
The End of Asylum Redux and the Role of Law School Clinics

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ABSTRACT. The Biden Administration has perpetuated many of the prior administration's hostile policies undermining access to asylum at the southern border. This Essay first examines these policies and then identifies emerging opportunities for law school clinics to address these new challenges, including by serving asylum seekers south of the U.S.-Mexico border.

INTRODUCTION

Over the past six years, immigration law and policy have changed at an astonishing rate. President Trump completed an unprecedented 472 executive actions on immigration during his presidency.¹ His signature efforts sought to decimate asylum law,² separate immigrant children from their parents at the border, and generally shut down America's borders for Black, brown, and Muslim immigrants, wishing instead for more individuals from places like Norway.³

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1. *Trump Completed 472 Executive Actions on Immigration During His Presidency, Many that Could Have Lasting Effects on the U.S. Immigration System*, MIGRATION POL'Y INST. (Feb. 1, 2022), <https://www.migrationpolicy.org/news/trump-472-executive-actions-immigration-during-presidency> [<https://perma.cc/9X2U-ZHJX>]; Jessica Bolter, Emma Israel & Sarah Pierce, *Four Years of Profound Change: Immigration Policy During the Trump Presidency*, MIGRATION POL'Y INST. (Feb. 2022), <https://www.migrationpolicy.org/sites/default/files/publications/mpi-trump-at-4-report-final.pdf> [<https://perma.cc/BU7B-D4TP>].
 2. ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES & PHILIP G. SCHRAG, *THE END OF ASYLUM* (2021).
 3. Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, WASH. POST (Jan. 12, 2018, 7:52 AM), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfco725c-f711-11e7-91af-31ac729add94_story.html [<https://perma.cc/UHU8-UN8Z>].

On the campaign trail and when he took office, President Biden promised a different approach: to restore asylum protections that Trump had taken away,⁴ reunite separated families, and build a “fair, orderly, and humane, and legal immigration system.”⁵ Within a month of taking office, President Biden issued a sweeping Executive Order that sought to “restore and strengthen our asylum system, which has been badly damaged by policies enacted over the last 4 years that contravened our values and caused needless human suffering.”⁶ In just his first year in office, President Biden took nearly 300 executive actions on immigration,⁷ followed by more than 100 executive actions in his second year in office.⁸

At the outset, many in the immigrants’ rights community had high hopes for the Biden Administration’s potential to rehabilitate the asylum system. The Administration’s restoration of the possibility of asylum protections for domestic violence survivors⁹ and its opening of pathways for certain foreign nationals to enter the United States — namely, those from Ukraine,¹⁰ Cuba, Haiti, Nicaragua,

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4. While running for President, then-candidate Joe Biden denounced the Trump Administration’s asylum bans and pledged that he would not “deny[] asylum to people fleeing persecution and violence.” See *Biden Administration’s Proposed Asylum Ban: Illegal, Inhumane, and No Solution*, HUM. RTS. FIRST 1 (Feb. 23, 2023), https://humanrightsfirst.org/wp-content/uploads/2023/02/Biden_asylum_ban_factsheet_Feb2023_1.pdf [https://perma.cc/44BR-8PFX] (quoting from and linking to Biden’s campaign website, which is no longer available).
 5. *Remarks by President Biden at Signing of Executive Orders Advancing His Priority to Modernize Our Immigration System*, WHITE HOUSE (Feb. 2, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/02/remarks-by-president-biden-at-signing-of-executive-orders-advancing-his-priority-to-modernize-our-immigration-system> [https://perma.cc/UUV8-CPSH].
 6. Creating a Comprehensive Regional Framework to Address the Causes of Migration, Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 5, 2021).
 7. *Biden Has Taken Nearly 300 Executive Actions on Immigration in His First Year, Outpacing Trump*, MIGRATION POL’Y INST. (Jan. 19, 2022), <https://www.migrationpolicy.org/news/biden-executive-actions-immigration-first-year> [https://perma.cc/RK5K-UJ7G].
 8. Muzaffar Chishti & Kathleen Bush-Joseph, *Federal Judges Step into the Void to Set U.S. Immigration Policy*, MIGRATION POL’Y INST. (Mar. 30, 2023), <https://www.migrationpolicy.org/article/courts-set-us-immigration-policy> [https://perma.cc/S4XY-K77D].
 9. *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021).
 10. The Uniting for Ukraine program is widely considered a success. As of February 2023, one year after the Russian invasion of Ukraine began, more than 271,000 Ukraine refugees had been admitted to the United States, of which more than 117,000 were admitted via the Uniting for Ukraine program. See Julia Ainsley, *U.S. Has Admitted 271,000 Ukrainian Refugees Since Russian Invasion, Far Above Biden’s Goal of 100,000*, NBC NEWS (Feb. 24, 2023, 11:15 AM), <https://www.nbcnews.com/politics/immigration/us-admits-271000-ukrainian-refugees-russia-invasion-biden-rcna72177> [https://perma.cc/XMU4-NHNL]. The program has become the largest private sponsorship for displaced foreign nationals in U.S. history, with Americans nationwide applying to sponsor the arrival of more than 216,000 Ukrainians. See

and Venezuela¹¹ who already have American financial sponsors – have been welcome developments.

Yet, on the whole, the Administration has not lived up to its potential to protect asylum seekers. To the contrary, it has perpetuated and resurrected many of the Trump Administration’s most hostile policies undermining access to asylum at the southern border. This Essay first focuses on these recent policy changes that make seeking asylum much more difficult. The Essay then identifies emerging opportunities for law school clinics to be at the forefront of addressing these challenges, including by offering pro bono legal services to asylum seekers south of the U.S.-Mexico border.

Part I identifies four recent immigration policies that collectively make it far more difficult for asylum seekers to seek protection in the United States. First, the so-called “Title 42 Order” is a pretextual public-health order that allowed for the expulsion of migrants, including bona fide asylum seekers, from March 2020 to May 2022, resulting in severe harm – including murders, rapes, and kidnappings – to thousands expelled at the southern border. Second, the final rule published by the Department of Homeland Security (DHS) and the Department of

Camilo Montoya-Galvez, *A Year into War, U.S. Sponsors Apply to Welcome 216,000 Ukrainian Refugees Under Biden Policy*, CBS NEWS (Feb. 24, 2023, 8:00 AM), <https://www.cbsnews.com/news/a-year-into-war-u-s-sponsors-apply-to-welcome-216000-ukrainian-refugees-under-biden-policy> [<https://perma.cc/8HPG-YFM5>].

11. Based on the success of Uniting for Ukraine, the Biden Administration subsequently opened sponsor-driven parole programs for nationals of Venezuela in October 2022 and then for nationals of Cuba, Haiti, and Nicaragua in January 2023. Since January 2023, the U.S. Department of Homeland Security (DHS) has enforced a monthly limit of 30,000 travel authorizations across the parole process for Venezuelans, Cubans, Haitians, and Nicaraguans. 88 Fed. Reg. 1279 (Jan. 9, 2023). Within two weeks of implementing this parole program, twenty-one Republican-led states filed a federal lawsuit challenging this parole program as violating the Administrative Procedure Act (APA) and exceeding the federal government’s parole authority. Memorandum Opinion & Order, *Texas v. DHS*, No. 23-cv-00007, 2023 WL 2457480, at *1-2 (S.D. Tex. Mar. 10, 2023). These states filed suit in the Victoria Division of the Southern District of Texas, “a single-judge division at the time,” headed by Trump-appointed Judge Drew B. Tipton. Memorandum Opinion & Order, *Texas*, 2023 WL 2457480, at *1-2; *Appointment of United States District Judge Drew Tipton*, U.S. Dist. & Bankr. Ct. S. Dist. Tex., <https://www.txs.uscourts.gov/content/appointment-united-states-district-judge-drew-b-tipton-corpus-christi-division> [<https://perma.cc/28WM-J8NH>]. The federal government sought to transfer the case to Austin, the District of Columbia, or at the very least, any division in the Southern District of Texas with more than one judge, explaining that there might be a “‘public perception’ that the Plaintiff States selected the Victoria Division . . . so that the case will be heard by a judge who is biased in their favor.” Memorandum Opinion & Order, *Texas*, 2023 WL 2457480, at *1-2. Judge Tipton denied the motion to transfer the case. Memorandum Opinion & Order, *Texas*, 2023 WL 2457480, at *1. Notably, none of these plaintiff states – or anyone else – has challenged the legality of the virtually identical Uniting for Ukraine program.

Justice on May 16, 2023,¹² titled “Circumvention of Lawful Pathways,” amounts to a ban on asylum access at the southern border for the overwhelming majority of asylum seekers. Third, this Administration has reinstated policies of the Trump Administration that subject asylum seekers to rapid credible fear screenings while they are detained in U.S. Customs and Border Protection (CBP) custody, which denies asylum seekers any meaningful ability to access counsel and dramatically increases the risk of deporting individuals to grave harm or even death. Fourth, the current Administration has, for the first time in U.S. history, begun to systematically deport noncitizens to Mexico as part of the expedited removal system, even when these individuals are not Mexican and without offering them a meaningful opportunity to explain why they may be in danger in Mexico. Collectively, these four policies normalize the end of access to asylum at the southern border.

Part II explores the evolving role of law school clinics during this unprecedented moment, when both major political parties seek to normalize the end of meaningful access to asylum in the United States. What should be the role of law school clinics as the United States turns its back on its commitments to asylum seekers? This moment raises new challenges and possibilities for immigration law clinics. I suggest that law school clinics should continue to offer traditional full-scope representation to asylum seekers and other immigrants who are already in the United States. This work is at the heart of many immigration law clinics, meets urgent community needs, and provides excellent legal training opportunities for law students. Moreover, law school clinics with the resources to do so should consider expanding the breadth of their work to supporting individuals as they prepare for credible fear interviews; to rural and border regions where pro bono legal services are scarce; and to working south of the U.S.-Mexico border to offer legal services and monitor for human rights abuses. Expanding access to counsel in each of these spaces would help to meet enormous gaps in legal representation for asylum seekers in especially precarious situations. Incorporating these opportunities into the context of clinical legal education will also help to train the next generation of political and moral leaders, who have the potential to restore America’s promise as a safe haven for those fleeing persecution.

12. 88 Fed. Reg. 31314 (May 16, 2023).

I. THE END OF ASYLUM REDUX

U.S. asylum law seeks to protect those who fear being gravely harmed or killed in their home country on account of their race, religion, nationality, political opinion, or membership in a particular social group.¹³ Bona fide asylum seekers often must flee with little to no resources after being seriously threatened or harmed. These asylum seekers fear that they do not have time to wait for visas to be processed and approved by third countries; if they wait, they fear that they or their loved ones will be subjected to assault, rape, murder, and other harms.

In the wake of World War II, countries recognized the urgent need for refugee protections, which resulted in the 1951 Refugee Convention and its 1967 Protocol. These documents spelled out refugee rights vis-à-vis nationals and foreign nationals in a country. Initially, the 1951 Convention was more or less limited to protecting European refugees in the aftermath of World War II. The 1967 Protocol expanded its scope to people from around the world. In 1980, the United States incorporated the Refugee Convention into domestic law with the enactment of the Refugee Act. Title 8 of the U.S. Code governs the various tracks through which the federal government screens and processes refugees and asylum seekers and deports those who do not qualify for protections. Critically, with the Refugee Act, Congress established an asylum procedure available to all noncitizens who arrive in the United States, “whether or not at a designated port of arrival” and “irrespective of [their] status.”¹⁴

While catering to perceived political expediencies, the current and prior administrations have trampled our nation’s legal obligations under the Refugee Act. This Part addresses four abusive and illegal policies in turn: the Title 42 Expulsion Order, the May 16, 2023, Rule, the Prompt Asylum Claim Review and Humanitarian Asylum Review Process (PACR/HARP) programs, and the Biden Administration’s systematic deportations of foreign nationals to Mexico as part of the expedited removal process. Collectively, these policies erect a nearly insurmountable regulatory wall at the southern border that denies protection to the vast majority of asylum seekers. The harm suffered by asylum seekers as a result of these policies should stain our national conscience for years to come.

A. *The Title 42 Expulsion Policy*

From March 2020 to May 2023, approximately 2.8 million migrants, including bona fide asylum seekers, were expelled from our southern border under the pretextual Title 42 public-health order from the Centers for Disease Control and

13. 8 U.S.C. § 1101(a)(42) (2018).

14. 8 U.S.C. § 1158(a)(1) (2018).

Prevention (CDC).¹⁵ The Title 42 Order allowed for the suspension of immigration to the United States based on a purported concern about the “introduction” of “communicable disease.”¹⁶ The plan to use a public-health provision of Title 42 of the U.S. Code to expel migrants, including asylum seekers, was the brainchild of Stephen Miller, former President Trump’s chief architect of anti-immigration policies, well before the COVID-19 pandemic. In 2018, Miller suggested a shutdown of migration for health reasons, and he floated the idea again in 2019 during a mumps outbreak.¹⁷ The COVID-19 pandemic gave the Trump Administration the opportunity to implement the Title 42 Expulsion Order, called a “Stephen Miller special” by former White House officials, even though at the time, in March 2020, many top scientists at the CDC saw no valid public-health reason to issue the order.¹⁸

Abrogating the right to seek asylum through Title 42 expulsions resulted in untold suffering, the return of refugees to persecution and death, and chaos at the U.S.-Mexico border. Human rights organizations tracked at least 13,480 reports of murder, torture, kidnapping, rape, and other violent attacks on migrants and asylum seekers blocked in or expelled to Mexico under Title 42.¹⁹ In large part due to Title 42 (and perpetuated as individuals wait for CBP One appointments),²⁰ there are now refugee camps along the southern side of the U.S. border, where people who wish to seek asylum in the United States live in squalor in tent cities and shelters without basic security or necessities for months and even years on end.²¹

15. Adam Isacson, *10 Things to Know About the End of Title 42*, WASH. OFF. LATIN AM. (May 9, 2023), <https://www.wola.org/analysis/end-title-42> [<https://perma.cc/MTW9-CRHA>].

16. 42 U.S.C. § 265 (2018).

17. Caitlin Dickerson & Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html> [<https://perma.cc/2LGV-22FT>].

18. *Id.*; Jason Dearen & Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, ASSOCIATED PRESS (Oct. 3, 2020, 9:19 AM EDT), <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4efoc6c5263815a26f8aa17f6ea490ae> [<https://perma.cc/XZ57-VSDS>]; *Emails Show Stephen Miller Led Efforts to Expel Migrants at Border Under Title 42*, AM. OVERSIGHT (Mar. 21, 2022), <https://www.americanoversight.org/emails-show-stephen-miller-led-efforts-to-expel-migrants-at-the-border-under-title-42> [<https://perma.cc/HCE3-JRFF>].

19. Press Release, *Title 42: “Human Rights Stain, Public Health Farce,”* HUM. RTS. FIRST (Dec. 16, 2022), <https://humanrightsfirst.org/library/title-42-human-rights-stain-public-health-farce> [<https://perma.cc/3NPD-VH8T>].

20. See *infra* Section I.B. & Part II.

21. Mireya Villarreal, *Migrants Desperate to Live in US Endure Inhumane Conditions Near the Mexican Border: Reporter’s Notebook*, ABC NEWS (May 6, 2023, 7:44 AM), <https://abcnews.go.com/US/migrants-desperate-live-us-endure-inhumane-conditions-mexican/story?id=99108515> [<https://perma.cc/Y8CH-G4JB>].

After relying on Title 42 for well over a year, the Biden Administration sought to revoke the order in May 2022,²² an effort that was preliminarily enjoined by the U.S. District Court for the Western District of Louisiana.²³ However, after successfully rescinding the Title 42 Rule the following year on May 11, 2023,²⁴ the Administration quickly replaced it with the May 16 Rule.

B. The May 16 Rule – An Asylum Ban Resurrected

With the implementation of the May 16, 2023, Rule, the Biden Administration has gutted the protections of the Refugee Act. The text of the Act is unambiguous: an asylum procedure must be available to all noncitizens who arrive in the United States, “whether or not at a designated port of arrival” and “irrespective of [their] status.”²⁵ In lieu of adhering to the Act, this administration has resurrected policies of the prior administration that focus on illegally denying asylum seekers protections in the United States.

The Rule applies to all non-Mexican adults and families. It creates a rebuttable presumption for two years, effective until May 11, 2025,²⁶ of “asylum ineligibility for noncitizens who traveled through a country other than their own before entering the United States through the southern border with Mexico.”²⁷ The Rule’s presumption can be rebutted only upon a showing of “exceptionally compelling circumstances” justifying an exception to the Rule at the time of entry to the United States through the southern border or adjacent coastlines.²⁸ These exceptions are limited to (1) unaccompanied children; (2) those traveling to the

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22. The Centers for Disease Control and Prevention (CDC) issued a statement on April 1, 2022 explaining: “After considering current public health conditions and an increased availability of tools to fight COVID-19 (such as highly effective vaccines and therapeutics), the CDC Director has determined that an Order suspending the right to introduce migrants into the United States is no longer necessary.” *CDC Public Health Determination and Termination of Title 42 Order*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 1, 2022), <https://www.cdc.gov/media/releases/2022/s0401-title-42.html> [<https://perma.cc/5VUW-9UKB>].
23. *Louisiana v. Ctrs. for Disease Control & Prevention*, 603 F. Supp. 3d 406, 441 (W.D. La. May, 20, 2022).
24. The State of Florida has challenged the lifting of the Title 42 Order in pending litigation. Temporary Restraining Order at 1, *Florida v. Mayorkas*, No. 2023-cv-9962, 2023 WL 3398099 (N.D. Fla. May 16, 2023), *appeal filed*, No. 23-11644 (11th Cir. 2023).
25. 8 U.S.C. § 1158(a)(1) (2018).
26. 8 C.F.R. § 208.33(a)(1)(i) (2023).
27. *E. Bay Sanctuary Covenant v. Biden*, No. 18-cv-6810, 2023 WL 4729278, at *1 (N.D. Cal. July 25, 2023).
28. *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314, 31449-52 (May 16, 2023) (to be codified at 8 C.F.R. § 208.33(a)(1), (a)(2)(i)).

United States with advance permission to apply for parole; (3) those who present at a port of entry for a prescheduled appointment through the CBP One application or those who can demonstrate an “ongoing and serious obstacle” that precluded their ability to make such an appointment; and (4) individuals who have been denied asylum or other protection by another country en route to the United States.²⁹ The Rule means that the overwhelming majority of asylum seekers at the southern border will be ineligible to seek protection in the United States.

The May 16 Rule’s basic tenet—generally requiring individuals to apply for protections in countries on their way to the United States or else be deemed ineligible for asylum in the United States—is not grounded in reality. It can only be understood as intended to deny asylum seekers a meaningful chance of seeking protection in the United States. The countries that a non-Mexican asylum seeker must travel through to get to the United States, such as Guatemala, Honduras, or El Salvador, do not have fair or functioning asylum systems.³⁰ While the Rule specifically discusses Belize, Colombia, and Mexico as countries where noncitizens can effectively seek protection, the evidence confirms that “seeking asylum or other protection in Belize or Colombia is not a viable option for many migrants.”³¹ Belize has only ever received 4,104 asylum applications and has granted just seventy-four of those applications,³² about 1.8%. Colombia’s asylum system had approximately 37,000 applications submitted between January 2017 and June 2021, of which just 753 (approximately two percent) were granted.³³ In Mexico, the refugee agency “is underfunded and unable to keep up with demand” and “in a situation of near-breakdown.”³⁴ While a total of 118,478 individuals sought protection in 2022, Mexico processed just 34,762 applications (approximately twenty-nine percent) that year.³⁵

Overwhelming evidence documents that many migrants in Mexico are at risk of violence by both state and nonstate actors, including gender-based violence, kidnapping, torture, extortion, homicide, and forced labor.³⁶ Requiring asylum

29. *Id.* at 31451.

30. Karen Musalo, *Biden’s Embrace of Trump’s Transit Ban Violates US Legal and Moral Refugee Obligations*, JUST SEC. (Feb. 8, 2023), <https://www.justsecurity.org/84977/bidens-embrace-of-trumps-transit-ban-violates-us-legal-and-moral-refugee-obligations> [https://perma.cc/4HPW-6NXX]; *E. Bay*, 2023 WL 4729278, at *14-16.

31. *E. Bay*, 2023 WL 4729278, at *14.

32. *Id.*

33. *Id.* at *14.

34. *Id.* at *15.

35. *Id.*

36. *Id.* (collecting sources).

seekers to remain in dangerous transit countries to apply for protection and wait for a denial before trying to enter the United States may put them at risk of violence over a prolonged period of time.³⁷ Under the Rule, if an asylum seeker reasonably chooses not to apply for protections in a transit country en route to the United States, they would be presumed ineligible for asylum in the United States as well.³⁸

The Rule also generally presumes that individuals are ineligible for asylum if they enter the United States between ports of entry or if they enter the United States at a port of entry without a previously scheduled appointment through the CBP One mobile application. Unfortunately, CBP One is deeply flawed. It is inaccessible to many asylum seekers due to financial, language, technological, and other barriers, including limited Internet access in northern and central Mexico, the only areas of Mexico where the app is available.³⁹ Some asylum seekers lack smartphones necessary to access the app. Other asylum seekers are not tech-literate and do not understand how to access the app. The app itself is only available in English, Spanish, and Haitian Creole; Login.gov, which applicants must use to access CBP One, is exclusively available in English.⁴⁰ These language barriers are often insurmountable for those asylum seekers who speak other languages. Securing an appointment through CBP One requires a photograph but the app's initial facial recognition technology failed to register many people with darker skin tones — disproportionately Black and Indigenous asylum seekers — which effectively barred them from asylum protections.⁴¹ Moreover, securing a

37. In Mexico, for example, the process for filing asylum applications can extend beyond a year, and many asylum seekers have to camp outside government offices as they wait for the opportunity to file their asylum claims. Even after prolonged waits, many asylum seekers in Mexico never receive a final decision on their asylum cases. Brief of Asylum Access México A.C. and Instituto Para Las Mujeres En La Migración A.C. as Amici Curiae Supporting Appellees and Affirmance at 3-4, 9-11, *E. Bay Sanctuary Covenant v. Biden*, No. 23-16032 (9th Cir. Aug. 3, 2023).

38. In fiscal year 2021 (the most recent data available), close to 17,700 people were granted asylum in the United States. Fifty-eight percent (more than 10,300 individuals) were granted asylum in the affirmative posture by asylum offices, while the remaining forty-two percent (nearly 7,400 individuals) were granted asylum in the defensive posture by the Immigration Courts. Nicole Ward & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POL'Y INST. (June 15, 2023), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states> [<https://perma.cc/HMK7-TZ9N>].

39. *E. Bay*, 2023 WL 4729278, at *16.

40. *Id.*

41. See Bernd Debusmann Jr., *At US Border, Tech Issues Plague New Migrant Applications*, BBC (Mar. 8, 2023), <https://www.bbc.com/news/world-us-canada-64814095> [<https://perma.cc/UWC2-D2GX>]. The CBP One app no longer relies on facial recognition technology, but “darker-skinned applicants and some young children” experience difficulties having their photographs accepted by the system. ABIGAIL F. KOLKER & KRISTIN FINKLEA, CONG. RSCH.

scheduled appointment has been like winning the lottery; 1,450 appointments have been available each day in recent months,⁴² but they are scarce compared to demand.⁴³ When the app initially launched, more than 62,000 people applied for the first 1,000 appointments.⁴⁴ Some individuals have been waiting for eight months to try to secure an appointment.⁴⁵ The stakes often are literally life-or-death, as many asylum seekers wait indefinitely in dangerous and squalid conditions in Mexico while they attempt to schedule an appointment.⁴⁶

A federal district court has opined that the May 16 Rule is unlawful under the Refugee Act, echoing invalidations of similar Trump-era asylum bans.⁴⁷ On

SERV., IN12166, CBP ONE APPLICATION: EVOLUTION AND FUNCTIONALITY 2 (May 30, 2023), <https://crsreports.congress.gov/product/pdf/IN/IN12166/1> [<https://perma.cc/3EH8-5A85>]; see also Christina Ascencio, *A Line that Barely Budgets*, HUM. RTS. FIRST 15 (June 2023), https://humanrightsfirst.org/wp-content/uploads/2023/06/A-Line-That-Barely-Budgets_Nogales-Arizona-1.pdf [<https://perma.cc/U3VT-9D6M>] (explaining how the app could not recognize the “darker pigmentation” of a Venezuelan woman).

42. Press Release, *CBP One Appointments Increased to 1,450 Per Day*, U.S. CUSTOMS & BORDER PROT. (June 30, 2023), <https://www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day> [<https://perma.cc/CK8F-Q7W6>].
43. *E. Bay*, 2023 WL 4729278, at *16; *New Asylum Ban Leaves Migrants Stranded: Recommendations to Increase Access to Protection at the US-Mexico Border*, WOMEN’S REFUGEE COMM’N 2 (Aug. 2023), <https://www.womensrefugeecommission.org/wp-content/uploads/2023/08/New-Asylum-Ban-Leaves-Migrants-Stranded-Recommendations.pdf> [<https://perma.cc/GMH3-4VDS>].
44. Maria Abi-Habib, Emiliano Rodríguez Mega, Edgar Sandoval & J. David Goodman, *Migrants Struggle to Get Appointments on Border Protection App*, N.Y. TIMES (May 11, 2023), <https://www.nytimes.com/2023/05/11/us/migrants-border-app-cbp-one.html> [<https://perma.cc/GWN9-DFQD>].
45. Christina Ascencio & Rebecca Gendelman, *Inhumane and Counterproductive: Asylum Ban Inflicts Mounting Harm*, HUM. RTS. FIRST 11 (Oct. 2023), <https://humanrightsfirst.org/wp-content/uploads/2023/10/Inhumane-and-Counterproductive-final-report.pdf> [<https://perma.cc/V723-9N9P>].
46. See *infra* Part II; WOMEN’S REFUGEE COMM’N, *supra* note 43, at 2-3; Ann Garcia & Kate Wheatcroft, *Facing an Impossible Choice: Experiences of Asylum Seekers in Matamoros and Reynosa Two Months into the Biden Asylum Ban*, NAT’L IMMIGR. PROJECT 2-4 (July 24, 2023), https://nippnlg.org/sites/default/files/2023-07/2023_Facing-An-Impossible-Choice.pdf [<https://perma.cc/3BQS-69Z8>]; *Refugee Protection Travesty: Biden Asylum Ban Endangers and Punishes At-Risk Asylum Seekers*, HUM. RTS. FIRST 29-35 (July 2023), https://humanrightsfirst.org/wp-content/uploads/2023/07/Refugee-Protection-Travesty_Asylum-Ban-Report_July-2023-1.pdf [<https://perma.cc/7X8M-KQ2M>]. It is worth noting that eighteen GOP-led states have challenged the CPB One app on entirely different grounds, complaining that it is *ultra vires* in violation of, *inter alia*, the parole statute, 8 U.S.C. § 1182(d)(5) (2018), and the Immigration and Nationality Act. See Complaint at 29 n.51, 36-38, *Indiana v. Mayorkas*, No. 23-cv-00106 (D.N.D. May 31, 2023).
47. See *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 868 (N.D. Cal. 2018) (granting a temporary restraining order against a 2018 regulation that barred asylum eligibility for

July 25, 2023, in *East Bay Sanctuary Covenant v. Biden*, a district court in northern California held that the May 16 Rule is inconsistent with the Refugee Act’s criteria for applying for asylum.⁴⁸ As Judge Tigar explained, “Under binding Ninth Circuit precedent, conditioning asylum eligibility on presenting at a port of entry or having been denied protection in transit conflicts with the unambiguous intent of Congress as expressed in [the Refugee Act].”⁴⁹ The court concluded that the Rule was both substantively and procedurally invalid⁵⁰ and granted the plaintiffs’ motion for summary judgment, effectively “restor[ing] a regulatory regime that was in place for decades before.”⁵¹

The government immediately appealed. In a two-to-one order, the Ninth Circuit granted the government’s request for a stay pending appeal.⁵² Judge VanDyke, a Trump appointee who dissented from a previous Ninth Circuit case striking down Trump-era asylum bans,⁵³ issued a scathing dissent, highlighting

noncitizens who entered the United States outside of designated ports of entry); *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1118-21 (N.D. Cal. 2018) (granting a preliminary injunction striking down a 2018 regulation), *aff’d*, 993 F.3d 640 (9th Cir. 2021); *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019) (enjoining a 2019 interim final rule that made noncitizens crossing the southern border after traveling through a country other than their own ineligible for asylum), *modified*, 934 F.3d 1026 (9th Cir. 2019) (narrowing the injunction as applicable only within the Ninth Circuit); *E. Bay Sanctuary Covenant v. Barr*, 391 F. Supp. 3d 974, 985 (N.D. Cal. 2019) (restoring the nationwide scope of the injunction of the 2019 interim final rule), *aff’d sub nom. E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2020); *see also* Cap. Area Immigrants’ Rts. Coal. v. Trump, 471 F. Supp. 3d 25, 60 (D.D.C. 2020) (vacating a rule that would not accept asylum applicants unless they were rejected by another country they transited through); *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019) (vacating a rule barring asylum status for those who entered the United States outside a port of entry).

48. *E. Bay*, 2023 WL 4729278, at *9-11.

49. *Id.* at *9. The court also ruled that the Rule violated the APA. First, the court found that the Rule is arbitrary and capricious because it (1) “relies on the availability of other pathways for migration to the United States, which Congress did not intend the agencies to consider in promulgating additional conditions for asylum eligibility”; and (2) “the record shows that each exception will be unavailable to many noncitizens subject to the Rule.” *Id.* at *11; *see also id.* at *12 (“The availability of refugee admissions, parole, or work visas is irrelevant to the availability of asylum, which Congress considered to be independent of any particular means of entry.”). Second, the court reasoned that the thirty-three-day, *id.* at *3 n.6, notice-and-comment period for the Rule was insufficient under the APA given the complexity of the Rule and because “[t]he agencies did not disclose other, relevant policy changes that would affect the agencies’ reasoning for adopting the Rule,” *id.* at *18.

50. *Id.* at *9-*18.

51. *Id.* at *19.

52. *E. Bay Sanctuary Covenant v. Biden*, No. 23-16032 (9th Cir. Aug. 3, 2023).

53. *E. Bay Sanctuary Covenant v. Biden*, 992 F.3d 640, 696-705 (9th Cir. 2021) (VanDyke, J., dissenting).

the overwhelming similarities between the current and previous administration's border policies.⁵⁴ Specifically, Judge VanDyke wrote:

The Biden administration's "Pathways Rule" before us in this appeal is not meaningfully different from the prior administration's rules This new rule looks like the Trump administration's Port of Entry Rule and Transit Rule got together, had a baby, and then dolled it up in a stylish modern outfit, complete with a phone app. Relying on this court's rationales in our prior decisions rejecting the Trump administration's rules, Judge Tigar concluded that this new rule is indistinguishable from those rules in any way that matters. He's right It's hard to shake the impression that something other than the law is at work here.⁵⁵

Oral argument in the case took place before the Ninth Circuit on November 7, 2023. During the argument, the federal government conceded that, in the first month of the Rule's implementation, only eight percent of asylum seekers subject to the Rule's presumption were able to rebut it.⁵⁶ Meanwhile, the plaintiffs emphasized that "about nine out of ten people are being barred" from asylum "if they enter between ports [of entry]," and "almost nobody has been able to show a third country denial" of their asylum claim while in transit.⁵⁷ A decision from the court is expected any day.

In the meantime, on a daily basis, thousands of asylum seekers wait in Mexico, often in inhumane and dangerous conditions, for CBP One appointments so that they can try to cross into the United States without being presumed ineligible for asylum.⁵⁸ Human rights groups have documented that "[o]ver 1300 people have faced kidnapping, torture, rape, extortion, and other violence while waiting to seek protection in the U.S. since the asylum ban took effect in mid-May 2023."⁵⁹ On the northern side of the border, many who manage to set foot in the United States are deported because of the Rule. Between May 12 and September 30, 2023, U.S. Citizenship and Immigration Services (USCIS) interviewed approximately 57,700 noncitizens who entered the United States and were subject to the Rule. Approximately 23,700 of these individuals (forty-one

54. *E. Bay*, No. 23-16032, slip op. at 2-6.

55. *Id.* at 3-4.

56. Oral Argument at 10:15-10:50, *E. Bay*, No. 23-16032, <https://www.ca9.uscourts.gov/media/video/?20231107/23-16032> [<https://perma.cc/FZZ4-U6UR>].

57. *Id.* at 30:59-32:30.

58. See *infra* Part II.

59. Fact Sheet, *Asylum Ban Strands Asylum Seekers and Migrants in Mexico and Returns Them to Danger*, HUM. RTS. FIRST (Nov. 2023), <https://humanrightsfirst.org/wp-content/uploads/2023/11/Asylum-Ban-Harms-Factsheet-formatted.pdf> [<https://perma.cc/2EJT-D523>].

percent) were removed from the United States because they did not meet an exception to the Rule, rebut the Rule's presumption, or satisfy the "reasonable possibility" standard for a credible fear of persecution or torture set forth in the Rule.⁶⁰

C. Expedited Fear Screenings in CBP Custody

On the eve of the May 16 Rule, the Biden Administration implemented additional measures designed to quickly deport potential asylum seekers, including the resurrection of a version of Trump Administration programs known as PACR/HARP.⁶¹ First implemented in October 2019, PACR/HARP has been called "one of the most draconian Trump administration attacks on asylum."⁶² PACR/HARP required would-be asylum seekers to participate in fear screenings while in CBP custody, instead of while in U.S. Immigration and Customs Enforcement custody, where such screenings had historically taken place. These fear screenings—known as "credible fear" interviews⁶³—are low threshold screenings for establishing whether noncitizens have a credible fear of persecution or torture. Congress defined a "credible fear" as a "significant possibility" that the individual "could establish eligibility for asylum in removal proceedings."⁶⁴ The credible fear screening process is designed to "ensur[e] that individuals with valid asylum claims are not returned to countries where they could face persecution."⁶⁵

The shift to PACR/HARP in 2019 had drastic intended consequences. Conditions of confinement in CBP custody are generally horrendous, and access to counsel is near impossible.⁶⁶ Unsurprisingly, credible fear interview passage rates for those subjected to PACR/HARP plummeted. Before PACR/HARP, seventy-four percent of asylum seekers passed their screenings and were able to

60. Declaration of Blas Nuñez-Neto at 9-10, *M.A. v. Mayorkas*, No. 23-cv-01843 (D.D.C. Oct. 27, 2023).

61. Asencio & Gendelman, *supra* note 45, at 50-51.

62. Kate Huddleston, *Ending PACR/HARP: An Urgent Step Toward Restoring Humane Asylum Policy*, JUST SEC. (Feb. 16, 2021), <https://www.justsecurity.org/74678/ending-pacr-harp-an-urgent-step-toward-restoring-humane-asylum-policy> [<https://perma.cc/U3SJ-J6QL>].

63. 8 U.S.C. § 1225(b)(1)(B) (2018).

64. 8 U.S.C. § 1225(b)(1)(B)(v) (2018); 8 C.F.R. § 208.30(e)(2)-(3) (2023).

65. *Grace v. Barr*, 965 F.3d 883, 902 (D.C. Cir. 2020).

66. Asencio & Gendelman, *supra* note 45, at 51-52 ("Conditions in CBP jails are abusive, dehumanizing, and sometimes life-threatening, with widespread reports of medical neglect, inedible food and water, lack of access to showers and other basic hygiene, and inability to sleep because of overcrowding, lack of adequate bedding, cold conditions, and lights that are kept on at night.").

pursue protection in the United States.⁶⁷ For those subjected to PACR/HARP, the passage rate was only twenty-three percent.⁶⁸ Both the Government Accountability Office and DHS's Office of the Inspector General issued reports highly critical of PACR/HARP.⁶⁹

In his first month in office, President Biden issued an Executive Order requiring DHS to “promptly cease implementing” PACR/HARP.⁷⁰ But on May 10, 2023, the Administration resumed fast-track credible fear interviews in CBP custody, requiring asylum seekers to participate in their interviews within twenty-four hours of entering CBP custody,⁷¹ with a goal of deporting them within seventy-two hours if they fail their screenings.⁷² Despite these stated timeframes, the Administration consistently detains people subjected to these interviews in CBP custody for weeks, with an average time of nine to sixteen days,⁷³ in violation of government policy generally prohibiting the detention of people in CBP custody for more than seventy-two hours.⁷⁴ The Biden Administration insists that its policy differs from PACR/HARP because credible fear interviews are now conducted by USCIS officers instead of Border Patrol agents (which was

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67. *Credible Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/sites/default/files/document/data/Credible_Fear_Stats_FY19.pdf [<https://perma.cc/4C2B-WQ7L>].
68. *Southwest Border: DHS and DOJ Have Implemented Expedited Credible Fear Screening Pilot Programs, but Should Ensure Timely Data Entry*, U.S. GOV'T ACCOUNTABILITY OFF. (Jan. 25, 2021), <https://www.gao.gov/products/gao-21-144> [<https://perma.cc/VE8P-NL6T>].
69. *Id.*; Office of the Inspector General, *DHS Has Not Effectively Implemented the Prompt Asylum Pilot Programs*, U.S. DEP'T HOMELAND SEC. (Jan. 25, 2021), <https://www.oig.dhs.gov/sites/default/files/assets/2021-01/OIG-21-16-Jan21.pdf> [<https://perma.cc/RF7K-5WSW>].
70. Exec. Order No. 14010 § 4(E), 86 C.F.R. § 8267 (2021).
71. *See Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration*, U.S. DEP'T HOMELAND SEC. (Apr. 27, 2023), <https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration> [<https://perma.cc/R4A9-WERN>]; Plaintiffs' Motion for Summary Judgment and Memorandum of Law in Support at 7, *M.A. v. Mayorkas*, No. 23-cv-01843 (D.D.C. Sept. 28, 2023); Hamed Aleaziz, *Biden Cuts Time for Migrants to Get Lawyers, Echoing Trump Policy as Title 42 Expires*, L.A. TIMES (May 11, 2023), <https://www.latimes.com/politics/story/2023-05-11/biden-immigration-lawyers-title-42-trump> [<https://perma.cc/3JET-YSLX>].
72. Rebecca Santana & Elliot Spagat, *US to Test Expedited Asylum Screenings at Mexico Border*, ASSOCIATED PRESS (Apr. 7, 2023, 3:33 PM EDT), <https://apnews.com/article/biden-asylum-screening-title-42-mexico-93273917fa28848b78684cfb99bb7ad5> [<https://perma.cc/P7R7-F32R>].
73. Asencio & Gendelman, *supra* note 45, at 51.
74. *National Standards on Transport, Escort, Detention and Search*, U.S. CUSTOMS & BORDER PROT. 14 (Oct. 2015), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf> [<https://perma.cc/9JGR-Z26P>] (“Detainees should generally not be held for longer than 72 hours in CBP hold rooms or holding facilities. Every effort must be made to hold detainees for the least amount of time.”).

the practice under the Trump Administration), and because asylum seekers would have access to counsel.⁷⁵

In fact, credible fear interviews are being conducted by USCIS employees who are not asylum officers,⁷⁶ in violation of the statutory requirement that asylum officers conduct such interviews,⁷⁷ and the promise of access to counsel has been almost entirely hollow.⁷⁸ After thousands of fear screenings and nearly three months into the program, perhaps 100 migrants have secured counsel to represent them at fear screenings, while several hundred more received informal advice through one-time phone calls ahead of their fear screenings.⁷⁹ The overwhelming majority of would-be asylum seekers have had no access to counsel at all prior to their fear screenings.

This is not surprising. Detention in CBP custody and the quick turnaround time for a credible fear interview make it nearly impossible to secure counsel, let alone recover from the trauma many asylum seekers have endured en route to the United States and in their home country. Without access to counsel, many individuals do not understand the purpose and the stakes of the interview, which can be life-or-death. Moreover, lawyers are not physically allowed in CBP facilities.⁸⁰ If a lawyer calls a CBP facility, they cannot get confirmation that an asylum seeker is detained there, much less speak with the person via phone.⁸¹ To make matters worse, the fear screenings take place by phone from phone booths that offer only minimal privacy as individuals are expected to recount the most traumatic experiences of their lives to a complete stranger who wields enormous power over the trajectory of their lives. The screenings take place both day and night and on weekends, making it even harder for individuals to reach potential counsel. Finally, given the truncated timeline, it is extremely difficult for both

75. Elliot Spagat, *US Readies Second Attempt at Speedy Border Asylum Screenings*, ASSOCIATED PRESS (May 1, 2023, 8:59 PM EDT), <https://apnews.com/article/asylum-screenings-border-credible-fear-biden-obaadca5c41bb9ccdc4bo74d2034fb94> [<https://perma.cc/55M5-43H8>]. Critically, the Immigration and Nationality Act provides that a noncitizen “who is eligible for [a credible fear] interview may consult with a person or persons of the [noncitizen’s] choosing prior to the interview or any review thereof.” 8 U.S.C. § 1225(b)(1)(B)(iv) (2018); *see also* 8 C.F.R. § 208.30(d)(4) (2023) (same).

76. *See* Amended Complaint at 41-42, *M.A. v. Mayorkas*, No. 23-cv-01843 (D.D.C. July 10, 2023).

77. *See* 8 § C.F.R. 208.30(b), (d) (2023); 8 U.S.C. § 1225(b)(1)(B)(i) (2018) (“An asylum officer shall conduct [credible fear] interviews . . .”).

78. Asencio & Gendelman, *supra* note 45, at 51.

79. Elliot Spagat, *The Biden Administration Guaranteed Attorney Access for All Migrant Screenings. Most Don’t Have It*, ASSOCIATED PRESS (July 2, 2023, 11:06 AM), <https://apnews.com/article/border-asylum-screenings-credible-fear-biden-cocb41b512609b3894ebcfaa3ed3bb4c> [<https://perma.cc/N3BU-X4S9>].

80. *Id.*; Asencio & Gendelman, *supra* note 45, at 52.

81. Asencio & Gendelman, *supra* note 45, at 52.

the noncitizen and their potential or retained counsel to physically sign the G-28 form, which the agencies require for counsel to participate in credible fear interviews.

The percentage of those passing their fear screenings under this new policy has dropped precipitously from eighty-three percent to fifty-six percent.⁸² A lawsuit challenging the fear-screening process is pending.⁸³ Plaintiffs are challenging the new policy as unlawful in violation of the intentionally low screening standard set by Congress for asylum seekers,⁸⁴ and as arbitrary and capricious in violation of the Administrative Procedure Act.⁸⁵

D. Removing Non-Mexican Asylum Seekers to Mexico

When asylum seekers fail their credible fear interviews, they do not even have the opportunity to designate their country of removal. Starting in May 2023, the Biden Administration began systematically deporting individuals who are not Mexican—including people from Cuba, Haiti, Venezuela, and Nicaragua—to Mexico.⁸⁶ The U.S. government announced this policy pursuant to an agreement in which Mexico will accept noncitizens, from at least these countries, who are removed from the United States.⁸⁷ This policy is at odds with the Immigration and Nationality Act, which establishes procedures for removing individuals to third countries and generally permits them the opportunity to designate their country of removal.⁸⁸ The administration's new policy offers non-

82. Plaintiffs' Motion for Summary Judgment, *supra* note 71, at 8; *cf.* Spagat, *supra* note 79 (finding, during the five months of the Trump-era expedited-screening program, that twenty-three percent of migrants passed credible fear interviews, down from nearly three-fourths). The May 16 Rule is a factor that contributes to this lower passage rate. According to the Assistant Secretary for Border and Immigration Policy for DHS, between May 12 and June 13, 2023, U.S. Citizenship and Immigration Services conducted fear screenings for approximately 8,195 individuals subject to the Rule. Nearly ninety percent of these individuals were unable to rebut the presumption of asylum ineligibility or establish an exception to the Rule. Declaration of Blas Nuñez-Neto at 9, *E. Bay Sanctuary Covenant v. Biden*, No. 18-cv-6810 (N.D. Cal. July 25, 2023). *See generally* 8 C.F.R. § 208.33(b)(1) (2023) (asylum officers must "determine whether the [noncitizen] is covered by the presumption [of asylum ineligibility] and, if so, whether the [noncitizen] has rebutted the presumption").

83. *See* Amended Complaint, *supra* note 76, at 1. Plaintiffs filed their motion for summary judgment on September 28, 2023. Plaintiffs' Motion for Summary Judgment, *supra* note 71, at 1.

84. 8 U.S.C. § 1225(b)(1)(B)(v) (2018).

85. Plaintiffs' Motion for Summary Judgment, *supra* note 71, at 7.

86. Plaintiffs' Motion for Summary Judgment, *supra* note 71, at 31 (citing Statement of Undisputed Facts ¶¶ 17-18, *M.A. v. Mayorcas*, No. 23-cv-1843 (D.D.C. July 10, 2023)).

87. *See* Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31316-17 n.21 (May 16, 2023) (citing a White House statement).

88. *See* 8 U.S.C. § 1231(b)(2)(A) (2018).

Mexican individuals no opportunity to choose their country of removal. Noncitizens are not even informed that they are facing removal to Mexico rather than their home countries, so they do not know that they need to focus on their fear of being removed to Mexico during their fear screenings. Individuals are simply ordered to be removed to Mexico if they do not pass their fear screenings. Moreover, after their removal to Mexico, the Mexican government has ordered these noncitizens to leave the country, thereby heightening their risk of grave danger.⁸⁹ Recently, Mexico and the United States agreed that Mexico would deport migrants from border cities to their home countries by land and air; these deportations would focus on nationals from Venezuela, Brazil, Nicaragua, Colombia, and Cuba, raising the risk of deporting would-be asylum seekers to the very countries they fled.⁹⁰

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Taken together, these recent policy changes decimate meaningful access to asylum at the southern border. Where individuals are deported to countries where they would face serious threats to their lives or freedom as a result of these policy changes, these policies violate the core principle of nonrefoulement embedded in the Refugee Convention and the Refugee Act of 1980. Though the May 16 Rule is time-limited and set to expire in May 2025,⁹¹ it will cause lasting damage to the asylum system by providing a blueprint for subsequent policies blocking asylum access. Worse still, there is no expiration date on the policies requiring expedited fear screenings in CBP custody and deporting non-Mexican citizens to Mexico. Contrary to its initial rhetorical expressions of concern for asylum seekers, the Biden Administration has built a solid regulatory wall at the southern border that denies protection to the vast majority of asylum seekers.⁹²

89. See, e.g., Amended Complaint, *supra* note 76, at 38.

90. Rosa Flores, Sara Weisfeldt, Emma Tucket & Macie Goldfarb, *Mexico Makes Agreement with US to Deport Migrants from Its Border Cities as One Mayor Warns His City Is at ‘A Breaking Point,’* CNN (Sept. 24, 2023), <https://www.cnn.com/2023/09/23/us/mexico-us-border-patrol-agreement-migration-surge/index.html> [<https://perma.cc/F4W2-YNH4>].

91. 8 C.F.R. § 208.33(a)(1)(i) (2023).

92. This regulatory wall is coupled with ongoing “expeditious construction” of physical border walls. See, e.g., Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 88 Fed. Reg. 69214, 69214 (Oct. 5, 2023) (waiving the legal requirements to expedite the construction of physical barriers along portions of the southern Texas border pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996). While on the campaign trail in the summer of 2020, Biden proclaimed, “There will not be another foot of wall constructed.” Michael Shear, *How Biden’s Promise to Reverse Trump’s Immigration Policies Crumbled*, N.Y. TIMES (Oct. 6,

II. THE ROLE OF LAW SCHOOL CLINICS

Given the current state of asylum law and policy, this can feel like a dispiriting time to teach asylum law. The prospect of comprehensive immigration reform or meaningful legislative or administrative efforts to protect asylum seekers is unlikely in the foreseeable future. Given the U.S. Supreme Court's conservative majority and the 234 federal judicial appointments by former President Trump,⁹³ significant wins for immigrants' rights from the judiciary seem unlikely. In these times, none of the branches of the federal government seem inclined, equipped, or empowered to uphold the moral and legal commitments of the Refugee Act to their fullest extent.

As clinical law professors, how then should we teach immigration clinics at this unprecedented moment, when the party many of us had hoped would restore the asylum system is actually shredding it? Immigration law clinics offer an opportunity to train future generations of immigration-legal-services providers, advocates, policymakers, and strategists. Our responsibilities as clinical teachers extend not only to our clients – as would be typical at a traditional legal-services organization or immigrants' rights organization – but to our students. We owe our students the training, mentorship, and guidance they need to reshape immigration law and policy so that our nation can once again become a beacon of hope and protection for asylum seekers.

First and foremost, as teachers, we should call out that we are seeing the normalization of the end of meaningful access to asylum at the southern border of the United States. On the right, the calls to end asylum are open and explicit. On the left, there is some reluctance to criticize the Biden Administration's immigration policies, especially given its rhetoric about restoring a “humane” immigration system. Yet, we owe our students a close analysis of this Administration's asylum policies, their similarities to its predecessor's policies, and the intended effects: vulnerable asylum seekers are shut out from the opportunity to seek protection in the United States. This Essay is part of the project of calling out the normalization of the end of access to asylum; it is an effort to push back against this normalization, without regard for the political party advancing this agenda at any given time.

Increasing backlogs in the immigration system are making it harder to run law school immigration clinics than in the past. This concern has been voiced by immigration clinic professors in the context of stakeholder meetings with leaders

2023), <https://www.nytimes.com/2023/10/06/us/politics/biden-trump-immigration.html> [<https://perma.cc/4FJ7-2YFC>].

93. *Federal Judges Nominated by Donald Trump*, BALLOTPEDIA, https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump [<https://perma.cc/44WM-NKVG>].

of the Executive Office of Immigration Review (EOIR).⁹⁴ The backlog of cases before the immigration courts is now nearly 2.8 million.⁹⁵ In surveys of immigration clinic professors who practice with clinical students before the immigration courts, trying to schedule cases in accordance with the academic calendar has repeatedly been voiced as a top concern.⁹⁶ Many immigration law clinics operate on a one-semester or one-year model. Among many immigration law clinics' goals is to have student-attorney teams prepare an asylum seeker's case from beginning to end during their time in the clinic, so that the student-attorney team participates in the trial (i.e., an individual merits hearing) of the asylum seeker's case in about November or April. Given the immigration courts' changing dockets, priorities, and backlogs, cases can be unexpectedly continued (i.e., delayed) for one or two years or even longer. EOIR tried to be responsive to these concerns by issuing a memorandum in 2021 that encourages judges to accommodate clinic scheduling needs.⁹⁷ But the memorandum is not binding on immigration judges, who have wide latitude to schedule cases and deal with overwhelming case backlogs. As recently as September 2023, a working group of immigration judges dedicated to improving relationships with law school clinics reported that, nationwide, scheduling cases in accordance with the academic calendar continues to be the biggest challenge raised by law school clinics.⁹⁸

Scheduling challenges have also become exacerbated in the context of affirmative asylum cases where applicants appear for interviews before asylum offices under the jurisdiction of USCIS. The affirmative asylum backlog exceeds 667,000 applicants.⁹⁹ Whereas prior to the COVID-19 pandemic, an affirmative asylum applicant typically received a decision on their case two weeks after their

94. See, e.g., Memorandum from Immigr. Clinical Professors to Alexander Wang, Assoc. Dir. for Immigr., Domestic Pol'y Council (Dec. 2, 2021) (on file with author); Notes from Exec. Off. Immigr. Rev. Nat'l Stakeholder Meeting for L. Sch. Immigr. Clinics (Sept. 21, 2023) (on file with author).

95. *Immigration Court Backlog*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Aug. 2023), <https://trac.syr.edu/immigration/quickfacts/eoir.html> [<https://perma.cc/R26Q-KF8J>].

96. See, e.g., Memorandum from Immigr. Clinical Professors to Alexander Wang, Assoc. Dir. for Immigr., Domestic Pol'y Council (Dec. 2, 2021) (on file with author); Notes from Exec. Off. Immigr. Rev. Nat'l Stakeholder Meeting for L. Sch. Immigr. Clinics (Sept. 21, 2023) (on file with author).

97. Exec. Off. of Immigr. Rev., *Encouraging and Facilitating Pro Bono Legal Services*, U.S. DEP'T OF JUST. 4 (Nov. 5, 2021), <https://www.justice.gov/eoir/book/file/1446651/download> [<https://perma.cc/7XKS-ZB3>].

98. Notes from Exec. Off. Immigr. Rev. Nat'l Stakeholder Meeting for L. Sch. Immigr. Clinics (Sept. 21, 2023) (on file with author).

99. See Letter from Ur M. Jaddou, Dir., U.S. Citizenship & Immigr. Servs., to Rep. Andy Barr 1 (Feb. 17, 2023), https://www.uscis.gov/sites/default/files/document/foia/Asylum_backlog-Representative_Barr.pdf [<https://perma.cc/FC82-8ASC>] (noting that, as of the end of 2022, 667,040 asylum applications were pending approval).

asylum-office interview date, applicants are now waiting months and years after their interviews for decisions. For law school clinics operating on semester-long or year-long timelines, the certainty of the two-week timeframe made it easier to plan casework. That certainty is now absent, leaving law school clinic dockets ballooning with cases that extend over prolonged periods of time. Likewise, prior to the COVID-19 pandemic, some asylum offices offered priority scheduling of asylum office interviews for law-school-clinic clients out of consideration for the particular scheduling needs of clinics, but this practice has been suspended in at least some jurisdictions due to COVID-19-related capacity restrictions.¹⁰⁰

In this more challenging environment, I would like to suggest several new and invigorating opportunities for immigration law clinics. These range from relatively easy to implement to more resource-intensive teaching and service opportunities with asylum seekers in detention in remote areas and for those south of the U.S. border.

First, given the constantly evolving immigration landscape at the national, state, and local levels, I would encourage clinic seminars to consistently incorporate time for discussion of updates in immigration law and policy. I have made this a regular part of our clinic seminars in recent semesters. Our seminar classes now often open with a discussion of breaking developments in immigration law and policy. Student-attorneys in the clinic have consistently expressed how valuable these discussions are. Out of these discussions, clinic projects responsive to the moment may arise.

For example, in the Spring 2023 semester, as our clinic followed developments with the Brooklyn mega-shelter warehousing recent immigrant arrivals to New York City, we developed a project to assess the needs of these arrivals and provide information responsive to their concerns. Likewise, following a seminar discussion in the Fall 2020 semester about the medical abuse of immigrant women detained at the Irwin County Detention Center, our clinic began representing individuals detained there. These discussions and subsequent clinic-generated projects can offer invaluable learning, lawyering, and leadership opportunities for student-attorneys.

Second, law school clinics may wish to assist individuals in CBP custody who are subjected to expedited credible fear interviews. The Immigration Justice Campaign, a joint project of the American Immigration Council and the American Immigration Lawyers Association, has set up a legal preparation hotline to

100. Confidential Email Correspondence (on file with author).

assist those in CBP custody who are facing expedited credible fear interviews.¹⁰¹ When calling the hotline, individuals will reach either a volunteer legal professional who can explain the interview process or a recording that runs 24/7 with information about the interview and how to prepare. Student-attorneys who are fluent in Spanish and understand the asylum process and fear-screening process may be well-equipped to offer pro bono legal services through this hotline to individuals in CBP custody. This opportunity gives clinic student-attorneys a direct opportunity to offer services in a legal black hole, created by the current and prior administrations, that leads to deportations.

Third, law school immigration clinics may be uniquely positioned to take on cases with expedited timelines. While backlogs before the immigration court and the asylum office are generally making it more difficult for student-attorneys in single-semester clinics to see cases from initial client interviews through adjudications, working with Afghan affirmative asylum seekers may offer this opportunity. In October 2021, Congress passed a statute requiring the expeditious processing of asylum applications for certain Afghan nationals, specifically those “paroled into the United States between July 31, 2021, and September 30, 2022.”¹⁰² The statute requires affirmative asylum officer interviews for these individuals to take place within forty-five days of their filing an asylum application. Significantly, our clinic has relied on this statute to successfully seek expedited interviews for Afghans paroled into the United States as well as for an Afghan national who was not paroled into the United States. By relying on this statute and its extensions, student-attorneys may be able to lead the arc of a case in a single semester, thereby meaningfully meeting the goals of many immigration law clinics.¹⁰³

Fourth, I would encourage law school clinics to consider expanding their work in immigration detention centers, especially those in rural and border regions where pro bono immigration legal services are typically scarce. In the fall of 2020, six law school clinics banded together, in partnership with national and local immigrants’ rights organizations, to provide representation to individuals detained at the Irwin County Detention Center in rural Georgia. Together, we

101. Email from Bekah Wolf, Pol’y Counsel, Immigr. Just. Campaign, *Volunteers Needed for a New and Urgent Project*, (Aug. 23, 2023) (on file with author); Email from Immigr. Just. Campaign, *Campaign Dispatch: Join Us to Learn and to Help*, (Sept. 21, 2023) (on file with author).

102. Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. No. 117-43, 135 Stat. 344, 377 (2021) (codified at 8 U.S.C. § 1101 (2018)).

103. While expedited asylum-office interviews for Afghan parolees are generally taking place, there are many delays with adjudicating these asylum applications. See, e.g., Complaint at 3, *Ahmed v. U.S. Dep’t of Homeland Sec.*, No. 23-cv-1892 (N.D. Cal. Apr. 19, 2023) (noting that the government has adjudicated only eleven percent of these asylum applications within the 150-day congressional deadline). This case settled in September 2023 on terms requiring the federal government to expedite decision-making in these cases.

engaged in individual representation on immigration cases, requests for release, congressional advocacy, class-action litigation, participation in federal investigations of medical abuses suffered by detained women, and related advocacy. Clinic student-attorneys participated in all aspects of this work, including by filing immigration appeals, interviewing individuals in detention, helping them to prepare affidavits about their experiences, facilitating congressional briefings, and preparing release requests. In the course of this work, the Biden Administration announced that the facility would no longer detain immigrants.¹⁰⁴

Significantly, our clinics' collective work at this detention center was made possible because of a previous lawsuit that required that videoconferencing be made available for attorney-client visitation. Without such videoconferencing access, law school clinics nationwide would not have been able to offer pro bono legal services at this remote detention center. It is worth pursuing this model of collaboration in other detention centers in rural and border areas, as immigration detention approaches its highest point in four years with nearly 40,000 individuals detained as of November 2023, 71.2% of whom have no criminal record.¹⁰⁵ Notably, the immigration detention system is designed and budgeted for a maximum population of 34,000.¹⁰⁶

Finally, time and resources permitting, I would encourage law school clinics to engage in learning and service opportunities with asylum seekers and migrants before they cross into the United States. Our clinic engaged in this work in January 2019 (just before the implementation of Migrant Protection Protocols¹⁰⁷) in Tijuana with *Al Otro Lado* and in January 2020 in Ciudad Juarez with

104. Molly O'Toole, *ICE to Close Georgia Detention Center Where Immigrant Women Alleged Medical Abuse*, L.A. TIMES (May 20, 2021), <https://www.latimes.com/politics/story/2021-05-20/ice-irwin-detention-center-georgia-immigrant-women-alleged-abuse> [https://perma.cc/5TW4-F9WT].

105. *Immigration Detention Quick Facts*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Nov. 19, 2023), <https://trac.syr.edu/immigration/quickfacts> [https://perma.cc/ZC3C-9VXG].

106. Rafael Bernal, *Democrats to Garland, Mayorkas: Ease Up on Migrant Detention Bonds*, HILL (Oct. 30, 2023), <https://thehill.com/latino/4284122-democrats-garland-mayorkas-detention-bonds-migrants> [https://perma.cc/7TGA-WYUE].

107. Announced on January 24, 2019, Migrant Protection Protocols (MPP), also known as the Remain in Mexico policy, required asylum seekers to be returned to Mexico and wait outside of the United States for the duration of their immigration proceedings—a process that could easily last years. On June 1, 2021, and October 29, 2021, DHS issued memoranda to rescind the policy; the latter memo cited the “substantial and unjustifiable human costs on the individuals who were exposed to harm while waiting in Mexico.” Memorandum re: Termination of the Migrant Protection Protocols from Alejandro Mayorkas, Sec’y, U.S. Dep’t of Homeland Sec. (Oct. 29, 2021). Litigation challenging the Administration’s rescission of MPP reached the U.S. Supreme Court. In *Biden v. Texas*, the Court ruled that the Administration has the authority to rescind MPP but left open the question of whether the October 2021 memorandum comported with the APA. Subsequent litigation is pending. 142 S. Ct. 2528, 2548 (2022).

the Estamos Unidos Asylum Project of the Catholic Legal Immigration Network, Inc. Clinic student-attorneys and I sought to inform and empower potential asylum seekers about what they would face if or when they crossed the border into the United States, including providing information about immigration detention, credible fear interviews, and family separations. We also provided basic information about options for seeking asylum and work authorization in Mexico. This work helped individuals make life-altering decisions in a setting where high-quality, free legal information was extremely scarce.

The importance of this type of legal counseling, before individuals enter the United States, is now more important than ever. “People waiting to seek asylum overwhelmingly do not know about or understand the [May 16] asylum ban and the consequences it inflicts if entering at or between ports of entry without a CBP One appointment, and some are unaware of CBP One.”¹⁰⁸ In September 2023, clinic student-attorneys and I returned to Tijuana to partner with Al Otro Lado. Our clinic was the first law school group that offered in-person, pro bono legal services in Tijuana in partnership with Al Otro Lado after the COVID-19 pandemic, during which in-person volunteer services were discontinued. Student-attorneys and I helped to monitor the port of entry at El Chaparral-San Ysidro Pedwest, and we offered pro bono legal consultations to those who had secured CBP One appointments to enter the United States. In addition, we offered Know Your Rights presentations and pro bono legal consultations at Al Otro Lado’s office and at migrant shelters in Tijuana.

A focal point of these efforts was explaining the differences between Title 42 and Title 8, so that asylum seekers and migrants understood the differences between expulsions (which carry no immigration consequences under Title 42) and removals (which carry, in the words of Secretary Mayorkas, “stiff consequences for irregular migration” under Title 8, including a five-year ban and potential criminal charges for those caught trying to enter the country multiple times).¹⁰⁹ We also emphasized that, despite the challenges of using the CBP One app, it was critically important to secure an appointment prior to crossing the border. We explained that if an asylum seeker was able to secure an appointment

Compare Texas v. Biden, 554 F. Supp. 3d 818 (N.D. Tex. 2021) (requiring the Biden Administration to implement MPP in good faith), *with* Immigrant Defs. L. Ctr. v. Mayorkas, No. 20-cv-9893, 2023 WL 3149243 (C.D. Cal. 2023) (allowing lawsuit on behalf of migrant asylum seekers to proceed). Significantly, on October 31, 2023, a settlement agreement announced that DHS would accept parole applications from asylum seekers still subject to MPP, and that those parole requests would be processed within fifteen days. Stipulated Dismissal, Innovation L. Lab v. Mayorkas, No. 19-cv-0807 (N.D. Cal. Oct. 31, 2023).

¹⁰⁸. Asencio & Gendelman, *supra* note 45, at 7 (Oct. 2023).

¹⁰⁹. Michael Crowley, *Biden Administration Moves to Stem Expected Migrant Surge*, N.Y. TIMES (Apr. 27, 2023), <https://www.nytimes.com/2023/04/27/us/politics/biden-migration-title-42.html> [<https://perma.cc/Y2LL-RDMV>].

with the CBP One app, they would be more likely to be paroled into the United States and therefore eligible for work authorization.¹¹⁰ In contrast, under Title 8, an entry without inspection would carry severe consequences, including the likelihood of detention, a rapid credible fear interview, ineligibility for parole, ineligibility for immediate work authorization, and likely ineligibility for asylum given the May 16 Rule. We consistently counseled individuals to be wary of fraud, given the propensity of scammers to take advantage of asylum seekers and migrants' desperation by promising to sell CBP One appointments. We also explained the process of seeking asylum in the United States, including the importance of collecting and securing evidence to corroborate one's claims.

For the clinic student-attorneys, this border work was remarkably eye-opening and even transformative. Although they had read about and watched coverage of conditions for asylum seekers and migrants south of the U.S. border, bearing witness to the situation hit them hard. Seeing hundreds of migrants, including families with very young children and crying infants, crowded into shelters with no privacy, open fire pits, and sewage running by, waiting for CBP One appointments, often for months, in destitution and facing dangers, was deeply upsetting. Many children had no meaningful access to education, many families faced dangers, and many individuals were plagued with anxiety about an uncertain future, including when and whether they would be able to secure CBP One appointments. Among those whom we counseled were a young child with a brain tumor and her grandmother (who almost certainly would be separated upon entering the United States because they would not be considered a family unit), a woman with breast cancer who could not receive necessary treatment in Mexico because of her migration status and language isolation, multiple survivors of torture with extensive permanent physical scarring, a young woman whose persecutor had stalked her to Tijuana, and many others at high risk of grave danger.

Generous colleagues at Al Otro Lado emphasized that our work made critical contributions. According to these colleagues, our work in migrant shelters made it possible to reach individuals who otherwise would likely never have encountered high-quality pro bono legal services. In Tijuana, a small and mighty Al Otro Lado staff work tirelessly to meet the needs of thousands of migrants and asylum seekers. They have emphasized that they would like to welcome more

110. Data released by the U.S. House Committee on Homeland Security suggests that more than ninety-five percent of individuals who scheduled appointments through the CBP One app from January 12, 2023, to September 30, 2023, were eventually issued a "Notice to Appear" in immigration court and released into the United States on parole. Email from House Homeland Sec. Press, to Jennifer Ibañez Whitlock, Supervisory Pol'y & Prac. Couns., Am. Immigr. Laws. Ass'n, *New Documents Obtained by Homeland Majority Detail Shocking Abuse of CBP One App*, (Oct. 23, 2023) (on file with author).

legal volunteers with fluency in Spanish, Haitian Creole, and other languages, and that there are also important supporting roles for volunteers who are not fluent in other languages. In this setting, law school clinics can play an essential role in trying to reach asylum seekers and migrants in the most precarious situations, and help to empower them with essential information so they can make informed decisions about their futures.

Based on our clinic's productive experiences in September 2023, I hope to replicate this experience in coming semesters. From both the perspective of student learning and the perspective of making tangible social-justice contributions, this experience was unparalleled. Al Otro Lado was a phenomenal partner and host, with multiple staff offering us trainings on the legal landscape and changes at the border, encouraging us to bond as a group, and helping us to process utterly heart-wrenching situations. Al Otro Lado's service model also offers terrific learning opportunities. Following a weekly Know Your Rights presentation at the office and individual legal consultations, staff offered asylum seekers and migrants a hot meal, clothing, and shoes, while onsite caregivers engaged children in play and art. During our visit, a traveling family circus also made an unexpected appearance, providing some mirth in otherwise dismal conditions.

Our work at ground zero provided clinic students with a visceral reminder of how much asylum seekers must navigate before reaching the United States. We could see, smell, and learn firsthand about the almost insurmountable obstacles to asylum eligibility posed by the current and prior administrations. I encourage other law school clinics to consider doing this type of work at the border to maximize both learning and service opportunities for students. If this work is undertaken, comprehensive trauma training also should be incorporated into the clinic semester to equip student-attorneys to engage in this work on a sustainable basis.

Before closing, I would emphasize that clinical professors should never *require* border work of student-attorneys in their clinics. In explaining this opportunity to my clinic student-attorneys, I repeatedly emphasized that the trip was not a course requirement and that those who opted out would have opportunities to do extremely valuable work in New York City. Border work exposes participants to high trauma loads, potential security challenges, and extremely difficult work. If a clinic incorporates border work into a given semester's curriculum, alternative meaningful local opportunities for community engagement and service work should be offered as well. For example, this fall semester, our clinic has engaged in border work while simultaneously partnering with the New York City Asylum Application Help Center to offer pro bono legal services to local asylum seekers. All this work has been paired with student-attorneys having ownership over asylum cases that they see, more or less, from start to

finish in the course of a single semester in a prototypical immigration clinic model.

In sum, immigration law clinics can and should be structured to meet the current moment. From incorporating regular discussions of updates in immigration law and policy into the clinic seminar, to offering pro bono legal services to asylum seekers facing expedited fear screenings, to taking on service learning opportunities in rural areas and at the border, there are myriad opportunities to shape immigration law clinics to be responsive to emerging challenges.

CONCLUSION

As our nation falls short of its legal and moral obligations under the Refugee Convention, law school clinics can play a unique role in reshaping the future. By offering student-attorneys knowledge of and first-hand experiences with unjust and illegal asylum policies, law school clinical programs have an opportunity to try to influence the future of immigration law by training upcoming generations of lawyers and leaders.

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