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October 19, 2021

Attorney General Merrick B. Garland
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Secretary Alejandro Mayorkas
Department of Homeland Security
Washington, D.C. 20528

Via regulations.gov:

RE: DHS Docket No. USCIS-2021-0012 – Proposed Rule by the Department of Homeland Security and Executive Office for Immigration Review – Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers

Dear Attorney General Garland and Secretary Mayorkas:

The undersigned Attorneys General, as the chief legal officers of our States, write to express concern about and opposition to the Department of Homeland Security's ("DHS") and the Department of Justice's (collectively, "the Departments") August 20, 2021, proposal to amend regulations governing the determination of certain protection claims raised by individuals subject to expedited removal and found to have a credible fear of persecution or torture ("the Proposed Rule").

GENERAL COMMENT:

The Proposed Rule advances troubling revisions to asylum procedures, generally, and the credible fear determination process, specifically, that exacerbate loopholes in the expedited removal process. Indeed, the Proposed Rule prioritizes administrative efficiency and expediency over national security, health risks, the impact to the States, and basic common-sense solutions and effective border security policies.[1]

Congress enjoys formidable power in setting the nation's immigration policy. "The power of Congress over the admission of aliens and their right to remain [in the United States] is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and national security."[2] While the effective legislation and faithful execution of our nation's immigration laws necessarily requires coordination between the Executive and Legislative Branches,

[1] *See* 86 Fed. Reg. 46,906 (Aug. 20, 2021).
[2] *Galvan v. Press*, 347 U.S. 522, 530 (1954).

the Executive Branch may not "disregard legislative direction in the statutory scheme it administers."[3] Nor may the Executive Branch "ignore statutory mandates or prohibitions merely because of policy disagreements with Congress."[4] That is so because "[n]o matter how successful Congress might be in crafting a set of immigration laws that would – in theory – lead to the most long-term benefits to the American people, such benefits will not actually occur if those laws cannot be enforced."[5]

The United States faces an unprecedented immigration crisis at the Southwest Border. July 2021 proved the busiest month for illegal border crossings at the Southwest Border in over 21 years, with 212,672 encounters between migrants and U.S. Customs and Border Protection ("CBP") agents.[6] August 2021 again exceeded the 200,000 encounter threshold, with 208,887 migrant encounters at the Southwest Border.[7] Indeed, the Departments' Proposed Rule itself recognizes the significant challenges presented by such a sharp increase in non-citizens attempting to cross (and in many cases successfully crossing) the nation's Southwest Border.[8]

The Departments point to an "overwhelmed" and back-logged asylum system that "delays justice and certainty for those who need protection" and, as presently constructed, "encourages abuse by those who will not qualify for protection and smugglers who exploit the delay for profit."[9] However, much of this crisis was created by the new Administration's own policies and "priorities." The changes suggested by the Department's Proposed Rule, at best, miss the mark, and at worst, shift significant burdens to the States and local communities.

SPECIFIC COMMENT 1: The Departments should clarify how the statutory changes advocated by the Proposed Rule comply or conflict with the Departments' existing legal obligations under the Migrant Protection Protocols.

The undersigned Attorneys General have serious concerns as to whether the statutory revisions suggested by the Proposed Rule are consistent with the legal obligations imposed by the Migrant Protection Protocols ("MPP"), informally known as the "Remain in Mexico" program.

On December 20, 2018, then-Secretary of Homeland Security Kirstjen M. Nielsen announced MPP,[10] under which DHS planned to initiate the process of removing non-citizens from the United

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[3] *Heckler v. Chaney*, 470 U.S. 821, 833 (1985).
[4] *In re Aiken Cnty.*, 725 F.3d 255, 260 (D.C. Cir. 2013).
[5] S. Rep. No. 104-249, at 3 (1996).
[6] U.S. Customs and Border Protection, *CBP Releases July 2021 Operational Update*, (Aug. 12, 2021), https://www.cbp.gov/newsroom/national-media-release/cbp-releases-july-2021-operational-update; Nick Miroff, *July was busiest month for illegal border crossings in 21 years, CBP data shows*, WASHINGTON POST (Aug. 12, 2021, 9:43 p.m.), https://www.washingtonpost.com/national/record-numbers-illegal-border-crossings/2021/08/12/e3d305e2-facd-11eb-b8dd-0e376fba55f2_story.html.
[7] U.S. Customs and Border Protection, *CBP Releases August 2021 Operational Update*, (Sep. 15, 2021), https://www.cbp.gov/newsroom/national-media-release/cbp-releases-august-2021-operational-update.
[8] *See* 86 Fed. Reg. at 46,907 ("As the number of [asylum and related protection] claims [have] skyrocketed over the years, the system has proven unable to keep pace, resulting in large backlogs and lengthy adjudication delays.").
[9] *Id.*
[10] Department of Homeland Security, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration*, (Dec. 20, 2018), *available at* https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration.

States pursuant to 8 U.S.C. § 1225(b)(2)(C)[11] for the duration of the non-citizen's removal proceedings under 8 U.S.C. § 1229a.[12] One stated goal of MPP is to ensure that

> [c]ertain aliens attempting to enter the U.S. illegally or without documentation, *including those who claim asylum*, will no longer be released into the country, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim.[13]

Specifically as it pertains to the Southwest Border, MPP authorizes "DHS to return to Mexico certain third-country nationals— *i.e.*, aliens who are not nationals or citizens of Mexico – arriving in the United States from Mexico for the duration of their removal proceedings under 8 U.S.C. § 1229a."[14]

Predictably, MPP faced legal challenges in federal district court[15] and in the United States Court of Appeals for the Ninth Circuit.[16] A California federal district court enjoined the implementation of MPP and the Ninth Circuit affirmed the injunction on the merits.[17] The United States Supreme Court thereafter stayed the district court's injunction in March 2020[18] and dismissed the legal challenges against MPP as moot in June 2021.[19] Thus, MPP remained in effect before and at the time when President Biden took office on January 20, 2021.

Notwithstanding the clear, recognized success achieved through MPP's implementation,[20] DHS unilaterally suspended new enrollment in the program on January 20, 2021, Inauguration Day, subject to a department-wide review of the program.[21] On June 1, 2021, Secretary Mayorkas issued a document titled "Termination of the Migrant Protection Protocols Program" that terminated MPP in its entirety.[22] This action precipitated yet another round of legal challenges concerning MPP.

In April 2021, Texas and Missouri challenged DHS's suspension of MPP—and later DHS's wholesale termination of MPP (which mooted the initial suspension challenge)—in the United States

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[11] 8 U.S.C. § 1225(b)(2)(c) provides that: "In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title."

[12] *See* 8 U.S.C. § 1229a (providing for removal proceedings).

[13] *See supra* note 11 (emphasis added).

[14] *State v. Biden*, --- F. Supp. 3d ---, 2021 WL 3603341, at *5 (N.D. Tex. Aug. 13, 2021).

[15] *See Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019).

[16] *See Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020).

[17] *Id.* at 1095 (holding that "[b]ecause the MPP is invalid in its entirety due to its inconsistency with [8 U.S.C.] § 1225(b), it should be enjoined in its entirety.").

[18] *Wolf v. Innovation Law Lab*, --- U.S. ---, 140 S. Ct. 1564, 206 L.Ed.2d 389 (2020) (mem.).

[19] *Mayorkas v. Innovation Law Lab*, ---U.S. ---, 141 S. Ct. 2842, --- L.Ed.2d --- (2021) (mem.).

[20] Department of Homeland Security, *Assessment of the Migrant Protection Protocols (MPP)*, (Oct. 28, 2019), *available at* https://www.dhs.gov/publication/assessment-migrant-protection-protocols-mpp.

[21] Department of Homeland Security, *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program*, (Jan. 20, 2021), https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program.

[22] Memorandum from Alejandro N. Mayorkas, Secretary of Homeland Security, on Termination of the Migrant Protection Protocols Program (June 1, 2021), *available at* https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

District Court for the Northern District of Texas.[23] On August 13, 2021, the District Court entered a nationwide permanent injunction that ordered DHS to, among other things:

> enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA **and** until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 1225 without releasing any aliens *because of* a lack of detention resources.[24]

DHS sought an emergency stay of the injunction. The United States Court of Appeals for the Fifth Circuit denied DHS's motion for stay pending appeal on August 19, 2021.[25] The Proposed Rule was announced the next day, August 20, 2021. Four days later, the Supreme Court refused to consider DHS's application for a stay of the District Court's permanent injunction.[26] Thus, the District Court's nationwide injunction compelling DHS to implement MPP remains in *full legal effect* pending appeal and resolution on the merits in the Fifth Circuit and ultimately the Supreme Court.

The undersigned Attorneys General remain concerned with DHS's sluggishness in implementing MPP in a manner consistent with the District Court's permanent injunction.[27] Indeed, DHS's unilateral cancellation of the program and sluggish restarting of it have contributed significantly to the crisis at the Southwest Border. In short, DHS *created* and is *perpetuating* the very crisis it purports to address with this Proposed Rule. The Departments should at the very least clarify how and to what extent the Proposed Rule complies—or conflicts—with the existing legal obligations imposed by MPP and why implementing MPP would not adequately reduce the demand on the system in processing individuals who appear at the Border.

In addition, the undersigned Attorneys General request that a non-citizen's eligibility for MPP be part of a threshold screening process, similar to the process that applies to non-citizens barred from seeking asylum pursuant to the safe-third country agreement with Canada.[28] In making an early, initial determination that a non-citizen is eligible for MPP, the Departments would preserve detention space for vulnerable non-citizens, enhance security at the border, and promote humanitarian interests.

SPECIFIC COMMENT 2: Permitting asylum officers to fully adjudicate asylum claims could encourage a substantial increase in non-meritorious credible fear claims.

In the context of immigration policies and procedures, the ends to achieve goals of expediency and administrative efficiency do not justify the means. The Departments do not analyze or discuss the likelihood that the Proposed Rule's revisions to the asylum process would encourage *more* non-citizens to seek asylum. For example, the Departments consider the administrative efficiencies expected to be gained from the Proposed Rule and the expected benefits conferred upon non-citizens availing themselves of the asylum process through quicker adjudication timelines. But the Departments fail to analyze (much less discuss) whether these changes to the asylum process will in fact make the Border

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[23] *See supra* note 14.

[24] *State*, 2021 WL 3603341, at *27 (emphases in original).

[25] *State v. Biden*, 10 F.4th 538 (5th Cir. 2021) (per curiam).

[26] *Biden v. Texas*, --- U.S. ---, --- S.Ct. ---, --- L.Ed.2d ---, 2021 WL 3732667, at *1 (Aug. 24, 2021) (mem.).

[27] Grace Dixon, *States Say Feds Are Slow-Walking 'Remain in Mexico' Reboot*, LAW360 (Sep. 24, 2021, 5:45 p.m.), https://www.law360.com/immigration/articles/1425004/states-say-feds-are-slow-walking-remain-in-mexico-reboot.

[28] *See* 86 Fed. Reg. at 46,945; *see also* 8 U.S.C. § 208.30(6) (providing for threshold screening to determine asylum eligibility prior to credible fear determination).

crisis worse by encouraging non-citizens living abroad to make their way to the United States. And an increase in non-citizens seeking to enter the United States (illegally or to claim asylum) will further drive up enforcement actions at the Southwest Border and increase the statistical likelihood of non-meritorious asylum claims and illegal entry overall.

Many non-citizens already attempt to seek asylum in the United States based on nothing other than their inability to find work in their home countries. But this is not a basis for asylum. As reported in *The Texas Tribune*, a migrant from South America readily admitted to the press that he and his family were encamped under a bridge in Del Rio, Texas, and planned on seeking asylum in the United States on the basis that he "couldn't find work to support his family."[29] This "economic asylum" is a far cry from the statutory requirements for asylum, such as a credible fear of persecution or torture.[30]

MPP, for example, achieved concrete results in managing asylum seekers attempting to cross the Southwest Border, but it is unclear whether the Proposed Rule would achieve even remotely the same results because the Departments failed to analyze this issue.

At a minimum, the Departments should address with specificity whether the Proposed Rule is expected to stem or grow the number of non-citizens attempting to travel to the United States in order to seek asylum and explain the basis for its conclusions. It is likely that this policy will exacerbate the existing Border crisis because the Departments' Proposed Rule creates a super-highway for asylum applications with little to no oversight. The Proposed Rule does not address this problem.

SPECIFIC COMMENT 3: The Proposed Rule affords little or no opportunity for meaningful, independent review of positive credible fear determinations made by an asylum officer.

Enforcement of immigration policies and procedures demands both intra- and inter-agency cooperation. Nowhere is this inter-agency cooperation more vital (or more visible) than in the cooperation between USCIS asylum officers and EOIR immigration judges ("IJs"). This Proposed Rule seems to unravel that inter-agency coordination.

Through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress established the process for expedited removal, which is codified in the Immigration Nationality Act ("INA") § 235.3(b), 8 U.S.C. § 1225(b)(1)(A)(i). The expedited removal process authorizes DHS to remove non-citizens arriving if they (1) lack valid entry documents, or (2) tried to procure their admission into the United States through fraud or misrepresentation.[31] Non-citizens attempting to enter the United States at a port of entry and those apprehended within 100 miles of the U.S. border within 14 days of entering the United States are both subject to the expedited removal process.[32] These non-citizens are to be "removed from the United States without further hearing or review" unless

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[29] Uriel J. García and Jolie McCullough, *Thousands of Haitian migrants fleeing disaster and unrest seek asylum at Del Rio bridge*, THE TEXAS TRIBUNE (Sep. 17, 2021 7:00 p.m.), https://www.texastribune.org/2021/09/17/texas-border-del-rio-migrants/.
[30] Alicia A. Caldwell, *Middle-Class Migrants Fly to Mexico and Then Cross U.S. Border Illegally*, THE WALL STREET JOURNAL (Oct. 13, 2021 5:30 a.m.), https://www.wsj.com/articles/middle-class-migrants-fly-to-mexico-and-then-cross-u-s-border-illegally-11634117401.
[31] HILLEL R. SMITH, CONG. RESEARCH SERV., IF11357, EXPEDITED REMOVAL OF ALIENS: AN INTRODUCTION 1 (2021), *available at* https://crsreports.congress.gov/product/pdf/IF/IF11357.
[32] *Id.*

they meet one of the few exceptions to expedited removal, *i.e.*, they indicate "an intention to apply for asylum" or "a fear of persecution."[33]

A non-citizen expressing an intention to apply for asylum or a fear of persecution is referred to a USCIS asylum officer for an asylum interview to determine whether the non-citizen has a "credible fear" of persecution or torture. "Credible fear of persecution" is statutorily defined as a "significant possibility" that the noncitizen could establish eligibility for asylum.[34] As noted by the Congressional Research Service,

> [a] credible fear determination is a screening process that evaluates whether an alien might qualify for one of three forms of relief from removal: asylum, withholding of removal, and protection under the Convention Against Torture (CAT). Asylum is the only form of relief that gives the alien a permanent legal foothold in the United States.[35]

A non-citizen may apply for asylum in the United States through one of two methods: affirmative asylum processing or defensive asylum processing.[36] Affirmative asylum processing permits a non-citizen physically present in the United States to apply for asylum within one year of the date of their last arrival, regardless of the non-citizen's immigration status.[37] Defensive asylum processing is an application for asylum that occurs when a non-citizen is placed in removal proceedings before an immigration court with EOIR and the non-citizen requests asylum as "a defense against removal from the United States."[38]

Under the current regulatory scheme, a non-citizen found to have a positive credible fear is placed into full removal proceedings before an IJ. The asylum applicant bears the burden of proving that they qualify for asylum; *the IJ*—not the asylum officer—serves as the adjudicator as to whether a non-citizen is eligible for asylum in the United States.[39] However, the Department's Proposed Rule offers a puzzling solution insofar as it would effectively permit the *asylum officer* to have the final say on whether a non-citizen may receive asylum once a positive credible fear determine has been made.

If implemented, the Proposed Rule would permit asylum officers, upon making a positive credible fear determination, to adjudicate in the first instance—through a non-adversarial hearing—the protection claims of non-citizens otherwise subject to expedited removal.[40] Thus, the Proposed Rule entirely *strips* IJs (and thus the EOIR) from meaningful participation in the asylum determination process once an asylum officer has determined that a credible fear exists. This Proposed Rule starkly departs from the present statutory regime as envisioned by Congress.

Administrative judges are a vital component to the asylum system, because the ultimate question is whether the non-citizen meets a legal standard. Asylum officers, employed by USCIS, do not weigh evidence or test claims as part of their intake process. In Fiscal Year ("FY") 2019, asylum

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[33] INA § 235.3(b)(4); 8 U.S.C. § 1225(b)(1)(A)(i).
[34] 8 U.S.C. § 1225(b)(1)(B)(v).
[35] SMITH, *supra* note 31, at 1.
[36] U.S. Citizenship and Immigration Services, *Obtaining Asylum in the United States*, https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states (last updated Sept. 16, 2021).
[37] *Id.*
[38] *Id.*
[39] *See generally* 8 C.F.R. § 1240.1 (providing for the immigration judge's authority).
[40] The Proposed Rule would significantly alter 8 C.F.R. §§ 208.2, 208.3, and 208.9 to achieve these goals.

officers found that 73.6 percent of non-citizens claiming credible fear passed that bar.[41] However, only 15.1 percent of non-citizens were ultimately granted asylum by an IJ.[42] While some of that delta relates to non-citizens never filing a claim for asylum, the vast difference in grant rates illustrates that the two entities have different, if not incompatible, missions. While asylum officers review claims for whether, if true, the claims *might* support a finding of refugee status, immigration judges determine whether the non-citizen has actually carried his or her burden. This requires evidence, an evaluation of the standard of proof, and other features of our legal system that make asylum officers improper decision-makers.

As justification, the Departments contend that permitting asylum officers to adjudicate asylum claims in the first instance will relieve "strain" on the asylum system and address the significant backlog of cases. While many observers may readily agree that the current immigration system is strained, and that certain asylum procedures are untenable in the long-term, the undersigned Attorneys General sharply dispute that a viable solution to a situation significantly exacerbated by the Administration's unlawful refusal to implement proven policies, like MPP and removal of violent criminals, involves wholesale removal of IJs and the EOIR from the asylum determination process. Making the matter worse, the Departments do not address at all the vast difference in training, qualifications, and adjudicatory conditions between the two different officers.

The Proposed Rule does not state whether the Departments sought or evaluated any alternative means of reducing caseloads and stemming rapid growth of EOIR caseloads outside of removing the EOIR from the asylum adjudication process entirely. One thing is clear, however: the Proposed Rule offers *no meaningful administrative review* by an IJ once an asylum officer makes a positive credible fear determination and proceeds to consider the wide array of benefits able to award the non-citizen.

SPECIFIC COMMENT 4: The Proposed Rule dramatically alters the burden of proof that more appropriately rests with the non-citizen applying for asylum protections, rather than USCIS.

Whether a non-citizen affirmatively or defensively applies for asylum, it is incumbent on *the non-citizen* to take the necessary steps in filing an application for asylum. If referred to an IJ for full removal proceedings, the burden rests with the applicant to demonstrate eligibility for asylum.[43] The Department's Proposed Rule turns this burden on its head and demands that USCIS assume the burden in what should be the non-citizen's role in the asylum application process.

The Proposed Rule provides that

> [a]s part of this new procedure for "further consideration," and to eliminate delays between a positive credible fear determination and the filing of an application for asylum, the

[41] *See* USCIS, Credible Fear Workload Report Summary, FY2019 Total Caseload, *available at* https://www.uscis.gov/sites/default/files/document/data/Credible_Fear_Stats_FY19.pdf.

[42] DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2019 REFUGEE AND ASYLEES ANNUAL FLOW REPORT 6-7 (SEP. 2020), *available at* https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/refugee_and_asylee_2019.pdf.

[43] *See* 8 C.F.R. § 208.2(c)(3)(i) (applying the same procedures as removal proceedings held under 8 C.F.R. § 240, subpart A); 8 C.F.R. § 1240.8(d) ("The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief [from removal] may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.").

> Departments propose that the written record of the credible fear determination created by USCIS during the credible fear process, and subsequently served on the individual together with the service of the credible fear decision itself, would be treated as an "application for asylum," with the date of service on the individual considered the date of filing. 8 CFR 208.3(a)(2) (proposed). Every individual who receives a positive credible fear determination would be considered to have filed an application for asylum at the time the determination is served on him or her.[44]

By the Departments' own admission, credible fear *claims* made at the border (one of the few exceptions to placement in expedited removal proceedings) now appear to be the norm.[45] In a February 2020 report to Congress, the Government Accountability Office ("GAO") found that 73 to 80 percent of all credible fear assessments resulted in positive credible fear determinations between FY 2014 through the first two quarters of FY 2019.[46] The Departments assert that the asylum system is overwhelmed, yet the Proposed Rule would treat every positive credible fear determination as an application for asylum. The overwhelming majority of non-citizens seeking asylum in the United States will not receive it. During FY 2019, USCIS received 96,952 applications for affirmative asylum and EOIR received 210,752 applications for defensive asylum as a defense to removal from the United States.[47] Of these, 46,508 non-citizens received asylum, with 27,643 individuals receiving it through the affirmative asylum process and 18,865 individuals receiving it through the defensive asylum process.[48] So, to put these numbers into perspective, only 46,508 non-citizens received asylum in FY 2019 out of the 307,704 applications received by USCIS and EOIR—a mere 15.1 percent. It is clear that the problem is *not* that too many non-citizens are granted asylum. In fact, quite the opposite. It is the unmanageable amount of non-meritorious asylum applications about which the Departments complain.

Curiously, the Proposed Rule appears to promote the filing of asylum applications, an action that seems counterproductive to the purported goals set out by the Departments. While the Proposed Rule may in fact reduce administrative delay between the time a non-citizen is placed into full removal proceedings before an IJ (after a positive credible fear determination is made), it does so at the expense of the secondary review Congress expected to evaluate that initial decision. This appears to be the actual purpose of the Proposed Rule – to avoid the secondary review, which would dramatically increase the number of non-citizens released at a border entry point into the United States. The undersigned Attorneys General have serious concerns about the Proposed Rule's impact on the amount of non-citizens that may attempt to unlawfully enter the United States in the hope of obtaining asylum and the burden that places on our States. This problem may be further exacerbated were USCIS permitted to virtually prepare the application for asylum on behalf of the non-citizen. The Departments should strongly reconsider these proposed changes.

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[44] 86 Fed. Reg. at 46,916.

[45] *Id.* at 46,909 ("These steps are meant to ensure greater efficiency in the system, which was initially designed for protection claims to be the exception, not the rule, among those encountered at or near the border").

[46] U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-250, ACTIONS NEEDED TO STRENGTHEN USCIS'S OVERSIGHT AND DATA QUALITY OF CREDIBLE AND REASONABLE FEAR SCREENINGS 15 (2020), *available at* https://www.gao.gov/assets/gao-20-250.pdf.

[47] DEPARTMENT OF HOMELAND SECURITY, *supra* note 42, 6-7.

[48] *Id.* at 8.

SPECIFIC COMMENT 5: The Proposed Rule includes revisions to parole considerations that undercut and substitute the mandatory detention standard as envisioned by Congress in favor of subjective, ambiguous standards for parole created by administrative rule.

The Departments' Proposed Rule envisions significant changes to parole considerations made prior to a positive credible fear determination. Currently, 8 C.F.R. § 235.3 requires mandatory detention pending a credible fear determination, providing that:

> [a]n alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section *shall be detained* pending determination and removal, except that parole of such alien . . . may be permitted only when the Attorney General determines, in the exercise of discretion, *that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.*[49]

The Departments revise this mandatory statutory language by permitting DHS to consider whether parole is required "because detention is unavailable or impracticable."[50] The proposed changes to parole considerations, presently submitted, are problematic because they are overly broad and subjective. The issue of space for detention is squarely within the control of DHS, specifically ICE. For example, in a January 2021 report to the Chairman of the Committee on Homeland Security in the House of Representatives, GAO found that ICE, among other things, "agreed to pay detention facility operators for a fixed number of detention beds regardless of whether it use[d] them" and "spent millions of dollars a month on unused detention space" between FY 2017 through May 2020.[51] Thus, DHS can unilaterally restrict available space and create its own discretionary safe-harbor that evades the clear intent of Congress regarding mandatory detention. DHS has not imposed upon itself or disclosed any meaningful limits on its power to *make* detention "unavailable." And the Proposed Rule plainly envisions no change to detention facility capacity.[52] In addition, DHS does not address what condition or set of conditions would be sufficient for the DHS to consider detention "impracticable."

Recent press coverage highlights a disturbing trend: DHS is following its own standards instead of the statutory standards envisioned by Congress when it comes to releasing and paroling out non-citizens from detention centers.[53] According to this reporting, the Biden Administration has released at least 160,000 illegal immigrants into the United States since March and has made liberal use of statutory parole standards.[54] Former Border Patrol Chief Rodney Scott put it simply:

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[49] 8 C.F.R. § 235.3(b)(2)(iii) (emphases added). *See also* 8 U.S.C. § 1182(d)(5)(A) ("The Attorney General may . . . in his discretion parole into the United States temporarily" any noncitizen apply for admission "under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit . . . .").

[50] 86 Fed. Reg. at 46,913.

[51] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-149, ACTIONS NEEDED TO IMPROVE PLANNING, DOCUMENTATION, AND OVERSIGHT OF DETENTION FACILITY CONTRACTS 24 (2021), *available at* https://www.gao.gov/assets/gao-21-149.pdf.

[52] *See* 86 Fed. Reg. at 46,939 ("The proposed rule also would not make any changes to detention facilities. Rather, the detention facilities are already in existence . . . .").

[53] Bill Melugin & Adam Shaw, *Leaked Border Patrol docs show mass release of illegal immigrants into US by Biden administration*, FOX NEWS (Oct. 13, 2021), https://www.foxnews.com/politics/leaked-border-patrol-docs-release-immigrants-us-biden-administration.

[54] *Id.*

> 'By law and regulation a parole shall only be granted on a case by case basis and only for significant humanitarian reasons or significant public benefit. Neither of these appear to apply to the current situation,' he said, adding that the number of paroles brings into question the review and approval process.[55]

DHS must remain within the statutory bounds envisioned by Congress. The vague standards offered by the Proposed Rule appear to be intended to evade the clear limits on such unbounded discretion that Congress intended to apply. The Proposed Rule is unclear and inconsistent with the statute. The Departments should utilize more definite language if they insist on revising the mandatory detention provisions contained in 8 C.F.R. § 235.3.

SPECIFIC COMMENT 6: The Proposed Rule fails to acknowledge and in fact disclaims any impact on States, which incur much of the social and economic costs related to positive asylum determinations with little recourse available.

America has benefited much from lawful immigration and the contributions made by immigrants lawfully present within the United States. The unfortunate challenge facing the Nation presently, however, is one of a grim reality: States and local communities disproportionately bear the social and economic costs of illegal immigration.

First, the social cost. The unfortunate truth is that many non-citizens seeking asylum in the United States—regardless of whether their circumstances *actually* merit the ultimate legal status of asylee—arrive with little or no resources – usually only what they can carry. Recent press reports detail ICE officers dropping off non-citizens at shelters, bus stations, and airports without resources, language skills, or assistance. Some non-governmental organizations ("NGOs") have decried this treatment and complained about ICE failing to give any notice.[56] Immigration advocacy groups have similarly complained of the "chaotic way" in which ICE has elected to release non-citizens at various urban and rural locations.[57] Additionally, state and local officials have accused ICE of providing "little to no warning" prior to the release of non-citizens,[58] and members of Congress have sought information on ICE's conduct.[59] Regrettably, over the past few months, ICE has employed such

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[55] *Id.*

[56] Dan Lieberman, *U.S. Border Patrol is increasingly dropping off migrants in rural areas lacking resources*, PBS: NEWS HOUR (Jun. 4, 2021 6:48 p.m.), https://www.pbs.org/newshour/show/u-s-border-patrol-is-increasingly-dropping-off-migrants-in-rural-areas-lacking-resources.

[57] Destinee Patterson, *Some asylum seekers dropped off in Shreveport reportedly were not allowed to call their families*, KSLA NEWS 12 (Jul. 19, 2021 at 4:48 p.m.), https://www.ksla.com/2021/07/19/some-asylum-seekers-dropped-off-shreveport-reportedly-were-not-allowed-call-their-families/.

[58] Bill Lunn, *ICE releases immigrants in Shreveport with little warning to local officials*, KTBS 3 (Jul. 16, 2021), https://www.ktbs.com/news/3investigates/ice-releases-immigrants-in-shreveport-with-little-warning-to-local-officials/article_f764e9a4-e678-11eb-a69f-13f40e85871f.html; Matt Sledge, *Disorganized immigration releases draw concern from advocates, U.S. Sen. Bill Cassidy*, NOLA.COM (Jul. 20, 2021), https://www.nola.com/news/politics/article_f7e6d19e-e8d5-11eb-b64b-8b51fd85a303.html.

[59] *See* Press Release, Bill Cassidy, U.S. Senator, Cassidy Statement on ICE Immigrant Dropoff in Shreveport (Jul. 18, 2021), https://www.cassidy.senate.gov/newsroom/press-releases/cassidy-statement-on-ice-immigrant-dropoff-in-shreveport.

tactics not only in Louisiana, but in Arizona,[60] Georgia,[61] and Mississippi,[62] to name a few examples. This troubling practice adversely impacts States and local communities, who have little choice other than to bear these consequences without assistance from the Federal government.

As the Supreme Court has noted, "deportable criminal aliens who remain[ ] in the United States often commit[ ] more crimes before being removed."[63] Many non-citizens arrested by ICE have previously been convicted of *at least* one crime or had criminal charges pending against them at the time of their arrest. According to ICE's Fiscal Year 2020 Enforcement and Removal Operations Report, ICE conducted 103,603 administrative arrests in FY 2020.[64] Ninety percent of the non-citizens arrested had either criminal convictions or criminal charges pending.[65] ICE effectuated even more administrative arrests of non-citizens with criminal histories in FY 2019, totaling 143,099.[66] Additionally, ICE effectuated 4,360 criminal arrests in FY 2020 and assisted prosecutorial agencies in securing 5,397 convictions.[67] According to ICE's own statistical reporting, many of the non-citizens arrested in FY 2019, 2020, and 2021 have criminal histories that include crimes of violence, sex offenses, property crimes, weapon and drug offenses, trafficking, kidnapping, and fraud.[68] To be sure, States and local communities are the ones that overwhelmingly bear the tangible and intangible costs of crimes committed by non-citizens.

In a September 30, 2021, memorandum, Secretary Mayorkas instructed ICE to prioritize the apprehension and removal of non-citizens based on three enumerated factors: 1) threat to national security; 2) threat to public safety; and 3) threat to border security.[69] This memorandum demands ICE officials examine the "totality of the circumstances" and consider "mitigating factors that militate in favor of declining enforcement action."[70] Even more concerning, DHS imposes these final guidelines

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[60] Aila Slisco, *ICE Resumes Dropping Migrants Off at Greyhound Terminal Instead of Welcome Center*, NEWSWEEK (May 7, 2021 9:45 p.m.), https://www.newsweek.com/ice-resumes-dropping-migrants-off-greyhound-terminal-instead-welcome-center-1589765; Kirk Siegler, *Why The U.S. Government Is Dropping Off Migrants In Rural Arizona Towns*, NPR (Apr. 15, 2021 6:57 p.m.), https://www.npr.org/2021/04/15/987618530/why-the-u-s-government-is-dropping-off-migrants-in-rural-arizona-towns.

[61] Lautaro Grinspan, *When ICE detainees are dropped off at Atlanta airport, this group helps*, THE ATLANTA JOURNAL-CONSTITUTION (Sep. 24, 2021), https://www.ajc.com/news/when-ice-detainees-are-dropped-off-at-atlanta-airport-this-group-helps/2RNBQ25RTRBB7H7DMUQLSMDN4E/.

[62] Jan Griffey, *Update: ICE drops more than 90 immigrants at Natchez bus station*, THE NATCHEZ DEMOCRAT, (Jul. 16, 2021 7:41 p.m.), https://www.natchezdemocrat.com/2021/07/16/ice-drops-more-than-90-immigrants-at-natchez-bus-station/.

[63] *Demore v. Kim*, 538 U.S. 510, 518 (2003) (citing Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989)).

[64] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FISCAL YEAR 2020 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 13 (2020), *available at* https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf.

[65] *Id.*

[66] *Id.* at 14.

[67] *Id.* at 16.

[68] U.S. Customs and Border Protection, Criminal Noncitizen Statistics Fiscal Year 2021, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/criminal-noncitizen-statistics (last updated Sep. 15, 2021).

[69] Memorandum from Alejandro N. Mayorkas, Secretary of Homeland Security, on Guidelines for the Enforcement of Civil Immigration Law 3-4 (Sep. 30, 2021), *available at* https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.

[70] These mitigating factors include considerations such as: (1) advanced or tender age; (2) lengthy presence in the United States; (3) a mental condition that may have contributed to the criminal conduct, or a physical or mental condition requiring care or treatment; (4) status as a victim of crime or victim, witness, or party in legal proceedings; (5) the impact of removal on family in the United States, such as loss of provider or caregiver; (6) whether the noncitizen may be eligible for

even though the interim guidelines on this issue hampered ICE's ability to make arrests—reportedly only averaging one arrest every two months.[71]

This Proposed Rule, which relaxes parole considerations and encourages more asylum seekers to travel to the United States, will only make matters worse for an already overwhelmed Southwest Border. The Proposed Rule blatantly disregards the social costs to States and local communities.

Second, this extraordinary shift in immigration policy will have a deleterious effect on the States' public fisc.[72] Non-citizens granted the legal status of asylee are entitled to certain public benefits such as Social Security Income, Medicaid, welfare and food stamps, employment authorization, a driver's license, and more.[73] Critically though, as explained in more detail below, many non-citizens (and their minor children) are entitled to many of these benefits while they remain in the United States as undocumented immigrants, while they await removal proceedings outside of a detention facility, or while they have their removal from the United States withheld, even if they are not ultimately granted asylum. The Proposed Rule will have financial impacts on States ranging from costs of border security to education to medical care and other public services. Notably, the Supreme Court and the Fifth Circuit have recognized injuries to a local or state government's financial interest based on the actions of the federal government, specifically in the context of immigration.[74]

In a 2017 report titled *The Fiscal Burden of Illegal Immigration on United States Taxpayers*, the Federation for American Immigration Reform ("FAIR") examined "the fiscal impact of illegal aliens as reflected in both federal and state budgets." [75] FAIR analyzed state expenditures associated with border security and policing, actions which require substantial expenditure of state monies. In 2017, Texas allocated $800 million to operations to secure the Texas-Mexico border, with the federal government "ignoring reimbursement requests for Texas funds spent on border security."[76] Similarly, and over the same period, New Mexico and Arizona spent approximately $49.1 million and $29.6 million, respectively, on border security.[77]

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humanitarian protection or other immigration relief; (7) military or other public service of the noncitizen or their immediate family; (8) time since an offense and evidence of rehabilitation; or (9) whether a criminal conviction was vacated or expunged. *See id.*

[71] Nolan Rappaport, *Biden isn't doing as well as Trump at removing aliens who pose a threat to public safety,* THE HILL (Oct. 7, 2021), https://thehill.com/opinion/immigration/575710-biden-isnt-doing-as-well-as-trump-at-removing-aliens-who-pose-a-threat-to?rl=1.

[72] *See Texas v. United States*, 524 F. Supp. 3d 598, 619-628 (S.D. Tex. 2021) (discussing DHS's 100-day pause on removal of non-citizens, analyzing the impact of this decision on the State of Texas's public fisc, and enjoining the implementation of the 100-day pause on removal of non-citizens).

[73] U.S. Citizen and Immigration Services, Benefits and Responsibilities of Asylees, https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/benefits-and-responsibilities-of-asylees (last updated Mar. 8, 2018).

[74] *See Clinton v. City of New York*, 524 U.S. 417, 430-31 (1998) (finding a local government to have standing when challenging immigration policies for purposes of the local government's claim to suffering injury to its "borrowing power, financial strength, and fiscal planning."); *see also Texas v. United States*, 809 F.3d 134, 152-53 (5th Cir. 2015) (finding sufficient for standing purposes several States' claims to suffering injury to their public fiscs).

[75] Matthew O'Brien, Spencer Raley, and Jack Martin, *The Fiscal Burden of Illegal Immigration on United States Taxpayers*, FEDERATION FOR AMERICAN IMMIGRATION REFORM 1 (2017), *available at* https://www.fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf.

[76] *Id.* at 44.

[77] *Id.*

But the States' financial obligations do not begin and end with securing their borders. Many non-citizens unlawfully entering the country often arrive with children, whom States are required to protect and educate and provide health care.[78] States are required to provide free public education to the children of unlawfully present non-citizens pursuant to the Supreme Court decision in *Plyler v. Doe*, which presents the States with an unfunded mandate.[79] According to FAIR's analysis, much of the public school expenditures involve limited English proficiency ("LEP") programs which require specialize training in English language skills for children possessing limited abilities to speak, read, and write in English.[80] In a 2016 report titled *The Elephant in the Classroom Mass Immigration's Impact on Education*, FAIR noted that the federal government provides a mere 8 percent of public school funding, with the lion's share funded by state and local government, and only 1 percent of cost associated with LEP programs.[81] As public education budgets have witnessed cuts over the past decade in tandem with an overall increase in the number of non-citizen children enrolled in public schools and relying on LEP, it is not difficult to understand that many municipalities' LEP programs are growing at a rate faster than the municipalities' ability to operate or fund them effectively.[82] Additionally, FAIR examined various aid and subsidy programs—the benefits of which are sometimes obtained by fraud—and found that the states overwhelming make up the federal shortfall in these programs, with approximately $2.6 billion in state and local funds being drawn on by ineligible illegal aliens nationwide.[83]

States also provide public services such as emergency medical care to non-citizens who lack other medical resources.[84] Many millions of undocumented non-citizens seeking medical care lack health insurance, and often an emergency room visit is their only source of health care.[85] And to make matters worse, we are still coping with the global COVID-19 pandemic, with hospitals in many of our states advising they have limited capacity. Some are even rationing care. The Departments' denial of any impact to states is flatly contradicted by the daily news and on-the-ground reports in our States from a wide scope of state officials and NGOs.[86] Given the current crisis at our borders, these numbers are no doubt exponentially larger. Health care and other costs arising from the pandemic also must be added to the current costs.

<u>Specific Comment 7</u>: The Proposed Rule fails to properly consider and analyze substantial Federalism concerns.

The Proposed Rule wholly fails to provide a federalism summary impact statement, as required by, *inter alia*, the Unfunded Mandates Reform Act ("UMRA"), which requires that "[e]ach agency shall

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[78] *Id.* at 36, 40.
[79] *Id.* at 37 (citing *Plyler v. Doe*, 457 U.S. 202 (1982)).
[80] *Id.*
[81] Marc Ferris and Spencer Raley, *The Elephant in the Classroom Mass Immigration's Impact on Education*, FEDERATION FOR AMERICAN IMMIGRATION REFORM 6 (September 2016), *available at* https://www.fairus.org/sites/default/files/2017-08/FAIR-Education-Report-2016.pdf.
[82] *Id.* 6-7.
[83] O'Brien, *supra* note 75, at 46-48.
[84] *Id.* at 40-42.
[85] *See* Whitney L. Duncan & Sarah B. Horton, *Serious Challenges And Potential Solutions for Immigrant Health During COVID-19*, HEALTH AFFAIRS BLOG (April 18, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200416.887086/full/.
[86] Julia Harte & Sharon Berstein, *Some U.S. Hospitals forced to ration care amid staffing shortages, COVID-19 surge*, Reuters (Sep. 17, 2021 7:39 p.m.), https://www.reuters.com/world/us/some-us-hospitals-forced-ration-care-amid-staffing-shortages-covid-19-surge-2021-09-17/.

. . . assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector."[87] Astonishingly, the Departments contend that the Proposed Rule insubstantially impacts States and presents *no substantial Federalism concerns*. The Departments state that

> [t]his proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.[88]

This position is as astonishing as it is false. Federalism concerns abound. "Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect."[89] Admittedly, under our constitutional design, States have ceded to the federal government the authority to establish a "uniform Rule of Naturalization"[90] as well as the authority to regulate and enforce immigration policies.[91] Nevertheless, the fundamental premise that States "bear[ ] many of the consequences of unlawful immigration" cannot be seriously disputed.[92] Indeed, the Supreme Court and Fifth Circuit have recognized that "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States."[93] To be sure, "[t]he problems posed to the State[s] by illegal immigration must not be underestimated."[94] This Proposed Rule nakedly underestimates these concerns.

The impact of the Proposed Rule on the States is wide-ranging, affecting State finances and resources, public safety, and public health during the midst of the COVID-19 global pandemic, to say the least. Whether the Departments choose to recognize these concerns has *no* bearing on the fact that they exist. Nor does it change the fact that the States will be left to navigate the consequences of ill-conceived immigration policies. Despite these serious concerns, however, the undersigned Attorneys General are unable to provide meaningful comment on this issue because the Proposed Rule contains no Federalism analysis or impact statement.

At a minimum, the Departments should reassess the Federalism implications of this Proposed Rule and republish the Proposed Rule with an appropriate Federalism summary impact statement.

<u>Specific Comment 8</u>: The Proposed Rule fails to adequately analyze whether an unfunded mandate is imposed on the States through this Proposed Rule.

The Proposed Rule states that "the Departments do not believe this proposed rule would impose any unfunded Federal mandates on State, local, and Tribal governments, in the aggregate, or on the private sectors" because, in the Departments' view, "[t]he impacts are likely to apply to

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[87] 2 U.S.C. §1531.
[88] 86 Fed. Reg. at 46,939.
[89] *Arizona v. United States*, 567 U.S. 387, 398 (2012) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).
[90] U.S. Const. art. 1, § 8, cl. 4 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization").
[91] *Texas*, 524 F. Supp. 3d at 617.
[92] *Arizona*, 567 U.S. at 397.
[93] *Id.*; *see also Texas*, 809 F.3d at 163.
[94] *Arizona*, 567 U.S. at 398.

individuals, potentially in the form of beneficial distributional effects and cost savings."[95] The undersigned Attorneys General sharply dispute this contention.

UMRA considers a mandate unfunded unless the legislation authorizing the mandate fully meets its estimated direct costs by either (1) providing new budget authority (direct spending authority or entitlement authority) or (2) authorizing appropriations. If appropriations are authorized, the mandate is still considered unfunded unless the legislation ensures that in any fiscal year, either (1) the actual costs of the mandate are estimated not to exceed the appropriations actually provided; (2) the terms of the mandate will be revised so that it can be carried out with the funds appropriated; (3) the mandate will be abolished; or (4) Congress will enact new legislation to continue the mandate as an unfunded mandate.[96] The Departments address the requirements of the Act by *denying* any impact. But the undersigned Attorneys General have already raised concerns and provided examples of how States are forced to incur costs as a result of immigration.

The Departments cannot avoid their obligations under UMRA by blinding themselves to reality, nor may they adopt conclusory statements of Adminspeak. Whatever "beneficial distributional effects and cost savings" means, it is at best unsupported and conclusory. The undersigned Attorneys General submit that it is also flatly contradicted by the findings of several federal courts as well as economic studies and our experiences. "Although the State has no interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government, unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service."[97] At bottom, the Departments must assess the financial costs associated with the Proposed Rule, which clearly constitute an unfunded Federal mandate. Because the Departments did not perform a thorough analysis of this issue, it is difficult for the undersigned Attorneys General to provide a meaningful comment on the specific impact of the unfunded mandates imposed by the Proposed Rule.

UMRA also requires that "[e]ach agency shall . . . develop an effective process to permit elected officers of State, local, and tribal governments . . . to provide *meaningful and timely* input in the development of regulatory proposals containing significant Federal intergovernmental mandates."[98] The Departments never allowed elected leaders in State, local, and tribal governments to provide *any* input into the development of the new Proposed Rule. The Departments must therefore allow State, local, and tribal governments to provide meaningful and timely input before republishing the Proposed Rule.

<u>Specific Comment 9</u>: Environmental costs related to immigration and population growth were not considered by the Departments, in contravention of applicable regulations and statutory directives.

The Proposed Rule, as presently submitted, contains only a cursory environmental analysis under the National Environmental Policy Act ("NEPA").[99] NEPA includes two statutory directives: it places an obligation on federal agencies to "consider every significant aspect of the environmental

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[95] 86 Fed. Reg. at 46,939.
[96] *See* 2 U.S.C. § 658d(a)(2); § 425 of the Congressional Budget and Impoundment Control Act of 1974, as amended, P.L. 93-344, 88 Stat. 297, 2 U.S.C. § 658, *et seq*.
[97] *Plyler*, 457 U.S. at 228 n.23.
[98] 2 U.S.C. §1534(a) (emphasis added)
[99] *See* 86 Fed. Reg. 46,939-940.

impact of a proposed action," and "it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process."[100] To put it lightly, the Proposed Rule's NEPA analysis leaves much to be desired.

The Proposed Rule acknowledges the obligations imposed by NEPA; however, the Departments contend that no NEPA analysis is required because the Proposed Rule "clearly fits within categorical exclusion A3(d) [and] A3(a)" in the Instruction Manual.[101] Specifically, the Departments state that "NEPA does not apply to a rule intended to change a discrete aspect of an immigration program because any attempt to analyze its potential impact would be largely, if not completely, speculative."[102] Moreover, the Departments aver that

> [t]he proposed rule also would not make any changes to detention facilities. Rather, the detention facilities are already in existence and to attempt to calculate how many noncitizens would be paroled—a highly discretionary benefit—and how many would proceed to the detention centers would be near impossible to determine. The Departments have no reason to believe that these amendments would change the environmental effect, if any, of the existing regulations.[103]

Thus, the Departments rely on categorical exclusions to avoid a more fulsome NEPA analysis. The undersigned Attorneys General sharply dispute the Departments' assertions that the potential environmental impacts of the Proposed Rule are "largely, if not completely, speculative" and that statutory amendments proffered by the Proposed Rule would not change the environmental effect of the existing regulations.

While it may be an inconvenient truth for some, concerns about the environmental costs of immigration and population growth are not new. Title I, Section 101 of NEPA contains a "Congressional Declaration of National Environmental Policy" which, among other things, recognizes "the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth[.]"[104] A recent report from the U.S. Census Bureau indicates that "[d]ifferent levels of immigration between now and 2060 could change the projection of the population in that year by as much as 127 million people, with estimates ranging any-where from 320 to 447 million U.S. residents."[105] Environmental challenges posed by mass immigration include loss of biodiversity, water shortages, increased urban sprawl, overcrowding cities, and an increase in carbon emissions.[106] Some studies suggest that non-citizens, particularly those migrating from lower-polluting countries, produce more CO2 annually than these

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[100] *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

[101] 86 Fed. Reg. 46,940 (citing Department of Homeland Security, *Implementing the National Environmental Policy Act* (Directive 023-01, issued Oct. 31, 2014, and Instruction Manual, issued Nov. 6, 2014), *available at* https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex).

[102] *Id.* at 46,939.

[103] *Id.* at 46,939-40

[104] *See* NEPA, Pub. L. 91-190, 42 U.S.C. § 4321, *et seq*., Jan. 1, 1970, 93 Stat. 852.

[105] U.S. CENSUS BUREAU, P25-1146, A CHANGING NATION: POPULATION PROJECTIONS UNDER ALTERNATIVE IMMIGRATION SCENARIOS 1 (FEBRUARY 2020),
available at https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1146.pdf.

[106] Matthew Sussis, *Five Ways Immigration-Driven Population Growth Impacts Our Environment*, CENTER FOR IMMIGRATION STUDIES (Nov. 19, 2018), https://cis.org/Sussis/Five-Ways-ImmigrationDriven-Population-Growth-Impacts-Our-Environment.

non-citizens would have produced had they remained in their home countries.[107] The same is undoubtedly true of other greenhouse gasses and other pollutants. In declining to perform a NEPA analysis, the Departments ignored the potential increase in environmental harm that the Proposed Rule is likely to directly and indirectly cause.

Moreover, the Proposed Rule makes no mention of the guidance provided by President Biden's January 20, 2021, Executive Order on *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*.[108] This Executive Order instructs an Interagency Working Group ("IWG") to analyze the social cost of carbon, social cost of nitrous oxide, and social cost of methane, which "are estimates of monetized damages associated with incremental increases in greenhouse gas emissions."[109] The Executive Order then instructs agencies to rely on an interim social cost analysis "when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions" until a final social cost analysis is published no later than January 2022.[110] Given the Proposed Rule's cursory NEPA analysis, it is readily apparent that the Departments did not refer to or rely on President Biden's Executive Order concerning the social cost of carbon. Louisiana and other States are challenging the legality and use of the IWG values for the social cost of carbon and other greenhouse gasses.[111] But to the extent the federal government is permitted to implement them, it is clearly arbitrary and capricious to use them only when the Biden Administration dislikes a policy.

<u>Specific Comment 10</u>: Automatically starting the work-authorization time clock increases the illegal immigration pull-factor and harms U.S. workers.

The Proposed Rule treats a positive credible-fear finding, which has little relation to whether an individual will ultimately qualify for asylum, as a properly filed asylum application that starts the clock for eligibility to file for work authorization. Because only 56 percent of non-citizens who meet the credible fear bar currently apply for asylum, this change will drastically increase the number of work-eligible non-citizens in the United States.[112]

This change will exacerbate the asylum system as a backdoor immigration system for economic non-citizens. By speeding up the process by which a non-citizen can gain work authorization, the Departments are creating yet another pull factor that will exacerbate the crisis at the Southwest Border. At no point does the Proposed Rule address this concern or determine ways to mitigate it. Moreover, the impact on U.S. workers could be severe. The U.S. economy generated only 194,000 jobs in September.[113] Meanwhile, border agents are encountering more than 200,000 inadmissible non-citizens monthly.[114] Without sufficient job-growth, and with hundreds of thousands of working age non-citizens gaining work authorization, U.S. workers may experience wage depression. While this shift may benefit some business owners, that benefit represents a transfer of wealth *away* from low-wage U.S. workers. The Proposed Rule acknowledges a potential "distributional economic impact"

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[107] *Id.*
[108] Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021).
[109] *Id.* at § 5(a), 86 Fed. Reg. at 7,040.
[110] *Id.* at § 5(b)(ii)(A), 86 Fed. Reg. at 7.040.
[111] *Louisiana, et al., v. Biden, et al.*, No. 2:21-01074 (W.D. La.)
[112] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 46, at 20.
[113] U.S. BUREAU OF LABOR STATISTICS, USDL-21-1799, EMPLOYMENT SITUATION SUMMARY (Oct. 8, 2021), *available at* https://www.bls.gov/news.release/empsit.nr0.htm.
[114] *See supra* notes 6 & 7.

from U.S. workers to asylum seekers, but fails to quantify it or otherwise acknowledge the serious economic issues that could arise if U.S. workers see their wages decrease in a time of drastic inflation.[115]

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The Proposed Rule represents a fundamental shift in immigration policy in the United States and raises several grounds for concern about the Departments' methodology and analysis. It is unclear how the Proposed Rule complies or conflicts with other existing legal obligations. Also unclear is the intersection between this Proposed Rule and an increase in asylum seekers seeking safe haven in the United States. Importantly, the Proposed Rule ignored entirely any Federalism analysis, any explanation of how States and local communities will be impacted by such a momentous change in immigration policy, meaningful and timely input from State governments, and an environmental assessment. The Departments should withdraw the Proposed Rule, or must substantially revise it, consistent with the contours of the Administrative Procedure Act and UMRA.

Sincerely,

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Louisiana Attorney General

Lynn Fitch
Mississippi Attorney General

Steve Marshall
Alabama Attorney General

Eric Schmitt
Missouri Attorney General

Mark Brnovich
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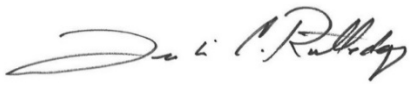
Austin Knudsen
Montana Attorney General

[115] Gwynn Guilford, *Accelerating Inflation Spreads Through the Economy*, THE WALL STREET JOURNAL (Oct. 13, 2021 3:30 p.m.), https://www.wsj.com/articles/us-inflation-consumer-price-index-september-2021-11634074529.



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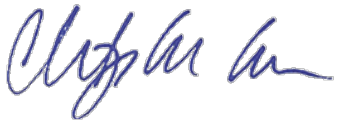
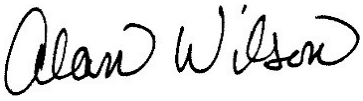


Christopher Carr
Georgia Attorney General



Alan Wilson
South Carolina Attorney General

Todd Rokita
Indiana Attorney General

Ken Paxton
Texas Attorney General

Derek Schmidt
Kansas Attorney General

Patrick Morrisey
West Virginia Attorney General