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Daniel Delgado
Acting Director, Border and Immigration
Policy, Office of Strategy, Policy, and Plans
Department of Homeland Security
Washington, DC 20528

Lauren Alder Reid
Assistant Director
Office of Policy
Executive Office for Immigration Review
Department of Justice
5107 Leesburg Pike
Falls Church, VA 22041

*Submitted via* http://www.regulations.gov

**Re**: **American Immigration Lawyers Association and American Immigration Council Comment on Circumvention of Lawful Pathways**
**DHS Docket Number USCIS 2022-0016**

Dear Mr. Delgado and Ms. Alder Reid:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) submit the following comments in response to the above-referenced Department of Homeland Security (DHS) and Department of Justice (DOJ) (collectively, "the Departments") Notice of proposed rulemaking (proposed rule), Circumvention of Lawful Pathways (DHS Docket Number USCIS 2022-0016), 88 Fed. Reg. 11704 (February 23, 2023). The Departments request comment on, among other things, "[w]hether the proposed rule appropriately provides migrants a meaningful and realistic opportunity to seek protection."[1]

The situation the Departments face is a uniquely difficult one. Regional migratory and displacement patterns have shifted significantly in recent years. Increased numbers of asylum seekers at the Southern Border are a symptom of these shifting patterns and long-term Congressional inaction to address humanitarian needs holistically to fix issues within the wider immigration system that would alleviate the pressure at the Southern border. Compounding this is a historic asylum backlog across both Departments.

[1] Circumvention of Lawful Pathways, 88 FR 11704, 11708 (proposed Feb. 23, 2023) (to be codified at 8 CFR 208 and 8 CFR 1208), https://www.federalregister.gov/documents/2023/02/23/2023-03718/circumvention-of-lawful-pathways. [hereinafter: "NPRM"]

However, the proposed rule is a step in the wrong direction. The proposed rule will prevent meaningful access to asylum to individuals who arrive at the U.S.-Mexico border, which covers the majority of asylum seekers who are unable to afford a passport (or had their passport revoked by a persecuting government) and a flight. The proposed rule amounts to an asylum transit ban—relying on transit countries that can neither ensure asylum seekers' safety nor meaningful access to a system that protects the human rights guaranteed under U.S. law. It further conditions access to asylum based on how asylum seekers enter the country. Furthermore, the proposed "core protections" and safeguards will not sufficiently protect access to asylum and other forms of humanitarian relief, particularly in light of our significant concerns surrounding its implementation and access to counsel.

AILA and the Council urge the Biden administration to remain true to its commitment to asylum law and humanitarian protections.

## I. About AILA and the Council

Established in 1946, AILA is a voluntary bar association of more than 16,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council litigates in the federal courts to protect the statutory, regulatory, and constitutional rights of noncitizens, advocates on behalf of noncitizens before Congress, and has a direct interest in ensuring that those seeking protection in the United States have a meaningful opportunity to do so.

## II. The proposed rule violates international and domestic law, as it functionally denies individuals safety from persecution

### (A) The proposed rule undermines both U.S. domestic and international law obligations

The proposed rule violates the United States' obligations to protect individuals fleeing persecution under both international and domestic law. As a signatory to the 1967 Refugee Protocol, the United States has agreed to uphold the principles of the 1951 Convention Relating to the Status of Refugees, including the right to seek asylum and the prohibition on refoulement. Domestic law also requires the United States to protect asylum seekers. Under the Immigration and Nationality Act (INA), an individual may apply for asylum regardless of their manner of entry, subject to certain very limited exceptions.[2] The INA also sets limits on when an asylum seeker can be denied protection based on residing in a third country. The proposed rule denies

[2] 8 U.S.C. § 1158(a)(1) (1952).

access to asylum to individuals primarily on the basis of their manner of entry and is therefore contrary to international and domestic law.

The proposed rule is inconsistent with fundamental international law principles aimed at protecting refugees, which the United States has agreed to uphold. The Refugee Convention's principle of non-refoulement prohibits the United States from returning an individual seeking humanitarian protection to a country where they could face persecution.[3] Under the proposed rule, asylum seekers subject to the ban will be ineligible for asylum and face a heightened risk of being returned to countries where they fear persecution based on factors that have nothing to do with the merits of their underlying asylum claim. The proposed rule's requirement that asylum seekers enter through a port of entry with an appointment or via parole also violates the Refugee Convention's prohibition against imposing penalties on asylum seekers based on their irregular entry into the country.[4]

The United States incorporated these international law principles into domestic law when it passed the 1980 Refugee Act.[5] In 8 U.S.C. § 1158, Congress established a comprehensive asylum system, which includes limited exceptions to noncitizens' ability to apply for and be granted asylum. The rule relies on 8 U.S.C. § 1158(b)(2)(C), which allows the Attorney General to establish regulations with additional limitations, to justify its ability to implement a new bar to asylum. However, 8 U.S.C. § 1158(b)(2)(C) mandates that any additional limitations be "consistent with" the statute.[6] The limitations in the proposed rule are in direct conflict with the INA.[7] For example, the INA states that, subject to certain exceptions, anyone "who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* . . .), irrespective of [their] status, may apply for asylum."[8] The proposed rule contravenes the statute by barring from asylum individuals who enter between ports of entry and those who arrive at a port of entry without utilizing DHS's appointment system, unless there is a specific reason why they could not.[9]

Additionally, Congress already explicitly addressed asylum restrictions for people who may find safety in other countries in two separate statutory provisions. First, under 8 U.S.C. § 1158(a)(2)(A), individuals generally cannot apply for asylum if they can be removed to a country that has a formal safe third country agreement with the United States. A "safe third country" is defined as a country where that person's life or freedom would not be threatened and

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[3] United Nations High Commissioner for Refugees (UNHCR), *Note on Non-Refoulement (Submitted by the High Commissioner)*, Aug. 1977, https://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html.

[4] *See* UNHCR, *Brief of the Office of the United Nations High Commissioner for Refugees*, *O.A., et al. v. Trump, et al.*, Aug. 13, 2020, No. 19-5272 ("[n]either the 1951 Convention nor the 1967 Protocol permits parties to condition access to asylum procedures on regular entry"), https://www.refworld.org/docid/5f3f90ea4.html, at 24.

[5] *Matter of D-L-S*, 28 I. & N. Dec. 568, 571 (BIA 2022) ("It is well established that Congress enacted the Refugee Act of 1980 to 'bring United States refugee law into conformance with the country's obligations under the Protocol.'" (citing and quoting *Matter of Q-T-M-T-,* 21 I. & N. Dec. 639, 645 (BIA 1996)).

[6] 8 U.S.C. § 1158(b)(2)(C) ("The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which a [noncitizen] shall be ineligible for asylum under paragraph (1).").

[7] *See E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2020) (upholding preliminary injunction of Trump administration transit ban interim final rule) [hereinafter "East Bay I"].

[8] 8 U.S.C. § 1158(a). Emphasis added.

[9] *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 669 (9th Cir. 2021) (concluding that a 2018 asylum restriction based on manner of entry was "not in accordance with law") [hereinafter "East Bay III"].

where they would have "access to a full and fair procedure" for accessing humanitarian protection. Second, under 8 U.S.C. § 1158(b)(2)(A)(vi), an asylum seeker who was "firmly resettled," meaning that the person was eligible for or received permanent legal status, in another country is generally not eligible for asylum.

Finally, 8 U.S.C. § 1231 codified the Convention's prohibition against returning refugees to countries where they face persecution. The proposed rule, which conditions access to asylum on manner of entry and transit, would result in the return of refugees to danger and contravenes these provisions of U.S. law.

The proposed rule is also contrary to the credible fear screening standard Congress established in 1996, when it created the expedited removal process through the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). Under this process, asylum seekers placed in expedited removal who establish a credible fear of persecution must be referred to full removal proceedings, where they can apply for asylum.[10] Congress intended the "significant possibility" standard used in credible fear interviews to be a low threshold.[11] If an asylum officer determines that an applicant is not eligible for asylum under the proposed rule, the officer must interview the person under the heightened standard generally applicable in reasonable fear proceedings to determine if they may qualify for withholding of removal or protection under the Convention Against Torture.[12] Given the higher standard required for withholding and CAT, the proposed rule will drain resources from USCIS by requiring asylum officers to apply a two-step process while making it more difficult for individuals to qualify for life-saving protection. Even those who meet the higher standard for withholding of removal or CAT will not receive the same benefits that asylum provides, which could lead noncitizens to experience instability, lack of permanency, and family separation.[13]

The proposed rule undermines our domestic law obligations. As a result, most individuals who cross the southern border without an appointment, except Mexican nationals or those who meet the proposed rule's limited exceptions, would be ineligible for asylum in the United States because they would have transited through a country that is a signatory to the Convention or the Protocol. Additionally, nearly every country in the world is a signatory to the Convention or the Protocol.[14] Thus, this proposed rule will adversely impact asylum seekers from all over the world who are seeking protection in the United States.

Such a ban undermines congressional mandates regarding our domestic asylum system and betrays our international law obligations. Indeed, federal courts repeatedly vacated and enjoined similar Trump administration asylum bans based on manner of entry and transit because they

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[10] *See* 8 U.S.C. § 1225(b)(1)(B)(ii).
[11] *See* 142 CONG. REC. S11491–02 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch) ("The conference report struck a compromise by rejecting the higher standard of credibility included in the House bill. The standard adopted . . . is intended to be a low screening standard for admission into the usual full asylum process"), https://www.govinfo.gov/content/pkg/CREC-1996-09-27/html/CREC-1996-09-27-pt1-PgS11491-2.htm.
[12] NPRM at 11750.
[13] *See* American Immigration Council, *Fact Sheet: The Difference Between Asylum and Withholding of Removal*, https://www.americanimmigrationcouncil.org/research/asylum-withholding-of-removal (Oct. 6, 2020).
[14] 148 countries signed one or both of the 1951 Convention and the 1967 Protocol. *See* UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf.

were contrary to U.S. law.[15] The proposed rule relies on these same premises that courts have already found unlawful.

(B) Mexico, Guatemala, and other common transit countries lack fair and functioning asylum systems

The proposed rule exempts people who apply for protection in a third country and receive a denial. However, Mexico, Guatemala, and most countries through which asylum seekers regularly transit en route to the United States have deficient asylum systems that fail to meet the INA's requirements of a "full and fair" process. In particular, Mexico and Guatemala lack the capacity, infrastructure, and rule of law required to process high numbers of asylum claims while providing safety to the number of refugees in need.[16]

It is well documented that the Mexican asylum system is deeply flawed and underfunded.[17] Mexico already receives high numbers of asylum applications, but it struggles to adjudicate them in a timely manner. From January to August 2021, Mexico received nearly 78,000 asylum applications but resolved only about 23,000 cases.[18] In 2019, the Mexican Commission for Refugee Assistance ("COMAR") had only 48 staff members adjudicating asylum claims.[19] According to the Department of State, "COMAR's budget increased modestly in recent years but was not commensurate with the growth in refugee claims."[20] Asylum approval rates also differ widely based on country of origin, with most Haitian and Guatemalan asylum seekers being denied asylum in Mexico.[21] Given current backlogs and resource constraints, Mexico is not prepared to adjudicate the increased volume of applications that will be generated by the proposed rule.

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[15] *See Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 60 (D.D.C. 2020) (vacating Trump administration transit ban interim final rule); *see also* East Bay I (concluding that a 2019 third country transit bar is not "consistent with this section"); *O.A. v. Trump*, 404 F. Supp. 3d 109, 154 (D.D.C. 2019) (vacating Trump administration interim final rule barring asylum for individuals who entered between ports of entry).

[16] *See* Human Rights First*, Is Guatemala Safe for Refugees and Asylum Seekers?*, https://humanrightsfirst.org/wp-content/uploads/2022/10/IsGuatemalaSafeforRefugeesandAsylumSeekers.pdf (June 2019); *see also* Human Rights First, *Is Mexico Safe for Refugees and Asylum Seekers?*, https://humanrightsfirst.org/wp-content/uploads/2022/10/MEXICO_FACT_SHEET_PDF.pdf (Nov. 2018).

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

[18] *See* Human Rights Watch, *World Report 2022: Mexico*, https://www.hrw.org/world-report/2022/country-chapters/mexico#39f1f6 (n.d.).

[19] *See* Refugees International, *Harmful Returns: The Compounded Vulnerabilities of Returned Guatemalans in the Time of COVID-19*, https://www.refugeesinternational.org/reports/2020/6/16/harmful-returns-the-compounded-vulnerabilities-of-returned-guatemalans-in-the-time-of-covid-19 (June 23, 2020).

[20] U.S. Dep't of State, *2021 Country Reports on Human Rights Practices: Mexico*, https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/mexico/.

[21] *See* Refugees International, *Harmful Returns: The Compounded Vulnerabilities of Returned Guatemalans in the Time of COVID-19* (June 23, 2020); *see also* Alex J. Rouhandeh, "Haitians Stuck in Mexico's 'Open Air Prison' City Claim Racism as Asylum Cases are Denied," *NEWSWEEK*, https://www.newsweek.com/haitians-stuck-mexicos-open-air-prison-city-claim-racism-asylum-cases-are-denied-1662251 (Dec. 22, 2021).

Additionally, Mexico's asylum process presents asylum seekers with many hurdles, which severely limit access to asylum.[22] Mexican officials often expel individuals seeking protection or violently detain them.[23] Black migrants in particular report experiencing longer periods of detention and discriminatory treatment by officials while detained.[24] Asylum seekers in Mexico must also generally apply for asylum within 30 days of arriving in Mexico and they must remain in the state where they applied for asylum until their application is decided.[25] Given the instability faced by recently arrived asylum seekers, Mexico's onerous asylum requirements and lack of capacity severely limit the availability of protection.

Guatemala has a "nascent and cumbersome asylum system" that is unable to meet current demands, much less process a significant increase in asylum applications. In 2018, around 260 people applied for asylum in Guatemala (an increase of 75 percent from previous years), and only 20 cases were approved.[26] A Guatemalan Office of the Ombudsman official warned, "If we had, in two years, 472 cases and we were not able to resolve them, what is going to happen if we have thousands of cases or hundreds each day? We are not going to be able to resolve them. We don't resolve the cases because the [National] Migration Authority, the institution responsible for resolving the cases, is not interested in resolving them . . . Asylum is not a priority for our country."[27] Instead, the Guatemalan government shifts the burden to civil society groups to provide critical legal orientation and humanitarian aid to asylum seekers.[28]

Though the preamble to the proposed rule mentions developments in Guatemala's asylum system during the last two years, it is unfathomable that Guatemala's very new asylum system could be prepared to provide a full and fair asylum process for people in need of protection. Indeed, the preamble states that as of March 2022, the Guatemalan Migration Institute ("IGM") had "already received nearly 300 applications in 2022 and granted asylum to 590 individuals."[29] However, according to the document cited in the preamble, 590 actually refers to the total number of individuals *ever granted* asylum in Guatemala, not to the number of applications granted in 2022.[30] Other Central American countries are also ill-equipped to offer necessary protection to a

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[22] *See* Kirk Semple, "A Flawed Asylum System in Mexico, Strained Further by U.S. Changes," *New York Times*, https://www.nytimes.com/2017/08/05/world/americas/mexico-central-america-migrants-refugees-asylum-comar.html (Aug. 5, 2017); *see also* Human Rights First, *Is Mexico Safe for Refugees and Asylum Seekers?* (Nov. 2018).
[23] *See* Human Rights Watch, *World Report 2022: Mexico.*
[24] *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*, https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf (2021).
[25] *See* Asylum Access, *Mexican Asylum System for U.S. Immigration Lawyers FAQ*, https://asylumaccess.org/wp-content/uploads/2019/11/Mexican-Asylum-FAQ-for-US-Immigration-Lawyers.pdf (Nov. 2019).
[26] *See* Human Rights First, *Is Guatemala Safe for Refugees and Asylum Seekers?* (June 2019).
[27] Georgetown Law Human Rights Institute, *Dead Ends: No Path To Protection for Asylum Seekers Under the Guatemala Asylum Cooperative Agreement*, https://www.refworld.org/docid/5f0eeeb04.html (June 10, 2020).
[28] *Id.*
[29] NPRM at 11722.
[30] *See* Instituto Guatemalteco de Migración, *Información Sobre Personas Solicitantes y Refugiadas en Guatemala: Enero 2002–Marzo 2022*, https://igm.gob.gt/wp-content/uploads/2022/04/Informe-con-Graficos-Marzo-2022.pdf (Mar. 2022).

large number of asylum seekers because their asylum systems are either not well-established or suffer from severe resource constraints.[31]

Given these known deficiencies in Guatemala's and Mexico's asylum systems—the two countries most migrants transit through—the proposed rule does not adequately explain why only those who seek asylum in such countries and are denied can rebut a presumption *against* asylum in the United States.

(C) The proposed rule would place bona fide asylum seekers in danger

The proposed rule will return bona fide asylum seekers to danger and persecution abroad or force them to remain in dangerous transit countries. Individuals will be forced to attempt to find protection in transit countries, such as Mexico and Guatemala, that are not equipped to offer safe harbor.

Mexico and Guatemala are deeply affected by violence and instability. Non-Mexican asylum seekers have been subjected to extortion, kidnapping, rape, and other violent crime while in Mexico, especially following the implementation of the "Migrant Protection Protocols" (MPP).[32] The State Department has also documented numerous risks to migrants in Mexico and it has stated that "violence against migrants by government officers and organized criminal groups" is one of the "most significant human rights issues" in Mexico.[33] In his October 2021 memorandum terminating the Migrant Protection Protocols, DHS Secretary Mayorkas cited concern for migrant safety as one of the reasons for ending MPP, as "there were pervasive and widespread reports of MPP enrollees being exposed to extreme violence and insecurity at the hands of transnational criminal organizations that prey on vulnerable migrants."[34] Black migrants in Mexico "faced widespread racial discrimination from individuals and authorities" and are particularly vulnerable.[35] Mexico also has high rates of gender-based violence, with the government reporting nearly 1,000 femicides in 2020.[36]

Guatemala has high rates of systemic violence, instability, and corruption, making it unsafe for asylum seekers.[37] The Department of State has reported that Guatemala "remains among the most dangerous countries in the world," due to "endemic poverty, an abundance of weapons, a

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[31] *See* Karen Musalo, "Biden's Embrace of Trump's Transit Ban Violates US Legal and Moral Refugee Obligations," *Just Security*, https://www.justsecurity.org/84977/bidens-embrace-of-trumps-transit-ban-violates-us-legal-and-moral-refugee-obligations (Feb. 8, 2023).

[32] *See* American Immigration Council, *Letter Urges Sec. Nielsen to End the Migrant Protection Protocols Policy*, https://immigrationjustice.us/advocacy/advocacy-issues/access-to-counsel/letter-migrant-protection-protocols/ (Feb. 6, 2019); *See also* Human Rights First, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process*, https://humanrightsfirst.org/library/delivered-to-danger-illegal-remain-in-mexico-policy-imperils-asylum-seekers-lives-and-denies-due-process (Aug. 2019).

[33] U.S. Dep't of State, *Country Reports on Human Rights Practices for 2017: Mexico (2018)*, https://www.state.gov/reports/2017-country-reports-on-human-rights-practices/mexico/.

[34] U.S. Dep't of Homeland Security, *Explanation of the Decision to Terminate the Migrant Protection Protocols*, https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf (Oct. 29, 2021).

[35] U.S. Dep't of State, *2021 Country Reports on Human Rights Practices: Mexico*.

[36] *See* Human Rights Watch, *World Report 2022: Mexico*.

[37] Human Rights First, *Is Guatemala Safe for Refugees and Asylum Seekers?* (June 2019).

legacy of societal conflict, and the presence of organized criminal gangs."[38] According to the Department of State, "[v]iolent crime such as extortion, murder, armed robbery, carjacking, narcotics trafficking and gang activity are common."[39] It also notes that "Guatemala's high murder rate is driven by narcotrafficking activity, gang-related violence, a heavily armed population, and a law enforcement and judicial system unable to hold criminals accountable."[40] Moreover, Guatemala, like other Central American countries, has recently attempted to crack down on migration, implementing new regulations in January 2023 that could criminalize religious workers and volunteers for assisting asylum seekers.[41] Leaders of the Catholic Church in Guatemala reported that the new regulations could force them to close all nine of their shelters.[42] This would leave asylum seekers in Guatemala without a crucial source of humanitarian aid.

Seeking asylum in neighboring countries is not a viable option for Central American asylum seekers in particular, because the border between Mexico and Guatemala is porous and law enforcement in both countries lack resources and are susceptible to corruption. Central American gangs and other armed groups can easily find and persecute their victims in Mexico.[43] Conditions throughout Central America's Northern Triangle are no better, as Guatemala, Honduras, and El Salvador have the highest rate of femicide in the world and all three countries have extremely high rates of violence against LGBTQ+ individuals.[44]

By forcing individuals transiting through countries such as Mexico and Guatemala to seek asylum there, the rule will in practice lead to asylum seekers being caught in countries where they are not safe.

## III. The proposed rule is not materially different from previous entry and transit rules enjoined by the 9th Circuit

The proposed rule suggests that it is significantly different from two rules previously issued and then vacated due to subsequent litigation.[45] In those cases (collectively *East Bay I, II, and III*) the 9th Circuit's reasoning was crystal clear—a categorical bar to asylum based on either how a person enters the country and/or what processes they do or do not avail themselves of in a country through which they transit is in violation of Section 208 of the INA.[46] The proposed rule's suggestion that this iteration is distinct because it only applies a rebuttable presumption instead of a categorical bar is a distinction without a difference. The presumption can only be

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[38] U.S. Dep't of State, *Overseas Security Advisory Council, Crime & Safety Report (2022)*, https://www.osac.gov/Content/Report/2013f384-296b-4394-bfcb-1c9c40b9c7df.
[39] U.S. Dep't of State, *Guatemala Travel Advisory*, https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/guatemala-travel-advisory.html (Mar. 1, 2023).
[40] U.S. Dep't of State, *Overseas Security Advisory Council, Crime & Safety Report (2022)*, https://www.osac.gov/Content/Report/2013f384-296b-4394-bfcb-1c9c40b9c7df.
[41] Jeff Abbott, "Migrant Shelters in Guatemala under Threat from Legal Reforms," *Al Jazeera*, https://www.aljazeera.com/news/2023/2/18/migrant-shelters-in-guatemala-under-threat-from-legal-reforms (Feb. 18, 2023).
[42] *Id.*
[43] U.S. Dep't of State, *Country Reports on Human Rights Practices for 2017: Mexico (2018)*.
[44] *See* Karen Musalo, "Biden's Embrace of Trump's Transit Ban Violates US Legal and Moral Refugee Obligations."
[45] East Bay III; East Bay I, and an injunction in *E. Bay Sanctuary Covenant v. Barr*, 519 F. Supp. 3d 663 (N.D. Cal. 2021) ("East Bay II").
[46] *Id.*

rebutted by a demonstration of extremely narrow circumstances that are wholly unrelated to a person's asylum claim.

While the proposed rule claims that this system is designed to vet out meritorious claims, the bases for rebuttal do nothing of the sort. Those bases—acute medical issues, imminent *and* extreme threats to life or safety, or severe forms of trafficking—do not relate to whether an individual is more or less likely to have a meritorious claim for asylum. While the rule allows for adjudicators to accept a rebuttal based on other "extremely compelling circumstances," the proposed rule is designed to exempt people from the presumption based only on circumstances related to their manner of entry.

Further, the means of implementing this system of presumption and rebuttal is so fraught that it will in practice become a *de facto* categorical bar. According to the rule as currently designed, an adjudicator would first assess whether a person is subject to the presumed ineligibility. If that adjudicator finds the presumption applies, the burden shifts to the asylum seeker to prove by a preponderance of the evidence that they can rebut it. Functionally, this burden is nearly impossible for an asylum seeker to meet. These determinations are made in a single interview with an asylum officer. The idea that a person who has just fled across the border seeking safety would have the means to provide evidence of an acute medical issue, an imminent and extreme threat, or trafficking is absurd. There is no indication that the asylum officer would be directed to affirmatively elicit from an applicant facts related to a possible basis for rebuttal.

This process is significantly different from how other presumed bars to asylum function. For example, when an asylum officer believes at a credible fear interview that a person is likely to be subject to the firm resettlement bar, this determination is not dispositive. While it is indicated on the credible fear worksheet, it is ultimately up to an immigration judge to determine whether the bar actually applies. The potential for immigration judge (IJ) review of the application of the presumption under this proposed rule is unclear. It is clear, however, that an individual who was deemed subject to the presumption would have to affirmatively request review by an IJ. This makes the application of the rule more akin to the categorical bans prohibited by previous federal courts than to other forms of presumptive bars.

## IV. In practice, implementation of the rule will be fraught with problems

### (A) The rule will cause confusion and inconsistent application at the ports of entry

Implementation of this rule can be expected to go poorly at the ports of entry. While there are exceptions built into the rule for individuals who do not have an appointment to present at the border nor prior authorization such as parole, how the exceptions will be determined and at what stage in the process is unclear, and can easily lead to improper application of the rule. Will individuals without an appointment be uniformly admitted upon presentation at the port, to be assessed later by an asylum officer as to whether they meet the exemption, or will Customs and Border Protection (CBP) officers turn away people who do not have an appointment? Though the rule indicates the latter should not happen, experience with officers implementing previous similar rules is a cause for concern that, while CBP may not be formally empowered to make these determinations, in practice they often make their own determinations on the spot.

Further complicating this process is how family units are treated under the proposed rule. For families, the proposed rule states that the presumption of ineligibility does not apply if any member of the family unit traveling together meets one of the exceptions.[47] For example, the presumption of ineligibility would not apply if one person in the family unit traveling together was fleeing imminent and extreme danger. This presents a quandary for an individual—do they wait to travel with their family, or do they flee on their own, leaving their family to have to meet the higher standard for entry?

For those who do avail themselves of a processing appointment through the CBP One app, under the proposed rule, there are no assurances as to how long individuals will be required to wait in Mexico to make their appointments on the app. For migrants, then, this system will be unpredictable and technology-dependent. Rather than creating a more predictable process, the new rule only adds an additional requirement for individuals to be put on this new list: they must access a smartphone, connect to the internet, download the CBP One app, and navigate that app in order to even be put on a list.

Under Title 42, MPP, and the metering policy implemented under President Trump, similar restrictions on entering the United States resulted in large communities of migrants settling in temporary encampments by the ports of entry waiting for their opportunity to cross the US-Mexican border as discussed above in Section III. Widespread media reports have documented the challenges facing individuals living in these makeshift communities. Primary among them are that the individuals must often live in the most dangerous cities in Mexico, where they have been extremely vulnerable to kidnapping, extortion, rape, and other abuses.

In a March 2021 report, Human Rights Watch (HRW) documented widespread targeting of asylum seekers waiting at the southern border.[48] In interviews with 71 Venezuelan asylum seekers who transited through Mexico, HRW concluded that "migrants in Mexico are exposed to rape, kidnapping, extortion, assault, and psychological trauma."[49] They articulated a fear of reporting crimes and abuse to Mexican authorities.[50] In addition to threatening the health and safety of the asylum seekers, violence and other setbacks in Mexico also posed a major obstacle to attending the hearing dates set in the United States.[51] HRW writes:

> Nearly half of asylum seekers under the Remain in Mexico program lost their cases after missing court dates. Human Rights Watch has spoken to families who missed court dates because they were kidnapped in Mexico. Others were bused south by the Mexican government, leaving them thousands of miles from their hearing locations.[52]

The same difficulties that plagued these earlier border externalization programs will affect users of CBP One. Kidnappings, violence, and extortion from criminal actors, and limitations on movement by Mexican authorities will all prevent individuals from booking appointments through CBP One and showing up once those appointments are

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[47] NPRM at 11750.
[48] Human Rights Watch, *Mexico: Abuses Against Asylum Seekers at US Border*, https://www.hrw.org/news/2021/03/05/mexico-abuses-against-asylum-seekers-us-border (Mar. 5, 2021).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

scheduled. Already, international media have reported on the death of a 15-year-old Haitian boy waiting for his CBP One appointment in Reynosa, Mexico.[53]

In addition to the risks of waiting in Mexico, the CBP One app stands to inherit other pitfalls of earlier Trump administration initiatives caused by inconsistencies across different ports of entry. Due to the differences in processing capacity across ports of entry, some ports will inevitably have more appointments, faster processing, or gain a reputation for easier access. Migrants will be motivated to travel between ports of entry, based on either real or rumored advantages at one port over another, exposing them to greater risk of harm along the way, simply to get an appointment at the port with the most appointments or fastest processing. Such movement was common under the Trump-era "metering" practice: an October 27, 2020 memo prepared by the DHS Office of Inspector General found that CBP agents themselves would tell migrants to travel to other ports where processing could take place more quickly.[54]

This movement of migrants to find the best port will create artificial and unnecessary inefficiencies in the asylum process, expose migrants to greater risk of harm in Mexico, and undermine the goal of equitable and efficient implementation of the rule at the southern border. These likely scenarios are not taken into account by the proposed rule.

The new system, then, introduces a number of elements that will cause implementation to go poorly at the ports of entry. It will create new waitlists and feed into makeshift communities of migrants forming around the ports of entry as they wait on the CBP One list, or wait to join that list. For those who cannot access CBP One, the rule does not lay out a process by which CBP will process their cases at the border, which may result in incentivizing crossing without permission. This will present a drain on CBP resources as well as asylum officers responsible for credible fear screening, while adding complexity to the process at a time when both agencies are suffering from understaffing. In short, implementation at the border is expected to result in many predictable problems.

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[53] Jaime Jiménez, "Haitian Youth Dies in Reynosa, Waiting to Enter the United States [Muere joven haitiano en Reynosa, esperaba ingresar a Estados Unidos]," *El Sol de Tampico*, https://www.elsoldetampico.com.mx/policiaca/muere-joven-haitiano-en-reynosa-esperaba-ingresar-a-estados-unidos-9552796.html (Jan. 31, 2023).

[54] DHS Office of Inspector General, OIG 21-02, *CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry*, 7, 10-12, https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf (Oct. 27, 2020).

(B) Implementation by asylum officers will be overly burdensome

In addition, the new system will add to the burden of asylum officers, who are also already grossly understaffed. Already, the agency is processing record numbers of credible fear interviews, and denials of this initial screening are being reviewed and overturned in record numbers by the immigration judges.[55] The Citizenship and Immigration Services (CIS) Ombudsman warned in its most recent annual report to Congress that using asylum officers in the credible fear interview (CFI) process has in turn reduced capacity to process affirmative applications and contributed to a growing backlog of affirmative applications.[56] By adding the additional burden of screening for applicability and exceptions to the new rule, the fear interviews can be expected to take even longer per case, and further contribute to growing backlogs.

(C) Implementation at the Immigration Court will go poorly

Far from furthering the agencies' goal of streamlining asylum processing and easing the burden on already-overtaxed immigration judges, the proposed regulation will overtax the Executive Office for Immigration Review (EOIR) at both the negative credible fear review (NCFR) and asylum merits stages.

### *1. Negative Credible Fear Adjudications*

The proposed rule presumes that the new process will cull potential asylum applicants from the pool, and will result in fewer asylum seekers presenting their claims to EOIR. To the extent that the new bar will result in more negative credible fear determinations it is true that the total number of people who are placed in removal proceedings will quite likely fall. But any increase in negative CFI determinations at the DHS level will result in a concurrent increase in NCFR proceedings. As such, EOIR will need to divert more immigration judges to adjudicate more credible fear review proceedings and those reviews will require significantly more administrative resources than do NCFR adjudications under the current regulatory scheme. EOIR will be overloaded on the front end, with more IJs expending more time on more negative credible fear review proceedings, particularly since the proposed rule adds significant additional fact-based determinations to the process.

The proposed rule lays out a complicated framework for assessing the applicability of the new bar to asylum eligibility in NCFR proceedings. It requires that the IJ first evaluate *de novo* whether the bar applies; that is, whether the applicant 1) had authorization to travel to the U.S. to seek parole pursuant to a DHS-authorized parole process; 2) presented at a port of entry at a pre-scheduled time and place unless it was not possible for them to access CPP One because of language, literacy, or technical barriers or an undefined "other ongoing and serious obstacle;" or 3) applied for and was denied asylum or an undefined "other protection" in a third country en route to the United States. That analysis will require significantly more factual development than

[55] TRAC Immigration, *Immigration Judge Decisions Overturning Asylum Officer Findings in Credible Fear Cases*, https://trac.syr.edu/reports/712/ (Mar. 14, 2023).

[56] U.S. Dep't Homeland Security, Citizenship and Immigration Services Ombudsman, *Annual Report 2022*, at 43, https://www.dhs.gov/sites/default/files/2022-07/2022%20CIS%20Ombudsman%20Report_verified_medium_0.pdf (June 30, 2022).

does the current NCFR scheme—a scheme in which none of the bars to asylum apply, and in which the relevant facts are limited to those relating to the applicant's fear of persecution or torture.

If the judge determines that the presumption applies, the rule further mandates that they engage in still more factual development to review *de novo* whether "exceptionally compelling circumstances exist" including (but not limited to) evidence that the applicant or their family 1) faced an acute medical emergency; 2) faced an imminent and extreme threat to life or safety such as rape, kidnapping, torture, or murder; or 3) was a victim of a severe form of trafficking in persons.

The proposed rule places the burden on the applicant to establish either the inapplicability of the presumption or an exception to that presumption by a preponderance of the evidence. But it does not define or provide guidance on many of the dispositive terms (such as "extreme threat to life or safety" or "acute medical emergency"), and does not articulate whether the "exceptionally compelling circumstance" is in any way tied to the applicant's failure to use CBP One—that is, it does not clarify whether the exceptionally compelling circumstance must be one which prevented the asylum seeker from scheduling an appointment or whether it may be an equitable factor which mitigates in favor of granting humanitarian protection.

And finally, the rule not only permits but demands that immigration judges look outside of the record of proceedings to rely on their own personal breadth of knowledge[57] to reach a conclusion. Not only requiring but actually mandating that IJs engage in speculation and guesswork is wholly contrary to the notion of an unbiased adjudicator, and will lead to disparate adjudications and confusion in the courts.

The rule would significantly expand the scope of NCFR proceedings, would place a tremendous burden on the IJs to develop the factual record, and would not only encourage but actually mandate that they engage in improper speculation and rely on facts outside of the record of proceedings in the course of their adjudications.

### *2. Asylum Adjudications*

The proposed rule lays out a complicated framework for assessing the applicability of the new bar to asylum eligibility to NCFR proceedings, but says not a word about substantive asylum adjudications. As such, it will likely engender confusion among the nation's IJs about whether the rule even applies once an applicant has been placed in removal proceedings or whether it is applicable only at the credible fear stage. This is because the text of the rule indicates that once an individual passes the fear interview with the higher standard applied, it indicates the person could then apply for asylum, withholding, or other humanitarian relief. The inclusion of asylum as a possibility at this stage is unexplained and will cause confusion. And assuming the bar does apply at the merits stage, the same issues discussed above—the lack of clarity as to many of the dispositive terms and overly complicated adjudicatory framework—will continue to plague adjudicators in the removal context.

[57] NPRM at 11752, proposed 8 CFR § 1208.13(c)(1), instructing that IJs in credible fear determinations "shall take into account the credibility of the statements made by the [noncitizen] in support of the [noncitizen]'s claim ***and such other facts as are known to the immigration judge***." (emphasis added).

Far from easing EOIR's burden, the proposed rule would front-end already overtaxed EOIR resources to credible fear review proceedings, and would significantly expand the IJ's duty to develop a factual record in both NCFR and removal proceedings. And the lack of clarity in the proposed rule as to the meaning of dispositive terms, the applicability to removal proceedings, and the scope of the IJ's authority to consider extra-record evidence will overtax the agency and lead to disparate adjudications.

## V. The proposed rule improperly makes asylum eligibility contingent on individuals' ability to use CBP One

With the proposed rule, CBP effectively has made the use of a mobile phone app—CBP One—a threshold requirement for asylum. The scheme under the proposed new rule establishes a rebuttable presumption of ineligibility for asylum for those who "present[ ] at a port of entry without a pre-scheduled time and place," i.e. an appointment, for inspection.[58] Based on language in a related document, CBP One is the "mechanism" for noncitizens to schedule a time to arrive at ports of entry at the southwest border.[59] Because asylum seekers now must submit information prior to arrival at a port of entry and receive an appointment time for their inspection, CBP One is, in practice, the only way asylum seekers can be processed at the border. To be clear, the proposed rule would not codify the use of CBP One because it references a "DHS scheduling system." However, DHS has clarified in related documents that CBP One will serve as the "DHS scheduling system."[60]

The new heavy reliance on CBP One to prepare an asylum seeker to present at the border is concerning given CBP One's poor track record during its roll out as part of the Title 42 exemption process.

In short, the app has barred thousands of individuals from seeking exemptions to restrictions under Title 42. Previously, international organizations had been tasked with entering information on behalf of individuals seeking Title 42 exemptions and helping them secure an "appointment" at ports of entry. Though CBP touted CBP One as a method an individual could use to enter information to secure appointments on their own, users immediately encountered myriad issues with CBP One that prohibited them from entering their information into the app and securing a time and place for inspection. While the proposed rule acknowledges some of CBP One's failures by offering limited exceptions to the app's use, the rule lacks guidance as to how these exceptions will be applied. Because the proposed rule addresses asylum eligibility rather than CBP officers' conduct at ports of entry, this lack of guidance is particularly troublesome as it leaves many questions unanswered relating to how asylum seekers, especially those without appointments, will be able to access ports of entry.

First, the agency's expansion of CBP One relied on the assumption that asylum seekers near the U.S.-Mexico border would have obtained, or be able to obtain, a mobile phone that could support the app's functions. However, those who arrive at the border seeking safety in the United States

[58] NPRM at 11750 (to be codified at 8 C.F.R. § 208.33(a)(ii)).
[59] NPRM at 11707 fn. 25, citing CBP, *Fact Sheet: Using CBP One to Schedule an Appointment*, https://www.cbp.gov/document/fact-sheets/cbp-one-fact-sheet-english (last modified Jan. 12, 2023).
[60] NPRM at 11750.

often lack the latest phone models that can support the app's functions.[61] Those who cannot afford a phone are shut out from the process unless they can procure assistance from non-governmental organizations.

Though DHS states in the proposed rule that CBP One will help minimize the influence of smugglers, the requirement that individuals have access to advanced technology to use CBP One has played into the hands of unscrupulous actors at the border. The Office Chief for the United Nations International Organization for Migration in Ciudad Juarez reported that people pose as lawyers or other professionals and offer vulnerable migrants assistance using CBP One in exchange for a fee.[62] The government's purported goal to use CBP One to create a safer way for asylum seekers to access the asylum process is thwarted when the new system is based on an assumption that users will have access to certain technology. When potential users lack a mobile phone that supports CBP One, they are vulnerable to exploitation.

Another issue users have encountered with CBP One is challenges in meeting the requirement that an individual submit a live photograph taken with their mobile phones while the app is operating at various stages of the data entry process. Some users have not been able to submit photos through the app because conditions such as bad lighting, poor internet connection, and even darker skin tones often lead to CBP One rejecting the photo.[63] When CBP One rejects a user's submission of a photo, it allows the user to try again. But multiple rejections cost users valuable time and prevent them from obtaining appointments during the limited number of timeslots at ports of entry on a given day. Though CBP has not informed the public about the number of appointments available at the participating ports of entry, reports suggest that all appointments are taken only minutes after they are released early in the morning. Thus, any delays in accessing CBP One are costly.[64]

Issues with internet connectivity also limit asylum seekers' access to CBP One. Registering as a CBP One user, and then using the app's functions, requires individuals to be connected to the internet for a prolonged time. Users must first create an account through login.gov, then navigate the app's identity verification process, enter extensive biographic information for themselves and their accompanying family members, and finally access CBP One's scheduling feature.[65] Throughout this process, if users are disconnected from their internet connection, the app prohibits them from advancing to the next step, delaying their submissions.[66] This particularly burdens immigrants at shelters, which often lack reliable internet, forcing some individuals to seek Wi-Fi signal in dangerous places. Families must wander into city centers controlled by

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[61] Bernd Debusmann Jr., "At US border, tech issues plague new migrant applications," *BBC News*, https://www.bbc.com/news/world-us-canada-64814095 (Mar. 8, 2023).
[62] Julian Resendiz, "IOM warns asylum-seekers of CBP One scams in Juarez," *Border Report*, https://www.borderreport.com/immigration/iom-warns-asylum-seekers-of-cbp-one-scams-in-juarez/ (Jan. 23, 2023).
[63] Eileen Sullivan and Steve Fisher, "At the End of a Hard Journey, Migrants Face Another: Navigating Bureaucracy," *The New York Times*, https://www.nytimes.com/2023/03/10/us/politics/migrants-asylum-biden-mexico.html (Mar. 10, 2023).
[64] *Id.*
[65] U.S. Dep't of Homeland Security, "Privacy Impact Assessment for the CBP OneTM Mobile Application," https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf, 1, 15-16 (Feb. 19, 2021; updated Jan. 19, 2023).
[66] *See* Arelis R. Hernández, "Desperate migrants seeking asylum face a new hurdle: Technology," *The Washington Post*, https://www.washingtonpost.com/nation/2023/03/11/asylum-seekers-mexico-border-app/ (Mar. 11, 2023).

cartels that "kidnap, rape and extort migrants" to find stable internet.[67] In one tragic case, a migrant was severely burned because he climbed onto the roof of a building and ran into low-hanging power lines looking for Wi-Fi signal to make an appointment.[68] Users also received error messages while they used the app that prevented them from completing the pre-registration process.[69] Many families state that CBP One simply does not work.[70]

These issues are aggravated by how difficult it is to navigate CBP One. Asylum seekers may not have the tech skills to be able to complete all the steps required to access CBP One. An unintelligible error message may cause some to simply abandon use of the app altogether. The limited number of appointments, coupled with CBP One's systemic issues, have led to families being separated at the border. The system requires asylum seekers to make appointments for each member of the family.[71] Individuals who can enter their information quicker are more likely to get one of the coveted inspection appointments. This issue has left families with the unenviable decision of either waiting an unknown amount of time for everyone to get an appointment, or allowing one family member to take an appointment while leaving their family behind with the hope those left in Mexico can later join them.[72]

Finally, CBP One is not accessible in the multiple languages spoken by asylum seekers. Until February 2023, CBP One was only available in English and Spanish. Media reports indicate that in February, CBP One became available in Haitian Creole.[73] Based on government data showing asylum seekers' nationalities,[74] many asylum seekers coming to the southern border speak many other languages other than English, Spanish, and Creole; for example, Russian and Turkish. Thus, thousands of asylum seekers could be deemed ineligible for asylum simply because they do not speak one of the languages in which CBP One is available.

The agency has implemented some positive changes to CBP One. For example, CBP One now allows individuals to submit their registration information separately from the time they schedule an inspection appointment, which can reduce the time that people need to be connected to the internet to get an appointment. Agency officials have also stated that the app was recently

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[67] Eileen Sullivan and Steve Fisher, "At the End of a Hard Journey, Migrants Face Another: Navigating Bureaucracy," *The New York Times*, https://www.nytimes.com/2023/03/10/us/politics/migrants-asylum-biden-mexico.html (Mar. 10, 2023).
[68] Arelis R. Hernández, "Desperate migrants seeking asylum face a new hurdle: Technology," *The Washington Post*, https://www.washingtonpost.com/nation/2023/03/11/asylum-seekers-mexico-border-app/ (Mar. 11, 2023).
[69] Regina Yurrita, "Asylum seekers met with issues from new CBP One app," *CBS8*, https://www.cbs8.com/article/news/local/asylum-seekers-met-with-issues-from-cbp-one-app/509-5f69579c-05e1-4999-a7a9-720eab0cc680 (Feb. 1, 2023).
[70] Corrie Boudreaux, "Hundreds of frustrated Venezuelan migrants block bridge linking El Paso and Juárez," *El Paso Matters*, https://elpasomatters.org/2023/03/12/el-paso-juarez-bridge-blocked-by-venezuelan-migrants/ (Mar. 12, 2023).
[71] Arelis R. Hernández, "Desperate migrants seeking asylum face a new hurdle: Technology," *The Washington Post*, https://www.washingtonpost.com/nation/2023/03/11/asylum-seekers-mexico-border-app/ (Mar. 11, 2023).
[72] *Id.*
[73] Melissa del Bosque, "Facial recognition bias frustrates Black asylum applicants to US, advocates say," *The Guardian*, https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias (Feb. 8, 2023).
[74] Dep't Homeland Security, *Annual Flow Report, Refugees and Asylum: 2021*, 9-11, https://www.dhs.gov/sites/default/files/2022-10/2022_0920_plcy_refugees_and_asylees_fy2021.pdf ( Sept. 2022).

updated to make groups of appointments available at the same time so families could stay together.[75]

The agency must continue to improve CBP One's functionality so asylum seekers can access inspection appointments and their safety does not hinge upon a technological glitch. Otherwise, the same issues that have plagued app users applying for Title 42 exemptions will prohibit people from accessing asylum processing at ports of entry under the scheme outlined in the proposed rule.

(A) CBP has failed to clearly explain how individuals may obtain exemptions to CBP One, and restrictive agency interpretations of eligibility for exemptions may lead to wrongful denials

The proposed rule recognizes that in some situations people cannot access CBP One. The rule purportedly exempts a person from using CBP One if they can demonstrate by a "preponderance of the evidence" that they cannot access the app "due to language barriers, illiteracy, significant technical issues, or other ongoing and serious obstacle."[76] Without examples of what information an individual would need to provide or how the information will be assessed, this standard has little meaning for asylum seekers. In addition, the proposed rule provides no details about whether asylum seekers will be able to simply present at ports of entry and, if they can, what the process will look like for people trying to demonstrate that an exemption to the use of CBP One should apply to them. The rule states that people seeking processing at ports of entry will need to appear at pre-scheduled times and places for their inspections, but DHS has not provided any information as to how people without an appointment will be able to access ports of entry. This is concerning, especially considering that many asylum seekers were turned back from ports of entry during the implementation of Title 42 or due to metering.

The rule also fails to explain how the exemptions' evidentiary standard—"preponderance of the evidence"—might be met to demonstrate language barriers, illiteracy, significant technical issues, or other "ongoing and serious" obstacles. For example, officers could ask asylum seekers about their ability to read or write, but it is unclear whether individuals' testimony about their own abilities will be sufficient to apply an illiteracy exemption. It is also unclear whether an individual's failure to indicate that they believe an exception applies to a CBP officer would be counted against them when an asylum officer reviews their case for applicability of the rule, as is sometimes the case for asylum seekers in other contexts. The rule also fails to define what type of technical difficulties qualify for the exemption and how individuals who encounter technical difficulties with CBP One will be able to document them to meet the standard of proof envisioned in the proposed rule.

This lack of clarity is particularly problematic as it relates to the language barrier exemption because it will lead to disparate outcomes depending on individuals' spoken languages. Assuming no other exception applies, Spanish speakers, English speakers, and Creole speakers

[75] Eileen Sullivan and Steve Fisher, "At the End of a Hard Journey, Migrants Face Another: Navigating Bureaucracy," *The New York Times*, https://www.nytimes.com/2023/03/10/us/politics/migrants-asylum-biden-mexico.html (Mar. 10, 2023).
[76] NPRM at 11750.

are required to use CBP One because the app is available in those languages. For asylum seekers who are not fluent in one of the languages in which the app is available, the rule provides no standards as to how officials will determine asylum seekers' language proficiency to justify an exemption. This could lead to erroneous denials when applicants speak limited English but may have trouble understanding the app's English-only directions.

(B) DHS's lack of publicly available guidance has contributed to asylum seekers' troubles using the app

The proposed rule does not outline a plan to educate intending asylum seekers about the app, even as media and advocacy groups question its workability. As DHS has expanded the uses for CBP One so individuals can submit their own information, the agency has failed to educate potential users about how to use the app and its potential risks. In contrast, the agency prepared detailed presentations for staff members of international organizations instructing them how CBP One worked as it recruited these staff members to help enter asylum seekers' information into the app to request exemptions to Title 42. A description of how CBP One's functions work can only be obtained by piecing together the limited information the agency has made available on the CBP One webpage, the information on agency fact sheets, and several Privacy Impact Assessments (PIA) published by DHS on different functions of the app. For example, while DHS published a PIA dedicated to CBP One, a more detailed explanation about how CBP uses some photographs submitted to the agency through the app is found in the Traveler Verification Service PIA. In short, the agency has not created a user-friendly instruction manual for CBP One or a one-stop repository where users can easily find information on the app.

This lack of information makes asylum seekers attempting to use CBP One vulnerable to fraud and scams. Migrants have complained that, in Ciudad Juárez for example, individuals have offered to help them navigate the app in exchange for money.[77] DHS officials have stated that the agency is continually improving CBP One.[78] However, the agency lacks a cohesive publicly available repository with all information related to CBP One, so it is unclear what changes the agency is making to the app and when those changes will be made. When this information is available, it is not effectively communicated to potential CBP One users.

(C) A mobile app cannot be the only way vulnerable populations can access asylum

The proposed rule channels all asylum seekers into one track: seeking asylum at ports of entry via the CBP One app (or mounting the evidentiary burden to show why they cannot access the app). Implementation of technology tools to make border processing more efficient and safer is likely inevitable, but for the technology to serve this laudable goal, it must work. Technology is not infallible, and it is seldom accessible to all, which is why a mobile phone app cannot be the only way vulnerable populations access their passage to safety. There should be other methods for presenting the same information users provide through CBP One, and asylum seekers should not be penalized for using alternatives to CBP One. All those who seek asylum should be able to

[77] Julian Resendiz, "IOM warns asylum-seekers of CBP One scams in Juárez," *Border Report*, https://www.borderreport.com/immigration/iom-warns-asylum-seekers-of-cbp-one-scams-in-juarez/ (Jan. 23, 2023).
[78] Sandra Sanchez, "DHS tweaks CBP One app after reports of family separation, agency says," *NewsNation*, https://www.newsnationnow.com/us-news/immigration/border-coverage/dhs-tweaks-cbp-one-app-after-reports-of-family-separations-agency-says (Mar. 6, 2023).

access processing at ports of entry. These alternatives must be robust realistic alternatives to CBP One and be widely publicized to ensure that asylum seekers can make an informed decision as to their preferred method for making appointments. Forcing individuals to use CBP One, while providing unworkable exemptions to the app's use, will inevitably bar individuals from seeking asylum at our borders. It also may lead to greater numbers of individuals attempting to reach the United States outside the ports of entry, undermining DHS's intended purpose for implementing this rule.

## VI. The proposed rule will exacerbate problems with access to counsel

The proposed rule does not adequately address concerns regarding meaningful access to counsel for asylum applicants. Notably missing from the Departments' preamble is *any* mention of access to counsel during the credible and reasonable fear interview process. The importance of legal representation cannot be overstated. A person who can retain an attorney is far more likely to succeed in immigration court.[79] A 2015 study showed that for immigrants who were never detained, those with lawyers were nearly five times more likely to obtain immigration relief than those without (63 percent of those with representation obtained relief versus 13 percent of those without representation).[80] The proposed rule allows asylum officers at the border to quickly determine whether a person can rebut the presumption of ineligibility or prove why they shouldn't be subject to the rule, with no explicit reference to access to counsel. Under the proposed procedure, the asylum officer first determines whether the asylum seeker has rebutted the presumption of asylum ineligibility.[81] If they have not rebutted the presumption, then they will have to show a higher bar of a "reasonable possibility" of persecution or torture.[82] Because of the fast-tracked nature of the proceedings that the proposed rule contemplates, it is unlikely that asylum seekers will have counsel throughout this period to help them support this higher threshold showing or to demonstrate that an exemption should apply. The May 2022 asylum processing rule is telling in this regard. Under proceedings subject to that new rule, only one percent of credible fear cases have had attorney representation.[83]

The proposed presumption of ineligibility is applied as a part of the credible fear screening interviews at the border, which is an element of the expedited removal process.[84] The expedited removal process has long been rife with concerns of a lack of due process and little access to

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[79] Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. Pa. L. Rev. 1, 48–59, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review (2015).
[80] American Immigration Council, *Access to Counsel in Immigration Court*, 2-3, https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf (Sept. 2016).
[81] 8 C.F.R. 208.33(a)(2).
[82] 8 CFR 1208.33(c)(2)(ii).
[83] U.S. Dep't of Homeland Security, "Asylum Processing Rule Cohort Report – December 2022," https://www.dhs.gov/immigration-statistics/special-reports/asylum-processing-rule-report (Jan. 6, 2023). (Tab: Credible Fear Claims, "Final or Most Recent Credible Fear Outcome by Attorney Representation." The available data demonstrates that 42 cases have attorney representation out of 3,741 cases completed under this pilot program, with four of these cases with attorney representation still pending completion.)
[84] *See* 208.33(c).

counsel.[85] The majority of asylum seekers navigate expedited removal without an attorney. Now, under the proposed rule, they must mount a case, likely without an attorney, to make a case for one of the exceptions to the proposed rule. Without counsel, they will likely struggle to provide the evidentiary support needed to clear that burden, nor will they have the requisite knowledge of asylum procedures to make a claim for relief. The United Nations High Commissioner for Refugees (UNHCR) has specifically recommended that "exclusion" decisions, which would include decisions such as those made on the applicability of the transit ban, not be made in accelerated procedures such as expedited removal.[86]

The proposed rule will accelerate the already fast-tracked removal proceedings in a way that will exacerbate barriers to counsel. Data collected from immigration cases that are part of another recent initiative to fast-track immigration proceedings, known as the "Dedicated Docket," makes clear that accessing counsel takes time.[87] In May 2021, the U.S. Department of Justice (DOJ) and DHS announced the Dedicated Docket initiative, which places certain families who crossed between ports of entry on or after May 28, 2021 into fast-tracked removal proceedings where an IJ is generally expected to issue a decision within 300 days of the master calendar hearing.[88] In the first seven months of the Dedicated Docket initiative, only 15.5 percent of asylum seekers had counsel to represent them in their proceedings, compared to 91.1 percent of asylum seekers whose cases were decided over the same period, virtually all of whom were not in fast-tracked proceedings.[89] Of those who had been on the Dedicated Docket for seven months—more than three times as long as the IFR's timeline (60 days) for issuing an asylum decision—only 45 percent had an attorney to represent them in court.[90] A total of 1,557 asylum seekers on the Dedicated Docket have received deportation orders so far. Of these, only 75—just 4.7 percent—had representation. By contrast, since the start of the Dedicated Docket program just 13 people—all represented—have been granted asylum or another form of lawful relief from deportation.[91] These statistics are particularly troubling given the administration's assurances that families placed on the Dedicated Docket would have time, despite the expedited schedule, to access representation.[92]

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[85] *See, e.g.*, Daniel Kanstroom, *Expedited Removal and Due Process: "A Testing Crucible of Basic Principle" in the Time of Trump*, 75 Wash. & Lee L. Rev. 1323, 1356 (2018); Stephen Manning and Kari Hong, *Getting It Righted: Access to Counsel in Rapid Removals*, 101 Marq. L. Rev. 673, 692 (2018).

[86] UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, III. Procedural Issues, 31 at p. 8-9, https://www.refworld.org/docid/3f5857684.html (2003).

[87] TRAC Immigration, Unrepresented Families Seeking Asylum on "Dedicated Docket" Ordered Deported by Immigration Courts, https://trac.syr.edu/immigration/reports/674/#f4 (Jan. 13, 2022) [hereinafter "TRAC Dedicated Docket Report"].

[88] U.S. Dep't of Justice, *DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings*, https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings (May 28, 2021).

[89] *See* TRAC Dedicated Docket Report.

[90] *Id.*

[91] *Id.*

[92] U.S. Dep't of Justice, *DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings*,

These concerns relating to the Dedicated Docket will only be amplified by the addition of a new evaluation of a rebuttable presumption against asylum eligibility. Those individuals subject to the rebuttable presumption who pass the heightened "significant possibility" screening standard applied by the proposed rule and are placed on the Dedicated Docket will find it even more difficult to obtain counsel, as they will have to argue a case for withholding of removal while simultaneously attempting to rebut the presumption a second time. In essence, the proposed rule will further compound the already significant problems with access to counsel caused by the Dedicated Docket.

Furthermore, it can only be presumed that most immigrants going through the new rebuttable-presumption credible fear process will be detained. Among detained immigrants, people with lawyers were twice as likely to obtain relief than those without lawyers (49 percent of those with representation are able to obtain relief whereas only 23 percent of those without representation are able to obtain relief).[93] Notably, non-detained immigrants are much more likely to have representation, with two-thirds of them having counsel compared to only 14 percent of detained immigrants.[94] Recently arrived asylum seekers—who often have added vulnerabilities, including trauma, language barriers, and a lack of familiarity with the U.S. legal system—are especially dependent on counsel to understand and navigate our evolving and highly complex U.S. asylum laws.

In sum, navigating the process outlined in the proposed rule, with its added burdens, imposes new complexity to an asylum system that is already impenetrable to pro se individuals. Navigating that system without the aid of counsel will have devastating consequences for those fleeing persecution who are making a protection-based claim. The proposed rule fails to address these challenges and the critical need for access to counsel.

## VII. Flawed data is at the heart of the justification for this proposed rule

There is a concerning and deeply flawed assumption within the rationale of the proposed rule that an alleged disparity between credible fear grants and the number of IJ grants of relief justifies the issuance of this proposed rule. The proposed rule asserts that "a full 83 percent of the people who were subject to ER and claimed fear from 2014 to 2019 were referred to an IJ for section 240 proceedings, but only 15 percent of those cases that were completed were granted asylum or some other form of protection."[95]

However, this 15 percent figure is misleading. The choice of the denominator of "total case completions" in getting to this figure is problematic and artificially deflates this number. DHS Office of Immigration Statistics (OIS) numbers divide asylum grants by total case completions, which generally include cases that have been abandoned, not adjudicated, withdrawn, and

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https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings (May 28, 2021).

[93] *Supra* note 79.

[94] *Supra* note 79.

[95] NPRM at 11716.

administratively closed.[96] Including these "other closures" in the math deflates the overall grant rate, as many of those asylum applications may well have been found to be meritorious if litigated to their conclusion. The proposed rule cites OIS analysis which is not publicly available. However, available EOIR data on asylum decisions originating with a credible fear claim shows that when dividing the number of grants by the total of grants and denials (i.e., only looking at those cases which are adjudicated on the merits), the asylum grant rate rises to 36 percent.[97] Theoretically, this number would be higher if it included withholding of removal and Convention Against Torture (CAT) cases, which the 15 percent number includes.

The administration acknowledges this methodological choice. Tucked in a footnote within the proposed rule is an acknowledgment that the 15 percent number includes case completions that were not decided on the merits, stating that "OIS estimates that 28 percent of cases decided *on their merits* are grants of relief" (emphasis added).[98] Choosing to uplift the lower 15 percent number, which includes cases not decided on their merits in its math, is not only misleading but misrepresents the ratio of asylum seekers who present at our southern border with a meritorious claim of persecution.

Whatever methodological choices are made in crunching numbers, the success rate in seeking relief from persecution should have no impact on meaningful access to asylum. The consequences of an asylum seeker being returned to persecution are simply too dire to be distilled to a number in an Excel chart.

## VIII. Relying on "legal pathways" disparately harms Black, Brown, and Indigenous asylum seekers

The proposed rule applies only to people who seek protection at the southern border, and as a result, specifically impacts individuals who do not have access to a passport or a visa. An asylum seeker may not have access to a passport for any number of reasons, including affordability, bureaucratic instability, and that it would need to be issued by the government that may be persecuting them. Indeed, it is not uncommon for an individual facing persecution due to being critical of their government to have their passport revoked.[99] If a passport is in hand, an asylum

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[96] NPRM at note 97; EOIR, "Executive Office for Immigration Review Adjudication Statistics: Asylum Decisions and Filing Rates in Cases Originating with a Credible Fear Claim," https://www.justice.gov/eoir/page/file/1062976/download (Jan. 16, 2023).

[97] EOIR, "Executive Office for Immigration Review Adjudication Statistics: Asylum Decisions and Filing Rates in Cases Originating with a Credible Fear Claim," https://www.justice.gov/eoir/page/file/1062976/download (Jan. 16, 2023). Period of time: 2014 to 2019.

[98] NPRM at note 97.

[99] *See e.g.*, Melissa Medina Márquez, *Adding to the Stress of Emigration from Venezuela: Passports hard to come by*, Venezuela Politics and Human Rights, https://www.venezuelablog.org/migration-venezuela-passport-inefficiencies/#:~:text=A%20major%20factor%20is%20the,follow%2Dup%20after%20the%20first (Apr. 19, 2018) (stating "in early 2017 several opposition politicians and public figures reported having their passports seized or their migration procedures canceled."); Charlie Campbell, "The Thai Junta Revokes a Famed Academic's Passport in Its Crackdown on Dissidents," *Time*, https://time.com/2971785/thailand-junta-pavin-chachavalpongpun-passport/ (July 10, 2014); *The World*, "This Egyptian musician's passport was revoked for his political songs. He still can't wait to go home again," https://theworld.org/stories/2019-01-10/egyptian-musicians-passport-was-revoked-his-political-songs-he-still-cant-wait-go (Jan. 10, 2019); *Radio Free Europe Radio Liberty*, "Iran Revokes Passports Of Celebrities Who Supported

seeker is not likely to have access to a visa in a timely manner. While visa wait times vary by post, a tourist visa requiring an interview in Guatemala City will have a 371-day wait as of writing.[100] Complicating this is the fact that someone is unlikely to get a tourist visa if they intend to abandon their foreign residence to seek asylum.[101] For individuals who cannot access a passport and visa and are not one of the specific and limited countries with a parole program, the southern border is their only avenue to asylum in the United States.

The availability of lawful pathways to a potential asylum seeker is more narrow for individuals from predominantly Black countries. The Department of State has limited public statistics available and does not state specific reasons for denying visas, but reports show disproportionate denials for African countries. Professionals in international education, for example, report that "[d]enial rates for US F1 visas reached 'a new high' in Nigeria in 2022, with around two in three students being rejected" and "denial rates for students in Ghana and other Sub-Saharan regions are trending in a similar fashion."[102] This problem is not a new one. A published author was denied a visa to attend a prestigious literary residency.[103] A University of Southern California attempted to hold an Africa Trade Meeting without any Africans after losing "about 100 attendees, including speakers and government officials [due to visa denials]. The countries affected included Sierra Leone, Guinea, Ghana, Nigeria, Ethiopia and South Africa."[104] While AILA has heard reports of perceived higher denial rates of visas from its members, a 30-day comment period is not a sufficient length of time to adequately survey more than 16,000 members.

The visa denials are significant because they leave only the Southern border open to asylum seekers from these countries. This is reflected in the change in migrant flows, as according to a Migrant Policy Institute (MPI) report, Africans are increasingly joining the migrant flows to the southern land border of the United States.[105]

Someone who experiences persecution should not have to settle for the first country they transit through if this will mean facing discrimination on account of their race. According to MPI, most Africans "enter the Americas through Brazil or Ecuador," and experiences with racism begin then, "making it difficult for those who may otherwise intend to remain, at least in the short term,

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Nationwide Protests," https://www.rferl.org/a/iran-bans-celebrities-leaving-country-support-protests/32074157.html (Oct. 10, 2022).

[100] U.S. Dep't of State, "Global Visa Wait Times," https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/global-visa-wait-times.html (Mar. 9, 2023).

[101] 9 FAM 402.2-2(B), https://fam.state.gov/fam/09fam/09fam040202.html.

[102] Maureen Manning, "US visa denials in Sub-Saharan region concern stakeholders," *The Pie News*, https://thepienews.com/news/us-visa-denials-in-sub-saharan-region-concern-stakeholders/ (Jan. 18, 2023).

[103] Nkiacha Atemnkeng, "'Try again next time': my three visa rejections," *The Guardian*, https://www.theguardian.com/world/2020/oct/29/try-again-next-time-my-three-visa-rejections (Oct. 29, 2020).

[104] Michelle Quinn, "Africa Trade Meeting Has No Africans After US Visa Denials," *Voice of America*, https://www.voanews.com/a/african-trade-conference-canceled-after-visas-denied-african-delegates/3770907.html (Mar. 17, 2017).

[105] Caitlyn Yates and Jesica Bolter, *African Migration through the Americas: Drivers, Routes, and Policy Responses*, Migration Policy Institute, https://www.migrationpolicy.org/research/african-migration-through-americas (Oct. 2021).

to secure housing and good jobs, and leading to violence and harassment for some."[106] The Department of State Country Reports on Human Rights Practices for both of these countries acknowledge a high level of racism.[107] Both of these countries also signed the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, and under the proposed rule, African arrivals would need to apply in these countries.[108] The unsuitability of the proposed alternative countries is discussed further below.

As discussed, requiring asylum seekers to use CBP One to seek asylum at the border disparately harms Black asylum seekers due to the challenges recognizing Black faces.[109] CBP One also has accessibility issues for individuals who are illiterate in a language other than English, Spanish, and Haitian Creole, which will include many native speakers of indigenous languages. Indigenous languages such as Mam, K'iche' and Q'anjob'al have become increasingly common among asylum seekers in recent years and should not be discounted.[110]

In short, this proposed rule is significantly out of line with the Biden administration's recent executive order stating a "commitment to advancing equity for all . . . and addressing systemic racism in our Nation's policies and programs."[111]

## IX. 30 days is insufficient time to prepare a comment on a rule of this magnitude

The Biden administration has provided only 30 days for the public to comment on the proposed rule, effectively denying the public the right to meaningfully comment under the notice and comment rulemaking procedures required by the Administrative Procedure Act. This timeframe is insufficient for a sweeping proposed rule that would deny many people access to asylum in violation of U.S. law. On March 1, 2023, 172 organizations wrote to the agencies urging them to provide at least 60 days to comment on the complex 153-page rule that would have enormous implications for asylum access at the border and in USCIS and immigration court asylum proceedings.[112]

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[106] *Id.* at 2.
[107] U.S. Dep't of State, *2021 Country Reports on Human Rights Practices: Brazil*, https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/brazil/, at 32 ("Despite this high representation within the general population, darker-skinned citizens, particularly Afro-Brazilians, encountered discrimination."); U.S. Dep't of State, *2021 Country Reports on Human Rights Practices: Ecuador*, https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/ecuador/ at 27, ("Afro-Ecuadorian citizens . . . suffered pervasive discrimination, particularly regarding educational and economic opportunity.").
[108] UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*.
[109] Melissa del Bosque, "Facial recognition bias frustrates Black asylum applicants to US, advocates say," *The Guardian* (Feb. 8, 2023).
[110] Jennifer Medina, "Anyone Speak K'iche' or Mam? Immigration Courts Overwhelmed by Indigenous Languages," *New York Times*, https://www.nytimes.com/2019/03/19/us/translators-border-wall-immigration.html (Mar. 19, 2019).
[111] Exec. Order No. 14091, 88 Fed. Reg. 10825, https://www.federalregister.gov/documents/2023/02/22/2023-03779/further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal (Feb. 16, 2023).
[112] Letter from 172 organizations to Attorney General Merrick Garland, Secretary Alejandro Mayorkas, et. al., https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2023-03/Biden%20Asylum%20Ban%20-%20Extension%20letter%20to%2030-days%20comment%20period%20FINAL.pdf (Mar. 1, 2023).

Executive Orders 12866 and 13563 state that agencies should generally provide at least 60 days for the public to comment on proposed regulations.[113] A minimum of 60 days is especially critical given the rule's attempt to ban asylum for many refugees in violation of U.S. law and international commitments and return many to death, torture, and violence. While the agencies cite the termination of the Title 42 policy in May 2023 as a justification to curtail the public's right to comment on the proposed rule, this reasoning is specious especially given that the administration itself sought to formally end Title 42 nearly a year ago and has had ample time to prepare for the end of the policy.

Providing a 30-day comment period for the proposed asylum ban is reminiscent of Trump administration practices, when agencies routinely provided 30-day comment periods on sweeping asylum rules, leaving the public little time to meaningfully assess and respond to proposed rules.

For example, while AILA has heard reports of perceived higher denial rates of visas from our members, a 30-day comment period is not a sufficient length of time to adequately survey our more than 16,000 members, evaluate their responses, and incorporate them into a comment. This is indicative of the many challenges presented by having a shortened comment period.

Furthermore, on March 23, we learned that the API technology on Regulations.gov had been malfunctioning, causing an unknown number of public comments to be discarded when posted via third-party software. In a conversation on March 23, a representative from Regulations.gov indicated that the issue began on Monday, March 20. According to the representative, as of Thursday afternoon, March 23, there was no timeline for a resolution and no plan for accepting the public comments that failed to post to Regulations.gov. This technical outage effectively shortened the 30-day period further and apparently discarded public comments without the knowledge of the commenters.

## X. The standards set to bypass the sunset date set up the proposed rule to be continued indefinitely

The structure created within this proposed rule would apply from the date of the termination of the Title 42 public health order (May 11, 2023) until 24 months after the rule's effective date.[114] After the sunset date, the proposed rule would continue to apply to the asylum seekers who entered under this rule.[115] If the proposed rule is effective as scheduled, the sunset date will be a few months into either the current administration's second term or a few months into a new administration.

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[113] Exec. Order 12866, 58 Fed. Reg. 190, https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf (Sep. 30, 1993) (stating ". . . each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days."); Exec. Order 13563, 76 Fed. Reg. 3821, 3822, https://www.federalregister.gov/documents/2011/01/21/2011-1385/improving-regulation-and-regulatory-review (Jan. 18, 2011) (stating "[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.").

[114] NPRM at 11708-08.

[115] NPRM at 11726.

It is highly problematic that the standard the proposed rule states for supporting the determination that the sunset provision should be extended sets up a current or future administration to extend the proposed rule indefinitely. The proposed rule states "if migration remains or is expected to remain at a sustained or heightened level, despite the Departments' actions, that could support a determination that the sunset provision should be lifted or extended."[116] Notably, there is no definition of "sustained" or "heightened" levels.

Without a concrete definition of what is considered "sustained" or "heightened," the sunset clause grants DHS effectively unbounded discretion to continue using the heightened standard set forth in the proposed rule. Every modern administration has looked to the southern border and seen a problem thought to be sustained or heightened.[117] This is part of a larger problem in addressing border security more broadly: a lack of concrete standards and metrics. In 2011, researchers observed DHS "has never clearly defined what border security means in practice," an observation that has withstood the test of time.[118] Without clear definitions of what constitutes "sustained," "heightened," or a border "emergency," this administration or subsequent ones can claim sustained or heightened numbers indefinitely.

## XI. Conclusion

AILA and the Council urge the administration not to move forward with this proposed rule and to rescind the proposed rule. The consequences of this proposed rule are too grave to do otherwise.

For any questions, please reach out to Amy Grenier at agrenier@aila.org or Rebekah Wolf at rwolf@immcouncil.org.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL

Attachments (4): Select Citations Sources

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[116] NPRM at 11727.

[117] Notably, when issuing the Trump administration's asylum ban in 2018, President Trump observed, "[f]ailing to take immediate action to stem the mass migration the United States is currently experiencing and anticipating would only encourage additional mass unlawful migration and further overwhelming of the system." President Donald Trump, "Read Trump's Proclamation Targeting the Caravan and Asylum Seekers," *New York Times*, https://www.nytimes.com/2018/11/09/us/politics/trump-proclamation-caravan-asylum.html (Nov. 9, 2018); The Obama administration faced an "influx of children" requiring a "surge" in resources in 2014. The White House Office of the Press Secretary, *The Obama Administration's Government-Wide Response to Influx of Central American Migrants at the Southwest Border*, https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/obama-administration-s-government-wide-response-influx-central-american- (Aug. 1, 2014); President George W. Bush noted in a 2006 speech "we do not yet have full control of the border." George W. Bush, "Transcript: Bush's Speech on Immigration," *New York Times*, https://www.nytimes.com/2006/05/15/washington/15text-bush.html (May 15, 2006).

[118] Danilo Zak, *What Makes a Border Secure? Building a Healthier Border Dialogue*, National Immigration Forum, https://immigrationforum.org/article/what-makes-a-border-secure-building-a-healthier-border-dialogue/ (Apr. 16, 2022), *citing* Edward Alden and Bryan Roberts, "Are U.S. Borders Secure? Why We Don't Know, and How to Find Out," *Foreign Affairs*, 90, 4 (2011): 19–26, http://www.jstor.org/stable/23039603 (2011).