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The Evolution of Immigration Policy and Law Within the Democratic Party: A Comparative Analysis of Immigration Law and Policy Between The Obama and Biden Administrations

Armando A. Olmedo Arias
Televisa Univision, Inc.

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**THE EVOLUTION OF IMMIGRATION POLICY AND LAW WITHIN THE
DEMOCRATIC PARTY:
A COMPARATIVE ANALYSIS OF
IMMIGRATION LAW AND POLICY BETWEEN
THE OBAMA AND BIDEN ADMINISTRATIONS**

*Armando A. Olmedo Arias**

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* Olmedo Arias serves as a Vice President, Global Immigration Counsel at TelevisaUnivision, Inc.

INTRODUCTION

The topic of immigration has been at the center of politics, both at a local and national level since the start of the millennium. Yet, there have been few changes in the existing law. The fervor exhibited by both sides of the political spectrum has failed to ignite a spark that would engender significant reform, particularly, as it relates to undocumented individuals in the U.S.¹ Instead, the hyper-partisan climate has pushed the political extremes of each party to become entrenched in certain principles, which have prevented the centrist elements from legislating on the matter. This shift has been developing since the terrorist attack on September 11, 2001,² which highlighted the need to focus on immigration processes and their impact on national security. Since 2001, change in immigration law came only when politicians agreed on enforcement measures. However, the parties have been unable to find consensus on a comprehensive immigration reform that would resolve the status of millions of undocumented individuals living in the U.S.

The Democratic Party has long led legislative efforts to reform the immigration system.³ This may be because of the significant support the party receives from the non-white segments of society.⁴

¹ Daniel J. Tichenor, *The Quest for Elusive Reform: Undocumented Immigrants in a Polarized Nation*, RICE UNIV'S BAKER INST. FOR PUB. POLICY 1, 3 (Mar. 2021), <https://www.bakerinstitute.org/sites/default/files/2021-03/import/usmx-pub-elusive-reform-032321.pdf>.

² Hannah Hartig & Carroll Doherty, *Two Decades Later, the Enduring Legacy of 9/11*, PEW RSCH. CTR. (Sept. 2, 2021), <https://www.pewresearch.org/politics/2021/09/02/two-decades-later-the-enduring-legacy-of-9-11/> (explaining that in the aftermath of the September 11, 2001, terrorist attacks that killed nearly 3,000 people in New York City, Washington, D.C., and Shanksville, Pennsylvania. Americans largely supported U.S. military action and initially endorsed far-reaching measures to combat terrorism, including requiring national ID cards, allowing the CIA to contract with criminals, and permitting the CIA to carry out assassinations abroad when pursuing suspected terrorists).

³ J. Baxter Oliphant & Andy Cerda, *Republicans and Democrats have Different top Priorities for U.S. Immigration Policy*, PEW RSCH. CTR. (Sept. 8, 2022), <https://www.pewresearch.org/short-reads/2022/09/08/republicans-and-democrats-have-different-top-priorities-for-u-s-immigration-policy/>.

⁴ PEW RESEARCH CENTER, CHANGING PARTISANSHIP COALITIONS IN A POLITICAL DIVIDED NATION 13 (2024).

Thus, the Democratic Party has been able to push forward measures only when they have been able to secure the support of a small group of Republicans.⁵ Republicans on the other hand, have been focused on a more unforgiving, nativist approach to immigration that focuses on restrictions and penalties.⁶ As a result, efforts for comprehensive immigration reform, with the exception of enforcement and security measures, have faced staunch opposition, mainly in the House of Representatives, and has fostered the Congressional stalemate that exists to date.

It is therefore not surprising that the most significant change to the foundational Immigration and Nationality Act of 1965 (INA)⁷ was the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA).⁸ IIRIRA is an enforcement law passed by a Republican Congress and signed by a Democratic President that strengthened U.S. immigration laws by adding penalties for undocumented immigrants who commit crimes while in the United States or individuals who stay in the U.S. beyond their statutorily defined period of time.⁹ This was the last major piece of bipartisan legislation that amended and redefined the issue of legal status in the United States.¹⁰ While it did not provide comprehensive reform, it established an enforcement regime that continues to shape immigration law today. Signed into law by President Bill Clinton, the IIRIRA set forth draconian penalties on immigration violators and created new deportation procedures that have profoundly influenced how immigration law is interpreted and implemented, making it

⁵ H.R. 815, 118th Cong., 1st Sess. (Okla. 2024) (e.g. Most recently the Emergency National Security Supplemental Appropriations Act of 2024 (Biden Border Bill) was prepared by a bipartisan group of Senators that included James Lankford, Conservative U.S. Senator from Oklahoma).

⁶ Oliphant & Cerda, *supra* note 3.

⁷ 8 U.S.C. §§ 1104-1401 (1964).

⁸ Pub. L. No. 104-208, 110 Stat. 3009, 3009-546 (1996).

⁹ *See id.*

¹⁰ Donald Kerwin, *From IRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, CTR. MIGRATION STUD. (2018), <https://cmsny.org/publications/jmhs-iirira-to-trump/>; *see also* Melina Juárez et al., *Twenty Years After IIRIRA: The Rise of Immigrant Detention and its Effects on Latinx Communities Across the Nation*, CTR. MIGRATION STUD. (2018), <https://cmsny.org/publications/jmhs-twenty-years-iirira/>.

difficult to move from illegal status to lawful permanent resident.¹¹ Since IIRIRA's passage, all current immigration law and policy have been developed with these penalties in mind, including the growth of waiver procedures, expansion of parole programs, and heightened focus on consular processes.¹²

Since the passage of IIRAIRA, moderate members of both parties have been unable to persuade the rest of their parties to compromise on immigration reform.¹³ There is an understanding, particularly among Democrats, that in order to achieve comprehensive immigration reform, the number of unauthorized entries must be significantly curtailed.¹⁴ However, it has been virtually impossible to package such measures with a reform proposal that would resolve and regularize the status of the large number of undocumented individuals living in the U.S. This stalemate has created a system that has forced changes in how immigration law and policy is administered, currently testing the constitutionally established separation of powers between the executive and legislative branches.

As evaluated in this article, while both parties have agreed to enforcement, no pathway to legalization has been successfully proposed or passed in Congress. While the immigration proposals by the last two Democratic presidents included new enforcement funding to tighten the borders, particularly the southern border with Mexico, neither has been able to gain the necessary support from an intransigent Congress for significant non-enforcement reform. As a result, they have looked to alternatives to effect significant change for certain groups of undocumented individuals in the U.S. as well as others unable to obtain the necessary visa authorizations to enter the country.

¹¹ See *28 Years of IIRIRA: A Horrible Legacy of White Supremacist and Deeply Xenophobic Immigration Law*, ALIANZA AMERICAS (Sept. 30, 2024), <https://www.alianzaamericas.org/post/28-years-of-iirira-a-horrible-legacy-of-white-supremacist-and-deeply-xenophobic-immigration-law>.

¹² See U.S. CONST. art. II.

¹³ Suzanne Gamboa, *Congress has failed for more than two Decades to Reform Immigration—Here's a Timeline*, NBC NEWS: IMMIGRATION & THE BORDER, <https://www.nbcnews.com/news/latino/immigration-reform-failure-congress-timeline-rcna64467> (last updated May 9, 2023, 7:31 AM).

¹⁴ BARACK OBAMA, A PROMISED LAND, 616 (2020) (explaining the need for a strong security bill before pushing forward with some comprehensive reform).

This article will discuss how, in light of the existing Congressional stalemate, the two most recent Democratic presidents have been able to develop and effect immigration policy through the enforcement authority inherent in the Presidency. This article will examine how they have tried to navigate the complexities associated with the constitutionally established separation of powers by leveraging grants of authority within existing legislation. Additionally, the article will address how Democratic candidates have been forced to evolve their approach to immigration law and policy, starting with President Obama, who shifted away from a traditionally institutionally sound, legislatively driven approach to one dominated by executive action. This shift has allowed the President to exert more power through their ability to establish priorities and enforce immigration law. The article will touch on the Trump/Pence administration's impact on the measures implemented by the Biden/Harris administration.¹⁵

I. THE EXECUTIVE BRANCH AND IMMIGRATION LAW

In light of the existing Congressional stalemate on immigration law,¹⁶ the President of the United States has become the principal policymaker with regard to immigration law, an authority derived from the executive's constitutional duty to enforce the law.¹⁷ As discussed in this article, starting with President Obama, there has been a departure from reliance on the traditional, institutional legislative process.¹⁸ Now, the Executive is focused on an increased centralization of power and policy in the office of the President, who can establish priorities through the application, implementation, and interpretation of the law. Due to the bureaucracy involved in immigration law (namely in benefit processing, assessing special protections for asylum, and immigration enforcement) the President can have a

¹⁵ See generally JULIE HIRSCHFELD DAVIS & MICHAEL D. SHEAR, BORDER WARS: INSIDE TRUMP'S ASSAULT ON IMMIGRATION (2019) (Analyzing the Trump administration and its approach on immigration law).

¹⁶ Maryam T. Stevenson, *Explaining the Comprehensive Immigration Reform Stalemate in Congress*, 73 CATH. UNIV. L. REV. 400, 441 (July 1, 2024).

¹⁷ See U.S. CONST. art. 2, §§ 1-4.

¹⁸ BARACK OBAMA, *supra* note 14.

profound impact on policy. This can often result in dramatic shifts from one administration to the next. Executive orders, declarations, and the selection of certain cabinet members, particularly the Attorney General and Department of Homeland Security (DHS) Secretary, have therefore become highly anticipated decisions, requiring the immigration bar to follow them due to their profound impact on the development of immigration law.

Some scholars have defined this phenomenon as a “shadow system” operating alongside the formal immigration system.¹⁹ Adam B. Cox and Cristina M. Rodriguez have gone to describe this system as one that “...has rendered Congress’ intricate, detailed code of immigration rules ever less central to defining the content and character of the immigrant population. Instead, the Executive’s enforcement judgements—decision about whom to target from the pool of deportable immigrants—have taken center stage.”²⁰ Cox and Rodriguez make a persuasive argument that the dramatic increase in the number of undocumented, deportable population in the last thirty years, coupled with laws that result in low compliance levels, have resulted in an increase of “the discretionary charging power wielded by the Executive.”²¹ They add:

When the pool of lawbreakers is small, there is little room for enforcement discretion to shape regulatory policy. But when large swaths of the population are in formal violation of the law, police and prosecutors effectively make policy by deciding whom among the large pool of violators to investigate, arrest, and prosecute.²²

As discussed in this Note, President Obama came to accept the use of executive authority to effect change in immigration law and

¹⁹ ADAM B. COX & CHRISTINA M. RODRIGUEZ, *THE PRESIDENT AND IMMIGRATION LAW 105* (Oxford Univ. Press, 2020).

²⁰ *Id.*

²¹ *Id.* at 111.

²² *Id.*

policy change while in office.²³ By steering immigration enforcement, President Obama laid the groundwork for alternatives to the legislative impasse and effectively shaped enforcement policy. His administration analyzed and offered alternatives to comprehensive immigration reform that were not realized until the next Democratic administration. Furthermore, the Biden/Harris administration fully accepted the use of such authority and dramatically built on the actions implemented by President Obama.²⁴

II. CANDIDATE OBAMA

By the time Obama decided to run for President on February 10, 2007, it was well established that the U.S. had a broken immigration system, and a congressional stalemate was becoming increasingly more difficult to overcome.²⁵ As a Senator, Obama became well-versed in immigration law and was involved in several bills and laws that sought to minimize the divide.²⁶ He supported enforcement measures while advocating for some of the most vulnerable members of the undocumented population: young individuals brought to the U.S. by their parents. During his first and only term as Senator he set the stage for how he would later address the complexities of the immigration system as President. He created political goodwill by supporting immigration enforcement measures before seeking reform that would benefit those undocumented individuals already in the U.S.²⁷

For example, Senator Obama voted yes on the Secure Fence Act of 2006, which created 700 miles of new fence along the

²³ See Elena A. Chiras, *Current Development: Development in The Executive Branch: The Obama Administration's Promise of Executive Action on Immigration*, 29 GEO. IMMIGR. L. J. 169, 169 (2014).

²⁴ See *President Biden's Executive Actions on Immigration*, CTR. MIGRATION STUDIES (Feb. 2, 2021), <https://cmsny.org/biden-harris-immigration-executive-actions/>.

²⁵ See Robert Pear & Carl Hulse, *Immigration Bill Fails to Survive Senate Vote*, N.Y. TIMES (June 28, 2007), <https://www.nytimes.com/2007/06/28/washington/28cnd-immig.html>.

²⁶ Barack Obama, *Senate Floor Speech on Comprehensive Immigration Reform*, AMERICAN RHETORIC (May 23, 2007), <https://www.americanrhetoric.com/speeches/barackobama/barackobamasenatefloorimmigration.htm>.

²⁷ See *id.*

U.S./Mexico border.²⁸ The law authorized the Department of Homeland Security to increase the use of advanced technology like cameras, satellites, and unmanned aerial vehicles, to reinforce existing infrastructure at the border.²⁹ This bill received the support of the future party leaders, including Hillary Clinton, Joe Biden, and Chuck Schumer.³⁰ This was soon followed by his participation in a bipartisan group of Senators that, with the support of the Bush/Cheney White House, pushed for the Comprehensive Immigration Reform Act of 2007.³¹ This comprehensive package included diverse measures included stronger border security mechanisms, an employment verification system, and the creation of a pathway to earned citizenship for the 11 to 12 million undocumented individuals in the U.S.³²

In support of this bill Senator Obama clearly laid out his argument in support of the normalization of status for the millions of undocumented individuals:

The idea would be that those people, over the course of eleven years could earn their way to citizenship by paying a fine, paying their back taxes (if they owe any), staying out of trouble, learning English and so on. The opponents of this kind of proposal call this amnesty and they hearken back to what happened in 1986

²⁸ Allison Graves, *Fact-Check: Did top Democrats Vote for a Border Wall in 2006?*, POLITIFACT (Apr. 23, 2017), <https://www.politifact.com/factchecks/2017/apr/23/mick-mulvaney/fact-check-did-top-democrats-vote-border-wall-2006/>.

²⁹ *Fact Sheet: The Secure Fence Act of 2006*, THE WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Oct. 26, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061026-1.html>

³⁰ The Boston Globe, *In 2006, Democrats were Saying 'Build that Fence!'*, BOSTON.COM (Jan. 27, 2017), <https://www.boston.com/news/politics/2017/01/27/in-2006-democrats-were-saying-build-that-fence/>.

³¹ *President Bush's Plan for Comprehensive Immigration Reform*, THE WHITE HOUSE (2007), <https://georgewbush-whitehouse.archives.gov/stateoftheunion/2007/initiatives/immigration.html>.

³² Barack Obama, *Immigration Rallies and Status of Reform – Podcast Transcript*, OBAMASPEECHES.COM, (May 6, 2006), <http://obamaspeeches.com/065-Immigration-Rallies-Obama-Podcast.htm> (claiming the bill would have provided an opportunity for undocumented workers to “earn their way to citizenship” through devices such as fines, back taxes, staying out of trouble, and learning English).

when, in fact, undocumented workers were provided amnesty. There was supposed to be a grand bargain where in exchange for such amnesty there was going to be serious border security and employer sanctions on those who had hired undocumented workers. That never really happened. And so people who are opposed to the Senate bill believe that the best strategy is not to provide amnesty to these undocumented workers but simply shut off the possibility that they can be hired, perhaps deport them where they can be rounded up and build either a virtual wall or a literal wall along the Mexican and United States borders. That kind of approach just isn't realistic. We're not going to deport 11 to 12 million people; many of them have been here for many years, many of them have strong roots, many of them have children who were born here and are therefore United States citizens.³³

More important for Obama was that the bill included the Development, Relief and Education for Alien Minors (DREAM) Act of 2007, which he co-authored. This Act would have created a path to citizenship for undocumented individuals brought to the U.S. as minors.³⁴ The DREAM Act would later be resurrected as the

³³ *Id.*

³⁴ UCLA Dep't of Pol. Sci., *110th Congress Senate Vote 394*, VOTEVIEW, <https://voteview.com/rollcall/RS1100394> (last visited Sep. 27, 2024) ("Authorizes the Secretary of Homeland Security to cancel the removal of, and adjust to conditional permanent resident status, an alien who: (1) entered the United States before his or her sixteenth birthday, and has been present in the United States for at least five years immediately preceding enactment of this Act; (2) is a person of good moral character; (3) is not inadmissible or deportable under specified grounds of the Immigration and Nationality Act; (4) at the time of application, has been admitted to an institution of higher education, or has earned a high school or equivalent diploma; (5) from the age of 16 and older, has never been under a final order of exclusion, deportation, or removal; and (6) is under 30 years old on the date of enactment of this Act. Sets forth the conditions for conditional permanent resident status, including: (1) termination of status for violation of this Act; and (2) removal of conditional status to permanent status. Authorizes an alien who has satisfied the appropriate requirements prior to enactment of this Act to petition the Secretary for conditional permanent resident status. Provides for: (1) exclusive jurisdiction; (2) penalties for false application

foundational inspiration for a different approach than the traditional legislative route for immigration reform. In the case of the Comprehensive Immigration Reform Act of 2007, it failed to obtain the necessary votes to overcome a Senate filibuster and therefore never made it to the House of Representatives.³⁵

After announcing his candidacy for the presidency in 2007, Obama positioned himself as an advocate for immigration reform. For example, he co-sponsored the Citizenship Promotion Act of 2007, which did not make it out of committee. This act would have required the federal government to freeze the fees legal immigrants pay for each application for services at current levels and allocated \$80 million a year to promote citizenship.³⁶ He also developed and laid out his immigration law proposal, which included a system to verify employment eligibility, full support for guest worker programs, and a pathway to citizenship for undocumented individuals, as outlined in the Comprehensive Immigration Reform Act of 2007:

[We] have to recognize that we've got 12 million undocumented workers who are already here. Many of them living their lives alongside other Americans. Their kids are going to school. Many of the kids, in fact, were born in this country and are citizens. And so, it's absolutely vital that we bring those families out of the shadows and that we give them the opportunity to travel a pathway to citizenship. It's not automatic citizenship. It's not amnesty. They would have to pay a fine. They would have to not have engaged in any criminal activity. They would have to learn English. They would have to go to the back of the line so that

statements; (3) confidentiality; (4) fee prohibitions; (5) higher education assistance; and (6) a Government Accountability Office (GAO) report respecting the number of aliens adjusted under this Act.”)

³⁵ Eric Green, *Immigration Bill Defeat Lamented by Bush, Congressional Leaders*, U.S. EMBASSY & CONSULATES IN JAPAN, <https://japan2.usembassy.gov/e/p/2007/tp-20070702-08.html> (last visited Nov. 11, 2024).

³⁶ See S. 795, 110th Cong. (2007) (as introduced by Senate, Mar. 7, 2007).

they did not get citizenship before those persons who had come here legally.³⁷

He also continued his firm position on securing the borders, particularly the southern border with Mexico:

We're going to have to secure our borders. And this past year, the Senate invested billions of dollars in improving border security. I think that's important because I think all Americans think that we should be able to regulate who comes in and out of this country in an orderly way, not only for the sake of our sovereignty but also to avoid the hundreds of people who have been dying across the desert, the enormous costs that are placed on border states and border towns. I also think that we've got to be serious about employers' obligations to check to see whether somebody is here legally or not. . . . There hasn't been a serious program of employer sanctions. That has to be put in place.³⁸

As the country entered the Great Recession in December 2007, it also appeared that candidate Obama would continue to make immigration reform a priority if elected President.³⁹ In fact, in May 2008, Senator Obama went so far as to guarantee that, if elected, by the end of his first year, he would have an immigration bill to support and advocate for before Congress.⁴⁰ It is important to note that he made this statement as unemployment numbers resulting from the economic downturn continued to rise, growing from less than 5% to 10% during

³⁷ CNN, *CNN Larry King Live: Interview with Barack Obama*, YOUTUBE (June 4, 2010), <https://www.youtube.com/watch?v=OCroZU1O7Po> (interview was taken on March 24, 2007).

³⁸ *Id.*

³⁹ See generally John Weinberg, *The Great Recession and its Aftermath*, FEDERAL RESERVE HISTORY (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/great-recession-and-its-aftermath> (describing the impact and effects of the 2007-2009 financial crisis which was coined "the great recession").

⁴⁰ Univision, *La Promesa de Obama (Mayo 2008)*, YOUTUBE (May 21, 2012), <https://www.youtube.com/watch?v=89i5Eb4iM2M>.

the period⁴¹, a reality that would impact his political position once in office. Barack Obama was elected with 365 electoral college votes and 53% of the popular vote.

III. THE OBAMA/BIDEN WHITE HOUSE, 2009 TO 2012

Although the Democrats controlled Congress in 2009,⁴² during his first year of presidency, Obama focused on addressing the Great Recession and its aftermath.⁴³ Unsurprisingly, he did not advance the immigration reform he had guaranteed as a candidate. Instead, his administration and Congress focused on complementing the extraordinary actions of the Federal Reserve by passing economic stimulus bills and providing unemployment insurance for those affected by the recession.⁴⁴

President Obama later acknowledged that the timing was not ripe for introducing a new comprehensive immigration bill:

With the economy in crisis and Americans losing jobs, few in Congress had any appetite to take on a hot-button issue like immigration. Kennedy was gone. McCain, having been criticized by the right flank for his relatively moderate immigration stance, showed little interest in taking up the banner again. Worse yet,

⁴¹ U.S. Bureau of Lab. Stat., *Great Recession, Great Recovery? Trends from the Current Population Survey*, MONTHLY LAB. R. (Apr. 2018), <https://www.bls.gov/opub/mlr/2018/article/great-recession-great-recovery.htm>; *see also 2008 Presidential Election, 270 TO WIN*, https://www.270towin.com/2008_Election/#google_vignette (last visited Nov. 10, 2024).

⁴² *111th United States Congress*, BALLOTPEDIA, https://ballotpedia.org/111th_United_States_Congress (last visited Nov. 10, 2024).

⁴³ William A. Galston, *President Barack Obama's First two Years: Policy Accomplishments, Political Difficulties*, THE BROOKINGS INST. (Nov. 4, 2010), <https://www.brookings.edu/articles/president-barack-obamas-first-two-years-policy-accomplishments-political-difficulties/>.

⁴⁴ *See generally* Andrew Fieldhouse, *President Obama's Policies Revived the Economy*, ECON. POL'Y INST. (Mar. 21, 2012), <https://www.epi.org/publication/president-obama-policies-economic-recovery/> (discussing the American Recovery and Reinvestment Act); John Weinberg, *supra* note 39 (explaining the causes and aftermath of the Great Recession).

my administration was deporting undocumented workers at an accelerated rate.⁴⁵

He also acknowledged that instead of seeking to remedy the status of many of the undocumented in the country who would have benefited from a comprehensive immigration reform bill, he instead continued to strictly apply existing immigration law: “This wasn’t a result of any directive from me, but rather it stemmed from a 2008 congressional mandate that both expanded ICE’s budget and increased collaboration between ICE and local law enforcement departments in an effort to deport more undocumented immigrants with criminal records.”⁴⁶

Evidently, President Obama either believed that it would be inappropriate for the executive branch to halt the deportation of so many individuals or was hesitant to use such executive power during such a delicate economic time. This move would likely have had complex, negative implications for the Democrats, who were seeking to retain control of Congress.

It is also clear that with regard to border security and immigration enforcement, the Obama/Biden White House strategically chose not to reverse the Bush/Cheney policies immediately, principally to avoid criticism that Democrats were soft on immigration.⁴⁷ For example, with regard to recently arrived illegal aliens, the administration continued the Bush/Cheney policy of expedited removal, applying it to individuals in the U.S. for less than two weeks and within 100 miles of the U.S. border, whether it be

⁴⁵ BARACK OBAMA, *supra* note 14.

⁴⁶ *Id.*; see also *Secure Communities*, U.S. IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/secure-communities> (last updated May 10, 2024) (explaining that the increase in deportations was caused by the expansion of the Secure Communities program, launched in 2008, prioritizing immigration enforcement on “the removal of public safety and national security threats, those who have violated our nation’s immigration laws, including those who have failed to comply with a final order of removal, and those who have engaged in fraud/willful misrepresentation in connection with official government matters,” utilizing a federal information-sharing partnership between ICE and the Federal Bureau of Investigation (FBI), to identify removable aliens who have been arrested and booked for violations of criminal law).

⁴⁷ See BARACK OBAMA, *supra* note 14.

Mexico or Canada.⁴⁸ The Obama/Biden administration also maintained the Secure Communities program, under which local police departments voluntarily cooperate with immigration enforcement agencies on the deportation of criminals. It even made participation mandatory for all states.⁴⁹

In addition, President Obama signed into law new enforcement provisions. In 2010, he signed the Southwest Border Security Bill, which aimed to “bolster the work of federal law enforcement officials and improve their ability to partner with state, local, and tribal law enforcement.”⁵⁰ As a result, the administration placed more officers on the field, increased administrative resources by deploying more federal agents on the U.S./Mexico border, and improved surveillance mechanisms.⁵¹ According to the administration, this renewed focus resulted in an increase in the deportation of aliens with criminal records by more than 70% in 2010 as compared to 2008.⁵²

Not surprisingly, by 2010, Latino and immigration advocacy groups were loudly criticizing the lack of progress on his campaign promise.⁵³ Specifically, the continued expansion of immigration enforcement was heavily criticized by his supporters and left-leaning advocacy groups, like the National Council of La Raza, the Mexican American Legal Defense Fund, and the League of United Latin American Citizens.⁵⁴ These advocacy groups did not expect President Obama, who had appealed to Latino voters by criticizing Republicans

⁴⁸ Designating Aliens for Expedited Removal, 69 Fed. Reg 48877 (Aug. 11, 2004).

⁴⁹ See Alex Nowrasteh, *Obama's Mixed Legacy on Immigration*, CATO INST.: COMMENTARY (Jan. 25, 2017), <https://www.cato.org/publications/commentary/obamas-mixed-legacy-immigration>.

⁵⁰ Jesse Lee, *President Obama Signs the Southwest Border Security Bill*, WHITE HOUSE: BLOG (Aug. 13, 2010, 12:12 PM), <https://obamawhitehouse.archives.gov/blog/2010/08/13/president-obama-signs-southwest-border-security-bill>.

⁵¹ See *id.*

⁵² Matt Chandler, *Record-Breaking Immigration Enforcement Results*, U.S. DEP'T OF HOMELAND SEC., (Aug. 7, 2024), <https://www.dhs.gov/archive/news/2010/10/06/record-breaking-immigration-enforcement-results>.

⁵³ See BARACK OBAMA, *supra* note 14.

⁵⁴ See Ruben Navarrette, *Immigration Flip-Flops Expose Obama's Insincerity*, RECORDNET.COM (Apr. 8, 2011, 12:00 AM), <https://www.recordnet.com/story/opinion/columns/2011/04/08/immigration-flip-flops-expose-obama/50122941007/>.

for being too tough on immigration enforcement, to take an even tougher approach.⁵⁵

What was unknown by many of these organizations was that the Obama/Biden administration was already considering alternatives to legislation by focusing on a potential administrative agenda that outlined large-scale programs that would provide relief to many undocumented individuals in the U.S. In an undated internal memo leaked in the late summer of 2010, Alejandro Mayorkas, the Obama administration's Director of U.S. Citizenship and Immigration Services (USCIS), received a series of outlined administrative relief options "to promote family unity, foster economic growth, achieve significant process improvements and reduce the threat of removal for certain individuals present in the United States without authorization."⁵⁶ In the memo, Mayorkas lay out the legal argument in favor of executive action in the absence of legislative action.⁵⁷ Among the numerous options suggested were actions that fostered economic growth, extended benefits and protections to specific groups, and used deferred action for those eligible for relief in the future.⁵⁸ Additional proposals included allowing TPS applicants who entered without inspection to adjust their status in the U.S. and an expansion of parole in place (PIP).⁵⁹

President Obama advocated for immigration reform during the State of the Union address in January of 2010⁶⁰ while Democrats

⁵⁵ *Id.*

⁵⁶ Memorandum from Denise A. Vanison, Policy & Strategy, et al., U.S. Citizenship & Immigr. Servs., to Alejandro N. Mayorkas, Dir., U.S. Citizenship & Immigr. Servs., on Administrative Alternatives to Comprehensive Immigration Reform, <https://abcnews.go.com/images/Politics/memo-on-alternatives-to-comprehensive-immigration-reform.pdf>

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* (examining changes in the EB-5 Immigrant Investor Program, such as expanding the "dual intent" concept to additional nonimmigrant categories such as F, O, TN, P and E visa holders; allowing employment authorization for H-4 dependent spouses under certain circumstances; affording workers admitted in nonimmigrant status "a reasonable period of time to conclude their affairs and depart after expiration of their authorized period of employment"; and expanding the availability of the Premium Processing Service).

⁶⁰ Barack H. Obama, President, State of the Union Address (Jan. 27, 2010), *in* 156 CONG. REC. H414-06.

still had control of both chambers in Congress.⁶¹ After losing the majority in the House of Representatives in November 2010,⁶² the President introduced a narrow version of the DREAM Act in December, which passed in the lame duck House of Representatives but failed to obtain the necessary votes to overcome a Senate filibuster by a vote of 55-41.⁶³ Once again, the established federal legislative mechanism failed to pass legislation that would provide some resolution to the wider population of undocumented individuals in the U.S.⁶⁴ The arrival of a Republican-controlled House of Representatives in 2011⁶⁵ also guaranteed that no new comprehensive immigration reform legislation would make it to his desk for signature, thereby setting the stage for a dramatic shift by the White House on how to effect immigration policy change.

Following the disappointing failure of the DREAM Act, the administration took its first enforcement initiative that refocused the prosecutorial discretion on immigration.⁶⁶ In a 2011 memorandum to all Immigration and Customs Enforcement (ICE) employees, ICE Director John Morton set forth the agency's priorities for the apprehension, detention, and removal of aliens by focusing on individuals who pose a danger to national security or public safety.⁶⁷

⁶¹ *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> (last visited Sept. 30, 2024); *Party Divisions of the House of Representatives., 1789 to Present*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (last visited Sept. 30, 2024).

⁶² See *Party Divisions of the House of Representatives, 1789 to Present*, *supra* note 61.

⁶³ See DREAM Act of 2010, S. 3992, 111th Cong. (2010); see also Scott Wong & Shira Toeplitz, *DREAM Act Dies in Senate*, POLITICO (Dec. 20, 2010, 8:07 AM), <https://www.politico.com/story/2010/12/dream-act-dies-in-senate-046573>.

⁶⁴ See generally Wong & Toeplitz, *supra* note 63 (discussing the political debate and legislative challenges surrounding the failure of the DREAM Act in the U.S. Senate).

⁶⁵ *Party Divisions of the House of Representatives., 1789 to Present*, *supra* note 61.

⁶⁶ See generally U.S. Immigr. & Customs Enf't, Memorandum on Civil Immigration Enforcement: Priorities for Apprehension, Detention, and Removal of Aliens (March 2, 2011) (introducing revised prosecutorial discretion guidelines aimed at prioritizing the removal of criminal offenders and threats to public safety and signaling a shift away from pursuing low-priority individuals, including DREAM Act-eligible youth) [hereinafter ICE Memo].

⁶⁷ *Id.*

This was the first initiative of its kind since the inception of ICE.⁶⁸ The memorandum listed the following priorities for enforcement⁶⁹:

1. Aliens who pose a danger to national security or risk to public safety, including terrorists, spies, individuals convicted of crimes (with an emphasis of violent criminals), and gang members, referring to new offense levels defined in the Secure Communities Program;
2. Recent illegal aliens; and,
3. Aliens subject to a final order of removal who have absconded or failed to depart.⁷⁰

The instructions provided in the memorandum called for the executive branch to use prosecutorial discretion to better allocate the limited resources of the enforcement agencies. This argument would later be front and center as justifications for the use of executive action in immigration law and policy.⁷¹ The purpose was to better use the government's limited resources by focusing on individuals who were

⁶⁸ *Id.*; see *Who We Are*, U.S. IMMIGR. AND CUSTOMS ENF'T., <https://www.ice.gov/about-ice> (last visited Sept. 30, 2024) (explaining that ICE is the immigration investigative and enforcement branch of the Department of Homeland Security that was created in 2003; it has over 20,000 law enforcement and support personnel in more than 400 offices in the U.S., and its operations are divided into three directorates: Homeland Security Investigations (HSI), Enforcement and Removal Operations (ERO) and Office of the Principal Legal Advisor (OPLA)); see also Luke Barr, *Homeland Security Agency Under ICE Rebrands to aid its Investigations*, ABC NEWS (Apr. 23, 2024, 11:30 AM) <https://abcnews.go.com/Politics/homeland-security-agency-ice-rebrands-aid-investigations/story?id=109510154> (noting that in April 2024, ICE's investigative arm rebranded itself as Homeland Security Investigations (HSI)); see also *Who We Are*, DEP'T. OF HOMELAND SEC.: HOMELAND SEC. INVESTIGATIONS, <https://www.dhs.gov/hsi/who-we-are> (last visited Sept. 27, 2024) (discussing that HSI investigates "the illegal movement of people, goods, money, contraband, weapons and sensitive technology," into and through the U.S., as well as crimes like "child exploitation, human trafficking, financial fraud and scams and other crimes against vulnerable populations.").

⁶⁹ U.S. Immigr. & Customs Enf't Memorandum on Civil Immigration Enforcement, *supra* note 68.

⁷⁰ ICE Memo, *supra* note 66, at 1-3.

⁷¹ See *id.* at 1.

high priorities for deportation.⁷² More importantly, by targeting these three narrow categories of unauthorized individuals, the government implied that it would not focus on the large number of undocumented individuals without a criminal record who were not recent entrants to the U.S.⁷³

Furthermore, ICE Director Morton issued additional field guidance in a second memorandum, authorizing ICE officials to exercise discretion concerning the priorities set out in the March communiqué.⁷⁴ This guidance defined discretion to encompass all enforcement decisions.⁷⁵

It is clear that in late March 2011, the Obama/Biden White House was hesitant to publicly acknowledge it was ready to pursue a new course on immigration enforcement.⁷⁶ In an interview with Univision anchor Jorge Ramos, President Obama specifically stated that, as President, he was obliged to enforce the law and that an executive order stopping deportations “would not conform with [his] appropriate role as president.”⁷⁷ The impact and precedent set by the recent publication of the initial ICE memoranda were not fully appreciated until much later, particularly since the two memoranda did not have an immediate affect the number of low-priority immigrants being deported, agency arrests, and deportation proceedings.⁷⁸

⁷² *See id.*

⁷³ *See generally id.* (emphasizing the government’s focus on individuals with criminal convictions, recent entrants, and national security threats, without discussing other low-priority undocumented individuals).

⁷⁴ *See* U.S. Immigr. & Customs Enf’t, Memorandum on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011).

⁷⁵ *Id.* at 2.

⁷⁶ *Remarks by the President in State of Union Address*, THE WHITE HOUSE (Jan. 25, 2011, 9:12 PM), <https://obamawhitehouse.archives.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

⁷⁷ Interview by Jorge Ramos with Barack Obama, President, (Mar. 28, 2011) (in Washington, D.C. by Univision).

⁷⁸ *See* COX & RODRIGUEZ, *supra* note 19, at 170-73.

IV. AN ABOUT-FACE ON EXECUTIVE ACTION, THE
OBAMA/BIDEN WHITE HOUSE 2012 - 2016

As the 2012 re-election campaign picked up pace, the Obama/Biden administration continued to face intense pressure from immigration advocacy groups and progressives within the party who sought results. The barely discernable impact of the ICE memoranda in refocusing the enforcement arm of the established deportation machine only aggravated sentiments among these groups. As a result, the White House determined the time was right to protect a defined group of individuals from deportation through an administrative relief mechanism: those who would have benefited from the DREAM Act.⁷⁹ In what would become his signature achievement in immigration law, President Obama shielded up to five million immigrants who entered the country illegally from deportation by using deferred action,⁸⁰ just as it was suggested in the Director Mayorkas memorandum leaked in 2010.⁸¹

Specifically, the Obama/Biden White House, through an executive branch memorandum issued by DHS Secretary Janet Napolitano in June 2012, ordered immigration enforcement agents to defer action against young people who had arrived in the United States as children.⁸² The Deferred Action for Childhood Arrivals (DACA) program, which impacted 580,000 individuals, offered a path to work permits.⁸³ The memorandum titled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States

⁷⁹ See Dream Act of 2010, *supra* note 63.

⁸⁰ Eyder Peralta, *Obama Goes it Alone, Shielding up to 5 Million Immigrants from Deportation*, NPR (Nov. 20, 2014, 6:00 PM), <https://www.npr.org/sections/thetwo-way/2014/11/20/365519963/obama-will-announce-relief-for-up-to-5-million-immigrants>.

⁸¹ Vanison, *supra* note 56, at 10 (“Deferred action is an exercise of prosecutorial discretion not to pursue removal from the U.S. of a particular individual for a specific period of time.”).

⁸² Office of the Press Secretary, *Secretary Napolitano Announces Deferred Action Process for Young People who are low Enforcement Priorities*, U.S. DEPT. OF HOMELAND SEC. (June 15, 2012), <https://www.dhs.gov/archive/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

⁸³ See ANDORRA BRUNO, CONG. RSCH. SERV., *THE DACA AND DAPA DEFERRED ACTION INITIATIVES: FREQUENTLY ASKED QUESTIONS*, at ii (2017).

as Children,” suggests allowing certain immigrants to avoid deportation and obtain work permits for two years – renewable upon good behavior.⁸⁴ To apply, an immigrant had to be younger than thirty-one on June 15, 2012, must have entered the U.S. before turning sixteen, and must have lived in the U.S. since 2007.⁸⁵

President Obama laid out his rationale and justification for bypassing the legislative branch as follows:

In the absence of any immigration action from Congress to fix our broken immigration system, what we've tried to do is focus our immigration enforcement resources in the right places. So we prioritized border security, putting more boots on the southern border than at any time in our history -- today, there are fewer illegal crossings than at any time in the past 40 years. We focused and used discretion about whom to prosecute, focusing on criminals who endanger our communities rather than students who are earning their education. And today, deportation of criminals is up 80 percent. We've improved on that discretion carefully and thoughtfully. Well, today, we're improving it again.

Effective immediately, the Department of Homeland Security is taking steps to lift the shadow of deportation from these young people. Over the next few months, eligible individuals who do not present a risk to national security or public safety will be able to request temporary relief from deportation proceedings and apply for work authorization.

⁸⁴ U.S. Dep't of Homeland Sec., Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), at 2.

⁸⁵ *Id.* at 1.

Now, let's be clear—this is not amnesty, this is not immunity. This is not a path to citizenship. It's not a permanent fix.⁸⁶

This policy was presented as a temporary protection while Congress worked to create a pathway to permanent legal status.⁸⁷ It was also a necessary next step in refocusing the government's enforcement priorities, moving beyond the discretionary nature of the ICE memoranda to a clearer set of rules that reduced agent discretion, at least for this particular group of individuals.⁸⁸

This was a novel use of executive authority in immigration law because most previous executive actions on immigration prior to the creation of DACA were targeted fairly narrowly.⁸⁹ By contrast, this action would be massive. According to the Pew Research Center, an estimated 1.5 million individuals would be affected,⁹⁰ which was by far the largest number impacted by such an executive action in recent history. Therefore, it is not surprising that the Republicans reacted swiftly with claims that the President lacked the authority to enact the policy and that it represented a clear abuse of executive power.⁹¹

Although it is evident that the Obama-Biden White House considered administrative options in response to the legislative impasse on comprehensive immigration reform as early as 2010, President Obama never directly addressed what appeared to be a reversal in his stance on executive branch enforcement in immigration

⁸⁶ Barack Obama, the President, *Remarks by the President on Immigration*, THE WHITE HOUSE: OFFICE PRESS SECRETARY (June 15, 2012, 2:09 PM), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration>.

⁸⁷ *See id.*

⁸⁸ *See* COX & RODRIGUEZ, *supra* note 19, at 178-80 (discussing the interplay between the White House and the enforcement bureaucracy).

⁸⁹ Drew Desilver, *Executive Actions on Immigration Have Long History*, PEW RESEARCH CTR. (Nov. 21, 2014), <https://www.pewresearch.org/short-reads/2014/11/21/executive-actions-on-immigration-have-long-history/>.

⁹⁰ *Id.*

⁹¹ *See, e.g., Stop Obama's Amnesty to Stop the Border Crisis*, SENATOR TED CRUZ (July 7, 2014), <https://www.cruz.senate.gov/newsroom/press-releases/stop-obama-and-146s-amnesty-to-stop-the-border-crisis>.

law, which is now criticized by detractors as imperial and autocratic.⁹² In a 2014 interview with Univision's Jorge Ramos, President Obama was confronted on this issue.⁹³

Jorge Ramos. Even on March 2011 on a Univision town hall meeting you told us, and I quote, "With respect to the notion that I can just suspend deportations through executive order, that's just not the case." That's exactly what you did.

The President. No, no, no.

Jorge Ramos. Why did you change your mind?

The President. No, because, Jorge, at the time, and I can run back the tape on your questions and some of the questions of that town hall, the notion was that we could just stop deportations period, and we can't do that. What I've said very clearly, consistently is that we have to enforce our immigration laws, but that we have prosecutorial discretion given the limited resources, and we can't deport 11 million people.

Jorge Ramos. So it's not that you changed your mind on this?

The President. What was —

Jorge Ramos. Or that you were convinced otherwise?

The President. — what was clear was that we could reprioritize how we deploy the limited resources we have to focus on the borders, to focus on criminals. We began that process as soon as I came into office. We amplified that approach through the DACA program that we instituted, and then we continued to see what else we could do. And Jeh Johnson, I think, has done a terrific job in saying, here are our priorities. We're not going to separate families. We're going to focus on

⁹² See Linda Feldmann, *Is Barack Obama an Imperial President?*, THE CHRISTIAN SCI. MONITOR (May 7, 2014, 7:50 AM), <https://www.csmonitor.com/USA/Politics/2014/0126/Is-Barack-Obama-an-imperial-president>.

⁹³ Interview by Jorge Ramos with Barack Obama, President, (Mar. 28, 2011) (in Wash., D.C. by Univision).

criminals. We're going to focus on borders. We're going to focus on new arrivals. Because one of the things that I think is important to understand is that although we are reprioritizing to make sure that we're not in the business of separating families, we are still sending a message to people who have not yet come here, we're going to be enforcing those immigration laws so that newcomers, people who just arrived, you are likely to be sent back. And we're going to still be focused on making sure that, not just from Mexico but anywhere around the world, that we can actually enforce better the laws that we have. In the meantime, the people who have lived here, let's make sure that they're treated as the members of our community that they truly are.

Jorge Ramos. But if you — as you were saying, you always had the legal authority to stop deportations, then why did you deport two million people?

The President. Jorge, we're not going to —

Jorge Ramos. For six years you did it.

The President. No. Listen, Jorge —

Jorge Ramos. You destroyed many families. They called you deporter-in-chief.

The President. You called me deporter-in-chief.

Jorge Ramos. It was Janet Murguia from La Raza.

The President. Yeah, but let me say this, Jorge —

Jorge Ramos. Well, you could have stopped deportations.

The President. No, no, no.

Jorge Ramos. That's the whole idea.

The President. That is not true. Listen, here's the fact of the matter.

Jorge Ramos. You could have stopped them.

The President. Jorge, here's the fact of the matter. As President of the United States I'm always responsible for problems that aren't solved right away. I regret millions of people who didn't get health insurance before I passed health insurance and before I

implemented it. I regret the fact that there are kids who should've been going to college during my presidency, but because we didn't get to them fast enough, they gave up on college. The question is, are we doing the right thing, and have we consistently tried to move this country in a better direction.⁹⁴

Empowered by the support it received for this program, particularly among progressives within the party and pro-immigrant grassroots organizations, in November 2014, the Obama--Biden White House announced its intention to expand the deferred action program as part of the Administration's Immigration Accountability Executive Action (AIAEA).⁹⁵ Through this, the White House once again argued for a more efficient and effective use of its limited enforcement resources.⁹⁶

AIAEA had multiple components related to enforcement, but its most controversial proposal was an expansion of DACA⁹⁷ and the creation of a new program titled Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).⁹⁸ DAPA would have granted deferred action to certain undocumented immigrants who had lived in the U.S. since 2010 and had U.S. citizenship or lawful permanent resident children.⁹⁹ As with DACA, DAPA would not make these individuals subject to removal proceedings, as the administration would instead focus resources on the removal of individuals who were threats to border security, national security, and

⁹⁴ *Id.*

⁹⁵ Off. of the Press Sec'y, *FACT SHEET: Immigration Accountability Executive Action*, THE WHITE HOUSE (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>.

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ The Immigration and Ethnic History Society, *Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and DACA Program Expanded*, IMMIGR. HIST. (2019), <https://immigrationhistory.org/item/deferred%E2%80%8B-action-for-parents-of-americans-and-lawful-permanent-residents-dapa-and-daca-program-expanded/#>.

⁹⁹ *Id.*

public safety.¹⁰⁰ The program would also grant DAPA recipients three-year work authorization permits.¹⁰¹

While it is important to note that the AIAEA also sought to crack down on illegal immigration at the southern border and prioritized the removal of individuals with criminal backgrounds, it was the expanded DACA and the creation of DAPA that captured headlines, as approximately 3.5 million individuals would have benefited from the program.¹⁰² This was seen as amnesty by those on the right of the political spectrum. Not surprisingly, in December 2014, Texas and twenty-five other states with Republican governors sued in the U.S. District Court for the Southern District of Texas, asking the court to enjoin implementation of both the DACA expansion and DAPA.¹⁰³ They claimed abuse of executive power and violations of the Administrative Procedures Act—arguments that have since become the foundational position statements for either party when challenging presidential authority on the matter.¹⁰⁴ In the case of the DACA expansion and creation of DAPA, a preliminary injunction was issued in February 2015 and remained in place for the remainder of the Obama presidency.¹⁰⁵

V. ENHANCED FOCUS ON NATIONAL SECURITY FOR THE REMAINDER OF THE TERM

Even though the administration began to pursue executive actions during its second term in an effort to effectuate change in immigration policy, it also continued to expand existing national security enforcement mechanisms that cater to the protection and defense of the citizenry from terrorist, criminal, and health-related threats—mechanisms that faced little to no objection from

¹⁰⁰ *See id.*

¹⁰¹ U.S. CITIZENSHIP AND IMMIGRATION SERVICES, YOU MAY BE ABLE TO REQUEST DAPA. WANT TO LEARN MORE? 1 (2015), https://www.uscis.gov/sites/default/files/document/flyers/EAFlier_DAPA.pdf.

¹⁰² *See* Desilver, *supra* note 89.

¹⁰³ *See Texas v. United States*, 86 F. Supp. 3d 591, 607 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), as revised (Nov. 25, 2015).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 676.

Republicans.¹⁰⁶ For example, President Obama expanded the Criminal Alien Program (CAP), an enforcement mechanism that helped the federal government locate and remove individuals incarcerated by local or state law enforcement agencies.¹⁰⁷ While CAP had been in existence in some form or another since 1986,¹⁰⁸ it had previously focused on those individuals with serious criminal convictions that made them removable under immigration law. This program was responsible for the largest number of apprehensions and, while it supposedly focused only on individuals convicted of a crime, the administration expanded the program to all noncitizen individuals who had been charged with a crime in 2013.¹⁰⁹ As a result, CAP-related arrests accounted for between “two thirds and three quarters of all deportations from the interior of the country in the early 2010s.”¹¹⁰

Additionally, President Obama also continued the Bush/Cheney administration’s Operation Streamline, introduced in 2005 to deter illegal border crossings by referring more illegal border crossings to the Department of Justice for criminal prosecution.¹¹¹ The Obama/Biden White House incorporated Operation Streamline into a broader border security measure known as the “Consequence Delivery System,” designed to measure the effectiveness and

¹⁰⁶ See Michael T. Costelloe, *Immigration as Threat: A Content Analysis of Citizen Perception*, 2 J. OF PUB. AND PROF. SOCIO. (2008) (arguing that some consider immigration itself to be a threat to the national security).

¹⁰⁷ See *The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails*, AM. IMMIGR. COUNCIL (Aug. 1, 2013), <https://www.americanimmigrationcouncil.org/research/criminal-alien-program-cap-immigration-enforcement-prisons-and-jails>.

¹⁰⁸ See *id.*

¹⁰⁹ *Id.* See also 8 U.S.C. §1227 (2024) (stating crimes that can lead to deportation include crimes of moral turpitude, multiple criminal convictions aggravated felonies, and controlled substance violations).

¹¹⁰ Dara Lind, *Inside the Government’s most Powerful Weapon for Deporting Unauthorized Aliens*, VOX (Nov. 2, 2015), <https://www.vox.com/2015/11/2/9657806/criminal-alien-program>.

¹¹¹ Cristobal Ramón, *Federal Prosecutions of Illegal Immigrants*, BIPARTISAN POL’Y CTR. (Mar. 27, 2018), <https://bipartisanpolicy.org/blog/the-prosecution-pipeline/> (There was a decline in cases after 2010 attributed to improved border enforcement measures and administration changed priorities in 2014 to target serious criminals entering the U.S.).

efficiency of consequences, not the individual enforcement measures themselves.¹¹²

Furthermore, as part of the Immigration Accountability Executive Action--the aforementioned proposal that also announced the DACA expansion and creation of DAPA--DHS Secretary Jeh Johnson issued a memorandum setting forth new policies for the apprehension, detention, and removal of undocumented immigrants.¹¹³ This memorandum marked a significant shift in focus, honing in on the removal of recent border crossers and serious criminals rather than on ordinary status violators who happen to be apprehended in the interior of the country. Throughout the memo, the agency set out a clear position on the legal basis for selective enforcement of immigration law. Specifically, the memorandum states the following:

Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. And, in the exercise of that discretion, **DHS can and should develop smart enforcement priorities, and ensure that use of its limited resources is devoted to the pursuit of those priorities. DHS's enforcement priorities are, have been, and will continue to be national security, border security, and public safety. DHS personnel are directed to prioritize the use of enforcement personnel, detention space, and removal assets accordingly.** In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also

¹¹² *Id.*; Randy Capps et al., *Advances in U.S.-Mexico Border Enforcement*, MIGRATION POL'Y INST. (May 2017), <https://www.migrationpolicy.org/sites/default/files/publications/ConsequenceDelivery-Report-FINAL.pdf>.

¹¹³ Memorandum from Jeh Charles Johnson, Sec'y, to the U.S. Dep't of Homeland Sec. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion%281%29.pdf.

to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case. While DHS may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing enforcement and removal of higher priority cases. Thus, DHS personnel are expected to exercise discretion and pursue these priorities at all stages of the enforcement process—from the earliest investigative stage to enforcing final orders of removal—subject to their chains of command and to the particular responsibilities and authorities applicable to their specific position.¹¹⁴

[emphasis added].

Applying this rationale and justification for selective executive enforcement, the government indicated that it would focus its removal power on the following individuals in order of priority:

1. Individuals who pose a threat to national security, border security, and public safety (felons and terrorists)
2. Individuals convicted of multiple misdemeanors or a significant misdemeanor, individuals in the country for less than one year, and individuals who have significantly abused the visa or visa waiver programs; and,
3. Individuals with a final order of removal issued within the last year.¹¹⁵

¹¹⁴ *Id.*

¹¹⁵ *Id.*

By this order, millions of individuals were not considered to be a deportation priority. By stressing that department resources should be dedicated, to the greatest degree possible, to the removal of individuals described in the priorities set forth above, commensurate with the level of prioritization identified, those not included in the list received reprieve from deportation.¹¹⁶ Clearly, the administration sought to deter illegal border crossings and remove them prior from U.S. territory prior to their integration into society.

VI. A MIXED LEGACY

There is no question that the legacy of the Obama/Biden White House was mixed and complex. It inherited a relatively new and massive immigration enforcement bureaucracy, which it sought to refocus and restructure using novel guidance and prosecutorial discretion. However, it had de minimis results as it pertains to the removal of undocumented individuals. While his executive actions shielded hundreds of thousands from deportation, President Obama was also one of the toughest enforcers of immigration laws in U.S. history, earning him the nickname “Deporter-in-Chief” from the National Council of La Raza.¹¹⁷

Congressional funding continued to rise under the Obama/Biden administration, increasing the resources allocated to DHS and its enforcement division from approximately \$53 billion in 2008 to \$66 billion by 2017.¹¹⁸ This funding provided more personnel and facilities

¹¹⁶ *Id.*

¹¹⁷ Reid Epstein, *NCLR Head: Obama ‘Deporter-in-Chief’*, POLITICO (Mar. 4, 2014, 6:00 AM), <https://www.politico.com/story/2014/03/national-council-of-la-raza-janet-murguia-barack-obama-deporter-in-chief-immigration-104217>; *Obama Has Deported More People Than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM), <https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661> (“[b]etween 2009 and 2015 [the Obama A]dministration [] removed more than 2.5 million people”); see also *2015 Yearbook of Immigration Statistics*, U.S. DEPT. OF HOMELAND SEC.: OFF. OF IMMIGR. STATS. 103 (Dec. 2016), https://ohss.dhs.gov/sites/default/files/2023-12/Yearbook_Immigration_Statistics_2015.pdf.

¹¹⁸ *The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL (January 25, 2017) <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security> (when ICE was created under DHS, it had a budget of \$3.3 billion. By the end of the Obama presidency, its budget was

for locating, detaining, and deporting individuals. Due to these increased resources, the number of noncitizen removals increased dramatically during his administration, which ultimately became the harshest enforcer of immigration law in history, deporting more undocumented immigrants than any previous administration. This was largely due to the expansion of the Secure Communities program and continued use of CAP.¹¹⁹ The Obama administration also showed less leniency on employer violators than its predecessors, imposing 15.5 times more fines and making 8.3 times more arrests for immigration law violations than George W. Bush's administration by the end of 2014.¹²⁰ Additionally, his administration actively promoted—but did not mandate—the use of E-Verify, a government program aimed at identifying unlawful immigrants in the workforce.

However, another aspect to President Obama's immigration legacy involves his administration being the first to seriously analyze existing law to determine how executive action could effectuate change in immigration law and policy. Through the executive action that created DACA, President Obama effectively granted temporary legal status to a large group of undocumented immigrants, shielding hundreds of thousands of young people from deportation to date. DACA's scope had to date never been seen and set the foundation for future actions. Further, President Obama's 2014 executive actions on immigration, though unsuccessful in the courts, demonstrated a new willingness to push the envelope of executive authority to protect even more immigrants from deportation. These actions showcased a new eagerness to test the daunting immigration law quagmire through unilateral executive office action, effectively setting the stage for a

\$6.1 billion); *FY 2018 Budget in Brief*, DEP'T OF HOMELAND SEC. 36, <https://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20BIB%20Final.pdf> (the total DHS budget allocation grew from approximately \$52.8 billion in 2009 to \$66 billion in 2017).

¹¹⁹ Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RSCH. CNTR. (Oct. 2, 2014), <https://www.pewresearch.org/short-reads/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013/>.

¹²⁰ Alex Nowrasteh, *Obama's Mixed Legacy on Immigration*, CATO INST. (Jan. 25, 2017), <https://www.cato.org/publications/commentary/obamas-mixed-legacy-immigration>

much more aggressive use of executive authority to provide immigration relief by the future Biden/Harris administration.

VII. THE TRUMP/PENCE WHITE HOUSE, 2017- 2020

It would be impossible to compare the Obama and Biden White House positions without mentioning of the tumultuous four years of the Trump/Pence White House. While we will not discuss in detail the barrage of measures the executive branch issued on immigration law, particularly during Trump's first two years of office, it is worthwhile to mention the scope, mechanisms, and success of the Trump/Pence administrations in immigration policy, frequently referred to as the "zero tolerance" policy. For purposes of this article, it is sufficient to say that his administration issued over 400 executive actions, including orders and presidential proclamations related to immigration, covering a wide range of immigration topics, including border security, asylum, visa issuance, and refugee admission—all with the purpose of curtailing immigration to the U.S., not providing reprieve or benefit to those already in the U.S.¹²¹

While it followed the example of the Obama/Biden White House in using executive law enforcement to effectuate real, dramatic, and expansive changes in United States immigration policy, it did so almost exclusively on the enforcement front, showing no interest in addressing the situation of the large number of undocumented individuals in the U.S. It effected change almost exclusively through executive orders aimed to "drastically narrow humanitarian benefits, increase enforcement and decrease legal immigration."¹²²

The Trump/Pence White House immediately issued proclamations and executive orders in early 2017 to attack sanctuary cities, implement a travel ban targeting several predominantly Muslim countries, push for an expansion and completion of a physical border wall between the U.S. and Mexico, change the immigration enforcement priorities—making every undocumented individual in

¹²¹ Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes Under the Trump Presidency*, MIGRATION POL'Y INST. 1 (July 2020), https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf.

¹²² *Id.*

the U.S. subject to deportation—and reduce the number of refugee admissions, all without congressional support.¹²³ Among the first significant enforcement changes was the expansion of expedited removal proceedings, allowing their use well beyond the 100-mile reach from the borders and extending their application across the entire national landscape, unless the individual had been in the U.S. for at least two years.¹²⁴

The Trump/Pence administration also sought to reduce legal immigration by expanding “public charge,” making it more difficult for those individuals with lower resources to obtain immigration benefits.¹²⁵ It imposed various restrictions on certain types of visas, with a particular focus on the H-1B visa for professional workers.¹²⁶ In one of the more sinister chapters related to immigration law, the Trump/ Pence administration also implemented a family separation policy as part of a broader effort to deter illegal immigration.¹²⁷ The administration further implemented various measures to restrict asylum claims and attempted, albeit unsuccessfully, to end Temporary Protection Status (TPS) for Sudan, Haiti, El Salvador, Nepal, Honduras, and Nicaragua.¹²⁸

¹²³ See Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017); see also ARMANDO OLMEDO & JORGE CANCINO, *INMIGRACION LAS NUEVAS REGLAS* 229 – 232 (2017).

¹²⁴ Memorandum from John F. Kelly, Sec’y, Dep’t of Homeland Sec., on Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf; Yael Schacher, *Addressing the Legacy of Expedited Removal: Border Procedures and Alternatives for Reform*, REFUGEES INT’L (May 13, 2021), <https://www.refugeesinternational.org/reports-briefs/addressing-the-legacy-of-expedited-removal-border-procedures-and-alternatives-for-reform/>.

¹²⁵ *Changes to “Public Charge” Inadmissibility Rule: Implications for Health and Health Coverage*, KFF (Aug. 12, 2019), <https://www.kff.org/racial-equity-and-health-policy/fact-sheet/public-charge-policies-for-immigrants-implications-for-health-coverage/>.

¹²⁶ Stuart Anderson, *The Story of how Trump Officials Tried to end H-1B Visas*, FORBES <https://www.forbes.com/sites/stuartanderson/2021/02/01/the-story-of-how-trump-officials-tried-to-end-h-1b-visas/> (last updated Dec. 10, 2021, 9:42 AM).

¹²⁷ *Family Separation and Detention*, AM. BAR ASS’N, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/immigration/familyseparation/ (last visited Nov. 11, 2024).

¹²⁸ *Latest on TPS for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan*, CLINIC, <https://www.cliniclegal.org/resources/latest-tps-el-salvador-haiti-honduras->

VIII. THE BATTLE OVER DACA

The Trump/Pence administration tried to end the Obama-era DACA program in September 2017 and it immediately faced court challenges that forced the administration to keep the program.¹²⁹ DACA advocates in three separate lawsuits successfully argued that the administration had violated the Administrative Procedures Act (APA) by failing to follow the established formal process, an argument that would be repeated in nearly every lawsuit aimed at curbing executive action on immigration law.¹³⁰ In June 2020 the Supreme Court ruled that the decision to rescind DACA was arbitrary and capricious under the APA and remanded the consolidated cases for further proceedings.¹³¹

Conversely, in May 2018, Texas along with eight other states and two governors, filed a lawsuit, in the United States District Court for the Southern District of Texas challenging the legality of DACA's implementation in 2012. That case is still moving through the courts, and the Supreme Court could decide the future of DACA within the next year.¹³² As things stand, the Southern District of Texas issued a ruling declaring that DHS did not have the authority to implement DACA, although the ruling does not impact the current DACA recipient protections or the ability to renew them.¹³³

nepal-nicaragua-and-sudan (last updated June 26, 2024).; *see also* Peniel Ibe & Eli Johnson, *Trump has Ended Temporary Protected Status for Hundreds of Thousands of Immigrants. Here's what you need to know*, AFSC, <https://afsc.org/news/trump-has-ended-temporary-protected-status-hundreds-thousands-immigrants-heres-what-you-need> (last updated June 30, 2020).

¹²⁹ *Id.*; *see also* *Supreme Court Overturns Trump Administration's Termination of DACA*, NAT'L IMMIGR. L. CTR. (June 22, 2020), <https://www.nilc.org/articles/supreme-court-overturns-trump-administrations-termination-of-daca/>.

¹³⁰ *See* U.S. Dep't of Homeland Sec. v. Regents of Univ. of Cal., 591 U.S. 1, 16-19 (2020); Vidal v. Nielsen, 291 F. Supp. 3d 260, 269-73 (E.D.N.Y. 2018); NAACP v. Trump, 298 F. Supp. 3d 209, 234-35 (D.D.C. 2018).

¹³¹ Administrative Procedures Act, 5 U.S.C. §§ 551–559. APA governs the way in which administrative agencies of the U.S. federal government may propose and establish regulations. It also grants U.S. federal courts oversight over all agency actions.

¹³² *Regents of Univ. of Cal.*, 591 U.S. at 4.

¹³³ *Id.* at 743.

IX. THE IMPACT OF COVID-19

National security, which encompasses the national defense and refers to any person or event that may impact the financial, physical, and health well-being of the citizenry, is frequently invoked to curb immigration.¹³⁴ During the pandemic, the most effective measures against both legal and illegal immigration resulted from the global SARS-CoV-2 (COVID-19) pandemic, not the implementation of the zero-tolerance policy. As expected from a shutdown of services, the bureaucracy responsible for the processing of immigration benefits was structurally impacted. In the case of the U.S. citing public health concerns, the administration used the pandemic to justify the closure of U.S. embassies and consulates worldwide, effectively suspending the issuance of nonimmigrant and immigrant visas. Also, immigration courts, which are under the Department of Justice, postponed hearings, exacerbating the already existing backlogs in immigration courts.

In the period immediately preceding the pandemic, in 2019, the administration had implemented the Migrant Protection Protocols (MPP) at the southern border, also known as the “Remain in Mexico” policy, which required certain non-Mexican asylum seekers who arrived at the border to remain in Mexico while their asylum court proceedings were pending in the U.S., imposing new controls aimed at stemming the flow of asylum applicants. With the arrival of the pandemic in March 2020, the administration, through the Centers for Disease Control and Prevention (CDC), issued an order under Title 42 of the Public Health Service Act allowing for the quick expulsion of migrants because of COVID-19, effectively closing the southern land border.¹³⁵ The invocation of Title 42 effectively closed the southern border with Mexico shortly thereafter and allowed for the rapid expulsion of migrants at the southern border, bypassing standard immigration and asylum procedures.¹³⁶

¹³⁴ See U.S. Dep’t of Just., Just. Manual § 9-90.000 (2022) (defining national security).

¹³⁵ 42 U.S.C. §265 (dealing with public health and welfare).

¹³⁶ *Id.* (removing individuals under Title 42, lacks criminal or immigration consequences, contrasted with Title 8, where unlawful border crossings can lead to deportation, prosecution, and a five-year reentry ban).

In a further example of executive action, the administration ordered the Centers for Disease Control and Prevention to issue an order authorizing the immediate expulsion of individuals attempting to enter the U.S. without proper documentation. As a result, by 2021, the administration reduced legal immigration by up to 49% without any change to the Immigration and Nationality Act (INA).¹³⁷

X. CANDIDATE BIDEN

On April 25, 2019, former Obama Vice President Joe Biden launched his candidacy for the 2020 Democratic Party presidential primaries. His pledges in 2020 included dismantling the Trump/Pence administration's changes to the immigration system. This included stopping work on the border wall, changing the administration's zero tolerance approach to immigration enforcement, and again welcoming individuals seeking refuge in the U.S. Specifically, he pledged to renew and expand DACA protections, raise the refugee limit to 125,000 per year, and immediately stop construction of the \$15 billion border wall. Regarding DACA, he called the Trump/Pence administration's attempt to eliminate DACA as "cruel and counterproductive" and indicated that he would protect recipients from deportation and "send a bill to Congress".¹³⁸

XI. THE BIDEN/HARRIS WHITE HOUSE, 2021-2024

Unlike President Obama, President Biden came into office firmly leadership role that the executive branch exercised in immigration law and policy. However, it faced a daunting task. Not

¹³⁷ Stuart Anderson, *Immigrants and America's Comeback from the COVID-19 Crisis*, NAT'L FOUND. FOR AM. POL'Y (July 2020), <https://nfap.com/wp-content/uploads/2020/07/Immigrants-and-Americas-Comeback-From-The-Covid-19-Crisis.NFAP-Policy-Brief.July-2020.pdf>; see also John Gramlich, *Key Facts about Title 42, the Pandemic Policy that has Replaced Immigration Enforcement at U.S.-Mexico Border*, PEW RSCH. CNTR. (Apr. 27, 2022), <https://www.pewresearch.org/short-reads/2022/04/27/key-facts-about-title-42-the-pandemic-policy-that-has-reshaped-immigration-enforcement-at-u-s-mexico-border/>.

¹³⁸ Maria Sacchetti, *Biden has Promised to Protect 'Dreamers,' but DACA Court Challenges loom*, WASH. POST (Dec. 2, 2020), <https://www.washingtonpost.com/politics/2020/12/02/biden-daca-dreamers/>.

only did the administration have to address and undo accepting the now established the vast number of changes made by executive fiat under President Trump, but it also had to do so while balancing the needs of a nation still grappling with a global health crisis. While it believed that a comprehensive immigration bill was needed and pushed for comprehensive immigration reform not once, but twice, it did not hesitate to use executive authority to create and expand programs that went well beyond immigration law enforcement in an attempt to improve the situation of millions of undocumented individuals. Although the pandemic prevented the implementation of executive actions that would have ameliorated the flow of individuals at the border, it did boost refugee numbers, preserved DACA and did not enforce the public charge rule proposed by the previous administration which would have denied lawful permanent residence to low-income immigrants.¹³⁹

Joe Biden was elected with 306 electoral college votes and 51% of the popular vote.

As President Obama did before him, President Biden attempted the legislative route by sending an immigration proposal to Congress to modernize the immigration system.¹⁴⁰ However, unlike President Obama, President Biden immediately sent his proposal. Known as the U.S. Citizenship Act of 2021, it kept an important campaign promise with the progressive elements of the party. The bill, introduced simultaneously in the House and Senate, was also much more expansive than the DREAM Act submitted by President Obama. Presented in Congress in February 2021, it would have allowed more new immigrants into the U.S. while giving millions of unauthorized immigrants who are already in the country a pathway to legal status. It would have cleared visa availability backlogs, for both family and employment categories, eliminated the 3 and 10-year bars created by

¹³⁹ See Jens Manuel Krogstad & Ana Gonzalez-Barrera, *Key Facts About U.S. Immigration Policies and Biden's Proposed Changes*, PEW RSCH. CNTR. (Jan. 11, 2022), <https://www.pewresearch.org/short-reads/2022/01/11/key-facts-about-u-s-immigration-policies-and-bidens-proposed-changes/>.

¹⁴⁰ *Fact Sheet: President Biden Sends Immigration Bill to Congress as part of his Commitment to Modernize our Immigration System*, THE WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/>.

Illegal Information Reform and Immigrant Responsibility Act (IIRAIRA), and dedicated significant resources to border security.¹⁴¹ Both bills died in committee. Democrats would later try to include many of its provisions in a budget reconciliation bill in 2021 but they run into parliamentary problems and opposition from a handful of moderates in the party, preventing their inclusion in the bill.

Faced with congressional stalemate, the Biden/Harris Administration proceeded with numerous measures that sought to ameliorate the status of millions of undocumented individuals in the U.S. DHS secretary Alejandro Mayorkas was the author of the leaked memorandum from 2010 that sought administrative alternatives to congressional inaction on the topic of comprehensive immigration reform legislation. He aggressively used many of the available tools and mechanisms discussed in that memorandum to provide administrative relief to undocumented individuals in the U.S.

Among the first important measures from the administration was the publication, by Secretary Mayorkas, of guidelines for the enforcement of civil immigration law. In a September 30, 2021, memorandum to the Acting Commissioner for U.S. Customs and Border Protection, the Director of USCIS, the Undersecretary of Strategy, Policy and Plans, the Chief Privacy Officer, and the Officer for Civil Rights and Civil Liberties, Secretary Mayorkas reinstated prosecutorial priorities for the entire agency. Through it, DHS sought to better focus the resources on the apprehension and removal of noncitizens who posed a threat to our national security, public safety, and border security while advancing the interests of justice by ensuring a case-by-case assessment of whether an individual poses a threat.¹⁴² Secretary Mayorkas stated:

¹⁴¹ U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. (2021), www.congress.gov/117/bills/hr1177/BILLS-117hr1177ih.pdf. See also Hannah Miao, *Democrats Introduce Sweeping Immigration Bill With 8-year Pathway to Citizenship*, CNBC (Feb. 18, 2021), <https://www.cnbc.com/2021/02/18/immigration-democrats-to-introduce-bill-with-pathway-to-citizenship.html>.

¹⁴² *Press Release: Secretary Mayorkas Announces New Immigration Enforcement Priorities*, DEP'T HOMELAND SEC (Sept. 30, 2021), <https://www.dhs.gov/news/2021/09/30/secretary-mayorkas-announces-new-immigration-enforcement-priorities>.

“In exercising this discretion, we are guided by the knowledge that there are individuals in our country who have been here for generations and contributed to our country’s well-being, including those who have been on the frontline in the battle against COVID, lead congregations of faith, and teach our children. As we strive to provide them with a path to status, we will not work in conflict by spending resources seeking to remove those who do not pose a threat and, in fact, make our Nation stronger.”¹⁴³

Compared to the Director ICE memoranda, which established tiered priorities, these guidelines provided are a clear break from a that categorical approach to enforcement. The guidelines instead required case-by-case assessments. The government was instructed to focus on the individual and the totality of the facts and circumstances surrounding each case to ensure resources were focused most effectively on those who posed a threat.¹⁴⁴

XII. TPS EXPANSION

Of the tools available to the administration, the Temporary Protection Status (TPS) designation became one of the most effective administrative relief options. Established law allows for the unilateral designation of TPS by the Attorney General to nationals of countries where there is ongoing armed conflict, such as a civil war; an environmental disaster, such as an earthquake, hurricane, drought, or epidemic; and other extraordinary and temporary conditions that render the country unsafe.¹⁴⁵ Because TPS is designed to bypass Congress, the Biden/Harris administration has been able to use it to deliver immigration relief to hundreds of thousands of people, expanding the program to include citizens from Cameroon, Myanmar, Syria and Venezuela. As a result, currently, more than a million

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ 8 U.S.C. § 1254(a).

individuals in the U.S. have or are eligible for TPS.¹⁴⁶ Of these four countries, Venezuela has the largest number of approved individuals, with over 344,000.¹⁴⁷ Thus, a large number of individuals are receiving benefits and protections without the need for congressional approval. Although TPS does not grant a path to residency and ultimately citizenship, it does provide the benefitting groups temporary authorization to live and work in the U.S. without fear of removal.¹⁴⁸

XIII. THE POST COVID-19 BORDER SITUATION

The Biden/Harris administration sought to normalize the border situation, which was dramatically impacted by the dual forces of the Trump/Pence policies and the global pandemic. In June 2021, the administration officially ended the MPP, citing the humanitarian situation at the border. However, in August 2021, a federal court in Texas ordered the Biden/Harris administration to restart the MPP program, citing a violation of procedures under the APA. As a result, the policy was reinstated, with some safeguards, and the administration continued to fight its right to terminate the policy in the courts, ultimately prevailing in June 2022 when the Supreme Court ruled in favor of the administration, allowing for the termination of the MPP.

¹⁴⁶ See JILL H. WILSON, CONG. RSCH. SERV., RS20844, TEMPORARY PROTECTED STATUS AND DEFERRED ENFORCED DEPARTURE 9, 11, 21, 24 (2024) (explaining that aggressive use of the designation is also in stark contrast to the use of TPS under the Obama administration, which granted TPS only once, to undocumented Haitian immigrants due to the impact left on Haiti by the 2010 earthquake).

¹⁴⁷ See *id.* at 11, 24. (explaining that some current TPS beneficiaries have lived in the U.S. for two decades or more. For example, those from Honduras and Nicaragua have been eligible because of damage from Hurricane Mitch in 1998, provided they have been living in the U.S. since December 30 of that year. And current protections for immigrants from El Salvador apply to those who have lived in the U.S. since Feb. 13, 2001, following a series of earthquakes that killed more than a thousand people and inflicted widespread damage).

¹⁴⁸ *Temporary Protected Status*, U.S. CITIZENSHIP AND IMMIGR. SERV., (July 22, 2024) <https://www.uscis.gov/humanitarian/temporary-protected-status>. See Diana Roy and Clair Klobucista, *What is Temporary Protected Status?*, COUNCIL ON FOREIGN RELATIONS (Sept. 21, 2023) <https://www.cfr.org/background/what-temporary-protected-status>.

As part of the normalization process, the Biden/Harris administration also sought to end the reliance on Title 42 as a pretext of keeping the border closed. As the pandemic raged, the administration was willing to use and rely on Title 42 based on the existing public health concerns. However, as vaccines continued to develop and become available to the general public, helping to stem the contagion, the administration sought to cancel the use of Title 42. In April 2022, the administration announced its intention to end Title 42 expulsion in May of that year, stating that its use was no longer necessary due to improved public health conditions. Not surprisingly, several Republican state governments sued the administration to keep the policy in place and a federal judge blocked the administration's efforts for terminate it. It was not until May 2023, when the public health emergency ended, that Title 42 was officially lifted and border crossings were once again processed under the established immigration laws, also referred to as Title 8.

XIV. UNPRECEDENTED INCREASE IN ILLEGAL BORDER
CROSSINGS AND DEMANDS AT THE SOUTHERN BORDER

The shift of immigration policy into the hands of the executive branch has also made it easier to also blame the administration for perceived failures in immigration enforcement. During the Biden/Harris administration, predictions of mass migration arose due to "seasonal changes in undocumented immigration combined with a backlog of demand because of 2020s coronavirus border closure."¹⁴⁹ It could be argued that changes in immigration policy and shifts in enforcement priorities may have contributed to increased migration to the U.S. Specifically, changes in the enforcement of the MPP and Title 42 may have been interpreted as leniency toward asylum seekers and unauthorized entrants. However, it is more likely that several factors acted in conjunction to fuel the dramatic spike at the southern border beginning in the summer of 2022, including:

¹⁴⁹ See Tom K. Wong et al., *The Migrant "Surge" at the U.S. Southern Border is Actually a Predictable Pattern*, WASH. POST (Mar. 25, 2021, 2:29 PM), <https://www.washingtonpost.com/politics/2021/03/23/theres-no-migrant-surge-us-southern-border-heres-data/>.

1. The political and economic instability in Venezuela, Haiti, Cuba and Nicaragua;
2. The destruction caused by Hurricanes Eta and Iota in the fall of 2020, which devastated Honduras, Guatemala and Nicaragua; and,
3. Pent-up demand due to the previous policies implemented by the Trump/Pence administration.

Additional factors, such as the seasonal and cyclical nature of migration patterns, the incredible backlog of asylum cases in the U.S., and the lack of legal pathways to the U.S. also likely influenced unauthorized migration. Consequently, the increasing number of individuals arriving at the southern border became a national concern, particularly from Cuba, Haiti, Nicaragua, and Venezuela.

To relieve the pressure created by this spike in border crossings— and in preparation of the lifting of Title 42—in early 2023, the Biden/Harris administration used another discretionary tool within its INA toolbox: humanitarian parole. The INA states that the Attorney General may grant parole to someone if there are “urgent humanitarian or significant public benefit reasons” for granting the benefit.¹⁵⁰ While the INA does not define “urgent humanitarian” nor “significant public benefit,” the administration invoked both grounds for granting parole to citizens of Cuba, Haiti, Nicaragua and Venezuela (CHNV),¹⁵¹ providing a “safe and orderly” pathway to the United States for up to 30,000 nationals per month.¹⁵² At the same time,

¹⁵⁰ 8 U.S.C. § 1182(d)(5)(A); KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., LSB11102, HUMANITARIAN PAROLE AUTHORITY: A LEGAL OVERVIEW AND RECENT DEVELOPMENTS 5 (2024).

¹⁵¹ *Id.*

¹⁵² *Press Release: DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes*, U.S. DEP’T HOMELAND SEC. (Jan. 5, 2023), <https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and-processes-for-cubans-haitians-nicaraguans-and-venezuelans> (“Processes for Cubans, Haitians, Nicaraguans, and Venezuelans” (CHNV), allows people from these countries who have a sponsor in the U.S. and pass a background check to work and live in the U.S. for two years).

it also restricted the access to asylum at the southern border with Mexico to migrants from those countries.¹⁵³

It is important to note that the Biden/Harris administration's use of this program differs in two important ways from other humanitarian parole programs, such as those established for Afghanistan and Ukraine. First, the CHNV program includes explicit monthly maximums on the total number of parolees—an unprecedented feature for humanitarian parole programs.¹⁵⁴ Second, it is coupled with a harsh enforcement mechanism not found in the Afghans and Ukrainian humanitarian parole programs.¹⁵⁵ As with TPS, a humanitarian parole beneficiary does not have a permanent pathway to remain in the U.S; however, they can apply for work authorization and remain without fear of deportation.¹⁵⁶

In *Texas v. Department of Homeland Security*, the State of Texas, along with 20 other states, sued in January 2023 in the Southern District of Texas, seeking injunctive relief to terminate the new parole processes for CHNV.¹⁵⁷ In March 2024, the Southern District of Texas upheld the agency action, ruling that the states could not prove injury and thus lacked standing to sue.¹⁵⁸

With the return to Title 8 enforcement, the Biden/Harris administration introduced a final rule, entitled the Circumvention of Lawful Pathways (Lawful Pathways rule), which encouraged the use of lawful pathways and imposed a rebuttable presumption of asylum

¹⁵³ *The Biden Administration's Humanitarian Parole Program for Cubans, Haitians, Nicaraguans, and Venezuelans: An Overview*, AM. IMMIGR. COUNCIL 1 (Sept. 2023), https://www.americanimmigrationcouncil.org/sites/default/files/research/147888892_09.23_chnv_factsheet.pdf. See Camilo Montoya-Galves, *20 GOP-led states ask federal judge to halt migrant sponsorship program*, CBS NEWS (Jan. 24, 2023, 8:48 pm), <https://www.cbsnews.com/news/immigration-migrant-sponsorship-lawsuit-republican-states/> (suing the Biden administration to end this program, which they see as an abuse of the President's authority designed to increase the flow of immigrants).

¹⁵⁴ *Id.* at 4.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1; *Humanitarian or Significant Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/CHNV> (last visited Sep. 30, 2024).

¹⁵⁷ *Texas v. U.S. Dep't of Homeland Sec.*, 661 F. Supp. 3d 683, 686 (S.D. Tex. 2023).

¹⁵⁸ *Texas v. U.S. Dep't of Homeland Sec.*, No. 6:23-CV-00007, 2024 U.S. Dist. LEXIS 40790, at *51 (S.D. Tex. Mar. 8, 2024).

ineligibility on those who do not use them.¹⁵⁹ Specifically, the Lawful Pathways rule was designed to:

. . . to address the high levels of migration throughout the Western Hemisphere and further discourage irregular migration by encouraging migrants to use lawful, safe, and orderly processes for entering the United States or to seek protection in other partner nations; imposing a presumptive condition on asylum eligibility for those who fail to do so; and supporting the swift return of those who do not have valid protection claims.¹⁶⁰

Despite these efforts, the number of immigrants continued to rise to unprecedented levels throughout 2023.¹⁶¹ Although the Administration requested additional funding for border security and related migration issues in August and October 2023, Congress failed to provide the necessary resources.¹⁶² As a result, December of 2023 saw the highest levels of encounters between ports of entry in history.¹⁶³

In late 2023 the Biden/Harris administration began negotiations with a bipartisan group of Senators to address the immigration problem through legislation.¹⁶⁴ Titled the Emergency National Security Supplemental Appropriations Act,¹⁶⁵ it garnered support from most Democrats who were willing to back a bill focused on border security without provisions for legalizing the status of any migrants who had entered the country illegally—not even the “Dreamers”—to address the border issue.¹⁶⁶

¹⁵⁹ 8 C.F.R. §§ 208, 1003, 1208 (2023).

¹⁶⁰ Proclamation No. 10773, 89 Fed. Reg. 48,487 (June 7, 2024).

¹⁶¹ *Id.* at 48,488.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Nationwide Encounters*, U.S. CUSTOMS BORDER PROTECTION <https://www.cbp.gov/newsroom/stats/nationwide-encounters> (last updated Oct. 22, 2024).

¹⁶⁵ H.R. 815, 118th Cong. (2024), https://www.appropriations.senate.gov/imo/media/doc/emergency_national_security_supplemental_bill_text.pdf.

¹⁶⁶ *Id.*

Introduced by a bipartisan group of Senators, the Emergency National Security Supplemental Appropriations Act,¹⁶⁷ would have been the “most sweeping immigration bill of the twentieth century.”¹⁶⁸ To act aimed to overhaul the asylum process, expand visa availability, and increase detention capacity.¹⁶⁹ It represented a serious attempt to tackle the continued border situation and reform the asylum process, creating a “border security authority” that would allow for the summary deportation of undocumented individuals without permitting them to apply for asylum.¹⁷⁰ It also included \$18 billion in supplemental funding for DHS, residence for Afghan allies, and an additional 250,000 immigrant visas.¹⁷¹ Additionally, the act proposed the hiring of 1,500 border agents, deploying 100 cutting-edge machines to detect and stop fentanyl at the border, and increasing the number of asylum officers and immigration judges to help reduce backlogs.¹⁷²

However, the bill did not meet the demands of many rank-and-file members of the new Republican establishment for both substantive and political reasons, and it failed to reach the Senate floor.¹⁷³ It is well documented that the measure largely failed because the Republican nominee for President, Donald Trump, urged congressional Republicans to instruct them to defeat the bill.¹⁷⁴

The inability to achieve a bipartisan, legislative solution to the immigration quagmire once again forced the executive into unilateral

¹⁶⁷ Proclamation No. 10773, *supra* note 160.

¹⁶⁸ *The Emergency National Security Supplemental Appropriations Act (H. R. 815)*, AM. IMMIGR. COUNCIL (Feb. 2024), https://www.americanimmigrationcouncil.org/sites/default/files/research/senater_border_bill_2024_factsheet.pdf.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Remarks on Emergency National Security Supplemental Appropriations and an Exchange With Reporters*, THE WHITE HOUSE (Feb. 6, 2024), <https://www.govinfo.gov/app/details/DCPD-202400083>.

¹⁷³ *Id.*

¹⁷⁴ See, e.g., Sahil Kapur & Frank Thorp V, *Republicans Kill Border Bill in a Sign of Trump's Strength and McConnell's Waning Influence*, NBC NEWS (Feb. 7, 2024, 5:20 PM), <https://www.nbcnews.com/politics/congress/republicans-kill-border-bill-sign-trumps-strength-mcconnells-waning-in-rcna137477>; Manu Raju ET AL., *GOP Senators Seethe as Trump Blows up Delicate Immigration Compromise*, CNN POLITICS (Jan. 25, 2024, 8:52 PM), <https://www.cnn.com/2024/01/25/politics/gop-senators-angry-trump-immigration-deal/index.html>.

action. On June 4, 2024, the Biden/Harris Administration issued a proclamation that implemented many of the border security and enforcement elements of the failed bill.¹⁷⁵ Along with the proclamation, the Administration issued an interim final rule implementing these instructions.¹⁷⁶ It suspended the entry of noncitizens across the southern border, restricted asylum eligibility for those who entered irregularly, limited fear screenings to those who expressed a desire to file for protection, and heightened the screening standards for statutory withholding and claims under the Convention Against Torture.¹⁷⁷ The restriction on asylum eligibility will be discontinued only when encounters fall below certain levels.¹⁷⁸

Progressive groups immediately criticized the measure, which relied on section 212(f) of the INA that authorizes the president to limit the entry of specific immigrants if their admission is detrimental to the national interest. It was the authority previously used by former President Trump to bar immigrants from Muslim-majority countries.¹⁷⁹

Despite the controversy, the number of encounters at the southern border fell drastically.¹⁸⁰

¹⁷⁵ Proclamation No. 10773, *supra* note 160.

¹⁷⁶ *Fact Sheet: Joint DHS-DOJ Final Rule Issued to Restrict Asylum Eligibility for those who Enter During high Encounters at the Southern Border*, DEP'T HOMELAND SEC. (Sept. 30, 2024), <https://www.dhs.gov/news/2024/09/30/fact-sheet-joint-dhs-doj-final-rule-issued-restrict-asylum-eligibility-those-who>.

¹⁷⁷ *Fact Sheet: Presidential Proclamation to Suspend and Limit Entry and Joint DHS-DOJ Interim Final Rule to Restrict Asylum During High Encounters at the Southern Border*, U.S. DEP'T OF HOMELAND SEC. (Jun. 4, 2024), <https://www.dhs.gov/news/2024/06/04/fact-sheet-presidential-proclamation-suspend-and-limit-entry-and-joint-dhs-doj>.

¹⁷⁸ *Id.* (“[T]hese measures are in effect until 14 calendar days after there has been a 7-consecutive-calendar-day average of less than 1,500 encounters between the ports of entry. The measures would again go into effect, or continue, as appropriate, when there has been a 7-consecutive-calendar-day average of 2,500 encounters or more.”)

¹⁷⁹ Dan Gooding, *Biden Uses Trump ‘Muslim Ban’ Maneuver to Cap Asylum Seekers*, NEWSWEEK (June 4, 2024, 2:53 PM), <https://www.newsweek.com/biden-immigration-executive-order-signed-asylum-seekers-1908097>.

¹⁸⁰ National Media Release: CBP Releases June 2024 Monthly Update, U.S. CUSTOMS & BORDER PROT. (July 15, 2024) <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-june-2024-monthly-update> (In the first month in which these measures have been in effect – the U.S. Border Patrol recorded a 29% drop in encounters along the southwest border from the previous month. Total southwest

XV. PAROLE-IN-PLACE

Shortly after announcing the closure of the border to asylum seekers, President Biden introduced another mechanism available in the INA to provide relief to undocumented individuals in the U.S. This initiative stemmed from a specific option listed in the leaked Mayorkas memo from 2010. In accordance with the Attorney General's authority to parole any "alien" on a case-by-case basis for "urgent humanitarian reasons or significant public benefit,"¹⁸¹ the Biden/Harris administration announced the Keeping Families Together process on June 18, 2024. This initiative expanded access to Parole in Place (PIP) for over half a million undocumented individuals married to U.S. citizens.¹⁸²

While the humanitarian parole authority typically applies to individuals seeking to enter the country, the government has also claimed the authority to grant parole to certain individuals who have entered the U.S. illegally.¹⁸³ This new grant of PIP is estimated to benefit approximately 550,000 individuals, making it one of the largest

border irregular encounters in June, including individuals who presented at ports of entry without a CBP One appointment, saw a 30% decrease from May 2024. This is the U.S. Border Patrol's and CBP's lowest monthly southwest border encounter total since January 2021. From May to June, the total number of individuals encountered along the southwest border between ports of entry and at ports of entry without a CBP appointment decreased across all demographics: encounters of unaccompanied children decreased 14%, single adult encounters decreased 28%, and family unit individual encounters decreased by 36%). See also *Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last visited Sept. 30, 2024).

¹⁸¹ 8 U.S.C. § 1182(d)(5)(A).

¹⁸² *Fact Sheet: President Biden Announces New Actions to Keep Families Together*, THE WHITE HOUSE (June 18, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/18/fact-sheet-president-biden-announces-new-actions-to-keep-families-together/>.

¹⁸³ See SANTAMARIA, *supra* note 150, at 1-2 (Prior to the Keeping Families Together announcement, DHS had been employing parole in place (PIP) for a very limited number of undocumented individuals, namely U.S. service members and certain immediate relatives of service members.). See *Immigration Options for Families of Certain Military Members and Veterans M-1138 (rev.11/16)*, U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/sites/default/files/document/brochures/Brochure-Immigration_Options_for_Family_of_Certain_Military_Members_and_Veterans.pdf (last visited Oct. 24, 2024).

administrative relief programs since the creation of DACA.¹⁸⁴ Unlike DACA, which is a deferred action program that does not provide a pathway to lawful permanent residence, PIP would eliminate the need for qualified recipients to return to their home country for consular immigrant processing, particularly when doing so may trigger one of the IIRAIRA bars to re-entry.

Similar to the grant of humanitarian parole, PIP is granted on a case-by-case basis for urgent humanitarian reasons or significant public benefit.¹⁸⁵ Individuals granted PIP would be protected temporarily from deportation, allowed to apply for legal work authorization, and potentially able to complete their application process for lawful permanent residency in the U.S. through the adjustment of status process.¹⁸⁶ However, unlike humanitarian parole, it is considered a lawful immigration status for purposes of certain immigration benefits, such as lawful permanent residence, allowing for qualifying individuals to adjust their status in the U.S., avoiding the need to travel abroad to obtain the benefit.¹⁸⁷

On August 19, 2024, DHS posted for public inspection a Federal Register notice implementing the Keeping Families Together program. However, on August 26, 2024, Texas, along with 15 other states, filed a lawsuit against the measure in the United States District Court for the Eastern District of Texas. The courts administratively stayed DHS from granting PIP under Keeping Families Together initiative for 14 days, a period that may be extended depending on the evidentiary and documentary needs of the parties and the court.¹⁸⁸ On

¹⁸⁴ *Keeping Families Together*, U.S. CITIZENSHIP AND IMMIGR. SERVS. <https://www.uscis.gov/keepingfamilies-together> (last updated Oct. 10, 2024).

¹⁸⁵ *Id.*

¹⁸⁶ *See id.* (qualifying individuals must 1) be legally married to a U.S. citizen, 2) have lived in the U.S. since at least June 17, 2024, 3) be present in the U.S. without admission or parole, and 4) satisfy other legal requirements).

¹⁸⁷ *See COX & RODRIGUEZ*, *supra* note 19 at 181 (the authors specifically discuss how a use of this parole authority would benefit undocumented spouses of U.S. citizens).

¹⁸⁸ *See Texas v. U.S. Dep't of Homeland Sec.*, No. 24-cv-00306 (E.D. Tex. Aug. 26, 2024) (in complying with the district court's administrative stay, USCIS will 1) not grant any pending parole in place requests under Keeping Families Together, 2) continue to accept filings of Form I-131F, Application for Parole in Place for Certain Noncitizen Spouses and Stepchildren of U.S. Citizens, and 3) continue to schedule biometric appointments and capture biometrics at Application Support Centers (ASCs)).

September 11, 2024, the Fifth Circuit ordered the lower court to halt all proceedings until they could hear an appeal from a group of individuals who were denied a motion to intervene in the lawsuit.¹⁸⁹ On November 7 the matter was vacated by the court, finding that the plaintiffs were entitled to relief.¹⁹⁰

XVI. A MORE PROGRESSIVE LEGACY

The leaked memos from 2010 reveal that both the Obama and Biden administrations recognized the legal and administrative alternatives to comprehensive immigration reform should Congress fail to grant benefits and protections to the significant number of undocumented individuals in the United States. The political balance that the Obama administration sought to maintain limited its executive actions to measures aimed at refocusing government enforcement, yielding limited results. Its most notable action was only the establishment of the DACA program.

In contrast, the Biden/Harris Administration has not hesitated to implement aggressive administrative measures, many of which were considered during the previous Democratic administration. Its efforts to strengthen DACA, utilize PIP and humanitarian parole, and emphasize prosecutorial discretion reflect an increasingly bold position that could theoretically protect and benefit millions of individuals.

The question remains regarding how these different actions will be interpreted by the federal courts, and more importantly, by the Supreme Court. The conservative makeup of the Court, bolstered by three justices appointed by the Trump/Pence Administration, makes it difficult to predict how the Court will rule on the separation of powers issues inherent in implementing these administrative remedies within immigration law. All eyes will be on the Court's review of the original DACA program, with a decision on the program's fate expected within the next two years.

¹⁸⁹ See *Texas et al. v. U.S. Dep't of Homeland Sec. et. al*, No. 24-40571 (5th Cir. Sept. 11, 2024) (that hearing is set for October 10, 2024).

¹⁹⁰ See *Texas et al. v. U.S. Dep't of Homeland Sec. et. al*, No. 6:24-cv-00306 (5th Cir. Nov. 7, 2024).

