SENATE JUDICIARY COMMITTEE
HEARING ON H.R. 6
AMEICAN DREAM AND PROMISE ACT OF 2021

PREPARED TESTIMONY OF
JOSEPH B. EDLOW
FOUNDER, THE EDLOW GROUP LLC

Chairman Durbin, Ranking Member Grassley, and Senators of this committee, thank you for the opportunity to present testimony on H.R. 6, the American Promise and Dream Act of 2021 and on the ramifications of such legislation on the ongoing crisis at the Southwest Border of the United States.

I look forward to discussing the legislation at issue, but we cannot focus on this bill in a vacuum without considering the broader immigration landscape. The threat to the integrity of the U.S. immigration system has reached crisis levels. With border apprehensions consistently rising, inconsistency in the processing of aliens arriving at the border, and the Administration taking actions in contravention of U.S. immigration laws, we are at great risk of the entire immigration system failing.

Since being inaugurated, President Biden has waged war on immigration enforcement and reversed the successful policies that kept the southwest border and our first line officers in U.S. Border Patrol and CBP's Office of Field Operations from being completely overrun. Disastrous executive actions aimed at halting deportations[1], re-instituting Obama-era prosecutorial discretion[2], ending the Migrant Protection Protocols[3], and instituting large-scale catch and release along the border have taken their toll.

Since February, apprehensions along the southwest border have risen well above 100,000 per month and are continuing to climb. So far in Fiscal Year 2021, 929,868 aliens have been encountered by U.S. Customs and Border Protection (CBP), 633,342 of whom were encountered from February through May of 2021.[4] With four months left in the fiscal year, this country is on track to see a record number of apprehensions along the southwest border.

---

[1] Memo. from David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), available at: https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

[2] Memo. from Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021), available at: https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf; *see also* Memo. from John D. Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021) available at: https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf.

[3] Memo. from Alejandro N. Mayorkas, *Termination of the Migrant Protection Protocols Program* (June 1, 2021), available at: https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

[4] *CBP Enforcement Statistics Fiscal Year 2021*, U.S. CUSTOMS AND BORDER PROTECTION (undated), available at: https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics.

These are just the known and reported numbers and do not account for the tens of thousands of "got aways" who were able to elude Border Patrol agents.

Border Patrol is never able to apprehend all aliens crossing the border illegally each month. Those aliens who elude Border Patrol apprehension are known as "got aways."[5] At a May 13, 2021 hearing on "DHS Actions to Address Unaccompanied Minors at the Southern Border"[6] with DHS Secretary Alejandro Mayorkas, Sen. Rob Portman revealed that Border Patrol "conservatively estimates that over 40,000 people who crossed illegally got away and were not apprehended in April."[7]

These apprehensions and "got aways" run the gamut from single adults to families to unaccompanied minors. They flock to the border as the Administration perpetuates the perception that they will be allowed to enter, free from detention and deportation, and ultimately join family and friends and work in this country. That the Administration has continued to ignore longstanding loopholes in the law that encourage their entry has exacerbated this issue and given smugglers the ability to easily exploit our laws and abet thousands upon thousands of aliens as they make the exceedingly dangerous journey into the United States.

Border Patrol life-saving efforts are also up this fiscal year. Through May, agents at the Southwest border have performed 6,898 searches and rescues, already eclipsing the totals for all of FY 2020 (5,071) and all of FY 2019 (4,920).[8]

Aliens follow more rugged, remote, and rural routes, placing them farther away from help when help is needed. Those are not aliens who are coming to turn themselves over agents to claim credible fear; they are migrants who do not want to be detected—let alone apprehended-- at all.

The increased savagery of the smuggling gangs also plays a big role in the increased number of Border Patrol rescues, as well. The *Wall Street Journal* recently reported on the tactics of one such group, which had placed 65 adults and 152 children on rafts crossing the Rio Grande near Roma Texas.[9]

---

[5] Todd Bensman, '*Got-Aways' at the Border, Why the mass migration crisis is more severe than official reporting suggests*, CENTER FOR IMMIGRATION STUDIES (May 3, 2021), *available at*: https://cis.org/Bensman/GotAways-Border.

[6] Comm. Hearing on DHS Actions to Address Unaccompanied Minors at the Southern Border, S. Comm. on Homeland Security and Governmental Operations (117th Cong. 1st Sess.), *available at*: https://www.hsgac.senate.gov/hearings/dhs-actions-to-address-unaccompanied-minors-at-the-southern-border.

[7] *Sen. Portman Exchange with DHS Secretary on Migrants, Senate Hearing on Unaccompanied Minors at U.S.-Mexico Border*, C-SPAN (May 13, 2021), *available at*: https://www.c-span.org/video/?511573-1/senate-hearing-unaccompanied-minors-us-mexico-border.

[8] *CBP Enforcement Statistics Fiscal Year 2021*, U.S. CUSTOMS AND BORDER PROTECTION (undated), available at: https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics.

[9] Jillian Kay Melchior, *Biden's Border Crisis, Up Close, His policies endanger vulnerable migrants by encouraging them to make perilous illegal crossings*, WALL STREET JOURNAL (Mar. 29, 2021), available at: https://www.wsj.com/articles/bidens-border-crisis-up-close-11617057522?mod=searchresults_pos1&page=1.

The most recent CBP data[10] also reveals that Border Patrol apprehensions of aliens with criminal convictions has increased significantly in FY 2021. In the first eight months of this fiscal year, Border Patrol has "encountered" 6,918 aliens with criminal convictions, more than twice as many as in all of FY 2020 (2,438), and already more than 37 percent more than in all of FY 2019 (4,269).

Projecting forward based on current trends, Border Patrol will apprehend 10,047 aliens with criminal convictions, which would far surpass the totals for FY 2018 (6,698) and FY 2017 (8,531). Keep in mind that those 5,861 aliens with criminal convictions are in addition to 1,011 aliens with outstanding criminal wants and warrants.[11] The number of aliens apprehended whom federal, state, and local officials are looking for is down this fiscal year from FY 2020 (2,054) and FY 2019 (an astounding 4,153).

That said, Border Patrol is on track to apprehend 1,733 aliens with wants and warrants, which would be greater than the total of such apprehensions in FY 2018 (1,550).

THE DRAW OF THE LOOPHOLES

Apart from the draw of the United States itself, there are three main loopholes in U.S. law and policy: Administrative policies favoring — in contravention of statute — the release of aliens who have entered illegally and claimed "credible fear"; the unequal treatment of UACs from non-contiguous countries in the 2008 Trafficking Victims Protection Reauthorization Act (TVPRA); and novel judicial interpretations of the 1997 *Flores* settlement agreement.[12]

Under section 235(b)(1) of the Immigration and Nationality Act (INA)[13], aliens apprehended by CBP entering illegally along the border or without proper documents at the ports of entry are subject to "expedited removal", meaning that they can be quickly removed without receiving removal orders from an immigration judge (IJ).

If an arriving alien claims to fear harm or asks for asylum, however, CBP must hand the alien over to an asylum officer (AO) in U.S. Citizenship and Immigration Services (USCIS) for a "credible fear" interview.[14] Credible fear is a screening process to assess whether the alien may have an asylum claim, and thus proving credible fear is easier than establishing eligibility for

---

[10] CBP Enforcement Statistics Fiscal Year 2021, U.S. Customs and Border Protection (undated), *available at*: https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics.

[11] *Id*.

[12] *See* Andrew Arthur, *Why Are Central American Migrants Entering Illegally? Part 2, The 'pull factors' that are driving illegal immigration, and how they can be easily stopped*, CENTER FOR IMMIGRATION STUDIES (Apr. 26, 2021), *available at*: https://cis.org/Arthur/Why-Are-Central-American-Migrants-Entering-Illegally-Part-2.

[13] Section 235(b)(1) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[14] Section 235(b)(1)(A)(ii) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

asylum.[15] If an AO finds that the alien does not have credible fear (makes a "negative credible fear determination"), the alien can ask for a review of that decision by an IJ.[16] If the IJ upholds the negative credible fear determination, the alien is to be removed immediately.

When an AO or IJ makes a "positive credible fear determination", on the other hand, the alien is placed into removal proceedings to apply for asylum before an IJ.[17] Most aliens who have claimed a fear of return in the past received a positive credible fear assessment (83 percent between FY 2008 and FY 2019)[18], but less than 17 percent of those who received a positive credible fear assessment were ultimately granted asylum.[19]

Under section 235(b) of the INA, aliens found to have credible fear are supposed to be detained until their asylum claims are adjudicated.[20]

In December 2009, however, ICE leadership issued a policy directive[21] that aliens who have received a positive credible fear determination should generally be granted "parole" and released from detention under the circumscribed release authority provided in section 212(d)(5)(A) of the INA[22].

The number of aliens claiming credible fear climbed thereafter, as smugglers recognized an avenue by which migrants could enter illegally and still could remain in the United States indefinitely— even if they were caught — by claiming a fear of return or by requesting asylum.

For example, in FY 2009[23], asylum officers completed just over 5,500 credible fear cases. That number more than doubled to 11,716 by FY 2011 after that directive was issued, and then more than tripled again to 36,454 in FY 2013.[24] By the time the migrant "crisis" of FY 2019

---

[15] *See* section 235(b)(1)(B)(v) of the INA (defining "Credible fear of persecution"), *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[16] Section 235(b)(1)(B)(iii)(III) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[17] Section 235(b)(1)(B)(ii) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[18] Credible Fear and Asylum Process: Fiscal Year (FY) 2008 – FY 2019, U.S. Dep't of Justice, Executive Office for Immigration Review (generated Oct. 23, 2019), *available at*: https://www.justice.gov/eoir/file/1216991/download.
[19] *Id*.
[20] Section 235(b)(1)(B)(ii) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[21] *Directive 11002.1, Parole of Aliens Found to Have a Credible Fear of Persecution or Torture*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Dec. 8, 2009), *available at*: https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.
[22] Section 212(d)(5)(A) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim.
[23] *Credible Fear Workload Report, Summary*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (undated), *available at*: https://www.uscis.gov/sites/default/files/document/data/CredibleFearWorkloadReport.pdf.
[24] *Id*.

occurred, USCIS received 105,439 credible fear claims — more than 18 times as many as it had received in FY 2009, before that directive was issued.[25]

That December 2009 Obama-era parole directive prompted so many credible fear claims that the detention required under section 235(b)(1)(B)(ii) of the INA would have been prohibitively expensive by FY 2019, and for many migrant families, would not have been legally permissible more than 20 days (as explained below).

The Trump administration effectively implemented that requirement, however, in its 2019 Migrant Protection Protocols[26] (MPP, better known as "Remain in Mexico").

By way of background, under MPP (which began in January 2019, but took several months to come into full effect), DHS could return certain aliens who were caught by CBP entering illegally or without proper documentation back to Mexico to await their removal hearings, thus denying them immediate entry into the United States.[27] The Mexican government agreed to provide those foreign nationals with protection for the duration of their stays.[28]

Some 68,000 migrants who had claimed credible fear were returned to Mexico under MPP[29], and paroled into the United States for removal hearings. If they were granted asylum, they were admitted, but if they were denied, they were not.

Like the detention requirement in section 235(b)(1)(B)(ii) of the INA, MPP ensured that only arriving aliens who had claimed credible fear and received asylum were allowed to live and work in the United States.

Under MPP, between July and September 2019, the number of credible fear claims USCIS received dropped 59 percent—almost definitely because illegal entrants knew that they would not be released into this country until they had received an asylum grant.[30]

---

[25] *Credible Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (undated), *available at*: https://www.uscis.gov/sites/default/files/document/data/Credible_Fear_Stats_FY19.pdf.
[26] *Migrant Protection Protocols*, U.S. DEP'T OF HOMELAND SECURITY (Jan. 24, 2019), *available at*: https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols.
[27] Andrew Arthur, *DHS to Admit Aliens in 'Remain in Mexico' Program, and Promises It Will Let in Others Later, Details are sketchy, but you better like frog soup, because it looks like Biden will be 'gigging' the law*, CENTER FOR IMMIGRATION STUDIES (Feb. 16, 2021), *available at*: https://cis.org/Arthur/DHS-Admit-Aliens-Remain-Mexico-Program-and-Promises-It-Will-Let-Others-Later#:~:text=The%20Mexican%20government%20agreed%20to,still%20in%20the%20hearing%20process.
[28] *Id*.
[29] Camila DeChalus, *Biden's immigration problem: How to end 'Remain in Mexico', The program is one of many Trump policies that the president-elect has promised to unravel*, ROLL CALL (Dec. 11, 2020), *available at*: https://www.rollcall.com/2020/12/11/bidens-immigration-problem-how-to-end-remain-in-mexico/.
[30] *Credible Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (undated), *available at*: https://www.uscis.gov/sites/default/files/document/data/Credible_Fear_Stats_FY19.pdf.

Then-candidate Joe Biden derided MPP[31], and as president, Biden has ended the program[32] as well as other Trump border initiatives[33], but the president could always re-implement it.

Alternatively, Congress could fund sufficient detention space to comply with the non-release requirement in section 235(b)(1)(B)(ii) of the INA. Both detention and MPP deter fraudulent and otherwise worthless asylum claims, while allowing meritorious asylum claims to be granted more quickly.

Under the TVPRA, DHS can quickly screen and remove UACs who are nationals of "contiguous countries" (Mexico and Canada) if they have not been trafficked and have no fear of return home.[34] DHS, however, must place unaccompanied children from all other countries into removal proceedings and send them quickly to HHS, first for placement in a shelter run or contracted by HHS, and ultimately for identification of a "sponsor" with which to place that child in the United States and transfer of the child to the sponsor.[35]

In 2017[36], DHS disclosed that most (about 60 percent) of the sponsors of UACs had been those children's own parents-- also here illegally-- and the Senate reported in April 2019[37] that

---

[31] *The Biden Plan for Securing Our Values as a Nation of Immigrants* (undated) ("[T]hrough his Migrant Protection Protocol policies, Trump has effectively closed our country to asylum seekers, forcing them instead to choose between waiting in dangerous situations, vulnerable to exploitation by cartels and other bad actors, or taking a risk to try crossing between the ports of entry."), *available at*: https://joebiden.com/immigration/.

[32] *The MPP Program and Border Security Joint Statement by Assistant to the President and National Security Advisor Jake Sullivan and Assistant to the President and Homeland Security Advisor Dr. Elizabeth Sherwood-Randall*, WHITE HOUSE (Feb. 16, 2021), *available at*: https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/16/the-mpp-program-and-border-security-joint-statement-by-assistant-to-the-president-and-national-security-advisor-jake-sullivan-and-assistant-to-the-president-and-homeland-security-advisor-and-deputy-na/.

[33] *See* Rob Law, *Biden's Executive Actions: President Unilaterally Changes Immigration Policy*, CENTER FOR IMMIGRATION STUDIES (Mar. 15, 2021), *available at*: https://cis.org/Report/Bidens-Executive-Actions-President-Unilaterally-Changes-Immigration-Policy.

[34] Section 235(a)(2) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 (2008), *available at*: https://www.congress.gov/bill/110th-congress/house-bill/7311/text?q=%7B%22search%22%3A%5B%22William+Wilberforce+Trafficking+Victims+Protection+Reauthorization+Act+of+2008%22%5D%7D&r=1.

[35] Sections 235(a)(3) and (b) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 (2008), *available at*: https://www.congress.gov/bill/110th-congress/house-bill/7311/text?q=%7B%22search%22%3A%5B%22William+Wilberforce+Trafficking+Victims+Protection+Reauthorization+Act+of+2008%22%5D%7D&r=1.

[36] *Memorandum from John Kelly, Secretary, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies"*, U.S. DEP'T OF HOMELAND SECURITY (Feb. 20, 2017), *available at*: https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

[37] *See* Andrew Arthur, *Most UACs Released to Sponsors Without Status, U.S. government completing the conspiracy to smuggle minors*, CENTER FOR IMMIGRATION STUDIES (Apr. 29, 2019), *available at*: https://cis.org/Arthur/Most-UACs-Released-Sponsors-Without-Status.

during one six-month period it had studied, almost 79 percent of all UACs were sent to sponsors who were—again-- here illegally.

Facing his own surge of unaccompanied alien children, then-President Barack Obama asked Congress in June 2014 to give DHS "additional authority to exercise discretion in processing the return and removal of unaccompanied minor children from non-contiguous countries like Guatemala, Honduras, and El Salvador"[38]-- that is, to end the unequal treatment of UACs in sections 235(a)(3) and (b) of TVPRA who are not from Canada or Mexico.

Even the *Washington Post* editorial board admitted in August 2014 that TVPRA had "encouraged thousands of Central American children to try to reach the United States by granting them access to immigration courts that Mexican kids don't enjoy".[39]

As for migrants arriving in family units, there is also bipartisan agreement[40] that federal court decisions in 2015[41] and 2016[42] interpreting the 1997 *Flores* settlement agreement[43] exacerbate border control by encouraging adult migrants to bring children with them on the dangerous trek to the United States.

That settlement agreement governs the conditions of detention and release of children in immigration custody, and until 2015, it was only applied to unaccompanied children-- not children accompanied by parents or other adults.[44]

---

[38] *Letter from the President -- Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation's Southwest Border*, WHITE HOUSE (Jun. 30, 2014), *available at*: https://obamawhitehouse.archives.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle.

[39] Editorial Board, *The Post's View, Frustration over stalled immigration action doesn't mean Obama can act unilaterally*, WASHINGTON POST (Aug. 5, 2014), *available at*: https://www.washingtonpost.com/opinions/frustration-over-stalled-immigration-action-doesnt-mean-obama-can-act-unilaterally/2014/08/05/9c7bc1c6-1c1c-11e4-ae54-0cfe1f974f8a_story.html.

[40] *See Final Emergency Interim Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Apr. 16, 2019) ("By far, the major 'pull factor' [encouraging adult migrants to enter illegally in family units with children] is the current practice of releasing with a NTA most illegal migrants who bring a child with them. The crisis is further exacerbated by a 2017 federal court order in *Flores v. DHS* expanding to FMUs a 20-day release requirement contained in a 1997 consent decree, originally applicable only to unaccompanied children (UAC)."), *available at*: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

[41] *Flores v. Lynch*, 212 F. Supp. 3d 907 (U.S.D.C. Cent. Cal. 2015), *available at*: https://cite.case.law/f-supp-3d/212/907/.

[42] *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016), *available at*: http://cdn.ca9.uscourts.gov/datastore/opinions/2016/07/06/15-56434.pdf.

[43] *Flores v. Reno* (CV 85-4544-RJK(Px)) (Stipulated Settlement Agreement) (U.S.D.C. Cent. Dist. Cal. 1997), *available at*: https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf.

[44] *See Final Emergency Interim Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Apr. 16, 2019) ("The crisis is further exacerbated by a 2017 federal court order in *Flores v. DHS* expanding to FMUs a 20-day release requirement contained in a 1997 consent decree, originally applicable only to unaccompanied children (UAC)."), *available at*: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

In FY 2014, the Obama administration was faced with a surge of migrant families, as the number of aliens in FMUs apprehended by Border Patrol at the Southwest border increased 360 percent from the year before, to 68,445.[45]

Under *Flores*, children are supposed to be placed in licensed shelters, but Border Patrol under the Obama administration had apprehended so many families that the administration was placing them in unlicensed facilities (including on at least three military bases), and allegedly refusing to release many of them to dissuade other illegal entrants.[46]

The *Flores* plaintiffs went to the district court judge now overseeing the settlement agreement to stop such detention. In August 2015[47], the judge held (over the government's objections) that *Flores* covered the detention and release of accompanied children as well, and ordered that both they and their parents be released within 20 days of apprehension.

The Obama DOJ appealed that decision, and in July 2016[48], the Ninth Circuit sustained the 20-day release requirement for the children, but not the parents and other adults who brought them. To avoid "family separation", however, the parents have subsequently generally been released, as well.

Seeing a new loophole, smugglers encouraged migrants to bring a child with them when entering the United States illegally, and by FY 2019, the number of aliens in family units apprehended by agents at the Southwest border had mushroomed to 473,682[49] — an almost 600-percent increase over FY 2014.

Correlation may not always indicate causation, but there is no analysis that I have seen that would suggest that this increase in FMU apprehensions resulted from anything other than the 2015 and 2016 *Flores* decisions, and the virtual guarantee that they provide for adult migrants of quick release into the interior of the United States if they enter illegally with a child.

---

[45] *See* Andrew Arthur, *Ninth Circuit Flores Decision Puts Biden in a Fix, The more that come, the more that will come*, Center for Immigration Studies (Jan. 11, 2012), *available at*: https://cis.org/Arthur/Ninth-Circuit-Flores-Decision-Puts-Biden-Fix.

[46] *Id*.

[47] *Flores v. Lynch*, 212 F. Supp. 3d 907 (U.S.D.C. Cent. Cal. 2015), *available at*: https://cite.case.law/f-supp-3d/212/907/.

[48] *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016), *available at*: http://cdn.ca9.uscourts.gov/datastore/opinions/2016/07/06/15-56434.pdf.

[49] *Border Patrol Total Monthly Family Units by Sector FY13-19*, U.S. Border Patrol (undated), *available at*: https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29_1.pdf.

In fact, a bipartisan federal panel tasked with assessing the care of children and families in CBP custody during an earlier "border emergency" in 2019 basically made the same determination.[50]

In its April 2019 Final Emergency Interim Report, that panel found that "[b]y far, the major 'pull factor'" drawing families to enter illegally was the then-"current practice of releasing ... most illegal migrants who bring a child with them" with just a Notice to Appear or "NTA", the charging document in removal proceedings, "further exacerbated" by the 20-day release requirement in *Flores*.

The policy of releasing migrant families with an NTA was largely a direct result of the *Flores* decisions, too. ICE, which is responsible for detaining most migrants released from CBP processing, did not invest in detention space for FMUs after those *Flores* decisions were issued, knowing the agency had to release families in 20 days, anyway.

As noted, most Border Patrol stations and processing facilities were built to accommodate single adults (mostly male, mostly Mexican nationals) for a few hours, not non-Mexican migrant families for days. Because ICE did not have space for them either during the border emergency of 2019, CBP began releasing families after processing with NTAs in lieu of placing them in expedited removal, as that panel found.

That problem has only gotten worse during the current border crisis, as CBP is now releasing migrants *without even giving them an NTA or a removal hearing date*[51], because it lacks the space to detain them long enough to process them. Instead, apprehended migrants in FMUs are simply being told to report to the local ICE office at their destinations in the United States.

There is no reason to believe that ICE would even be aware that those aliens are present in the United States unless and until the aliens report to the agency (which many, most or all will not do). That means an untold number of aliens apprehended at the border will be at large in this country, with no effective way to keep track of them.

Consequently, this *Flores*-created pull factor will only get stronger, encouraging an even greater number of foreign nationals to bring their children with them as they attempt to enter the United States illegally.

---

[50] *See Final Emergency Interim Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Apr. 16, 2019) ("By far, the major 'pull factor' [encouraging adult migrants to enter illegally in family units with children] is the current practice of releasing with a NTA most illegal migrants who bring a child with them. The crisis is further exacerbated by a 2017 federal court order in *Flores v. DHS* expanding to FMUs a 20-day release requirement contained in a 1997 consent decree, originally applicable only to unaccompanied children (UAC)."), *available at*: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf

[51] Adam Shaw, Migrants being released into US without court dates, as border officials struggle to cope with surge, Fox News (Apr. 1, 2021), *available at*: https://www.foxnews.com/politics/migrants-released-without-court-dates-border-surge.

THE AMERICAN DREAM AND PROMISE ACT OF 2021

As the above testimony suggests, to enact any legislation without addressing the loopholes and the resulting surge at the border is bad policy. Simply put, enacting legislation of this magnitude would legalize large segments of the population who are presently not entitled to permanent residence while simultaneously inviting future populations who will assuredly seek amnesty in the future. This bill provides no enforcement measures and, ultimately, serves to assist aliens and their attorneys while providing nothing for the average U.S. citizen, all at taxpayer expense.

H.R. 6 seeks to provide permanent, or at least conditional status, to DACA and TPS recipients and certain other Dreamers, as defined in the bill. Its provisions are much broader and, in truth, have no nexus to DACA eligibility.

H.R. 6 would allow any alien continuously physically present in the United States since January 1, 2021 to gain status.[52] For perspective, DACA eligibility requires physical presence on June 15, 2012. If H.R. 6 were enacted, the eligible population would be those who were eligible for DACA plus nearly 5 years' worth of aliens who were not eligible for DACA.

Additionally, unlike DACA, which required that an alien be under 16 years of age upon entering the United States, this bill expands the eligibility to those under 18 years of age.[53]

Lastly, while DACA was capped for aliens 31 years of age and older on June 15, 2012, H.R. 6 has no age cut off and no maximum age, meaning that this bill is far broader than the "Dreamer" population as that term is commonly understood.

H.R. 6 provides numerous waivers for criminal aliens and others, discussed below, but omits several grounds of inadmissibility from base eligibility requirements. There are numerous grounds of inadmissibility that would typically keep aliens from being permitted to get status that are ignored in this bill. Among those grounds, aliens who have illegally voted, misrepresented facts, and lied to gain admission to the country to receive an immigration benefit, aliens with communicable diseases, and those aliens who have been previously removed.[54] The waiver may be granted by the Secretary for purposes of family unity, humanitarian needs, or in the public interest.[55] Additionally, an alien with a final order of removal who has remained in the United States in contravention of that order may, likewise, be able to obtain status under this bill.

Why should those that flagrantly and willfully violate our immigration laws or interfere in our democratic process by illegally voting be rewarded for such activity? Neither the bill nor its sponsors answer that question.

---

[52] American Dream and Promise Act of 2021, H.R. 6, 117th Cong. §102(b)(1)(A) (2021).
[53] *Id*. at §102(b)(1)(B).
[54] *Id*. at §102(b)(2).
[55] *Id*.

While the waivers and exceptions permitted in obtaining the conditional residency raise concerns, the removal of these conditions and the granting of a pathway to citizenship contains a massive omission.

To have the conditions removed pursuant to the bill, aliens must be conditional residents as described in the bill and must not have abandoned their residences in the United States while conditional residents.[56]

Additionally, an alien must have either served in the military for at least two years (and, if applicable, discharged honorably), demonstrated earned income for at least 3 years and 75% of the time that the alien has had work authorization, or has obtained a degree or has completed at least two years of a program leading to a bachelor degree or higher.[57]

The third prong can be waived, however, when an alien demonstrates a compelling reason as to why he or she could not meet the requirement and that their removal would result in "hardship" to themselves, their spouse, parent, or child.[58] That is an exceptionally low level of proof and could result in those who simply have not complied with the third prong quickly receiving permanent residence and, ultimately, citizenship.

Regarding those aliens with Temporary Protected Status, the Immigration and Nationality Act explicitly prohibits bills seeking to adjust the status of TPS holders. Specifically, Section 244(h) of the INA mandates that consideration of such bills shall be out of order in the Senate unless the prohibition is waived or suspended by an affirmative vote of three fifths of sitting Senators, a supermajority.[59] H.R. 6 fails to address this point and, without such a supermajority, pursuant to law, the Senate must, at a minimum, find that Title II of the bill is out of order and cannot be considered.

With the many pitfalls of H.R. 6, I want to focus on five specific issues with the bill as drafted: (1) It would overwhelm USCIS resources in its implementation; (2) It creates blanket waivers for criminal aliens thereby allowing most criminal aliens to benefit; (3) It contains a very low standard of proof that will invite fraud; (4) It contains stringent confidentiality provisions that will stymie future enforcement efforts; and (5) Its reliance on judicial review in the District Court will overwhelm the federal judiciary in federal districts with large immigrant populations.

The Migration Policy Institute estimates that approximately 4,438,000 aliens would be eligible for status under H.R.6.[60] This includes the 2,310,000 Dreamers as defined in the bill, 393,000 aliens presently with Temporary Protected Status (TPS), and approximately 171,000

---

[56] *Id*. at §104(a)(1)(A),(B).
[57] *Id*. at §104(a)(1)(C).
[58] *Id*. at §104(a)(2).
[59] Section 244(h) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1254a&num=0&edition=prelim.
[60] *See American Dream and Promise Act of 2021: Who is Potentially Eligible?*, (Mar. 2021), *available at*: https://www.migrationpolicy.org/content/american-dream-and-promise-act-2021-eligibility.

"legal" Dreamers who are presently in non-immigrant status as riders of others' status. This is far larger than the existing DACA population of approximately 650,000 or the estimated number of DACA enrollees and eligible population of 1.8 million.

As USCIS processing times and delays grow increasingly larger for applications for naturalization, waivers, permanent residence, removal of conditional status, and most other benefit types[61], the introduction of up to an additional 4.5 million applications would cripple the agency without more resources.

Additionally, as USCIS faced a fiscal crisis during the early months of COVID-19 pandemic, the agency would require appropriations for new immigration services officers, training, and other infrastructure improvements to handle this influx of receipts. Even with such accommodations, those individuals who have filed for immigration benefits pursuant to existing law would find themselves subject to ever-increasing delays. The agency will bear the burden and, in turn, will require the taxpayer money to administer this bill, if enacted.

On its face, the criminal provisions of H.R. 6 appear to make most criminal aliens ineligible for relief. However, using waivers, definitional amendments, and a rigorous review and appeal process, many-- if not most-- criminal aliens would be eligible for status under this bill. This is aided by an apparent unwillingness to recognize misdemeanor offenses as potentially serious criminal actions.

H.R. 6 provides for a waiver of the criminal grounds of inadmissibility for aliens convicted of crimes involving moral turpitude, drug crimes, drug trafficking/smuggling offenses, and commercialized vice offenses, including prostitution.[62]

While these crimes could still form the basis for a finding by the Secretary that the alien is threat to public safety, the Secretary may use broad discretion in ultimately making such a determination. Additionally, the bill exempts either one misdemeanor offense if more than 5 years old and up to two misdemeanor offenses if more than 10 years old from consideration as a public safety threat.[63] The examples of those who may be able to benefit from this bill is chilling, as the Secretary would be deprived of the discretion to deny those with old offenses including-- but certainly not limited to-- those convicted of misdemeanor sexual abuse of children, multiple drunk driving offenses, or misdemeanor assault.

The treatment of gang members is also a threat to public safety. Under the provisions of the bill, gang participation requires an affirmative finding that the alien participated in gang activities as narrowly defined by the sentencing enhancement contained in 18 U.S.C. 521.[64]

---

[61] *USCIS Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year* (undated), *available at:* https://egov.uscis.gov/processing-times/historic-pt.
[62] American Dream and Promise Act of 2021, H.R. 6, 117th Cong. §102(c)(2)(A) (2021).
[63] *Id*. at §102(c)(3)(B).
[64] *Id*. at §102(c)(3)(D).

These include only offenses related to federal controlled substances, federal crimes of violence, federal human trafficking and smuggling.[65] These limited crimes are outdated and a relic of a misunderstanding of the type of criminal activity engaged in by street gangs. Additionally, the Secretary's inability to use any law enforcement database on gangs and gang members[66] ensures that, at most, this provision will capture the low-level associates that serve as buffers between the criminal activity and gang leadership.

The bill's treatment of expunged convictions also raises significant public safety concerns. Longstanding immigration law precedent dictates that the vacatur of a conviction will only be found to be not a conviction for immigration purposes if the vacatur was based on a procedural defect or substantive issue.[67] Vacaturs for the purpose of solely avoiding the immigration consequences of a conviction can still form the basis for removal.[68]

H.R. 6 deliberately fails to make this distinction, and only defines a conviction as one that does not "include a judgment that has been expunged or set aside, that resulted in a rehabilitative disposition, or the equivalent."[69] This will overburden the state courts as every potentially eligible alien will seek an expungement or vacatur of any conviction, free to argue that the basis is rehabilitative in nature. Activist state judges will likely rubberstamp these vacaturs, and we will be left a population of criminal aliens who are fully eligible for conditional permanent residence and beyond.

Title III of H.R. 6 includes documentation requirements aimed at providing guidance as to what documents may be used to establish identity, physical presence, entry, enrollment in higher education, hardship, etc.[70] While the list appears comprehensive, in numerous sections documentary requirements can be satisfied by at least two sworn affidavits.[71] If enacted, I predict that the vast majority of documents received by DHS will be affidavits. These provisions invite fraud. Given the sheer numbers of aliens who will be filing for conditional permanent status, there will be no time for adjudicators to pore over each affidavit, which will lead to a new cottage industry among fraudulent document preparers. Simply put, fraud detection would be difficult and policing it is near impossible.

Fraudulent documents have always been a problem in the immigration system but when fraud of any type is detected, it is incumbent on those responsible for immigration enforcement to act. H.R. 6 repeats the mistakes of the past by including stringent confidentiality restrictions that would prevent any information about an alien in this new application from being shared

---

[65] *See* 18 U.S.C. 521 *available at*: https://uscode.house.gov/view.xhtml?req=(title:18%20section:521%20edition:prelim)%20OR%20(granuleid:USC-prelim-title18-section521)&f=treesort&edition=prelim&num=0&jumpTo=true.
[66] American Dream and Promise Act of 2021, H.R. 6, 117th Cong. §102(c)(3)(E) (2021).
[67] *See Matter of Adamiak*, 23 I. & N. Dec. 878 (BIA 2006).
[68] *See Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003) (rev'd on other grounds).
[69] American Dream and Promise Act of 2021, H.R. 6, 117th Cong. §301(b)(2021).
[70] *Id*. at §307.
[71] *See Id.* at §307(b)(17); *See Id.* at §307(g)(2)(C); *See Id.* at §307(g)(3); *See Id*. at §307(h).

with immigration enforcement officials or used to take immigration enforcement action. Ultimately, no information gathered could be used in removal proceedings, even if the alien were ultimately determined to be ineligible for the relief sought.[72] Likewise, information gathered pursuant to DACA applications, and any administrative or judicial review is off limits.[73] Vague exceptions to identify and prevent fraudulent claims are unclear-- and therefore useless. Much like the 1986 amnesty, H.R. 6 will encourage hundreds of thousands of frivolous applications and the submission of fraudulent documents, and thereby overburden an already overburdened system.

Lastly, the judicial review provisions provide a truly unique burden on the federal courts. Under H.R. 6, the Secretary-- in his or her non-delegable discretion-- may provisionally deny an application. To do so, multiple notices must be sent to the alien and, after an opportunity for the alien to respond, if the Secretary stands by the denial, the alien may challenge the Secretary's determination in federal district court.[74]

Additionally, an alien who is ultimately denied adjustment under these provisions may appeal to the federal district courts as well.[75] Even if only 10% of applications result in federal court review, the 667 federal district court judges nationwide would see an increase of approximately 400,000 new cases on their dockets.

Such an influx would cause disruption even if spread evenly, but the distribution will not be even in these cases. Due to migration patterns, certain courts are likely to see the bulk of these cases, thereby throwing certain district courts into chaos. It is also worth noting that aliens seeking review are afforded counsel appointed at government expense. This would overwhelm the federal court system, delay other cases filed in federal court, and impose significant costs on taxpayers and the public fisc.

CONCLUSION

H.R. 6 is the epitome of the wrong bill at the wrong time. With the immigration crisis growing daily, we need to ensure that the Department of Homeland Security is following the law, that procedures across ports of entry and Border Patrol sectors are consistent, and that enforcement measures remain intact and unimpeded by departmental memos aimed at contravention of the law and process. This bill will not alleviate the problems our immigration system is facing, but rather it will exacerbate them and ensure that we have a steady and heavy stream of migrants flagrantly violating our laws for decades to come.

Thank you for the opportunity to appear today, and I look forward to your questions.

---

[72] *Id*. at §309.
[73] *Id*.
[74] *Id*. at §104(c)(3)(G).
[75] *Id*. at §306(b),