

**REPORT BY THE IMMIGRATION AND NATIONALITY LAW COMMITTEE**

**RESTORING CIVILITY, DUE PROCESS, AND FUNCTIONALITY  
TO THE UNITED STATES IMMIGRATION SYSTEM:  
RECOMMENDATIONS RESPECTFULLY SUBMITTED TO  
THE BIDEN-HARRIS ADMINISTRATION**

**I. INTRODUCTION**

The Immigration and Nationality Law Committee of the New York City Bar Association (the “Committee”) respectfully submits the following recommendations to the Biden-Harris Administration, in the hope of addressing the damage wrought by the last four years of unjust and xenophobic attacks against the immigration system, the lawyers who practice in this area of law, and especially against immigrant communities. Our Committee consists of immigration attorneys from the public, private, and government sectors; big and small law firm practitioners; academics, coalition leaders, and judges. Our expertise ranges from administrative agencies and tribunals on the state and federal levels, to litigation before international tribunals.

Members of the committee have firsthand experience with the chaos that has become our immigration system and with the constant advocacy required to combat it. As a Committee, we wholeheartedly agree with the vision stated in the Biden campaign website, to wit, that “[t]he United States deserves an immigration policy that reflects our highest values as a nation,” part of which can be implemented through changes at the executive level. We applaud the Biden-Harris Administration’s demonstrated commitment to addressing immigration reform from Day 1 through executive orders signed on January 20<sup>th</sup>—in particular, reversing the “Muslim Ban,” ending border wall construction, and recommitting to the Deferred Action for Childhood Arrivals (DACA) program—as well as the U.S. Department of Homeland Security policy memorandum issued that same day calling for a 100-day moratorium on deportations, directing that DHS leadership conduct an internal review of policies and practices concerning immigration enforcement and, in the interim, returning to the pre-Trump era enforcement priorities of national security, border security, and public safety.<sup>1</sup> We also understand that Comprehensive Immigration

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<sup>1</sup> We were also heartened by the additional executive orders signed on February 2<sup>nd</sup> calling, inter alia, for the formation of a task force to reunite migrant families separated at the southern border and for an examination of the

***\*An overview of the recommendations found in this report can be found here: <http://bit.ly/3pcGwrw>.***

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

Reform requires congressional action. As such, we urge the Biden-Harris Administration to push for legislative reform that is fair, humane, and purposeful, and that keeps at its core, respect and dignity for all immigrants.

Our recommendations come in two parts. First, we briefly discuss some of the attacks on immigrants, asylum-seekers, and immigration law and practice that we believe the Biden-Harris Administration can remedy without much controversy. The latter part of this memo will focus on four substantive recommendations about which our Committee will provide more details.

## **II. EXECUTIVE SUMMARY**

Over the last four years, our Committee has written more reports, letters and comments than ever before, opposing harmful, abrupt changes to our immigration system imposed by the Trump Administration. Similarly, immigrant communities and the advocates who work with them have been forced to stand in constant vigilance of the seemingly endless onslaught of drastic changes to immigration law, policy and procedure. Such changes have taken the form of Notices of Proposed Rulemaking, with progressively less notice or time for commenting, hostile Executive Orders and Presidential Proclamations, and misguided Attorney General (AG) and Board of Immigration Appeals (BIA) precedential decisions. According to an article from The Hill, the Trump Administration implemented “900 federal immigration acts and policies that have made it nearly impossible for asylum seekers to receive humanitarian protection. It is much harder for families to reunify, for people to become citizens, and for businesses to hire foreign workers.”<sup>2</sup>

Your administration will no doubt receive countless recommendations about the myriad unwarranted changes to immigration law over the past four years. Before providing substantive recommendations on achieving universal representation in immigration court, addressing the harms caused by family separation, and undoing the over criminalization of our immigration system, our Committee recommends that the Biden-Harris administration take the following steps to swiftly address some of the more obvious affronts.

- Ban the Use of Detention for Immigrant Children and Families
- Lift All Travel and Immigrant and Non-immigrant Visa Entry bans, including Travel Bans purportedly for COVID prevention, but clearly intended to further curtail immigration
- Rescind New Regulations, including the DHS and DOS Public Charge Rules, the DHS and DOJ Rules Limiting Asylum and Employment Authorization, and EOIR re-organization
- Rescind All Regulations Not Yet Effective
- Restore Refugee Numbers

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prior administration’s program requiring asylum seekers to remain in Mexico while their claims were being processed.

<sup>2</sup> Gregory Chen, “How America’s Immigration System Can Work Again,” The Hill, (Nov. 11, 2020) <https://thehill.com/opinion/immigration/525492-how-americas-immigration-system-can-work-again>. (All sites last visited Feb. 5, 2021).

### III. DETAILED RECOMMENDATIONS

#### A. Addressing the Harm Caused by Family Separation

The Trump Administration intentionally separated upwards of 4,300 children from their parents to deter families from migrating to seek asylum or other protection. Some of the children separated from parents were under a year old and non-verbal.<sup>3</sup> The separations came to public attention most visibly while the administration’s “Zero Tolerance” policy was in effect during May and June of 2018, but the administration had begun separating families in a pilot program in 2017. Throughout its implementation, this policy was marked by interagency communication failures, deliberate obfuscation of information, and a disregard for the humanity and vulnerability of the impacted children and parents. Despite court orders and public condemnation, hundreds of these children remain separated from their parents.<sup>4</sup>

The damage from family separation has yet to be fully and accurately measured, quantitatively and qualitatively. A count of forcibly separated families has emerged slowly and in piecemeal fashion, partly through litigation<sup>5</sup> and reports of inspectors general, with estimates fluctuating as new data has emerged.<sup>6</sup> In qualitative terms, medical and mental health professionals have continued to assess the psychological, psychosomatic, behavioral, and developmental consequences for the affected children. As explained by the American Academy of Pediatrics, “highly stressful experiences, like family separation, can cause irreparable harm, disrupting a child’s brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious stress—known as toxic stress—can carry lifelong consequences for children.”<sup>7</sup>

The City Bar has closely tracked and publicly commented on the family separation crisis. In a July 2018 letter to the Trump Administration, the City Bar called on the Department of Justice and Department of Homeland Security to rescind their respective policies authorizing family separation and begin the process of repairing the resulting harms.<sup>8</sup> The task of assessing the full scope of the damage, and of providing redress to the affected families, will fall to the Biden-Harris Administration. How can families, broken apart pursuant to this discredited policy, be made whole?

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<sup>3</sup> Committee on the Judiciary, United States House of Representatives, Majority Staff Report, “The Trump Administration’s Family Separation Policy: Trauma, Destruction, and Chaos” (October 2020) at page 10.

<sup>4</sup> Caitlin Dickerson, “Parents of 545 Children Separated at The Border Cannot Be Found,” New York Times (October 21, 2020).

<sup>5</sup> *M.M.M. v. Sessions*, Case No. 3:18-cv-1832-DMS (S.D. Cal.); *M.M.M. v. Sessions*, Case No. 1:18-cv-1835-PLF (D.D.C.); *Ms. L. v. ICE*, Case No. 3:18-cv-428-DMS (S.D. Cal.); *Dora v. Sessions*, Case No. 18-cv-1938 (D.D.C.).

<sup>6</sup> See, e.g., Department of Health and Human Services, Office of the Inspector General, Separated Children Placed in Office of Refugee Resettlement Care (Jan. 2019) (noting “The total number of children separated from a parent or guardian by immigration authorities is unknown.”).

<sup>7</sup> American Academy of Pediatrics, Statement Opposing Separation of Children and Parents at the Border (May 8, 2018), <https://docs.house.gov/meetings/IF/IF14/20180719/108572/HHRG-115-IF14-20180719-SD004.pdf>.

<sup>8</sup> New York City Bar Association, Committee on Immigration and Nationality Law, Criminal Prosecution, “Separation and Detention of Families Seeking Asylum”, (July 6, 2018), [https://s3.amazonaws.com/documents.nycbar.org/files/2018407-Family\\_Separation.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/2018407-Family_Separation.pdf).

We applaud the Biden-Harris Administration's decision to appoint an interagency taskforce to reunify separated families. We also urge that the task force address, through a holistic approach, the harms perpetrated against separated families, and realize the obligation of our government to not only reunite parents and children who were separated at our borders, but also seek to repair the harm done to them.

The City Bar accordingly urges the Biden-Harris Administration to empower the task force to: 1) find families and reunify them in the U.S., with the ability to live in freedom, not detention, and with protection from deportation; 2) provide pathways to lawful immigration status for separated children and parents; 3) provide reparations to affected families; 4) make systemic changes to end family separation and family detention; and (5) seek accountability for separation policies and practices. The taskforce should collaborate with the Steering Committee formed during the *Ms. L. v. ICE* litigation, which has engaged in this work since 2018, and should regularly consult with other stakeholders.

### 1) *Family Reunification*

Separated family members removed from the United States should be given the opportunity to pursue reunification in the United States with children who remain here. Until now, non-governmental organizations have aided in facilitating the return of children to families remaining outside of the United States.<sup>9</sup> Forcing traumatized children to travel across borders with strangers only further exacerbates their traumatization.<sup>10</sup> The U.S. government has tools to facilitate the return of separated adults to the United States such as humanitarian parole.<sup>11</sup> Humanitarian parole is available for a variety of reasons including: in order to attend a funeral, to care for an ailing relative, to participate in civil legal proceedings, or to reunite with family in the U.S. for an urgent humanitarian reason.<sup>12</sup> There can be no more urgent humanitarian reason for parole than to reunite families who were forcibly and traumatically separated by the U.S. government.

The Department of Homeland Security should grant humanitarian parole for any separated parent who is no longer in the United States and who wishes to return to the United States to be reunited with their child. One mechanism could be applying from outside the U.S. for permission to re-enter with status in order to rejoin family members. Such a program might be patterned on the Central American Minors program,<sup>13</sup> which between 2014 and 2017 extended in-country processing to candidates for refugee status or parole. The Biden-Harris Administration should defray the costs of return transportation for any returning separated parents. The Office of Refugee Resettlement is well-situated to help facilitate such transportation, as the office regularly provides this service to refugees.

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<sup>9</sup> See e.g. Kids in Need of Defense's Family Reunification Project, <https://supportkind.org/what-we-do/international/central-america-mexico/separated-families-reunification-project/>.

<sup>10</sup> See generally PHYSICIANS FOR HUMAN RIGHTS, YOU WILL NEVER SEE YOUR CHILD AGAIN: THE PERSISTENT PSYCHOLOGICAL EFFECTS OF FAMILY SEPARATION (2020).

<sup>11</sup> See e.g., USCIS Guidance on Evidence for Certain Types of Humanitarian Parole, <https://www.uscis.gov/humanitarian/humanitarian-parole/guidance-on-evidence-for-certain-types-of-humanitarian-or-significant-public-benefit-parole-requests>.

<sup>12</sup> *Id.*

<sup>13</sup> See <https://www.uscis.gov/CAM>.

## 2) *Immediate Protections and Pathways to Legal Status*

Reunified families should be provided with immediate protections to provide security and stability as they adjust to reunification in the U.S., address trauma and other mental health needs, access services, and navigate a complex immigration system. The long-term safety and stability of the families impacted by the separation policy will require new viable pathways to permanent immigration status. Because of the varied postures and trajectories of the cases, protections for this population must entail multiple solutions, some of which are briefly described here.

Parents paroled into the U.S. for reunification should not be detained. A moratorium on executing removal orders should apply to all family members subjected to separation, and DHS and the DOJ must issue guidance on vacating removal orders as appropriate.

Moreover, the agencies must safeguard due process and ensure necessary accommodations in adjudicating requests for relief from family members reunified in the U.S. as well as those who repatriated together, who should also be given the opportunity to return for re-evaluation of their claims for relief. Families subjected to the separation policy faced many incremental challenges in seeking to establish their eligibility for asylum or other relief—challenges including but not limited to the trauma of separation, limited communication with and information about family members, prolonged detention, a paucity of legal representation, and uncertainty brought about by fluctuations in policy. Each of these affected family members deserves a reasonable opportunity to seek counsel, seek evidence, and prepare a claim for relief; guaranteeing due process may require additional measures in cases where persecution and flight were compounded by the traumas associated with separation. The task force should consider forbearance policies that will permit members of separated families a full and fair opportunity to present their claims, as well as new avenues to relief that take into account the harms suffered by these families.

Barriers to efficient claim processing should be minimized so that eligible reunified families receive a special path to permanent legal status as quickly as possible. Particularly where parents were repatriated without their children, there is reason to reexamine whether the procedures leading up to repatriation reflect fundamental fairness and the policy goals of family unity and humanitarian relief. In some cases, a failure to establish eligibility for relief may be attributable to the burdens and pressures that flowed directly from the family separation policies. Accordingly, the task force should consider supporting legislation creating additional pathways to status for those subjected to the separation policy.

## 3) *Compensation for Families Harmed by Separation*

The task force's mandate also should address financial compensation for the past and ongoing harm suffered by thousands of children and their parents, including through rapid executive action to settle Federal Tort Claims Act (FTCA) administrative cases.<sup>14</sup> A report by Physicians for Human Rights regarding separated families found “nearly everyone interviewed as exhibiting symptoms and behaviors consistent with trauma and its long-lasting effects”: being

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<sup>14</sup> See 28 U.S.C. § 2672 (2018) (“The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred...”).

confused and upset; being constantly worried; frequent crying; having sleeping difficulties; not eating well; having nightmares; being preoccupied; having severely depressed moods, overwhelming symptoms of anxiety, or physiological manifestations of panic and despair (racing heart, shortness of breath, and headaches); feeling pure agony, despair, and hopelessness; feeling emotional and mental despair; and being incredibly despondent, as well as regression in age-appropriate behaviors and loss of developmental milestones.<sup>15</sup> Sufficient efforts to heal and compensate for this damage have not been undertaken.<sup>16</sup>

The Biden-Harris Administration can begin the process of providing compensation through the settlement of FTCA cases filed by separated families, which can be accomplished without action by Congress.<sup>17</sup> The statute of limitations for FTCA claims should be categorically waived based on equitable tolling on humanitarian grounds, given that any new filings would likely be outside the statutory period.<sup>18</sup>

The Biden-Harris Administration should also explore supplemental means to compensate families. The administration could establish a redress fund and commission, and support legislation to create a Victims Compensation Fund. As one model, after the internment of U.S. citizens and residents of Japanese descent during World War II, a temporary Office of Redress Administration in the Department of Justice disbursed \$1.6 billion to more than 82,250 people, and conducted international outreach to ensure compensation reached those outside the United States.<sup>19</sup> The United States need not wait more than forty years to take action this time.

Beyond providing funds to support the healing process, reparations send a strong message to families and the world, acknowledging and apologizing for wrongs committed and announcing that the United States will not accept such injustice quietly.

#### **4) *Accountability and Building a Better System***

The taskforce should not only address the past harms of forcible family separations, it should also put in place systemic measures to ensure an end to, and accountability for, family separations.

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<sup>15</sup> “You Will Never See Your Child Again”: The Persistent Psychological Effects of Family Separation, Physicians for Human Rights (Feb. 2020), <https://phr.org/wp-content/uploads/2020/02/PHR-Report-2020-Family-Separation-Full-Report.pdf>.

<sup>16</sup> Although a court order the U.S. government to provide counseling services, many needs remain unmet. See Jacob Soboroff, Julia Ainsley & Geoff Bennett, “White House killed deal to pay for mental health care for migrant families separated at border”, NBC (Nov. 19, 2020), <https://www.nbcnews.com/politics/immigration/white-house-killed-deal-pay-mental-health-care-migrant-families-n1248158?fbclid=IwAR3P5L2P1iz05W4mNSrf7xd3JO64Jxuc5Pn2UkHA3qMcGeDYjNTEQQBccws>.

<sup>17</sup> See 28 U.S.C. § 2672 (2018).

<sup>18</sup> See 28 U.S.C. § 2401(b) (2018) (setting statute of limitations at two years or within six months of a notice of final denial of claim by the agency); *U.S. v. Wong*, 575 U.S. 402, 412 (2015) (permitting equitable tolling of FTCA claims).

<sup>19</sup> Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified at 50 app. U.S.C. § 1989); U.S. Dep’t of Just., *Ten Year Program to Compensate Japanese Americans Interned During World War II Closes Its Doors* (Feb. 19, 1999), <https://www.justice.gov/archive/opa/pr/1999/February/059cr.htm>.

The Biden-Harris Administration should support Congressional efforts to repeal provisions criminalizing “illegal entry” and “illegal reentry” (8 U.S.C §§ 1325, 1326). These provisions were the underpinning of the “Zero Tolerance” Policy in 2018, and for family separations both before and after the policy. The Department of Justice should, in the meantime, immediately exercise its prosecutorial discretion not to bring charges under 8 U.S.C §§ 1325 and 1326.

The Biden-Harris Administration should end family detention, and should replace the separation of detained families with policies that require release of families together. Humanitarian parole should be utilized to release families now in detention pending their immigration proceedings. Historically, ICE has released families together, but more recently has opted instead to present families with a choice: parents can remain detained and facing deportation while their children are released to a sponsor, or the family can stay detained together. ICE should use its legal authority and discretion to release parents and their children as family units instead of needlessly instituting family separation.

While the harms of family separation cannot be fully undone, accountability is critical to ensuring that such wrongs are never repeated. Full investigation will support public learning, inform policy changes, and build the historical record to guide future actions. The Biden-Harris Administration should establish a commission to conduct a comprehensive investigation with actionable recommendations for redress, restitution, and accountability.

Additionally, the Biden-Harris Administration should support Congress in the creation of special investigative committees, which should require officials, personnel, and contractors who, acting on behalf of any federal department, authorized or implemented family separation to publicly testify about their role in the policy. This process would ensure accountability of those who intentionally violated human rights, the law, or department policy. Additionally, the Department of Justice, Department of Homeland Security, and the Department of Health and Human Services should conduct internal investigations and issue recommendations for the accountability of actors found to be responsible for overseeing the policy and practice of family separation.

## **B. Ending the Criminalization of Immigrants**

### **1) *Challenges Under the Trump Administration***

Recent years -- and especially the past year -- have ushered in a national reckoning of the outdated and sometimes racist ways in which law enforcement and criminal legal systems function. Since at least around the late 1980s<sup>20</sup>, immigration enforcement has been part and parcel of these systems. Simply by virtue of being foreign-born, immigrants have had to endure double punishment--including civil detention subsequent to any criminal punishment, permanent separation from loved ones, and banishment from their homes--for the same conduct engaged in by U.S. citizens. Furthermore, immigration law has evolved in recent decades to increasingly remove discretion from adjudicators and, instead, create unforgiving categories that mandate draconian permanent outcomes without any regard to individual circumstances. As our country grapples with how to reform the criminal legal system that has wreaked havoc on so many communities of color, the Biden-Harris Administration must also recognize the inextricable ties

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<sup>20</sup> See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, S 7342, 1.02 Stat. 41.81, (1988) (creating ground of deportability for “aggravated felony” convictions).

between the criminal legal system and immigration enforcement and take immediate and long-term actions to remedy and prevent the innumerable and irreversible family separations that have occurred in the past decades.

## 2) *Short-Term Solutions*

There are numerous actions the new Administration can take immediately to start the process of untangling the civil immigration enforcement system from the criminal legal system. First and foremost, the Committee applauds President Biden's Executive Order issued on January 20, 2021 and the DHS memo issued the same day, rescinding former President Trump's Executive Order 13768 and the February 2017 DHS implementing memo that had prioritized for removal immigrants convicted of *any* criminal offense; *charged* with any criminal offense that had not been resolved; committed acts constituting a chargeable criminal offense; among many other vague and overly broad criteria, such as otherwise posing a risk to public safety solely in the judgment of an immigration officer.<sup>21</sup> The Committee also applauds the 100-day moratorium on removals pending a multi-agency review of policies and practices. The indiscriminate enforcement pushed by the Trump Administration promoted neither the faithful implementation of immigration laws nor actual public safety goals.

Executive Order 13768 and its subsequent actions have caused innumerable harms to noncitizens for the entirety of the Trump Administration. We have witnessed families torn apart at ICE check-ins, further criminalization of immigrants seeking safety from persecution, terrorizing ICE raids, and the re-calendaring of cases where prosecutorial discretion was previously exercised because of enormous inequities and hardship to respondents. Therefore we urge the Biden-Harris Administration to not only scrap the entire Executive Order but also to conduct a thorough review of and rescind all of its related memoranda, actions and policies, and to rethink enforcement priorities with the safety and health of our shared communities at the forefront of its consideration.

Second, the Biden-Harris Administration should rescind the immigration related conditions placed on federal law enforcement grants, such as the Byrne Justice in Action Grant (Byrne JAG) program, also enumerated by Executive Order 13768, and the concomitant guidance document issued by former Attorney General Sessions on July 25, 2017. These immigration related conditions are designed to punish "sanctuary jurisdictions" that adopt policies which prioritize public safety over civil immigration enforcement. Moreover, these conditions have been found to be unconstitutional and contradict the spirit and purpose of the Byrne JAG program as a whole.

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<sup>21</sup> See "Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities", (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-the-revision-of-civil-immigration-enforcement-policies-and-priorities/>; "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities", (Jan. 20, 2021), [https://www.dhs.gov/sites/default/files/publications/21\\_0120\\_enforcement-memo\\_signed.pdf](https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf); Former President Trump's Executive Order and the implementing memo also restored the Secure Communities program; directed ICE and CBP to expand 287(g) agreements; narrowed exercise of prosecutorial discretion; established the VOICE (Victims of Immigration Crime Engagement) office; stated that parole should not be granted for "predesignated categories;" and denied Privacy Act rights to persons who are not citizens or LPRs.



The Byrne JAG program was codified by Congress in 2006 and named after a New York City Police Officer who was killed in the line of duty<sup>22</sup>. The program is administered by the Department of Justice (DOJ) and serves to “give state and local governments more flexibility to spend money for programs that work for them rather than impose a ‘one size fits all’ solution” H.R. Rep No. 109-233 at 89 (2005), and allows grantees substantial discretion in utilizing the funds for purposes such as law enforcement, crime prevention and education, and drug treatment. 34 U.S.C. § 10152(a)(1). The State of New York has traditionally accepted awards from these funds since its inception. For the 2017-2018 fiscal year, the state received \$10 million in Byrne JAG awards to support state and local programs.

Under the Trump Administration, the DOJ imposed new unconstitutional, civil immigration enforcement related conditions upon the Byrne JAG awardees. The new conditions require all grantees to allow federal entities access to correctional facilities to question non-citizens suspected of violating immigration laws; respond to any formal request from the DHS to a correctional facility apprising the agency of the date and time of a non-citizen’s scheduled release; and comply with 8 U.S.C. § 1373 (requiring state and local governments to respond to DHS inquiries regarding the immigration status of individuals in their jurisdictions) throughout the duration of the award. Both the City and the State of New York, along with many other jurisdictions, have challenged these conditions as unconstitutional and unlawful. Numerous courts have found these immigration related conditions to be unconstitutional or unlawful as applied to states and localities.<sup>23</sup>

These new, immigration-related conditions on the Byrne JAG program have created an untenable situation for cities and states that prize building trust with immigrant communities for local public safety purposes. Numerous studies demonstrate that the community trust generated by sanctuary policies prioritizing public safety over civil immigration enforcement is more likely to reduce rather than increase crime.<sup>24</sup> The Biden-Harris Administration should rescind Executive

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<sup>22</sup> However, the origins of the program date back to the Omnibus and Crime Control and Safe Streets Act of 1968, which first created a federal grant funding scheme that is appropriated by Congress specifically for state and local law enforcement agencies.

<sup>23</sup> *See* *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) (upholding a district court’s preliminary injunction of the newly imposed conditions); *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020) (permanently enjoining immigration related conditions to the Byrne JAG awards); *see also*, *City of Philadelphia v. Attorney General of the U.S.*, 916 F.3d 276 (3rd Cir. 2019) (finding that the Attorney General exceeded his authority in imposing these immigration related conditions on the Byrne JAG awards); *accord*, *City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020). Conversely, only the Second Circuit Court of Appeals have found the imposed immigration related conditions to be lawful. *State v. Dep’t of Justice*, 951 F.3d 84, 121 (2d Cir. 2020) (vacating the district court’s injunction of the challenged conditions and finding the Attorney General statutorily authorized to implement them). The City and State of New York have appealed this decision to the Supreme Court of the United States and its petition for certiorari is docketed with the Court.

<sup>24</sup> Leslye E. Orloff, et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 *UCLA Women's L.J.* 43, 67-69 (2003) (highlighting distrust of domestic violence reporting amongst immigrant communities); Sam Torres & Ronald E. Vogel, *Pre and Post-Test Differences Between Vietnamese and Latino Residents Involved in a Community Policing Experiment*, 24 *Policing: Int'l J. Police Strat. & Mgmt.* 40, 53 (2001) (studying distrust of law enforcement amongst immigrant populations and finding that some are “less likely than the general population to report crime”); Vidales, G., Day, K.M. and Powe, M. (2009), “Police and immigration enforcement: Impacts on Latino (a) residents' perceptions of police”, *Policing: An International Journal*, Vol. 32 No. 4, pp. 631-653. <https://doi.org/10.1108/13639510911000740> (finding that Latinos are less likely to report crimes for fear of immigration enforcement); *see also*, Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 5-6 (2013); Mai Thi Nguyen & Hannah Gill, *Interior Immigration Enforcement: The Impacts of Expanding Local Law Enforcement Authority*, 53 *Urban Studies* 14-16 (Feb. 2016);

Order 13768 and the Attorney General guidance implementing these conditions in order to moot the litigation surrounding these conditions. Rescission of these immigration-related conditions on the Byrne JAG awards would restore harmony to the original purpose of the program -- to allow grantees substantial discretion in determining the best use of the funds without federal direction, supervision, or control.

Third, the Biden-Harris Administration can, and should, ensure that the detention of immigrants returns to be the exception, and not the rule. In the years since the 1996 reforms, the detention of immigrants has gone from the exception to the rule. Immigrants locked away in ICE detention include long-term green card holders and other long-term residents with extensive family ties and work histories in the United States, as well as recent arrivals fleeing civil unrest and persecution. Most immigrant detainees have no criminal records, and of those who do, all have already finished serving their sentences. Even for those with a conviction record, many have never spent even a day in criminal custody, yet, because of our draconian immigration laws, they may languish for months or years in immigration jail. Although removal proceedings are civil in nature and although the sole purpose of detention is to ensure that immigrants appear at their court hearings and comply with judges' orders, detention as carried out by ICE amounts to punitive incarceration. Other, more humane and less costly alternatives have been proven to ensure appearances at court.

Pursuant to the Administration's January 20, 2021 priorities memo, ICE should generously exercise prosecutorial discretion to release immigrants from detention. There should be a presumption of release from custody, and ICE's authority should be exercised when determining whether or not to detain an immigrant in the first instance, as well as determining whether to release those who have already been detained. Furthermore, the Biden-Harris Administration should immediately end the detention of children and close all family detention centers. Similarly, the Administration should quickly make good on its campaign promise to end DHS's reliance on for-profit prisons to house detained immigrants.<sup>25</sup> Specifically, it should defund for-profit prisons and end any contracts with private prisons and local and state jails.<sup>26</sup> The Biden-Harris Administration must signal to Congress its commitment to scaling down immigrant detention by drastically reducing ICE's detention budget in its first proposal.

Fourth, the Biden-Harris Administration should reverse many of the harmful Attorney General (AG) certified and Board of Immigration Appeals (BIA) decisions that have excessively punished immigrants with *any* criminal record and unnecessarily encroached upon state authority on criminal proceedings. The Trump Administration has been especially harmful for individuals with criminal convictions. Through executive orders, DHS regulations, and the power of the AG

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Jill T. Messing, et al., *Latinas' Perception of Law Enforcement: Fear of Deportation, Crime Reporting, and Trust in the System*, 30 *J. of Women & Soc.* 328, 330 (2015).

<sup>25</sup> See "The Biden Plan for Securing Our Values as a Nation of Immigrants," <https://joebiden.com/immigration/> ("No business should profit from the suffering of desperate people fleeing violence. Biden will ensure that facilities that temporarily house migrants seeking asylum are held to the highest standards of care and prioritize the safety and dignity of families above all").

<sup>26</sup> See Hauwa, Ahmed, "How Private Prisons Are Profiting Under the Trump Administration," (Aug. 30, 2019), <https://www.americanprogress.org/issues/democracy/reports/2019/08/30/473966/private-prisons-profit-trump-administration/> (detailing the Department of Homeland Security's contracting with private prisons to house increasingly more immigrants over the years. This has led to significant profit increases for private prisons at the expense of due process and safety conditions for immigrants).

to certify BIA decisions, it has adopted extreme policies targeting individuals with *any* criminal record. Several decisions published by the AG should be vacated, because they represent an extreme departure from prior case law, including *Matter of Reyes*, 28 I. & N. Dec. 52 (A.G. 2020); *Matter of Thomas and Thompson*, 27 I. & N. Dec. 674 (A.G. 2019); *Matter of Castillo-Perez*, 27 I. & N. Dec. 664 (A.G. 2019).<sup>27</sup> These rulings announced new analyses that are discordant with precedent, and, in *Matter of Thomas and Thompson* especially, disregard long standing constitutional norms of deference to state court orders under the Full Faith and Credit clause.

Fifth, the Biden-Harris Administration should also reverse and replace several BIA decisions concerning immigration consequences of convictions, or certify them for revision. These include: *Matter of Navarro Guadarrama*, 27 I. & N. Dec. 560 (BIA 2019) (reaffirming *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014), and asserting a stringent application of the realistic probability test);<sup>28</sup> *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847 (BIA 2016) (redefining when a theft offense is a crime involving moral turpitude (CIMT));<sup>29</sup> *Matter of Velasquez Rios*, 27 I. & N. Dec. 470 (BIA 2018) (refusing retroactive application of California Penal Code § 18.5(a), which provides that the maximum potential sentence for a California misdemeanor is 364 days rather than one year, despite § 18.5(a)'s clear language making the change retroactive);<sup>30</sup> *Matter of Cortez*, 25 I. & N. Dec. 301 (BIA 2010),<sup>31</sup> and *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382 (BIA 2018)<sup>32</sup> (immigrants are ineligible for non-LPR cancellation of removal for having a conviction under 8 U.S.C. § 1227(a)(2)(A)(i) (CIMT) irrespective of § 1227's required "admission" and temporal limitation (within 5 years of admission)).

Sixth, DHS Secretary should also rescind the final regulation establishing new and even broader categorical criminal bars to asylum.<sup>33</sup> The Immigration and Nationality Act (INA) already contains harsh criminal bars to asylum that preclude any person convicted of a "particularly serious crime," including all "aggravated felony" convictions—an extremely broad category. In *Pangea Legal Services v. DHS*, the Northern District of California issued a nationwide preliminary injunction stopping the new rule from going into effect, which the Trump Administration appealed.<sup>34</sup> We urge the Biden-Harris Administration to withdraw its challenge to the injunction

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<sup>27</sup> *Matter of Reyes*, 28 I&N Dec. 52 (A.G. 2020), <https://www.justice.gov/eoir/page/file/1299811/download>; *Matter of Thomas and Thompson*, 27 I&N Dec. 674 (A.G. 2019), <https://www.justice.gov/eoir/page/file/1213201/download>; *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019), <https://www.justice.gov/eoir/page/file/1213196/download>.

<sup>28</sup> *Matter of Navarro Guadarrama*, 27 I. & N. Dec. 560 (BIA 2019), <https://www.justice.gov/eoir/page/file/1171626/download>; *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/09/22/3815.pdf>.

<sup>29</sup> See <https://www.justice.gov/eoir/page/file/910821/download>.

<sup>30</sup> See <https://www.justice.gov/eoir/page/file/1098611/download>.

<sup>31</sup> See <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3690.pdf>.

<sup>32</sup> See <https://www.justice.gov/eoir/page/file/1085471/download>.

<sup>33</sup> See "Procedures for Asylum and Bars to Asylum Eligibility," Federal Register, (Oct. 21, 2020), <https://www.federalregister.gov/documents/2020/10/21/2020-23159/procedures-for-asylum-and-bars-to-asylum-eligibility>.

<sup>34</sup> *Pangea Legal Services v. DHS*, Case No.20-cv-07721-SI, ECF No. 69: Order Granting Plaintiffs' Motion for Temporary Restraining Order; Order to Show Cause Regarding Preliminary Injunction (N.D. Cal. Nov. 19, 2020), [https://nipnl.org/PDFs/practitioners/our\\_lit/impact\\_litigation/2020\\_19Nov\\_pangea-v-dhs-tro.pdf](https://nipnl.org/PDFs/practitioners/our_lit/impact_litigation/2020_19Nov_pangea-v-dhs-tro.pdf); see also *id.*, ECF No. 74: Order Converting TRO to Preliminary Injunction; Setting Status Conference (N.D. Cal. Nov. 24, 2020), <https://www.immigrantdefenseproject.org/wp-content/uploads/2020/10/74-Order-Converting-TRO-to-PI.pdf>.

and rescind these new and excessive bars that contravene the spirit and the text of the asylum statute.

### 3) *Long-Term Solutions*

In addition to the short-term actions discussed above, the Biden-Harris Administration must also work with Congress to enact much needed reforms to the outdated, counterproductive, and enforcement-focused provisions of the INA -- specifically, those contained in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) -- that have caused so much damage and heartache to families across the country for decades.

First, the Biden-Harris Administration should work with Congress to reform the INA to no longer mandate overly harsh and punitive outcomes, such as indefinite detention and certain deportation, that do not take into account individual circumstances. Currently, the INA requires that certain immigrants be detained without even the right to request release on bond. For instance, individuals who are deportable or inadmissible for a broad list of criminal conduct -- including the inadequately-defined crimes of “moral turpitude,” that can encompass minor offenses like petty larceny, and any drug-related offenses -- are subject to mandatory detention while they fight their immigration court case, which can take months if not years. Further, individuals with certain criminal convictions, such as a crime of moral turpitude within five years of admission or “aggravated felonies,” are mandatorily deportable with no way of fighting their immigration cases.

These outcomes are anathema to any public safety or justice rationale. First, although phrases like “moral turpitude” or “aggravated felony” imply serious criminal offenses, in reality, these terms encompass a wide range of conduct that are often so minor as to not even warrant any actual criminal punishment beyond fines or probation. For example, any exchange or sale of a controlled substance is an “aggravated felony,” which means that someone convicted of a misdemeanor sale of marijuana who serves no jail time is automatically subject to mandatory detention and deportation, resulting in permanent banishment from the country. Second, these statutorily mandated outcomes subject families and communities to enormous harms without any regard to individual circumstances. Across the country, one out of every four children has at least one immigrant parent<sup>35</sup>, and almost one out of twelve minor children share a home with an undocumented family member, often parents.<sup>36</sup> Numerous studies have shown that detention and deportations are hugely detrimental to the physical, mental, and economic well-being of these families. Yet, these provisions of the INA explicitly forbid immigration judges from taking into consideration not only the immigrant’s personal circumstances like evidence of rehabilitation but also the interests of the immigrant’s family members and community.

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<sup>35</sup> “Part of US: A Data-Driven Look at Children of Immigrants,” Urban Institute, (March 14, 2019), <https://www.urban.org/features/part-us-data-driven-look-children-immigrants>.

<sup>36</sup> A significant number of our families have immigrants members--about 12% of the nation’s population (39.4 million people) are native-born Americans with at least one immigrant parent, and about 16.7 million people in the country, 8 million of whom are citizens, have at least one undocumented family member living in the same household. *See* [https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants\\_in\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_the_united_states.pdf). Critically, 1 in 12 citizen children in the country live with at least one undocumented family member (5.9 million children in total). *See id.*

Most importantly, the mandatory nature of these detention and removal statutory provisions highlights the doubly punitive nature of the current civil immigration enforcement regime. For those immigrants who have criminal records, even for serious crimes, there is no justice rationale--be it deterrence or rehabilitation--for continuing to imprison them after they have successfully served their entire sentence or for forcibly separating them from their families and communities. This is especially true when U.S. citizens with the same records, even very serious ones, are released for good once they finish serving their sentence and often are afforded mechanisms, such as sealing or expungement, through which they can relieve themselves of the adverse effects of their records once they demonstrate rehabilitation. Yet, simply by virtue of being a non-citizen born abroad, many immigrants must live in fear of being mandatorily detained or deported even after they have successfully turned their lives around.

Second, the Biden-Harris Administration should work with Congress to reform the INA to mitigate against the outsized effects of minor criminal convictions on individuals' rights to continue living with their family and in their communities. Deportation has long been recognized as a particularly harsh penalty, resulting in the loss of "all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). We cannot continue to countenance a system that, by design, levies such a harsh penalty for minor convictions. In New York, we have made significant strides to protect our immigrant residents as much as possible through state penal law reforms such as passing the One Day to Protect New Yorkers bill and creating avenues for vacating convictions for low-level offenses like certain misdemeanors and marijuana possession offenses. However, these state and local level fixes cannot begin to adequately address all of the different ways even minor criminal records can prevent immigrants from obtaining stable immigration status or which result in deportation. Only legislative reform can mitigate the outsized effects of contact with the criminal legal system on our immigrant communities.

### **C. Legal Process Reforms**

The Trump Administration systematically undermined our immigration system through a far-reaching and multifaceted array of executive actions that include Executive Orders and Presidential Proclamations, formal rulemaking, interim final rules, Attorney General opinions, policy memoranda<sup>37</sup> and informal policy changes.<sup>38</sup> The Biden-Harris Administration should move swiftly to undo each of these actions. This section reviews the process for such reversals.

#### **1) *Executive Orders and Presidential Proclamations***

Former President Trump issued various Executive Orders and Presidential Proclamations,<sup>39</sup> which could easily be rescinded through superseding orders and proclamations,

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<sup>37</sup> USCIS NTA referral policy USCIS PM-602-0050.1 (06-28-2018); USCIS RFE and NOID policy USCIS PM-602-0163 (07-13-2018); USCIS policy regarding applying discretion, USCIS PA-2020-10 (07-15-2020).

<sup>38</sup> USCIS blank space policy, requiring "N/A" in each blank space; USCIS pencil-only policy for name and A# on the back of passport photos.

<sup>39</sup> Executive Order ("E.O.") No. 13767, Border Security and Immigration Enforcement Improvements (01-27-2017); E.O. No. 13768, Enhancing Public Safety in the Interior of the U.S. (01-27-2017); E.O. No. 13771, requiring two regulations to be rescinded for each new regulation; E.O. No. 13780 banning travel from predominantly Muslim countries (03-06-2017); Proclamation on Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry (09-24-2017 and 01-31-2020); E.O. No. 10014 and 10052, banning travel ban based on COVID (04-27-2020 and 06-25-2020); Presidential Proclamations banning travel from Europe during COVID pandemic (03-11-2020 and 03-14-2020); Presidential Proclamation on the Suspension of Entry of Immigrants Who Will

given that they are not subject to challenge under the Administrative Procedure Act (APA). President Biden should move quickly to reverse each of these.

## 2) *Final Regulations*

The Trump Administration finalized a great many harmful regulations through formal rulemaking,<sup>40</sup> after the issuance of a Notice of Proposed Rulemaking (NPRM) and completing the notice and comment process required by the APA. Many other regulations were being rushed through for finalization before the Biden-Harris Administration assumed power on January 20, 2021.<sup>41</sup> Reversing these regulations could be more complicated than reversing actions directly undertaken by Former President Trump.

Issuing a new NPRM is the safest method of overturning a prior rule, but is also the slowest, given that the Biden-Harris Administration would need to give due consideration to all comments received through a new notice and comment period.

An Interim Final Rule (IFR) is a quicker route to enacting a new regulation, but these are susceptible to challenges under the APA. See, for instance, the successful injunction against the U.S. Department of State's IFR regarding the public charge ground of inadmissibility.<sup>42</sup>

To the extent there is litigation challenging a rule, relief might be possible through the courts.<sup>43</sup> Short of a final settlement, the parties to litigation could agree to suspend enforcement of a rule for a period of time. See for instance the temporary suspension of the USCIS fee rule until the next case management conference, currently scheduled for February 5, 2021.<sup>44</sup> As a much

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Financially Burden the United States Healthcare System (10-04-2019); E.O. on Creating Schedule F In The Excepted Service (10-21-2020); E.O. limiting birthright citizenship (expected).

<sup>40</sup> DHS public charge regulations, Docket ID: USCIS-2010-0012; USCIS affidavit of support and sponsor liability regulations, 85 FR 62432, Docket ID: USCIS-2019-0023; DHS rule on employment authorization for certain aliens with final orders of removal, CIS No. 2653-19, DHS Docket No. USCIS-2019-0024; USCIS fee increase/fee waiver elimination regulations, 84 FR 62280, Docket ID USCIS-2019-0010; EOIR rule on good cause for continuances, EOIR 19-0410, Dir. Order No. 02-2021; EOIR rule on motions to reopen and reconsider, effect of departure bar, and stays of removal, EOIR Docket No. 18-0503, Dir. Order No. 01-2021; EOIR fee increase regulations, 85 FR 11866, EOIR Docket No. 18-0101, A.G. Order No. 4641-2020 (not yet final); EOIR Docket No. 18-0102, A.G. Order No. 4922-2020 (not yet final yet); EOIR asylum criminal bars regulation, EOIR Docket No. 18-0002, A.G. Order No. 4873-2020; DHS Special Immigrant Juvenile petitions final rule (not yet final); Joint DHS/DOJ Procedures for Asylum and Withholding Final Rule, Credible Fear and Reasonable Fear Interviews, 85 FR 36264 (not yet final); DOJ/EOIR Appellate Procedures and Decisional Finality in Immigration Proceedings, Administrative Closure, 85 FR 52491; Procedures for Asylum and Bars to Asylum Eligibility, 85 FR 67202; Procedures for Asylum and Withholding of Removal, Credible Fear and Reasonable Fear Review, 85 FR 36264; Asylum Application, Interview, and Employment Authorization for Applicants, 85 FR 38532.

<sup>41</sup> "Trump Policies That May Be Finalized Before Inauguration Day 2021", American Immigration Lawyers Association, AILA Doc. No. 20112338 (Jan. 21, 2021), <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/trump-policies-that-maybe-finalized-before>.

<sup>42</sup> See *Make the Road New York, et al. v. Pompeo*, 1:19-cv-11633-GBD (S.D.N.Y.), regarding DOS public charge IFR, Docket ID DOS-2019-0035.

<sup>43</sup> See, e.g., *Vangala v. USCIS*, 4:20-cv-08143-HSG (N.D. Cal.), in which USCIS agreed on December 18, 2020 to pause implementation of the policy at issue by December 24, 2020, and the parties agreed to enter into negotiations to resolve the claims.

<sup>44</sup> See *Immigrant Legal Resource Center v. Wolf*, 4:20-cv-05883 (N.D. Cal.), challenging the USCIS fee rule, 84 FR 62280, Docket ID: USCIS-2019-0010.

welcomed first step to remedying the expansive dangers of the Public Charge rule, we welcome the Biden-Harris Administration's February 2, 2021 Executive Order, giving agency heads 60 days to conduct a thorough internal review of the impact of the new Public Charge rule and to create a plan for how the President should curtail it.<sup>45</sup>

The DOJ under the Biden-Harris Administration could also withdraw its opposition to temporary restraining orders, preliminary injunctions, and permanent injunctions already issued, by simply withdrawing appeals or otherwise discontinuing adverse action in the courts. There is a risk, however, of third parties seeking to intervene in the case, pursuant to Rule 24 of the Federal Rules of Civil Procedure, to continue the fight upon seeing that the Biden-Harris Administration is contemplating laying down its arms.

The Biden-Harris Administration could opt for a mélange of these approaches, by issuing a statement of non-enforcement and issuance of a Request for Information (RFI), as a precursor to the issuance of an NPRM or settlement of litigation or some other permanent solution. If done in anticipation of a new NPRM, this approach could offer immediate, interim relief. The same is true if done in anticipation of the settlement of litigation, though as explained above, this entails the risk of third-party interveners.

To the extent Congressional action may be possible, the Congressional Review Act (CRA) allows for the adoption of special joint resolutions of disapproval of regulations. Such actions must, however, be undertaken within 60 session days after a rule is transmitted to Congress. The most recent regulatory actions by the Trump Administration may be susceptible to invalidation under the CRA.

### 3) *Pending Regulations*

The Trump Administration finalized as many new regulations as possible before leaving office.<sup>46</sup> To the extent such regulations were not yet effective by January 20, 2021, the Biden-Harris Administration should take immediate action to halt them.

Any rule that has not yet been published in the Federal Register should be withdrawn completely. Rules that have been published but are not yet effective should be postponed pending further consideration by the Biden-Harris Administration. And the Biden-Harris Administration should prohibit agencies from sending any additional regulations to the Federal Register, absent extraordinary circumstances.

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<sup>45</sup> See Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, (Feb. 02, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-restoring-faith-in-our-legal-immigration-systems-and-strengthening-integration-and-inclusion-efforts-for-new-americans/>.

<sup>46</sup> Currently, five rules are pending review at the Office of Information and Regulatory Affairs (OIRA): Joint DHS/DOJ Procedures for Asylum and Withholding Final Rule; Credible Fear and Reasonable Fear Interviews: 85 FR 36264, (06-15-20) (OIRA review completed on 11-24-20, awaiting publication of final rule); DOJ/EOIR Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure Final Rule: 85 FR 52491 (08-26-20) (OIRA review completed on 12-03-20, awaiting publication of Final Rule); EOIR Final Fee Rule 85 FR 11866 (02-28-20) (OIRA review completed on 12-3-20, awaiting publication of final rule); DOJ/EOIR Final Rule on Jurisdiction and Venue in Removal Proceedings; 72 FR 14494 (03-28-07) (received by OIRA on 12-04-20); DOJ/EOIR Proposed Rule on Procedures for Asylum and Withholding Rule; 85 FR 58692 (09-23-20) (received by OIRA on 11-24-20).

#### 4) *Curtail the Certification Power of the Attorney General*

Pursuant to INA § 103(g)(2) and 8 C.F.R. § 1003.1(h), the Attorney General has vast discretion over immigration matters, including the ability to review and certify cases to themselves for a final and binding decision. The Trump Administration excessively relied on and abused the self-certification power, with former Attorneys General Sessions and Barr and former Acting Attorney General Whitaker issuing a barrage of binding opinions that fundamentally eroded both administrative remedies and substantive legal rights.<sup>47</sup>

The use of this power can easily give rise to separation of powers concerns,<sup>48</sup> often violates the 5th Amendment Due Process Clause,<sup>49</sup> and prevents immigration judges and members of the Board of Immigration Appeals from acting independently of the Executive Branch.<sup>50</sup> Moreover, by certifying the decision to themselves, the Attorney General makes a binding and precedential decision on matters in which they lack expertise.<sup>51</sup>

The Biden-Harris Administration should re-evaluate and curtail the self-certification power of the Attorney General by entirely eliminating self-certification and permit Attorney General opinions only in response to requests by the parties; requiring any Attorney General decision to subsequently go through a notice and comment period, limiting the standard of review to only questions of law, not of facts; and appointing an Immigration Specialist Advisor to oversee that such protocols are respected.<sup>52</sup>

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<sup>47</sup> See e.g. *Matter of Castro Tum*, 27 I&N Dec. 271 (A.G. 2018) limiting administrative closure; *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) limiting continuances; *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) limiting termination; *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), denying bond hearings for individuals subject to expedited removal; *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019) good moral character; *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019), undermining immigration effect of vacatur of criminal convictions; *Matter of J-J-G-*, 27 I&N Dec. 808 (BIA 2020) exceptional and extremely unusual hardship standard; *Matter of Reyes*, 28 I&N Dec. 52 (A.G. 2020), criminal convictions; *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018) asylum; *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) limiting asylum particular social groups (PSG) based on domestic violence etc.; *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) limiting asylum PSG based on family unit; *Matter of R-A-F-*, 27 I&N Dec. 778 (A.G. 2020) Convention Against Torture; *Matter of A-M-R-C-*, 28 I&N Dec. 7 (A.G. 2020) asylum persecutor bars; *Matter of O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020), Convention Against Torture; *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020), introducing de novo review of asylum to second-guess IJ fact-finding and tightening PSG; *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020) eliminating duress exception to persecutor bar.

<sup>48</sup> See e.g. Kim Bellware, “On Immigration, Attorney General Barr is His Own Supreme Court. Judges and Lawyers Say That’s a Problem,” Wash. Post, (Mar. 5, 2020), <https://www.washingtonpost.com/immigration/2020/03/05/william-barr-certification-power/>.

<sup>49</sup> *Londoner v. Denver*, 210 U.S. 373, 385-86 (1908) (explaining what the 5th Amendment requires when handling agency adjudication). See American Bar Association, Resolution 121A, (Aug. 12-13, 2019), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/121a-annual-2019.pdf>; Bijal Shah, The Attorney General’s Disruptive Immigration Power, 102 Iowa L. Rev. 129, 136-37 (2017). See e.g. *Matter of A-B-*, 27 I&N Dec. 247, 249-50 (A.G. 2018).

<sup>50</sup> Maureen A. Sweeney, Enforcing/Protection: The Danger of Chevron in Refugee Act Cases, 1, 12 (2018).

<sup>51</sup> Alberto R. Gonzales & Patrick Glen, Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority, 101 Iowa L.Rev 841, 917 (2016).

<sup>52</sup> Alberto R. Gonzales & Patrick Glen, Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority, 101 Iowa L.Rev 841, 917 (2016).



As a crucial first step towards undoing the above referenced harms and changing the overall tone of the immigration system from one of discrimination, xenophobia, and exclusion, the Committee again applauds the Biden-Harris Administration’s February 2, 2021 Executive Order. Its title alone symbolizes a shift in our immigration system to one that embraces inclusion and integration: “Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans.” An improved tone regarding non-citizens is apparent as early as Section 1, which calls for the federal government to create policies “that promote[s] integration, inclusion, and citizenship, and [that] embrace the full participation of the newest Americans in our democracy.” We also welcome the Administration’s creation of a Domestic Policy Council to monitor the progress called for by the Executive Order and the directive to agency heads to conduct an internal review of all policies to determine if any go counter to the stated objectives, i.e., fee increase plans, and create a plan for addressing all policies within 90 days and to submit a progress report about that plan after 180 days.

#### **D. Universal Representation in Immigration Court**

The Biden-Harris Administration must restore and expand programs that ensure access to legal representation in immigration proceedings, including legal counsel for children and noncitizens in detention. The New York City Bar Association has long supported universal representation, including in immigration court, as a due process safeguard and a way to improve efficiency in complex legal proceedings. Justice cannot be carried out when toddlers are representing themselves against federal prosecutors in one of the nation’s most complicated areas of law with life-or-death consequences.

Studies have shown that immigrants in removal proceedings have a much higher chance of obtaining a successful outcome when represented by legal counsel than immigrants who are not represented. For example, a study of cases in the New York immigration courts, one of the busiest in the nation, revealed that non-detained respondents who were represented by counsel achieved a successful outcome in 74 percent of cases, defined as either relief granted or termination of their case, while those who had no representation were successful in only 13 percent of cases.

##### ***1) Challenges Under the Trump Administration***

Despite the growing consensus that representation increases efficiency and protects justice, the last four years have seen efforts to undermine access to representation, with officials even referring to counsel as “dirty immigration lawyers.”<sup>53</sup> Not only have proceedings become more remote and less transparent, the Trump Administration has actively sought to cut or curtail programs working toward the expansion of representation. For example, in defiance of Congressional direction, the Trump Administration sought to defund the Executive Office for Immigration Review’s Legal Orientation Program (“LOP”) and the Immigration Court Help Desk Program, which provide critical information and resources in detention facilities, often located in remote areas with limited access to representation. Although Congress intervened to save the program, the Trump Administration continued its attack through restructuring, changes to contracts, and proposed rulemaking. The Trump Administration also undercut representation by erecting barriers to pro bono and nonprofit representation programs. For example, limits on who

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<sup>53</sup> “Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review,” Department of Justice, Justice News, (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

can screen cases for the Board of Immigration Appeals (“BIA”) Pro Bono Project has resulted in a substantial decrease in the number of appeals cases successfully matched with pro bono counsel. In addition, the Trump Administration sought to make it more difficult to provide limited representation or for non-lawyers to provide support.

Moreover, backlogs, fee increases, changes to docket management, restrictions on prosecutorial discretion, narrowing pathways to relief, and an ever-expanding list of bureaucratic hoops that counsel must jump through mean that representation consumes more time and more resources. The strain on available resources makes it increasingly difficult for the legal community to meet the growing demand for assistance.

## **2) *Short-Term Solutions***

The Biden-Harris Administration should restore and expand the Legal Orientation Program (LOP) and the Immigration Court Help Desk Program. All individuals facing expedited removal or removal proceedings should have access to LOP services. The LOP currently only covers a fraction of detention facilities in the United States.

The Biden-Harris Administration should expand and further develop the National Qualified Representative Program, which provides representation to individuals who lack capacity to represent themselves. While the program currently extends to those with serious mental or developmental disabilities, these services should be expanded to include children, survivors of trauma, and other vulnerable groups with additional safeguards to ensure help reaches all those who need it.

The Biden-Harris Administration should reduce barriers to pro bono and nonprofit representation programs. The administration should seek to partner with non-governmental actors to expand universal representation programs and to increase screening and placement for projects such as the BIA Pro Bono Program. The administration should also promote immigration court reforms that will reduce backlogs and barriers to representation.

## **3) *Long-Term Solutions***

The Biden-Harris Administration should support efforts to establish universal representation for all respondents in removal proceedings. Because removal proceedings are considered civil, the right to counsel that protects criminal defendants does not apply. As such, although the consequences of deportation are often much more dire than incarceration or other restraints of freedom resulting from a criminal case, immigrants in removal proceedings who cannot afford private counsel must defend themselves without an attorney against a federal prosecutor from the Department of Homeland Security.

Promoting universal representation can be accomplished, even in the short term, by utilizing the broad discretion that federal agencies have in making expenditures under their general appropriations powers. A more permanent right to counsel should be established through advocacy for legislative changes that would establish such a right.

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We appreciate the opportunity to offer our recommendations to the Biden-Harris Administration to refocus and strengthen our nation's commitment to a just and humanitarian immigration system, and stand ready to assist in any way we can to bring about lasting and systemic change.

Immigration & Nationality Law Committee  
Danny Alicea, Chair

February 2021

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