

**The Oxford Handbook of Comparative Immigration Law**

**Chapter 6**

**Border Security in the United States**

**Working Title: The (In)discretion of Border Security Threats**

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**Table of Contents**

**I. Introduction. . . . . 1**  
**II. Why People Cross Borders. . . . . X**  
**III. Racial Disparities. . . . . X**  
**IV. Congressional Inaction. . . . . X**  
**V. Conclusion. . . . . X**

**I. Introduction**

The Secretary of Homeland Security is required to set priorities for enforcement, which are necessary because the government simply lacks the resources to arrest and deport every person arriving or living in the United States without authorization.<sup>2</sup> Prioritization refers to the choice made by an administration about who to target for civil immigration enforcement. These enforcement stages can include apprehension, detention, trial and removal or deportation.<sup>3</sup> Individuals who fall outside of these priorities have traditionally or at least theoretically, been treated by the government as low priorities for enforcement, often eligible for temporary protection through prosecutorial discretion.<sup>4</sup> When a person is protected through prosecutorial discretion, the federal government has made a choice to refrain from taking enforcement action against them.<sup>5</sup>

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<sup>2</sup> Homeland Security Act of 2002, 107 P.L. 296, 116 Stat. 2135.

<sup>3</sup> HSA 202

<sup>4</sup> See Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases* (2015); Kate Manuel & Todd Garvey, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, U.S. Congressional Research Service (2013); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J. 243 (2010).

<sup>5</sup> See *Id.* The author has studied the ways the former agency known as the Immigration and Naturalization Service and the current agency known as the Department of Homeland Security (DHS) has long used prosecutorial discretion to protect noncitizens who bear specific equities such as long-term residence in the United States, a medical condition or family ties in the United States.

For the last decade, and over three administrations, the federal Department of Homeland Security (DHS) has prioritized recent arrivals at the border for removal or deportation from the United States.<sup>6</sup> During the Obama administration, then-Immigration and Customs Enforcement (ICE) head John Morton issued a memorandum outlining priorities for enforcement, listing as Priority 2 “Recent illegal entrants” which included “the removal of aliens who have recently violated immigration controls at the border, at ports of entry.”<sup>7</sup> In 2014, then-DHS Secretary Jeh Johnson issued an agency-wide memorandum<sup>8</sup> listing three priorities for enforcement with Priority 1, listed as the highest priority for enforcement, as “Threats to national security, border security, and public safety” and within this grouping included “aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States.”<sup>9</sup> Similarly, former President Donald J. Trump issued executive orders and fact sheets during his tenure that made clear that anyone in the United States without immigration status was vulnerable to removal from the United States. He also issued a list of enforcement priorities through an executive order published on January 25, 2017.<sup>10</sup> Though border crossers were not listed explicitly in this EO, a subsequent fact sheet extended the priority label to those noncitizens arriving at the border without documents or false documents “[I]n order to maximize the benefit to public safety, to stem unlawful migration and to prevent fraud and misrepresentation.”<sup>11</sup>

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<sup>6</sup> Memorandum from Jeh Charles Johnson, Sec’y, Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf’t, R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot., Leon Rodriguez, Dir., U.S. Citizenship & Immigr. Serv., Alan D. Bersin, Acting Assistant Sec’y for Pol’y, Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014) [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf); Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) <https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02102.pdf>; Off. of the Press Sec’y, Fact Sheet: Enhancing Public Safety in the Interior of the United States (Feb. 21, 2017) <https://www.dhs.gov/news/2017/02/21/fact-sheet-enhancing-public-safety-interior-united-states>; Memorandum from Alejandro N. Mayorkas, Sec’y, Dep’t of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf’t, Guidelines for the Enforcement of Civil Immigration Law 5 (Sept. 30, 2021) <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>. Beyond the scope of this essay but important to the context, is the history of funding and enforcement at the border. *See e.g.*, Marc R. Rosenblum, Cong. Research Serv., Border Security: Immigration Enforcement Between Ports of Entry (2012). [https://ecommons.cornell.edu/bitstream/handle/1813/78139/CRS\\_Border\\_Security.pdf?sequence=1](https://ecommons.cornell.edu/bitstream/handle/1813/78139/CRS_Border_Security.pdf?sequence=1)

<sup>7</sup> Memorandum from John Morton, Assistant Sec’y, U.S. Immigr. & Customs Enf’t, to All ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens 2 (June 30, 2010) <https://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf>

<sup>8</sup> Memorandum from Jeh Charles Johnson, Sec’y, Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf’t, R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot., Leon Rodriguez, Dir., U.S. Citizenship & Immigr. Serv., Alan D. Bersin, Acting Assistant Sec’y for Pol’y, Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants 3 (Nov. 20, 2014) [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

<sup>9</sup> *Id.* at 3.

<sup>10</sup> Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) <https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02102.pdf>; Off. of the Press Sec’y, Fact Sheet: Enhancing Public Safety in the Interior of the United States (Feb. 21, 2017) <https://www.dhs.gov/news/2017/02/21/fact-sheet-enhancing-public-safety-interior-united-states>.

<sup>11</sup> Memorandum from John Kelly, Sec’y, Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf’t, Lori Scialabba, Acting Dir., U.S. Citizenship & Immigr. Servs., Joseph B. Maher, Acting Gen. Couns., Dimple Shah, Acting Assistant Sec’y for Int’l Affairs, Chip Fulghum, Acting Undersecretary for Mgmt., Enforcement of the Immigration Laws to

The Biden administration has shifted or repealed many immigration policies from the Trump administration. However, border crossers remain a priority. On September 30, 2021, DHS Secretary Alejandro Mayorkas issued a Department-wide memorandum, pinning those who recently entered or currently enter the United States without authorization as “threats to border security.”<sup>12</sup>

According to the Mayorkas Memo:

A noncitizen who poses a threat to border security is a priority for apprehension and removal. A noncitizen is a threat to border security if: (a) they are apprehended at the border or port of entry while attempting to unlawfully enter the United States; or (b) they are apprehended in the United States after unlawfully entering after November 1, 2020.<sup>13</sup>

Based on a plain reading the language of the Mayorkas Memo, subpart (b) reaches individuals and families who have resided in the United States for more than one year. Who is labeled as an enforcement priority is consequential because it makes certain individuals vulnerable to immigration enforcement and with broader impacts on their family and communities.<sup>14</sup> While the Obama and Biden administrations identified mitigating or humanitarian factors that support a choice to not take enforcement action,<sup>15</sup> the priority label is still substantial to who the government targets and how it frames its priorities.<sup>16</sup> As of this writing, the legality of the Mayorkas Memo has been challenged to different federal courts.<sup>17</sup> Prioritizing border crossers and recent entrants is problematic because it perpetuates a narrative that places blame on the individuals and families

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Serve the National Interest 2 (Feb. 20, 2017),

[https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf); see also Off. of the Press Sec’y, Fact Sheet: Enhancing Public Safety in the Interior of the United States (Feb. 21, 2017) <https://www.dhs.gov/news/2017/02/21/fact-sheet-enhancing-public-safety-interior-united-states>.

<sup>12</sup> Memorandum from Alejandro N. Mayorkas, Sec’y, Dep’t of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf’t, Guidelines for the Enforcement of Civil Immigration Law 4 (Sept. 30, 2021)

<https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> See e.g., Bill Ong Hing, *The Failure Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 SCHOLAR 437 (2013); Madison Burga and Angelina Lerma, *The Use of Prosecutorial Discretion in the Immigration Context after the 2013 ICE Directive: Families Are Still Being Torn Apart*, 42 W. St. L. Rev. 25 (2014).

<sup>15</sup> To illustrate, the Mayorkas Memo includes as mitigating factors age, long-term presence in U.S., victimization, mental health conditions, military or public service, hardship on U.S. family, rehabilitation from a previous offense, and expunged or vacated convictions.

<sup>16</sup> Beyond the scope of this essay are the challenges to the immigration enforcement structure and to the very nature of prioritization. See e.g., Hong, K. (2018-2019). 10 Reasons Why Congress Should Defund ICE’s Deportation Force. *Harbinger*, 43, 40-61; Peter L. Markowitz, *After ICE: A New Humane & Effective Immigration Enforcement Paradigm*, 55 *Wake Forest L. Rev.* 89 (2020)

[https://heinonline.org/HOL/Page?handle=hein.journals/wflr55&div=6&g\\_sent=1&casa\\_token=&collection=journal](https://heinonline.org/HOL/Page?handle=hein.journals/wflr55&div=6&g_sent=1&casa_token=&collection=journal); National Immigration Project of the National Lawyers Guild, *The Human Costs of ICE’s Enforcement Framework: Why ICE Must Prioritize People for Protection, Not Enforcement* (June 2021) [https://ninpnlg.org/PDFs/2021\\_28June\\_enforcement-report.pdf](https://ninpnlg.org/PDFs/2021_28June_enforcement-report.pdf).

<sup>17</sup> Hailey Konnath, *Biden Urges Justices To Restore Priority Deportation Memo* (July 8, 2022)

[https://www.law360.com/articles/1510026?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=articles\\_search](https://www.law360.com/articles/1510026?utm_source=rss&utm_medium=rss&utm_campaign=articles_search)

who are crossing without a closer examination of the factors and agency actors that cause unauthorized migration.

This essay challenges the choice by the U.S. government to prioritize border crossers for immigration enforcement through three lenses. First, it explains the reasons for why people enter the United States through the U.S. Mexico border, considering natural disasters, civil war, poverty, persecution, gang violence, and economic opportunity. Related to the factors that push or pull individuals to the border is the treatment of people at the border. This essay also examines the racial disparities caused by targeting border crossers, and those who have faced expulsions through an immigration policy change issued in March 2020 in the name of public health. Finally, this essay studies how congressional inaction on immigration reform has influenced immigration at the border. These three lenses raise important legal and policy questions about the legitimacy of making unauthorized border crossers a priority for enforcement. This essay recommends a reframing of the narrative “threats to border security” to one that is more aligned with legal principles, racial equity, and the social and political conditions in the United States and abroad.

## II. Why People Cross Borders

There is a rich literature examining the different push and pull factors of immigration to the United States generally and to the Southern border.<sup>18</sup> The conditions that push a person or group of persons out of their country or ones that pull people to move to another area are hard to define. One organization labels the push factors as “negative” reasons a person may leave their home—poverty, armed conflict and war to name a few reasons.<sup>19</sup> Many of these push factors are viewed as more affirmative and extend to those who are forced to leave their homes. By contrast, pull factors include better opportunities, healthcare or education.<sup>20</sup>

While some scholars use the term “forced migration,” there is no legal concept known as “forced migration.”<sup>21</sup> Both U.S. and international law recognize a narrower term “refugee” that is distinguishable from everyone else. The legal definition of a refugee includes a person who has suffered persecution or faces persecution in the future because of a specific reason: race, religion,

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<sup>18</sup> See e.g., Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457 (2020); <https://sgp.fas.org/crs/row/IF11151.pdf>; Musalo, Karen and Frydman, Lisa and Cernadas, Pablo Ceriani, *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges* (2015); Jaya Ramji-Nogales, *Migration Emergencies*, 68 *Hastings L.J.* 609 (2017); See also, National Security Council, *U.S. Strategy for Addressing the Root Causes of Migration in Central America* (July 2021) <https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf> and Lutheran Immigration and Refugee Service, *Why Do People Migrate?—The Different Causes of Immigration* (July 14, 2021) <https://www.lirs.org/causes-of-immigration/>

<sup>19</sup> *Id.*; See also, UNHCR, ‘Refugees’ and ‘Migrants’ — Frequently Asked Questions (FAQs) (Mar. 16, 2016) <https://www.unhcr.org/en-us/news/latest/2016/3/56e95c676/refugees-migrants-frequently-asked-questions-faqs.html>; See also Jaya Ramji-Nogales, *Migration Emergencies*, 68 *Hastings L.J.* 609 (2017) (citing to commonly articulated reasons for involuntary migration, among them food insecurity, environmental factors, and poverty)

<sup>20</sup> Lutheran Immigration and Refugee Service, *Why Do People Migrate?—The Different Causes of Immigration* (July 14, 2021) <https://www.lirs.org/causes-of-immigration/>.

<sup>21</sup> UNHCR, ‘Refugees’ and ‘Migrants’ — Frequently Asked Questions (FAQs) (Mar. 16, 2016) <https://www.unhcr.org/en-us/news/latest/2016/3/56e95c676/refugees-migrants-frequently-asked-questions-faqs.html>

nationality, membership in a particular social group or political opinion.<sup>22</sup> As Hiroshi Motomura and others point out, this line is increasingly hard to draw because the language of refugee law is narrower than the broad set of conditions that force individuals to migrate.<sup>23</sup> T. Alexander Aleinikoff has recently raised a question about whether the line between a forced refugee and everyone else is even sustainable, pointing to the way U.S. refugee law has evolved, complex reasons that drive migration, and the role of state sovereignty.<sup>24</sup> Jaya Ramji-Nogales has questioned whether forced migration, or what she coins as “migration emergencies,” are more predictable and based more on structural failures with the international refugee framework.<sup>25</sup> These important questions are beyond the scope of this article.

Even without a legal definition for forced migration or what some might call “involuntary” migration, the conditions of migration are important to examining the legitimacy of prioritizing border crossers for immigration enforcement. Data examining recent migration from the Northern Triangle of Central America shows U.S. Border Patrol encountered nearly 684,000 individuals at the Southern border<sup>26</sup>: 309,000 Hondurans, 279,000 Guatemalans, and 96,000 Salvadorans.<sup>27</sup> This same source notes the complexity of identifying the exact motivations, but lists “difficult socioeconomic and security conditions—exacerbated by natural disasters and poor governance” as the key factors driving migration from this region.<sup>28</sup>

During fiscal year 2014, the Customs and Border Protection (CBP) recorded arresting more than 68,000 unaccompanied children along the Southwest Border, representing a 77 percent increase from the previous fiscal year.<sup>29</sup> There were similar increases in the number of apprehensions of family units or those children who were accompanied by one or both parents.<sup>30</sup> More than half of children from El Salvador interviewed in one case study cited to crime, gang

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<sup>22</sup> Immigration and Nationality Act § 101(a)(42)(A)

<sup>23</sup> Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 *CORNELL L. REV.* 490-1 (2020).

<sup>24</sup> T. Alexander Aleinikoff, *Can Refugee Scholars Hold the Line? Why the theoretical line that separates forced migrants from other persons on the move may not be sustainable* (June 21, 2021) <https://publicseminar.org/essays/can-refugee-scholars-hold-the-line/>.

<sup>25</sup> Jaya Ramji-Nogales, *Migration Emergencies*, 68 *Hastings L.J.* 609 (2017).

<sup>26</sup> In this essay, the author will use “southern border” “Southwest border” and “U.S. Mexico border interchangeably. As applied, these terms will include the border between Mexico and Arizona, California, New Mexico and Texas.

<sup>27</sup> Peter J. Meyer, Cong. Research Serv., *Central American Migration: Root Causes and U.S. Policy* (March 31, 2022) <https://sgp.fas.org/crs/row/IF11151.pdf>

<sup>28</sup> *Id.*

<sup>29</sup> Dennis Stinchcomb & Eric Hershberg, *Unaccompanied Migrant Children from Central America: Context, Causes, and Responses* 6 (Ctr. for Latin Am. & Latino Stud., Working Paper No. 7, 2014) [https://www.researchgate.net/profile/Eric-Hershberg-2/publication/299275780\\_Unaccompanied\\_Migrant\\_Children\\_from\\_Central\\_America\\_Causes\\_Consequences\\_and\\_Responses/links/56f0110d08ae3c6534366614/Unaccompanied-Migrant-Children-from-Central-America-Causes-Consequences-and-Responses.pdf](https://www.researchgate.net/profile/Eric-Hershberg-2/publication/299275780_Unaccompanied_Migrant_Children_from_Central_America_Causes_Consequences_and_Responses/links/56f0110d08ae3c6534366614/Unaccompanied-Migrant-Children-from-Central-America-Causes-Consequences-and-Responses.pdf).

<sup>30</sup> *Id.*

threats of violence for their decision to leave home.<sup>31</sup> A meaningful number of immigrants have also died in the United States after entering the United States through the southern border.<sup>32</sup>

More recently, CBP encounters at the Southwest border have endured and expanded. In fiscal year 2021, CBP recorded more than 1.1 million encounters with single adults, nearly 480,000 encounters of individuals in a family unit, more than 146,000 unaccompanied minors or those under age 18 who arrive at a border alone, and 2,108 accompanied minors or those who arrive at a border with at least one parent.<sup>33</sup> The “encounters” capture not only apprehensions at the Southwest border but also those who are identified as “inadmissible” or ineligible for admission to the United States as well as those processed under “Title 42”, a controversial border policy implemented in March 2020 which resulted in the expulsion of thousands of individuals in the name of “public health.”<sup>34</sup> Also of controversy, was the Migrant Protection Protocols (MPP) which allowed DHS to return non-Mexican nationals who arrived at the U.S. Mexico border seeking asylum to Mexico to wait for their immigration proceedings.<sup>35</sup>

Many individuals and families who arrive at the Southwest border seek asylum under U.S. immigration law. CBP officials are required to ask specific questions to determine if an individual at the border indicates a fear of persecution or torture in their home country and in relevant cases, refer the individual to an “asylum officer” for a fuller screening.<sup>36</sup> In fiscal year 2019, CBP referred 146,060 cases to a credible fear interviews among those who were apprehended or deemed inadmissible.<sup>37</sup> The governing statute called the Immigration and Nationality Act (INA) is clear that any person, regardless of how they entered the United States or their immigration status, may apply for asylum.<sup>38</sup> Despite this clarity, access to asylum at the border has been complicated by the enduring effects of border policies such as Title 42 and MPP. For example, the government has taken the position that individuals processed under Title 42 are not subject to the immigration rules governing asylum at the border.<sup>39</sup>

#### *A. Treatment of Noncitizens At the Border*

Examining the treatment of individuals and families at the border is important to understanding the acceptability of categorizing the same as enforcement priorities. One area of (mis)treatment has been in the choice by CBP to detain those who arrive without documents for

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<sup>31</sup> *Id.* at 15 (citing Elizabeth G. Kennedy, No Childhood Here: Why Central American Children Are Fleeing Their Homes, American Immigration Council, July 2014).

<sup>32</sup> From 1995 to 2000, an estimated 225 to 370 migrants died annually in the United States after making an unauthorized northbound crossing of the U.S. Mexico border.

<sup>33</sup> U.S. Customs & Border Prot., Southwest Land Border Encounters (June 15, 2022) <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

<sup>34</sup> 42 U.S.C. § 265; Sarah Sherman-Stokes, *Public Health and the Power to Exclude: Immigrant Expulsions at the Border*, 36 Geo. Immigr. L.J. 261(2021); Casey Plach, “*Under the Guise of Public Health: The Biden Administration and Title 42*,” St. Louis Univ. Online L.J. (2021).

<sup>35</sup> American Immigration Council, The “Migrant Protection Protocols” (Jan. 7, 2022) <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>

<sup>36</sup> INA § 235(b)(1)(A)(ii); 8 CFR 208.30(b); 87 Fed. Reg. 18078 (Mar. 29, 2022)

<sup>37</sup> U.S. Customs & Border Prot., Claims of Fear (July 17, 2020) <https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear>.

<sup>38</sup> Immigration and Nationality Act § 208(a)(1)

<sup>39</sup> 85 Fed. Reg. 56424 (Sept. 11, 2020) <https://www.govinfo.gov/content/pkg/FR-2020-09-11/pdf/2020-20036.pdf>.

prolonged periods of time. By law, CBP may detain noncitizens for a short period of time, but findings from the Office of Inspector General (OIG) indicate that detentions have lasted much longer and in substandard conditions. After making “unannounced inspections” in 2019, the OIG issued a report and found that “Many of the Border Patrol stations we visited were overcrowded and held detainees for longer than 72 hours.”<sup>40</sup> On-site medical staff interviewed during the inspection indicated feeling overwhelmed by the overcrowded facilities and the health and safety consequences, such as the inability to treat contagious illnesses.<sup>41</sup> The conditions were so severe in five facilities that OIG issued a subsequent “alert” for five border patrol facilities in El Paso and the Rio Grande Valley, where they found “serious overcrowding” of unaccompanied minors, family units and populations labeled as “at risk” as well as 2,669 children held in CBP custody for longer than what is permitted under law.<sup>42</sup> OIG also found that in some of these facilities, children had little or no access to hot meals, showers, or a change of clothes.<sup>43</sup> This same report found similar problems with overcrowding exacerbated by additional health and safety issues among single adults at these facilities.<sup>44</sup>

Beyond the OIG reports documenting conditions at the border are the administrative complaints that have been filed with the Department of Homeland Security and litigation.<sup>45</sup> Summarizing on mother’s experience in their complaint of medical negligence by CBP officers, the American Immigration Council and the American Immigration Lawyers Association noted: “Beatriz fled Honduras this summer with her nine-year-old daughter, who was diagnosed prenatally with cysts that prevented one of her kidneys from working. The child’s doctor had instructed Beatriz to change her daughter’s underwear and bathe her carefully every day due to her high risk for urinary tract infections. In July 2019, the family was detained and transferred to a CBP facility. When her child vomited twice, an immigration official told Beatriz that “they only took children to a medical provider if they had fever or had vomited three times.” Despite multiple requests to officials and a medical provider, Beatriz’s daughter went five days without a shower or a change of underwear. The child complained of genital itching and burning during urination.”<sup>46</sup> Finally, reports and documents obtained by the House Oversight Committee reveal several instances of misconduct by CBP.<sup>47</sup>

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<sup>40</sup> Off. of Inspector Gen. Dep’t of Homeland Sec., Capping Report: CBP Struggled to Provide Adequate Detention Conditions During 2019 Migrant Surge 8 (June 12, 2020) <https://www.oig.dhs.gov/sites/default/files/assets/2020-06/OIG-20-38-Jun20.pdf>.

<sup>41</sup> *Id.* at 16-17.

<sup>42</sup> Off. of Inspector Gen. Dep’t of Homeland Sec., Management Alert—DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley 5 (July 2, 2019) <https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19.pdf>.

<sup>43</sup> *Id.* at 6.

<sup>44</sup> *Id.* at 6-7.

<sup>45</sup> See e.g., American Immigration Council, *Firsthand Accounts of Medical Negligence in Customs and Border Protection Facilities* (Sept. 4, 2019) <https://www.americanimmigrationcouncil.org/advocacy/medical-negligence-customs-and-border-protection-facilities>.

<sup>46</sup> *Id.*

<sup>47</sup> Press Release, House Committee on Oversight and Reform, Committee Report Reveals CBP Reduced Discipline for Dozens of Agents and Allowed Them to Continue Working with Migrants Despite Violent and Offensive Facebook Posts (Oct. 25, 2021) <https://oversight.house.gov/news/press-releases/committee-report-reveals-cbp-reduced-discipline-for-dozens-of-agents-and-allowed>.

There have also been reports of mistreatment and danger for those noncitizens subject to MPP. Individuals who were sent to Mexico under this program faced dangerous conditions and insecurity and were disadvantaged in their immigration proceedings because of limitations on access to counsel.<sup>48</sup> More than 70,000 noncitizens were returned to Mexico under the MPP.<sup>49</sup> On June 30, 2022, the Supreme Court ruled that the Biden administration did not violate the INA in deciding to terminate the program.<sup>50</sup> Though this long awaited ruling is a sound victory for immigration and refugee advocates and asylum seekers, the harm this program caused has been profound.<sup>51</sup> One report discusses the enduring physical and psychological implications of asylum seekers placed under MPP.<sup>52</sup> Another report documents the more than 1,500 public reports of murder, rape, torture and other violent acts stemming from MPP.<sup>53</sup>

The foregoing is but a snapshot of a much larger literature that has examined the causes for migration and the treatment of migrants at the border.<sup>54</sup> But it does raise concern about the choice by DHS to treat those who arrive at a border as priorities for enforcement. When Congress has explicitly spoken and named the right for anyone to apply for asylum regardless of their entry, what are the countereffects of taking enforcement action those who may enter without papers because of fear? When the data shows that many factors for migration are tied to poverty, violence or harm, what are the consequences of apprehending the same? What are the implications of taking enforcement action against children and adults who are held in conditions that compromise their health and safety and exceed what is permitted lawfully? How should the government respond when noncitizens are impacted by border policies that are legally or morally consequential? These important questions underscore the problems with categorically labeling border crossers as an enforcement priority without regard to the context of how and why they entered the United States or the conditions after entry.

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Biden v. Texas*, No. 21-954, 2022 U.S. LEXIS 3269 (June 30, 2022); *See also*, Shoba Sivaprasad Wadhia, *Court Allows Administration to End “Remain in Mexico”*, *The Regulatory Review* (July 13, 2022)

<https://www.theregreview.org/2022/07/13/wadhia-scotus-remain-in-mexico/>

<sup>51</sup> *See*, Shoba Sivaprasad Wadhia, *Court Allows Administration to End “Remain in Mexico”*, *The Regulatory Review* (July 13, 2022) <https://www.theregreview.org/2022/07/13/wadhia-scotus-remain-in-mexico/>; *See e.g.*, Human Rights First, *Forced Returns to Mexico: At Least 1,544 Publicly Reported Cases of Murder, Rape, Torture, Kidnapping & Other Violent Assaults* (Feb. 19, 2021) <https://www.humanrightsfirst.org/campaign/remain-mexico>.

<sup>52</sup> Madeleine C. Silverstein, Rebecca F.P. Long, Elizabeth Burner, Parveen Parmar, and Todd W. Schneberk, *Continued Trauma: A Thematic Analysis of the Asylum-Seeking Experience Under the Migrant Protection Protocols*, *Nat. Libr. Of Med.*, (April 2021) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8175263/>

<sup>53</sup> Human Rights First, *Forced Returns to Mexico: At Least 1,544 Publicly Reported Cases of Murder, Rape, Torture, Kidnapping & Other Violent Assaults* (Feb. 19, 2021) <https://www.humanrightsfirst.org/campaign/remain-mexico>

<sup>54</sup> Justice for Immigrants, *Root Causes of Migration* (Feb. 4, 2017) <https://justiceforimmigrants.org/what-we-are-working-on/immigration/root-causes-of-migration/>; Francesco Castelli, *Drivers of migration: why do people move?*, 25 *J Travel Med.* 1 (2018); Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 *Cornell L. Rev.* 457 (2020); National Security Council, *U.S. Strategy for Addressing the Root Causes of Migration Central America* (July 2021) <https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf>.



### III. Racial Disparities

Race is another factor crucial to examine in reviewing the merits of targeting border crossers. There is a long history of racism as it relates to deciding who to stop and question at the southern border. One report illustrates the history of the racialized U.S. Border Patrol, the ways immigration laws have since targeted Mexicans, as well as the “repeated complaints of racial profiling against Latino, Indigenous, and Black residents of the border region at internal Border Patrol checkpoints.”<sup>55</sup> One federal court has also chronicled the ways in which a federal statute known as 1326, disparately impacts Latinx and Mexicans, and concluded that the statute was motivated by racial animus and discriminatory intent.<sup>56</sup> When comparing the unlawful reentry statute passed by Congress in 1929 with its recodification in 1952, the court noted “Congress’ silence about the prior racist iterations of this bill coupled with its decision to expand the grounds for deportation and carceral punishment, despite its knowledge of the disparate impact of this provision on Mexican and Latinx people, is some evidence that racial animus was a motivating factor.”<sup>57</sup> While 1326 is a statute that criminalized reentry at the border, there are also civil penalties, including detention and deportation. In fact, the choice to target those who crossed the border for immigration enforcement only underscores how DHS would more likely arrest, detain and deport this same population.

In March 2020, the Trump administration announced a border policy known as “Title 42” which was introduced in the previous section, resulted in the expulsion of thousands of individuals and families to Mexico or to their home countries without being processed under U.S. immigration law for protection. Title 42 was crafted as a public health measure and relied on a Public Health statute, but leading public health officials including the nation’s leading infectious disease doctor have questioned the public health value.<sup>58</sup> Title 42 has also had the countereffect of increasing unauthorized border crossings according to American Immigration Council: “That is because, under Title 42, individuals who are expelled to Mexico within hours after being apprehended at the border can simply try again a second or third time in hopes of getting through. Some individuals have made dozens of failed attempts to cross the border and been turned back under Title 42 each time. This increase in apprehensions has been seen most among single adults who are not seeking asylum.”<sup>59</sup>

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<sup>55</sup> The Legacy of Racism within the U.S. Border Patrol (AIC February 10, 2021).

<sup>56</sup> *United States v. Carrillo-Lopez*, Case No. 20-cr-00026-MMD-WGC, 2021 WL 3667330, at 24 (D. Nev. Aug. 18, 2021).

<sup>57</sup> *Id.* at 15.

<sup>58</sup> Human Rights First, “*Illegal and Inhumane*”: Biden Administration Continues Embrace of Trump Title 42 Policy as Attacks on People Seeking Refuge Mount (Oct. 2021) <https://www.humanrightsfirst.org/sites/default/files/IllegalandInhumane.pdf>; Human Rights First, *Ten Reasons to End the Title 42 Policy* (Mar. 11, 2022) <https://www.humanrightsfirst.org/resource/ten-reasons-end-title-42-policy>; Alison Durkee, *Fauci Says Immigrants Are ‘Absolutely Not’ Driving Covid-19 Surge: ‘Let’s Face Reality Here’*, Forbes (Oct. 3, 2021) <https://www.forbes.com/sites/alisondurkee/2021/10/03/fauci-says-immigrants-are-absolutely-not-driving-covid-19-surge-lets-face-reality-here/?sh=4cc66c6173d1>; See also, Casey Plach, “*Under the Guise of Public Health: The Biden Administration and Title 42*,” St. Louis Univ. Online L.J. (2021).

<sup>59</sup> American Immigration Council, Fact Sheet: A Guide to Title 42 Expulsions at the Border (Oct. 15, 2021) <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>

The racial disparities caused by Title 42 are also evident as many of those impacted have been from African and Caribbean countries.<sup>60</sup> Professor Sarah Sherman Stokes surfaces the intersection of public health and race and also reveals how Title 42 “effectively closing the door on asylum for anyone from Central America—and indeed on disproportionately low income Black and Brown immigrants, nearly 22,000 of them Haitian families and adults<sup>61</sup>—comes on the heels of years of immigration law and policy pushing asylum increasingly out of reach.”<sup>62</sup> The racial gap also surfaced when CBP issued a memorandum date March 11, 2022 exempting Ukrainians from Title 42.<sup>63</sup> The continued defense of Title 42 by the Biden administration was surprising to immigration and refugee advocates, and perpetuated litigation.<sup>64</sup> While the CDC announced the Title 42 would be terminated in May 2022,<sup>65</sup> this decision perpetuated more legal challenges.<sup>66</sup> Right when Title 42 was set to be terminated, a federal district court issued a preliminary injunction blocking its termination.<sup>67</sup>

The MPP has also been labeled as a racist immigration policy by the Southern Poverty Law Center<sup>68</sup> and impacted many different nationalities, many from Latin, Central and South America.<sup>69</sup> While the MPP was a facially neutral, the choice to target non-Mexicans arriving at

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<sup>60</sup> Human Rights Watch, *Q&A: US Title 42 Policy to Expel Migrants at the Border* (Apr. 8, 2021) <https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border>. Over 20,000 migrants from Haiti have been expelled under Title 42. African Communities Together, Black Immigrants’ Rights Organizations Joint Statement on Title 42 Termination (Apr. 5, 2022) <https://africans.us/title-42-termination%2%A0>

<sup>61</sup> Human Rights First, *Extending Title 42 Would Escalate Dangers, Exacerbate Disorder, and Magnify Discrimination* (April 27, 2022) <https://www.humanrightsfirst.org/resource/extending-title-42-would-escalate-dangers-exacerbate-disorder-and-magnify-discrimination#:~:text=DHS%20continues%20to%20use%20Title,well%20as%20many%20LGBTQ%20people>.

<sup>62</sup> Public Health and the Power to Exclude: Immigrant Expulsions at the Border (Fall 2021); *See also*, Black Alliance for Just Immigration, *Open Until We’re Free: Letter to President Biden* <https://baji.org/our-work/statements/untill-were-free-open-letter-to-president-biden/> (calling for a rescission of Title 42 because of the disproportionate expulsion of Black immigrants)

<sup>63</sup> Memorandum from Matthew S. Davies, Exec. Dir., U.S. Customs & Border Prot., to Dir. Field Operations, Off. of Field Operations, Title 42 Exceptions for Ukrainian Nationals (Mar. 11, 2022) <https://www.aila.org/infonet/cbp-issues-memo-on-title-42-exceptions>.

<sup>64</sup> *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (U.S. D.C. Cir. 2022); *See also*, ACLU, *Huisha-Huisha v. Mayorkas* <https://www.aclu.org/cases/huisha-huisha-v-mayorkas>; American Immigration Council, *A Guide to Title 42 Expulsions at the Border* (Oct. 15, 2021) <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>

<sup>65</sup> Dep’t of Homeland Sec., *FACT SHEET: DHS Preparations for a Potential Increase in Migration* (March 30, 2022) <https://www.dhs.gov/news/2022/03/30/fact-sheet-dhs-preparations-potential-increase-migration>.

<sup>66</sup> *Louisiana v. Ctrs. for Disease Control & Prevention*, No. 6:22-CV-00885, 2022 U.S. Dist. LEXIS 91296 (W.D. La. May 20, 2022). *See also*, Just Security, *Title 42 is a Failure Yet Still Dominates U.S. Border Policy* (June 24, 2022) <https://www.justsecurity.org/82080/title-42-is-a-failure-yet-still-dominates-u-s-border-policy/>.

<sup>67</sup> *Louisiana v. Ctrs. for Disease Control & Prevention*, No. 6:22-CV-00885, 2022 U.S. Dist. LEXIS 91296 (W.D. La. May 20, 2022) <https://www.bloomberglaw.com/public/desktop/document/LouisianaetalvCentersforDiseaseControlPreventionetalDocketNo622cv/7?1653080541>

<sup>68</sup> Liz Vinson, *‘Remain in Mexico’: Migrants still waiting in peril as ‘cruel and racist policy’ continues after three years*, S. Poverty Law Ctr., (Jan. 28, 2022) <https://www.splcenter.org/news/2022/01/28/remain-mexico-migrants-still-waiting-peril>

<sup>69</sup> American Immigration Council, *The “Migrant Protection Protocols”* (Jan. 7, 2022) <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols#:~:text=These%20individuals%20were%20predominantly%20of,Biden%20promised%20to%20end%20MPP>.

the southern border necessarily means that asylum seekers from neighboring nations have been impacted differently and distinctly from those arriving through other means such as airports of entry.

Immigration policies should be crafted in ways that do not lead to discriminatory outcomes. Recent guidance from DHS affirms this principle: “We must ensure that enforcement actions are not discriminatory and do not lead to inequitable outcomes.”<sup>70</sup> Prioritizing those crossing the border for immigration enforcement has the potential to create the same discriminatory outcomes we have seen with the history of the Border Patrol, 1326, and Title 42 and is yet a further reason for rejecting “threats to border security” as an immigration enforcement priority.

#### IV. Congressional Inaction

Congressional inaction refers to the decades attempts to enact legislative reforms to U.S. immigration law. The INA has not been updated since 1990, more than thirty years ago. Most amendments made to the INA since that time have been more punitive, increasing the scope of immigration enforcement and the actions that can result in an immigration violation.<sup>71</sup> While some members of Congress introduced legislation in 2006, 2007, and 2013,<sup>72</sup> there have been insufficient votes to pass such legislation. Most immigration reform legislation has included legal pathways for those entering the United States to reunite with family members or to fill economic needs, also known as “future flow.”<sup>73</sup> Notably, the immigration bill sent by the Biden administration to Congress in 2021 lacked this component.<sup>74</sup>

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<sup>70</sup> Memorandum from Alejandro N. Mayorkas, Sec’y, Dep’t of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf’t, Guidelines for the Enforcement of Civil Immigration Law 5 (Sept. 30, 2021) <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

<sup>71</sup> See e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (with the goal of deterring “illegal immigration,” this Act expanded the grounds of removability to concern essentially all noncitizens in the U.S. and significantly reduced due process), The REAL ID Act of 2005 (imposing higher burdens on noncitizens seeking asylum and relief in immigration court), USA Patriot Act of 2001 (following the September 11 attacks, this Act was enacted to tighten national security and allowed for mandatory detention of noncitizens).

<sup>72</sup> Comprehensive Immigration Reform Act of 2006, The Comprehensive Immigration Reform Act of 2007, Border Security, Economic Opportunity, and Immigration Modernization Act of 2013.

<sup>73</sup> See e.g., American Immigration Council, Future Flow: Repairing Our Broken Immigration System (Feb. 1, 2010) <https://www.americanimmigrationcouncil.org/research/future-flow-repairing-our-broken-immigration-system>; National Immigration Forum, Language Learning for a Global Society <https://immigrationforum.org/article/forum-statement-record-hearing-future-flow/>; Nicole Narea, *Immigrants Could Fix the U.S. Labor Shortage*, Vox (Oct. 26, 2021) <https://www.vox.com/business-and-finance/2021/10/26/22733082/labor-shortage-inflation-immigration-foreign-workers>; Donald Kerwin & Robert Warren, US Foreign-Born Workers in the Global Pandemic: Essential and Marginalized, 8 J. ON MIGRATION & HUM. SEC. 282 (2020) <https://journals.sagepub.com/doi/pdf/10.1177/2331502420952752>

<sup>74</sup> U.S. Citizenship Act, H.R. 1177, 117<sup>th</sup> Cong. (2021); The White House, Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System (Jan. 20, 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/>; See also, Ronald Brownstein, *On Immigration, Biden Seeks a New Approach to an Old Deadlock*, CNN Politics (Jan. 26, 2021) <https://www.cnn.com/2021/01/26/politics/biden-immigration-strategy/index.html> (“Also different: While Bush and Obama pursued the “three-legged stool” of legalization for the undocumented (a Democratic priority), guaranteeing future flows of temporary workers (key for business) and tougher enforcement (a Republican emphasis), the plan Biden released offers relatively little on the latter.”)

Remarkably, Congress has not created new channels for future immigration despite these pull factors. Economists have also argued how immigration can help to fill the current labor shortage in the United States. According to one source: “The irony is clear; if there was any time in the modern history of the United States to promote a flexibilization of its migration policies, it is now. It is the most efficient and easiest way to offer a smart solution to the unprecedented tightness in U.S. labor markets.”<sup>75</sup> Beyond the scope of this essay but also relevant are ways the aging population in the United States increase the demand for immigrant labor<sup>76</sup> as well as how immigrant labor is crucial for the caregiving of the aging population in the United States.<sup>77</sup> Importantly, pathways at the border would necessarily shrink the number of individuals and families arriving at the border without documentation, and also help to fill labor shortages.

## V. Conclusion

DHS should eliminate the border security category from its enforcement priorities. Removing this category has the potential to reduce racial disparities in immigration enforcement and permit qualifying asylum seekers to seek protection under U.S. immigration law. Eliminating border crossers as a priority would also acknowledge the realities about why people enter the United States; how people are treated at the border; and the importance of immigration reform to fill labor needs and reunite families. Further, it will align with the broader principles of the Biden administration to establish a humane immigration system and to address the root causes of migration.<sup>78</sup>

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<sup>75</sup> Dany Bahar, *President Biden, tear down those walls and let immigrants take jobs in high demand*, Brookings, (Feb 24, 2022) <https://www.brookings.edu/blog/up-front/2022/02/24/president-biden-tear-down-those-walls-and-let-immigrants-take-jobs-in-high-demand/>.

<sup>76</sup> See e.g., Richard Jackson, *The Vital Role of Immigration in an Aging Population*, The Concord Coalition (Dec. 8, 2021) <https://www.concordcoalition.org/special-publication/vital-role-immigration-aging-america>; Arloc Sherman, Danilo Trisi, Chad Stone, Shelby Gonzales & Sharon Parrott, *Immigrants Contribute Greatly to U.S. Economy, Despite Administration’s “Public Charge” Rule Rationale*, Center on Budget and Policy Priorities (Aug. 15, 2019) <https://www.cbpp.org/research/poverty-and-inequality/immigrants-contribute-greatly-to-us-economy-despite-administrations>

<sup>77</sup> See e.g., Lindsay Lowell, Susan Martin, & Robyn Stone, *Ageing and Care Giving in the United States: Policy Contexts and the Immigrant Workforce*, J OF POPULATION AGING (2010); Susan Martin, B. Lindsay Lowell, Elzbieta M. Gozdzia, Micah Bump, & Mary E. Breeding, *The Role of Migrant Care Workers in Aging Societies: Report on Research Findings in the United States*, Institute for the Study of Int’l Migration (Dec 2009) [https://www.ltsscenter.org/resource-library/Role of Migrant Care Workers in Aging Societies.pdf](https://www.ltsscenter.org/resource-library/Role%20of%20Migrant%20Care%20Workers%20in%20Aging%20Societies.pdf); Kristin Butcher, Kelsey Moran, & Tara Watson, *Immigration and the care of America’s older population*, Vox EU (Feb. 22, 2022) <https://voxeu.org/article/immigration-and-care-america-s-older-population>.

<sup>78</sup> Biden Harris, *The Biden Plan for Securing Our Values As A Nation of Immigrants* <https://joebiden.com/immigration/>; National Security Council, *U.S. Strategy for Addressing the Root Causes of Migration in Central America* (July 2021) <https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf>.