

NOT YET SCHEDULED FOR ORAL ARGUMENT

Case No. 25-5243

IN THE
**United States Court of Appeals
for the District of Columbia Circuit**

REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL
SERVICES, et al.,

Plaintiffs-Appellees,

v.

KRISTI NOEM, et al.

Defendants-Appellants.

From the United States District Court for the District of Columbia
Case No. 1:25-cv-00306-RDM (Hon. Randolph D. Moss)

**BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT
OF PLAINTIFFS-APPELLEES IN SUPPORT OF AFFIRMANCE**

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September 19, 2025

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel certifies:

A. Parties and *Amici Curiae*

All parties, intervenors, and other *amici* appearing before the district court and in this Court are listed in the brief for Appellants, with the exception of the Federation for American Immigration Reform, who filed an appearance as *amicus curiae* after the filing of Appellant's brief.

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B. Rulings Under Review

References to the ruling under review appear in the brief for Appellants.

C. Related Cases

This case has not previously been before this or any other court. The Cato Institute is not aware of any other case related to this case under Rule 28(a)(1)(C).

Dated: September 19, 2025

/s/Thomas A. Berry
Thomas A. Berry

Counsel for Amicus Curiae

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Dated: September 19, 2025

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TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	i
RULE 26.1 CORPORATE DISCLOSURE STATEMENT.....	ii
TABLE OF AUTHORITIES.....	iv
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT.....	3
I. BORDER APPREHENSIONS HAD ALREADY FALLEN MORE THAN 90 PERCENT BEFORE THE PROCLAMATION; THE FURTHER DECREASE SINCE CONTINUED THAT PRE- EXISTING TREND.	3
A. The Large Decrease in Border Apprehensions In 2024 Was Not Due to U.S. Asylum Restrictions.	7
B. There is No Basis to Conclude that Border Patrol Would Have to Resume “Large-Scale Releases.”	11
II. THERE IS NO CONNECTION BETWEEN MIGRATION LEVELS AND DRUG INTERDICTION LEVELS.....	15
A. Data Does Not Support the Government’s Other Claims About Smuggling and National Security.	20
B. The Government Itself is Diverting CBP Resources Away from Border Enforcement.	34
CONCLUSION	36
CERTIFICATE OF COMPLIANCE.....	37
CERTIFICATE OF SERVICE.....	38

TABLE OF AUTHORITIES

Statutes

8 U.S.C. § 1158(b)(2)	26
8 U.S.C. § 1225(b)(1)	26
8 U.S.C. § 1226(c)	33
8 U.S.C. § 1231(a)(6)	33

Other Authorities

Albert Sun & Brent McDonald, <i>Deportation Flights Reach Highest Level Under Trump So Far</i> , N.Y. TIMES (June 3, 2025)	15
Alex Nowrasteh & Krit Chanwong, <i>Diseased Illegal Immigrants Aren’t “Invading” the United States</i> , CATO INST. (Jan. 21, 2025).....	27
Alex Nowrasteh, <i>Mexico Is Not Sending Its Murderers: Homicide Rates on the Mexican Border</i> , CATO INST. (July 31, 2018)	34
Ariel G. Ruiz Soto & Andrew Selee, <i>Amid Tariff Threats, Migration Management Is Key to the Evolving Trump-Sheinbaum Relationship</i> , MIGRATION POL’Y INST. (Feb. 2025)	8
Benedict Smith & Ben Butcher, <i>The true scale of migrant crossings under Kamala Harris revealed</i> , THE TELEGRAPH (Oct. 28, 2024).....	22, 24, 31
<i>Beyond the Border: Terrorism and Homeland Security Consequences of Illegal Immigration Hearing Before the Subcomm. on Counterterrorism, Law Enf’t & Intel. and the Subcomm. on Border Sec. & Enf’t</i> , 118th Cong. (2024) (Testimony of Alex Nowrasteh).....	32
<i>Booming Migrant Charter Flights to Nicaragua Prompt US Crackdown</i> , VOICE OF AM. (Nov. 24, 2023).....	9
<i>CBP Enforcement Statistics, Terrorist Screening Data Set Encounters</i> , U.S. CUSTOMS & BORDER PROT. (last modified July 18, 2025).....	32
<i>COVID Restrictions for Migrants at U.S. Border Cannot End Yet, Judge Rules</i> , REUTERS (May 21, 2022)	26

<i>Custody and Transfer Statistics FY2021</i> , U.S. CUSTOMS & BORDER PROT. (Oct. 1, 2020–Sept. 30, 2021)	14
<i>Custody and Transfer Statistics</i> , U.S. CUSTOMS & BORDER PROT. (July 15, 2025)	12
<i>Custody and Transfer Statistics</i> , U.S. CUSTOMS & BORDER PROT. (last updated Sept. 19, 2025)	13, 18
<i>Customs and Border Protection Border Patrol Statistics</i> , U.S. CUSTOMS & BORDER PROT. (last updated Sept. 9, 2025)	5, 6, 22, 24, 30, 31
Darla Miles, <i>Demonstrators demand release of 20 workers from ICE custody after raid at Eidson warehouse</i> , ABC 7 NEW YORK (July 16, 2025).....	35
Dave Jamieson, ‘Sensitive’ Memo Reveals How Many Border Agents Trump Is Enlisting In Immigration Raids, HUFFINGTON POST (July 22, 2025).....	35
David J. Bier, <i>How Legalizing Marijuana Is Securing the Border: The Border Wall, Drug Smuggling, and Lessons for Immigration Policy</i> , CATO INST. (Dec. 19, 2018).....	17
David J. Bier, <i>Trump Will Likely Cut Legal Entries More Than Illegal Entries</i> CATO INST. (Jan. 21, 2025).....	21
DEP’T OF HOMELAND SEC., DEPARTMENT OF HOMELAND SECURITY BORDER SECURITY METRICS REPORT: 2022 (July 3, 2023)	16
DEP’T OF JUST., FOREIGN AFFAIRS MANUAL	27
DEP’T OF STATE, FOREIGN AFFAIRS MANUAL	25
<i>Detention Management</i> , U.S. IMMIGR. & CUSTOMS ENF’T.....	14
<i>DHS Conducts Removal Flight to the People’s Republic of China</i> , DEP’T OF HOMELAND SEC. (Jan. 10, 2025)	15
<i>Drug Seizure Statistics</i> , U.S. CUSTOMS & BORDER PROT. (2025)	20
Eric Bazail-Eimil, <i>Cuba tried to improve its relations with the US by cooperating with Trump’s deportation flights. It didn’t work.</i> , POLITICO (June 2, 2025).....	15
<i>Frontline Against Fentanyl</i> , U.S. CUSTOMS & BORDER PROT. (May 22, 2025)	16

Gio Insignares, <i>Immigration agents release Army veteran detained during Camarillo farm raid</i> , CBS NEWS (July 16, 2025)	35
Gunduz Declaration, Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem, No. 1:25-cv-00306, (D.D.C. July 2, 2025)	5, 7, 12, 16, 20, 21, 23, 24, 25, 27, 28, 32, 33, 34
James Wagner and Simon Romero, <i>Trump Vowed a Crackdown on the Mexican Border, but It's Already Quiet</i> , N.Y. TIMES (Jan. 18, 2025)	9
<i>Job Openings and Labor Turnover Survey (JOLTS)</i> , BUREAU OF LABOR STATISTICS (last updated July 2025)	11
<i>Job Openings: Construction</i> , FED. RSRV. ECON. DATA	10
Julia Ainsley and Chloe Atkins, <i>Mexico is stopping nearly three times as many migrants now, helping keep U.S. border crossings down</i> , NBC NEWS (May 15, 2024)	9
Memorandum from Border Patrol Chief Raul L. Ortiz to all Chief Patrol Agents and Directorate Chiefs Policy on Parole with Conditions in Limited Circumstances Prior to the Issuance of a Charging Document (May 10, 2023)	28
Memorandum from Joseph V. Cuffari, Dep't of Homeland Sec. to Chris Magnus, U.S. Customs and Border Protection Commissioner, Inspector General Report No. OIG-22-71 (Sept. 19, 2022)	27, 29
<i>Mexico/Central America: New Visa Restrictions Harm Venezuelans</i> HUM. RTS. WATCH (July 5, 2022)	9
Michael T. Light et al., <i>Comparing Crimes Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born US Citizens in Texas</i> , 117 PROCS. OF THE NAT'L ACAD. OF SCIS. (Dec. 22, 2020)	33
Michaelangelo Landgrave & Alex Nowrasteh, <i>Illegal Immigrant Incarceration Rates, 2010-2023</i> , CATO INST. (Apr. 24, 2025)	32
<i>Migrant crossings through Panama's Darien Gap down 35% so far in 2024</i> , VOICE OF AM. (Sept. 27, 2024)	8
Molly Gibbs, <i>Fox News correspondent was with border patrol agents in south Sacramento raid</i> , SACRAMENTO BEE (July 17, 2025)	34

<i>Monthly Migration Through Panama’s Darien Gap</i> , WASHINGTON OFF. ON LATIN AM. (Apr. 17, 2025)	8
<i>Nationwide Drug Seizures</i> , U.S. CUSTOMS & BORDER PROT., (last updated Sept. 19, 2025)	18, 19
<i>Nationwide Encounters</i> , U.S. CUSTOMS & BORDER PROT. (last updated Sept. 19, 2025)	11, 18, 19
Noem Declaration, Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem, No. 1:25-cv-00306 (D.D.C. July 2, 2025).....	30, 35, 36
<i>Panama reports sharp drop in irregular migration through Darien Gap</i> , AL JAZEERA (Jan. 3, 2025).....	8
Press Release, Dep’t of Homeland Sec., Secretary Noem Commends President Trump and One Big Beautiful Bill Signing into Law: Historic Win for the American People and the Rule of Law (July 4, 2025).....	36
Press Statement, U.S. Embassy in Nicaragua, Visa Restrictions on Executive of a Charter Flight Company Facilitating Irregular Migration to the U.S. (June 13, 2024).....	9
Priscilla Alvarez et al., <i>Trump administration plans to deploy hundreds more federal agents to ramp up immigration enforcement across the country</i> , CNN (May 13, 2025)	34
Seung Min Kim, <i>U.S. and Mexico will boost deportation flights and enforcement to crack down on illegal migration</i> , AP (Apr. 30, 2024)	8
Thomas H. Cartwright, <i>ICE Air Flight Report</i> (July 5, 2025).....	15
<i>Trump, Mexican president give differing reviews of “wonderful conversation” on border, illegal immigration</i> , CBS NEWS (Nov. 28, 2024)	9
U.S. BORDER PATROL, NATIONWIDE ENCOUNTERS FISCAL YEARS 1925-2020, (2020)	5
U.S. BORDER PATROL, TOTAL ILLEGAL ALIEN APPREHENSIONS BY MONTH (FY 2000-FY 2020) (2020)	5, 12

U.S. CUSTOMS & BORDER PROT. OFF. OF THE CHIEF MED. OFFICER, SUPPLEMENTAL GUIDANCE RE: CBP DIRECTIVE NO. 2210-004, ENHANCED MEDICAL SUPPORT EFFORTS (May 21, 2024).....	26
U.S. CUSTOMS & BORDER PROT., NAT’L STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH (Oct. 2015).....	26, 27
U.S. CUSTOMS & BORDER PROT., NATIONWIDE APPREHENSIONS FY2025 THROUGH MARCH 31, 2025 (2025)	4, 6
U.S. CUSTOMS & BORDER PROT., NATIONWIDE ENCOUNTERS (2025)	5
U.S. CUSTOMS & BORDER PROT., SOUTHWEST LAND BORDER ENCOUNTERS (2025)	3, 4, 6, 7
U.S. GOV’T ACCOUNTABILITY OFF., DNA COLLECTIONS: CBP IS COLLECTING SAMPLES FROM INDIVIDUALS IN CUSTODY, BUT NEEDS BETTER DATA FOR PROGRAM OVERSIGHT (June 2, 2023)	28
U.S. IMMIGR. & CUSTOMS ENF’T, FY 2024 ANNUAL REPORT (2024)	14
<i>US breaks record with 209 deportation flights in June after first major increase of Trump era, EL PAIS (July 11, 2025)</i>	<i>15</i>
<i>US, Mexico team up to deport 500 Venezuelans, BORDER REP. (Apr. 24, 2025)...</i>	<i>15</i>
<i>USBP Encounter Subject Details Q4 FY 2024, U.S. CUSTOMS & BORDER PROT. (2024).....</i>	<i>16</i>
<i>Venezuela reaches deal to accept deportation flights from U.S., CBS NEWS (Mar. 23, 2025)</i>	<i>15</i>
<i>Yearbook of Immigration Statistics 2023, OFF. OF HOMELAND SEC. STAT.....</i>	<i>25</i>
Regulations	
89 Fed. Reg. 48710 (2024)	7
90 Fed. Reg. 8333 (2025)	1, 2
90 Fed. Reg. 8334 (2025)	2
Circumvention of Lawful Pathways, 88 Fed. Reg. 11715. (Feb. 23, 2023).....	14

INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato’s Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Cato Institute scholars have published extensive research on regulation and constitutional law. This case interests the Cato Institute because it concerns the legality of a contested exercise of executive power that threatens the separation of powers and individual liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

On January 20, 2025—Inauguration Day—President Trump issued “Proclamation 10888—Guaranteeing the States Protection Against Invasion.”² The Proclamation claimed that the current scheme as set out in the Immigration and

¹ All parties have consented to the filing of this brief. No party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund the brief’s preparation or submission; and no person other than *amicus* contributed money intended to fund the brief’s preparation or submission.

² 90 Fed. Reg. 8333 (2025).

Nationality Act, 8 U.S.C. § 1101 *et seq.*, was overwhelmed and no longer effective. According to the Proclamation, the extant scheme under the Immigration and Nationality Act was “wholly ineffective in the border environment,”³ and as such was no longer able to prevent “aliens posing threats to public health, safety, and national security from entering the United States . . .” or to “screen all illegal aliens crossing the southern border for communicable diseases of public-health concern.”⁴

These two assumptions, upon which the entire Proclamation rests, are plainly incorrect. First, border crossings had already fallen to manageable levels before the Proclamation was issued. That decline was due to economic factors and migration restrictions in other countries rather than U.S. asylum restrictions. Therefore, relevant evidence does not indicate that the district court’s order will cause an unmanageable increase in border crossings or require the Department of Homeland Security (DHS) to return to “large-scale releases” of noncitizens. Second, evidence does not support the government’s assertions of a connection between border apprehension numbers and DHS’s ability to interdict drugs or perform other law enforcement duties at the border, and so there is no reason to expect that any increase in border crossings would detract from these other DHS operations.

³ 90 Fed. Reg. 8333.

⁴ *Id.* at 8334.

The government's assertions are based on either misinterpretations or tortured readings of the data, attempting to find justification for a spurious legal argument in facts that simply are not there.

ARGUMENT

I. BORDER APPREHENSIONS HAD ALREADY FALLEN MORE THAN 90 PERCENT BEFORE THE PROCLAMATION; THE FURTHER DECREASE SINCE CONTINUED THAT PRE-EXISTING TREND.

Relevant data does not support the Government's assertions that an unmanageable number of asylum seekers will cross the southern border if the order below is affirmed. Southern border crossings reached elevated levels for a period between 2021 and 2023. However, DHS data shows that border crossings had already fallen from those elevated levels *before* the Proclamation was issued. In fact, by the time the Proclamation was issued on January 20, 2025, border apprehensions had already fallen more than 90 percent from their peak under the Biden administration in December 2023.

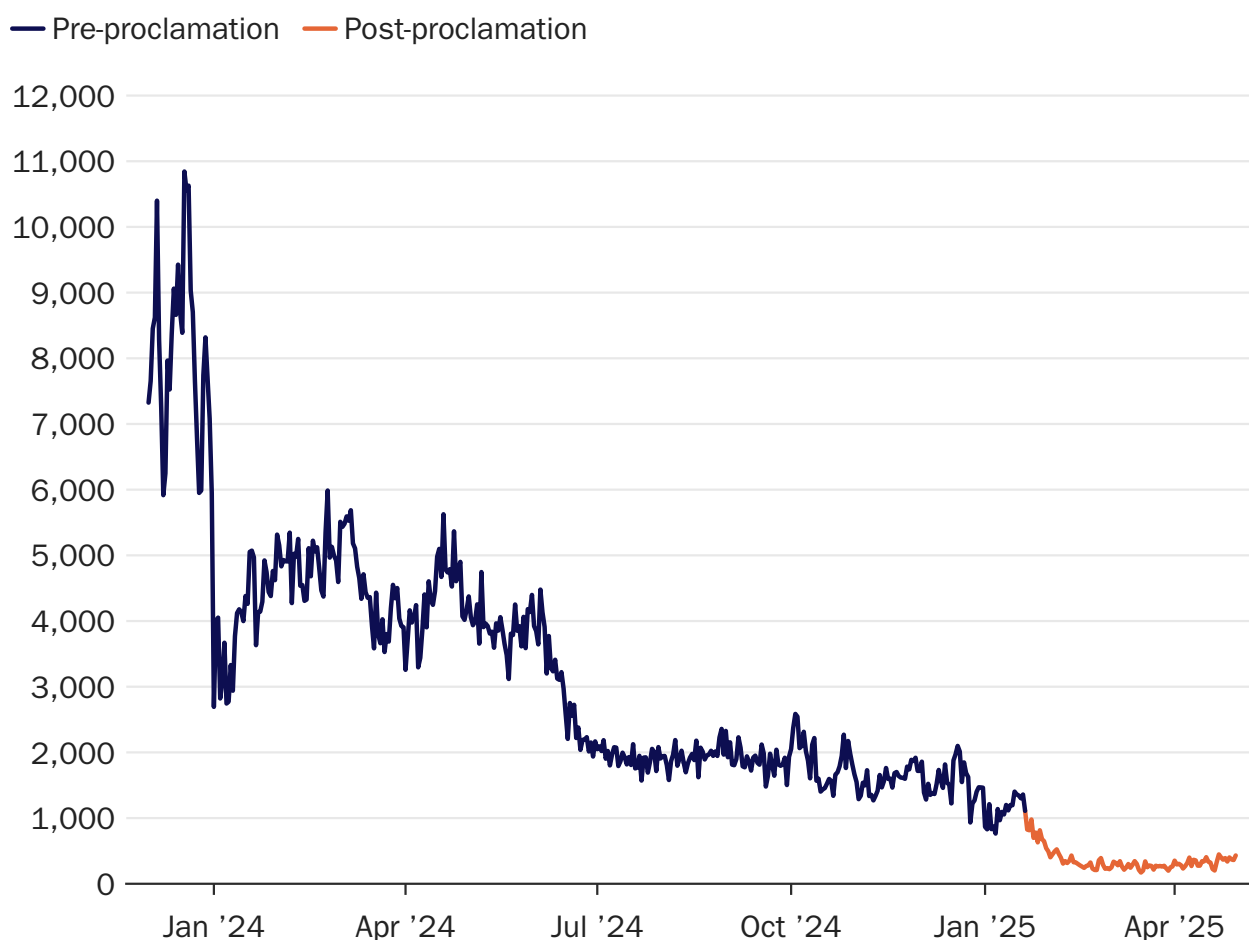
Beginning in early 2021, Border Patrol apprehensions between southern border ports of entry averaged over 100,000 per month and often exceeded 200,000 per month.⁵ But the number of such apprehensions fell off significantly throughout 2024—from a peak of 222,018 in December 2023 to fewer than 50,000 in both

⁵ U.S. CUSTOMS & BORDER PROT., SOUTHWEST LAND BORDER ENCOUNTERS (2025) <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

November and December 2024.⁶ There were 21,108 such apprehensions between January 1 and January 19, 2025—the period in January before the Proclamation—an average of just over 1,100 per day.⁷ That represents a decrease of 90 percent from the one-day peak of 10,844 Border Patrol apprehensions on December 18, 2023.

Border Patrol arrests were falling for over a year before the Proclamation

Daily Border Patrol apprehensions, 2024 - 2025



⁶ *Id.*

⁷ U.S. CUSTOMS & BORDER PROT., NATIONWIDE APPREHENSIONS FY2025 THROUGH MARCH 31, 2025 (2025), <https://www.cbp.gov/document/foia-record/customs-and-border-protection-border-patrol-statistics>.

Source: *Customs and Border Protection Border Patrol Statistics*, U.S. CUSTOMS & BORDER PROT. (last updated Sept. 9, 2025), <https://tinyurl.com/3k3jud7c>.

If that pre-Proclamation rate of 1,100 daily Border Patrol apprehensions had continued, January 2025 would have seen about 34,000 apprehensions. Even if the Proclamation had not been issued, that would have been a routine month for Border Patrol apprehensions: In fact, 72 percent of months since FY 2000 had higher apprehensions,⁸ as did roughly 84 percent of months since FY 1980, when the Refugee Act was enacted.⁹ In light of this 90 percent drop in apprehensions through January 19, 2025, the further decrease since then continued a prior trend.

The data does not support a conclusion that the further reduction in apprehensions since January 20 is primarily due to the Proclamation. Unaccompanied children are not subject to the Proclamation.¹⁰ But between January 19 and April 30, 2025, southern border apprehensions of unaccompanied children

⁸ U.S. BORDER PATROL, TOTAL ILLEGAL ALIEN APPREHENSIONS BY MONTH (FY 2000-FY 2020) (2020) <https://perma.cc/LYT5-NGXQ>; U.S. CUSTOMS & BORDER PROT., NATIONWIDE ENCOUNTERS (2025), <https://www.cbp.gov/document/stats/nationwide-encounters>.

⁹ Based on annual totals, using the monthly distribution from FY 2000. *See* U.S. BORDER PATROL, NATIONWIDE ENCOUNTERS FISCAL YEARS 1925-2020, (2020) <https://perma.cc/5TVG-QYAA>; TOTAL ILLEGAL ALIEN APPREHENSIONS BY MONTH, *supra* note 8.

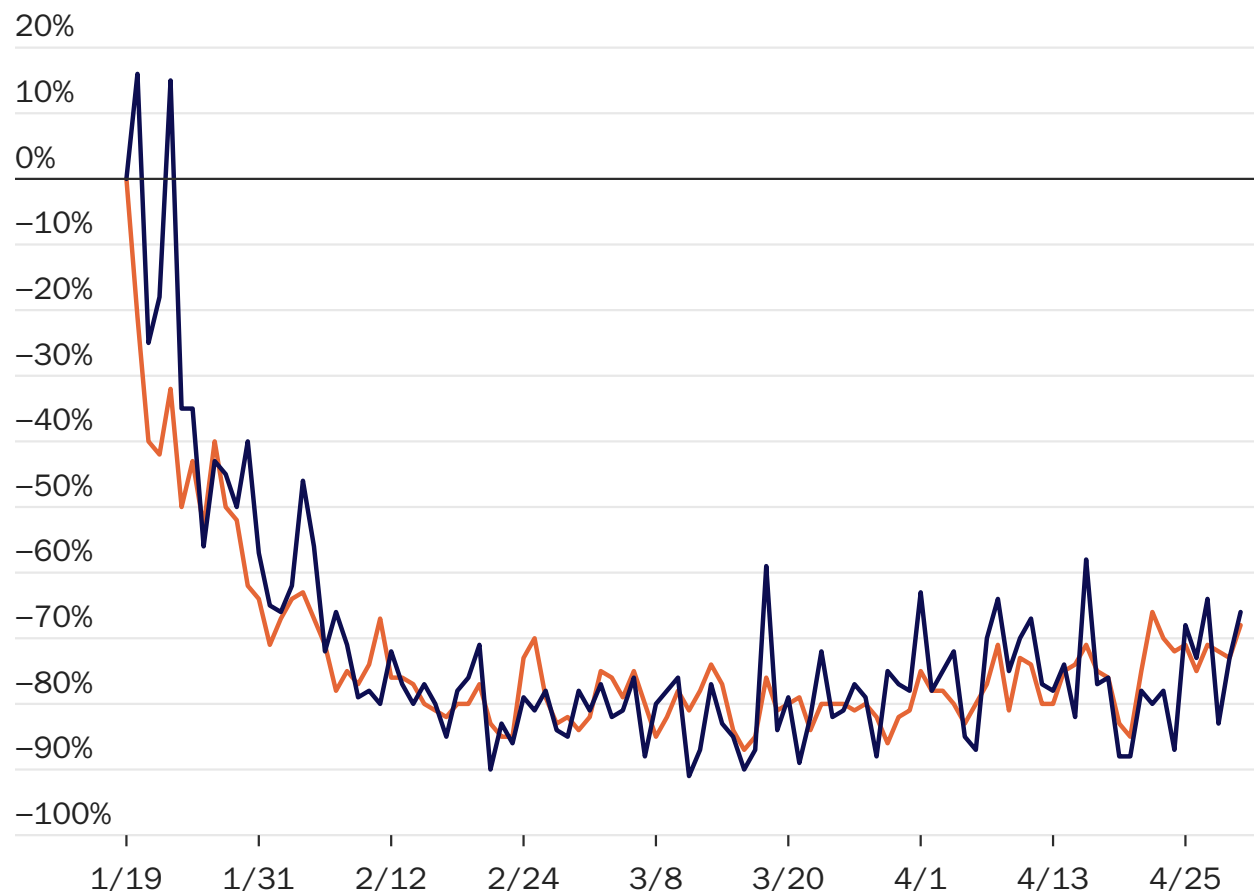
¹⁰ Gunduz Declaration at ¶ 32, *Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem*, No. 1:25-cv-00306, (D.D.C. July 2, 2025) (“Gunduz Decl.”).

fell by virtually the same rate (66 percent) as noncitizens who are subject to the Proclamation (68 percent).¹¹

Border Patrol arrests exempt from the Proclamation fell as far as others

Border Patrol arrests, change from January 19, 2025

— Unaccompanied children (not subject to Proclamation) — Other (subject to proclamation)



Source: *Customs and Border Protection Border Patrol Statistics, supra.*

The Government claims that the Proclamation is necessary because the “sheer

¹¹ NATIONWIDE APPREHENSIONS FY2025 THROUGH MARCH 31, 2025, (2025), *supra* note 7; SOUTHWEST LAND BORDER ENCOUNTERS, *supra* note 5.

number” of noncitizens entering the United States has “overwhelmed” DHS.¹² However, the number of noncitizens crossing the southern border had already fallen to manageable levels before the Proclamation was issued. And even were the Government’s claim true, the Proclamation is not limited to periods when DHS is overwhelmed.

A. The Large Decrease in Border Apprehensions In 2024 Was Not Due to U.S. Asylum Restrictions.

The government incorrectly suggests that the reduction in the number of southern border apprehensions by the end of 2024 and the beginning of 2025 was due to the Biden administration’s June 2024 “Securing the Border” regulation restricting access to asylum.¹³ But border apprehensions were already in steep decline *before* that regulation was issued. Over the six months from December 2023 to May 2024, before the regulation, monthly Border Patrol apprehensions had already fallen 53 percent, from 222,018 to 117,905.¹⁴ This trend continued after the regulation was issued: Over the six months from May to October 2024, apprehensions fell by a similar 48 percent, from 117,905 to 56,519.¹⁵

¹² Gunduz Decl., *supra* note 10, at ¶ 2.

¹³ 89 Fed. Reg. 48710 (2024); Gunduz Decl., *supra* note 10, at ¶ 24.

¹⁴ SOUTHWEST LAND BORDER ENCOUNTERS, *supra* note 5.

¹⁵ *Id.* The same point holds using the period beginning in June 2024: apprehensions fell 56 percent in the six months between June and November 2024, from 83,532 to 46,616. *Id.*

The reduction in border crossings over the course of 2024 and into the first weeks of 2025 was largely due to restrictions imposed by foreign nations and economic conditions. Panama severely restricted migration in 2024.¹⁶ As a result, monthly irregular crossings through Panama fell 94 percent from a peak of more than 80,000 in August 2023 to fewer than 5,000 in December 2024.¹⁷ It makes sense that this decrease in migration through Panama parallels the 90 percent decrease in U.S. southern border apprehensions over the similar period between December 18, 2023, and January 19, 2025.

Mexico's imposition of increased immigration controls in 2024 was another factor.¹⁸ In May 2024, it was reported that U.S. officials credited Mexico's "expanded . . . enforcement efforts" for decreased apprehensions at the U.S. border.¹⁹

¹⁶ See, e.g., *Panama reports sharp drop in irregular migration through Darien Gap*, AL JAZEERA (Jan. 3, 2025), <https://perma.cc/YU25-QJX6>; *Migrant crossings through Panama's Darien Gap down 35% so far in 2024*, VOICE OF AM. (Sept. 27, 2024), <https://perma.cc/F4TE-N2BU>.

¹⁷ *Monthly Migration Through Panama's Darien Gap*, WASHINGTON OFF. ON LATIN AM. (Apr. 17, 2025), <https://perma.cc/7PFT-2XP9>.

¹⁸ See, e.g., Ariel G. Ruiz Soto & Andrew Selee, *Amid Tariff Threats, Migration Management Is Key to the Evolving Trump-Sheinbaum Relationship*, MIGRATION POL'Y INST. (Feb. 2025), <https://www.migrationpolicy.org/news/tariff-threats-trump-sheinbaum-migration>.

¹⁹ Seung Min Kim, *U.S. and Mexico will boost deportation flights and enforcement to crack down on illegal migration*, AP (Apr. 30, 2024), <https://apnews.com/article/joe-biden-andres-manuel-lopez-obrador-mexico-immigration-border-c7e694f7f104ee0b87b80ee859fa2b9b>.

Those efforts reportedly included “stopping nearly three times as many migrants” as in 2023.²⁰ In November 2024, CBS News reported that “U.S. officials mostly credit[ed] Mexican” actions “to block migrants going north” for the decline in arrivals at the border.²¹ Mexico and several Central American countries have also prohibited legal entries from Venezuelans and other nationalities.²² The United States has sanctioned airlines that previously had provided transportation from Cuba and Haiti to the Central American mainland.²³

²⁰ Julia Ainsley and Chloe Atkins, *Mexico is stopping nearly three times as many migrants now, helping keep U.S. border crossings down*, NBC NEWS (May 15, 2024), <https://www.nbcnews.com/politics/immigration/mexico-stopping-three-times-as-many-migrants-as-last-year-rcna146821>.

²¹ *Trump, Mexican president give differing reviews of “wonderful conversation” on border, illegal immigration*, CBS NEWS (Nov. 28, 2024), <https://www.cbsnews.com/news/trump-mexico-president-tariffs-border-immigration/>; see also James Wagner and Simon Romero, *Trump Vowed a Crackdown on the Mexican Border, but It’s Already Quiet*, N.Y. TIMES (Jan. 18, 2025), <https://www.nytimes.com/2025/01/18/world/americas/migrants-trump-inauguration-border.html>, (In the last quarter of 2024, “Mexican security forces said that they” had detained “nearly 68 percent more” migrants “compared with the same period a year earlier”).

²² See, e.g., *Mexico/Central America: New Visa Restrictions Harm Venezuelans*, HUM. RTS. WATCH (July 5, 2022), <https://www.hrw.org/news/2022/07/05/mexico/central-america-new-visa-restrictions-harm-venezuelans>.

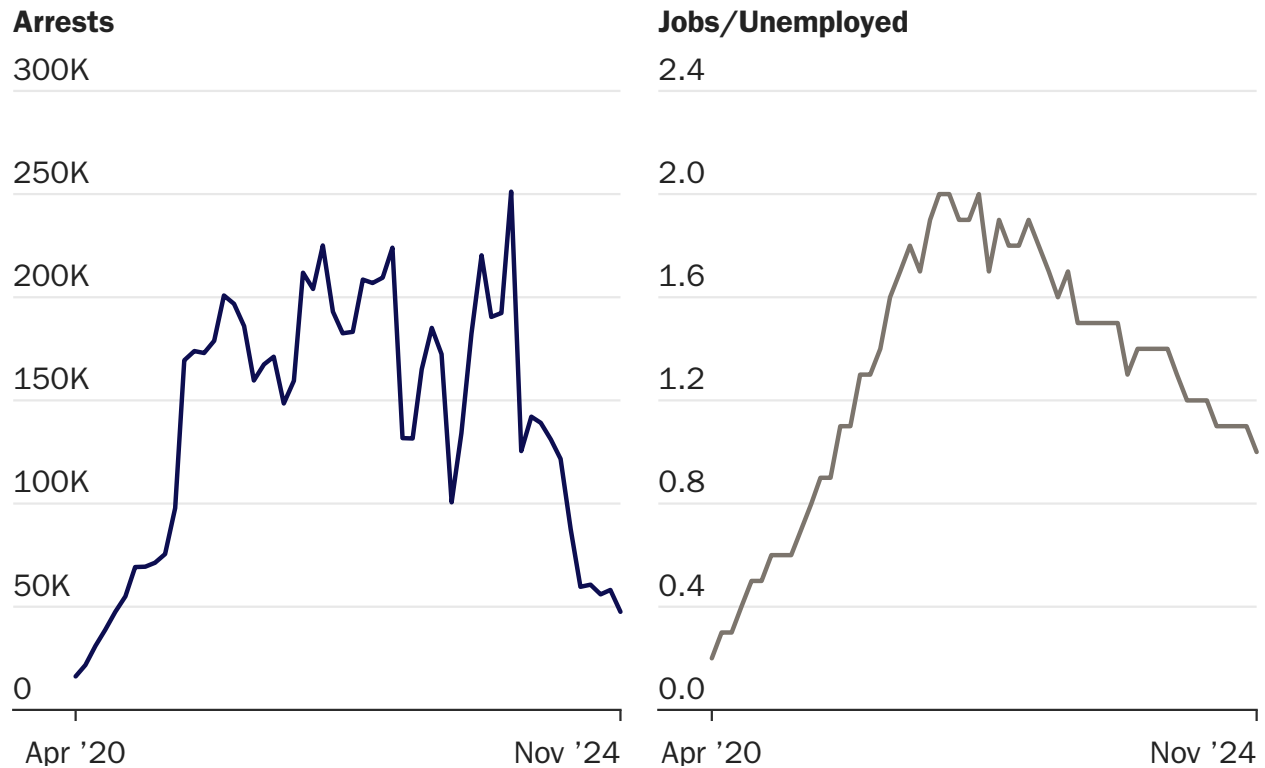
²³ See, e.g., *Booming Migrant Charter Flights to Nicaragua Prompt US Crackdown*, VOICE OF AM. (Nov. 24, 2023), <https://perma.cc/6X9W-CSR6>; Press Statement, U.S. Embassy in Nicaragua, Visa Restrictions on Executive of a Charter Flight Company Facilitating Irregular Migration to the U.S. (June 13, 2024), <https://perma.cc/Y3G4-C7JL>.

Economic conditions were the other most important factor explaining both the previously elevated levels of migration and the subsequent decline. While other countries lagged, the U.S. labor market took off in 2021. This led to increased migration until other countries caught up in 2024. In absolute terms, there were twelve million open jobs in the United States in 2022—the highest recorded by the government since the job openings survey began in 2001. There were more open jobs each month from February 2021 to August 2024 than in any month measured before February 2021. As job openings decreased in 2024, migration subsided. For instance, the number of open construction jobs—the top employment category for new immigrants—has been 35 percent lower since May 2024 than in the previous two-and-a-half years.²⁴ The rise and fall of the high labor demand economy tracks the rise and eventual fall in Border Patrol arrests.

²⁴ *Job Openings: Construction*, FED. RSRV. ECON. DATA, <https://fred.stlouisfed.org/series/JTU2300JOL>.

Unprecedented labor demand receded in 2024 and Border Patrol arrests fell

Border Patrol arrests and job openings per unemployed worker, April 2020–November 2024



Source: *Nationwide Encounters*, U.S. CUSTOMS & BORDER PROT. (last updated Sept.19, 2025), <https://tinyurl.com/5dhyc3y>; *Job Openings and Labor Turnover Survey (JOLTS)*, BUREAU OF LABOR STATISTICS (last updated July 2025), <https://tinyurl.com/5fwu5f5t>.

B. There is No Basis to Conclude that Border Patrol Would Have to Resume “Large-Scale Releases.”

The data does not support the Government’s claim that the district court’s order could require DHS to resume “large-scale releases” of noncitizens at the

southern border.²⁵ As explained above, the Border Patrol was on pace to conduct around 34,000 apprehensions in January 2025 before the Proclamation was issued. That is in line with monthly apprehension figures from FY 2014 to 2019, when border crossings were manageable.²⁶

Moreover, Border Patrol's release rate between January 1 and January 19, 2025 (*before* the Proclamation) was at most 13 percent—down over 80 percent from December 2023.²⁷ During that period, Border Patrol released at most 136 people it apprehended at the southern border per day—down 98 percent from 6,186 per day in December 2023.²⁸ Border Patrol's near-zero release rate in the post-Proclamation period is the conclusion of a trend, not the start of one.

²⁵ See Gunduz Decl., *supra* note 10, at ¶¶ 36, 47-48.

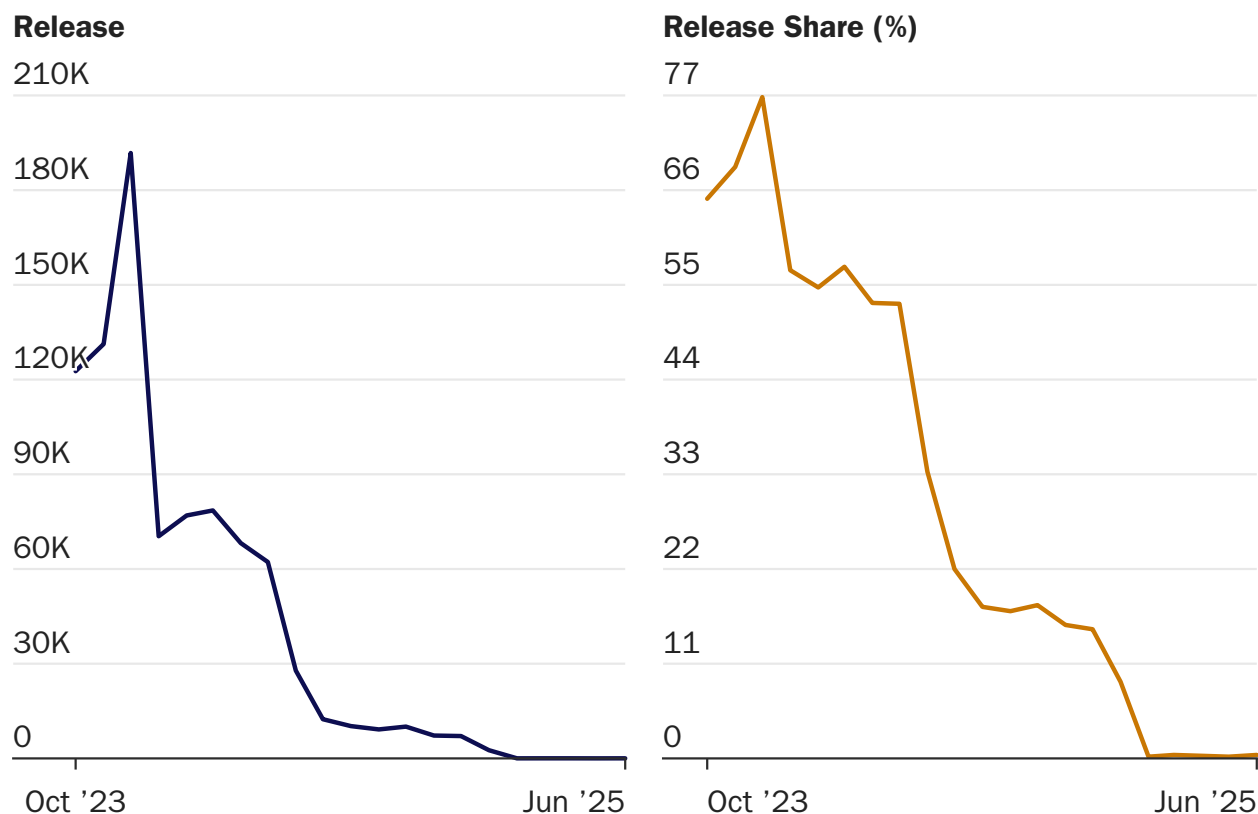
²⁶ TOTAL ILLEGAL ALIEN APPREHENSIONS BY MONTH (FY 2000-FY 2020), *supra* note 8.

²⁷ *Custody and Transfer Statistics*, U.S. CUSTOMS & BORDER PROT. (July 15, 2025) <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>. I assume all releases occurred before January 20.

²⁸ *Id.* This calculation again assumes all releases occurred before January 20.

Border Patrol releases were falling for a year before the proclamation

Border Patrol releases and release share of all arrests, FY 2024-25



Source: *Custody and Transfer Statistics*, U.S. CUSTOMS & BORDER PROT. (last updated Sept. 19, 2025), <https://tinyurl.com/47eyfxmr>.

The primary factor explaining the releases of non-citizens was the number of non-Mexican noncitizens apprehended. When there were few apprehensions of people from countries other than Mexico, the percentage removed was high, such that there were few releases. Whenever non-Mexican apprehensions increased, the removal percentage declined, and releases occurred, regardless of the processing disposition. Non-Mexican apprehensions explain an astounding 60 percent of the variation in the monthly border removal percentage from October 2013 to November

2024. The reason releases were low in January 2025 and have remained low since is that few non-Mexican nationals were and are attempting to enter the United States.

Removals to Mexico can be carried out via land; Mexico accepts removals of its nationals without numerical limits. Releases were primarily determined by logistical factors such as the availability of detention space, the availability of flights, the willingness and speed at which countries cooperate with removals, and, most importantly, the number of apprehensions of noncitizens of difficult-to-remove nationalities.²⁹ Non-Mexican arrivals are currently low because Mexico and other countries are preventing those noncitizens from traversing their territory to reach the U.S. border, and economic conditions are less favorable to immigrating.

DHS has ameliorated the other limitations to removals should apprehensions increase. Since 2021, DHS has increased detention space capacity from about 19,195 in January 2021 to 68,816 in July 2025.³⁰ This includes increasing CBP detention capacity from 5,000 to 12,000. At the same time, DHS has increased monthly

²⁹ E.g., U.S. IMMIGR. & CUSTOMS ENF'T, FY 2024 ANNUAL REPORT 22–23, 30–31, (2024) <https://perma.cc/Q84L-CUUN>; Circumvention of Lawful Pathways, 88 Fed. Reg. 11715. (Feb. 23, 2023).

³⁰ *Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T <https://www.ice.gov/detain/detention-management>; *Custody and Transfer Statistics FY2021*, U.S. CUSTOMS & BORDER PROT. (Oct. 1, 2020–Sept. 30, 2021), <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy2021>.

removal flights from 81 in January 2021 to 209 in June 2025.³¹ Finally, the government has struck numerous agreements that streamline the removal of noncitizens from countries that had previously been difficult to remove.³² The district court's order would not materially affect any of the primary causes of the decline in apprehensions nor affect the increase in removals.

II. THERE IS NO CONNECTION BETWEEN MIGRATION LEVELS AND DRUG INTERDICTION LEVELS.

Relevant data also does not support the government's claim that the district court's order would negatively impact CBP's ability to interdict drugs at the southern border.

³¹ Thomas H. Cartwright, *ICE Air Flight Report* (July 5, 2025), <https://perma.cc/2JQP-SFBP>; *US breaks record with 209 deportation flights in June after first major increase of Trump era*, EL PAIS (July 11, 2025), <https://perma.cc/DYS2-XTD8>; Albert Sun & Brent McDonald, *Deportation Flights Reach Highest Level Under Trump So Far*, N.Y. TIMES (June 3, 2025), <https://www.nytimes.com/interactive/2025/06/03/us/trump-deportation-flights-ice-may.html>.

³² See, e.g., *Venezuela reaches deal to accept deportation flights from U.S.*, CBS NEWS (Mar. 23, 2025), <https://www.cbsnews.com/news/venezuela-reaches-deal-to-accept-deportation-flights-from-u-s/>; *US, Mexico team up to deport 500 Venezuelans*, BORDER REP. (Apr. 24, 2025), <https://www.borderreport.com/immigration/us-mexico-team-up-to-deport-500-venezuelans/>; Eric Bazail-Eimil, *Cuba tried to improve its relations with the US by cooperating with Trump's deportation flights. It didn't work.*, POLITICO (June 2, 2025), <https://www.politico.com/news/2025/06/02/cuba-us-relations-deportation-flights-johana-tablada-00381355>; *DHS Conducts Removal Flight to the People's Republic of China*, DEP'T OF HOMELAND SEC. (Jan. 10, 2025), <https://perma.cc/4YYH-THG5>.

The overwhelming majority of illegal drugs interdicted at the border, including “[m]ore than 90% of interdicted fentanyl,” are seized at ports of entry “primarily in vehicles driven by U.S. citizens.”³³ Just 11 of 168,267 noncitizens (0.007 percent) apprehended by Border Patrol along the southwest border from July 2024 to September 2024 possessed any drugs at all.³⁴ None of the drug-smuggling cases the government cites involved drugs seized by Border Patrol from noncitizens apprehended between ports of entry.³⁵ CBP estimates that it interdicted 82 percent of border crossers between ports in FY 2021; whereas CBP estimates that it seized only 2.98 percent of cocaine—the only drug it analyzed—that went through U.S. ports of entry that year.³⁶ The government, therefore, points to no evidence that there is a pressing need to devote more resources to drug interdiction between border ports of entry.

³³ *Frontline Against Fentanyl*, U.S. CUSTOMS & BORDER PROT. (May 22, 2025), <https://perma.cc/4NAU-9GSY>.

³⁴ *USBP Encounter Subject Details Q4 FY 2024*, U.S. CUSTOMS & BORDER PROT. (2024), https://www.cbp.gov/sites/default/files/2025-01/usbp_encounter_subject_details_q1_fy2024.xlsx.

³⁵ Gunduz Decl., *supra* note 10, at ¶ 40.

³⁶ DEP’T OF HOMELAND SEC., DEPARTMENT OF HOMELAND SECURITY BORDER SECURITY METRICS REPORT: 2022, 42–43 (July 3, 2023). Because 2.98 percent is less than 4 percent of 82 percent, there is at least a 96 percent greater chance of interdiction between ports of entry.

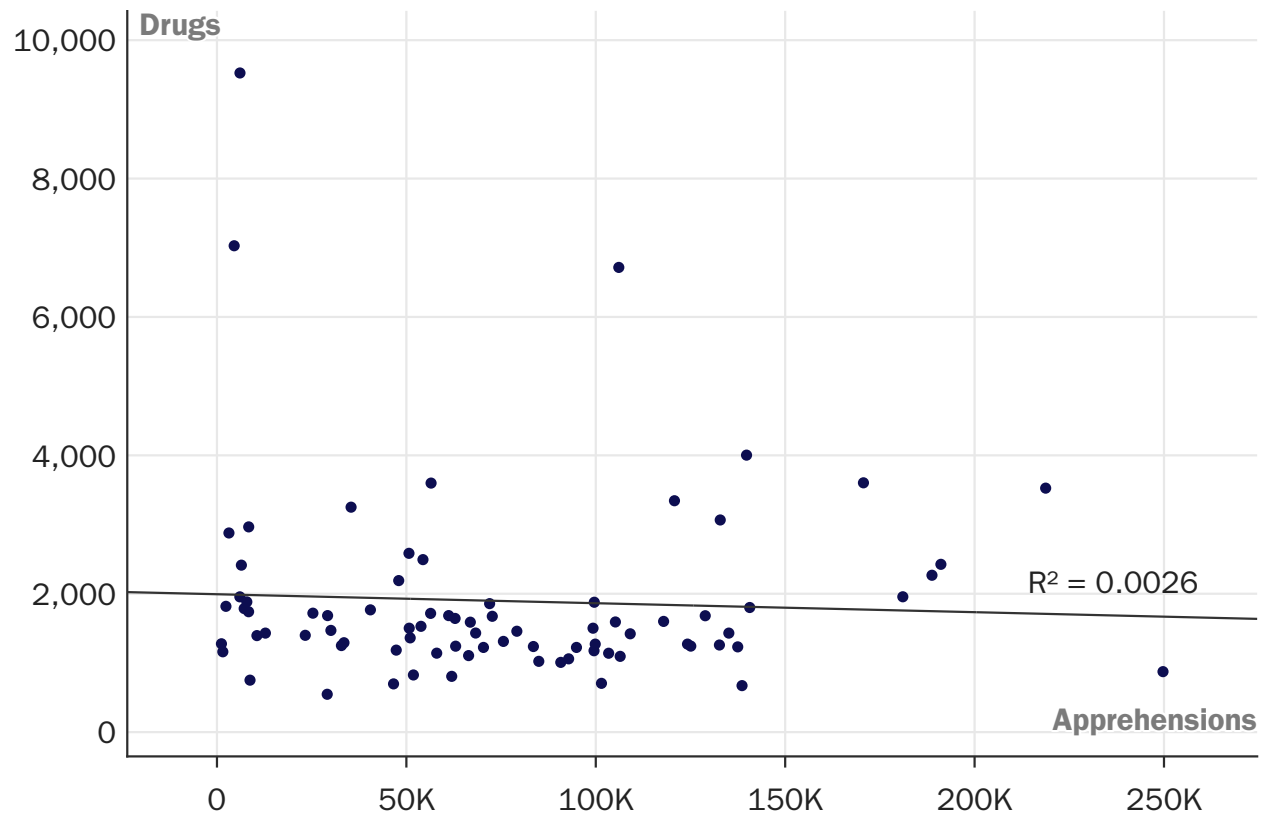
In fact, DHS's own data shows that southern border apprehensions are not correlated with southern border drug seizures. Setting aside marijuana seizures, which have declined for over a decade because of state-level legalizations,³⁷ there is no statistically significant correlation between the absolute level of Border Patrol apprehensions and Border Patrol drug seizures, i.e., Border Patrol does not seize fewer hard drugs when apprehensions are higher:³⁸

³⁷ David J. Bier, *How Legalizing Marijuana Is Securing the Border: The Border Wall, Drug Smuggling, and Lessons for Immigration Policy*, CATO INST. (Dec. 19, 2018), <https://www.cato.org/policy-analysis/how-legalizing-marijuana-securing-border-border-wall-drug-smuggling-lessons#less-marijuana-smuggling>. Marijuana should also be set aside for this analysis because marijuana measured in weight dominates over hard drugs, such that a regression would effectively only be measuring changes in marijuana, but marijuana's value per pound is a fraction of that for hard drugs.

³⁸ Coefficient: -0.0013; R-squared (R^2): 0.0026; p-value: 0.650. While the coefficient is negative, implying that Border Patrol makes fewer seizures when it makes more apprehensions, the R-squared value shows that apprehensions explain virtually none of the variance in seizures, and the p-value is so high that it is not statistically significant. Drug seizure data available at <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>. Apprehension data available at <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

Border Patrol apprehensions are not correlated with hard drug seizures

Monthly levels (lbs), FY 2019-2025



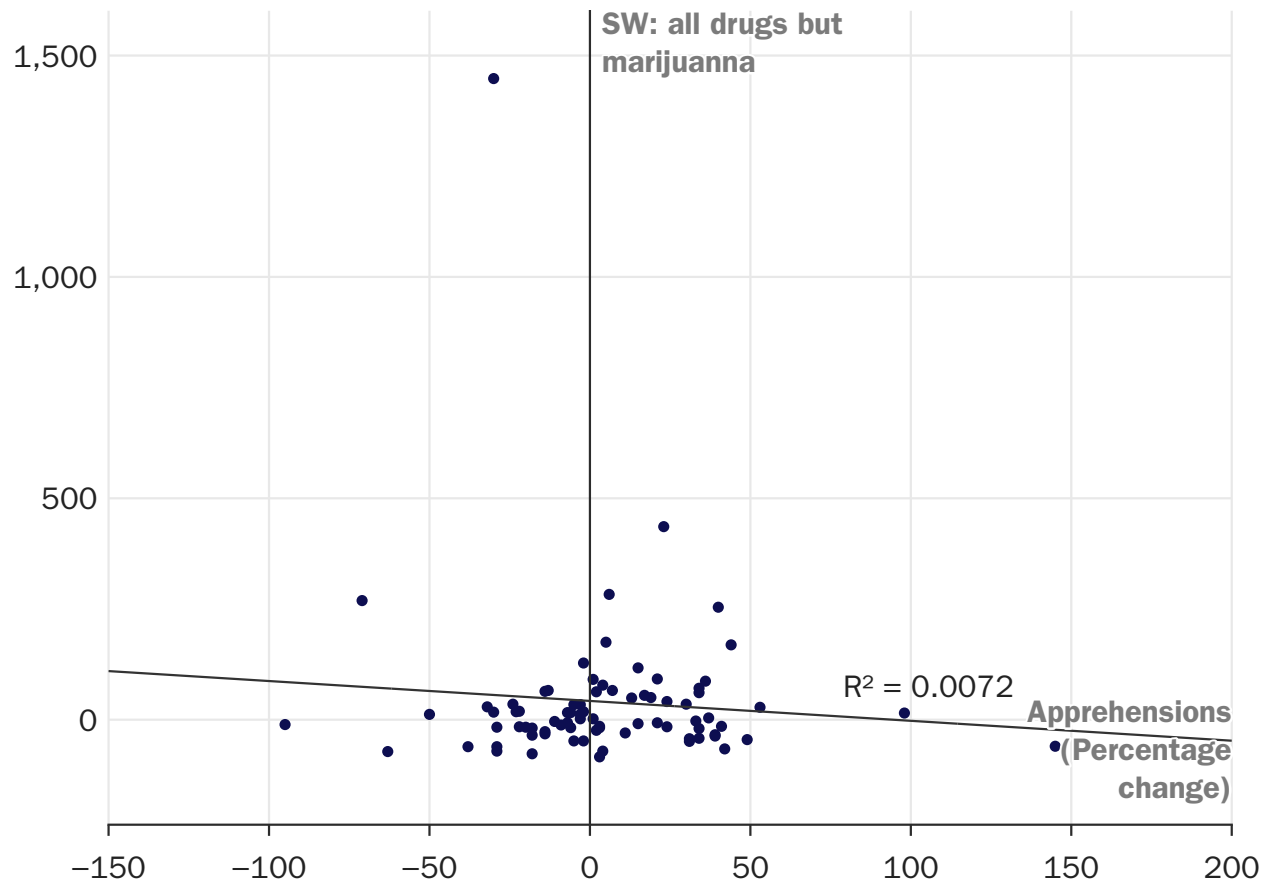
Source: *Custody and Transfer Statistics, supra*; *Nationwide Drug Seizures*, U.S. CUSTOMS & BORDER PROT., (last updated Sept. 19, 2025); *Nationwide Encounters, supra*.

The month-to-month *changes* in apprehensions also have no statistically significant relationship to month-to-month changes in hard drug seizures by Border

Patrol.³⁹ This means sudden increases or decreases in apprehensions do not result in greater or lesser drugs being seized.

Monthly changes in Border Patrol apprehensions are not correlated with changes in drug seizures

Percentage change in Border Patrol apprehensions and hard drug seizures (lbs), FY 2019 - 2025



Source: *Nationwide Drug Seizures, supra*; *Nationwide Encounters, supra*.

³⁹ Coefficient: -0.0159; R-squared (R^2): 0.0072; P-value: 0.454. While the coefficient is negative, the R-squared value shows that changes in apprehensions explain virtually none of the variance in changes in seizures, and the p-value is so high that it is not statistically significant.

The government also contradicts itself by asserting first that the Proclamation should *increase* drug seizures and then claiming that the fact that CBP seized *fewer* pounds of fentanyl from February to June 2025 than from August to December 2024 suggests the Proclamation reduces drug smuggling.⁴⁰ However, nearly 90 percent of that decline occurred at ports of entry, not between ports where Border Patrol operates.⁴¹ In any case, Border Patrol on average seized somewhat *more* pounds of all hard drugs—and of both cocaine and methamphetamine—during the 2025 period than during the period last year.⁴²

A. Data Does Not Support the Government’s Other Claims About Smuggling and National Security.

DHS asserts that because of the ability to request asylum, the expedited removal process undermines border security.⁴³ This is incorrect. Asylum law incentivizes noncitizens crossing the border to present themselves to Border Patrol to be vetted. When expedited removal was suspended under Title 42, evasions of Border Patrol nearly doubled from 13,604 in February 2020 to 22,569 in December

⁴⁰ Gunduz Decl., *supra* note 10, at ¶ 40.

⁴¹ *Drug Seizure Statistics*, U.S. CUSTOMS & BORDER PROT. (2025) <https://www.cbp.gov/newsroom/stats/drug-seizure-statistics>.

⁴² *Id.*

⁴³ *E.g.*, Gunduz Decl., *supra* note 10, at ¶¶ 5–6, 36–41.

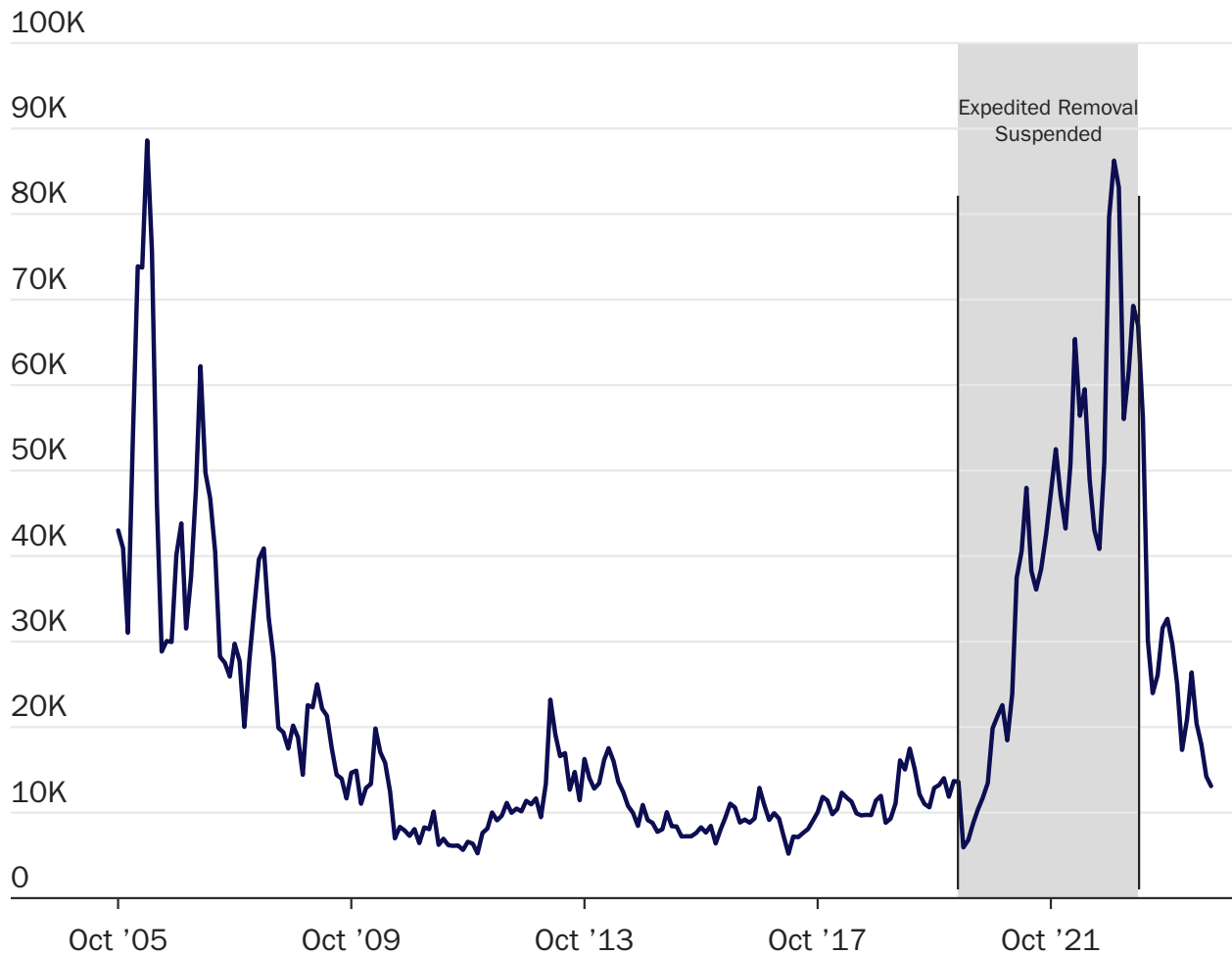
2020, before there was any significant increase in border releases.⁴⁴ Under Title 42, evasions ultimately grew sixfold over the February 2020 level. However, evasions fell immediately after expedited removal resumed, and this was not because illegal crossings immediately declined. Rather, by opening up the opportunity to request asylum, the return to expedited removal processing encouraged people to turn themselves in for vetting rather than evade Border Patrol. In other words, contrary to DHS’s assertions that credible fear processing “diverts” resources and therefore increases evasions, the evidence shows that it decreases evasions and increases security.⁴⁵

⁴⁴ David J. Bier, *Trump Will Likely Cut Legal Entries More Than Illegal Entries* CATO INST. (Jan. 21, 2025), <https://www.cato.org/blog/trump-will-cut-legal-entries-more-illegal-entries>.

⁴⁵ See Gunduz Decl., *supra* note 10, at ¶ 37.

Expedited removal and asylum law reduced evasions of Border Patrol

Border Patrol known gotaways, Oct. 2005 - Jun. 2024



Source: *Customs and Border Protection Border Patrol Statistics*, *supra*; Benedict Smith & Ben Butcher, *The true scale of migrant crossings under Kamala Harris revealed*, THE TELEGRAPH (Oct. 28, 2024), <https://tinyurl.com/582jz4bb>.

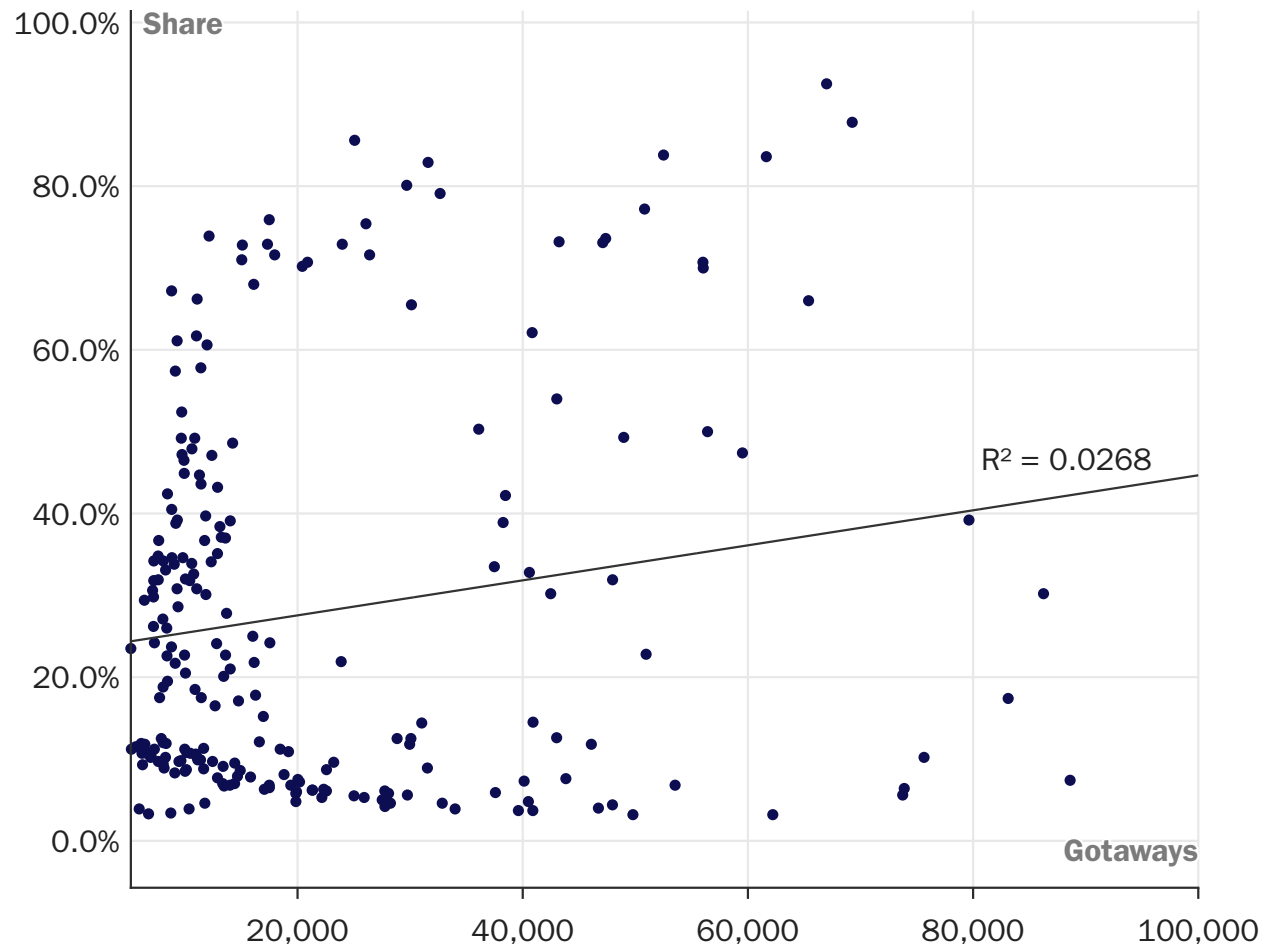
The government implies that referring noncitizens for credible fear screenings or issuing them notices to appear for immigration court proceedings increases

evasions of Border Patrol.⁴⁶ But the method by which Border Patrol processes noncitizens has not historically had a strong relationship with evasions. From FY 2006—when Border Patrol began logging evasions—to July 2024 (the most recent data available), the share of Border Patrol apprehensions referred for credible fear screenings or issued notices to appear in immigration court explained virtually none (2.7 percent) of the variance in evasions. Evasions fell from 2006 to 2019—as credible fear referrals and notices to appear became more common—and then spiked in 2020 when almost no credible fear referrals or notices to appear were issued. Evasions collapsed after Title 42 ended, and notices to appear and credible fear referrals reached unprecedented highs.

⁴⁶ *See id.* at ¶ 2.

Processing immigrants for asylum doesn't explain evasions of Border Patrol

Gotaways and share of Border Patrol apprehensions issued notices to appear or referred for credible fear screening, FY 2006 - July 2024



Source: *Customs and Border Protection Border Patrol Statistics, supra*; Smith & Butcher, *supra*.

The government incorrectly dismisses Border Patrol's vetting of asylum seekers as "wholly ineffective" compared with the requirements for legal entrants.⁴⁷

As the government notes, however, Border Patrol's vetting identified dozens of

⁴⁷ *Id.* at ¶ 5.

people on the terrorism watchlist, hundreds of suspected gang members, and thousands of convicted criminals, during the very period when the government claims Border Patrol vetting was “overwhelmed” and “wholly ineffective.”⁴⁸ When the Proclamation took effect, there was no reason to believe that the vetting process was ineffective.

Individuals in Border Patrol custody are often subject to stricter vetting than the typical legal traveler. For instance, the government claims that “effectively no aliens” subject to credible fear screenings provide “comprehensive health information, as aliens who are admitted lawfully would.”⁴⁹ But lawfully admitted aliens rarely provide comprehensive health information. There were 68.3 million nonimmigrant visa admissions in 2023,⁵⁰ and “[m]edical examinations are not routinely required for [nonimmigrant visa] applicants.”⁵¹ Nonimmigrant visa holders are not subject to vaccination requirements, and except in unusual cases, they are not tested for diseases.⁵²

⁴⁸ *Id.* at ¶ 19, ¶ 5.

⁴⁹ *Id.* at ¶ 16.

⁵⁰ *Yearbook of Immigration Statistics 2023, Table 25. Nonimmigrant Admissions by Class of Admission: Fiscal Years 2014 to 2023*, OFF. OF HOMELAND SEC. STAT. <https://perma.cc/WCJ9-E3XV> (“Total I-94 Admissions” for FY 2023).

⁵¹ DEP’T OF STATE, 9 FOREIGN AFFAIRS MANUAL 302.2-3(A), <https://perma.cc/57GY-HVB6>.

⁵² *Id.*

By contrast, Border Patrol performs health screenings on everyone in its custody, even when border apprehensions are high.⁵³ These examinations include screening for infectious diseases, physical distress, or other medical problems.⁵⁴ Moreover, DHS states that it endeavors to treat all sick individuals in its custody.⁵⁵

In any case, individuals subject to credible fear screenings do not provide health information in advance because, contrary to DHS's claim, the law does not require them to provide any such information.⁵⁶ Nor does the Proclamation itself add this requirement. Instead, it uses this pretext to simply end credible fear screenings, even though the experience during the COVID-19 pandemic showed that asylum applicants were willing to provide health information.⁵⁷ Regardless, "[t]here is no

⁵³ U.S. CUSTOMS & BORDER PROT., NAT'L STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH 14 (Oct. 2015) (hereafter CBP Detention Standards), <https://perma.cc/3CUS-F3GU>; U.S. CUSTOMS & BORDER PROT. OFF. OF THE CHIEF MED. OFFICER, SUPPLEMENTAL GUIDANCE RE: CBP DIRECTIVE NO. 2210-004, ENHANCED MEDICAL SUPPORT EFFORTS 2 (May 21, 2024), <https://perma.cc/P7XT-V6H9>.

⁵⁴ CBP Detention Standards, *supra* note 53, at 14; SUPPLEMENTAL GUIDANCE RE: CBP DIRECTIVE NO. 2210-004, *supra* note 53 at 2–3.

⁵⁵ CBP Detention Standards, *supra* note 53, at 5–6.

⁵⁶ Gunduz Decl., *supra* note 10, at ¶ 16; *See* 8 U.S.C. §§ 1158(b)(2), 1225(b)(1).

⁵⁷ *See, e.g., COVID Restrictions for Migrants at U.S. Border Cannot End Yet, Judge Rules*, REUTERS (May 21, 2022), <https://www.reuters.com/world/us/us-judge-blocks-plan-lift-covid-border-restrictions-migrants-2022-05-20/>.

relationship between monitored diseases and the share of all immigrants, illegal immigrants, or legal immigrants at the state level during the 2021–2022 period.”⁵⁸

The government also states that people in Border Patrol custody do not “readily provide comprehensive background information.”⁵⁹ But most legal travelers to the United States also do not provide “comprehensive background information” such as foreign police certificates or the results of foreign government database checks.⁶⁰ Instead, DHS conducts background checks on nonimmigrant visa applicants—primarily against U.S. databases—using the names and fingerprints provided by applicants. Border Patrol conducts these same biometric background checks on all noncitizens in its custody before releasing them.⁶¹ However, Border Patrol goes much further. It conducts pat-down searches of all detainees and can perform more invasive searches subject to officer discretion.⁶² All personal property

⁵⁸ Alex Nowrasteh & Krit Chanwong, *Diseased Illegal Immigrants Aren’t “Invading” the United States*, CATO INST. (Jan. 21, 2025), <https://www.cato.org/blog/disease-not-good-reason-close-border-2025>.

⁵⁹ Gunduz Decl., *supra* note 10, at ¶ 17.

⁶⁰ By contrast, immigrant visa applicants must submit police certificates. *See* DEP’T OF JUST., 9 FOREIGN AFFAIRS MANUAL 504.4-4(B), <https://perma.cc/XP9H-66KF>.

⁶¹ Memorandum from Joseph V. Cuffari, Dep’t of Homeland Sec. to Chris Magnus, U.S. Customs and Border Protection Commissioner, Inspector General Report No. OIG-22-71 (Sept. 19, 2022), <https://perma.cc/RS78-9HZL> (Border Patrol “followed its screening procedures” and “conducted required records checks” on migrants”).

⁶² CBP Detention Standards, *supra* note 53, at 9–11.

is removed from the individual and searched.⁶³ The biggest difference is that, unlike legal travelers, DHS can continue to detain noncitizens in Border Patrol custody if their backgrounds are uncertain because the presumption is against release.⁶⁴ Border Patrol often collects DNA from detainees to screen against criminal databases and vet purported family relationships—a relatively rare occurrence for legal travelers.⁶⁵ Regardless, the Proclamation does not actually require or permit asylum seekers to provide “comprehensive background information,” instead using this pretext to preclude them from seeking protection.

The government states that rescinding the Proclamation would “exacerbat[e] threats to national security and public safety,” because “not only did overall encounters at the SWB increase from FY 2021 to FY 2024, but so did encounters with aliens that pose threats to national security and public safety.”⁶⁶ However, the fact that more public safety threats were identified and interdicted proves that Border

⁶³ *Id.* at 26.

⁶⁴ *Cf.* Memorandum from Border Patrol Chief Raul L. Ortiz to all Chief Patrol Agents and Directorate Chiefs Policy on Parole with Conditions in Limited Circumstances Prior to the Issuance of a Charging Document (May 10, 2023), <https://www.aila.org/cbp-issues-memo-on-policy-on-parole-with-condition> (discussing DHS’s discretion to release noncitizens apprehended by Border Patrol).

⁶⁵ U.S. GOV’T ACCOUNTABILITY OFF., DNA COLLECTIONS: CBP IS COLLECTING SAMPLES FROM INDIVIDUALS IN CUSTODY, BUT NEEDS BETTER DATA FOR PROGRAM OVERSIGHT 14 (June 2, 2023), <https://www.gao.gov/assets/d23106252.pdf>.

⁶⁶ Gunduz Decl., *supra* note 10, at ¶ 4, ¶ 19.

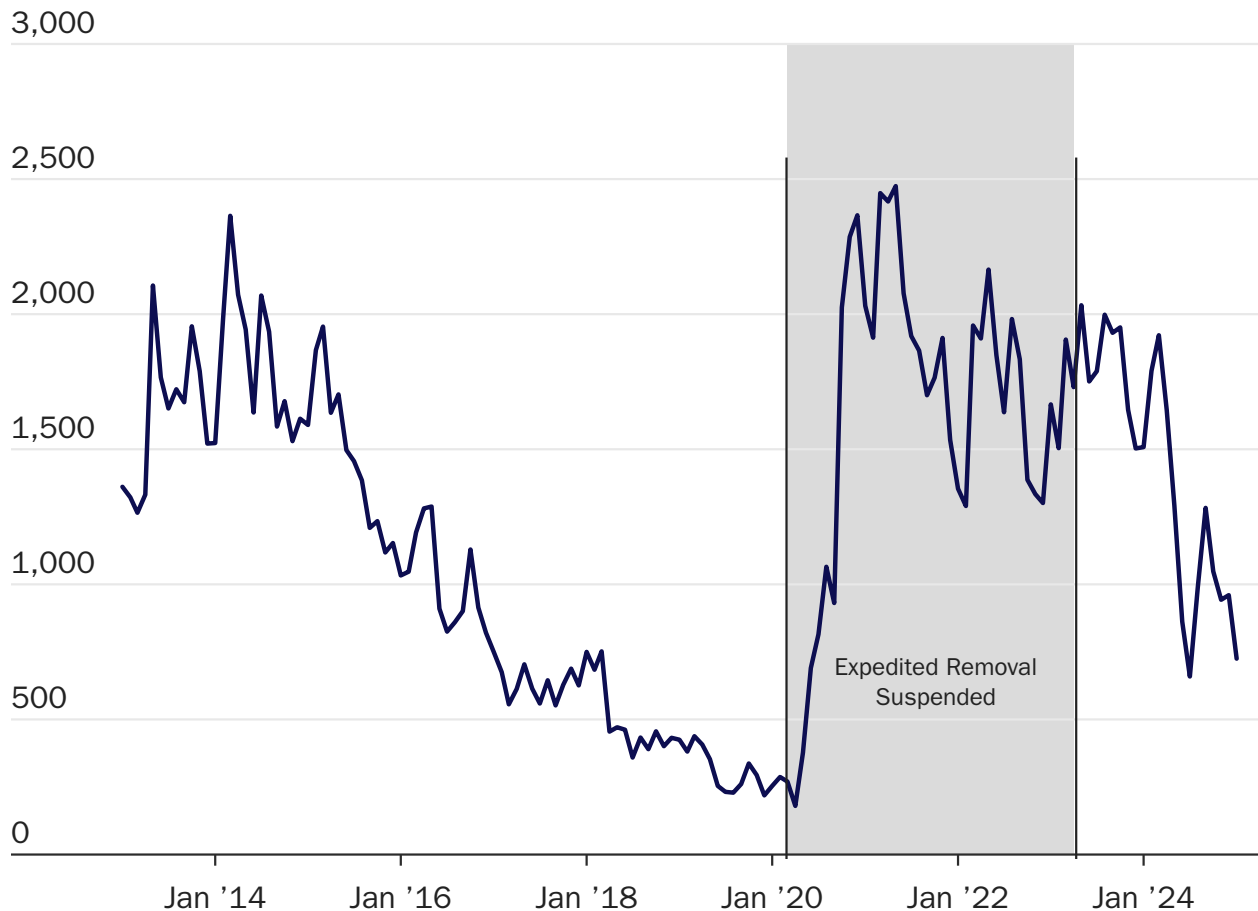
Patrol *can* vet individuals in its custody and manage its security responsibilities even when border apprehensions are much higher than they were when the Proclamation was issued.⁶⁷

Moreover, the number of Border Patrol apprehensions of convicted criminals spiked in calendar year 2020 *before* the increase in asylum seekers and while expedited removal processing was suspended by Title 42. That increase was likely caused by the lack of consequences imposed on convicted criminals while Title 42 was in effect. Once consequences returned under expedited removal, convicted criminal crossings fell.

⁶⁷ See also Memorandum from Joseph V. Cuffari, *supra* note 61 (Border Patrol “followed its screening procedures to prevent migrants with serious criminal backgrounds or individuals on the terrorist watch list from entering the United States”).

Criminal crossings spiked when expedited removal was suspended

Border Patrol arrests of convicted criminals, 2013 - 2025



Source: *Customs and Border Protection Border Patrol Statistics*, *supra*.

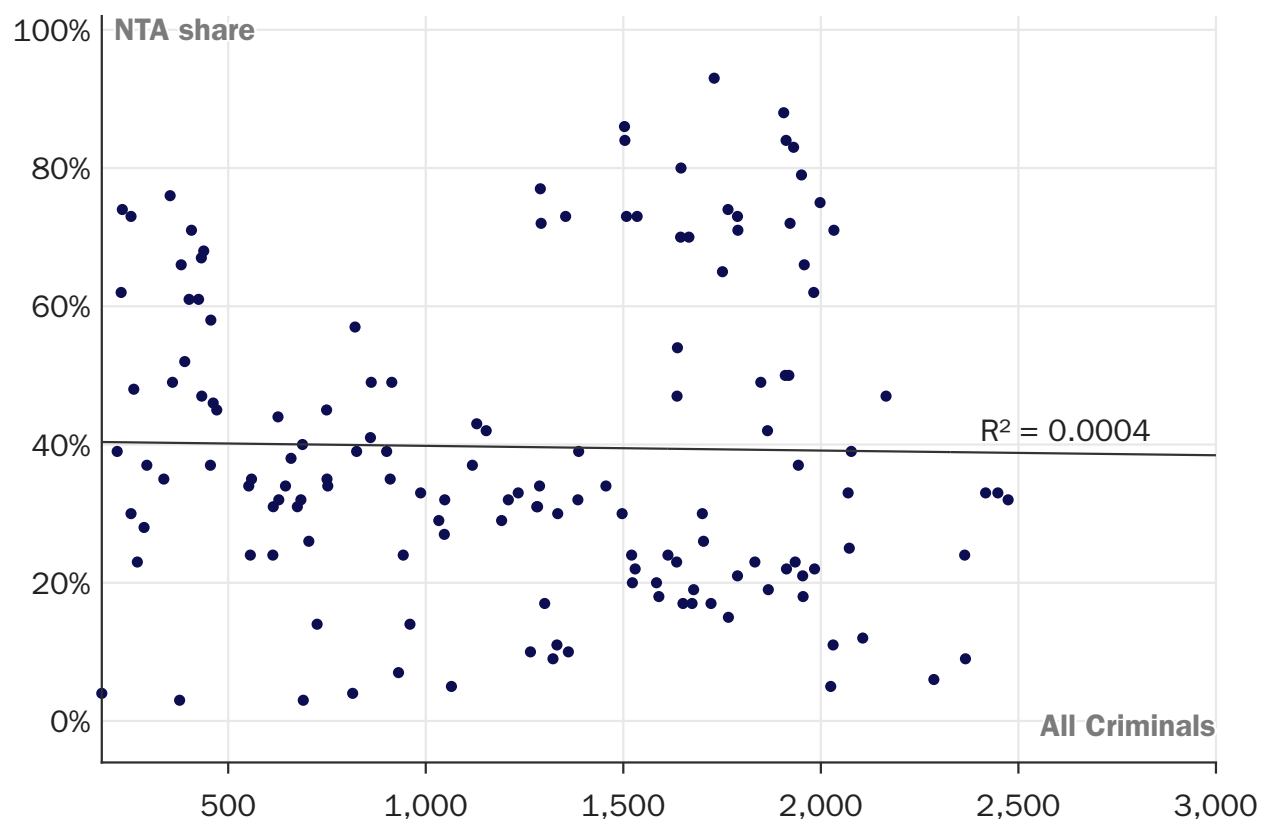
The government states that asylum processing permits smugglers to “circumvent” Border Patrol “to move illicit contraband and criminal aliens into the interior,” but it provides no data to support this conclusion.⁶⁸ Since January 2013—when Border Patrol began recording criminal history in its searchable database—there is no statistically significant relationship between convicted criminals arrested

⁶⁸ Noem Declaration at ¶ 4, *Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem*, No. 1:25-cv-00306 (D.D.C. July 2, 2025) (“Noem Decl.”).

by Border Patrol and the share of noncitizens apprehended by Border Patrol issued credible fear referrals or notices to appear. This shows that the method under which Border Patrol processes arrivals is not likely influencing Border Patrol's effectiveness in interdicting criminals.

Border arrests of convicted criminals are not related to asylum

Border Patrol arrests of convicts and the share of arrests with notices to appear or credible fear, 2013 - 2024



Source: *Customs and Border Protection Border Patrol Statistics, supra*; Smith & Butcher, *supra*.

And although Border Patrol does interdict and stop threats, the government provides virtually no evidence for the proposition that noncitizens *released* by Border Patrol are public safety threats. In 2023, during the period of peak border

encounters, the Census Bureau’s American Community Survey data show that immigrants without legal status were about half as likely as the U.S.-born population to have committed offenses serious enough for them to be incarcerated in the United States—and that includes noncitizens in Border Patrol or DHS detention and those incarcerated for having entered illegally.⁶⁹

Similarly, the government asserts that Border Patrol screening for terrorism concerns can be “wholly ineffective” during peak migration periods.⁷⁰ But Border Patrol successfully identified more than 400 detainees on the terrorist watchlist during the period of highest border encounters between FY 2021 and 2024.⁷¹ More importantly, no person released from Border Patrol custody has killed anyone in a terrorist attack, even though millions of noncitizens entered illegally during that period of time and were detained and released by Border Patrol.⁷² There is no

⁶⁹ Michaelangelo Landgrave & Alex Nowrasteh, *Illegal Immigrant Incarceration Rates, 2010-2023*, CATO INST. (Apr. 24, 2025), <https://www.cato.org/policy-analysis/illegal-immigrant-incarceration-rates-2010-2023>.

⁷⁰ Gunduz Decl., *supra* note 10, at ¶ 5.

⁷¹ *CBP Enforcement Statistics, Terrorist Screening Data Set Encounters*, U.S. CUSTOMS & BORDER PROT. (last modified July 18, 2025), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>.

⁷² *Beyond the Border: Terrorism and Homeland Security Consequences of Illegal Immigration Hearing Before the Subcomm. on Counterterrorism, Law Enf’t & Intel. and the Subcomm. on Border Sec. & Enf’t*, 118th Cong. (2024) (Testimony of Alex Nowrasteh 2–3),

evidence that people released from Border Patrol custody after vetting pose a greater threat to U.S. security than any other immigrant or person in the United States.

Nor is there any basis for the government's vague suggestions that asylum seekers are likely to commit crimes or acts of terrorism.⁷³ Immigrants have considerably lower arrest rates than the U.S.-born population.⁷⁴ And existing statutory authorities permit the government to quickly seek to remove noncitizens who it determines actually constitute national security threats.⁷⁵

The government also vaguely states that the Proclamation is necessary because international cartels and other criminal organizations operate and control territory “on the other side of the southern border.”⁷⁶ But violence in Mexican border states has historically been negatively correlated with violence in U.S. border

<https://www.congress.gov/118/meeting/house/117604/witnesses/HHRG-118-HM05-Wstate-NowrastehA-20240919.pdf>.

⁷³ See Gunduz Decl., *supra* note 10, at ¶¶ 18–21, 37–41.

⁷⁴ Michael T. Light et al., *Comparing Crimes Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born US Citizens in Texas*, 117 PROCS. OF THE NAT'L ACAD. OF SCIS. (Dec. 22, 2020), <https://pmc.ncbi.nlm.nih.gov/articles/PMC7768760/>.

⁷⁵ *E.g.*, 8 U.S.C. §§ 1226(c), 1231(a)(6).

⁷⁶ Gunduz Decl., *supra* note 10, at ¶ 18.

states—that is, homicide rates on the U.S. side have fallen even when Mexican border states’ homicide rates have risen.⁷⁷

B. The Government Itself is Diverting CBP Resources Away from Border Enforcement.

While the government claims that the district court’s order would require reassigning CBP agents to migrant processing and “divert[] them from other activities, including law enforcement priorities like combatting criminal activity at the border,” it is the government itself that is diverting Border Patrol agents away from the border to take part in civil immigration enforcement in the interior of the country.⁷⁸ In May, CNN reported that DHS would begin “tapping Border Patrol agents to fan out nationwide” to help “ramp up arrests of undocumented immigrants” to hit arrest quotas demanded by the White House.⁷⁹ Border Patrol and other CBP agents have since been identified taking part in civil immigration enforcement operations far from the border, from California to New Jersey.⁸⁰ It has also been

⁷⁷ Alex Nowrasteh, *Mexico Is Not Sending Its Murderers: Homicide Rates on the Mexican Border*, CATO INST. (July 31, 2018), <https://www.cato.org/blog/mexico-not-sending-its-murderers-homicide-rates-mexican-border>.

⁷⁸ Gunduz Decl., *supra* note 10, at ¶ 37.

⁷⁹ Priscilla Alvarez et al., *Trump administration plans to deploy hundreds more federal agents to ramp up immigration enforcement across the country*, CNN (May 13, 2025), <https://perma.cc/3AT7-6LJ8>.

⁸⁰ E.g., Molly Gibbs, *Fox News correspondent was with border patrol agents in south Sacramento raid*, SACRAMENTO BEE (July 17, 2025),

reported that an internal DHS memo reflects that “[a]s of late June, CBP was lending out more than 1,100 of its 19,000 [B]order [P]atrol agents and more than 800 of its 26,000 port officers to ICE” to participate in immigration enforcement in the interior of the United States.⁸¹ This voluntary diversion of CBP personnel away from the border undercuts the government’s claims that the Proclamation permits CBP to “to dedicate significantly more resources to address national security and public safety threats at the border,” “[i]nstead of spending all their manpower processing illegal aliens.”⁸²

The government’s claims that the district court’s order will deprive it of necessary law enforcement resources are further belied by its own acknowledgement of the recent appropriation of tens of billions of dollars in additional border security

<https://www.sacbee.com/news/politics-government/capitol-alert/article310876615.html>; Gio Insignares, *Immigration agents release Army veteran detained during Camarillo farm raid*, CBS NEWS (July 16, 2025), <https://www.cbsnews.com/losangeles/news/immigration-agents-release-army-veteran-detained-during-camarillo-farm-raid/>; Darla Miles, *Demonstrators demand release of 20 workers from ICE custody after raid at Eidson warehouse*, ABC 7 NEW YORK (July 16, 2025), <https://perma.cc/9KF5-BS4J>.

⁸¹ Dave Jamieson, *‘Sensitive’ Memo Reveals How Many Border Agents Trump Is Enlisting In Immigration Raids*, HUFFINGTON POST (July 22, 2025), https://www.huffpost.com/entry/trump-cbp-border-patrol-immigration_n_687ff2a1e4b0a3d10a1f1363.

⁸² See Noem Decl., *supra* note 68, at ¶ 8.

funding.⁸³ The DHS Secretary admits that the appropriations bill provides “additional resources for border security,” but claims that it “does not mitigate any concerns” because it is not specifically “intended to remediate” any consequences of an injunction against the Proclamation.⁸⁴ But the infusion of tens of billions of new dollars for CBP funding more than offsets any speculative diversion of resources to migrant processing that the government asserts may result if the district court’s order is affirmed.

CONCLUSION

The district court correctly held that Sections 1182(f) and 1185(a)(1) of the Immigration and Nationality Act do not authorize the President to create new repatriation procedures, and it chose proper remedies to address those clear statutory violations.

Respectfully submitted,

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⁸³ Press Release, Dep’t of Homeland Sec., Secretary Noem Commends President Trump and One Big Beautiful Bill Signing into Law: Historic Win for the American People and the Rule of Law (July 4, 2025), <https://perma.cc/65AA-3FXM>.

⁸⁴ Noem Decl., *supra* note 68, at ¶ 11

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Fed. R. App. P. 32(a)(7) and Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,120 words.

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Dated: September 19, 2025

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2025 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by CM/ECF.

/s/Thomas A. Berry
Thomas A. Berry

Dated: September 19, 2025

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