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## United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

February 8, 2023

The Honorable Joseph R. Biden, Jr.  
President  
1600 Pennsylvania Ave., NW  
Washington, D.C. 20500

Dear Mr. President:

We write to offer some suggestions regarding your Administration's recently announced initiative to give migrants from Cuba, Haiti, Nicaragua, and Venezuela a safe and orderly pathway to the United States, and to surge resources to humanely process migrants at our southwest border.

As an initial matter, we recognize that legislative immigration reforms—including new lawful pathways and better processes at the border—are necessary to address our nation's challenges. It has been nearly a decade since the Senate passed bipartisan comprehensive immigration reform legislation, only for it to be thwarted by Republican obstructionists in the House of Representatives.

Experts agree that this legislation would have addressed many of our challenges at the border, and that the need for bipartisan immigration reform has only grown more urgent in the last ten years. In the absence of such legislative reforms, we recognize that your Administration must take steps to meet the most acute needs at our southwest border. As you implement your recent initiative, we request that you consider the following recommendations.

**Increase Coordination and Support of State and Local Jurisdictions.** The Department of Homeland Security's (DHS) expansion of outreach efforts and coordination with state and local jurisdictions are essential to managing the needs of these communities and the migrants arriving in them. Unfortunately, this coordination has only become more necessary as extremist Republican governors continue to transport migrants to various states and localities as a political stunt. We urge DHS to direct FEMA to expeditiously distribute funds through the new Shelter and Services grant program to provide funding for cities, states, and nongovernmental organizations that provide shelter and respite to recently arrived migrants.

We also recommend that DHS facilitate the transportation of migrants to their final destination. Governors who transport migrants have often refused to coordinate with receiving communities. The federal government—and DHS in particular—is far better suited to facilitate transportation from the border to the interior of the United States. Congress has appropriated sufficient funds for such transportation to U.S. Customs and Border Protection (CBP) and

Immigration and Customs Enforcement (ICE).<sup>1</sup> For example, the fiscal year 2023 omnibus spending legislation appropriated \$420 million for ICE transportation and removal alone.<sup>2</sup> Facilitating transportation from the border to the interior of the United States would ensure coordination between the federal government and states, in addition to coordination with federal agencies tasked with processing migrants, such as local ICE offices that are currently experiencing significant backlogs. We urge your Administration to take on this important responsibility.

**Work Authorization.** Industries and communities across the country are desperate for additional workers. A reported 10.3 million jobs are currently unfilled across the United States, which Federal Reserve Chairman Jerome Powell has attributed in part to a “plunge in net immigration.”<sup>3</sup> Expeditiously granting work authorization to migrants would serve a significant public benefit to the communities to which they are arriving by meeting these urgent workforce needs. We urge you to use your existing authority to grant migrants meeting such urgent workforce needs significant public benefit parole and ensure that they are granted work authorization within 90 days.<sup>4</sup>

**Ensure Access to Asylum.** We have concerns with the DHS and Department of Justice plan to establish a rebuttable presumption against asylum eligibility for those who do not seek protection in a country through which they traveled on their way to the United States.<sup>5</sup> Current law establishes the standard for asylum, with no distinction in this standard based on manner of entry or immigration status.<sup>6</sup> The Immigration and Nationality Act sets forth two narrow circumstances under which an asylum seeker may be ineligible for protection in the United States based on an opportunity to seek protection or safety in a third country.<sup>7</sup> First, the Act permits removal to a safe third country if there is an agreement with the country and an asylum seeker “would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection” in such country.<sup>8</sup> Second, the Act makes migrants who have been “firmly resettled in another country prior to arriving in the United States” ineligible for asylum.<sup>9</sup> We are deeply concerned that establishing a higher standard for asylum based on passage through a third country would circumvent this statutory scheme and undermine the

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<sup>1</sup> *Transportation of Migrants Facilitated by States*, Congressional Research Service (Oct. 20, 2022), <https://crsreports.congress.gov/product/pdf/IN/IN12034>.

<sup>2</sup> *Explanatory Statement Submitted by Mr. Leahy, Chair of the Senate Committee on Appropriations, Regarding H.R. 2617, Consolidated Appropriations Act, 2023* at 56 (Dec. 20, 2022), <https://www.congress.gov/117/crec/2022/12/20/168/198/CREC-2022-12-20-bk2.pdf>.

<sup>3</sup> Vanessa Yurkevich, *America needs immigrants to solve its labor shortage*, CNN (Dec. 22, 2022), <https://www.cnn.com/2022/12/22/economy/immigration-jobs/index.html>.

<sup>4</sup> INA 212(d)(5), 8 U.S.C. 1182(d)(5); 8 C.F.R. 274a.12(c)(11).

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

<sup>6</sup> INA 208(a)(1), 8 U.S.C. 1158(a)(1); INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii).

<sup>7</sup> *East Bay Sanctuary Covenant v. Garland*, Case No. 19-16487 at 31, 32 (9th Cir. 2021), <https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf> (noting that the statutory scheme is rooted in the 1951 Refugee Convention, including the same exceptions).

<sup>8</sup> INA 208(a)(2)(A); 8 U.S.C. 1158(a)(2)(A).

<sup>9</sup> INA 208(b)(2)(A)(vi); 8 U.S.C. 1158(b)(2)(A)(vi).

fundamental right to asylum, violating the letter and spirit of the law. We urge you to not to proceed with any such proposal.

**CBP One App.** The provision of lawful pathways is essential to encouraging safe and orderly migration, and the CBP One app is a useful new mechanism to provide one such pathway. We recommend, however, that the CBP One app not be the only method by which migrants may seek entry to the United States. As an initial matter, the app may not be viable for all migrants, such as those with visual impairments, those who speak less commonly known languages, or those who do not have access to a smart phone and a strong internet connection. We are also concerned with reports that DHS does not yet have capacity to process applications at the scale necessary to provide sufficient access to an appointment, and that the facial recognition software currently used by the app may not register darker skinned migrants.<sup>10</sup> We urge you to develop and increase access to this important tool, making additional appointments available and addressing concerns with the app's facial recognition software.<sup>11</sup>

We recognize the pressing nature of the challenges your Administration faces as you seek to process migrants at our southwest border. We look forward to working closely with you on thoughtful and humane responses to these challenges.

Thank you for your time and consideration.

Sincerely,



Richard J. Durbin  
United States Senator



Alex Padilla  
United States Senator

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<sup>10</sup> Elliott Spagat, *Online system to seek asylum in US is quickly overwhelmed*, AP News (Jan.28, 2023), <https://apnews.com/article/technology-united-states-government-caribbean-mexico-mobile-apps-49b38b18869ed3b2260fb6d774153456>

<sup>11</sup> Suzanne Gamboa, *Migrants now asked to use app to seek U.S. asylum; advocates raise concerns*, NBC News (Jan. 19, 2023), <https://www.nbcnews.com/news/latino/migrants-app-us-asylum-immigration-advocates-concerns-rcna66574>.