HOUSE COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY

THE BIDEN ADMINISTRATION'S REGULATORY AND POLICYMAKING EFFORTS TO UNDERMINE U.S. IMMIGRATION LAW
JANUARY 17, 2024

PREPARED TESTIMONY OF
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Chairman Comer, Ranking Member Raskin, and distinguished members of this committee, thank you for the opportunity to present testimony regarding the regulatory and policymaking efforts that have directly undermined U.S. immigration law, triggering a crisis of epic proportions.

Using a cadre of intentional mechanisms, the Biden Administration has waged war against the immigration system of the United States. The results speak for themselves. As each memorandum, regulatory action, or policy decision is announced, the crisis at the southwest border grows exponentially. There is a direct correlation between these policies and the exploding number of encounters, the number of known (and unknown) got-aways, and backlogs at both U.S. Citizenship and Immigration Services (USCIS) and the immigration courts. The system has been brought to its knees and the Administration does not appear to be slowing down. One thing is clear – this is all by design.

I am optimistic that this committee, along with the House Judiciary and House Homeland Committees, recognize the critical importance of examining the Administration's actions since January 2021. These actions have caused a humanitarian crisis, a public safety crisis, a national security crisis, placing tremendous burdens on state and local governments. The Department of Homeland Security (DHS) and the Department of Justice (DOJ) must be subject to aggressive oversight and be made to explain why enforcing the laws as Congress has proscribed is not an option for them. They must be made to account for their policy choices, and they must be forced to repair the damage and restore integrity to our immigration system.

Executive Order and Memos

Beginning on Day 1 of the Biden Administration, DHS Acting Secretary, David Pekoske, halted all deportations for 100 days.[1] This was predicated on interim enforcement priorities that the Department wanted Immigration and Customs Enforcement (ICE) to implement. In its view, the only way to sufficiently update priorities was to reset the entire system by halting all enforcement actions. This was followed up by ICE Acting Director Tae Johnson's memo of February 18, 2021. This memo was the first step to implement the priorities and included

[1] Memo. from David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), available at: https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

reporting requirements for enforcement actions and the need to justify any action to superiors through a pre-approval process.[2]

At the White House, on February 2, 2021, President Biden then issued his "Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans."[3] The order required DHS, in conjunction with DOJ and the Department of State to "identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits and make recommendations on how to remove these barriers."[4] This was followed with an executive order that, among other things, created the battle cry of the Administration – removing barriers to immigration.

To that end, on September 30, 2021, Secretary Alejandro Mayorkas issued a memorandum entitled "Guidelines for the Enforcement of Civil Immigration Law" which outlined the appropriate instances in which DHS was authorized to take action against aliens either unlawfully present or lawfully present but removable.[5] [6] Specifically, Secretary Mayorkas outlined three main buckets for removal – 1) threats national security; 2) threats to public safety; and 3) threats to border security. While, in theory, this would seem to encompass many aliens who should properly be targeted for enforcement actions by ICE, in reality, the numerous carve-outs, loose definitions, and required factors for consideration make it nearly impossible to move forward with most enforcement actions. These poorly defined categories could be seen to give even the most serious of criminal aliens a free pass in the interest of equity and "justice."

On April 3, 2022, ICE's Principal Legal Advisor, Kerry Doyle, issued a memo on prosecutorial discretion, aligning ICE action in immigration court with the Mayorkas Memo.[7] The April Memo provided that ICE attorneys were to exercise prosecutorial discretion in cases that were not deemed priority cases. This could include dismissal as well as administrative closure (pausing the case indefinitely).

These memos all seek to redefine immigration enforcement by creating fictional priorities with no basis in law. Neither the Immigration and Nationality Act's (INA) section on inadmissibility nor its section on removability suggests a prioritization of grounds for enforcement. Instead, it enumerates a list of grounds of inadmissibility and removability that the DHS is required to enforce. Its failure to do so in the name of prosecutorial discretion is a dereliction of duty and cannot be permitted to continue.

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[2] Memo. from Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021), available at: https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf

[3] Exec. Order No. 14012, 86 Fed. Reg. 8277 (Feb. 5, 2021).

[4] *Id*.

[5] Memo. From Alejandro N. Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), available at: https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.

[6] On June 10, 2022, the U.S. District Court for the Southern District of Texas vacated this memorandum.

[7] Memo. from Kerry E. Doyle, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* (Apr. 3, 2022), available at: https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

Prosecutorial discretion is a critical tool for any police or prosecuting agency, provided it is used correctly in accordance with the law. The Supreme Court has even upheld such measures. Writing for the Court, Justice Scalia found that a "…well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes."[8] In interpreting "seemingly mandatory legislative commands," the Court found that the there exists a "deep-rooted nature of law enforcement discretion…"[9] However, that discretion is not absolute and cannot replace whole statutory text. Prosecutorial discretion should be viewed in the context of a case-by-case analysis in an individual matter. The use of prosecutorial discretion to exempt an entire class of individuals from law enforcement action, as is suggested in these memos, is not discretion at all.

Removals are the ultimate measure of effective immigration enforcement, and the numbers clearly demonstrate the stunning decrease during this Administration due to issuance of these memos. Based on public data, from FY 2017-2020, ICE removed illegal aliens at a rate of 32% of the aggregate number of encounters.[10] From FY 2021-2023, ICE has only removed aliens at a rate of 3.5% of the aggregate number of encounters. If this Administration had simply kept pace with the prior and kept policies in place, there would have been 2,535,758 illegal aliens removed, as opposed to the 273,768 who have been removed thus far.[11]

During the period that these memos were in effect, and beyond, the number of encounters along the southwest border steadily climbed. Under the current Administration, Customs and Border Protection (CBP) has recorded more than 8.5 million encounters at America's borders[12], including more than 7 million at the Southwest border alone.[13] For comparison, CBP recorded just over three million encounters nationwide from FY 2017-2020 combined.[14] These are just the known and reported numbers and do not account for the thousands of "gotaways" who were able to elude Border Patrol agents.

The numbers simply do not add up and the result is lopsided enforcement compared to the record number of aliens entering.

The Regulations

Under the guise of removing barriers, DHS, along with DOJ, have engaged in several rulemakings purportedly aimed at creating efficiency and expediency at the border.

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[8] *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005).
[9] *Id*. at 761 (citing *Chicago v. Morales*, 527 U.S. 41 (1999)).
[10] U.S. Immigration and Customs Enforcement, *ICE Statistics (Archived Content)* (Nov. 17, 2023) https://www.ice.gov/remove/statistics.
[11] U.S. Immigration and Customs Enforcement, *Fiscal Year 2023 ICE Annual Report* (Dec. 29, 2023) https://www.ice.gov/doclib/eoy/iceAnnualReportFY2023.pdf.
[12] U.S. Customs and Border Protection, *Nationwide Encounters* (Dec. 22, 2023) https://www.cbp.gov/newsroom/stats/nationwide-encounters.
[13] U.S. Customs and Border Protection, *Southwest Land Border Encounters* (Dec. 22, 2023) https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.
[14] U.S. Customs and Border Protection, *CBP Enforcement Statistics* (Dec. 22, 2023) https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics.

It is well-established that an agency may only act as "authoritatively prescribed by Congress."[15] It is unlawful for agencies to act in violation of its own regulations or enabling statutory authority.[16] The *Chevron* Doctrine states generally, that where "…Congress has spoken to the precise question at issue…" and that the "…intent of Congress is clear…," an agency may not act.[17] Yet the regulatory efforts undertaken by the Biden Administration have reinterpreted unambiguous statutes and have imposed its own policy when clear Congressional mandate exists.

The earliest example was rulemaking aimed at credible fear and the expedited removal process. Under section 235(b)(1) of the INA[18], aliens apprehended by CBP entering illegally along the border or without proper documents at the ports of entry are subject to "expedited removal", meaning that they can be quickly removed without receiving removal orders from an immigration judge (IJ).

If an arriving alien claims to fear harm or asks for asylum, however, CBP must hand the alien over to an asylum officer (AO) in USCIS for a "credible fear" interview.[19] Credible fear is a screening process to assess whether the alien may have an asylum claim, and thus proving credible fear is easier than establishing eligibility for asylum.[20] If an AO finds that the alien does not have credible fear (makes a "negative credible fear determination"), the alien can ask for a review of that decision by an IJ.[21] If the IJ upholds the negative credible fear determination, the alien is to be removed immediately.

When an AO or IJ makes a "positive credible fear determination", on the other hand, the alien is placed into removal proceedings to apply for asylum before an IJ.[22] Most aliens who have claimed a fear of return in the past received a positive credible fear assessment (83 percent between FY 2008 and FY 2019)[23], but less than 17 percent of those who received a positive credible fear assessment were ultimately granted asylum.[24]

In 2022, DHS issued an interim final rule entitled "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims

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[15] City of Arlington v. FCC, 529 U.S. 290, 298 (2013).
[16] *Id*.; Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512)1994).
[17] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984).
[18] Section 235(b)(1) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[19] Section 235(b)(1)(A)(ii) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[20] *See* section 235(b)(1)(B)(v) of the INA (defining "Credible fear of persecution"), *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[21] Section 235(b)(1)(B)(iii)(III) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[22] Section 235(b)(1)(B)(ii) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[23] Credible Fear and Asylum Process: Fiscal Year (FY) 2008 – FY 2019, U.S. Dep't of Justice, Executive Office for Immigration Review (generated Oct. 23, 2019), *available at*: https://www.justice.gov/eoir/file/1216991/download.
[24] *Id*.

by Asylum Officers."[25] Under the new process, a positive credible fear determination by a DHS asylum officer will lead to a non-adversarial asylum interview before another DHS asylum officer. Asylum officers who find an alien eligible for a form of protection lesser than full-fledged asylum, such as statutory withholding of removal[26] or protection under the Convention Against Torture[27], must still refer the matter to a DOJ immigration judge who may consider the entire case. That is hardly streamlining the process.

Even more concerning was that the written summary of the original credible fear interview doubles as an alien's asylum application, rendering the requirement that an alien file an asylum application moot. This shifts the burden to present and prepare a meritorious claim for protection. Aliens may rely on first-made claims of their story, changing or including relevant details in advance of the asylum interview or court proceeding, but without having to affirmatively file an application. While this, in and of itself, does not ensure an asylum grant, it certainly provides a path for fraud. It also renders a key anti-asylum fraud measure moot.

In addition to the practical problems associated with this rule, it impermissibly shifts authorities from DHS and DOJ. As Congress was creating the new DHS, it specifically determined which functions would be enumerated. [28] Regarding asylum officers, or USCIS in general, Congress specified which immigration functions would be transferred to the new created department.[29] Section 451 of the HSA established the Bureau of Citizenship and Immigration Services and provided its function as transferred from the DOJ.[30] By including a catchall provision for any functions that may have been missed in the paragraphs 1 through 4, it is apparent that the intent was to ensure that whatever adjudicative functions were being performed

[25] Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (Interim Final Rule Mar. 29, 2022) (to be codified at 8 C.F.R. parts 208, 212, 235, 1003, 1208, 1235, and 1240).

[26] Statutory withholding of removal specifies that an alien may not be removed "to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

[27] Following the U.S. ratifying its signing of the Convention Against Torture in 1994, Congress implemented CAT protections in Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 aimed at not effecting the removal of a person who would be subjected to torture upon such removal. *See* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. 105-277, Div. G, Tit. XII, chap. 3, subchap. B, section 2242(a) (1998).

[28] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

[29] *Id*.

[30] *Id*. at §451(b), 116 Stat. 2135, 2196 (2002). ("(b) Transfer of Functions from the Commissioner. – In accordance with title XV (relating to transition provisions), there are transferred from the Commissioner of Immigration and Naturalization Services the following functions and all personnel, infrastructure, and funding provided to the Commissioner in support of such functions immediately before the effective date specified in section 455:

(1) Adjudications of immigrant visa petitions.
(2) Adjudications of naturalization petitions.
(3) Adjudications of asylum and refugee applications.
(4) Adjudications performed at service centers.
(5) All other adjudications performed by the Immigration and Naturalization Service immediately before the effective date specified in section 455.")

by INS prior to the transfer, would be continued by USCIS subsequent to it. Nothing in the provision suggests that any further functions be transferred.

As additional evidence that the Executive Office for Immigration Review (EOIR) functions were not transferred, the HSA affirmatively established EOIR within DOJ. This section, ultimately codified in INA, states:

> (1) *In general.* – The Attorney General shall have such authorities and functions under this Act and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.[31][32]

This provision makes clear that the Attorney General retained the functions of EOIR to include the authority to order deportation from the United States. Nowhere in the HSA nor in the INA is there any reference to USCIS, exercising authority to order removal. As the former INS did not exercise such authority, and no such functions were specifically transferred to USCIS, the statute is not ambiguous or silent on the matter. Congressional intent is clear that such quasi-judicial functions would remain with EOIR where such functions have been exercised exclusively since 1983.

Accordingly, DHS, through USCIS, is now taking on additional authorities aimed at processing in aliens faster and getting them full-fledged asylum interview, in a non-adversarial manner, without the benefit of immigration court or ICE trial attorney's input. This is rulemaking run amok as it is contrary to statute, contrary to long-existing policy, and directly encroaches on DOJ..

A subsequent notice of proposed rulemaking was published on February 23, 2023.[33] Starting with the name, "Circumvention of Lawful Pathways," the proposed role is an ineffective measure and empty gesture. Despite its perceived enforcement provisions, this rule, if implemented, would allow most aliens to arrive at or between ports of entry, make fraudulent claims of fear to enter the U.S. or continue to utilize unlawful mass parole programs to accomplish the same. As the Biden Administration continues to steadfastly grip to its executive

[31] 8 U.S.C. 1103(g).

[32] The Immigration Reform, Accountability and Security Enhancement Act of 2002 (S. 2444; 107th Cong.) was introduced in May of 2002 but was never passed. This language was retained for the Homeland Security Act of 2002, Pub. L. No. 107-296, § 1102, 116 Stat. 2135, 2273-2274 (2002).

[33] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

order on removing barriers to immigration,[34] this rule, finalized on May 16, 2023 will do exactly that.[35]

The rule may be framed as an enforcement tool to limit the number of aliens who will ultimately be able to receive asylum, however we are hard-pressed to find any examples of classes of aliens who will actually be kept out of the process under this rule.

The crux of the rule is the concept that a presumption of asylum ineligibility exists for any alien entering the United States who does not meet certain criteria. Specifically, the proposed rule requires that to be eligible for asylum one of three criteria must be met: (1) the alien must have appropriate documentation; (2) must present at a port of entry with a prescheduled appointment through the CBP ONE App; or (3) must have sought protection in a third country and received a final determination. The last criterion is akin to the Third Country Transit Rule, which likewise largely prohibited asylum eligibility for a non-contiguous alien who did not apply for protection in a country where such processes are available.[36]

The similarities to the previous rule end there, however. While this appears to be a strong measure to control migration along the southern border, it becomes apparent that the exceptions swallow the rule. We are left with the question of to whom this rule will actually apply once implemented. Of the three criteria, the one that we presume will most often be utilized is the prescheduled appointments. It is not likely that many aliens will suddenly obtain legitimate documentation and, if they were able to do so, they likely would not be applying for asylum but would be entering on a type of visa. This is an important distinction because credible fear procedures would not apply to an admitted alien (i.e. one that actually has a valid authorization). The third criterion may be used more often than the first, but it is unclear to the extent that an alien would avail themselves of protection in Mexico and other nations in Central and South America. Whether they are being smuggled to the United States or make the journey on their own, the lack of resources and familiarity with the law will also make this criterion rarely met.

The rule is clearly encouraging aliens to use the second criterion. A prescheduled appointment through the CBP ONE App is the most available option for aliens with access to smart phones or other technology allowing them to contact the system. However, even this criterion is waived if the alien can demonstrate that "it was not possible to access or use the…system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle."[37] In essence, everything must align perfectly for this criterion to be the basis

[34] Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 2877 (Feb. 5, 2021).
[35] Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (Final on May 16, 2023)(to be codified at 8 C.F.R. parts 208 and 1208).
[36] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11750-11752 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).
[37] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11750 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

for the presumption of ineligibility. Relying on technology is itself a risky proposition as factors such as bugs within the app or lack of available cellular service or a reliable internet connection could all hamper an alien's ability to successfully schedule an appointment. Additionally, while we do not have statistics on literacy rates of migrants, it would be fairly common to find migrants without a strong grasp of the English language. If language and literacy are included as prerequisites, this will likely include a far larger population of migrants who would overcome the rule's presumption. Lastly, the catchall of "other or ongoing and serious obstacle" is left undefined in the regulatory text. As asylum officers and immigration judges will be trained on identification of the presumption, leaving a catchall which will seemingly be within the discretion of the adjudicator, will allow virtually *any* reason to pass muster. This will result in the presumption being raised against hardly any alien crossing into the United States.

For those few aliens against whom the presumption will be raised, the rule has fashioned it as a rebuttable presumption. Again, the exceptions and now the rebuttals swallow the rule itself. An alien may rebut the presumption when proving that the alien has a medical emergency, "faces an imminent and extreme threat to life or safety," or meets the statutory definition of trafficking victims.[38] Of the three, the most concerning is the threat to life or safety. It is well-established that the trek to the United States is dangerous with more migrants killed or kidnapped each year. The dangers of the journey are further exacerbated with the influence of cartels and other criminal organizations that view smuggling migrants as a for-profit business without regard to their safety. From FY 2017 through FY 2021, CBP has reported over 1,700 migrant deaths.[39] FY 2021 had the most in a single year with 568 deaths.[40] Additionally, in that same time period, Border Patrol rescued over 8,400 individuals.[41] FY 2021 again saw the most rescues in a single year with 3,423.[42] These numbers only represent the deaths and emergencies reported by CBP, not other federal, state, and local agencies and it is unknown how many bodies have never been discovered. The journey to the southern border of the United States is inherently a journey where an alien will face extreme threats to life and safety from beginning to end. To add this as an exception is to exempt the entire population of migrants that have traveled with the assistance of smugglers and other criminal enterprises.

While the rule claims to disincentivize illegal border crossers, the Department's provisions have instead created additional incentives to make the perilous journey either as unaccompanied children or with children in tow. In addition to the fact that the NPRM does not apply to unaccompanied children, the DOJ rule requires granting asylum despite ineligibility in an effort to preserve family unity. In a relevant portion, the DOJ regulation states that "[w]here a principal asylum applicant is eligible for withholding…and would be granted asylum but for the

[38] *Id*.
[39] U.S. Customs and Border Protection, *Border Rescues and Mortality Data* (Feb. 6, 2023), https://www.cbp.gov/newsroom/stats/border-rescues-and-mortality-data.
[40] *Id.*
[41] *Id.*
[42] *Id.*

presumption…and where an accompanying spouse or child …does not independently qualify for asylum or other protections…the presumption shall be deemed rebutted."[43] Caselaw has long held that grantees of withholding of removal cannot receive derivative benefits for their spouses and children.[44] This provision seeks to sidestep that issue by granting full asylum status to the principal and family even if the principal alien cannot otherwise rebut the presumption.

More recently, DOJ undertook rulemaking to purportedly make the U.S. Immigration Courts more efficient.[45] Efficiency and finality should be the hallmark of a working immigration court system. Aspects of this proposed rule, however, were focused not on finality, but on creating a class of alien endlessly left in limbo through expanded use of both administrative closure and termination authority. The underlying result of such provisions would be the antithesis of what the immigration court is supposed to provide – either an immigration benefit and relief from removal or removal itself.

The proposed rule sought to justify these provisions to ensure that immigration judges are provided with all necessary authority to carry out their mission. Broadly, the rule stated that immigration judges may take any actions "…necessary or appropriate for the disposition or alternative resolution of such cases."[46] Immigration judges should be focused on concluding cases through a substantive order – either relief or removal – and should use the authority to terminate in rare instances where the proceedings are legally insufficient.

The reliance on a broad-based usage of administrative closure cannot be considered a tool for docket management, nor can it be viewed as a necessary or appropriate authority for an immigration judge. Administrative closure is the equivalent of kicking a can down the road, as it does not dispose of a case, nor does it truly lend itself to alternative resolution – unless that resolution is keeping an alien in limbo until the alien becomes eligible for another form of relief. That is neither the purpose of our immigration courts nor administrative closure. Nor is it an expeditious tool because years often pass before an alien is eligible for new relief. If an alien is not eligible for the relief sought, the judge should deny the application and issue the final order of removal.

There is currently a backlog of nearly 2.8 million pending cases before EOIR.[47] This rule would seemingly allow a significant percentage of those cases to be administratively closed. The proposed rule provides that administrative closure is appropriate where a joint motion or a

[43] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11752 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).
[44] *Matter of A-K-*, 24 I. & N. Dec. 275 (BIA 2007).
[45] Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 88 Fed. Reg. 62242 (proposed Sept. 8, 2023) (to be codified at 8 C.F.R. parts 1001, 1003, 1239, 1240).
[46] Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 88 Fed. Reg. 62242, 62280 (proposed Sept. 8, 2023) (to be codified at 8 C.F.R. parts 1001, 1003, 1239, 1240).
[47] Exec. Off. For Immig. Review, *Adjudication Statistics: Pending Cases, New Cases, Total Completions* (July 13, 2023), available at https://www.justice.gov/media/1174681/dl?inline.

motion noting non-opposition is filed.[48] All other cases require the immigration judge to weigh the totality of the circumstances and to look at a litany of factors provided in the proposed rule.[49] Briefly setting aside the conflation of administrative closure and termination when an alien is seeking administrative relief before U.S. Citizenship and Immigration Services, this rule provides authority for mass administrative closures where no relief is available, and no petitions are pending. As the proposed rule included the consideration of prosecutorial discretion, the immigration court could seemingly empty its dockets through utilization of this authority, subject to the whim of this or any other incumbent administration.

The Department further sought to clarify termination by defining mandatory versus discretionary termination.[50] The majority of enumerated reasons for mandatory termination are appropriate. If an alien derives permanent status, another immigration benefit, or has naturalized, it is proper that the immigration court acts quickly to terminate proceedings. The Department goes farther, however, stating "Fundamentally fair proceedings are not possible [when] the noncitizen is mentally incompetent and adequate safeguards are unavailable."[51] It is wholly improper to simply end proceedings because of mental incompetency. To do so would be unfair to the alien but could also result in public safety issues writ large. In the more than 40 years that EOIR has been administering the immigration court, it is unfathomable that the only method of handling such matters is to terminate. This leaves an alien unnecessarily in limbo and also, as discussed below, could result in a drain on public benefits. The decision to simply terminate is arbitrary and capricious, not justified, and without consideration of available alternatives.

The Department is attempting to promulgate a rule where the same situation could lead to closure or termination.[52] The lack of consistency is nonsensical and demonstrates a fundamental lack of understanding of the need to use each tool or to provide effective and much-needed guidance on which tool is appropriate. Additionally, the Department has failed to consider the alternative of continuances for actively pending administrative benefits and the use of status dockets to keep tabs on cases where prima facie eligibility for an administrative benefit exists or where an unaccompanied child has cited an intention to apply for asylum. Terminating these cases prematurely only serves to lessen accountability and provides further incentives for respondents to simply disappear should the intended administrative relief be denied.

Lastly, it is imperative to note at least a few examples of the Administration undermining legal immigration through the regulatory process. In a September 20, 2023 notice of proposed rulemaking entitled "Modernizing H-2 Program Requirements, Oversight, and Worker

[48] Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 88 Fed. Reg. 62242, 62280 (proposed Sept. 8, 2023) (to be codified at 8 C.F.R. parts 1001, 1003, 1239, 1240).
[49] *Id*.
[50] Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 88 Fed. Reg. 62242, 62281 (proposed Sept. 8, 2023) (to be codified at 8 C.F.R. parts 1001, 1003, 1239, 1240).
[51] *Id*.
[52] *Id*.

Protection,"[53] the Administration sought to weaken the program and any immigration enforcement inherent in the program.

The text belies the title and makes clear that the only workers that the Administration is interested in protecting are the foreign workers using the program. Like the rulemakings discussed above, this NPRM also contradicted congressional authority and direction, while simultaneously undermining immigration enforcement, and removing any mandate to use E-Verify.

The Department undermined unambiguous statutory language that the H-2 programs provide for temporary admission. The NPRM states that "The approval of a permanent labor certification, the filing of a preference petition for an alien, or an application by an alien to seek lawful permanent residence or an immigrant visa, will not, standing alone, be the basis for a denial of an H-2 petition…."[54] Two provisions of the Immigration and Nationality Act (INA) primarily govern nonimmigrant visas – 8 U.S.C. §1101 contains the definition for each class of visa, and 8 U.S.C. § 1184 sets specific conditions for admission on those visas. Nonimmigrant visa holders are admitted after having met certain conditions and are expected to maintain the conditions of their admission during the duration of that authorized stay in the United States. Both the H-2A and H-2B provisions in the INA include that the alien has "…a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform…."[55]

If a regulation conflicts with the plain reading of the statutory text, the statute controls. [56] An agency cannot, via regulation, act inconsistently with the plain limits placed on that agency through statute.[57] In interpreting a statute, "we begin with the text."[58] The plain language of the H-2 definition limits the intent of the beneficiary to temporary admission. Pursuant to clear statutory construction, admission of an H-2 beneficiary cannot be granted when the beneficiary has an intent to abandon a foreign residence. This conflicts with the proposed regulation and is violative of *Chevron*.

The proposed rule seeks to remove the H-2 eligible countries list from existing regulations. The list, created in 2008 via notice-and-comment rulemaking, is an important tool in preventing nonimmigrant overstays.

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[53] Modernizing H-2 Program Requirements, Oversight, and Worker Protections, 88 Fed. Reg. 65040 (proposed Sept. 20, 2023) (to be codified at 8 C.F.R. parts 214 and 274a).
[53] 8 U.S.C. § 1101(a)(15)(h)(ii)
[54] Modernizing H-2 Program Requirements, Oversight, and Worker Protections, 88 Fed. Reg. 65040, 65107 (proposed Sept. 20, 2023) (to be codified at 8 C.F.R. parts 214 and 274a).
[55] 8 U.S.C. § 1101(a)(15)(h)(ii)
[56] *Murphy v. IRS,* 493 F.3d 170, 176 (D.C. Cir. 2007)
[57] *Doe I v. Fed. Election Comm'n*, 920 F. 3d 866, 874 (D.C. Cir. 2019) (Henderson,J., dissenting).
[58] *Arlington Cent. Sch. Dist. Bd. Of Educ. V. Murphy,* 548 U.S. 291, 296 (2006).

As justification for removal of this provision, the Department relies heavily on the so-called administrative burdens placed on its own agencies as well as prospective employers/petitioners.[59] Specifically, the proposed rule is overly concerned with the time spent by the government on compiling data prior to the annually generated list and the time spent by USCIS on adjudication of the waiver requests.[60] It also notes that petitioners may rely on workers whose countries are de-listed from one year to another thereby creating stress and administrative burdens.[61] The concern is that this may cause a problem for returning workers and delay time-sensitive work by the petitioner.

The Biden Administration seeks to further end legal barriers within the proposed rule as it removes E-Verify as a prerequisite for an employer who is hiring a porting H-2A worker. H-2A workers have long had the ability to port to a new employer provided that employer was successfully enrolled in E-Verify. This was justified as "…thereby reducing opportunities for aliens without employment authorization to work in the agricultural sector and helping protect the integrity of the H-2A program."[62]

DHS now justifies removal of this provision as it wants to increase opportunities for workers in the H-2A space to find new employment.[63] Additionally, this and other changes to portability requirements (not discussed herein) are believed to benefit both the beneficiaries and their employers.[64] It should come as no surprise that any easing of requirements will benefit those seeking to work within the program.

E-Verify is a signature enforcement program aimed at reducing the magnet for illegal immigration in the United States and is a key indicator that an employer is fairly dealing with its employees. Th agency's own E-Verify website touts its speed and accuracy and notes that the results are provided in as little as three to five seconds.[65] Estimates for FY 2022 suggest that well over 47 million employees eligibility were confirmed during that fiscal year.[66] Furthermore, E-Verify acts as a deterrent for an illegal population. Research conducted on the effect of E-Verify found that illegal immigration in a state fell more than 50% when a state implemented a mandatory E-Verify law.[67]

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[59] Modernizing H-2 Program Requirements, Oversight, and Worker Protections, 88 Fed. Reg. 65040, 65069 (proposed Sept. 20, 2023) (to be codified at 8 C.F.R. parts 214 and 274a).
[60] *Id.*
[61] *Id.*
[62] Changes to Requirements Affecting H-2A Nonimmigrants, 73 FR 8230, 8235 (proposed Feb. 13, 2008) (to be codified at 8 C.F.R. parts 213, 215, 274a).
[63] Modernizing H-2 Program Requirements, Oversight, and Worker Protections, 88 Fed. Reg. 65040, 60567 (proposed Sept. 20, 2023) (to be codified at 8 C.F.R. parts 214 and 274a).
[64] *Id.*
[65] E-Verify, https://www.e-verify.gov/about-e-verify/what-is-e-verify (last visited Nov. 19, 2023).
[66] Center for Immigration Studies, *E-Verify Fact Sheet* (Feb. 10, 2023), https://cis.org/Fact-Sheet/EVerify-Fact-Sheet.
[67] Preston Huennekens, *Study Shows E-Verify's Effectiveness* (Dec. 8, 2017), https://cis.org/Huennekens/Study-Shows-EVerifys-Effectiveness.

Parole Abuse

While the Department claims that a lack of available pathways has made the aforementioned rules necessary, that lack has not stopped the Department from abusing its parole authority. For a section of law meant to be used sparingly and in exceptional circumstances, the Department has relied heavily on its parole powers to permit aliens to enter the counter *en masse*, many without a notice to appear before an immigration judge. Section 212(d)(5) of the INA authorizes parole of aliens "into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit…"[68] Additionally, the legislative history of parole authority, cited by the former INS in its initial regulation, makes clear that the intent was to exercise the authority in a narrow and restrictive manner. The original rule stated:

> The drafters of the Immigration and Nationality Act of 1952 gave as examples situations where parole was warranted in cases involving the need for immediate medical attention, witnesses, and aliens being brought into the United States for prosecution. H. Rep. No. 1365, 82nd Cong., 2d Sess. at 52 (1952). In 1965, a Congressional committee stated that the parole provisions 'were designated to authorize the Attorney General to act on an ***emergent, individual, and isolated situation***, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside the limit of the law.' 5 Rep. No. 748, 98th Cong., 1st Sess. at 17 (1965).[69]

Regardless of the plain language of the statute and the legislative history, parole has become a favorite tool of the Biden Administration. While first used as an alternative to detention, parole programs have subsequently played a large role in artificially decreasing numbers along the border.

When reviewing the Border Patrol monthly disposition and transfer statistics, it becomes apparent that parole was the path of choice to quickly process and move aliens northward. Border Patrol monthly disposition and transfer statistics for fiscal years 2022 and 2023 demonstrate just how commonplace parole has become. While Border Patrol suggestions that the "processing disposition decision related to each apprehension is made on a case-by-case basis…"[70] the raw numbers belie that disclaimer. In fiscal year 2022, parole numbers steadily

[68] 8 U.S.C. § 1182(d)(5).
[69] Detention and Parole of Inadmissible Aliens; Interim Rule with Requests for Comments, 47 Fed. Reg. 30044 (Jul. 9, 1982) (codified in 8 C.F.R. parts 212 and 235) (emphasis added).
[70] Customs and Border Protection, *Custody and Transfer Statistics FY2023* (May 19, 2023), available at: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics.

rose to culminate in over 95,000 paroles granted in September 2022.[71] That trend has continued in this fiscal year as Border Patrol recorded over 130,000 paroles in December 2022.[72]

Moreso than individual aliens, the Department has gone farther astray as it has implemented parole programs, contrary to law, for nationals of certain countries. Beginning in October, 2022, the Department announced that it was utilizing new pathways to "create a more orderly and safe process for people fleeing the humanitarian and economic crisis in Venezuela."[73] This was augmented in January, 2023, when the Department announced expanded parole programs for nationals of Nicaragua, Cuba, and Haiti.[74] The program permits nationals of those countries, and their immediate relatives, to seek parole when sponsored by someone with lawful status in the United States. It is worth noting that the sponsor need not be a relative of the beneficiary.

While the previous administration did end parole programs, such as the Central American Minors ("CAM") program, it is undeniable that some parole programs continued to exist and operate. These programs were far more limited in scope. The Filipino World War II Veterans Parole Program, the Haitian Family Reunification Parole Program, and the Cuban Family Reunification Parole Program only account for a fraction of the number of paroles granted by the Biden Administration in just a single month. Additionally, the Cuban Family Reunification Parole Program stems from the Cuba Accords, something that cannot be said about the other countries currently enjoying broad parole.

The result of these parole programs was a drop in border numbers and a marked decrease in parole utilized by Border Patrol. This is all smoke and mirrors however as it is supplanting one form of illegal entry for another. This is not to suggest that parole is akin to an illegal entry but a recognition that parole usage in this fashion is unlawful.

Conclusion

The Biden Administration has taken many immigration and border security actions in the past three years but simply enforcing the law as written was never one of the options. The memos, regulatory actions, and other policy-making efforts have been singularly focused on bringing in more individuals without viable claims to remain in the United States in flagrant disregard of the law as Congress intended. These actions have created instability, not only for

[71] Customs and Border Protection, *Custody and Transfer Statistics FY2022* (Nov. 14, 2022), available at: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy22.
[72] Customs and Border Protection, *Custody and Transfer Statistics FY2023* (May 19, 2023), available at: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics.
[73] Dep't of Homeland Sec., *DHS Announces New Migration Enforcement Process for Venezuelans* (Oct. 12, 2022), available at: https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans.
[74] Dep't of Homeland Sec., *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), available at: https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.

national security, public safety, and the economy, but for the aliens themselves who are allowed to remain in a quasi-status akin to limbo. The efforts undertaken by the Administration have simply undermined our system and need to be reversed immediately. I implore this committee to continue its investigations and to take all necessary actions to ensure that the laws are faithfully enforced, and that order and integrity is restored to U.S. immigration law. This country is unable to fulfill its critical humanitarian mission nor fairly and expeditiously provide proper immigration benefits until this crisis is quelled. A return to the rule of law is long overdue and it is incumbent upon Congress to demand that corrective action be immediately taken.

I thank you for your attention and interest in this matter and look forward to answering your questions.