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RE: Comments in Opposition to the Joint Notice of Proposed Rulemaking entitled *Circumvention of Lawful Pathways;* RIN: 1125-AB26 / 1615-AC83 / Docket No: USCIS 2022-0016 / A.G. Order No. 5605-2023

Dear Assistant Director Reid and Acting Director Delgado:

The National Immigrant Justice Center (NIJC or "we") submits the following comments to the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), and the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR) ("the Departments") in response and opposition to the above-referenced Notice of Proposed Rulemaking (NPRM or "the Rule") issued by the Departments on February 23, 2023. NIJC calls on EOIR and DHS to withdraw the Rule in its entirety and ensure that a full and fair asylum system is made accessible to all those who seek refuge in the United States.

NIJC's strong interest in the Departments' proposed changes

NIJC is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding more than three decades ago, NIJC uniquely blends individual client representation with advocacy for broad-based systemic change.

Headquartered in Chicago, NIJC provides legal services through our staff and pro bono network to more than 10,000 individuals each year, including more than 800 asylum seekers, many of whom have entered the United States by crossing the U.S.-Mexico border. These individuals have survived persecution and torture in their home countries and many dangers throughout their journey to seek safety in the United States.

NIJC's clients include indigent, Black, Brown, Indigenous, and LGBTQ asylum seekers who frequently have no avenue to seek safety but to approach the United States at the U.S.-Mexico

border. We have served people forced to wait in Mexico to seek asylum in the United States under anti-asylum policies instituted by the Trump Administration. In addition to our own direct representation, NIJC provides pro se support to asylum seekers. Our experience working directly with clients and advising pro se applicants makes it clear that the vast majority of asylum seekers lack the linguistic and legal skills to navigate the U.S. asylum system alone. They often lack the financial resources to hire private counsel for purposes of pursuing asylum.

The Rule's proposed changes are all but certain to adversely impact the asylum seekers NIJC seeks to serve. Many asylum seekers will not be able to pass initial credible fear screenings and will be removed from the United States before they have an opportunity to secure pro bono counsel from NIJC or another similarly situated organization. Even for clients who do pass through screening, many will have to satisfy the higher standard for protection in the form of withholding of removal or relief under the Convention Against Torture (CAT). Developing cases to meet that higher standard will require additional time and resources from NIJC and our pro bono network, as will developing the necessary factual record to try to rebut the presumptions against asylum eligibility that the Rule would impose.

Even when NIJC and our pro bono partners are able to successfully obtain withholding of removal for clients, the Rule will impose an additional burden on our resources: Individuals who receive withholding of removal have a removal order and must apply annually for work authorization. The result is that many clients will continue to need our services in perpetuity. Additionally, because withholding does not allow for derivative protection for family members, and the proposed rule's exception for family unity is not guaranteed and may be applied only at the end of proceedings, NIJC will need to file stand-alone asylum requests for clients' family members in order to preserve their rights to access protection.[1] This need to continue serving existing clients and their families will detract from our ability to serve other asylum seekers because we will have to divert resources away from taking on new clients toward providing ongoing services. This diversion of resources will frustrate NIJC's mission, which, in part, is to serve as many individuals as possible while establishing and defending the legal rights of immigrants regardless of their background.

The Rule separately frustrates another key component of NIJC's mission, which is to transform the immigration system to one that affords equal opportunity for all. Not only does this proposed Rule eliminate access to asylum for entire groups of people, it does so in a way that will have a disparate impact on some of the most vulnerable among the already vulnerable population of asylum seekers. This change runs directly contrary to NIJC's mission.

Comments on proposed changes of this Rule

The Departments propose significant changes to asylum processing. These changes significantly alter the expedited removal screening process created by Congress over twenty-five years ago, disqualify many people from asylum eligibility, and will further choke access to permanent protection for asylum seeking adults, children, and families. Our comments below review these

[1] We discuss further in Section (4)(f) how the Rule's family unity provision falls short of protecting families in many respects.

substantive changes.

As further discussed below, 1) NIJC renews its objection to the comment period, and the prospect that the Departments may finalize their proposal without duly considering received comments; 2) this Rule builds on prior unlawful, anti-asylum policies; 3) the NPRM undermines numerous codified obligations to asylum seekers; and 4) the Departments fail to provide a "meaningful and realistic opportunity to seek protection" for countless asylum seekers.[2]

NIJC urges the Departments to withdraw this Rule in its entirety and instead surge resources and staffing to increasing processing capacity at ports of entry and to strengthen communication and cooperation between groups—including non-profit service providers as well as local governments where applicable—providing legal representation and respite services to asylum seekers.[3]

1) NIJC renews its objection to this truncated comment period.

NIJC joined over 170 organizations[4] calling on the Departments to follow binding Executive Orders[5] and the Administrative Procedure Act[6] (APA) in affording stakeholders a meaningful opportunity to comment on the Rule—recalling that 60-day timeframes are the floor, not the ceiling in executive rulemaking.[7]

On March 21, 2023, less than a week before the comment deadline, EOIR emailed a denial of this request by attaching a letter dated a week earlier, which states that "[a]t this time, the Departments do not intend to extend the comment period."[8] DHS followed suit one business day before comments were due, on March 24, 2023, stating: "As noted in the NPRM, the Departments published the proposed rule with a 30-day comment period because the

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[2] 88 Fed. Reg. 11708.

[3] For a more detailed discussion of these policy recommendations, see National Immigrant Justice Center, Solutions for a Humane Border Policy (Jan. 17, 2023), https://immigrantjustice.org/staff/blog/solutions-humane-border-policy.

[4] *See* National Immigrant Justice Center, *172 Organizations Call for Extension on Public Comment Period For Proposed Asylum Ban* (Mar. 1, 2023), *available at* https://immigrantjustice.org/staff/blog/172-organizations-call-extension-public-comment-period-proposed-asylum-ban.

[5] Two Executive Orders instruct agencies that, "[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment . . . . with a comment period that should generally be at least 60 days." Exec. Order 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, § 2(b) (Jan. 18, 2011) (emphasis added); see also Exec. Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51735, § 6(a) (Sept. 30, 1993) ("[I]n most cases [rulemaking] should include a comment period of not less than 60 days.").

[6] *Becerra v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1176 (N.D. Cal. 2019) (quoting *Prometheus Radio Proj. v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011)) ("90 days is the 'usual' amount of time allotted for a comment period.").

[7] *Id.*

[8] Lauren Adler Reid, *Re: Request to Provide a Minimum of 60 days for Public Comment in Response to the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), and Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) (the Departments) Joint Notice of Proposed Rulemaking (NPRM): Circumvention of Lawful Pathways*, EOIR (Mar. 14, 2023) (delivered via e-mail on March 21, 2023).

Departments seek to be in a position to finalize the proposed rule, as appropriate, before the Title 42 public health order is lifted."[9]

The Departments are thus opting to plow forward with a third or half of the usual allotted timeframe for comments, preemptively announcing their plan to issue a Temporary Final Rule or Interim Final Rule by May 11, 2023.[10] As discussed below, the Departments lack rationale for proceeding with such rushed comment period; undermine our ability to provide thorough comments; thwarted the Departments' own ability to put forth their full proposal; and raise the alarming prospect that they will finalize this Rule without duly considering stakeholder input.

a. There is no justification for this rushed comment period.

The NPRM contains no express rationale for permitting only a 30-day comment period. Although the NPRM may be read to imply that the impending end of the illegal Title 42 policy provides a sufficient justification,[11] any supposed urgency due to the end of Title 42 has been manufactured by the Departments. The Departments have been on notice for years that Title 42 is illegal—and therefore subject to termination at any time. The Departments have also known for many months that the Centers for Disease Control and Prevention, which at least nominally issued the policy, believed that it had run its course and should be ended nearly one year ago in April 2022. Indeed, President Biden and Secretary Mayorkas announced their intention to issue this Rule on January 5, 2023,[12] yet declined to issue it for more than six weeks after those announcements. The Departments have thus had a lengthy period in which to prepare to fulfill their statutory obligations under the Immigration and Nationality Act (INA) by, among other things, increasing their capacity to receive people seeking asylum at points of entry. Instead, the Departments have chosen to sit on their hands and then, at the last moment, claim that their own inaction justifies curtailing the comment period. That course of action is indefensible and violates the APA.

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[9] Brenda F. Abdelall, Letter from DHS on extension request (Mar. 24, 2023).

[10] Dep't of Homeland Security & Executive Office for Immigration Review, *Circumvention of Lawful Pathways*, 88 Fed. Reg. 11704, 11708, RIN 1125–AB26 (Feb. 23, 2023) ("[I]f, prior to the issuance of the final rule, the Title 42 public health Order is lifted or encounter rates rise significantly (even without the lifting of the Title 42 public health Order), the Departments intend to take appropriate action, consistent with the Administrative Procedure Act (''APA''), which may include issuance of a temporary or interim final rule similar to this NPRM while the Departments complete the notice-and-comment rulemaking process.").

[11] 88 Fed. Reg. at 11708.

[12] The White House, *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions* (Jan. 5, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/; DHS, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.

b. This comment period undermines stakeholder ability to provide meaningful comments.

The Departments solicit comments on an array of different issues.[13] We are not able to comment on every proposed change of this NPRM under the timeframe afforded for comments. A more robust comment period is particularly critical here, given the lengthy (50 Federal Register pages) and profound nature of the changes proposed. The Departments propose a multi-tiered, complex asylum ban that would affect most asylum seekers seeking protection at the U.S.-Mexico land border.[14] The proposed changes directly implicate, among many other things, circumstances on the ground in numerous other countries and the functionality (or non-functionality) of asylum systems in those countries. The Departments also make clear that a version of this Rule may put in place when the anticipated end of Title 42 comes to pass, substituting the mass expulsion policy for this new scheme that explicitly aims to "decrease the number of asylum grants"[15] and decrease the number of individuals referred to Immigration and Customs Enforcement (ICE) because so many will be summarily removed and face a five-year bar on re-entry.[16]

Our failure to comment on every feature of this NPRM or to provide more concrete examples and supporting data is not a tacit endorsement; it simply means we lacked the resources to respond within the time allotted. The proposed changes require careful consideration and evaluation of their impact on people seeking asylum. Doing so further requires considering a range of possibilities that may arise under this proposed new system and how those possibilities might fluctuate from one administration to the next.[17] The timeframe for this NPRM does not afford us the time and opportunity to dedicate the resources and expertise needed for such careful review. To name just two examples, with more time, NIJC would have been able to provide additional specific examples of how this Rule is likely to impact clients with strong claims to asylum, examples that would have been based on the real-life experiences of other clients who have entered the United States via the U.S.-Mexico border. In addition, NIJC would have been able to provide more concrete data to refute some of the Rule's incorrect assumptions about access to protection in the Western Hemisphere and the likely migration patterns that will follow the end of Title 42.

c. The Departments not only rush stakeholders, but themselves—further undermining stakeholder ability to provide meaningful input.

This comment period appears to be rushed not just for stakeholders, but for the Departments as

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[13] *See, e.g.*, 88 Fed. Reg. 11708 (soliciting comments on six different areas as well as on whether there are reliance interests); *id*. at 11727 (referencing plan to jointly consider comments to this NPRM alongside comments received in response to "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims," 83 Fed. Reg. 55934 (Nov. 9, 2018)); *id*. at 11748 (welcoming comments regarding potential impacts of this Rule on small entities); id. at 11749 (soliciting comments on Customs and Border Protection (CBP) information collection notice concurrently with NPRM).

[14] 88 Fed. Reg. at 11707.

[15] *Id*. at 11748.

[16] *Id*. at 11715.

[17] This Rule proposes to "sunset" upon 24 months with the possibility of indefinite extension, making it more likely than not that this change would straddle the next Presidential term. *Id*. at 11726.

well. The Departments claim to rescind two Trump-era bans in the preamble, but they fail to do so in the proposed regulations within the NPRM.[18] The Departments also state in the NPRM that they are simultaneously revising the CBP One information collection notice previously issued in the Fall of 2021[19] alongside this rule, but they have failed to post the proposed revision to the information collection notice. Such revision appears particularly important given the Rule's codification of the required use of the CBP One app to access regular Title 8 asylum processing. Stakeholders cannot comment on changes that are not in fact proposed, due to the Departments' apparent oversight and rushed posting of this NPRM. The Department's self-imposed rush to publish the NPRM has therefore prohibited us entirely from commenting on the proposed information collection revision.

d. In addition to rushing this comment period, the Departments raise the alarming prospect that they will rush to promulgate a final version of this Rule in violation of the APA.

The NPRM raises the possibility that the Departments will promulgate its contents as a final rule without first responding to comments.[20] Doing so would not comport with the APA. Given that the Departments had years to prepare for the end of the Title 42 policy, there can be no good cause for forgoing the usual notice and comment procedure. Even if the end of that policy were a surprise—and it is not—the mere expiration of an illegal, arbitrary policy would not provide good cause for departing from the usual notice and comment procedure in the APA. And there is no credible evidence that allowing the notice-and-comment procedure to run its usual course would defeat the purpose of the NPRM or pose an imminent danger to life. To the contrary, it is the *issuance* of a final rule that would pose an imminent danger to the life of many people who would immediately become subject to the NPRM's illegal bar.

Nor may the Departments rely on the foreign affairs exception to the notice and comment requirement. That exception covers only regulations that directly involve the conduct of foreign affairs. The NPRM, by contrast, involves solely domestic affairs; it attempts to rewrite U.S. immigration law, not to govern relationships with other sovereign nations. The Departments therefore may not lawfully pretermit the APA's notice-and-comment procedure.

2) With this Rule, the Departments attempt to resurrect and recycle prior unlawful, anti-asylum policies.

This Rule erects a new barrier exclusively applicable to people seeking asylum who approach the

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[18] *Compare* 88 Fed. Reg. at 11727 ("The Departments propose rescinding prior rules establishing bars to asylum that are currently subject to court orders rendering them ineffective.") with *id.* at 11750 (proposed regulations).

[19] *Id*. at 11749 (referencing "Collection of Advance Information from Certain Undocumented Individuals on the Land Border"). NIJC commented on that information collection notice. *See* National Immigrant Justice Center, *Comment On Collection of Advance Information From Certain Undocumented Individuals on the Land Border, Docket Number 2021-20988; 86 FR 53667* (Nov. 29, 2021), available at https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2021-12/NIJC-Comment-on-CBP-Information-collection-notice-11_29_21.pdf.

[20] 88 Fed. Reg. at 11708.

U.S.-Mexico land border.[21] Most people who were not able to secure a prior appointment[22] or parole entry[23] from the U.S. government would be subject to a presumption that they are ineligible for asylum. Unless they can successfully show that they were subject to exceptionally compelling circumstances, such as an acute medical emergency, imminent threat to life or safety, or trafficking, this presumption would bar them from asylum and limit them to eligibility for more demanding and less protective relief, i.e., withholding of removal or CAT.[24] The Rule affords immigration judge review only to those who expressly request it.[25] As discussed below, the Rule offers new iterations of prior anti-asylum policies that have been enjoined or held unlawful, including (a) asylum bans based on transit or mode of entry and (b) metering.

a. While the Departments claim to rescind Trump-era bans based on transit or mode of entry, this Rule puts forth new iterations of the same illegal policies.

In the preamble to the NPRM, the Departments state that the Rule would rescind two asylum bans from the prior administration: the interim final rule that barred individuals who entered between ports of entry and a final rule that banned individuals from gaining asylum if they traveled through a third country.[26] The Departments purport to offer a "tailored, time-limited approach" that is distinct from these Trump rules.[27] However, the regulations they propose neither rescind the Trump rules, nor are they substantially distinct from those rules or other Trump-era asylum bans.[28]

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[21] Proposed 8 CFR 208.33(a)(1); 8 CFR 1208.33(a)(1).

[22] Proposed 8 C.F.R. § 208.33(a)(1)(ii).

[23] Proposed 8 C.F.R. § 208.33(a)(1)(i).

[24] Proposed 8 C.F.R. § 208.33(c)(2)(i).

[25] Proposed 8 C.F.R. § 208.33(c)(1)(iv).

[26] 88 Fed. Reg. at 11728 ("[T]he Departments propose rescinding the amendments made by both the Proclamation Bar [i.e., *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934 (Nov. 9, 2018) interim final rule] and the TCT Bar rulemaking [i.e., *Asylum Eligibility and Procedural Modifications*, 85 Fed. Reg. 82260 (Dec. 17, 2020)] to 8 CFR 208.13, 208.30, 1003.42, 1208.13, and 1208.30, as well as amendments made to those sections by *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (Dec. 11, 2020) ("Global Asylum Rule") relating to the Proclamation Bar and the TCT Bar final rule.").

[27] *Id*. at 11728.

[28] NIJC, with partner organizations, has been involved in litigation challenging both of the relevant Trump era policies. *See O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019) *appeal pending sub nom O.A. v. Biden*, No. 19-5272 (D.C. Cir.); *Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 31 (D.D.C. 2020) *appeal dismissed sub nom I.A. v. Garland*, No. 20-5271, 2022 WL 696459 (D.C. Cir. Feb. 24, 2022). If, as urged in this comment, the Departments decline to issue the final rule as proposed, they should still issue rulemaking that rescinds these previous asylum eligibility bars.

We also urge the Departments to issue rulemaking that rescinds two other Trump-era rules that relate to the administration of asylum claims for applicants who present at the U.S.-Mexico border. The first, the Interim Final Rule, *Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. at 63994 (Nov. 19, 2019), created a system for illegally removing noncitizens to third counties pursuant to Asylum Cooperative Agreement. NIJC was also involved in a legal challenge to that Rule. *See U.T. v. Barr*, No. 1:20-cv-00116-EGS (D.D.C filed Jan. 15, 2020). The second, *Procedures for Asylum and*

1. This Departments propose a new form of transit ban.

At the tail end of the Trump administration, the Departments finalized a rule—the interim form of which had been vacated—that aimed to exclude any person from asylum access if they transited through a third country.[29] Like the instant Rule, the Trump transit ban justified this extraordinary regulatory action as a deterrence measure, a means to address the purported strain on the U.S. immigration system, and a strategy to combat smuggling networks.[30] Also like this Rule, the enjoined transit ban did not apply to asylum seekers who could prove that they were the victims of a severe form of trafficking.[31] And finally, the Trump rule mirrored this NPRM in punishing individuals for travel through a country that is "party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees" without seeking and being denied asylum.[32]

Immediately after the Trump Administration issued a final rule implementing the previously-vacated interim final rule imposing a transit ban, a federal district court enjoined it because it was "not in accordance with law" and was "in excess of statutory limitations."[33] The portion of that rule that barred access to asylum for anyone for merely traveling through another nation was inconsistent with the safe third country and firm resettlement provisions of the INA. The Court found no merit to the Departments' specification that transit countries would need to be parties to the 1951 Refugee Convention or the 1967 Refugee Protocol, as "[t]his requirement does not remotely resemble the assurances of safety built into the two safe-place bars of § 1158" and is inconsistent with the INA.[34] The Court also rejected the Departments' justification that withholding of removal or relief under CAT provide guardrails to prevent the return of asylum seekers barred under the transit rule, as the standard for those forms of relief are much higher than asylum. This 2021 decision as to the final rule was in keeping with the substantive findings of the Ninth Circuit, in its evaluation of an injunction of the prior Interim Final Rule. That Court

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Withholding of Removal, 85 Fed. Reg. 81698 (Dec. 16, 2020), requires newly arrived asylum seekers to, among other things, apply for asylum within 15 days of their first hearing in removal proceedings. *See NIJC et al. v. EOIR et al.*, No. 21-cv-0056-RBW (filed Jan. 12, 2021). While these rules are not directly implicated by the changes in this proposed Rule, they cannot co-exist with the proposals offered in this Rule. They should thus be rescinded in their entirety.

[29] *Asylum Eligibility and Procedural Modifications*, 85 Fed. Reg. 82260 (Dec. 17, 2020) (codified at 8 C.F.R. §§ 208, 1208); *see I.A. v. Garland*, No. 20-5271, 2022 WL 696459 (D.C. Cir. Feb. 24, 2022) (vacating the preceding interim final rule (IFR)).

[30] 85 Fed. Reg. at 82260 n.1 (adopting and incorporating same rationale of the IFR, which "sought to address the large number of meritless asylum claims that aliens are filing with the Departments. Such claims place an extraordinary strain on the Nation's immigration system, undermine many of the humanitarian purposes of asylum, exacerbate the humanitarian crisis of human smuggling, and affect the United States' ongoing diplomatic negotiations with foreign countries.") (citations omitted).

[31] Transit ban final rule 8 C.F.R. §208.13(c)(4)((ii) ? https://www.federalregister.gov/documents/2020/12/17/2020-27856/asylum-eligibility-and-procedural-modifications

[32] 8 C.F.R. §208.13(c)(4)(iii)

[33] *E. Bay Sanctuary Covenant v. Barr,* 519 F. Supp. 3d 663 (N.D. Cal. 2021).

[34] *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 977 (9th Cir. 2020).

said of the prior Transit Ban that it was a "critical component of [statutory third-country provisions] that the alien's 'safe option' be genuinely safe."[35] The Court then rejected the Trump era transit ban, reasoning that "the Rule does virtually nothing to ensure that a third country is a 'safe option.'"[36]

Two years later, the Departments return to its premise with this Rule. Once more, the Departments create new tiers for asylum access, screening out from normal Title 8 processing individuals and families who traveled through a third country that is party to the 1951 Refugee Convention or 1967 Refugee Protocol without seeking final adjudication on their asylum claim. They claim to protect individuals from smuggling and trafficking networks through this Rule as well, while limiting their relief eligibility to more demanding and less protective forms of relief. Most importantly, they ignore once more the statutory authority that controls asylum access in the United States and erect a barrier that has no justification in domestic or international law. Only now, they do so in combination with an entry ban, reminiscent of another, separate Trump-era ban. The Rule does this without confronting the fact that the Western Hemisphere countries identified in the Rule are in fact *not* safe options for many of the most vulnerable asylum seekers.[37]

2. This Rule proposes a new form of entry ban.

The Rule also recycles an invalidated Trump-era position barring asylum based on manner of entry into the United States. In November 2018, DHS and DOJ issued an interim final rule titled "Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims."[38] President Trump also issued a proclamation, "Addressing Mass Migration Through the Southern Border of the United States."[39] Both the interim final rule and the proclamation sought to limit access to asylum for persons who enter the United States between ports of entry at the southern border.[40] In December 2018, one federal court enjoined the Departments from implementing this entry ban, and in August 2019 another court vacated that rule in its entirety.[41] In both cases, the Courts held that an entry ban violated the INA. That rule was invalid because it ran "afoul of three codified rules: 1) the right to seek asylum; 2) the

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[35] *Id.*

[36] *Id.*

[37] *See e.g.*, Karen Musalo, *Biden's Embrace of Trump's Transit Ban Violates US Legal and Moral Refugee Obligations*, Just Security (Feb. 8, 2023), https://www.justsecurity.org/84977/bidens-embrace-of-trumps-transit-ban-violates-us-legal-and-moral-refugee-obligations/. We discuss this further in Section (4)(b) *infra*.

[38] Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934 (Nov. 9, 2018).

[39] Proclamation 9880, Addressing Mass Migration Through the Southern Border of the United States, 84 Fed. Reg. 21229 (May 8, 2019).

[40] Taken together, the Rule and the Proclamation "create an operative rule of decision for asylum eligibility" that denies asylum to all people who fail to enter at a designated port of entry. *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 770 (9th Cir. 2018).

[41] *See O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019) *appeal pending sub nom O.A. v. Biden*, No. 19-5272 (D.C. Cir.) (vacating prior rule); *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1121 (N.D. Cal. 2018) *affirmed by East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021) (enjoining rule).

prohibition against penalties for irregular entry; and 3) principles of nonrefoulement, which prohibit signatories to the 1951 Convention from returning a refugee to the frontiers of territories where his life or freedom would be threatened."[42]

With this Rule, the Departments not only propose a new iteration of the entry ban, but they *expand* it to apply to asylum seekers presenting at ports of entry if they present without an appointment. So long as a person seeking asylum lacks a valid visa and passport—a common byproduct of fleeing for one's life—and travel through another country than the United States, they may be subject to this new bar.[43]

The Departments justify this ban despite the invalidation of its predecessor on the grounds that this ban is merely a "rebuttable presumption." But that difference is semantic. The Trump entry ban functioned as a categorical ban even though it did have some very narrow exceptions. Here too, the NPRM has exceedingly narrow exceptions,[44] and for everyone who cannot meet one of those exceptions, it amounts to a categorical ban. There is little daylight between the two for most people seeking asylum, especially those who are detained or unrepresented, as we discuss further in Section (4).

In sum, the Departments combine President Trump's transit and entry bans to create new tiers for asylum access, screening out from normal Title 8 processing individuals and families who traveled through a third country without seeking final adjudication on their asylum claim and lack a visa or valid passport to enter the United States. Individuals and families would no longer be able to exercise their lawful right to seek asylum at the U.S. southern border unless they secured a prior appointment through the highly dysfunctional CBP One app or waited for final denial of their asylum claim in a country of transit.

b. This Rule also brings back metering.

This Rule purports to provide an off-ramp to its proposed bar for individuals who appear at a "pre-scheduled time and place" through the use of CBP One mobile app.[45] This app is currently available at a few ports of entry across the U.S.-Mexico border as the only way to access exemptions to Title 42 processing, requiring asylum seekers to travel long distances if they are fortunate enough to secure an appointment.[46]

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[42] *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1121 (N.D. Cal. 2018) *affirmed by East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021) (enjoining rule).

[43] Proposed 8 § C.F.R. 208.33(a)(1) & § 1208.33(a)(1).

[44] Proposed 8 C.F.R. § 208.33 (a)(2) & § 1208.33(a)(2) (providing exceptionally compelling circumstances for those who can show by a preponderance of the evidence that they suffered an acute medical emergency, faced an imminent and extreme threat to life or safety, or satisfied the definition of "victim of a severe form of trafficking in persons").

[45] Proposed 8 C.F.R. § 208.33(a)(1)(ii)

[46] *DHS Continues to Prepare for End of Title 42: Announces New Border Enforcement Measures and Additional Safe and Orderly Processes*, Dep't of Homeland Security (Jan. 5, 2023),

Dozens of members of Congress have called out significant malfunctioning with this app, citing "numerous reports of unusability, inaccessibility, and inequity that have already resulted in grave harm to asylum seekers,[47] and one U.S. senator called for Customs and Border Protection (CBP) to shelve it altogether.[48] This Congressional alarm followed weeks of reports that CBP One was wholly inaccessible to many due to language, technological barriers, and even skin tone.[49] Many families have despaired when realizing that they have to secure an appointment for every individual, including small children, and some have become so frustrated and fearful that they will not secure an appointment that they have sent their children alone as unaccompanied.[50]

Reports from border regions reveal it is now commonplace for individuals and families to travel through dangerous conditions and/or wake in the middle of the night in desperate efforts to overcome seemingly insurmountable obstacles to obtaining appointments through CBP One that include random and hard-to-discern error messages, poor WIFI especially in border camps for migrants, and the limited number of appointments available for those who do manage to access the app.[51] As lawmakers have observed, CBP One is creating tiered access to asylum, excluding

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https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.

[47] *See* Suzanne Monyak, *House Democrats call to improve border appointment app,* Roll Call, (Mar. 14, 2023), https://rollcall.com/2023/03/14/house-democrats-call-to-improve-border-appointment-app/; Letter from Rep. Jesús G. "Chuy" García, et. al. to U.S. Secretary of Homeland Security Alejandro Mayorkas (Mar. 13, 2023), https://s3.documentcloud.org/documents/23707058/cbponeletter.pdf.

[48] Press Release, Sen. Ed Markey, *Senator Markey Calls of DHS to Ditch Mobile App Riddled with Glitches, Privacy Problems, For Asylum Seekers* (Feb. 21, 2023), https://www.markey.senate.gov/news/press-releases/senator-markey-calls-on-dhs-to-ditch-mobile-app-riddled-with-glitches-privacy-problems-for-asylum-seekers; Letter from Sen. Ed Markey to U.S. Secretary of Homeland Security Alejandro Mayorkas (Feb. 21, 2023) https://www.markey.senate.gov/imo/media/doc/senator_markey_letter_to_dhs_on_cbp_one_app_-_february_2023.pdf.

[49] *See generally*, Kate Morrissey, *Asylum seekers in Tijuana are scrambling through mobile app error messages for few appointments into the U.S.*, The San Diego Union Tribune (January 22, 2023) https://www.sandiegouniontribune.com/news/immigration/story/2023-01-22/cbp-one-app-asylum-tijuana ; Jack Herrera, *Fleeing for Your Life? There's An App for That.*, Texas Monthly (Mar. 2, 2023) https://www.texasmonthly.com/news-politics/cbp-app-asylum-biden-administration/ ; John Washington, *Glitchy CBP One app turning volunteers into Geek Squad support for asylum-seekers in Nogales,* The Arizona Luminaria (March 20, 2023) https://azluminaria.org/2023/03/20/glitchy-cbp-one-app-turning-volunteers-into-geek-squad-support-for-asylum-seekers-in-nogales/ ; Melissa de Bosque, *Facial recognition bias frustrates Black asylum applicants to US, advocates say*, The Guardian (Feb. 8, 2023) https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias ; Raul Pinto, *CBP One Is Riddled With Flaws That Make the App Inaccessible to Many Asylum Seekers*, Immigration Impact (Feb. 28, 2023) https://immigrationimpact.com/2023/02/28/cbp-one-app-flaws-asylum-seekers/.

[50] *See* Andrea Castillo, *Asylum seekers face decision to split up families or wait indefinitely under new border policy,* L.A. Times (Feb. 24, 2023) https://www.latimes.com/politics/story/2023-02-24/asylum-seeking-families-consider-separation-shortage-mobile-app-appointments. *See also*, Morrissey, at n. 49; Arelis R. Hernandez, *Desperate migrants seeking asylum face a new hurdle: Technology*, Wash. Post (Mar. 11, 2023), https://www.washingtonpost.com/nation/2023/03/11/asylum-seekers-mexico-border-app/ .

[51] *See* Hernández, *supra* n.50, ("Do they know where we are?" [quoting asylum seeking mother], bursting into sobs. "The most dangerous place on the continent. Kids can't play outside because of gunshots. Taxi drivers help kidnap people. We had to sleep on the streets for days before finding a shelter."").

the most vulnerable and contravening the free and open access that individuals are entitled to under domestic and international law.[52]

This Rule would dramatically expand the harms of CBP One by making it the primary gatekeeper for most asylum seekers seeking asylum at the U.S.-Mexico border. Individuals who cannot use this app are subjected to the punitive presumptive bar and they are required to demonstrate exceptionally compelling circumstances to be excused from having to have used the app. As such, under this Rule CBP One would act as a digital waitlist akin to metering, a harmful policy begun under the Obama era and expanded under Trump.[53]

Once again, the Rule seeks to rely on programs have already been legally invalidated: Asylum seekers have successfully challenged turnbacks and metering, practices wherein DHS previously waitlisted individuals, citing processing challenges at ports of entry.[54] On November 1, 2021, CBP released a memorandum ending the "metering" policy, and provided updated guidelines on management and processing of noncitizens at southwest border ports of entry (POE).[55] The memorandum states that asylum seekers or people seeking humanitarian parole cannot be required to submit advance information in order to be processed at a POE, stating: "POEs must strive to process all travelers, regardless of documentation status, who are waiting to enter, as expeditiously as possible, based on available resources and capacity."[56]

However, the memorandum also addresses steps to "leverage technological and processing efficiencies to streamline POE processing," including the "innovative use of existing tools such as the CBPOne™ mobile application;" according to CBP, the application "enables noncitizens seeking to cross through land POEs to securely submit certain biographic and biometric information prior to arrival and thus streamline their processing upon arrival."[57]

Also in the Fall of 2021, CBP issued an information collection notice on the use of CBP One—one that this Rule purports to update but fails to attach, as previously mentioned. That information collection notice, together with the insertion of CBP One in the November 2021 memorandum, raised concerns that CBP One could exacerbate—rather than alleviate—"metering" at the border by creating new and separate backlogs. Since users of CBP One are far

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[52] *See* Letter from Rep. Jesús G. "Chuy" García, et. al. to U.S. Secretary of Homeland Security Alejandro Mayorkas, *supra* n.47; Letter from Sen. Ed Markey to U.S. Secretary of Homeland Security Alejandro Mayorkas, *supra* n.48.

[53] Brief of Haitian Bridge Alliance, Institute for Justice & Democracy in Haiti, Ira Kurzban, and Irwin Stotzky as Amici Curiae in Support of Plaintiffs' Motion for Summary Judgment, *Al Otro Lado, Inc. v. Wolf*, 336 F.R.D. 494 (S.D. Cal. 2020) (No.: 3:17-cv-02366-BAS-KSC), https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/challenging_custom_and_border_protections_unlawful_practice_of_turning_away_asylum_seekers_amicus_brief_hba.pdf.

[54] *Al Otro Lado, Inc. v. Wolf*, 952 F.3d 999 (9th Cir. 2020); *Al Otro Lado, Inc. v. Mayorkas*, 2022 WL 3135914 (S.D. Cal. Aug. 05, 2022).

[55] *See CBP Issues Memo on Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry*, American Immigration Lawyers Association, AILA Doc. No. 21110307 (Nov. 1, 2021), https://www.aila.org/infonet/cbp-issues-memo-on-processing-of-undocumented.

[56] *Id*.

[57] *Id*.

from guaranteed an appointment at a POE, the application effectively forces individuals to wait for processing for weeks at a time while trying to obtain an appointment. Because the app is currently available only within a certain proximity to the border, migrants are forced to wait in dangerous conditions at or near the border for however long it takes.[58]

Though the information collection notice described the use of CBP One as "voluntary," this Rule makes clear that DHS is viewing it as a prerequisite for asylum access. Those who cannot afford access to the application will be evaluated as second-class refugees who, subject to the discretion of an asylum officer and the unreviewable oversight of an immigration judge, will be permanently barred from access to asylum due to poverty, literacy, or other factors they do not control.[59]

NIJC represents Julia*,[60] an asylum-seeking mother whose daughter, daughter-in-law, and infant grandchild have waited in Mexico for a CBP One appointment for over two months. An appointment on CBP One is required for all three to enter the United States without facing expulsion under Title 42. While waiting in a Mexican border town with dominant cartel presence, they face daily risk of kidnapping, sexual assault, and other violence. Despite their clear vulnerability and diligent, daily attempts to seek an appointment every morning, the CBP One app has shown error messages or no available appointments.[61] NIJC has attempted to seek assistance for this family across the border to navigate the app, without success. Days before submitting this comment, NIJC learned that Julia's family finally secured an appointment. However, this appointment requires her and her family to travel more than seven hours to the POE where they obtained their appointment, bringing them further risk. Through CBP One, Julia's family effectively faced a form of waitlisting, exposing them to months of danger all because CBP refuses to reopen POEs for processing. There is scant difference between this and metering, especially should the Departments convert CBP One as the sole avenue for accessing asylum.

The INA is unambiguous in its requirement that asylum seekers be processed into the United States to seek safety, at ports of entry or between. The imposition of processing requirements on

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[58] For a description of the "geofencing capabilities" that restrict the app's geographic access, *see* Department of Homeland Security, *Privacy Impact Assessment: Collection of Information from Certain Undocumented Individuals on the Land Border* (Jan. 19, 2023), at n. 24, https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf.

[59] The Rule's statement that most migrants who enter the United States at the U.S.-Mexico border have functioning smart phones is contrary to NIJC's experience. 88 Fed. Reg. at 11720 ("CBP has observed that the overwhelming majority of noncitizens processed at ports of entry have smartphones."). While many do have such devices, they are often stolen, broken, or lacking in service by the time our clients arrive at the border. Nonetheless, relying on the fact that applicants may have functioning smart phones to erect a barrier to asylum is impractical and inconsistent with the United States' moral and legal obligations.

[60] Stars reference the use of a pseudonym to protect client confidentiality.

[61] Technological glitches are not exclusive to CBP One. In NIJC's experience, DHS technology has proven shaky in other circumstances as well, including the widely used Smartlink app that ICE relies on for checkins. A recent client faced so many glitches when attempting to upload required photographs that she was forced to attend more frequent ICE check-ins. Another drove nearly three hours to replace her Smartlink phone, which also failed to help her fulfil her check-in obligations.

asylum seekers *prior to arriving at the U.S. border*, even if not technically mandatory, raises questions regarding the equitable application of domestic asylum law and protections for those arriving at the border. The requirement that a person use the CBP One App also appears to violate the plain language of the statute, which requires that "any alien" be permitted to seek asylum regardless of their manner of entry.[62] Indeed, the passage of the Refugee Act marked a strong intent to introduce uniformity into the process for seeking asylum, while CBP One affords tiered access that favors people with wealth and access to resources.[63] The required use of CBP One is one among many conflicts between this Rule and U.S. and international asylum law.

3) This NPRM undermines numerous codified obligations to asylum seekers under domestic and international law.

The Departments' proposed Rule, if finalized, would violate numerous statutory and constitutional rights enshrined in U.S. asylum law as well as U.S. international treaty obligations. Specifically, this Rule, if finalized, would violate 8 U.S.C. § 1158(a)(1), 8 U.S.C. § 1158(a)(2)(A) & (b)(2)(A)(vi), 8 U.S.C. § 1225(a) & (b), and 8 U.S.C. § 1252. Separately, the Departments invoke 8 U.S.C. § 1158(b)(2)(C) and (d)(5)(B), which allow for the imposition of additional bars on asylum but only if they are "consistent with" the existing text. The provisions in the proposed rule are not in fact consistent with the other provisions of the INA discussed below, despite the Departments' attempts to claim otherwise.

a. The NPRM violates 8 U.S.C. § 1158(a)(1).

The presumption in the NPRM violates the congressional guarantee that noncitizens who arrive in the United States may seek asylum "whether or not" they arrived "at a designated port of arrival."[64] Contrary to that language, the NPRM renders almost everyone who enters between ports of entry—and almost everyone who uses a port of entry on the southern border but does not preschedule an appointment via CPB One—ineligible for asylum. The NPRM cannot be reconciled with this statutory text.

b. The NPRM violates 8 U.S.C. § 1158(a)(2)(A) & (b)(2)(A)(vi).

By incorporating a supposed need to seek asylum in a third country without respect to whether that country is safe, the NPRM violates the safe-third-country and firm-resettlement provisions of the INA.

In 8 U.S.C. § 1158(a)(2)(A), Congress crafted an exception to asylum eligibility for people who "may be removed, pursuant to a bilateral or multilateral agreement, to a country … in which the [person's] life or freedom would not be threatened on account of" a protected ground and "where the [person] would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection." Separately, in 8 U.S.C. § 1158(b)(2)(A)(vi), Congress crafted

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[62] 8 U.S.C. § 1158(a)(1).

[63] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (explaining that Congress sought to "establish a more uniform basis for the provision of assistance to refugees.").

[64] 8 U.S.C. § 1158(a)(1).

another exception to asylum eligibility for those who were "firmly resettled in another country prior to arriving in the United States." Mere transit through a country during a flight from persecution is not firm resettlement. Through these combined exceptions, Congress spoke clearly about how and when a relationship to a third country can be a permissible bar to asylum. Even if it were the case—it is not—that the Departments could create additional rules in this arena that would be "consistent" with the remainder of Section 1158, the provisions of the Rule fall short.

As to the safe third country provision, no "bilateral or multilateral agreement" allows the United States to remove people seeking asylum to any country to its south, as the Rule would. The NPRM expressly acknowledges the need for a treaty—but declines to adhere to that statutory requirement because it is inconvenient.[65] The NPRM also makes no guarantee of safety or access to a "full and fair" asylum system, and indeed seems to at least implicitly acknowledge that many of the countries where it would have a potential asylum seeker stay are not in fact safe.[66] For example, if a transgender person from Honduras transits through Guatemala and Mexico—countries in which trans people are at huge risk—and is unable to secure a metered CBP One appointment, that person will be rendered ineligible for asylum by virtue of not having applied for asylum in a country in which they would not be safe.

Though safety is just one of multiple requirements that would have to be satisfied to comply with either of these bars, the NPRM cannot even promise that much. Indeed it does not, and cannot reasonably claim that the Western Hemisphere countries it mentions provide sufficient safety to satisfy these legal obligations because those countries are both unsafe and lacking in functional asylum systems. For example, the record that existed in support of the Trump administration's transit ban, which was cited extensively by the Ninth Circuit, demonstrated the following about Mexico, the country mentioned in the proposed rule with the *most* robust asylum system:

- "During transit through Mexico, '68.3 percent of people from the [Northern Triangle] reported that they were victims of violence,' and that '31.4 percent of women and 17.2 percent of men had been sexually abused.'"[67]

- There are "'strong obstacles to accessing the asylum procedure' in Mexico," and "'[w]omen and girls in particular are at risk of sexual and gender-based violence" in Mexico.[68]

- Mexico faces, per UNHCR, "ongoing problems in the areas of (1) '[s]exual and gender-based violence against migrants, asylum-seekers, and refugees'; (2) '[d]etention of

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[65] 88 Fed. Reg. at 11731-32.

[66] *Id*. at 11720-21 ("The Departments recognize that not all the options below are viable for each migrant or asylum seeker, depending upon their individual circumstances. However, a location that may be unsafe for one person may not only be safe for, but offer a much needed refuge to, others. While some of the countries below are the origin for sizable numbers of asylum seekers in the region, they also demonstrably provide protection for others who do consider those countries to be safe options where they are free from persecution or torture.").

[67] *E. Bay*, 994 F.3d at 981 (citing Medecins Sans Frontières, *Forced to Flee Central America's Northern Triangle: A Neglected Crisis* (May 2017)).

[68] *Id*. (citing UNHCR April 2019 Factsheet).

migrants and asylum seekers, particularly children and other vulnerable persons'; and (3) '[a]ccess to economic, social and cultural rights for asylum-seekers and refugees.'"[69]

- "Many refugees face deadly dangers in Mexico. For many, the country is not at all safe" because "'refugees and migrants face acute risks of kidnapping, disappearance, sexual assault, trafficking, and other grave harms in Mexico[.]"[70]

- "[T]he Mexican government is routinely failing in its obligations under international law to protect those who are in need of international protection."[71]

- "'Trans women in particular encounter persistent abuse and harassment in Mexico at the hands of drug traffickers, rogue immigration agents and other migrants.'"[72]

There is nothing in the Rule that reflects any meaningful improvement of the aforementioned conditions in Mexico as they pertain to the safety of migrants in that country. To the contrary, as discussed below and in comments submitted by other organizations, the situation on the ground in Mexico has either stayed the same or gotten worse. Against this backdrop, the Rule cannot comply with the safety requirements for the safe-third country provision or for firm resettlement.

It makes no difference that the NPRM would not "make asylum eligibility hinge *exclusively* on the availability of protection in a third country,"[73] because any additional condition or limitation on asylum must be "consistent with" the provisions in the existing asylum statute.[74] The carefully crafted circumstances in § 1158 do not allow for requirements that asylum seekers seek "protection" in countries that are not safe, and do not have a full and fair asylum system. Yet that is exactly what the Rule would do. The Departments may not rely on the statute's permission to impose additional barriers to asylum and do so in a way that is inconsistent with the existing text of the statute.

Nor does it matter that the Departments call the proposal "a rebuttable presumption" against asylum eligibility rather than a "categorical bar."[75] The bar is not a presumption of any kind. A presumption is an inference drawn from a given set of facts; if it is rebuttable, that inference can be displaced via additional facts.[76] For instance, when a person shows facts amounting to past persecution, U.S. law presumes that the person also has a well-founded fear of future persecution—unless the government rebuts that presumption with new evidence. That is not

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[69] *Id.* (citing UNCHR 2018 review of Mexico's asylum process).

[70] *Id.* (citing Human Rights First, *Is Mexico Safe for Refugees and Asylum Seekers?* (Nov. 2018)).

[71] *Id.* (citing Amnesty International, *Overlooked, Under-Protected: Mexico's Deadly Refoulement of Central Americans Seeking Asylum* (2018)).

[72] *Id.* (citing *"They Were Abusing Us the Whole Way": A Tough Path for Gay and Trans Migrants*, N.Y. Times (July 11, 2018)).

[73] 88 Fed. Reg. at 11736 (emphasis added).

[74] 8 U.S.C. § 1158(b)(2)(C) & (d)(5)(B).

[75] 88 Fed. Reg. at 11736.

[76] *See* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/presumption; Black's Law Dictionary (11th ed. 2019); Webster's New World College Dictionary 1067 (3d ed. 1997).

what the NPRM does. Rather, the NPRM excludes people from asylum unless they can show that they are covered by the exception. It therefore operates identically to the asylum bar that applies, with narrow exceptions, if people fail to apply for asylum within one year after arriving in the United States. Given that Congress specifies the universe of situations in which transit may be used as a bar to asylum in the United States, the Departments are not free to expand that universe at their discretion. Further, in almost all cases, the NPRM's bar *is* categorical; it applies to people fleeing bona fide persecution in their home country who cannot find a safe haven in any transit country unless they happen to find themselves in absolutely imminent danger to life or limb immediately to the south of the U.S.-Mexico border.

c. The NPRM violates 8 U.S.C. § 1225(a).

Under 8 U.S.C. § 1225(a)(1), a noncitizen "present in the United States who has not been admitted or who arrives in the United States (whether or not at a port of entry…) shall be deemed…an applicant for admission." Under 8 U.S.C. § 1225(a)(3), meanwhile, all "applicants for admission…shall be inspected by immigration officers." This inspection process includes the credible fear process in 8 U.S.C. § 1225(b).

The INA thus makes clear that DHS *must* provide the opportunity to show a credible fear of persecution to *every* noncitizen who arrives at a port of entry—not just those with the resources to have a smartphone and the good fortune to obtain one of the severely limited number of appointments available by CBP One. The NPRM's proposal to withhold that opportunity is therefore contrary to law.

d. The NPRM violates 8 U.S.C. § 1225(b).

The NPRM also violates 8 U.S.C. § 1225(b). Under § 1225(b)(1)(B)(ii), any person who shows a credible fear of persecution in their country of origin must be allowed to proceed with an asylum application. Under § 1225(b)(1)(B)(v), meanwhile, the phrase "credible fear of persecution" means "a significant possibility … that the [person] could establish eligibility for asylum under section 1158."

The NPRM contravenes this clear language. The NPRM seeks to impose a screening standard that is different, and higher, than the "significant possibility" standard codified in the statute. In fact, it does so in two ways: by assessing the application of the bar under a preponderance of the evidence standard; and, for those to whom the bar would apply, assessing eligibility for statutory withholding and CAT relief under a "reasonable possibility" standard. Doing so is contrary to the plain text of § 1225(b)(1)(b).

So, too, is the NPRM's proposal to consider its bar at the credible fear stage. Until the issuance of the Trump era transit ban, bars to asylum have never been assessed in the credible fear process, and regulations foreclosed doing so.[77] There is good reason for this rule: many of the

[77] *See* 8 C.F.R. 208.30(e)(4) (2018) (explaining that cases involving "novel or unique issues" should be referred to an IJ for resolution rather than having those issues resolved in a CFI); *id*. § 208.30(e)(5) (2018) (explaining that if a noncitizen in a CFI appears to be subject to "one or more of the mandatory bars to applying for, or being granted,

bars to asylum are fact-intensive while others require answering complex legal questions, such as like whether or not an individual has been convicted of an aggravated felony. Similar complexities will arise with the adjudication of limited exceptions to this rebuttable presumption: ascertaining whether a person was in fact in imminent danger or facing an acute medical emergency will require significant record development. Proving the denial of protection in a transit country or the inability to use the CBP One app for a covered reason may be entirely impossible to demonstrate in the context of a credible fear interview.

The NPRM also impermissibly imports a factor relevant to the Departments' ultimate decision whether to grant asylum to an eligible person as a matter of discretion into the initial determination whether a person is eligible. Here too, this approach violates the plain language of the statute. Congress used the "significant possibility" standard because it wanted to impose a low screening threshold and it wanted to avoid the risk that people would be erroneously screened out of their chance to seek asylum.[78] By inserting an element of unreviewed discretion into the screening process, the Rule turns this reasoning on its head.

e. The NPRM is incompatible with International Treaty obligations.

In assessing the proposed rules purported "consistency" with the overall asylum statute, it is important to consider the role of international treaty obligations in the formation of Section 1158 of the INA. Congress carefully crafted the Refugee Act of 1980 to bring the domestic laws of the United States into conformity with its treaty obligations under the United Nations Protocol Relating to the Status of Refugees.[79] The intent of conformity is evident by the fact that the bars to asylum codified in Section 208 of the INA hew closely to existing provisions of the Refugee Convention.

For example, subsections 1158(b)(2)(A)(ii), (iv), and (v) of Title 8 of the U.S. Code respectively instruct that asylum cannot be granted to individuals convicted of particularly serious crimes, who are a danger to the United States, or who have ties to terrorism. These provisions link back to the Refugee Convention.[80]

Similarly, subsections 1158(b)(2)(A)(i) and (iii) apply to people who have persecuted others on the basis of membership in a protected group and those who committed serious nonpolitical crimes. Here too, the bars link directly back to the Refugee Convention, Art. 1(F) (Protection

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asylum" in Section 1158 of the INA, DHS "shall nonetheless" issue an NTA and have the applicant referred to proceedings for resolution of the bar).

[78] *See* House Judiciary Committee Report explaining, "[u]nder [the credible fear screening] system, there should be no danger that [a noncitizen] with a genuine asylum claim will be returned to persecution." H.R. Rep. No. 104-469, pt. 1, at 158 (1996).

[79] *INS v. Stevic*, 467 U.S. 407, 421, 427 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987).

[80] Convention Relating to the Status of Refugees art. 32(2), July 28, 1951 [hereinafter Refugee Convention] ("The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.").

under the Convention does not apply to a person who "has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes" or to a person who "committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee").

Though the one-year filing deadline at 1158(a)(2)(B) is not as closely linked to the provisions of the Refugee Convention, Art. 31(1) is instructive. It provides: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, *provided they present themselves without delay* to the authorities and show good cause for their illegal entry or presence."[81]

Overall, while Congress gave the Attorney General authority to impose additional restrictions to access to asylum in 8 U.S.C. § 1158(b)(2)(C) and (d)(5)(B), those restrictions need to be consistent with the legislation as written, and with the intention of Congress to craft legislation that conforms to international treaty obligations. The provisions of this Rule are inconsistent with both.

More broadly, the United States is a party to the 1967 Refugee Protocol and all "substantive provisions" of the 1951 Refugee Convention.[82] Courts have recognized the central role of the United Nations Refugee Agency (UNHCR) in providing continuous guidance and interpretation of these international obligations, which Congress incorporated via the Refugee Act of 1980.[83] As such, it is particularly concerning that UNHCR has repeatedly raised alarm that current and prior attempts to impose such bans run afoul of international obligations.[84]

During the Trump administration, UNHCR outlined its position on the entry ban, highlighting its clear conflict with the United States' legal obligation under international law to provide "a fair and efficient process" for all asylum seekers, citing specific violation of Article 31(1) of the Refugee Convention which prohibits imposing penalties on irregular entry and pushbacks or refoulement of people to harm.[85] With this NPRM, UNHCR found itself repeating these same concerns, only now also calling out the tiered and disparate treatment of individuals who are able to secure a CBP One appointment vs. those who cannot.[86] Additionally, UNHCR stressed that,

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[81] Refugee Convention, art. 31(1) (emphasis added).

[82] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

[83] *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 672 n.13 (9th Cir. 2021) (citing *Cardoza-Fonseca*, 480 U.S. at 439 n.22) (UNHCR analysis "provides significant guidance in construing the [1967] Protocol, to which Congress sought to conform[,]" and are "useful in giving content to the obligations that the Protocol establishes").

[84] *See* Brief for UNHCR as Amicus Curiae, *E. Bay Sanctuary Covenant v. Barr*, 9th Cir Nos. 19-16487 & 19-16773, at 21-22, https://www.refworld.org/docid/5dcc03354.html; Brief for UNHCR as Amicus Curiae, *E. Bay Sanctuary Covenant v. Barr*, N.D. Cal. No. 3:19-CV-04073, https://www.refworld.org/docid/5dcc03354.html.

[85] *Id.* at 12.

[86] UNHCR comment on the NPRM, at 14 ("Disparate treatment of two groups of refugees—those who arrive at ports of entry and those who enter irregularly or who arrive at a port of entry without having secured an appointment—is exactly this type of detriment, as is denying the latter group access to rights enumerated in the 1951 Convention.").

under these international instruments, the travel route of asylum seekers does not suspend the United States' non-refoulement obligations.[87] It remains the United States' obligation and primary responsibility not to deny protection and penalize asylum seekers.

f. The NPRM violates the uniform scheme Congress crafted in the Refugee Act.

Congress sought to "establish a more uniform basis for the provision of assistance to refugees."[88] Instead, the Departments put forth one asylum system for the U.S.-Mexico land border, and another for the rest of land, air, and maritime POEs. There is no justification for suspending uniform asylum processing in contravention of Congress' plain word and intent.

This problem is particularly acute given the Rule's stark failure to consider its impact on migrants from outside of the western hemisphere. For example, the Rule emphasizes the ability to receive protection in countries like Costa Rica, Colombia, and Ecuador without acknowledging that the programs that exist in those countries tend to be for nationals of a specific, neighboring country. The vast majority of migrants who will be able to seek and obtain protection in Costa Rica, for example, are from neighboring Nicaragua. Colombia and Ecuador's programs are likewise generally targeted at Venezuelan migrants. In other words, the obligation to seek protection in a third country will be cold comfort for refugees from countries that cannot receive benefits in the relevant host country. And in places like Mexico, Black migrants in particular will be forced to apply for protection in a country with profound anti-Black racism.[89]

We discuss further in Section (4) how Black, Indigenous, and LGBTQ asylum seekers are more likely to be disqualified for asylum access because they rarely have opportunities to seek asylum in a third country en route to the United States. The Departments would further punish these individuals by restricting their access to asylum and heightening the burden they face, rather than offer them protection. The NPRM fails even to consider these radical disparities in treatment, much less make any attempt to justify them.

4) This Rule fails to provide a "meaningful and realistic opportunity to seek protection" for countless asylum seekers.

The Departments solicit comments on whether the changes in the Rule successfully provide a meaningful and realistic opportunity to seek protection. There is little doubt that they fail to do so. In particular, this Rule fails because (a) it is framed as a complement to parole programs, though the latter have little bearing on asylum access at the southern border or the Departments' stated goal to reduce border apprehensions; (b) it misguidedly requires asylum seekers to reach a final decision en route to the United States regarding their future plans, disregarding the fact that

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[87] *Id.*

[88] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

[89] *See* S. Priya Morley et al., *There is a Target on Us: The Impact of Mexico's Anti-Black Racism on African Migrants at Mexico's Southern Border* (2021) https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf; Zefitret Abera Molla, *The Experiences of Black African and Haitian Migrants Forced to Remain in Mexico Due to Restrictive U.S. And Mexican Immigration Policies*, 83 (Oxford Monitor of Forced Migration, Vol. 11 No. 1 2023) https://www.sogica.org/wp-content/uploads/2023/02/OxMo-Volume-11.1.pdf.

many asylum seekers are in no position to do so; (c) it disparately harms Black, Indigenous, and LGBTQ asylum seekers who face some of the most egregious harms in the countries that the rule identifies as alternatives; (d) this Rule worsens a systemically flawed expedited removal screening system by heightening the standard and imposing numerous additional fact-intensive queries into the interview; (e) it affords scant protection to those barred from asylum but able to proceed with withholding or CAT; (f) it falls short of protecting families and children; (g) it fails to justify such drastic departure from established asylum processing; (h) it further restricts asylum, rather than require increased processing capacity at POEs which would impact meaningful access to protection; and (i) it would impact asylum processing for years to come.

a. Parole programs are not a substitute for asylum access.

The Departments drafted this Rule with a stated goal to decrease the number of people apprehended at the U.S. southern border, as well as a goal to decrease the number of asylum grants altogether.[90] The Departments purport to "encourage" asylum seekers to use "lawful pathways"[91]—a confounding and expansive term they use throughout this NPRM to simultaneously refer to at least three distinct things: the Rule's imposition of CBP One on asylum seekers to gain access to POEs, the Rule's misguided presumption that asylum seekers can seek protection in transit countries, and narrow nationality-based parole programs that predate this Rule.[92] Two of these three supposed pathways have no nexus with U.S. asylum access, as parole programs are not contingent on the need to seek protection in the United States and the ability to seek protection en route to the United States has little bearing on affording safe and orderly access to asylum at the U.S. border.

Notably absent from the Departments' commentary is the fact that seeking asylum at the U.S. border—irrespective of access to any app, prescheduled appointment, secured visa or passport, prior failed attempts in transit nations, or existing parole programs—*is* a lawful pathway recognized under U.S. and international law. Nevertheless, the Departments claim that this Rule, in conjunction with prior parole programs, is both a lawful pathway that can ensure access for asylum seekers and a panacea to deter migrants from attempting to cross into the United States without permission, a necessity that it claims must be addressed in conjunction with the anticipated end to Title 42. As discussed below, parole programs are neither a proper replacement for asylum access by design or in their application. Further, the Rule's reliance on the self-declared "success" of the parole programs as a justification for the restrictive measures set forth in the Rule is misguided and rests on questionable conclusions related to southwest border apprehension data.

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[90] 88 Fed. Reg. at 11715, 11741, 11748.

[91] 88 Fed. Reg. at 11704.

[92] See 88 Fed. Reg. at 11706 (referencing parole programs as successful lawful pathways); *id*. at 11706 n.15 ("The term ''lawful pathways,'' as used in this preamble, refers to the range of pathways and processes by which migrants are able to enter the United States or other countries in a lawful, safe, and orderly manner and seek asylum and other forms of protection."); *id.* at 11707 (including refugee processing and seasonal employment visas as lawful pathways).

1. Parole programs erect barriers for many asylum seekers.

In addition to the vast expansion of Title 42 expulsions built into parole programs, there are many limitations inherent to the cited parole programs that, individually and in the aggregate, fail to supplant asylum access at the border. Limitations include:

- Nationality-based (dis)qualification: Currently, only Cubans, Haitians, Nicaraguans, Ukrainians, and Venezuelans have access to parole programs, and they must apply within Latin America and the Caribbean.[93] This requirement stands in stark contrast with the uniformity of U.S. asylum law, which does not discriminate or seek to disparately restrict or facilitate asylum from some nations over others.

- Passport requirements: These parole programs require access to a passport, which inherently exclude asylum seekers who are fearful of contacting their government (who may be complicit in their persecution),[94] as well as those who cannot afford the cost of seeking a valid passport. For others, processing time alone can be barrier as parole programs strain passport production,[95] since many asylum seekers make the decision to flee based on an unexpected risk of imminent harm. This requirement can also erect an insurmountable barrier for children fleeing family-and gender-based violence.

- Requiring air travel: The parole programs touted by the Rule require individuals and families to afford air travel and enter the United States via commercial flight. But air travel is generally unavailable to asylum seekers who do not have prior authorization or visa to travel to the United States due to carrier sanctions, which deputize private airline companies in screening out asylum seekers based on visa and documentary requirements.[96] Additionally, these programs assume asylum seekers can afford the high

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[93] Afghans also have access to a parole program through Operation Allies Welcome. However, the Ukrainian, Venezuelan, Cuban, Haitian, and Nicaraguan parole programs uniformly share the characteristics bulleted in this section.

[94] Current regulations require refugees and asylees to obtain a travel document, rather than turn to their governments to issue them passports. See 8 CFR § 223.2(b)(2)(1). The UN refugee agency also advises that refugees who obtain a passport from their persecuting nation may be considered to avail themselves of protection from such country, potentially leading to loss of refugee status. *See* Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, at ¶ 121 https://www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.

[95] Jacqueline Charles, *New U.S. parole program for Haitians leads to long passport lines, cops fleeing the country*, Miami Herald (Feb. 13, 2023), https://www.miamiherald.com/news/nation-world/world/americas/haiti/article272389513.html ("Videos shared on social media show Haitians pushing and shoving their way in crowded lines, women scaling the top of bleachers in gymnasiums and Haitians holding late-night vigils outside the main immigration office in Port-au-Prince despite an uptick in ransom kidnappings. In Cap-Haïtien, where a near riot broke out last month, a Miami Herald reporter observed crowds spilling out into the road in front of one of the two passport offices in the city, making it impossible for even motorcycles to pass. . . . The requests for passports. . . [in Haiti] has gone from an average of 1,500 a day to about 5,000. He noted that while the requests have tripled, forcing [Haitian authorities] to expand the number of facilities to 15 nationwide to accommodate the growing demand, the prices have not changed, with the passports costing around $100.").

[96] Azadeh Erfani and Maria Garcia, *Pushing Back Protection: How Offshoring and Externalization Imperil the Right to Asylum*, National Immigrant Justice Center, at 16 (July 2021),

cost of air travel. Those who cannot afford such costs often opt to travel on foot, working precarious jobs along the road to make it to the U.S.-Mexico border.

- Financial sponsor requirement: Parole programs created under the Biden administration have uniformly required individuals or families to have connections with sponsors in the United States who can vouch for their financial stability for the duration of their parole; this disadvantages indigent asylum seekers or those who lack access to a network or support within the United States in order to avail themselves of these parole programs. It also wrongly assumes, as with the other requirements, that asylum seekers have time to sort out these details before taking the urgent decision to flee to the United States.

- Processing Time: Last but not least, parole programs require time, something that, as mentioned above, many asylum seekers cannot afford due to the harms they face. This is a significant factor for many asylum seekers who need to leave the dangers they face, potentially triggering ineligibility as they cross into Panama or Mexico without authorization, because they cannot afford to wait.

In addition to these systemic limitations, the implementation of parole programs have not shown that they are in fact serving asylum seekers who would otherwise need to approach the U.S.-Mexico border. According to the government of Mexico, as of January 5, 2023, only 11,460 Venezuelans were able to enter the United States via the Venezuelan parole program since October 2022.[97] Comparatively, nearly 34,000 Venezuelans were processed or expelled at the border in September 2022 alone, before the implementation of this program.[98] Since January 2023, Venezuelans have been required to share 30,000 parole grants with Cuba, Haiti, and Nicaragua, further lowering the odds that parole programs can be a proper substitute for asylum access at the border. And more importantly, the overall parole numbers for a period—less than three months for Cubans, Haitians, and Nicaraguans, and nearly six months for Venezuelans—

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https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2021-11/Offshoring%20Asylum%20Report_Chapter1.pdf ("Legislation turning private carrier companies, such as airlines and other vessels, into de facto immigration enforcement agents was widely adopted in the second half of the twentieth century. Under carrier sanction legislation in countries in […] the United States, private carriers are incentivized to block asylum seekers from boarding vessels such as planes through significant financial penalties. Penalties include bearing the cost of deporting individuals, covering related expenses including accommodation or detention, and additional fines. As a result, private carrier companies bar asylum seekers, who frequently lack required travel documents, from safely reaching their country of destination and seeking refuge. This privatization of migration control yields another benefit for states eager to circumvent the principle of non-refoulement; because carriers are private companies and non-state actors, it is difficult to prove that their actions fall under the jurisdiction of the state, even if they are acting on behalf of said state.") (citations omitted).

[97] Gov. of Mexico, *México recibe con agrado el anuncio de nuevas acciones por parte de EE.UU. para lograr una migración ordenada, segura, regular y humana* (Jan. 5, 2023), https://www.gob.mx/sre/prensa/mexico-recibe-con-agrado-el-anuncio-de-nuevas-acciones-por-parte-de-ee-uu-para-lograr-una-migracion-ordenada-segura-regular-y-humana?idiom=es ("Hasta hoy, el nuevo programa ha permitido el acceso ordenado, seguro y regular a Estados Unidos de 11,460 personas venezolanas y alrededor de 16,000 cuentan ya con autorización para ingresar a dicho país.").

[98] CBP, *Nationwide Encounters* (last accessed Mar. 25, 2023), https://www.cbp.gov/newsroom/stats/nationwide-encounters. *See also* attached, CBP southwest land border encounters for people from Venezuela.

have been: 22,000 Venezuelans; 7,800 Cubans; 5,100 Haitians; and 1,600 Nicaraguans.[99] These numbers fall far short of the 30,000 monthly parole grant goal set by DHS (which would translate to 90,000 people receiving parole in this three-month time period). This data shows that parole program entries and border processing are not a zero-sum game: those who have the time and means to use these parole programs are not one and the same with the people who flee and approach the U.S. land border—only to face summary expulsions or (if this Rule becomes final), an asylum ban and removal with a five-year bar.

2. The Departments misleadingly associate parole programs with a drop in border apprehensions.

A closer look at the government's own southwest border data illustrates that it is misleading to claim that the decrease in border numbers the Departments reference is statistically correlated to the parole programs.[100] First, and perhaps most importantly, the government is looking at a set of data that spans only a few months; migration trends that vary in the days or weeks after major shifts in border policy are notoriously unreliable as they don't represent long term trends that will settle over time.[101] Further, the Departments present a statistical correlation between their newly launched parole programs and border data that is overly simplified and fails to account for nuance and externalities. The Departments, for example, base their self-declared success of parole programs for Cuba, Haiti, Nicaragua, and Venezuela on a drop in apprehensions between port of entry in January 2023, despite the fact that this drop included nationalities *not included* in the parole programs or targeted by the expanded use of Title 42.[102] Of greater concern, the

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[99] Camilo Montoya-Galvez, *Stricter U.S. migration controls keep illegal border crossings at 2-year low — for now*, CBS News (Mar. 14, 2023), https://www.cbsnews.com/news/immigration-border-crossings-us-mexico-february-2-year-low/.

[100] *See* Jesse Franzblau, *Restricting asylum is not a humane or logical solution: The flimsy reasoning behind the asylum ban*, National Immigrant Justice Center (Mar. 15, 2023), https://immigrantjustice.org/staff/blog/restricting-asylum-not-humane-or-logical-solution-flimsy-reasoning-behind-asylum-ban.

[101] The NPRM cites numbers of encounters of people from Venezuela along the U.S. southwest border for a one-week period in October 2022, a one-week period in November 2022, and a one-week period in January 2023. The Rule also cites the number of encounters for people from Cuba, Nicaragua and Venezuela for the period from January 5 to January 21, 2023. 88 Fed. Reg. at 11706. The conclusions drawn from the selected dates should not be considered a reliable source for asserting larger migration trends. Studies of comparable deterrence-oriented measures over the years have countered similar government assertions and shown that punitive asylum-restricting measures do not actually drive down migration numbers. A 2018 study, for example, found that, counter to the government's claims, there was no statistically significant relationship between either the 2014 expansion of family detention or the 2017 Zero-Tolerance pilot and the "monthly number of U.S. Border Patrol apprehensions." *See*, Jesse Franzblau, *Five Ways That Immigration Prosecutions Are Ineffective And Deadly*, National Immigrant Justice Center (July 19, 2022), https://immigrantjustice.org/staff/blog/five-ways-immigration-prosecutions-are-ineffective-and-deadly.

[102] The NPRM says that encounters of Cubans, Haitians, and Nicaraguans between ports of entry at the southwest border declined from 928 on January 5 (the day of the announcement for parole programs for those countries) to just 92 on January 22—a decline of 92 percent. The Rule also claims that encounters of other noncitizens increased by 40 percent during the same time period. 88 Fed. Reg. at 11706 n. 13. However, an examination of the public data shows that encounters between ports of entry also fell for other populations not including people from Cuba, Haiti and Nicaragua, during the month of January 2023, from December 2022 to the end of January 2023. For example, encounters of people from Peru, Colombia and Ecuador fell by over 20,000 from December 2022 to January 2023.

Departments' narrative conflates the impact of new pathway and parole programs on migration trends with the impact of pushback and deterrence policies such as the expansion of Title 42.

In sum, the Departments should not frame asylum access at the U.S.-Mexico border as "circumventing" lawful pathways such as existing parole programs, which tend to exclude more than protect far too many—not only through the expanded use of Title 42, but through their nationality, air travel, passport, or time restrictions. While it is laudable to create new pathways, these are no substitute to providing asylum access at the U.S. border as required under domestic and international law.

b. The Departments wrongly presume that asylum seekers can seek safety in any transit country south of the United States.

The Departments also premise this Rule on the arbitrary assumption that most people seeking asylum may do so safely in countries through which they would transit en route to the United States. The truncated nature of the comment period prevents us from addressing this error in full, and it also prevents us from providing a full set of sources relevant to the issue. As a result, we cannot address any country in full; we address only a few countries in part.

As prefaced in Section (3)(b) *supra*, at the time of the last transit ban, *Mexico* was not a safe country for the vast majority of people seeking asylum, and its asylum system did not offer access to a full and fair procedure. Both of those conclusions remain true today: people seeking asylum are routinely subject to severe violence in Mexico.[103] Secretary Mayorkas expressly recognized as much in terminating the illegal "Remain in Mexico" program (i.e., the Migrant Protection Protocols).[104] Women, LGBTIA+ people, and Black people are at especially high risks of violence.[105] Further, the Mexican asylum system is rife with corruption and abuse—including official pressure for people to drop asylum claims—and Mexico, unlike the United States, does not have the capacity to accept an increased number of asylum applications.[106]

See attached, USBP apprehension numbers of all other populations not including people from Cuba, Haiti and Nicaragua; and USBP apprehension numbers of people from Colombia, Peru and Ecuador.

[103] *See, e.g.*, Human Rights First, *Human Rights Stain, Public Health Farce* (Dec. 2022), https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf; Washington Office on Latin America, *Struggling to Survive: the Situation of Asylum Seekers in Tapachula, Mexico* (June 2022), https://www.wola.org/wp-content/uploads/2022/06/FINAL-Struggling-to-Survive-Asylum-Seekers-in-Tapachula.pdf.

[104] DHS, *Explanation of the Decision to Terminate the Migrant Protection Protocols* (Oct. 29, 2021), https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf.

[105] *See, e.g.*, Black Alliance for Just Immigration, at n. 89; Human Rights Watch, *US: LGBT Asylum Seekers in Danger at the Border* (May 31, 2022), https://www.hrw.org/news/2022/05/31/us-lgbt-asylum-seekers-danger-border; Women's Refugee Comission & IMUMI, *Stuck in Uncertainty & Exposed to Violence: The Impact of US and Mexican Migration Policies on Women Seeking Protection in 2021* (Feb. 2022), https://www.womensrefugeecommission.org/wp-content/uploads/2022/02/Stuck-in-Uncertainty-2.pdf; Molla, *supra* at n. 89, 83-89.

[106] *See, e.g.*, Human Rights Watch, *Mexico: Asylum Seekers Face Abuses at Southern Border* (June 6, 2022), https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border; Nat'l Immigration Forum, *Mexico's Asylum System: Good in Theory, Insufficient in Practice* (Mar. 15, 2023),

Guatemala is driven by gang violence, and large portions of the country are controlled by gangs that prevent free movement and exact violent retribution against entire families rather than by the state.[107] The success of gangs in capturing the police and other state institutions gives them "extraordinary power and influence," and the police and courts systematically fail to protect people from gang violence as a result of both weakness and corruption.[108] Guatemala has extremely high rates of violence against women, including one of the world's highest rates of femicide.[109] Indigenous and LGBTQIA+ people and children also face a heightened, extreme risk of violence in Guatemala.[110] And Guatemala suffers from extreme poverty, food insecurity, and housing deficits.[111]

The asylum system in Guatemala, meanwhile, is charitably described as skeletal.[112] In 2019, the U.N. High Commissioner for Refugees for Central America found that Guatemala's national government had very few migration employees, of whom only three were assigned to conduct asylum interviews—meaning that the country could process only about 200 asylum claims per year.[113] Indeed, for the fifteen year period from 2002-2017, Guatemala processed only 868 total claims for asylum[114]—and in 2019, it had a backlog of 632 unadjudicated cases even though only 494 new cases were filed that year.[115] Numerous deep structural issues must be addressed

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https://immigrationforum.org/article/mexicos-asylum-system-good-in-theory-insufficient-in-practice/; Amnesty International, *Overlooked, Under-protected: Mexico's Deadly* Refoulement *of Central Americans Seeking Asylum* (2018), https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf; WOLA, *Key Issues on Access to Asylum in Mexico, Protections for Migrant Children, and U.S. Cooperation* (Mar. 2021), https://www.wola.org/analysis/key-points-migration-march-2021/; El Colegio de la Frontera Norte, *The Mexican Asylum System: Between Protecting and Control* (2021), https://fronteranorte.colef.mx/index.php/fronteranorte/article/view/2103/1683.

[107] Expert Declaration of Dr. Eric Hershberg, *U.T. v. Barr*, D.D.C. No. 1:20-cv-116, Dkt. 38-8, ¶¶ 9-20, 23-30 (Feb. 28, 2020) ("Hershberg Dec."); Declaration of Elizabeth Ann Oglesby, *U.T. v. Barr*, D.D.C. No. 1:20-cv-116, Dkt. 38-10, ¶¶ 7, 12-16 (Feb. 28, 2020) ("Oglesby Dec."); Declaration of Claudia Paz y Paz Bailey, *U.T. v. Barr*, D.D.C. No. 1:20-cv-116, Dkt. 38-7, ¶¶ 19-20 (Feb. 28, 2020) ("Paz y Paz Bailey Dec."); Declaration of Dr. Ursula Roldan Andrade, *U.T. v. Barr*, D.D.C. No. 1:20-cv-116, Dkt. 38-9, ¶¶ 10, 15 (Feb. 28, 2020) ("Roldan Andrade Dec.").

[108] Hershberg Dec. ¶¶ 33-40; Oglesby Dec. ¶¶ 25-37; Roldan Andrade Dec. ¶ 6.

[109] InfoSegura, *Guatemala: Violence Against Women Throughout the Life Cycle*, (2021), https://infosegura.org/wp-content/uploads/2022/08/VCM-GUATEMALA2021-ENG.pdf; Oglesby Dec. ¶¶ 39-43; Roldan Andrade Dec ¶¶ 12.

[110] Oglesby Dec. ¶¶ 38, 44-50; Roldan Andrade Dec. ¶¶ 13-14, 16; USCIS, *Guatemala: Treatment of Non-Guatemalan LGBTQ Migrants* (Nov. 30, 2019). [USCIS-Guidance21-27]

[111] Hershberg Dec., ¶¶ 41-43; Oglesby Dec. ¶¶ 8-11; Roldan Andrade Dec. ¶ 8.

[112] *See, e.g.*, U.S. Embassy in Guatemala, *Assessment of the Guatemalan Asylum System* (June 12, 2019). [DHSFF1227-34].

[113] Hershberg Dec., ¶¶ 44-45; U.S. Embassy in Guatemala, *supra* n. 113; Email from G. Bassu, *RE: URGENT PRM request for information* (Sept. 30, 2019) ("Bassu email"). [DHSFF1253-54].

[114] Paz y Paz Bailey Dec. ¶ 7.

[115] *Id.* ¶ 12.

before Guatemala can be in a position to offer protection to people from other countries.[116] Among other things, Guatemala must become able to "provide employment, education[,] and basic services to [its own] population" before it can do so for any significant "population of refugees and asylum seekers."[117]

Conditions in *Honduras* and *El Salvador* are no better than conditions in Guatemala. Gangs commit violent acts, and control territory and institutions, with impunity in both countries.[118] As in Guatemala, women, LGBTQIA+ people, and children are at particular risk of severe violence.[119] Corruption and the weakness of state institutions mean that those who commit violence are never held responsible.[120] And a person who flees persecution in El Salvador, Honduras, or Guatemala will not be able to escape from their persecutors in another of those countries—or, for that matter, in Mexico.[121]

The asylum systems in Honduras and El Salvador are, like the system in Guatemala, "unprepared to receive an increase in asylum seekers."[122] Honduras received only 27 total asylum applications in the period from 2002 to 2013 and had only three officers assigned to adjudicate asylum cases in 2019; El Salvador, meanwhile, received only 65 applications in 2017 and had no staff assigned to review asylum applications in 2019.[123] And as in Guatemala, anyone seeking asylum in Honduras and El Salvador would live in constant danger and deep economic insecurity.[124]

The remaining countries mentioned in the NPRM also cannot provide a safe haven for any significant number of people seeking asylum.[125]

c. Rather than offer a meaningful and realistic opportunity, this Rule would disproportionately harm the most marginalized people seeking asylum.

As discussed in Section (2), this Rule does not equally protect all asylum seekers. Specifically,

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[116] *See* Oglesby Dec. ¶¶ 51-104; Paz y Paz Bailey Dec. ¶¶ 6-18, 21-29; Roldan Andrade Dec. ¶¶ 7, 9, 11, 20, 22-35; Declaration of Lisa Frydman, *U.T. v. Barr*, 1:20-cv-116, Dkt. 38-11, ¶¶ 22- (Feb. 28, 2020) ("Frydman Dec."); Human Rights Watch, *Deportation with a Layover*: *Failure of Protection Under the US-Guatemala Asylum Cooperative Agreement* (May 19, 2020), https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative; U.S. Embassy in Guatemala, *supra* n. 113.

[117] Roldan Andrade Dec. ¶ 21.

[118] Hershberg Dec., ¶¶ 21-22.

[119] Frydman Dec. ¶¶ 10-13, 19.

[120] *Id.* ¶¶ 13-16.

[121] *Id.* ¶¶ 17-18, 20; USCIS, *Guatemala: Treatment of Non-Guatemalan Migrants* (Nov. 30, 2019). [USCIS-Guidance 11-20]

[122] Frydman Dec. ¶ 37.

[123] *Id.* ¶ 38; Bassu email.

[124] Frydman Dec. ¶¶ 39-41.

[125] As discussed in Section (1)(b), we lack the time sufficient to comment on each country due to the truncated comment period.

the Departments propose a system that would disparately harm asylum seekers already unable to seek protection en route to the United States due to their LGBTQ status, race, or indigeneity.

1. Disparate impact on LGBTQ and Black asylum seekers

NIJC has represented many asylum seekers who have traveled across multiple countries—all signatories of the 1951 Convention and/or 1967 Protocol—but who could not obtain protection in transit.

For example, Bilal* is a bisexual man from West Africa who traveled through Ecuador, Colombia, Panama, Costa Rica, Nicaragua, Honduras, Guatemala, and Mexico on his way to the United States. He shared that he felt extremely fearful during his journey because he had heard about migrants being killed. For this reason, he stayed as hidden as possible during his travels. He expressed a particular fear of anti-Black racism in Mexico.

Another client, Cesar*, left his southern African nation and traveled through Brazil, Bolivia, Peru, Ecuador, Colombia, Panama, Costa Rica, Nicaragua, Honduras, and Guatemala. He was afraid to stay or seek protection in any of these countries because of anti-Black racism and his sexual orientation. Just after arriving in Brazil, he heard about a Congolese man who was murdered, and shortly thereafter he was held at gunpoint by police.

NIJC has also represented many asylum seekers from Central and South America who have fled their home countries due to persecution on the basis of their sexual orientation. For example, Manuel* is a gay man from Ecuador who traveled through Nicaragua, Guatemala, Costa Rica, Panama, Honduras and Mexico on his way to the United States. He did not seek protection in any other country because he had been targeted by a Mexican cartel in Ecuador on account of his sexual orientation and family membership. He knew the cartel that targeted him was based in Mexico and had members throughout Central/South America.

Bilal, Cesar and Manuel all won asylum under the existing system. But this Rule would severely truncate their chances, penalizing them when they did not have equal access to asylum protection en route to the United States on the basis of their race or LGBTQ status.

Black asylum seekers frequently face systemic discrimination throughout much of Latin America, with authorities casting doubt on their bona fide claims. This includes Mexico, where the head of the Mexican Commission for Refugee Assistance recently opined without explanation that the majority of Haitians, Angolans, and Senegalese migrants do not meet the definition of refugees.[126]

A final version of this Rule would disparately harm a wide range of African, Caribbean, and

[126] Amnesty International, *Not Safe Anywhere: Haitians on the Move Need Urgent International Protection* (Oct. 2021), at 5, https://www.amnestyusa.org/wp-content/uploads/2021/10/Not-Safe-Anywhere-Haitians-need-urgent-international-protection-READY-FOR-PUBLISHING1.pdf (citing Andrés Ramírez, 'La llegada masiva de haitianos a México,' Eje Central, 21 October 2021. www.ejecentral.com.mx/la-llegada-masiva-de-migrantes-haitianos-a-mexico/); *see also* CNN, *Mexico Rethinks Asylum Initiative After Controversial US Announcement* (Feb. 24, 2023), https://www.cnn.com/2023/02/24/americas/mexico-asylum-policy-intl-latam/index.html.

Latin American asylum seekers—as was the case with the prior enjoined transit ban.[127] But it is remarkable that the Departments have not so much as acknowledged the extra burden that the proposed ban will place on Black and LGBTQ migrants who racism, homophobia, and transphobia throughout the Americas and who will not qualify for the special programs put in place, for example in Colombia, Costa Rica, and Ecuador for their regional neighbors.

2. Disparate harm on Indigenous people

The Rule also jeopardizes protection for Indigenous people, who often face discrimination, erasure, lack of language access, and exclusion from legal protection en route to the United States as a result of enduring and systemic genocidal policies. People continue to flee due to persecution on the basis of Indigeneity, as was the case of Te'k,[128] a Maya Ixil human rights defender forced to flee Guatemala in 2021. Te'k was summarily returned to Mexico under Title 42, without an opportunity to seek asylum. This Rule would also presumptively ban Te'k, rather than afford him with the meaningful and fair opportunity to seek asylum under U.S. and international law.

d. The Rule builds on the already flawed credible fear interview (CFI) process.

It is no secret that expedited removal rushes asylum seekers through credible fear screenings in circumstances that undermine basic principles of fairness. Expedited removal requires asylum seekers to disclose intimate information about their fear and trauma to government officials, usually without the presence of an attorney, while detained,[129] with minimal language access,[130] and often within a very short time of their arrival. Courts have questioned the reliability and disproportionate weight the Departments have afforded CFIs in the past, reversing adverse rulings and removal orders on the basis of unreliable information obtained in a CFI.[131] Yet, the

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[127] Human Rights First, *Asylum Denied, Families Divided: Trump Administration's Illegal Third-Country Transit Ban* (July 2020), at 2, https://humanrightsfirst.org/library/cameroonian-asylum-seekers-increasingly-detained-denied-asylum-under-trump-administration/ ("Asylum grant rates have declined by 45 percent for Cameroonian asylum applicants, 32 percent for Cubans, nearly 30 percent for Venezuelans, 17 percent for Eritreans, and 12 percent for Congolese (DRC) compared to the year before the [Trump transit] ban took effect.").

[128] The Mayan League, *Anti-Asylum Policies are a Form of Genocide Against Indigenous Peoples*, https://www.youtube.com/watch?v=5fGoZepRUEg.

[129] *See e.g.*, U.S. Department of Homeland Security, *Detained Asylum Seekers: Fiscal Year 2014 Report to Congress* (Sept. 9, 2015) (indicating that 35,598 of 42,187 or 84 percent of credible fear applicants were detained in ICE custody).

[130] *See* Complaint to Dep't of Homeland Sec. Office of Civil Rights and Civil Liberties (CRCL) calling for an investigation of the Houston Asylum Office's handling of CFIs (Apr. 27, 2021), *available at* https://nipnlg.org/PDFs/2022_27April-CFI-complaint.pdf ("The Houston Asylum Office routinely fails to provide appropriate language interpreters to asylum seekers, forcing them to proceed with CFIs in languages in which they are not fluent. Asylum seekers have also agreed to move forward with CFIs in languages in which they lack fluency because they were unaware of their right to insist upon an interpreter in their primary language. Asylum Officers often pressure asylum seekers to go forward with interviews in their second or third-best language.").

[131] *See, e.g., Ndudzi v. Garland*, No. 20-60782, 2022 WL 9185369, at *3 (5th Cir. 2022) (criticizing the BIA for "accept[ing] as true the CFI notes' unsworn, non-verbatim statements while ignoring evidence to the contrary"); *Jimenez Ferreira v. Lynch*, 831 F.3d 803 (7th Cir. 2016) (ruling that Dominican woman who fled to the United States to escape an abusive partner was wrongly denied protection because the immigration judge and Board of

Departments further restrict access to asylum by placing even greater emphasis on these already unreliable screenings. Should this Rule become final, the low screening standard that Congress envisioned for CFIs would be a distant memory.[132]

NIJC recently represented Adam*, an asylum seeker from South America who underwent 5.5-hour, taking place over two days while he was in ICE detention. USCIS issued a negative CFI determination, which an immigration judge later reversed. Adam described his experience as follows:

> "There were communication struggles with the interpreter on the first day of my interview. He would tell me to continue explaining and then cut me off after only one or two words. The asylum officer jumped topics a lot making it difficult for me to finish saying what I was trying to communicate in short sentences while doing my best to answer the next question he posed. I explained to the officer that my family received several threatening phone calls. It's my understanding that the CFI transcript says just one phone call. During my interview I explained that my family is still being threatened, but I didn't have the opportunity to explain more. I felt rushed by the interviewer, who sounded irritated and commented the interview was taking a long time. I was also very stressed due to my extended separation from my son."

Adam's experience is a far cry from the low-threshold, non-adversarial screening by an asylum officer trained in skillfully and carefully interviewing people who fled extensive harm, as Congress contemplated; however, it is not an anomaly. Cristina*, another NIJC client, had a similarly terrible CFI experience. She fled Honduras to escape domestic violence and was then kidnapped and sex-trafficked in Mexico by individuals connected to her hometown in Honduras. Her daughter, whose father was one of Cristina's traffickers, was born in Mexico, but the asylum officer repeatedly failed to ask Cristina any questions about what had happened to her in Mexico, focusing all questions exclusively on Honduras. When Cristina's attorneys pressed the officer to ask Cristina about any harm in Mexico, the officer responded that he had already asked her to explain why she was afraid to return to Honduras. Only after the attorney continued pushing the officer did he finally ask her about Mexico, leading Cristina to disclose extensive information about the connections between the persecution in Mexico and its relationship to her fears about harm in Honduras. That information would have never been elicited if Cristina had been unrepresented at her CFI, which is the reality for most asylum seekers.

Without NIJC's intervention, these clients would be removed to face the persecution and torture they fled. Under this Rule, Adam and Cristina would face a presumptive disqualification from asylum eligibility, bearing an insurmountable burden to rebut this presumption while facing

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Immigration Appeals (BIA) placed too much weight on the notes USCIS officer took during the woman's initial asylum screening interview); *Cuesta-Rojas v. Garland*, 991 F.3d 266 (1st Cir. 2021) (reversing adverse credibility finding, which rested at least in substantial part on asserted discrepancies between noncitizen's credible fear interview account and his removal proceeding account); *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052-53 (9th Cir. 2002) (ruling that failure to disclose sexual abuse at a CFI could not be considered an inconsistency given the nature and timing of CFI interviews).

[132] Senator Hatch, a principal sponsor of the bill, stated: "The [significant possibility] standard . . . is intended to be a low screening standard for admission into the usual full asylum process." 142 Cong. Rec. 25,347 (1996).

hostile or disinterested USCIS interviewers.

Even where there are organizations such as NIJC or other attorneys ready and willing to consult with asylum seekers prior to CFI, access to counsel is often severely compromised. When NIJC's legal teams attempted to provide meaningful representation to people in threshold fear interviews in detention in the context of the Return to Mexico program, the challenges were overwhelming: insufficient attorney meeting rooms; long waits to meet with clients; clients not allowed to bring their coats to extremely cold attorney/client meetings rooms; and difficulties with malfunctioning communications technology.[133]

With this Rule, the Departments put their thumb on a scale that already tips in favor of rushed removal as they layer additional bars on a fundamentally flawed system.

e. Withholding and CAT are not sufficient replacements for those able to proceed despite this ban.

The Rule provides continued access to withholding and CAT relief, with the understanding that those forms of relief have higher burdens and yield minimal protection. In NIJC's experience, asylum seekers who only win withholding face lifetime family separation from their close relatives, as withholding provides no opportunity for them to petition for their family to come to the United States as derivatives or for them to travel to see ailing relatives. Withholding and CAT also offer time-limited work authorization that undermine people's ability to achieve stability and job security, while they continue to fear third country removals on a perennial basis. With such limitations, withholding and CAT are no substitute to meaningful access to asylum.

For example, NIJC represents Oscar* an individual from Central America who was granted withholding of removal in 2014. Because he lives in a part of the country where he can only obtain a driver's license with a valid work permit, the annual struggle to renew work authorization has been a significant stressor for nearly a decade. Oscar diligently contacts NIJC many months before it is time to renew his work permit, and NIJC is careful to file well in advance of the expiration of his existing permit. Yet, year after year, USCIS fails to adjudicate Oscar's work permit in a timely fashion, which causes a lapse in Oscar's driver's license and significant employment insecurity.

As discussed above, the purpose of the Refugee Act of 1980 was to bring U.S. law into compliance with the Refugee Convention. Many of the goals of the Refugee Convention cannot be achieved through the provision of withholding of removal alone. Recipients of withholding must prove themselves to face persecution at a standard higher than the one contemplated for asylum seekers. And having met that higher standard, they are still subject to a removal order, unable to apply for permanent residency or citizenship, unable to travel abroad, and required to

[133] Colleen Kilbride, "The Cruelty of 'Remain in Mexico' under Biden," NIJC (Aug. 3, 2022), https://immigrantjustice.org/staff/blog/cruelty-remain-mexico-under-biden.

endure the employment insecurities that come with having to renew an annual application for work authorization.[134]

f. The Departments' proposal to safeguard family unity falls short of protecting families and children.

The Departments purport to provide a guardrail unique to families where the principal applicant is barred from asylum and obtains withholding of removal, *and* their spouse or children do not independently qualify for asylum "or other protection from removal"—a vague and expansive additional condition that leaves many questions as to who would in fact qualify for this guardrail.[135] The Departments justify this provision as a safeguard for family unity, ridding impacted principal applicants of their bar under this Rule. While protecting family unity is laudable, this section falls short in many respects.

First, this purported guardrail is only available at the tail end of asylum processing, as immigration judges are about to order principal applicants removed and grant withholding. This means that for people whom the Departments barred from asylum relief and cannot satisfy the higher withholding standard would not be able to avail themselves of this safeguard.

Second, this safeguard presumes that derivative spouse and children are already in the United States and processed simultaneously with the principal. That is neither a guarantee or worthwhile assumption, as families frequently suffer years of separation. NIJC represents countless asylees who need to file for their spouse or children to follow to join, only to face years of processing time. Under this Rule, these same individuals may not have won asylum due to the transit and entry bars the Departments seek to resurrect. They would thus have no ground to avail themselves of the benefits of this provision.

It is unclear if this provision could work retroactively, belatedly granting individuals with withholding of removal asylum *after* their spouse or children undergo their own journey and adjudication—and thus after the principal has been ordered removed and would need their removal order rescinded, after they have lived with the instability of limited employment authorization under withholding, and perhaps after they already began the demanding process of petitioning for their relatives. The procedural hurdles and administrative burden in that scenario are dizzying, as are the emotional turmoil and uncertainty this provision would generate. The Departments would better preserve family unity by not subjecting asylum seekers to their bar and stripping them of asylum benefits, including the pathway to family reunification.

Additionally, the Rule leaves many outstanding questions in terms of what independent relief would disqualify families from availing themselves of this provision. If a spouse can independently win withholding like the principal, the Departments may find comfort in the fact that they have preserved family unity without needing to take any further action, though both

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[134] *See Matter of Lam*, 18 I. & N. Dec. 15, 18 (1981); 8 C.F.R. § 245.1(d)(1) (explaining that only those in "lawful immigration status" can seek permanent residency and excluding withholding recipients from such status); 209.2(a)(1) (authorizing adjustment of status to permanent residence for asylees); 8 C.F.R. § 316.2 (naturalization available only to permanent residents).

[135] Proposed 8 C.F.R. § 1208.33(d).

spouses would live with the burdens inherent to withholding of removal—lack of access to basic social benefits, unstable employment authorization, inability to travel, and the risk of removal to a third country—for the rest of their lives. Here, as in other scenarios, the Departments would be better poised to preserve family unity by *not* finalizing this Rule, which strips individuals of asylum eligibility and benefits.

Finally, the Departments disregard how the Rule would harm families and children long before final adjudications of relief. Expedited processes already have a deleterious impact on families, as derivative spouse and children are continuously haunted by the prospect of family separation were one member of the family not to win relief.[136] With this Rule, the Departments would compound those harms by adding more bars to an already punishing process. Even worse, they do so while families live with the new, yet familiar fear that DHS will begin jailing them again, in the name of deterrence. To tout this provision as a cure-all in this atmosphere—where the Departments are severely aggravating a process that already hurts families, while resurrecting the fear that they will undergo this process from detention—makes a mockery of family unity.

g. The Departments have failed to show good reasons for departing from prior policies.

The NPRM backtracks on the Departments' own recent statements. For example, the proposed rule requires applicants to *affirmatively* seek immigration court review of a negative credible fear determination, an about-face from the Departments' own statements less than a year ago. Specifically, in December 2020, the Trump Administration issued a rule named the "Global Asylum" rule in the proposed rule that would require applicants to affirmatively request immigration judge review of a credible fear denial.[137] In May 2022, in the Asylum Processing interim final rule (IFR), the Biden Administration reversed that requirement.[138] Yet, now, less than a year later, the Departments retreat from that position and offer no legitimate reasons for this about face. Nor could they offer such reasoning without plainly acknowledging that the proposed rule favors expedience over meaningful access to refugee protections in the United States. That is because Immigration Court review is a critical component of ensuring access to asylum, and IJs routinely reverse negative credible fear findings.

The NPRM likewise withdraws from other aspects of the Asylum Processing IFR without cause. "The Departments acknowledge that, in the Asylum Processing IFR, they recently rescinded changes made by the Global Asylum Rule that applied mandatory bars during credible fear screenings and subjected noncitizens' remaining claims for statutory withholding and CAT protection to the 'reasonable possibility' of persecution or torture standard."[139] The Departments

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[136] First Focus on Children and the Young Center for Immigrant Children, *Fast Not Fair: Children Seeking Asylum are Fast-Tracked for Deportation* (Feb. 2023), https://www.theyoungcenter.org/fastnotfair.

[137] DHS & EOIR, *Procedures for Asylum & Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274, 80279 (Dec. 11, 2020).

[138] DHS & EOIR, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18078, 18084 (Mar. 29, 2022).

[139] 88 Fed. Reg. at 11724 n.176.

reverse their own position in two ways. By inserting this new bar into the CFI process, they both resurrect a Trump practice they claimed to leave behind and effectively raise the CFI standard once more. The Departments, however, provide no good—or even rational—justification for such undermining their own prior position in compliance with the statutory standard for CFIs. Instead, they assert simply that the current situation is "unique."[140] But that conclusion rests on nothing more than the agency's own say-so.

The Departments then contend that applying *this* bar at the credible fear stage is appropriate because it would be easy to do so. But that is simply incorrect: To apply the bar, an asylum officer would have to determine, at a minimum, (i) whether a person transited through a third country; (ii) whether a person attempted to use CBP One but could not; (iii) whether a person would have used CBP One had the person been able to access that system; and (iv) whether extraordinary circumstances exist. Given the severe problems that CBP One has had, and will continue to have, and given the great dangers that people seek asylum face on the Mexican side of the Mexico-U.S. border, these inquiries will be fact-specific and time-intensive. The Departments, in fact, concede as much.[141] They also concede that training, staffing, and applying the bar will consume significant amounts of DHS time.[142]

The NPRM, however, refuses to connect the dots and recognize that these concessions directly undermine its supposed basis for inserting the bar into credible fear interviews. Instead, the Departments make the bare and unsubstantiated claim that this rule is "superior" despite these inefficiencies because the increased time during the credible fear process will, supposedly, lead to "efficiencies" elsewhere in the adjudication process, apparently within EOIR.[143] But the Departments fail to even specify in what way the rule might be superior, and the only possible alternate efficiencies involve the illegal refusal to hear the claims, and *refoulement*, of people who would otherwise be eligible for relief in the United States. The NPRM therefore fails to adequately justify the Departments' about-face.

The Departments also overstate the potential efficiency gains that the Rule would create. Adjudication of credible fear interviews will be much more onerous, and the same will be true of immigration judge review of those determinations. And after all that, many people will still have to have a full adjudication of their protection-based claims, albeit under the withholding of removal standard. That process is likely to be slower, not faster, than adjudication of these same cases under the asylum standard. That is so for at least two reasons. The higher standard applicable in withholding of removal will require more expert testimony and presentation of more detailed evidence to satisfy the higher burden. And, the proposed rule allows immigration judges to reconsider the application of the presumption against asylum eligibly, meaning that this entire set of issues regarding the application of the presumption will be adjudicated not once but twice. In other words, the *only* efficiency gain that the proposed rule creates is through the anticipated increase in people who will never see a day in court because they will be denied

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[140] 88 Fed. Reg. at 11744.

[141] *Id.*

[142] *See id.* at 11,745.

[143] 88 Fed. Reg. at 11745.

access to asylum in the unreviewable CFI process. Sacrificing fundamental fairness and access the asylum system, and contravening Congress, can hardly constitute an efficiency gain.

h. The Departments have failed to consider obvious alternatives.

The NPRM fails to consider the obvious alternate option of expanding capacity to follow the INA's inspection requirement and its dictate that anyone arriving in the United States be allowed to apply for asylum. Because people presented with a safe pathway to seek asylum will choose that pathway, doing so would achieve the Departments' goal of curbing crossings between ports of entry. It would also discourage people from using smugglers, who are often exploitative and violent.

As a result, expanding capacity at ports of entry would, in the medium and long term, sharply reduce the resources that DHS feels the need to expend at the border.[144] This would be especially true if the Departments coordinate with state and local governments as well as non-governmental organizations and move away from the routine imprisonment of people fleeing persecution and torture.[145] Further, because increasing capacity at ports of entry would allow USCIS asylum officers to conduct credible fear interviews that are true screening interviews (as Congress intended), asylum officers would—for the first time in many years—be able to concentrate on their core work of conducting CFIs and asylum merits interviews. In other words, simply increasing the capacity to process people seeking asylum at ports of entry in ways that can meet current demand would provide a solution to the perceived problems the Departments assert in the NPRM—and it would do so while also saving lives and sharply reducing the number of people who suffer the retraumatization of severe violence or threats of violence while fleeing persecution.

There can be no doubt that DHS has the ability to increase capacity at ports of entry, just as it has previously made a conscious choice to lower capacity at ports of entry.[146] Expanding capacity at ports of entry, however, is an option that the Departments have thus far refused to consider. Here, for instance, the Departments proffer the alternatives of the status quo; resuming the (illegal) Remain-in-Mexico program; and seeking safe-third-country agreements with countries that the Departments know are not safe and lack robust asylum systems.[147] But they entirely ignore the possibility of fulfilling this administration's promises to increase capacity at ports of

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[144] CBP has a history of failing to process asylum seekers even within its existing capacity. See Elliot Spagat, *Holding-cell stats raise questions about Trump asylum policy*, AP News (Feb. 13, 2020), https://apnews.com/article/texas-immigration-us-news-ap-top-news-laredo-6d32dd1fcda84a98bbf7c6455a2d6ae5 ("On March 14, according to one daily snapshot, 672 people were in custody at all 24 crossings, a 57% occupancy rate. San Diego's San Ysidro port of entry was 89% full, Hidalgo was overcrowded, and El Paso was nearly full. But Laredo was only 40% full, Brownsville was at 35%, and seven crossings, mostly in California, were empty.").

[145] *See* NIJC, *Solutions for a Humane Border Policy* (Jan. 17, 2023), https://immigrantjustice.org/staff/blog/solutions-humane-border-policy.

[146] *See* DHS OIG, *CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry*, https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf (Oct. 27, 2020).

[147] 88 Fed. Reg. at 11731-32.

entry in conformity with the INA. In other words, the Departments ignore the safe, orderly, legal way to process people seeking asylum in favor of yet another unsafe, disorderly, illegal system.

The Departments have also failed to use the recent 2022 asylum merits interview process, created by the Interim Final Rule, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers.*[148] The stated purpose of that rule was to "increase both the efficiency and the procedural fairness of the expedited removal process for individuals who have been found to have a credible fear of persecution or torture" in response to the Departments' perception of "challenges" for the "U.S. asylum system at the southwest border."[149] That is the same purpose purportedly served by the new NPRM. Nevertheless, although the Departments slowly ramped up use of the asylum merits interview process through much of 2022, use of that process plunged in the last quarter of the year. DHS went from providing merits interviews to 860 people in August 2022 to only 68 people in December 2022.[150] There has been no public explanation of the Departments' apparent decision to effectively pause use of the asylum merits interview process, and the NPRM does not seriously consider expanding capacity to allow for the increased use of that process, much less provide a rational explanation for moving in a dramatically different direction.

i. The NPRM's bar should sunset in 90 days, not two years.

Even if it were legally permissible and sound policy—and it is neither—there would be no rational reason for the NPRM to last for two years. By its own (deeply flawed and indefensible) terms, the NPRM is an increase in people approaching the ports of entry that DHS believes will occur when Title 42 is lifted. But nothing at all in the NPRM even begins to support the notion that this increase will last for two years—or even for a fraction of that time.

Further, there is no reason to believe the Departments have any intention of allowing the rule to sunset. Over the last several years, the Departments have consistently refused to allow people to seek asylum at ports of entry, shifting from one illegal and ineffective deterrence policy to another—be it metering, Remain in Mexico, the ban on entries without inspection, the transit ban, sham safe-third-country agreements with Northern Triangle countries, PACR/HARP, Title 42, the use of CBP agents to conduct credible fear interviews, or other policies.[151] And throughout this series of illegal policies, one erected as quickly as the previous one could be torn down, the Departments have never given serious consideration to simply fulfilling their duties under the INA to people seeking asylum by increasing capacity to process people at ports of entry.

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[148] DHS & DOJ, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 86 Fed. Reg. 46906, 46909 (Aug. 20, 2021), *adopted by reference*, 87 Fed. Reg. 18078, 18079 (Mar. 29, 2022).

[149] *Id.*

[150] USCIS, *Asylum Processing Rule Cohort Report - December 2022*, https://www.dhs.gov/sites/default/files/2023-02/2023_0223_plcy_asylum_processing_rule_cohort_report_december_2022_0.xlsx.

[151] *Cf.* NIJC, *A Timeline of the Trump Administration's Efforts to End Asylum* (last accessed Mar. 27, 2023), https://immigrantjustice.org/timeline-trump-administrations-efforts-end-asylum.

Now the Departments have proposed yet another illegal ban for a 2-year period that is divorced from facts on the ground and even from DHS's non-public projections. In light of recent history, there is no reason to believe the Departments will *ever* allow the rule to sunset if it is allowed to remain in place for two years. For that reason, and given the inherent unpredictability of events at the border, the NPRM's ban should—even if enacted—remain in place for no more than 90 days at a time.

Conclusion

As government officials have privately acknowledged,[152] this Rule will constitute a foundational shift in the U.S. asylum system, making access to asylum at the southern border the exception rather than the norm. NIJC urges the Departments to withdraw this Rule and comply with domestic and international obligations to afford every individual access to asylum regardless of their documentation, mode of entry, and transit route.

Thank you for your consideration of this comment and the numerous exhibits attached to it,[153] which NIJC incorporates by reference throughout. Please do not hesitate to contact Azadeh Erfani for further information.

/s/
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[152] Hamed Aleaziz, *Why the border may 'never go back to what it was before Trump'*, LA Times (Mar. 2, 2023), https://www.latimes.com/politics/story/2023-03-02/biden-asylum-proposal-trump.

[153] We have attached to this comment the sources we cite as well as other sources relevant to the use of CBP One, conditions at the border, the expedited removal process, country conditions in Central and South America, the requirements of international law, and the legality of the NPRM.