

The National Immigrant Justice Center (NIJC) strongly opposes S.4361, which would decimate the U.S. asylum system, choke off access to protection for many, and render the system unfair and punishing for the few who are able to access it. In addition to flouting the United States' fundamental obligations under the international Refugee Convention, this bill adds new, complex procedures to the law that would undermine basic rights under the U.S. Constitution.

NIJC urges senators to oppose this bill. This document provides a brief overview of the bill followed by detailed analysis of its main provisions and the harms they would cause in practice.

In short, S. 4361 will:

- **Violate the Refugee Convention by closing the border to people seeking safety:** The centerpiece provision of the bill requires the U.S. government to seal the border to people seeking asylum when the numbers of people arriving at the border reach a certain “trigger number.” This would force the United States to close its doors to countless people in need of asylum protection and send them back to harm.
- **Exacerbate the humanitarian and operational challenges on the border:** Like the procedurally similar Title 42 policy, expulsions and unpredictable border closures will create chaos and incentivize organized crime on the border. Refusing to process people so they may seek safety in the U.S. will mean they are trapped – unable to return home and vulnerable to kidnappings and violent crime by cartels and other armed groups. Under Title 42, people in this untenable situation were forced to try multiple times to reenter the United States, exacerbating processing delays.
- **Make asylum largely inaccessible for those who are permitted to ask for it at ports of entry:** The bill creates a rushed new process for people seeking asylum, starting with a screening interview most will fail under newly heightened standards. People facing rushed deportations under this new process will have *no access* to immigration judge or federal judge review, effectively guaranteeing wrongful deportations.
- **Punish asylum seekers with imprisonment, while enriching private prison companies:** The bill seeks record-breaking funding for immigration detention – higher levels than seen even during the Trump administration. Private prison companies will reap the benefits, while refugees will be punished with incarceration for the mere act of seeking safety.

In-Depth Analysis

I. Mandatory closure of the U.S. border based on “trigger numbers,” or quotas

What it does:

- The bill creates a new statutory authority for the Department of Homeland Security (DHS) to close the border to people seeking asylum after certain “trigger numbers” have been met. If over the course of seven days, the cumulative number of people arriving at the border (at or between ports, and regardless of whether they are actually processed for asylum) reaches 4,000, the authority is discretionary. If that number reaches 5,000 or a single day’s encounters exceed 8,500, the authority is mandatory.
- When the authority is triggered, DHS is required to turn away or expel all people arriving at the border without so much as an asylum screening. There are exceptions built in for unaccompanied children. There is no requirement for DHS to screen people for fear prior to their expulsions. People who “manifest” or affirmatively make known their fear of return may be granted a screening interview for a lesser form of protection known as withholding of removal. During periods when the authority is being used, Border Patrol would still process at least 1,400 people per day at ports of entry.

Why it’s harmful:

- This provision means that a person’s access to asylum in the United States depends on luck of the draw – whether they happen to arrive at the border during a period of closure, and if so whether they happen to be able to get to a port before 1,400 other individuals. A quota-based asylum lottery violates the United States’ compliance with its obligations under the Refugee Convention and would mean regularly sending people with strong asylum claims directly back to their persecutors. A similar policy (known as “metering”) was found [unconstitutional](#) by a federal judge under Trump.
- On the ground, this expulsion authority will mimic what we saw during the Trump administration with the enactment of Title 42. People will be forced to wait in Mexico and continue trying to cross until they can finally access safety. Under the Title 42 policy, human rights monitors tracked more than [13,480](#) reports of murder, kidnapping, rape, torture, and other violent attacks against people blocked in or expelled to Mexico. The proposed legislative change would [fuel and incentivize organized crime](#) on the border, creating more chaos and confusion, not less.

II. New fast-tracked process for asylum processing at the border, under surveillance and with no judicial review

What it does:

- The bill creates an entirely new asylum screening process (called “protection determination”) for people arriving at the border who are not subject to expulsion. This new process would be conducted entirely by officers within U.S. Citizenship and Immigration Services (USCIS) with *no judicial review whatsoever*. People denied asylum under this process could be denied asylum and deported in under

90 days, without any right to request review by a federal judge or even an immigration administrative law judge.

- All people (including family heads of households) placed into the protection determination program would be put under heavy surveillance throughout its duration, either in the form of GPS ankle monitors or other electronic monitoring.

Why it's harmful:

- This new process will render due process illusory for most people seeking asylum. It does little to improve access to legal counsel, which has never been guaranteed under U.S. immigration law despite the high stakes of the proceedings. The complexity of immigration law, punishing timelines, and obstacles caused by electronic surveillance will make it extremely difficult for people to find lawyers or get the information they need to fully articulate their claims. Indeed, for people in DHS's [current non-detained expedited removal pilot](#), fewer than *3 in 100* people have legal representation.
- Further, the judicial review stripping provisions of this bill will mean that many are wrongfully deported because of bad decision-making at the agency level that cannot be corrected. The stakes in asylum cases are too high to toss away checks and balances in this way. [Deportation is a death sentence](#) for people whose claims to asylum are wrongfully denied.
- This program also envisions a dramatic expansion of Immigration and Customs Enforcement's surveillance and monitoring program, which utilizes surveillance techniques developed in the context of the criminal legal system to monitor people seeking asylum. [GPS-enabled ankle monitors](#) have serious physical, emotional, and mental health consequences, leaving people to feel as though they are being punished for the act of seeking safety.

III. Heightened standards and new bars to eligibility at threshold asylum screening

What it does:

- This bill envisions nearly all people arriving at the U.S.-Mexico border to seek asylum being placed into expedited processing under either the new process described above or the existing [Expedited Removal](#) process. Under either system, a threshold asylum screening determines whether a person is able to present their full asylum claim to an adjudicator. This bill heightens the standard of review in all threshold screenings, including the existing Credible Fear Interviews used in Expedited Removal and the threshold screening in the new process described above, known as the "protection determination."
- The new standard will require people to show a "reasonable possibility" they could establish eligibility for asylum, rather than a "significant possibility" which is the standard in current law.
- The bill also adds new obstacles to passage at the threshold screening stage, including adding a new statutory bar to asylum when the government argues the person might have been safe in a different part of their country.

Why it's harmful:

- Heightening the credible fear standard will mean that many of those who are in the most desperate need of protection will be unable to access asylum. The Biden administration's asylum ban, which already imposes the reasonable possibility for most credible fear screenings, has already [tripled negative findings](#) and returned refugees to harm.
- [Indigenous peoples](#), [LGBTQ people](#), and people with complex asylum claims such as survivors of gender-based violence will be rushed through their fear screenings without the time and support they need to understand how to articulate the legal basis for their claims. Many will be pushed right back to harm.
- The vast majority of people seeking asylum are unrepresented when they undergo their credible fear screenings, due to the rapid nature of these screenings and their frequent occurrence in ICE or CBP custody. Under these conditions, asylum seekers have been unable to retain their attorneys and [deported to danger](#).

IV. Entrenched criminalization of migration through increased detention, prosecutions, and border wall funding

What it does:

- The bill provides historically high levels of funding for [immigration detention](#), surpassing the immigration detention budget during the years of the Trump administration. More than \$1 billion is provided for the expansion of ICE's surveillance and monitoring programs – nearly tripling a notoriously opaque and harmful program with few safeguards.
- The bill provides over \$10 billion to Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), again historically high amounts that are intended for surveillance programming, infrastructure creation, and detention and deportation management with few guardrails.
- The bill provides more than \$200 million for increased detention and transport of people facing federal criminal prosecutions for [migration-related offenses](#), which is likely to mean increased use of [prosecutions](#) for people who attempt to enter the U.S. outside a port of entry.

Why it's harmful:

- The bill further entrenches a carceral approach to the humanitarian challenge of processing people seeking asylum at the border. People should never be punished for seeking safety, yet that's exactly what immigration detention does. Immigration detention is [rife](#) with sexual, physical, and verbal abuse, punitive use of [solitary confinement](#), denials of basic necessities, and medical neglect, even resulting in deaths. Immigration detention [separates families](#) and produces less fair outcomes, [undermining the due process rights of people seeking asylum](#) and their ability to fully pursue their claim.
- This bill will also line the pockets of [private prison](#) CEOs, who [lobby mightily](#) day in and day out for exactly the type of provisions found in this bill.

V. Funding for border wall construction

What it does:

- Shockingly, the bill reinstates unused funds from Trump-era border wall construction, requiring that the dollars be used as originally instructed.

Why it's harmful:

- Border wall and barrier construction wreaks destruction and causes irreparable harm to the borderlands and the millions who call the border region home. Border wall construction during the Trump administration resulted in the [bulldozing of Native American burial sites](#), the dynamiting of pristine mountain wilderness, and unjust seizures of private ranches and farmlands.
- Border walls force people seeking asylum to seek out even more dangerous terrain, causing [injuries](#) and [needless deaths of thousands of people](#).

VI. Additional provisions

The bill includes some changes that would protect certain individuals and families. While these provisions offer some protections, they are overshadowed by those detailed above that fundamentally alter asylum and detention in a manner that imposes great injustice and harm.

- The bill provides a path to lawful status for some **Afghan nationals** evacuated or paroled into the United States in the wake of the United States' withdrawal from Afghanistan.
- The bill would provide funding that is critically needed to resource the hiring of additional **immigration judges** and **asylum officers** to adjudicate requests for protection.
- The bill provides additional funds for **refugee resettlement**.
- The bill provides funds that are also critically needed to be transferred from CBP to FEMA for the **Shelter and Services Program**, a currently underfunded program that supports cities, localities and civil society organizations providing respite and services to new arrivals. Notably, however, a large portion of the funds are made contingent on enforcement and hiring metrics likely to be unachievable.
- The bill expands some opportunities for pathways to immigration to the United States, including **increasing the available number of immigrant-based visas** and **protections for children of people on high-skilled work visas**.
- The bill expands existing programs to provide government-funded legal counsel for **unaccompanied children under the age of 13**. It also codifies access to government-appointed counsel for **people determined to be mentally incompetent by an immigration judge**, a protection [already provided](#) as a result of a class action lawsuit. The bill does *not* provide government-funded legal counsel for any new categories of people facing deportation.