregularly. The end result was a series of significant losses in court and a toothless “suspension of entry” that remained on the books for the rest of his term.

But even if invoking INA 212(f) to ban asylum at the border did *not* conflict with the plain text of the INA, operational and diplomatic limitations would prevent any blanket asylum bans from being applied to all, or even most, migrants crossing today. Without sufficient asylum officers to carry out credible fear interviews, even a policy which bars asylum to all migrants can only be applied to a limited number of people each month, preventing the U.S. government from carrying out expedited removal processing. This is more than theoretical. In May 2023, the Biden administration’s “Circumvention of Lawful Pathways” regulation went into effect, imposing a “rebuttable presumption” against asylum eligibility to nearly all migrants who cross the border between ports of entry and for those who arrive at ports of entry without a CBP One appointment.<sup>12</sup> Despite this near-complete restriction on asylum for people who do not come through the CBP One scheduling system at ports of entry, operational limitations on the

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<sup>8</sup> President Donald J. Trump, “Remarks by President Trump on the Illegal Immigration Crisis and Border Security,” November 1, 2018, <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/>.

<sup>9</sup> President Joseph R. Biden, “Remarks by President Biden After Operation Briefing | Brownsville, TX,” March 1, 2024, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/03/01/remarks-by-president-biden-after-operation-briefing-brownsville-tx/>.

<sup>10</sup> 8 U.S.C. § 1182(f), *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 175 (1993). The Court engaged in an analysis of whether the proclamation ran afoul of treaty obligations and found that it did not.

<sup>11</sup> *Trump v. Hawaii*, 585 U.S. 667, 668 (2018).

<sup>12</sup> Dep’t of Homeland Security, *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (May 16, 2023), available at <https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways>.

credible fear process mean that the rule is only being applied through the expedited removal process to roughly 15 percent of migrants, with everyone else only subject to the rule years later in the immigration court process.<sup>13</sup>

Similarly, just as Cuban migrants were largely immune from deportation for generations before the Cuban government agreed to accept limited numbers of its citizens in 2016,<sup>14</sup> without repatriation agreements in place with so-called “recalcitrant countries,” many migrants arriving at the border today simply cannot be deported because there is no country willing to take them.

Similar legal and operational constraints apply to every other executive authority currently possessed by the President. As the United States has learned over the past decade of rising migration, there are no silver bullets that will solve a global displacement crisis overnight. Even Title 42, under which the US government carried out 2.5 million expulsions, did not secure the border.

### **Section 212(f) of the INA Cannot be Converted into an Asylum Ban on Migrants Crossing Irregularly**

In 1952, Congress granted the president the authority to “suspend the entry” of “all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate,” if the president finds their entry would be “detrimental to the interests of the United States.”<sup>15</sup> Over the course of the last 70 years, the Supreme Court has emphasized that this is an “ample power”<sup>16</sup> that “exudes deference to the President” and gives the president authority to decide “whether and when to suspend entry, whose entry to suspend, for how long, and on what conditions.”<sup>17</sup> At the same time, the Supreme Court has assumed that INA 212(f) “does not allow the President to expressly override particular provisions of the INA,”<sup>18</sup> and that the president can only take action under INA 212(f) which “neither the Convention [on Refugees] nor the [Immigration and Nationality Act] clearly prohibits.”<sup>19</sup> It is this latter restriction which in 2018 prevented the executive branch from using INA 212(f) to block people from seeking asylum at the southern border.

In November 2018, President Trump invoked INA 212(f) in an effort to ban asylum to migrants who crossed the U.S.-Mexico border improperly.<sup>20</sup> In Proclamation 9822, President Trump suspended “the entry of any alien into the United States across the international boundary between the United States and Mexico,” except for any alien who “enters the United States at a port of entry and properly presents for

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<sup>13</sup> Elliot Spagat, “US asylum measure aimed at curbing claims has limited impact given strained border budget,” *Associated Press*, February 28, 2024, <https://apnews.com/article/asylum-migrants-biden-border-budget-58e447ee0033a5ef23593ed5c02da02e>.

<sup>14</sup> See, e.g., Lindsay Daniels, *The End of Special Treatment for Cubans in the U.S. Immigration System: Consequences and Solutions for Cubans with Final Orders of Removal*, 122 Dick. L. Rev. 707, 718 (2018) (noting that “Cuban immigrants previously enjoyed de facto immunity from removal to Cuba”).

<sup>15</sup> 8 U.S.C. § 1182(f).

<sup>16</sup> *Sale*, 509 U.S. at 187.

<sup>17</sup> *Hawaii*, 585 U.S. at 668.

<sup>18</sup> *Ibid.* at 689, 692.

<sup>19</sup> *Sale*, 509 U.S. at 187.

<sup>20</sup> President Donald J. Trump, Proclamation 9822, *Addressing Mass Migration Through the Southern Border of the United States*, 83 Fed. Reg. 57661 (Nov. 9, 2018).

inspection,” or who held lawful permanent resident status.<sup>21</sup> In short, the order “suspended the entry” of any individual crossing the border unlawfully.

On its face, Proclamation 9822 did not impact asylum or any other humanitarian protections. The order mentions asylum only in the preamble and not in any substantive provisions. And the Proclamation further makes clear that “nothing in this proclamation shall limit an alien ... from being considered for withholding of removal [] or protection ... [under] the Convention Against Torture..., or limit the statutory processes afforded to unaccompanied alien children.” As a result, Proclamation 9822 by itself did not provide any new authorities to DHS under the INA nor permit DHS officials to take actions that they had not previously been able to take.

Because Proclamation 9822 did not facially impact asylum processing, the Trump administration combined it with a second measure. Simultaneously, the Department of Justice (DOJ) and DHS published an interim final rule entitled “Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims.”<sup>22</sup> This rule aimed to leverage Proclamation 9822 and convert it into an asylum ban. Under the rule, “if [an] alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to subsection 212(f) ... and the alien enters the United States after the effective date of the proclamation,” then the person “shall be ineligible for asylum.”<sup>23</sup> Like the proclamation, the regulation made clear that any person banned from asylum under the rule “remain[ed] eligible for statutory withholding of removal ... or for protections under [the Convention Against Torture].”<sup>24</sup>

Taken together, the Proclamation and the implementing asylum ban regulation worked to ban asylum to any person who crossed the border between ports of entry, with no exceptions. The ACLU quickly sued to block the regulation but did *not* bring a challenge to Proclamation 9822. Ten days later on November 19, 2018, a judge in the Northern District of California issued a temporary restraining order blocking the regulation from going into effect.<sup>25</sup> The Court emphasized that “Congress has clearly commanded that immigrants be eligible for asylum regardless of where they enter.”<sup>26</sup> In response to the Trump administration’s argument that a restriction on asylum *grants* did not violate a statutory right to *apply* for asylum, the Court noted that “To say that one may apply for something that one has no right to receive is to render the right to apply a dead letter.”<sup>27</sup>

After the rule was blocked, the Trump administration appealed to the 9th Circuit. On December 7, 2018, the 9th Circuit unanimously denied the request for an emergency stay, emphasizing that “It is the hollowest of rights that an alien must be allowed to apply for asylum regardless of whether she arrived

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<sup>21</sup> *Ibid.* at 57663.

<sup>22</sup> U.S. Citizenship and Immigration Services, Department of Homeland Security, Executive Office for Immigration Review, Department of Justice, *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934 (Nov. 9, 2018).

<sup>23</sup> *Ibid.* at 55952.

<sup>24</sup> *Ibid.* at 55936.

<sup>25</sup> *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018).

<sup>26</sup> *Ibid.* at 856.

<sup>27</sup> *Ibid.*

through a port of entry if another rule makes her categorically ineligible for asylum based on precisely that fact.”<sup>28</sup> The Trump administration then went to the Supreme Court to request another emergency stay, which was denied.<sup>29</sup>

Following the Supreme Court’s order declining to grant a stay, the Trump administration nevertheless renewed the 212(f) proclamation in February 2019, and then indefinitely renewed the proclamation in May 2019.<sup>30</sup> This proclamation remained in full effect until February 2, 2021, when it was revoked by President Biden.<sup>31</sup> The initial injunction was later upheld by the 9th Circuit on a regular appeals posture, holding that the rule was “effectively a categorical [asylum] ban on migrants who use a method of entry explicitly authorized by Congress.”<sup>32</sup>

The lessons of the asylum ban litigation provide a clear rule that no administration may categorically bar asylum to individuals who cross the border between ports of entry—even where a 212(f) proclamation is directly involved. In addition, the fact that the Proclamation itself remained on the books throughout 2019 and 2020, and yet had no operative impact on border processing, shows the clear limitations of INA 212(f) in addressing migration at the southern border.

### **Fundamental Limitations Prevent the Executive from Applying Asylum Bans at the Border to All Crossers**

Should President Biden seek to follow the failed attempt of President Trump to invoke INA 212(f) to suspend asylum at the border, such a policy would likely fail not only as a matter of law, but also as a matter of deterrence. The Trump administration’s 2018 ban operated within the existing statutory frameworks of expedited removal under 8 U.S.C. § 1225 and regular removal under 8 U.S.C. § 1229a.

Any future ban would likely operate within those same two frameworks. It would not create a third framework separate and apart from those two—in other words, it would not create a new expulsion process similar to what occurred during the three years under which the Director of the Centers for Disease Control and Prevention invoked section 265 of Title 42 to authorize immigration officials to expel individuals arriving from Mexico without regard to immigration law.

Asylum restrictions, regardless of the statutory authority they are based on, are applied to recent entrants placed into the credible fear interview process under section 235 of the INA.<sup>33</sup> For those who cannot be put through the credible fear process—for example, if there are not enough asylum officers available to

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<sup>28</sup> *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 771 (9th Cir. 2018).

<sup>29</sup> Robert Barnes, “Supreme Court denies Trump administration request to immediately enforce new asylum rules,” *Washington Post*, December 21, 2018, [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-denies-trump-administration-request-to-immediately-enforce-new-asylum-rules/2018/12/21/e9cdaf32-03c8-11e9-b6a9-0aa5c2fcc9e4\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-denies-trump-administration-request-to-immediately-enforce-new-asylum-rules/2018/12/21/e9cdaf32-03c8-11e9-b6a9-0aa5c2fcc9e4_story.html).

<sup>30</sup> President Donald J. Trump, Proclamation 9880, *Addressing Mass Migration Through the Southern Border of the United States*, 84 Fed. Reg. 21229 (May 8, 2019).

<sup>31</sup> President Joseph R. Biden, Executive Order 14010, *Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, 86 Fed. Reg. 8267 (Feb. 2, 2021).

<sup>32</sup> See *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 669-670 (9th Cir. 2020).

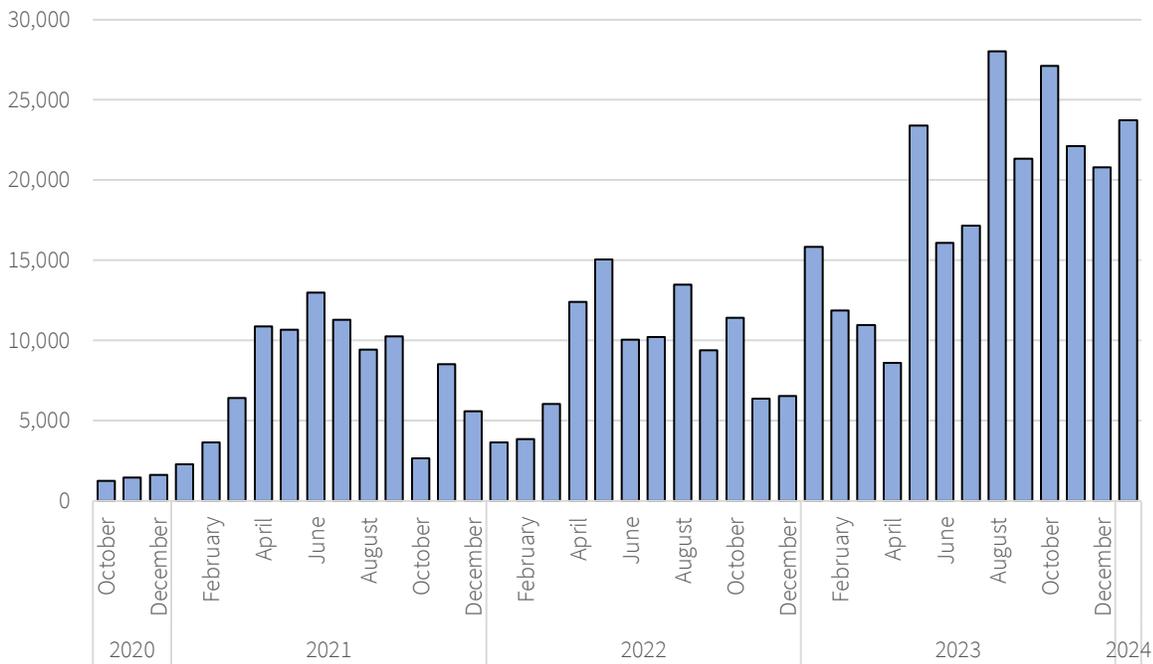
<sup>33</sup> *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. at 55952.

carry them out—asylum bans can only be applied at the immigration court stage or the affirmative asylum process, potentially years later.

This fundamental resource constraint has limited the Biden administration’s ability to apply expedited removal to all asylum seekers crossing the border, just as it did during the Trump administration.<sup>34</sup> Following the end of Title 42, the Biden administration has significantly increased the use of expedited removal.

As illustrated by Figure 1, the Biden administration has placed more than 20,000 people a month through the expedited removal process in every month since August 2023. Throughout the first four months of FY 2024, the Biden administration is on pace to place over 280,000 people through the expedited removal process in total, the highest level in years.<sup>35</sup>

**Figure 1: Monthly SW Border Use of Expedited Removal, Fiscal Year 2021 to present**



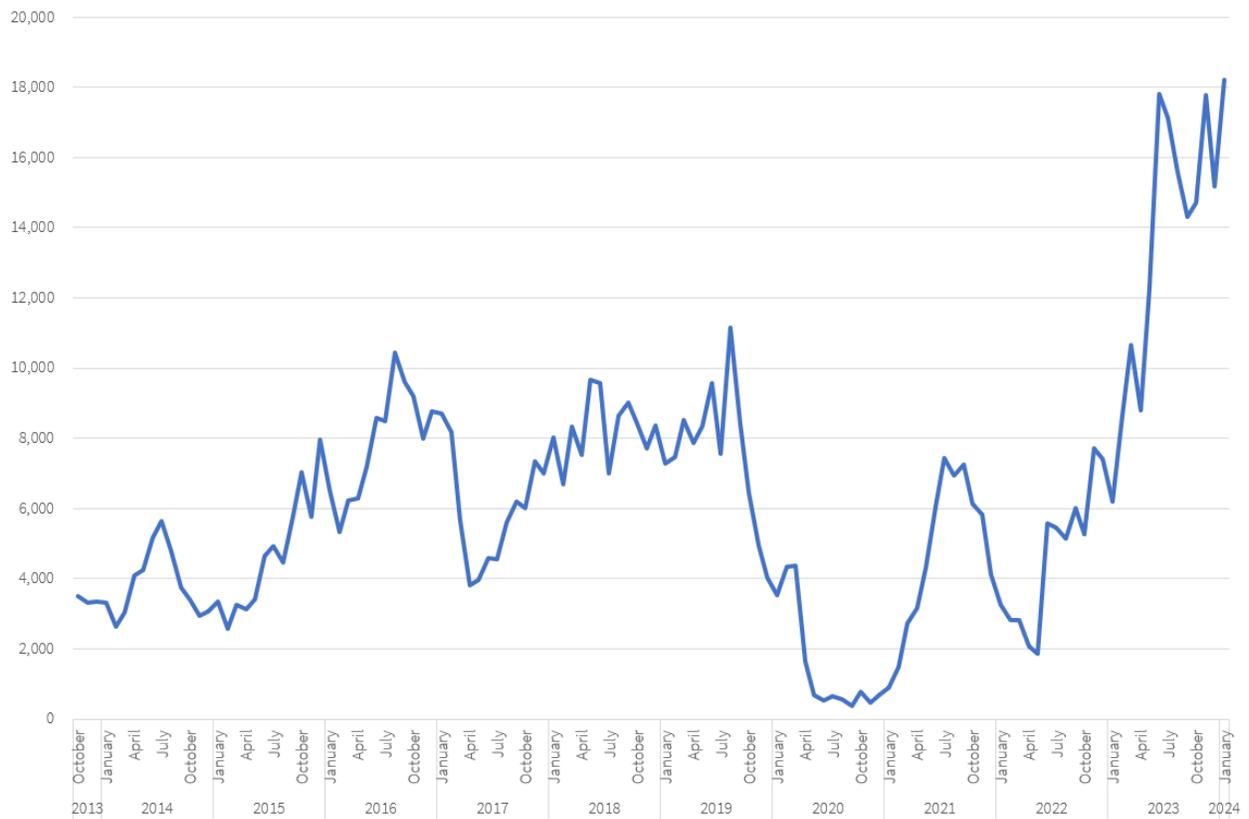
**Source:** U.S. Customs and Border Protection, *Custody and Transfer Statistics*, <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

The Biden administration has also significantly increased the number of credible fear interviews carried out each month. The administration is currently on track to nearly double the previous record level of credible fear completions set under the Trump administration in 2019 (see Figure 2).

<sup>34</sup> Elliot Spagat, “Asylum seekers find it’s catch and can’t release fast enough,” *Associated Press*, January 8, 2019, <https://apnews.com/article/07b2dbeac9c84b089aef48525c12c3ee>.

<sup>35</sup> U.S. Customs and Border Protection, *Custody and Transfer Statistics*, <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

Figure 2: Monthly Credible Fear Completions, Fiscal Year 2014 to Present.



**Source:** Office of Homeland Security Statistics, “Immigration Enforcement and Legal Processes Monthly Tables,” <https://www.dhs.gov/ohss/topics/immigration/enforcement-and-legal-processes-monthly-tables>.

Despite new record levels of credible fear processing, the majority of migrants continue to be released with notices to appear.<sup>36</sup> This is because there are simply too many migrants arriving to place each of them through expedited removal due in large part to the lack of asylum officers to conduct credible fear interviews, resource limitations on repatriations, and diplomatic issues relating to so-called “recalcitrant countries.”

As Table 1 illustrates, every executive authority to turn away migrants has legal and operational restraints on their uses. Some programs, like Title 42, which in theory permit a complete border shutdown, do not work in practice due to diplomatic and resource constraints. Others, like INA 212(f), simply do not provide the authority to shut the border in the first place.

**Table 1: Operational and Legal Restraints on Executive Authorities to Turn Away Migrants**

Program Name	Statutory Authority	Legal Restraints	Operational Restraints
Remain in Mexico / “Migrant Protection Protocols”	INA 235(b)(2)(C)	<ul style="list-style-type: none"> <li>- The legality of the program remains highly uncertain.<sup>37</sup></li> <li>- Even if the program is lawful, some aspects of it may not be.<sup>38</sup></li> <li>- Everyone returned to Mexico must be given a hearing.</li> <li>- DHS must provide <i>nonrefoulement</i> interviews individuals who express a fear of persecution in Mexico and exempt any person who demonstrates a fear.</li> <li>- Cannot be used on</li> </ul>	<ul style="list-style-type: none"> <li>- Requires consent of the Mexican government, which has always set limitations on the use of the program.</li> <li>- Requires continuous and intensive diplomatic engagement with Mexico.</li> <li>- Requires building and maintaining infrastructure for thousands of court hearings and <i>nonrefoulement</i> interviews, all at great monetary expense.</li> <li>- Disrupts immigration court</li> </ul>

<sup>36</sup> U.S. Customs and Border Protection, *Custody and Transfer Statistics*, <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

<sup>37</sup> See, e.g., *Innovation L. Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *vacated and remanded sub nom. Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021), and *vacated as moot sub nom. Innovation L. Lab v. Mayorkas*, 5 F.4th 1099 (9th Cir. 2021).

<sup>38</sup> *Doe v. McAleenan*, 415 F. Supp. 3d 971 (S.D. Cal. 2019).

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		unaccompanied children.	cases scheduled inside the U.S. - Providing hearing notices to migrants in shelters and tent camps in Northern Mexico is difficult and often impossible.
Proclamations suspending entry	INA 212(f)	- Supreme Court has said in dicta that INA 212(f) “does not allow the President to expressly override particular provisions of the INA” <sup>39</sup> and that a president may not use 212(f) to take any action that the INA or the UN Convention on Refugees “clearly prohibits.” <sup>40</sup> - Does not independently ban asylum or supersede existing removal procedures.	- Asylum restrictions implemented under 212(f) can only be applied in the credible fear context by asylum officers, or the regular removal context by immigration judges. - Removals to recalcitrant countries may not be possible.
Safe Third Country agreements	INA 208(b)	- Requires a bilateral agreement with a third country which must provide access to a “full and fair procedure” for asylum and must be a country where the person would not face persecution on account of a protected ground. - DHS must provide <i>nonrefoulement</i> interviews to individuals who express a fear of persecution in the third country, and exempt any person who demonstrates a fear.	- Require removals by plane, which imposes significant operational limitations. - Requires continuous and intensive diplomatic engagement with the third country. - Requires detention space and staffing for <i>nonrefoulement</i> interviews and detention prior to removal.
Title 42	42 U.S.C. § 265	- Requires the CDC Director to determine that there is a “serious danger” of the “introduction” of a communicable disease into the United States. - Carries no formal legal consequences for the individual that is being expelled. - Subject to standard repatriation agreements.	- Requires consent of the Mexican government to expel non-Mexicans by land. - Require expulsion by plane, which imposes significant operational limitations. - Expulsions to recalcitrant countries may not be possible. - Requires continuous and intensive diplomatic engagement.

<sup>39</sup> *Hawaii*, 585 U.S. at 689.

<sup>40</sup> *Sale*, 509 U.S. at 187.

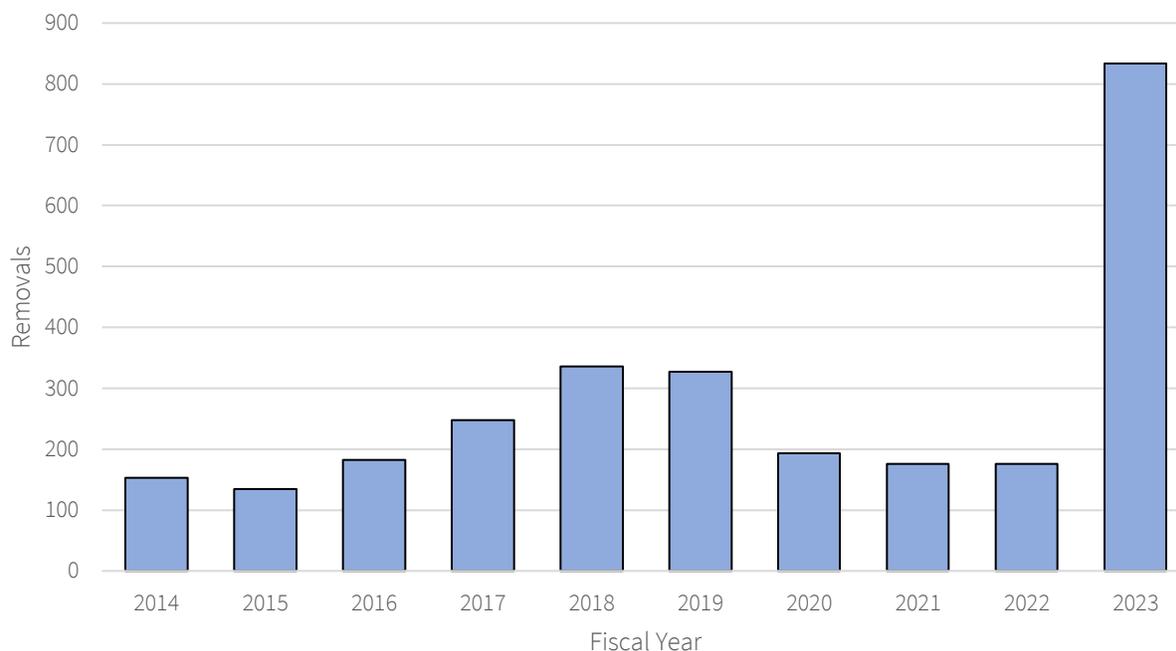
Expedited Removal	INA 235(a)	<ul style="list-style-type: none"> <li>- Mandates credible fear screenings for anyone who expresses a fear of persecution or torture or asks for asylum.</li> <li>- Mandates immigration judge review of any credible fear denial that requests review.</li> <li>- Mandates CAT screenings and reasonable fear screenings in reinstatement proceedings.</li> <li>- Subject to standard repatriation agreements.</li> </ul>	<ul style="list-style-type: none"> <li>- Removals to recalcitrant countries may not be possible.</li> <li>- Requires removals by plane, which imposes significant operational limitations.</li> <li>- Requires sufficient asylum officers to carry out credible fear interviews</li> </ul>
Voluntary Return	Inherent authority	<ul style="list-style-type: none"> <li>- Carries no formal legal consequences for the individual that is being permitted to voluntarily return to Mexico.</li> <li>- Subject to standard repatriation agreements.</li> </ul>	<ul style="list-style-type: none"> <li>- Requires consent of the Mexican government to expel non-Mexicans by land.</li> </ul>

A perfect example of the limitations of these programs has been the situation faced by Venezuelan migrants. For years, Venezuela refused direct repatriation flights from the United States, limiting ICE’s ability to remove Venezuelan nationals to only people who can be removed through commercial flights.<sup>41</sup> As a result, the United States has been largely unable to remove more than a few hundred Venezuelans each year. Over a ten-year span from FY 2014 to FY 2023, immigration judges issued 14,189 removal orders to Venezuelans whose cases began during that period. Yet as illustrated by Figure 3, over that same time period ICE removed just 2,759 Venezuelans in total. With Venezuelans now making up the largest nationality of new immigration court cases, this imbalance will grow increasingly dramatic in the future, emphasizing the need to address migration from Venezuela on a regional and comprehensive basis beyond the narrow lens of the U.S.-Mexico border alone.

**Figure 3: Removals to Venezuela by Fiscal Year, FY 2014 to FY 2023**

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<sup>41</sup> Damia Bonmatí and Belisa Morillo, “Venezuelans say deportations Biden denounced under Trump still taking place,” *NBC News*, updated February 1, 2022, <https://www.nbcnews.com/news/latino/venezuelans-say-deportations-biden-denounced-trump-still-taking-place-rcna13947>.



**Source:** Annual ICE Enforcement and Removal Operations End-of-Year Reports, Fiscal Years 2014-2023.

When Venezuelans began arriving at the U.S.-Mexico border in large numbers in 2021, Mexico did not permit the United States to expel Venezuelans to Mexico under Title 42. It was not until October 2022 that Mexico permitted such expulsions.<sup>42</sup> And even then, expulsions were generally limited to 1,000 per day across the entire border and 200 per day at five specific ports of entry. These limitations caused widespread releases of Venezuelan migrants to resume in late 2022 when more than that total began crossing on a daily basis, limiting the U.S.’s ability to expel them under Title 42.<sup>43</sup> These challenges have continued even after Title 42 ended. While the Biden administration was able to briefly restart direct deportations to Venezuela in October 2023,<sup>44</sup> these flights have ceased in recent weeks following a breakdown in diplomatic relations between the two countries.<sup>45</sup>

Ultimately, it is only Congress that can fundamentally change how individuals are processed at the border. Over the last 30 years, the United States has poured billions of dollars into immigration enforcement while systematically neglecting our immigration adjudication systems.

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<sup>42</sup> Dep’t of Homeland Security, *DHS Announces New Migration Enforcement Process for Venezuelans*, October 12, 2022, <https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans>.

<sup>43</sup> Cindy Ramirez, “Nobody can keep up with that,’ city leader says of ongoing migrant influx,” *El Paso Matters*, December 8, 2022, <https://elpasomatters.org/2022/12/08/el-paso-migrant-street-releases-surge-as-biden-sends-title-42-back-to-court/>.

<sup>44</sup> Kristina Cooke and Mica Rosenberg, “US restarting direct deportations to Venezuela, security secretary says,” *Reuters*, October 5, 2023, <https://www.reuters.com/world/us/us-restarting-direct-deportations-venezuela-senior-official-2023-10-05/>.

<sup>45</sup> Kejal Vyas and Santiago Pérez, “Venezuela Halts Flights of Deported Migrants From U.S. and Mexico,” *Wall Street Journal*, February 22, 2024, <https://www.wsj.com/world/americas/venezuela-halts-flights-of-deported-migrants-from-u-s-and-mexico-962f6149>.

As we explain in our recent report *Beyond a Border Solution*, in response to rising migration at the southern border, “past presidential administrations have attempted over and over again to use aggressive enforcement- and deterrence-based policies in hopes of reducing the number of people who are permitted to apply, rather than making a sustained investment into building a better system.”<sup>46</sup>

This failed approach has diverted significant resources away from positive reform without achieving the primary goal of reduction. For example, the previous administration spent roughly \$15 billion on building 450 miles of border wall,<sup>47</sup> all of which had little to no impact on overall migration.

These funding mismatches have existed for decades and are the direct cause of many of the longstanding backlogs throughout our humanitarian protection systems. Over the last 20 years, the immigration court budget has risen from \$191 million in FY 2003 to \$856 million in FY 2023, an increase of \$665 million (see Figure 4). Over the same time, the Border Patrol’s budget rose from \$1.52 billion to \$5.47 billion, an increase of \$3.95 billion.

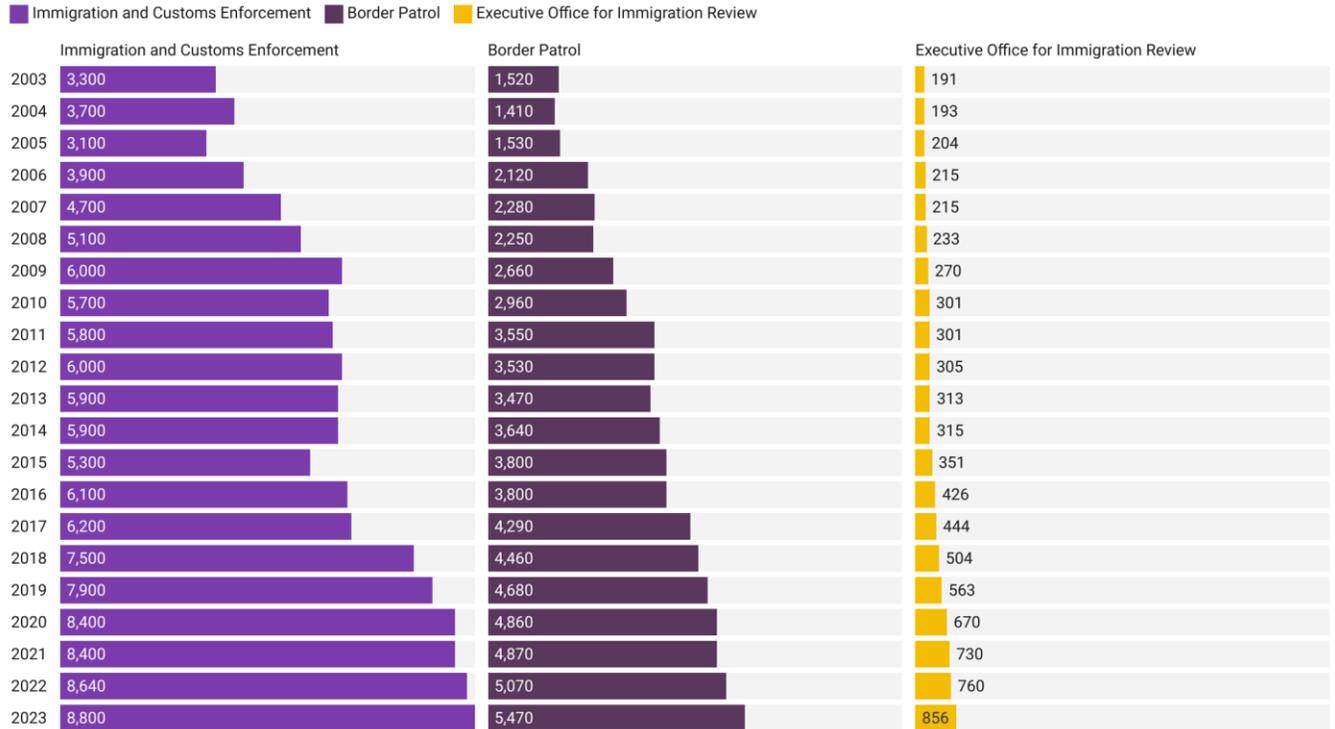
In 2003, for every \$1 spent on the immigration courts, Congress spent \$7.95 on the Border Patrol. A significant gap persists today, although increased funding to the immigration courts has narrowed it slightly. In the FY 2023 budget, for every \$1 spent on the immigration courts, Congress spent \$6.4 dollars on the Border Patrol. Sadly, in FY 2024, this mismatch seems likely to have gotten worse, as Congress cut the immigration court budget by \$16 million despite the staggering size of the backlog.

**Figure 4: Annual budgets of ICE, Border Patrol, and EOIR, in millions of dollars**

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<sup>46</sup> American Immigration Council, *Beyond a Border Solution: How to Build a Humanitarian Protection System That Won’t Break*, May 3, 2023, <https://www.americanimmigrationcouncil.org/research/beyond-border-solutions>.

<sup>47</sup> Christopher Giles, “Trump’s wall: How much has been built during his term?,” *BBC News*, January 12, 2021, <https://www.bbc.com/news/world-us-canada-46748492>.



Source: Congressional Research Service, Appropriations Status Tables, <https://crsreports.congress.gov/AppropriationsStatusTable>.

### Neither “Remain in Mexico” Nor Asylum Cooperative Agreements Can Shut the Border

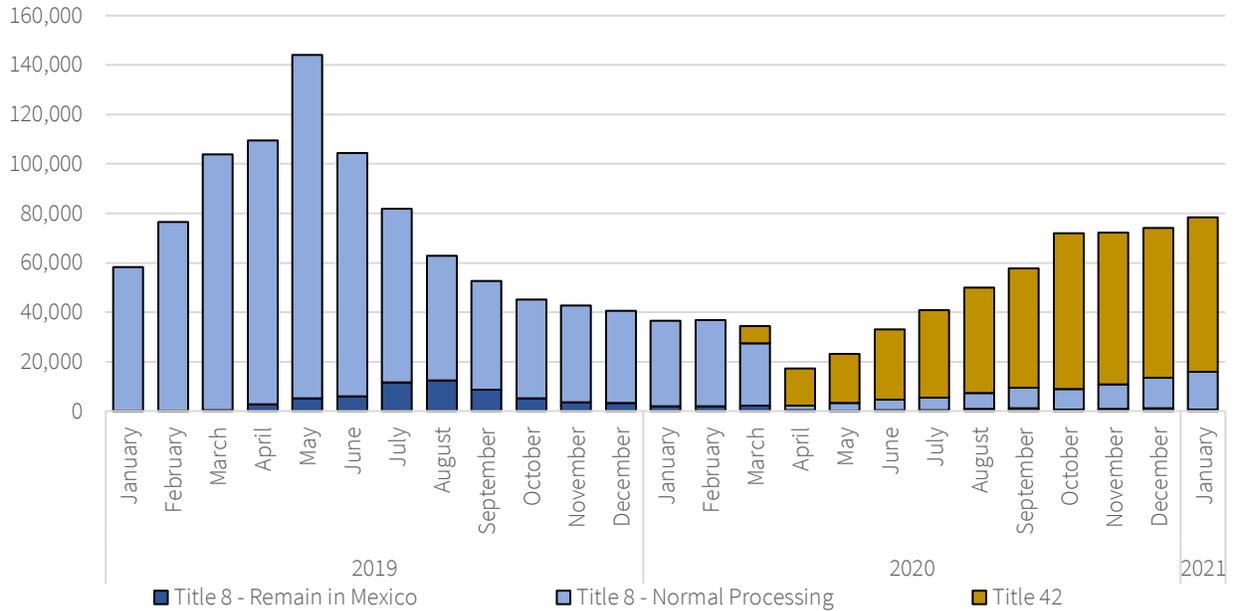
Within a short period after President Biden took office, his administration terminated two programs put in place by the previous administration to much fanfare: the so-called Migrant Protection Protocols (“Remain in Mexico”), and three Safe Third Country agreements (“asylum cooperative agreements” or “ACAs”) signed with Guatemala, Honduras, and El Salvador. Both programs were largely suspended at the time President Biden took office, and thus their termination had little immediate impact on border operations.

Discussion of restarting Remain in Mexico must also not ignore that it caused immense harm to the people placed into the programs. Migrants were routinely kidnapped and tortured for ransom.<sup>48</sup> Migrants had to brave kidnapers to arrive at ports of entry before dawn for court hearings, with virtually no access to lawyers and an almost certain denial at the end of the process. Despite the Orwellian “Migrant Protection Protocols” name, there was no protection at all for those placed into the program. Restarting it a third time would betray fundamental values of justice and due process

<sup>48</sup> See This American Life, “The Out Crowd,” November 15, 2019, <https://www.thisamericanlife.org/688/the-out-crowd>.

In addition, impact of these programs during the brief period that they operated has been significantly overstated. Remain in Mexico was applied to fewer than 65,000 people<sup>49</sup> prior to the implementation of Title 42 when the COVID-19 pandemic hit. Just 945 people were ever subject to one of the ACAs.<sup>50</sup> During the nine months prior to President Biden taking office, less than 1.5 percent of individuals apprehended at the border were placed into the Remain in Mexico program (see Figure 5), and no one was subject to an ACA.

Figure 5: Use of Remain in Mexico Compared to Title 42, January 2019 to January 2021



**Source:** U.S. Customs and Border Protection, U.S. Border Patrol Monthly Apprehensions (FY 2000 - FY 2020),” <https://shorturl.at/irCK8>, U.S. Customs and Border Protection, “Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2020,” <https://shorturl.at/aHMN>; TRAC, “MPP (Remain in Mexico) Deportation Proceedings—All Cases,” November 2022, <https://trac.syr.edu/phptools/immigration/mpp/>.

As the Migration Policy Institute noted in 2021, “[W]hile Remain in Mexico may have contributed to a perception that it would be harder to cross the border, it is not clear that the program was an effective deterrent on its own.”<sup>51</sup> In the first four months of the Remain in Mexico program, as it expanded from San

<sup>49</sup> TRAC, “MPP (Remain in Mexico) Deportation Proceedings—All Cases,” November 2022, <https://trac.syr.edu/phptools/immigration/mpp/>.

<sup>50</sup> Committee on Foreign Relations, Democratic Minority, “Cruelty, Coercion, and Legal Contortions: The Trump Administration’s Unsafe Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador,” January 18, 2021, <https://www.foreign.senate.gov/imo/media/doc/Cruelty.%20Coercion.%20and%20Legal%20Contortions%20-%20SFRC%20Democratic%20Staff%20Report.pdf>.

<sup>51</sup> Muzaffar Chishti and Jessica Bolter, “Court-Ordered Relaunch of Remain in Mexico Policy Tweaks Predecessor Program, but Faces Similar Challenges,” *Migration Policy Institute*, December 2, 2021, <https://www.migrationpolicy.org/article/court-order-relaunch-remain-in-mexico>.

Diego to the El Paso, Yuma, and El Centro Sectors, migrant arrivals continued to increase. Only after the Trump administration convinced Mexico to deploy its national guard in early June 2019 did migrant arrivals begin to drop—*before* any significant increase in the use of Remain in Mexico.<sup>52</sup>

Thus, a lack of correlation between fluctuations in border encounters in 2019 and the deployment timeline of Remain in Mexico throws significant doubt on the claim that the program itself was the cause of the drop in border encounters in summer 2019, and instead points to external factors. In the last week of May 2019, Border Patrol reported nearly 33,000 migrant apprehensions.<sup>53</sup> Following the increase in Mexican enforcement, by the first week of July border apprehensions had dropped nearly 50 percent.<sup>54</sup> This occurred even though Remain in Mexico had still not been expanded to south Texas and its use had gone up less than 15 percent from May to June. This throws significant doubt on the claim that the program itself was the cause of the drop in border encounters in early June 2019 and supports the theory that it was primarily Mexico’s crackdown which caused the significant drop in arrivals in summer 2019.

That was neither the first, nor last time that a significant increase in Mexican enforcement caused a sudden, but temporary, drop in migrant arrivals. In 2014, within weeks after the Obama administration announced the beginning of family detention, a crackdown on migrant routes in Mexico caused a similar temporary drop in arrivals.<sup>55</sup> In January 2022, and just two months ago, another sweeping crackdown on freight trains, combined with checkpoints and escalated “decompression” of migrants on the Mexican border led to a dramatic drop in migrant arrivals.<sup>56</sup>

In each case, Mexican crackdowns caused a sharp drop in arrivals, followed by a steady rise over the next months as migratory patterns adjusted to the new norm, exposing the significant limitations of any efforts to rely on Mexico alone for enforcement. There is also little evidence that restoring Remain in Mexico would have a significant impact on border crossings. At its peak under the Trump administration in July and August 2019, fewer than 12,500 people were placed into the program each month.<sup>57</sup> Today, more people than that are currently returned to Mexico each month through voluntary return alone. After three years of Title 42, migrant smuggling patterns have adapted to the prospect of Return to Mexico, blunting much of the deterrent effect that people ascribe to the program in 2019 and 2020.

Similarly, the Asylum Cooperative Agreements had little impact on migrant arrivals. Only the Guatemalan ACA was ever put into effect, and even then, it was applied to a very small number of people. From November 2019 through March 2020, fewer than 200 migrants per month were sent to Guatemala—less than one percent of the eligible migrants who crossed the border during that period. And in March 2020,

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<sup>52</sup> *Ibid.*

<sup>53</sup> Data on file with author.

<sup>54</sup> Data on file with author.

<sup>55</sup> Dara Lind, “The 2014 Central American migrant crisis,” *Vox*, October 10, 2014, <https://www.vox.com/2014/10/10/18088638/child-migrant-crisis-unaccompanied-alien-children-rio-grande-valley-obama-immigration>.

<sup>56</sup> Rebecca Santana and Elliot Spagat, “Illegal border crossings from Mexico plunge after a record-high December, with fewer from Venezuela,” *Associated Press*, February 13, 2024, <https://apnews.com/article/immigration-border-security-migrants-homeland-security-1c6e9f612dff721191c0254f980947a5>.

<sup>57</sup> TRAC, “MPP (Remain in Mexico) Deportation Proceedings—All Cases,” November 2022, <https://trac.syr.edu/phptools/immigration/mpp/>.

Guatemala suspended the ACA due to COVID-19 and refused to resume the program throughout the rest of the Trump administration.

Nevertheless, many people have called for restarting these programs, claiming that they would “secure the border.” These arguments are incorrect. As an initial matter, Mexico has refused to restart the Remain in Mexico program a second time.<sup>58</sup> Under both the Trump and the Biden administrations, Mexico set limitations on the use of Remain in Mexico. For the first year of its use under the Trump administration, Mexico accepted only the return of individuals who came from Spanish-speaking countries.<sup>59</sup> At no point has Mexico ever permitted the United States to return unaccompanied children, nor individuals from outside the Western Hemisphere. As a result, there is no evidence that the program could even be used on many of the people crossing today.

Similarly, even if the Biden administration *could* restart the ACAs, the same resource problems that exist across the system today would severely restrict its use: a limited number of asylum officers to carry out *nonrefoulement* screenings, a limited number of planes and pilots, and the limited receiving capacity of third countries.

### Congress needs to do more

Restoring our humanitarian protection systems and breaking the cycle of crises and crackdowns is not only possible, but within reach. To do so, we need a major shift in thinking and policymaking. Politicians must abandon a fantasy of short-term solutionism and acknowledge that only sustained investment over a period of time can realistically address these 21st century challenges. Therefore, short-term action must focus on establishing a viable path towards a better system. In the long term, with significant investment, we can create a flexible, orderly, and safe asylum process which offers significant financial savings over the current system.

Initially, Congress needs to provide a significant infusion of resources into the asylum process. Without enough asylum officers, there is no quick way to distinguish between those seeking asylum and those who simply are here for a better life. And with 3 million cases in the immigration court backlogs, only a massive investment in resources can cut down on a multi-year waiting time for adjudication that has itself become a draw for some migrants considering whether to come to the United States. So long as we focus purely on ramping up enforcement, without focusing resources on adjudication, both enforcement and adjudication will suffer.

Congress also needs to address the ongoing problems with the legal immigration system, plagued as it is by backlogs on backlogs on backlogs. According to a recent estimate by the Bipartisan Policy Center, there are 7.6 million people who have been approved for an immigrant visa but are waiting for the visa to

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<sup>58</sup> Armando Garcia and Quinn Owen, “Mexico rejects any effort to reinstate ‘remain in Mexico’ policy for asylum-seekers,” *ABC News*, February 7, 2023, <https://abcnews.go.com/Politics/mexico-rejects-effort-reinstate-remain-mexico-policy-asylum/story?id=96939554>.

<sup>59</sup> Camilo Montoya-Galvez, “U.S. to require Brazilian asylum-seekers to wait in Mexico for court hearings,” *CBS News*, January 29, 2020, <https://www.cbsnews.com/news/remain-in-mexico-expansion-us-to-require-brazilian-asylum-seekers-to-wait-in-mexico-for-hearings/>.

become available.<sup>60</sup> USCIS now routinely receives over 1,000,000 applications per month, and there are more than 4,000,000 applications currently pending that are outside of target processing times.<sup>61</sup>

Given these extensive delays, many people around the world increasingly view the United States as inaccessible by legal immigration. And that has driven many people as a last resort into the hands of smugglers, who swindle them on coming to the border as the only way they will ever be able to live in the United States. As one smuggler in India recently indicated to the *Washington Post*, until U.S. visas are more available “the demand-and-supply chain will remain, like a mother and father. Those that want to go will find any way to reach. It doesn’t matter which route you show them.”<sup>62</sup> Adding more resources to this system will also help resolve some of the challenges caused by high levels of migration; asylum officers are funded by fees paid for by immigration petitioners and beneficiaries. More resources mean quicker work authorization and quicker adjudication for all.

Beyond changes to the legal immigration process, Congress also needs to help state and local governments. We believe that the federal government should establish a Center for Migrant Coordination.<sup>63</sup> As we envision it, the Center for Migrant Coordination would serve both as a centralized information and coordination hub between the federal government and state and local stakeholders, and as an active participant in coordinating migrant arrivals between different locations. This would allow communities around the country to work together to share both the challenges *and* the opportunities created by migration. And with Congressional support, the United States could adopt programs similar to those which have proven successful in other countries, such as post-arrival integration assistance in the form of language classes, job assistance, and self-help resources for the asylum process.

A greater federal role in the migration process will also significantly reduce the fiscal impact of migration on state and local governments. A recent study found that refugees who enter the United States through the federally-funded U.S. Refugee Admissions Program “have no statistically significant impact on local or state finances in the short- or long-term.”<sup>64</sup> One key reason for this is that “refugees receive support primarily from the federal government, resettlement agencies, and religious and secular community organizations rather than local funds.”<sup>65</sup> Federal support would also be more fiscally efficient than a

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<sup>60</sup> Jack Malde, Theresa Cardinal Brown, and Ben Gitis, “Green Light to Growth: The Economic Benefits of Clearing Green Card Backlogs,” *Bipartisan Policy Center*, November 2023, [https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2023/11/WEB\\_BPC\\_Immigration-Green-Light-to-Growth\\_R01.pdf](https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2023/11/WEB_BPC_Immigration-Green-Light-to-Growth_R01.pdf).

<sup>61</sup> U.S. Citizenship and Immigration Services, “Completing an Unprecedented 10 Million Immigration Cases in Fiscal Year 2023, USCIS Reduced Its Backlog for the First Time in Over a Decade,” February 9, 2024, <https://www.uscis.gov/EOY2023>.

<sup>62</sup> Karishma Mehrotra, “Ever more undocumented Indian migrants follow ‘donkey’ route to America,” *Washington Post*, March 3, 2024, <https://www.washingtonpost.com/world/2024/03/03/india-undocumented-immigrants/>.

<sup>63</sup> See *Beyond a Border Solution*, Recommendation 3; Aaron Reichlin-Melnick, “Federal coordination can help migrants and communities that support them,” *Dallas Morning News*, July 12, 2023, <https://www.dallasnews.com/opinion/commentary/2023/07/12/federal-coordination-can-help-migrants-and-communities-that-support-them/>.

<sup>64</sup> Reva Dhingra, Mitchell Kilborn, and Olivia Woldemikael, “Does Refugee Resettlement Impact State and Local Finances? The Fiscal Effects of the Refugee Resettlement Program,” U.S. Immigration Policy Center, September 2021, <https://usipc.ucsd.edu/publications/usipc-fiscal-impact-refugee-resettlement.pdf>.

<sup>65</sup> *Ibid.*

patchwork of local programs, because agencies could sign competitively-bid long-term contracts with established service providers, rather than relying on emergency contracting at significantly increased costs. For similar reasons, we suggest the creation of an emergency migration fund to limit unexpected impacts on appropriations.<sup>66</sup>

Congress can also limit any fiscal costs associated with migration through the creation of semi-custodial regional processing centers, where migrants would go through initial screenings at the border in purpose-built facilities designed for humanitarian migration.<sup>67</sup> Congress should also provide emergency backlog reduction funding to U.S. Citizenship and Immigration Services for adjudication of asylum applications, parole applications, TPS applications and employment authorization applications.<sup>68</sup>

A key point that state and local governments have made in recent years is that the federal government should be doing more. We agree. A broader federal role in migration management, combined with a revitalized humanitarian protection system would reduce fiscal impacts on local governments, promote due process, uphold American values, and unlock the energy and talents of new arrivals.

The best way to restore the United States humanitarian protection system, reduce state and local burdens caused by the need to provide basic humanitarian needs for new arrivals, and to lower migration at the border is for Congress to create alternate legal pathways for entry (either temporary guest worker programs or through increased immigrant visas) and provide sufficient resources to reestablish a functioning system of humanitarian protection screenings. As Congress continues to debate this critically complex issue, we urge legislators to address the issue with the seriousness it deserves, rather than falling for a myth that immigration can be solved with the stroke of a pen.

Thank you for your time.

Aaron Reichlin-Melnick  
Policy Director  
American Immigration Council

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<sup>66</sup> See *Beyond a Border Solution*, Recommendation 10.

<sup>67</sup> See *Beyond a Border Solution*, Recommendation 7.

<sup>68</sup> See *Beyond a Border Solution*, Recommendation 4.