

November 6, 2023

Re: Protecting Asylum in Funding Negotiations

Dear Senator:

On behalf of the American Civil Liberties Union (ACLU), we write to urge you to oppose extreme changes to the country's asylum system as part of any negotiations over emergency supplemental funding. We are extremely concerned by reports that devastating and permanent policy changes could be on the table during a Democratic administration and urge you to convey to Senate leadership and all those involved in the funding negotiations that our nation's commitment to protecting vulnerable people in need of asylum should not be a bargaining chip.



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The policies we understand to potentially be at issue include a heightened asylum standard, a return to the Trump-era Remain in Mexico program, and the mandatory detention of asylum seekers. Any of these or similar policies would threaten the lives and safety of millions of people coming to our country in search of protection—and would undermine this country's commitment to the basic value of protection. It has been proven time and time again that these punitive policies do nothing to strengthen management of the border or support receiving communities.¹ Such disastrous Trump-era policies belong in the past, not in a funding deal negotiated by an Administration and Senate avowedly committed to protecting human rights and human dignity.

Some of the floated changes to asylum law would make it much harder for people seeking asylum to establish that they have a credible fear of persecution. The current standard was established decades ago by Congress in recognition of the fact that people arriving at the border have often fled immediate danger and are traumatized, overwhelmed, and unable to convey their asylum claim fully in the initial rushed interviews with border agents. When this standard was established as a compromise in 1996, Congress recognized that basic fairness and our non-refoulement obligations require that we provide people with a real opportunity to seek

¹ See Emily Ryo, *The unintended consequences of US immigration enforcement policies*, 118 PNAS 21 (2021), <https://www.pnas.org/doi/pdf/10.1073/pnas.2103000118>; Tom K. Wong, Micah Farver, Sevin Sagnic and Hyangseon Ahn, UC San Diego US Immigration Policy Center, *Deterrence, Displacement, and Death: The Impact of the Border Wall on Undocumented Immigration*, (2019) <https://usipc.ucsd.edu/publications/usipc-working-paper-4.pdf>; Tal Kopan, CNN, "Exclusive: Trump admin thought family separations would deter immigrants. They haven't," June 18, 2018, <https://www.cnn.com/2018/06/18/politics/family-separation-deterrence-dhs/index.html>; Tom K. Wong, Center for American Progress, *Do Family Separation and Detention Deter Immigration?* (2018), <https://www.americanprogress.org/article/family-separation-detention-deter-immigration/>; Jesse Franzblau, National Immigrant Justice Center, "Five Ways That Immigration Prosecutions Are Ineffective And Deadly," <https://immigrantjustice.org/staff/blog/five-ways-immigration-prosecutions-are-ineffective-and-deadly>. See also Tom K. Wong, Gabriel De Roche and Jesus Rojas Venzor, *The Washington Post*, "The migrant 'surge' at the U.S. southern border is actually a predictable pattern," March 21, 2023, <https://www.washingtonpost.com/politics/2021/03/23/theres-no-migrant-surge-us-southern-border-heres-data/>.



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asylum. That is the basis of the current standard; making the baseline standard harder means sending many people who have valid claims back to persecution, torture, and death. That is why Stephen Miller and other Trump administration opponents of asylum kept trying to do it even though it does not stop people from coming to the border in search of protection.

Similarly, resurrecting any version of a Remain in Mexico Policy (the “Migrant Protection Protocols”) would create a humanitarian disaster at the border. During the two years this policy was in operation under President Trump and Stephen Miller’s leadership, Human Rights First documented over 1,540 cases of rape, kidnappings, torture and other violence against migrants waiting in Mexico for their protection claims to be heard.² Indeed, migrants in Mexico waiting for a port of entry appointment right now are facing threats, extortion, kidnapping, and sexual violence.³ Adopting this disastrous Trump-era policy would inevitably expose even more people to extreme danger and betray not only our moral and legal commitments to asylum seekers but also the campaign commitment the current Administration made to the American people to reject such hateful policies.

Finally, we have heard of proposals to require the detention of asylum seekers upon arrival and throughout their immigration proceedings, rather than allowing them to be in the community. Once again, this is a callous and expensive policy that deliberately and unnecessarily exposes arriving families to inhumane treatment. This year, several reports from the Department of Homeland Security’s Office for Civil Rights and Civil Liberties came to light, identifying detention conditions and practices over several years that inspectors labeled “barbaric”, “negligent”, and defying “basic principles of humanity.”⁴ Further, to double-down on costly⁵ detention policies at a time when Immigration and Customs Enforcement (ICE) is holding an unprecedented 39,000 people⁶ in detention (mainly in private prisons⁷) defies common sense. In FY 2023, over 99 percent of

² Human Rights First, *Fatally Flawed: “Remain in Mexico” Policy Should Never Be Revived* (2022), <https://humanrightsfirst.org/library/new-report-documents-devastating-toll-of-court-ordered-reimplementation-of-remain-in-mexico/>.

³ Laura Gottesdiener, Ted Hesson, Mica Rosenberg and Daina Beth Solomon, *Reuters*, “Migrants are being raped at Mexico border as they await entry to US,” Sept. 29, 2023, <https://www.reuters.com/world/migrants-are-being-raped-mexico-border-they-await-entry-us-2023-09-29/>; Human Rights First, *Inhumane and Counterproductive: Asylum Ban Inflicts Mounting Harms* (Oct. 2023), <https://humanrightsfirst.org/library/inhumane-and-counterproductive-asylum-ban-inflicts-mounting-harm/>; Women’s Refugee Commission, *New Asylum Ban Leaves Migrants Stranded: Recommendations to Increase Access to Protection at the US-Mexico Border* (Aug. 2023), <https://www.womensrefugeecommission.org/wp-content/uploads/2023/08/New-Asylum-Ban-Leaves-Migrants-Stranded-Recommendations.pdf>.

⁴ *National Public Radio*, “Government’s own experts found ‘barbaric’ and ‘negligent’ conditions in ICE detention,” Aug. 16, 2023, <https://www.npr.org/2023/08/16/1190767610/ice-detention-immigration-government-inspectors-barbaric-negligent-conditions>.

⁵ Vera Institute for Justice, “ICE Is Wasting Millions of Dollars on Unnecessary Detention Beds,” July 20, 2022, <https://www.vera.org/news/ice-is-wasting-millions-of-dollars-on-unnecessary-detention-beds>; Ted Hesson, *Reuters*, “Biden officials kept immigration jails despite internal cost concerns,” Sept. 27, 2023, <https://www.reuters.com/world/us/biden-officials-kept-immigration-jails-despite-internal-cost-concerns-2023-09-27/>.

⁶ Rafael Bernal, *The Hill*, “Democrats to Garland, Mayorkas: Ease up on migrant detention bonds,” <https://thehill.com/latino/4284122-democrats-garland-mayorkas-detention-bonds-migrants/>.

⁷ Eunice Cho, ACLU, “Unchecked Growth: Private Prison Corporations and Immigration Detention, Three Years Into the Biden Administration,” Aug. 7, 2023, <https://www.aclu.org/news/immigrants-rights/unchecked-growth-private-prison->

people released to the community and whose asylum cases were decided by immigration judges appeared for their hearings.⁸ We know that detention is not necessary to ensure that people appear for their proceedings, just as we know that detention of any kind is harmful, particularly for vulnerable individuals, children, and asylum seekers.

We strongly urge your office to stand firm against these horrific proposals, including those proposed by the Senate Republican Working Group, and ensure they are not rushed into law as part of a broader funding deal. Such disastrous and lasting policy and legal changes have no place in these negotiations; they will create incalculable harm without doing anything to address border management issues. They may appease various negotiating parties in the short-term but at the cost of incredible harm to our asylum and refugee protection system and to those seeking safety in the United States.

The ACLU looks forward to working with you to protect these critical rights and protections. Please contact Sarah Mehta, ACLU senior border policy counsel, at smehta1@aclu.org with any questions.



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Sincerely,

A handwritten signature in blue ink, appearing to read "Deirdre", written over a light blue horizontal line.

Deirdre Schifeling
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[corporations-and-immigration-detention-three-years-into-the-biden-administration#:~:text=ACLU's%20privacy%20policy,-,Unchecked%20Growth%3A%20Private%20Prison%20Corporations%20and%20Immigration%20Detention%2C%20Three%20Years,venues%20from%20immigrant%20detention%20soar.](#)

⁸ United States Department of Homeland Security, Immigration and Customs Enforcement, "Detention Management," <https://www.ice.gov/detain/detention-management> (accessed Nov. 5, 2023).