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Re: Comment in Opposition to Proposed Rule by the Department of Homeland Security and the Executive Office for Immigration Review entitled *Circumvention of Lawful Pathways*, RIN: 1125-AB26 / 1615-AC83 / Docket No: USCIS 2022-0016 / A.G. Order No. 5605-2023

Dear Acting Director Delgado and Assistant Director Reid:

The Harvard Immigration & Refugee Clinical Program ("HIRCP") and the Harvard Law School Immigration Project ("HIP") submit the following comment to the Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS"), the Department of Justice ("DOJ"), and the Executive Office for Immigration Review ("EOIR") ("the agencies") in response and opposition to the above-referenced Notice of Proposed Rulemaking ("NPRM" or "the Proposed Rule") issued by the agencies on February 23, 2023. HIRCP and HIP strongly oppose the Proposed Rule, which, if implemented, would ban many refugees from asylum protection in the United States, prevent current and future asylum seekers from accessing protection to which they are entitled under domestic and international law, and result in the return of many refugees to persecution or torture. HIRCP and HIP strongly urge the agencies to withdraw the Proposed Rule in its entirety.

I. Statement of Interest

HIRCP is one of the oldest clinical programs in the country that focuses on the advancement of immigrants' rights while teaching students critical lawyering skills. HIRCP includes two distinct clinics: (1) the Immigration & Refugee Advocacy Clinic, which represents clients seeking humanitarian protections in a range of different fora, including administrative tribunals and federal appellate courts, and (2) the Crimmigration Clinic, which focuses on the growing intersection of criminal law and immigration law. HIRCP faculty and staff also teach a range of courses concerning immigration policy, refugee law and trauma, the intersection of immigration law and labor law, and the intersection of criminal law and immigration law. HIRCP faculty and staff regularly publish scholarship concerning asylum adjudication, due process protections in removal proceedings, trauma, crimmigration, and immigration detention.

HIRCP has worked with thousands of immigrants and refugees since its founding in 1984. Its advocacy includes the representation of individual applicants for asylum and related relief and the development of theories and policy relating to asylum law, crimmigration, and immigrants' rights. HIRCP has an interest in the application and development of U.S. asylum law to ensure that the claims of individuals seeking asylum and related relief receive fair and proper consideration.

HIP is a student-practice organization under the supervision of HIRCP, which provides law students with the opportunity to gain practical, hands-on legal experience. HIP promotes policy reform and engages in community outreach. HIRCP and HIP regularly partner to offer Know Your Rights presentations and advice and counsel legal clinics throughout the greater Boston community.

If implemented, the Proposed Rule would jeopardize the lives and safety of countless refugees and asylum seekers eligible for protection and would contravene the protections the United States is required to provide under domestic and international law to individuals who fear return to persecution or torture. We urge the agencies to withdraw their current proposal immediately.

In addition to our concerns about the substance of the Proposed Rule, HIRCP and HIP also object to the 30-day comment period. Thirty days is insufficient for the public to have a meaningful opportunity to comment, particularly considering the Proposed Rule's scope and complexity. With more time, HIRCP and HIP would have been able to collect data about the likely effect of the Proposed Rule on our clients and/or similarly-situated refugees and asylum seekers. The agencies have not identified any compelling reason for departing from the more typical comment period of 60 days. If the agencies do not withdraw the Proposed Rules in their entirety, HIRCP and HIP request that the agencies extend the comment period or establish a second comment period.

II. The Proposed Rule Would Undo Key Asylum Protections Fundamental to Domestic and International Law Without Providing the Public with Adequate Time to Comment.

The Proposed Rule would impose a new, sweeping bar to asylum for individuals arriving at the U.S. southwest border. This Proposed Rule, if implemented, would constitute a foundational shift in the U.S. asylum system, restricting access to asylum protection for bona fide asylum seekers fleeing persecution. Yet, the Biden Administration has failed to provide the public with sufficient time to comment on this overhaul of the U.S. asylum system.

The Proposed Rule establishes a presumptive bar against asylum based on an asylum seeker's manner of entry and whether they have applied for asylum in transit countries. Specifically, the Proposed Rule provides that asylum seekers arriving at the southwest border without permission to enter are presumed to be ineligible for asylum if they did not seek and receive a denial of asylum in a transit country, and/or if they entered between ports of entry or at a port of entry without having obtained an appointment via a mobile application called CBP One ("CBP One app"). Asylum seekers subject to the Proposed Rule must rebut this presumption by demonstrating that they meet one of three per se rebuttal grounds—i.e., an acute medical emergency, imminent and extreme threat to their life or safety, or that they were a trafficking victim—or that other "exceptionally compelling circumstances" warrant an exception. Those who fail to rebut the presumption will be deported unless they can meet the heightened standard of proof for withholding of removing or protection under the U.N. Convention Against Torture ("CAT"). Even if individuals can meet this heightened standard, withholding of removal and CAT protection are lesser forms of relief that, unlike asylum, provide no path to citizenship, expose individuals to the ongoing risk of removal and refoulement to harm, and do not allow for family reunification. As set forth below, foreclosing asylum seekers from critical protection stands in direct conflict with both domestic and international law.

The notice and comment requirement is intended to provide the public with a meaningful opportunity to participate in rule making.[1] To that end, most rules "should include a comment period of not less than 60 days."[2] In this case, however, the agencies have provided only 30 days for the public to provide comment, and they have done so over the objection of more than 170 national, state, and local organizations, including HIRCP.[3]

The agencies have provided no compelling reason to truncate the public comment period in this way. The justification provided in the Proposed Rule largely relies on the anticipated end of the Title 42 border expulsion policy on May 11, 2023, when the federal public health emergency declared for COVID-19 is set to expire.[4] This justification makes little sense, however, given that the Biden Administration itself formally sought to end the Title 42 policy nearly one year ago in April 2022,[5] and DHS announced publicly its efforts to prepare for the policy to end that same month, which did not include the Proposed Rule at issue.[6] Moreover, given the complexity of the rule and the extent of changes to the asylum system it proposes, 30 days is an insufficient period for the public to comment.

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[1] *See, e.g.*, *Idaho Farm Bureau Fed. v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) ("The purpose of the notice and comment requirement is to provide for meaningful public participation in the rule-making process.").

[2] Exec. Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993); *see also* Exec. Order 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (same).

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

[4] *See* Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11705 (Feb. 23, 2023) (to be codified at 8 C.F.R. pt. 208, pt 1208); *see also* Dep't of Health and Hum. Serv., Fact Sheet: COVID-19 Public Health Emergency Transition Roadmap (Feb. 9, 2023), https://www.hhs.gov/about/news/2023/02/09/fact-sheet-covid-19-public-health-emergency-transition-roadmap.html.

[5] Centers for Disease Control and Prevention, *CDC Public Health Determination and Termination of Title 42 Order* (Apr. 1, 2022), https://www.cdc.gov/media/releases/2022/s0401-title-42.html.

[6] U.S. Customs and Border Protection, *Statement of U.S. Customs and Border Protection Commissioner Chris Magnus Concerning Title 42* (Apr. 4, 2022), https://www.cbp.gov/newsroom/speeches-and-statements/statement-us-customs-and-border-protection-commissioner-chris.

III. The Manner of Entry Requirement Under the Proposed Rule Violates Domestic and International Law.

The Proposed Rule unlawfully bars refugees from accessing asylum based on their manner of entry, which the NPRM refers to as the "lawful pathways condition." Yet, this restriction violates both international and domestic law. Indeed, any consideration of the manner of entry is generally inconsistent with the plain language of the Immigration and Nationality Act ("INA"), the 1951 Refugee Convention Relating to the Status of Refugees ("1951 Convention" or "Refugee Convention"), and the 1967 Protocol Relating to the Status of Refugees ("1967 Protocol").[7]

The Proposed Rule contradicts Congress's clear dictum in 8 U.S.C. § 1158(a)(1) that "*any* [noncitizen] 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 such [noncitizen]'s status*, may apply for asylum."[8] The plain language of the statute thus demonstrates Congress' clear intent that a person's ability to seek refuge in the United States should not be undermined by their manner of entry. The Proposed Rule contravenes this unambiguous statutory language.

The Proposed Rule also violates U.S. obligations under international law, which the United States incorporated into domestic law through the Refugee Act of 1980. In passing the Refugee Act, Congress was clear that its intent was to codify the 1967 Protocol, which it signed and ratified in 1968.[9] Under the 1951 Convention and 1967 Protocol, refugees have a fundamental right to seek asylum regardless of their manner of entry.[10]

Article 31 of the 1951 Convention expressly bars a country from penalizing refugees based on "illegal entry." Yet, the Proposed Rule's "lawful pathways condition" would render an individual presumptively ineligible for asylum—in direct violation of Article 31—based on whether they comply with the new manner of entry requirements. This provision impermissibly penalizes asylum seekers, due to resource limitations and technological difficulties if they are unable to access a smartphone to use the CBP One app.[11]

The Proposed Rule also contravenes the duty of *non-refoulement* that lies at the core of international and domestic law. The 1951 Convention imposes broad obligations on states not to refoul an asylum seeker "in any manner whatsoever" to territories where they may face danger to their life or freedom.[12] This obligation prohibits both direct refoulement to an asylum seeker's home country, as well as indirect refoulement, caused by expelling refugees to countries where

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[7] *See* 1951 Convention Relating to the Status of Refugees, Art. 31 (prohibiting penalizing refugees for irregular manner of entry).

[8] 8 U.S.C. § 1158(a)(1) (emphasis added).

[9] *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees…to which the United States acceded in 1968[.]").

[10] *See* Refugee Convention, Art. 31 (1), *supra* (specifically barring states from penalizing asylum seekers "on account of their illegal entry or presence"); Convention and Protocol Relating to the Status of Refugees, Introductory Note by the Office of the United Nations High Commissioner for Refugees (emphasizing that "refugees should not be penalized for their illegal entry or stay. This recognizes that the seeking of asylum can require refugees to breach immigration rules"); Brief for U.N. High Comm'r for Refugees as Amicus Curiae Supporting Plaintiffs, *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018), *aff'd*, 950 F.3d 1242 (9th Cir. 2020) (reiterating that "States may not condition access to asylum procedures on regular entry").

[11] *See infra* Section IX.

[12] Refugee Convention, Art. 33(1), *supra*.

they face a subsequent risk of refoulement to their home countries.[13] Many face harm in transit countries, similar to the persecution suffered or feared in their home countries, and many transit countries do not provide fair, clear, and accessible asylum processes. Denying individuals the right to seek asylum based on transit through third countries thus places the lives of asylum seekers at risk.

Whether through direct or indirect refoulement, the Proposed Rule's presumptive bar to asylum based on manner of entry will cause the United States to violate its duty of *non-refoulement.* Asylum seekers who are unable to comply with the new manner of entry requirements will be presumed ineligible for asylum, and if unable to rebut the presumption or meet the heightened standard for withholding of removal or CAT protection, asylum seekers will be deported and refouled either to their home country or to third countries where they may face further risk to their life or freedom. The exceptions the agencies tout in the Proposed Rule will not effectively prevent this outcome, and the new rules would thus likely lead to breach of the duty of *non-refoulement.*

IV. The Proposed Rule Violates the Immigration and Nationality Act by Penalizing Asylum Seekers for Failing to Seek Protection in Countries of Transit.

The 1980 Refugee Act arose out of lengthy, bipartisan deliberations in which asylum was understood to be "a cherished thing."[14] Indeed, testimony before the House Foreign Relations Committee prior to the passage of the Act recognized that people fleeing persecution seek refuge through whatever means available to them and "one way or another, arrive on our shores" looking for safety.[15] The penalties imposed on asylum seekers in the Proposed Rule for failing to seek protection in countries of transit directly conflict with that statutory commitment to protect those fleeing persecution and provide them access to asylum, regardless of how they arrive at the border.[16]

In keeping with the humanitarian purpose of the 1980 Refugee Act, Congress carved out only two circumstances in the INA in which an asylum seeker's ability to seek refuge in another country precludes a grant of asylum in the United States: (1) the "safe third country" provision, which bars a noncitizen from applying for asylum if there is "a bilateral or multilateral agreement" between the United States and the third country, and the noncitizen would be free from persecution and would be eligible for a "full and fair procedure" to determine asylum eligibility in the third country;[17] and (2) the firm resettlement provision, which precludes asylum eligibility where a noncitizen was permanently resettled in another country where they were free from persecution prior to coming to the United States.[18] Together, these two narrow provisions reflect a clear legislative intent: asylum should not be restricted unless it is clear that the noncitizen has protection from persecution and legal status in another country.

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[13] *See Hirsi Jamaa v. Italy*, 2012-II Eur. Ct. H.R. ¶34 (2012) (framing *refoulement* as an act that can happen "directly or indirectly"); *see id.* ¶¶10, 11, 34, 143 (describing Libya's deportation of asylum seekers following Italy's "interception and push-back" of non-citizens as "chain *refoulements*").

[14] *See Proposals to Reduce Illegal Immigration and Control Costs to Taxpayers: Hearing on S. 269 Before the S. Comm. on the Judiciary*, 104th Cong. 23 (1995) (statement of Sen. Alan K. Simpson).

[15] *The Refugee Act of 1979: Hearing on H.R. 2816 Before the H. Subcomm. on Int'l Operations, Comm. on Foreign Affairs*, 96th Cong. 72 (1979) (statement of David A. Martin).

[16] 8 U.S.C. § 1158(a)(1) (providing that provides that "[a]ny [noncitizen] . . . who arrives in the United States (whether or not at a designated port of arrival) . . . may apply for asylum").

[17] 8 U.S.C. § 1158(a)(2)(A).

[18] 8 U.S.C. § 1158(b)(2)(A); 8 C.F.R. § 208.15.

Since any "additional limitations and conditions" imposed on asylum eligibility must be "consistent with" the INA, any transit-based measure cannot violate the underlying concept of the safe third country and firm resettlement provisions: the administration cannot restrict asylum without "ensur[ing] a genuinely safe option in another country."[19] As the Ninth Circuit reasoned when it invalidated the 2019 Third Country Transit Bar proposed by the Trump administration, "regulations imposing additional limitations and conditions under §1158(b)(2)(C) *must be consistent with the core principle of §1158(a)(2)(A) and (b)2(A)(vi)*—that an otherwise qualified [noncitizen] can be denied asylum only if there is a 'safe option' in another country."[20] Put simply, "[a] critical component of both bars is the *requirement that the [noncitizen]'s 'safe option' be genuinely safe*."[21] The Ninth Circuit held that the Trump administration's 2019 Third Country Transit Bar was inconsistent with § 1158 and therefore invalid because it did "virtually nothing to ensure that a third country is a 'safe option.'"[22]

Despite claims to the contrary, the Proposed Rule presents the same legal failures as the 2019 Third Country Transit Bar. As with the unlawful 2019 rule, the Proposed Rule restricts access to asylum where an individual fails to seek refuge in a "safe" third country en route to the United States, but it requires no analysis whatsoever of whether the asylum seeker's alleged "'safe option' [is] genuinely safe"[23] or if they can in fact access immigration relief. Paradoxically, the agencies openly acknowledge "that not all [third countries discussed in the rule] are viable for each migrant or asylum seeker," yet the agencies nevertheless proceed to propose a rule that presumes such viability. Thus, despite the Biden Administration's attempts to distinguish its Proposed Rule as a "rebuttable presumption" rather than a "categorical bar,"[24] it suffers from the very same legal infirmities as its Trump-era predecessor. The Proposed Rule contravenes a congressionally-devised framework and penalizes asylum seekers for failing to avail themselves of alleged alternatives without requiring any evaluation of the alternatives' viability.

Moreover, the administration's unfounded assurances about the safety of multiple third countries fail to remedy this deficiency. As evidence of viable third country alternatives, the NPRM cites recent collaborations in which countries in the Western Hemisphere "commit to implementing programs to stabilize communities hosting migrants and asylum seekers, providing increased regular pathways and protections for migrants and asylum seekers residing in or traveled through their countries, and humanely enforcing existing immigration laws."[25] Yet, the mere existence of such commitments does not prove their success, and, as discussed below, multiple countries remain highly dangerous for asylum seekers and lack sufficient legal capacity to evaluate their claims. Moreover, the INA provides for specific conditions that denote a safe third country: there must be "a bilateral or multilateral agreement" with the country in question, a guarantee that the asylum seeker will be protected from persecution, and access to "full and fair" procedures for asylum or equivalent relief.[26] The statute provides a clear legal framework for *ensuring* that third countries are viable alternatives; the administration cannot circumvent it by baselessly asserting that they are or strive to be.

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[19] *East Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 979 (9th Cir. 2020).
[20] *Id.* at 979 (emphasis added).
[21] *Id.* at 977 (emphasis added).
[22] *Id.* (citing *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 944 (N.D. Cal. 2019)).
[23] *Id.* at 979.
[24] Circumvention of Lawful Pathways, 88 Fed. Reg. at 11739.
[25] *Id.* at 11720.
[26] 8 U.S.C. § 1158(a)(2)(A).

Thus, the administration cannot establish that its Proposed Rule "is consistent with" the statutory exclusion from asylum eligibility for "those persons 'not considered to be in need of international protection' because there is a 'safe option' in another country" when it has plainly provided no mechanism to *ensure* that such countries are in fact safe and viable alternatives.[27] To proceed with the proposed third country transit provision would be to repeat the Trump administration's egregious restrictions on asylum eligibility in blatant violation of U.S. law.

V. The Proposed Rule Subjects Bona Fide Asylum Seekers to Further Harm By Compelling Them to Seek Refuge in Countries Where They Will Face Grave Danger and Be Deprived of Adequate Immigration Relief.

Under the Proposed Rule, many asylum seekers will be faced with an impossible decision: either apply for asylum in a country that cannot ensure their safety or lose the ability to apply for asylum upon reaching the United States. Many of the countries the Biden Administration presents as viable alternatives in the Proposed Rule fall far short of the safe third country provision's legal requirements, compounding the danger and harm faced by those already fleeing for their lives. Mexico and Guatemala serve as illustrative examples.

Many asylum seekers will face extreme hardship and grave danger if compelled by the Proposed Rule to seek asylum in Mexico. According to the U.S. Department of State's 2021 Human Rights Report, Mexico faces "[s]ignificant human rights issues," including "unlawful or arbitrary killings by police, military, and other governmental officials;" "insufficient investigation of and accountability for gender-based violence;" and violence against LGBTQ+ individuals.[28] The report further notes that "[i]mpunity and extremely low rates of prosecution[,]" the complicity of government agents in organized crime, and the "significant perpetrat[ion] of violent crimes" by gangs and cartels "result[] in high levels of violence and exploitation."[29]

Critically, the danger in Mexico is even more prevalent for asylum seekers. Human Rights First has documented "over 13,480 reports of murder, torture, kidnapping, rape, and other violent attacks on migrants and asylum seekers" in Mexico within the first two years of President Biden's term.[30] In many cases, the officials tasked with protecting people are in fact responsible for the violence or accomplices to it. Indeed, in another Human Rights First report which draws on interviews of approximately one thousand asylum seekers and migrants, government officials were "identified as responsible for or complicit in 36 percent of the violent attacks reported."[31]

Moreover, Mexico's asylum system remains rife with flaws and abuses. First, it is overwhelmed by the increased volume of asylum applications. In 2021, the Mexican

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[27] 88 Fed. Reg. at 11740 (citing to *E. Bay v. Garland*, 994 F.3d at 979).
[28] U.S. Department of State, *Mexico 2022 Human Rights Report*, 1-2 (2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/mexico/.
[29] *Id.* at 2.
[30] Human Rights First, *Human Rights Stain, Public Health Farce* 2 (Dec. 2022), https://humanrightsfirst.org/library/human-rights-stain-public-health-farce/; *see also* Doctors Without Borders, *No Way Out: The Humanitarian Crisis For Migrants And Asylum Seekers Trapped Between The United States, Mexico and the Northern Triangle of Central America* 6 (Feb. 2020), https://www.doctorswithoutborders.org/sites/default/files/documents/Doctors%20Without%20Borders_No%20Way%20Out%20Report.pdf (reporting that 57.3% of patients from Honduras, Guatemala, and El Salvador treated in Mexico experienced violence in Mexico; 39.2 % were violently attacked and 27.3 % were threatened or extorted).
[31] Human Rights First, *Fatally Flawed: "Remain in Mexico" Policy Should Never Be Revived* 3 (Sept. 2022), https://humanrightsfirst.org/library/fatally-flawed-remain-in-mexico-policy-should-never-be-revived/.

Commission for Refugee Assistance ("COMAR") received over 130,000 applications but resolved or closed only 38,005 in that year.[32] In the long wait for their applications to be processed,[33] asylum seekers face threats, attacks, and severe discrimination, including difficulty accessing housing and finding work. Second, numerous reports have documented Mexico's problematic practice of returning asylum seekers to their home countries or expelling them to unknown third countries without considering their fears of return to persecution or risks of future persecution.[34] In some cases, Mexican immigration authorities pressure asylum seekers to abandon their claims and return to the home countries they fled.[35] As a result of the violence asylum seekers experience in Mexico and the deficiencies in Mexico's immigration system, forcing individuals to seek asylum in Mexico will only increase the danger they face rather than protecting them from it.

Asylum seekers will also face extreme hardship and grave danger if compelled by the Proposed Rule to seek protection in Guatemala. According to the U.S. Department of State, "Guatemala remains among the most dangerous countries in the world."[36] Its 2021 violent crime rate was "more than double that of the United States," and the impact of such crime is "magnified by corruption, an inadequate justice system, and the prevalence of gang and narcotrafficking activity across the country."[37] Furthermore, the "[s]ignificant human rights issues" documented in Guatemala include "unlawful or arbitrary killings;" "lack of investigation of and accountability for gender-based violence; crimes involving violence or threats of violence targeting persons with disabilities and members of Indigenous groups; [and] crimes involving violence or threats of violence targeting [LGBTI] persons."[38] As a result of these dangers, many Guatemalans themselves are forced to flee persecution given the failure of state protection. Indeed, in 2021, Guatemalans represented one of the top five nationalities seeking asylum in the United States.[39] Guatemala thus cannot adequately protect asylum seekers from persecution.

Nor can Guatemala provide asylum seekers with a full and fair evaluation of their claims. The U.S. Department of State has described Guatemala's asylum system as "inadequate,"[40] with "gaps and shortcomings in the procedures for implementing the legal framework" as well as "major delays" and "an increased backlog.".[41] Under the Trump administration's U.S.-Guatemala Asylum Cooperative Agreement ("ACA"), those transferred to Guatemala who applied for asylum experienced "massive bottlenecks," with ACA asylum applicants trapped in a

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[32] *Mexico: Asylum Seekers Face Abuses at Southern Border*, Human Rights Watch (June 6, 2022 12:00 AM), https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border.
[33] *Id.*
[34] *See* Human Rights Watch, *Mexico: Mass Expulsion of Asylum Seekers to Guatemala* (Sept. 8, 2021), https://www.hrw.org/news/2021/09/08/mexico-mass-expulsion-asylum-seekers-guatemala ("Mexico has been carrying out mass expulsion of migrants and asylum seekers of various nationalities to a remote area of the jungle in Guatemala," including "families and unaccompanied children, some of whom were first expelled from the United States"); *see also* Amnesty Int'l, *Facts and figures: Deportations of unaccompanied migrant children by the USA and Mexico* (describing that Mexican authorities report deporting approximately half of unaccompanied minors from Central America, up to 85% in some localities).
[35] Human Rights Watch, *Mexico: Asylum Seekers Face Abuses at Southern Border*, *supra.*
[36] U.S. Department of State, Overseas Security Advisory Council, *Guatemala Country Security Report* (2022).
[37] *Id.*
[38] *Id.*; *see also* U.S. Department of State, *Guatemala 2022 Human Rights Report* 1-2 (2023).
[39] United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2021* 31 (June 21, 2022).
[40] U.S. Department of State, *Guatemala 2021 Human Rights Report* 18 (2022).
[41] *Id.* at 16 (2023).

case backlog.[42] Furthermore, many asylum seekers expressed fears that "they would be subjected to the same harms in Guatemala from which they fled in their home countries."[43] Indeed, due to the geographic proximity to their home countries, many feared that their persecutors would still be able to reach them.[44] The result was a system that "effectively compel[led] transferees to abandon their claims" and return instead to the home countries they fled.[45] This already-deficient system would become rapidly overwhelmed under the Proposed Rule: Guatemala received just over 1,000 asylum applications in 2021, a fraction of the number of applications it would receive if the Proposed Rule were implemented. Thus, compelling asylum seekers to apply for asylum in Guatemala would only deprive them of the protection from persecution they seek.

Without any measures to ensure the viability of third country alternatives, asylum seekers will be forced to endure further violence and persecution and will be deprived of the protection that the 1951 Convention, its 1967 Protocol, and corresponding U.S. laws sought to ensure.

VI. The Proposed Rule Would Compound Existing Barriers to Asylum.

The agencies suggest that the Proposed Rule is designed to confront what they deem to be a crisis at the U.S. border. But the agencies fail to explain why the additional procedural restrictions proposed are necessary given the existence of significant barriers to asylum that already exist, including statutory procedural restrictions to obtaining asylum. These existing procedural restrictions already burden and exclude bona fide asylum seekers. The Proposed Rule is regulatory excess that will unnecessarily exacerbate the overbroad procedural limitations that asylum seekers have faced since the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, was enacted.

IIRIRA effectuated rigorous procedural limits designed to restrict access to asylum.[46] These procedural limits provide, *inter alia*, for expedited removal of individuals arrested at or near the U.S. border or port of entry unless they express a credible fear of return, as well as detention of immigrants arrested at or near the border.[47] These provisions already impose extensive restrictions on asylum seekers and exclude bona fide refugees from protection.

HIRCP and HIP have represented hundreds of asylum seekers whose personal stories exemplify how these existing procedural restrictions already burden bona fide asylum seekers—burdens that the Proposed Rule would exacerbate. Take the case of a young man who fled his country of origin in Central America after being targeted by gangs. When he arrived at the U.S. border, he tried to explain his fear of return, but was subjected to expedited removal and deported without an adequate screening, where he faced further attacks and threats to his life. By contrast, his mother and aunt who also fled to the United States were not subject to expedited removal and were ultimately granted asylum based on the same circumstances that he had fled. Another client, targeted because members of his community believed that he was gay, was detained in terrible conditions in the United States for months before he was given a credible fear screening and released. He then had to wait for years to prove his case in court, which he finally did and was granted asylum. In yet another case, an indigenous father and son were forced to go through the credible fear screening process without an interpreter who spoke their language and,

[42] Human Rights First, *Deportation with a Layover* 1 (2020).
[43] *Id.* at 3.
[44] *Id.* at 2.
[45] *Id.* at 3.
[46] *See* Anker, Law of Asylum in the United States, Appendix A § A1:3 (2023 ed.).
[47] 8 U.S.C. § 1225(b)(1)(B)(ii); 8 U.S.C. § 1225(b)(1)(A)(i), (ii).

as a result, were unable to adequately express their fear of return and were deported to Guatemala.

Other case examples of clients who suffered harm transiting through Guatemala and Mexico further demonstrate the drastic negative consequences of this Proposed Rule. These include a mother whose young daughter was abused in Guatemala while in transit from Honduras to the U.S. border as well as a mother and daughter who were threatened and targeted by cartels while waiting at the U.S.-Mexico border.

The new rule would only further exacerbate the burdens and barriers to protection asylum seekers already face. The administration has not shown why it needs additional procedural barriers beyond those already enacted with IIRIRA.

VII. The Proposed Rule's Presumption of Ineligibility Will Bar Bona Fide Asylum Seekers from Accessing Protection Absent Exceptionally Compelling Circumstances.

Throughout the NPRM, the agencies repeatedly assert that the Proposed Rule is distinguishable from the Trump administration's invalidated 2019 Third Country Transit Bar because "it would yield only a presumption (which, unlike those bars, may be rebutted)."[48] However, the shift from categorical bar to "rebuttable" presumption is a distinction without a difference: the conditions under which the presumption may be rebutted are limited to "*exceptionally compelling* circumstances."[49] The Proposed Rule lists three per se grounds for rebutting the presumption of asylum ineligibility: (i) "an *acute* medical emergency," (ii) "an *imminent and extreme* threat to their life or safety," or (iii) they were a "victim of a *severe* form of trafficking in persons."[50] The presumption may also be rebutted in "other exceptionally compelling circumstances," at an adjudicator's discretion.[51]

The Proposed Rule on its face demonstrates that successfully rebutting the presumption will occur only under the most extreme scenarios, and all in excess of what would ordinarily be sufficient to claim asylum. The NPRM elaborates, for example, that an "imminent" and "extreme" threat must be immediate and "sufficiently grave"—such as rape, kidnapping, torture, or murder—and "cannot be speculative, based on generalized concerns about safety[.]"[52] Indeed, the requirement of a particular, imminent threat shows that by the time anyone is eligible to establish rebuttal under the Proposed Rule, it may well be too late to claim it.

Therefore, for many asylum seekers, the presumption of asylum ineligibility is rebuttable in name only and will wholly eliminate the possibility of asylum without regard to the underlying merit of the asylum claim.

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[48] Circumvention of Lawful Pathways, 88 Fed. Reg. at 11740.
[49] *Id.* at 11750 (emphasis added).
[50] *Id.* (emphasis added). The lack of distinction between the Proposed Rule and the 2019 bar is further reflected in the fact that one of the three listed grounds for rebuttal was in fact included as an exception under the unlawful 2019 Third Country Transit Bar. *Compare id.* at 11750, *with* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829, 33843 (July 16, 2019).
[51] Circumvention of Lawful Pathways, 88 Fed. Reg. at 11740.
[52] *Id*. at 11707 n. 27.

VIII. The Administration's Expansion of Alternative Pathways Cannot Compensate for the Unlawful Restrictions on Access to Asylum under the Proposed Rule.

Throughout the NPRM, the agencies reference a variety of alternative legal pathways beyond asylum, including the steps it has taken to expand some pathways, such as parole processes and H-2 temporary worker visas, and the continued availability of other forms of relief, namely withholding of removal and CAT protection.[53] Yet, such pathways are distinct from asylum and cannot substitute for it.

Although the NPRM is quick to note that those who fall under the presumption of ineligibility remain eligible for withholding of removal and protection under CAT, these forms of humanitarian relief cannot substitute for the protection offered under asylum for multiple reasons. First and foremost, the standards for both forms of relief are higher than that for asylum.[54] For both withholding of removal and protection under CAT, applicants must establish by a preponderance of the evidence that they would face persecution or torture in their countries of origin.[55] By contrast, asylum requires only a showing of "well-founded fear," understood to be a one-in-ten chance of persecution.[56] As a result, those with valid asylum claims may be unable to meet the higher bar for withholding of removal and CAT and may fail to receive the humanitarian protection they need and for which they would be eligible under the asylum standard.

Furthermore, unlike asylum, neither withholding of removal nor CAT protection provide pathways to citizenship.[57] Additionally, while asylum allows recipients to petition for immediate family members "accompanying, or following to join" them,[58] withholding of removal and CAT protection do not.[59] Relegating asylum seekers to these lesser forms of protection leaves their future in the United States uncertain and deprives them of the ability to reunite with their children and spouses.

The parole options that the administration highlights provide no substitute for full and fair asylum procedure. The agencies put forth a limited set of parole programs as evidence of the government's commitment to "enhancing legal pathways and processes for migrants"[60] and as a proof of concept for the Proposed Rule. However, these specific parole programs are limited, available only to asylum seekers from Venezuela, Cuba, Haiti, Nicaragua, and Ukraine.[61] The NPRM entirely fails to address the extent to which its Proposed Rule would restrict access to asylum for individuals from countries outside of these five, without providing access to the parole programs that the Proposed Rule promotes as alternatives.

Additionally, the NPRM's reference to H-2 worker visas is irrelevant. H-2 worker visas are temporary visas designed for individuals who wish to return home. They provide no solution for those fleeing their home countries and seeking permanent protection from persecution. Therefore, they are insufficient alternatives that cannot possibly compensate for the Proposed Rule's restrictions on asylum access.

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[53] *See, e.g.*, *id.* at 11718-20.
[54] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-46 (1987); Anker, *supra*, §§ 2:26; 7:4.
[55] Anker, *supra*, §§ 2:26; 7:4.
[56] 480 F.3d at 431, 440.
[57] 8 C.F.R. §§ 208.16, 1208.16.
[58] 8 U.S.C. §§ 1158(b)(3)(A), 1157(c)(2)(A).
[59] *See* Anker, *supra*, § 1:11.
[60] Circumvention of Lawful Pathways, 88 Fed. Reg. at 11718.
[61] *Id.* at 11718-19.

Finally, the mere existence of these visas is inapposite: asylum is a distinct form of relief, established under the INA pursuant to U.S. treaty obligations. The government cannot simply decide to substitute it with other, lesser forms of relief.

IX. Concerns with the CBP One App Warrant Immediate Withdrawal of the Proposed Rule.

Conditioning access to asylum largely on access to a smartphone app, CBP One, is neither legal nor equitable. The CBP One app limits access to asylum at ports of entry and frustrates the asylum-seeking process. The CBP One app, which has many reported glitches and failures, is restricted by language, has faulty facial recognition with racially inequitable implications, and presents insurmountable barriers for those who lack the financial means to have a sophisticated smartphone and/or internet connection. The Proposed Rule's requirement that asylum seekers use CBP One to access protection disparately impacts more vulnerable, Black and Brown asylum seekers, as well as less tech-savvy asylum seekers. Any requirement to use the CBP One app will result in bona fide refugees being turned away at the border and foreclosed from asylum protection.

The CBP One app makes asylum access a lottery based on luck, technological skills, resources, and skin color. It is unclear how many, where, and when appointments will be available. Reports claim that appointments can take up to two weeks, which forces asylum seekers to remain in dangerous places near the border and/or pay for safer accommodations while waiting for their appointments.[62] Furthermore, the CBP One app does not ask users if they are seeking asylum and those arriving for appointments are not given interviews or asked questions about vulnerabilities that may indicate asylum eligibility.[63]

Additionally, many asylum seekers may not have cell phones, or may have outdated cell phones, which often do not support the CBP One app.[64] Asylum seekers located near the border who live in tents and camps without internet or electricity may be unable to keep a cell phone charged, which makes them unable to utilize the CBP One app to schedule an appointment.[65] Access to both a functioning, updated phone, as well as to the internet is thus another financial barrier restricting who can apply for asylum.

Furthermore, the CBP One app has many technical issues that create a further barrier to entry for asylum seekers. There are multiple reports of glitches forcing users to begin the process to book an appointment repeatedly after completing the various steps in order to make an appointment on the app.[66] The app also restricts usability and access through limited language options. The app is only offered in English, Spanish, and Haitian Creole, and error messages are reportedly only offered in English; if you do not speak one of these three languages, you cannot

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[62] *See* Jack Herrera, *Fleeing for Your Life? There's An App for That*, Texas Monthly (Mar. 2, 2023), https://www.texasmonthly.com/news-politics/cbp-app-asylum-biden-administration/.
[63] *Id.*
[64] *See* Melissa del Bosque, *Facial recognition bias frustrates Black asylum applicants to US, advocates say*, The Guardian (Feb. 8, 2023), https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias.
[65] *Id*. ("There are about 4,000 Black asylum seekers waiting in Reynosa and at least another 1,000 Haitians in Matamoros. Hardly anyone is getting an asylum appointment. Neither population is being represented as it should[.]").
[66] *See* Regina Yurrita, *Asylum seekers met with issues from new CBP One app*, CBS8 (Feb. 1, 2023), https://www.cbs8.com/article/news/local/asylum-seekers-met-with-issues-from-cbp-one-app/509-5f69579c-05e1-4999-a7a9-720eab0cc680.

utilize the app to make an appointment without assistance. Under the Proposed Rule, inability to speak English, Spanish, or Haitian Creole, could effectively preclude access to asylum. Yet, many asylum speakers come to the U.S.-Mexico border to seek asylum from countries that do not speak these three languages or are indigenous and speak an indigenous language. These asylum seekers would be effectively barred from access to asylum as a result of the app's limited language options.

The CBP One app also requires literacy. Many asylum speakers may have an oral understanding of English, Spanish, or Haitian Creole, but may not read or write, and cannot therefore use the app, which would effectively bar them from seeking asylum under the Proposed Rule.

Lastly, the app's facial recognition software has misidentified people of color, particularly Black asylum seekers. Many assisting Black asylum seekers have reported that the CBP One app fails to register many with darker skin tones, effectively barring them from the right to request entry into the United States.[67] The app is unable to map facial features and rejects uploaded photos, a requirement to receive an asylum appointment.[68] This technical issue greatly impacts asylum seekers from Haiti, countries in Africa, and darker-skinned Venezuelans, among others.[69] Attorneys working with asylum seekers at the border report that children under six are also particularly affected by faulty facial recognition, preventing many families from applying for asylum.[70]

As a result of these flaws with the CBP One app, the most vulnerable populations would be left with no way to seek asylum under the Proposed Rule.

Conclusion

HIRCP and HIP thus strongly oppose the Proposed Rule because it violates the existing statutory framework and mandate of the agencies to provide protection and a full and fair process to asylum seekers. We urge you to rescind this NPRM in its entirety.

If you have questions, please contact us by phone at (617) 384-8165 or by email at hirc@law.harvard.edu.

Sincerely,
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[67] *See Facial recognition bias frustrates Black asylum applicants to US, advocates say*, The Guardian, *supra*.
[68] *Id.*
[69] *Id.*
[70] *Id.*