

**Human Rights First Comment on
Department of Homeland Security & Department of Justice, “Circumvention of Lawful Pathways,”
88 FR 11704**

Human Rights First submits these comments in response to the Department of Homeland Security (DHS) and the Department of Justice (DOJ) (collectively, the “agencies”) request for public comment regarding the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on February 23, 2023.¹

Overview of Comment

The agencies propose to implement a new rule (the “asylum ban”) at the southern border that would return to persecution refugees who qualify for asylum under U.S. law and leave others in limbo in the United States without permanent status, a pathway to citizenship, or the ability to reunite with their families. Human Rights First urges the agencies to withdraw the unlawful proposed rule in its entirety, rescind similar Trump administration bans, and take immediate steps to restore access to asylum and comply with U.S. law and treaty obligations.

The agencies request comments on whether the proposed rule would provide “a meaningful and realistic opportunity to seek protection.”² It would not. The proposed rule would bar refugees from asylum based on their manner of entry into the United States and their transit through third countries, factors that do not relate to their persecution or fear of return. It would apply only to refugees who enter at the southwest border, the vast majority of whom are people of color. If the agencies proceed with this ban, it will illegally punish and ban refugees fleeing political, religious, race-based, gender-based, anti-LGBTQI+, and other persecution, including Black and Indigenous people, LGBTQI+ asylum seekers, women, children, and people with disabilities. The agencies would apply the ban not only in full asylum adjudications but also in preliminary screenings at the border, which would result in mass deportations of refugees without a hearing.

As detailed in this comment, the proposed asylum ban would:

- violate U.S. law and international law, including treaties binding on the United States;
- improperly use safe pathways to deny access to asylum, undermine the Los Angeles Declaration on Migration and Protection, and subvert refugee law globally while discouraging other countries from upholding asylum;
- deny asylum to refugees who qualify for it under U.S. law;
- return refugees to their countries of persecution or to dangers in Mexico and other unsafe transit countries, where refugees are targeted for bias-motivated attacks, torture, kidnappings, and other violence;³

¹ Department of Homeland Security and Department of Justice, “Circumvention of Lawful Pathways,” 88 FR 11704, February 23, 2023 (<https://www.federalregister.gov/documents/2023/02/23/2023-03718/circumvention-of-lawful-pathways>)

² 88 FR 11704 at 11708.

³ In the proposed rule, the agencies indicate that the U.S. government is in consultation with the Government of Mexico, as well as other foreign partners to accept the returns of non-Mexicans under Title 8 authorities (such as people ordered removed through expedited removal or through full asylum adjudications). 88 FR 11704 at 11711.

- circumvent the statutory credible fear standard and unjustly deprive many refugees of an asylum hearing;
- inflict long-term or permanent family separation on refugees denied asylum due to the ban and left only with withholding of removal by depriving them of the ability to bring spouses and children stranded abroad to the United States;
- deprive refugees of citizenship and other benefits when they are denied asylum and afforded only withholding of removal;
- disproportionately harm Black, Brown, and Indigenous asylum seekers;
- build in nationality-based preferences that are contrary to refugee law by incorporating exceptions based on nationality-based parole policies;
- unlawfully require asylum seekers to request protection in unsafe transit countries where they face persecution and a risk of refoulement, including LGBTQI+ asylum seekers, women, children, and people with disabilities;
- codify DHS’s use of the deficient CBP One app as the only or primary method to seek asylum at the border, which would perpetuate inequities and add restrictions to — rather than maximize — asylum access at port of entry; and
- add to the complexity and length of asylum adjudications (as have other barriers to asylum imposed over the years), exacerbating delays and backlogs.

The Biden administration has repeatedly attempted to distinguish the proposed rule from similar Trump-era entry and transit bans and claim that it is not a “ban” but rather a “presumption” of ineligibility. The reality is that this rule, like the Trump-era bans, would bar asylum — on the basis of manner of entry and travel route — for all who are unable to establish that they qualify for a limited exception, while *also* depriving people of a meaningful opportunity to prove they meet an exception by subjecting them to accelerated preliminary screenings with inadequate procedural protections. The Round Table of Former Immigration Judges, composed of over 50 judges, submitted a comment on the proposed rule explaining that the proposed rule creates an “outright bar to asylum” and to refer to it as a presumption is misleading and inaccurate.⁴

The proposed rule flouts U.S. law and treaty commitments. In the wake of World War II, the United States played a lead role in drafting the Refugee Convention, which requires states to abide by core principles of refugee protection including non-discrimination, non-refoulement, non-penalization, and integration. The U.N. High Commissioner for Refugees (UNHCR) submitted a comment recommending that the agencies withdraw the asylum ban in its entirety, noting that the “presumption of eligibility is fundamentally incompatible with international refugee law, and the exceptions and rebuttal factors cannot redress this fundamental flaw.”⁵

Congress codified these treaty requirements into U.S. law, which explicitly guarantees access to asylum regardless of manner of entry and prohibits federal agencies from imposing restrictions

⁴ Round Table of Former Immigration Judges, "Comment on the Proposed Rule by the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) on Circumvention of Lawful Pathways," March 27, 2023 (https://drive.google.com/file/d/1CLuT7R_4WJkduTrwR2GitT6zw69XTVdX/view)

⁵ UNHCR, “UNHCR Comments on Circumvention of Lawful Pathways NPRM,” [Regulations.gov](https://www.regulations.gov), March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

on asylum that conflict with the statute, such as requiring asylum seekers to apply for protection in transit countries. The proposed rule violates these requirements by generally barring asylum for refugees who did not receive a formal denial of protection in a transit country and then entered the United States between ports of entry, or at a port of entry without first securing an appointment through a mobile app that is inaccessible to many of the most vulnerable asylum seekers.

Under the Trump administration, DHS and DOJ promulgated similar asylum bans that also barred people from asylum based on how they entered the United States and whether they applied for protection in a transit country. Such bans were unprecedented at the time, were repeatedly struck down by federal courts as unlawful, and drew sharp condemnation from then presidential candidate Biden, who promised to end restrictions on asylum for those who transit through other countries to reach safety and pledged that he would not “deny[] asylum to people fleeing persecution and violence.”⁶ Upon taking office, President Biden issued an Executive Order to “restore and strengthen our own asylum system, which has been badly damaged by policies enacted over the last 4 years that contravened our values and caused needless human suffering.”⁷ In June 2022, the United States signed the Los Angeles Declaration on Migration and Protection to reinforce its commitment to protect refugees and asylum seekers and uphold the principle of non-refoulement and other obligations under international law.⁸

Banning refugees based on manner of entry and transit route was inhumane and illegal then and it is inhumane and illegal now. Pursuing a new version of Trump administration asylum bans is the opposite of taking steps to “restore and strengthen” the asylum system, disregards fundamental principles of refugee protection enshrined in U.S. law, and only serves to advance the agenda of the former Trump administration and its hate group allies.

Human Rights First urges the agencies not to proceed with final rulemaking for this illegal ban. Rather than imposing a new iteration of an asylum ban to replace Trump-era bans, the agencies should immediately rescind Trump administration entry and transit bans and take steps to restore compliance with U.S. asylum law. The agencies should restore and maximize access to asylum at ports of entry, urge steps to strengthen capacities to receive and protect refugees in other countries, expand legal pathways to the United States without making such pathways contingent on denial of asylum access, and ramp up, and work with Congress to fund, reception capacities,

⁶ Biden Harris Presidential Campaign, “The Biden Plan for Securing Our Values as a Nation of Immigrants,” August 5, 2020 (<https://joebiden.com/immigration/>)

⁷ President Biden, “Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border,” February 2, 2021 (<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>)

⁸ Heads of State, “Los Angeles Declaration on Migration and Protection,” The White House Statements, June 10, 2022 (<https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/>)

legal representation, and sufficient asylum adjudication capacities to address asylum backlogs and ensure fair and timely adjudication of asylum cases.

Human Rights First and Its Interest in This Issue

For over 40 years, Human Rights First has provided *pro bono* legal representation to refugees seeking asylum in the United States and advocated for the protection of the human rights of refugees. Human Rights First grounds its work in the legal standards of the 1951 Refugee Convention, its 1967 Protocol, and other international human rights instruments, and advocates adherence to these standards in U.S. law and policy. Human Rights First operates one of the largest and most successful *pro bono* asylum representation programs in the country. Working in partnership with volunteer attorneys at many of the nation’s leading law firms, we provide legal representation, without charge, to hundreds of refugees each year through our offices in California, New York, and Washington D.C. This extensive experience working directly with refugees seeking protection in the United States is the foundation for our advocacy and informs the comments that follow.

I. The 30-day Comment Period is Insufficient for a Sweeping Rule That Guts Asylum

The public has not been given adequate time to respond to this proposed rule, which attempts to circumvent U.S. law to eviscerate asylum protections at the border. It makes fundamental changes to asylum eligibility based on sweeping factors that are irrelevant to refugees’ protection needs. If implemented, it would send refugees to death, persecution, and torture while leaving other refugees in limbo in the United States, separated from their spouses and children and without legal status or a pathway to citizenship. It would transform credible fear proceedings, immigration court hearings, and U.S. Citizenship and Immigration Services (USCIS) asylum adjudications, task adjudicators with applying an illegal and inhumane rule, and exacerbate asylum backlogs by adding complex barriers to asylum that would lengthen adjudications. The scope, complexity, and human cost that the rule would inflict make clear that 30 days is an inadequate period for the public to review, assess, and submit written comments.

On March 1, 2023, Human Rights First and other national, state, and local organizations whose work would be profoundly impacted by the asylum ban wrote to the agencies requesting that they provide at least 60 days to comment on the rule.⁹ By limiting the comment period to 30 days, the agencies have effectively denied the public the right to meaningfully comment under the notice and comment rulemaking procedures required by the Administrative Procedure Act (APA). Executive Order 12866 requires agencies engaged in rulemaking to “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.”¹⁰ In 2011, President Obama issued Executive Order 13563 to reaffirm these principles and reiterated that agencies should generally

⁹ Human Rights First and other organizations, “Extension to 30-day comment period letter,” March 1, 2023 (<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>)

¹⁰ Executive Order 12866, “Regulatory Planning and Review,” 58 FR 190, September 30, 1993 (<https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>)

provide at least 60 days for the public to submit comments.¹¹ Upon taking office, President Biden formally recognized and stressed the importance of the principles in these Executive Orders.¹² Federal courts have repeatedly held that the APA requires a “meaningful opportunity” for the public to submit comments,¹³ which entails adequate time to meaningfully comment.¹⁴ In passing the APA, Congress made clear that proposed rules of “great import, or those where public submission of facts will be...a protection to the public,” would necessitate “more elaborate public procedures.”¹⁵

The complexity and scope of the proposed rule as well as the egregious human rights violations it would inflict are even more reason to abide by these requirements and provide more than the 60-day minimum. Nor have the agencies offered any plausible justification to shorten the comment period. They cite a need to “move as expeditiously as possible”¹⁶ in order to finalize the proposed rule before the termination of the Title 42 policy, which is scheduled to end on May 11, 2023 with the expiration of the national public health emergency related to COVID-19. However, this rationale is specious and unfounded.

The administration has anticipated the end of the unlawful Title 42 policy for years and sought to formally end Title 42 in May 2022. It has faced the prospect of the policy’s end for years as ongoing litigation about the policy’s illegality was considered by the courts, resulting in injunctions in September 2021, March 2022, and November 2022.¹⁷ The administration’s own plans to end the policy nearly a year ago — stopped only by a lawsuit brought by Attorneys General aligned with the Trump administration — indicate that the agencies have had ample time to prepare and plan for the policy’s end.¹⁸ Moreover, the agencies’ argument that the Title 42 expulsion policy must be urgently replaced with a new asylum ban ignores overwhelming evidence that punitive bans and other policies that seek to deter and inflict harm on asylum seekers do not achieve the government’s goal of orderly processing. Title 42 did the opposite,

¹¹ Executive Order 13563, “Improving Regulation and Regulatory Review,” 76 FR 3821, January 18, 2011 (<https://www.federalregister.gov/documents/2011/01/21/2011-1385/improving-regulation-and-regulatory-review>)

¹² President Biden, “Memorandum for the Heads of Executive Departments and Agencies,” 86 FR 7223, January 20, 2021 (<https://www.federalregister.gov/documents/2021/01/26/2021-01866/modernizing-regulatory-review>)

¹³ *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009); *American Medical Ass’n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995); *Puget Soundkeeper All. V. Wheeler*, 2018 U.S. Dist. LEXIS 199358, 9 (W.D. Wash. 2018).

¹⁴ *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011); *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1998).

¹⁵ House Judiciary Committee, “Report of the Committee of the Judiciary House of Representatives on S.7 [Administrative Procedure Act]” H.R. Rep. No. 1980, 233, 259, May 3, 1946, (justice.gov/sites/default/files/jmd/legacy/2014/06/09/houserept-1980-1946.pdf)

¹⁶ 88 FR 11704 at 11708.

¹⁷ *Huisha-Huisha v. Mayorkas*, No. 1:21-cv-00100 (D.D.C. November 15, 2022), <https://www.documentcloud.org/documents/23307479-ruling-on-title-42>; *Huisha-Huisha v. Mayorkas*, No. 1:21-cv-00100 (D.C. Cir. March 4, 2022), [https://www.cadc.uscourts.gov/internet/opinions.nsf/F6289C9DDB487716852587FB00546E14/\\$file/21-5200-1937710.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/F6289C9DDB487716852587FB00546E14/$file/21-5200-1937710.pdf); *Huisha-Huisha v. Mayorkas*, No. 1:21-cv-00100 (D.D.C. September 16, 2021), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2021cv0100-123

¹⁸ *State of Louisiana v. Centers for Disease Control & Prevention*, No. 6:22-CV-00885 (W.D. La. May 20, 2022), <https://www.courthousenews.com/wp-content/uploads/2022/05/order-granting-injunction-against-ending-use-of-title-42.pdf>

fueling disorder and chaos and forcing asylum seekers to attempt dangerous crossings to reach safety.¹⁹ An asylum ban would do the same. The false urgency surrounding this rulemaking cannot justify a truncated comment period.

The former administration routinely provided the public only 30 days to comment on proposed rules that attempted to rewrite longstanding asylum law and render ineligible for protection countless refugees.²⁰ The agencies' continued truncation of comment periods with respect to sweeping asylum rules is a deeply troubling pattern and leaves the public inadequate time to meaningfully consider and respond to the rule. The insufficient comment period alone is a critical reason for the agencies to withdraw the proposed rule and, should the agencies choose to reissue it, grant the public significantly more time to respond.

II. The Proposed Rule Violates U.S. Law and Treaty Obligations to Refugees

The proposed asylum ban attempts to jettison core principles of the Refugee Convention and violate longstanding U.S. law enacted to comply with treaty obligations. The asylum ban would create a presumption of asylum ineligibility for individuals who 1) did not apply for and receive a formal denial of protection in a transit country and 2) entered between ports of entry at the southern border or entered at a port of entry without a previously scheduled appointment through the CBP One mobile application. The only way for asylum seekers to rebut this presumption is to establish that they qualify for an extremely limited exception. People who enter the United States through a "DHS-approved parole process," such as through new parole initiatives that currently exist for only five nationalities, would be exempt from the ban. The discriminatory ban would target only refugees at the southern border, impermissibly make refugees ineligible for asylum based on their manner of entry and travel route, and codify nationality-based discrimination — violating a host of key principles in international law and provisions in U.S. law that implement those international legal obligations.

Violations of international legal obligations

The right to seek asylum is enshrined in the Universal Declaration of Human Rights, which was drafted by the United States and other nations in the wake of World War II.²¹ The United States subsequently played a key role in drafting the 1951 Refugee Convention, which required states to abide by core principles to ensure access to asylum and the protection of refugees.²² These

¹⁹ Human Rights First, "Extending Title 42 Would Escalate Dangers, Exacerbate Disorder, and Magnify Discrimination," April 27, 2022 (<https://humanrightsfirst.org/library/extending-title-42-would-escalate-dangers-exacerbate-disorder-and-magnify-discrimination/>); Human Rights First, "Human Rights Stain, Public Health Farce," December 15, 2022 (<https://humanrightsfirst.org/library/human-rights-stain-public-health-farce/>)

²⁰ Dept. of Homeland Security and Dept. of Justice, "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," 85 FR 36264, June 15, 2020 (<https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>); Dept. of Homeland Security and Dept. of Justice, "Security Bars and Processing," 85 FR 41201, July 9, 2020 (<https://www.federalregister.gov/documents/2020/07/09/2020-14758/security-bars-and-processing>)

²¹ United Nations, "Universal Declaration of Human Rights," December 1948, (<https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf>)

²² United Nations, "Convention and Protocol Relating to the Status of Refugees, published 1951 and 1967, (<https://www.unhcr.org/en-us/3b66c2aa10>)

principles include non-discriminatory access to asylum, non-refoulement of refugees to persecution and torture, the prohibition against imposing improper penalties on people seeking refugee protection based on manner of entry, and facilitation of integration and naturalization of refugees. By ratifying the 1967 Refugee Protocol, the United States agreed to be bound by the Refugee Convention's legal requirements.

UNHCR has warned that the proposed rule “runs afoul of several central principles of international refugee law binding on the United States,” including the right to seek asylum, the prohibition against imposing penalties based on unlawful entry, and the principle of non-refoulement.²³ UNHCR similarly opposed Trump administration regulations that made refugees ineligible for asylum based on their manner of entry into the United States and whether they were denied protection in a transit country, warning that the bans violated these key principles of international law.²⁴

Non-discriminatory access to asylum

The Refugee Convention defines a refugee as a person who has a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion. As UNHCR has noted, the Convention's “extension of protection to refugees who have not received formal recognition of their status necessarily requires a process for identifying refugees among asylum-seekers.”²⁵ This process necessitates an individualized determination of whether each asylum seeker meets the definition of a refugee.

Regulations that deny access to asylum based on arbitrary factors that do not relate to a person's status as a refugee are inconsistent with these principles because, as UNHCR noted, the United States has an obligation under the Convention to provide a “fair and efficient refugee status determination procedure” to asylum seekers.²⁶ Closing off access to the asylum process for people who have entered the United States irregularly or without a scheduled appointment and who have not been denied protection in a transit country, many of whom would qualify as refugees, is at odds with these requirements. Following the Biden administration's announcement of its plans to issue an asylum ban, the U.N. High Commissioner for Human

²³ UNHCR, “UNHCR Comments on Circumvention of Lawful Pathways NPRM,” [Regulations.gov](https://www.regulations.gov/comment/USCIS-2022-0016-7428), March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

²⁴ UN High Commissioner for Refugees, “UNHCR Amicus Brief in *O.A. v. Donald J. Trump as President of the United States*,” UNHCR, August 13, 2020 (<https://www.refworld.org/topic,50ffbce53a,50ffbce54f,5f3f90ea4,0,,AMICUS,.html>); UN High Commissioner for Refugees, “UNHCR Amicus Brief in *East Bay Sanctuary Covenant v. Donald J. Trump as President of the United States*,” UNHCR, December 5, 2018 (<https://www.refworld.org/docid/5c459ac44.html>); UN High Commissioner for Refugees, “UNHCR Amicus Brief in *East Bay Sanctuary Covenant v. William Barr*,” UNHCR, October 15, 2019 (<https://www.refworld.org/topic,50ffbce4120,50ffbce4123,5dccc03354,0,,AMICUS,USA.html>).

²⁵ UNHCR Amicus Brief in *O.A. v. Donald J. Trump*, August 13, 2020 (<https://www.refworld.org/topic,50ffbce53a,50ffbce54f,5f3f90ea4,0,,AMICUS,.html>)

²⁶ UNHCR Amicus Brief in *East Bay Sanctuary Covenant v. Barr*, December 5, 2018 (<https://www.refworld.org/docid/5c459ac44.html>); UNHCR, “UNHCR Comments on Circumvention of Lawful Pathways NPRM,” [Regulations.gov](https://www.regulations.gov/comment/USCIS-2022-0016-7428), March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

Gibraltar.³³ The High Commissioner “considered that it would be unfortunate if a refugee in similar circumstances was penalized for not having proceeded directly to the country of asylum.”³⁴

The proposed rule denies access to asylum on a discriminatory basis, which also conflicts with Article 3 of the Convention. Article 3 prohibits discrimination based on race, religion or country or origin. The ban applies only to people who enter at the southern border, the overwhelming majority of whom are people of color. As discussed in Section VIII, it would disproportionately harm Black, Brown, and Indigenous asylum seekers, many of whom do not have the resources or ability — due to a U.S. visa regime that favors applicants from richer, whiter countries — to arrive in the United States by plane. Moreover, the proposed rule builds in nationality-based discrimination by punishing people who do not use parole initiatives or enter the United States through other designated pathways. The administration has only made its new parole initiatives accessible to people from five countries — Cuba, Haiti, Nicaragua, Venezuela, and Ukraine. Denying asylum to people who have not used certain pathways to reach the United States while making some of these pathways available only to certain nationalities constitutes nationality-based discrimination.

Non-penalization

Article 31 of the 1951 Refugee Convention generally prohibits states from imposing penalties on refugees on account of their illegal entry or presence. The introductory note to the Refugee Convention underscores this fundamental provision, noting that “the seeking of asylum can require refugees to breach immigration rules.”³⁵ UNHCR has repeatedly emphasized that “neither the 1951 Convention nor the 1967 Protocol permits parties to condition access to asylum procedures on regular entry.”³⁶ In its comment on the proposed rule, UNHCR concluded that the presumption of ineligibility “amounts to penalization of irregular entry in violation of Article 31(1).”³⁷

The agencies make clear that the central purpose of the rule is precisely what Article 31 prohibits: punishment of asylum seekers based on how they enter the United States. They repeatedly note that the goal of the proposed rule is to “impose consequences on certain noncitizens who fail to avail themselves of the range of lawful, safe, and orderly means for seeking protection” and tout the “immediate consequences” that the proposed rule would inflict on migrants.³⁸ The agencies discuss the “incentive structure” of the proposed rule, making clear

³³ Id.

³⁴ Id.

³⁵ United Nations, “Convention and Protocol Relating to the Status of Refugees, published 1951 and 1967, (<https://www.unhcr.org/en-us/3b66c2aa10>)

³⁶ UNHCR Amicus Brief in *O.A. v. Donald J. Trump*, August 13, 2020 (https://www.refworld.org/topic_50ffbce53a_50ffbce54f_5f3f90ea4_0_..AMICUS_.html)

³⁷ UNHCR, “UNHCR Comments on Circumvention of Lawful Pathways NPRM,” [Regulations.gov](https://www.regulations.gov), March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

³⁸ 88 FR 11704 at 11707, 11731.

that the “consequences” would be inflicted for the purpose of deterrence.³⁹ These consequences would be inflicted on many asylum seekers, including those who are refugees under U.S. law.

These consequences — i.e. penalties — would take the form of denial of asylum, deportation to harm, family separation, deprivation of a pathway to citizenship, and other harms. Anyone who enters the United States without authorization and did not receive a denial of protection in a transit country would fall within the scope of the rule’s “consequences.” Practically speaking, this would cover virtually every asylum seeker who enters without authorization, given regional realities. Their right to asylum would be cut off and other penalties imposed due to the way they entered the country. These consequences would also apply to people arriving at ports of entry without a previously scheduled appointment, if they similarly did not receive a denial of protection in a transit country. Premising the denial of asylum on manner of entry is incompatible with Article 31.

The administration's rhetoric with respect to this proposed rule makes it all the more evident that it is intended to punish asylum seekers for entering unlawfully or not entering through designated procedures. Dehumanizing “carrot and stick” language has permeated media reports about this proposed rule and other recent administration policies, with the “stick” referring to the penalty inflicted on asylum seekers who enter without authorization.

Non-refoulement

Article 33 of the Refugee Convention prohibits states from returning (refouling) a refugee to a country where their “life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁴⁰ Known as the principle of non-refoulement, it is “the cornerstone of asylum and of international refugee law.”⁴¹ The Refugee Convention’s non-refoulement provision is codified in U.S. law at 8 U.S.C. §1231. UNHCR has made clear that Article 33 prohibits the refoulement of a person who has a well-founded fear of persecution, with certain limited exceptions.⁴² The proposed ban would rely on factors that have no relation to a person’s risk of persecution and would fuel the deportation of asylum seekers who meet the definition of a refugee. As a result, UNHCR has warned that the rule “will lead to the refoulement of large numbers of asylum-seekers of many different nationalities, ethnic backgrounds or religions, and of a very wide range of people at risk.”⁴³

While the agencies note that a person barred from asylum under the proposed rule may still qualify for withholding of removal, many refugees who are unable to meet the higher standard

³⁹ 88 FR 11704 at 11731.

⁴⁰ United Nations, “Convention and Protocol Relating to the Status of Refugees, published 1951 and 1967, (<https://www.unhcr.org/en-us/3b66c2aa10>)

⁴¹ UNHCR Amicus Brief in *East Bay Sanctuary Covenant v. William Barr*, October 15, 2019 (https://www.refworld.org/topic_50ffbce4120_50ffbce4123_5dcc03354_0_.,AMICUS,USA.html)

⁴² UNHCR Amicus Brief in *O.A. v. Donald J. Trump*, August 13, 2020 (https://www.refworld.org/topic_50ffbce53a_50ffbce54f_5f3f90ea4_0_.,AMICUS,.html); UNHCR, “UNHCR Comments on Circumvention of Lawful Pathways NPRM,” [Regulations.gov](https://www.regulations.gov), March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

⁴³ UNHCR, “UNHCR Comments on Circumvention of Lawful Pathways NPRM,” [Regulations.gov](https://www.regulations.gov), March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

for withholding of removal would be deported to danger under the ban. As UNHCR noted, “withholding of removal does not provide an adequate substitute for the asylum process required to ensure access to rights conferred by the 1951 Convention and 1967 Protocol and does not fully implement Article 33(1)’s prohibition against *refoulement*.”⁴⁴ Like prior policies wielded to ban and block refugees from asylum, the proposed rule will lead to the refoulement and chain refoulement of refugees.⁴⁵

Integration

Article 34 of the Refugee Convention provides that states “shall as far as possible facilitate the assimilation and naturalization of refugees.”⁴⁶ By barring asylum for many refugees and leaving some with the inadequate protections of withholding of removal or Convention Against Torture (CAT) protection — for those who are not denied relief altogether — the proposed rule would leave refugees in a potentially permanent state of limbo. They would have an order of removal and have no pathway to status or citizenship. They would be unable to reunite with their spouses and children and unable to obtain a refugee travel document to allow them to travel abroad even to visit them in a third country. They would be unable to access certain benefits and would face barriers in obtaining and renewing their employment authorization.

As a result, the proposed rule would prevent refugees from integrating and deprive them of an ability to naturalize, in violation of Article 34. The Trump administration’s transit ban inflicted the same harms by denying refugees asylum and leaving them with lesser forms of protection, as outlined in Section VII.

Violations of U.S. law

Congress passed the Refugee Act of 1980 to bring the United States into compliance with international treaty obligations. The legislative history reflects that the Act was intended to ensure “greater equity in our treatment of all refugees” and “conform[] to our International treaty obligations under the United Nations Convention and Protocol Relating to the Status of Refugees.”⁴⁷

⁴⁴ UNHCR Amicus Brief in *East Bay Sanctuary Covenant v. William Barr*, October 15, 2019 (https://www.refworld.org/topic_50ffbce4120_50ffbce4123_5dcc03354_0..AMICUS.USA.html); see also UNHCR, “UNHCR Comments on Circumvention of Lawful Pathways NPRM,” [Regulations.gov](https://www.regulations.gov/comment/USCIS-2022-0016-7428), March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

⁴⁵ Human Rights First, “Asylum Denied, Families Divided: Trump Administration’s Illegal Third-Country Transit Ban,” July 2020 (<https://humanrightsfirst.org/wp-content/uploads/2022/10/AsylumDeniedFamiliesDivided.pdf>); Human Rights First, “Human Rights Stain, Public Health Farce,” December 15, 2022 (<https://humanrightsfirst.org/library/human-rights-stain-public-health-farce/>).

⁴⁶ United Nations, “Convention and Protocol Relating to the Status of Refugees, published 1951 and 1967, (<https://www.unhcr.org/en-us/3b66c2aa10>)

⁴⁷ U.S. Congressional Record 126 Cong. Rec. S 1753-55 (daily ed. Feb. 26, 1980); U.S. Congressional Record 125 Cong. Rec. S 11999-12003, U.S. Congressional Record 125 Cong. Rec. 12006-12017, U.S. Congressional Record 125 Cong. Rec. 12030 (daily ed. Sept. 6, 1979); *Yusupov v. Attorney Gen.*, 518 F.3d 185, 203 (3d Cir. 2008) (footnote omitted); accord, e.g., *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1060–61 (9th Cir. 2017) (en banc); Deborah E. Anker & Michael H. Posner, “The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,” 19 San Diego L. Rev. 9, 1981 (<https://digital.sandiego.edu/sdlr/vol19/iss1/3>).

The provisions of the Refugee Act and subsequent amendments relating to asylum eligibility are codified at 8 U.S.C. §1158. The first provision of this section states that anyone who is physically present in the United States or who arrives in the United States, whether or not at a designated port of entry, and regardless of status, may apply for asylum.⁴⁸ By enacting this provision, Congress sought to ensure that asylum seekers could apply for asylum regardless of where or how they entered the United States or whether they had status.⁴⁹ In enacting the Refugee Act of 1980, Congress adopted language from the House bill, which stated that anyone “physically present in the United States or at a land border or port of entry, irrespective of such [noncitizen’s] status” may apply for asylum, and rejected the Senate bill that excluded the language about the land border and ports of entry.⁵⁰ Representative Holtzman, the author of the House bill, wrote the provision to guarantee uniform treatment of asylum seekers, including at land ports of entry.⁵¹ Holtzman’s correspondence on the bill included a letter from the United Nations High Commissioner for Refugees recommending a “uniform” procedure for handling of asylum cases and a letter from the INS General Counsel indicating that the language of the asylum provision in the House version would require the Attorney General to apply the same asylum procedures at land border ports as were applied at air or sea ports of entry.⁵² In enacting the House version of the bill, Congress decided to make clear that asylum seekers at the land border could apply for asylum, regardless of status, and should be treated the same as other asylum seekers.⁵³ In 1996, Congress added the language “whether or not at a designated port of arrival” to the provision, making it even more clear that people who enter without authorization must be accorded the same access to asylum procedures.⁵⁴

Congress also later amended 8 U.S.C. §1158 to delineate specific exceptions where an individual would not be eligible for asylum. An asylum seeker may be denied based on their travel through other countries only if they were “firmly resettled” in a transit country or if the United States has a formal “safe third country” return agreement with a country where refugees are both safe from persecution and have access to fair asylum procedures. 8 U.S.C. §1158(d)(5)(B) provides that the administration may not issue regulations that are inconsistent with these provisions.

The statutory language and Congressional record make clear that it is illegal to deny an individual the right to apply for asylum based on how a person entered the United States, and therefore illegal to create a bar to asylum eligibility based on manner of entry.⁵⁵ It is also illegal

⁴⁸ 8 U.S.C. § 1158(a)(1).

⁴⁹ Yael Schacher and Refugees International Amicus Brief in *Immigrant Defenders vs. Chad Wolf*, No. 2:20-cv-09893 (C.D. Cal. November 20, 2020),

<https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/5f7a0c64571256540e2502/1606318604152/2020.11.20+%5B77%5D+Mtn+for+Leave+to+Participate+as+Amici+Curiae.pdf>

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Pub. L. No. 104-28, Div. C, § 302(a), 110 Stat. 3009-546, 3009-583

(<https://www.govinfo.gov/content/pkg/PLAW-104publ208/pdf/PLAW-104publ208.pdf>)

⁵⁵ ACLU, “East Bay Sanctuary Covenant v. Trump – TRO Granted,” November 20, 2018

(<https://www.aclu.org/cases/east-bay-sanctuary-covenant-v-barr?document=east-bay-sanctuary-covenant-v-trump->

to deny asylum based on an individual's travel through a third country (unless the country has a safe third country return agreement with the United States or an individual was firmly resettled there). The proposed rule violates these provisions by making people ineligible for asylum if they entered in a certain way at the border and were not denied protection in a transit country. Indeed, every regulation promulgated by the Trump administration that attempted to deny asylum based on manner of entry into the United States or transit through another country was struck down by federal courts as unlawful.

The Trump administration's entry ban, which barred asylum for refugees who enter the United States between ports of entry, was quickly blocked by a federal court.⁵⁶ The court concluded that the policy "flout[s] the explicit language" of U.S. asylum law.⁵⁷ The decision to enjoin the rule was later upheld by the U.S. Court of Appeals for the Ninth Circuit.⁵⁸ In a separate decision in a lawsuit brought by Human Rights First and other organizations, another federal court vacated the policy, also holding that it is inconsistent with asylum law.⁵⁹

The Trump administration repeatedly imposed transit bans to bar refugees at the border who had traveled through another country on their way to seek safety and had not applied for asylum in transit countries, subject to limited exceptions. The administration's first iteration of the policy, issued as an interim final rule, was vacated and enjoined by federal courts including in a lawsuit brought by Human Rights First and other organizations.⁶⁰ The Trump administration then attempted to revive the transit ban by issuing a final rule in 2020, which was similarly enjoined in a holding that the ban likely violated U.S. asylum law because it is inconsistent with the firm resettlement and safe third country provisions in U.S. law.⁶¹

The White House's own legal counsel warned the Biden administration in 2021 that a regulation barring asylum for people who enter between ports of entry and did not seek refuge in other countries could be struck down as illegal for the same reasons that the Trump administration's

[tro-granted&redirect=legal-document%2Ftro-granted-ebsc-v-trump](#)); ACLU, "East Bay Sanctuary Covenant v. Trump Ninth Circuit Ruling," February 28, 2020 (<https://www.aclu.org/cases/east-bay-sanctuary-covenant-v-barr?document=east-bay-sanctuary-covenant-v-trump-ninth-circuit-ruling>)

⁵⁶ ACLU, "East Bay Sanctuary Covenant v. Trump – TRO Granted," November 20, 2018

(<https://www.aclu.org/cases/east-bay-sanctuary-covenant-v-barr?document=east-bay-sanctuary-covenant-v-trump-tro-granted&redirect=legal-document%2Ftro-granted-ebsc-v-trump>)

⁵⁷ *Id.*

⁵⁸ ACLU, "East Bay Sanctuary Covenant v. Trump Ninth Circuit Ruling," February 28, 2020

(<https://www.aclu.org/cases/east-bay-sanctuary-covenant-v-barr?document=east-bay-sanctuary-covenant-v-trump-ninth-circuit-ruling>)

⁵⁹ *O.A. v. Trump; S.M.S.R v. Trump*, Nos.18-2718, 18-2838 D.D.C. August 2, 2019,

(<https://www.caircoalition.org/sites/default/files/Memo%20Opinion%20Dkt.%2092.pdf>)

⁶⁰ *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020), <https://casetext.com/case/capital-area-immigrants-rights-coal-v-trump>; *East Bay Sanctuary Covenant v. Barr*, Nos. 19-16487, 19-16773 (9th Cir. 2020), <https://s3.documentcloud.org/documents/6981578/East-Bay-2020-07-06.pdf>

⁶¹ ACLU, "East Bay Sanctuary Covenant v. Trump Order Granting Preliminary Injunction," February 16, 2021 (<https://www.aclu.org/cases/east-bay-v-barr?document=pi-order>)

bans were vacated and enjoined.⁶² It would be a terrible mistake for the agencies to move forward with final rulemaking in the face of overwhelming evidence of the rule’s illegality.

The proposed rule also violates U.S. law that sets forth requirements for screening asylum seekers in expedited removal. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which created the expedited removal process.⁶³ Under this process, codified at 8 U.S.C. §1225, asylum seekers placed in expedited removal who establish a credible fear of persecution must be referred for full asylum adjudications. Credible fear of persecution is defined as a “significant possibility” that the asylum seeker could establish eligibility for asylum in a full hearing. This determination is made in a preliminary screening (a “credible fear interview”) that is not intended to be a full adjudication. Congress made clear that this standard was intended to be a “low screening standard for admission into the usual full asylum process.”⁶⁴

Like the Trump administration’s asylum bans, the proposed rule attempts to unlawfully circumvent the credible fear screening standard. It provides that asylum seekers in expedited removal who are covered by the rule must show by a preponderance of evidence that they qualify for an exception. Only if they overcome this barrier — which will be impossible for many asylum seekers given the narrow exceptions and the due process barriers in fear screenings — can they then be screened under the “significant possibility” standard. Otherwise, they would be subjected to a more stringent screening standard and ordered deported if they do not pass. The screening process that the ban would put in place is completely incompatible with the statutory credible fear standard. It would convert the preliminary screening into a full adjudication of whether the asylum ban applies or not, and based on the outcome of that determination it would eliminate the “significant possibility” standard entirely for all asylum seekers covered by the ban and force them to meet a higher standard in order to pass the fear screening. It is not legally permissible for the agencies to deny full hearings to asylum seekers who could show a “significant possibility” of establishing asylum eligibility.

Asylum ban would subvert refugee law globally and undermine U.S. leadership on human rights

The agencies’ blatant attempt to violate the Refugee Convention and the improper use of safe pathways to attempt to justify denials of access to asylum threaten to subvert the refugee protection system globally. In June 2022, the United States and other governments signed the Los Angeles Declaration on Migration and Protection, in which they agreed to “protect[] the safety and dignity of all migrants, refugees, asylum seekers, and stateless persons” and uphold

⁶² Camilo Montoya-Galvez, “U.S. officials clashed over asylum restriction, and its legality, before Biden proposed it,” CBS News, March 1, 2023 (<https://www.cbsnews.com/news/immigration-biden-asylum-restrictions-legality/>)

⁶³ Pub. L. No. 104-28, Div. C, § 302(a), 110 Stat. 3009-546, 3009-583 (<https://www.govinfo.gov/content/pkg/PLAW-104publ208/pdf/PLAW-104publ208.pdf>)

⁶⁴ U.S. Congressional Record, Cong. Rec. Vol. 142, Num. 136, September 27, 1996, (<https://www.govinfo.gov/content/pkg/CREC-1996-09-27/html/CREC-1996-09-27-pt1-PgS11491-2.htm>)

the principle of non-refoulement and other obligations under international law.⁶⁵ The declaration emphasizes the shared responsibility of countries in the region to strengthen and expand access to international protection.⁶⁶

Promulgating the asylum ban would violate the United States' obligations under international law and its commitments in the Los Angeles declaration, which would undermine the U.S. government's efforts to encourage other countries to welcome and host refugees. If other countries follow the U.S. example and impose restrictions on asylum, refugees will be pushed to leave those countries and instead search for asylum elsewhere — including in the United States.

In its comment on the proposed rule, UNHCR noted that the asylum ban's attempt to deny access to protection on the grounds that it should have been sought elsewhere is "inappropriate and fail[s] to recognize the need for responsibility-sharing in refugee protection globally."⁶⁷ The former presidents of Costa Rica and Colombia have also warned that the asylum ban would subvert the Los Angeles Declaration, overburden countries in the Americas that already host large numbers of refugees, and undermine the willingness of governments to welcome and host refugees.⁶⁸ The overwhelming majority of the world's refugees are hosted by other nations, many of which have far less capacity than the United States.⁶⁹ In the Americas, Colombia, Costa Rica, Ecuador, Mexico, and other countries collectively host millions of refugees.⁷⁰ About 6 million of the 7.1 million people who have fled Venezuela in search of safety and stability are hosted in Colombia, Ecuador, Peru, and other countries in Latin America and the Caribbean.⁷¹ The proposed rule would threaten compliance with refugee law globally and violate U.S. commitments to work with regional partners to expand access to international protection.

The asylum ban also thwarts regional efforts to protect refugees by attempting to treat Mexico and other countries as "safe third countries" for asylum seekers even though they do not meet requirements under U.S. law. U.S. law sets forth clear requirements where a country may be

⁶⁵ Heads of State, "Los Angeles Declaration on Migration and Protection," The White House Statements, June 10, 2022 (<https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/>)

⁶⁶ *Id.*

⁶⁷ UNHCR, "UNHCR Comments on Circumvention of Lawful Pathways NPRM," [Regulations.gov](https://www.regulations.gov/comment/USCIS-2022-0016-7428), March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

⁶⁸ Former Colombian President Juan Manuel Santos, "Time for the Americas to step up (again) on migration," *El País*, March 6, 2023 (<https://english.elpais.com/opinion/2023-03-06/time-for-the-americas-to-step-up-again-on-migration.html>); Former Costa Rican President Carlos Alvarado Quesada, "What Biden's deeply troubling asylum limit means for the economy," *The Hill*, March 8, 2023 (<https://thehill.com/opinion/immigration/3889578-what-bidens-deeply-troubling-asylum-limit-means-for-the-economy/>) Former Colombian President Juan Manuel Santos, "Time for the Americas to step up (again) on migration," *El País*, March 6, 2023 (<https://english.elpais.com/opinion/2023-03-06/time-for-the-americas-to-step-up-again-on-migration.html>); Former Costa Rican President Carlos Alvarado Quesada, "What Biden's deeply troubling asylum limit means for the economy," *The Hill*, March 8, 2023 (<https://thehill.com/opinion/immigration/3889578-what-bidens-deeply-troubling-asylum-limit-means-for-the-economy/>)

⁶⁹ UNHCR, "Refugee data Finder," last updated October 27, 2022 (<https://www.unhcr.org/refugee-statistics/>)

⁷⁰ UNHCR, "The Americas: Global Report 2021," June 16, 2022 (<https://reporting.unhcr.org/globalreport2021/americas>)

⁷¹ UNHCR, "UNHCR, IOM and partners appeal for US\$1.72 billion for refugees and migrants from Venezuela," December 1, 2022 (<https://www.unhcr.org/en-us/news/press/2022/12/6388b0034/unhcr-iom-partners-appeal-us172-billion-refugees-migrants-venezuela.html>)

designated as a safe third country: the country must enter into a formal agreement with the United States, guarantee asylum seekers protection from persecution, and provide full and fair procedures for protection claims. Once there is a formal safe third country agreement with a country that meets these requirements, U.S. law allows adjudicators to deny asylum to people who have transited through that country. Mexico and other common transit countries have no formal agreement with the United States and do not meet the other requirements, as discussed in Section V. The Mexican government has repeatedly refused to enter into a safe third country agreement. However, under the asylum ban, any asylum seeker who transits through Mexico or another country could potentially be denied asylum based on their transit, essentially forcing other countries to bear the refugee protection responsibilities of the United States in violation of U.S. and international law and further undermining the Los Angeles Declaration.

As UNHCR noted in its comment, this “de facto transfer of responsibility for adjudicating asylum claims to other States” cannot be carried out because the United States does not have a formal agreement with these transit countries and has not ensured that necessary safeguards are in place, including that asylum seekers would be readmitted to the country and permitted to remain while a determination on their asylum claim is made, have access to a fair and efficient asylum procedure, would be treated consistent with international human rights and refugee laws and would not be refouled, and if determined to be refugees would be recognized as such and granted lawful stay or provided with a durable solution.⁷²

Exceptions cannot make the proposed rule lawful

The limited exceptions in the proposed rule do not make it lawful. Requiring adjudicators to deny asylum based on factors like entry and travel route is fundamentally unlawful under U.S. and international law, even if exceptions exist. The Trump administration also included exceptions in its transit ban, but federal courts repeatedly struck it down as unlawful. Making asylum broadly contingent on an impermissible ground violates the statute even if some asylum seekers are excepted from the ban.

The ban includes narrow exceptions for people who, at the time they entered the United States, “faced an acute medical emergency” or “an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder,” as well as for victims of severe trafficking.⁷³ These exceptions will not protect the vast majority of refugees who would qualify for asylum under U.S. law, including many who enter the United States without an appointment due to safety risks, medical issues, and other protection needs.

In its comment on the proposed rule, UNHCR warned that the exceptions “do not fundamentally address the breach of international legal standards stemming from the presumption of ineligibility for asylum.”⁷⁴ Assessing exceptions based on how extreme they were and their

⁷² UNHCR, “UNHCR Comments on Circumvention of Lawful Pathways NPRM,” [Regulations.gov](https://www.regulations.gov/comment/USCIS-2022-0016-7428), March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

⁷³ 88 FR 11704 at 11750.

⁷⁴ UNHCR, “UNHCR Comments on Circumvention of Lawful Pathways NPRM,” [Regulations.gov](https://www.regulations.gov/comment/USCIS-2022-0016-7428), March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

temporal relation to the moment of entry into the United States excludes many eligible refugees and is fundamentally inconsistent with the right to seek asylum, as UNHCR noted.⁷⁵

Moreover, the exceptions do not mitigate violations of Article 31, which prohibits the imposition of penalties on asylum seekers on account of unlawful entry provided they present themselves to authorities and show good cause for their entry. As UNHCR explained, well-founded fear of persecution is itself good cause for irregular entry.⁷⁶ The exceptions do not account for a range of circumstances where refugees are at risk or can demonstrate good cause, including non-life-threatening medical needs and non-medical needs.⁷⁷

Under the proposed rule, many refugees who qualify for asylum under U.S. law would not be eligible for exceptions, including those who:

- did not have knowledge of the ban;
- would be left separated from their spouse and children abroad due to the ban;
- did not have asylum or other durable status in a transit country;
- were not firmly resettled in a transit country;
- did not reasonably believe they would be protected from refoulement, violence, persecution, and other harms in a transit country;
- transited through a country that did not have full, fair, and efficient asylum procedures;
- had medical, safety, or other protection needs including non-life-threatening medical needs or non-medical needs;
- reasonably believed that their life or safety was at risk prior to entry;
- could not safely or reasonably travel to or access asylum at a port of entry;
- could show good cause for entering the United States; or
- did not have family or other ties in countries they transited.

Temporary nature of the proposed rule does not make it lawful

The agencies plan to implement the proposed rule for two years, but the temporary nature of the ban does not reduce its illegality and would subject refugees to deportation and other harms as long as it is in effect. Moreover, it could be wielded by subsequent administrations indefinitely to continue to ban refugees. Illegal and inhumane policies, even when temporary, can become entrenched and may be renewed and perpetuated by administrations or other branches of government, as the trajectory of the Title 42 policy confirms.

The agencies' claim that the proposed rule is needed as a temporary urgent measure to address the arrival of asylum seekers and migrants is not a justification to violate U.S. and international refugee law. As UNHCR stated in its comment on the proposed rule, "access to territory cannot

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id.

be suspended based on emergencies” and “no timeframe or ‘sunset’ provision” can mitigate the fact that the proposed rule denies access to asylum and places refugees at risk of refoulement.⁷⁸

Proposed rule will force adjudicators to implement an illegal ban

The proposed rule would cause terrible damage to the asylum adjudication system in the United States. Asylum officers and immigration judges would be tasked with implementing an asylum ban that is at odds with U.S. and international legal standards. Illegal and inhumane Trump administration policies forced many immigration judges and asylum officers to quit to avoid having to carry out unlawful policies and return asylum seekers to danger.⁷⁹

The president of the union that represents asylum officers, Michael Knowles, condemned the Trump administration’s attacks on asylum at the time: “These policies are blatantly illegal, they are immoral, and indeed are the basis for some egregious human rights violations by our own country.”⁸⁰ With respect to the transit ban, he noted that “[a]sylum officers who do this work are the ones tasked with applying it. We are the hands-on agents of this policy, and I don’t know of any asylum officers who think it is the right thing to do.”⁸¹ The union, which represented around 700 refugee and asylum offices at the time, submitted an amicus brief in litigation challenging the transit ban, warning that it “defies our nation’s asylum laws and ... rips at the moral fabric of our country.”⁸²

If the agencies proceed with the final rulemaking, they will again force asylum adjudicators to implement patently illegal policies. After the Biden administration announced the asylum ban, Knowles noted that asylum officers are already considering leaving their jobs, wondering: “Am I going to have to make a choice between my calling, my livelihood to be a refugee protector, or leaving as a matter of conscience?”⁸³ He further noted that he has not witnessed so many officers consider leaving their jobs since the Trump administration.

The proposed rule intends to rescind Trump-era entry and transit bans but fails to do so

⁷⁸ UNHCR, “UNHCR Comments on Circumvention of Lawful Pathways NPRM,” [Regulations.gov](https://www.regulations.gov/comment/USCIS-2022-0016-7428), March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

⁷⁹ Molly O’Toole, “Asylum officers rebel against Trump policies they say are immoral and illegal,” Los Angeles Times, November 15, 2019 (<https://www.latimes.com/politics/story/2019-11-15/asylum-officers-revolt-against-trump-policies-they-say-are-immoral-illegal>); Doug Stephens, “Why I Quit My Job Carrying Out Trump’s Immigration Policies,” New York Times, November 20, 2019 (<https://www.nytimes.com/2019/11/20/opinion/trump-asylum-remain-mexico-policy.html>); “Why Immigration Judges Opt To Leave Over Trump Policies” NPR Morning Edition, February 10, 2020 (<https://www.npr.org/2020/02/10/804408028/why-immigration-judges-opt-to-leave-over-white-house-policies>); Priscilla Alvarez, “Immigration judges quit in response to administration policies,” CNN, December 27, 2019 (<https://www.cnn.com/2019/12/27/politics/immigration-judges-resign/index.html>).

⁸⁰ Priscilla Alvarez, “Head of union for asylum officers calls Trump asylum policies ‘egregious,’” CNN, November 20, 2019 (<https://www.cnn.com/2019/11/19/politics/uscis-union-remain-in-mexico/index.html>).

⁸¹ Hamed Aleaziz, “Asylum Officers Are Urging A Court To Strike Down Trump’s Asylum Ban And Saying It ‘Rips At The Moral Fabric Of Our Country,’” BuzzFeed News, October 15, 2019 (<https://www.buzzfeednews.com/article/hamedaleaziz/asylum-officers-urge-ban-block-court-border-law>).

⁸² *Id.*

⁸³ Hamed Aleaziz, “News Analysis: Why the border may ‘never go back to what it was before Trump,’” Los Angeles Times, March 2, 2023 (<https://www.latimes.com/politics/story/2023-03-02/biden-asylum-proposal-trump>).

It should also be noted that while the agencies plan to replace the Trump administration’s entry and transit bans with this proposed rule, calling it a “tailored approach,” the proposed regulatory language does not actually delete the regulatory language related to the entry and transit bans and unless edited would leave those prior bans on the books.

III. Agencies’ Discussion of Proposed Rule is Rooted in Inaccurate Claims and Xenophobic Rhetoric, Disregards Harm to Asylum Seekers

In the supplementary information section of the proposed rule, the agencies cite false and unfounded claims about asylum seekers’ eligibility for asylum under U.S. law, employ dehumanizing rhetoric reminiscent of Trump administration asylum ban regulations, and fail to consider the harm that asylum seekers will suffer under the asylum ban.

The agencies repeatedly attempt to paint asylum seekers at the border as largely ineligible for asylum. They claim that “most migrants who are initially deemed eligible to pursue their claims ultimately are not granted asylum,” noting that “only a small proportion” will be granted asylum.⁸⁴ To support this sweeping claim, the agencies state that from 2014 to 2019, 15 percent of asylum seekers who passed their credible fear interviews were granted asylum or other protection.⁸⁵ They then note that among cases referred and completed since 2013, “significantly fewer than 20 percent” of people found to have a credible fear were granted asylum.⁸⁶

These statistics are misleading and do not accurately reflect grant rates for asylum seekers who have undergone the credible fear process. In fact, the agencies acknowledge in footnotes that these grant rates are calculated not by comparing grants of asylum to denials of asylum, but rather by dividing grants of asylum by all completed cases.⁸⁷ Completed cases include denials as well as *all* cases resolved on other grounds such as “not adjudicated,” withdrawn, administratively closed, or “no asylum application filed.”⁸⁸ These other categories reflect cases that were not completed on the merits and therefore do not indicate whether a person would have established eligibility for asylum. In some instances, cases are administratively closed because individuals may qualify for other relief with USCIS. Cases categorized as “no asylum application filed” could include cases where the asylum seeker qualified for other relief or was unable to file an application due to lack of access to counsel, detention, language barriers, and other issues. Using the agencies’ methodology to calculate denial rates, only 24 percent of positive credible fear cases completed since 2013 were ultimately denied asylum.⁸⁹

EOIR began calculating asylum grant rates in this misleading way under the Trump administration. Previously, the agency had reported asylum grant rates based only on cases

⁸⁴ 88 FR 11704 at 11705-06.

⁸⁵ *Id.* at 11716.

⁸⁶ *Id.*

⁸⁷ *Id.*, notes 97-98.

⁸⁸ EOIR, “EOIR Adjudication Statistics,” January 16, 2023 (<https://www.justice.gov/eoir/page/file/1062976/download>)

⁸⁹ *Id.*

where there was a decision on the merits of the asylum claim.⁹⁰ In 2018, the agency began to report asylum grant rates out of the total of all cases completed on all grounds regardless of whether there was a decision on the merits.⁹¹ This method artificially deflates the grant rate and creates the false impression that many asylum seekers were ineligible for asylum even where there was no decision on their asylum claim.

Using the pre-Trump methodology to calculate asylum grant rates, from 2013 to the first quarter of 2023, *nearly 40 percent* of all asylum seekers who had their cases decided on the merits of their asylum claim after a positive credible fear determination were granted asylum.⁹² This figure may exclude asylum seekers who were granted relief other than asylum, such as withholding of removal, CAT protection, cancellation of removal, and adjustment of status.⁹³

Moreover, it is important to consider this grant rate in the context of Trump administration anti-asylum policies that caused immigration court grants to plummet. Human Rights First has issued analysis on the impact of draconian Trump administration policies, such as the transit ban and *Matter of A-B-*, that led immigration courts to wrongly deny many refugees asylum and caused grant rates to fall.⁹⁴ In 2022, after some of these policies were terminated or enjoined, **a higher percentage — over 55 percent — of asylum seekers who had their cases decided on the merits after a positive credible fear determination were granted asylum.**⁹⁵

As Congress explained when creating the expedited removal process, adjudicators should apply a low screening standard in credible fear interviews in order to determine whether an asylum seeker should be referred for a full asylum adjudication. Putting aside the agencies' flawed and misleading calculations, the fact that only a subset of people who receive positive credible determination are later granted asylum cannot be wielded as a purported justification to create new barriers to asylum. Given that Congress intended for a credible fear interview to be a preliminary screening with a low threshold, not an adjudication on eligibility for asylum, it would be expected that not all asylum seekers who establish a credible fear of persecution would ultimately be granted asylum. Moreover, since the asylum ban sets forth grounds to deny asylum that have nothing to do with whether a person meets the definition of a refugee, any attempt by the agencies to paint asylum claims as meritless to try to justify the ban is disingenuous because the rule would deny asylum to people who *are* in fact eligible for it.

The proposed rule targets people who are fleeing countries in Central and South America and the Caribbean in large numbers and seeking protection at the southern border due to mass human

⁹⁰ TRAC Immigration, "About the Data on Asylum," November 16, 2022 (https://trac.syr.edu/phptools/immigration/asylum/about_data.html)

⁹¹ Id.

⁹² EOIR, "EOIR Adjudication Statistics," January 16, 2023 (<https://www.justice.gov/eoir/page/file/1062976/download>)

⁹³ TRAC Immigration, "A Mounting Asylum Backlog and Growing Wait Times," December 22, 2021 (<https://trac.syr.edu/immigration/reports/672/>)

⁹⁴ Human Rights First, "Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deports Refugees," June 11, 2020 (<https://humanrightsfirst.org/library/grant-rates-plummet-as-trump-administration-dismantles-u-s-asylum-system-blocks-and-deports-refugees/>)

⁹⁵ EOIR, "EOIR Adjudication Statistics," January 16, 2023 (<https://www.justice.gov/eoir/page/file/1062976/download>)

rights abuses and political persecution. However, the supplementary discussion does not take into account the abuses that force them to flee or that many of these individuals are granted asylum. In FY 2022 alone, over 10,000 asylum seekers from El Salvador, Cuba, Colombia, Ecuador, Guatemala, Haiti, Venezuela, and Nicaragua were granted asylum by the immigration court.⁹⁶ Others were granted asylum by USCIS. 77.4 percent of all Venezuelans with completed immigration court cases were granted asylum that year.⁹⁷ The proposed rule does not mention these statistics or discuss the human rights catastrophe that the United States would perpetuate by deporting them back to the countries they fled or to unsafe third countries.

The proposed rule barely discusses the deteriorating conditions and escalating human rights violations in many of these countries. For instance, violence and political instability continue to escalate in Haiti, and in late 2022 the UN High Commissioner for Human Rights, UN High Commissioner for Refugees and the UN Humanitarian Coordinator for Haiti all warned that people should not be returned to Haiti due to the dire and dangerous conditions there.⁹⁸ In Venezuela, the authoritarian regime brutally suppresses the political opposition and any dissent through murder, torture, detention, and other attacks in what the United Nations has concluded amount to crimes against humanity.⁹⁹ The Nicaraguan government has also continued to escalate political persecution against activists, human rights defenders, journalists, lawyers, and others, including carrying out sweeping arrests, extrajudicial detention, disappearances, and torture, with UNHCR recently noting that the situation “may be characterized as a massive violation of human rights.”¹⁰⁰ In Cuba, government officials sharply restrict basic human rights and carry out widespread abuses including recently responding to the largest peaceful protests in decades with tear gas, beatings, and arrests.¹⁰¹

⁹⁶ TRAC Immigration, “Asylum Decisions Through February 2023” (<https://trac.syr.edu/phptools/immigration/asylum/>)

⁹⁷ *Id.*

⁹⁸ UN Human Rights, “Comment by UN High Commissioner for Human Rights Volker Türk on deportation of Haitians from Dominican Republic,” November 10, 2022 (<https://www.ohchr.org/en/press-releases/2022/11/comment-un-high-commissioner-human-rights-volker-turk-deportation-haitians>); UNHCR, “UNHCR calls on States to refrain from forced returns of Haitians,” November 3, 2022 (<https://www.unhcr.org/en-us/news/press/2022/11/6363acd64/unhcr-calls-states-refrain-forced-returns-haitians.html>); United Nations, “United Nations provides overview of ‘severe and dire’ humanitarian crisis in Haiti, Miami Herald, October 14, 2022 (<https://www.miamiherald.com/news/nation-world/world/americas/haiti/article266922441.html>)

⁹⁹ UN Human Rights, “Venezuela: new UN report details responsibilities for crimes against humanity to repress dissent and highlights situation in remotes mining areas,” September 20, 2022 (<https://www.ohchr.org/en/press-releases/2022/09/venezuela-new-un-report-details-responsibilities-crimes-against-humanity>); United States Department of State, “2022 Country Reports on Human Rights Practices: Venezuela” (<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/venezuela/>).

¹⁰⁰ UNHCR, “International Protection Considerations with Regard to People Fleeing Nicaragua,” January 2023 (<https://www.refworld.org/docid/63bc17264.html>); Freedom House, Nicaragua: Freedom in the World 2022 (<https://freedomhouse.org/country/nicaragua/freedom-world/2022>); Lisa Schlein, “UN: Growing Repression in Nicaragua Spurring Political, Social and Human Rights Crisis,” VOA News, March 7, 2022 (<https://www.voanews.com/a/un-growing-repression-in-nicaragua-spurring-political-social-and-human-rights-crisis/6473581.html>); United States Department of State, “2022 Country Reports on Human Rights Practices: Nicaragua” (<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/nicaragua>).

¹⁰¹ United States Department of State, “2021 Country Reports on Human Rights Practices: Cuba” (<https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/cuba/>); United States Department of

In El Salvador, government authorities commit massive human rights violations, including torture and thousands of arbitrary detentions.¹⁰² LGBTQI+ individuals are targeted for homophobic and transphobic violence, including at the hands of gangs and the police.¹⁰³ Gangs forcibly recruit children and sexually abuse, kill, and disappear women, girls, and LGBTQI+ individuals.¹⁰⁴ In Honduras, LGBTQI+ individuals and women also face high levels of violence.¹⁰⁵ Honduras is one of the most dangerous countries for human rights defenders, including Indigenous land defenders who have been brutally attacked and murdered.¹⁰⁶ In Guatemala, rape, femicide, violence against women, violent attacks against LGBTQI+ persons, and gang recruitment of displaced children are widespread.¹⁰⁷ Persecution of journalists, Indigenous and human rights activists, and judicial officials combatting impunity has continued to escalate.¹⁰⁸

Instead of discussing the abuses that force people to flee, the proposed rule couples misleading statistics with xenophobic rhetoric about asylum seekers who request protection at the border. The agencies repeatedly use dehumanizing language about an “influx,” “surge,” and “flows” of migrants. The agencies describe human beings fleeing persecution and torture as an “unmanageable flow of migrants” and frame the proposed rule as a measure that will “protect” against them.¹⁰⁹ This invidious language combined with false claims about the merits of asylum claims is reminiscent of Trump administration rhetoric. In its supplementary discussion of the transit ban, the Trump administration similarly noted that “a large majority of the asylum claims raised by those apprehended at the southern border are ultimately determined to be without

State, “2022 Country Reports on Human Rights Practices: Cuba” (<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/cuba/>).

¹⁰² Amnesty International, “El Salvador: President Bukele engulfs the country in a human rights crisis after three years in government,” June 2, 2022 (<https://www.amnesty.org/en/latest/news/2022/06/el-salvador-president-bukele-human-rights-crisis/>); Human Rights Watch, “El Salvador: Events of 2022” (<https://www.hrw.org/world-report/2023/country-chapters/el-salvador>); United States Department of State, “2022 Country Reports on Human Rights Practices: El Salvador” (<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/el-salvador/>).

¹⁰³ Human Rights Watch, “El Salvador: Events of 2022” (<https://www.hrw.org/world-report/2023/country-chapters/el-salvador>); United States Department of State, “2022 Country Reports on Human Rights Practices: El Salvador” (<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/el-salvador/>).

¹⁰⁴ Human Rights Watch, “El Salvador: Events of 2022” (<https://www.hrw.org/world-report/2023/country-chapters/el-salvador>)

¹⁰⁵ United States Department of State, “2022 Country Reports on Human Rights Practices: Honduras” (<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/honduras/>).

¹⁰⁶ César Muñoz, “Honduras Needs to Protect Indigenous Land, Leaders,” Human Rights Watch, June 27, 2022 (<https://www.hrw.org/news/2022/06/27/honduras-needs-protect-indigenous-land-leaders>); Human Rights Watch, “Honduras: Events of 2022” (<https://www.hrw.org/world-report/2023/country-chapters/honduras>).

¹⁰⁷ United States Department of State, “2022 Country Reports on Human Rights Practices: Guatemala” (<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/guatemala/>).

¹⁰⁸ Marina E. Franco, “Guatemala intensifying crackdown on human rights defenders, group warns,” Axios, August 30, 2022 (<https://www.axios.com/2022/08/30/guatemala-crackdown-human-rights-defenders-journalists>); WOLA, “New Reports from U.S. Human Rights Organizations Raise Concern About Guatemala’s Path Towards Authoritarianism, Call for Stronger U.S. Responses,” October 6, 2022 (<https://www.wola.org/2022/10/reports-u-s-human-rights-organizations-guatemala-authoritarianism/>)

¹⁰⁹ 88 FR 11704 at 11707.

merit.”¹¹⁰ The proposed rule attempts to justify the ban in light of the “severe strain this anticipated influx of migrants would place on DHS resources,”¹¹¹ mirroring Trump administration transit ban language that the “large number of meritless asylum claims places an extraordinary strain on the nation’s immigration system.”¹¹² It is past time for the agencies to stop parroting this dehumanizing, xenophobic, false rhetoric about asylum claims.

With no evidence whatsoever, the agencies also falsely claim that “those who would circumvent orderly procedures and forgo readily available options may be less likely to have a well-founded fear of persecution than those individuals who do avail themselves of an available lawful opportunity.”¹¹³ This claim perpetuates a false narrative that flies in the face of longstanding international refugee protection principles. Entering without authorization does not have bearing on whether a person is a refugee; indeed, Article 31 of the Refugee Convention addressed the very reality that “many refugees...have no choice but to cross into a safe country irregularly prior to making an asylum claim.”¹¹⁴

The agencies also claim without evidence that the proposed rule would address the “strain” on the resources of NGOs.¹¹⁵ It is disingenuous to suggest that the asylum ban is intended to help NGOs when nearly 300 civil, human rights, and immigrant rights groups wrote to the Biden administration in January urging it not to issue the proposed rule, and after the proposed rule was published 383 groups again urged the administration to abandon its plan to impose the asylum ban.¹¹⁶ Human Rights First opposes the ban in its entirety. When the Trump administration’s transit ban was in effect, it was a significant strain on our resources, making it more difficult to secure protection for eligible refugees and requiring time-consuming appeals to obtain relief that our clients were entitled to after the ban was rightly vacated. The proposed rule would similarly thwart our mission to represent refugees and help them secure the relief they are entitled to under U.S. law.

Lastly, the agencies continue to double down on the ineffective, inhumane, and punitive deterrence approach despite overwhelming evidence that policies aimed at deterrence do not prevent people from seeking protection or achieve orderly processing. Rather, policies that block and ban asylum seekers — like Title 42, asylum bans, and the turning away of people who cannot use or access a government app — fuel disorder and force people to attempt dangerous

¹¹⁰ Department of Homeland Security and Department of Justice, “Asylum Eligibility and Procedural Modifications,” 84 FR 33829, 33831, July 16, 2019 (<https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>)

¹¹¹ 88 FR 11704 at 11728.

¹¹² 84 FR 33829 at 33831.

¹¹³ 88 FR 11704 at 11737.

¹¹⁴ UNHCR Amicus Brief in *O.A. v. Donald J. Trump*, August 13, 2020 (https://www.refworld.org/topic_50ffbce53a_50ffbce54f_5f3f90ea4_0_.,AMICUS_.html)

¹¹⁵ 88 FR 11704 at 11731.

¹¹⁶ 292 Non-Government Organizations, Letter to President Biden re: Notice of Proposed Rulemaking regarding asylum ban, January 18, 2023 (https://humanrightsfirst.org/wp-content/uploads/2023/01/Letter-to-President-Biden-re_-asylum-ban-NPRM-1.pdf); 383 Non-Governmental Organizations, “No Family Detention Letter,” March 15, 2023 (<https://www.detentionwatchnetwork.org/sites/default/files/NGO%20letter%20-%20No%20Family%20Detention%20.pdf>).

crossings between ports of entry to reach safety in the United States.¹¹⁷ Before the Trump and Obama administrations restricted asylum access at ports of entry, many populations including Cubans and Haitians largely sought asylum at ports of entry rather than crossing the border, but barriers such as metering and Title 42 drove them to cross between ports of entry to reach safety.¹¹⁸ Rather than creating new restrictions on access to asylum that will only cause more chaos and disorder, the agencies should maximize asylum processing at ports of entry and comply with legal obligations to refugees.

IV. Denying Asylum to People Who Qualify as Refugees Under U.S. Law

The proposed rule would make ineligible for asylum people seeking protection who have not been denied protection in a transit country and enter the United States at the southwest border between ports of entry or at a port of entry without a scheduled appointment through the CBP One application. It exempts people who can show that they were unable to access or use the CBP One app due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle, but does not acknowledge that this would be impossible for many to establish and disregards the reality that many refugees cannot secure appointments through the app due to extremely limited slots and are left to wait indefinitely in danger.

Under the proposed rule, the factors that determine whether a refugee is ineligible for asylum — manner of entry, ability to secure an appointment through a government app, transit through other countries — have nothing to do with their fear or persecution they suffered and whether they meet the definition of a refugee under U.S. law. Nor do the exceptions protect refugees from being denied asylum. The agencies make clear that these arbitrary factors would likely “decrease the number of asylum grants.”¹¹⁹

Like prior policies wielded to ban and block refugees from asylum, the proposed rule will lead to the refolement and chain refolement of refugees.¹²⁰ Many refugees fleeing persecution — political dissidents, LGBTQI+ asylum seekers, people fleeing gender-based harm, Indigenous people fleeing violence, and many others — would be denied asylum based on grounds that do not relate to whether they qualify as refugees. As a result, many would be deported to persecution and torture if they are unable to meet the higher standard for withholding of removal or protection under CAT. These forms of protection are far more difficult to secure because

¹¹⁷ Human Rights First, “Extending Title 42 Would Escalate Dangers, Exacerbate Disorder, and Magnify Discrimination,” April 27, 2022 (<https://humanrightsfirst.org/library/extending-title-42-would-escalate-dangers-exacerbate-disorder-and-magnify-discrimination/>); Human Rights First, “The Opposite of Orderly and Humane: Use of Title 42 Spurs Disorder and Undermines Security,” February 22, 2022 (<https://humanrightsfirst.org/library/the-opposite-of-orderly-and-humane-use-of-title-42-spurs-disorder-and-undermines-security/>); Human Rights First, “Human Rights Stain, Public Health Farce,” December 15, 2022 (<https://humanrightsfirst.org/library/human-rights-stain-public-health-farce/>)

¹¹⁸ David J. Bier, “How the U.S. Created Cuban and Haitian Illegal Migration,” CATO Institute, February 15, 2022 (<https://www.cato.org/blog/how-us-created-cuban-haitian-illegal-migration>)

¹¹⁹ 88 FR 11704 at 11748.

¹²⁰ Human Rights First, “Asylum Denied, Families Divided: Trump Administration’s Illegal Third-Country Transit Ban,” July 2020 (<https://humanrightsfirst.org/wp-content/uploads/2022/10/AsylumDeniedFamiliesDivided.pdf>); Human Rights First, “Human Rights Stain, Public Health Farce,” December 15, 2022 (<https://humanrightsfirst.org/library/human-rights-stain-public-health-farce/>).

asylum seekers must prove they are more than 50 percent likely to suffer persecution (for withholding of removal) or torture with consent or acquiescence of a government official (for CAT protection), whereas a person may be eligible for asylum if they have a 10 percent chance of suffering persecution.¹²¹ UNHCR has warned that withholding of removal is not an adequate substitute for the asylum process and would not protect refugees against refoulement to persecution.¹²²

Denial of asylum for refugees under Trump administration transit ban

Human Rights First has represented refugees who were denied asylum under the Trump administration's transit ban solely based on their travel through other countries where they did not apply for protection. We witnessed the devastating impact that the transit ban had on our clients who were ultimately found eligible for asylum due to litigation against the ban but suffered uncertainty, trauma, family separations, and other harms while it was in effect and long after it was vacated. Human Rights First urges the agencies to abandon this proposed rule in order to avert a similar human rights catastrophe. For instance:

- The immigration court denied asylum to a Human Rights First client who had been imprisoned, beaten, and interrogated in Cameroon for participating in political protests and suffered a miscarriage while seven months pregnant due to the attack. She was denied asylum solely due to the transit ban and granted withholding of removal in May 2020, leaving her unable to petition for her six-year-old child who was in hiding in Cameroon. The transit ban was vacated the following month, making her eligible for asylum, but she had to appeal her case and wait another year and a half to be granted asylum. She was finally able to petition for her child after the asylum grant but due to the delay she has still not been able to reunite with her child, who remains in danger in Cameroon.
- The immigration court also denied asylum to a refugee from Venezuela who was granted withholding without a lawyer while in the Remain in Mexico program, but was ineligible for asylum solely based on the transit ban. This decision left him separated from his young children and forced to appeal this denial. Extensive delays in re-calendar his case once the transit ban was vacated meant that he was not finally granted asylum until 2023 and is only now able to seek reunification with his family.

While the transit ban was in effect, Human Rights First conducted extensive research and interviewed asylum seekers affected by the transit ban. A Human Rights First report issued in July 2020 detailed cases of refugees denied all relief and ordered deported due to the transit ban, as well as many others left only with withholding and condemned to indefinite limbo, inability to

¹²¹ *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)

¹²² UNHCR Amicus Brief in *East Bay Sanctuary Covenant v. William Barr*, October 15, 2019 (https://www.refworld.org/topic_50ffbce4120,50ffbce4123,5dcc03354,0,,AMICUS,USA.html); UNHCR, "UNHCR Comments on Circumvention of Lawful Pathways NPRM," [Regulations.gov](https://www.regulations.gov), March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

reunite with family, and other harms.¹²³ Yet the agencies do not address these harms other than glibly noting that the costs of its proposed asylum ban are “borne by migrants.”¹²⁴

Refugees who were denied all relief and ordered deported due to the Trump administration’s transit ban, as documented in 2020 Human Rights First’s report, include:

- A gay Honduran asylum seeker was denied asylum under the transit ban and ordered deported relief in March 2020. While detained in Louisiana, he told Human Rights First: **“In Honduras, I was threatened and assaulted because I was gay. I was attacked by both gangs and the police. After being threatened in June 2019, I decided to flee Honduras, to seek asylum to protect my life . . . I cannot return to my country because I would be in danger, but I can’t have liberty here either. I only want an opportunity to stay here and be free.”**
- A Cuban man who had been detained in Cuba, beaten, and fired for his anti-regime political opinion was denied asylum due to the transit ban in June 2020 on the same day that the ban was vacated by a federal court. The man spoke with Human Rights First while jailed by Immigration and Customs Enforcement (ICE) and described his immigration court hearing: **“I felt in that moment that everything I had suffered, all my efforts to get out of Cuba, being detained in Mexico, everything that happened to me . . . w[as] just dismissed in less than an hour.”** He had already been detained in ICE custody for over 10 months at the time he spoke with Human Rights First.
- Other asylum seekers denied all relief due to the transit ban included: a Venezuelan opposition journalist and her one-year-old child; a Nicaraguan student activist who had been shot at during a protest against the government, had his home vandalized, and was pursued by the police; and a gay Nicaraguan asylum seeker living with HIV who experienced severe abuse and death threats on account of his sexual orientation, HIV status, and political opinion.

V. Proposed Rule Would Require People to Seek Asylum in Unsafe Transit Countries with Dysfunctional Asylum Systems, Endangering Many LGBTQI+ Asylum Seekers, Survivors of Gender-Based Violence, Women, Children, People with Disabilities

The proposed rule’s attempt to force refugees to seek asylum in transit countries that have no formal agreement with the United States and where refugees would not be safe from persecution or have access to meaningful procedures is a blatant violation of U.S. law and will endanger refugees. Many refugees suffer racially motivated violence, anti-LGBTQI+ attacks, gender-based violence, and other harms while traveling through common transit countries such as Mexico, Guatemala, and other countries. Many have been unable to access asylum systems in transit countries due to racial, nationality, or other discrimination or capacity restraints. The exceptions in the proposed rule are extremely narrow and there are no exceptions for refugees who faced or

¹²³ Human Rights First, “Asylum Denied, Families Divided: Trump Administration’s Illegal Third-Country Transit Ban,” July 2020 (<https://humanrightsfirst.org/wp-content/uploads/2022/10/AsylumDeniedFamiliesDivided.pdf>)

¹²⁴ 88 FR 11704 at 11748.

may suffer harm in transit countries, cannot access asylum procedures there, or will face a risk of chain refoulement to the countries they fled.

Asylum seekers face terrible dangers in transit countries

The agencies fail to discuss and assess the dangers refugees face while transiting and the lack of infrastructure to process large numbers of asylum claims in many transit countries. For instance, Mexico is a transit country for all non-Mexican asylum seekers at the southern border, meaning that any non-Mexican asylum seeker could potentially be barred on the basis of their transit through Mexico. Yet refugees are often targeted for brutal attacks in Mexico by both cartels and Mexican authorities precisely because of their migration status, or due to other characteristics such as gender, sexual orientation, and race. There have been over 13,000 attacks against asylum seekers and migrants stranded in Mexico under the Title 42 policy since President Biden took office.¹²⁵ The 2022 Department of State report on Mexico notes that migrants and asylum seekers are targeted by police, immigration officers, customs officials, and criminal groups, with “numerous instances of criminal armed groups extorting, threatening, or kidnapping asylum seekers and other migrants.”¹²⁶

Black asylum seekers and migrants face pervasive anti-Black violence, harassment, and discrimination, including widespread abuse by Mexican authorities.¹²⁷ The Haitian Bridge Alliance has organized at least a dozen funerals since December 2021 for Haitian migrants who have died or been killed in Mexico while stranded due to Title 42, including for a 34-year-old Haitian asylum seeker who was murdered last year.¹²⁸ The recent kidnapping of four Black U.S. residents — and murder of two of them — in Matamoros has underscored the violence and targeted attacks that Black migrants have long faced by cartels in Mexico.¹²⁹

Indigenous people, LGBTQI+ individuals, women, and people with disabilities also face a high risk of violence in Mexico. The 2022 Department of State report on Mexico documents frequent violence and discrimination against Indigenous women, who are among the most vulnerable groups in society according to the National Human Rights Commission.¹³⁰ It also notes that

¹²⁵ Human Rights First, “Human Rights Stain, Public Health Farce,” December 15, 2022

(<https://humanrightsfirst.org/library/human-rights-stain-public-health-farce/>)

¹²⁶ United States Department of State, “2022 Country Reports on Human Rights Practices: Mexico”

(<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/mexico/>)

¹²⁷ Black Alliance for Just Immigration, “There is a Target on Us – The Impact of Anti-Black Racism on African Migrants at Mexico’s Southern Border,” 2021 (<https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf>)

¹²⁸ Democracy Now, “Funerals Held for Haitians Who Died in Mexico While Waiting for U.S. to Hear Asylum Claims,” June 3, 2022

(https://www.democracynow.org/2022/6/3/headlines/funerals_held_for_haitians_who_died_in_mexico_while_waiting_for_us_to_hear_asylum_claims); Kate Morrissey, “For Haitian migrants, waiting in Tijuana brings fear, discrimination, even death,” The San Diego Union-Tribune, June 12, 2022

(<https://www.sandiegouniontribune.com/news/immigration/story/2022-06-12/haitian-migrants-tijuana>)

¹²⁹ Dianne Solis, “Deadly Matamoros kidnapping has sparked fear among black migrants, aid workers say,” The Dallas Morning News, March 10, 2023 (<https://www.dallasnews.com/news/2023/03/10/deadly-matamoros-kidnapping-has-sparked-fear-among-black-migrants-aid-workers-say/>)

¹³⁰ United States Department of State, “2022 Country Reports on Human Rights Practices: Mexico” (<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/mexico/>)

LGBTQI+ persons face widespread violence and mistreatment, including by Mexican police.¹³¹ Transgender women in particular face an enormous risk of harm; in 2021, 55 transgender women were killed in Mexico.¹³² Violence against women and girls — including rape, sexual assault, and femicide — is pervasive in Mexico, with high rates of impunity.¹³³ Migrant women face a particularly high risk of sexual assault.¹³⁴ Children, Indigenous persons, LGBTQI+ individuals, persons with disabilities, and asylum seekers and migrants are highly vulnerable to forced labor in Mexico.¹³⁵

Nor do many refugees have access to fair asylum procedures in Mexico, where many are at risk of deportation to persecution in their home countries.¹³⁶ The Department of State report on Mexico noted that migration authorities detained asylum seekers, did not provide information regarding access to asylum, dissuaded migrants from pursuing asylum requests, and in some cases tortured migrants.¹³⁷ Human Rights First has represented clients who were denied access to asylum, deported, or threatened with deportation by Mexican authorities and has documented many other cases of asylum seekers deported from Mexico without an opportunity to apply for asylum. Requiring asylum seekers to request protection in transit countries increases the risk of chain refoulement to the countries they fled.

In other common transit countries, such as El Salvador, Honduras, and Guatemala, many transiting through these countries face extreme dangers including gender-based violence, anti-LGBTQI+ attacks, race-based violence, and other persecution.¹³⁸ These countries do not have functional asylum systems that can protect large numbers of refugees. In 2022, the U.S. Department of State described Honduras’s asylum system as a “nascent system” and noted that transiting migrants and asylum seekers with pending cases were vulnerable to abuse and sexual exploitation, particularly women, children, and LGBTQI+ individuals.¹³⁹ In Guatemala, the U.S. Department of State noted that “identification and referral mechanisms for potential asylum seekers are inadequate” and that there are “gaps and shortcomings in the asylum system,” which is marred by “major delays.”¹⁴⁰ The system is not equipped to process large numbers of cases: in

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Human Rights First, “Human Rights Stain, Public Health Farce,” December 15, 2022

(<https://humanrightsfirst.org/library/human-rights-stain-public-health-farce/>)

¹³⁷ United States Department of State, “2022 Country Reports on Human Rights Practices: Mexico”

(<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/mexico/>)

¹³⁸ United States Department of State, “2022 Country Reports on Human Rights Practices: Guatemala”

(<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/guatemala/>); United States

Department of State, “2022 Country Reports on Human Rights Practices: Honduras”

(<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/honduras/>); United States

Department of State, “2022 Country Reports on Human Rights Practices: El Salvador”

(<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/el-salvador/>)

¹³⁹ United States Department of State, “2022 Country Reports on Human Rights Practices: Honduras”

(<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/honduras/>)

¹⁴⁰ United States Department of State, “2022 Country Reports on Human Rights Practices: Guatemala”

(<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/guatemala/>)

2020, 486 asylum cases were filed, and only 29 had been adjudicated by October 2021.¹⁴¹ The Department of State also noted that it was expensive and difficult for refugees to access government services, including health care, and that there were major barriers to access to education for refugees.¹⁴² According to the Department of State, the asylum system in El Salvador has “major regulatory and operational gaps,” asylum seekers are required to file an asylum claim within *five days* of entering the country, and the “criteria for case decisions are unclear.”¹⁴³

Human Rights First has previously issued analysis documenting the ways in which Mexico and other transit countries do not meet the requirements for safe third countries.¹⁴⁴ Human Rights First has also represented clients who suffered extreme violence and danger while transiting through Mexico and other countries, including bias-motivated attacks, refusal by authorities to permit them to apply for asylum, and threats of deportation. Many of these clients might have been banned from asylum if the proposed rule had been in effect at the time, despite their eligibility for asylum under U.S. law, serious risks to their lives in transit countries, and the danger of chain refoulement if required to seek protection in transit countries. For instance:

- A Honduran transgender woman and her bisexual partner, who were represented by Human Rights First in their asylum case, suffered severe anti-LGBTQI+ violence and discrimination in Mexico including robbery at knifepoint, an attack where a brick was thrown at one of the clients, and employment and housing discrimination. Though they had previously been granted asylum in Mexico, the couple fled to the United States because of the danger they faced. After multiple attempts to seek asylum at ports of entry, where they were turned away by government officials, they entered between ports of entry and requested asylum. The couple was granted U.S. asylum in 2019.
- Human Rights First represents a Black lesbian couple from Jamaica who suffered constant racist harassment and discrimination while stranded in Mexico due to Title 42 from August 2021 to April 2022. They were repeatedly told to go back to Haiti by people who assumed they were Haitian. They also faced threats and mistreatment due to their sexual orientation. Afraid for their lives, they barely left the LGBTQ shelter where they were staying but suffered racism by the owners of the shelter as well. They finally reached safety in the United States and have applied for asylum.

¹⁴¹ United States Department of State, “2021 Country Reports on Human Rights Practices: Guatemala” (<https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/guatemala/>)

¹⁴² United States Department of State, “2022 Country Reports on Human Rights Practices: Guatemala” (<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/guatemala/>)

¹⁴³ United States Department of State, “2022 Country Reports on Human Rights Practices: El Salvador” (<https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/el-salvador/>)

¹⁴⁴ Human Rights First, “Is Mexico Safe for Refugees and Asylum Seekers?,” November 2018 (https://humanrightsfirst.org/wp-content/uploads/2022/10/MEXICO_FACT_SHEET_PDF.pdf); Human Rights First, “Is Guatemala Safe for Refugees and Asylum Seekers?,” June 2019 (<https://humanrightsfirst.org/wp-content/uploads/2022/10/IsGuatemalaSafeforRefugeesandAsylumSeekers.pdf>); Human Rights First, “Is Honduras Safe for Refugees and Asylum Seekers?,” May 2020 (<https://humanrightsfirst.org/library/is-honduras-safe-for-refugees-and-asylum-seekers-2/>)

- A Venezuelan asylum-seeking family represented by Human Rights First was viciously attacked and the mother shot five times in Guatemala, and upon fleeing to Mexico to seek safety the family was denied access to asylum. In summer 2022, the parents, son, and newborn daughter were traveling by car in Guatemala when a man began shooting at them. The mother had to receive 25 staples, have a kidney removed, and undergo surgery on her spleen after suffering five bullet wounds. The family then fled to Mexico but when they attempted to apply for refugee status, Mexican authorities stated that they either needed to go to the United States or return to Guatemala but could not remain in Mexico. Desperate to reach safety, the family entered the United States between ports of entry and applied for asylum.
- A Russian asylum seeker and his wife and child, who are represented by Human Rights First, were extorted and threatened by Mexican officials who showed them videos of people being dismembered and threatened to do the same to them. The authorities used Google Translate to demand a bribe of \$2,000 to release them. Mexican officials detained them, forced them to complete documents they could not read or understand, and later transported them to the airport and told them to leave the country. When the family refused to leave, they were detained again, where they became very ill and did not receive medical care. The family was eventually released and fled to the United States, where they have since been granted asylum.
- Human Rights First represents a Guinean asylum seeker who fled religious-based persecution with her two-year-old child and attempted to apply for asylum in Mexico but was unable to proceed with her application because she was not informed of onerous requirements. She had difficulty communicating with the Mexican officers who completed her application forms because she did not receive interpretation assistance. The officers did not provide her with paperwork and simply instructed her to wait for a decision. When she returned three months later, she learned that she had been required to sign in every two weeks while her application was pending but because she had not done so she could not seek asylum in Mexico. Desperate to reach safety, she entered between ports of entry into the United States.

Stringent exceptions would be impossible to prove and will not protect many refugees who face dangers in transit countries

As discussed in Section II, exceptions cannot make the ban lawful because barring refugees from asylum based on entry and transit violates U.S. law and treaty obligations regardless of whether some individuals are covered by exceptions.

Moreover, the exceptions are extremely limited and will not protect many refugees who face terrible dangers in Mexico and other transit countries. As discussed, there are no exceptions for asylum seekers who would face danger in transit countries even though many asylum seekers are at serious risk in common transit countries — including LGBTQI+, Black, and Indigenous asylum seekers, women, children, and people with disabilities. Nor are there exceptions for asylum seekers who transited through countries that lack functional asylum systems, deport

people without access to asylum, or discriminate against them in the asylum process due to racial or other bias.

The stringent exceptions that do exist would not protect many refugees. The agencies require asylum seekers to prove by a preponderance of evidence (more than 50 percent) that they meet “exceptionally compelling circumstances,” language that appears to drastically restrict the availability of exceptions. The exceptions themselves use similarly restrictive language, only covering asylum seekers who, for example, at the time they entered the United States “faced an *acute* medical *emergency*” or “an *imminent* and *extreme* threat to life or safety, such as an *imminent* threat of rape kidnapping, torture, or murder.”

The proposed rule would task individual adjudicators who lack medical or other expertise to make these determinations — often in preliminary telephonic screenings where asylum seekers have virtually no opportunity to gather and present evidence. These exceptions do not even reference a subjective component, such as where the asylum seeker *believed* they faced an acute medical emergency or imminent and extreme threat. This means that if after a brief telephonic interview an adjudicator disagrees with the asylum seeker’s assessment of the danger they faced, or determines it wasn’t “acute,” “imminent”, or “extreme” enough, the asylum seeker could be immediately banned and deported without a hearing despite eligibility for asylum under U.S. law.

Requiring asylum seekers to prove by a preponderance of evidence that they faced an acute emergency or an imminent and extreme threat to life or safety is a drastically higher standard of proof than even the proof required to establish asylum eligibility itself. A person may be eligible for asylum if they have a 10 percent chance of suffering persecution in the country they fled.¹⁴⁵ There is no requirement to show that the harm they fled was acute, imminent, or extreme. Denying asylum to refugees unless they can qualify for an exception that *requires a higher risk of harm in a transit country than in the country of nationality* tears apart the entire asylum law framework in the United States.

These exceptions are narrow, unworkable, and will not protect many refugees who are eligible for asylum. Would asylum seekers who have endured a long and traumatic journey to reach safety be required, while jailed in U.S. immigration detention, to produce medical records to convince asylum officers — who are not medical experts — that they suffered an acute medical emergency at the time they entered? What if an asylum seeker does not have medical records because — as often happens — they were denied medical care in Mexico due to their migrant status, race, or nationality?¹⁴⁶ Or were denied care by Customs and Border Protection (CBP) or ICE and instead were immediately jailed and forced to undergo the credible fear process?

¹⁴⁵ *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)

¹⁴⁶ Human Rights First, “The Nightmare Continues,” June 16, 2022 (https://humanrightsfirst.org/wp-content/uploads/2023/02/NightmareContinues_final.pdf); Human Rights First, “Failure to Protect,” April 20, 2021 (<https://humanrightsfirst.org/wp-content/uploads/2022/10/FailuretoProtect.4.20.21.pdf>); Black Alliance for Just Immigration, “There is a Target on Us – The Impact of Anti-Black Racism on African Migrants at Mexico’s Southern Border,” 2021 (<https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf>).

Human Rights First has documented horrific cases of asylum seekers who were denied urgent medical attention by CBP and subjected to farcical screenings by USCIS asylum officers. For instance, a Cuban asylum seeker in MPP had a non-refoulement fear interview in March 2020 during which she suffered vaginal bleeding and was told the interview would be terminated if she did not calm down. The woman, who had been dragged down an alley, beaten, and kicked in the stomach while pregnant, suffered a miscarriage as a result. She suffered vaginal bleeding and severe pain in CBP custody while waiting for the fear interview but was denied medical attention. The asylum officer interviewing her did not permit her to submit evidence during a call that dropped five times. She and her husband were later returned to Ciudad Juárez, according to the Las Americas Immigrant Advocacy Center.¹⁴⁷ The agencies' plan to screen people for exceptions to the asylum ban would likely operate similarly, with vulnerable asylum seekers unable to obtain or present evidence during the telephonic screening even when in need of urgent medical care. If asylum seekers have been denied care by CBP or ICE, it could be all the more challenging for them to prove to an asylum officer that they had an urgent medical situation.

Asylum seekers would be required to share private details about their medical histories and bodies with a stranger on the phone if this rule were to go into effect. For instance, a 54-year-old Honduran asylum seeker who was returned under MPP with her children was raped by two men in Ciudad Juárez and suffered a rectovaginal fistula as a result of the rape, which causes her bowel contents to leak. She required surgery but was unable to obtain medical treatment in Mexico.¹⁴⁸ If she sought protection while the asylum ban was in effect, she would have to share the details of her rape and medical condition with an asylum officer to be considered for the medical emergency exception. She might be unable to share these details with a stranger while jailed in inhumane conditions, as has been the case for many asylum seekers who told Human Rights First they were afraid to share during their credible fear interviews that they had been raped, tortured, or otherwise harmed.¹⁴⁹ Would she qualify for an exception even if she did share her story? Would the asylum officer demand proof?

One Human Rights First client, fleeing repeated detention and torture in his home country in Central Africa, realized by the time he reached Mexico that he was extremely sick with what was later diagnosed as cancer. He was vomiting blood but when he sought medical care in Mexico he was turned away. He had no community support in Mexico and did not speak Spanish but had a very close contact in the United States willing to receive him. He found that the metering system in place for those seeking to present themselves at a port of entry was dysfunctional and chaotic, with people selling the numbers that were supposed to mark asylum seekers' places in the backlog to approach CBP. Fearing that he would die if he remained in this situation, he crossed the Rio Grande and waited for Border Patrol. If the asylum ban had been in effect at the time, he may have been required to prove to an asylum officer that he faced an acute medical emergency

¹⁴⁷ Human Rights First, "Humanitarian Disgrace: U.S. Continues to Illegally Block, Expel Refugees to Danger," December 2020 (<https://humanrightsfirst.org/wp-content/uploads/2022/09/HumanitarianDisgrace.pdf>)

¹⁴⁸ Human Rights First, "Humanitarian Disgrace," December 16, 2020 (<https://humanrightsfirst.org/library/humanitarian-disgrace-u-s-continues-to-illegally-block-expel-refugees-to-danger/>).

¹⁴⁹ Human Rights First, "Pretense of Protection," August 3, 2022 (<https://humanrightsfirst.org/library/pretense-of-protection-biden-administration-and-congress-should-avoid-exacerbating-expedited-removal-deficiencies/>)

at the time of entry. Would his access to asylum have hinged on whether he could produce records, whether he had already received a diagnosis for his severe symptoms, and whether he could convince an officer that at the time he entered the United States he faced a medical emergency?

And what would constitute an imminent and extreme threat to life or safety? Asylum seekers at the southwest border suffer horrific violence at the hands of government agents and cartels, with many targeted precisely because they are migrants. Human Rights First has documented over 13,000 violent attacks against migrants blocked in or expelled to Mexico due to Title 42 since President Biden took office.¹⁵⁰ Black asylum seekers face pervasive anti-Black violence in Mexico, including murder and vicious attacks. Women, LGBTQI+, and Indigenous asylum seekers are also targeted for horrific, bias-motivated attacks. Given this unremitting violence, asylum seekers in Mexican border regions so often face a serious risk to their safety that it is unclear what an asylum seeker would need to show to establish an “imminent and extreme” threat to life.

How would asylum seekers in grave dangers prove that they were about to be kidnapped, raped, or tortured at the time they entered the United States? Among the more than 13,000 attacks documented by Human Rights First were the cases of a transgender Honduran asylum seeker who was kidnapped and raped in Piedras Negras after she was expelled by DHS and had to escape her kidnappers by jumping out of a window, causing further serious injuries;¹⁵¹ a Guatemalan lesbian transgender woman raped by Mexican police officers in Piedras Negras shortly after being expelled;¹⁵² a Honduran mother and her four-year-old daughter who, after being turned away under Title 42, were sexually assaulted by Juárez police, turned over to cartels, and held captive for 22 days while cartel members raped the mother in front of her daughter;¹⁵³ a Central American asylum seeker and her six-year-old son who were abducted after they were expelled to Ciudad Juárez and imprisoned for two weeks by men who attempted to rape the mother¹⁵⁴; and a Haitian asylum seeker who was brutally attacked with a bat in Tijuana after being expelled.¹⁵⁵

All of these asylum seekers had sought protection before they suffered these attacks, but how could they have shown that they would imminently be kidnapped, raped, tortured, or beaten before these harms occurred? The reality is that the dangers asylum seekers face while waiting to

¹⁵⁰ Human Rights First, “Human Rights Stain, Public Health Farce,” December 15, 2022

(<https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf>)

¹⁵¹ Human Rights First, “Update: Grave Dangers Continue for Asylum Seekers Blocked In, Expelled to Mexico by Biden Administration,” June 2021,

(<https://humanrightsfirst.org/wp-content/uploads/2022/10/FailuretoProtectUpdate.06.21.pdf>)

¹⁵² Human Rights First, “Human Rights Stain, Public Health Farce,” December 15, 2022

(<https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf>)

¹⁵³ *Id.*

¹⁵⁴ Human Rights First and Hope Border Institute, “Disorderly and Inhumane: Biden Administration Continues to Expel Asylum Seekers to Danger While U.S. Border Communities Stand Ready to Welcome,” July 2021,

(<https://humanrightsfirst.org/wp-content/uploads/2022/10/DisorderlyandInhumane.pdf>)

¹⁵⁵ Human Rights First, The Bridge, and Al Otro Lado, “Extending Title 42 Would Escalate Dangers, Exacerbate Disorder, and Magnify Discrimination,” April 2022 (<https://humanrightsfirst.org/wp-content/uploads/2022/09/ExtendingTitle42.pdf>)

seek protection at the southern border are so extreme — especially for Black, Indigenous, and LGBTQI+ asylum seekers, women, children, and people with disabilities — that to force asylum seekers to prove an impossible standard to qualify for an exception is absurd, inhumane, and disregards the well-documented dangers asylum seekers face.

VI. Deportations of Refugees Without Access to Asylum Hearings

The agencies propose to apply the asylum ban during the expedited removal process. This is an unlawful attempt to erase statutory protections for asylum seekers who have a credible fear of persecution and will result in the deportation of refugees without access to hearings.

Agencies attempt to circumvent credible fear standard to weaponize an already deficient screening process

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which created the expedited removal process. Under this process, border officers may order the deportation of certain individuals charged with inadmissibility without an immigration court hearing. However, asylum seekers who express an intent to seek asylum or fear of return to their country of nationality *must* be referred for a preliminary fear screening (credible fear interview) by a USCIS asylum officer. If the asylum officer conducting the interview determines that the asylum seeker has a credible fear of persecution (i.e. a “significant possibility” the individual would be eligible for asylum after a full hearing), the asylum seeker must be referred for a full adjudication of their claim. If an asylum officer determines that an asylum seeker does not have a significant possibility of establishing asylum eligibility and that determination is not reversed by an immigration judge or reconsidered by USCIS, the asylum seeker may be deported. DHS is not required to use expedited removal and has authority to refer asylum seekers for full asylum hearings rather than first requiring them to pass credible fear screenings.

The agencies seek to circumvent statutory safeguards in the expedited removal process, which is already fundamentally flawed and insufficient to protect refugees. At the time of its creation, expedited removal was viewed by many in Congress as “an abandonment of our historical commitment to refugees.”¹⁵⁶ When signing IIRIRA into law, President Clinton noted that he would seek to “correct provisions in this bill that are inconsistent with international principles of refugee protection.”¹⁵⁷ U.S. Senator Patrick Leahy also warned that provisions of the law “may well violate our treaty obligations and undercut our world leadership on this issue.”¹⁵⁸ The due process violations inherent in subjecting asylum seekers to preliminary screenings upon their arrival to the United States were quickly apparent, with mounting reports of asylum seekers “thrown out of the country without the opportunity to convince an immigration judge that they faced persecution in their native lands.”¹⁵⁹

¹⁵⁶ 146 Cong. Rec. 111, “Domestic Violence Cases in the Asylum Process,” September 19, 2000 (<https://www.govinfo.gov/content/pkg/CREC-2000-09-19/html/CREC-2000-09-19-pt1-PgS8752.htm>)

¹⁵⁷ 1996 U.S.C.C.A.N. 3388, 3392, 1996 WL 787952 (Leg. Hist.)

¹⁵⁸ 142 Cong. Rec. S11886-01, S11901, 1996 WL 553836 (Leg. Hist.)

¹⁵⁹ 146 Cong. Rec. 111, “Domestic Violence Cases in the Asylum Process,” September 19, 2000 (<https://www.govinfo.gov/content/pkg/CREC-2000-09-19/html/CREC-2000-09-19-pt1-PgS8752.htm>)

As Senator Leahy explained in Congress in 2000, “people who flee their countries to escape serious danger should be able to have asylum hearings in the United States without having to navigate the procedural roadblocks established by expedited removal.”¹⁶⁰ In a 2001 Congressional hearing, Senator Edward Kennedy described “shameful examples of the deplorable treatment that individuals have received under the expedited removal process” and warned that many “have been deported, and sent back to situations where they could well be subjected to torture, and even death.”¹⁶¹ Senator Sam Brownback also noted the “flawed results” of expedited removal, which deprived asylum seekers of the right to a full hearing on their asylum claim.¹⁶²

Decades of research have underscored the unfixable flaws of expedited removal and the devastating consequences of wielding it against asylum seekers.¹⁶³ Refugees wrongly deported through expedited removal have been persecuted, tortured, and murdered after being returned by the United States to the country they had fled.¹⁶⁴ UNHCR has warned that “the credible fear pre-screening within expedited removal has, since its inception, diverged from international standards for accelerated procedures.”¹⁶⁵

Though it has become clear that expedited removal is fatally flawed, at the time of its creation Congress included safeguards in the process that were intended to comply with the Refugee Convention and ensure that people seeking refugee protection in the United States had an opportunity to apply for asylum and were not summarily deported to persecution or torture. One of these fundamental safeguards was a low screening standard — a “significant possibility” of establishing asylum eligibility. Congress considered and rejected a higher screening standard in a House bill that would have required asylum seekers to show both a significant possibility of

¹⁶⁰ *Id.*

¹⁶¹ Senate Judiciary Committee Hearing, “An Overview of Asylum Policy,” May 3, 2001 (<https://www.govinfo.gov/content/pkg/CHRG-107shrg77386/pdf/CHRG-107shrg77386.pdf>)

¹⁶² *Id.*

¹⁶³ U.S. Commission on International Religious Freedom, “Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal,” (<https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>) ; Human Rights Watch, “Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse,” February 5, 2020 (<https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and>); American Civil Liberties Union, “American Exile: Rapid Deportations That Bypass the Courtroom,” December 2014 (https://www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf); Kate Morrissey, “A Legitimate Fear of Death Doesn’t Always Matter in the U.S. Asylum System,” San Diego Union Tribune, October 11, 2020 (<https://www.sandiegouniontribune.com/news/immigration/story/2020-10-11/us-asylum-system-gang-violence-honduras>); Human Rights First, “Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies,” August 2022 (<https://humanrightsfirst.org/wp-content/uploads/2023/01/PretenseofProtection-21.pdf>).

¹⁶⁴ Human Rights First, “Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture,” September 2021 (<https://humanrightsfirst.org/library/biden-administration-move-to-eliminate-requests-for-reconsideration-would-endanger-asylum-seekers-deport-them-to-persecution-and-torture/>)

¹⁶⁵ UNHCR, “Comment Submitted by UNHCR on Asylum Interim Final Rule,” June 1, 2022 (<https://www.regulations.gov/comment/USCIS-2021-0012-5305>)

asylum eligibility *and* a substantial likelihood that their statements were true.¹⁶⁶ The lower standard that was ultimately adopted was “intended to be a low screening standard for admission into the usual full asylum process.”¹⁶⁷ By requiring asylum seekers only to show a “significant possibility” of asylum eligibility, a far lower standard than the “well-founded fear” standard for a full asylum hearing, Congress sought to ensure that there would be “no danger that a non-citizen with a genuine asylum claim will be returned to persecution.”¹⁶⁸ Under this system, anyone with “some characteristic” that would qualify them as a refugee would be entitled to a full adjudication of their asylum claim.¹⁶⁹ If an asylum seeker met the “significant possibility” threshold, the government would be required to treat them “the same as any other” asylum seeker and provide an opportunity to present their case in a full adjudication.¹⁷⁰

The agencies now seek to eliminate these minimum statutory safeguards in order to carry out the mass deportation of refugees without hearings, weaponizing an already deficient process. The proposed rule would erect a new barrier during the credible fear process that is completely separate from, and incompatible with, the “significant possibility” of success standard that Congress created. During a credible fear interview, asylum officers would first have to determine whether an asylum seeker is subject to the presumption of ineligibility created by the ban. If they are presumed ineligible, asylum seekers would be required to establish by a *preponderance of evidence* that they qualify for an exception. Only asylum seekers determined to have successfully rebutted the rule’s presumption of ineligibility would be screened for a “significant possibility” of establishing eligibility for asylum, while asylum seekers who cannot rebut the presumption would be subject to a higher screening standard and deported if they cannot meet it. Requiring asylum seekers to prove by a preponderance of evidence (more than 50 percent) that they are not subject to the new asylum ban is incompatible with the significant possibility standard and creates an even higher barrier than the well-founded fear standard (10 percent chance of persecution) for asylum.

This approach revives the Trump administration’s attempts to rig the credible fear process by applying the transit ban in credible fear interviews to block refugees from a full hearing on their claim. In fact, the proposed ban would create an even greater hurdle than the Trump administration’s version, which required asylum seekers to show a significant possibility (rather than a preponderance of evidence) that they were not subject to the ban. Both versions are illegal and inconsistent with Congressional intent, but the Biden administration’s version creates an even more insurmountable barrier at this stage.

The proposed rule would require refugees in expedited removal to meet a standard that is drastically higher than the credible fear standard and much higher than even the standard for

¹⁶⁶ S11491 Cong. Rec., “Asylum and Summary Exclusion Provisions,” September 27, 1996 (<https://www.congress.gov/crec/1996/09/27/CREC-1996-09-27-pt1-PgS11491.pdf>)

¹⁶⁷ *Id.*

¹⁶⁸ House Judiciary Committee, “Immigration in the National Interest Act of 1005 Hearing,” March 4, 1996 (<https://www.congress.gov/congressional-report/104th-congress/house-report/469/1>)

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

asylum. It would perpetuate the same mass due process and human rights violations that resulted from the Trump administration's application of its transit ban during credible fear interviews, including¹⁷¹:

- In November 2019, DHS ordered the deportation of an asylum seeker from the Democratic Republic of Congo who was determined to have failed her screening interview due to the transit ban. She had been beaten by police in her country when she sought information about her husband, who had been jailed and tortured due to his political activity. Citing the transit ban, the DHS officer determined she was ineligible for asylum and could not meet the (artificially elevated) screening standard. She was ordered deported to Congo without an asylum hearing.
- In late March 2020, DHS applied the transit ban to a 16-year-old girl who fled attempts by a Salvadoran gang, which exercises control over large swaths of the country, to traffic and sexually exploit her. The DHS officer determined that she did not meet the unduly high fear screening standard applied by DHS under the transit ban.
- An Indigenous Guatemalan asylum seeker who was sexually assaulted because of her ethnicity was summarily deported in February 2020 without being allowed to apply for asylum. She was subjected to a higher screening standard due to the transit ban and ordered deported when she was found not to meet the higher threshold.
- A Central American woman fleeing domestic violence by an abuser who killed one of her children was deported in February 2020 after being subjected to a heightened screening standard due to the transit ban and denied an opportunity to apply for asylum.

The agencies have already assessed and rejected the Trump administration's illegal approach of rigging the credible fear process against asylum seekers, yet in a sudden reversal have decided to resurrect and exacerbate this deadly approach. Less than a year ago, the agencies condemned and reversed the Trump administration's attempts to apply bars to asylum during the credible fear process. In its Asylum Processing Rule, the Biden administration provided that bars to asylum eligibility would not be considered during credible fear interview, explaining that this change would "ensure due process" for asylum seekers.¹⁷² The agencies noted that applying bars to asylum at the credible fear stage was inconsistent with Congressional intent in creating the expedited removal process. They further stated that the "complicated process requiring full evidence gathering and determinations to be made on possible bars to eligibility is incompatible with the function of the credible fear interview as a screening mechanism designed to quickly identify potentially meritorious claims deserving of further consideration in a full merits hearing."¹⁷³ Due to the complexity of adjudicating bars to asylum, the agencies concluded that individuals "should be afforded the additional time, procedural protections, and opportunity to

¹⁷¹ Human Rights First, "Asylum Denied, Families Divided: Trump Administration's Illegal Third-Country Transit Ban," July 2020 (<https://humanrightsfirst.org/wp-content/uploads/2022/10/AsylumDeniedFamiliesDivided.pdf>)

¹⁷² Dept. of Homeland Security and Dept. of Justice, "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers," 87 FR 18078, 18135, March 29, 2022 (<https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>).

¹⁷³ Id.

further consult with counsel” that full adjudications provide.¹⁷⁴ **Having already concluded less than a year ago that applying asylum bars during the credible fear screening is inconsistent with Congressional intent and threatens asylum seekers’ due process rights, it is arbitrary and inhumane for the agencies to fabricate a new asylum bar with no statutory basis and apply it during the credible fear process.**

The agencies also considered and rejected higher screening standards inconsistent with the “significant possibility” standard when terminating the Remain in Mexico policy, noting that “rather than using a screening standard familiar to asylum officers” such as the significant possibility standard, non-refoulement interviews for people subjected to Remain in Mexico “applied a more restrictive ‘more likely than not’ standard” under the Trump administration.¹⁷⁵ Secretary Mayorkas concluded that this standard, which required people to prove that it was more likely than not that they would be persecuted or tortured in Mexico, was “a higher substantive standard than they would ultimately have had to establish to secure asylum.”¹⁷⁶ Now the agencies plan to impose an equally high standard through the proposed rule — requiring asylum seekers covered by the ban to prove it is more likely than not that they faced an acute medical emergency, an imminent and extreme threat to life or safety, etcetera. Like the non-refoulement screening standard condemned by Secretary Mayorkas, the standard proposed by the agencies would impose a “more likely than not” screening standard that far exceeds even the standard for an asylum grant.

The deficient non-refoulement screenings carried out during Remain in Mexico, which did not protect asylum seekers from being returned to grave dangers, foreshadow the perils that asylum seekers will face if the asylum ban is implemented in expedited removal. The vast majority of asylum seekers subjected to these sham screenings were returned to Mexico, despite medical vulnerabilities or past attacks many had suffered, even after the Biden administration implemented a lower standard of proof (a reasonable possibility) rather than the higher preponderance of evidence standard required by the proposed rule. These included a Nicaraguan man who had been kidnapped and beaten by Mexican police, an Afro-Dominican man who had been kidnapped and threatened at gunpoint in Tijuana, and a Nicaraguan woman who had been kidnapped, tied up, and robbed by cartel members.¹⁷⁷ DHS data showed that only 18.6 percent of people who had fear screenings under the Biden administration’s Remain in Mexico policy were found to have a fear of return to Mexico, despite extensive documentation of the grave harms faced by returned asylum seekers forced to wait in Mexico.¹⁷⁸ This low rate was strikingly similar to Remain in Mexico fear screenings conducted during the Trump administration.¹⁷⁹ Imposing the asylum ban in credible fear screenings and requiring asylum seekers to prove that it

¹⁷⁴ *Id.* at 18094.

¹⁷⁵ Dept. of Homeland Security, “Explanation of the Decision to Terminate the Migrant Protection Protocols,” October 29, 2021 (https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf)

¹⁷⁶ *Id.*

¹⁷⁷ Human Rights First, “Fatally Flawed: “Remain in Mexico” Policy Should Never be Revived,” September 2022 (<https://humanrightsfirst.org/wp-content/uploads/2022/10/FatallyFlawed.pdf>)

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

is more likely than not that they faced an imminent risk or acute medical emergency in Mexico would be a similar sham.

The agencies' reported plan to conduct sham fear screenings in CBP custody within days of asylum seekers' arrival in the United States will only exacerbate this due process fiasco. Conditions in CBP custody are abusive, dehumanizing, and sometimes life-threatening, with widespread reports of medical neglect, inedible food and water, lack of access to showers and other basic hygiene, and inability to sleep because of overcrowding, lack of adequate bedding, cold conditions, and lights that are kept on at night.¹⁸⁰ It is virtually impossible for asylum seekers to access legal counsel in these facilities. Forcing asylum seekers to undergo fear screenings while jailed in CBP holding cells would resurrect another policy of the Trump administration, which conducted credible fear interviews in CBP custody through the Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP) programs. Many asylum seekers who underwent PACR were subjected to the transit ban and rapidly deported without an asylum hearing despite eligibility for asylum under U.S. law.

These programs were designed to rapidly deport asylum seekers who would otherwise have passed their credible fear interviews: only 18 percent of individuals in PACR and 30 percent in HARP passed their screenings, compared to 40 percent nationwide (excluding HARP and PACR) during the same period.¹⁸¹ Shortly after taking office, President Biden rightly ended these illegal and inhumane programs, but the agencies seek to resurrect a new version of them to similarly carry out mass summary deportations without an opportunity to apply for asylum.¹⁸²

Adjudications of credible fear screenings are already a due process disaster. Requiring officers to determine the applicability of the illegal asylum ban during fear screenings would only make it more so. In August 2022, Human Rights First published a report, *Pretense of Protection*, about the deficiencies of credible fear interviews.¹⁸³ Systemic due process violations and erroneous decisions abound in these preliminary fear screenings. Confusing, cursory, or hostile fear

¹⁸⁰ Human Rights Watch, "In The Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells," February 28, 2018 (<https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>); Human Rights First, "Biden Administration Detains Women Seeking Safety and Separates Them From Their Families," December 2022 (https://humanrightsfirst.org/wp-content/uploads/2022/12/Final-Berks-Factsheet-12.1.2022_FINAL-1.pdf); Human Rights Watch, "They Treat You Like You Are Worthless: Internal DHS Reports of Abuses by US Border Officials," October 21, 2021 (<https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials>)

¹⁸¹ Human Rights First, "Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies," August 2022 (<https://humanrightsfirst.org/wp-content/uploads/2023/01/PretenseofProtection-21.pdf>)

¹⁸² Executive Order, "Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border," February 2, 2021 (<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>)

¹⁸³ Human Rights First, "Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies," August 2022 (<https://humanrightsfirst.org/wp-content/uploads/2023/01/PretenseofProtection-21.pdf>)

interviews, lack of access to legal representation, failure to provide interpretation in the correct language, and horrific conditions of confinement deprive asylum seekers of a meaningful opportunity to share their stories. Many asylum seekers have been forced to undergo interviews in languages in which they are not fluent, fueling mistaken negative fear determinations, with a disproportionate impact on asylum seekers from Africa, and Indigenous people. Asylum seekers have little to no access to legal counsel before or during their credible fear interviews, especially if detained. For instance, government data related to the Asylum Processing Rule reflects that in credible fear interviews occurring primarily in two Texas detention centers where the rule is being implemented, around *one percent* of asylum seekers have been represented during their credible fear interviews.¹⁸⁴ Detained asylum seekers have also been forced to undergo fear interviews while experiencing medical and mental health issues, including physical injuries from assaults in detention and severe trauma from past persecution compounded by their current incarceration.

How would the asylum ban be implemented in this fundamentally defective process? As discussed, it will be impossible for many asylum seekers to establish that the ban does not apply or that they qualify for an exception. The unlawfully high screening standard — compounded by inadequate interpretation, lack of access to legal interpretation, trauma of detention, medical and mental health issues, and cursory or hostile interviews — will result in countless erroneous negative determinations. For instance, an asylum seeker who entered at a port of entry without a previously scheduled appointment would be required to show that they were unable to use or access CBP One due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. How would asylum seekers present evidence that they encountered a significant obstacle in scheduling an appointment, such as technical failure, when their phones have been confiscated by the government and they are required to prove that the ban does not apply to them during a telephonic screening in jail? As discussed earlier, it would often not be feasible for asylum seekers to prove that they faced an acute medical emergency, an imminent risk of harm, or that they qualify for another exception. Without access to legal representation, many asylum seekers would not even know what they are required to prove in the fear interview and could experience confusion and stress if asked questions related to the ban.

In proposing the asylum ban, the agencies have disregarded decades of evidence showing that requiring asylum seekers to pass credible fear screenings endangers refugees with well-founded fears of persecution. They have also disregarded the devastating consequences of years of Trump administration attempts to rig the credible fear process to subject asylum seekers to an even higher screening standard, which causes mass deportations of refugees and violates U.S. law.

Proposed rule erases other longstanding due process safeguards for review of negative credible fear decisions

The proposed rule would eliminate other critical safeguards in the expedited removal process that provide for review of negative credible fear determinations. It would 1) deprive asylum

¹⁸⁴ Dept. of Homeland Security, “Asylum Processing Rule Cohort Reports,” December 2022 (<https://www.dhs.gov/immigration-statistics/special-reports/asylum-processing-rule-report#:~:text=On%20May%2031%2C%202022%2C%20the,are%20not%20are%20promptly%20removed>)

seekers of the right to immigration court review of negative credible fear determinations where they do not affirmatively request review and 2) eliminate asylum seekers' ability to request USCIS reconsideration of negative credible fear determinations. These changes would apply to all asylum seekers banned under the rule and would accelerate their deportation to persecution.

8 U.S.C. 1225, the statute governing expedited removal, provides for immigration court review of credible fear determinations. In establishing this safeguard, Congress intended to provide an "important...check on the initial decisions of asylum officers."¹⁸⁵ Immigration court review of negative credible fear determinations has been crucial in reversing erroneous decisions and saving asylum seekers from deportation without a hearing. Over the past 25 years, immigration judges have reversed more than a quarter of all negative credible fear determinations, concluding that the asylum officer's initial decision was erroneous.¹⁸⁶

In its December 11, 2020 "death to asylum" rule, the Trump administration imposed a new limitation on this safeguard, depriving asylum seekers of immigration court review of credible fear decisions where they did not affirmatively request review.¹⁸⁷ The Biden administration reversed this change less than a year ago in its Asylum Processing Rule and provided that where an asylum seeker declines to indicate whether they would like immigration court review, they would be treated as having requested review. In reversing the Trump administration regulation, the agencies explained that "treating any refusal or failure to elect review as a request for IJ review, rather than as a declination of such review, is fairer and better accounts for the range of explanations for a noncitizen's failure to seek review."¹⁸⁸

The credible fear process is extremely confusing and stressful for asylum seekers who have recently fled persecution and often must navigate the process shortly after a traumatic and dangerous journey. They may face deadly consequences if they cannot navigate the process successfully. Few speak English or have an attorney. Asylum seekers who decline to indicate whether they wish to have an immigration judge review their negative credible fear determination may not understand the question they are asked or its implications due to language barriers or a host of other reasons, as the agencies properly concluded last year.

Despite the agencies' conclusion less than a year ago, they now seek to deprive asylum seekers of the right to immigration court review where they do not affirmatively request it. The proposed rule would deny asylum seekers issued negative fear determinations *due to the asylum ban* an opportunity for immigration court review if they do not affirmatively request it. In order to

¹⁸⁵ S11491 Cong. Rec., "Asylum and Summary Exclusion Provisions," September 27, 1996 (<https://www.congress.gov/crec/1996/09/27/CREC-1996-09-27-pt1-PgS11491.pdf>)

¹⁸⁶ TRACImmigration, "Immigration Judge Decisions Overturning Asylum Officer Findings in Credible Fear Cases," March 14, 2023 (<https://trac.syr.edu/reports/712/>)

¹⁸⁷ Dept. of Homeland Security and Dept. of Justice, "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review," 85 FR 80274, December 11, 2020 (<https://www.federalregister.gov/documents/2020/12/11/2020-26875/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>)

¹⁸⁸ Dept. of Homeland Security and Dept. of Justice, "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers," 87 FR 18078, 18094, March 29, 2022 (<https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>)

obtain immigration court review, an asylum seeker in this situation must indicate that they request review on the Record of Negative Fear Finding, a document written in English. Many asylum seekers may not understand what they are required to sign and why. Some may fear that by signing, they are agreeing to their deportation or withdrawing their request to seek asylum. This regulatory change may have a disproportionate impact on asylum seekers from Africa and Indigenous people, who may not be provided with proper translation in their native languages during the credible fear process. The change will also cause confusion as DHS officers would be required to treat asylum seekers with negative credible fear determinations differently based on whether they were denied under the asylum ban or on another basis. Requiring officers to implement two different rules while depriving some asylum seekers of their right to immigration court review is an inhumane and absurd policy.

In addition to imposing a new hurdle on obtaining immigration court review, the agencies also attempt to eliminate asylum seekers' longstanding right to submit requests to the USCIS asylum office to reconsider erroneous negative credible fear determinations. This regulatory change would similarly apply *only* to people who receive negative credible fear determinations due to the asylum ban, again creating different sets of procedural rules for asylum seekers denied under the ban and asylum seekers denied for other reasons. The Biden administration has already severely restricted this safeguard in its Asylum Processing Rule by imposing draconian numerical and temporal restrictions on requests for reconsideration. It now seeks to eliminate the safeguard in its entirety for people who are impacted by the asylum ban.

Shortly after the U.S. government began implementing expedited removal in 1997, the former Immigration and Naturalization Service (INS) clarified that it had authority to conduct a second credible fear interview and reverse a negative credible fear determination even if it had been affirmed by an immigration judge.¹⁸⁹ After widespread reports of asylum seekers wrongly deported under expedited removal, and concerns about mistaken credible fear denials expressed by Senator Leahy on the floor of the Senate in September 2000, the INS published final regulations in December 2000 to make clear that the INS (later DHS) could reconsider a negative determination including after it had been affirmed by an immigration judge.¹⁹⁰ For decades, this safeguard has shielded many refugees from deportation to persecution and torture.¹⁹¹ Between

¹⁸⁹ American Immigration Lawyers Association, "INS memo with Expedited Removal Guidance," December 30, 1997 (<https://www.aila.org/infonet/ins-expedited-removal-guidance>)

¹⁹⁰ American Bar Association and Leadership Conference on Civil Rights Education Fund, "American Justice Through Immigrants' Eyes," 2004 (https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/american_justice_through_immigrants_eyes.pdf); UC Hastings Center for Human Rights and International Justice, "Report on the Second Year of Implementation of Expedited Removal," May 1999 (<http://libraryweb.uchastings.edu/cgrs/Expedited%20removal%201999.pdf>); 146 Cong. Rec. 111, "Domestic Violence Cases in the Asylum Process," September 19, 2000 (<https://www.govinfo.gov/content/pkg/CREC-2000-09-19/html/CREC-2000-09-19-pt1-PgS8752.htm>); Dept. of Justice, "Asylum Procedures Final Rule," 65 FR 235, December 6, 2000 (<https://www.govinfo.gov/content/pkg/FR-2000-12-06/pdf/00-30601.pdf>)

¹⁹¹ Human Rights First, "Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture," September 2021 (<https://humanrightsfirst.org/library/biden-administration-move-to-eliminate-requests-for-reconsideration-would-endanger-asylum-seekers-deport-them-to-persecution-and-torture/>)

FY 2019 to FY 2021, USCIS reconsideration of erroneous negative credible fear determinations saved at least 569 asylum seekers from deportation to persecution or torture without an opportunity to apply for asylum.¹⁹²

The unrestricted ability of the asylum office to reconsider a negative determination remained in U.S. regulations until last year, when the Biden administration imposed a seven-day deadline on requests for reconsideration and limited asylum seekers to only one request. UNHCR has opposed the elimination of this safeguard or the imposition of restrictions on it and warned that it may increase the risk of refoulement.¹⁹³ Advocates and attorneys also condemned these new restrictions, which have already barred asylum seekers issued erroneous negative credible fear determinations from obtaining reconsideration.¹⁹⁴ For instance, multiple Russian asylum seekers were recently ordered deported and missed the seven-day deadline to request reconsideration because they did not know about it.¹⁹⁵ They face an immediate risk of deportation to Russia.¹⁹⁶

Despite the disastrous consequences of restricting requests for reconsideration, the agencies now seek to eliminate this safeguard completely for asylum seekers who are determined during their credible fear screenings to be banned under the proposed rule. In its comment on the rule, UNHCR again warned that this change may elevate the risk of refoulement, including where the ban is “hastily, incorrectly, or unfairly applied.”¹⁹⁷ This provision would prevent many asylum seekers wrongly found to be banned under the rule from subsequently presenting evidence to USCIS that they should have been exempted or qualified for an exception, which would especially harm unrepresented asylum seekers rushed through the credible fear process without any meaningful opportunity to present their claim.

VII. Indefinite Limbo, Family Separation, and No Path to Citizenship

Refugees barred from asylum under the ban and found to meet the higher burden for withholding of removal or CAT protection would be left in permanent limbo, separated from their families, and unable to obtain U.S. citizenship. Preventing refugees from reuniting with their families or integrating into U.S. communities violates the Refugee Convention, as discussed in Section II. It also conflicts with Congressional intent to enable refugees to reunite with and extend asylum

¹⁹² Dept. of Homeland Security and Dept. of Justice, “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers,” 87 FR 18078, March 29, 2022 (<https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>)

¹⁹³ UNHCR, “Comment Submitted by UNHCR on Asylum Interim Final Rule,” June 1, 2022 (<https://www.regulations.gov/comment/USCIS-2021-0012-5305>); UNHCR, “Comment Submitted on Asylum Notice of Proposed Rulemaking,” October 21, 2021 (<https://www.regulations.gov/comment/USCIS-2021-0012-5192>)

¹⁹⁴ Human Rights First, “Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies,” August 2022 (<https://humanrightsfirst.org/library/pretense-of-protection-biden-administration-and-congress-should-avoid-exacerbating-expedited-removal-deficiencies/>)

¹⁹⁵ Victoria Bekiempis, “Biden administration quietly resumes deportations to Russia,” *The Guardian*, March 18, 2023 (<https://www.theguardian.com/us-news/2023/mar/18/biden-administration-russia-deportations>)

¹⁹⁶ *Id.*

¹⁹⁷ UNHCR, “UNHCR Comments on Circumvention of Lawful Pathways NPRM,” *Regulations.gov*, March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

status to their families as well as to provide refugees with a pathway to permanent residence and citizenship.

Family unity is a key principle in international law and U.S. immigration law. Refugees granted asylum in the United States may automatically extend asylum protections to their spouses and children if they were included in the asylum application. If the family members are abroad or if the original applicant was in immigration court proceedings but the spouse and child were not, the person granted asylum may subsequently petition to extend asylum status to their family. Through this process, spouses and children may receive authorization to travel to the United States, receive asylum status, and become entitled to the same benefits, including a pathway to citizenship, as the original applicant.

By eviscerating asylum protections, the proposed rule unlawfully deprives refugees of the ability to reunite with their families by leaving them with forms of protection that, unlike asylum, do not enable them to bring their families to safety. Many refugees who flee are unable to travel with their families due to lack of resources, immediate danger, or other circumstances. In many situations, spouses and children remain in their home country until their relative's petition for them is approved. We have represented many refugees whose family members faced terrible danger in the country of persecution — often for the same reason that the client had to flee — and had to go into hiding. The agencies plan to eliminate the reunification process for many refugees and instead leave families permanently separated, with spouses and children indefinitely in hiding. Blocked from reuniting with their refugee relatives through this process, which allows people to travel by plane to the United States, family members may instead attempt dangerous journeys to the southern border to reach safety, forced to risk their lives because of the inhumane asylum ban.

The proposed rule attempts to create an exception to promote family unity for asylum-seeking families who are in the United States together, providing that if a principal applicant would be granted asylum but for the asylum ban *and* where an accompanying spouse or child does not independently qualify for asylum or other protection from removal, the applicant may be granted asylum. While this provision will prevent family separation in some circumstances, it will not protect refugees whose spouses and children remain abroad in their country of nationality or in a transit country. It would also perversely leave some families with only withholding or CAT protection if the spouse or child *can* independently qualify for protection. It is absurd for the agencies to include the second requirement that “an accompanying spouse or child does not independently qualify for asylum or other protection from removal” in order for the family unity exception to apply.

Regardless of the family unity exception, many refugee families will be permanently separated. The Trump administration's transit ban similarly left refugee families separated by denying asylum and leaving refugees with withholding of removal or CAT protection. The resulting

harms that Human Rights First documented, described below, would be perpetuated if the agencies implement the asylum ban:¹⁹⁸

- A Cameroonian refugee denied asylum due to the transit ban was separated from his nine-year-old daughter who remained in danger in Cameroon where she was living with his sister, who had been recently attacked herself. Because he received the limited protection of withholding of removal, the man could not petition to bring his daughter to safety in the United States. He told Human Rights First: **“It is something really disturbing. Every day I have to think about it . . . I never wished for my daughter to live like that.”**
- A Venezuelan refugee who was denied asylum due to the transit ban could not petition for his three children who remained in Venezuela. He had been detained and tortured by former police colleagues because he refused an order to arrest people protesting the Maduro regime. Because the man was denied asylum and received only withholding of removal, he could not bring his children to the United States to join him and his mother and sister who also fled persecution in Venezuela.
- A Cameroonian refugee fleeing political persecution was denied asylum due to the transit ban, leaving him unable to reunite with his wife and seven children. Reflecting on the reality that he may never see his family again, he told Human Rights First: **“It’s making me sick. It’s traumatizing that I have to live my life without my family. They aren’t safe in Cameroon and there’s no way that I can help them. Life is coming to an end for me and my family as a family, so I feel very much disturbed. I continue to pray to God that he performs one of his miracles and I can see my family again and feel the love that we had.”** He told us that one of his cousins had been recently shot by the military in Cameroon, further terrifying him for the safety of his family.
- A Cuban musician and critic of the Cuban government, who was jailed and beaten in Cuba, was denied asylum due to the ban, preventing him from reuniting with his wife and two children who remained in Cuba.

Refugees left with these deficient forms of protection face other major barriers to establishing a stable life in the United States. While refugees granted asylum generally become eligible for permanent residence and later citizenship once they have lived in the United States for a required period, withholding and CAT protection do not provide this pathway to permanent status and citizenship. People granted withholding of removal or CAT protection have in fact been ordered deported and live in the United States under the constant threat that the U.S. government could seek to reopen their cases and remove them.

Unlike asylum, these forms of protection also do not entitle people to automatic work authorization. Individuals must apply for and renew work permits, a process that often requires the assistance of a lawyer and has become subject to increasingly significant processing delays. Refugees left with withholding or CAT protection also face barriers to accessing health care, difficulty obtaining an identification card, and threats of deportation by ICE officers. Human

¹⁹⁸ Human Rights First, “Asylum Denied, Families Divided: Trump Administration’s Illegal Third-Country Transit Ban,” July 2020 (<https://humanrightsfirst.org/wp-content/uploads/2022/10/AsylumDeniedFamiliesDivided.pdf>)

Rights First documented the barriers and harms faced by refugees left with withholding due to the transit ban, including:¹⁹⁹

- A Cameroonian anti-government activist who was granted only withholding of removal because of the transit ban told Human Rights First: **“I’m really quite in limbo right now.”** Ineligible for most government support to individuals with asylum and unable to find a job to support himself until his work authorization request is approved, he reported to Human Rights First: **“Even though I was happy to leave the [detention] facility I really have a lot to think about. I’m thinking about my status of being here. The work permit—how long will I have it? The work permit procedure—how long?”**
- A lesbian Honduran woman recognized as a refugee but denied asylum because of the transit ban faced a host of difficulties in integrating into the United States. She had no identity documents because ICE refused to return her passport, a common practice with individuals who receive withholding. As a result, she was unable to obtain other identity documentation, making it even more difficult to apply for the extremely limited assistance available to refugees who have not received asylum.

VIII. Disproportionate Harm to Black, Brown, and Indigenous Asylum Seekers

Like other policies that target refugees seeking safety at the southern border, the asylum ban will inflict disproportionate harm on Black, Brown, and Indigenous asylum seekers, including refugees from Africa, the Caribbean, and Latin America. It would block and deny many asylum seekers who do not have the resources to travel to the United States by plane or the ability to procure visas, the vast majority of whom are people of color.

Fleeing political persecution, religious-based attacks, gender-based violence, and other persecution, many asylum seekers from El Salvador, Cameroon, Cuba, Guatemala, Haiti, Honduras, Nicaragua, Venezuela, and other countries who undertake difficult and dangerous journeys to the U.S.-Mexico border have no other option to reach safety. While wealthy and white immigrants are more likely to procure visas and arrive by plane, asylum seekers from these and other countries are often forced to travel to the southern border to request protection. The United States and other countries employ visa regimes to prevent people from reaching their countries’ territories to seek asylum while often allowing access to people from wealthier and predominantly white nations.²⁰⁰

Denying asylum access to people at the southwest border while respecting U.S. asylum law only for people who are able to reach the United States on planes is inequitable and will have a racially discriminatory impact. The Trump administration’s transit ban, which similarly banned asylum seekers at the southern border, targeted people of color. During the period that the Trump transit ban was implemented, immigration court asylum denial rates skyrocketed for many Black,

¹⁹⁹ Human Rights First, “Asylum Denied, Families Divided: Trump Administration’s Illegal Third-Country Transit Ban,” July 2020 (<https://humanrightsfirst.org/wp-content/uploads/2022/10/AsylumDeniedFamiliesDivided.pdf>)

²⁰⁰ Women’s Refugee Commission, “Visa Regimes: A Threat to Migrants’ Access to Safety and Asylum,” June 2022 (<https://www.womensrefugeecommission.org/wp-content/uploads/2022/06/Visa-Regimes-A-Threat-to-Migrants-Access-to-Safety-and-Asylum.pdf>)

Brown, and Indigenous asylum seekers requesting safety at the southern border.²⁰¹ For instance, asylum grant rates declined by 45 percent for Cameroonian asylum applicants, 32.4 percent for Cubans, 29.9 percent for Venezuelans, 17 percent for Eritreans, 12.9 percent for Hondurans, 12 percent for Congolese (DRC), and 7.7 percent for Guatemalans from December 2019 to March 2020, compared to the year before the third-country transit asylum ban began to affect refugee claims, according to data analyzed by Syracuse University’s Transactional Records Access Clearinghouse.²⁰²

Due to language barriers, the asylum ban will disproportionately harm asylum seekers from Africa as well as asylum seekers who speak Indigenous languages, who would often be unable to access or use CBP One because the app is only available in English, Spanish, and Haitian Creole, and may not receive proper interpretation during their credible fear interviews or immigration court review — their only opportunities to explain why the asylum ban should not apply to them. Additionally, many Black asylum seekers have been unable to access the CBP One app due to racial bias in its facial recognition software, as discussed in Section IX.

As discussed in Section II, the ban also illegally builds in nationality-based discrimination in access to asylum. It punishes asylum seekers who have not entered the United States via a “DHS-approved parole process” or through previously scheduled appointments at ports of entry. However, parole initiatives are only available to five nationalities — Cubans, Haitians, Nicaraguans, Ukrainians, and Venezuelans. There are no similar parole initiatives for people from Guatemala, Honduras, and El Salvador, for instance, but recent reports indicate that the Biden administration plans to wield the asylum ban against these nationalities.²⁰³ The proposed rule will enable the administration to discriminatorily wield the ban against asylum seekers from countries that do not qualify for parole initiatives.

If the proposed rule goes into effect, future administrations could continue to weaponize the asylum ban to discriminatorily ban asylum seekers. Administrations could provide access to parole initiatives for certain nationalities while excluding others, deny access to CBP One for certain nationalities, or stop scheduling appointments at ports of entry entirely. They might then use the illegal asylum ban to deny asylum access to people who have been discriminatorily excluded from these other pathways.

Last month, President Biden signed an Executive Order on advancing racial equity.²⁰⁴ This proposed asylum ban significantly undermines this commitment and will endanger Black, Brown, and Indigenous asylum seekers.

²⁰¹ Human Rights First, “Biden Administration Plan to Resurrect Asylum Ban Advances Trump Agenda,” January 2023 (https://humanrightsfirst.org/wp-content/uploads/2023/01/AsylumBanFactsheet_final2.pdf)

²⁰² *Id.*

²⁰³ Julia Ainsley, “Rights groups threaten to sue Biden administration over plan to block migrants with what groups call a Trump-era tactic,” NBC News, February 20, 2023 (<https://www.nbcnews.com/politics/immigration/biden-block-migrants-trump-era-stephen-miller-tactic-rcna71282>)

²⁰⁴ President Biden, “Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government,” February 16, 2023 (<https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>)

IX. Requiring Use of CBP One at the Border is Illegal, Perpetuates Inequities, and Denies Asylum to Most Vulnerable

The proposed rule would ban asylum for people who enter at a port of entry without a previously scheduled appointment through the CBP one app and were not denied protection in a transit country. This would codify DHS’s use of the deficient smartphone app as the primary method to seek asylum at the border and deny asylum access to refugees who do not have the resources, language or technological skills, luck, or time to wait for an appointment. The codification of CBP One as the main and generally *only* way to seek asylum at the border — combined with harsh penalties for asylum seekers who cannot schedule an appointment through the app — would shut down asylum access for many vulnerable refugees. As UNHCR noted in its comment on the proposed rule, “conditioning entry and access to asylum on appearing at a port of entry with a prior appointment (or the ability to demonstrate by a preponderance of evidence that it was not possible to secure an appointment) violates international law.”²⁰⁵ Programs like CBP One may be used to provide for safer travel and to facilitate entry but cannot be wielded to “designate exclusive methods of accessing territory.”²⁰⁶

Requiring asylum seekers to use CBP One at the southern border raises concerns that the system will be used for illegal metering, a system initiated by prior administrations to limit, turn back, or require asylum seekers to wait before they could be processed at a port of entry. In September 2021, a federal court held that “turning back asylum seekers at [ports of entry] without inspecting and referring them upon their arrival” violates the government’s statutory obligations under 8 U.S.C. § 1158(a)(1) (the provision guaranteeing asylum access to individuals regardless of manner of entry or status) and §1225 (section governing expedited removal procedures).²⁰⁷ DHS currently turns away many asylum seekers who have not scheduled an appointment through CBP One, which has essentially turned asylum access into a lottery — forcing asylum seekers to wait indefinitely in danger while their access to asylum processing depends on luck, technology skills, or resources to secure an appointment. The proposed asylum ban would codify use of this app and impose consequences on asylum seekers who cannot schedule an appointment with it.

CBP One is impossible for many asylum seekers to access or use. Asylum seekers who cannot afford to obtain a smartphone or are unfamiliar with navigating smartphone technology are often unable to schedule an appointment. The app is only available in English, Spanish, and Haitian Creole and some error messages only appear in English, making it impossible for many asylum seekers to use it. DHS’s reliance on the app as the only way to seek asylum at the border disproportionately blocks Indigenous language speakers who are often unable to schedule appointments due to language barriers. It also disparately harms Black asylum seekers due to racial bias in its facial recognition technology, which has prevented many from obtaining an

²⁰⁵ UNHCR, “UNHCR Comments on Circumvention of Lawful Pathways NPRM,” [Regulations.gov](https://www.regulations.gov/comment/USCIS-2022-0016-7428), March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

²⁰⁶ *Id.*

²⁰⁷ *Al Otro Lado v. Mayorkas*, No. 17-cv-02366-BAS-KSC (S.D. Cal Sept. 2021), https://fingfx.thomsonreuters.com/gfx/legaldocs/zjvqkzdwvx/IMMIGRATION_METERING_LAWSUIT_decision.pdf

appointment.²⁰⁸ The app routinely crashes and glitches for many asylum seekers desperate to schedule an appointment to seek asylum.²⁰⁹ Asylum seekers who can successfully access and navigate the app are still often unable to schedule appointments due to extremely limited slots that run out within minutes. As a result, asylum seekers are forced to remain in danger indefinitely, leaving them vulnerable to attacks, kidnappings, sexual assault, and other violence, including at the hands of cartels and Mexican authorities. LGBTQI+ asylum seekers, Indigenous people, Black asylum seekers, women, and children face a heightened risk of harm in Mexican border regions.

Requiring asylum seekers to schedule an appointment through CBP One leaves many vulnerable asylum seekers stranded in danger and has already resulted in horrific violence and death, including the murder of a 17-year-old Cuban child in Mexico who was required to wait weeks for an appointment.²¹⁰ A Venezuelan family unable to secure an appointment at a port of entry near them in Piedras Negras and forced to travel over 1200 miles to another port of entry for an appointment was kidnapped, tortured, and extorted by a criminal group while traveling to their appointment.²¹¹ After 20 days, their abductors blindfolded them and brought them to the U.S.-Mexico border, threatening to murder them if they did not cross.²¹² After crossing, the family tried to explain to Border Patrol that they had been kidnapped and forced to cross, but agents told them they were criminals for crossing illegally and expelled them back to Mexico.²¹³

Like other policies that block, ban, and deny asylum to refugees, the proposed rule would spur family separations at the border. The administration's use of the CBP One app and denial of access to asylum for people who cannot schedule appointments through the app has already led families to separate.²¹⁴ Some asylum-seeking families were unable to secure CBP One appointments together as a family unit, leading them to make the devastating decision to send their children across the border alone to protect them from harm in Mexican border regions.²¹⁵ Children who have separated from their parents to seek safety in the United States face an increased risk of harm and exploitation, as well as the long-lasting psychological harms of family separation. For instance, the New York Times recently published the devastating results of an investigation about the labor exploitation of children who came to the United States as

²⁰⁸ Melissa del Bosque, "Facial recognition bias frustrates Black asylum applicants to US, advocates say," The Guardian, February 8, 2023 (<https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias>); @L_Toczykowski, Twitter, March 1, 2023

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²⁰⁹ @jherrerx, Twitter, March 21, 2023 (<https://twitter.com/jherrerx/status/1638214778115047425>);

@L_Toczykowski, Twitter, March 1, 2023 (https://twitter.com/L_Toczykowski/status/1631063774210785280)

²¹⁰ Jack Herrera, "Fleeing for Your Life? There's An App for That," Texas Monthly, March 2, 2023 (<https://www.texasmonthly.com/news-politics/cbp-app-asylum-biden-administration/>)

²¹¹ @ReichlinMelnick, Twitter, March 2, 2023 (<https://twitter.com/ReichlinMelnick/status/1631400369266872322>)

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Stephanie Leutert and Caitlyn Yates, "Asylum Processing at the U.S.-Mexico Border: February 2023," UT Austin Strauss Center, February 2023 (https://www.strausscenter.org/wp-content/uploads/feb_2023_Asyum_Processing.pdf)

²¹⁵ Andrea Castillo, "Asylum seekers face decision to split up families or wait indefinitely under new border policy," Los Angeles Times, February 24, 2023 (<https://www.latimes.com/politics/story/2023-02-24/asylum-seeking-families-consider-separation-shortage-mobile-app-appointments>)

unaccompanied minors.²¹⁶ Policies like Title 42 have dramatically contributed to unaccompanied minors entering the United States without their families; for instance, in fiscal year 2021, more than 12,000 children reentered the United States as unaccompanied minors after having been expelled under Title 42, usually with their parents.²¹⁷ Replacing Title 42 with the asylum ban would continue to fuel family separation and endanger refugee children.

X. Proposed Rule Would Lead to Inefficiencies and Delay, Exacerbate Backlogs

Like other barriers to asylum imposed over the years, the asylum ban will add to the complexity and length of asylum adjudications, exacerbating delays and backlogs. Adjudicators will be required to determine whether the asylum ban applies in every case where an asylum seeker entered at the southern border, and if the person is covered by the ban, determine whether an exception applies. Credible fear screenings, immigration court hearings, and affirmative USCIS asylum interviews will become more complex and time-consuming as adjudicators analyze the facts of each case to determine the application of an illegal asylum ban.

Determining whether the ban applies could require substantial additional testimony, evidence, and analysis. In cases where individuals seek to prove that they were unable to use or access the CBP One app, asylum officers and judges might assess testimony and evidence relating to technological glitches, issues with facial recognition software, or other significant obstacles to using the app. Adjudicating exceptions such as acute medical emergency or imminent and extreme threat to life or safety, which require a much higher standard of proof than eligibility for asylum, would entail a lengthy fact-based inquiry and in some instances may be even more time-consuming than determining whether the asylum seeker has a well-founded fear of persecution. This could require review and analysis of medical records, country conditions evidence, and other documents.

The immigration court backlog continues to grow, with over 2 million cases pending, many of which are asylum claims.²¹⁸ There are more than 605,000 additional asylum cases pending before the USCIS Asylum Office.²¹⁹ Human Rights First has documented the ways in which policies that rig adjudications against asylum seekers and impose barriers to asylum exacerbate backlogs and delays.²²⁰ The asylum ban would similarly rig adjudications, add to the length and

²¹⁶ Hannah Dreier, “Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.,” New York Times, February 25, 2023 (<https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html?smid=tw-nytimes&smtyp=cur>)

²¹⁷ Camilo Montoya-Galvez, “12,212 migrant children reentered U.S. border custody alone in 2021 after being expelled,” CBS News, May 20, 2022 (<https://www.cbsnews.com/news/immigration-migrant-children-us-border-custody-unaccompanied-minors-2021/>)

²¹⁸ TRACImmigration, “Immigration Court Backlog Tool,” last updated January 2023 (https://trac.syr.edu/phptools/immigration/court_backlog/)

²¹⁹ USCIS, “Asylum Division Quarterly I-589 Statistics Fiscal Year 2022,” 2022 (https://www.uscis.gov/sites/default/files/document/data/AsylumDivisionQuarterlyStatsFY22Q4_I589_Stats_revised_I589_FilingCompletionPending.csv)

²²⁰ Human Rights First, “Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deports Refugees,” June 2020 (<https://humanrightsfirst.org/wp-content/uploads/2022/10/AdministrationDismantlingUSAsylumSystem.pdf>); Human Rights First, “Fair, Timely, and Less-Traumatizing Asylum Process,” January 2022 (<https://humanrightsfirst.org/wp-content/uploads/2022/09/AddressingBacklogsRecommendationsJanuary2022.pdf>)

complexity of interviews and hearings, and fuel erroneous decisions that must be resolved through subsequent review. Cases wrongly referred by the asylum office due to erroneous application of the asylum ban would unnecessarily add to immigration court backlogs, as do other barriers to asylum that are often wrongly adjudicated by USCIS and ultimately granted in immigration court.²²¹

The agencies' plan to apply the ban in expedited removal would also exacerbate backlogs by diverting asylum office resources away from addressing the affirmative asylum backlog and providing timely adjudications. The asylum office backlog exploded under the Obama administration as it increased the use of expedited removal and diverted asylum office resources to conduct credible fear screenings. It has continued to grow as subsequent administrations have continued to wield expedited removal against asylum seekers.²²² In 2022, the USCIS Ombudsman warned that fear screenings limit asylum officers' ability to conduct affirmative asylum adjudications and address the backlog.²²³ Fear screenings would be even more complex if officers must apply the asylum ban, requiring additional adjudications regarding whether the ban applies or whether an asylum seeker qualifies for an exception before an officer may even assess whether the person has a fear of persecution.

XI. Conclusion

Instead of creating illegal bars that deny asylum to refugees, separate families, and inflict human rights abuses and disorder, the agencies should pursue policies that comply with U.S. refugee law and international law. The best way to achieve the agencies' stated goal of encouraging refugees seeking asylum to do so through ports of entry is to restore and maximize access to asylum at ports of entry, after years of blockage and barriers due to Title 42 and other policies that pushed many asylum seekers to attempt to cross the border elsewhere.

²²¹ Human Rights First, "Draconian Deadline: Asylum Filing Ban Denies Protection, Separates Families," September 2021 (<https://humanrightsfirst.org/wp-content/uploads/2022/09/DraconianDeadlineFINAL.pdf>)

²²² Human Rights First, "Protection Postponed: Asylum Office Backlogs Cause Suffering, Separate Families, and Undermine Integration," April 2021 (<https://humanrightsfirst.org/library/protection-postponed-asylum-office-backlogs-cause-suffering-separate-families-and-undermine-integration/>)

²²³ Dept. of Homeland Security, "Citizenship and Immigration Services Ombudsman: Annual Report 2022," June 30, 2022 (https://www.dhs.gov/sites/default/files/2022-07/2022%20CIS%20Ombudsman%20Report_verified_medium_0.pdf)

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