



**DHS Docket Number USCIS 2022-0016: Circumvention of Lawful Pathways**

March 27, 2023

**Public Comment from the America First Policy Institute**  
Robert Law, Director of the Center for Homeland Security & Immigration



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Dear Mr. Delgado and Ms. Alder Reid,

The America First Policy Institute (AFPI) submits the following public comment to the U.S. Department of Justice (DOJ) and U.S. Department of Homeland Security (DHS) in response to the departments' request for comments on the Joint Notice of Proposed Rulemaking (JNPRM) titled *Circumvention of Lawful Pathways*, as published in the Federal Register on February 23, 2023.<sup>1</sup>

AFPI is a non-profit, non-partisan research institute that advances policies that put the American people first.<sup>2</sup> AFPI's guiding principles are liberty, free enterprise, national greatness, American military superiority, foreign-policy engagement in the American interest, and the primacy of American workers, families, and communities in all we do.

## I. Introduction

Through this JNPRM, DOJ and DHS are proposing to amend certain immigration regulations relating an alien's<sup>3</sup> ability to qualify for asylum under section 208 of the Immigration and

<sup>1</sup> *Circumvention of Lawful Pathways*, 88 FR 11704 (Feb. 23, 2023), available at <https://www.federalregister.gov/documents/2023/02/23/2023-03718/circumvention-of-lawful-pathways>.

<sup>2</sup> <https://americafirstpolicy.com/about>.

<sup>3</sup> See section 101(a)(3) of the Immigration and Nationality Act (INA) ("definitions" section; "The term 'alien' means any person not a citizen or national of the United States."), available at [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1101%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1101%20edition:prelim);); see also Section 101(a)(22) of the INA ("The term 'national of the United States' means: (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.") *Id.*; Miller v. Albright, 523 US 420, 467 n. 2 (1998) (Ginsberg, J., dissenting) ("Nationality and citizenship are not entirely synonymous; one can be a national of the United States and yet not a citizen."), available at [https://scholar.google.com/scholar\\_case?case=16706312627647904855&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholarr#](https://scholar.google.com/scholar_case?case=16706312627647904855&hl=en&as_sdt=6&as_vis=1&oi=scholarr#); Andrew Arthur, *Defining Immigrants, Noncitizens, Aliens, Nonimmigrants, and Nationals, Who's Who in Immigration Law?*, CENTER FOR IMMIGRATION STUDIES (Jun. 26, 2017) ("So, citizens are nationals of the United States, but not all nationals are citizens. Therefore, the term 'noncitizen' includes aliens and nationals who are not citizens. But, nationals are not subject to removal proceedings under section 240 of the INA, only aliens are; therefore, any case that discusses whether an individual is to be removed, unless it is a case involving contested citizenship, relates to an 'alien' not a 'noncitizen'."), available at <https://cis.org/Arthur/Defining-Immigrants-Noncitizens-Aliens-Nonimmigrants-and-Nationals>; Robert Law, *Immigration Newspeak, Who's afraid of alien(s)?*, CENTER FOR IMMIGRATION STUDIES (Jan. 26, 2021) ("The term 'alien' is precise, accurate, and in no way



Nationality Act.<sup>4</sup> Specifically, the rule would create a “rebuttable presumption” against asylum eligibility for aliens who unlawfully attempted to cross the southern border unless an exception applies. While certain media outlets<sup>5</sup> have described the JNPRM as a revival of the *Asylum Eligibility and Procedural Modifications* regulation<sup>6</sup> issued by the Trump Administration, the Biden Administration proposed rule contains numerous loopholes and exceptions to render the stated purpose of the rule toothless. Unlike the Trump Administration regulation that imposed a bar to asylum for aliens who transited through a third country without attempting to avail themselves of humanitarian protection as part of a multi-pronged strategy to secure the border, the JNPRM is all bark and no bite and will continue the Biden Administration’s shameful legacy of facilitating the mass trafficking and smuggling of vulnerable aliens.

## II. The Exceptions Swallow the Rule

The Biden Administration’s failed border policies are directly responsible for the ongoing humanitarian crisis at the southern border. When the Biden Administration began on January 20, 2021, it inherited the most secure border in our Nation’s history and was handed the playbook by Trump Administration officials for how to maintain those policies. Instead, the Department of Homeland Security (DHS) intentionally set about dismantling all Trump Administration policies, even over the objections of career Border Patrol agents who supported them. As a result, more than 5 million illegal aliens have already been apprehended<sup>7</sup> during the Biden Administration, excluding the “gotaways.”<sup>8</sup> The culmination of this refusal to enforce U.S. immigration law is the unprecedented record-setting 251,995 illegal aliens apprehended in December 2022.<sup>9</sup>

In a somewhat stunning development, the proposed rule concedes that Biden Administration policies are responsible for the border crisis *and* that it is unsustainable. The preamble explains what most Americans have already figured out—the “anticipation of a potential surge of [illegal]

offensive. To suggest otherwise is to suspend reality and is not a serious or reasonable position.”), *available at* <https://cis.org/Law/Immigration-Newspeak>.

<sup>4</sup> Section 208 of the INA, 8 USC 1158.

<sup>5</sup> See, e.g., Nick Miroff, *Asylum seekers who cross U.S. border illegally face new Biden rule*, WASHINGTON POST (Feb. 21, 2023) (“The Biden administration on Tuesday issued its most restrictive border control measure to date, announcing plans for a temporary rule that will penalize asylum seekers who cross the border illegally or do not apply for protection in other nations they pass through on their way to the United States.”), *available at* [https://www.washingtonpost.com/national-security/2023/02/21/border-asylum-rule-biden/?utm\\_source=alert&utm\\_medium=email&utm\\_campaign=wp\\_news\\_alert\\_revere&location=alert](https://www.washingtonpost.com/national-security/2023/02/21/border-asylum-rule-biden/?utm_source=alert&utm_medium=email&utm_campaign=wp_news_alert_revere&location=alert).

<sup>6</sup> *Asylum Eligibility and Procedural Modifications*, 85 FR 82260 (Dec. 17, 2020) *available at* <https://www.federalregister.gov/documents/2020/12/17/2020-27856/asylum-eligibility-and-procedural-modifications>; *Asylum Eligibility and Procedural Modifications*, 84 FR 33829 (July 16, 2019) *available at* <https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>.

<sup>7</sup> The term “apprehension” is the proper terminology that DHS has historically used to describe an alien who unlawfully crosses the southern border. The Biden Administration’s attempt to politicize this law-breaking activity by rebranding apprehensions as “encounters” is similar to the effort to replace “alien” with “noncitizen.” The federal government has an obligation to the American people to use precise, legal terminology and the unprecedented effort by DHS to dispense with these terms in place of overbroad and inaccurate words to cater to the political left is yet another example of the failures of the Biden Administration.

<sup>8</sup> <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

<sup>9</sup> *Id.*



migration” at the southern border once Title 42 ends on May 11, 2023 in conjunction with the termination of the Centers for Disease Control and Prevention’s (CDC) Covid-19 public health order.”<sup>10</sup> In the absence of this rule, the departments claim, “the number of migrants expected to travel without authorization to the United States is expected to increase significantly, to a level that risks undermining the Departments’ continued ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system, in the face of exceptionally challenging circumstances.”<sup>11</sup> Setting aside, for now, the departments’ mischaracterization of their policies being “safe[], effective[], and humane[]”, U.S. Border Patrol agents have been continuously overwhelmed by the approximately 8,000 illegal aliens *per day* surging across the southern border.

This is unsustainable and would be viewed as unacceptable by every previous administration. Most notably, in the words of former DHS Secretary Jeh Johnson during the Obama-Biden Administration, “And I’d look at [the daily illegal alien apprehension numbers] every morning, it’d be the first thing I’d look at. And I probably got too close to the problem, and my staff will tell you if it was under 1,000 apprehensions the day before that was a relatively good number, and if it was above 1,000 it was a relatively bad number, and I was gonna be in a bad mood the whole day.”<sup>12</sup> The current Biden Administration levels are *eight times worse* than the level the Obama-Biden Administration said are unacceptable. Clearly, the chaos at the border has been orchestrated and the Biden Administration is scrambling to disguise the optics of the problem rather than put forward solutions.

The departments’ claim the proposed rule will “encourage migrants to avail themselves of lawful, safe, and orderly pathways into the United States, or otherwise to seek asylum or other protection in countries through which they travel, thereby reducing reliance on human smuggling networks that exploit migrants for financial gain.” This misinformation may get a pass from the liberal media but the substance of the assertion is meritless.

As a brief recounting, the Trump Administration’s 2019 “forum shopping” rule barred all illegals apprehended at the southern border from claiming asylum with three narrow and commonsense exceptions.<sup>13</sup> First, aliens were allowed to make an asylum claim in the U.S. if they first sought asylum in a country they passed through but were denied.<sup>14</sup> Second, an alien was exempt from the rule if he or she was “severely trafficked” as defined elsewhere in the statute.<sup>15</sup> And third, the

<sup>10</sup> Circumvention of Lawful Pathways, 88 FR 11704 (Feb. 23, 2023), *available at* <https://www.federalregister.gov/documents/2023/02/23/2023-03718/circumvention-of-lawful-pathways>.

<sup>11</sup> *Id.*

<sup>12</sup> See Tim Hains, *Obama DHS Secretary Jeh Johnson: “We Are Truly In a Crisis” On Southern Border*, REAL CLEAR POLITICS (Mar. 29, 2019), *available at* [https://www.realclearpolitics.com/video/2019/03/29/obama\\_dhs\\_secretary\\_jeh\\_johnson\\_we\\_are\\_truly\\_in\\_a\\_crisis\\_on\\_southern\\_border.html](https://www.realclearpolitics.com/video/2019/03/29/obama_dhs_secretary_jeh_johnson_we_are_truly_in_a_crisis_on_southern_border.html) (video of Jeh Johnson remarks on MSNBC).

<sup>13</sup> Asylum Eligibility and Procedural Modifications, 85 FR 82260 (Dec. 17, 2020) *available at* <https://www.federalregister.gov/documents/2020/12/17/2020-27856/asylum-eligibility-and-procedural-modifications>; Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019) *available at* <https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*



alien was allowed to make an asylum claim if he or she traveled only through countries that did not participate in the same international humanitarian agreements as the U.S. did back in the 1950s and 1960s.<sup>16</sup>

Unfortunately for the American people, the Biden Administration’s proposed rule falls woefully short of the structure of the Trump Administration rule, thus continuing this administration’s legacy of perpetuating human trafficking and asylum fraud.

The first shortcoming of the JNPRM is that it fails to prevent illegal aliens from clogging the immigration court system with baseless asylum claims. Unlike the Trump era rule, the JNPRM uses a “rebuttable presumption against asylum eligibility” standard for illegal aliens apprehended at the border. This is not a bar to claiming asylum, just a facially stricter threshold to pass than under current practice. The rebuttable presumption is only a tougher standard in name only because the overwhelming majority of these illegal aliens do not qualify for asylum, regardless of what standard is used. The Biden Administration knows that fewer than 15% of illegal aliens apprehended at the border qualify for asylum, and obtaining humanitarian relief is not the end goal for the vast majority of them. Instead, being released into American communities is what they are really trying to achieve, and this rule perpetuates that practice. For the illegal aliens who filed fraudulent and frivolous claims under this “higher” standard, most will likely just fail to appear before the immigration judge and disappear into the vast interior of the United States knowing that the likelihood of being removed—particularly under the current administration—is minimal.

As mentioned above, the JNPRM is filled with exceptions beyond the commonsense ones from the Trump Administration’s rule that render the “asylum bar” nonexistent. For example, it will have no impact on the 30,000 illegal aliens *per month* from Venezuela, Cuba, Haiti, and Nicaragua who the Department of Homeland Security (DHS) is going to parole into the country unlawfully.<sup>17</sup> Section 212(d)(5) of the INA is an extremely narrow authority that only authorizes the DHS Secretary to temporarily parole an otherwise inadmissible alien “on a case-by-case basis” for “urgent humanitarian reasons or significant public benefit.”<sup>18</sup> The categorical application of parole on a nationality-basis criteria obviously fails the case-by-case requirement and similarly fails to articulate a legally sound, believable argument that such parole is grounded in urgent humanitarian reasons or significant public benefit. That is because there is no such basis for allowing 360,000 illegal aliens into American communities. Federal District Court Judge T. Kent Wetherell II of the U.S. District Court for the Northern District of Florida recently issued a scathing opinion striking down a different categorical parole policy as an unlawful abuse of Section 212(d)(5).<sup>19</sup> Judge Wetherell’s rule foreshadows the future striking down of this categorical parole program and the departments should immediately discontinue it rather than

<sup>16</sup> *Id.*

<sup>17</sup> See DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes (Jan. 5, 2023), available at <https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and>.

<sup>18</sup> Section 212(d)(5) of the INA, 8 USC 1182(d)(5).

<sup>19</sup> Florida v. U.S., Case No. 3:21-cv-1066-TKW-ZCB, Mar. 8, 2023 (D. No. FL.), available at [http://myfloridalegal.com/webfiles.nsf/WF/GPEY-CPQPAB/\\$file/final+order.pdf](http://myfloridalegal.com/webfiles.nsf/WF/GPEY-CPQPAB/$file/final+order.pdf).



wasting American taxpayer dollars raising dubious claims in court defending an indefensible interpretation of clear law.

Also exempt from the JNPRM’s rebuttable presumption standard are the tens of thousands of illegal aliens the administration will waive through the ports of entry if they schedule an “appointment” through the Customs and Border Protection “CBP One” app. Speaking of the CBP One app, which was not designed to facilitate the waving in of inadmissible aliens, the JNPRM also exempts aliens who claim the CBP One app was “not possible to access or use.” This vague standard, which impermissibly shifts the burden to DHS to refute, is rife for exploitation and will no doubt be badly abused. In light of the paltry 2.5 “star” rating the CBP One has in the Apple “App Store” for its iPhone, it almost appears that the app was designed to fail in order to prevent *any* illegal alien apprehended at the border from being subject to the rebuttable presumption standard. The rule also exempts aliens who have “other exceptionally compelling circumstances,” as defined by DHS.

And lastly, the rule fully exempts unaccompanied alien children (UACs) and “family units,” including in situations where the family members are proven ineligible for asylum. The exceptions for families (FMU) and UACs are similar to the exemptions the Biden Administration applied to Title 42, which allowed these populations into American communities instead of immediately turning them away at the border. The result of that Title 42-carve out was the facilitation of record numbers of vulnerable migrant children and families who were trafficked to the border. Based on UAC and FMU numbers thus far during the Biden Administration, that’s at least another 700,000 aliens per year not subject to the supposed “asylum bar.”

Beyond the extensive carve outs that swallow the rule, the temporary nature of the JNPRM—if finalized—is crass politics. The Biden Administration is clearly reeling from the public fallout of more than 251,000 illegal aliens attempting to cross the border unlawfully in December. The 24-month application of this rule smacks of political undertones, with the creation of this new “deterrent” policy long enough for the Biden Administration’s aspiration of being re-elected in the November 2024 presidential election. This is abhorrent; the American people deserve real solutions to secure the border instead of creative — and unlawful — mechanisms to further propel the mass release of illegal aliens into American communities.

### III. Conclusion

The JNPRM is a border enforcement red herring. While the open border Left will protest the new proposal, this is a performance to create the mirage of the Biden Administration pivoting to the middle ahead of the 2024 election. DHS Secretary Mayorkas said the quiet part out loud—that the JNPRM is toothless—during a recent exchange with open border activists.<sup>20</sup> The American people want solutions, not excuses and they do not want to be complicit in the human trafficking that the Biden Administration’s open border policies encourage. Rather than devoting limited resources to smoke-and-mirror regulatory efforts, the departments should revert to the proven America First border security policies of the Trump Administration.

<sup>20</sup> See Neil Munro, *Mayorkas Says Biden’s New Border Rule Leaves Many Open Gaps*, BREITBART, Mar. 20, 2023, available at <https://www.breitbart.com/immigration/2023/03/20/mayorkas-says-border-curbs-leave-many-gaps/>.

