

U.S. LEGAL AND MORAL OBLIGATIONS AT THE SOUTHERN BORDER

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INTRODUCTION: THE POLITICS OF GLOBAL MIGRATION

The twenty-first century is a time of unprecedented global migration. The Pew Research Center estimates that as of 2022, 3.6 percent of the human population lives outside of their birth country and 1.1 percent are displaced persons.¹ Of these displaced persons, a third live outside their country of birth as refugees or asylum seekers, constituting a total of over thirty million people worldwide.² Such a massive demographic transition inevitably raises major policy questions, particularly in countries that receive large numbers of new inhabitants.

* The policies discussed in this paper often have life-and-death consequences and are deeply personal to me and my co-author. Like so many other Ashkenazi Jews, each of my great-grandparents and their families escaped the pogroms in Russia in the late 19th and early 20th centuries, where violent attacks against Jewish communities killed thousands of people (including at least one of my relatives). My grandma's mom and her family, for example, escaped Russia in 1914. Her brother (my great-great-uncle) was a young toddler, about the age of my own son, and my family almost had to leave him behind as the whole family risked being caught because of his screaming. It took them seven years to cross Europe, and they ultimately sailed from Liverpool to the United States in 1921. Like most of the migrants discussed in this paper, my family came to this country to seek refuge from violent persecution. As a mother, my heart goes out to the thousands of parents making the impossible decision between remaining in a country where their children risk persecution (violence, rape, and even death) daily or making the long and perilous journey north for a chance at a better—and safer—life. I hope this paper helps humanize these individuals—mostly women and children—and reframe the conversation on the so-called “border crisis.” We, as a nation, need to do better.

** This paper is also dedicated to the memory of Phoong Le, a brave American patriot who cared for her grandchildren during the dangerous ocean voyage from Vietnam to a Hong Kong refugee camp and brought them safely to their new home in America. One of those grandchildren is now my (Jeff's) wife. I also recognize with gratitude the unsung efforts of activists, staffers, and lawyers who played a role in passing the 1980 Refugee Act that granted safe haven in the United States to Phoong Le's family.

¹ Anusha Natarajan et al., *Key Facts About Recent Trends in Global Migration*, PEW RSCH. CTR. (Dec. 16, 2022), <https://pewrsr.ch/3W68Qgm>.

² *Id.*

In recent years, this situation has led to an increase of anti-immigrant and anti-refugee sentiment in countries around the world.³ The political gridlock surrounding issues of migration is a problem currently facing governments and major institutions worldwide, from Greece ignoring a shipwreck in which over six hundred refugees perished⁴ to the United Kingdom planning to deport migrants crossing the sea to Rwanda.⁵ In the United States, hostility toward immigrants has increased significantly since the presidency of Donald Trump and his administration, which included White House policy aide and anti-immigrant hardliner Stephen Miller.⁶ Even after the election of the (somewhat) more immigrant-friendly Biden administration, a majority of Americans surveyed supported actions against asylum seekers at the border that federal courts have repeatedly found to violate U.S. immigration law.⁷ The overreaction of U.S. officials to this public sentiment has included Florida Governor (and presidential candidate) Ron DeSantis's constructive kidnapping of asylees⁸ and Texas Governor Greg Abbott's illegal and deadly obstacle courses in the Rio Grande on the U.S.-Mexico border.⁹ Politically, the situation at the U.S. border has devolved into a stalemate as Congress has remained unable to pass any meaningful immigration reform in decades. Accordingly, each new

³ Nesrine Malik, *As the Disturbing Scenes In Tunisia Show, Anti-Migrant Sentiments Have Gone Global*, THE GUARDIAN (Mar. 13, 2023), <https://www.theguardian.com/commentisfree/2023/mar/13/tunisia-anti-migrant-sentiments-president-saied>.

⁴ Matina Stevis-Gridneff & Karam Shoumali, *Everyone Knew the Migrant Ship Was Doomed. No One Helped*, N.Y. TIMES (July 3, 2023), <https://www.nytimes.com/2023/07/01/world/europe/greece-migrant-ship.html>.

⁵ Lauren Frayer, *The British Government Plans to Deport Migrants To Rwanda*, NPR (Aug. 22, 2023), <https://www.npr.org/2023/08/22/1195289241/the-british-government-is-deporting-migrants-to-rwanda>.

⁶ Jason Deparle, *How Stephen Miller Seized the Moment to Battle Immigration*, N.Y. TIMES (Aug. 17, 2019), <https://www.nytimes.com/2019/08/17/us/politics/stephen-miller-immigration-trump.html?searchResultPosition=25>.

⁷ Amina Dunn, *Americans Remain Critical of Government's Handling of Situation at U.S.-Mexico Border*, PEW RSCH. CTR. (June 21, 2023), <https://www.pewresearch.org/short-reads/2023/06/21/americans-remain-critical-of-governments-handling-of-situation-at-us-mexico-> (requiring registration to apply for asylum has been repeatedly found to be illegal by federal courts); see *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1041 (N.D. Cal. 2023).

⁸ Edgar Sandoval, *Prosecuting Florida's Migrant Flights Would Face Legal Hurdles*, N.Y. TIMES (June 6, 2023), <https://www.nytimes.com/2023/06/06/us/migrants-desantis-legal.html>.

⁹ Kierra Frazier & Josh Gerstein, *DOJ sues Texas and Gov. Greg Abbott over Rio Grande Barrier*, POLITICO (July 24, 2023), <https://www.politico.com/news/2023/07/24/doj-sues-texas-and-gov-greg-abbott-over-rio-grande-barrier-00107896>.

administration attempts to use executive orders and administrative rulemaking to achieve their policy preferences, often resulting in protracted legal appeals that leave noncitizens in legal limbo for years on end.¹⁰ Public opinion on the question of the border, like so many issues in the past decades, seems hopelessly shaped by pre-existing political identification. This paper is not intended to serve as part of the empty partisan debate. Instead, we hope this paper contributes to a more substantive and complete discussion on immigration policy.

OUR PROPOSAL: FOCUS ON U.S. OBLIGATIONS, NOT POLITICAL EXPEDIENCY

As the 2024 presidential election approaches, U.S. policy on the southern border remains front and center, with political discourse and media coverage extensively focused on shaping U.S. policy to prevent migrants from entering the southern border to seek asylum. Politicians and media outlets use terms like “border crisis” and “illegal border crossings” uncritically. However, what is almost universally overlooked is that the legal issues at the border cut two ways. In addition to the requirements placed on persons crossing the border, U.S. and international law place obligations on the United States as a receiving nation.¹¹ A clear articulation and understanding of these obligations are a key part of understanding the legal dynamics at the U.S-Mexico border.

We suggest that analyzing these issues based on a framework focused on the legal and moral obligations of the United States *towards* potential asylum seekers is a better way forward than trying to shape outcomes to match the current political mood. Too often, policy arguments are rooted in political assumptions about border crossers—those who are politically desirable being labeled as “legal” and those perceived to be less desirable labeled as “illegal.” The advantage of an obligations-based framework is that it provides an objective basis on which to formulate policy. Instead of asking, “what do the incoming people deserve?” we can ask, “what do we owe these incoming people?” When we start with the question of U.S. obligations, which are the same towards each person, we can then apply those principles in the fairest possible way to each person’s unique story and factual

¹⁰ Michele Waslin, *The Use of Executive Orders and Proclamation to Create Immigration Policy: Trump in Historical Perspective*, 8 JMHS 54–67 (2020).

¹¹ 8 U.S.C. 1158(a)(1); 1951 UN Convention and Protocol Relating to the Status of Refugees.

situation. In other words, immigration law should drive immigration policy—not the other way around.

To be clear, the obligation of the United States is not “the United States owes every person at the border the right to become a citizen,” or even, “the United States owes every person at the border protection from their perceived problems.” In fact, in some cases the answer is, “the United States ought to deport this person,” or “this person does not qualify to stay in the United States permanently.” Instead, by focusing on the obligations of the United States towards border-crossers, we can develop policy based on objective legal criteria, rather than polarized political assumptions about those crossing the border. We challenge those on the right to understand that the rule of law at the border does not simply mean exclusion—rather, it means evenhanded application of U.S. immigration to *each* person crossing the border. And we challenge those on the left to understand that moral obligation does not mean open borders. Both sides have opted for overly simplistic analysis based on knee-jerk reactions rather than careful legal and moral reasoning. Obligations-based analysis can help to overcome this impasse.

In the face of massive migration and massive opposition to that migration, policymakers must consider not only the loud public rhetoric *against* incoming migrants, but also the legal and moral obligations of governments and societies *towards* such people. The United States has a well-developed legal framework for those who cross its borders seeking protection from persecution in their country of origin. For example, in a recent ruling, a California District Court recounts at least six cases—five under President Trump and the most recent under President Biden—in which regulations seeking to reduce the flow of migrants over the U.S.-Mexico border were held to be illegal.¹² The Court held that the United States has legally obligated itself to those crossing the borders:

Simply put, the asylum statute contemplates that, subject to certain exceptions, any noncitizen physically present in the United States—regardless of whether they entered on a work visa or with parole-related travel authorization—or at a land border or port of entry—regardless of the size and scope of refugee admissions efforts—may apply for asylum.¹³

¹² See *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1041 (N.D. Cal. 2023).

¹³ *Id.* at 1045.

Every day, many asylum seekers from all over the world come to the U.S.-Mexico Border.¹⁴ For decades, a significant proportion of these asylum seekers have been from the Northern Triangle of Central America—Guatemala, Honduras, and El Salvador.¹⁵ In recent years, asylum seekers from Nicaragua, Venezuela, Cuba, and Haiti have also arrived in increasing numbers, fleeing some of the most dangerous situations of persecution on the globe.¹⁶ For decades, the U.S. government has avoided granting asylum to those from the Northern Triangle, but the flow of people has not stopped.¹⁷ Given these conditions, what are the legal and moral obligations of the United States at its southern border?

The first part of this paper examines the legal obligation to provide an asylum hearing to those who seek one, and the underlying moral substance that underscores this obligation. As described in detail below, the moral and legal obligation to grant a hearing to asylum seekers is not a mere technicality or “quirk,” as some current politicians suggest.¹⁸ Rather, it is an obligation rooted deeply in American constitutional law, international law, and the

¹⁴ *CBP Releases June 2024 Monthly Update*, U.S. CUSTOMS & BORDER PROTECTION (July 16, 2024), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-june-2024-monthly-update>.

¹⁵ John Gramlich, *Migrant encounter at the U.S.-Mexico border hit a record high at the end of 2023*, PEW RSCH. CTR. (Feb. 15, 2024), <https://www.pewresearch.org/short-reads/2024/02/15/migrant-encounters-at-the-us-mexico-border-hit-a-record-high-at-the-end-of-2023/>.

¹⁶ See Rebecca Beitsch, *Graham seeks to impose strict limitations on asylum system*, THE HILL (Mar. 24, 2021), <https://thehill.com/policy/national-security/544716-graham-seeks-to-impose-strict-limitations-on-asylum-system/>; *The Biden Administration's Humanitarian Parole Program for Cubans, Haitians, Nicaraguans and Venezuelans: An Overview*, AM. IMMIGR. COUNCIL (Oct. 31, 2023), <https://www.americanimmigrationcouncil.org/research/biden-administrations-humanitarian-parole-program-cubans-haitians-nicaraguans-and->

¹⁷ Zolan Kanno-Youngs & Michael D. Shear, *Federal Judge Strikes Down Trump Administration's Asylum Rule*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/us/politics/trump-asylum-ruling-immigration.html?searchResultPosition=4>; see Julie Hirschfeld Davis & Julia Preston, *Amid Influx of Migrants, Obama Is to Skip Border Visit on Texas Trip*, N.Y. TIMES (Jul. 3, 2014), <https://www.nytimes.com/2014/07/04/us/amid-influx-of-migrants-obama-to-skip-border-visit-on-texas-trip.html?searchResultPosition=6>; see also Sarah Kerr & Ainara Tiefenthäler, *Trump's Evolving Rhetoric on the Wall*, N.Y. TIMES (Nov. 20, 2019), <https://www.nytimes.com/video/us/politics/100000006298111/trump-wall-shutdown.html>.

¹⁸ Rebecca Beitsch, *Graham Seeks to Impose Strict Limitations on Asylum System*, THE HILL (Mar. 24, 2021), <https://thehill.com/policy/national-security/544716-graham-seeks-to-impose-strict-limitations-on-asylum-system/>.

Judeo-Christian moral tradition. To sidestep it for mere domestic or geopolitical interest is deeply illegal and immoral.

The second part of this paper argues that recent administrations, especially the Trump administration, have instituted illegal and immoral policies that flout the asylum rule and fail to uphold both legal and moral obligations at the border even when asylum hearings occur. As described in detail below, the last several presidential administrations, particularly the Trump administration, intentionally and illegally stacked the deck against asylum claims by those from Central America. Whatever practical reasons are given to justify these policies, they are clear violations of the legal and moral obligations of the United States at its border.

PART ONE: THE ASYLUM RULE IS THE FUNDAMENTAL U.S. OBLIGATION AT THE BORDER

The asylum rule states that any person who is physically present in a country that is not their home, and who has a well-founded fear of persecution if they return to their home country, may apply for asylum in the country they have entered.¹⁹ The asylum rule is based on a long tradition of international legal and moral consensus. This section will trace the development of the U.S. version of the asylum rule by establishing its constitutional foundations, its legislative history, and its background in the American legal and moral traditions. The goal of this section is to establish that the asylum rule is not particularly complicated or difficult to interpret but is, in fact, a clear and settled area of U.S. immigration law.

¹⁹ 8 U.S.C. 1158(a)(1); 1951 UN Convention and Protocol Relating to the Status of Refugees, <https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees>.

A. The Constitutional Background of the Asylum Rule

The Federalist Papers are essays written in the late eighteenth century by Alexander Hamilton, John Jay, and James Madison to explain and defend the new Constitution while it was being ratified by the states. In Federalist 42, James Madison argues that one of the advantages of the new, stronger federal government will be to give authority over naturalization to a single government, rather than allowing a confusing patchwork of individual state immigration laws that ruled under the Articles of Confederation, writing:

The new Constitution has accordingly, with great propriety, made provision against them [the contradictory naturalization policies of the states], and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States.²⁰

The Constitution vested this power in Congress in Article One: “The Congress shall have Power To...establish a uniform Rule of Naturalizations...throughout the United States.”²¹ The Supreme Court has repeatedly confirmed this rule, including in cases that are far from being pro-immigrant.²² Notably, the power to regulate immigration is not one—like so many other congressional powers—that is derived indirectly from another clause (such as the Commerce Clause) or that may have originally been intended to stay with the states but has gradually accreted to the federal government over the centuries. Rather, from the very foundation of the U.S. constitutional republic, the power to make law about immigration has been firmly vested in Congress.

Congress has spoken very clearly about who can apply for asylum and under what circumstances. The Refugee Act of 1980 states: “Any alien who is physically present in the United States...irrespective of such alien's status, may apply for asylum in accordance with this section.”²³ This sentence lays out the asylum rule in clear terms. Who may apply for asylum?

²⁰ THE FEDERALIST NO. 42, at 270–71 (James Madison) (Clinton Rossiter ed., 1961).

²¹ U.S. CONST. art. 1, § 8, cl. 4.

²² See *Ping v. U.S.*, 130 U.S. 581 (1889); see also *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893). Both of these cases are blatantly racist and support an anti-Chinese bias in immigration law. However, they are regularly cited to confirm that the Constitution vests the power to make immigration policy in Congress.

²³ 8 U.S.C. § 1158 (a)(1).

Any noncitizen.²⁴ What is the pre-condition placed on noncitizens? Only this: physical presence in the United States. Does it matter what status the noncitizen has—in particular, whether that noncitizen entered at a designated port of entry? It does not matter. *Irrespective* of the status of the noncitizen, the noncitizen may apply for asylum. This sentence does not say *anything* about a person who is *not* in the United States (this person would be referred to as a refugee rather than asylee).²⁵ It does *not* give the right to apply for asylum to any person who is *not physically present* in the United States. However, it does grant the *unconditional right* to apply for asylum to anyone who is currently *physically present in* the United States.

The framers of the Constitution intended to vest the power over immigration in the federal government. In Article I, they vested that power directly and explicitly to Congress. The asylum rule is not a loophole, a technicality, or an accident; it is an exercise of the power granted to Congress by the Constitution and applies to any person physically present in the United States.²⁶

The executive branch has the role of applying the laws passed by Congress and is granted wide latitude in making regulations to interpret such statutes. This applies to numerous executive agencies responsible for creating and enforcing immigration policy, including the Department of Homeland Security (DHS), the Department of Justice (DOJ), and the Department of State (DOS). These executive agencies have repeatedly attempted to bypass the asylum rule.²⁷ However, the agencies of the executive branch may not change the words of the laws passed by Congress. Even in the Supreme Court case most famous for granting deference to executive agencies in the interpretation of statutes, the Court states:

the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress...If a court,

²⁴ The term “alien” is archaic and now conjures images of Martians. This paper will use the term “noncitizen” as a direct replacement for “alien.” The terms have precisely the same legal meaning.

²⁵ See Sandoval, *supra* note 8.

²⁶ In spite of what Lindsay Graham and many anti-asylum advocates claim, the right to claim asylum is based on the clear intent of Cong. and is not a “loophole.” See, e.g., Susan Cornwell, ‘A wall will not fix this’: U.S. Senator Graham offers more steps to limit migrants, REUTERS (May 15, 2019), <https://www.reuters.com/article/us-usa-immigration-graham/a-wall-will-not-fix-this-u-s-senator-graham-offers-more-steps-to-limit-migrants-idUSKCN1SL2FO>.

²⁷ See *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1041 (N.D. Cal. 2023).

employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law, and must be given effect.²⁸

Thus, while the executive and judicial branches have a role to play in making immigration law, in the case of the asylum rule,²⁹ there is no room for interpretation. The rule is neither vague nor difficult to understand; it employs direct, clear language. The obligation to grant a fair asylum hearing is not ambiguous. The intention of Congress in the rule is clear, and its power to establish this rule is constitutionally unassailable. Both the courts and the executive branch are bound to obey it. Before we consider ways in which the executive branch has explicitly violated the asylum rule, we will explore the historic legal and moral intentions that underlie the rule.

B. Why Congress Made the Asylum Rule

As we consider the legal and moral underpinnings of the asylum rule, it is helpful to consider Congress's intention when they made it part of U.S. law through the Refugee Act of 1980.³⁰ One answer is found in the opening sections of the bill that clearly articulates Congress's intent in passing it: "The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."³¹ Two observations are relevant here. First, Congress saw itself as passing a law that was part of an ongoing policy of the United States. This was not a radically new policy but, in fact, a continuation of a theme in American life, now codified in new legislation. Second, the response of the United States is predicated on the "urgent needs of persons subject to persecution in their

²⁸ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

²⁹ Here, and elsewhere in Part One of this paper, "asylum rule" refers primarily to the right to apply for asylum. Part Two of this paper will cover issues related to the asylum adjudication itself.

³⁰ The distinction between refugee and asylee is that a refugee is not present in the United States, and an asylee is present in the United States. The Refugee Act does not require that every refugee in the world be granted admission to the United States. It does, however, explicitly require that an asylum seeker *present on U.S. soil*, be granted a hearing. Sometimes the term "refugee" is used as an umbrella term to describe both refugees and asylees, but the distinction is important. In considering the moral and legal obligations of the United States at the U.S.-Mexico border, this paper solely focuses on U.S. obligations to *asylum* seekers (meaning, those who are on U.S. soil).

³¹ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

homelands.”³² The context of the rule is not the urgent domestic political policy of a president seeking re-election, the prevailing sentiment in the opinion pages of newspapers, or the current policy objectives of the United States. While these factors do influence other aspects of immigration law, such as the issuance of employment-based immigration visas, the allocation of temporary worker visas, or the declaration of Temporary Protected Status for people from certain countries, the content of the asylum rule emanates from the needs of the asylees, *not* the political preferences of the president.

Congressional records further underscore these themes in the legislative history of the Refugee Act of 1980. Senator Ted Kennedy, who sponsored the bill, stated during the early floor discussion:

[T]he bill we are considering today—S. 643, the Refugee Act of 1979—deals with one of the oldest and most important themes in our Nation's history: Welcoming homeless refugees to our shores. It also will give statutory meaning to our national commitment to human rights and humanitarian concerns, which are not now reflected in our immigration laws.³³

Two observations about Senator Kennedy's comments are helpful. First, he emphasizes the concept that welcoming refugees is not a new idea but rather a recurring theme in the broader scope of U.S. history. Second, he clarifies that the purpose of this law was to codify in statutory form a pre-existing moral commitment, specifically, a commitment to human rights and humanitarian concerns. In other words, the asylum rule is not an invention of Congress but, instead, an expression by Congress of a moral imperative that Congress perceived to be part of the national character of the United States. Remarkably, even Strom Thurmond, the onetime pro-segregationist senator from South Carolina, was able to see the moral significance of the bill. He stated, “I would hope the verdict of history will tell those who come after us that we were true to our heritage as a people and a Nation and lastly, but above all, we cared.”³⁴

In signing the bill, President Jimmy Carter expressed similar sentiments in an accompanying statement: “The Refugee Act reflects our long tradition as a haven for people uprooted by persecution and political turmoil. *In recent years, the number of refugees has increased greatly.* Their

³² *Id.*

³³ 125 CONG. REC. S23231-32 (1979) (statement of Sen. Ted Kennedy).

³⁴ 125 CONG. REC. S23238 (1979) (statement of Sen. Strom Thurmond).

suffering touches all and challenges us to help them, often under difficult circumstances.”³⁵ It is important to note that, in signing the bill, the President acknowledged the increasing number of refugees seeking to enter the United States. Unlike recent administrations that have used an influx of asylees as a reason to *deny* asylum, the express intent of the Refugee Act of 1980 is to provide help to an increasing number of refugees, rather than as a means to exclude asylum seekers from the United States.

Congress was aware of the possibility that future administrations might seek to limit the number of refugees or asylees who could enter the country. In the committee debate in the House of Representatives, New York congressperson Elizabeth Holtzmann explicitly raised this concern. Consider the following testimony:

Ms. HOLTZMAN. The reason I raise this is because when Congress creates a statutory scheme and does not really specify how that scheme is to be implemented it can be thwarted by the executive branch. I am concerned because although I think the definition in this bill is an excellent one and even though it states what person will be a refugee if he or she has a well-founded fear of persecution, we don't specify how that well-founded fear is to be ascertained...

Mr. MCCARTHY. I can't agree with you more. The fact remains that we know in many cases it would seem that the administrative agencies of our government used a blanket approach. These people are all eligible or these people are not, rather than looking at each individual case...

Ms. HOLTZMAN. And questioning in a more careful manner might in some cases result in the admission of persons who might not otherwise be admitted...

Mr. MCCARTHY. I can't agree with you more.³⁶

Congressperson Holtzman's concern, as expressed here, is almost exactly what our paper asserts has come to pass. Rather than consider each individual case, recent administrations have, as Ms. Holtzman feared, undermined the intent of Congress by using “a blanket approach” to exclude entire groups of people from the asylum process for reasons not having to do with their actual

³⁵ *Id.*

³⁶ President Jimmy Carter, Refugee Act of 1980 Statement on Signing S. 643 Into Law (Mar. 18, 1980).

qualifications for asylum.³⁷ Representative Eilberg foresaw this potential problem in his statement in the same committee when he said:

I am deeply concerned that, under current law and procedures, Congress has surrendered – to a great extent – its authority to regulate the flow of refugees to this country. Our bill represents an attempt to restore this authority and, at the same time, to establish a proper balance between the executive and the legislative branches of government in establishing the appropriate procedures governing their admission.³⁸

In summary, the Refugee Act of 1980, which contains the statutory expression of the asylum rule, was intended to direct the executive branch to expand the rights of refugees and asylees. While the executive branch has extensive discretion in applying immigration law, it may not violate the express, clear intent of Congress. Congress has the constitutional power to make laws about immigration, and in the Refugee Act of 1980, Congress explicitly intended to expand the rights of asylees. In the floor and committee debate, Congress did not intend to give the administration the power to reduce the right to asylum – in fact, Congress clearly intended the opposite.

THE HISTORICAL AND INTERNATIONAL SOURCES FOR CONGRESS’S ASYLUM RULE

The Refugee Act of 1980 was passed to bring the United States in line with the 1951 UN Convention on Refugees and its 1968 Protocol, to which the United States was already a signatory. The heart of the international law about refugees is contained in Article 33 of the Convention, which establishes the principle commonly known as “non-refoulement.” The Convention states: “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his

³⁷ *Admission of Refugees into the U.S., Hearing Before the Subcomm. on Immigr., Citizenship, and Int’l Law, Comm. on Judiciary. H., 95th Cong. 39 (1977).*

³⁸ See, e.g., *Kamala Harris tells Guatemala migrants: “Do not come to US”*, BBC NEWS (June 8, 2021), <https://www.bbc.com/news/world-us-canada-57387350>; see also, Nicole Narea, *The demise of America’s asylum system under Trump, explained*, VOX (Nov. 5, 2019), <https://www.vox.com/2019/11/5/20947938/asylum-system-trump-demise-mexico-el-salvador-honduras-guatemala-immigration-court-border-ice-cbp>; see also, Katie Benner & Caitlin Dickerson, *Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html>.

life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.³⁹ Constitutional scholar Michael Stokes Paulsen summarizes the role of Congress regarding international law: “Congress possesses the U.S. legislative power to say what international law is—to ascertain, interpret and literally even to define it; to reduce it to domestic, enforceable law—for the United States.”⁴⁰ Put another way: the United States voluntarily chose to join the community of nations who have pre-emptively agreed that if a person requests asylum in a country, that country is obligated to take the request seriously, and if any member country concludes that the person in fact qualifies for asylum, it must not return that person to the country from which they fled under the principal of “non-refoulement.”⁴¹

The 1952 Refugee Convention was passed as part of the international community’s response to the horrors of the Holocaust, and the failure of the international community to receive Jewish people attempting to escape Hitler’s Germany. As the horrors of World War II began to unfold, as early as the Kristallnacht pogroms in 1938, rather than accept mass migration of Jewish people from Germany, the United States and Western Europe sought to avoid a mass influx of refugees.⁴² For example, in 1939, the United States refused to accept 900 Jewish refugees from Germany on the passenger ship MS St. Louis. According to the Holocaust Museum: “Of the 908 St. Louis passengers who returned to Europe, 254 (nearly 28 percent) are known to have died in the Holocaust...366 (just over 59 percent) are known to have survived the war.”⁴³ Furthermore, according to the same source: “[d]uring the second half of 1941, even as unconfirmed reports of the mass murder perpetrated by the Nazis filtered to the West, the U.S. Department of State placed even stricter limits on immigration based on national security concerns.”⁴⁴

³⁹ U.N. Charter art.33, ¶ 1.

⁴⁰ CONGRESSIONAL RESEARCH SERVICE, REFUGEES IN THE U.S. LAWS, PROGRAMS, AND PROPOSALS (1979).

⁴¹ U.N. Charter art.33, ¶ 1.

⁴² Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1808 (2009).

⁴³ *Holocaust Encyclopedia*, U.S. HOLOCAUST MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/refugees>.

⁴⁴ *Id.*

It is in this context that the Senate floor speech by Minnesota Senator Rudy Boschwitz in favor of the 1980 Refugee Act has significant historical and moral power:

I would like for a moment to speak about my youth. When fleeing Europe [Nazi Germany], my [Jewish] family went from country to country because the United States did not have a well-defined procedure for accepting refugees. We went from country to country seeking means of admission to the United States. Finally, we found an American consul who would let us in. My wife and her family had a similar experience. Her family went to Brazil where they met an American consul who luckily had been befriended in South Africa by my wife's uncle. So, in that rather unsystematic way, my wife and her family were able to come to this country. Certainly, a bill like S. 683, which systematizes and establishes a permanent procedure for refugees, is well in order. It really is in the best interest of the United States. The United States is the only country that is a country of refugees. We are the only country in the world that is a genuine country of the refugees which has been energized and given substance by people who came to our country to start anew.⁴⁵

Before turning from legal and historical sources to the moral obligations of the United States at the border, let us review the argument so far: (1) in the Constitution, Congress is the branch of government vested with the power to make rules about immigration; (2) in its enforcement of immigration rules, the executive branch must follow the laws passed by Congress; (3) in the Refugee Act of 1980, Congress made the asylum rule explicit, stating that the United States must grant a hearing to anyone on U.S. soil who requests asylum; (4) the asylum rule as expressed in the Refugee Act of 1980 is not a loophole or technicality, but, in fact, has deep historical roots in American purpose, in international law, and in the moral response to the horrors of the Holocaust. We will now turn to further sources about the U.S. moral obligation at the border.

A. Sources of Moral Obligations at the Border

The asylum rule does not proclaim open borders. It creates a definition for asylee and requires the government to grant a fair hearing to anyone who seeks asylum on U.S. soil. The asylum rule is a way of managing

⁴⁵ *Id.*

the border in a way that is fair and ethical. It is not the only way to manage the border, and it is not without its detractors. Scholars have argued for both a broader and a narrower interpretation of the rule.⁴⁶ What is agreed upon is that a nation has *some* obligation to those who arrive within its borders seeking asylum. In this section, we consider some of the sources of this moral obligation that underscore our nation's core principles.

One source of moral obligation is the Statue of Liberty, along with Emma Lazarus's famous poem inscribed at its base, which has long been seen as a symbol and icon of American values.⁴⁷ In fact, during the Senate debate over the Refugee Act of 1980, Senator Huddleston from Kentucky spoke against the bill and engaged in a direct debate with the Statue of Liberty, arguing, *mistakenly*, that its message was outdated: "[a]s to the assertion that reasonable restraint would be a repudiation of the inscription on the Statue of Liberty ... the statue was erected in 1884, when the population in the United States was about 50 million."⁴⁸ Furthermore, he argued, *incorrectly*, that the poem inscribed at its base "were the words of a French poet and not a reasoned policy developed by the Congress or the people of the United States."⁴⁹ In fact, the poem is called "The New Colossus," and was written by Emma Lazarus, a well-known poet and fourth generation Jewish-American concerned with the well-being of Russian refugees fleeing nineteenth century pogroms. Lazarus's friend recalls the writing of the poem:

I begged Miss Lazarus to give me some verses appropriate to the occasion. She was at first inclined to rebel against writing anything ... [saying] "if I attempt anything now, under the circumstances, it will assuredly be flat." "Think of that goddess standing on her pedestal down yonder in the bay, and holding her torch out to those Russian refugees of yours you are so fond of visiting at Ward's Island," I suggested. The shaft sped home – her dark eyes deepened – her cheek flushed – the time for merriment was passed – she said not a word more, then.⁵⁰

Emma Lazarus's poem "The New Colossus" interprets the moral force of the Statute of Liberty. It begins with a negative comparison, "[n]ot like the

⁴⁶ SEN. RUDY BOSCHWITZ (MN) 125 CONG. REC. 23239 (bound ed. Sep. 6, 1979).

⁴⁷ See, e.g., Salvatore Alaimo, *The Evolution of the Statue of Liberty: Determining Factors for Hypericon Status*, 13 INT'L J. IMAGE 15, 15–35 (2022).

⁴⁸ 125 CONG. REC. (bound ed. Sep. 6, 1979) Debated; Amended; Passed S.).

⁴⁹ *Id.*

⁵⁰ Barbara Hantman, *Emma Lazarus: Spinster-Versifier Well Worth Knowing*, 13 WOMEN IN JUDAISM: A MULTIDISCIPLINARY JOURNAL 1 (2016).

brazen giant of Greek fame,”⁵¹ insinuating that the great monument welcoming immigrants to America expresses something different than the Colossus of Rhodes, after which the statue was partially modeled. Instead of looking for the strongest and the most privileged, this statue cries out, “keep, ancient lands, your storied pomp,” asserting that America was not simply a playground for the aristocrats and merchants of Europe. Instead, on Lazarus’s account, the statue cries out, “[w]ith silent lips/Give me your tired, your poor/Your huddled masses yearning to breathe free.” The Statue, interpreted through this inscription, provides a powerful vision of what America is at its best—a place where those fleeing persecution, those who had been rejected by their former lands could start a new life, and create a land of freedom and opportunity for all.

Many of former President Donald Trump’s statements about immigration are on one hand deeply offensive and yet, in an ironic sense, represent precisely what the Statue stands for. President Trump asked, “[w]hy are we having all these people from shithole countries come here?”⁵² and famously began his 2016 presidential campaign proclaiming that other countries were “sending people that have lots of problems.”⁵³ The Statue’s response is that people who other nations cast off and consider undesirable can arrive in the United States to build a nation of those “yearning to breathe free.”⁵⁴

Another source of moral obligation is expressed in the work of both secular and religious ethicists, who agree on the obligation of the United States and other rich nations to offer asylum to those who seek it. Thirty-six American Jewish organizations expressed their agreement in a 2018 letter to President Trump, in which they wrote that

It is because of our history as refugees, our biblical commandment to ‘welcome the stranger,’ and our longstanding involvement as a community in resettling and welcoming refugees, that we call on you now to give today’s

⁵¹ EMMA LAZARUS, *The New Colossus*, POETRY FOUND., <https://www.poetryfoundation.org/poems/46550/the-new-colossus> (last visited Oct. 22, 2023).

⁵² Eugene Scott, *Trump’s most insulting - and violent - language is often reserved for immigrants*, WASH. POST (Oct. 2, 2019), <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/>.

⁵³ *Id.*

⁵⁴ LAZARUS, *supra* note 51.

refugees a chance to rebuild their lives in safety and freedom in the United States.⁵⁵

A scholar of Catholic social teaching similarly asserts that:

States are morally bound to respect and promote the basic human rights of both citizen and resident alien, especially the most vulnerable ... All people have a right to life and to secure the basic necessities of life ... Society has a moral obligation, including governmental action where necessary, to assure opportunity, meet basic human needs and pursue justice in economic life.⁵⁶

It is not difficult to find any number of additional U.S. religious groups who make similar arguments based on their sacred texts and moral traditions. Secular ethical philosopher Michael Walzer makes an argument specifically in regard to asylum seekers:

[a]ny refugee who has actually made his escape ... can claim asylum ... though he is a stranger, and newly come, the rule against expulsion applies to him as if he had already made a life where he is: for there is no other place where he can make a life ... we seem bound to grant asylum ... because its denial would require us to use force against helpless and desperate people.⁵⁷

Walzer's argument is especially interesting, as he differentiates the specific duty to asylees as opposed to refugees generally. Walzer recognizes that nations may legitimately limit the number of refugees they accept from outside their border. However, he makes a different argument for the asylee who has actually landed in a nation. To deny this person asylum requires an act of violence against that person—to return this person to their land of origin would be to deny them of the right to life, the defense of the which the

⁵⁵ Letter from thirty-six U.S. Jewish organizations to President Donald J. Trump (Aug. 15, 2018) (on file with Reconstructing Judaism), https://www.reconstructingjudaism.org/wp-content/uploads/2022/05/jewish_leaders_refugee_letter_august_2018.pdf

⁵⁶ William R. O'Neill, *A Little Common Sense: The Ethics of Immigration in Catholic Social Teaching*, S.J., 71 AM. J. ECON. & SOCIO (2012).

⁵⁷ MICHAEL WALZER, SPHERES OF JUSTICE 50–51 (1983).

Declaration of Independence declares is the purpose for the institution of government itself.⁵⁸

In the Judeo-Christian tradition, the moral obligation to care for the stranger is rooted in the biblical text itself. In the Christian New Testament, Jesus tells the story of the “Good Samaritan” in response to a lawyerly question about the extent of the command to “love your neighbor as yourself.”⁵⁹ In the story, a man is mugged while travelling on a dangerous road. Two high-ranking religious officials ignore him out of concern for their own safety and well-being. In contrast, a despised Samaritan walks by the man, cares for his needs, and takes him to an inn where he promises to pay the full price for the injured man’s stay until he recovers. Jesus asks the lawyer which of the men truly loved his neighbor, and the lawyer responds that it was the Samaritan. The lesson is clear. The Christian ethic of neighbor-love does not only obligate one to care for one’s family and fellow citizens. Instead, Christian neighbor-love requires care for those who might be considered undesirable, and whose care will require significant inconvenience and cost on behalf of those who offer it.

A second text comes from the Jewish Torah, part of what Christians call the Old Testament. The people of Israel were enslaved in Egypt for centuries, until God led them to freedom by performing mighty acts through Moses. As the people walked through the desert to their new home, Moses gave them these commands: “[y]ou shall not oppress a resident stranger; you know the heart of a stranger, for you were aliens in the land of Egypt,”⁶⁰ and “[y]ou shall also love the stranger, for you were strangers in the land of Egypt.”⁶¹ The ethical force of these commands for Americans is clear: with the exception of Indigenous peoples, all Americans came to the United States as outsiders or “strangers.” Basic human empathy therefore requires that Americans show care and empathy to those outsiders and strangers, just as the Israelites were commanded to show care for strangers based on their own experiences in Egypt.

⁵⁸ THE DECLARATION OF INDEPENDENCE (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men.”) (It is powerful to reflect on the idea that the right of an asylee to life and liberty is in fact part of the explicitly stated reason for the formation of the U.S. government in the first place.)

⁵⁹ *Luke* 10:25–37 (New Revised Standard Version).

⁶⁰ *Exodus* 23:9 (New Revised Standard Version).

⁶¹ *Deuteronomy* 10:19 (New Revised Standard Version).

Obviously, biblical texts are not binding law in the United States, and the poem inscribed on the Statue of Liberty is not a statute that can be cited in court. However, as is clear from the quotes in the previous section, these moral obligations are part of what shaped the lawmaking of Congress when it passed the Refugee Act of 1980. The U.S. law about asylees is not a loophole or an exception—it is a modern expression of centuries of American values, and millennia of religious values, expressed in a rule that requires the government to give an asylum hearing to anyone on U.S. soil who claims asylum. To violate the asylum rule is a profound failure to fulfill long-standing legal and moral obligations at the U.S.–Mexico border.

B. How Recent Administrations Violated U.S. Legal and Ethical Obligations at the Border

Recent U.S. administrations have violated legal and moral obligations at the border in two ways. First, they have attempted to prevent migrants from getting a fair asylum hearing before an immigration judge. Second, when asylum applicants have hearings before immigration judges, the immigration court system has misapplied the law and prevented certain groups from being granted asylum. The remainder of the first part of this paper will discuss ways in which administrations have attempted to avoid the obligation to provide a fair asylum hearing. The second part of this paper will discuss ways in which asylum hearings, when they do occur, still fail to fulfill the U.S. obligation of a fair and unbiased hearing for all asylum seekers.

U.S. policy at the border is extraordinarily complex and constantly changing. A recent Biden administration regulation heavily disfavors asylum seekers at the border by creating a rebuttable presumption that many applicants are ineligible for asylum if they do not first access an application appointment to apply at a designated place and time through a smartphone app.⁶² Even putting aside extensive concerns about the technical and equitable aspects of the app⁶³, the requirement of making an “appointment” to apply for asylum violates the clear intention of Congress in passing the 1980 Refugee Act because the language of the act allows for no pre-conditions to an application for asylum. The regulation creates “a rebuttable

⁶² Circumvention of Lawful Pathways, 88 Fed. Reg. 36, 11704 (Feb. 2023).

⁶³ Maria Abi-Habib et al., *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#:~:text=But%20migrants%20have%20faced%20difficulties,a%20day%20from%20about%20740>.

presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States.”⁶⁴ Only “noncitizens who are provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process,” would be exempt from this rebuttable presumption.⁶⁵

But the statutory language about asylum does not allow for a rebuttable presumption in any case, and only asserts that any person who is on U.S. soil may make an asylum claim, without exception.⁶⁶ To be clear, we do not object to using parole processes or technology in order to streamline DHS procedures or improve efficiency. But a penalty presumption against asylum prior to any fair consideration on the merits of a claim constitutes a clear violation of the asylum rule as established by Congress in the 1980 Refugee Act. The regulation states that “those who use the CBP One app or otherwise avail themselves of a safe, orderly process—which will be readily apparent upon encounter—will not be subject to the rebuttable presumption described by this proposed rule.”⁶⁷ However, in an attempt to follow this rule, those seeking asylum have been subject to tragic delays, and denied their right to claim asylum. For example, in March 2023, the New York Times reported the following statement from an aid worker at the border:

[a] month ago, a 4-month-old baby in need of emergency surgery died because the parents were unable to secure an appointment through the app, said Ms. Herrera of the Pro Amore Dei shelter in Tijuana. “Last year, the family would have been taken across the border, and the baby would be alive now,” said Ms. Herrera.”⁶⁸

Some would argue that the violation of the Refugee Act is legal on a temporary basis because the current number of crossings at the U.S. border constitutes an unprecedented crisis. However, the facts behind such a claim prove flimsy. In 1954, when the U.S. population was 158 million, 1,089,583 illegal noncitizens were apprehended at the U.S.–Mexico border. In 2022,

⁶⁴ Circumvention of Lawful Pathways, 88 Fed. Reg. 36, 11704 (Feb. 2023).

⁶⁵ *Id.* at 11728.

⁶⁶ Litigation about these regulations is ongoing, but a California District Court decision largely agrees with this legal analysis. *See* E. Bay Sanctuary Covenant v. Biden, 683 F. Supp. 3d 1025, 1041 (N.D. Cal. 2023).

⁶⁷ Circumvention of Lawful Pathways, 88 Fed. Reg. 36, 11745 (Feb. 2023).

⁶⁸ Miriam Jordan & Edgar Sandoval, *US Border Policies Have Created a Volatile Logjam in Mexico*, N.Y. TIMES (Mar. 28, 2023), www.nytimes.com/2023/03/28/us/mexico-border-migrants-shelters.html.

when the U.S. population was 334 million, there were 2,766,682 illegal noncitizens apprehended at the U.S.–Mexico border. When adjusted for the current U.S. population, the current crossings at the border are nearly the same as they were seventy years ago.⁶⁹ Furthermore, it seems difficult to classify an inundation of asylees who need jobs as a crisis when one of the greatest economic challenges that the United States faces is a lack of workers.⁷⁰ Certainly, integrating new arrivals into the United States always has certain challenges, but many commentators have observed that the biggest challenge for the United States in coming years is likely to be too few immigrants, not too many.⁷¹ While the details of these policy arguments are beyond the scope of this paper, it is important to observe that the narrative of the border as a place of overwhelming crisis is not universally accepted. The legal and moral obligations of the United States are violated when asylum seekers at the border are denied a fair hearing.

However, even when an asylum seeker manages to make their asylum claim and gets a hearing before an immigration judge, they face significant obstacles in receiving a fair adjudication of their claim. This is the theme of the second part of this paper.

PART TWO: U.S. FAILURE TO UPHOLD ITS LEGAL OBLIGATIONS IN ASYLUM PROCEEDINGS

In May 2023, the end to the controversial COVID-era, Title 42 policy restored the media and public's interest in the asylum crisis on the southern border, which consists largely of women and children fleeing gang-related violence. Title 42 was first implemented by Trump under the dubious

⁶⁹ *Comm. on Judiciary S., 96th Cong., U.S. Immigration Law and Policy: 1952-1979: Upon the Formation of the Select Commission on Immigration and Refugee Policy*, at 36 (Comm. Print 1979); Circumvention of Lawful Pathways, 88 Fed. Reg. 36, 11711 (Feb. 2023).

⁷⁰ See, e.g., Ben Casselman, *Another Big Boomer Effect*, N.Y. TIMES (Jan. 11, 2023), <https://www.nytimes.com/2023/01/11/briefing/labor-shortage.html> (citing Federal Reserve Chairman Jerome Powell's comments available at <https://www.federalreserve.gov/mediacenter/files/FOMCpresconf20221214.pdf>).

⁷¹ Deepak Bhargava & Rich Stolz, *The US's 'immigration crisis' is admitting too few immigrants, not too many*, THE GUARDIAN (Sept. 23, 2022), <https://www.theguardian.com/commentisfree/2022/sep/23/the-uss-immigration-crisis-is-admitting-too-few-immigrants-not-too-many>; see also MATTHEW YGLESIAS, ONE BILLION AMERICAN: THE CASE FOR THINKING BIGGER, PENGUIN PUBLISHING GROUP (2020).

pretense⁷² of protecting the United States from the spread of COVID-19, which allowed the United States to close its borders to asylum seekers at the southern border. Under this controversial policy—which was continued by Biden for over two years—the United States expelled migrants more than 2.8 million times.⁷³ Following the end of Title 42 pandemic restrictions, the Biden administration implemented a major policy shift that seeks to clamp down on unauthorized crossings at the U.S.-Mexico border through a variety of new policies and programs. Despite weeks of headlines, partisan attacks, and overall panic that the southern border would be overrun by thousands of migrants, the number of encounters has remained at or below average levels.⁷⁴

The panic surrounding the end of Title 42 is emblematic of the controversies surrounding the so-called “border crisis” for more than a decade. Since 2014, tens of thousands of migrants—mostly women and children—from the Northern Triangle have come to the United States seeking asylum. This includes not only women traveling with their young children, but also tens of thousands of unaccompanied children (“UACs”). While it was widely believed that the end of Title 42 would result in a huge surge of migration at the border, such an influx did not immediately occur. There is undoubtedly difficulty at the southern border, but one that is mischaracterized by partisan politics and the media that has convinced much of the American population that our country is being overrun by criminals and people taking advantage of the system. The true emergency is the humanitarian crisis on the southern border and our country’s failure to uphold our legal obligations under U.S. and international asylum law.

⁷² Immigration policy experts widely believe that Trump’s true purpose of invoking Title 42 was to keep asylum seekers out of the country as part of his administration’s overall anti-immigration agenda. In fact, the New York Times reported that Stephen Miller (Trump’s senior advisor who played a key role in the administration’s immigration agenda) advocated using Title 42 on the southern border as early as 2019, two years before COVID-19 emerged. See Zolan Kanno-Youngs, *This Is Not About the Pandemic Anymore*, N.Y. TIMES (Dec. 28, 2022), <https://www.nytimes.com/2022/12/28/us/politics/covid-title-42-border-migrants-biden.html>.

⁷³ Colleen Long, *Title 42 has ended. Here’s what it did, and how US immigration policy is changing*, ASSOC. PRESS (May 12, 2023), <https://apnews.com/article/immigration-biden-border-title-42-mexico-asylum-be4e0b15b27adb9bede87b9bbe798d#:~:text=Under%20Title%2042%2C%20migrants%20were,someone%20illegally%20crossed%20the%20border>.

⁷⁴ Nicole Larea, *9 questions about Biden’s border policy, answered*, VOX (May 16, 2023), <https://www.vox.com/policy/2023/5/16/23725482/immigration-title-42-us-mexico-border-biden-trump-uscis-homeland-security>.

The majority of migrants at the southern border in the past decade are those who are fleeing some of the deadliest and most violent countries in the world and are in desperate need of humanitarian relief in the United States.⁷⁵ The Northern Triangle is the deadliest non-combat zone in the world.⁷⁶ U.S. military officials have noted that the violence plaguing El Salvador, Honduras, and Guatemala has “come to rival the conflicts in Iraq and Afghanistan in terms of the scale of violence, spending, and weapons.”⁷⁷ This surge of Central American asylum-seekers in the past decades has not only created a serious humanitarian crisis, but it has also overtaken the immigration court system, creating unprecedented backlogs.⁷⁸ While the precise demographics of border crossers change over time, the issue of Central American asylum seekers has not substantially receded.⁷⁹ In this context, the immigration courts and federal circuit courts have contorted the law in a way that seems intentional to limit these specific asylum claims.

Even when asylum applicants have the opportunity to present their case to an adjudicator, the courts have misapplied U.S. asylum law unfavorably toward Central American asylum seekers. The Trump administration in particular intentionally shaped U.S. asylum policy to disfavor asylum applicants from Northern Triangle countries, even though such discrimination is a clear violation of both U.S. and international law. Most of the negative case law centers around the definition of “particular social group,” the primary basis used to argue asylum in Central American cases.

⁷⁵ See *Northern Triangle Now Deadliest Place on Earth*, INSIGHT CRIME (Apr. 1, 2011), <http://www.insightcrime.org/news-briefs/southcom-northern-triangle-now-deadliest-place-on-earth>.

⁷⁶ See Deborah Anker & Palmer Lawrence, “Third Generation” Gangs, Warfare in Central America, and Refugee Law’s Political Opinion Ground, 14–10 IMMIGR. BRIEFINGS 1 (2014).

⁷⁷ Jillian N. Blake, *Gang and Cartel Violence: A Reason to Grant Political Asylum from Mexico and Central America*, 38 YALE J. INT’L. L. ONLINE 31, 34 (2012).

⁷⁸ See Mila Koumpilova, *Immigration Court Backlog Puts Lives on Endless Hold*, STAR TRIB. (Jan. 23, 2016), <http://www.startribune.com/critics-decry-worsening-backlogs-in-immigration-court/366285221/>.

⁷⁹ See, e.g., The UN Refugee Agency, *Displacement in Central America*, <https://www.unhcr.org/emergencies/displacement-central-america> (last visited Oct. 22, 2023); see also, Eileen Sullivan, *Number of Migrants Crossing U.S. Southern Border Is Down. But for How Long?*, N.Y. TIMES (July 3, 2023), <https://www.nytimes.com/2023/07/03/us/politics/migrants-mexico-border.html>.

A. Overview of Relevant Case Law Restricting Particular Social Group Claims

To qualify for asylum, an applicant must show that he or she is a refugee within the meaning of INA § 101(a)(42)(A), which can be broken down into three key points.⁸⁰ First, the applicant must establish that he or she is unwilling to return to, or avail himself or herself of the protection of, their country of nationality or, if the applicant is stateless, the country of last habitual residence.⁸¹ Second, the inability or unwillingness to return must be based on past persecution or a well-founded fear of future persecution.⁸² Third, there must be a nexus between the past persecution or fear of future persecution and one of the five protected grounds: (1) race; (2) religion; (3) nationality; (4) membership in a particular social group; or (5) political opinion.⁸³ While many practitioners base Central American unaccompanied minor cases on both particular social group and political opinion, they typically focus more on particular social group as the primary basis of the asylum claims.⁸⁴ Immigration judges and asylum officers adjudicating these Central American claims deny many cases based on issues stemming from the restrictive case law defining “particular social group.”

In 1985, the Board of Immigration Appeals (BIA)⁸⁵ first defined the term “particular social group” in the landmark case *Matter of Acosta*. Applying the doctrine of *ejusdem generis* (“of the same kind”), the BIA held that persons forming a particular group must share common immutable and/or fundamental traits such as sex, color, kinship ties, shared past experience such as former military leadership, or landownership.⁸⁶ The BIA reasoned that all other grounds for asylum (race, religion, nationality, and political opinion) all describe immutable characteristics that are beyond the

⁸⁰ 8 U.S.C. §101(a)(42).

⁸¹ *Id.*

⁸² *See Id.*

⁸³ *See Id.*; *see also, Asylum Bars*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-bars> (last visited Oct. 22, 2023) (The applicant must also show that he or she does not fall into any of the bars to asylum, such as the one-year filing deadline or firm resettlement in a third country).

⁸⁴ Blake, *supra* note 77, at 35.

⁸⁵ The Board of Immigration Appeals (BIA) is the appellate court governing immigration court cases and reviews appeals of immigration judges’ decisions. The BIA and immigration trial courts are part of the Department of Justice within the Executive Branch. Its decisions are binding on immigration judges unless overruled by the Attorney General or a federal court.

⁸⁶ In the *Matter of Acosta*, 19 I&N 211, 212 (BIA 1985).

power of an individual to change or that is so fundamental to one's identity or conscience that it ought not to be required to be changed.⁸⁷

The *Acosta* test (or a close variation of it) governed courts' particular social group analysis for decades. The *Acosta* test lays out a clear rule for evaluating "particular social group" claims that is consistent with the other four protected grounds and was endorsed by all U.S. federal district courts (except the Second Circuit) and United Nations High Commissioner for Refugees (UNHCR).⁸⁸ As summarized by legal scholar Rachel Gonzalez Settlage:

The *Acosta* standard provides a clear and distinct method to analyze particular social group claims, a method that is both flexible but delineated. Thus, it provides a formulation to define a particular social group neither too broadly nor too narrowly. Scholars have noted that the *Acosta* standard is "a standard that is capable of principled evolution but not so vague as to admit persons without a serious basis for claims to international protection. The Eleventh Circuit in *Castillo-Arias* elaborated that, "Acosta strikes an acceptable balance between (1) rendering 'particular social group' a catch-all for all groups who might claim persecution, which would render the other four categories meaningless, and (2) rendering 'particular social group' a nullity by making its requirements too stringent or too specific."⁸⁹

Accordingly, the *Acosta* test governed asylum law in the United States for over twenty years. But in the mid-2000s, as the number of Central American gang-based asylum claims began to significantly increase, the BIA fundamentally changed asylum law by redefining and making it more difficult to establish a viable particular social group.⁹⁰ Despite decades of well-established case law defining "particular social group," the BIA held for the first time that to establish a viable particular social group, the group must not only be based on an immutable characteristic (as established in *Acosta*)

⁸⁷ *Id.*

⁸⁸ Rachel Gonzalez Settlage, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of a Particular Social Group*, 30 GEO. IMMIGR. L.J. 287, 297–98 (2016).

⁸⁹ *Id.* at 299.

⁹⁰ *Particular Social Group Practice Advisory: Applying for Asylum Based on Membership in a Particular Social Group*, NAT'L IMMIGRANT JUST. CTR. 4 (July 2021), <https://immigrantjustice.org/for-attorneys/legal-resources/file/practice-advisory-applying-asylum-based-membership-particular>.

but must *also* be “socially visible” (later redefined as “socially distinct”) and “particularly defined.”⁹¹ This new three-prong test has caused widespread confusion due to its circular reasoning and inconsistency with decades of well-established fundamental asylum case law. For example, the decisions ignored and failed to explain how particular social groups that had been accepted by the BIA for decades no longer appeared viable under the new rule, including women from a specific tribe who oppose female genital mutilation or gay men from a specific country.⁹² Although *Matter of S-E-G-* and *Matter of E-A-G-* are riddled with flaws,⁹³ the BIA doubled down on its new three-prong particular social group test and issued two additional decisions restating and emphasizing the BIA’s decision rejecting gang-based particular social groups.

For example, in *Matter of M-E-V-G-*, the asylum applicant claimed that he suffered past persecution and had a well-founded fear of future persecution in Honduras because members of the Mara Salvatrucha Gang (commonly known as “MS-13”) beat, kidnapped, and assaulted him and his family, and threatened to kill him if he refused to join the gang. In addition, the gang members would shoot at him and throw rocks and spears at him about two to three times a week.⁹⁴ But the BIA dismissed the particular social group of “Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs,” concluding that “a national community may struggle with significant societal problems resulting from gangs, but not all societal problems are bases for asylum.”⁹⁵ The BIA similarly held that “former members of the Mara 18 gang in El Salvador who have renounced their gang membership” do not constitute a particular social group and that there is no nexus between the harm the applicant feared and his status as a former gang member.⁹⁶ While the BIA noted that these holdings “should not be read as a blanket reject of all factual scenarios involving gangs,”⁹⁷ that comment rings hollow considering the practical effect almost entirely blocks any particular social group based on gang recruitment or renunciation.

⁹¹ *Id.*

⁹² *See Id.* at 5–10.

⁹³ *M-E-V-G-*, 26 I&N Dec. at 228.

⁹⁴ *Id.* at 251.

⁹⁵ *W-G-R-*, 26 I&N Dec. at 208.

⁹⁶ *See M-E-V-G-*, 26 I&N Dec. at 251.

⁹⁷ *See Gonzalez Settlement*, *supra* note 88, at 305–06.

The new definition of particular social group diverges from internationally recognized norms of asylum law protections and has therefore been rejected by the UNHCR (the agency responsible for aiding and protecting refugees), law scholars, and immigration advocates.⁹⁸ The new standard is confusing even for immigration attorneys, let alone pro se asylum applicants. One reason for the ongoing confusion is that the cases are contradictory and violate basic principles of common sense. For example, the BIA has defined “particularity” to mean that a group has “definable boundaries,” but it has also rejected groups with clear boundaries on the basis that the group is too broad. Similarly, the BIA held that social distinction is based on the view of society as a whole, but in maintaining that previously recognized particular social groups satisfied this standard, it relied on the perspective of the persecutors.⁹⁹

The new heightened particular social group test has been devastating to Central American asylum seekers fleeing gang violence. Since adding the new “social distinction” and “particularity” requirements, the BIA and federal courts have generally rejected potential gang-related particular social groups for failing to meet these requirements, even when the particular social group is defined with additional factors such as age or geography.¹⁰⁰ In fact, since rejecting *Acosta*, the BIA has yet to publish a single decision granting asylum in a particular social group based on resistance to gang recruitment.

While the case law relating to Central American asylum claims was almost universally bad, the BIA offered a glimmer of hope to women fleeing domestic violence. In 2014 – the same year the BIA restricted the above gang-based asylum claims – the BIA issued *Matter of A-R-C-G-*, recognizing “married women in Guatemala who are unable to leave their relationship” as a viable particular social group.¹⁰¹ The court found that the group is socially distinct in part because of a strong culture of machismo and domestic violence in Guatemala, where sexual violence is pervasive, and police often fail to respond to domestic violence complaints. While immigration practitioners and advocates celebrated the recognition that victims of

⁹⁸ See Fatma Marouf, *Becoming Unconventional Correcting the ‘Particular Social Group’ Ground for Asylum*, 44 N.C. J. INT’L L. 487, 489–91 (2019).

⁹⁹ Gonzalez Settlage, *supra* note 88, at 329.

¹⁰⁰ *A-R-C-G-*, 26 I&N Dec. at 388.

¹⁰¹ To be clear, the authors of this article strongly support the decision in *A-R-C-G-* but note the inherent inconsistencies between this case and other claims. We encourage adjudicators to extend that same recognition and reasoning to other particular social groups as well.

domestic violence could be eligible for asylum, *A-R-C-G-* remains inconsistent with other recent BIA analysis rejecting some particular social groups for failing to prove they are socially distinct and sufficiently particular (including the gang-based cases described above), while others are considered viable.¹⁰² *A-R-C-G-* made the adjudication of domestic-violence-based claims much more straightforward and helped make immigration judges and asylum officers feel more comfortable granting asylum in these cases.¹⁰³

Notably, in a blatantly anti-immigrant decision, Trump's Attorney General Jeff Sessions overruled *A-R-C-G-* and provided a near-blanket rejection of entire categories of asylum cases, including those that rely on domestic violence or gang violence as a legal basis for asylum. Despite decades of *Matter of Acosta* reaffirming that an asylum claim can be based on persecution inflicted by either (1) the government of a country or by persons, or (2) an organization that the government was unable or unwilling to control,"¹⁰⁴ *Matter of A-B-* invented a higher standard that required an applicant to show that the government *condoned* a private actor's conduct or demonstrated an inability to protect the victims.¹⁰⁵ The case clearly conflicts with well-established precedent that is fundamental to asylum law, as well as numerous federal appellate court precedent cases.¹⁰⁶ Again, the case seems clearly targeted at preventing Central American asylum claims, particularly considering Trump's overall anti-immigrant agenda. The Biden administration overruled *A-B-* and reinstated the prior case law, but the options for Central American asylum seekers with gang-based claims remain limited.

B. Policy Recommendations

While we recognize the logistical and political challenges of tens of thousands of individuals seeking asylum at the southern border, the fear of opening the floodgates is not a legal basis to deny an asylum case. Immigration practitioners, scholars, and experts widely consider the BIA's

¹⁰² See *Matter of A-R-C-G-; Matter of A-B-I And II; and Matter of L-E-A- II: A Quick Reference Guide*, NAT'L IMMIGRANT JUST. CTR. (June 2021), <https://immigrantjustice.org/for-attorneys/legal-resources/file/matter-r-c-g-matter-b-i-and-ii-and-matter-l-e-ii-quick-reference>.

¹⁰³ See *Matter of Acosta*, 19 I&N at 222.

¹⁰⁴ *A-B-*, 26 I&N Dec. at 316.

¹⁰⁵ Marouf, *supra* note 98.

¹⁰⁶ See *Gonzalez Settlege*, *supra* note 88.

changing definition of particular social group to be a direct reaction to the influx of Central American asylum seekers. But, as described in detail in Part One, the BIA and federal district courts lack the legal authority to make sweeping policy decisions outside of Congressional action—particularly when Congress has already spoken on the issue. We offer the following recommendations to correct bad case law that has adversely affected thousands of Central American asylum seekers.

i. Recommendation One: Return to the Acosta Definition of Particular Social Group

To return to a more ethical and legal asylum law system, advocates have long argued for the return to the *Acosta* definition of particular social group.¹⁰⁷ Immigration law and procedure is complex, but there are numerous ways of implementing this critical legal change within the executive branch.

First, the president has several mechanisms to clearly establish that *Acosta* correctly defined particular social group. As the head of the executive branch, the president has the power to direct administrative agencies, including the DOJ and the DHS, which house Executive Office for Immigration Review (EOIR) and United States Citizenship and Immigration Services (USCIS), respectively. The president could execute these changes through a variety of mechanisms, including proposing and implementing: (1) new regulations through the administrative rulemaking process that instruct agencies in the interpretations and enforcement of congressional statutes; (2) executive order, which carries the force of law and can establish or modify immigration policy; (3) memoranda or directives, which provide instructions on how agencies should interpret and apply existing immigration laws and regulations; and (4) enforcement priorities, which determine which individuals or categories of immigrants should be targeted for deportation and which should be given favorable treatment, such as Deferred Action for Childhood Arrivals (DACA) recipients. Of these options, proposing and implementing regulations that clearly define and endorse the *Acosta* definition of “particular social group” is the preferred mechanism because it would be more difficult to overturn by later administrations.

Second, the Attorney General could certify key cases, such as *M-E-V-G-* and *W-G-R-*, to overturn the BIA decisions and write them in such a way that opens the door for gang-based claims. Federal regulations grant the

¹⁰⁷ See 8 C.F.R. § 1003.1(h)(1).

Attorney General the power to certify a BIA case to himself or herself.¹⁰⁸ If the Attorney General does so, the BIA decision is no longer final and adjudicators cannot use it as precedent.¹⁰⁹ The Attorney General has extremely broad authority to review BIA cases, as the regulations governing the process simply require that the decision is stated in writing and transmitted to the BIA or the DHS.¹¹⁰ While the Attorney General typically only certifies a handful of cases, it is usually in response to outrage about a BIA decision. Here, it would resolve the legal issue because the Attorney General's decision would be the final decision for the agency and become binding precedent on future cases. As explained above, Former Attorney General Jeff Sessions used this process to overturn previous legal precedent and narrow the grounds for asylum based on claims of domestic violence or gang violence.¹¹¹ Later, Attorney General Merrick Garland vacated Sessions' anti-immigrant decision and restored critical pathways to protection for survivors of domestic violence.¹¹²

Given the reality of the current political climate that includes anti-asylum rhetoric as a cornerstone of the Republican Party, we recognize that these recommendations are a nonstarter. While even the Obama administration enacted policies that were unfavorable toward this subset of asylum seekers, Trump's presidency fundamentally shifted the conversation on immigration, asylum, and the border in such a profound way that it is difficult to imagine the possibility of positive reform in this area.¹¹³ Regardless, legislation is ultimately the best way to make comprehensive and lasting changes to U.S. immigration law.

¹⁰⁸ *See Id.*

¹⁰⁹ *See* 8 C.F.R. § 1003.1(h)(2).

¹¹⁰ *See* A-B-, 26 I&N Dec.; *see also* A-R-C-G-, 26 I&N Dec.

¹¹¹ *Id.*

¹¹² A prior iteration of this paper was submitted in early 2016 when one of the authors, Rachel, was in law school. As a practicing immigration attorney, one cannot overstate the extreme influence former President Trump's rhetoric and policies had on our country's immigration laws and regulations, the Republican Party, and much of the American electorate. It is disheartening to update the original paper—and add entirely new sections—to reflect these deeply problematic realities.

¹¹³ *See* Mei Fong, *The Impact of China's One-Child Policy on America*, SEATTLE TIMES (Jan. 27, 2016), <http://www.seattletimes.com/opinion/the-impact-of-chinas-one-child-policy-on-america/>.

ii. *Recommendation Two: Legislative Relief*

Another (and perhaps more radical) option would involve legislation granting relief to individuals from Guatemala, Honduras, and El Salvador who arrive in the United States by a certain date. Although the current political climate makes this proposal unlikely, there is a history of similar Congressional relief, as Congress has enacted statutes on several occasions granting immigration status to nationals from designated countries. In the asylum context, for example, Congress created a portion within the Illegal Immigration Reform Act to grant asylum to Chinese nationals who opposed the one-child policy.¹¹⁴ The law expanded the definition of refugee to include individuals subjected to, or who have a reasonable fear of “coercive population control programs,” which include sterilization and abortion; thereby withholding discretion typically given to adjudicators in determining what constitutes persecution.¹¹⁵ Congress also passed the Haitian Refugee Immigration Fairness Act (HRIFA) to grant adjustment of status to Haitian refugees who had been continuously present since 1995, rather than having to adjudicate their asylum claims. The Cuban Adjustment Act of 1996 (CAA) is similar, as it creates a special procedure for Cubans to become permanent residents.¹¹⁶ Under the CAA, the Attorney General has the discretion to grant permanent residence to Cuban nationals who: (1) have been present in the United States for a year or more; (2) have been admitted or paroled; and (3) are admissible as immigrants.¹¹⁷ The Nicaraguan Adjustment and Central American Relief Act (NACARA) did something similar, allowing immigrants from certain countries to adjust status if they entered the United States and applied for asylum prior to designated dates.¹¹⁸ Here, Congress

¹¹⁴ See Joseph Ax, *End of China's One-Child Policy May Slow U.S. Asylum Cases: Experts*, REUTERS (Oct. 29, 2015), <http://www.reuters.com/article/us-usa-china-asylum-idUSKCN0SN30U20151029>.

¹¹⁵ *Green Card for a Cuban Native or Citizen*, U.S. CITIZENSHIP & IMMIGR. SERV. (last updated Mar. 22, 2011), <https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-a-cuban-native-or-citizen>.

¹¹⁶ *Id.*

¹¹⁷ *Nicaraguan Adjustment and Central American Relief Act (NACARA) 203: Eligibility to Apply with USCIS*, U.S. CITIZENSHIP & IMMIGR. SERV. (last updated July 15, 2015), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/nicaraguan-adjustment-and-central-american-relief-act-nacara-203-eligibility-to-apply-with-uscis>.

¹¹⁸ Colleen Long, *How Those Fleeing Ukraine Inspired US Border Policies*, ASSOC. PRESS (May 9, 2023), <https://apnews.com/article/biden-immigration-ukraine->

could enact a similar statute, granting nationals from El Salvador, Honduras, and Guatemala the ability to become permanent residents if they arrive in the U.S. and apply for asylum by a designated cut-off date.

iii. *Recommendation Three: Expand Humanitarian Parole Programs*

While comprehensive reform addressing asylum law remains extremely unlikely, there are other common-sense steps that the Biden administration is already successfully implementing to reduce chaos on the border while simultaneously offering temporary humanitarian relief to thousands of individuals from certain countries. Soon after Russia invaded Ukraine in February 2022, as many as one thousand Ukrainians fleeing the war flew to Tijuana on tourist visas to reach the southern U.S. border and seek asylum. In response, the Biden administration began the “Uniting for Ukraine” program to offer up to 100,000 Ukrainians fleeing the war a safe path to enter the United States for a temporary period.¹¹⁹ To qualify, applicants need to apply online, have a financial backer in the United States, and enter legally through an airport. This humanitarian policy was so effective that in January 2023, the Biden administration expanded it to four additional countries suffering from war and political turmoil including Nicaragua, Venezuela, Haiti, and Cuba.

These countries were selected largely due to the dramatic increase in encounters on the southern border from people escaping the political turmoil and the difficulty of deporting migrants due to lack of diplomatic relations. In fact, in Fiscal Year 2022, U.S. Customs and Border Protection (CBP) registered over 2.4 million encounters with migrants on the southern border—an increase of over 37% from the year before.¹²⁰ This was largely driven by the dramatic increase in the number of people fleeing Nicaragua, Venezuela, and Cuba, who made up almost a quarter of the total number of

border-af1fb374771da55b83d88a1598621a84?utm_campaign=HubSpot-AILA8-05-09-2023&utm_medium=email&_hsmi=257651958&_hsenc=p2ANqtz-8aDA5LSqUcyFBgCHK8iTzwhUZtA1S6fx_Ohnh8OjtxKlq1iIWWDMMwgAXdwoX7swytHu98C8aF4tA9EACLj5CoUX1ng&utm_content=257651958&utm_source=hs_email.

¹¹⁹ Arturo Castellanos-Canales, *The Reasons Behind the Increased Migration from Venezuela, Cuba and Nicaragua*, NAT’L IMMIGR. F. (Feb. 9, 2023), <https://immigrationforum.org/article/the-reasons-behind-the-increased-migration-from-venezuela-cuba-and-nicaragua/>.

¹²⁰ *Id.*

encounters.¹²¹ Notably, the number of encounters with migrants from these countries surpassed encounters from the Northern Triangle. Accordingly, in January 2023, USCIS began accepting thirty thousand people collectively from these four nations to live and work in the United States legally for two years under a humanitarian parole program.

Given the success of these humanitarian parole programs, they should be expanded to include nationals from El Salvador, Honduras, and Guatemala. The program offers a humanitarian solution while addressing the most pressing concerns associated with migration on the southern border. First, to qualify for humanitarian parole, an applicant must have a U.S. financial sponsor to ensure the beneficiary's basic needs are met and will not rely on government assistance. Second, the program is only temporary, allowing foreign nationals to live and work legally in the United States for two years. It is unclear what will happen after that time, and it will likely depend on the outcome of the 2024 presidential election. Third, it allows the United States to fully vet applicants and protect national security. Finally, and perhaps most importantly, the process is a cornerstone to the Biden administration's post-Title 42 policies requiring migrants to enter the United States in a legal and orderly way. The humanitarian parole programs are working, and even the Manhattan Institute—a well-known conservative thinktank—endorses its success at preventing the entry of more than 380,000 migrants and recommends expanding the program to include other countries with high rates of immigration at the southern border.¹²²

We agree. These programs show that common sense humanitarian programs are possible when the government has the political will to act. We recognize the limitations to the humanitarian parole programs,¹²³ but they have already proven to be a powerful tool in reducing illegal immigration on the southern border while still allowing individuals fleeing dangerous conditions to temporarily live and work in the United States. The Biden administration recently announced a family reunification program that will

¹²¹ *Id.*

¹²² Daniel Di Martino, *Biden's Immigration Parole Programs Are Working*, MANHATTAN INST. (May 25, 2023), <https://manhattan.institute/article/bidens-immigration-parole-programs-are-working>.

¹²³ Camilo Montoya-Galvez, *1.5 Million Apply for U.S. Migrant Sponsorship Program with 30,000 Monthly Cap*, CBS NEWS (May 22, 2023), <https://www.cbsnews.com/news/us-migrant-sponsorship-program-cuba-haiti-nicaragua-venezuela-applications/> (there is a monthly cap of 30 thousand under the current program for Nicaragua, Venezuela, Haiti, and Cuba, but USCIS has already received 1.5 million applications).

admit up to 100,000 nationals from El Salvador, Honduras, Guatemala, and Colombia, but the new process is distinct to the parole programs described above.¹²⁴ It is limited to those whose family members are U.S. citizens or lawful permanent residents and who have received approval to join their family in the United States.¹²⁵

CONCLUSION: WHY OBLIGATIONS MATTER

Upholding our obligations is foundational to having a fair, functioning, and lawful immigration system. Under the U.S. constitutional system, Congress is entrusted with passing laws, which are then to be enforced *as they are written* by the executive branch. The executive branch has substantial discretion to interpret laws passed by Congress, but it may not violate or rewrite those laws. When the executive branch ignores the laws passed by Congress to fulfill what it perceives to be a short-term electoral or geopolitical advantage, it undermines the rights of noncitizens and the rule of law itself. Immigration policy that is fair and just begins with actually abiding by U.S. immigration law, which includes legal obligations to noncitizens at the border. It is disingenuous to call for enforcement of the laws *against* noncitizens crossing the border if the legal obligations *towards* those same individuals are not being honored.

Furthermore, if the United States is unwilling to uphold its own obligations, it is unrealistic to expect that legislation will effectively improve policy outcomes at the border. If the President or their administration believe that the current laws fail to generate outcomes in the best interest of the U.S., the answer is to change the laws. But if the executive branch is free to disregard the laws passed by Congress at the border, then legislative reform cannot be expected to change the actual outcomes. Under the U.S. constitutional system, policy flows from the laws passed by Congress, not from the political calculations of the executive branch.

Finally, U.S. obligations (and our failure to uphold them) matter because they not only shape public policy, but also public perception. A recent study demonstrates that when Americans perceive immigrants to be “illegal,” society at large is more likely to hold negative perceptions,

¹²⁴ Press Release, Department of Homeland Security, DHS Announces Family Reunification Parole Processes for Columbia, El Salvador, Guatemala, and Honduras (July 7, 2023) (on file with Department of Homeland Security).

¹²⁵ *Id.*

prejudice, and a stronger desire to punish noncitizens.¹²⁶ We argue that regardless of which term is used, many people who are *perceived* to be in the U.S. illegally are in fact noncitizens who have a legal *right* to be in the United States. Offering a fair, unbiased hearing to asylum seekers is not a *bonus* that these individuals receive based on the generosity of the DHS, it is a legal obligation under both U.S. law, as passed by both houses of Congress and signed by the President, and international law. The public perception of illegal immigration as a major problem is based at least in part on the *misperception* that all border crossers are “illegal.”¹²⁷ To determine the best legislative policy to address issues at the border, the electorate must be properly informed about the legal status of people who are crossing the border.

While largescale humanitarian migration can undoubtedly cause significant social and logistical disruption at major international borders, it is hypocritical for the United States to solely focus on the potential violations of asylum seekers while enacting and implementing illegal border policies that violate the very U.S. immigration laws that are specifically aimed at protecting many of these migrants. Given our personal and historical connections to immigrants and refugees, it is tempting to make emotional or sentimental arguments in favor of the admission of suffering people into the United States. Here, we have resisted this temptation. Instead, our description of U.S. obligations, and the violations of those obligations, is based on settled U.S. law that is anchored in firmly established international law and moral consensus. We are not calling on the U.S. government to perform humanitarian heroics at the border—we are simply arguing that it ought to do its duty.

¹²⁶ See, e.g., Sarah Fister Gale, *Cultural Stereotypes Drive Negative Perceptions of Undocumented Immigrants*, UCHICAGO NEWS (Oct. 23, 2018), <https://news.uchicago.edu/story/cultural-stereotypes-drive-negative-perceptions-undocumented-immigrants>; see also, Reidar Ommundsen et al., *Framing unauthorized immigrants: the effects of labels on evaluations*, 114 PSYCH. REP. 461, 461–78 (2014).

¹²⁷ Amina Dunn, *Americans Remain Critical of Government's Handling of Situation at U.S.-Mexico Border*, PEW RSCH. CTR. (June 21, 2023), <https://www.pewresearch.org/short-reads/2023/06/21/americans-remain-critical-of-governments-handling-of-situation-at-us-mexico-border/#:~:text=Public%20perceptions%20of%20illegal%20immigration,a%20very%20big%20national%20problem.>

POSTSCRIPT: REFLECTIONS ON THE BORDER IN AN ELECTION YEAR

In the year since the first draft of our paper was written, border crossings have increased significantly and immigration remains a top political issue in the 2024 U.S. campaigns, with the electorate in a decidedly cranky mood about the U.S.–Mexico border. A January 2024 Pew survey found that “a sizable majority of Americans (78%) say the large number of migrants seeking to enter this country at the U.S.-Mexico border is either a crisis (45%) or a major problem (32%).”¹²⁸ In February 2024 congressional negotiations, Republicans in Congress rejected a decidedly anti-immigrant border deal because former president Trump did not want to undercut his message of crisis at the border.¹²⁹ In this context and given the dynamic and ever-changing situation, we have added three brief reflections on immigration politics in the context of the legal and moral obligations of the U.S. at the border.

Our first reflection is that almost none of the political conversations about the border take legal and moral obligations into account.¹³⁰ While this may be politically expedient, it also displays a profound lack of perspective and imagination on the part of politicians. The very nature of an obligation is that it remains in force even when it is costly to fulfill. It may feel inconvenient or uncomfortable for Americans to uphold our nation’s asylum laws, but *this is precisely why they are laws*. When Congress passes a law that imposes an obligation on the U.S. government, the reason for passing that law is to ensure compliance with the law *even when it is difficult in the short term to do so*. Effective doctors explain to patients why eating vegetables is ultimately something that healthy adults must learn how to do; effective politicians need to explain why fulfilling obligations to asylum seekers is part of being the most wealthy and powerful nation in the world.

Our second reflection is that there should be no surprise that huge numbers of people want to enter the United States. Why are people coming

¹²⁸ *How Americans View the Situation at the U.S.-Mexico Border, Its Causes and Consequences*, PEW RSCH. CTR. (2024), <https://www.pewresearch.org/politics/2024/02/15/how-americans-view-the-situation-at-the-u-s-mexico-border-its-causes-and-consequences/>.

¹²⁹ Annie Karni, *G.O.P. Backlash to Border Deal Reflects Vanishing Ground for a Compromise*, N.Y. TIMES (Feb. 4, 2024), <https://www.nytimes.com/2024/02/05/us/politics/republicans-border-deal.html>

¹³⁰ Ironically, the potential bipartisan compromise did in fact include several changes the asylum laws that would have been very unfavorable to asylum seekers, but it was rejected by Republicans for breathtakingly cynical reasons.

to the United States in droves? Because many of them need jobs and the United States needs workers. Asylum is not intended to help people who are in dire economic straits, but violence, poverty, and political repression are almost never isolated from each other. The United States is very rich, generally safe, and full of opportunity. Many other nations are poor, violent, and lack opportunity. Breathless, panicky proclamations about “invasions,” “crises,” and “a broken system” seem to ignore a basic economic reality – the U.S. has something that billions of people on planet Earth want – a safe place to live and raise a family. The desperate people on the border are not part of some attempt to violate U.S. sovereignty. Rather, their hope of entering the United States to gain safety and security represents the inevitable consequence of violence and inequality all over the world.

Our third reflection is that there is incredibly low hanging fruit that could improve the situation at the border and that it is almost *entirely* the responsibility of Congress, and not in the purview of the presidency. The policy recommendations practically write themselves. Increase funding for the asylum system to speed up adjudications. Put more agents at border stations to expedite inspections and credible fear interviews. Hire more immigration judges to decrease the massive backlog in asylum adjudications. Increase the availability of family- and employment-based immigrant visas, raise the annual cap on temporary worker visas, and create new options for lower-skilled workers to take jobs that U.S. citizens do not want. What needs to be emphasized in an election year is that these solutions, none of which are perfect but all of which would make a major difference, require *congressional action*.

To summarize, we are essentially appealing to politicians to treat voters like adults. Dial down the silly rhetoric about “invasions” and “crises.” Explain how the Constitution works – don’t promise presidential action to solve problems that only Congress is empowered to address. Recognize the responsibility of being the richest and most powerful nation in the world and stop acting surprised that millions of people around the world dream of coming to the United States. The 26th Amendment lowered the voting age to eighteen, not eight. It’s time our politicians talk about immigration as if voters are grown-ups.