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The Past, Present, and Future of Humanitarian Parole

Farooq Chaudhry†

ABSTRACT

The humanitarian parole provision of the Immigration and Nationality Act grants the Attorney General discretion to allow people to enter the United States without an immigrant or non-immigrant visa. Despite the sparse language of the provision establishing parole, it has been used in a wide variety of contexts, ranging from one-time grants of entry into the United States for medical care to the establishment of large-scale programs for entire groups of people. The creation and administration of large-scale parole programs have been the focus of recent lawsuits, placing critical questions on the meaning and scope of the provision before judges. This Comment aims to provide a historical overview of humanitarian parole and evaluate controversies and lawsuits challenging large-scale parole programs. Ultimately, it argues that large-scale parole programs play a crucial role in our immigration system, and their creation is a legitimate, legal use of the provision. It ends by making a recommendation on how to amend the parole statute to formally authorize large-scale programs.

I. INTRODUCTION

Humanitarian parole is a discretionary tool available under the Immigration and Nationality Act (“INA”) that allows certain individuals to temporarily enter the United States without an immigrant or nonimmigrant visa. Parole is a temporary status during which parolees are protected from deportation for the allotted timeframe of their parole. It does not confer a pathway to permanent status, though pa-

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3 Id.
roles are permitted to apply for a work permit.4 The statute authorizing humanitarian parole grants the Attorney General power to use his or her “discretion” to “parole [people] into the United States temporarily under such conditions as [he or she] may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit . . . .”5 Although the statute grants this authority to the Attorney General, Congress transferred the enforcement of immigration laws to the Secretary of the Department of Homeland Security (DHS) under the Homeland Security Act of 2002.6 Consequently, parole applications are now assessed by Humanitarian Affairs Branch officers7 in the U.S. Citizenship and Immigration Services (USCIS), which sits under the DHS.8

The statute establishing humanitarian parole is sparsely worded, but parole is used in a variety of contexts. While it is often used to allow individuals to enter the United States to visit sick family members, seek medical treatment, or allow a noncitizen to participate in a criminal or civil legal proceeding,9 it has also been used to establish special, large-scale parole programs in the aftermath of political or humanitarian crises in order to provide relief for people affected by those crises.10 Because these programs are authorized by either the Attorney General before 2002 or DHS thereafter, the programs are vulnerable to changes across presidential administrations based on each administration’s views on immigration and the scope of the provision.11 These different approaches to humanitarian parole have created instability in parole-based programs.12 As a result, people have raised litigation challenging the legality of certain parole-based pro-

4 Id.
9 Zelaya, supra note 2.
10 Id. In Operation Pacific Haven in 1996, parole was used to bring 6,600 people from Iraq; in Operation New Life in 1975, parole was used to bring approximately 130,000 people from Vietnam.
12 Id.
grams, the harm caused when parole programs are cancelled, and the harm caused when a program’s adjudication standards are abruptly changed. This Comment offers an overview of the history and development of humanitarian parole, recent parole programs either created by or ended under the Obama, Trump, and Biden administrations, and recent lawsuits challenging either the programs themselves or how they have been administered. It will conclude by putting forth a recommendation to amend the statute to expressly authorize the creation of large-scale humanitarian parole programs and provide guidance on how to operate them. Expressly authorizing large-scale parole programs will enable more stability in administering them across presidential administrations and will place challenges to the administration of these programs under the Administrative Procedure Act on equal footing.

II. THE DEVELOPMENT, USAGE OF, AND CHALLENGES TO HUMANITARIAN PAROLE

A. Historical Background and Development of Humanitarian Parole

A statutory provision authorizing parole for humanitarian or public benefit purposes was a part of the original Immigration and Nationality Act of 1952 and has since been amended several times. The original provision authorized the Attorney General to grant parole for “emergent reasons or for reasons deemed strictly in the public interest.” At the time, the INA did not contain any distinct provisions pertaining to the admission of refugees, and so the parole provision was often used to bring in refugees.

In 1965, when the INA was amended to include a “conditional entry” provision for refugees, the House Judiciary and Senate Judiciary Committee reports both stated that parole authority should only be exercised by the Attorney General in “emergent, individual, and isolated situations, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups

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16 ANDORRA BRUNO, CONG. RSCH. SERV., R46570, IMMIGRATION PAROLE 1 (2020).
18 Id.
outside of the limit of the law.” Nonetheless, the provision continued to be used to address refugee situations throughout 1960s and 1970s. In order to curtail this practice, Congress explicitly added language in The Refugee Act of 1980 that defined the term “refugee,” established a refugee admissions process, and prohibited the Attorney General from paroling into the United States “an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than being admitted as a refugee under section 207.”

The most recent amendment to the provision originated in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. The IIRIRA repealed the original 1952 language in the INA, which stated that parole would be considered “for emergent reasons or for reasons deemed strictly in the public interest,” and replaced it with the current language limiting admission to “a case-by-case basis for urgent humanitarian reasons or for significant public benefit.”

Pursuant to the Homeland Security Act of 2002, the Secretary of DHS delegated authority to grant parole to USCIS in 2003, U.S. Immigrations and Customs Enforcement (ICE) in 2004, and U.S. Customs and Border Patrol (CBP) in 2006. USCIS authorizes parole for noncitizens outside of the United States; ICE authorizes parole for noncitizens outside the United States for law enforcement and in-

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19 Id.
20 Id.
26 Dep’t of Homeland Sec., Delegation of Authority to the Assistant Secretary for U.S. Immigration and Customs Enforcement (No. 7030.2) (Nov. 13, 2004), https://www.hsdl.org/?view&did=534774 [https://perma.cc/P3UQ-T6TX].
telligence purposes, as well as to release detained noncitizens from custody;29 and “CBP authorizes parole at United States ports of entry, including preflight inspection facilities.”30 In 2008, the three agencies entered into a memorandum of agreement (MOA) to coordinate their parole efforts for noncitizens outside of the United States and at ports of entry.31 In the MOA, the agencies interpreted parole for “humanitarian” reasons to mean “relating to urgent medical, family, and related needs.”32 Parole for “significant public benefit” reasons, the agencies stipulated, means “persons of law enforcement interest such as witnesses to judicial proceedings.”33 Parole requests are usually adjudicated by the USCIS Humanitarian Affairs Branch within ninety days of receipt.34 In the fiscal year 2020, USCIS received 1,500 requests for humanitarian or significant public benefit parole, which was the fewest they had received in the five years prior.35 The most recent approval rates published by USCIS are from 2014, stating that approximately 25% of applications for parole are approved each year.36

The categorical exclusion from parole eligibility for people who meet the definition of “refugee,”37 the “case-by-case” language in the current iteration of the parole statute,38 and the definitions of parole provided by the agencies that adjudicate parole applications39 portray parole as a discretionary tool that is evaluated and granted on an individual basis. Notably, the parole provision does not make any men-

31 BRUNO, supra note 16, 3–4.
33 Id.
37 BRUNO, supra note 16, at 3.
tion of large-scale, categorical programs that benefit specific populations or groups of people; rather, each application is to be adjudicated on the basis of specific emergency circumstances, such as those pertaining to urgent medical, family, and related needs.40

But despite the statutory language and legislative history, presidential administrations have continued to authorize and establish large-scale, categorical parole programs. One recent study found that over the past seven decades, at least “126 programmatic or categorical parole orders, meaning orders that were nationalized policies intended to permit the entry of certain defined noncitizens,” were created under the parole provision codified at 8 U.S.C. § 1182.41 These parole programs varied in size and were created to address a wide range of concerns. For example, in order “to respond more effectively to international developments which result[ed] in increased numbers of people being uprooted from their traditional homes,” the Attorney General authorized “a Special Parole Program permitting the parole of 5,000 Soviet Jews and Romanian refugees” from December 1977 through April 1978.42 In response to overpopulated refugee camps and a large influx of people fleeing Vietnam, Laos, and Cambodia, the Attorney General authorized the parole of 15,000 “Indochinese refugees” in 1977.43 And in 1996, in response to fighting in northern Iraq between Kurds and Iraqis, “5,900 Kurds who worked for the U.S. relief operations or U.S.-affiliated NGO’s in northern Iraq, as well as 650 opposition activists” were paroled into the United States.44 These are just three out of 126 documented examples of large scale programs created under the authority of the parole provision in response to geopolitical crises impacting the United States.

More recently, the Obama and Biden administrations have also used the parole provision to create large-scale programs that respond

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40 Refugee, Asylum, and International Operations Directorate, supra note 28, at 8.
43 Id.
to rapidly unfolding humanitarian crises and bring people impacted by them into the United States.\(^46\) The Trump administration, on the other hand, interpreted the scope of the parole provision more narrowly and thus ended a program established under the Obama administration.\(^47\) The parole programs created under the Biden administration—programs created to address urgent, actively unfolding humanitarian crises—are being challenged in federal courts,\(^48\) as is the Trump administration’s decision to abruptly end an Obama-era parole program.\(^49\) An overview of how these types of programs have been created, used, and understood under the Obama, Trump, and Biden presidential administrations highlights the vastly different approaches to humanitarian parole, which has given way to federal litigation regarding its usage and application and demonstrates the need for reforming the statute.

B. Special Humanitarian Parole Programs under the Obama Administration

1. Special Humanitarian Parole Program for Haitian Orphans

On January 12, 2012, a massive 7.0 magnitude earthquake hit the small Caribbean country of Haiti.\(^50\) In the aftermath of the earthquake, it is estimated that 222,000 people lost their lives, 300,000 were injured, and 1.5 million people became homeless.\(^51\) As a part of the U.S.’s relief efforts,\(^52\) DHS Secretary Janet Napolitano, in coordination with the Department of State, announced a special humanitar-

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\(^52\) US offered TPS and financial on the ground aid. DEP’T OF STATE, U.S. RELATIONS WITH HAITI (2023), https://www.state.gov/u-s-relations-with-haiti/; text=Since%20the%202010%20earthquake%2C%20the%20reconstruction%20and%20development%20programs [https://perma.cc/T55C-XFHJ].
ian parole policy to allow “orphaned children from Haiti to enter the United States temporarily on an individual basis” to ensure the orphaned children would receive the care that they needed. The children eligible for special humanitarian parole under this policy were “[c]hildren who have been legally confirmed as orphans eligible for intercountry adoption by the Government of Haiti and are being adopted by U.S. citizens,” as well as “[c]hildren who have been previously identified by an adoption service provider or facilitator as eligible for intercountry adoption and have been matched to U.S. citizen prospective adoptive parents.”

The program was “created quickly and out of whole cloth” in order to meet the urgent needs of the emergency situation unfolding in Haiti. While humanitarian parole applications are typically evaluated on a case-by-case basis, the Special Humanitarian Parole Program for Haitian Orphans (SHPPHO) proactively defined a class of individuals who “could qualify for humanitarian parole based on a set of specific eligibility requirements.” As a result of the program, the United States was able to parole over 1,100 children out of Haiti and into the United States in just the span of a few months.

Although Secretary Napolitano’s announcement said the policy would be applied on a case-by-case basis, this case-by-case scrutiny should be understood differently than the case-by-case scrutiny mentioned in 8 U.S.C. § 1182. Whereas case-by-case scrutiny in § 1182 refers to the holistic processing of applications by Humanitarian Affairs Branch officers in USCIS using the criteria established in the statute and further specified by USCIS, ICE, and CBP, case-by-case scrutiny under SHPPHO referred to whether the children fell into SHPPHO’s specific defined class of orphans who were eligible for intercountry

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54 Id.
55 Id.
57 Press Release, Dep’t of Homeland Sec., supra note 53 (“The humanitarian parole policy announced by Secretary Napolitano today will be applied on a case-by-case basis to the following children: Children who have been legally confirmed as orphans eligible for intercountry adoption by the Government of Haiti and are being adopted by US citizens.”).
58 Reitz, supra note 56, at 797.
59 Id. at 794. To put these numbers—1,100 successful parole petitions in the span of a few months—into context, USCIS received just 1,500 applications for parole in the entire fiscal year 2020. See 2020 USCIS STATISTICAL ANNUAL REPORT, supra note 35.
60 Press Release, Dep’t of Homeland Sec., supra note 53.
adoption and were being adopted by U.S. citizens. Nearly one third of the applications to the program were not approved simply because they did not meet the specified criteria of SHPPHO, even though all applicants were experiencing the humanitarian crisis motivating the parole program: the earthquake. Agencies administering SHPPHO did not utilize the general criteria outlined in § 1182, as the relevant consideration under this inquiry would have been whether an applicant was experiencing the humanitarian crisis in the wake of the Haiti earthquake.

Created in response to a natural disaster, SHPPHO was significant because it was “the first program of its kind” that defined a class of individuals eligible for humanitarian parole based on specific emergency-relief criteria and distinctly evaluated those applications based on the criteria laid out by DHS, instead of the general § 1182 provision. The SHPPHO program was ended on April 14, 2010, after the Haitian government requested that the United States provide it with the final list of orphans being considered under the program.

2. Central American Minors Program

Another humanitarian parole policy created by the Obama administration was the Central American Minors (CAM) program. Established in 2014, when the number of unaccompanied minors being apprehended at the Southern border was skyrocketing, CAM provided minors who were fleeing persecution in Guatemala, El Salvador, and Honduras, and had parents or relatives with legal status in the United States, with a “safe, legal, and orderly” way of traveling to the country. The program allowed prospective beneficiaries to apply to the program from their home countries rather than applying at the border after making the journey to the United States.

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62 Reitz, supra note 56, at 793.
63 Id. at 794.
64 Id. at 793, 739. Large scale parole programs had been created before, but this was the first program created in response to a natural disaster, rather than in response to geopolitical crises that generated large flows of refugees and migrants.
65 Id. at 797.
67 Fact Sheet: Central American Minors (CAM) Program, supra note 11.
69 The program allowed prospective beneficiaries to apply to the program from their home countries rather than applying at the border after making the journey to the United States.
law were assessed under a “parole pathway” which required a determination that the individual was at risk of harm, cleared background vetting, and had someone in the U.S. who could provide financial support.\textsuperscript{70} From 2014 through 2017, 3,092 minors were granted entrance into the U.S. through the program as either refugees or parolees, and an additional 2,500 were granted parole before it was revoked by the Trump administration.\textsuperscript{71} By the end of 2016, over 5,500 beneficiaries had been interviewed, and 99 percent had been approved for either refugee resettlement or parole.\textsuperscript{72} Approximately 30 percent of interviewed beneficiaries were approved as refugees, and 99 percent of the remaining beneficiaries were approved for parole.\textsuperscript{73}

Thus, under the Obama administration, two unique programs—SHPPHO and CAM—were created to address urgent humanitarian and immigration concerns using humanitarian parole. Both programs identified a particular class of beneficiaries, and beneficiaries from those groups had significantly higher approval rates than humanitarian parole applicants who were not eligible for them. While President Obama broke new ground by creating a parole program in response to a natural disaster,\textsuperscript{74} his approach was still in line with the long history of the parole provision being used to create large scale programs.

C. Special Humanitarian Parole Programs Under the Trump Administration

Five days after being sworn into office, on January 25, 2017, former President Donald Trump issued Executive Order 13767 on Border Security and Immigration Enforcement Improvements.\textsuperscript{75} One of the key directives of the Executive Order 13767 was for the Secretary of DHS to “take appropriate action to ensure that parole authority . . . is exercised only on a case-by-case basis in accordance with the plain language of the statute.”\textsuperscript{76} President Trump’s stated intention for issuing the directive on parole was to “end the abuse of parole and asylum provisions currently used to prevent the lawful removal of removable aliens.”\textsuperscript{77}

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\begin{itemize}
\item \textsuperscript{70} Fact Sheet: Central American Minors (CAM) Program, supra note 11.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} S.A. v. Trump, 363 F. Supp. 3d 1048, 1054 (N.D. Cal. 2018).
\item \textsuperscript{73} Id.
\item \textsuperscript{74} Reitz, supra note 56 at 797.
\item \textsuperscript{75} Exec. Order 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id.
\end{itemize}
Months later, in August of 2017, USCIS announced that the agency would no longer consider, or provide, parole under the CAM program.\textsuperscript{78} Citing Executive Order 13767, the agency stated that the CAM program’s automatic consideration for parole for all minors who were ineligible for refugee status under the in-country refugee programs in Guatemala, Honduras, or El Salvador was inconsistent with the case-by-case exercise of parole called for by “the plain language of the statute.”\textsuperscript{79} As a result of the Trump administration ending the program, 1,465 minors present in the United States under the CAM Parole program at the time it was ended were no longer allowed to renew their status under the program.\textsuperscript{80} Additionally, over 2,500 minors who had already won conditional approval under the program but had not yet traveled to the United States had their conditional offers revoked.\textsuperscript{81}

President Trump’s decision to repeal CAM signaled an understanding and approach to humanitarian parole that sharply differed from President Obama’s approach and the history of large-scale programs preceding him. While the Obama administration considered humanitarian parole a viable tool to create large-scale immigration programs to address pressing, urgent humanitarian needs,\textsuperscript{82} the Trump administration interpreted the provision in the narrowest, most literal sense possible. In his Executive Order, President Trump went so far as to allude that uses of the humanitarian parole provision for anything other than strict case-by-case adjudication constituted “abuse.”\textsuperscript{83}

D. Special Humanitarian Parole Programs under the Biden Administration

The Biden administration’s understanding of and approach to humanitarian parole can be described as a return to and expansion of the Obama administration’s approach. On March 10, 2021, the Department of State announced the reopening of the CAM program in


\textsuperscript{79} Id.


\textsuperscript{81} Id.; see also CAM: INFORMATION FOR PAROLE APPLICANTS, supra note 78.

\textsuperscript{82} Reitz, supra note 56, at 793.

two phases. During the first phase, USCIS processed eligible applications that were closed when the program was terminated by the Trump administration in 2017. The second phase, started on June 15, 2021, not only marked the beginning of USCIS processing new applications, but also expanded access to the program. Eligibility was expanded to include parents of children who are nationals of El Salvador, Guatemala, or Honduras and to legal guardians of those children who are in the United States pursuant to the categories of lawful permanent residence, temporary protected status, parole, deferred action, deferred enforced departure, or withholding of removal. More recently, the CAM program was updated to grant parole for three-year terms.

In addition to continuing and expanding CAM, the Biden administration used humanitarian parole to create three new parole programs to address large-scale humanitarian and immigration crises that unfolded during his presidency: the collapse of the Afghan government after the United States’ withdrawal from Afghanistan, the Russian invasion of Ukraine, and large influxes of migrants from Cuba, Haiti, Nicaragua, and Venezuela at the Southern border.

1. Operation Allies Welcome for Afghans Fleeing the Taliban

On August 30, 2021, the United States completed their evacuation from Afghanistan, officially ending the country’s twenty-year occupation of Afghanistan and the U.S.’s war with the Taliban. More than 122,000 people—many of them Afghan allies who had worked

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84 Press Release, Dep’t of State, Restarting the Central American Minors Program (Mar. 10, 2021), https://www.state.gov/restarting-the-central-american-minors-program/ [https://perma.cc/QZQ2-WE95].

85 Id.


with the United States military—had been flown out of Kabul, Afghanistan, between August 14, which was the day before the Taliban took over the city and regained control of the country, and August 30, 2021. In order to coordinate the evacuation efforts, President Biden directed the Secretary of Homeland Security to “lead the coordination of ongoing efforts across the Federal Government to resettle vulnerable Afghans, including those who worked on behalf of the United States.”

In what came to be known as Operation Allies Welcome (OAW), DHS established a Unified Coordination Group (UCG) to coordinate the implementation of a broad range of services, such as “initial processing, COVID-19 testing, isolation of COVID-positive individuals, vaccinations, additional medical services, and screening and support for citizens who are neither U.S. citizens nor lawful permanent residents.” By November 19, 2021, DHS had paroled over 70,000 Afghan evacuees into the United States and granted them an initial parole for two years. For Afghans who were not able to immediately evacuate during the United States’ withdrawal, USCIS set up a dedicated webpage with instructions on how to apply for parole. The instructions directed applicants to write “Afghanistan Humanitarian Parole” on the mailing envelope, and the word “EXPEDITE” on the top right corner of the application.

The OAW program came under scrutiny by lawmakers and advocates alike because of its poor administration. Despite being en-

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97 Id.
couraged to apply for parole and pay the $575 administrative fee with each application, the United States was slow to process the applications; of the 43,000 humanitarian parole applications received by USCIS between July 2021 and February 11, 2022, fewer than 2,000 applications had been processed, and only 170 had been approved.100 This program was formally ended on October 1, 2022, when the Biden administration announced that Afghan nationals will no longer be able to enter the United States under humanitarian parole authority.101 On June 8, 2023, DHS announced a new process for Afghans who were granted parole under OAW to renew their parole at no cost for a period of two years.102

2. Uniting for Ukraine

Operation Allies Welcome contrasted sharply with the Biden administration’s approach to providing relief to Ukrainian nationals fleeing their country after being invaded by Russia. On April 21, 2022, President Biden announced a program called “Uniting for Ukraine,”103 a streamlined parole process available to Ukrainian citizens to enter the United States, as part of the Biden administration’s stated goal to welcome up to 100,000 Ukrainians fleeing Russian aggression.104 While Afghan applicants had to pay the associated administrative fee with their application, Ukrainian applicants did not.105 Additionally, unlike the United States’ painfully slow processing of parole applica-

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tions from Afghans, the USCIS approved more than 68,000 applications from Ukrainians between April 2021, when the program was announced, and August 4, 2022.

3. Parole for Cubans, Haitians, Nicaraguans, and Venezuelans (CHNV)

On October 12, 2022, DHS announced a new parole program for up to 24,000 Venezuelans seeking to enter the United States as part of larger immigration policies developed by the Biden administration. According to DHS, “four times as many Venezuelans as [in 2021] attempted to cross into [the U.S.], placing their lives in the hands of ruthless smuggling organizations.” In response to this, the Biden administration established a parole program to “decrease flows at the border by creating an orderly process for entry.” The Biden administration set out the following eligibility criteria for the program:

Venezuelans must have a supporter in the United States who will provide financial and other support; pass rigorous biometric and biographic national security and public safety screening and vetting; and complete vaccinations and other public health requirements. Venezuelans are ineligible if they: have been ordered removed from the United States in the previous five years; have crossed without authorization between ports of entry after the date of announcement; have irregularly entered Mexico or Panama after the date of announcement, or are a permanent resident or dual national of any other country other than Venezuela, or currently hold refugee status in any country; or have not completed vaccinations and other public health requirements.

The program was designed to decrease the number of Venezuelans traveling through Mexico to enter the United States at its Southern border and instead to encourage them to get approved for parole before traveling from Venezuela. The cap on the number of Venezuelans eligible for the program was expanded to 30,000 in January of

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106 Id.
107 Id.
109 Id.
110 Id.
111 Id.
Within one week of the parole program for Venezuelans being announced, “the number of Venezuelans encountered at the SWB [Southwest border of the United States] fell from over 1,100 per day to under 200 per day, and, as of the week of December 4, [2022], to an average of 86 per day.”

Based on the Venezuelan parole program’s success in reducing the number of migrants at the Southern border, on January 5, 2023, the Biden Administration expanded the program to include nationals from Nicaragua, Haiti, and Cuba. The program allowed “up to 30,000 individuals per month from [Venezuela, Nicaragua, Haiti, and Cuba], who have an eligible sponsor and pass vetting and background checks” to come to the United States on parole for a period of two years. The program mirrored the original program established only for Venezuelans and held out the same eligibility requirements. As a result of the program, DHS encounters with nationals from these four countries decreased by ninety-seven percent between January 5, 2023, and January 31, 2023.

The Biden administration’s approach marked a return to the use of parole under the Obama administration and other administrations prior. The reopening of the CAM program, Operation Allies Welcome for Afghans, United for Ukraine, and programs for Cuban, Haitian, Nicaraguan, and Venezuelan nationals were all large-scale parole programs created for specific categories of people in response to humanitarian crises unfolding around the world.

E. Litigation Arising from Special Humanitarian Parole Programs

Across the Obama, Trump, and Biden administrations, the use of humanitarian parole has fluctuated dramatically. Lawyers, having identified the instability of humanitarian parole programs, are using litigation to strategically challenge the legitimacy of parole programs. Two central disputes are driving the litigation. One dispute asks whether the humanitarian parole provision authorizes the type of categorical, large-scale parole programs created by the Obama and Biden

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115 U.S. CITIZENSHIP & IMMIGR. SERV, supra note 90.
administrations. The second dispute is whether the APA can provide relief to potential beneficiaries of the programs who were harmed by the drastic policy changes across presidential administrations.

1. Challenging the legality of large-scale parole programs

On January 28, 2022, Texas Attorney General Ken Paxton filed a complaint in the Northern District of Texas against President Biden and other federal officials to challenge the legality of the CAM Program.117 Arguing that the CAM Program violates the APA, which prohibits agency actions that are “not in accordance with law,” the plaintiffs maintain that the humanitarian parole provision of the INA does not establish the authority for the executive branch to “create an entire program that categorically considers applicants for benefits as applicants for parole.”120 By creating such categorically-based admissions programs using the humanitarian parole provision, as opposed to a non-categorical case-by-case adjudication of each individual application, the plaintiffs assert that “CAM constitutes an unnecessary and ultra vires action in flagrant disregard of express and congressional authorization.”121 In other words, plaintiffs claim that the humanitarian parole provision cannot be used to authorize large-scale programs. Accordingly, Texas’s claim challenges not just the specific details of the CAM Program, but also the very scope and meaning of the humanitarian parole provision itself. On January 24, 2023, Paxton filed essentially the same exact suit, under the same legal theories, but this time challenging the legality of the Cuban, Haitian, Nicaraguan, and Venezuelan parole program.122

2. Relief for potential beneficiaries harmed by drastic changes in humanitarian parole programs

In S.A. v. Trump,123 parents lawfully residing in the United States who had applied to the CAM Program on behalf of their children filed a class-action lawsuit in the Northern District of California. The plaintiffs alleged that the Trump administration’s termination of the CAM Program and the revocation of the conditional approvals of pa-
role were unlawful under the APA, as DHS’s actions were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” One category of agency decisions the Supreme Court has found to be “arbitrary and capricious” are decisions that ignore reliance interests created by prior decisions.

The court distinguished CAM Program participants who had been conditionally approved for parole from those whose applications had not yet been approved. For those conditionally approved for parole, the only remaining steps for applicants were the completion of non-discretional tasks, such as completing a medical examination, undergoing final security checks, and making travel arrangements. These non-discretionary logistical tasks established reliance interests for people conditionally approved for parole. Therefore, when DHS rescinded parole, this exercise of power was arbitrary and capricious.

By contrast, “participants who had never been approved were subject to discretionary decisions” within the agency’s purview. DHS’s stated policy reason for denying parole for program participants who had not been conditionally approved was because there were no serious reliance interests. The court concluded that this reasoning was sufficient to establish that DHS did not act in an arbitrary and capricious manner when they rescinded parole for people whose applications had not yet been approved.

Additionally, litigation challenging the procedures used to process humanitarian parole applications for Afghans is underway. In Roe v. Mayorkas, the plaintiffs, “Afghans endangered by the Taliban’s return to power and the U.S.-based loved ones attempting to bring them to safety,” allege the USCIS violated § 706(2)(A) of the APA, which directs reviewing courts to invalidate agency actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The plaintiffs allege that USCIS, after receiving thousands of applications from the plaintiffs and others, implemented new standards for adjudicating humanitarian parole requests on behalf of Afghans, with the “purpose, and effect, of making it all but im-

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125 Id. at 1074 (citing 5 U.S.C. § 706).
126 See Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020).
127 S.A., 363 F. Supp. 3d at 1089.
128 Id.
129 Id.
130 Id. at 1085.
131 Id. at 1089.
133 Id.
134 Id. at 1.
135 Id. at 31 (citing 5 U.S.C. § 706(2)(A)).
possible for Afghan beneficiaries to be granted this benefit.”

In doing so, the USCIS “failed to consider” the “reliance interests of the Plaintiffs and other applicants and beneficiaries, who paid a total of more than 20 million dollars in application fees and who were waiting for a decision while in hiding from the Taliban or in third countries in which they have no long-term prospects.”

Defendants in Roe v. Mayorkas filed a motion to dismiss, arguing “that the Court lacks jurisdiction because parole decisions as well as the pace of those parole decisions have been committed to agency discretion under 8 U.S.C. § 1182(d)(5)(A), and Congress has precluded judicial review of those decisions and actions under 8 U.S.C. § 1252(a)(2)(B)(ii) and 5 U.S.C. § 701(a)(1) (2).” However, the Plaintiffs argued that they are “not seeking review of their individual parole determination or asking the court to grant their parole . . . . [But] are challenging changes in policy and the Defendants’ failure to adjudicate applications, as violative of the APA, § 1182(d)(5)(A), and USCIS’s own Policy Manual . . . .” The court found ample support to agree with the Plaintiffs position that § 1252(a)(2)(B)(ii) does not bar all judicial review of agency action taken under § 1182(d)(5)(A), and thus denied the Defendants motion to dismiss on this particular claim. The litigation is still ongoing.

Hence, in both S.A. v. Trump and Roe v. Mayorkas, litigants are not challenging the legality of the programs. Rather, the plaintiffs are challenging the harms they endured from the sudden, disruptive changes in programs that are not explicitly governed by any formal procedure and that failed to recognize their vested reliance interests.

136 Id. at 32.
137 Id.
139 Id. at 16.
140 Id. at 15 (citing Aracely, R. v. Nielsen, 319 F. Supp. 3d 110, 135 (D.D.C. 2018) (“While § 1252(a)(2)(B)(ii) undoubtedly bars judicial review of individual parole decisions, courts have declined to apply it to claims challenging the legality of policies and processes governing discretionary decisions under the INA.”); Damus v. Nielsen, 313 F. Supp. 3d 317, 327 (D.D.C. 2018) (holding that claims that are not asking the Court “to review the propriety of any given parole decision, but, instead, ‘simply seek compliance with certain minimum procedural safeguards when parole decisions are made’ . . . do not fall within the jurisdictional bar of 1252(a)”)).
141 Memorandum and Order, supra note 138, at 17.
143 Complaint, Roe v. Mayorkas, supra note 15.
III. THE IMPORTANCE OF PAROLE AND A PATH FORWARD

Humanitarian parole plays a unique role in the immigration system because it enables the United States to advance versatile and rapid responses to natural disasters and geopolitical crises that impact many people. In order to strengthen and solidify the place of large-scale humanitarian parole in our immigration system, the INA provision authorizing parole should be amended to establish procedures and guidelines for the executive branch when creating and operating large-scale humanitarian parole programs. There are three reasons for this recommendation. First, large-scale humanitarian parole programs serve an important humanitarian function that refugee and asylum law, by design, are not able to address. People who are impacted by and fleeing from natural disasters do not fit the statutory definition of “refugee,” and are therefore not eligible for relief.144 Additionally, the highly fact-dependent, individualized scrutiny applied to each asylum application creates substantial procedural hurdles when trying to provide large-scale relief to on a group basis.145 Large-scale programs have allowed the United States to respond rapidly to global humanitarian crises and provide relief to vulnerable people.146 Next, humanitarian parole plays an important role in advancing the United States’ foreign policy interests.147 Historically, the provision has been used to provide relief to vulnerable people fleeing geopolitical conflicts and crises that the United States has a vested interest in.148 Finally, amending the humanitarian parole statute to establish procedures and guidelines for creating large-scale humanitarian parole programs would regulate the creation of these programs and policies, not the adjudication of individual applications. Thus, these programs would fall under the jurisdiction of the APA, which would provide much-needed procedural stability to the programs across presidential administrations. By amending the statute to include large-scale programs, Con-

146 See UNITING FOR UKRAINE., supra note 103; Carrington & Jeffries, supra note 45.
148 UNITING FOR UKRAINE., supra note 103; Aminy & Mehrrotra, supra note 105.
A. Humanitarian Parole Fills a Gap Left by Refugee and Asylum Law

The legislative history of the humanitarian parole provision makes it clear that Congress did not intend for the provision to create large-scale relief programs.\textsuperscript{149} Multiple presidential administrations, however, have continued to utilize the humanitarian parole provision to create large-scale relief programs.\textsuperscript{151} This pattern presents the question of why this practice continues. One possible reason for the continued creation of special humanitarian parole programs could be that these programs were created to help certain populations that could not be helped under refugee or asylum law because of statutory limitations on who qualifies for refugee status, and the procedural hurdles created by the asylum process.\textsuperscript{152} The combination of statutory and procedural limitations in asylum law therefore leaves humanitarian parole as the only way to provide relief to people during a humanitarian crisis.

According to 8 U.S.C. § 1101, a refugee is a person who is outside of their country of nationality and is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”\textsuperscript{153} An asylee is a person who meets the same statutory criteria as a refugee, but, unlike a refugee, is already present within the United States or is seeking admission at a port of entry.\textsuperscript{154}

Despite the devastating impact of the 2010 earthquake in Haiti,\textsuperscript{155} people suffering from the effects of the natural disaster were not covered by refugee and asylum law because the hardships they faced were not on account of their race, religion, nationality, membership in

\textsuperscript{149} S.A. v. Trump, 363 F. Supp. 3d 1048, 1074 (N.D. Cal. 2018); Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020).
\textsuperscript{150} BRUNO, supra note 16, at 1, 12.
\textsuperscript{151} Brier, supra note 41; Press Release, supra note 53; OPERATION ALLIES WELCOME, supra note 94.
\textsuperscript{152} Parker, supra note 144, at 137; THE AFFIRMATIVE ASYLUM PROCESS, supra note 145.
\textsuperscript{153} 8 U.S.C. § 1101.
a particular social group, or political opinion. As a result, humanitarian parole provided the only mechanism to provide immediate relief and legal status in the United States for victims of the earthquake. Prior to the Refugee Act of 1980, the INA provided that people fleeing natural disasters should be considered within the quota for the number of refugees the United States would accept. The new definition of refugee that was incorporated in the Refugee Act of 1980, however, removed the language that provided victims of “catastrophic natural calamities” with eligibility to seek refuge in the United States on the account the harm suffered due from the natural disaster. As a result, victims of natural disasters are no longer eligible to seek refugee status or asylum within the United States.

As an earthquake spurred the humanitarian crisis in Haiti in 2010, the Special Humanitarian Parole Program for Haitian Orphans provided a legal pathway to the United States for over 1,100 children who would not have been eligible to come as refugees or asylees. Humanitarian parole therefore provided the United States with a mechanism to quickly respond to an unforeseen humanitarian crisis.

Additionally, substantive and procedural vulnerabilities in refugee and asylum law made them inadequate tools for the Biden administration’s United for Ukraine program and Operation Allies Welcome for the evacuation of Afghans. Applying for asylum is a multi-step process for individual applicants that requires a thorough interview to evaluate the merits of the application and assess whether one meets the statutory requirements for asylum. Whether the harm or risk of harm facing the individual reaches to the level of persecution is a “very fact-dependent” inquiry, and applicants must show that they have a roughly 10 percent chance of being persecuted in order to establish that their fear of persecution is “well-founded.” Courts have previously held that “general fears (even ‘well-founded ones’) of future harm from political upheaval or terrorist violence are not sufficient to establish eligibility for asylum,” and the existence of civil conflict it-

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157 Parker, supra note 145, at 137.
158 Id.
159 Reitz, supra note 56, at 794.
161 See Cordon-Garcia v. INS, 204 F.3d 985, 991 (9th Cir. 2000).
163 Meguenine v. INS, 139 F.3d 25, 29 (1st Cir. 1998); Novoa-Umania v. INS, 896 F.2d 1, 5 (1st Cir. 1990).
self does not establish grounds from asylum. If one is able to establish a well-founded fear of persecution, they must then show that the persecution they face is on account of their race, religion, nationality, membership in a particular social group, or political opinion. In the context of persecution on account of one’s political opinions, the persecution needs to be on the account of the victim’s opinion, not the aggressor’s; an aggressor’s underlying, “generalized ‘political’ motive” is inadequate to establish persecution on the account of political opinion. These evidentiary and procedural barriers can significantly reduce the number of people who are eligible for asylum or refugee status.

By way of example, the Supreme Court declared that “if a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion.” In other words, facing violence at the hands of a political regime does not automatically qualify one for asylum; one must demonstrate that they are specifically being targeted by that regime because of political views that they hold. Thus, the process of applying for asylum is an individualized, fact-intensive inquiry and process that requires assessing the nature and basis of one’s claims for relief. Around this process, a body of jurisprudence has emerged that gives color to what does and does not count as persecution. The doctrine indicates that the experience of violence or the risk of experiencing violence itself is not sufficient to qualify.

Based on both the procedure and jurisprudence of asylum, it becomes clear that asylum could not provide the support that humanitarian parole did for both Afghans and Ukrainians fleeing turbulent and violent political situations. Designed to provide urgent relief to a blanket group of people, the Biden administration’s United for Ukraine and Operation Allies Welcome programs were not intended to heavily scrutinize individual applicants as the asylum process requires. In the case of Afghanistan, the immediate collapse of the Afghan government resulted in a massive rush of people trying to flee the country at once. In just two weeks, more than 122,000 people

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164 Pieterson v. Ashcroft, 364 F.3d 38, 44 (1st Cir. 2004).
165 The Affirmative Asylum Process, supra note 160.
167 Id.
168 See, e.g., Martinez-Buenia v. Holder, 616 F.3d 711 (7th Cir. 2010); Espinosa-Cortez v. Attorney Gen. of U.S., 607 F.3d 101 (3d Cir. 2010).
were flown out of Kabul and immediately needed a place to go.\textsuperscript{170} Humanitarian parole provided them with temporary legal status in the United States while they figured out their next steps, including whether to apply for asylum now that they had reached the safety of the United States.\textsuperscript{171}

A similar categorical approval was provided for Ukrainians fleeing Russian aggression. Under the United for Ukraine program, the United States approved more than 68,000 humanitarian parole applications in a five-month span.\textsuperscript{172} Humanitarian parole ensured efficient large-scale relief in an efficient manner that would not have been possible under the individualized asylum process and corresponding case law that potentially bars eligibility. Considering the rapid development of the war in Ukraine,\textsuperscript{173} it is not implausible to imagine that the evidentiary burden required to prove that there is a 10 percent chance of persecution because of the war would be challenging. One reason for this could be because of the various ebbs and flows and regional hotspots of the conflict. Regardless of the potential challenges posed by asylum requirements and jurisprudence, the United States deemed it important to provide a refuge for Ukrainians and Afghans facing precarious situations. Executing these large-scale programs required the United States to utilize humanitarian parole.

One could argue that when humanitarian parole programs are created, the president sidesteps the vetting process that asylees and refugees must undertake to ensure they face a serious threat of harm, are not persecutors of harm themselves, do not pose a danger to the security of the United States, and have not committed any serious nonpolitical crime outside of the United States.\textsuperscript{174} Recipients of humanitarian parole, however, still go through a vetting process in which they are evaluated on a variety of factors. Some of these factors include whether applicants may pose any national security concerns, criminal history or previous immigration violations, and what impact the applicant’s presence will have on the United States.\textsuperscript{175} Additional-

\begin{footnotes}
\footnotetext{170}{Id.}
\footnotetext{171}{Id.}
\footnotetext{172}{Najib Aminy & Dhruv Mehrotra, supra note 105.}
\footnotetext{173}{Matthew Mpoke Bigg, Russia Invaded Ukraine More than 200 Days Ago. Here is One Key Development From Every Month of the War, N.Y. TIMES, (Sept. 13, 2022), https://www.nytimes.com/article/ukraine-russia-war-timeline.html [https://perma.cc/7KYL-S6LR] (last visited Dec. 28, 2022).}
\end{footnotes}
ly, a grant of parole requires that the applicant provides evidence that they have a financial sponsor in the United States who “agrees to provide financial support to the beneficiary while they are in the United States for the duration of the parole authorization period.” Even in emergency situations, like the mass evacuation from Afghanistan, parolees were put through a “rigorous screening and vetting process” that involved “biographic screenings conducted by intelligence, law enforcement, and counterterrorism professionals from DHS and DOD [Department of Defense], as well as the Federal Bureau of Investigation (FBI), National Counterterrorism Center (NCTC), and additional intelligence community partners.”

Additionally, parole is only a temporary status that typically expires after one year. During the parole period, recipients can apply for asylum or other legal status to permanently remain in the United States, which subjects applicants to the screening and application process required to be considered for permanent residence. Therefore, even though the parolees are not immediately subjected to the same level of scrutiny as asylum seekers, they are still thoroughly vetted before being granted temporary permission to stay in the United States. If parolees do decide to apply for asylum, they would then go through the same application process as typical asylum seekers who were not paroled into the country.

Parole plays a critical role in efficiently providing humanitarian relief to vulnerable populations who may not be covered by refugee or asylum law, such as people suffering from humanitarian disasters or living in the aftermath of war. Formalizing the creation and operation of large-scale parole programs via statute will enable the United States to continue to provide such relief and protection.

B. Humanitarian Parole Supports the United States’ Foreign Policy Interests

It is also prudent for Congress to establish procedures and guidelines for the executive branch to create large-scale humanitarian parole programs because of the important role humanitarian parole plays in advancing the United States’ foreign policy goals. Over the past seventy years, the humanitarian parole provision “has been used repeatedly by presidents of both parties . . . to bring a range of groups


176 Id.

177 DEP’T OF HOMELAND SEC., supra note 94.

178 HUMANITARIAN OR SIGNIFICANT PUBLIC BENEFIT PAROLE FOR INDIVIDUALS OUTSIDE THE UNITED STATES, supra note 175.
and individuals into the country.” 179 For example, in 1956, President Eisenhower paroled tens of thousands of Hungarians fleeing communism after the country’s failed revolution. 180 In 1962, parole authority was used to bring in Chinese refugees who had fled to Hong Kong trying to escape Chinese communism. 181 Again, after the Vietnam War, Vietnamese, Cambodians, and Laotians entered the United States under parole authority. 182 In each situation, the United States was either providing relief to people escaping a style of government that is opposed to popular democratic rule or providing relief to people in the aftermath of a war in which the United States was involved. Both rationales establish and advance the United States’ foreign policy interests.

A more recent example of humanitarian parole being utilized to advance foreign policy goals is the United for Ukraine program. 183 Unlike the war in Afghanistan, the United States is neither an aggressor nor defender of its own territorial sovereignty in the Russian war against Ukraine. Nonetheless, the Biden administration concluded that Russia’s actions in Ukraine “challenge[e] the international system itself and unravels our transatlantic alliance, erodes our unity, pressure[s] democracies into failure.” 184 Because of the United States’ interest in preserving the international system and its transatlantic alliances, the Biden administration set out a series of programs to support Ukraine. This included a pathway to parole Ukrainian nationals. 185 Humanitarian parole, therefore, has proven to be a key tool in advancing the United States’ foreign policy interests.

Presidential administrations can shape the use of parole to advance the United States’ foreign policy interests, therefore casting humanitarian parole in a utilitarian role: a variable foreign policy tool wielded by the executive. As humanitarian parole serves the United States’ foreign policy interests, Congress should create procedures and guidelines that govern the creation and operations of large-scale hu-

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180 Id.
181 Id.
182 Id.
185 Id.
manitarian parole programs in ways that are distinct from the Trump administration’s opaque and jilting approaches.\textsuperscript{186}

\textbf{C. Statutory Authorization of Large-Scale Parole Programs Would Make Adjudicating Claims Under the Administrative Procedure Act More Consistent}

Amending the humanitarian parole provision to include express authorization to create categorical programs, as well as procedures outlining the creation and administration of large-scale parole programs, would bring the provision within the jurisdiction of the APA,\textsuperscript{187} which governs the promulgation of regulations by federal agencies.\textsuperscript{188}

Under the APA, a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”\textsuperscript{189} Reviewing courts will “hold unlawful and set aside agency action, findings, and conclusions found to be — arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]”\textsuperscript{190} After meeting Article III standing requirements,\textsuperscript{191} a plaintiff’s APA claim “must assert an interest that is ‘arguably within the zone of interests to be protected or regulated by the statute’ that he says was violated.”\textsuperscript{192} The test to demonstrate that a claim falls within a statute’s zone of interests is “not especially demanding.”\textsuperscript{193} The zone of interests test “forecloses suit only when a plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue.”\textsuperscript{194}

\textsuperscript{189} S.A., 363 F. Supp. 3d at 1074 (quoting 5 U.S.C. § 702) (internal quotation marks removed).
\textsuperscript{190} Id. (quoting 5 U.S.C. § 706(2)) (internal numbering removed).
\textsuperscript{191} See TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) (holding that in order to establish standing, “a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief.”).
\textsuperscript{194} Id. (quoting Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209 (2012)) (internal quotation marks removed).
The DHS retains discretion to decide individual parole applications under 8 U.S.C. § 1182(d)(5)(A), which Congress strengthened by precluding judicial review of DHS decisions under 8 U.S.C. § 1252(a)(2)(B)(ii).\(^{195}\) When individual agency determinations are not being challenged, but instead, the method by which decisions are being made, these decisions are not precluded from judicial review by 8 U.S.C. § 1252(a)(2)(B)(ii).\(^{196}\) When category-based parole programs, such as the CAM Program, are changed and ignore reliance interests created by previous iterations of the program, applicants can therefore advance “arbitrary and capricious” claims under the APA.\(^{197}\) The APA does not bar future federal administrative officials from changing policies established by their predecessors; rather, it establishes guidelines and procedures changes to agency policies\(^{198}\) and requires agencies to fulfill commitments already made to potential beneficiaries.\(^{199}\)

Litigants have already succeeded in challenging the administration of large-scale humanitarian parole programs their APA claims.\(^{200}\) However, because there are no uniform procedures or guidelines for establishing and administering such programs, the merits of litigants’ APA claims are entirely dependent on the unique operating procedures of each individual program. A comparison of two lawsuits, S.A. v. Trump\(^{201}\) and Roe v. Mayorkas,\(^{202}\) illustrates this point.

Both plaintiffs in S.A. v. Trump and Roe v. Mayorkas assert that DHS’s abrupt changes to their humanitarian parole policies were arbitrary and capricious.\(^{203}\) The plaintiffs in S.A. v. Trump who received conditional parole approval were successful in their claim because the court found that in not recognizing the reliance interests created through conditional approval, DHS acted in an arbitrary and capricious manner.\(^{204}\) Notably, the court explained that plaintiffs who were applicants, but had not yet received conditional approval, did not have serious reliance interests and therefore could not substantiate a claim.


\(^{197}\) Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020).

\(^{198}\) Id. at 1905.

\(^{199}\) S.A. v. Trump, 363 F. Supp. 3d 1048, 1089 (“The court holds that DHS’s failure to take into account and address those more serious reliance interests when it mass-rescinded parole for those participants was arbitrary and capricious.”).

\(^{200}\) Id. at 1048.

\(^{201}\) Id.

\(^{202}\) Complaint, Roe v. Mayorkas, supra note 15.

\(^{203}\) S.A., 363 F. Supp. 3d at 1055; Complaint, Roe v. Mayorkas, supra note 15.

\(^{204}\) S.A., 363 F. Supp. 3d at 1089.
that DHS’ changes in the program were arbitrary and capricious. On the other hand, plaintiffs’ reliance interests claims in Roe v. Mayorkas are based on the allegation that USCIS abruptly changed their adjudication standards for humanitarian parole applications and categorically rejected applicants who paid over 20 million dollars in application fees. Although the court has yet to issue a decision in Mayorkas, similarities could be found between Mayorkas plaintiffs and those S.A. v. Trump plaintiffs lacking conditional approval with reliance interests unrecognized by the court. The difference between the two cases, though, is that the conditional approval of applications was not part of the parole process for the plaintiffs in Roe v. Mayorkas, and so receiving conditional approval was never an option. Consequently, if the allegations of Mayorkas plaintiffs are true and that their applications were categorically rejected because of a sudden rule-change, their chances of relief are limited due to the design of the humanitarian parole program rather than their applications themselves.

Because of the absence of statutory guidelines governing the design and administration of parole programs, litigants similar to the Mayorkas plaintiffs who have been harmed by abrupt changes in these programs may face different challenges in substantiating their claims for relief under the APA. As such, it is likely that amending the humanitarian parole provision to include express authorization to create categorical programs, along with uniform guidelines and rules on how to administer those programs, would place litigants on similar footing when adjudicating claims for relief under the APA. This is especially true in instances where the parole programs undergo rapid changes that fail to consider the reliance interests created by earlier iterations of the program.

It could be argued that an express authorization amendment vests too much immigration control in the executive branch by allowing different presidential administrations to craft major immigration policies without bicameralism and presentment. Such policies, it could be argued, are not within the scope of the parole provision. However, such an argument overlooks an important consideration regarding large-scale humanitarian parole programs.

The long history of large-scale humanitarian parole programs suggests that such programs are legal even under the current parole statute, although a narrow, textualist reading might suggest other-

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205 Id. at 1085.  
206 Complaint, Roe v. Mayorkas, supra note 15.  
207 Id. at 32.  
208 Id.  
209 Brier, supra note 41.
Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer,* which puts forward a framework for assessing the scope of presidential powers in relation to the powers held by Congress, illuminates why. According to Justice Jackson, when the president is acting “pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” Alternatively, when the president is acting either in the absence of an explicit grant of authority or an explicit denial of authority from Congress, “there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” In these situations, “congressional inertia, indifference or acquiescence may sometimes at least as a practical matter, enable, if not invite, measure on independent responsibility.” This framework provides ample support for the legality of large-scale parole programs. First, one can argue that Congress explicitly granted the ability to confer parole status to the Attorney General, who sits in the Executive Branch under the direction of the President. Accordingly, the Attorney General can use the parole provision as he or she sees fit, which includes the ability to authorize large-scale parole programs. But even if one argues that there is not explicit Congressional authorization to create such programs, one can argue that they are still legal by virtue of the congressional inertia or acquiescence described by Justice Jackson. Congress has amended the statute multiple times in the past when, with the passage of The Refugee Act of 1980, it deemed that the parole provision should not be used to bring in refugees. But nonetheless, large scale parole programs continued. In 1988, the provision was used to parole “up to 2,000 Soviet emigres per month from Moscow plus all Soviet emigres in Rome, Italy, who cannot be admitted under current constraints.” The Orderly Departure Program (ODP) in Vietnam, established in 1979, “provid[ed] for the departure of immigrants and refugees [from Vietnam] for family reunion and humani-

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210 8 U.S.C. § 1182 grants the Attorney General the power to parole people into the United States “only on a case-by-case basis.”.
212 Id. at 635.
213 Id. at 637.
214 Id.
215 Id. at 637.
tarian reasons.”218 Under ODP, over 2,700 Vietnamese nationals were offered parole.219 And in 1996, 6,550 Iraqi Kurds who worked with the United States were granted parole following fighting between Iraqi and Kurdish forces in northern Iraq.220 These are only three of many examples of large-scale parole programs continuing after Congressional amendments to the statute.221 Had Congress wanted to ban large-scale programs outright, they could have. But their actions have been limited to banning large-scale programs for one category of people, refugees.222 Large-scale programs themselves were left unaffected, and indeed have continued through the present day.223 Thus, one can argue that the continuation of large-scale programs indicates Congressional acquiescence to their legality, placing these programs on sound legal footing.

D. The Temporary Protected Status (TPS) Model

When considering updates to stabilize and formularize humanitarian parole, lawmakers can consider Temporary Protected Status (TPS) as a model. Established in 1990, TPS was established to “provide humanitarian relief to citizens whose countries were suffering from natural disasters, protracted unrest, or conflict.”224 TPS is a discretionary tool that authorizes the Secretary of Homeland Security to designate foreign countries as eligible for TPS status if conditions in that country temporarily prevent the country’s nationals from returning safely.225

A country’s TPS designation can be made for either six, twelve, or eighteen months at a time.226 At least sixty days prior to the expiration of an existing TPS designation, the Secretary of Homeland Security decides whether to extend or terminate TPS designation for a particular country based on updated country conditions.227 Failure to
make an extension or termination decision at least sixty-days in advance of the prior designation’s expiration results in an automatic six month extension.\textsuperscript{228} This designation status allows foreign nationals from that country to apply for temporary protected status in the United States if they meet certain, pre-determined eligibility criteria.\textsuperscript{229} If their applications are approved, TPS beneficiaries are not removable from the United States for the duration of the program, can obtain work authorization, and cannot be detained by the Department of Homeland Security due to their immigration status.\textsuperscript{230}

An updated humanitarian parole statute should parallel the TPS model because the TPS model addresses the structural issues identified in the preceding sections. Namely, TPS clearly defines who is eligible for the status, outlines the duration of the status, and provides individuals with a minimum sixty-day notice outlining whether eligibility will be extended. These procedural protections shield beneficiaries from abrupt changes during times of political turbulence. When designing an updated humanitarian parole statute, lawmakers can create clear forward-looking guidelines that stipulate parole eligibility, such as people fleeing natural disasters or political instability, and people from countries with strategic ties to the United States. Congress can also create guidelines on the number of people that the United States will accept under the parole program, as well as stipulate the duration of the program. Moreover, Congress can require public notice of any changes to the programs at least six months before such changes go into effect. In order to minimize the risk of bias in adjudicating applications, Congress can also put forward clear eligibility requirements for applicants. Such reforms would directly address the issues motivating litigation challenging humanitarian parole programs, while solidifying the versatility and uniqueness of the provision that is critical for addressing complex immigration issues.

\section*{IV. CONCLUSION}

Humanitarian parole is a versatile tool that grants the United States the ability to urgently respond to rapidly developing huma-
tarian crises around the globe by creating special programs targeted towards helping those vulnerable populations. Although a strictly textualist reading of the statute may not authorize such programs, numerous presidential administrations have used it for such over the past seven decades, creating programs to provide humanitarian relief where refugee or asylum law could not, while also advancing the United States’ foreign policy interests. As such, Congress should consider amending the humanitarian parole provision in 8 U.S.C. § 1182 to formally authorize the creation of special humanitarian parole programs and create statutory guidelines on their administration. In doing so, Congress would be able to decide the future of humanitarian parole rather than leaving it up to the interpretation of the courts, which could potentially undercut a provision that has been a tremendously useful in a wide variety of immigration contexts.