Federal Public and Community Defenders Comment on Human Smuggling

(January Proposal 4)

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Federal Public and Community Defenders urge the Commission to reject the proposed increases to §2L1.1. Defenders represent both those accused of smuggling and those being smuggled, who are detained as material witnesses or prosecuted for entering illegally. This gives us deep insight into the nature of these offenses. The Department of Justice (the Department) has asked the Commission, with no empirical basis, to expand or add several specific offense characteristics (SOCs) to this broken guideline. But as explained below, this guideline already lacks an empirical basis for its high guideline ranges, which overstate culpability and are often ignored by courts. There is no need for additional unstudied increases that will fall largely on the backs of people of color in low-income border communities, especially given the lack of evidence that doing so will make migrants any safer.

The Commission should conduct a comprehensive study of §2L1.1 offenses before taking action. Defenders are more concerned than anyone about the safety of migrants; they are our largest group of clients.[1] But these unempirical and unnecessary penalty increases will not make border-crossing safer, and history shows increased criminal penalties will not impact the demand for clandestine border-crossing services. As discussed below, the data show that sentences often fall below the guideline range in cases sentenced under §2L1.1, even those with aggravated facts, which means the ranges are already too high in many cases.

In general, offenses sentenced under §2L1.1 are not hostage situations, and they almost never involve people trapped in shipping containers. These are market-driven cooperative offenses (comparable in some ways to drug offenses), in which those being smuggled pay for assistance in committing criminal offenses themselves (illegal re/entry). Most commonly, Defenders see scenarios in which a group of individuals is arrested hiding in a passenger vehicle at a checkpoint or walking through the desert (trying to bypass checkpoints)—all desperately seeking a better life. Upon capture, the government often prosecutes migrants for their immigration offenses. Those migrants who are not immediately prosecuted are held as material witnesses

[1] Defenders and panel attorneys represent a wide variety of those being smuggled; some are held as material witnesses, but many are prosecuted separately for illegal entry and/or reentry.

and detained in jail, prior to their transfer to detention by the Department of Homeland Security (DHS) and removal from the country.

Much like in drug-trafficking cases, the majority of our clients sentenced for smuggling are low-level players in a larger conspiracy. They receive small sums of money for very limited participation (usually driving a group concealed in a vehicle for a very short period of time or guiding a group through the brush to make it around a checkpoint; sometimes part of their own smuggling fee might be paid in exchange for performing other tasks). In general, they have little control over the offense logistics, and they are fungible. Also, like in drug-trafficking cases, the applicable guideline involves empirically deficient, quantity-driven sentencing that produces guideline ranges out of touch with culpability, with an outsized impact on people of color.

This comment proceeds in three parts. Section I lays out the ways in which this guideline is already broken, and it explains why the proposed amendments lack an empirical basis. Section II explains how the proposed amendments will not further the statutory purposes of sentencing and will compound unwarranted disparities. Section III explores an alternative suggestion: if the Commission feels that it must act now, it should focus on improving the guideline's ability to distinguish between more and less culpable individuals. Several existing enhancements—including the current (b)(7)—lack mens rea or causation requirements and routinely hold individuals accountable for harms caused by others, including by immigration enforcement agents—that they had absolutely no control over and could not have foreseen. Further, if the Commission feels that it must take action related to sexual offenses, it can simply move the commentary's instruction that "serious bodily injury" includes criminal sexual abuse to the text of the guideline itself.

I. Section 2L1.1 is broken, and the Commission should not increase the sentencing ranges it produces without significant further study.

Section 2L1.1, the fifth-most commonly applied guideline,[2] is broken due to decades of unstudied increases that weren't empirically grounded. Sentences routinely fall below the guideline range in §2L1.1 cases (even in cases involving bodily injury or death).[3] The Commission should pause and study this fundamentally flawed guideline before taking any action that would increase sentencing ranges that judges are finding already too high.

This section first discusses what the heartland smuggling case looks like, which is nothing like the sensationalized media accounts; then it addresses the lack of empirical support for this proposal; and finally, it addresses the decades of unempirical increases and factor creep, which led to a guideline largely out of touch with offense seriousness.

A. Beyond the headlines: the mine-run §2L1.1 case

What do these cases really look like? In the last five fiscal years, 96% of cases sentenced under §2L1.1 came from the five Southwest border districts.[4] And if the Commission were to study smuggling offenses, it would find that these cases look different in different border communities. With vehicular smuggling cases, Defenders often see cases involving an individual, desperately in need of money, who gets paid a few hundred dollars to drive a small group of people a short distance through a checkpoint.[5] If people are

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[2] *See* USSC, *2024 Sourcebook of Federal Sentencing Statistics*, at 44-45 tbl. 20 (showing that §2L1.1 applies in the fifth-highest percentage of cases (at 7.3%)).

[3] Sentences were below the guideline range in 55% of cases from FY 2020-2024 in §2L1.1 cases. In §2L1.1 cases with levels applied for the specific offense characteristic for bodily injury or death (§2L1.1(b)(7)), the below-range rate was 54%. The data for these analyses were extracted from the USSC "Individual Datafiles" spanning fiscal years 2020 to 2024. The dataset is publicly available for download on its website.

[4] Individual Datafiles, FY 2020 to 2024.

[5] Border Patrol operates several immigration checkpoints within the interior of the country, north of the border. *See* U.S. Gov't Accounting Off., *Border Patrol Lacks Important Information about Immigration Checkpoints Within the United States* (June 29, 2022). They are part of a longstanding policy of "prevention through deterrence," which involves aggressive enforcement to make illegally entering the

concealed in the trunk or cargo area of a car, they are generally there only for a very short period of time to get through the checkpoint, and they often have access to egress methods, airflow, and the ability to communicate with the driver.[6] We also have clients who get paid a small sum to guide a group of people on foot through rough terrain to circumvent a checkpoint. Sometimes our smuggling clients are related to the individuals being transported, or they are even part of the migrant group themselves. The vast majority of people sentenced under this guideline are people of color (81% Hispanic, 9% Black).[7] And most are American citizens.[8]

As migration experts have pointed out, there is a key difference between *smugglers* and *traffickers*: "smugglers have clients while traffickers have captives."[9] Almost none of our cases involve coercion; the people being smuggled want to avoid detection, as they are committing criminal offenses themselves (illegal entry or illegal reentry), and they pay large sums of money to avoid detection. Many of our smuggling clients are often low-level players in a diffused conspiracy, with little knowledge regarding the other players or those with more responsibility, and they are often just as fungible and unknowledgeable as drug couriers.

Scholars of irregular migration have documented the collaborative nature of illegal border crossings in the U.S. Southwest, dispelling myths surrounding the media portrayal of dangerous "coyotes."[10] They have shown that those aiding migrants to enter illegally are often themselves part of the

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country so deadly and costly that fewer people attempt to do so. *See* U.S. Gen. Acct. Off., GAO-99-44, *Illegal Immigration: Status of Southwest Border Strategy Implementation* 3 (1999) (describing policy's attempt to "shift [migrant] traffic [to] areas that were more remote and difficult to cross).

[6] *See* section II.B.2.

[7] Individual Datafiles, FY 2024.

[8] *Id*.

[9] Jasper Gilardi, Migration Pol'y Inst., *Ally or Exploiter? The Smuggler-Migrant Relationship is a Complex One* (Feb. 5, 2020).

[10] *See* David Spener, *Clandestine Crossings: Migrants and Coyotes on the Texas-Mexico Border* 163-71 (2011) (documenting how migrants and coyotes collaboratively draw on their social connections and cultural knowledge to stage successful border crossings); Gabriella Sanchez, *Human Smuggling and Border Crossings* at Chapter 2 (2015) (describing the legal history of immigration enforcement and the collaborative nature of irregular crossing in the Sonoran desert).

border communities, which were historically fluid until immigration enforcement ramped up near the turn of this century.[11] The involvement of large transnational criminal organizations in these offenses is rare, although smugglers and migrants often have to pay a "piso," or a sort of tax, to such organizations in order to pass through certain territories.[12]

B. Data do not support the Department's requests to increase sentencing ranges in §2L1.1 cases, and increased sentences would fall largely on Hispanic individuals in low-income border communities.

Data show that we cannot criminalize our way out of immigration offenses, specifically human smuggling, via guideline increases.[13] While overall unauthorized border crossings have dropped sharply over the past year,[14] no data suggest that is because of increased Guidelines penalties in immigration offenses.[15] And turning to data regarding §2L1.1, sentences under this guideline routinely fall below the guideline range.[16] This indicates

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[11] Spener, *Clandestine Crossings* at 160-73 (describing decentralized structure of smuggling networks).

[12] *See* Gilardi, *Ally or Exploiter?* (Feb. 5, 2020); *see also* Victoria A. Greenfield, et al., *Human Smuggling and Associated Revenues: What Do or Can We Know About Routes from Central America to the United States?*, Homeland Sec. Operational Analysis Ctr., RAND Corp. at 9, 22-23 (2019).

[13] *See* Section I.C. *infra* (discussing Guidelines increases in the 1990s). *Compare* USSC, 1996 Sourcebook of Federal Sentencing Statistics at Table 17 (1,005 cases sentenced with §2L1.1 as primary guideline) *with* USSC, 2024 Sourcebook of Federal Sentencing Statistics at Table 20 (4,345 cases sentenced with §2L1.1 as primary guideline).

[14] *See* U.S. Dept. of Homeland Sec., *Historic 9th Straight Month of Zero Releases at the Border* (Feb. 4, 2026); *see also* Madeline Halpert, *Illegal US-Mexico border crossings hit lowest level in over 50 years*, BBC (Oct. 7, 2025).

[15] Defenders have previously highlighted how ineffective criminal penalties are in deterring undocumented immigration offenses. Statement of Marjorie Meyers on behalf of Defenders to USSC at 9-11 (Mar. 16, 2016). Increased penalties have little impact on the demand for illegal crossing services for migrants driven by economic, humanitarian, and familial reasons. And decades of criminalized immigration enforcement have done little to impact the frequency of these cases. *See infra* notes 41-42 and accompanying text (discussing increased frequency of sentenced smuggling cases and previous guideline increases).

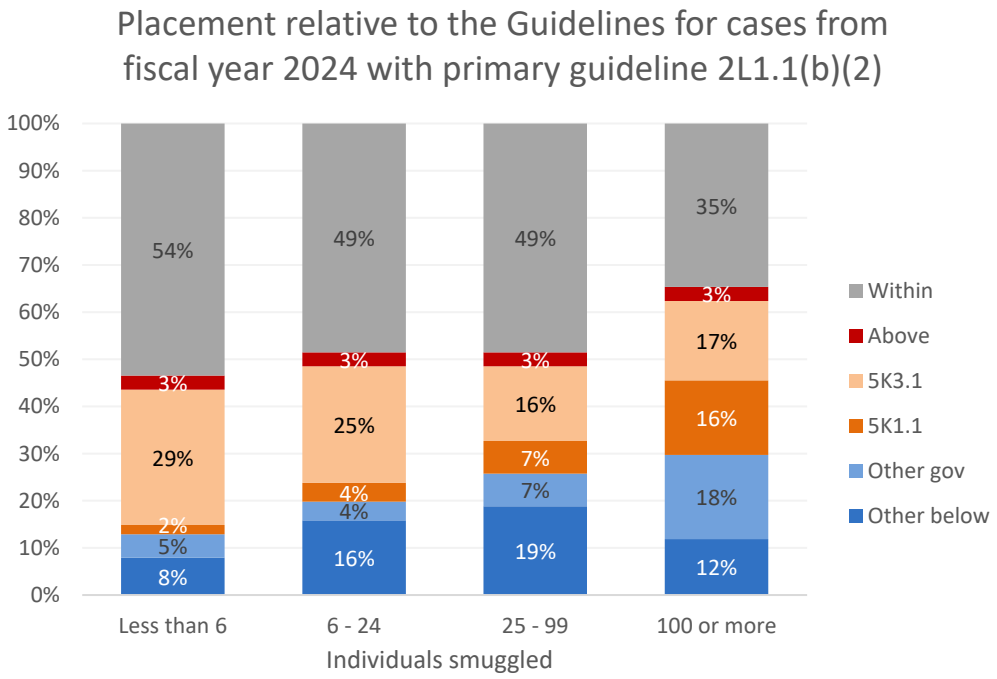
[16] Individual Datafiles, FY 2020 to 2024.

there is a problem in these cases, but the problem is not that the guideline is generating ranges that are too low.

1. Even in aggravated cases, data show that §2L1.1's sentencing ranges are not well calibrated.

In the past five fiscal years, only 43% of cases sentenced under primary guideline §2L1.1 received a within-guidelines sentence; 55% of such cases were sentenced below the advisory guideline range.[17]

And this holds true even in cases involving aggravating circumstances. The data briefing shows that cases involving increases under SOC (b)(2) for increased number of smuggled persons actually had *higher* incidences of below-range sentences than cases involving no increase under SOC (b)(2).[18]



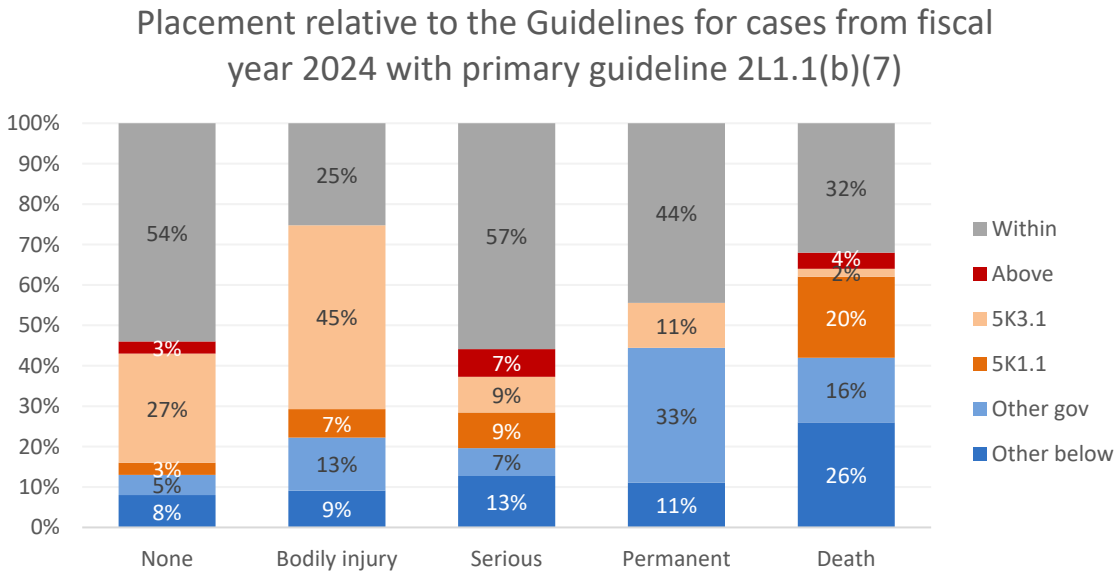
[17] Individual Datafiles, FY 2020 to 2024. Because of the way that placement relative to guideline range is recorded, it is difficult to determine how many cases receiving a fast-track reduction (35% of these cases) also might have received a variance or departure. But the percentage of within-range sentences rose in fiscal year 2024 to 52%, while the percentage of cases receiving fast-track reductions dropped to 27%. *See* USSC, *Quick Facts: Allien Smuggling Offenses* (FY 2024).

[18] Figure created from USSC, *Public Data Briefing on Proposed Amendment on Human Smuggling* at 7 (Feb. 13, 2026).

Less than half of cases that received an enhancement under (b)(2) fell within the guideline range.[19]

Data also show that over the last five fiscal years, only 34% of cases receiving the harsh (b)(6) SOC enhancement, which automatically moves cases up to at least offense level 18, received within-guidelines sentences, while 65% of such cases received sentences below the guideline range.[20]

And on average, sentences fell below-range even in the rare cases where the (b)(7) enhancements (related to injury or death) applied,[21] indicating that this enhancement, too, fails to properly calibrate sentences that are sufficient but not greater than necessary.[22]



[19] *Id.*

[20] Individual Datafiles, FY 2020 to 2024.

[21] *Public Data Briefing* at 17.

[22] Figure created from *Public Data Briefing* at 18.

Thus, the data do not support the Department's request for increased penalties.[23] Although one thing that the data is clear on is that additional (unnecessary) enhancements would largely impact Hispanic individuals.[24]

2. The ranges §2L1.1 currently generates, coupled with § 3553(a), are more than sufficient for outlier cases.

In outlier cases involving increased culpability, the government has a variety of tools at its disposal to seek higher penalties. The Department can charge multiple counts, and it can bring § 1324 charges carrying the possibility of the death penalty in death-resulting cases. Also, in cases resulting in death, the guideline has a cross-reference instructing courts to apply the appropriate homicide guideline "if the resulting offense level is greater than that determined under this guideline."[25]

And §2L1.1 already has a plethora of other enhancements available to account for aggravated conduct in outlier cases. As the co-director of Joint Task Force Alpha for the Western District of Texas, targeting human smuggling, has explained: "There is a distinction between routine alien smuggling" and aggravated cases focused on by this task force.[26] Task force leaders explained that, even for the outlier cases, the Department can use existing guideline enhancements coupled with charging decisions to "get to a deterrent message."[27]

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[23] And the data are limited with respect to harms to multiple people: the data briefing slide on harms to more than one person provides averages, which can be impacted by outlier cases, especially in such a small pool of cases (160 cases). *Public Data Briefing* at 16-17.

[24] *Id*. at 9, 25.

[25] USSG §2L1.1(c)(1).

[26] Ian Hanna & James Hepburn, U.S. Dep't of State, *Foreign Press Center Briefing: Targeting Human Smuggling and Trafficking in the Northern Triangle and Mexico* (June 5, 2024).

[27] *See id*. (emphasizing the importance of "focus[ing] our resources to go after the most egregious targets" to be able to use the guideline's enhancements for over 100 persons smuggled or death resulting). Mr. Hanna discussed ways to increase sentences under §2L1.1's structure, favorably invoking the more harsh drug trafficking guideline. However, it does not appear that increased guideline penalties provide a "deterrent message" in smuggling cases, given that §2L1.1 frequencies have increased over time, despite past increases in offense levels. *See infra* n. 41 and

C. Section 2L1.1's history is one of unstudied increases, resulting in overinflated guideline ranges that overstate offense seriousness and individual culpability.

A look at the history of §2L1.1 provides insight into why sentences routinely fall below guideline ranges here. After years of unstudied increases and factor creep, §2L1.1 has drifted away from measuring culpability, and toward producing overinflated ranges.

The original 1987 Guideline carried a base offense level of 6: half of today's lowest base level.[28] It had only two SOC enhancements; both were specific to the individual being sentenced.[29] In 1987, the Commission estimated that 50% of "first time offenders" sentenced for smuggling undocumented people after being convicted at trial would be sentenced to prison under the new Guidelines scheme.[30] By contrast, in fiscal year 2024, 80% of individuals in Criminal History Category I sentenced under primary - guideline §2L1.1 received prison terms, even *after* pleading guilty.[31]

What happened? While there have been several amendments to §2L1.1 over the years, two are particularly relevant to the proposed amendment. First, the Commission created the ancestor of current SOC (b)(2) in 1992, with tiered increases based on the number of people smuggled (replacing language in the commentary suggesting upward departures for cases

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accompanying text (discussing history of guideline increases and increased frequency of sentenced smuggling cases).

[28] *Compare* USSG §2L1.1(a) (1987) (providing base offense level 6) *with* USSG §2L1.1(a) (2025) (providing base offense levels between 12 and 25). There is scant information in the original Manual or the Supplemental Report to Congress as to whether this guideline was created by looking at pre-SRA sentences, but the original §2L1.1 guideline levels appear to have been similar to that of the Parole Commission guideline that preceded it. USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 25, Appx. C 45 (1987).

[29] One SOC enhancement applied "if the defendant committed the offense for profit or with knowledge that the alien was excludable as a subversive," and another applied if the defendant was previously convicted of a similar offense. USSG §2L1.1(b)(1), (2) (1987).

[30] *1987 Supplementary Report* at 33 tbl. 1(a). No estimate was provided for sentences for individuals who plead guilty.

[31] This statistic does not include cases that had any law enforcement contact or any specific offense characteristics applied. Individual Datafiles, FY 2024.

involving "large numbers of aliens").[32] There was little explanation for this, although the amendment noted that the Commission designed the new SOC to "work in conjunction with the operation of the [aggravating] role enhancements from §3B1.1."[33] Like other quantity-based enhancements in the Manual, the (b)(2) enhancement proved to be a flawed proxy for individual offense culpability,[34] and it currently does not track the application of role increases.[35]

But a later, unstudied package of increases shaped §2L1.1 into the overinflated guideline we know today. A congressional directive in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), mandated a variety of increases to the guideline, including increased penalties for number of persons smuggled, among other enhancements.[36] Congress directed the Commission to increase the (b)(2) enhancement for number of persons by "at least 50 percent," [37] but the Commission went beyond even that baseline in creating the new table at (b)(2).[38] Congress also

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[32] USSG App. C, Amend. 450 (Nov. 1, 1992).

[33] *Id*. at Reason for Amendment.

[34] *See* Defenders' Comment on the USSC's 2025-2026 Economic Offenses Proposed Amendments at 4-6 (Feb. 10, 2026) (discussing flaws of loss as quantity-based increases); Defenders' Comment on the USSC's 2024-2025 Drug Offenses Proposed Amendments at 3, 7-8 (Mar. 3, 2025) (discussing flaws of drug quantity-based increases).

[35] In the past five fiscal years, only 4% of individuals who received the (b)(2)(A) enhancement (6-24 persons smuggled) also received an aggravated role increase, whereas 24% received a minor role reduction. For those who received an increase under (b)(2)(B) (25-99 persons smuggled), 13% received an aggravated role increase, whereas 23% received a minor role reduction. For those who received an increase under (b)(2)(C) (100 or more persons smuggled), 39% received an aggravated role increase, whereas 10% received a minor role reduction. Individual Datafiles, FY 2020 to 2024.

[36] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 203(e); 110 Stat. 3009.

[37] *Id.* at § 203(e)(2).

[38] With respect to the number of persons enhancement, Congress directed the Commission to "review the sentencing enhancement for the number of aliens involved (U.S.S.G. 2L1.1(b)(2)), and increase the sentencing enhancement by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act." *Id.*; *see also* Defenders' Comment on the USSC's 1997 Alien Smuggling

directed the Commission to "impose an appropriate sentencing enhancement" on an individual who, in the course of committing a smuggling offense "(i) murders or otherwise causes death, bodily injury, or serious bodily injury to an individual; . . . or (iii) engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury."[39] This directive, and the Commission's rushed response,[40] rather than any exercise of the Commission's empirical function, led to the §2L1.1 guideline we know today, with its higher base offense levels and present-day SOCs (b)(6) (reckless endangerment) and (b)(7) (injury or death), which—unlike the directive's mandate—are not limited to the sentenced individual's own acts.

As it turns out, this sharp increase in punishment did not deter smuggling offenses: by 2006, cases with §2L1.1 as primary guideline rose to more than triple the amount in 1996.[41] This should surprise no one: as Defenders and others have explained before, criminal penalties are ineffective at deterring human smuggling, which is driven by market forces related to geopolitical, socioeconomic, and humanitarian factors.[42] And the Guidelines cannot change the nature of smuggling offenses. To the extent that smuggling offenses may be riskier than in the past, scholars have noted that as increasingly militarized immigration enforcement grew over the past three decades, migrants have had to take more dangerous routes through

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Proposed Amendments at 2-4 (noting amendment far exceeded mandated increase in congressional directive and was unsupported by Commission data).

[39] *Id. at* Div. C § 203(e)(2)(E).

[40] The Commission first implemented a package of temporary emergency post-IIRIRA amendments, without notice and comment. USSC, Proposed Emergency and Non-Emergency Amendments to the Sentencing Guidelines for 1997 (Jan. 2, 1997).

[41] *Compare* USSC, 1996 Sourcebook of Federal Sentencing Statistics at Table 17 (1,005 cases sentenced with §2L1.1 as primary guideline) *with* USSC, 2006 Sourcebook of Federal Sentencing Statistics at Table 17 (3,462 cases sentenced with §2L1.1 as primary guideline).

[42] *See* Meyers Statement at 9-11 (discussing lack of deterrent effect of increased sentences in immigration context); ACLU Comment on the USSC's 2016 Proposed Amendments at 3 (Mar. 21, 2016) (discussing lack of deterrent effect of prosecutions on illegal reentry offenses); Human Rights Watch Comment on the USSC's 2016 Proposed Amendments at 8 (Mar. 21, 2016) (discussing lack of deterrent effect of criminal prosecutions on irregular migration).

harsh terrain, increasing both risks to migrants and their perceived need for clandestine crossing methods.[43]

D. The current §2L1.1(b)(6) and (b)(7) are already overbroad and result in unwarranted similarities and unwarranted disparities.

The SOCs at §2L1.1(b)(6) and (b)(7)—which the Commission has proposed broadening—are part of this broken guideline, and they are too broad as things stand.

SOC (b)(6) is far broader than the Congressional directive that spawned it. This provision imposes a two-level increase whenever an offense "involved intentionally or recklessly creating a substantial risk of death or serious bodily injury."[44] Congress's directive in IIRIRA required an enhancement only for an individual who "engages in conduct that consciously or recklessly places another in serious danger."[45] The directive focused narrowly on an individual's conduct and culpable mental state. Yet the SOC as written can, and frequently does, apply based on the actions of others, not the sentenced individual.[46]

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[43] *See* Irene I. Vega, *"Reasonable Force" at the U.S.-Mexico Border*, 69 Social Problems 1154, 1155 (2022) (explaining that "prevention through deterrence" is a "deadly policy" that redirected migration flows into remote terrain); Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of U.S. Immigration Control Policy*, 27 Population & Development Rev. 661, 674-77 (2001), (finding that intensified border enforcement displaced crossings toward hazardous desert regions, increasing migrant mortality risks); U.S. Gov't Accountability Off., GAO-06-770, *Illegal Immigration: Border-Crossing Deaths Have Doubled Since 1995; Border Patrol's Efforts to Prevent Deaths Have Not Been Fully Evaluated* 14-18 (Aug. 15, 2006) (reporting increased migrant deaths associated with enforcement strategies that shifted crossings into more remote terrain).

[44] USSG § 2L1.1(b)(6).

[45] IIRIRA, Pub. L. 104-208, Div. C at § 203(e)(2)(E)(iii).

[46] *See, e.g.*, *United States v. De Jesus-Ojeda*, 515 F.3d 434, 443 (5th Cir. 2008) (upholding application of reckless endangerment enhancement for "cohorts" reckless or intentional creation of a substantial risk of death or serious bodily injury); *United States v. Wilkerson*, No. 24-50404, 2025 WL 1605123, at *1 (5th Cir. June 6, 2025) (upholding application of (b)(6) enhancement for co-conspirator's conduct of "transporting aliens in a vehicle's trunk" as it was "was reasonably foreseeable to

Commission data suggest that the overbroad (b)(6) does a poor job of quantifying risk. In fiscal year 2024, §2L1.1(b)(6) applied in 1,550 cases, yet 90% of those cases involved no injury or death, suggesting that the enhancement routinely punishes *theoretical* risk.[47] At the same time, sentences frequently fell below the guideline range in §2L1.1 cases involving the (b)(6) enhancement, suggesting that this enhancement produces guideline ranges that overstate both risk and an individual's culpability.[48]

The (b)(7) SOC adds between two and ten offense levels when bodily injury or death occurs, yet it does not contain a requirement of causation or a nexus to the sentenced individual's conduct, and it has no mental state requirement. Because the current (b)(7) enhancement is so broad, it fails to advance just punishment, cannot promote deterrence, and risks producing unwarranted similarity, running afoul of § 3553(a)(6). The current (b)(7) SOC is far broader than the directive, which instructed the Commission to enhance punishment for a "defendant" who "murders or otherwise causes death, bodily injury serious bodily injury to an individual."[49] The directive's focus on causation contrasts sharply with the guideline's broad language, which does not require that a sentenced individual act intentionally or even recklessly, which combined with expansive relevant-conduct principles,[50] means sentenced individuals can receive massive increases based on events only tenuously connected to their conduct,[51] or for the conduct of others even

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her given her knowing participation in the conspiracy to transport illegal aliens in their vehicles").

[47] *Public Data Briefing* at 13.

[48] Nearly 65% of these cases received below guidelines sentence. Individual Datafiles, FY 2020 to 2024.

[49] IIRIRA, Pub. L. 104-208, Div. C at § 203(e)(2)(E)(i).

[50] *See* U.S.S.G. § 1B1.3(a)(1)(B).

[51] *See United States v. Mondragon-Gonzalez*, No. 24-50758, 2025 WL 2465752, at *1 (5th Cir. Aug. 27, 2025) (affirming 480-month sentence in smuggling offense where Mr. Mondragon "hired a co-conspirator to transport illegal aliens," resulting in a fatal crash that he was not present for); *United States v. Mares-Martinez*, 329 F.3d 1204, 1207 (10th Cir. 2003) (applying injury/death SOC when smuggler arranged for transport in an overloaded van and the migrants were injured or killed in accident resulting from a tire blow-out, even though that individual was not driving); *United States v. Flores-Flores*, 356 F.3d 861, 863 (8th Cir. 2004) (applying enhancement where sentenced individual was smuggling van full of undocumented people and let a migrant drive the van, resulting in an accident).

if the individual himself was also in danger.[52]

The result: (b)(7) can increase a sentencing range by *years* based on the (accidental or intentional) conduct of others, including codefendants or DHS agents, regardless of whether it was entirely unforeseeable to the sentenced individual. The Supreme Court has repeatedly recognized that a culpable mental state is a "bedrock" principle separating wrongful conduct from mere accident.[53] Yet §2L1.1(b)(7) permits dramatic sentencing increases—even 10 offense levels for death—without proof that the sentenced individual intended, or even recklessly disregarded, the risk of harm. As Defenders and others have written before, strict liability sentencing enhancements carry no deterrent value, as one cannot deter unintentional conduct.[54] It also results in unwarranted similarity, by treating an individual who cannot foresee and does not inflict harm the same as one who intentionally inflicts harm on a migrant.[55] The resulting increase often results in strict liability sentencing, inconsistent with proportionality and just punishment.[56] And this is no doubt part of the reason why cases involving application of this enhancement often produce sentences that fall below the guideline range.[57]

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[52] *See* Ignacio Castañeda Perez, et. al, *Homeland Secrets, Chapter 2, The Chase*, Cronkite News (Feb. 24, 2020) (describing HSI unmarked interdiction units performing "pinch" maneuver and opening fire on vehicle transporting migrants in a residential area, killing the driver and injuring defendant and a migrant); *see also* Defendant's Sent. Memo., *United States v. Warren Evan Jose*, No. 4:19-1050 ECF No. 304 (D. Ariz., Oct. 20, 2022), Dkt. No. 304.

[53] *See Ruan v. United States*, 597 U.S. 450, 457, (2022) (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)); *see also* Statement of Deirdre D. von Dornum on behalf of Defenders to USSC on Proposal 4: Circuit Conflicts at 17 (Feb. 27, 2024); Defenders' Comment on the USSC's 2023 Proposed Amendments: Firearms Offenses at 24 (Mar. 14, 2023).

[54] Defenders' 2023 Firearms Comment at 24.

[55] *See* von Dornum Statement at 17; Defenders' 2023 Firearms Comment at 24.

[56] The Ninth Circuit has previously "suggested that a mens rea of recklessness is required to impose an enhancement under section 2L1.1(b)([7])(4)" for the +10 death resulting enhancement. *United States v. Ramirez Lopez*, 315 F.3d 1143, 1159 (9th Cir. (9th Cir. 2003) (citing *United States v. Rodriguez-Cruz*, 255 F.3d 1054, 1059 (9th Cir. 2001), *opinion withdrawn due to dismissed indictment, appeal dismissed*, 327 F.3d 829 (9th Cir. 2003).

[57] *See* Sec. I.B.1.

What's more, (b)(7)'s breadth has produced a persistent circuit split regarding causation standards: Some circuits require only but-for causation, others demand a showing closer to proximate causation, and at least one has held that courts cannot impose a causation requirement at all.[58] This means that similarly situated individuals face dramatically different sentencing exposure depending on their location, creating additional unwarranted disparity.

The breadth of §2L1.1(b)(7) also allows enhancements based on actions of DHS agents, rather than on those of sentenced individuals or their codefendants. In *United States v. Gaspar-Felipe,* Border Patrol agents engaged in a high speed chase of a vehicle transporting migrants and "fired their rifles at" the vehicle, shooting and killing one of the migrants.[59] The Fifth Circuit upheld application of the 10-level (b)(7)(D) enhancement to Mr. Gaspar-Felipe, who had been identified as the foot guide who had previously guided the group including the deceased migrant on foot. Mr. Gaspar-Felipe was not a part of the high speed chase, and he was acquitted of causing the migrant's death at trial.[60] Applying the broad but-for causation standard, the Fifth Circuit reasoned that "[a]bsent Gaspar-Felipe's guiding [the deceased individual] from Mexico to the rendezvous point in Texas, [the deceased] would have not found himself in the Chrysler where he was killed by police

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[58] *Compare United States v. Ramos-Delgado*, 763 F.3d 398, 401-02 (5th Cir. 2014) (concluding §2L1.1(b)(7)(D) requires at least but-for causation); *with United States v. Flores-Flores*, 356 F.3d 861, 862-63 (8th Cir. 2004) (focusing on whether the death was "causally connected to the dangerous conditions created by [the defendant's] unlawful conduct"); *compare United States v. Zaldivar*, 615 F.3d 1346, 1350-51 (11th Cir. 2010) (focusing on whether it was "reasonably foreseeable ... that [the defendant's] actions or the actions of any other member of [his criminal] operation could create the sort of dangerous circumstances" likely to result in death); *with United States v. Cardena-Garcia*, 362 F.3d 663, 666 (10th Cir. 2004) (because § 2L1.1(b)(7)(D) "contains no causation requirement" courts "have no license to impose one"). No circuit requires that the individual himself cause the injury or death, since (b)(7) is clear that's not required.

[59] *United States v. Gaspar-Felipe*, 4 F.4th 330, 335 (5th Cir. 2021).

[60] *Id*. at 343 ("[T]he government need show only that the defendant's alien-smuggling conduct was a but-for cause of someone's death"). This case was decided prior to the Commission's acquitted conduct amendment, but absent an acquittal at trial, the relevant conduct rules would allow for expansive liability under this SOC.

firing at the fleeing car."[61] The lack of causation in the (b)(7) enhancement therefore transfers liability to individuals based on the downstream actions of immigration agents.

Gaspar-Felipe is not an aberration. Scholars have documented what Defenders at the border have known for decades: U.S. Border Patrol has a longstanding practice of routinely utilizing force, which can result in injury or death to migrants (and others).[62] Border Patrol does not publicly track use-of-force incidents that lead to death, but the Southern Borders Community Coalition reports that since 2010, 367 people have been killed in encounters with Border Patrol; 58 were killed in 2021 alone.[63] Agency practices are particularly troubling in vehicular smuggling cases; Border Patrol has a well-documented practice of engaging in high-speed chases that lead to deaths or serious injuries when they are attempting to apprehend suspected migrants.[64] Given the but-for causation standard the Fifth Circuit has read

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[61] *Id.*

[62] *See* Robin C. Reineke and Daniel E. Martinez, *Excessive Use of Force and Migrant Death and Disappearance in Southern Arizona*, 12 J. on Migration and Hum. Sec. 243, 247-250 (2024) (cataloguing reports and studies documenting Border Patrol's long history of physically abusing migrants and describing routine tactics including high-speed vehicle chases; aggressive chase and use of helicopter tactics against migrants on foot; and the use of lethal force, including fatal shootings, asphyxiation, tasers, and beatings); Vega, *"Reasonable Force"* at 1154-55 ("[V]iolence against Mexicans and other migrants has been a feature of the Border Patrol since its founding in 1924"); Inter-Am. Comm'n on Hum. Rts, Report No. 60/25, Case 14.042, Merits Report (Publication), Anastasio Hernández Rojas and Family, United States at 23-25 (April 28, 2025) (finding U.S. Customs and Border Protection ("CBP") agents tortured a migrant, violating his rights to life, personal integrity, and access to justice, and that the violations occurred in a broader context of "discrimination against migrants of Latin American origin").

[63] *See* Southern Borders Community Coalition, *Abuse of Power and its Consequences* (Feb. 3, 2026) (reporting data collected by monitoring media reports and CBP press releases); *see also* Robin C. Reineke and Daniel E. Martinez, *Excessive Use of Force and Migrant Death and Disappearance in Southern Arizona*, 12 J. on Migration and Hum. Sec. 243, 246 (2024) (describing a "culture of force" within the agency that, along with other factors, "creates a milieu where there is routine abuse of migrants with low levels of accountability").

[64] *See, e.g.*, Eileen Sullivan, *A Rise in Deadly Border Patrol Chases Renews Accountability Concerns*, N.Y. Times (Jan. 9, 2022) (reporting 21 deaths from Border Patrol vehicle chases in 2021). In 2023, after public outcry, CBP updated their policy regarding vehicle pursuits. U.S. Customs and Border Protection, *CBP Updates*

into (b)(7), our clients can, and in fact do, receive the (b)(7) enhancement for this official conduct.[65]

Finally, the unique nature of smuggling cases compounds all these concerns. The facts alleged to support the (b)(6) and (b)(7) enhancements frequently rely on statements from migrants who are either detained as material witnesses and at risk of potential prosecution themselves, or who are removed from the United States at the beginning of the case, giving defense counsel little to no ability to investigate facts. Material witnesses are routinely removed from the country after being deposed by the government early in the case, which makes later additional investigation of alleged facts underlying sentencing enhancements nearly impossible.[66]

II. The proposed enhancements would not effectuate the statutory purposes of sentencing and would make this broken guideline even worse.

This year's proposed amendments would compound the disparities created by this broken guideline. Unlike the unstudied increases of the past, there is no emergency directive and no need to act at this time. In fact,

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Emergency Driving and Vehicular Pursuits Directive (Jan. 11, 2023). However, the updated policy was rescinded on January 20, 2025. U.S. Customs and Border Protection, *Emergency Driving Including Vehicular Emergency Driving Including Vehicular Pursuits by U.S. Customs and Border Protection Personnel: Directive 4510-026* (indicating recission of the 2023 policy as of Jan. 20, 2025). Currently, the full scope of the CPB's vehicle pursuits policy is not known, as large sections of the updated policy, including the entire section labeled "Tactics," have been redacted from the policy posted on CBP's website. *See* U.S. Dept. of Homeland Sec., U.S. Customs and Border Protection, CBP Directive No. 4510-026B (effective Oct. 2025).

[65] *Gaspar-Felipe*, 4 F.4th at 343. The two Texas border districts (in the Fifth Circuit) produced over half of sentenced §2L1.1 cases last year. USSC, Quick Facts: Alien Smuggling (FY 2024).

[66] *See, e.g., Gaspar-Felipe*, 4 F.4th at 336 (migrant witnesses deported after government deposed them, but before the defense could cross-examine them); *United States v. Hernandez*, 347 F. Supp. 2d 375, 383-384 (S.D. Tex. 2004) (granting motion to dismiss a case involving an assault on a USBP agent because a migrant witness who had given a statement favorable to the defense was deported without notice to defense counsel); *United States v. Jose Manuel Gutierrez*, et al., No. 2:22-CR-251, Dkt. 105 (Order on Defendant's Motion to Dismiss) (S.D. Tex. 2022) (granting motion to dismiss a § 1324 case because migrant witness with exculpatory information was deported).

unauthorized border crossings are currently *down*. And the rates of below-guidelines sentences in §2L1.1 function as institutional feedback showing that additional unstudied guideline increases would be inappropriate. The Commission should not repeat its past mistakes here.

Just as we have in the past,[67] we urge the Commission to pause and study these offenses instead of proceeding with unstudied and unnecessary increases that will fall on the backs of low-income people of color.

A. The proposed changes to §2L1.1(b)(2) make this enhancement more complicated and less useful to judges seeking to base sentences on culpability.

The existing enhancement at (b)(2) for the number of persons smuggled already generates penalty ranges that are beyond sufficient to account for offense seriousness. As things stand, Commission data indicate that the (b)(2) enhancements currently produce overinflated guideline ranges, with average sentences consistently falling below the average guideline minimums for each ordinal increase in number of undocumented persons smuggled.[68] There is no need to make this enhancement more complex, or to call for even higher enhancements in most cases.

The Commission originally believed that in cases involving large numbers of people, this enhancement would work in tandem with the aggravated role enhancement.[69] But that has not happened, as discussed above.[70] What Defenders see is that, much like in drug-trafficking cases, the relevant conduct rules, coupled with quantity-based increases, result in low-level players being held liable for the actions of others.

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[67] *See* Defenders' Comment on the USSC's 1997 Proposed Amendments at 1-4 (noting the amendment far exceeded the mandated increase in the Congressional directive and was unsupported by Commission data).

[68] *See* *Public Data Briefing* at 6.

[69] *See* USSC App. C, Amend. 450, Reason for Amend. (1992) (describing increase as designed to work with aggravated role adjustment).

[70] Section I.B.1.

B. The proposed new §2L1.1(b)(6) (trunk enhancement) would create new problems while solving nothing.

There is no need to add another unempirical and expansive strict-liability enhancement untethered from an individual's conduct or intent into this already flawed guideline. The proposed SOC related to a migrant in a trunk or overcrowded vehicle would fail to effectuate the statutory purposes of sentencing.

1. Without any mens rea requirement, and without defendant-specific language, the trunk/overcrowding enhancement will compound the guideline's existing flaws.

As with the current (b)(7), the new unstudied vehicular enhancement in the proposed (b)(6) has no mens rea requirement and is not defendant-specific, in contrast to the original Congressional directive. This means that a court might find that a foot-guide who never gets into a vehicle could receive this enhancement, based on actions that occurred after his conduct ended. Among other problems, the lack of mens rea makes the enhancement worthless as a potential deterrent.[71]

The proposed enhancement is also dramatic, acting not only as a two-level increase but also as a portal to offense level 18 if the offense level isn't at 18 already. This would lead to increased unwarranted *similarity* in sentences for differently situated individuals.

2. The existing enhancements already address risky transportation involving trunks.

The Commission has provided no public data on how often smuggling offenses involve migrants riding in trunks or overcrowded vehicles. But Defenders are concerned that the proposed (b)(6) could result in a de facto base offense level in many vehicular smuggling cases simply because of how these cases work. Migrants do not want to be caught; they often voluntarily

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[71] *See United States v. Handy*, 570 F. Supp. 2d 437, 478, 479 (E.D.N.Y. 2008) (noting strict liability enhancement for possession of a stolen firearm is an ineffective deterrent "since a person cannot be deterred from doing what he or she does not know is being done").

conceal themselves for brief periods of time, in vehicles passing through the interior checkpoints. The current (b)(6) enhancement already applies when this is done in a risky manner, often including when people are transported in the trunk of a car.

As the Ninth Circuit has explained, "there is a baseline risk inherent in all vehicular travel, and we focus on the ways in which the method of transporting the alien increased the risk of death or injury beyond that faced by a normal passenger" when considering application of the current risk-focused (b)(6) enhancement.[72] Every case is different, and the application of the current (b)(6) enhancement hinges on an assessment of the facts.[73] This makes sense, as an offense involving two people willingly transported in a large trunk for less than 10 minutes to clear a checkpoint, who had cell phones, airflow, the ability to talk to the driver, and access to and understanding of how to use the glow-in-the-dark trunk release handle is very different than a situation involving multiple people trapped in a trunk of an older vehicle for an extended period. The Commission has provided no data on why all offenses involving trunks (regardless of if it was only for a short duration, at very slow speeds, and where the migrants had multiple methods of egress) should be considered more inherently risky than those involved in normal highway automobile transportation, such as riding unrestrained in a vehicle's front seat.[74]

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[72] *United States v. Bernardo*, 818 F.3d 983, 986 (9th Cir. 2016) (quoting *United States v. Torres–Flores*, 502 F.3d 885, 889 (9th Cir. 2007)).

[73] The Fifth Circuit "has identified five factors to consider when applying the current § 2L1.1(b)(6) to situations involving migrants concealed in vehicles: 'the availability of oxygen, exposure to temperature extremes, the aliens' ability to communicate with the driver of the vehicle, their ability to exit the vehicle quickly, and the danger to them if an accident occurs.'" *See United States v. Rodriguez*, 630 F.3d 377, 381 (5th Cir. 2011) (citing *United States v. Zuniga–Amezquita,* 468 F.3d 886, 889 (5th Cir.2006)).

[74] To the extent this proposal acts as a proxy for perceived risk of injury from vehicular crashes, this enhancement is also particularly troubling, because as laid out above, high-speed immigration enforcement chases and shootings pose a serious risk to migrants. *See* section I.D. To the extent the Commission wants to keep migrants safe and reduce the risk of vehicular crashes, it could also consider a *reduction* in these cases (to deter government use of force against migrants) where immigration enforcement conduct created a risk of injury.

Further, many of our clients sentenced under §2L1.1 lack authority over transportation or logistics decisions. Vehicle type, routes, and timing are typically determined by others or factors outside of their control. So, increasing penalties for low-level participants has no ability to impact the conduct the enhancement seeks to address. The existing enhancement (along with courts' miserly approach to applying minor role adjustments) provides more than adequate increases to punish risky situations, while giving judges flexibility to make individualized assessments.

3. The proposed increase for overcapacity vehicles overestimates risk and removes discretion from sentencers closest to the facts of the case.

With respect to a new (b)(6) enhancement for "carrying substantially more passengers than the rated capacity of a motor vehicle," the proposed amendment is unnecessary, overly vague, and would result in double counting with the (b)(2) amendment. The Commission has provided no data on how often offenses involve vehicles with "substantially more" passengers than the rated capacity. This language is also vague: What does "substantially more passengers" mean? This enhancement would likely lead to disparate interpretations and litigation.

It will also punish conduct that is not necessarily inherently risky. Law-abiding families occasionally pack more people into their vehicle than ideal for short periods of time, out of necessity. And in four out of the five border districts, there is no applicable state law restricting adults from riding in the back of pickup trucks—a routine practice in rural and agricultural communities that could well receive an increase under the new proposed SOC.[75] To the extent the Commission is considering this proposed enhancement to account for the risk of vehicle crashes, it should stop and study the matter, particularly given the immigration enforcement practices described above.[76]

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[75] *Compare* 2026 Proposed Amendments: Human Smuggling at 6 *with* Insurance Inst. for Highway Safety and Highway Loss Data Inst., *Restrictions on riding in pickup beds* (February 2026).

[76] *See* Section I.D.

C. The proposed new (b)(8)(B) (currently (b)(7), re bodily injury/death) would make an already problematic enhancement far worse.

The Commission has proposed expanding what is currently (b)(7) (but would become (b)(8) under the full proposal) to include certain sexual crimes; and it has separately proposed to create a new sub. (B) to this enhancement dealing with multiple victims who sustain varying degrees of bodily injury. As a general matter, this comment has already explained that the current (b)(7) is deeply flawed and overstates culpability, largely because it lacks any mens rea or causation requirements, and also because it does not look to the conduct of the sentenced individual. The Commission should not expand this broken SOC further unless it first also acts to cabin the already overexpansive existing injury/death enhancement.

As for the specific proposed changes, the next section of this comment addresses changes to the existing enhancement related to sexual crimes. Here, we will address the proposed new sub(B) in general. Of the two options presented, the scope of covered conduct in Option 2 is more attuned with the statutory purposes of sentencing. Option 2 limits the enhancement for additional instances of "death or permanent or life-threatening bodily injury," with the second set of bracketed language that would apply to offenses where "the defendant intentionally or knowingly caused" death or permanent or life-threatening bodily injury. Defenders appreciate that, for both options, at least the second set of bracketed language is both defendant-specific and contains a mens rea requirement, which is consistent with the directive language that the original enhancement was based on (but was broader than). But the scope of Option 1, which includes less serious injuries as well as relatively minor sexual-contact offenses like touching an adult's buttocks over the clothes—more on that in the next section—is far too broad. That said, the offense-level increases in Option 2 are too large and could potentially render the cross-reference irrelevant.

That is why Defenders strongly urge the Commission not to promulgate either option. Commission data on number of victims in cases involving what is currently a (b)(7) enhancement show that for more serious or permanent injuries, there is a median of one victim, so it is unclear why

this proposed increase is necessary.[77] For cases involving multiple deaths, the Department can charge multiple counts, and has its choice of charges under § 1324, including charges that carry the *death penalty*.[78] And the homicide cross-reference in §2L1.1 is more than sufficient to handle serious cases involving one or more death; in fact, the proposed (b)(8) could increase sentences to the point that it renders the cross-reference moot. The Department has stated this increase is needed due to language in 28 U.S.C. § 994(c)(3), which directs the Commission to consider the "nature and degree of the harm caused by the offense, including whether it involved . . . a person, a number of persons . . . ." But the factors in § 994(c) matter "only to the extent that they do have relevance" to an appropriate sentence.[79] And the (b)(7) injury/death enhancement already lacks an empirical foundation and sweeps too broadly. It would not help judges impose sentences consistent with § 3553(a) to increase it further.

D. The remaining portions of the proposed amendment, addressing sexual conduct, are overbroad and unwarranted.

The Commission has proposed to make several changes to §2L1.1 related to smuggling offenses involving sexual misconduct:

- a new provision in what is now (b)(6) (but under the proposal would be (b)(7)) increasing the sentence where the offense "created a substantial risk of . . . serious bodily injury (including criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law");
- a new provision in what is now (b)(7) (but under the proposal would be (b)(8)) treating "criminal sexual contact under 18 U.S.C. § 2244" the same as "bodily injury" for purpose of that enhancement; and
- a new cross-reference for sexual offense conduct.[80]

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[77] *Public Data Briefing* at 20.

[78] *See* 8 U.S.C. § 1324(a)(1)(B)(iv).

[79] 28 U.S.C. §994(c).

[80] The Commission also has proposed adding language to the current (b)(7) that effectively would move from commentary to text an instruction providing that a

As noted in the preceding section, there's also Option 1 of the proposal for a new subsection of the current (b)(7) enhancement, which would enhance a sentence based on additional injuries—including "criminal sexual contact" under § 2244. But as we explained earlier, Option 1 is problematic for additional reasons; and in any event, our discussion of the breadth of § 2244 should make clear why enhancing a sentence based on "criminal sexual contact" would be a nonstarter.

1. Enhancing a sentence based on a "risk of . . . criminal sexual abuse" does not make sense.

The most obvious problem with the proposal to enhance a sentence based on a risk of criminal sexual abuse is that it is nonsensical: How does conduct create a substantial risk that a migrant will be subject to criminal sexual abuse? Perhaps a smuggler who works with a co-conspirator who is a known registered sex offender? What about just housing people of different genders in the same room? Or for that matter, the same gender? And should the judge not care that no sexual crime was actually committed?

The one thing we do know is that the enhancement will apply in every case in which sexual abuse *actually occurs*, regardless of whether the sentenced individual was involved or could possibly foresee that event, because the proposed amendment would mandate the application of the risk enhancement in every case in which a person receives an enhancement for bodily injury on the basis of criminal sexual abuse. This is straight double-counting, and it would grossly overstate the sentenced person's culpability, particularly since the application of the risk enhancement automatically increases a person's base offense level to 18.

Moreover, this expansion of what is currently (b)(6) comes with the problem that already plagues (b)(6): no requirement that the defendant

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violation of § 2241 or § 2242 "or any similar offense under state law" is treated the same as "serious bodily injury" for purposes of that enhancement. But this is not a change per se, since the rule is already in the commentary, and the Guidelines also specifically define "serious bodily injury" to encompass "conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law." USSG §1B1.1, cmt. n.1(L).

himself engaged in this conduct—here, no requirement that the sentenced individual created the risk.[81]

Given that Defenders do not understand this enhancement, it might never apply in the absence of sexual abuse that does not occur; or it might apply sometimes in ways we cannot foresee. The only thing that is clear is that whenever a PSR might suggest this provision applies, significant litigation would ensue.

2. The Commission should not expand the already overbroad (b)(7) enhancement to include "sexual contact."

The Commission should not expand the already overbroad injury/death SOC further by adding "sexual contact" under § 2244 to the types of "bodily injury" that result in an enhancement.[82] While the enhancement currently applies (through commentary) if the offense involved conduct under § 2241 or § 2242 (or similar conduct under state law), it does not currently apply to mere "sexual contact" under § 2244—with good reason. The conduct covered by § 2244 is extremely broad. "Sexual contact" includes touching, over

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[81] The SOC is worded so broadly that it could conceivably apply even to sexual abuse by immigration officials, which is a well-documented problem that the Department and DHS could focus on preventing. *See* Michael Sainato, *'Horrific': report reveals abuse of pregnant women and children at US Ice facilities*, The Guardian (Aug. 6, 2025) (describing report compiled by Sen. Ossoff's office finding "deaths in custody, physical and sexual abuse of detainees" among other things); Emily Bregel, *Border agent charged with child sex trafficking, fraud in Cochise County*, Arizona Daily Star (July 24, 2025) (discussing Border Patrol agent who was arrested on allegations of criminal wrongdoing, including child sex trafficking); DOJ, *Former Customs and Border Patrol Agent Found Guilty of Federal Civil Rights and Kidnapping Charges for Sexually Assaulting and Abducting Minor Victim* (Aug. 30, 2024) (reporting that a former Border Patrol agent was found guilty of kidnapping and repeated sexual assault of a minor); Lomi Kriel, *ICE Guards "Systematically" Sexually Assault Detainees in an El Paso Detention Center, Lawyers Say*, ProPublica (Aug. 14, 2020) (describing alleged sexual abuse of migrants in immigration detention).

[82] Proposed 2026 Amendments: Human Smuggling at 4-5. In addition to adding conduct constituting criminal sexual contact under § 2244, the amendment would move the instructions to equate criminal sexual abuse with serious bodily injury from the commentary to the text of § 2L1.1. *Id*.

clothing, a person's breast or buttocks, with a sexual purpose.[83] And the specific offenses at § 2244 include nonconsensual sexual contact (*e.g.* buttocks-touching) with an adult[84] and consensual sexual contact (*e.g.* buttocks-touching) with a teenager.[85]

It is likely no accident that of the many SOCs in the Guidelines that address bodily injury, *not one of them* incorporates § 2244's broad definition of "sexual contact."[86] Under this definition, and under the proposed amendment, touching the rear pockets of a person's jeans (with sexual intent) could result in an enhanced sentence. This could apply, for example, if a migrant claims that a smuggler touched her buttocks when lifting her into a truck, or if he grazed her breast while helping her cross a fence. And because the enhancement is offense-based, it would apply regardless of whether the person sentenced is the person who (allegedly) touched the migrant.

These sorts of allegations would be much more difficult for the defense to rebut than allegations of the types of sexual abuse that are criminalized by §2241 and § 2242, which require more significant and invasive sexual acts, which would not happen accidentally.[87] And people subject to the enhancement will likely be deprived of the opportunity to question other migrants who might have witnessed the purportedly intentional touching and could shed light on its context, because, as noted earlier, migrant witnesses are generally removed from the country well before trial, much less

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[83] 18 U.S.C. §2246(3) (defining "sexual contact" under Chapter 109A, which includes § 2244).

[84] 18 U.S.C. § 2244(a)(2).

[85] 18 U.S.C. § 2244(a)(3).

[86] Guidelines that include SOCs for bodily injury—including, for example, §2A6.2(b)(1)(B) (stalking or domestic violence) and 2H4.2(b)(1) (willful violations of the Migrant and Seasonal Agricultural Workers Act) incorporate § 1B1.1's definition of "bodily injury," which means "any significant injury; e.g. an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought." USSG § 1B1.1, cmt. n.1(B). The conduct covered by § 2244 will rarely meet that definition; nor can it be equated to that level of injury.

[87] 18 U.S.C. § 2246(2) (defining the "sexual act[s]" that are criminalized by §§ 2241 and 2242 to require either penetration or contact between a person's genitals or mouth and the anus or genitals of another).

sentencing. The only certainty this proposal brings is that of increased litigation and hearings at sentencing.

3. The proposed cross-reference to Chapter 2 guidelines for offenses involving sexual conduct can overstate individual culpability in smuggling cases involving sexual abuse, and it would rarely be applicable in cases involving sexual contact.

The Commission should not adopt the expanded cross-reference for offenses involving sexual conduct.[88] The proposed cross-reference to Chapter Two, Subpart A for §2L1.1 offenses involving conduct described in 18 U.S.C. §§ 2241-2242 will result in guideline ranges that are too severe for, and have no nexus to the offense of conviction, due to the expansive application of the relevant-conduct rules.

Section 2A3.1 is the guideline that applies to offenses under §§ 2241 and 2242, with a base offense level of 30 for most offenses, and many enhancing SOCs.[89] People who are subject to the proposed cross reference will therefore face substantially higher guideline ranges than they would face under §2L1.1, without the government having to prove the alleged sexual abuse beyond a reasonable doubt.[90] This end-run around the burden of proof will be even more troubling if the cross-reference is offense-based, and a person can face the guideline range produced by §2A3.1 even without any allegation that they personally committed any sexual misconduct. And as we noted earlier, it can be extremely difficult (or impossible) for our clients to successfully dispute allegations of sexual misconduct, whether the misconduct is alleged against a co-conspirator, another migrant, or

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[88] If the Commission does choose to adopt this cross reference, we urge it to select the "defendant engaged in" bracketed language, given the expansive liability present in this guideline, so that it appropriately tracks individual culpability.

[89] *See* USSG §2A3.1. The guideline has a base offense level of 38 if the person was convicted under 18 U.S.C. § 2241(c), which involves aggravated sexual abuse of a child under the age of 12, or between the ages of 12-15 who is 4 years younger than the person committing the abuse. *See id*. at §2A3.1(a)(1). Presumably, that BOL would not apply in human smuggling cases not involving a conviction under § 2241(c); but if it did, that is even more reason not to include the cross-reference.

[90] The base offense level for a § 1324 offense is 12. *See* USSG §2L1.1(a)(3).

immigration officials,[91] because witnesses are often detained and rapidly removed from the country.

Defenders, of course, want our migrant clients to be safe from sexual misconduct. But without the proposed cross-reference, the harms it would target will hardly go unaddressed. If the government can prove criminal sexual abuse, the person will receive an enhancement for serious bodily injury under the current §2L1.1(b)(7)—even without the proposed amendments. And there can also be a federal or state prosecution for a sex crime.[92] Such prosecutions not only provide justice for victims, they also provide procedural fairness to both the accused and victims in a way that simply is not possible when such allegations are subject to a lesser standard of proof at sentencing, often based on reported statements of deported witnesses.

As for offenses involving conduct described in 18 U.S.C. § 2244, a cross-reference to §2A3.4 would result in a base offense level of 12. While §2A3.4 has enhancements for offenses involving sexual conduct with children under the age of 16, §2L1.1 will almost always provide the higher sentence, rendering the cross-reference irrelevant.

Finally, the cross-reference is unwarranted because criminal sexual abuse occurs rarely in smuggling offenses, and when it does, judges are perfectly capable of addressing it under § 3553(a).

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[91] *See, e.g.*, U.S. Dept. of Justice, U.S. Att'ys Off., S. Dist. of Ohio, *Grand jury indicts former deportation officer with federal crimes related to sexually assaulting immigrant victims* (Dec. 8, 2022) (discussing indictment of ICE deportation officer alleging the sexual assault of "at least two females under his supervision in the ICE Alternatives to Detention program"); U.S. Imm. and Customs Enf't, *Former ICE special agent arrested on federal civil rights charges that allege he sexually assaulted 2 women* (Aug. 15, 2018) (alleging ICE special agent attempt to rape one woman and did rape another).

[92] *See, e.g.*, U.S. Imm. and Customs Enf't, *Convicted felon ordered to serve nearly 10 years for sexual assault near the Arizona/Mexico border* (Oct. 17, 2019).

E. An enhancement for offenses conducted in connection with a transnational criminal organization is empirically unsupported and risks compounding unwarranted ethnic disparity.

In response to the Commission's request for comment,[93] Defenders oppose any additional increases for the involvement of transnational criminal organizations (TCOs). Human smuggling is, by definition, a transnational offense, but the involvement of large cartels is rare. Requiring sentencing courts to determine whether a person committed a transnational smuggling offense "in connection with [their] participation" in a TCO will lead to overbroad, inconsistent application of an enhancement that is empirically unsupported. Beyond that, such an enhancement risks double counting and would overlap with existing guideline provisions, and it would create substantial risks of unwarranted ethnic profiling and disparity.

1. The involvement of TCOs in §2L1.1 offenses is empirically unsupported.

Scholarship has shown that involvement of large cartels in smuggling offenses is rare,[94] and Defenders' experience confirms that. In our experience, smuggling operations at the Southwest border frequently consist of small-scale facilitators performing discrete tasks—drivers, guides, document providers, or local coordinators—linked through flexible and opportunistic networks.[95] Even on the other side of the border, in Mexican territories controlled by TCOs, past research indicates that they often do not conduct migrant smuggling operations directly. Instead, they extract tolls from migrants and smugglers for protection, leaving smuggling logistics largely in

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[93] Proposed 2026 Amendments: Human Smuggling at 8-9 (Issue for Comment #4).

[94] *See* Sanchez, *Human Smuggling and Border Crossings* at Chapter 1 (discussing lack of empirical research on smuggling and racial undertones of discourse surrounding the transnational nature of the offense, noting that most smuggling involves local facilitators).

[95] *See also id.*; Spener, *Clandestine Crossings* at 160 (describing decentralized structure of smuggling networks). Defenders would hope that the sorts of loose associations that arrange smuggling would not incorrectly be labeled as a TCO (or a subsidiary of a TCO), but we have some concerns with that possibility.

the hands of smaller-scale actors.[96] As one analysis explains, there has been "little evidence" that cartels themselves smuggle migrants, despite public narratives suggesting otherwise.[97]

The Commission's data briefing supports that TCO involvement in these cases is rare.[98] Moreover, the data show that these rare cases were more likely to receive six- and nine-level enhancements for conduct involving at least 25 or 100 migrants, respectively; and they were more likely to receive enhancements for inflicting any bodily injury or death.[99] Thus, cases involving TCOs are already receiving substantial enhancements that produce higher guideline ranges than those for more typical smuggling offenses. A separate TCO enhancement is not needed.

2. The proposed enhancement would broadly punish alleged association, posing a serious risk of unwarranted ethnic disparity.

A TCO enhancement risks sweeping in broad swaths of Hispanic individuals for alleged associations, without looking to actual conduct. As we previously explained in relation to the gang enhancement in §2K2.1, "[t]he problems with law enforcement methods for documenting criminal affiliation have been widely recognized, and counsel in favor of great caution…."[100] Scholars and stakeholders have shown that law enforcement use broad,

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[96] Greenfield, *Human Smuggling and Associated Revenues* at 9 ("Migrants' payments to drug-trafficking TCOs are not payments for smuggling, per se, but they are the only revenue associated with human smuggling that we could attribute directly to TCOs of some kind."); *see also* Amelia Frank-Vitale, *Coyotes, caravans, and the Central American migrant smuggling continuum*, 26 Trends in Organized Crime 64, 68 (Feb. 17, 2023) (discussing cartels in Mexico requiring fees to move migrants within their territory).

[97] Gilardi, *Ally or Exploiter?* (Feb. 5, 2020).

[98] According to the recent Commission data briefing, in fiscal year 2024, an estimated 201 (or 5%) of §2L1.1 cases involved a "cartel or [TCO]." *Public Data Briefing* at 30; *see also* USSC, *Transcript of Public Data Briefing on Proposed Amendment on Human Smuggling* at 7 (Feb. 13, 2026). This indicates TCO involvement is rare, although the data briefing does not explain the exact parameters of the special coding project used to identify which cases involved a cartel or TCO or how these findings of fact were made.

[99] *Public Data Briefing* at 30-31.

[100] Defenders' 2023 Firearms Comment at 15 (Mar. 14, 2023).

unbridled discretion in determining whether someone is involved in a criminal organization, designating people as gang members (or "affiliated" with a gang) based on mere suspicion—leading gang databases to be significantly overinclusive, and riddled with racial bias.[101]

These problems will be compounded in determining if someone is affiliated with a TCO, since TCOs are typically based in other countries. In some border districts, Defenders find that prosecutors already sometimes insinuate that our Mexican or Mexican-American clients have cartel ties and should not receive role reductions, where evidence on the ground is scant. For instance, if a client in a drug case admits even just to being from the Sinaloa region, Defenders often worry that he will unjustifiably be thought to be associated with the Sinaloa cartel.

This raises another problem that we flagged in connection with gang enhancements: participation in the activities of a criminal organization is "not a reliable identifier of culpability," as teens "who grow up in areas with heavy gang activity often have little choice in whether they interact with gangs on a daily basis."[102] Instead, "[i]t is not mere participation that predicts criminality—it is the degree of the person's participation that matters."[103] The same is true of TCOs, which dominate some regions in northern Mexico. Given the disparity risks inherent in the determination of whether a person participated in a TCO, the Commission should not take action without comprehensive study of smuggling offenses.

3. A TCO enhancement would overlap with existing enhancements that already address the targeted harms.

Finally, such an enhancement would not properly track offense seriousness because organizational affiliation does not reliably correlate with culpability or role. A common low-level driver recruited for a single trip in a large conspiracy could receive the same enhancement as the rarely-prosecuted genuine cartel member.

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[101] *Id.* at 15-18.

[102] *Id.* at 18 (quoting Brady United Against Gun Violence's Comments on the USSC's 2023 Proposed Priorities at 5 (Oct. 17, 2022)).

[103] Defenders' 2023 Firearms Comment at 18.

Relatedly, the proposed enhancement would also fail to properly gauge offense seriousness because the Guidelines already contain enhancements that account for the harms caused by hypothetical TCO involvement. Section §2L1.1(b)(9) provides for a 2-level enhancement if the sentenced individual was convicted under § 1324(a)(4), which includes cases where "the offense was part of an ongoing commercial organization or enterprise."[104] Also, aggravating role adjustments can address the conduct of the rarely prosecuted individuals with actual decisional responsibility in a TCO.

Finally, we note that in 2016, the Commission considered adding an enhancement to §2L1.1 (in the form of a higher base offense level) if a person "smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization."[105] After a hearing and public comment, the Commission opted not to adopt the amendment. There is no reason to change course now.

III. Rather than adding empirically unsupported enhancements that would make a broken guideline worse, the Commission should contemplate changes that could actually make it better.

The Commission should not take any action with §2L1.1 that would drive sentencing ranges higher, when data show that the existing ranges are already too high. At least, it should not do so without first pausing and studying these offenses. There is no need to act now, particularly given the documented decrease in irregular border crossings in the past year. But if the Commission wants to take action to amend §2L1.1 now, it should use the opportunity to actually improve its functionality.

The two SOCs addressing risk, injury, and death—the current §2L1.1(b)(6) and (b)(7)—are broken, and they produce sentencing ranges that data indicate are frequently disregarded. The Commission should not be expanding those SOCs; it should fix them instead. The injury/death SOC, in particular, operates without meaningful mens rea, individualization, or causation guardrails, unduly transferring liability for the unforeseen actions

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[104] 8 U.S.C. § 1324(a)(4)(A).

[105] USSC, 2016 Proposed Guidelines Amendment: Immigration at 56-58 (Jan. 15, 2016).

of co-conspirators or immigration enforcement agents onto the individual being sentenced. The result is unwarranted disparity and sentencing ranges that are often greater than necessary.

In particular, the Commission could:

- amend the current reckless endangerment enhancement to focus on the "defendant's" conduct, in accordance with the original Congressional directive in IIRIRA, rather than focusing on risks created by other actors;
- cabin the overbroad injury/death SOC to include both mens rea and individual causation, which would add guardrails and track the original Congressional directive;
- move the note defining "serious bodily injury" as criminal sexual abuse to the text of the (b)(7) SOC itself; and
- consider an additional SOC *reduction* for mitigating circumstances such as when immigration enforcement action causes injury, sexual abuse, or death of a migrant.[106]

IV. Conclusion

We urge the Commission not to adopt the proposed amendments. Migrants make up one of the largest demographic of clients that we serve, and we care deeply about their safety. But the proposed amendments will not make them safer. The history of §2L1.1 tells a familiar tale of factor creep and severity expanded by unstudied increases justified by perceived enforcement needs and knee-jerk reactions to troubling headlines, while empirical analysis lags behind.[107] These penalty increases have had, and will continue to have, an outsized impact on Hispanic individuals. The Commission should engage in comprehensive study of these offenses instead of adopting the proposed amendments. In the alternative, if the Commission feels it must act, it could take the opportunity to fix this broken guideline to better effectuate the statutory purposes of sentencing, as described above.

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[106] *See* 2026 Proposed Amendments: Human Smuggling at 9 (Issue for Comment #5).

[107] *See* Statement of Michael Carter on behalf of Defenders to USSC re: Proposed 2023 Firearms Amendment at 27 (March 7, 2023).