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March 27, 2023

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
2707 Martin Luther King Jr. Ave SE
Washington, DC 20528

Attorney General Merrick Garland
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Re: Comment to Notice of Proposed Rulemaking "*Circumvention of Lawful Pathways,"* Docket No.: USCIS 2022-0016

Dear Secretary Mayorkas and Attorney General Garland:

The undersigned Attorneys General, as the chief legal officers of our States (the "States"), write to express concern about and opposition to the Department of Homeland Security's ("DHS") and the Department of Justice's (collectively, "the Departments") Notice of Proposed Rulemaking, *Circumvention of Lawful Pathways*, 88 Fed. Reg. 11704 (Feb. 23, 2023) (the "Proposed Rule").

The Proposed Rule euphemistically characterizes the current once-in-a-century border crisis whereby millions of aliens have illegally crossed the border, flooded American communities, and stretched to the breaking point state and local social services and education systems, as merely "a substantial increase in migration."[1] Strikingly, the Proposed Rule fails to acknowledge the root cause of the crisis: the Administration's reckless open borders policies. And rather than address that root cause, the Proposed Rule is little more than an academic exercise that tries to define the problem away by re-characterizing illegal crossings as lawful pathways.

The undersigned States strongly support first safe country principles. Our neighbors to the South should be adjudicating any asylum claims of those crossing their borders—rather than acting as a superhighway to the United States.

[1] Proposed Rule at 11,708.

Unfortunately, however, the Proposed Rule is some combination of a half measure and a smoke screen. It is riddled with exceptions, and it is part of the Biden Administration's broader effort to obfuscate the true situation at the Southwest Border.

The Proposed Rule will not, as claimed, deter illegal border crossings or lead to a decrease in the number of new unlawful aliens in the United States. Rather, the Biden Administration's unlawful parole policies will increase the number of unlawful aliens in the United States by guaranteeing a quicker path to quasi-legal status in the United States (with accompanying work permits and access to entitlement programs and social services). And the toothless Proposed Rule will do little to prevent the resulting irreparable harm to States and local communities.

The Proposed Rule claims that it will reduce reliance on human smuggling networks by introducing a "rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel."[2] However, the Proposed Rule itself gives the game away, explaining that aliens who use the CBP One app[3] to "schedule" their entry into the United States at a specific Port of Entry (POE) will "be exempted from this proposed rule's rebuttable presumption on asylum eligibility."[4] The Biden Administration's only real purpose is to incentivize "an increasing number of migrants" to use the CBP One app to make bogus asylum claims, all while avoiding the bad optics of crowds of illegal aliens "wait[ing] in long lines of unknown duration at the ports of entry."[5]

The Proposed Rule references a new "process" that is unlawful and would allow vast numbers of aliens to enter the country and receive instant work authorization and quick access to public benefits. These aliens, who previously would have had to cross the border illegally, will still lack lawful status in the United States (though with a false imprimatur of legality, thanks to the Biden Administration's unlawful procedures), and the States will still be forced the bear the cost of their presence.

For this reason, and the reasons further outlined below, the States stand in fervent opposition to the Proposed Rule as written. The Biden Administration's unlawful parole policies should be withdrawn, the Proposed Rule's rebuttable presumption should either be substantially expanded or abandoned, and the Department should focus on zealously enforcing the commands of our nation's immigration laws, including by fully reinstating recent policies that successfully

[2] Proposed Rule at 11,707.
[3] CBP One is a mobile application that serves as a portal for a variety of U.S. Customs and Border Protection (CBP) services. Through guided questions, the app directs users to the appropriate CBP services.
[4] Proposed Rule at 11,707.
[5] *Id.*

deterred unlawful border crossings: the Migrant Protection Protocols (MPP), safe-third country agreements and other related tools, and also by increasing their detention capacity to be able to fulfill Congress's command that aliens awaiting adjudication of their asylum claims must be detained.

I. The Departments Cannot Create an Exception to the Rebuttable Presumption of Asylum Ineligibility Because They Lack the Authority to Use the Parole Power in the Manner They Propose.

The Proposed Rule relies entirely on creating so-called "lawful, safe, and orderly pathways" that "would be authorized separate from this proposed rule."[6] The Proposed Rule would add a regulation that exempts aliens from the Proposed Rule's rebuttable presumption of ineligibility for asylum if the alien "[w]as provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process."[7] As the Proposed Rule preamble explains, those pathways are DHS policies to programmatically grant parole to large classes of aliens, expanding on DHS's prior unlawful programmatic parole programs for aliens from Venezuela, Cuba, Haiti, and Nicaragua.[8] And, as the preamble further explains, those "lawful ... pathways" will also include the programmatic grant of parole to aliens who use the CPB One app to schedule their unlawful entry into the United States in advance.[9]

But DHS lacks the authority to create a "parole process"[10] involving the programmatic grant of parole to entire classes of aliens. And because the Proposed Rule relies on an unlawful abuse of DHS's very limited parole authority, the Proposed Rule itself is unlawful.

Parole "authority is not unbounded: DHS may exercise its discretion to parole applicants 'only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.'"[11] DHS "cannot use that power to parole aliens *en masse*,"[12] which is *precisely* what the Proposed Rule would do. And thus, the Proposed Rule is unlawful for the same reason that DHS's Parole+ATD program was recently declared unlawful: because "it is largely focused on DHS's operational circumstances rather than an individual alien's circumstances."[13]

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[6] *Id.* at 11,748.
[7] *Id.* at 11,750 (adding 8 CFR §§ 208.33 and 1208.33, creating rebuttable presumption of ineligibility)
[8] *Id.* at 11,711-12.
[9] *Id.* at 11,719-20.
[10] *Id* at 11,750.
[11] *Biden v. Texas*, 142 S. Ct. 2528, 2543 (2022) (quoting 8 U.S.C. §1182(d)(5)(A))
[12] *Texas v. Biden*, 20 F.4th 928, 997 (5th Cir. 2021) *rev'd in part on other grounds*, *Biden*, 142 S.Ct. at 2528.
[13] *Florida. v. United States*, --- F.Supp.3d ----, 2023 WL 2399883, at *30 (N.D. Fla. Mar. 8, 2023)

Additionally, the Proposed Rule, and the CBP One app on which it relies for implementation, would turn the expedited removal process on its head. Instead of being the intended procedure for quickly removing aliens from the United States, it turns the process into one for expediting the entry of illegal aliens into the United States to remain indefinitely.

II. The Proposed Rule Will Facilitate Larger Numbers of Unlawful Aliens Entering the United States and Fails to Consider Its Impact on Illegal Immigration Patterns.

The Proposed Rule claims that "[u]nder this proposed rule the Departments would use their Title 8 authorities to process, detain, and remove, as appropriate, those who cross the [Southwest border] without authorization and do not have a valid protection claim."[14] However, the Proposed Rule never even attempts to quantify or forecast many essential factors, such as 1) how many aliens will gain entry under the Proposed Rule (including through the CPB One app); 2) how many aliens will still attempt unlawfully to cross the border without using the app (and thus become "gotaways"); 3) how many aliens will be deterred from illegally crossing; and 4) how many aliens will be incentivized to cross because of the Proposed Rule and the app. These are all "important aspects of the problem" that must be understood before adopting the Proposed Rule.[15] Nor can the Departments claim that such figures are unknowable. The Proposed Rule is littered with specific forecasts of how many aliens will illegally cross the border when Title 42 restrictions are rescinded.[16] If the Departments can forecast the number of crossings when Title 42 is canceled, then there is no reason they cannot forecast crossing numbers under the Proposed Rule. But the Departments do not even attempt to make such forecasts or explain their failure to forecast.

By the Departments' admission, "the fact that [aliens making asylum claims] can wait in the United States for years before being issued a final order denying relief, and that many such individuals are never actually removed, likely incentivizes migrants to make the journey north."[17] Yet, the Departments also admit that under a recent rule implementing allegedly faster asylum procedures, they "do not yet have the capacity, and do not expect to have the capacity in the near term, to process the large number of migrants expected to cross the border through the system."[18] In light of this lack of capacity, the Departments never adequately explain how the Proposed Rule will solve the problem it is supposed to address. If the Departments lack the capacity to apply the new procedures to process aliens' asylum claims at the border

[14] Proposed Rule at 11,708.
[15] *Michigan v. EPA*, 576 U.S. 743, 750-52 (2015) (requiring "reasoned decision making").
[16] *E.g.* Proposed Rule at 11,705, 11,728, 11,731, and 11,746 (forecasting daily crossings of 11,000 to 13,000).
[17] *Id.* at 11,716; see also id. at 11,729.
[18] *Id.* at 11,717.

quickly, then this means that aliens using the CPB One app will have to be admitted into the United States for their asylum claims to be processed under the old system that, by the Departments' admission, takes years.

If allowing aliens entry into the United States to await a years-long asylum process "incentivizes migrants to make the journey north,"[19] and if the Proposed Rule (by the Departments' admission) will facilitate the entry of aliens to start that years-long asylum process, then this means that the Proposed Rule and the CPB One app will incentivize increased rates of illegal immigration into the United States. The only rational conclusion, therefore, is that the purpose of the Proposed Rule is to facilitate and incentivize the entry of illegal aliens into the United States—a purpose directly contrary to the clear language of the Immigration and Nationality Act (INA) and to Congress's intent.

Our republican form of government cannot function when the Executive Branch subverts the will of the people by doing the exact opposite of what Congress has commanded. President Biden said, "the American system … depends on the rule of law."[20] Yet, the Proposed Rule makes a mockery of the rule of law by facilitating the presence of countless unlawful aliens in the United States.

Indeed, that the purpose of CBP One is to encourage migration is widely recognized in Latin America. For example, Enrique Lucero, municipal director of migration for the Mexican city of Tijuana, recently commented during a media interview that "[w]e believe that CBP One has encouraged migration," not least because the number of aliens arriving in Tijuana who intend to migrate into the United States illegally increased by 181 percent after CBP One went live.[21] Similarly, in Cuba, following the rollout of CBP One, "lines inside Cuba to get exit passports, visas, and airline tickets extend[ed] for kilometers."[22]

III. The Proposed Rule's "Rebuttable Presumption" Against Asylum Is Meaningless.

The Proposed Rule's "rebuttable presumption" against asylum is pointless. It will not decrease real illegal immigration rates and will likely increase them for two reasons.

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[19] *Id.* at 11,716

[20] Joseph Biden, Remarks by President Biden on Standing up for Democracy, WhiteHouse.Gov, (Nov. 2, 2022, https://tinyurl.com/2zcrkb3t.

[21] Cinthya Gómez, *"Creemos que CBP One ha fomentado la migración": Aumenta 181% llegada de migrantes a Tijuana en búsqueda de asilo en EEUU*, TELEMUNDO 10 SAN DIEGO, (Feb. 10, 2023), https://tinyurl.com/5bcka98e.

[22] Todd Bensman, *Mexico in Chaos after First Month of Biden's 'CBP One' Work Permit Giveaway Program*, CENTER FOR IMMIGRATION STUDIES, (Feb. 7, 2023), https://tinyurl.com/3yp584pw.

First, the rebuttable presumption only applies to aliens who illegally cross the border without using the CBP One app to schedule their crossing ahead of time. Entries facilitated by the CBP One app will undoubtedly continue to increase dramatically, increasing the total number of unlawful aliens in the States. The only aspect that will change is that DHS will no longer record those entries as unlawful. The Proposed Rule is an accounting exercise allowing the Administration to claim that illegal entries have decreased. In reality, though, the Proposed Rule will drastically incentivize increased illegal immigration into the United States and lead to an explosion in the population of unlawful alien residents in the States. This will impose enormous new demands on State social service and education systems already stretched to the breaking point.

Second, the rebuttable presumption has so many exceptions that it might as well be called an "always-rebutted presumption." The Proposed Rule includes the following exceptions: "medical emergency"; "imminent and extreme threat to life or safety"; being a "victim of a severe form of trafficking in persons"; or *any other circumstance* "as the adjudicators may determine in the sound exercise of the judgment permitted to them under the proposed rule."[23] It is well-known that various NGOs and legal organizations coach illegal aliens in Mexico on which "magic words" they must utter to gain entry into the United States. The exceptions to the "rebuttable presumption" just provide a new list of magic words for coaching aliens. Furthermore, the catch-all provision allowing adjudicators to make exceptions whenever they want renders the rebuttable presumption entirely toothless.

IV. The Proposed Rule Ignores the States' Reliance Interests and the Harm that It Will Cause to the States.

The government must "turn square corners in dealing with the people."[24] When an agency changes course, as the Departments have done here, they must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[25] In fact, "[i]t would be arbitrary and capricious to ignore such matters."[26]

The Proposed Rule repeatedly considers and defers to the interests of foreign countries.[27] Yet, other than a substance-less perfunctory mention of costs to "the

[23] Proposed Rule at 11,707.
[24] *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020).
[25] *Id.* at 1913 (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).
[26] *Id.* (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).
[27] *E.g.*, Proposed Rule at 11,706 (referring to "ongoing efforts to share the responsibility of providing asylum and other forms of protection to deserving migrants with the United States' regional partners" and to the concerns of "the Government of Mexico" about accepting the return of aliens caught at the border); *id.* at 11,707 (touting Proposed Rule's "responsive[ness] to the requests of foreign partners" and that it is "critical to our ongoing engagements with regional partners"); *id.* at

States and local communities where migrants are provisionally released," the Proposed Rule never addresses its effect on the States or the States' reliance interests.[28] Indeed, the Proposed Rule completely ignores the increased costs to the States of higher levels of unlawful aliens precipitated by the Proposed Rule and falsely claims that "[t]he costs of the proposed rule primarily are borne by migrants and the Departments."[29] The Departments go so far as to claim that "[t]his proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government."[30]

The Departments specifically commit in the Proposed Rule to "conduct a review and make a decision" during the 24 months of the Proposed Rule and "[s]uch review and decision would consider all relevant factors, which the Departments expect would include" a list of four factors for consideration.[31] That list includes the Departments' resource constraints and the Proposed Rule's effect on "key foreign partners," but remarkably (or unremarkably at this point, given the Departments' history of completely disregarding the reliance interests of the States and the effect of rulemaking on State resources), the list of factors contains not a single mention of considering the reliance interests of the States.[32]

Yet, the reality is that the States "bear[] many of the consequences of unlawful immigration."[33] These burdens are not merely hypothetical and have been increasing. Even when "the taxes paid by illegal aliens are factored in, the net cost of illegal immigration to U.S. taxpayers is now $150.7 billion. This means that each American taxpayer shells out a net average of $956 [per year] ... due to illegal immigration."[34] That $150 billion figure "is greater than the annual GDP output of 15 U.S states."[35] The "cost incurred per illegal alien (including their U.S.-born children) ... now total[s] $8,776 annually."[36] The vast majority of these costs are borne by the states and total $100.5 billion annually.[37]

11,710-11 (section analyzing "Impact on Regional Partners"); *id*. at 11,727 (describing planned future efforts "to build on the multi-pronged, long-term strategy with our foreign partners throughout the region to support conditions that would decrease irregular migration"); *id*. at 11,729-30 (claiming the Proposed Rule will contribute to "efforts to encourage other countries to provide protection to migrants").

[28] *Id*. at 11,714, 11,715.

[29] *Id*. at 11,748.

[30] *Id*. at 11,749.

[31] *Id*. at 11,727.

[32] *Id*.

[33] *Arizona v. United States*, 567 U.S. 387, 397 (2012).

[34] Federation for American Immigration Reform, *The Fiscal Burden of Illegal Immigration*, (Mar. 8, 2023), at 2, https://tinyurl.com/yzdh3rvk.

[35] *Id*. at 1.

[36] *Id*. at 2.

[37] *Id*. at 40.

The increase in illegal aliens arriving in Indiana has forced Indiana to incur additional expenses. Indiana has roughly 207,000 illegal aliens, including their children.[38] The cost per alien to taxpayers is $4,451.[39] This total cost of illegal aliens and their children amounts to $921,276,750.[40] Indiana bears the cost of illegal immigration through education programs, state medical costs, incarceration of illegal aliens who commit crimes, and welfare programs.

The Indiana Department of Education provides a portion of the State's Title III (of the Elementary and Secondary Education Act of 1965 as amended by the Every Student Succeeds Act of 2015) appropriation to support schools and school districts experiencing an influx of immigrant students. Based upon the influx of immigrant students in eight school districts, the Indiana Department of Education made Title III appropriations in the amount of $183,738.40 for the 2021-2022 school year, in addition to the per-pupil state tuition support payment.[41] The 3,151 additional children arriving between October 2020 and September 2022 would cost Indiana an average of $1,332,852.51 for English Language Learner services assuming the children are all school-age and require English Language Learner services.[42] This does not include the additional expenditures by Indiana for state tuition support provided for all children enrolled in public schools, which would amount to almost $27.3 million for the 3,151 additional children.[43]

According to a report from the Government Accountability Office, as many as 5,000 family units settled in Indiana between July 2021 and February 2022 as a result of the Biden Administration's Parole + ATD policy.[44] If each family unit consisted of two people, the State of Indiana has the burden of providing education, medical care, and other benefits to 10,000 aliens entering under Parole + ATD. If each family unit consists of just one child, the annual cost to the State of Indiana to educate them would be as high as $45,467,551.20 for English Language Learner services and state tuition support.

States thus have overwhelming reliance interests in federal enforcement of immigration law. The States' budgets and resource allocations are determined in reliance on the Departments' *enforcement* of immigration law. The Departments did

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] INDIANA DEPT. OF ED., 2021-2023 TITLE III IMMIGRANT INFLUX ALLOCATIONS (2023) https://www.in.gov/doe/files/2021-2023-TIII-Immigrant-Influx-Allocations.pdf.
[42] OFFICE OF REFUGEE RESETTLEMENT, Unaccompanied Children Released to Sponsors by State (March 9, 2023), https://www.acf.hhs.gov/orr/grant-funding/unaccompanied-children-released-sponsors-state.
[43] Ind. Code § 20-43-3-8 (school corporation's foundation amount); Ind. Code § 20-43-6-3 (formula for calculating basic tuition support).
[44] U. S. GOVERNMENT ACCOUNTABILITY OFFICE, SOUTHWEST BORDER: CHALLENGES AND EFFORTS IMPLEMENTING NEW PROCESSES FOR NONCITIZEN FAMILIES (Sept. 2022), https://www.gao.gov/assets/gao-22-105456.pdf.

not consider whether the States relied on the enforcement of immigration laws as written by Congress when the States determined how they would marshal and distribute their resources to deal with the number of unauthorized aliens entering their states. The Proposed Rule is arbitrary and capricious because it utterly ignores these reliance interests.[45]

The additional aliens incentivized by the Proposed Rule to enter the United States will predictably cause the States to spend additional funds on law enforcement, education, and healthcare—often due to federal mandates.[46] For example, the States must spend state monies on Emergency Medicaid, including for unauthorized aliens.[47] The States' emergency medical providers deliver millions of dollars in medical services to illegal aliens each year. These costs are not fully reimbursed by the federal government or the aliens themselves. Furthermore, under federal law, aliens granted parole or asylum become eligible for a variety of benefits after five years in the United States.[48] These benefits include Medicaid; SNAP (commonly referred to as "food stamps"); and TANF (commonly referred to as "welfare" payments). Because these benefits are paid by State agencies and are partially financed from State budgets, the Proposed Rule will increase the States' costs because increased numbers of aliens receiving grants of parole or asylum will cause more individuals to claim benefits.

Because the Proposed Rule fails to consider the State's reliance interests, and the costs to the States of the Proposed Rule, it should be withdrawn.

a. The Unfunded Mandate Act Applies Here.

As explained above, the Proposed Rule will impose significant costs on the States, and many of those costs directly result from federal mandates. The Proposed Rule thus imposes significant unfunded mandates on the States. Yet, in crafting the Proposed Rule, the Departments failed to comply with their legal obligations in relation to state, local, tribal, and small governments. The Unfunded Mandates Reform Act (UMRA) requires that "[e]ach agency shall ... assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector."[49]

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[45] *See Regents*, 140 S. Ct. at 1913-14.
[46] *Texas v. Biden*, 20 F.4th 928, 969 (5th Cir. 2021) *rev'd on other grounds* 142 S.Ct. 2528 (2022); *Texas v. Biden*, 10 F.4th 538, 548-49 (5th Cir. 2021); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (education mandate for aliens not lawfully present in U.S.); 42 C.F.R. § 440.255(c) (emergency healthcare mandate for same).
[47] 42 C.F.R. § 440.255(c).
[48] *See* 8 U.S.C.A. § 1641(b)(2), (4) (defining a "qualified alien" as "an alien who is paroled into the United States under [8 U.S.C. § 1182(d)(5)] for a period of at least 1 year" or "an alien who is granted asylum"); 8 U.S.C. § 1612 (2)(L) (making eligible for food stamps aliens who have been "'qualified aliens' for a period of 5 years or more"); 8 U.S.C. § 1613(a) (making qualified aliens eligible for "any Federal means-tested public benefit ... 5 years" after "the date of the alien's entry into the United States").
[49] 2 U.S.C. §1531.

But the Departments never assessed the impact on the States and their constituent local governments of the Proposed Rule.

UMRA also requires that "[e]ach agency shall ... develop an effective process to permit elected officers of State, local, and tribal governments ... to provide *meaningful and timely input* in the development of regulatory proposals containing significant Federal intergovernmental mandates."[50] But Defendants never allowed elected leaders in the Amicus States to provide *any* such input.

The Proposed Rule claims that it "does not contain such a[n unfunded] mandate, because it would not impose any enforceable duty upon any other level of government.... Any downstream effects on such entities would arise solely due to their voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed by this proposed rule."[51] The Supreme Court has held the opposite.[52] In *Department of Commerce*, New York's injuries were indirect and downstream of not just illegal third-party conduct (*i.e.*, predicted non-completion of census forms) but a multitude of other laws' operations and agency action (*e.g.*, funding formulas based on census data).[53] Despite the extended causal chain, the Supreme Court *unanimously* held that New York had standing (while dividing 5-4 on the merits).[54] In *City & County of San Francisco v. USCIS*, the Ninth Circuit has applied the same reasoning specifically in the immigration context.[55] The same reasoning applies here. If the independent unlawful choices of third parties were not enough to break the chain of causation for standing in *Department of Commerce* or *City & County of San Francisco*, then they are not enough to break the chain of causation to trigger UMRA. The Proposed Rule, thus, must be withdrawn because the Departments failed to allow the States to provide meaningful and timely input before it was proposed.

V. The Departments Should Fully Reimplement the Migrant Protection Protocols and Increase Detention Capacity.

Because the Proposed Rule relies on an illegal exercise of the parole power (as described above), it is not a lawful solution to the problem it purports to address. The Migrant Protection Protocols (MPP) is one of only two lawful alternatives available (the other is to increase detention capacity, as discussed below). Congress explicitly

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[50] 2 U.S.C. §1534(a) (emphasis added).
[51] Proposed Rule at 11,748.
[52] *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019))
[53] *Dep't of Com.*, 139 S. Ct. at 2565–66.
[54] *Id.* at 2556 (noting unanimous parts of opinion, including part II, about jurisdiction and standing).
[55] *City & County of San Francisco v. USCIS*, 944 F.3d 773, 787 (9th Cir. 2019) (rejecting federal government's argument that "attenuated chain of possibilities that does not show certainly impending injury" because "the predicted result is premised on the actions of third parties, but this type of 'predictable effect of Government action on the decisions of third parties' is sufficient to establish injury in fact.")

granted to DHS the power to "return ... alien[s]" who "arriv[e] on land ... from a foreign territory contiguous to the United States ... to that territory pending" immigration proceedings.[56] As the Fifth Circuit recently held, the Departments simply "don't want to do [the] one thing Congress allowed."[57]

The Proposed Rule claims that, following an increase in illegal border crossings from 2017 to 2019, there was "a steep drop in the first months of the COVID-19 pandemic."[58] This is incorrect. Border crossings dropped significantly *before* the COVID-19 pandemic because implementing the MPP significantly deterred illegal border crossings. Indeed, DHS's own internal October 28, 2019 assessment found that the MPP was "effective[]" and an "indispensable tool."[59] Yet, puzzlingly, DHS canceled the MPP anyway.

Full reimplantation of the MPP has all the upsides that the Departments claim for the Proposed Rule, and none of the downsides pointed out here. The MPP ensures that migrants from third countries may wait in a safe third country (Mexico) while their asylum claims are adjudicated. This ensures the safety of legitimate asylum seekers while still deterring aliens with spurious claims from attempting to enter the United States.

The Proposed Rule itself acknowledges that "DHS data shows that the ability to quickly remove individuals who do not have a legal basis to remain in the United States can reduce migratory flows—whereas, conversely, the inability or failure to do so risks yielding increased flows."[60] The only proven policy tool that has achieved this result is the MPP.

The Departments claim that they cannot reimplement the MPP for two reasons. First, "the resources and infrastructure necessary to use contiguous-territory return authority at scale are not currently available."[61] That claim, however, is based on the premise that current illegal border crossing levels will remain at the abnormally increased levels that have prevailed since January 21, 2021. But those levels only increased because the Administration stopped enforcing proven border measures, such as the MPP. A resolute reimplementation of the MPP will lead to a rapid decrease in illegal border crossing attempts. Thus, it will require *fewer* resources than the Proposed Rule (which will increase border crossing attempts). This is borne out by real-world historical data, which show decreases in border crossing attempts when the MPP was being zealously implemented.

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[56] 8 U.S.C. § 1225(b)(2)(C).
[57] *Texas v. Biden*, 20 F.4th at 996.
[58] Proposed Rule at 11,708.
[59] *Texas v. Biden*, 554 F. Supp. 3d 818, 833 (N.D. Tex.), rev'd and remanded on other grounds, 142 S. Ct. 2528 (2022) (discussing a DHS October 2019 assessment of MPP, in which DHS found this policy "effective[]" and an "indispensable tool in addressing the ongoing crisis at the southern border").
[60] Proposed Rule at 11,713.
[61] *Id.* at 11,731.

Second, the Departments claim that "programmatic implementation of" the MPP "requires Mexico's concurrence and support" and that "to date the Government of Mexico has made clear that it will not accept such returns."[62] This claim fails to consider or explain why, in the very recent past, Mexico willingly *did* cooperate with the implementation of the MPP. There is no way the Departments can actually claim that Mexico would not assent to the MPP because the Departments under this Administration have never made a good-faith effort to secure Mexico's assent or acquiescence. The Departments' claims are belied by the fact that Mexico *did* agree to the MPP in the recent past. And Mexico *will* agree to the MPP again, if the United States government makes a good faith attempt to secure cooperation.

Similarly, the Departments claim that the Proposed Rule is a better alternative to "negotiating safe-third-country agreements or asylum cooperative agreements" under 8 U.S.C. 1158(a)(2)(A) because it can take a long time to negotiate such agreements.[63] Yet, the Proposed Rule itself includes a sunset provision because there is significant doubt about its long-term viability. The Proposed Rule also claims that it would be preferable to safe-third-country agreements because the Departments claim that the Proposed Rule would provide greater protection to aliens who would be able to wait for the adjudication of their asylum country in the safety of the United States. Yet, the Proposed Rule fails to account for the costs of providing that safety, which is borne almost entirely by the States and not reimbursed by the federal government. Nor does the Proposed Rule actually attempt to quantify any alleged differences in safety, which is an important aspect to consider, given soaring crime rates in the United States.[64]

a. DHS Should Increase Its Detention Capacity.

When Congress enacted the INA and its amendments, it established the expectation that aliens should be detained pending the adjudication of their immigration claims. Thus, aliens who convince an asylum officer that the alien has a credible fear of persecution "**shall be detained** for further consideration of the application for asylum." 8 U.S.C.A. § 1225(b)(1)(B)(ii) (emphasis added). Aliens who have failed to convince an asylum officer of their credible fear and who seek review before an immigration judge "**shall be detained** pending a final determination." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (emphasis added). And for aliens who are "not clearly and beyond a doubt entitled to be admitted, the alien[s] **shall be detained**," subject only to limited exceptions not applicable here (for crewmen and stowaways). 8 U.S.C. § 1225(b)(2)(A) (emphasis added).

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[62] *Id.* at 11,731.
[63] *Id.* at 11,731-32.
[64] Emma Colton, *Violent crimes on the rise in 2022, following previous unprecedented spike in murders*, FOX NEWS, (May 18, 2022), https://tinyurl.com/2f3575xa.

Against this backdrop of mandatory detention, Congress created a limited exception in 8 U.S.C. § 1182(d)(5)(A). That provision gives DHS the power to parole aliens into the United States, rather than detain them, but "only on a case-by-case basis for urgent *humanitarian reasons or significant public benefit*."[65] The Proposed Rule turns this system on its head, assuming that parole is the default rule and detention should only be a limited exception. But this defies the clear command of Congress that such aliens "shall be detained."

Even more astonishingly, at the same time that the Departments have been claiming they lack sufficient detention capacity for aliens, and thus that they have no alternative but to parole aliens into the country *en masse*, the Administration's Fiscal Year 2024 budget includes "a reduction of 9,000 adult [Average Daily Population detained] from the FY 2023 Enactment," which would decrease DHS's alien detention capacity by more than 25%.[66] The federal government further affirmatively degraded its detention capacity by canceling contracts with private detention facilities and by closing detention facilities.[67]

In addition, even where DHS has capacity, it has often failed to utilize it. For example, an April 12, 2022 DHS Inspector General Report explains how DHS acquired detention capacity from hotels through no-bid contracts and then inexplicably failed to use it: indeed, DHS "spent approximately $17 million for hotel space and services at six hotels that went largely unused between April and June 2021" and "did not adequately justify the need for the sole source contract to house migrant families."[68] Moreover, DHS has entered into settlement agreements with ideologically aligned groups to hobble its detention capacity further.[69]

Detention of aliens who are awaiting adjudication of their immigration claims has two benefits over the Proposed Rule: first, it would have far more of a deterrent effect than the Proposed Rule's rebuttable presumption; and second, it would show important respect for the rule of law, something that is essential in a well-functioning democracy.

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[65] 8 U.S.C. § 1182(d)(5)(A)(emphasis added).
[66] DEPARTMENT OF HOMELAND SECURITY, FY 2024 Budget in Brief, https://tinyurl.com/2p8v5yyx, p. 39.
[67] Eileen Sullivan, *Biden to Ask Congress for 9,000 Fewer Immigration Detention Beds*, NEW YORK TIMES (Mar. 25, 2022), https://nyti.ms/3vOI00F; Priscilla Alvarez, *Biden administration to close two immigration detention centers that came under scrutiny*, CNN (May 20, 2021), https://cnn.it/3KcxGol.
[68] DHS Off. of Inspector Gen., *ICE Spent Funds on Unused Beds, Missed COVID-19 Protocols and Detention Standards while Housing Migrant Families in Hotels* at 3, 5 (April 12, 2022) https://www.oig.dhs.gov/sites/default/files/assets/2022-04/OIG-22-37-Apr22.pdf.
[69] *See*, *e.g.*, Rae Ann Varona, *ICE Agrees To Restrictions In COVID-19 Hot Spot Settlement*, LAW360 (July 7, 2022), https://www.law360.com/articles/1509393/ice-agrees-to-restrictions-in-covid-19-hot-spot-settlement.

VI. Conclusion

The Proposed Rule further represents the deterioration of the country's immigration system. It raises multiple grounds for concern about its legality and about the Departments' methodology and analysis. Notably, the Proposed Rule ignored entirely any federalism analysis, any explanation of how States and local communities will be impacted by such a momentous change in immigration policy, and meaningful and timely input from State governments. It also ignores and disregards the clear mandate of Congress with respect to requirements for detention and asylum claims. The Departments should withdraw the Proposed Rule or substantially revise it, consistent with the contours of the Administrative Procedure Act and UMRA.

Sincerely,

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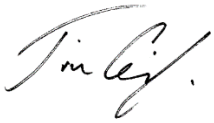

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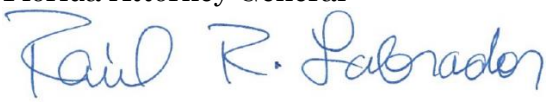

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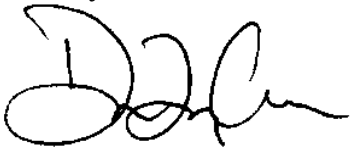

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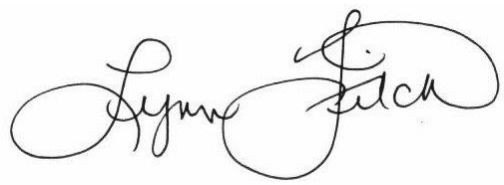

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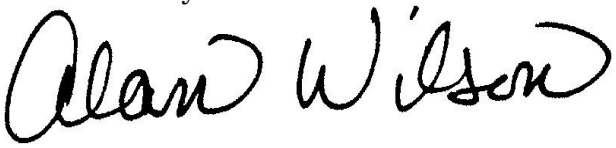

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