

# **The Law of Asylum Procedure at the Border: Statutes and Agency Implementation**

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# The Law of Asylum Procedure at the Border: Statutes and Agency Implementation

The Immigration and Nationality Act (INA) generally provides for the removal of non-U.S. citizens or nationals (“aliens,” under the INA) encountered at the border without valid entry documents, unless they qualify for asylum or other humanitarian protections. Two significant questions of legal procedure arise regarding these aliens (referred to here as “undocumented migrants” to distinguish them from aliens encountered in the interior of the United States). *First*, how should the United States determine which undocumented migrants qualify for humanitarian protections? By trial or some more rapid assessment? *Second*, how should undocumented migrants be treated while their claims are evaluated? Should the government detain them, release them under supervision, or—as the Trump Administration opted to do—require many of them to wait in Mexico? These questions have become more prominent as the flow of undocumented migrants seeking humanitarian protections (“asylum seekers”) has increased over the past decade.

Most undocumented migrants encountered at the border are subject to expedited removal. The statutory framework for expedited removal outlines the following answers to these procedural questions:

1. **Screening.** Protection claims by undocumented migrants at the border should be screened for a level of potential merit called “credible fear,” and rejected if they lack such potential merit, before being referred to trial-type immigration court proceedings before the Executive Office for Immigration Review within the Department of Justice. (Unaccompanied alien children generally go directly to immigration court, whether or not they make protection claims.)
2. **Detention.** Asylum seekers encountered at the border must be detained during the screening process and may be detained during subsequent proceedings (except that unaccompanied alien children must generally be released to a suitable placement, and due to court orders family units generally are not detained beyond the screening process).

The credible fear screening process typically takes about two to three weeks and involves the transfer of the asylum seeker from holding facilities at the border to detention facilities in the interior. Undocumented migrants who establish credible fear must be placed into trial-type proceedings in immigration court; otherwise, they may be removed without any such proceedings.

Expedited removal is not mandatory. Instead of invoking it, Department of Homeland Security (DHS) officials may place undocumented migrants directly into trial-type proceedings by releasing them with a notice to appear (NTA) in immigration court. DHS typically chooses to skip expedited removal in this fashion—an approach sometimes called “catch and release”—when it lacks detention space and logistical bandwidth to process large flows of undocumented migrants.

Executive branch approaches to implementing the expedited removal framework have varied by presidential administration. In response to an increased flow of asylum seekers—particularly Central American children and families—that began around 2013, the Obama Administration initially sought to detain family units for rapid immigration court proceedings. Federal courts subsequently limited this detention policy. Thereafter, DHS resorted to releasing many asylum seekers—especially those in family units—into the interior of the United States during standard immigration court proceedings, which often take years. The Trump Administration changed course. It developed an array of policies that generally sought to enable DHS officials to reject more claims during initial screening procedures, so that more asylum seekers could be removed before their claims reached immigration court. Other policies sought to avoid releasing asylum seekers in the United States during the adjudication process (including by requiring them to wait in Mexico). In response to the Coronavirus Disease 2019 (COVID-19) pandemic, the Trump Administration implemented a policy that mostly terminated asylum screening and adjudication at the border on public health grounds. The Biden Administration has begun to roll back the Trump Administration’s pre-pandemic policies but has left the more restrictive public health policy mostly in place for now.

Proposals to reform asylum procedure at the border generally focus on expediting the adjudication process in immigration court, with a goal of delivering definitive judgments more quickly. Other proposals would take a substantive approach by expanding the legal immigration options available to populations of prospective asylum seekers abroad—especially for Central Americans—thereby seeking to reduce pressure on asylum adjudication at the border.

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Non-U.S. citizens or nationals (aliens)<sup>1</sup> encountered at the southern border without visas or other valid travel documents—called “undocumented migrants” in this report to distinguish them from aliens encountered in the interior of the country<sup>2</sup>—generally may establish a legal basis to remain in the United States only if they qualify for humanitarian protections from torture or persecution suffered abroad.<sup>3</sup> Customs and Border Protection (CBP) officials within the Department of Homeland Security (DHS) most commonly encounter undocumented migrants attempting to cross the border unlawfully between ports of entry.<sup>4</sup> CBP encounters a smaller share of undocumented migrants (roughly one-third in recent years) when they present themselves at official ports of entry along the southern border.<sup>5</sup>

The humanitarian protections available to these undocumented migrants include asylum (a discretionary protection from identity-based persecution abroad),<sup>6</sup> withholding of removal (a mandatory protection from such persecution),<sup>7</sup> and withholding or deferral of removal under the Convention Against Torture (CAT, a mandatory protection from government-sponsored torture abroad).<sup>8</sup> There are important differences among these protections. Asylum is the only one that

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<sup>1</sup> 8 U.S.C. § 1101(a)(3) (“The term ‘alien’ means any person not a citizen or national of the United States.”). Some have criticized the statutory term as offensive, but avoiding its use in legal analysis is difficult because the term is woven deeply into the statutory framework. *See* *Trump v. Hawaii*, 138 S. Ct. 2392, 2443 n.7 (2018) (Sotomayor, J., dissenting) (“It is important to note . . . that many consider ‘using the term “alien” to refer to other human beings’ to be ‘offensive and demeaning.’ I use the term here only where necessary ‘to be consistent with the statutory language’ that Congress has chosen and ‘to avoid any confusion in replacing a legal term of art with a more appropriate term.’”) (quoting *Flores v. United States Citizenship & Immigration Servs.*, 718 F.3d 548, 551-552 n. 1 (6th Cir. 2013)); *but cf.* *Barton v. Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (“This opinion uses the term ‘noncitizen’ as equivalent to the statutory term ‘alien.’”). A bill in the 117th Congress would amend the Immigration and Nationality Act to replace the term “alien” with “noncitizen.” U.S. Citizenship Act of 2021, S. 348, 117th Cong. § 3 (2021) (companion bill, H.R. 1177).

<sup>2</sup> *See* *Sale v. Haitian Ctr. Council, Inc.*, 509 U.S. 155, 161 (1993) (employing the term “migrant” to describe Haitian nationals apprehended by the Coast Guard when seeking to enter the United States by sea); Dep’t of Homeland Sec., Press Release: Migrant Protection Protocols (Jan. 24, 2019) (using “migrant” to refer to “foreign individuals entering or seeking admission to the U.S. from Mexico – illegally or without proper documentation”); *see also* Dep’t of Homeland Sec., Office of Inspector Gen., *CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry*, at 3 (Oct. 27, 2020) (“CBP refers to aliens who are not in possession of documents allowing them entry into the United States — e.g., a travel visa — as ‘undocumented aliens.’”), <https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf>. As used here, the term “undocumented migrant” does not refer to aliens residing in the interior of the United States without lawful immigration status. *See* CRS Report R45993, *Legalization Framework Under the Immigration and Nationality Act (INA)*, by Ben Harrington, at 1 n.3 (explaining that the adjectives “illegal,” “undocumented,” and “unauthorized” are all commonly used to refer to aliens living in the United States without lawful status).

<sup>3</sup> *See* 8 U.S.C. § 1225(b)(1)(A); *see generally* CRS Report R45314, *Expedited Removal of Aliens: Legal Framework*, by Hillel R. Smith [hereinafter CRS Expedited Removal Report]. For persecution to qualify for protection, it must satisfy the refugee definition in the Immigration and Nationality Act (INA)—that is, it must be “on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42).

<sup>4</sup> CRS Report R46012, *Immigration: Recent Apprehension Trends at the U.S. Southwest Border*, by Audrey Singer and William A. Kandel at 5 [hereinafter CRS Apprehensions Report]. The United States Border Patrol is the component within CBP “with primary responsibility for interdicting persons attempting to illegally enter or exit the United States.” 6 U.S.C. § 211(e)(3).

<sup>5</sup> CRS Apprehensions Report, *supra* note 4, at 5. CBP’s statistics for “inadmissible” aliens at ports of entry do not differentiate between aliens deemed inadmissible due to a lack of valid entry documents and aliens deemed inadmissible on other grounds (e.g., due to a prior immigration violation), so the statistics give only a rough account of the number of undocumented migrants encountered at ports of entry. *See* Customs and Border Protection, *CBP Enforcement Statistics FY 2020*, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics-fy2020>.

<sup>6</sup> *See* 8 U.S.C. § 1158.

<sup>7</sup> *See id.* § 1231(b)(3)(A); 8 C.F.R. § 208.16(b).

<sup>8</sup> *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822 (1998); 8 C.F.R. §§ 208.16(c), 208.18.

offers a dedicated pathway to lawful permanent residence and citizenship.<sup>9</sup> It also requires the lowest standard of proof but, unlike the other two, may be denied for discretionary reasons even to aliens who qualify for it.<sup>10</sup> Yet despite their substantive differences, all of these humanitarian protections share a key similarity: unlike essentially every other form of immigration status or relief, they are generally available to undocumented migrants notwithstanding their lack of visas or other valid travel documents.<sup>11</sup> For this reason, the various forms of humanitarian protection have similar implications for immigration enforcement at the border.<sup>12</sup> (For brevity and per common usage, throughout this report undocumented migrants who come to the border seeking humanitarian protections are referred to as “asylum seekers,” and the legal mechanisms for evaluating their claims are referred to as “asylum processing” or “asylum procedure.”<sup>13</sup>)

While there are disagreements over the boundaries of eligibility for humanitarian protections—namely, whether they should encompass certain groups, such as aliens fleeing domestic violence<sup>14</sup>—the basic proposition that the United States should protect undocumented migrants who arrive in U.S. territory if they would face identity-based persecution or torture abroad has an established pedigree in U.S. immigration law.<sup>15</sup> But asylum *procedure*, particularly at the border,

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<sup>9</sup> See 8 U.S.C. § 1159(b) (creating independent pathway to adjustment of status for aliens granted asylum); CRS Legal Sidebar LSB10046, *The Application of the “One Central Reason” Standard in Asylum and Withholding of Removal Cases*, by Hillel R. Smith (explaining the differences between asylum and withholding of removal).

<sup>10</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428–29 (1987); *Salgado-Sosa v. Sessions*, 882 F.3d 451, 456 (4th Cir. 2018) (“Asylum is discretionary, whereas withholding of removal is mandatory.”); *Scatambuli v. Holder*, 558 F.3d 53, 58 (1st Cir. 2009) (“To qualify for asylum, an alien bears the burden of proving that he has suffered past persecution or has a well-founded fear of future persecution based on one of the statutorily protected factors. . . . Withholding of removal requires a showing ‘that an alien is more likely than not to face persecution’ on account of a protected ground.”) (quoting *Datau v. Mukasey*, 540 F.3d 37, 42 (1st Cir. 2008)).

<sup>11</sup> 8 U.S.C. § 1225(b)(1)(A); *Grace v. Barr*, 965 F.3d 883, 887 (D.C. Cir. 2020) (explaining that § 1225(b) forms part of a “comprehensive scheme for distinguishing between aliens with potentially valid asylum claims and those ‘who indisputably have no authorization to be admitted [to the United States].’”) (quoting *Am. Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352, 1355 (D.C. Cir. 2000)); *but see infra* text at note 82 (explaining that some undocumented migrants with prior removal orders cannot initiate asylum claims at the border and, as a result, face a heightened burden when pursuing other humanitarian protections); *infra* “Trump Administration Policy During COVID-19” (noting that the Trump Administration implemented a public health policy in 2020 that mostly barred undocumented migrants from pursuing humanitarian protections). As noted later, immigration parole is also available to undocumented migrants at the border, but it is entirely discretionary and does not require adjudication—in other words, parole does not require immigration officials to sort eligible and ineligible applicants. See *infra* note 34.

<sup>12</sup> See 8 U.S.C. § 1225(b)(1)(A); *Grace v. Barr*, 965 F.3d 883, 887 (D.C. Cir. 2020).

<sup>13</sup> See 8 U.S.C. § 1225(b)(1)(A)(ii) (referring to “an intention to apply for asylum . . . or a fear of persecution” collectively as “claims for asylum”); Dep’t of Homeland Sec., Office of Inspector Gen., *CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry*, at 3 n.3 (Oct. 27, 2020) (“Throughout this report, we refer to undocumented aliens who express a fear of returning to their home country or intention to apply for asylum in the United States as asylum seekers.”), <https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf>; David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1266 (1990) (using the term “asylum determinations” to refer generally to the adjudication process for asylum and withholding of removal).

<sup>14</sup> CRS Report R45539, *Immigration: U.S. Asylum Policy*, by Andorra Bruno, at 26–28 [hereinafter CRS Asylum Policy Report]; CRS Legal Sidebar LSB10207, *Asylum and Related Protections for Aliens Who Fear Gang and Domestic Violence*, by Hillel R. Smith.

<sup>15</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987) (“Since 1980, the Immigration and Nationality Act has provided two methods [asylum and withholding of removal] through which an otherwise deportable alien who claims that he will be persecuted if deported can seek relief.”); Martin, *supra* note 13, at 1258 (“Congress enacted the first express statutory provision in 1950, directing the Attorney General not to deport aliens to countries where they ‘would be subjected to physical persecution.’”) (quoting Subversive Activities Control Act of 1950, Pub. L. No. 81–831, § 23, 64 Stat. 987, 1010 (repealed 1952)).

is at the center of one of the most heated immigration debates of recent times.<sup>16</sup> A formidable adjudication challenge fuels the debate: how can the asylum processing system distinguish between valid and invalid claims swiftly enough to discourage illegitimate claimants from traveling to the border, while also striving for fair and accurate decisions?<sup>17</sup> This adjudication challenge can be separated into two main questions. *First*, how should the United States determine which undocumented migrants arriving to the southern border qualify for humanitarian protections? By trial? By rapid assessment in the field? *Second*, how should the government treat these individuals while deciding their claims? Should it detain them, release them under supervision, or—as the Trump Administration opted to do—require many of them to wait in Mexico?<sup>18</sup>

Legal scholars have long debated these procedural questions.<sup>19</sup> Over the past decade, changes in the flow of undocumented migration have made asylum procedure a central component of border operations.<sup>20</sup> While the overall number of undocumented migrants encountered at the southern border peaked roughly 20 years ago, since about 2013 the demographics of the flow have shifted away from single Mexican adults to non-Mexican children and families, predominantly from the Northern Triangle countries of El Salvador, Guatemala, and Honduras.<sup>21</sup> This demographic shift raises logistical challenges: children and families require specialized detention facilities, and removals to countries other than Mexico are more difficult for DHS to arrange.<sup>22</sup> (During the

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<sup>16</sup> See *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1599, 1663 (2020) (“Every year, hundreds of thousands of aliens are apprehended at or near the border attempting to enter this country illegally. Many ask for asylum, claiming that they would be persecuted if returned to their home countries. Some of these claims are valid, and by granting asylum, the United States lives up to its ideals and its treaty obligations. Most asylum claims, however, ultimately fail, and some are fraudulent.”); Eunice Lee, *Regulating the Border*, 79 MD. L. REV. 374, 375 (2020) (“How do, and should, asylum screening interviews operate amidst the administration’s constant politicization of our border?”).

<sup>17</sup> See Martin, *supra* note 13, at 1253 (“Two public values . . . come into conflict in the asylum program. On the one hand stands the promise of refuge to the persecuted, on the other the demand for reasonable assurance of national control over the entry of aliens. Asylum will always be an inherently unruly component in an immigration system that usually functions with tidy categories and elaborate advance screening. But its unruliness can be curbed, and public support thereby increased, if we can create a system capable of saying ‘no’ to the unqualified—fairly, but firmly and expeditiously—while promptly welcoming the meritorious applicant.”).

<sup>18</sup> See *Thuraissigiam*, 140 S. Ct. at 1663 (explaining that the INA sets forth “a system for weeding out patently meritless claims and expeditiously removing the aliens making such claims from the country. It was Congress’s judgment that detaining all asylum seekers until the full-blown removal process is completed would place an unacceptable burden on our immigration system and that releasing them would present an undue risk that they would fail to appear for removal proceedings”); *id.* at 1664 (“The average civil appeal takes approximately one year. During the time when removal is being litigated, the alien will either be detained, at considerable expense, or allowed to reside in this country, with the attendant risk that he or she may not later be found.”).

<sup>19</sup> See *id.* at 2014 (Sotomayor, J., dissenting) (“[T]he political branches have numerous tools at their disposal to reform the asylum system, and debates over the best methods of doing so are legion in the Government, in the academy, and in the public sphere.”); see generally Martin, *supra* note 13, at 1253 (“The search for effective reforms [to asylum adjudication systems] continues, but in a highly polarized environment.”); Lee, *supra* note 16, at 375–76 (“But who properly pronounces the applicable contours of asylum law in border screenings, and how and when should the various pronouncements be implemented? And how should both DHS and DOJ approach the inter-agency nature of decisionmaking to ensure fidelity to statutory and constitutional design?”).

<sup>20</sup> See *Thuraissigiam*, 140 S. Ct. at 1666–67 (reviewing increase in asylum claims originating at the border); U.S. GOV’T ACCOUNTABILITY OFF., GAO–20–250, IMMIGRATION: ACTIONS NEEDED TO STRENGTHEN USCIS’S OVERSIGHT AND DATA QUALITY OF CREDIBLE AND REASONABLE FEAR SCREENINGS 1 (2020) [hereinafter GAO Credible and Reasonable Fear Report].

<sup>21</sup> CRS Apprehensions Report, *supra* note 4, at 6–11.

<sup>22</sup> *Dep’t of Homeland Sec., 2014 Southwest Border Encounters: Three-Year Cohort Outcomes Analysis*, at 8 (Aug. 2018) (“Mexicans subject to expedited removal or reinstatement of removal are often immediately processed and removed by CBP, whereas non-Mexicans, even if subject to a non-judicial form of removal, must be transferred to ICE



Coronavirus Disease 2019 [COVID-19] pandemic, the demographics of undocumented migration have swung back again toward single Mexican adults, although it is not yet clear whether this reversion will hold.<sup>23</sup>) Beyond logistics, however, undocumented migrants in these new demographics also seek humanitarian protections at a higher rate.<sup>24</sup> Legal procedure for evaluating the protection claims of undocumented migrants at the border—and for determining whether and where to detain the migrants in the meantime—has thus become an issue “with significant consequences for the immigration system.”<sup>25</sup>

This report reviews how the INA answers the major questions of asylum procedure at the border, and how the executive branch has implemented those statutory answers over the last decade. The report also briefly covers some of the major proposals advanced by lawmakers and commentators for reforming asylum procedure at the border. The report does not cover aspects of asylum law unrelated to border processing, such as the rules for asylum applications filed affirmatively by aliens in the interior of the United States or the rules of procedure for full removal proceedings in immigration court.<sup>26</sup>

### Key Terms Used in This Report

**Asylum Procedure or Asylum Processing:** the legal mechanisms for evaluating claims for humanitarian protections.

**Asylum Seeker:** a person who seeks any humanitarian protection.

**Humanitarian Protections:** the bundle of protections from torture and persecution abroad available under U.S. immigration law. These protections include asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3), and withholding and deferral of removal under the Convention Against Torture.

**Undocumented Migrant:** an alien encountered by Customs and Border Protection at the southern border—whether at a port of entry or between ports—who lacks a visa or other document necessary to seek admission into the United States. The term refers specifically to aliens encountered at the cusp of entry, as opposed to aliens residing in the United States without lawful immigration status.

## Humanitarian Protections in Context: The Rule of Decision for Undocumented Migration

The U.S. immigration system relies heavily on advance screenings performed abroad. Aliens must obtain visas from U.S. consulates before coming to a port of entry to seek admission as immigrants or nonimmigrants, unless they are lawful permanent residents or fall within certain exceptions (the best-known exceptions cover visitors from specified countries, such as the visa

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until their travel can be arranged . . .”) [hereinafter DHS Cohort Report], [https://www.dhs.gov/sites/default/files/publications/18\\_0918\\_DHS\\_Cohort\\_Outcomes\\_Report.pdf](https://www.dhs.gov/sites/default/files/publications/18_0918_DHS_Cohort_Outcomes_Report.pdf).

<sup>23</sup> See Customs and Border Protection, *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2020* (Nov. 19, 2020) (showing that single Mexican adults accounted for 57% of all Border Patrol apprehensions), <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2020#>.

<sup>24</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 1; Dep’t of Homeland Sec., *Assessment of the Migrant Protection Protocols (MPP)*, at 7 (Oct. 28, 2019) (Table A1, showing rising rates of expedited removal cases requiring asylum screenings, 2006–2018) [hereinafter DHS MPP Assessment], <https://www.dhs.gov/publication/assessment-migrant-protection-protocols-mpp>.

<sup>25</sup> *Thuraissigiam*, 140 S. Ct. at 1967.

<sup>26</sup> Other CRS products cover these topics. See CRS Asylum Policy Report, *supra* note 14, at 3 (“Affirmative Asylum” section); CRS In Focus IF11536, *Formal Removal Proceedings: An Introduction*, by Hillel R. Smith.

waiver countries that are mostly in Europe).<sup>27</sup> U.S. immigration statutes have imposed a visa requirement since 1924.<sup>28</sup> This requirement allows immigration officials to screen out some inadmissible aliens before they reach the United States, thereby reducing the need for more burdensome enforcement action at the border or in the interior.<sup>29</sup> To enforce the visa requirement, the INA authorizes DHS to remove aliens encountered at the border if they lack valid travel documents<sup>30</sup> and also if they enter unlawfully.<sup>31</sup> Even if an alien who arrives at the border satisfies the criteria for some immigration status in the United States—such as nonimmigrant visitor or student status, or family-based immigration status—the individual remains ineligible for admission and subject to removal if he or she lacks a visa or other valid entry document.<sup>32</sup>

Humanitarian protections create an exception to this general prohibition of undocumented migration. It is not the only exception—immigration officers may also exercise discretion to

<sup>27</sup> 8 U.S.C. §§ 1181(a) (visa requirement for immigrants), 1182(a)(7) (visa requirements for immigrants and nonimmigrants), 1182(d)(4) (exceptions to nonimmigrant visa requirements), 1187 (visa waiver program); *see* Trump v. Hawaii, 138 S. Ct. 2392, 2443 (2018) (“Generally, admission to the United States requires a valid visa or other travel document.”). The visa waiver program still requires advance screening, albeit in a more limited fashion by requiring travelers to seek preclearance electronically. *Bayo v. Napolitano*, 593 F.3d 495, 498-99 (7th Cir. 2010) (“[T]he Electronic System for Travel Authorization (‘ESTA’) . . . requires visitors to fill out [an arrival] form online in advance of travel to the United States.”). Another exception to the visa requirement authorizes aliens from the Compact of Free Association (COFA) countries—Palau, Micronesia, and the Marshall Islands—to seek admission without visas as special “permanent nonimmigrants.” *Korab v. Fink*, 797 F.3d 572, 574 n.1 (9th Cir. 2014) (explaining that the compacts allow nationals of the covered countries “to enter the United States and establish residence as a ‘nonimmigrant’”); USCIS, *Fact Sheet: Status of Citizens of the Freely Associated States of the Federated States of Micronesia and the Republic of the Marshall Islands*, at 1 (Sept. 2020) (noting that covered nationals “are entitled under the Compacts to travel and apply for admission to the United States as nonimmigrants without visas. . . . If determined admissible under the Compacts, an FSM or RMI citizen may live, study, and work in the United States. The United States has the right to set terms and conditions on the nonimmigrant stay of FSM and RMI citizens. Currently, they are granted an unlimited length of stay.”), <https://www.uscis.gov/sites/default/files/document/fact-sheets/FactSheetVerifyFASCitizens.pdf>.

<sup>28</sup> Immigration Act of 1924, Pub. L. No. 68-139, § 2, 43 Stat. 153 (1924); *see* ROGER DANIELS, *GUARDING THE GOLDEN DOOR* 53 (2005) (“For the first time [in the 1924 Act], visas and photographs were required of all immigrants, which involved the consular service of the Department of State directly in the regulation of immigration.”). Earlier, in 1917, executive branch agencies had imposed a visa requirement administratively, but consular officers apparently lacked statutory authority to make determinations of inadmissibility and “simply advised aliens of the various exclusionary provisions of the immigration laws.” *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1156 (D.C. Cir. 1999). Laws enacted in 1918 and 1921 appear to have redressed this gap in executive branch authority, although the laws did not expressly impose visa requirements. *See* Leon Wildes, *Review of Visa Denials: The American Consul As 20th Century Absolute Monarch*, 26 SAN DIEGO L. REV. 887, 893 (1989) (“The first congressional enactment giving rise to the current system of consular visas was a [1918] wartime measure which authorized the president to prescribe ‘reasonable rules, regulations and orders’ to govern persons wishing to depart from or enter into the United States.”) (quoting Act of May 22, 1918, Pub. L. No. 65-154, 40 Stat. 559); Katrina M. Wyman, *Limiting the National Right to Exclude*, 72 U. MIAMI L. REV. 425, 457 n.156 (2018).

<sup>29</sup> *See* DANIELS, *supra* note 28, at 53 (“The statutory requirement of a visa, which had to be obtained at an American consulate, was felt to be most important by restrictionists. It was, in their terminology, a way of controlling immigration at the source and it gave considerable discretionary authority to individual consular officials.”); Martin, *supra* note 13, at 1270 (discussing “tidy categories and elaborate advance screening” as bulwarks against “unruliness” in the immigration system); Doris Meissner, *Immigration in the Post 9-11 Era*, 40 BRANDEIS L.J. 851, 854 (2002) (“Once people get to the United States, law enforcement and effective control are infinitely more difficult.”).

<sup>30</sup> 8 U.S.C. §§ 1182(a)(7)(A), 1229a(e)(2).

<sup>31</sup> *Id.* §§ 1182(a)(6)(A), 1229a(e)(2). A visa is a prerequisite to admission (unless an exception applies) but does not guarantee admission: DHS may still determine that aliens with visas are inadmissible on grounds specified in the INA. *Id.* § 1201(h); *Almaqrani v. Pompeo*, 933 F.3d 774, 776 (D.C. Cir. 2019) (“A visa does not guarantee entry into the United States; it only confers the right to travel to a port of entry and apply for admission to enter the country.”).

<sup>32</sup> 8 U.S.C. §§ 1182(a)(7)(A), 1229a(e)(2).



parole undocumented migrants into the country<sup>33</sup>—but it is the only mandatory exception (i.e., the only exception that immigration officers must consider).<sup>34</sup> If an undocumented migrant qualifies for humanitarian protections, then federal law either prohibits the migrant’s removal to his or her country of origin (for aliens who qualify for withholding of removal or CAT protections)<sup>35</sup> or, more significantly, makes the migrant eligible to remain in the country on a track to citizenship (for aliens who qualify for asylum).<sup>36</sup> The migrant is eligible for these protections notwithstanding the lack of a valid entry document and, if he or she crossed the border illegally, notwithstanding that fact also.<sup>37</sup> As such, humanitarian protections supply an operative rule of decision for undocumented migration into the United States: undocumented migrants encountered at the border have a legal basis to avoid removal only if they qualify for them.<sup>38</sup> In terms of procedure, as discussed further below, this means that even if an alien does not qualify for humanitarian protections, removal must be prohibited for a certain time to allow that determination to be made.<sup>39</sup>

Not only are humanitarian protections uniquely available to undocumented migrants at the border, they are also uniquely *unavailable* to people who might wish to apply for them in advance from

<sup>33</sup> *Id.* § 1182(d)(5); see generally CRS Report R46570, *Immigration Parole*, by Andorra Bruno.

<sup>34</sup> See 8 U.S.C. § 1225(b)(1)(A)(ii) (prohibiting the expedited removal of aliens who seek to make “claims for asylum”). In contrast to humanitarian protections, the fully discretionary nature of parole does not trigger any mandatory adjudication procedures at the border and, as such, does not present undocumented migrants at the border with the same opportunity to seek legal status in the United States. See *id.*; *Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013) (“The parole process is purely discretionary . . .”).

<sup>35</sup> 8 U.S.C. § 1231(b)(3); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-821 (1998) (CAT withholding).

<sup>36</sup> 8 U.S.C. § 1158(a)(1).

<sup>37</sup> See *id.* (“Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with this section . . .”); *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1259 (9th Cir. 2020) (holding that a regulation rendering unlawful entrants ineligible for asylum likely violated the INA). Some aliens with prior orders of removal who are apprehended at the border are not eligible for asylum, but they remain eligible for withholding of removal protections. See *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 489-93 (5th Cir. 2015); Sioban Albiol, R. Linus Chan, Sarah J. Diaz, *Re-Interpreting Postville: A Legal Perspective*, 2 DEPAUL J. FOR SOC. JUST. 31, 49 (2008) (“[N]oncitizens who have either unlawfully re-entered the United States after a prior order of removal or individuals who were issued administrative removal orders by the agency (DHS), rather than by an Immigration Judge, for conviction of an ‘aggravated felony,’ and are therefore ineligible for traditional removal proceedings, can still raise a claim for protection under withholding of removal or CAT.”).

<sup>38</sup> 8 U.S.C. § 1225(b)(1)(A)(ii) (requiring credible fear screenings for aliens who intend to seek asylum); 8 C.F.R. § 208.31 (requiring “reasonable fear” screenings for aliens ineligible for asylum who “express[] a fear of returning to the country of removal”); see *Grace v. Barr*, 965 F.3d 883, 887 (D.C. Cir. 2020) (explaining that the INA contains provisions “for distinguishing between aliens with potentially valid asylum claims and those ‘who indisputably have no authorization to be admitted’” to the United States) (quoting *Am. Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352, 1355 (D.C. Cir. 2000)).

<sup>39</sup> See 8 U.S.C. § 1225(b)(1)(A)(ii); *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1599, 1964 (2020) (“During the time when removal is being litigated, the alien will either be detained, at considerable expense, or allowed to reside in this country, with the attendant risk that he or she may not later be found. Congress addressed these problems by providing more expedited procedures for certain ‘applicants for admission.’”); Martin, *supra* note 13, at 1252-53, 1268.

abroad.<sup>40</sup> There is no asylum visa, in other words.<sup>41</sup> There is a corollary protection for people located abroad: refugee status.<sup>42</sup> But it is numerically restricted (unlike humanitarian protections), and it has an application process that often flows through international organizations and to which access may be limited in some regions (also unlike humanitarian protections, which have an application process available to anyone who reaches the United States).<sup>43</sup> Since 2005, the United States has never admitted more than 5,000 refugees in one year from all of Latin America and the Caribbean.<sup>44</sup> By contrast, credible fear claims—often the first stage of a humanitarian protection case for undocumented migrants at the border—by nationals of El Salvador, Honduras, Guatemala, and Mexico alone have regularly exceeded 50,000 annually since 2016, and those figures do not reflect protection claims originating at the border that go through other channels.<sup>45</sup>

The justification for not requiring advance screening for humanitarian protections is that people fleeing persecution may not be able to apply for relief safely in the place where they are facing persecution.<sup>46</sup> This justification flows from the international treaties on refugee protection that U.S. asylum law seeks to implement.<sup>47</sup> As a result, however, border enforcement systems cannot simply repatriate undocumented migrants as a matter of course, but instead must develop mechanisms to identify those undocumented migrants who qualify for humanitarian protections.<sup>48</sup> This dynamic creates a tension between border enforcement and the provision of humanitarian protections.<sup>49</sup> Conversely, from the perspective of asylum seekers, the unavailability of advance adjudication options means that they must reach U.S. territory to lodge their claims without visas or other valid entry documents to facilitate their journey (unless they can obtain such documents

<sup>40</sup> See 8 U.S.C. § 1158(a)(1) (requiring physical presence for asylum applications); see generally Shalini Bhargava Ray, *Optimal Asylum*, 46 VAND. J. OF TRANSNAT'L L. 1215, 1230 (2013) (“[B]ecause satisfying the definition of a refugee is not a basis for receiving a U.S. visa, ‘as a practical matter, most asylum seekers cannot use the normal migration procedures to reach [the] U.S. . . .’”) (quoting DAVID A. MARTIN ET AL., *FORCED MIGRATION: LAW AND POLICY* 815 (2D ED. 2013)).

<sup>41</sup> See 8 U.S.C. § 1201 (authorizing visa issuance only for immigrants and nonimmigrants); Ray, *supra* note 40, at 1230; cf. 9 FAM 202.3-3(B)(2)(b) (explaining that, in “rare instances,” consular officers abroad may request that DHS grant parole to an asylum seeker if “there is a clear U.S. government interest and a need for the alien to travel to the United States as quickly as possible;” if DHS approves the request, the consular officer may print a boarding document for the asylum seeker).

<sup>42</sup> 8 U.S.C. § 1157; see Ray, *supra* note 40, at 1229.

<sup>43</sup> 8 U.S.C. § 1157(b); Ray, *supra* note 40, at 1229 (“Access to the U.S. [Refugee Assistance Program] is also limited by the applicant’s location and ties to the United States, thus placing it beyond the reach of most refugees.”).

<sup>44</sup> CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno (Appendix, “Refugee Admissions by Region”).

<sup>45</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 97. Credible fear statistics do not reflect protection claims pressed by aliens who are not placed into expedited removal, such as, for example, undocumented family units apprehended at the border and released with a notice to appear in immigration court or (more recently) placed into the Migrant Protection Protocols. See *infra* “Discretionary Nature of Expedited Removal.”

<sup>46</sup> See *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1276 (9th Cir. 2020) (“Many migrants enter between ports of entry out of necessity: they ‘cannot satisfy regular exit and entry requirements and have no choice but to cross into a safe country irregularly prior to making an asylum claim.’”) (quoting amicus brief by the United Nations High Commissioner for Refugees); *Huang v. INS*, 436 F.3d 89, 100 (2d Cir. 2006) (“[I]f illegal manner of flight and entry were enough independently to support a denial of asylum, we can readily take notice, from the facts in numerous asylum cases that come before us, that virtually no persecuted refugee would obtain asylum.”).

<sup>47</sup> *East Bay Sanctuary Covenant*, 950 F.3d at 1276 (“Article 31(1) of the 1951 [Refugee] Convention also explains that signatories ‘shall not impose penalties’ on account of refugees’ ‘illegal entry or presence’ . . .”).

<sup>48</sup> See 8 U.S.C. § 1225(b)(1)(A)(ii) (credible fear processing for undocumented migrants); Martin, *supra* note 13, at 1267 (“[T]he singular trumping power of a successful asylum claim . . . overcomes virtually all the other qualifying requirements for immigration to the United States.”).

<sup>49</sup> Martin, *supra* note 13, at 1269.

on grounds unrelated to asylum, an option typically available only to the relatively prosperous).<sup>50</sup> Without entry documents, asylum seekers cannot travel to the United States by commercial airline or other common carrier,<sup>51</sup> and they may undertake more hazardous journeys as a result.<sup>52</sup>

### Wet-Foot/Dry-Foot and the Regulation of Undocumented Migration

For perspective on U.S. immigration law's use of eligibility for humanitarian protections as the rule of decision for undocumented migration at the border, consider an instance where the United States has used a different rule. Until 2017, DHS had a general policy of granting immigration parole to undocumented Cuban nationals who arrived on U.S. soil.<sup>53</sup> The policy was commonly known as the "Wet-Foot/Dry-Foot" policy, because parole was granted only to Cuban nationals "who reach[ed] United States soil (those with 'dry feet') while Cubans who [we]re interdicted at sea (those with 'wet feet') [we]re repatriated to Cuba."<sup>54</sup> Once paroled into the United States, Cuban nationals are generally eligible to apply for lawful permanent resident status after one year under the Cuban Adjustment Act (CAA).<sup>55</sup> Together, the Wet-Foot/Dry-Foot policy and the CAA created a relatively simple rule of decision for undocumented Cuban migrants: they could generally remain in the United States.<sup>56</sup> In 2017, following the reestablishment of diplomatic relations between the United States and Cuba, DHS terminated Wet-Foot/Dry-Foot, in part to discourage Cubans from making perilous journeys by sea and by land to reach U.S. territory.<sup>57</sup> Since then, undocumented Cuban migrants fall under the INA's general prohibition of undocumented migration.<sup>58</sup> They are subject to removal unless they qualify for humanitarian protections, or unless DHS decides to grant them parole for some individualized reason (such as a lack of detention space).<sup>59</sup> This rule of decision requires more challenging adjudications, starting from the time CBP encounters undocumented Cubans at the border, to determine asylum eligibility.<sup>60</sup>

<sup>50</sup> See 8 U.S.C. § 1201 (authorizing visas for immigrants and nonimmigrants only); Ray, *supra* note 40, at 1231-32 (explaining that access to the U.S. asylum system requires either undocumented travel or "entrance on a valid nonimmigrant visa").

<sup>51</sup> 8 U.S.C. § 1323(a)(1) ("It shall be unlawful for any person, including any transportation company, or the owner, master, commanding officer, agent, charterer, or consignee of any vessel or aircraft, to bring to the United States from any place outside thereof (other than from foreign contiguous territory) any alien who does not have a valid passport and an unexpired visa, if a visa was required under this chapter or regulations issued thereunder."); see generally *United Airlines, Inc. v. Brien*, 588 F.3d 158, 162 (2d Cir. 2009) (interpreting the § 1323 "penalty statute").

<sup>52</sup> See, e.g., *Qing Hua Lin v. Holder*, 736 F.3d 343, 352 (4th Cir. 2013) (explaining that immigration officials often encounter asylum seekers at the border "following long and often dangerous journeys into the United States"); Ray, *supra* note 40, at 1232.

<sup>53</sup> See *United States v. Estrada*, 969 F.3d 1245, 1261-62 (11th Cir. 2020); CRS Asylum Policy Report, *supra* note 14, at 8.

<sup>54</sup> *United States v. Dominguez*, 661 F.3d 1051, 1067-68 (11th Cir. 2011).

<sup>55</sup> Cuban Adjustment Act, Pub. L. No. 89-732, § 1, 80 Stat. 1161 (1966); see *Estrada*, 969 F.3d at 1261. As with adjustment of status applicants generally, paroled Cubans must be "admissible" to the United States to obtain lawful permanent residence under the CAA, a requirement that disqualifies some aliens based on criminal history and other criteria. See *Toro v. Dep't of Homeland Sec.*, 707 F.3d 1224, 1227-28 (11th Cir. 2013).

<sup>56</sup> *Dominguez*, 661 F.3d at 1067 ("By taking advantage of the CAA, Cuban nationals, who have no documents authorizing their presence in the United States, can remain in the United States without demonstrating that they suffered persecution or proving refugee status [if they obtain parole under Wet-Foot/Dry-Foot].").

<sup>57</sup> Dep't of Homeland Sec., *Fact Sheet: Changes to Parole and Expedited Removal policies affecting Cuban Nationals*, at 2 (Jan. 12, 2017) ("Many . . . Cuban nationals have taken a dangerous journey through Central America and Mexico; others have taken to the high seas in the dangerous attempt to cross the Straits of Florida."); see *Estrada*, 969 F.3d at 1261 n.10.

<sup>58</sup> See 8 U.S.C. § 1225(b).

<sup>59</sup> See *id.*; *id.* § 1182(d)(5); see, e.g., *Kiakombua v. Wolf*, -- F. Supp. 3d --, 2020 WL 6392824, at \*7 (D.D.C. Oct. 31, 2020) (reviewing application of statutory procedures for asylum adjudication to undocumented Cuban migrant encountered at the border); *Quintero-Prieto v. Barr*, -- F. Supp. 3d --, 2020 WL 6216949, at \*1-2 (D. Ariz. Sept. 29, 2020) (similar).

<sup>60</sup> See, e.g., *Kiakombua*, 2020 WL 6392824, at \*7.

A common reform idea is to employ advance adjudication to reduce pressure on asylum processing at the border. Bills in Congress have proposed expanding refugee processing in Central America, either as an alternative to humanitarian protections (i.e., permitting but not requiring Central Americans who seek protection to avail themselves of expanded options for refugee processing)<sup>61</sup> or as a trade-off that limits eligibility for humanitarian protections at the border (i.e., requiring such aliens to make use of refugee processing options to a certain extent).<sup>62</sup> Commentators have also proposed creating an asylum visa that would allow aliens who pass a screening interview abroad to travel legally to the United States to pursue asylum applications.<sup>63</sup>

## Procedural Framework in Statute: Expedited Removal and Credible Fear

Given that humanitarian protections form the principal exception to the INA's general prohibition of undocumented migration, essential procedural questions arise about how to determine eligibility for these protections at the border.<sup>64</sup> To review, there are two main questions: (1) what adjudication process should be used to make the determination—a trial, or something more streamlined?—and (2) should asylum seekers be held in custody during the adjudication process?<sup>65</sup> Current law answers those questions with the following framework:

1. **Screening:** Protection claims by undocumented migrants at the border should be screened for a level of potential merit called “credible fear,” and rejected if they lack such potential merit, before being referred to trial-type proceedings before an immigration court in the Executive Office for Immigration Review (EOIR) within the Department of Justice (DOJ). (But unaccompanied alien children [UACs] generally go directly to immigration court proceedings without a screening process, whether or not they make protection claims.)
2. **Detention:** Asylum seekers must be detained during the screening process and may be detained during subsequent immigration court proceedings (except that UACs must generally be released to a suitable placement, and family units generally cannot be detained beyond the screening process).<sup>66</sup>

<sup>61</sup> See Refugee Protection Act of 2019, H.R. 5210, 116th Cong. §§ 205-06 (2019) (companion bill, S. 2936).

<sup>62</sup> Secure and Protect Act of 2019, S. 1494, 116th Cong. § 3(c) (2019).

<sup>63</sup> See Ray, *supra* note 40, at 1219 (“Such a visa would be issued at the embassy within the applicant’s home country or in a third country for individuals who demonstrate, for example, a ‘credible fear of persecution’ and wish to enter the United States for the purpose of applying for asylum.”); Homeland Sec. Advisory Council, *Final Emergency Interim Report CBP Families and Children Care Panel*, at 13 (Apr. 16, 2019) (recommending the creation of a processing center in Guatemala “that permits processing by the USG of asylum claimants from the Northern Triangle nations in Guatemala”) [hereinafter HSAC Interim Report], [https://www.dhs.gov/sites/default/files/publications/19\\_0416\\_hsac-emergency-interim-report.pdf](https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf).

<sup>64</sup> See *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1964-65 (2020); Martin, *supra* note 13, at 1269.

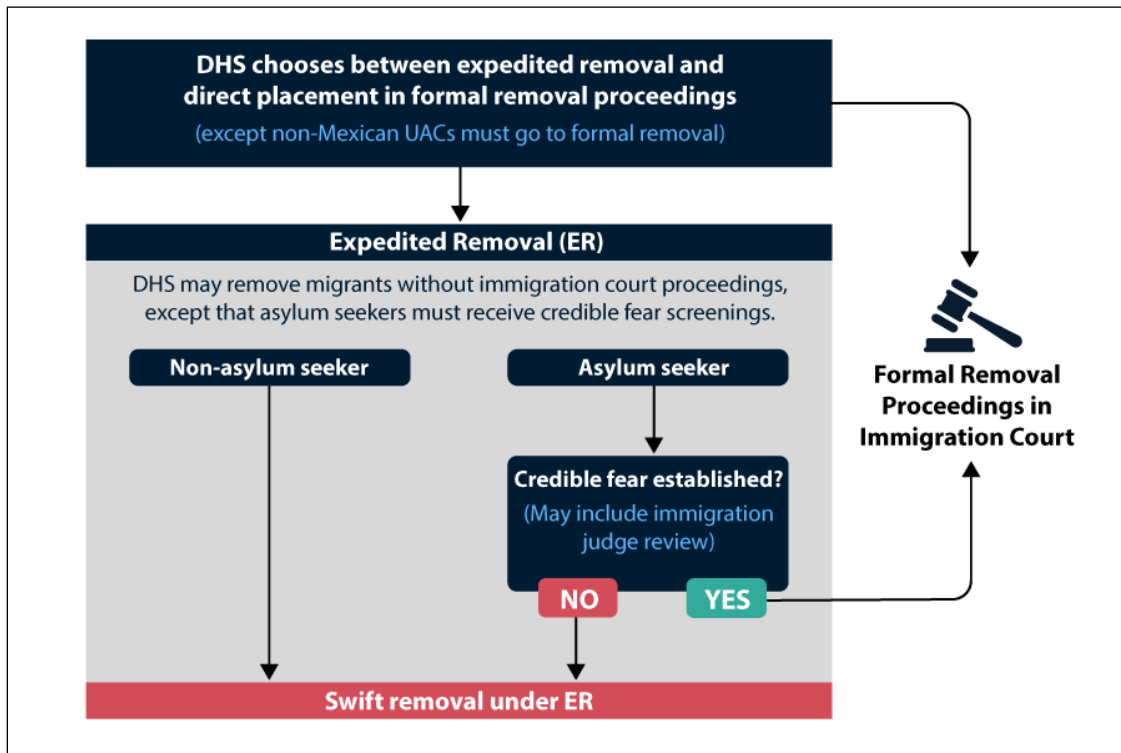
<sup>65</sup> See, e.g., *Thuraissigiam*, 140 S. Ct. at 1964 (“The average civil appeal takes approximately one year. During the time when removal is being litigated, the alien will either be detained, at considerable expense, or allowed to reside in this country, with the attendant risk that he or she may not later be found.”).

<sup>66</sup> See *id.* at 1964-66 (explaining expedited removal system); CRS In Focus IF11357, *Expedited Removal of Aliens: An Introduction*, by Hillel R. Smith (providing overview of expedited removal and exceptions for UACs). As explained later, detention following a positive credible fear interview is effectively permissive in light of DHS’s parole authority: the expedited removal statute still requires detention beyond this juncture, but DHS parole policy authorizes the release of aliens who satisfy certain criteria. See *infra* note 92.

These answers come primarily from amendments to the INA made by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996<sup>67</sup>—Congress’s last comprehensive statement on asylum procedure at the border—which established the expedited removal system and its credible fear component.<sup>68</sup>

**Figure I. Statutory Framework**

Processing of Undocumented Migrants at the Southern Border



**Source:** 8 U.S.C. §§ 1225(b)(1), 1229a, 1232; Dep’t of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1964-65 (2020); Matter of E-R-M- & L-R-M-, 25 I&N Dec. 520, 524 (BIA 2011).

**Notes:**

- (1) Multiple DHS agencies participate. CBP takes initial custody of migrants it encounters at the border. Immigration and Customs Enforcement (ICE) generally detains migrants (other than UACs) during credible fear screenings and, if the migrants are not released on parole, formal removal proceedings. United States Citizenship and Immigration Services (USCIS) generally conducts credible fear screenings. Either CBP or ICE may choose to place migrants in formal removal proceedings in lieu of expedited removal and credible fear. See CRS Expedited Removal Report, *supra* note 3, at 13; *infra* “Discretionary Nature of Expedited Removal.”
- (2) CBP must transfer UACs to the custody of the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services (HHS) within 72 hours. 8 U.S.C. § 1232(b)(3). There are some exceptions for UACs from contiguous countries (Mexico and Canada, although Canadian UACs are extremely rare) and for “exceptional circumstances.” *Id.* § 1232(a)(2), (b)(3); *infra* note 126.

<sup>67</sup> Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

<sup>68</sup> See *Thuraissigiam*, 140 S. Ct. at 1963 (“In 1996, when Congress enacted [IIRIRA], it crafted a system for weeding out patently meritless claims and expeditiously removing the aliens making such claims from the country.”); *Grace v. Barr*, 965 F.3d 883, 887 (D.C. Cir. 2020) (“In IIRIRA, Congress established a comprehensive scheme for distinguishing between aliens with potentially valid asylum claims and those ‘who indisputably have no authorization to be admitted [to the United States].’”) (quoting *American Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352, 1355 (D.C. Cir. 2000)).



## Background on Expedited Removal and Credible Fear

To seek the removal of an alien encountered in the interior of the United States, DHS must generally initiate trial-type proceedings before an immigration court in the EOIR within the DOJ.<sup>69</sup> These are known as “formal removal proceedings.”<sup>70</sup> In them, aliens enjoy many of the procedural protections typically associated with adversarial trial proceedings.<sup>71</sup> These include the right to counsel (at the alien’s own expense) and the right to present testimony and other evidence relevant to, among other issues, the alien’s eligibility for humanitarian protections or other forms of relief.<sup>72</sup> If the immigration judge orders the alien’s removal, the alien may appeal to the Board of Immigration Appeals (BIA), which is also within DOJ, and may seek judicial review of some issues in the federal courts of appeals.<sup>73</sup>

IIRIRA establishes a different process called “expedited removal.”<sup>74</sup> This process allows DHS to swiftly remove certain aliens, including undocumented migrants encountered near the border (other than UACs), without formal hearings or any other type of adversarial trial procedure.<sup>75</sup> The purpose of expedited removal is “to substantially shorten and speed up the removal process” for undocumented migrants and the other categories of aliens subject to it.<sup>76</sup> Before DHS may remove an alien under this streamlined procedure, DHS must ask if he or she fears persecution or torture in his or her country of origin.<sup>77</sup> If the alien says yes or otherwise indicates an intent to

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<sup>69</sup> See *Thuraissigiam*, 140 S. Ct. at 1964; CRS Expedited Removal Report, *supra* note 3, at 6-7.

<sup>70</sup> See *Bonilla v. Sessions*, 891 F.3d 87, 91-92 (3d Cir. 2018); CRS In Focus IF11536, *Formal Removal Proceedings: An Introduction*, by Hillel R. Smith.

<sup>71</sup> See 8 U.S.C. § 1229a; *Bonilla*, 891 F.3d at 91-92.

<sup>72</sup> 8 U.S.C. § 1229a(b)(4); *Thuraissigiam*, 140 S. Ct. at 1964.

<sup>73</sup> *Thuraissigiam*, 140 S. Ct. at 1964 (“If . . . the alien is ordered removed, the alien can appeal the removal order to the Board of Immigration Appeals and, if that appeal is unsuccessful, the alien is generally entitled to review in a federal court of appeals.”).

<sup>74</sup> See *Thuraissigiam*, 140 S. Ct. at 1963; *Grace*, 965 F.3d at 887.

<sup>75</sup> 8 U.S.C. § 1225(b)(1)(A). By the terms of the statute itself, expedited removal applies to aliens who present themselves at ports of entry without valid entry documents or who seek admission through fraud or misrepresentation. *Id.* § 1225(b)(1)(A)(i). But the statute also authorizes DHS to expand expedited removal to apply to covered aliens encountered within two years after entering the country without inspection (i.e., between ports of entry), *id.* § 1225(b)(1)(A)(iii), and since 2004 DHS has used this authority to subject aliens to expedited removal if, among other grounds, they are apprehended within 100 miles of the U.S. border within 14 days of unlawful entry. See *Make the Road New York v. Wolf*, 962 F.3d 612, 620 (D.C. Cir. 2020); CRS Expedited Removal Report, *supra* note 3, at 9. In 2019, DHS issued a new policy to expand the use of expedited removal so that it applies to unlawful entrants apprehended anywhere in the United States within two years of entry. *Make the Road New York*, 962 F.3d at 620. Ongoing litigation challenges the legality of the policy, *id.* at 635, and President Biden has ordered his administration to review it. See CRS Legal Sidebar LSB10574, *Recent White House Actions on Immigration*, by Hillel R. Smith and Kelsey Y. Santamaria (noting that a Feb. 2, 2021 Executive Order directs agency officials to “decide whether to modify, revoke, or rescind a 2019 rule expanding the use of expedited removal into the interior of the United States”); see also CRS Legal Sidebar LSB10336, *The Department of Homeland Security’s Nationwide Expansion of Expedited Removal*, by Hillel R. Smith.

<sup>76</sup> *Make the Road New York*, 962 F.3d at 618.

<sup>77</sup> 8 C.F.R. § 235.3(b)(2)(i) (“[T]he examining immigration officer shall record the alien’s response to the questions contained on Form I-867B . . . .”); see *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1097 n.8 (9th Cir. 2020) (Fernandez, J., dissenting) (explaining that “the A portion of [Form I-867] explains that the United States provides protection for those who face persecution or torture upon being sent home, and the B portion requires asking specific questions about whether the alien fears that kind of harm”).



apply for asylum, DHS must refer the alien to an asylum officer for a screening interview to assess the migrant's claims.<sup>78</sup>

IIRIRA requires the asylum officer to apply a forgiving standard during this interview. The officer is not seeking to determine whether the alien qualifies for humanitarian protections, but rather whether the alien has a "credible fear"—defined as a "significant possibility" that he or she could ultimately qualify.<sup>79</sup> If the alien passes this interview—which happens in about 77% of all cases and 87% of family unit cases, according to Government Accountability Office (GAO) statistics from recent fiscal years<sup>80</sup>—then DHS must refer the alien to formal removal proceedings.<sup>81</sup>

A stricter screening standard called "reasonable fear" applies to certain undocumented migrants who have prior orders of removal that render them ineligible for asylum and leave them eligible only for withholding of removal or CAT protections, which have a higher burden of proof.<sup>82</sup> According to GAO, migrants pass reasonable fear screenings about 30% of the time (versus 77% for credible fear).<sup>83</sup> Although reasonable fear interviews have typically accounted for a small minority of asylum screenings at the border,<sup>84</sup> they became more common in 2019 under a Trump Administration policy called the Transit Rule that made most aliens ineligible for asylum (but not withholding of removal or CAT protections) if they reached the southern border through third countries.<sup>85</sup>

If the alien does not pass the screening interview, he or she can request that an immigration judge review the asylum officer's determination.<sup>86</sup> If the immigration judge affirms the negative determination, DHS may remove the alien without further proceedings.<sup>87</sup> Immigration judges affirm about 80% of negative fear determinations.<sup>88</sup>

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<sup>78</sup> 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(2)(4); *Thuraissigiam*, 140 S. Ct. at 1965.

<sup>79</sup> 8 U.S.C. § 1225(b)(1)(B)(ii), (v); see *Thuraissigiam*, 140 S. Ct. at 1967 (describing the credible fear standard as a "low bar").

<sup>80</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 13-14, 37. GAO posits that the higher rate for family unit cases may occur because, under USCIS policy, a positive determination for only one family member allows the asylum officer to treat the entire family as having received positive determinations. *Id.* at 38-39.

<sup>81</sup> *Thuraissigiam*, 140 S. Ct. at 1965 (citing 8 U.S.C. § 1225(b)(1)(B)(ii) and 8 C.F.R. § 208.30(f)). A joint DHS and Department of Justice proposal from June 2020 would limit the ensuing immigration court proceedings to the exclusive consideration of humanitarian protections, thereby prohibiting the aliens from pursuing other forms of relief (such as adjustment of status based on a family relationship to a U.S. citizen) following positive credible fear determinations. See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36266 (June 15, 2020) ("[T]he Departments believe . . . that it is better policy to place aliens with a positive credible fear determination in asylum-and-withholding-only proceedings . . .").

<sup>82</sup> 8 C.F.R. § 208.31(a) (establishing that reasonable fear screenings apply to "any alien ordered removed under section 238(b) of the Act [allowing for the administrative removal of aliens with aggravated felony convictions] or whose deportation, exclusion, or removal order is reinstated under section 241(a)(5) of the Act"); see *Albiol*, *supra* note 37, at 49.

<sup>83</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 13-14.

<sup>84</sup> *Id.* at 12 ("From fiscal year 2014 through the first two quarters of fiscal year 2019, referrals to USCIS for credible fear screenings comprised about 89 percent of all credible and reasonable fear referrals.").

<sup>85</sup> See *infra* "Trump Administration Policies (Pre-Pandemic)."

<sup>86</sup> 8 U.S.C. § 1225(b)(1)(B)(iii)(III); *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1965 (2020).

<sup>87</sup> 8 U.S.C. § 1225(b)(1)(B)(iii)(I). Aliens may further appeal negative reasonable fear determinations (but not credible fear determinations) to a federal circuit court of appeals, where a limited standard of review applies. See *Andrade-Garcia v. Lynch*, 828 F.3d 829, 833 (9th Cir. 2016).

<sup>88</sup> EOIR, *Credible Fear and Asylum Process: Fiscal Year (FY) 2019 Quarter 2* (Apr. 23, 2019) ("IJs find credible fear in 20% of [credible fear reviews]"), <https://perma.cc/9DSX-LDUE>; GAO Credible and Reasonable Fear Report, *supra* note 20, at 19 (showing that immigration judges affirmed 77% of combined credible and reasonable fear determinations).

The expedited removal statute requires DHS to detain aliens during expedited removal proceedings, including the credible fear process.<sup>89</sup> Mandatory detention continues to apply even to aliens who establish a credible fear and are referred to immigration court.<sup>90</sup> But DHS has broad authority under a different INA provision to parole aliens out of mandatory detention.<sup>91</sup> Under DHS policy, officers may use this parole authority to release asylum seekers who establish credible fear if they meet certain criteria, such as lack of flight risk and lack of danger to the community.<sup>92</sup> For family units, a federal court order known as the *Flores* Settlement Agreement constrains DHS's ability to continue detention after a positive credible fear determination.<sup>93</sup>

## Time Frame of Credible Fear Process

Perhaps as a result of statutory language connoting but not requiring swift processing, a common misconception holds that credible fear screenings usually begin almost immediately upon CBP's apprehension of an asylum seeker and conclude within a few days.<sup>94</sup> The credible fear process typically takes a minimum of two to three weeks from apprehension.<sup>95</sup> The process can be described in three segments: (1) pre-interview processing and referral, including transfer from the border to detention in the interior (about 3-4 days); (2) interview, supervisory review, and decision (about 10-14 days); and (3) immigration judge review of negative determinations (about 7 days). In some cases, the process can take longer than the minimum two- to three-week time frame described here.<sup>96</sup>

First, per standard DHS practice, asylum seekers ordinarily must be transferred from temporary CBP holding facilities along the border to detention facilities run by Immigration and Customs

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from 2014 through the first half of 2019).

<sup>89</sup> 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); *Thuraissigiam*, 140 S. Ct. at 1966.

<sup>90</sup> *Thuraissigiam*, 140 S. Ct. at 1966; *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018).

<sup>91</sup> *Thuraissigiam*, 140 S. Ct. at 1966; *Jennings*, 138 S. Ct. at 837.

<sup>92</sup> See CRS Expedited Removal Report, *supra* note 3, at 26-27. For aliens in expedited removal who have not yet received a positive credible fear determination, DHS regulations permit parole only if “required to meet a medical emergency or is necessary for a legitimate law enforcement objective.” *Id.* (quoting 8 C.F.R. § 235.3(b)(2)(iii), (4)(ii), (5)(i)).

<sup>93</sup> See *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016); *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1070 (C. D. Cal. 2017) (indicating that the *Flores* Settlement Agreement allows DHS to detain family units in unlicensed DHS family detention centers for up to 20 days, “if 20 days is as fast as [DHS], in good faith and in the exercise of due diligence, can possibly go in screening family members for reasonable or credible fear”); CRS Expedited Removal Report, *supra* note 3, at 29 (“Although the court also held that the *Flores* Settlement does not require DHS to release parents along with their children, the effect of the agreement has been that DHS typically will release family units pending their removal proceedings given the difficulties of separating families who may be subject to removal.”).

<sup>94</sup> See *Grace v. Barr*, 965 F.3d 883, 888 (D.C. Cir. 2020) (describing credible fear proceedings as a “highly expedited process” that “is meant to conclude within 24 hours”). As noted below, the INA provides that immigration judge review should take no more than 24 hours “if practicable,” but that is only the final component of credible fear proceedings. See *infra* text at note 106. The INA also provides that the credible fear interview shall occur “either at a port of entry or at such other place” that DHS designates, which may lead to confusion about whether interviews begin immediately after CBP encounters the alien. See 8 U.S.C. § 1225(b)(1)(B)(i).

<sup>95</sup> See *Flores*, 394 F. Supp. 3d at 1070 (reviewing DHS assertions that “20 days is as fast as [they], in good faith and in the exercise of due diligence, can possibly go in screening family members for reasonable or credible fear”); GAO Credible and Reasonable Fear Report, *supra* note 20, at 44-45 (discussing 10- and 14-day benchmarks for middle, USCIS component of credible fear proceedings).

<sup>96</sup> See, e.g., *Ye v. Lynch*, 845 F.3d 38, 41 (1st Cir. 2017) (about four months between apprehension and credible fear interview); *Ali v. Sessions*, 706 Fed. App'x 223, 224 (6th Cir. 2017) (two months between apprehension and credible fear interview); *Yong Lin v. Holder*, 589 Fed. App'x 582, 583 (2d Cir. 2014) (“Here, Lin's credible fear interview was conducted nearly a month after his arrival . . .”).

Enforcement (ICE) in the interior, where the credible fear interviews occur.<sup>97</sup> (A pair of Trump Administration policies known as Prompt Asylum Claim Review [PACR] and Humanitarian Asylum Review Process [HARP] allowed some interviews to occur in temporary CBP facilities instead, with a reduced timeline of “five to seven days for removal.”<sup>98</sup>) ICE then refers the asylum seekers to the United States Citizenship and Immigration Services (USCIS) for an interview with an asylum officer.<sup>99</sup> By this point, three to four days have commonly elapsed since apprehension by CBP.<sup>100</sup>

Upon receiving a referral, USCIS uses a 10-day benchmark for the completion of its segment of the credible fear process.<sup>101</sup> This segment includes the interview, drafting of a written decision, supervisory review, and service of the decision on the asylum seeker.<sup>102</sup> According to GAO, USCIS exceeded the 10-day benchmark in 56% of cases in FY2019<sup>103</sup> and in 32% of cases in the second half of FY2018.<sup>104</sup> Before February 2018, DHS used a 14-day benchmark, which it satisfied in about 83% of cases.<sup>105</sup>

Finally, review by an immigration judge—which asylum seekers who receive negative determinations from USCIS may request—should, according to statute, be concluded “to the maximum extent practicable within 24 hours, but in no case later than 7 days” after the negative determination.<sup>106</sup> Immigration judge review takes longer than the seven-day threshold in 28% of

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<sup>97</sup> See GAO Credible and Reasonable Fear Report, *supra* note 20, at 4 (“ICE is generally responsible for referring any fear claims to USCIS for a fear screening after individuals enter detention.”); *id.* at 21–22 (“[A]n asylum office is to wait a minimum of one full calendar day from the applicant’s arrival at an ICE detention facility before conducting a credible fear interview . . .”).

<sup>98</sup> Las Americas Immigr. Advoc. Ctr. V. Wolf, -- F. Supp. 3d --, 2020 WL 7039516, at \*5 (D.D.C. Nov. 30, 2020); U.S. GOV’T ACCOUNTABILITY OFF., GAO–21–144, SOUTHWEST BORDER: DHS AND DOJ HAVE IMPLEMENTED EXPEDITED CREDIBLE FEAR SCREENING PILOT PROGRAMS, BUT SHOULD ENSURE TIMELY DATA ENTRY 5 (2021) [hereinafter GAO PACR and HARP Report]; see *infra* “Trump Administration Policies (Pre-Pandemic).”

<sup>99</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 4; see *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1965 (2020) (“If an applicant ‘indicates either an intention to apply for asylum’ or ‘a fear of persecution,’ the immigration officer ‘shall refer the alien for an interview by an asylum officer.’” (quoting 8 U.S.C. § 1225(b)(1)(A)(i)–(ii)).

<sup>100</sup> See 6 U.S.C. § 211(c)(8)(B), (m)(3) (charging CBP with the “short-term detention” of persons unlawfully entering the United States, and defining short-term detention as “72 hours or less”); see also GAO Credible and Reasonable Fear Report, *supra* note 20, at 22 (explaining that the screening interview generally happens two days after arrival at an ICE facility, but not clarifying when, exactly, the referral occurs). During past periods of heavy flows of undocumented migration, when limited space in ICE and HHS facilities slows the pace of transfers out of CBP custody, CBP has held significant numbers of migrants for more than 72 hours. See, e.g., *Dep’t of Homeland Sec., Office of Inspector Gen., Management Alert – DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley (Redacted)*, at 2–3 (July 2, 2019) (“Border Patrol was holding about 8,000 detainees in custody [in facilities in the Rio Grande Valley] at the time of our visit, with 3,400 held longer than the 72 hours generally permitted under the [CBP] standards. Of those 3,400 detainees, Border Patrol held 1,500 for more than 10 days.”).

<sup>101</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 46.

<sup>102</sup> *Id.* at 45; see 8 C.F.R. § 208.30(d)–(e) (governing USCIS interview and determination process).

<sup>103</sup> USCIS, *Credible Fear Workload Report Summary: FY2019 Total Caseload*, at 3 (2020), [https://www.uscis.gov/sites/default/files/document/data/Credible\\_Fear\\_Stats\\_FY19.pdf](https://www.uscis.gov/sites/default/files/document/data/Credible_Fear_Stats_FY19.pdf).

<sup>104</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 46. According to the GAO report, delays occur for such reasons as “a lack of space in detention facilities for officers to screen fear cases, telephones not working properly, and other types of delays—which officers told us occur on a regular basis.” *Id.* at 49.

<sup>105</sup> *Id.* at 45. For reasonable fear cases, USCIS uses a 10-day benchmark. *Id.* at 46–47; 8 C.F.R. 208.31(b) (“In the absence of exceptional circumstances, this [reasonable fear] determination will be conducted within 10 days of the referral.”).

<sup>106</sup> 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

cases, according to a GAO analysis of data from FY2014 through the third quarter of 2019.<sup>107</sup> After this review, the credible fear proceedings are over.<sup>108</sup> If the immigration judge overturns the negative determination, the asylum seeker is referred to formal removal proceedings.<sup>109</sup> If the immigration judge affirms the negative determination, the statute provides for removal without further review, although DHS must still make arrangements to this end with authorities from the receiving country.<sup>110</sup>

## Discretionary Nature of Expedited Removal

Under current case law, CBP is not required to place undocumented migrants apprehended at the border into expedited removal proceedings.<sup>111</sup> It can choose instead to place them directly into full removal proceedings in immigration court.<sup>112</sup> To do so, CBP issues the migrant a notice to appear (“NTA”) in immigration court.<sup>113</sup> CBP may release the migrant at this juncture,<sup>114</sup> or may transfer the alien to ICE, which will then decide whether to release the alien pending the immigration court proceedings.<sup>115</sup> The practice of releasing undocumented migrants apprehended at the border pending immigration court proceedings instead of placing them into expedited removal proceedings is often called “catch and release.”<sup>116</sup> An asylum seeker placed directly into

<sup>107</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 55.

<sup>108</sup> See 8 U.S.C. § 1225(b)(1)(B)(ii)-(iii); 8 C.F.R. § 208.30(f)-(g).

<sup>109</sup> 8 C.F.R. § 208.30(f)-(g).

<sup>110</sup> *Id.*; see, e.g., *Hamama v. Adducci*, 912 F.3d 869, 872-73 (6th Cir. 2018) (discussing ICE efforts to obtain “travel documents” from a recipient country for aliens ordered removed); *Bah v. Cangemi*, 548 F.3d 680, 682 (8th Cir. 2008) (similar).

<sup>111</sup> *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1084 (9th Cir. 2020) (“A § (b)(1) applicant [i.e., an alien eligible for expedited removal under 8 U.S.C. § 1225(b)(1)] may also be placed directly into regular removal proceedings under § 1229a at the discretion of the Government.”); *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 524 (BIA 2011) (“[W]e find that the statutory scheme itself supports our reading that the DHS has discretion to put aliens in section 240 removal proceedings even though they may also be subject to expedited removal under section 235(b)(1)(A)(i) of the [INA].”). Although the statute provides that immigration officers “shall” place eligible aliens into expedited removal proceedings, the BIA reasoned that DHS nonetheless retains discretion to place such aliens into formal proceedings instead. *Id.* at 522 (“It is common for the term ‘shall’ to mean ‘may’ when it relates to decisions made by the Executive Branch of the Government on whether to charge an individual and on what charge or charges to bring.”).

<sup>112</sup> *Innovation Law Lab*, 951 F.3d at 1084.

<sup>113</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 10 n.a. (“If agents and officers place noncitizens into full immigration removal proceedings, they typically issue individuals a Notice to Appear before immigration court, where they may seek various forms of immigration relief such as asylum.”); see *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. at 520 (reviewing case in which DHS opted to place undocumented migrants eligible for expedited removal into full removal proceedings instead, by issuing them NTAs).

<sup>114</sup> See, e.g., *Juan Antonio v. Barr*, 959 F.3d 778, 786 (6th Cir. 2020) (case in which Border Patrol released an undocumented family unit after three days in custody); *Hernandez-Castillo v. Sessions*, 875 F.3d 199, 202 (5th Cir. 2017) (similar); *Morales-Gonzalez v. Sessions*, 742 F. App’x 120, 120-21 (6th Cir. 2018) (similar).

<sup>115</sup> Dep’t of Homeland Sec., *Immigration Enforcement Actions: 2019* (Sept. 2020) (“[A]ll adults [apprehended by Border Patrol] who are processed for expedited removal and referred to an asylum officer or issued an NTA are generally transferred to ICE for a custody determination.”), [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement\\_actions\\_2019.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf).

<sup>116</sup> See, e.g., *DHS Ends Release of Family Units into U.S. Interior*, 96 No. 38 Interpreter Releases Art. 2 (Sept. 30, 2019) (transcribing speech in which a DHS Acting Secretary referred to the practice of releasing family units from Border Patrol stations as “catch and release”); Dep’t of Homeland Sec., Press Release, *The McCain-Coons Proposal Would Increase Illegal Immigration, Surge Chain Migration, Continue Catch and Release, and Give a Pathway to Citizenship to Convicted Alien Felons* (Feb. 14, 2018), <https://www.dhs.gov/news/2018/02/14/mccain-coons-proposal-would-increase-illegal-immigration-surge-chain-migration>; *Border Enforcement Update*, 83 No. 31 Interpreter

full removal proceedings following apprehension does not go through the credible fear screening process, but instead has the protection claims heard for the first time in immigration court.<sup>117</sup>

No published regulations or policy documents explain how CBP decides whether to place an undocumented migrant apprehended at the border into expedited or full removal proceedings.<sup>118</sup> But space and logistics appear to be determinative factors. When CBP and ICE lack space to keep undocumented migrants in detention during expedited removal and lack logistical bandwidth to make transfers between the two agencies, they resort to releasing undocumented migrants with NTAs.<sup>119</sup> In other words, the option to release undocumented migrants with NTAs may be an outlet for CBP and ICE when operational pressures mount during periods of heavy undocumented migration.<sup>120</sup>

## **A Note About Unaccompanied Alien Children**

Expedited removal does not apply to undocumented migrants who are UACs.<sup>121</sup> Instead, the INA requires that UACs be placed in full removal proceedings in immigration court.<sup>122</sup> If they pursue protection claims as a defense to removal, those claims go first to USCIS adjudicators and then, if USCIS denies the claims, to the immigration judge.<sup>123</sup> Within three days of apprehending a UAC, CBP must transfer the child to the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services (HHS).<sup>124</sup> ORR is then required to seek a suitable placement for UACs outside of federal custody, except in unusual cases.<sup>125</sup> This framework has an important exception for Mexican UACs: unlike UACs from noncontiguous territories, CBP may allow Mexican UACs to return to Mexico voluntarily, subject to certain limitations.<sup>126</sup> According to

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Releases 1754, 1755 n.58 (Aug. 14, 2006) (“ICE’s practice of ‘catching and releasing’ undocumented aliens with a request for them to appear at a later hearing, which ICE asserts is the result of their limited detention space, has been the subject of several Congressional hearings.”).

<sup>117</sup> *Innovation Law Lab*, 951 F.3d at 1084.

<sup>118</sup> *Id.* (not citing regulations or policies about how to exercise the discretionary choice); Oral Argument at 3:20 - 5:00, *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019) (No. 19-15716) (colloquy between O’Scannlain, J., and government counsel, about the point that no formal regulations or other sources establish clear factors to govern the discretionary choice between expedited and full removal proceedings), [https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000015563](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015563).

<sup>119</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 10 n.a (“Border Patrol and OFO officials stated that Border Patrol agents and OFO officers must determine whether ICE has space in its detention facilities before placing individuals into expedited removal proceedings.”); *Border Enforcement Update*, 83 No. 31 Interpreter Releases 1754, 1755 n.58 (Aug. 14, 2006) (describing ICE’s assertion that “limited detention space” causes it to release undocumented migrants with NTAs); *see also* *Hernandez-Castillo v. Sessions*, 875 F.3d 199, 202 (5th Cir. 2017) (“The Border Patrol released Hernandez-Castillo [an undocumented migrant] on his own recognizance due to a lack of detention funds.”).

<sup>120</sup> *See, e.g., CBP Officers Reassigned to Help Border Patrol Agents Deal with Migrants; Border Patrol Releasing Detainees on Own Recognizance*, 96 No. 14 Interpreter Releases Art. 6 (2019) (“U.S. Border Patrol processing centers are not designed to house the current numbers of families and small children that agents are encountering. Due to capacity issues, agents have begun identifying detainees for potential release in Eagle Pass with a notice to appear for their immigration hearings.”).

<sup>121</sup> 8 U.S.C. § 1232(a)(5)(D).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* § 1158(b)(3)(C).

<sup>124</sup> *Id.* § 1232(b)(2), (3).

<sup>125</sup> 8 U.S.C. § 1232(c)(2)(A); *see generally* *Flores v. Sessions*, 862 F.3d 863, 870-71 (9th Cir. 2017).

<sup>126</sup> 8 U.S.C. § 1232(a)(2)(A), (a)(2)(B), (a)(5)(D). The exception also applies to Canadian UACs, although CBP encountered only 5 Canadian UACs from FY2014 through FY2019. Dep’t of Homeland Sec., *Fiscal Year 2020 Enforcement Lifecycle Report*, at 13 n.13 (Dec. 2020) [hereinafter *DHS 2020 Lifecycle Report*],



DHS statistics, given this exception, in practice the majority of Mexican UACs are quickly repatriated to Mexico while UACs from other countries often gain legal immigration status and rarely face removal within three years of arrival.<sup>127</sup>

## DHS Implementation of the Statutory Framework

DHS's implementation of the statutory framework for evaluating protection claims at the border has varied by presidential administration.

- When undocumented migration to the southern border surged toward the end of the Obama Administration, DHS came to rely heavily on its discretion to release undocumented migrants—particularly families—with NTAs for immigration court proceedings at a future date in lieu of conducting expedited removal and credible fear proceedings.<sup>128</sup>
- Under the Trump Administration, DHS developed policies to reject a higher percentage of protection claims at the credible fear phase and, for cases in which it placed migrants directly into formal removal proceedings in lieu of expedited removal, to require undocumented migrants to remain in Mexico during the formal proceedings rather than releasing them into the United States.<sup>129</sup>
- During the COVID-19 pandemic, DHS under the Trump Administration interpreted public health laws to authorize a policy under which it expelled most undocumented migrants encountered at the border without providing access to asylum screenings.<sup>130</sup>
- The Biden Administration has begun to roll back most of the Trump Administration's pre-pandemic policies but has thus far left the pandemic policy mostly in place, with an exception for UACs.<sup>131</sup>

The following subsections explain the implementation approach of each administration in more detail.

### Obama Administration Response to Increased Flow of Asylum Seekers

Credible fear statistics reflect a marked increase in the flow of asylum seekers to the southern border beginning around 2013. Until then, undocumented migrants encountered at the border and placed into expedited removal proceedings sought humanitarian protections in relatively small numbers. Credible fear referrals never exceeded 14,000 per year between FY1997 and FY2012.<sup>132</sup> As a share of all aliens placed into expedited removal, those referred for credible fear interviews

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[https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Special\\_Reports/Enforcement\\_Lifecycle/2020\\_enforcement\\_lifecycle\\_report.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Special_Reports/Enforcement_Lifecycle/2020_enforcement_lifecycle_report.pdf).

<sup>127</sup> DHS 2020 Lifecycle Report, *supra* note 126, at 13-14; DHS 2014 Cohort Report, *supra* note 22, at 4-5.

<sup>128</sup> See *infra* "Obama Administration Response to Increased Flow of Asylum Seekers."

<sup>129</sup> See *infra* "Trump Administration Policies (Pre-Pandemic)."

<sup>130</sup> See *infra* "Trump Administration Policy During COVID-19."

<sup>131</sup> See *infra* "Regulatory Outlook Under the Biden Administration."

<sup>132</sup> CRS Asylum Policy Report, *supra* note 14, at 37 (Table B-2).



hovered between 4% and 8%.<sup>133</sup> But, according to DHS data, in FY2013 the share of credible fear referrals reached 15% before rising steadily to 44% in FY2017.<sup>134</sup> This trend—which continued into the Trump Administration, as described in the next subsection—led the Supreme Court to remark that “the past decade [2008-2018] has seen a 1,883% increase in credible fear claims.”<sup>135</sup> The credible fear figures do not capture the full number of asylum seekers at the southern border, because the figures do not include those asylum seekers whom DHS opted to place directly into full removal proceedings without conducting credible fear screenings.<sup>136</sup> Still, the rise in credible fear referrals may indicate a “significant increase” in the flow of undocumented asylum seekers to the border.<sup>137</sup>

The rising trend of asylum seekers has coincided with, and appears to have been driven by, a demographic shift in the flow of undocumented migrants. Since 2013, non-Mexican nationals and family units accounted for increasingly large shares of the flow (until the onset of the COVID-19 pandemic in 2020, when Mexican adults traveling without family came to dominate the flow once again).<sup>138</sup> The share of UACs also increased significantly during that time, although UACs do not contribute to credible fear claims because they are not subject to expedited removal.<sup>139</sup>

The Obama Administration had initially sought to detain the increased flow of family units during adjudication of their protection claims,<sup>140</sup> but federal court orders limited this policy.<sup>141</sup> Thereafter, the Obama Administration made heightened use of its discretion to release undocumented migrants—particularly those in family units—during formal removal

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<sup>133</sup> DHS MPP Assessment, *supra* note 24, at 7.

<sup>134</sup> *Id.*; see also Notice of Transit Rule as Interim Final Rule, 84 Fed. Reg. 33,829, 33,830-831 (July 16, 2019) (“[O]ver the past decade, the overall percentage of aliens subject to expedited removal and referred, as part of the initial screening process, for a credible-fear interview on claims of a fear of return has jumped from approximately 5 percent to above 40 percent.”).

<sup>135</sup> *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1966-67 (2020).

<sup>136</sup> See *supra* “Discretionary Nature of Expedited Removal.”

<sup>137</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 1; Dep’t of Homeland Sec., *Immigration Enforcement Actions: 2016*, at 7 (Dec. 2017) (describing increased CBP encounters with asylum seekers).

<sup>138</sup> CRS Apprehensions Report, *supra* note 4, at 6-11; see Customs and Border Protection, *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2020* (Nov. 19, 2020) (showing that single Mexican adults accounted for 57% of all Border Patrol apprehensions), <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2020#>.

<sup>139</sup> CRS Apprehensions Report, *supra* note 4, at 11.

<sup>140</sup> See *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 174 (D.D.C. 2015) (“Various immigration experts and attorneys have averred that, based on their firsthand knowledge and collection of data, ICE has been largely denying release to Central American mothers accompanied by minor children since June 2014. . . . DHS has defended its recent denials of release in immigration court by asserting that a ‘no bond’ or ‘high bond’ policy would significantly reduce the unlawful mass migration of Guatemalans, Hondurans, and Salvadorans.”) (some internal quotation marks and alterations omitted); Dep’t of Homeland Sec., Statement by Secretary Jeh Johnson Before the Sen. Comm. on Appropriations (July 10, 2014) (“[T]here are adults who brought their children with them. Again, our message to this group is simple: we will send you back. We are building additional space to detain these groups and hold them until their expedited removal orders are effectuated.”), <https://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>; see also Ingrid Eagly et al., *Detaining Families*, 106 CAL. L. REV. 785, 801 (2018) (“Beginning in 2014, family detention space again increased, most dramatically with the opening of Dilley and Karnes. In 2016, family detention centers in the United States had the capacity to hold over 3,500 children with their parents each day.”).

<sup>141</sup> See *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016) (holding that the *Flores* Settlement Agreement applies to the detention of accompanied children); *R.I.L.-R*, 80 F. Supp. 3d at 190 (holding that the detention of families for the purpose of deterring more undocumented migration, rather than based on an individualized assessment of dangers of releasing a person from custody, likely violates the INA when “read in light of constitutional constraints”).

proceedings.<sup>142</sup> Some undocumented migrants and most family units were released without ever being placed into expedited removal, meaning that CBP opted to issue them NTAs and place them in formal removal proceedings without vetting any protection claims first.<sup>143</sup> Other undocumented migrants were released after being placed into expedited removal and receiving positive credible fear determinations—although, for adults not in family units, DHS made these post-credible fear release decisions on a case-by-case basis and may have tightened its release policies in response to the rise in asylum seekers.<sup>144</sup> Family units put into expedited removal were released as a matter of course following positive credible fear determinations, in light of restrictions in the *Flores* Settlement Agreement.<sup>145</sup> Some of the released families were placed into an alternative to detention program called the Family Case Management Program (FCMP) in 2016 and early 2017.<sup>146</sup>

DHS statistics indicate that the great majority of family units released under these policies have remained in the United States in “unresolved statuses” for several years—meaning that, as of March 2020, they had neither been removed nor been granted humanitarian protections or other relief from removal.<sup>147</sup> Statistics for undocumented migrants who claimed fear after being placed into expedited removal show similar results: the status of most of these migrants remained unresolved, according to the latest case data.<sup>148</sup>

<sup>142</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 81 (T10, showing NTA issuances by Border Patrol) and 85 (T13, showing number of family units not placed in expedited removal by Border Patrol).

<sup>143</sup> *Id.*; Dep’t of Homeland Sec., *Immigration Enforcement Actions: 2016*, at 7 (Dec. 2017) (“The increases for USBP and OFO [issuances of NTAs] correspond to increases in asylum seekers from the Northern Triangle and Haiti.”), [https://www.dhs.gov/sites/default/files/publications/Enforcement\\_Actions\\_2016.pdf](https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf); DHS Cohort report, *supra* note 22, at 6 (noting that only 3.1% of family units encountered in FY2014 were placed in expedited removal proceedings); DHS 2020 Lifecycle Report, *supra* note 126, at 15 n.14 (noting that many family units encountered by CBP since FY2014 have been issued NTAs in lieu of expedited removal, “because large numbers of family arrivals have overwhelmed the Department’s family detention capacity, and when detention facilities are unavailable CBP may release people with NTAs rather than holding them for ER processing”). CBP may still transfer undocumented migrants to ICE after choosing to issue them NTAs, but these migrants are apparently more likely to be released upon arriving in ICE custody than are migrants placed into expedited removal proceedings. *See* GAO Credible and Reasonable Fear Report, *supra* note 20, at 10 n.a (noting that CBP issues NTAs instead of processing migrants for expedited removal when CBP determines that ICE lacks detention space, because “noncitizens placed into expedited removal proceedings are required to be detained for the duration of their credible fear screening”); *see also* Immigration and Customs Enforcement, *Fiscal Year 2019 Enforcement and Removal Operations Report*, at 9 (noting that both ICE and CBP conducted “direct releases” in FY2019 of large numbers of family units due to “high volume”), <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>. Under the *Flores* Settlement Agreement, family units cannot be detained together for more than approximately 20 days. *See Flores v. Sessions*, 394 F. Supp. 3d 1041, 1070 (C.D. Cal. 2017).

<sup>144</sup> *See* Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* (Dec. 8, 2009), [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_alien\\_found\\_credible\\_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf); Ana Pottratz Acosta, *Sunlight Is the Best Disinfectant: The Role of the Media in Shaping Immigration Policy*, 44 MITCHELL HAMLINE L. REV. 803, 856 (2018) (“While the number of asylum seekers released on parole decreased following the 2014 Central American Migrant Crisis, many asylum applicants continued to be released on parole during the last two years of the Obama Administration after passing a credible fear interview.”).

<sup>145</sup> *See Flores*, 828 F.3d at 901 (holding that the *Flores* Settlement Agreement applies to the detention of accompanied children); *Flores*, 394 F. Supp. 3d at 1070 (indicating that the *Flores* Settlement Agreement allows DHS to detain family units in unlicensed DHS family detention centers for up to 20 days, “if 20 days is as fast as [DHS], in good faith and in the exercise of due diligence, can possibly go in screening family members for reasonable or credible fear”).

<sup>146</sup> CRS Report R45804, *Immigration: Alternatives to Detention (ATD) Programs*, by Audrey Singer, at 10-12.

<sup>147</sup> DHS 2020 Lifecycle Report, *supra* note 126, at 13, 18 (data on case outcomes current as of March 31, 2020); DHS 2014 Cohort report, *supra* note 22, at 6.

<sup>148</sup> DHS 2020 Lifecycle Report, *supra* note 126, at 15; DHS 2014 Cohort report, *supra* note 22, at 7.

## Trump Administration Policies (Pre-Pandemic)

The upward trend in the flow of asylum seekers to the border continued into the Trump Administration. FY2019 set a record for credible fear referrals at 105,000.<sup>149</sup> The flow of undocumented migrant families also surged: in FY2019, Border Patrol apprehensions of aliens in family units reached 473,682, “more than all family unit apprehensions from FY2012 to FY2018 combined” and more than the total of apprehensions of aliens in all groups in any year since FY2014.<sup>150</sup> After terminating a short-lived and controversial policy of separating families at the border in June 2018, the Trump Administration relied heavily for a period on its discretion to release family units with NTAs instead of processing them for expedited removal.<sup>151</sup>

The Trump Administration developed a series of policies in 2018 and 2019 that set forth more restrictive answers to the essential questions of asylum procedure at the border. To review, those questions are (1) what adjudication process should be used to determine asylum eligibility—a trial, or something more streamlined?—and (2) during the adjudication process, should asylum seekers be held in custody, released, or treated in some other fashion? Trump Administration policies drew up the following answers:

1. DHS officials should apply a more demanding screening test to protection claims in expedited removal, so that more claims may be rejected before they reach immigration court.
2. Asylum seekers should not be released into the interior of the United States while their claims are evaluated, and they should be required to wait in Mexico in the event they cannot be detained in the United States.

The following subsections examine these answers in more depth.

### Policies to Reject More Claims at the Screening Phase

Policies that contributed to the first answer include the following:

- a policy that made most unlawful entrants ineligible for asylum (often called “the Asylum Ban”), leaving them eligible only for withholding of removal and CAT protections;<sup>152</sup>

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<sup>149</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 107.

<sup>150</sup> CRS Apprehensions Report, *supra* note 4, at 6-9.

<sup>151</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 90 (T13, showing family units not placed into expedited removal by Border Patrol); Immigration and Customs Enforcement, *Fiscal Year 2019 Enforcement and Removal Operations Report*, at 9 (noting large number of “direct releases” of family units in FY2019), <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>; *see also* Dep’t of Homeland Sec., *Acting Secretary McAleenan Announces End to Widespread Catch and Release* (Sep. 23, 2019) (“With some humanitarian and medical exceptions, DHS will no longer be releasing family units from Border Patrol Stations into the interior . . .”), <https://www.dhs.gov/news/2019/09/23/acting-secretary-mcaleenan-announces-end-widespread-catch-and-release>. On the family separation or “Zero Tolerance” policy, *see* CRS Report R45266, *The Trump Administration’s “Zero Tolerance” Immigration Enforcement Policy*, by William A. Kandel.

<sup>152</sup> *See* E. Bay Sanctuary Covenant v. Trump, 950 F.3d 1242, 1259 (9th Cir. 2020) (“In November 2018, the Departments of Justice and Homeland Security jointly adopted an interim final rule . . . which, coupled with a presidential proclamation issued the same day . . . , strips asylum eligibility from every migrant who crosses into the United States between designated ports of entry.”); 8 C.F.R. §§ 208.13(c)(3), 208.30(e)(5)(ii) (regulations codifying interim final rule and subsequent changes in final rule); Proclamation No. 9,880, 84 Fed. Reg. 21,229 (2019).

- a policy that made most aliens ineligible for asylum if they transited through a third country to reach the southern border (the “Transit Rule”), leaving them eligible only for withholding of removal and CAT protections;<sup>153</sup> and
- a policy of creating safe third-country agreements (STCAs, called “Asylum Cooperative Agreements” by DHS) with Northern Triangle countries.<sup>154</sup> The STCAs authorized DHS to transfer asylum seekers to those countries instead of evaluating their claims for any humanitarian protection.<sup>155</sup>

Of the three policies, only the Transit Rule was extensively implemented, as shown in **Table 1**.

As a matter of procedure, these policies allocated more power to asylum officers to reject claims at the screening phase. The first two policies replaced the normal credible fear screening standard with the stricter reasonable fear standard (which, to reiterate, migrants satisfy 30% of the time, instead of 77% for credible fear, according to GAO statistics<sup>156</sup>) for unlawful entrants and aliens who transited through third countries.<sup>157</sup> The STCA policy authorized asylum officers to order the transfer of some asylum seekers to third countries without any assessment of their claims at all, except that asylum seekers who asserted a fear of persecution or torture in the third country were to receive screening of that assertion under a “more likely than not” standard (which is stricter than even reasonable fear).<sup>158</sup>

## **Policies to Prevent Release into the United States Pending Adjudication of Claims**

Policies that contributed to the Trump Administration’s second answer—that undocumented migrants should not be released into the interior while protection claims are pending—include the following:

- Twin policies called PACR and HARP, under which screening interviews occurred on a five-to-seven day timeline at CBP facilities at the border instead of on a two- to three-week timeline in ICE detention facilities in the interior.<sup>159</sup> PACR was for migrants who are subject to the Transit Rule—i.e., non-Mexican nationals—and HARP was for Mexican migrants.<sup>160</sup>

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<sup>153</sup> See *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 838 (9th Cir. 2020) (“With limited exceptions, the [Transit] Rule categorically denies asylum to aliens arriving at our border with Mexico unless they have first applied for, and have been denied, asylum in Mexico or another country through which they have traveled.”); Notice of Interim Final Rule, 84 Fed. Reg. 33,829 (July 16, 2019) (codified at 8 C.F.R. §§ 208, 1003, 1208).

<sup>154</sup> Interim Final Rule for Asylum Cooperative Agreements, 84 Fed. Reg. 63,994 (Nov. 19, 2019).

<sup>155</sup> *Id.* at 64,002; 8 C.F.R. § 208.30(e)(7) (implementing interim final rule and providing that determination of removability to a third country should be made “prior to any determination concerning whether the alien has a credible fear of persecution or torture”).

<sup>156</sup> See *supra* note 83.

<sup>157</sup> See *Las Americas Immigr. Advoc. Ctr. v. Wolf*, -- F. Supp. 3d --, 2020 WL 7039516, at \*4 n.5 (D.D.C. Nov. 30, 2020) (“Asylum consideration is effectively precluded through [the Transit Rule], but such a noncitizen may still be eligible for statutory withholding, or for protection under the Convention Against Torture (‘CAT’), both of which require a finding of ‘reasonable fear’ rather than ‘credible fear’ of persecution.”) (citations omitted); 8 C.F.R. § 208.30(e)(5)(ii)-(iii).

<sup>158</sup> 8 C.F.R. § 208.30(e)(7); see *supra* text at note 82 (discussing reasonable fear standard).

<sup>159</sup> See *Las Americas Immigr. Advoc. Ctr.*, 2020 WL 7039516, at \*1; GAO PACR and HARP Report, *supra* note 98, at 5.

<sup>160</sup> *Las Americas Immigr. Advoc. Ctr.*, 2020 WL 7039516 at \*5.

- The Migrant Protection Protocols (MPP or “Remain in Mexico”), under which undocumented migrants were returned to Mexico to wait while their claims for humanitarian protections were adjudicated in immigration court.<sup>161</sup>

A third policy called “queue management” or “metering,” which began under the Obama Administration and expanded during the Trump Administration, arguably fits into this category.<sup>162</sup> Under metering, CBP restricts the number of undocumented migrants who may access land ports of entry along the southern border, requiring undocumented migrants to wait in Mexico (often for weeks or months) until processing capacity becomes available at the port.<sup>163</sup> Metering has a limited scope—it applies only to undocumented migrants at ports of entry (not unlawful entrants)—and arguably functions more as a barrier to initial access to the asylum system than as a mechanism to avoid releasing asylum seekers during the adjudication process.<sup>164</sup>

## Implementation and Litigation

Some of the policies in both categories were not widely implemented, often due to federal court orders that blocked them, as described in **Table 1**. The primary legal issue concerning most of the policies was whether they went too far in reshaping asylum procedure at the border without legislative action.<sup>165</sup> The MPP was also challenged on the ground that it exposed migrants to dangerous conditions in Mexico, in violation of statutory prohibitions on the removal of migrants to places where they face persecution or torture.<sup>166</sup> The Transit Rule and the MPP were the most widely implemented policies; the Supreme Court issued orders concerning both policies that allowed implementation during ongoing litigation.<sup>167</sup> (**Table 1** also covers the Trump Administration’s policy during the COVID-19 pandemic, which is analyzed in the next section of the report.)

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<sup>161</sup> See *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1077-78 (9th Cir. 2020), *stay granted*, 140 S. Ct. 1564 (2020).

<sup>162</sup> See Dep’t of Homeland Sec., Office of Inspector General, *CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry*, at 5 (Oct. 27, 2020) [hereinafter *OIG Metering Report*], <https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf>; CRS Legal Sidebar LSB10295, *The Department of Homeland Security’s Reported “Metering” Policy: Legal Issues*, by Hillel R. Smith; see also *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1179 (S.D. Cal. 2019).

<sup>163</sup> *OIG Metering Report*, *supra* note 162, at 5, 14.

<sup>164</sup> See *id.* at 9 (explaining that DHS authorized metering at all ports of entry in 2018 after determining that such a policy “would turn away approximately 650 undocumented aliens per day”).

<sup>165</sup> See, e.g., *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1272 (9th Cir. 2020) (holding that the Asylum Ban “conflicts with the plain congressional intent instill in” the INA); *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 857-58 (9th Cir. 2020) (holding that the Transit Rule violates the INA); *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020) (holding that the MPP likely violates the INA), *stay granted*, 140 S. Ct. 1564 (2020).

<sup>166</sup> *Innovation Law Lab*, 951 F.3d at 1093 (“[P]laintiffs have shown a likelihood of success on the merits of their claim that the MPP does not comply with the United States’ anti-refoulement obligations . . .”).

<sup>167</sup> *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019) (mem.) (Transit Rule); *Innovation Law Lab v. Wolf*, 140 S. Ct. 1564 (2020) (mem.) (MPP); Dep’t of Homeland Sec., *Migrant Protection Protocols Metrics and Measures*, at 2 (2020) (showing 65,409 MPP enrollments as of Oct. 1, 2020); GAO *Credible and Reasonable Fear Report*, *supra* note 20, at 74-76 (explaining impact of Transit Rule on asylum screening process).

**Table I. Selected Trump Administration Policies on Asylum Processing at the Southern Border**

Policy	Procedural Impact at Southern Border	Status	Litigation Notes	Notes on Biden Administration Action
<b>Policies to Reject More Claims at Screening Phase</b>				
Asylum Ban	Heightened screening standard applies to asylum seekers who enter unlawfully (“reasonable fear” instead of “credible fear”).	Revoked by President Biden.	Federal courts prevented implementation at the outset, and the Supreme Court declined to grant the government a stay.	President Biden effectively terminated the policy by revoking Presidential Proclamation 9880. DHS and DOJ must “review and determine whether to rescind” supporting regulations. <sup>168</sup>
Transit Rule	Heightened screening standard applies to asylum seekers who transit third countries (“reasonable fear” instead of “credible fear”).	Blocked by court order.	Federal district courts vacated the rule in June 2020 and have preliminarily enjoined a subsequent version of it. Before the pandemic, DHS had implemented the rule widely after the Supreme Court stayed preliminary injunctions against it.	DHS and DOJ must “review and determine whether to rescind” the rule. <sup>169</sup>

<sup>168</sup> See *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1259-1260 (9th Cir. 2020) (procedural history of the litigation); Exec. Order No. 14,010, § 4(a)(ii)(C), (F)(2), 86 Fed. Reg. 8,267 (Feb 2, 2021) (revoking Procl. 9880 and ordering review of supporting regulations) [hereinafter E.O. on Comprehensive Regional Framework].

<sup>169</sup> *Capital Area Immigrants’ Rights Coal. v. Trump*, 471 F. Supp. 3d 25, 57 (D.D.C. 2020) (vacating the Transit Rule as an interim final rule on the ground that it violated notice and comment requirements); *E. Bay Sanctuary Covenant v. Barr*, -- F. Supp. 3d --, 2021 WL 607869 (N.D. Cal. Feb. 16, 2021) (holding that Transit Rule, which the Trump Administration re-issued as a final rule following the D.D.C. decision, violates the INA); *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019) (mem.) (staying preliminary injunctions against the interim final rule); *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 857-58 (9th Cir. 2020) (affirming preliminary injunction with Supreme Court stay in place); E.O. on Comprehensive Regional Framework, *supra* note 168, § 4(a)(ii)(C).



Policy	Procedural Impact at Southern Border	Status	Litigation Notes	Notes on Biden Administration Action
Safe Third Country Agreements (STCAs) with Northern Triangle Countries	Claims for humanitarian protections made by aliens eligible for transfer to a third country may be rejected without evaluation at screening phase. The only screening that occurs is of fear of transfer to the recipient country (under “more likely than not” test).	Suspended by Secretary of State Blinken.	Of the three STCAs, only the Guatemala STCA had been implemented (and only to a limited extent and only before the COVID-19 pandemic). Litigation challenging the legality of the STCAs did not produce a judicial decision.	Secretary Blinken suspended and began the process to terminate the three agreements, which the President had ordered him to review. DHS and DOJ must “review and determine whether to rescind” supporting regulations. <sup>170</sup>
<b>Policies to Prevent Release into the U.S. During Adjudication Process</b>				
Prompt Asylum Claim Review (PACR) / Humanitarian Asylum Review Process (HARP)	Screening interviews occur in CBP facilities at the border on five- to seven-day timeline, instead of in ICE facilities in the interior on two- to three-week timeline. Limited access to counsel and preparation time.	Suspended by President Biden.	A federal district court rejected a legal challenge to the policy in November 2020.	The President ordered DHS to cease implementation of the policies and to “consider rescinding” related guidance. <sup>171</sup>
Migrant Protection Protocols (MPP)	Asylum seekers must wait in Mexico during immigration court proceedings.	DHS is winding down the policy.	The Ninth Circuit held the policy likely illegal, but the Supreme Court granted a stay that allowed DHS to keep the policy in place during ongoing litigation.	DHS suspended new enrollments on the first day of the Biden Administration and, on February 19, 2021, began processing migrants waiting in Mexico under the policy. <sup>172</sup>

<sup>170</sup> Customs and Border Protection, *Custody and Transfer Statistics FY2020* (showing small number of aliens processed under Guatemala STCA or “ACA” until April 2020), <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy-2020>; U.T. v. Barr, 1:20-cv-00116-EGS (D.D.C.) (case currently stayed for negotiations between litigants, with motion for summary judgment and permanent injunction pending); Dep’t of State, Press Statement, *Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras* (Feb. 6, 2021), <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/>; E.O. on Comprehensive Regional Framework, *supra* note 168, § 4(a)(ii)(D) (ordering review).

<sup>171</sup> Las Americas Immigr. Advoc. Ctr. V. Wolf, -- F. Supp. 3d --, 2020 WL 7039516, at \*2 (D.D.C. Nov. 30, 2020) (rejecting challenge); E.O. on Comprehensive Regional Framework, *supra* note 168, § 4(a)(ii)(E) (ordering review).

<sup>172</sup> Innovation Law Lab v. Wolf, 951 F.3d 1073 (9th Cir. 2020) (holding MPP likely illegal), *stay granted*, 140 S. Ct. 1564 (2020); Dep’t of Homeland Sec., Fact Sheet: DHS Announces Process to Address Individuals Outside the United States with Active MPP Cases (Feb. 18, 2018), <https://www.dhs.gov/publication/fact-sheet-dhs-announces-process-address-individuals-outside-united-states-active-mpp>; *see also* E.O. on Comprehensive Regional Framework, *supra* note 168, § 4(a)(ii)(B) (ordering DHS to “review and determine whether to terminate or modify” the MPP).

Policy	Procedural Impact at Southern Border	Status	Litigation Notes	Notes on Biden Administration Action
Metering ( <i>applies only to undocumented migrants at ports of entry</i> )	Undocumented migrants cannot initiate claims for humanitarian protections at land ports of entry until CBP accepts them for processing.	Not blocked.	An ongoing lawsuit challenges the legality of the policy.	The Title 42 policy against asylum processing during the COVID-19 pandemic likely displaces metering in current practice. <sup>173</sup>
<b>Pandemic Policy (see next section, “Trump Administration Policy During COVID-19”)</b>				
Title 42	Undocumented migrants may be “expelled” without access to asylum processing, with limited exceptions.	In effect, except not for UACs per Biden Administration order.	A federal district court order prohibits DHS from holding children (including accompanied children) in hotels while arranging for their expulsion under the policy. A separate district court order that has been stayed pending appeal would prohibit DHS from applying the policy to UACs.	Federal agencies including DHS must “review and determine whether to terminate” the policy. In the meantime, the Biden Administration has decided to not apply the policy to UACs (even though the district court order on this issue has been stayed). <sup>174</sup>

**Source:** Sources cited in **Table I**.

While each pre-pandemic policy had unique features, a few general points about them bear mentioning. The changes that they made to border procedure generally did not apply to UACs.<sup>175</sup> The most extensively implemented policies—the Transit Rule and the Migrant Protection Protocols—also did not apply to Mexican nationals and appear to have been designed primarily for the processing of Central American family units.<sup>176</sup> Additionally, the policies seemed to fit together in complex and often inscrutable ways.<sup>177</sup> Sometimes the policies presented DHS with

<sup>173</sup> See *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1179 (S.D. Cal. 2019) (denying motion to dismiss legal challenges); see *infra* “Trump Administration Policy During COVID-19.”

<sup>174</sup> *Flores v. Barr*, No. CV 85-4544, 2020 WL 5491445, at \*1 (C.D. Cal. Sept. 4, 2020) (prohibiting “hotelings” of children); *stay denied*, 977 F.3d 742 (9th Cir. 2020); *P.J.E.S. v. Wolf*, -- F. Supp. 3d --, 2020 WL 6770508, at \*8-12 (D.D.C. Nov. 18, 2020) (preliminary injunction with respect to UACs); *stay granted*, No. 20-5357 (D.C. Cir. Jan. 29, 2021); E.O. on Comprehensive Regional Framework, *supra* note 168, § 4(a)(ii)(A) (ordering review); Notice of Temporary Exception from Expulsion of Unaccompanied Noncitizen Children, 86 Fed. Reg. 9,942, 9,942 (Feb. 17, 2021) (“The temporary exception went into effect on or about January 30, 2021.”).

<sup>175</sup> See, e.g., *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1077 (9th Cir. 2020) (MPP does not apply to UACs); Interim Final Rule for Asylum Cooperative Agreements, 84 Fed. Reg. 63,994, 63,997 n.4 (Nov. 19, 2019) (explaining that UACs “are categorically exempted from the ACA bar”). The Transit Rule, like the other policies, does not change border procedure for UACs—because UACs are not subject to expedited removal, the heightened screening standard that applies under the Transit Rule is not relevant to them—but the Transit Rule does apply to UACs in formal removal proceedings in immigration court. See Interim Final Rule, 84 Fed. Reg. 33,829, 33,839 n.7 (July 16, 2020); see also *Capital Area Immigrants’ Rights Coal. v. Trump*, -- F. Supp. 3d --, 2020 WL 3542481, at \*34 (D.D.C. June 30, 2020).

<sup>176</sup> See *Innovation Law Lab*, 951 F.3d at 1077; *Capital Area Immigrants’ Rights Coal.*, 2020 WL 3542481 at \*46.

<sup>177</sup> See, e.g., Customs and Border Protection, *Custody and Transfer Statistics FY2021* (“Subjects enrolled in multiple programs are only counted once based on the following order: PACR, ACA, HARP, MPP”), <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

independent processing options. For example, CBP had authority to place non-Mexican asylum seekers at the border into screening procedures under the Transit Rule or the Migrant Protection Protocols, but not both.<sup>178</sup> It was not always clear how CBP chose between these options.<sup>179</sup> Other policies applied in tandem. PACR, for example, provided for Central American asylum seekers to be held in CBP custody (rather than ICE custody) while they underwent screening interviews governed by the Transit Rule.<sup>180</sup>

The Trump Administration pre-pandemic policies described above all had notable procedural implications. The Transit Rule and the MPP went into effect broadly enough to fundamentally reshape legal procedure at the border for much of 2019; the combined effect of the two policies was that non-Mexican asylum seekers either faced heightened screening measures or were required to wait in Mexico during formal removal proceedings.<sup>181</sup> But these policies by no means constitute an exhaustive list of Trump Administration policies relevant to asylum processing at the border. Other such policies include the following:

- the Zero Tolerance policy that was in effect for six weeks in 2018, under which family units of undocumented migrants were separated at the border when the parents were referred for criminal prosecution for illegal entry;<sup>182</sup>
- regulations to terminate the *Flores* Settlement Agreement (parts of these are blocked by court order);<sup>183</sup>
- a policy of having CBP officers, rather than USCIS officials, conduct credible fear interviews;<sup>184</sup>
- an Attorney General interpretation of the scope of humanitarian protections from gang and domestic violence that made some undocumented migrants less likely

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<sup>178</sup> See *Innovation Law Lab*, 951 F.3d at 1077 (explaining that the MPP does not apply to aliens placed into expedited removal). The asylum ineligibility created by the Transit Rule, however, applies in the immigration court proceedings of aliens placed into the MPP, even though the Transit Rule does not bear on screening procedures under the MPP. See 8 C.F.R. § 1208.13(c)(4).

<sup>179</sup> See *supra* note 118 (sources from MPP litigation showing absence of clear criteria governing CBP processing choices); Customs and Border Protection, *Custody and Transfer Statistics FY2021* (showing menu of CBP processing options), <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

<sup>180</sup> *Las Americas Immigr. Advoc. Ctr. v. Wolf*, -- F. Supp. 3d --, 2020 WL 7039516, at \*5 (D.D.C. Nov. 30, 2020) (explaining that DHS created PACR to achieve “more effective processing” of aliens subject to the Transit Rule).

<sup>181</sup> Dep’t of Homeland Sec., *Migrant Protection Protocols Metrics and Measures*, at 2 (2020) (showing 68,039 MPP enrollments as of Dec. 31, 2020), [https://www.dhs.gov/sites/default/files/publications/migrant\\_protection\\_protocols\\_metrics\\_and\\_measures\\_3.pdf](https://www.dhs.gov/sites/default/files/publications/migrant_protection_protocols_metrics_and_measures_3.pdf); GAO Credible and Reasonable Fear Report, *supra* note 20, at 74-76 (explaining impact of Transit Rule on asylum screening process).

<sup>182</sup> See *Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1139-40 (S.D. Cal. 2018); Dep’t of Homeland Security, Press Release, *Myth vs. Fact: DHS Zero-Tolerance Policy*, at 3 (June 18, 2018) (“If an adult is referred for criminal prosecution, the adult will be transferred to U.S. Marshals Service custody and any children will be classified as an unaccompanied alien child and transferred to the Department of Health and Human Services custody.”), <https://www.dhs.gov/news/2018/06/18/myth-vs-fact-dhs-zero-tolerance-policy>.

<sup>183</sup> See *Flores v. Rosen*, 984 F.3d 720, 727 (9th Cir. 2020) (“The remaining new regulations relating to accompanied minors depart from the Agreement in several important ways. We therefore affirm the district court’s order enjoining those regulations.”); CRS In Focus IF11799, *Child Migrants at the Border: The Flores Settlement Agreement and Other Legal Developments*, by Kelsey Y. Santamaria.

<sup>184</sup> GAO Credible and Reasonable Fear Report, *supra* note 20, at 11 n.f. (“In June 2019, Border Patrol agents on assignment to USCIS began conducting credible fear interviews and, in September 2019, began conducting credible fear interviews at the family residential center in Dilley, Texas.”).

- to pass their credible fear interviews (some aspects of these are blocked by court order);<sup>185</sup>
- USCIS policy guidance that called for more rigorous credible fear screenings (also blocked by a court order);<sup>186</sup> and
  - a major rule that was set to take effect in January 2021 that, among many other revisions to asylum and withholding of removal regulations, would have adopted a more restrictive interpretation of the credible fear standard and imported more asylum ineligibilities into the screening process (a federal court blocked the rule before it took effect).<sup>187</sup>

These additional policies also fit into the Trump Administration's general approach of preventing more claims from reaching immigration court and avoiding the release of asylum seekers into the United States during evaluation of their claims.

## Trump Administration Policy During COVID-19

In response to the COVID-19 pandemic, the Trump Administration implemented a policy that mostly shut down asylum processing for undocumented migrants at the border.<sup>188</sup> This policy is often called the "Title 42" policy because it purports to derive statutory authority from a public health provision of Title 42 of the *U.S. Code* (specifically, 42 U.S.C. § 265).<sup>189</sup> (As of the date of publication of this report, President Biden had directed agencies to review and consider terminating the policy but the Administration had yet to announce its termination.<sup>190</sup>) Unlike the pre-pandemic policies described above, which favored negative screening determinations and disfavored release into the interior of the United States, the Title 42 policy allows CBP to expel undocumented migrants (including UACs) to Mexico or their countries of origin without any asylum screenings at all.<sup>191</sup> As such, the Title 42 policy does not so much alter asylum procedure

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<sup>185</sup> See CRS Legal Sidebar LSB10207, *Asylum and Related Protections for Aliens Who Fear Gang and Domestic Violence*, by Hillel R. Smith. President Biden has ordered DHS and DOJ to conduct a "comprehensive review" of this issue. E.O. on Comprehensive Regional Framework, *supra* note 168, § 4(c)(i).

<sup>186</sup> See *Kiakombua v. Wolf*, -- F. Supp. --, 2020 WL 6392824, at \*3 (D.D.C. Oct. 31, 2020) (holding that parts of the USCIS "Lesson Plan" for credible fear screenings "are manifestly inconsistent with the INA and its implementing regulations as a matter of law").

<sup>187</sup> *Pangea Legal Servs. v. Dep't of Homeland Sec.*, -- F. Supp. 3d --, 2021 WL 75756 (N.D. Cal. Jan. 8, 2021) (granting nationwide preliminary injunction against the final rule); see Final Rule on Asylum, Withholding of Removal, Credible Fear, and Reasonable Fear, 85 Fed. Reg. 80274-01 (Dec. 11, 2020); see also 97 No. 47 INTERPRETER RELEASES ART. 8, *DHS, EOIR Publish Wide-Ranging Final Rule on Asylum, Withholding, and CAT Claims in Expedited Removal* (Dec. 14, 2020).

<sup>188</sup> Cntrs for Disease Control Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act, 85 Fed. Reg. 31,503 (May 26, 2020) [hereinafter CDC Order].

<sup>189</sup> See, e.g., Customs and Border Protection, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions* (Nov. 19, 2020) (citing 42 U.S.C. § 265 as authority for policy), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>. The statute provides that the Surgeon General, whose authority in this regard has been transferred and delegated to the Centers for Disease Control, "shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert" a "serious danger" of the introduction of a communicable disease into the United States. 42 U.S.C. § 265; see *P.J.E.S. v. Wolf*, -- F. Supp. 3d --, 2020 WL 6770508, at \*2 (D.D.C. Nov. 18, 2020).

<sup>190</sup> E.O. on Comprehensive Regional Framework, *supra* note 168, § 4(a)(ii)(A).

<sup>191</sup> See *id.* ("[P]ersons subject to the [Title 42] order will not be held in congregate areas for processing and instead will immediately be expelled to their country of last transit. In the event a person cannot be returned to the country of last transit, CBP works with interagency partners to secure expulsion to the person's country of origin and hold the person

at the border as dispense with it.<sup>192</sup> The Trump Administration justified the Title 42 policy as a necessary measure to avoid outbreaks of COVID-19 in the CBP facilities where undocumented migrants are typically held following apprehension.<sup>193</sup>

The Title 42 policy makes one specific and one general exception to the unavailability of asylum screenings. The specific exception applies to undocumented migrants who affirmatively claim a fear of torture in the country to which they are to be expelled.<sup>194</sup> With supervisory approval, CBP officers may refer such aliens to an asylum officer if the claim is “reasonably believable,” according to internal CBP documents made available through media reporting and litigation.<sup>195</sup> The general exception is a catch-all for aliens who CBP officers “determine, with approval of a supervisor, should be excepted based on the totality of the circumstances.”<sup>196</sup> Outside of these exceptions, however, the policy directs CBP officers to expel undocumented migrants without any type of asylum screening, even apparently if the migrant affirmatively asserts a fear of persecution.<sup>197</sup> Through February 2021, CBP had expelled more than 500,000 migrants at the southern border under the Title 42 policy since it went into effect in March 2020.<sup>198</sup>

There are questions about whether the Title 42 policy violates the INA or is otherwise illegal.<sup>199</sup> In November 2020, a federal district court held the policy likely illegal and issued a preliminary

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for the shortest time possible.”); Dep’t of Homeland Sec., *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus* (Oct. 19, 2020) (“To help prevent the introduction of COVID-19 into our border facilities and into our country, aliens subject to the order will not be held in congregate areas for processing by CBP and instead will immediately be turned away from ports of entry. Those encountered between ports of entry after illegally crossing the border similarly will not be held in congregate areas for processing and instead, to the maximum extent feasible, will immediately be returned to their country of last transit.”) [hereinafter DHS Fact Sheet], <https://www.dhs.gov/news/2020/10/19/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus>.

<sup>192</sup> See DHS Fact Sheet, *supra* note 191 (providing that undocumented migrants “will immediately be turned away from ports of entry” and that unlawful entrants “will immediately be returned to their country of last transit”).

<sup>193</sup> *Id.* (“These aliens are processed in stations designed for short-term processing, where distancing is not a viable option, creating a serious danger of an outbreak.”); CDC Order, 85 Fed. Reg. 31,503, 31,506 (May 26, 2020) (“Because the limited medical capacity in POEs and Border Patrol stations presents a significant obstacle to safely managing the risk of COVID-19 among covered aliens held in these facilities, the public health risk is best addressed by suspending the introduction of covered aliens into land and coastal POEs and Border Patrol stations.”).

<sup>194</sup> Customs and Border Protection, *COVID-19 CAPIO* at 1-2, 4 [hereinafter CAPIO Memo], <https://assets.documentcloud.org/documents/6824221/COVID-19-CAPIO.pdf>. This internal CBP memorandum was originally disclosed to the public through the press but has since been relied upon in federal court litigation without triggering objections from CBP as to its authenticity. *Flores v. Barr*, CV 85-4544, 2020 WL 5491445, at \*4 n.4 (C.D. Cal. Sept. 4, 2020) (“The Capio Memo is an internal document published by the press and cited by Plaintiffs, but Defendants do not dispute its authenticity.”); see *P.J.E.S. v. Wolf*, -- F. Supp. 3d --, 2020 WL 6770508, at \*4 (D.D.C. Nov. 18, 2020) (also relying on the Capio Memo for details of CBP’s implementation of the Title 42 policy).

<sup>195</sup> Capio Memo, *supra* note 194, at 4.

<sup>196</sup> CDC Order, 85 Fed. Reg. at 31,507; Capio Memo, *supra* note 194, at 3 (“Based on available evidence and only for extenuating circumstances, agents may determine to process under existing statutory authorities found in Title 8 of the US code [instead of under Title 42]. The authority to make this determination resides with the Chief Patrol Agent and cannot be delegated below the Watch Commander position.”).

<sup>197</sup> Capio Memo, *supra* note 194, at 1-2.

<sup>198</sup> Customs and Border Protection, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions* (Feb. 10, 2021) (Fiscal Year 2021 statistics), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>; Customs and Border Protection, *FY 2020 Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions* (Nov. 20, 2020), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020>.

<sup>199</sup> *P.J.E.S. v. Wolf*, -- F. Supp. 3d --, 2020 WL 6770508, at \*8-12 (D.D.C. Nov. 18, 2020) (holding that Title 42 likely does not authorize the executive branch to expel migrants from the United States without adherence to the requirements of the INA).



injunction barring the government from expelling UACs under it while litigation continues.<sup>200</sup> The U.S. Court of Appeals for the D.C. Circuit stayed that injunction on January 29, 2021,<sup>201</sup> but the Biden Administration exempted UACs from expulsion under the Title 42 policy the following day.<sup>202</sup> Separately, the federal court that oversees the *Flores* Settlement Agreement ruled that the government may not hold children—whether accompanied or unaccompanied—in hotels while arranging for their expulsion under the Title 42 policy (a practice known as “hoteling”),<sup>203</sup> except for “*brief* hotel stays (not more than 72 hours) as necessary and in good faith to alleviate bottlenecks in the intake processes at licensed facilities [for UACs or families].”<sup>204</sup> Thus, although the Title 42 policy remains in effect, currently DHS does not apply it to UACs and cannot implement it by holding family units with children in hotels while processing their expulsion. (Also, in practice, the extent to which Mexico is willing to accept undocumented migrants from other countries appears to constrain how broadly DHS applies the policy.<sup>205</sup>)

DHS and DOJ issued a new rule in December 2020, originally set to take effect on January 22, 2021, that would incorporate a version of the Title 42 policy into asylum screening regulations under the INA.<sup>206</sup> The Biden Administration has delayed the effective date until December 31, 2021, so that it may review the rule.<sup>207</sup> The rule, if implemented, would authorize asylum officers to enter negative screening determinations for aliens in expedited removal who are deemed to be public health risks based on categorical grounds (such as the outbreak of a “communicable disease of public health significance” in the asylum seeker’s country of origin or country of transit).<sup>208</sup>

## Regulatory Outlook Under the Biden Administration

The Trump Administration showed that the executive branch has considerable power to reshape asylum procedure at the border without legislative changes. Even with federal courts scrutinizing the legality of every major policy, the Trump Administration succeeded in refashioning asylum procedure at the border before the pandemic (primarily through the MPP and the Transit Rule) and mostly eliminated asylum processing on public health grounds during the pandemic (through the Title 42 policy).

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<sup>200</sup> *Id.*

<sup>201</sup> *P.J.E.S. v. Gaynor*, No. 20-5357 (D.C. Cir. Jan. 29, 2021) (“Appellants have satisfied the stringent requirements for a stay pending appeal.”).

<sup>202</sup> Notice of Temporary Exception from Expulsion of Unaccompanied Noncitizen Children, 86 Fed. Reg. 9,942, 9,942 (Feb. 17, 2021) (“The temporary exception went into effect on or about January 30, 2021.”).

<sup>203</sup> *Flores v. Barr*, No. CV 85-4544, 2020 WL 5491445, at \*1 (C.D. Cal. Sept. 4, 2020); *stay denied*, 977 F.3d 742 (9th Cir. 2020).

<sup>204</sup> *Id.* at \*4. Another lawsuit challenges the legality of the policy as applied to family units. See Complaint, *Huisha-Huisha v. Gaynor*, No. 21-cv-00100 (D.D.C. Jan. 12, 2021); see also Complaint, *Poe v. Mayorkas*, Civ. No. 21-cv-10218 (D. Mass. Feb. 08, 2021) (challenging expulsions of seven asylum-seekers under the policy).

<sup>205</sup> See Nick Miroff and Kevin Sieff, *Mexico Has Stopped Accepting Some Central American Families ‘Expelled’ by U.S. along the Border*, WASH POST (Feb. 3, 2021, 8:01 PM), [https://www.washingtonpost.com/national/mexico-has-stopped-accepting-central-american-families-expelled-by-us-along-the-border/2021/02/03/39da9828-6650-11eb-bf81-c618c88ed605\\_story.html](https://www.washingtonpost.com/national/mexico-has-stopped-accepting-central-american-families-expelled-by-us-along-the-border/2021/02/03/39da9828-6650-11eb-bf81-c618c88ed605_story.html).

<sup>206</sup> Security Bars and Processing, 85 Fed. Reg. 84,160, 84,193 (Dec. 23, 2020); see Interpreter Releases Daily 1 12-24-20, *Final Rule Adopts Communicable Disease Risk as Grounds for National Security Bar to Asylum and Withholding* (Dec. 24, 2020).

<sup>207</sup> Security Bars and Processing; Delay of Effective Date, 86 Fed. Reg. 15,069 (Mar. 22, 2021).

<sup>208</sup> 85 Fed. Reg. at 84,193.



The Biden Administration clearly intends to break with the Trump Administration approach of imposing heightened screening standards and of requiring many asylum seekers to wait in Mexico during proceedings.<sup>209</sup> The Biden Administration has already terminated or begun to roll back most of the key, pre-pandemic Trump Administration policies, as **Table 1** shows. The pandemic-related Title 42 policy remains in place (except for UACs), but President Biden has ordered implementing agencies to review and consider terminating it.<sup>210</sup> Reportedly, the Biden Administration has also negotiated with parties challenging the legality of the Title 42 policy in federal court to obtain time to phase out the policy.<sup>211</sup> Thus, the key question about the Trump policies that endures is how long the Biden Administration will retain the pandemic-related policy.

The form that asylum processing will actually take under the Biden Administration remains to be seen. The President has signaled a commitment to expanding access in Central America to refugee processing and other immigration programs<sup>212</sup>—measures intended to reduce the strain on asylum processing at the border.<sup>213</sup> The concrete details of how asylum processing at the border will work are likely to emerge only after the termination of the Title 42 policy. Will DHS return to the Obama Administration model and rely heavily on its discretion to release families and other undocumented migrants with NTAs? Or will it develop some new processing model that fits within the statutory parameters?

## Reform Ideas

Many proposals to reform asylum procedure at the border converge upon the concept of setting up rapid immigration court proceedings to resolve claims quickly and definitively, perhaps within 30- 45 days.<sup>214</sup> Some proposals contemplate that asylum seekers—including family units—would remain detained during the rapid proceedings,<sup>215</sup> while others would make broad use of alternatives to detention.<sup>216</sup> The key idea of these proposals is to stand up an adjudication system

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<sup>209</sup> E.O. on Comprehensive Regional Framework, *supra* note 168, § 4(a)(ii) (directing the administration to “begin taking steps to reinstate the safe and orderly reception and processing of arriving asylum seekers, consistent with public health and safety and capacity constraints.”).

<sup>210</sup> See *supra* note 202 and accompanying text.

<sup>211</sup> Maria Sacchetti and Nick Miroff, *Squeezed on immigration, Biden braces for border crisis*, WASH. POST (Feb. 25, 2021), at A13.

<sup>212</sup> E.O. on Comprehensive Regional Framework, *supra* note 168, § 3(a) (ordering agencies to study plans for expanding refugee processing and complementary forms of relief for nationals of Northern Triangle countries).

<sup>213</sup> See *infra* “Reform Ideas.”

<sup>214</sup> HSAC Interim Report, *supra* note 63, at 2 (“At a minimum, legislation is needed to modify asylum procedures, at least temporarily, so that a hearing and decision can be provided to family members within 20 or 30 days. We also are recommending that Congress immediately fund a substantial increase in immigration judges.”), 11-12 (recommending that DHS surge immigration judges to border processing centers “with the single goal of resolving all [family unit] asylum claims at the immigration court stage within twenty days or less”); Migration Policy Institute, *From Control to Crisis*, at 35 (Aug. 2019) (calling for “significant new investments and revamped procedures that enable fair [asylum] processing within months, not years”) [hereinafter MPI Control to Crisis Report], <https://www.migrationpolicy.org/sites/default/files/publications/BorderSecurity-ControltoCrisis-Report-Final.pdf>; HUMANE Act of 2019, H.R. 2522, 116th Cong. § 437(d) (2019) (companion bill, S. 1303) (providing for the placement of immigration judges in border processing centers “to expeditiously adjudicate the immigration proceedings of family units and other aliens”).

<sup>215</sup> HSAC Interim Report, *supra* note 63, at 9, 12 (calling for legislation to terminate the Flores Settlement Agreement, and opining that asylum-seeking families should be detained during adjudication process); H.R. 2522 § 2 (similar).

<sup>216</sup> MPI Control to Crisis Report, *supra* note 214, at 35-36 (“U.S. authorities should put into place robust case-management systems to ensure appearance for asylum interviews, court dates, and removal requirements as the

capable of delivering final decisions for most claims for humanitarian protections that originate at the border within weeks or months.<sup>217</sup> The current system, in contrast, provides for rapid screening of claims but ultimately deposits most of them into slower court proceedings in the interior of the country.<sup>218</sup>

Other proposals would retain the current system's reliance on screening procedures but would alter those procedures in important ways. Restrictive ideas include authorizing the swift repatriation of UACs from noncontiguous countries, subject to criteria similar to those that currently apply to children from Mexico;<sup>219</sup> raising the credible fear threshold so that more asylum protection claims fail during the screening process;<sup>220</sup> and imposing asylum ineligibilities applicable at the screening phase on unlawful entrants and on aliens who forgo opportunities to apply for refugee protections abroad (see below).<sup>221</sup> A more protective proposal would leave the current screening standards in place but give asylum officers within USCIS the authority to grant humanitarian protections in meritorious cases, thereby definitively resolving such cases more quickly and reducing the flow of cases that proceed to immigration court following positive screening determinations.<sup>222</sup>

Another category of proposals would take a substantive approach to asylum reform by expanding the opportunities for legal immigration available to the Northern Triangle populations. By expanding the legal pathways, such proposals seek to diminish the role that asylum adjudication for undocumented migrants at the border currently plays in regulating migration from these countries.<sup>223</sup> To this end, some recent bills would expand refugee processing in Central America. The U.S. Citizenship Act, introduced in the 117th Congress with President Biden's support, would mandate the placement of refugee processing centers throughout the Northern Triangle.<sup>224</sup> A pair of Senate bills from the 116th Congress also sought to expand refugee processing in the region through the creation of processing centers. The more expansive of these also would have mandated the admission of at least 100,000 refugees per year from Northern Triangle countries.<sup>225</sup> The other, more restrictive proposal included a trade-off: it would have made aliens ineligible for asylum in the United States if there was a processing center in or next to their country of origin.<sup>226</sup>

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alternative to the prohibitive costs and emotional damage of prolonged detention.”).

<sup>217</sup> *See id.*

<sup>218</sup> *See supra* “Procedural Framework in Statute: Expedited Removal and Credible Fear,” GAO Credible and Reasonable Fear Report, *supra* note 20, at 13-14 (noting that 71.4% of credible and reasonable fear screenings result in positive determinations, per FY2014-FY2019 data).

<sup>219</sup> HSAC Interim Report, *supra* note 63, at 3; Secure and Protect Act of 2019, S. 1494, 116th Cong. § 2(b) (2019).

<sup>220</sup> S. 1494, 116th Cong. § 3(a)(1) (raising credible fear to a “more likely than not” standard); Fix the Immigration Loopholes Act, H.R. 586, 116th Cong. § 201 (2019) (similar).

<sup>221</sup> S. 1494 § 3(b)-(c).

<sup>222</sup> Migration Policy Institute, *The U.S. Asylum System in Crisis*, at 25-26 (Sep. 2018), <https://www.migrationpolicy.org/sites/default/files/publications/MPI-AsylumSystemInCrisis-Final.pdf>.

<sup>223</sup> *See* David J. Bier, CATO Institute, *Legal Immigration Will Resolve America's Real Border Problems* (Aug. 20, 2019), <https://www.cato.org/publications/policy-analysis/legal-immigration-will-resolve-americas-real-border-problems>; *see also* E.O. on Comprehensive Regional Framework, *supra* note 168, § 3 (directing agencies to review ways to expand access in the Northern Triangle to refugee processing, complementary forms of relief, and visa programs).

<sup>224</sup> U.S. Citizenship Act of 2021, S. 348, 117th Cong. § 2204 (2021) (companion bill, H.R. 1177).

<sup>225</sup> *See* Refugee Protection Act of 2019, H.R. 5210, 116th Cong. §§ 205-06 (2019) (companion bill, S. 2936). The bill also provided for adjudication of some special immigrant visas and parole applications at the processing centers. *Id.* §§ 207-08.

<sup>226</sup> S. 1494, 116th Cong. § 3(c).

Beyond the concept of expanding refugee processing in Central America, other ideas in this category include expanding immigration parole, special immigration visa programs, and work visa programs for Central Americans.<sup>227</sup>

It is common for proposals to combine aspects of all three of these ideas—rapid court proceedings, altered screening procedures, and substantive alternatives.<sup>228</sup> Also, proposals often call for reforms that do not relate directly to asylum law or procedure, such as increased investment in Northern Triangle countries to reduce the outflow of undocumented migration and closer coordination with Mexico and other regional partners on efforts to expand their refugee processing capacity and reduce undocumented migration.<sup>229</sup>

## Conclusion

The work of adapting asylum procedure at the border to address the increased flow of asylum seekers in recent years has been performed almost entirely by the executive branch, with federal courts reviewing the legality of major policies and with Congress mostly on the sidelines. Congress made its last comprehensive statement on asylum procedure at the border in 1996, when it enacted the expedited removal system and its credible fear screening process. At that time, the flow of undocumented migration to the southern border consisted mostly of Mexican adults traveling without children. When the flow shifted around 2013 toward Central American children and families who sought humanitarian protections at higher rates, a federal court blocked an attempt by the Obama Administration to detain family units during rapid immigration court proceedings.<sup>230</sup> DHS resorted to releasing many asylum seekers—especially those in family units—into the interior of the United States during long court proceedings. The Trump Administration changed course. It developed an array of policies that generally sought to enable DHS officials to reject more claims during initial screening procedures—so that more asylum seekers could be removed before their claims reached immigration court—and through other policies geared to avoid releasing asylum seekers in the United States during the adjudication process (including by requiring them to wait in Mexico). In response to the COVID-19 pandemic, the Trump Administration implemented a policy that mostly terminated asylum processing at the border altogether, allowing DHS to remove asylum seekers without any type of evaluation of their claims. Federal courts blocked many of the Trump Administration policies.<sup>231</sup> The Biden Administration has taken steps to dismantle most of the Trump Administration’s pre-pandemic policies but has left the pandemic policy in place during a review period.<sup>232</sup> How asylum processing will take shape after that review remains to be seen.

Reform proposals generally focus on expediting the asylum adjudication process with a goal of delivering definitive judgments more quickly. Other proposals would take a substantive approach

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<sup>227</sup> See S. 348, 117th Cong. §§ 2207, 2208; H.R. 5210, 116th Cong. § 208; CATO Institute: Legal Immigration Will Resolve America’s Real Border Problems, <https://www.cato.org/publications/policy-analysis/legal-immigration-will-resolve-americas-real-border-problems>; see also E.O. on Comprehensive Regional Framework, *supra* note 168, § 3 (directing agencies to study expansion of lawful immigration pathways, including visa programs).

<sup>228</sup> See, e.g., S. 1494, 116th Cong. §§ 3-4, 6; H.R. 5210, 116th Cong. §§ 102, 104(d)-(e), 201.

<sup>229</sup> See S. 348, 117th Cong. §§ 2101-2107; MPI Control to Crisis Report, *supra* note 214, at 35-36; HSAC Interim Report, *supra* note 63, at 12; see also E.O. on Comprehensive Regional Framework, *supra* note 168, § 2 (ordering the preparation of a “Root Causes Strategy” and a “Collaborative Management Strategy” for migration in the region).

<sup>230</sup> See *supra* note 141 (citing decisions from the *Flores* litigation).

<sup>231</sup> See *supra* Table 1.

<sup>232</sup> See *supra* “Regulatory Outlook Under the Biden Administration.”

and seek to diminish the significance of asylum's role as the substantive rule of decision for undocumented migration to the border, especially for Central Americans.

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