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**Re: Human Rights First Comment on the Departments of Justice and Homeland Security’s Final Rule on Securing the Border, USCIS Docket No. USCIS 2024-0006; A.G. Order No. 6053-2024**

Dear Acting Deputy Assistant Secretary Daniel Delgado and Acting Assistant Director Sarah Flinn:

Human Rights First submits this comment in opposition to the Final Rule promulgated by the Department of Homeland Security (DHS) and Department of Justice (DOJ) under the title “Securing the Border” (“2024 asylum ban”).<sup>1</sup> Human Rights First also responds here to the accompanying request for comment on expanding and extending the Circumvention of Lawful Pathways rule (“2023 asylum ban”).<sup>2</sup> We also resubmit our previous comments on these rulemakings and incorporate our prior arguments into this comment. The extension or expansion of these asylum bans will prolong and multiply the unlawful, inhumane impacts that we have witnessed and extensively documented.

**I. Overview**

For a year and a half, the Biden administration has implemented asylum bans that punish people fleeing persecution and torture. These bans, issued in 2023 and 2024, are similar to prior Trump administration bans and violate the same core provisions of U.S. and international refugee law. They inflict penalties on people seeking asylum who enter the United States between ports of entry while at the same time imposing a discriminatory access system at ports of entry that leaves people waiting in danger for months or longer and pushes many to cross the border without inspection. Human Rights First and other organizations have extensively documented the bans’

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<sup>1</sup> Dep’t of Homeland Security and Dep’t of Justice, “Securing the Border,” October 7, 2024 [hereinafter “Securing the Border October 7”] (<https://www.federalregister.gov/documents/2024/10/07/2024-22602/securing-the-border>).

<sup>2</sup> Dep’t of Homeland Security and Dep’t of Justice, “Circumvention of Lawful Pathways,” May 16, 2023 [hereinafter “Circumvention of Lawful Pathways May 16”] (<https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways>).

catastrophic impact, including the systematic refoulement of people seeking safety, summary deportations without a fear screening or after a rigged fear screening, discriminatory denial of access to asylum, the denial of stable status and a pathway to citizenship for people determined to be refugees under U.S. law, and counterproductive inefficiencies in asylum adjudications. Extending or expanding the bans only perpetuates this discriminatory, punitive, and unlawful system. We call on the agencies to instead implement effective, non-discriminatory, and fair policies and processes.

The 2023 and 2024 asylum bans impose penalties on people seeking safety based on how they enter the United States, which is explicitly prohibited by U.S. refugee law. Federal courts have struck down the 2023 ban and the 2018 Trump ban for this reason, but the agencies have continued to impose rules that unlawfully bar asylum based on manner of entry. The agencies have also disregarded the U.N. Refugee Agency's (UNHCR) repeated warnings that the bans violate core principles of the Refugee Convention and Protocol, including by fueling refoulement, imposing prohibited penalties, and denying asylum access on a discriminatory basis. A diverse array of faith-based, civil rights, LGBTQ+ and human rights organizations, the union representing over 14,000 USCIS employees including asylum officers, and Members of Congress also warned the agencies of the illegality, inhumanity, counterproductive consequences, and other harms of the bans, but the agencies proceeded with these policies despite this opposition.

Both bans penalize people who enter the United States at the southern border between ports of entry or at a port of entry without an appointment, even though the government's primary mechanism for making an appointment, the CBP One app, is inaccessible to many people due to discriminatory barriers relating to language, literacy, disability, and financial resources and requires some people to wait nearly a year for an appointment while at high risk of kidnappings, torture, rape, and other attacks. They also both weaponize expedited removal to block asylum access, including by unlawfully heightening the screening standard applied in fear screenings to rig the process against asylum seekers.

The 2024 ban takes additional steps that are unprecedented in the history of expedited removal, including 1) eliminating a nearly 30-year-old safeguard designed to comply with statutory obligations to refer people who fear return for fear screening interviews and 2) heightening the standard applied in fear screenings to an even higher standard (which had already been raised by the 2023 ban) that further rigs the process against asylum seekers. The 2024 ban works in tandem with a Presidential Proclamation that unlawfully shuts down asylum processing at ports of entry for most people without appointments, leaving many people with no choice but to attempt dangerous crossings between ports of entry and risk the ban's penalties.

The agencies have now finalized and expanded the 2024 asylum ban rule and requested comment on the Final Rule. They have also requested comment on the 2023 asylum ban, including whether to extend it indefinitely and expand it further.

In finalizing and expanding the 2024 ban, the agencies turned a blind eye to its catastrophic impact in the past five months. The government is systematically denying fear screenings to asylum seekers including people fleeing violence and harms on the basis of sexual orientation, Indigeneity, and gender, pregnant asylum seekers, people seeking safety with infants and young children, and people with disabilities. The heightened standard that is applied to those who manage to be referred for fear screenings makes them nearly three times as likely to be ordered deported compared to the fear screening standard created by Congress. Indeed, the agencies explicitly acknowledged in the Final Rule that the ban may create a risk of refoulement, in violation of U.S. and international law. But the agencies touted these horrific harms as evidence that the ban is “working as intended” and attempted to justify the ban by recycling legal arguments already rejected by federal courts and raising pretextual and specious arguments.

At the same time, the agencies indicated that they plan to potentially extend indefinitely and expand the 2023 ban, which they had repeatedly told the public was “temporary” at the time it was promulgated. The 2023 ban similarly led to refoulement of people seeking safety, rigged fear screenings, fueled discriminatory denial of access to asylum, and stranded people in danger in Mexico where over 2,500 asylum seekers and migrants suffered horrific attacks since the ban was implemented, including those waiting for appointments to enter at ports of entry. The 2023 ban continues to deprive people determined to be refugees under U.S. law of stable status or a pathway to citizenship, leaving many in permanent limbo in the United States with a removal order. Extending the ban would exponentially multiply these counterproductive harms.

In the face of these escalating and systematic human rights and refugee law violations, it is unconscionable that the agencies have finalized and expanded the 2024 ban and are considering expanding and extending the 2023 ban indefinitely. Human Rights First strongly urges the agencies to immediately rescind the 2023 and 2024 asylum bans. Rather than attempting to entrench and expand these illegal rules, the agencies should take steps long recommended by Human Rights First and other groups to ensure equitable access to asylum including at ports of entry, upgrade asylum adjudications to ensure they are fair, timely, and humane, and rescind other policies that violate U.S. and international law.<sup>3</sup>

## **II. Human Rights First’s Interest in the Final Rule**

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<sup>3</sup> Human Rights First, “Upholding And Upgrading Asylum: Recommendations for the Biden Administration,” October 2023 ([https://humanrightsfirst.org/wp-content/uploads/2023/10/Upholding-and-Upgrading-Asylum\\_Recommendations.pdf](https://humanrightsfirst.org/wp-content/uploads/2023/10/Upholding-and-Upgrading-Asylum_Recommendations.pdf)).

For over 45 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 United States 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 in California, New York, and Washington, DC. This extensive experience working directly with refugees seeking protection in the United States is the foundation for Human Rights First’s advocacy and informs the observations that follow.

Human Rights First has long monitored and documented the impact of the use of expedited removal on people seeking asylum,<sup>4</sup> and has represented many people seeking asylum who were subjected to that process. Human Rights First has also documented the impact of both the Trump administration and Biden administration’s asylum bans, including in numerous reports on the 2023 and 2024 asylum bans.<sup>5</sup>

### **III. The Public Did Not Have a Meaningful Opportunity to Respond to the 2024 Asylum or 2023 Asylum Bans**

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<sup>4</sup> Human Rights First, “Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies,” August 3, 2022 [hereinafter Human Rights First, “Pretense of Protection”] (<https://humanrightsfirst.org/library/pretense-of-protection-biden-administration-and-congress-should-avoid-exacerbating-expedited-removal-deficiencies/>); Human Rights First, “Biden Administration Poised to Eliminate Critical Safeguard Amid Escalating Reports of Erroneous Credible Fear Decisions,” December 8, 2021 (<https://humanrightsfirst.org/library/biden-administration-poised-to-eliminate-critical-safeguard-amid-escalating-reports-of-erroneous-credible-fear-decisions/>).

<sup>5</sup> Hope Border Institute, Human Rights First, Immigrant Defenders Law Center, Kino Border Initiative, RAICES, and Refugees International, “Don’t Tell Me About Your Fear,” August 7, 2024 [hereinafter, “Don’t Tell Me About Your Fear”] (<https://humanrightsfirst.org/library/dont-tell-me-about-your-fear/>); Florence Immigrant & Refugee Rights Project, Hope Border Institute, Human Rights First, Immigrant Defenders Law Center, Kino Border Initiative, Las Americas Immigrant Advocacy Center, National Immigrant Justice Center, National Immigration Law Center, Refugees International, and Women’s Refugee Commission, “Six-Week Report: Implementation of the Biden Administration’s June 2024 ‘Securing the Border’ Asylum Ban,” July 2024 (<https://immigrantjustice.org/research-items/Biden-June-2024-asylum-ban-six-week-report>) [hereinafter, “Six-Week Report: Implementation of the Biden Administration’s June 2024 ‘Securing the Border’ Asylum Ban”]; Human Rights First, “Trapped, Preyed Upon, and Punished: One Year of the Biden Administration Asylum Ban,” May 7, 2024 [hereinafter Human Rights First, “Trapped, Preyed Upon, and Punished”] ([www.humanrightsfirst.org/library/trapped-preyed-upon-and-punished](http://www.humanrightsfirst.org/library/trapped-preyed-upon-and-punished)); Human Rights First, “Inhumane and Counterproductive: Asylum Ban Inflicts Mounting Harm,” Oct. 12, 2023 [hereinafter Human Rights First, “Inhumane and Counterproductive”] ([www.humanrightsfirst.org/library/inhumane-and-counterproductive-asylum-ban-inflicts-mounting-harm](http://www.humanrightsfirst.org/library/inhumane-and-counterproductive-asylum-ban-inflicts-mounting-harm)); Human Rights First, “Refugee Protection Travesty: Biden Asylum Ban Endangers and Punishes At-Risk Asylum Seekers,” July 12, 2023; Human Rights First, “Pretense of Protection”; 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 reiterates its opposition to the initial 30-day comment period on the 2023 proposed asylum ban rule<sup>6</sup> and the 2024 Interim Final Rule (IFR),<sup>7</sup> as well as the agencies' decision to circumvent the Administrative Procedure Act's notice-and-comment process for the 2024 ban. Had the agencies provided a sufficient comment period to respond to the bans, the public would have had an opportunity to submit more comments and discuss in greater detail the illegality and harms of the bans. The agencies' denial of a meaningful comment period and their race to implement and cement these unlawful asylum bans does not accord with President Biden's recognition, upon taking office, of the principles set out in Executive Order 12866 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."<sup>8</sup>

The truncated comment periods were especially inappropriate considering the complex nature of the rules, which impact many stages of the asylum process including referral for credible fear interviews (CFIs), the conduct of CFIs, and full asylum adjudications before USCIS and the immigration court. The rules make fundamental changes to asylum eligibility to send refugees to death, persecution, and torture while leaving other refugees with lesser forms of protection that do not provide permanent status or a pathway to citizenship. The inadequacy of the initial 30-day comment period provided by the agencies to respond to the June 2024 IFR was further exacerbated by an overlapping 30-day comment period for another proposed regulation that was also designed to more quickly deport people through expedited removal by allowing adjudicators to consider bars to asylum in rushed CFIs.<sup>9</sup>

The inadequate comment period for the 2024 ban was particularly egregious as the ban went into effect before the rule was even published in the Federal Register. In the past five months, the agencies put into effect a sweeping asylum ban before receiving any public comments, required attorneys, advocates, and others to comment within 30 days at the same time that they struggled to mitigate the horrific human rights violations inflicted by the ban, and then rushed to finalize a drastically expanded version of the rule despite strong opposition to it. Since the IFR went into effect, legal service providers have expended massive amounts of time and resources to attempt to mitigate these harms and represent people facing deportation under the ban, including

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<sup>6</sup> Dep't of Homeland Security, "Circumvention of Lawful Pathways," Feb. 23, 2023 (<https://www.federalregister.gov/documents/2023/02/23/2023-03718/circumvention-of-lawful-pathways>).

<sup>7</sup> Dep't of Homeland Security, "Securing the Border," June 7, 2024 [hereinafter, "Securing the Border June 7"] (<https://www.federalregister.gov/documents/2024/06/07/2024-12435/securing-the-border>).

<sup>8</sup> 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>); 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>).

<sup>9</sup> Federal Register, "Application of Certain Mandatory Bars in Fear Screenings," May 13, 2024 (<https://www.federalregister.gov/documents/2024/05/13/2024-10390/application-of-certain-mandatory-bars-in-fear-screenings>).

numerous cases where the government fails to disclose where they are detained or allow them to communicate with attorneys.

As the human rights violations continued to mount, the agencies rushed to expand the 2024 asylum ban through a Final Rule and provided another 30-day period to respond. As a result, since the ban went into effect in June, many who can speak directly to the harms, unlawfulness, and other impacts of the rule have had very limited and unfairly truncated periods to submit comprehensive comments to the IFR or Final Rule as they attempted to protect the countless refugees wrongly denied access to asylum in the wake of it.

The agencies' decision to push through and finalize the 2024 ban in such a short time frame – without meaningful opportunity for public comment – under the pretext of addressing high numbers of border crossings and asylum backlogs is unjustified, as explained further in Section VI.

#### **IV. The Bans are Contrary to United States Law and Treaty Obligations to Refugees**

In public comments on the 2023 and 2024 bans, Human Rights First and other legal and advocacy organizations, the asylum officers' union, UNHCR, and other groups explained that the ban blatantly violates U.S. law and core treaty obligations.<sup>10</sup> The 2023 ban was struck down by a federal court for violating U.S. law.<sup>11</sup> In June, immigrants' rights groups sued the administration over the 2024 ban because it also violates U.S. law.<sup>12</sup>

**The discussion in this section focuses on the 2024 ban, the recently documented violations of refugee law since its implementation, and the agencies' inaccurate arguments in the Final Rule. However, the same arguments regarding the 2024 ban's illegality apply to the 2023 ban,<sup>13</sup> as it violates the same provisions of U.S. refugee law and obligations under the Refugee Convention and its Protocol.** Extending or expanding the 2023 ban would exacerbate the violations of refugee law that it inflicts, as explained in further detail in Section VII.

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<sup>10</sup> Human Rights First, "Summary of Widespread Support for Rescinding the June 2024 Asylum Ban," (<https://humanrightsfirst.org/wp-content/uploads/2024/08/Public-Comments-Urge-the-Biden-Administration-to-Rescind-the-Latest-Asylum-Ban-1.pdf>); Human Rights First, "Public Comments Urge Withdrawal of Biden Administration's Proposed Asylum Ban," April 2023 ([https://humanrightsfirst.org/wp-content/uploads/2023/04/Asylum\\_ban\\_comments\\_summary\\_pdf](https://humanrightsfirst.org/wp-content/uploads/2023/04/Asylum_ban_comments_summary_pdf)).

<sup>11</sup> *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023), stayed pending appeal, 2023 WL 11662094 (9th Cir. Aug. 3, 2023), appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024)

<sup>12</sup> Complaint, *Las Americas Immigrant Advocacy Center v. U.S. Dep't of Homeland Security, et al.* (Dist. Ct. D.C.) (<https://www.aclu.org/cases/las-americanas-immigrant-advocacy-center-v-u-s-department-of-homeland-security?document=Complaint>).

<sup>13</sup> The 2024 ban's additional provision eliminating the nearly 30-year-old regulatory requirement for CBP officers to ask people if they fear return is discussed in this section, but does not apply to the 2023 ban, which did not have this provision.

Since the 2024 ban was implemented, Human Rights First and other organizations have confirmed the resulting violations of refugee law and treaties through extensive reporting on the refoulement of people seeking safety, denial of access to asylum, discrimination, and other violations.<sup>14</sup> Days before the agencies issued the Final Rule, UNHCR warned that the rule “severely curtails access to protection for people fleeing conflict, persecution, and violence,” which is “a violation of international refugee law and the humanitarian principles to which the United States has long been a leader.”<sup>15</sup>

Nonetheless, the agencies proceeded to issue a Final Rule that makes it even more difficult to lift the ban and is otherwise materially unchanged from the IFR, ensuring that these violations of law continue for longer. Like the IFR, the Final Rule violates core principles of the Refugee Convention and Protocol as well as U.S. law that was enacted to codify these principles.

### **A. Violation of U.S. Treaty Commitments to Refugees**

In the wake of World War II, the United States played a lead role in drafting the 1951 Refugee Convention, which requires states to abide by core principles of refugee protection including non-discrimination, non-refoulement, non-penalization, and facilitation of integration. The United States acceded to the Protocol Relating to the Status of Refugees in 1968, which incorporated the substantive obligations of the Refugee Convention. The Convention and Protocol are codified in U.S. refugee law.<sup>16</sup>

Since the ban’s implementation in June, there is overwhelming evidence that it systematically violates core principles of the Convention and Protocol, including by fueling refoulement, imposing prohibited penalties, and driving impermissible discrimination based on manner of entry, race, and nationality. By denying people access to asylum due to their language, it disproportionately harms and blocks people based on their race and nationality, fueling impermissible discrimination under the Convention and Protocol.

Like the IFR, the Final Rule violates multiple provisions of the Refugee Convention and Protocol, including Articles 3, 31, 33 and 34. These glaring and ongoing violations of international law threaten the lives and safety of refugees and undermine refugee protection globally.

#### *Non-refoulement*

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<sup>14</sup> “Don’t Tell Me About Your Fear”; “Six-Week Report: Implementation of the Biden Administration’s June 2024 ‘Securing the Border’ Asylum Ban.”

<sup>15</sup> UNHCR, “News comment: UNHCR reiterates concern about US asylum regulations,” September 30, 2024 (<https://www.unhcr.org/us/news/press-releases/news-comment-unhcr-reiterates-concern-about-us-asylum-regulation>).

<sup>16</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

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.”<sup>17</sup> Known as the principle of non-refoulement, it is “cornerstone of the 1951 Convention and its 1967 Protocol.”<sup>18</sup> U.S. courts have recognized that the principle of non-refoulement is codified in U.S. law.<sup>19</sup> UNHCR has moreover made clear that Article 33 prohibits the refoulement of a person who has a well-founded fear of persecution, with certain limited exceptions.<sup>20</sup>

The Final Rule, like the IFR, is replete with provisions that dramatically increase the risk of refoulement, including: 1) eliminating the nearly 30-year-old regulatory requirement for Customs and Border Protection (CBP) officers to ask people if they fear return, 2) unlawfully raising the screening standard in credible fear interviews to “reasonable probability” for those subject to the ban based on their manner of entry into the United States, and 3) denying asylum in full adjudications to people who are subject to the ban. Exceptions to the ban do not protect against refoulement, as they are unrelated to the merits of a person’s asylum case or the persecution and other harm they would suffer if returned. In an amicus brief filed in support of litigation against the ban, UNHCR warned that it “may lead to the refoulement of large numbers of refugees.”<sup>21</sup> Additionally, the rule works in tandem with a Presidential Proclamation that suspends processing at ports of entry, which constitutes refusal of admission at a frontier in violation of the non-refoulement requirement.<sup>22</sup>

In both the IFR and Final Rule, the agencies explicitly acknowledged that the asylum ban could increase the risk that people with meritorious asylum claims would be wrongly turned away and returned to danger without being referred for a credible fear interview or after erroneously

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<sup>17</sup> UNHCR, “Convention and Protocol Relating to the Status of Refugees” published 1951 and 1967, (<https://www.unhcr.org/en-us/3b66c2aa10>).

<sup>18</sup> “Comments of the United Nations High Commissioner for Refugees on the Interim Final Rule from the U.S. Department of Homeland Security and U.S. Department of Justice: ‘Securing the Border’,” July 8, 2024 (<https://www.regulations.gov/comment/USCIS-2024-0006-1033>).

<sup>19</sup> *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440–41 (1987).

<sup>20</sup> “Comments of the United Nations High Commissioner for Refugees on the Interim Final Rule from the U.S. Department of Homeland Security and U.S. Department of Justice: ‘Securing the Border’,” July 8, 2024 (<https://www.regulations.gov/comment/USCIS-2024-0006-1033>); “Comments Submitted by the United Nations High Commissioner for Refugees (UNHCR),” March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>); UNHCR “Brief of the Office of the United Nations High Commissioner for Refugees before the United States Court of Appeals for the District of Columbia Circuit Court in the case *O.A., et al., Plaintiffs-Appellees, v. DONALD J. TRUMP, AS PRESIDENT OF THE UNITED STATES, et al., Defendants-Appellants*,” August 13, 2020 (<https://www.refworld.org/jurisprudence/amicus/unhcr/2020/en/123235>).

<sup>21</sup> Amicus Brief of UNHCR in *Las Americas Immigrant Advocacy Center v. DHS*, July 29, 2024 (<https://cgisr.uclawsf.edu/legal-document/amicus-brief-unhcr>).

<sup>22</sup> UNHCR, “Note on Non-Refoulement (Submitted by the High Commissioner) EC/SCP/2,” August 23, 1977 (<https://www.unhcr.org/publications/note-non-refoulement-submitted-high-commissioner#:~:text=on%20their%20territory,-2..social%20group%20or%20political%20opinion.%22>).

receiving a negative credible fear determination.<sup>23</sup> The agencies callously referred to the “costs to noncitizens that result from their removal” without acknowledging that these “costs” could involve persecution, torture, and death.<sup>24</sup> The Final Rule stated that “indeed, such costs are likely.”<sup>25</sup>

After acknowledging the potential increased risk of refoulement, the agencies insisted in the Final Rule that the asylum ban “strike[s] an appropriate balance” in light of high numbers of border crossings.<sup>26</sup> However as UNHCR explained to the agencies in its public comment, the principle of non-refoulement is non-derogable and “[t]here is no ‘acceptable’ level of refoulement under international law.”<sup>27</sup> Nor is violating the law and endangering lives a “balanced” approach. The agencies’ circumvention of U.S. law only encourages further violations of law and severely undermines the rule of law, which is crucial to the survival and stability of democratic states and to protecting the human rights of all people.

Consistent with warnings by UNHCR and others as well as the agencies’ own repeated admissions, the asylum ban has and continues to fuel the refoulement of people to persecution and torture.<sup>28</sup> People who have been deported to danger without a credible fear interview under the rule include survivors of gender-based violence, people whose family members were assassinated, LGBTQI+ people, individuals with visible marks and bruises from attacks, and people fleeing death threats and other harms with young children.<sup>29</sup> Under the ban, Mexican asylum seekers are often trapped in their country of feared persecution without access to asylum, constituting refoulement. Additionally, non-Mexican nationals who are trapped in Mexico or deported to Mexico under the rule are at serious risk of chain refoulement to their countries of persecution.<sup>30</sup> The terrible consequences of the ban are described in further detail in Section V.

By barring asylum, the ban leaves refugees with well-founded fears of persecution at risk of return. While the agencies argued that the rule satisfies the United States’s non-refoulement obligations because people may apply for withholding of removal, UNHCR has repeatedly explained – and again reiterated in its public comment – that this argument is incorrect and that “withholding does not adequately substitute for asylum.”<sup>31</sup> Regardless, the agencies are incorrect that the rule protects people who are potentially eligible for withholding of removal, as the

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<sup>23</sup> “Securing the Border October 7,” at 81203; “Securing the Border June 7,” at 48767.

<sup>24</sup> *Id.*

<sup>25</sup> “Securing the Border October 7,” at 81203.

<sup>26</sup> “Securing the Border October 7,” at 81183.

<sup>27</sup> “Comment Submitted by the United Nations High Commissioner for Refugees (UNHCR),” July 8, 2024 (<https://www.regulations.gov/comment/USCIS-2024-0006-1033>).

<sup>28</sup> “Don’t Tell Me About Your Fear; “Six-Week Report: Implementation of the Biden Administration’s June 2024 ‘Securing the Border’ Asylum Ban.”

<sup>29</sup> “Don’t Tell Me About Your Fear.”

<sup>30</sup> Human Rights First, “Trapped, Preyed Upon, and Punished.”

<sup>31</sup> “Comment Submitted by United Nations High Commissioner for Refugees (UNHCR),” July 8, 2024 (<https://www.regulations.gov/comment/USCIS-2024-0006-1033>).

elimination of the requirement to ask about fear and the heightened screening standard in credible fear interviews result in the unlawful refoulement of people eligible for withholding of removal.

### *Non-penalization*

Article 31 of the 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.”<sup>32</sup> UNHCR’s legal guidance on Article 31, which was issued in September 2024, emphasizes that “Article 31 is central to the object and purpose of the 1951 Convention and its 1967 Protocol, because it ensures that refugees can gain access to international protection effectively, without being penalized for breaches of immigration and other laws.”<sup>33</sup>

The rule, like the 2023 ban, directly violates the non-penalization requirement by punishing people who enter the United States between ports of entry or at ports of entry without an appointment. Penalties inflicted by the rule based on manner of entry include denial of asylum, a higher screening standard for credible fear interviews, increased risk of deportation, and permanent limbo and denial of a pathway to citizenship for those denied asylum and granted lesser forms of protection. Indeed, the Final Rule used the word “consequences” 127 times, often in the context of imposing consequences on those who cross the border without an appointment, making clear that the rule is designed to inflict penalties. The agencies further explained that the rule is a “tool” to “ensur[e] the timely enforcement of **consequences for noncitizens who enter the United States irregularly**” (emphasis added).<sup>34</sup>

The agencies attempted to dismiss these arguments by claiming that the denial of asylum is not a “penalty” within the meaning of Article 31<sup>35</sup>. However, UNHCR explained in its public comment that “penalties” include “denying or limiting access to asylum procedures and protection.”<sup>36</sup> UNHCR’s September 2024 legal guidance on Article 31 reiterated that “[p]enalties may include...any discriminatory treatment or procedural detriment to the refugee, including denial, obstructions, delay or limits on access to the territory or asylum procedure...or a decision to declare an application for international protection inadmissible for the sole reason of the

<sup>32</sup> UNHCR, “Convention and Protocol Relating to the Status of Refugees” published 1951 and 1967, (<https://www.unhcr.org/en-us/3b66c2aa10>).

<sup>33</sup> UNHCR, “Guidelines on International Protection Np. 14: Non-penalization of refugees on account of their irregular entry or presence and restrictions on their movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees,” September 23, 2024 (<https://www.refworld.org/policy/legalguidance/unhcr/2024/en/148632>).

<sup>34</sup> “Securing the Border October 7,” at 81189.

<sup>35</sup> *Id.* at 81175.

<sup>36</sup> “Comment Submitted by United Nations High Commissioner for Refugees (UNHCR),” July 8, 2024 (<https://www.regulations.gov/comment/USCIS-2024-0006-1033>).

applicant's irregular entry or presence."<sup>37</sup> The penalties imposed by the rule for irregular entry fit squarely within this description.

The agencies rejected UNHCR's interpretations of the Convention and Protocol as not binding and failed to meaningfully address UNHCR's position even though the Supreme Court has recognized that UNHCR "provides significant guidance in construing the Protocol, to which Congress sought to conform".<sup>38</sup> The agencies' position harms U.S. interests globally by undermining respect for international refugee law and encouraging other countries to ban and turn away refugees at borders in violation of international law, and is entirely inconsistent with the United States' role as a member of UNHCR's Executive Committee.

### *Access to asylum*

The Refugee Convention requires access to an asylum process for people seeking protection, which must include an individualized determination of whether each person meets the definition of a refugee. The 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 repeatedly explained in response to the Trump administration and Biden administration's asylum bans and again in its public comment to the IFR, the Refugee Convention and Protocol require "[a]ccess to a fair and efficient refugee status determination procedure," which is a safeguard against refoulement.<sup>39</sup> By barring people from seeking asylum during the credible fear screening process based on their manner of entry, "the Rule jeopardizes the right to seek and enjoy asylum."<sup>40</sup>

### *Non-discrimination*

Article 3 of the Refugee Convention prohibits discrimination based on race, religion, or country of origin. The 2024 ban, like the 2023 ban, has produced glaring inequities in access to asylum based on race, country of origin, and other factors including language, disability, literacy, and financial resources.

The rule is designed to impose a range of consequences on people who enter the United States at the southern border without obtaining an appointment. It disproportionately harms Black, Brown,

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<sup>37</sup> UNHCR, "Guidelines on International Protection Np. 14: Non-penalization of refugees on account of their irregular entry or presence and restrictions on their movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees," September 23, 2024 (<https://www.refworld.org/policy/legalguidance/unhcr/2024/en/148632>).

<sup>38</sup> "Securing the Border October 7," at 81176; UNHCR, "Convention and Protocol Relating to the Status of Refugees" published 1951 and 1967, (<https://www.unhcr.org/en-us/3b66c2aa10>).

<sup>39</sup> "Comment Submitted by United Nations High Commissioner for Refugees (UNHCR)," July 8, 2024 (<https://www.regulations.gov/comment/USCIS-2024-0006-1033>).

<sup>40</sup> *Id.*

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. Additionally, the main way to request and obtain an appointment is through the CBP One mobile application, which is currently only available in English, Spanish, and Haitian Creole. As a result, many African, Indigenous, and other people seeking asylum, especially people fleeing from outside the Americas, cannot use CBP One and are more likely to be subject to the rule’s penalties, constituting impermissible discrimination based on race and nationality. The agencies declined to include an exception to the ban for people who faced a significant obstacle to using CBP One, even though such an exception was included in the 2023 asylum ban.<sup>41</sup> In response to “commenters’ concerns” that the IFR did not include a similar exception, the agencies reiterated that they “choose not to include an exception,”<sup>42</sup> disregarding the systemic discrimination fueled by the ban.

The rule’s elimination of the requirement for CBP officers to ask about fear of return with interpretation into the person’s language also particularly endangers people based on their language – fueling additional discrimination on account of race and country of origin. Indigenous people and other asylum seekers who cannot communicate with CBP officers face disproportionate barriers to expressing their fear before they are deported, as discussed in Section V. Indeed, even people who speak Spanish have been unable to express their fear to CBP officers and wrongly deported without referral for a credible fear interview after being told that the officer did not speak Spanish.<sup>43</sup> Since the IFR was implemented, attorneys have reported cases where Indigenous language speakers who feared return were processed for deportation without referral for a credible fear interview. In multiple instances, RAICES only learned of these cases because CBP brought the wrong person for a legal call, whereas in many cases Indigenous language speakers who fear return are likely deported without a CFI long before they can speak to an attorney.

Additionally, people who undergo CFIs face additional barriers if they do not speak English or Spanish because of widespread issues with deficient interpretation in other languages (particularly “rare” languages) and pressure and coercion to proceed with a CFI in a non-primary language.<sup>44</sup> While facing these language access barriers, Indigenous and other people subjected to the rule must meet an unfairly heightened standard under the ban to avoid deportation and pursue protection.

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<sup>41</sup> This exception was often illusory because it only applied to people who were processed at ports of entry and was erroneously not granted in some cases where people should have qualified for it, as Human Rights First has documented. Despite repeated requests by legal and humanitarian organizations, the agencies have failed to issue any public guidance on how the exception should be adjudicated. However, eliminating it altogether exacerbates race and nationality-based discrimination under the ban.

<sup>42</sup> “Securing the Border October 7,” at 81215.

<sup>43</sup> “Don’t Tell Me About Your Fear.”

<sup>44</sup> Human Rights First, “Pretense of Protection.”

As a result, the 2024 ban layers numerous barriers at each stage of border processing that disproportionately harm and block people based on their race and nationality. The agencies doubled down in their Final Rule and claimed that it “does not discriminate on the basis of any of the protected characteristics described in Article 3” and “applies equally based on the actions of a noncitizen.”<sup>45</sup> However, as documented extensively in public comments and reports issued in the wake of the rule’s implementation, the rule applies based on whether a person can access CBP One, which often hinges on a person’s language, race, and nationality.<sup>46</sup> The fate of people subjected to expedited removal is similarly determined by their language, race, and nationality, as many cannot communicate with CBP officers to “manifest” their fear or pass their CFIs with inadequate interpretation, as discussed in Section V.

### *Integration*

Article 34 of the Refugee Convention provides that states “shall as far as possible facilitate the assimilation and naturalization of refugees.” By design, the rule, like the 2023 ban, automatically denies asylum to people who enter without appointments unless they meet a narrow exception. Refugees barred from asylum under the rule are only able to pursue other forms of protection that do not enable them to fully integrate into the United States. While asylum confers benefits to facilitate integration, including permanent resident status, a pathway to citizenship, ability to extend asylum status to spouses and children in the United States and abroad, automatic work authorization without having to apply for renewals, and ability to obtain a refugee travel document to travel abroad and visit a third country, other forms of protection — withholding of removal or Convention Against Torture (CAT) protection — do not provide any of these benefits.

**As a result, the rule denies status and a pathway to citizenship for people who cannot be deported because they would face persecution or torture.** Those who are denied asylum under the ban and manage to secure withholding of removal or CAT protection live in limbo in the United States with an order of removal, deprived of stable status or a pathway to citizenship. This means that people *recognized by U.S. asylum adjudicators to be refugees under U.S. law* and granted withholding are punished by the rule based solely on how they entered the country and prevented from integrating because of these penalties. In addition to lacking status and being denied the opportunity to naturalize, they must routinely re-apply for work authorization and may face gaps in employment if it is not timely granted, cannot travel abroad and visit a third

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<sup>45</sup> “Securing the Border October 7,” at 81175.

<sup>46</sup> “Six-Week Report: Implementation of the Biden Administration’s June 2024 ‘Securing the Border’ Asylum Ban”; “Don’t Tell Me About Your Fear”; “Human Rights First Comment on the Departments of Justice and Homeland Security’s Interim Final Rule, *Securing the Border*, DHS Docket No. USCIS-2024-0006,” July 2, 2024 (<https://humanrightsfirst.org/wp-content/uploads/2024/07/Human-Rights-First-Comment-Securing-the-Border-IFR.pdf>).

country, and face other barriers to integration. These penalties are imposed on a discriminatory basis due to race, nationality, language, and other factors, as discussed above.

By blocking refugees from asylum status and leaving many in permanent limbo, the rule deliberately thwarts integration in violation of Article 34. UNHCR’s Executive Committee Conclusion 117, adopted in October 2024, emphasizes “the right to seek and enjoy asylum, which paves the way for durable solutions.”<sup>47</sup> The ban does exactly the opposite, thwarting by design durable solutions for refugees established in U.S. law.

## **B. The Final Rule Violates U.S. Law**

As Human Rights First, Members of Congress, the asylum officers’ union, and many other groups and individuals explained in public comments, the 2023 and 2024 bans violate U.S. refugee law.<sup>48</sup> This section focuses on the 2024 ban, but the same arguments about its illegality apply to the 2023 ban.<sup>49</sup>

The agencies have disregarded the blatant illegality of the 2024 ban and have persisted in implementing and now finalizing it, attempting to differentiate it from prior illegal bans through word-smithing and specious arguments. The ban unlawfully makes people ineligible for asylum based on their manner of entry and attempts to circumvent the credible fear screening process created by Congress. Additionally, since the agencies published the Final Rule, the Ninth Circuit affirmed a lower court ruling holding that U.S. law requires border officers to inspect and process asylum seekers arriving at U.S. ports of entry and allow them to seek protection in the United States, providing additional confirmation of the 2024 ban’s illegality.<sup>50</sup> The rule works in tandem with a Presidential Proclamation, which shuts down processing of most asylum seekers at ports of entry if they do not have CBP One appointments.

*Ban unlawfully denies asylum in violation of 8 U.S.C. § 1158(a)(1)*

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<sup>47</sup> UNHCR, “Conclusion No. 117 (LXXV): Durable Solutions and Complementary Pathways- Adopted by the Executive Committee (2024),” October 2024 (<https://www.refworld.org/policy/exconc/excom/2024/en/148870>)

<sup>48</sup> Human Rights First, “Public Comments Urge the Biden Administration to Rescind the Latest Asylum Ban,” August 15, 2024 (<https://humanrightsfirst.org/wp-content/uploads/2024/08/Public-Comments-Urge-the-Biden-Administration-to-Rescind-the-Latest-Asylum-Ban-1.pdf>).

<sup>49</sup> The 2024 ban’s additional provision eliminating the nearly 30-year-old regulatory requirement for CBP officers to ask people if they fear return is discussed in this section, but does not apply to the 2023 ban, which did not have this provision.

<sup>50</sup> CGRS, “Ninth Circuit Upholds Rights of Asylum Seekers, Rules “Metering” Unlawful,” Oct. 23, 2024 (<https://cgrs.uclawsf.edu/news/ninth-circuit-upholds-rights-asylum-seekers-rules-%E2%80%9Cmetering%E2%80%9D-unlawful>).

Congress passed the Refugee Act of 1980 to bring the United States into compliance with the Refugee Convention and Protocol.<sup>51</sup> 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, § 1158(a)(1), states: “Any [noncitizen] who is physically present in the United States or who arrives in the United States (**whether or not at a designated port of arrival...**), irrespective of such alien's status, may apply for asylum.”<sup>52</sup> (emphasis added). 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.<sup>53</sup> The section prohibits federal agencies from imposing restrictions on asylum that conflict with the statute.<sup>54</sup> In its comment on the IFR, Human Rights First discussed in further detail that 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 place and manner of entry.<sup>55</sup>

**Though U.S. law explicitly guarantees access to asylum for people who enter at or between ports of entry, regardless of how they arrive in the United States, the Trump administration and now the Biden administration have repeatedly promulgated asylum bans that deny access to asylum and make people ineligible for asylum based on how they enter the United States.** In 2018, the Trump administration similarly issued an IFR to ban asylum for people who cross between ports of entry. This ban was quickly blocked by a federal court.<sup>56</sup> The court concluded that the policy “flout[s] the explicit language” of U.S. asylum law.<sup>57</sup> The decision to enjoin the rule was later upheld by the U.S. Court of Appeals for the Ninth Circuit.<sup>58</sup> 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 because it

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<sup>51</sup> 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>).

<sup>52</sup> 8 U.S.C. § 1158(a)(1).

<sup>53</sup> Brief of Yael Schacher and Refugees International as Amicus Curiae in Support of Plaintiffs at 7, *Immigrant Defenders vs. Wolf*, No. 2:20-cv-09893 (C.D. Cal. Nov. 20, 2020), ([https://www.splcenter.org/sites/default/files/documents/2020.11.20\\_77\\_mtn\\_for\\_leave\\_to\\_participate\\_as\\_amici\\_curiae.pdf](https://www.splcenter.org/sites/default/files/documents/2020.11.20_77_mtn_for_leave_to_participate_as_amici_curiae.pdf)).

<sup>54</sup> 8 U.S.C. § 1158(d)(5)(B).

<sup>55</sup> Human Rights First, “Human Rights First Comment on the Departments of Justice and Homeland Security’s Interim Final Rule, *Securing the Border*, DHS Docket No. USCIS-2024-0006,” July 2, 2024 (<https://humanrightsfirst.org/wp-content/uploads/2024/07/Human-Rights-First-Comment-Securing-the-Border-IFR.pdf>).

<sup>56</sup> *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018) (<https://www.aclu.org/cases/east-bay-sanctuary-covenant-v-barr?document=east-bay-sanctuary-covenant-v-trumptr-o-granted&redirect=legal-document%2Ftro-granted-ebsc-v-trump>).

<sup>57</sup> *Id.*

<sup>58</sup> *E. Bay Sanctuary Covenant v. Trump*, No. 18-17274 (Feb. 28, 2020) (slip op.)

disqualifies from asylum people who enter between ports of entry.<sup>59</sup> The Trump administration also promulgated an asylum ban that barred people based on transit through a third country, which was repeatedly struck down by federal courts.<sup>60</sup>

When the Biden administration began contemplating issuing an asylum ban of its own, the White House's legal counsel was reported to have warned the 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 bans were vacated and enjoined.<sup>61</sup> Nonetheless, the administration moved forward with the 2023 asylum ban to deny asylum to people based on manner of entry and transit through a third country. The 2023 ban was again struck down by a federal court for violating U.S. law.<sup>62</sup> An appeal court ruled that the ban can stay in effect while the government pursues its appeal and the case is currently in abeyance pending settlement negotiations.<sup>63</sup>

Despite these multiple court rulings, U.S. agencies continued their efforts to impose policies that unlawfully punish asylum seekers based on their manner of entry into the United States. The agencies issued the June 2024 IFR to ban asylum for people who enter between ports of entry or enter at ports of entry without an appointment, with extremely narrow exceptions. Public comments explained again why this ban, like its predecessors, directly violates the core provision of U.S. asylum law that anyone may apply for asylum regardless of where and how they enter.<sup>64</sup> As the asylum officers' union reiterated in its public comment, "[a]ny limitations and conditions imposed by the Departments must be consistent with § 208(a)(1)(A)'s guarantee that place of and status at entry should not impact a noncitizen's ability to pursue their asylum claim. The IFR's limitations are inconsistent with that guarantee, and they therefore may not stand."<sup>65</sup>

**No matter how many iterations of entry bans the agencies issue, they continue to be illegal.** The agencies recycled old arguments in support of the 2024 ban's legality that were already

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<sup>59</sup> O.A. v. Trump, 404 F. Supp. 3d 109, 118 (D.D.C. 2019).

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

<sup>60</sup> 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>);

East Bay Sanctuary Covenant v. Trump, 19-cv-04073-JST (N.D. Cal. February 16, 2021),

(<https://www.aclu.org/cases/east-bay-v-barr?document=pi-order>).

<sup>61</sup> 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/>).

<sup>62</sup> E. Bay Sanctuary Covenant v. Biden, 683 F. Supp. 3d 1025 (N.D. Cal. 2023), stayed pending appeal, 2023 WL 11662094 (9th Cir. Aug. 3, 2023), appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024).

<sup>63</sup> E. Bay Sanctuary Covenant v. Biden, 2023 WL 11662094 (9th Cir. Aug. 3, 2023); E. Bay Sanctuary Covenant v. Biden, appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024).

<sup>64</sup> Human Rights First, "Summary of Widespread Support for Rescinding the June 2024 Asylum Ban,"

(<https://humanrightsfirst.org/wp-content/uploads/2024/08/Public-Comments-Urge-the-Biden-Administration-to-Rescind-the-Latest-Asylum-Ban-1.pdf>).

<sup>65</sup> "Comment Submitted By National Citizenship and Immigration Services Council 119," July 9, 2024

(<https://www.regulations.gov/comment/USCIS-2024-0006-1064>).

rejected by federal courts that struck down the Trump and Biden administration bans. For instance, the agencies argued in the Final Rule, as they did for the 2018 and 2023 bans, that manner of entry can be used as a discretionary factor in asylum denials; however, as federal courts have repeatedly explained and reiterated when they struck down the 2023 ban, it is unlawful to presume ineligible for asylum people who enter between ports of entry, as people are **“using a manner of entry that Congress expressly intended should not affect access to asylum.”**<sup>66</sup>

The agencies attempted to claim that the presence of exceptions in the rule meant that it was not a categorical bar on asylum and therefore legally permissible under the statute, but this argument was also rejected by a federal court. In the Final Rule, the agencies argued that the rule is “not a sweeping categorical bar that would preclude a grant of asylum solely based on entry...manner of entry alone is never dispositive. Rather, the rule’s limitation on asylum eligibility does not apply if a noncitizen establishes that exceptionally compelling circumstances exist.”<sup>67</sup> The agencies used almost verbatim language to justify the 2023 asylum ban.<sup>68</sup> A federal court rejected this reasoning when it struck down the 2023 ban, explaining that the existence of exceptions to the ban or the fact that a person may show exceptionally compelling circumstances to avoid the ban “does not address the reason why restricting asylum eligibility based on place of entry conflicts with the law.”<sup>69</sup>

The agencies further attempted to distinguish their ban from the Trump entry ban through wordsmithing, arguing that “the limitation at issue here turns on whether—during the emergency border circumstances described in the Proclamation and this rule—**an individual has followed the lawful, safe, and orderly pathways that the United States has established** when it is essential that noncitizens use such pathways to ensure the United States’ ability to manage the border.”<sup>70</sup> This language is simply another way of saying that the “limitation” on asylum turns on how a person has entered the United States – precisely what the Trump entry ban’s “limitation” on asylum unlawfully turned on.

#### *Ban improperly attempts to circumvent credible fear process established by Congress*

The 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.<sup>71</sup> Under this process,

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<sup>66</sup> E. Bay Sanctuary Covenant v. Biden, 683 F. Supp. 3d 1025 (N.D. Cal. 2023), stayed pending appeal, 2023 WL 11662094 (9th Cir. Aug. 3, 2023), appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024).

<sup>67</sup> “Securing the Border October 7,” at 81170.

<sup>68</sup> “Circumvention of Lawful Pathways May 16” at 31374-75

<sup>69</sup> E. Bay Sanctuary Covenant v. Biden, 683 F. Supp. 3d 1025 (N.D. Cal. 2023), stayed pending appeal, 2023 WL 11662094 (9th Cir. Aug. 3, 2023), appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024).

<sup>70</sup> “Securing the Border October 7,” at 81170.

<sup>71</sup> Pub. L. No. 104-28, Div. C, § 302(a), 110 Stat. 3009-546, 3009-583 (1996) (codified at 8 U.S.C. §1225).

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.”<sup>72</sup>

Like the 2023 asylum ban and the Trump administration’s asylum bans, the 2024 IFR and Final Rule attempt to unlawfully circumvent the credible fear screening standard. The 2024 ban requires people to establish a significant possibility that they are not subject to the ban, which is impossible for many asylum seekers given the narrow exceptions and the due process barriers in fear screenings. The rule forces those who cannot overcome this hurdle to meet a more stringent screening standard, “reasonable probability” of eligibility for withholding or CAT protection, to have an opportunity to apply for protection.<sup>73</sup> The “reasonable probability” standard is unprecedented in the history of the expedited removal process and far removed from what Congress envisioned as a low screening standard to ensure that there is “no danger that a non-citizen with a genuine asylum claim will be returned to persecution.”<sup>74</sup> In its public comment, the asylum officers’ union noted that the “unprecedented, vague, and overly stringent “Reasonable Probability” standard impedes [asylum officers’] ability to complete their duties with any degree of consistency under the laws they have sworn to uphold, and it should be rescinded.”<sup>75</sup>

As a result of this heightened standard, the rule forecloses access to the asylum process at the preliminary screening stage for the majority of people who enter to seek asylum and are subjected to the ban in expedited removal. Data published by the agencies in the Final Rule reflects that only 48 percent of people subjected to these interviews have been able to overcome the “reasonable probability” standard.<sup>76</sup> **Those subject to the rule and forced to meet this higher standard are over 2.7 times more likely to be ordered deported compared to those who meet an exception and are screened under the “significant possibility” standard that Congress intended.**<sup>77</sup> The increased likelihood of deportation is unrelated to the merits of a person’s asylum claim, as the heightened standard is applied solely as punishment for the way that they entered the United States. Rigging the credible fear process by artificially heightening the standard based on manner of entry is unlawful. Moreover, deporting people who may meet

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<sup>72</sup> 142 Cong. Rec. 136, S11491 (Sept. 27, 1996).

<sup>73</sup> The 2023 ban imposed a heightened “reasonable possibility” standard, which the 2024 ban further raised to an even higher “reasonable probability” standard.

<sup>74</sup> 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>).

<sup>75</sup> “Comment Submitted by National Citizenship and Immigration Services Council 119,” July 9, 2024 (<https://www.regulations.gov/comment/USCIS-2024-0006-1064>).

<sup>76</sup> “Securing the Border October 7,” at 81203.

<sup>77</sup> *Id.*

the definition of a refugee and who are entitled to asylum hearings under U.S. law is unlawful and leads to devastating harms.<sup>78</sup>

## V. Mounting Human Rights and Refugee Law Violations Under the IFR Confirm Warnings in Public Comments

Horrific and escalating human rights and refugee law violations under the rule have confirmed the urgent warnings that the agencies chose to ignore when they implemented the IFR. The agencies made clear in the Final Rule – in dehumanizing terms – that they have achieved their goals to “more quickly remove a greater percentage” of people, “remove more noncitizens through expedited removal,” “reduce” the “high rates” of credible fear referrals and positive determinations, and “filter out a greater portion of cases.”<sup>79</sup> They repeatedly used dehumanizing language including “surge” and “flows” of migrants. Over the past five months, Human Rights First and other groups have confirmed the reality of what it means to “remove” and “filter out” human beings without regard for U.S. and international refugee law:

### 1. Summary deportations without fear screenings

In the wake of the rule’s elimination of the nearly 30-year-old requirement for CBP officers to ask people if they fear return,<sup>80</sup> officers have systematically failed to refer people seeking protection for CFIs, in violation of U.S. law. Asylum seekers deported without a CFI include survivors of gender-based violence, people whose family members were assassinated, LGBTQI+ people, individuals with visible marks and bruises from attacks, and people fleeing death threats and other harms with young children.<sup>81</sup> These removals have happened quickly, sometimes within 24 hours, without any screening of a person’s protection needs and often while people are held in CBP custody<sup>82</sup> without an opportunity to speak with a lawyer or family.

The longstanding requirement to ask about fear and formally document responses was designed in the 1990s to comply with U.S. legal obligations to refer for CFIs people who indicate a fear of return or intent to apply for asylum.<sup>83</sup> The rule eliminated this requirement for the first time in

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<sup>78</sup> 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>).

<sup>79</sup> “Securing the Border October 7,” at 81160-61; 81190; 81210.

<sup>80</sup> Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10, 313 (March 6, 1997).

<sup>81</sup> Amicus Brief of Human Rights First, Hope Border Institute, Immigrant Defenders Law Center, Kino Border Initiative, and Refugees International in *Las Americas Immigrant Advocacy Center v. DHS*,” July 29, 2024 (<https://humanrightsfirst.org/wp-content/uploads/2024/07/Las-Americas-Advocacy-Center-v.-DHS-amicus-brief-of-Human-Rights-First-et-al.pdf>); “Don’t Tell Me About Your Fear.”

<sup>82</sup> Human Rights First uses the term “CBP custody” throughout this comment to include CBP and Border Patrol facilities, and “CBP officers” to include Border Patrol officers.

<sup>83</sup> 8 U.S.C. §1225; “Report on the First Year of Implementation of Expedited Removal,” Markkula Center for Applied Ethics at Santa Clara University (May 1998) (<http://libraryweb.uchastings.edu/cgrs/Expedited%20removal%201998.pdf>).

the history of expedited removal and instead states that officers need only refer people for a fear screening if CBP perceives them to “manifest” a fear of return or otherwise express an intention to apply for asylum, fear of persecution or torture, or fear of return. **The agencies’ position that instead of asking questions about fear in a language the person understands, border officers should be treated as mind readers who will know – despite language and other barriers – whether people fear return, is disingenuous and amounts to willful blindness.**

In the past five months, the devastating consequences of this change have illustrated why the requirement to ask about fear was deemed critical to comply with U.S. legal obligations and implemented for nearly three decades. A joint report by Hope Border Institute, Human Rights First, Immigrant Defenders Law Center, Kino Border Initiative, RAICES, and Refugees International and a filing by Hope Border Institute, Human Rights First, Immigrant Defenders Law Center, Kino Border Initiative, and Refugees International in support of federal litigation against the ban confirm that since the rule was implemented, CBP officers are removing people seeking protection who have no opportunity to communicate their fear, face language barriers that impede communication, or do not feel safe doing so, due to the elimination of the requirement for CBP officers to ask about fear.<sup>84</sup> Officers have forbidden people from speaking in CBP custody, even as asylum seekers cried and begged for officers to let them speak.<sup>85</sup> People have also reported that they cannot speak confidentially with CBP officers or cannot communicate with officers because of lack of interpretation.<sup>86</sup> People attempting to tell officers that they fear return or intend to seek asylum have been told “I don’t speak good Spanish” and “I don’t speak Spanish; I don’t know what you are saying.”<sup>87</sup> Lack of interpretation disproportionately harms and endangers Indigenous asylum seekers and other rare language speakers.

The report and filing also document that officials are systematically and routinely deporting without a CFI people who explicitly express fear, including those who requested asylum, relayed their past persecution, explained their asylum claims, showed agents their injuries, had anxiety attacks, and visibly sobbed and begged to be heard.<sup>88</sup> Even in some cases where attorneys have intervened and communicated with U.S. immigration officials about their clients’ fear of return, officials have still removed their clients without a CFI.<sup>89</sup> Immigration officials have responded to people who express fear of return with disturbing remarks that there is no more asylum, that the

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<sup>84</sup> Amicus Brief of Human Rights First, Hope Border Institute, Immigrant Defenders Law Center, Kino Border Initiative, and Refugees International in *Las Americas Immigrant Advocacy Center v. DHS*,” July 29, 2024 (<https://humanrightsfirst.org/wp-content/uploads/2024/07/Las-Americas-Advocacy-Center-v.-DHS-amicus-brief-of-Human-Rights-First-et-al.pdf>); “Don’t Tell Me About Your Fear.”

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

border is closed, that the law has changed, that what they say doesn't matter, and that they should not speak about their fear.<sup>90</sup>

These devastating outcomes are fueling family separation, where family members are arbitrarily ordered removed from the United States without a CFI while their loved ones are referred for a CFI, including where their asylum cases could have been processed together.<sup>91</sup>

The administration received and was aware of the above reports of the systematic violations occurring as a result of the rule. The agencies concluded in the Final Rule that the “shift to a manifestation standard has, as intended, reduced...high rates of referrals.”<sup>92</sup> Indeed, from the second half of May – before the rule went into effect – to the first half of October, there has been **a 95 percent reduction in referrals for CFIs<sup>93</sup> due to the widespread failure to refer people who fear return.** The agencies’ conclusion that the rule is, as intended, reducing “high rates of referrals” is a euphemism for the government deporting survivors of persecution and torture who are required to receive fear screenings under U.S. law. While the rule remains in effect, the violations of U.S. and international law continue to escalate and the agencies continue to turn a blind eye to them.

In addition to the extensive reporting mentioned above that was already published and provided to the agencies, Human Rights First has received reports of additional, ongoing systematic failures to refer people for CFIs or provide a meaningful opportunity for people to express fear, resulting in deportations without CFIs of people fleeing violence and harms on the basis of sexual orientation, Indigeneity, and gender, pregnant asylum seekers, people seeking safety with infants and young children, and people with disabilities. Ongoing systematic violations in the wake of the 2024 ban include:

#### Failures to refer people who expressly state that they fear return or are seeking asylum

CBP officers continue to deport people without CFIs after they express fear of return or an intent to apply for asylum, and have made demeaning, insulting, or false statements in response to people’s attempts to express their fear.

- The statements below, reported by deported asylum seekers to the Kino Border Initiative, add to the long list of previously reported statements made by CBP officers.<sup>94</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> “Securing the Border October 7,” at 81160.

<sup>93</sup> USCIS, “Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions, Data from October 1, 2023 to October 15, 2024,” October 2024

(<https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions>).

<sup>94</sup> Amicus Brief of Human Rights First, Hope Border Institute, Immigrant Defenders Law Center, Kino Border Initiative, and Refugees International in *Las Americas Immigrant Advocacy Center v. DHS*,” July 29, 2024

- “You people always say the same thing, that there’s killings, that there’s wars, it’s all lies, you all just want to be here.”
  - “Your evidence is false, pure lies.”
  - “[You are] not eligible for asylum,”
  - “Asylum is not an option for you.”
  - An agent referred to asylum seekers as “dogs.”
  - Another agent told a family that asked for asylum that they were not granting asylum due to election season.
- A Mexican woman who is four months pregnant and fled gender-based violence was deported within 48 hours of entering the United States in October 2024 despite telling a CBP officer that she feared return to Mexico. Shortly after entering the United States, she and other women were taken from their cell and instructed to sign deportation orders. She stated that she could not sign because she was afraid of returning to Mexico. She was then returned to her cell, but the next morning she and others were boarded onto a bus. When they asked where they were being taken, CBP replied that it was a surprise. She was then deported to Mexico. She told Human Rights First that she had fled abuse by her partner, including sexual abuse, and feared for herself and her pregnancy.
  - A Mexican woman was separated from her 19-year-old son and deported with her 17-year-old son within 48 hours of arrival in the United States even though she tried to express her fear to CBP officers. The family told Human Rights First: **““They didn’t let us speak. They didn’t tell us anything. They told us to sign a paper, and I asked ‘what’s it for?’ The officer replied, ‘for your deportation.’ I replied, ‘no, I come to request asylum.’ I was told, ‘sign.’ I said I wouldn’t sign and was told ‘you’ll still be deported.’ I told them I didn’t want to return, there’s a lot of danger there and I have evidence. They replied that they didn’t care.”**
  - Even in some cases where attorneys intervene and communicate with U.S. immigration officials about their clients’ fear of return, officials have still deported their clients without a CFI. These unlawful deportations continue to occur. For instance, attorney Luis Angeles of Angeles Law PLLC reported to Human Rights First that in October 2024, an Indigenous woman from Ecuador and her 15-year-old son who had fled harm on the basis of their Indigeneity were deported without a CFI even though Angeles had notified CBP during a legal call that his client feared return and heard the client expressing fear to the officer as well. At the time, the officer informed Angeles that the client and her son would be referred for a CFI, but they were deported a week later.
  - A woman reported to Kino Border Initiative that she told CBP that she wanted to seek asylum but was deported because CBP asked people to raise their hands if they had family members who were legal residents in the United States and only permitted those people to seek asylum, while the rest were deported.

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<https://humanrightsfirst.org/wp-content/uploads/2024/07/Las-Américas-Advocacy-Center-v.-DHS-amicus-brief-of-Human-Rights-First-et-al.pdf>); “Don’t Tell Me About Your Fear.”

- CBP continues to unlawfully assess people’s asylum claims, which they lack any expertise to evaluate and are prohibited from doing so: under U.S. law, they are required to refer for a CFI anyone who expresses fear or an intent to apply for asylum. This misconduct is an inevitable outcome of the rule, which eliminates a key safeguard that requires asking about and documenting fear to ensure accountability. In one instance reported by Kino Border Initiative, CBP told a woman who requested asylum that she didn’t have enough proof and deported her. Another person asked for asylum and was told that hers was not an asylum case and deported, according to Kino Border Initiative. An Ecuadorian asylum seeker told RAICES that when he tried to express fear, a CBP officer stated that they had visited Ecuador, that it was safe, and that the person was lying. He was ultimately referred for a CFI, but only after being subjected to these improper remarks in response to his expressions of fear.

### Retaliation and abuse against people who express fear

In addition to ignoring people who express fear, CBP officers have also been reported to have retaliated against, tortured, and threatened people for expressing fear or requesting asylum. These horrendous abuses in CBP custody traumatize and retraumatize asylum seekers including those who fled detention and torture by their countries’ governments.

- In late June 2024, a person detained in CBP custody in the El Paso sector attempted to claim fear of return to his country and an officer responded: “Why did you guys go over the wall? Everyone get on your knees.” **Officers forced people to sit on their knees with their arms above their heads for around an hour**, according to a complaint filed with CRCL and OIG by the New Mexico Immigrant Law Center (NMILC).
- **Officers have also punished people who request asylum or claim fear by locking them in a cold room without food at night or forcing people to sit in the sun with their face tilted up, burning them**, according to the complaint filed by NMILC. One migrant shared that officers forced him to take off his shirt and locked him in the cold room for hours, as described in the complaint.
- People also reported to NMILC that officers threatened to detain them for months before they would have their CFIs and said that if they keep fighting their cases, they may even have to wait six to eight months in detention, according to the complaint. Those who spoke with NMILC witnessed many people accept deportation out of desperation to escape the abusive conditions, even though they feared return.

### Severe barriers to request protection based on language and disability

In the wake of the rule’s elimination of the requirement for CBP officers to ask about fear with interpretation, the government continues to deport people without CFIs because they could not communicate fear in their language. These discriminatory barriers impact people who do not

speak English and particularly harm Indigenous people and other people who speak rare languages.

- An Indigenous Mexican woman fled to the United States with her three daughters and attempted to communicate with CBP officers in her limited Spanish, which is not her native language, in order to request asylum. **She reported to Kino Border Initiative that officers ignored her and an agent called her “burra” (dumb) for not understanding him.** She and her children were deported without a CFI.
- Another Indigenous woman from Mexico who fled with her two-year-old child told Kino Border Initiative that when she entered the United States to seek protection, CBP quickly deported her without trying to understand her or confirming that she could understand them. She did not know about the CBP One app, speaks limited Spanish, and doesn't know how to read or write.
- An Indigenous asylum seeker fleeing persecution in Guatemala due to her race and whose native language is Kaqchikel attempted to express fear in her very limited Spanish, but CBP deported her in August 2024 without a CFI and without communicating with her through a Kaqchikel interpreter. She returned to the United States and received a reasonable fear interview (RFI) because she had an expedited removal order. At her RFI, the asylum office improperly contacted her father to translate since the officer could not locate a Kaqchikel interpreter. After she received a negative decision, Attorney Luis Angeles of Angeles Law PLLC successfully advocated for the asylum office to reverse its decision, but the woman is now only eligible to apply for withholding of removal rather than asylum due to her prior wrongful expedited removal order.
- Multiple Indigenous language speakers who spoke with RAICES were processed for deportation without a CFI even though they feared return. RAICES only learned of their situation because during scheduled legal calls CBP repeatedly brought the wrong woman to the phone. Both women were Indigenous and told RAICES that they were terrified of return. After RAICES intervened in one of the cases, CBP pulled the woman off a deportation flight at the last moment. These stories only reflect a small fraction of the rampant discriminatory denial of asylum access to Indigenous people, as many who fear return are likely removed without a CFI before they can communicate with an attorney. Indeed, RAICES only learned of these cases due to CBP's mistake.
- Even Spanish language speakers continue to face barriers to expressing fear due to language. In a recent case reported by Kino Border Initiative, a Mexican asylum seeker who fled after his family member was murdered tried to explain to CBP that he feared return, but the officers told him they didn't speak Spanish and deported him.

People with disabilities also continue to face disproportionate barriers to expressing fear to CBP. Kino Border Initiative reported multiple recent deportations of people with disabilities who were not referred for CFIs, including a Mexican man with a hearing disability who had fled after being

targeted for his military service and an 18-year-old Mexican asylum seeker with a hearing impairment.

### Denying people the opportunity to speak and express fear

People seeking protection continue to report that they have no opportunity to express fear in CBP custody and are sometimes even prohibited from speaking by officers. Human Rights First and other organizations documented this widespread practice in the wake of the rule and provided this information to the administration before it issued the Final Rule.<sup>95</sup> Additional recent cases include:

- A gay man fleeing severe physical attacks due to his sexual orientation was deported without a CFI without having any opportunity to express his fear, according to Kino Border Initiative. He told KBI that the officers were very rude and simply said that there is no asylum.
- After surviving kidnapping, a Mexican woman fled Mexico and crossed the border with her infant son and attempted to request asylum, but officers did not allow her to speak. They simply told her that she would be removed and barred from the United States for five years. They confiscated her baby's formula and clothes before deporting them to Mexico, according to Kino Border Initiative.
- One asylum seeker told Kino Border Initiative that he was deported within one day of entering the United States and denied an opportunity to explain his situation: "They don't let us speak. They just put us on a truck and deported us."

### Hostile and abusive environment that prevents people from claiming fear

Asylum seekers continue to report a hostile, intimidating environment where it is extremely difficult or impossible to express fear to CBP officers due to verbal and physical abuse, constant threats of deportation, and horrific conditions of confinement. In these conditions, people are often too afraid to speak or believe that the decision to deport them has already been made and that they cannot safely raise fears about their deportation.

- People continue to report physical abuse in CBP custody, including a family that recently shared with Kino Border Initiative that an agent pushed their eight-year-old daughter. Another asylum seeker who is HIV positive reported to KBI that an agent hit him in the head when he presented himself to Border Patrol.
- According to a complaint filed with CRCL and OIG by the New Mexico Immigrant Law Center, people detained in recent months in CBP custody in the El Paso sector reported

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<sup>95</sup> Amicus Brief of Human Rights First, Hope Border Institute, Immigrant Defenders Law Center, Kino Border Initiative, and Refugees International in *Las Americas Immigrant Advocacy Center v. DHS*," July 29, 2024 (<https://humanrightsfirst.org/wp-content/uploads/2024/07/Las-Americas-Advocacy-Center-v.-DHS-amicus-brief-of-Human-Rights-First-et-al.pdf>); "Don't Tell Me About Your Fear."

that officers regularly yelled at migrants, including racist and xenophobic insults such as “pinche dominicanos” (“fucking Dominicans”) and “pinche feo guatemaltecos” (“fucking ugly Guatemalans”). Officers would also tell migrants that “valen verga” (“you guys are worth shit”), “a que chingados han venido a nuestro país” (“why the fuck did you come to our country”), and “this is a punishment for you all. Did you think it would be easy to get in? This is a punishment, so you don’t come back to our country. Chingue su madre a todos los inmigrantes” (“to all the immigrants, fuck your mother”).

- People who were recently detained by CBP told Kino Border Initiative that CBP officers insulted and demeaned them, making statements such as: “you people come here supposedly to work, when you’re actually lazy,” “you people don’t have a right to anything,” “don’t count on getting asylum,” “you’re going to be deported to your countries,” “you’re all a bunch of delinquents,” “you have no rights here,” and “shut up.” Another person recounted that officers “shouted a lot and told us that if we didn’t like it, we could go back to our countries.” An officer also threatened to punish a woman’s children if she did not control them. Another officer yelled at a woman’s young son and insulted her parenting. A single mother who fled with her teenage daughter to seek asylum told KBI that she “felt humiliated and judged for no reason” because an officer called her a bad mother for “allowing” her daughter to get pregnant.
- A Salvadoran woman who managed to be referred for a CFI shared with RAICES: "There were so many people who were not told anything about what was going on. A large group of about 10 women and their children were told they were being deported. All we could do was cry, the children who were old enough to understand what was happening became desperate and started crying...We were just looking for an opportunity, a chance, from the officer or even God Himself. It's terrifying to not even be able to tell anyone what we've been through."

### Lies and misinformation in CBP custody

The agencies claimed in the Final Rule that people have an adequate opportunity “to manifest fear at any point while in DHS custody.”<sup>96</sup> In addition to all of the above human rights, refugee law, and due process violations that illustrate why people do not have the opportunity to manifest or are afraid to do so, there are also continued reports that CBP officers have lied to people or withheld information such that they don’t even know they are being deported and do not know that they need to express fear immediately.

- CBP officers lied to an asylum seeker who fled with his wife and young sons and expressed fear of return. They told him that he would be allowed to enter the United States and travel to Pennsylvania. Once the family was already on the bus, they were told they were being returned to Nogales, Mexico, according to Kino Border Initiative.

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<sup>96</sup> “Securing the Border October 7,” at 81239.

- A five-month pregnant asylum seeker told Kino Border Initiative that she tried to explain to officers that she was fleeing danger but was never interviewed about her situation. Officers later threw everyone’s belongings on the ground and yelled at people to grab them. She was told to board a bus without being told where she was being taken, and only when she arrived in Mexico did she learn she had been deported.
- An asylum seeker whose son had been murdered tried to explain to an officer that she was seeking asylum, but the officer told her that she would have an opportunity to talk about it later. She did not have another chance to speak to an officer and was deported to Mexico, according to Kino Border Initiative.
- A Mexican woman who is four months pregnant told Human Rights First that she expressed fear to a CBP officer but the next morning was taken to board a bus with other migrants and when they asked where they were headed, CBP told them that it was a surprise. They were then deported to Mexico.

2. *Heightened “reasonable probability” standard leads to wrongful deportations and wastes resources*

The rule’s unlawfully heightened reasonable probability standard, which is unprecedented in the history of expedited removal, has fueled deportations of people who would have otherwise passed their credible fear interviews under the significant possibility standard that Congress enacted. Data included in the Final Rule on the implementation of the IFR reflects that **those subject to the rule and forced to meet this higher standard are over 2.7 times more likely to be ordered deported compared to those who meet an exception and are screened under the “significant possibility” standard that Congress intended.**<sup>97</sup>

The agencies falsely claimed in the Final Rule that the dramatically reduced fear screening pass rate under the reasonable probability standard relates to the merits of a person’s asylum claim. They touted that the heightened standard is working to “reduce the gap” between CFI pass rates and ultimate asylum grant rates and “align” these two figures.<sup>98</sup> These claims are false and misleading. The application of the heightened standard is based on whether the rule applies – which turns on whether someone entered without an appointment – and is unrelated to a person’s asylum claim. As a result, the soaring deportations resulting from the standard are arbitrary. Contrary to the agencies’ misleading framing, the subset of people who fail their CFIs under the heightened standard does not correspond to people who would have ultimately been denied asylum.

The agencies’ language about “reduc[ing] the gap” between CFI pass rates and asylum grant rates further underscores that the agencies’ intention is to weaponize the preliminary screening

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<sup>97</sup> *Id.* at 81203.

<sup>98</sup> *Id.* at 81161; 81183.

process and convert it into an adjudication with exacting standards of proof and arbitrary barriers, in order to artificially drive down the pass rate and block people from a full hearing on their claim. Due to the accelerated nature of the process and serious access to counsel barriers during the CFI process, it is extremely difficult to learn of individuals subjected to the heightened standard before they are deported and to obtain records of their CFI decisions. However, Human Rights First continues to receive reports that the heightened standard is fueling wrongful deportation orders.

- Lawyers have reported widespread denials for people with strong asylum claims who were subjected to the reasonable probability standard in the wake of the rule, including, for instance, Russian asylum seekers fleeing persecution due to their sexual orientation.
- A young Indigenous Colombian woman suffered horrific persecution due to her Indigeneity and gender and was denied under the reasonable probability standard in fall 2024. She was targeted for sex trafficking by a prominent professional in the community with ties to the government, raped, whipped, kidnapped, and beaten over 10 times by him and other men who followed her across Colombia, and had her hair – a symbol of her Indigenous culture – cut off. During her CFI in CBP custody, which took place just days after she was brutally raped by multiple men, she had to relay her story to an asylum officer by phone with connectivity issues. She stood with an active UTI, infected leg, and vaginal infection while in a tiny booth where she could not sit down. She attempted to describe the horrific rapes, torture, and death threats she had experienced, but was not asked if she was Indigenous and did not know that this was relevant information. She was found to be credible, but she was subjected to the heightened standard under the rule and issued a negative credible fear determination. Her attorney, Emily Robinson, represented her in the immigration court review and advocated for USCIS to conduct a second CFI. The asylum office again found all the horrific torture she suffered to be credible, but issued a negative determination under the heightened standard in the second CFI. Her attorney shared with Human Rights First that the asylum office did not use an appropriate framework to exempt her from the rule as a victim of trafficking and other exceptionally compelling circumstances. Attorney Robinson has provided the asylum office with additional information about how the persecution and torture was inflicted on her in part due to her Indigeneity, but the asylum office has failed to reverse the decision and the woman faces imminent deportation. The asylum office has also failed to engage with or acknowledge additional evidence furnished.

In addition to weaponizing the heightened standard to arbitrarily deport people based on their manner of entry, this tactic forces attorneys to expend enormous time and resources at the preliminary screening stage to help ensure that asylum seekers are not wrongly deported. The complexity of CFIs under the 2024 asylum ban, lack of access to counsel, accelerated timeline, and other due process deficiencies have forced many attorneys and legal service organizations to

conclude that they lack the capacity or resources to represent people in this process, particularly in CBP custody.

- Emily Robinson, who represented the Indigenous Colombian woman described above in her credible fear process in CBP and Immigration and Customs Enforcement (ICE) custody in fall 2024, spoke with Human Rights First and highlighted the extent to which the government is attempting to bar people at the CFI stage through arbitrary hurdles including the new rule and barriers to access to counsel. Robinson noted: **“I’ve been working basically every hour of the day. I haven’t been able to work on my other cases. I’m fitting in all my other work on the side...at this point, I feel I’ve fought an entire merits case before the asylum office. I furnished country conditions and case law and I strongly believe that I could win this case far more easily before an immigration judge.”**

In addition to straining attorney resources, the rule continues to waste asylum office and immigration court resources, requiring asylum officers and immigration judges to evaluate the applicability of the rule and its exceptions at the credible fear stage before even assessing a person’s asylum claim and then in cases where an exception is not met to apply a heightened standard that is unprecedented, vaguely defined, and carries a high risk of erroneous deportation of people who are eligible for protection. In an amicus brief submitted in litigation against the ban, the asylum officers’ union noted on behalf of asylum officers forced to apply the rule that **“this heightened “reasonable probability” standard is anything but efficient. In practice, it hinders the AOs’ ability to identify viable claims.”**<sup>99</sup>

The government has exacerbated the devastating harms of the rule by continuing to implement and expand its policy of conducting CFIs in CBP custody, where it rushes people through CFIs with no meaningful opportunity to speak with an attorney or obtain representation. In summer 2024, the government also expanded this policy to families, forcing people fleeing with their children to undergo CFIs in CBP custody while jailed for days or weeks.<sup>100</sup> In CBP custody, people face horrendous human rights abuses and deprivations of basic necessities, are separated from family members and often held incommunicado, and are summarily deported to danger within hours or days.<sup>101</sup> The United Nations Working Group on Enforced or Involuntary Disappearances issued general allegations against the United States in June 2024 regarding the

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<sup>99</sup> “Amicus Brief of Asylum Officers’ Union,” Las Americas Immigrant Advocacy Center v. DHS, July 29, 2024 (<https://cgrs.uclawsf.edu/legal-document/amicus-brief-asylum-officers-union>).

<sup>100</sup> Dallas News, “Fast-track asylum programs are hurting migrant families in need,” August 1, 2024 (<https://www.dallasnews.com/opinion/commentary/2024/08/01/fast-track-asylum-programs-are-hurting-migrant-families-in-need/>).

<sup>101</sup> OHCHR, “Short-Term Disappearances of Migrants and Asylum Seekers in the United States,” July 22, 2023 (<https://www.ohchr.org/sites/default/files/documents/hrbodies/ced/cfis/short-term-disap/submission-short-term-ED-CED-WGEID-cso-usmigrants-en.pdf>); OHCHR, “General Allegations: Working Group on Enforced or Involuntary Disappearances,” 2024 ([https://www.ohchr.org/sites/default/files/documents/issues/disappearances/allegations/132-USA\\_Annex-I\\_0.pdf](https://www.ohchr.org/sites/default/files/documents/issues/disappearances/allegations/132-USA_Annex-I_0.pdf)).

detention of people in CBP custody, noting that the information the Working Group received “suggests that Customs and Border Protection...[has] deprived migrants, refugees, and asylum-seekers of their liberty, subjecting them in incommunicado detention for days, placing them outside of the protection of the law and depriving them of fundamental rights.”<sup>102</sup>

In June 2024, the government further reduced the time that a person in CBP or ICE custody has to consult with an attorney before a CFI to four hours,<sup>103</sup> an absurd and cruel timeframe that leaves asylum seekers fleeing persecution and torture with virtually no opportunity to even speak with an attorney to understand the CFI process. Human Rights First has received reports that many asylum seekers are not permitted to make a phone call before their CFIs and those who manage to use the phone frantically try to call legal service providers who are overwhelmed with calls – often outside business hours and on weekends – from detained asylum seekers desperate for information on what is happening to them. This timeframe is even more nonsensical given the rule, its narrow exceptions, and the heightened standard, which require extensive preparation for CFIs. Attorneys must prepare people to testify about a range of issues related to the rule and its exceptions that don’t even relate to their asylum claim and then meet a higher reasonable probability standard if they are subject to the rule.

Many asylum seekers are forced to undergo the CFI process shortly after fleeing horrific persecution and torture. For instance, attorney Emily Robinson shared with Human Rights First that an Indigenous woman had to testify at her CFI in CBP custody in September 2024, just days after she was raped, suffering from infections and covered in bruises. She was experiencing night terrors and anxiety attacks and shared with her attorney that when she tried to think about or express what had happened to her she would just cry. She also has chronic asthma, but CBP tried to take after her inhaler and she had to beg them to let her keep it. Dehumanizing and abusive conditions in detention compound the inhumanity of subjecting people to the CFI process – and a heightened standard designed to block and deport them. In fact, CBP directly told this asylum seeker that she did not need an attorney as “less than 1 percent” of individuals going through this process are successful.

Human Rights First has continued to receive horrific reports of torture, mistreatment, denial of access to counsel, and other rights violations occurring in CBP custody since the rule was implemented. Cruel and dehumanizing conditions in CBP custody, coupled with the rule’s new barriers in the CFI process, make it extremely difficult to pass CFIs regardless of the strength of a person’s asylum claim. In its Final Rule, the agencies merely noted that DHS “is committed to

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<sup>102</sup> OHCHR, “General Allegations: Working Group on Enforced or Involuntary Disappearances,” 2024 ([https://www.ohchr.org/sites/default/files/documents/issues/disappearances/allegations/132-USA\\_Annex-I\\_0.pdf](https://www.ohchr.org/sites/default/files/documents/issues/disappearances/allegations/132-USA_Annex-I_0.pdf)).

<sup>103</sup> New York Times, “A New Hurdle for Asylum Seekers: 4 Hours to Find a Lawyer,” June 7, 2024 (<https://www.nytimes.com/2024/06/05/us/politics/biden-asylum-restrictions-lawyer.html>).

providing safe, sanitary, and humane conditions to all individuals in custody.”<sup>104</sup> Meanwhile, reports of mistreatment from the past few months include:

- Asylum seekers continue to report mistreatment in CBP custody, as described in Section V.1. An asylum seeker reported to Kino Border Initiative that agents repeatedly shouted at them as they were falling asleep in order to keep them awake. She said: “it was torture!” Another person shared with KBI that officers would wake them every two hours throughout the night to prevent them from sleeping. **Officers also inflicted psychological torture when they pulled people from their cells between 1:00 and 5:00 am and told them they were being released, but instead took them to shower,** according to a complaint filed with CRCL and OIG by NMILC. The complaint also detailed that according to people detained in CBP custody, officers routinely forced people to get on their knees with their hands behind their head, in one instance for around 40-60 minutes because there was a small piece of garbage left on the floor.
- CBP continues to deny people urgent medical attention. Asylum seekers often arrive in the United States suffering from physical injuries and psychological trauma due to persecution in their country of nationality or during the journey to the United States. Some have urgent health concerns that require medical attention. But they are jailed in abysmal conditions, have their medications confiscated and thrown away, denied urgent medical care, and forced to undergo CFIs that will determine whether they are deported or allowed to apply for asylum. The complaint filed by NMILC detailed recent cases where officers intimidated people who asked for medical help, threatening to detain people for longer if they went to the doctor.
- People detained in CBP custody have continued to report freezing conditions, inadequate food, and confiscation of necessary items. One asylum seeker reported to Kino Border Initiative that officers threw away her four-month-old baby’s diapers, wipes, formula, and bottles. When the baby started vomiting, the doctor at the facility refused to see the child. Another woman told Kino Border Initiative that the temperature in the CBP cells was freezing cold and she had to watch her one-year-old baby shivering.

### 3. *Denial of equitable access to asylum based on race, nationality, language, and other factors*

Like the 2023 asylum ban, the rule has denied equal access to asylum to people based on their race, nationality, language, literacy, disability, sexual orientation, financial resources, and other factors.<sup>105</sup> As discussed in Section IV, the rule punishes people who cannot make an appointment

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<sup>104</sup> “Securing the Border October 7,” at 81202.

<sup>105</sup> “Six-Week Report: Implementation of the Biden Administration’s June 2024 ‘Securing the Border’ Asylum Ban”; Human Rights First, “Recommendations for Equitable Access to Asylum and Ports of Entry,” September 2024

(<https://humanrightsfirst.org/wp-content/uploads/2024/09/POE-processing-recommendations-factsheet-09.16.24.pdf>).

through CBP One, which is currently only available in English, Spanish, and Haitian Creole. While Human Rights First welcomes the agencies' indication in the rule that CBP One will also be available in French, many African, Indigenous, and other people seeking asylum, especially people fleeing from outside the Americas, will still be unable to use CBP One and will face discriminatory barriers to access to asylum based on race, nationality, and language.

People also face inequitable barriers to asylum if they cannot use CBP One because they cannot read or write, have a disability, or do not have the financial means to access daily internet or purchase a smartphone to try to obtain a CBP One appointment for months or longer.<sup>106</sup> LGBTQ asylum seekers also face disproportionate barriers because many migrant shelters are religiously affiliated and some have turned away LGBTQ asylum seekers or otherwise discriminated against them, making it even more challenging to access Wi-Fi in order to use the CBP One app.<sup>107</sup> Additionally, many people who cannot safely wait for a CBP One appointment for up to eight or nine months, especially people who are targeted for persecution in Mexico or face urgent medical issues including Black, Indigenous, and LGBTQ people, individuals living with HIV, women, children, and other vulnerable people are disproportionately harmed as they often have no choice but to cross without an appointment to escape danger.<sup>108</sup>

The agencies further exacerbated the discriminatory impact of conditioning access to asylum on CBP One by refusing to include in the 2024 ban the exception from the 2023 asylum ban for people who were unable to use CBP One due to significant and ongoing obstacles and were processed at ports of entry. They again declined to include such an exception in the Final Rule despite public comments emphasizing the discriminatory barriers to CBP One.

In researching the impacts of the 2023 asylum ban, Human Rights First documented many cases of people seeking protection who could not speak a CBP One language, could not read or write, or faced other serious barriers to using CBP One.<sup>109</sup> The government's continued actions to condition access to asylum on CBP One – this time without any exceptions for people who could not use the app – continue to discriminate against people and deny equitable access to asylum.

- Many African asylum seekers continue to face major obstacles to using CBP One and some have reported that since the CBP One app is not available in any of the languages they speak, they believed that it must not be intended for them, according to an April 2024 report by Center for Gender & Refugee Studies, Haiti Justice Partnership, UC College of the Law, San Francisco and Haitian Bridge Alliance.<sup>110</sup>

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<sup>106</sup> Human Rights First, “Trapped, Preyed Upon, and Punished.”

<sup>107</sup> Human Rights Watch, “‘We Couldn’t Wait’: Digital Metering at the US-Mexico Border,” May 1, 2024 (<https://www.hrw.org/report/2024/05/01/we-couldnt-wait/digital-metering-us-mexico-border>)

<sup>108</sup> Human Rights First, “Trapped, Preyed Upon, and Punished.”

<sup>109</sup> *Id.*; Human Rights First, “Inhumane and Counterproductive.”

<sup>110</sup> CGRS, Haiti Justice Partnership, UC College of the Law, San Francisco, and Haitian Bridge Alliance, “Precluding Protection: Findings from Interviews with Haitian Asylum Seekers in Central and Southern Mexico,” May 8, 2024

- An Indigenous woman from Mexico who speaks limited Spanish and doesn't know how to read or write reported to Kino Border Initiative in fall 2024 that she had been deported after entering between ports of entry with her two-year-old child to seek safety.
4. *Stranding asylum seekers in danger in Mexico, where they face persecution and chain refoulement*

The rule works in tandem with the Presidential Proclamation, which shuts down processing of most asylum seekers at ports of entry if they do not have CBP One appointments, stranding people in Mexico where they are at high risk of kidnapping, rape, and other violence that is often perpetrated with complicity by Mexican government officials. At the same time, the ban inflicts severe penalties on people who enter between ports of entry to seek safety. Struggling to obtain CBP One appointments, people end up waiting in danger indefinitely – in some cases nearly a year – while many are denied access to appointments due to language, disability, literacy, technological, and other barriers.

As a result, the rule and Proclamation endanger the lives of asylum seekers and make them targets for horrific violence in Mexico at the hands of cartels and government agents, with particular dangers for Black, Indigenous, and LGBTQ people, women, children, and other vulnerable groups. While monitoring the 2023 asylum ban, which similarly stranded asylum seekers in Mexico and penalized them if they entered without an appointment, Human Rights First tracked reports of over 2,500 survivors of kidnappings and other violent attacks on asylum seekers and migrants stranded in Mexico, including those waiting to secure CBP One appointments.<sup>111</sup> Many Black and Indigenous asylum seekers forced to wait in Mexico suffer racist violence and attacks including kidnappings, sexual assault, and trafficking, discrimination, language access barriers, abuse and deportation by Mexican authorities, denial of medical care and other necessities, and other life-threatening harms.<sup>112</sup> LGBTQ people are often targeted for

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(<https://cgrs.uclawsf.edu/our-work/publications/precluding-protection-findings-interviews-haitian-asylum-seekers-central-and-southern-mexico>).

<sup>111</sup> Human Rights First, “Trapped, Preyed Upon, and Punished.”

<sup>112</sup> CGRS, Haiti Justice Partnership, UC College of the Law, San Francisco, and Haitian Bridge Alliance, “Precluding Protection: Findings from Interviews with Haitian Asylum Seekers in Central and Southern Mexico,” May 8, 2024

(<https://cgrs.uclawsf.edu/our-work/publications/precluding-protection-findings-interviews-haitian-asylum-seekers-central-and-southern-mexico>); Human Rights First, “U.S. Border and Asylum Policies Harm Black Asylum Seekers,” February 12, 2024 (<https://humanrightsfirst.org/library/u-s-border-and-asylum-policies-harm-black-asylum-seekers/>); Letter to Alejandro Mayorkas, “The ‘Circumvention of Lawful Pathways’ Rule Leaves Indigenous Peoples with No Pathway to Seek Asylum,” June 1, 2023 ([https://nipnl.org/sites/default/files/2023-06/2023\\_June-Indigenous-Peoples-Asylum-Letter.pdf](https://nipnl.org/sites/default/files/2023-06/2023_June-Indigenous-Peoples-Asylum-Letter.pdf)); Human Rights First, “Trapped, Preyed Upon, and Punished”; Human Rights First, “Inhumane and Counterproductive: Asylum Ban Inflicts Mounting Harm.”

persecution including kidnappings, sexual assault, and other harms due to their sexual orientation or gender identity, as well as their race, language, and nationality.<sup>113</sup>

Under the ban, Mexican asylum seekers continue to be indefinitely trapped in their country of feared persecution, where they are at risk of further harm or death. Trapped in Mexico without access to U.S. asylum, Mexican people have been kidnapped, sexually assaulted, tortured, and threatened with death while forced to wait for a CBP One appointment or to be processed at a port of entry.<sup>114</sup> In September 2023, a Mexican LGBTQI+ asylum seeker was found dead in Nogales after spending months on the waitlist of people waiting to be processed by CBP at the Nogales port of entry.<sup>115</sup> The 2024 ban exacerbates these dangers and harms because, unlike the 2023 ban, it does not exempt Mexican asylum seekers from its penalties for crossing without an appointment. Non-Mexican asylum seekers face a risk of chain refoulement to persecution while they are stranded in Mexico, where they are vulnerable to arrest, detention, and deportation by Mexican immigration authorities.<sup>116</sup>

Targeting of asylum seekers and migrants stranded in Mexico has continued to escalate, with reports of mounting attacks and kidnappings against people seeking safety.<sup>117</sup> This year, the frequency and brutality of kidnappings in Laredo, Matamoros, and Reynosa has only gotten worse.<sup>118</sup> Migrant survivors of kidnapping in Tamaulipas reported extreme physical violence such as acid burns, fractures, beatings with a slab of wood, and even mentioned having witnessed

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<sup>113</sup> Human Rights First, “U.S. Asylum Bans Strand LGBTQI+ Refugees in Danger and Risk Return to Persecution,” June 2024

([https://humanrightsfirst.org/wp-content/uploads/2024/06/Factsheet\\_Asylum-Bans-Strand-LGBTQI-Refugees\\_final-formatted.pdf](https://humanrightsfirst.org/wp-content/uploads/2024/06/Factsheet_Asylum-Bans-Strand-LGBTQI-Refugees_final-formatted.pdf)).

<sup>114</sup> “Six-Week Report: Implementation of the Biden Administration’s June 2024 ‘Securing the Border’ Asylum Ban.”

<sup>115</sup> Human Rights First, “U.S. Asylum Bans Strand LGBTQI+ Refugees in Danger and Risk Return to Persecution,” June 2024

([https://humanrightsfirst.org/wp-content/uploads/2024/06/Factsheet\\_Asylum-Bans-Strand-LGBTQI-Refugees\\_final-formatted.pdf](https://humanrightsfirst.org/wp-content/uploads/2024/06/Factsheet_Asylum-Bans-Strand-LGBTQI-Refugees_final-formatted.pdf))

<sup>116</sup> Human Rights Watch, “‘We Couldn’t Wait’: Digital Metering at the US-Mexico Border,” May 1, 2024 (<https://www.hrw.org/report/2024/05/01/we-couldnt-wait/digital-metering-us-mexico-border>); Hope Border Institute and Derechos Humanos Integrales en Acción, “Pain as Strategy: The Violence of U.S.-Mexico Immigration Enforcement and Texas’ Operation Lone Star against People on the Move in El Paso-Ciudad Juarez,” 2024 ([https://www.hopeborder.org/files/ugd/e07ba9\\_1ef77e8068b24ab7bf55ff6236c1850d.pdf](https://www.hopeborder.org/files/ugd/e07ba9_1ef77e8068b24ab7bf55ff6236c1850d.pdf)); CGRS, Haiti Justice Partnership, UC College of the Law, San Francisco, and Haitian Bridge Alliance, “Precluding Protection: Findings from Interviews with Haitian Asylum Seekers in Central and Southern Mexico,” May 8, 2024 (<https://cgrs.uclawsf.edu/our-work/publications/precluding-protection-findings-interviews-haitian-asylum-seekers-central-and>).

<sup>117</sup> Hope Border Institute and Derechos Humanos Integrales en Acción, “Pain as Strategy: The Violence of U.S.-Mexico Immigration Enforcement and Texas’ Operation Lone Star against People on the Move in El Paso-Ciudad Juarez,” 2024 ([https://www.hopeborder.org/files/ugd/e07ba9\\_1ef77e8068b24ab7bf55ff6236c1850d.pdf](https://www.hopeborder.org/files/ugd/e07ba9_1ef77e8068b24ab7bf55ff6236c1850d.pdf)); U.S. Committee for Refugees and Immigrants and International Institute of New England, “Policy Report: Mariposas de la Frontera,” October 2024 (<https://refugees.org/wp-content/uploads/2024/10/Mariposas-Digital-Final.pdf>); Human Rights First, “Trapped, Preyed Upon, and Punished.”

<sup>118</sup> Human Rights First, “Trapped, Preyed Upon, and Punished.”

homicides, as told to Doctors Without Borders.<sup>119</sup> In August 2024, the Strauss Center for International Security and Law reported that “the security situation in Reynosa continues to deteriorate” and that kidnappings of migrants are a “common occurrence.”<sup>120</sup> In Nuevo Laredo, the Strauss Center reported that conditions are so dangerous that migrant shelters continue to be closed due to “members of organized crime threatening and perpetrating violence against shelter staff and migrants.”<sup>121</sup>

Reports of sexual violence against migrants in Reynosa and Matamoros increased 70% during the last months of 2023 according to Doctors Without Borders,<sup>122</sup> in addition to the sharply escalating instances of kidnappings in these and other areas.<sup>123</sup> This year, aid workers recounted to Human Rights First that men and women have suffered from horrific torture and sexual violence, including women gang raped and sexually assaulted in the presence of children.<sup>124</sup> In January 2024, Doctors Without Borders teams in northern Mexico reported more cases of sexual violence than in any month of the previous year.<sup>125</sup>

A 2024 report by Hope Border Institute and Derechos Humanos Integrales en Acción documents widespread kidnappings of asylum seekers and migrants in Juarez with collaboration by Mexican government agents.<sup>126</sup> For instance, when migrants arrive at the airport or bus station, INM (National Institute of Migration) informs cartels about the migrants so they can intercept and kidnap them.<sup>127</sup> The security situation also continues to deteriorate in other border areas where migrants are waiting for CBP One appointments, including in Piedras Negras and Nogales.<sup>128</sup> In August 2024, a van that was transporting migrants was attacked south of Nogales by armed men, who killed a Mexican boy and injured people from Mexico, Ecuador, and African countries.<sup>129</sup>

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<sup>119</sup> Medecins Sans Frontiers/ Doctors Without Borders, “Migrants in Central America and Mexico face violence and abuse,” May 27, 2024

(<https://www.msf.org/msf-details-violence-and-abuses-faced-migrants-central-america-and-mexico>)

<sup>120</sup> Strauss Center, “Asylum Processing at the U.S.-Mexico Border: August 2024,” August 20, 2024

(<https://www.strausscenter.org/publications/asylum-processing-at-the-u-s-mexico-border-august-2024/>)

<sup>121</sup> *Id.*

<sup>122</sup> Medecins Sans Frontiers/ Doctors Without Borders, “17 days in captivity along the US-Mexico Border,” February 28, 2024 (<https://www.doctorswithoutborders.org/latest/17-days-captivity-along-us-mexico-border>)

<sup>123</sup> Human Rights First, “U.S. Asylum Bans Strand LGBTQI+ Refugees in Danger and Risk Return to Persecution,” June 2024

([https://humanrightsfirst.org/wp-content/uploads/2024/06/Factsheet\\_Asylum-Bans-Strand-LGBTQI-Refugees\\_final-formatted.pdf](https://humanrightsfirst.org/wp-content/uploads/2024/06/Factsheet_Asylum-Bans-Strand-LGBTQI-Refugees_final-formatted.pdf))

<sup>124</sup> Human Rights First, “Trapped, Preyed Upon, and Punished.”

<sup>125</sup> Medecins Sans Frontiers/ Doctors Without Borders, “17 days in captivity along the US-Mexico Border,” February 28, 2024 (<https://www.doctorswithoutborders.org/latest/17-days-captivity-along-us-mexico-border>)

<sup>126</sup> Hope Border Institute and Derechos Humanos Integrales en Acción, “Pain as Strategy: The Violence of U.S.-Mexico Immigration Enforcement and Texas’ Operation Lone Star against People on the Move in El Paso-Ciudad Juarez,” 2024

([https://www.hopeborder.org/\\_files/ugd/e07ba9\\_1ef77e8068b24ab7bf55ff6236c1850d.pdf](https://www.hopeborder.org/_files/ugd/e07ba9_1ef77e8068b24ab7bf55ff6236c1850d.pdf))

<sup>127</sup> *Id.*

<sup>128</sup> Human Rights First, “Trapped, Preyed Upon, and Punished.”

<sup>129</sup> Strauss Center, “Asylum Processing at the U.S.-Mexico Border: August 2024,” August 20, 2024

(<https://www.strausscenter.org/publications/asylum-processing-at-the-u-s-mexico-border-august-2024/>)

While the Proclamation provides for exemptions from the suspension of processing, legal service providers have reported that it has been extremely difficult to obtain exemptions for people at imminent risk of harm or who are suffering from urgent medical issues. People who have survived widespread kidnapping, rape, and torture, women with high-risk pregnancies, and others with urgent medical conditions have been denied access at ports of entry and left in danger.<sup>130</sup> For instance, a humanitarian worker reported to Human Rights First that a Haitian woman with cancer in need of emergency medical care, together with her young daughter, were repeatedly denied asylum processing by CBP officers at a port of entry in July 2024.<sup>131</sup> Only after extensive advocacy, CBP agreed to process the Haitian woman and her daughter.<sup>132</sup> In September 2024, a Haitian asylum seeker in need of emergency medical care was repeatedly denied asylum processing by CBP officers at a port of entry despite providing medical evidence of his critical state as assessed by a U.S. medical doctor. After extensive advocacy by humanitarian workers, hours later he was granted permission to return, but it was too late – within an hour he died. An October 2024 report by the U.S. Committee for Refugees and Immigrants and the International Institute of New England documents the stories of asylum seekers stranded at the U.S.-Mexico border, including people who have survived brutal attacks in Mexico as well as those suffering from urgent medical conditions.<sup>133</sup> In August 2024, the Strauss Center reported that in Nuevo Laredo, Piedras Negras, and Ciudad Juarez, “there is no process for crossing asylum seekers who are undergoing medical emergencies.”<sup>134</sup> In Matamoros, Reynosa, and Tijuana, the Strauss Center noted that there is a process but it has “strict criteria—including a medical revision—and CBP must provide final approval for each case.”<sup>135</sup>

## **VI. Agencies Double Down in Final Rule Despite Widespread Opposition to the IFR and Extensive Evidence of Resulting Harms**

The agencies moved forward in issuing a Final Rule that expands and entrenches the IFR, disregarding strong opposition by a diverse array of faith-based, human rights, and civil rights groups — including Black-led, Indigenous, and LGBTQ+ organizations, as well as Members of

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<sup>130</sup> Human Rights First, “Two Weeks of the Biden Border Proclamation and Asylum Shutdown,” June 2024 (<https://humanrightsfirst.org/wp-content/uploads/2024/06/Two-Weeks-of-the-Biden-Border-Proclamation-Asylum-Shutdown.pdf>)

<sup>131</sup> “Six-Week Report: Implementation of the Biden Administration’s June 2024 ‘Securing the Border’ Asylum Ban.”

<sup>132</sup> *Id.*

<sup>133</sup> U.S. Committee for Refugees and Immigrants and International Institute of New England, “Policy Report: Mariposas de la Frontera,” October 2024 (<https://refugees.org/wp-content/uploads/2024/10/Mariposas-Digital-Final.pdf>).

<sup>134</sup> Strauss Center, “Asylum Processing at the U.S.-Mexico Border: August 2024,” August 20, 2024 (<https://www.strausscenter.org/publications/asylum-processing-at-the-u-s-mexico-border-august-2024/>)

<sup>135</sup> *Id.*

Congress, the UN Refugee Agency, and the asylum officers' union.<sup>136</sup> Public comments submitted in opposition to the IFR explained that it was unlawful, would lead to grave human suffering, would spur irregular entries, and was counterproductive to safe and orderly processing.

For instance, the asylum officers' union submitted a public comment condemning the IFR for being “contrary to law, arbitrary and capricious, bad policy, and contrary to our country’s core values.”<sup>137</sup> UNHCR warned in its comment that “the IFR runs afoul of fundamental principles and standards of international refugee and human rights law that are binding on the United States” and “will lead to the refoulement of large numbers of asylum-seekers.”<sup>138</sup> Members of Congress submitted a public comment condemning the IFR, noting that it “mirrors earlier asylum bans issued by the Trump and Biden administrations, violating the guarantee in the Immigration and Nationality Act that people fleeing violence and persecution may apply for asylum no matter how they enter the United States.”<sup>139</sup> Many faith-based groups opposed the ban, including the United States Conference of Catholic Bishops, which warned in a comment that the rule would “undermine the ability for families to seek humanitarian protection” and threatens to separate families, causing “long-term harm to children.”<sup>140</sup>

Human Rights Campaign, the largest political lobbying civil-rights organization for LGBTQ rights with more than three million members and supporters nationwide, submitted a comment opposing the IFR and warning that its issuance did not align with the historically most pro-LGBTQIA+ administration.<sup>141</sup> Over a dozen LGBTQ organizations<sup>142</sup> submitted a joint statement warning that “the IFR will subject LGBTQ/H refugees to grave harm, either because it will result in the wrongful denial of meritorious queer and trans asylum claims, or because

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<sup>136</sup> Human Rights First, “Summary of Widespread Support for Rescinding the June 2024 Asylum Ban,” August 14, 2024 (<https://humanrightsfirst.org/wp-content/uploads/2024/08/Public-Comments-Urge-the-Biden-Administration-to-Rescind-the-Latest-Asylum-Ban-1.pdf>).

<sup>137</sup> “Comment Submitted by National Citizenship and Immigration Services Council 119,” July 9, 2024 (<https://www.regulations.gov/comment/USCIS-2024-0006-1064>).

<sup>138</sup> “Comment Submitted by United Nations High Commissioner for Refugees (UNHCR),” July 8, 2024 (<https://www.regulations.gov/comment/USCIS-2024-0006-1033>).

<sup>139</sup> “Comment Submitted by Reps. Jesús ‘Chuy’ Garcia (IL-04), Delia Ramirez (IL-03), Raul Grijalva (AZ-07), Nanette Barragán (CA-44),” July 9, 2024 (<https://www.regulations.gov/comment/USCIS-2024-0006-1070>).

<sup>140</sup> “Comment Submitted by United States Conference of Catholic Bishops,” July 8, 2024 (<https://www.regulations.gov/comment/USCIS-2024-0006-1032>).

<sup>141</sup> “Comment Submitted by Human Rights Campaign,” July 9, 2024 (<https://www.regulations.gov/comment/USCIS-2024-0006-1057>).

<sup>142</sup> Oasis, Immigration Equality, The Black LGBTQIA+ Migrant Project, Border Butterflies Project, Council for Global Equality, Equality California, Familia: Trans Queer Liberation Movement, Human Rights Campaign, Lambda Legal, National Immigrant Justice Center, Lawyers for Good Government, National Center for Lesbian Rights, National LGBTQ Task Force Action Fund, Rainbow Railroad, The Transgender Law Center, and Young Center for Immigrant Children’s Rights.

LGBTQ/H refugees will put their lives in danger trying to comply with the IFR’s illegal requirements.”<sup>143</sup>

When the agencies announced their asylum ban in June, the International Mayan League, a leading Indigenous rights organization, explained that the ban would exacerbate language barriers and discrimination, leading to the return of Indigenous refugees to persecution and death.<sup>144</sup> Black-led organizations including Haitian Bridge Alliance, African Communities Together, and Undocublack also opposed the ban, noting that it would disproportionately harm Black asylum seekers by denying equal access to asylum and subjecting them to targeted violence, discrimination, and death.<sup>145</sup>

For months after the implementation of the rule, the asylum officers’ union, UNHCR, Members of Congress, and others have continued to warn of the rule’s illegality and inhumanity through amicus briefs, letters, public statements, and reports.<sup>146</sup> Legal service and advocacy organizations issued joint reports about the systemic human rights and refugee law violations occurring as a result of the IFR, including unlawful deportations of people who fear return without mandatory fear screenings, as described in Section V.<sup>147</sup>

In the Final Rule, the agencies noted that “the majority” of comments received on the IFR “expressed opposition.”<sup>148</sup> Confronted with this widespread and diverse opposition, the agencies doubled down by expanding the rule and rejecting all suggestions to avoid or mitigate the horrific harms to people seeking protection. **In the Final Rule, the agencies touted the**

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<sup>143</sup> “Comment Submitted by Immigration Equality,” July 9, 2024 (<https://www.regulations.gov/comment/USCIS-2024-0006-1054>).

<sup>144</sup> International Mayan League, “Biden’s Proclamation a Betrayal to Indigenous Peoples Seeking Refuge and Safety,” June 4, 2024 ([https://issuu.com/mayanleague.org/docs/iml\\_statement\\_executive\\_order\\_june\\_4\\_2024.docx](https://issuu.com/mayanleague.org/docs/iml_statement_executive_order_june_4_2024.docx))

<sup>145</sup> Haitian Bridge Alliance, “Haitian Bridge Alliance Strongly Condemns President Biden’s Executive Order Limiting Asylum Applications,” June 4, 2024 (<https://haitianbridgealliance.org/haitian-bridge-alliance-strongly-condemns-president-bidens-executive-order-limiting-asylum-applications/>); African Communities Together, “Statement: Biden’s Executive Order is Not the Solution and Recycles Harmful Trump-Era Policies,” June 4, 2024

(<https://africans.us/statement-bidens-executive-order-not-solution-and-recycles-harmful-trump-era-policies>); Undocublack Network, “The Undocublack Network Acknowledges the Department of State’s Released Manual for Undocumented Graduates Eligible for Waivers,” July 24, 2024 (<https://undocublack.org/press-releases>).

<sup>146</sup> “Amicus Brief of Asylum Officers’ Union” in *Las Americas Immigrant Advocacy Center v. DHS*, July 29, 2024 (<https://cgrs.uclawsf.edu/legal-document/amicus-brief-asylum-officers-union>); “Amicus Brief of UNHCR” in *Las Americas Immigrant Advocacy Center v. DHS*, July 29, 2024

(<https://cgrs.uclawsf.edu/legal-document/amicus-brief-unhcr>); UNHCR, “News comment: UNHCR reiterates concern about US asylum regulations,” September 30, 2024 (<https://www.unhcr.org/us/news/press-releases/news-comment-unhcr-reiterates-concern-about-us-asylum-regulation>); Congress of the United States, House of Representatives, “Congressional Letter,” July 31, 2024 ([https://chuygarcia.house.gov/sites/evo-subsites/chuygarcia.house.gov/files/evo-media-document/\[CONGRESSIONAL%20LETTER\]%20Urge%20the%20Biden%20administration%20to%20rescind%20Interim%20Final%20Rule%20related%20to%20asylum.pdf](https://chuygarcia.house.gov/sites/evo-subsites/chuygarcia.house.gov/files/evo-media-document/[CONGRESSIONAL%20LETTER]%20Urge%20the%20Biden%20administration%20to%20rescind%20Interim%20Final%20Rule%20related%20to%20asylum.pdf)).

<sup>147</sup> “Don’t Tell Me About Your Fear”; “Six-Week Report: Implementation of the Biden Administration’s June 2024 ‘Securing the Border’ Asylum Ban.”

<sup>148</sup> “Securing the Border October 7,” at 81168.

**unlawful returns to danger inflicted by the rule, acknowledged the rule’s potential increased risk of refoulement and discrimination, and disregarded and minimized the extent of these harms while painting a picture of border processing and treatment of asylum seekers that is at odds with reality. They also continued to use pretextual arguments to attempt to justify the ban, insisting that they needed to maximize the use of expedited removal and address the asylum backlogs even though expedited removal is not legally required and the rule counterproductively exacerbates the backlogs.**

*1. Touting harms inflicted by rule and acknowledging risks of refoulement and discrimination*

In the face of the mass human rights and refugee law violations documented above, the agencies touted the rule as a success that is “working as intended.”<sup>149</sup> This disturbing approach defines success as a reduction in border crossings, increased rate of the use of expedited removal, decreased referrals for CFIs, and lower CFI pass rates. Not only are these the wrong metrics to measure the effectiveness of an asylum policy, but the latter two are simply euphemisms for mass violations of U.S. law and treaty commitments.

As discussed in section V, the government is using the rule to summarily deport people to countries of feared persecution without CFIs even though they fear return; rig the credible fear process to reduce CFI pass rates, without regard for the merits of a person’s asylum claim; and strand people in danger without equitable access to asylum, where they face kidnappings, torture, sexual assault, and other human rights abuses. The resulting deportations and human rights abuses inflicted on people seeking safety, including survivors of gender-based violence, LGBTQ individuals, Indigenous people, families, young children, and others whose stories are discussed in this comment and were extensively documented prior to the issuance of the Final Rule, are what the government cites to claim that its rule is “working as intended.” As discussed above, the rule used dehumanizing language to tout its success, describing violations of refugee law and deportations to danger as “filter[ing] out a greater portion of cases.”<sup>150</sup>

While touting the harms of the rule, the government openly acknowledged the increased risk of refoulement and discriminatory impact on access to asylum:

- “the rule’s manifestation of fear and reasonable probability standards **may increase the risk** that some noncitizens with meritorious claims may not be referred for credible fear interviews or may not receive a positive credible fear determination. . . there may be costs to noncitizens that result from their removal—**indeed, such costs are likely.**”<sup>151</sup>

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<sup>149</sup> *Id.* at 81159.

<sup>150</sup> *Id.* at 81210.

<sup>151</sup> *Id.* at 81203.

- “there may be some noncitizens who have a fear of persecution or a fear of return, but who are not referred for a credible fear interview.”<sup>152</sup>
- “the changes to the credible fear process adopted may result in the denial of asylum when such an asylum claim otherwise may have been granted.”<sup>153</sup>
- The agencies also acknowledged the discriminatory impact of the rule, noting that language, disability, and other factors “may limit a migrant’s ability to use the CBP One app.”<sup>154</sup>

After repeatedly acknowledging the illegal impacts of the rule, agencies stated that they “weighed” these risks, read “studies and their conclusions” regarding the harms of the manifestation approach, and “determined that these important policies outweigh whatever marginal impact on meritorious claims the rule might have.”<sup>155</sup> The agencies’ open acknowledgment that they are violating refugee law and their argument that these violations are justified or outweighed by the need to deport more people is a shocking rejection of the United States’ responsibility to comply with legally binding treaties designed to protect refugees.

Additionally, while touting the rule as the reason for reduced border crossings, the agencies downplayed the major impacts of Mexico’s escalation of its interception actions since January 2024.<sup>156</sup> As media and human rights reports have documented, Mexico has escalated efforts to intercept people traveling to the United States to seek safety, often in violation of human rights law, which further prevents people from reaching the U.S. border and contributes to the decreased border crossings that the government cites.<sup>157</sup>

## 2. *Disregarding and/or minimizing harms*

Throughout the Final Rule, the agencies ignored the extent of the harms inflicted by the rule and attempted to minimize the harms, employed euphemistic language, and painted a picture of border processing that ignores the actual reality.

For instance, the agencies ignored the extensive documentation of systematic failures of CBP officers to refer people for CFIs, claiming that “commenters have provided no evidence that

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<sup>152</sup> *Id.* at 81239.

<sup>153</sup> *Id.* at 81203.

<sup>154</sup> *Id.* at 81219.

<sup>155</sup> *Id.* at 81203; 81239.

<sup>156</sup> Human Rights First, “Trapped, Preyed Upon, and Punished.”

<sup>157</sup> *Id.*; The Associated Press, “Mexico’s tactic to cut immigration to the US: wear out immigrants,” June 11, 2024 (<https://apnews.com/article/mexico-immigration-border-lopez-obrador-biden-a5498f0791f5f1ef99f1dfd9accce8f4>); Immigration Impact, “Why are Border Crossings at Their Lowest Level in Four Years,” July 19, 2024 (<https://immigrationimpact.com/2024/07/19/why-are-border-crossings-lowest-level-in-four-years/>); WOLA, “Weekly U.S.-Mexico Border Update: Fiscal 2024 data, ‘metering’ struck down, migration route,” October 25, 2024 (<https://www.wola.org/2024/10/weekly-u-s-mexico-border-update-fiscal-2024-data-metering-struck-down-migration-route/>).

there is a widespread problem of CBP officers and agents ignoring fear claims.”<sup>158</sup> This claim is disingenuous and absurd in light of the multiple joint reports, a litigation filing, and numerous case stories described above, detailing widespread and systematic practices of CBP officers outright ignoring fear claims and denying people an opportunity to express fear. Moreover, the agencies are certainly aware that the only in-depth study permitted by DHS of the CBP fear referral process, conducted by the bipartisan US Commission on International Religious Freedom, documented widespread failures to properly refer fear claims.<sup>159</sup>

The agencies minimized the impact of these harms through euphemistic language. For instance, they referred to erroneous denials of asylum and deportations of people who should have been granted asylum as “**imperfect outcomes**.”<sup>160</sup> With respect to the horrors of CBP custody and the ways that forcing people to undergo CFIs in CBP custody compounds these harms, the agencies again ignored extensive evidence of abuses, claiming that: “[r]egarding concerns about noncitizens going through the credible fear process while in CBP custody, the Departments disagree with the contention that such a process causes or exacerbates harm.”<sup>161</sup>

The agencies acknowledged that waiting indefinitely in Mexico for a CBP One appointment “may present safety concerns,”<sup>162</sup> a dramatic understatement given the widespread targeting of asylum seekers and migrants at the U.S.-Mexico border for attacks, kidnappings, sexual assault, torture, and other harms, often carried out by Mexican officials or with their complicity.<sup>163</sup> As discussed above, the targeting of asylum seekers and migrants has only continued to escalate. Yet the agencies referred to rampant violence targeting asylum seekers in Mexico as “purely speculative” with respect to their eligibility for the threat to life or safety exception in the rule.<sup>164</sup> Human Rights First has documented thousands of attacks against people trapped in Mexico under policies that block access to U.S. asylum.<sup>165</sup> Describing the threat to people’s life and safety as “purely speculative” is inaccurate, disingenuous, and amounts to wilful blindness. The agencies also claimed that they “disagree with commenters expressing a belief that immigration officers are not likely to understand expressions of fear in languages other than English or Spanish and that they are not incentivized to seek an interpreter.”<sup>166</sup> This statement is

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<sup>158</sup> “Securing the Border October 7,” at 81240.

<sup>159</sup> USCIRF, “Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal” (<https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>); USCIRF, “Report on Asylum Seekers in Expedited Removal,” February 8, 2005 (<https://www.uscirf.gov/publications/report-asylum-seekers-expedited-removal>).

<sup>160</sup> “Securing the Border October 7,” at 81203.

<sup>161</sup> *Id.* at 81202.

<sup>162</sup> *Id.* at 81218.

<sup>163</sup> Human Rights First, “Trapped, Preyed Upon, and Punished.”

<sup>164</sup> “Securing the Border October 7,” at 81225.

<sup>165</sup> Human Rights First, “Trapped, Preyed Upon, and Punished”; Human Rights First, “Human Rights Stain, Public Health Farce: Evasion of Asylum Law and Title 42 Abuse Must End—and Never Be Revived,” December 15, 2022 (<https://humanrightsfirst.org/library/human-rights-stain-public-health-farce/>).

<sup>166</sup> “Securing the Border October 7,” at 81242.

Kafkaesque, as the agencies are suggesting that officers will somehow understand expressions of fear of return in languages that they do not speak.

### 3. *False pretexts for rule*

Like the IFR, the Final Rule raises pretextual arguments to justify the ban and the failure to follow proper rulemaking timelines. In reality, the Final Rule was issued in the lead-up to national elections and at a time when border crossing numbers had fallen by over 78 percent since December 2023.<sup>167</sup> Moreover, Mexico’s escalation of its interception actions since January 2024 has dramatically contributed to lower numbers of border crossings.<sup>168</sup>

The agencies claimed that there was an emergency because DHS needed to “increase its ability to deliver consequences through referrals into expedited removal” but did not have enough asylum officers “to keep pace with the number of noncitizens who could be referred for credible fear interviews.”<sup>169</sup> The agencies’ attempt to override, evade, and eliminate protections in U.S. expedited removal law is not a lawful response to deficiencies in staffing and appropriations. Nor do those gaps legally justify suspending asylum law.

The agencies presented the rule as an urgent step to ensure that the agencies could wield expedited removal against more people arriving at the border. Absent in the agencies’ reasoning is the fact that expedited removal is actually counterproductive to efficiency and timely and humane asylum processing. It is also not legally required. The use of expedited removal is wasteful, diverts asylum officers from full asylum adjudications, exacerbates the affirmative asylum backlog, and burdens immigration judges conducting credible fear reviews and detracts from their ability to address the immigration court backlog.<sup>170</sup> The agencies themselves correctly noted that “maximizing credible fear screening capacity pulls resources away from USCIS processing cases in the affirmative asylum backlog, which had reached over 1.25 million cases as of the third quarter of FY 2024.”<sup>171</sup> In fact, the rule notes that **511 asylum officers are currently assigned to work *exclusively* on credible fear cases,**<sup>172</sup> whereas they could instead be

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<sup>167</sup> U.S. CBP, “Nationwide Encounters,” Last Modified: October 22, 2024 (<https://www.cbp.gov/newsroom/stats/nationwide-encounters>).

<sup>168</sup> WOLA, “Fewer Migrants, Greater Danger: The Impact of 2024’s Crackdowns,” August 29, 2024 (<https://www.wola.org/analysis/fewer-migrants-greater-effect-2024s-migration-crackdowns/>); Immigration Impact, “Why are Border Crossings at Their Lowest Level in Four Years,” July 19, 2024 (<https://immigrationimpact.com/2024/07/19/why-are-border-crossings-lowest-level-in-four-years/>).

<sup>169</sup> “Securing the Border October 7,” at 81187.

<sup>170</sup> Human Rights First, “Pretense of Protection.”

<sup>171</sup> “Securing the Border October 7,” at 81181.

<sup>172</sup> *Id.* at 81187.

adjudicating affirmative asylum cases for people with pending cases, some of which have been pending for eight years or longer.<sup>173</sup>

The rule is not a solution to the asylum backlogs and will instead exacerbate these backlogs in addition to violating U.S. law and treaty obligations. Human Rights First has repeatedly recommended solutions to address the backlogs by ensuring that more cases that are eligible for asylum are resolved by the asylum office rather than unnecessarily added to the immigration court backlog, working with Congress to remedy the unconscionable resource gaps that impede timely and fair asylum adjudications, and ending policies that impose counterproductive, unnecessary barriers that complicate adjudications.<sup>174</sup> **Indeed, the agencies correctly identified that there is an urgent need for additional funding for the asylum office and immigration court to ensure timely asylum adjudications.**<sup>175</sup> Rather than issuing another unlawful barrier to asylum, the agencies should take steps to actually address the asylum backlogs and provide timely and humane adjudications without the counterproductive use of expedited removal.

The agencies themselves acknowledged that the rule further burdens asylum officers and immigration judges by “requir[ing] additional time” to conduct credible fear interviews, credible fear reviews, and full asylum adjudications, as they must assess the applicability of the rule and its exceptions.<sup>176</sup> The agencies attempted to dismiss this concern by noting that in the absence of the rule, officers and judges would have to inquire into the applicability of the 2023 asylum ban. This means that the agencies essentially cited as a justification for the rule a problem that they themselves created: as Human Rights First and others repeatedly warned, the 2023 asylum ban made adjudications more complicated and time-consuming for officers and judges. It is farcical for the agencies to layer a new asylum ban on top of it and then claim that the additional time and complexity it creates for adjudications is justified because without it they would have to spend time implementing a different asylum ban anyway.

Additionally, the agencies continued to rely on their misleading statistics about asylum grant rates as a pretext for artificially lowering CFI pass rates. First of all, as explained in Section V, this approach is nonsensical regardless of asylum grant rate numbers because the agencies are lowering CFI pass rates based on reasons unrelated to the person’s asylum claim – and therefore denying asylum and deporting people at random. Moreover, through misleading data on asylum grant rates, the agencies attempted to paint asylum claims as largely unsuccessful in order to try to justify increasing and accelerating deportations of people seeking protection without full hearings.

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<sup>173</sup> Human Rights First, “Saving Lives, Ending Inefficiencies: Steps to Strengthen the U.S. Asylum Adjudication System,” July 2024 [hereinafter Human Rights First, “Saving Lives, Ending Inefficiencies”] ([https://humanrightsfirst.org/wp-content/uploads/2024/07/HRF\\_Asylum\\_Adjudication\\_Recommendations\\_2024-for-matted.pdf](https://humanrightsfirst.org/wp-content/uploads/2024/07/HRF_Asylum_Adjudication_Recommendations_2024-for-matted.pdf))

<sup>174</sup> Human Rights First, “Saving Lives, Ending Inefficiencies.”

<sup>175</sup> “Securing the Border October 7,” at 81159.

<sup>176</sup> “Securing the Border October 7,” at 81210

As Human Rights First previously explained, the data is misleading as it does not accurately capture the proportion of asylum claims that could be eligible for protection.<sup>177</sup> This is because many asylum cases are not adjudicated on the merits of the claim, including where the court administratively closes the case, the person qualifies for other relief, or an asylum application isn't filed. There are many reasons that an asylum application isn't filed, including that the person is eligible for other relief or can't file the application on their own because they are detained, cannot find a lawyer, cannot afford a lawyer, do not speak English, cannot read or write, have a disability, do not understand the requirements and deadline to submit an application, or their case is moving on an accelerated timeline.

The agencies have repeatedly calculated asylum grant rates by dividing grants by total number of cases, which misleadingly presents cases that are not adjudicated on the merits as asylum denials (which is not the case). In the Final Rule, the agencies dismissed Human Rights First's concerns about misleading asylum grant rate calculations and argued that cases where the asylum application is not filed and other cases not decided on the merits should be included in the denominator for calculating grant rates. Human Rights First continues to oppose this approach and believes that the agencies should address barriers that prevent asylum seekers from filing an application rather than presenting asylum cases as largely ineligible and attempting to use that misleading data to justify an asylum ban. The agencies should at a minimum include asylum grant rates divided by cases decided on the merits when presenting grant rate data in order to avoid painting a misleading picture.

## **VII. Expansion or Extension of the 2023 Asylum Ban Would Compound Devastating Harms**

After inflicting over a year of horrors through the 2023 asylum ban, which was struck down by a federal court for violating U.S. law, the agencies are considering extending and expanding the ban. They note that they are contemplating steps on the ban including making it permanent, expanding it to ban people entering at all southern coastal borders, and applying it to people arriving by sea even if they didn't travel through a third country. The agencies should immediately rescind this unlawful ban in its entirety instead of taking further steps to entrench it and expand its catastrophic impact. Extending this rule would perpetuate its legal violations, extend its harmful human impacts including wrongful deportations and denials of a pathway to citizenship, and magnify the complexities and inefficiencies it inflicts on the adjudication system.

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<sup>177</sup> Human Rights First, "Rhetoric v. Reality: Biden Administration Should Correct Misleading Narrative on Asylum Eligibility," August 2023 (<https://humanrightsfirst.org/wp-content/uploads/2023/08/Asylum-grant-rates-fact-sheet-August-2023.pdf>).

When the agencies published the proposed asylum ban rule in February 2023, nearly 52,000 individuals and groups submitted comments, the vast majority of which opposed the rule.<sup>178</sup> Had the agencies provided a meaningful comment period rather than the truncated 30-day period, even more comments would likely have been filed. A notably diverse array of administration allies, nonpartisan groups, legal experts, civil society groups, refugee and immigrant rights advocates, faith-based groups, 80 Members of Congress, UNHCR, the asylum officers' union, major unions, and the Round Table of more than 50 former Immigration Judges and Board of Immigration Appeals members submitted comments condemning the rule.<sup>179</sup> These and other comments detailed the rule's illegality and warned that it would lead to grave human suffering and was counterproductive to safe and orderly processing.

The 2023 ban is illegal because it violates the same core principles of international law and key provisions of U.S. law as its successor, the 2024 ban, as explained in Section IV. The U.S. and international law arguments we detailed in that section of this comment apply as well to the 2003 ban. We are also resubmitting and have attached our comments on the 2023 proposed ban, which extensively details its violations of U.S. and international law. UNHCR warned that the 2023 ban “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.<sup>180</sup> The rule also violates the same provisions of U.S. law as the 2024 ban. As a federal court explained when it struck down the 2023 ban, it is unlawful to presume ineligible for asylum people who enter between ports of entry, as they are “using a manner of entry that Congress expressly intended should not affect access to asylum.”<sup>181</sup>

The 2023 ban, like the 2024 ban, was modeled off the Trump administration's bans and has led to many of the same unlawful harms described in Section V, including fueling discriminatory denial of access to asylum, deportations to danger after deficient CFIs with a heightened standard screening standard, denial of asylum to refugees who otherwise qualify for asylum under U.S. law, and deprivation of permanent status and a pathway to citizenship for people determined to be refugees but denied asylum under the ban and left only with withholding of removal. Human Rights First and other organizations have researched and extensively documented the harms of the 2023 ban since it went into effect. We are attaching some of these reports to our comment and summarize below some of the egregious harms inflicted by the ban.

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<sup>178</sup> Welcome With Dignity, “Press Release: Opposition to Proposed Asylum Ban Rule Across U.S.,” March 28, 2023 (<https://welcomewithdignity.org/opposition-to-proposed-asylum-ban-rule-across-u-s/>)

<sup>179</sup> Human Rights First, “Public Comments Urge Withdrawal of Biden Administration's Proposed Asylum Ban,” April 2023 ([https://humanrightsfirst.org/wp-content/uploads/2023/04/Asylum\\_ban\\_comments\\_summary\\_.pdf](https://humanrightsfirst.org/wp-content/uploads/2023/04/Asylum_ban_comments_summary_.pdf))

<sup>180</sup> “Comment Submitted by United Nations High Commissioner for Refugees (UNHCR),” March 20, 2023 (<https://www.regulations.gov/comment/USCIS-2022-0016-7428>).

<sup>181</sup> *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023), stayed pending appeal, 2023 WL 11662094 (9th Cir. Aug. 3, 2023), appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024)

People seeking asylum who were forced to wait indefinitely in Mexico for CBP One appointments were targeted for kidnappings, torture, rape, and brutal violence, but couldn't enter without an appointment without risking the ban's penalties.<sup>182</sup> As of May 2024, **Human Rights First had tracked reports of over 2,500 survivors of kidnappings and other violent attacks on asylum seekers and migrants stranded in Mexico, including those waiting to secure CBP One appointments, since the asylum ban was initiated in 2023.**<sup>183</sup> Mexican state actors are often complicit in these horrific and widespread abuses.<sup>184</sup> While stranded in Mexico, asylum seekers were also targeted for arrest, detention, forced transfers to southern Mexico, and potential return to persecution.<sup>185</sup>

- Three Haitian asylum seekers in Reynosa were kidnapped and tortured by members of a cartel, including the forcible removal of teeth. Two of the men were waiting for CBP One appointments and one missed his appointment on account of the kidnapping in April 2024.<sup>186</sup>
- A Latin American pregnant woman was raped by members of a cartel in Reynosa after they kidnapped her and her husband in March 2024. The kidnappers continued to rape her as she went into labor and her water broke. She was left on the street with her husband who was badly beaten, and soon after delivered her baby.<sup>187</sup>
- In December 2024, a Haitian unaccompanied teenage girl and three Haitian women seeking asylum survived an enforced disappearance by Mexican authorities, who turned them over to cartel members who abused them physically and sexually.<sup>188</sup>

The barriers and harms inflicted by the 2023 ban have particularly impacted Black, Indigenous, LGBTQI+, HIV+, women, children, and other vulnerable people.<sup>189</sup> Like the 2024 ban, it denies equal access to asylum for people who do not speak English, Spanish, or Haitian Creole, including African, Indigenous, and other people seeking asylum, especially people fleeing from outside of the Americas, in addition to others who cannot use the CBP One app due to access barriers.<sup>190</sup>

The asylum ban's heightened standard in credible fear interviews led to the return of refugees to persecution and torture, amounting to refoulement.<sup>191</sup> The 2023 ban imposed a heightened "reasonable probability" standard to establish eligibility for withholding and CAT protection, and the 2024 ban imposed an even higher standard of "reasonable probability." People subject to the

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<sup>182</sup> Human Rights First, "Trapped, Preyed Upon, and Punished."

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

2023 ban's heightened screening standard in credible fear interviews were **three times more likely to be ordered deported to their countries of feared persecution or to Mexico, where they faced dangers and were at risk of return (chain refoulement), compared to those who were not subject to the ban.**<sup>192</sup> The result was that the United States ordered the deportation of people with strong and obvious needs for refugee protection. This rigged process resulted in deportation orders against over 52,000 people subjected to the ban between May 12th and March 31, 2024.<sup>193</sup>

- People deported or ordered deported under the asylum ban after being subjected to the heightened credible fear standard include: a transgender woman from Venezuela fleeing anti-LGBTQI+ abuses, a victim of political persecution from Senegal, an illiterate man from Nicaragua fearing torture by Nicaraguan authorities, a Chinese prodemocracy dissident, and a victim of religious persecution from Egypt.<sup>194</sup>

The asylum ban's exceptions are extremely narrow and often illusory, especially when applied in credible fear interviews. They have proven wildly insufficient to protect refugees, including vulnerable populations such as Black, Indigenous, and LGBTQI+ asylum seekers, women, and children.<sup>195</sup> Asylum seekers forced to undergo CFIs in detention face particularly inhumane and insurmountable barriers because their ability to apply for safety may hinge on sharing detailed information about horrific attacks, dangers, and medical issues that could make them eligible for an exception, which are often retraumatizing to share and might seem irrelevant to their reasons for seeking asylum. Despite repeated requests by legal and humanitarian organizations, the government has not provided public guidance on how these exceptions are adjudicated, what constitutes a threat to life or safety or a medical emergency, and what evidence is required, leading to inconsistency in adjudications.

- A Venezuelan woman was denied an exception to the ban even though she was locked out of CBP One and entered the United States at a port of entry after suffering an attempted kidnapping and rape by a Mexican law enforcement officer, circumstances that should have qualified her for multiple exceptions – threat to life and safety and obstacles to using CBP One. She had fled torture, kidnapping, and threats of death by Venezuelan police because of her political opposition.<sup>196</sup>
- An Ecuadorian asylum seeker who entered the United States after he was robbed and told he would be killed if he did not quickly leave the area where he was waiting in Mexico was denied an exception and deported under the asylum ban because the immigration judge reviewing his credible fear decision decided that the death threat was not

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<sup>192</sup> Human Rights First, "Correcting the Record: The Reality of U.S. Asylum Process and Outcomes," November 3, 2023 (<https://humanrightsfirst.org/library/correcting-the-record-the-reality-of-u-s-asylum-process-and-outcomes/>).

<sup>193</sup> "Securing the Border June 7," at 48746.

<sup>194</sup> Human Rights First, "Trapped, Preyed Upon, and Punished."

<sup>195</sup> *Id.*; Human Rights First, "Inhumane and Counterproductive."

<sup>196</sup> Human Rights First, "Trapped, Preyed Upon, and Punished."

“imminent or extreme” since *two days* had lapsed between the threat and his entry into the United States.<sup>197</sup>

- A Colombian asylum seeker who entered the United States while experiencing urgent medical needs and directly fleeing torture he had suffered in Mexico was found not to meet an exception to the ban, despite testifying about the harm he had suffered in Mexico. While traveling through Mexico, he was kidnapped by a criminal organization that tortured him and hit him in the chest where he had existing stab wounds, leading him to run for his life to the U.S. border, according to his attorney at the New Mexico Immigrant Law Center. He has since been deported.<sup>198</sup>

The asylum ban also continues to inflict serious harm on many who overcome the hurdles described above and have their cases heard by an immigration judge. Those who are ultimately denied asylum in their immigration court case because of the ban but do not qualify for other forms of protection with higher standards of proof face deportation to danger even if they would have been granted asylum but for the ban. **Others who are determined to be refugees but left only with withholding of removal due to the ban’s penalties live in the United States in potentially permanent limbo, without status or a path to citizenship.** People granted withholding of removal actually have a deportation order and live under constant threat that the U.S. government could seek to reopen their cases and remove them. They face other major barriers to integration including difficulty accessing healthcare and having to routinely renew their work authorization.

- A Georgian asylum seeker fleeing LGBTQI+ persecution was subject to the asylum ban in his immigration court hearing, denied asylum under the ban and granted withholding of removal. The immigration judge held that he would have been granted asylum but for the asylum ban, according to the asylum seeker’s pro bono attorneys at Lewis Roca.<sup>199</sup>
- An Afghan asylum seeker who fears that he will be killed and tortured in Afghanistan due to his work with a U.S.-backed security force, and whose brother was already granted asylum for related reasons, is scheduled for an immigration court hearing where he faces potential application of the asylum ban due to his entry without a CBP One appointment. After fleeing to the southern border, he attempted to secure a CBP One appointment but was confused and disoriented when he experienced repeated technical failures in CBP One and couldn’t secure an appointment. He entered the United States to seek safety. He is now scheduled for his final immigration court hearing in May 2025, and if the court applies the asylum ban he may be ordered deported or, if granted withholding or CAT, live in limbo in the United States without status or a path to citizenship. While waiting for his hearing, he has been terrified that he will be denied asylum under the ban and face deportation to torture and death.

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<sup>197</sup> *Id.*

<sup>198</sup> Human Rights First, “Inhumane and Counterproductive.”

<sup>199</sup> Human Rights First, “Trapped, Preyed Upon, and Punished.”

In immigration court, the ban and the complexities it adds to adjudications necessarily require additional time across the adjudication system, cause inefficiencies, and spur mistaken decisions that in turn add to delays and backlogs. The ban has created widespread confusion among immigration judges about its provisions, resulting in inconsistent decisions and erroneous denials under the ban, with a disproportionate impact on people who are unrepresented. These erroneous denials of asylum have meant, among other catastrophic consequences, that people determined to be refugees under U.S. law cannot petition for their spouses and children abroad due to the ban.

Attorneys have reported that immigration judges and ICE attorneys (Assistant Chief Counsel, or ACC) across the country have failed to comply with the mandatory family unity provision in the rule, which *requires* a person to be granted asylum if they establish eligibility for withholding, would have been granted asylum but for the ban, and have a spouse or child in the United States or abroad.<sup>200</sup> This raises serious concerns about uneven application of the ban's exceptions and widespread devastating outcomes for refugees and their families. ACCs have also erroneously argued that the family unity exception does not apply, citing an irrelevant section of the rule. An immigration attorney also recently shared an experience in a hearing where both the judge and ACC expressed confusion over the rule and the ACC commented off the record, expressing personal dislike for the rule.

Attorneys have also reported confusion and uncertainty with respect to representing people subject to the ban, particularly regarding the family unity provision. An applicant who has an accompanying spouse or child is only entitled to the family unity exception if the spouse or child does not independently qualify for protection. As a result, attorneys must decide how to proceed given that a judge is only required to grant the family unity exception if the accompanying spouse or child is *not* independently eligible for protection. This gives rise to strategic and ethical quandaries for attorneys, confusion for immigration judges, and illogical consequences such as the potential for a family where both spouses are in the United States and meet the withholding standard to be penalized for the strength of their claims by being denied the permanence of asylum.

In addition to violating U.S. legal obligations to refugees and inflicting horrific harms, the 2023 ban is ineffective and counterproductive to effective migration policy and refugee protection. People seeking asylum, including the over 500 interviewed by Human Rights First across the U.S.-Mexico border during the first year of the ban, were overwhelmingly not aware of the ban and its consequences.<sup>201</sup> Even when asylum seekers did learn of it, their decisions were primarily driven by urgent needs for safety and protection.<sup>202</sup> Like other forms of metering, long wait times for CBP One appointments spur crossings outside of official ports of entry, making them

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<sup>200</sup> Where the applicant has an accompanying spouse or child, there is an additional requirement to establish that the spouse or child does not independently qualify for protection.

<sup>201</sup> Human Rights First, "Trapped, Preyed Upon, and Punished."

<sup>202</sup> *Id.*

counterproductive to effective migration policy and detrimental to the safety of people seeking asylum.<sup>203</sup>

The agencies indicated in the Final Rule that they are considering extending the 2023 asylum ban indefinitely, whereas it currently applies to people who enter the United States between May 11, 2023 and May 11, 2025. After a year and a half of horrors, it is unconscionable that the agencies would consider extending this ban indefinitely. When they first proposed the 2023 ban, they repeatedly told the public and stated in the rule that it was “temporary,” and their plan to potentially extend it indefinitely – at a time when the agencies tout that border crossing numbers are low – lays bare the pretextual nature of their arguments for the ban. Any action short of rescinding the ban will add to the escalating human rights violations, unlawful deportations, and other abuses and harms inflicted on people seeking safety.

The agencies also stated that they are considering additional steps to expand the ban, including applying it to all people who arrive at southern coastal borders and even subjecting people arriving by sea to the ban if they did not travel through a third country. The May 2023 Final Rule expanded the ban’s application to people arriving at adjacent coastal borders and solicited comments on whether to expand it to ban all maritime arrivals, irrespective of whether they traveled through a third country (a similar proposal to the one that the agencies are considering again.) At the time, Human Rights First joined 68 civil, human rights, faith-based, and immigration groups in submitting a comment that explained that such an expansion would further restrict asylum access to those who are most vulnerable, disparately harm Black and Brown asylum seekers, and add to the lengthy and troubling history of discriminatory treatment of Haitians and other people intercepted at or arriving by sea.<sup>204</sup> The agencies disregarded these harms and are now considering expanding the ban to inflict penalties on more people arriving by sea, which would have disastrous impacts and discriminate against many vulnerable Haitians and Cubans arriving by sea who would then potentially be subject to the ban regardless of whether they transited through another country.

**The agencies should rescind the 2023 asylum ban in its entirety.** Its illegality cannot be mitigated by exceptions because restricting asylum eligibility based on manner of entry violates U.S. law regardless of exceptions, as a federal court explained.<sup>205</sup> To the extent the agencies keep this unlawful ban in effect, Human Rights First notes that the current exemptions and exceptions

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<sup>203</sup> *Id.*

<sup>204</sup> Americans for Immigrant Justice, “Re: Comment in Opposition to the Proposed and Expanded Applicability of the Circumvention of Lawful Pathways Rule in the Maritime Context, CIS No. 2744-23; Docket Number USCIS 2022-0016; A.G. Order No. 5660-2023,” June 15, 2023 (<https://aijustice.org/wp-content/uploads/2023/06/Final-Joint-Comment-in-Opposition-to-the-Expansion-of-the-CLP-Final-Rule-in-the-Maritime-Context-.pdf>).

<sup>205</sup> East Bay Sanctuary Covenant v. Biden, Order Granting Plaintiff’s Motion for Summary Judgment and Denying Defendants’ Motion for Summary Judgment, Case No. 18-cv-06810-JST (N.D. Cal. 2023) ([https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2023-07/187-East%20Bay-v-Biden\\_Order-granting-motion-for-SJ\\_7-25-23.pdf](https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2023-07/187-East%20Bay-v-Biden_Order-granting-motion-for-SJ_7-25-23.pdf)).

to the rule are extremely narrow and have – as we warned in our initial comments – failed to protect countless refugees who qualify for asylum under U.S. law and should not be subjected to the ban. These include asylum seekers who:

- could show good cause for entering the United States, such as:
  - did not have knowledge of the ban;
  - did not have knowledge of CBP One;
  - could not use the CBP One app due to language, literacy, financial, technological and other barriers and entered between ports of entry;
  - 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;
- did not have asylum or other durable status in a transit country;
- were not firmly resettled in a transit country;
- did not have family or other ties in countries they transited
- 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 and fair asylum procedures;

**While the ban is unlawful regardless of its exceptions, should the agencies keep the ban in effect they should additionally exempt or except people seeking asylum who fall into the categories listed above.** For example, the ban should not apply to asylum seekers who transited through countries where they were not firmly resettled or that do not meet the requirements for a Safe Third Country, an approach that would be in line with 8 U.S.C. §1158.

In addition, the rule, to the extent it is not rescinded, should specify that asylum seekers who had “good cause” for irregular entry are exempt and should include a non-exhaustive list of examples of “good cause.” These should include examples included in UNHCR guidance on Article 31 such as “fear of being rejected or pushed back at the border;” “being unable to physically enter at an established port of entry;” “lacking information or knowledge about relevant procedures for claiming asylum upon entry;” “acting under instruction of a third party, such as a smuggler;” and “being traumatized or otherwise lacking capacity to identify or use lawful means to enter.”<sup>206</sup> In addition, the common scenarios referenced above – which fall squarely within the “good cause” parameters described by UNHCR and the requirements of Article 31 – should be specified as examples in order to assist in accurate and efficient adjudications and procedures. Thus, these specified “good cause” examples should also include,

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<sup>206</sup> UNHCR, “Guidelines on International Protection No. 14: Non-penalization of refugees on account of their irregular entry or presence and restrictions on their movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees,” September 23, 2024 (<https://www.refworld.org/policy/legalguidance/unhcr/2024/en/148632>).

for instance: asylum seekers who could not use the CBP One app due to language, illiteracy, financial, technological and other barriers; 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; and/or could not safely or reasonably travel to or access asylum at a port of entry or did not know of the ban of CBP One.

Such an approach better corresponds to the realities of refugees' situations than the ban's wildly deficient exceptions, and would help protect some refugees at risk under the ban. **Given the ban's unlawfulness and counterproductive inefficiencies, however, the better way forward is to rescind the ban and focus on real, effective, and humane measures to strengthen the immigration and asylum systems.**

Additionally, **should the agencies keep the ban in effect, they should modify it to not apply at the full asylum adjudication stage**, as it is counterproductive, thwarts the integration of refugees, and exacerbates backlogs by adding to the complexity of case adjudications. People who are potentially subject to the ban may have their immigration court cases adjudicated years after they entered the United States, subjecting them to potential deportation or permanent limbo without a path to status or stability even if they meet the definition of a refugee. These consequences are inhumane and counterproductive. For those refugees who are not denied relief altogether under the ban, the rule leaves them with inadequate forms of protection. People left with only withholding or CAT protection have an order of removal, no pathway to status or citizenship, cannot obtain a refugee travel document to allow them to travel abroad to a third country, cannot access certain benefits, and face barriers in obtaining and renewing their employment authorization.

## **VIII. Conclusion**

For the past year and a half, the agencies have persisted in implementing illegal asylum bans over widespread opposition and repeatedly claimed that the escalating human rights abuses were evidence that the bans were "working." Instead of heeding federal court decisions striking down the 2023 asylum ban and the 2018 Trump asylum ban, the agencies have now implemented and finalized a 2024 ban that takes the same illegal approach of barring people from asylum based on manner of entry.

In addition to ignoring court decisions, the agencies have disregarded the repeated objections of asylum officers tasked with carrying out the bans, the U.N. Refugee Agency charged with supervising the application of international refugee treaties, Members of Congress, NGOs and attorneys who assist people seeking safety, human rights monitors, and many other individuals and groups. The 2023 asylum ban continues to cause devastation and perpetrate violations of refugee law, including punishing refugees for their manner of entry by denying asylum and

depriving many of permanent status and a pathway to citizenship. Like its predecessor bans, the 2024 asylum ban is inflicting horrific abuses, fueling deportations to persecution and torture, and denying equitable access to asylum.

After a year and a half of horrors, the agencies must stop their relentless push to expand and entrench these asylum bans. It is long past time to abandon these unlawful bans and pursue humane solutions that comply with U.S. and international law, as Human Rights First has recommended in a series of detailed recommendations.<sup>207</sup> The agencies should instead take critical steps including providing equitable access to asylum at ports of entry without delays, upgrading asylum adjudication processes and addressing asylum backlogs and delays, rescinding counterproductive policies and regulations that punish and block refugees from protection, and finalizing rulemaking to safeguard protection of persecuted social groups and ensure compliance with international refugee law.<sup>208</sup>

Please find attached to this comment the following full versions of selected cited materials for the Departments' consideration.

1. Human Rights First, "Human Rights First Comment on Department of Homeland Security & Department of Justice, "Circumvention of Lawful Pathways," 88 FR 11704," March 28, 2023 (<https://humanrightsfirst.org/library/human-rights-first-comment-on-circumvention-of-lawful-pathways/>).
2. Human Rights First, "Human Rights First Comment on the Departments of Justice and Homeland Security's Interim Final Rule, *Securing the Border*, DHS Docket No. USCIS-2024-0006," July 2, 2024 (<https://humanrightsfirst.org/library/human-rights-first-comment-on-securing-border/>).
3. Hope Border Institute, Human Rights First, Immigrant Defenders Law Center, Kino Border Initiative, RAICES, and Refugees International, "Don't Tell Me About Your Fear," August 7, 2024 (<https://humanrightsfirst.org/library/dont-tell-me-about-your-fear/>).

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<sup>207</sup> Human Rights First, "Upholding And Upgrading Asylum: Recommendations for the Biden Administration," October 2023 ([https://humanrightsfirst.org/wp-content/uploads/2023/10/Upholding-and-Upgrading-Asylum\\_Recommendations.pdf](https://humanrightsfirst.org/wp-content/uploads/2023/10/Upholding-and-Upgrading-Asylum_Recommendations.pdf)); Human Rights First, "Walking the Talk: 2021 Blueprints for a Human Rights-Centered U.S. Foreign Policy," October 2020 ([https://humanrightsfirst.org/wp-content/uploads/2022/09/HRF\\_Standalone\\_Ch.3\\_v6.pdf](https://humanrightsfirst.org/wp-content/uploads/2022/09/HRF_Standalone_Ch.3_v6.pdf)); Human Rights First, "Swift Action to Improve Fairness and Enable timely Asylum Hearings in Immigration Courts," QApril 6, 2021 (<https://humanrightsfirst.org/library/swift-action-to-improve-fairness-and-enable-timely-asylum-hearings-in-immigration-courts/>).

<sup>208</sup> Human Rights First, "Upholding And Upgrading Asylum: Recommendations for the Biden Administration," October 2023 ([https://humanrightsfirst.org/wp-content/uploads/2023/10/Upholding-and-Upgrading-Asylum\\_Recommendations.pdf](https://humanrightsfirst.org/wp-content/uploads/2023/10/Upholding-and-Upgrading-Asylum_Recommendations.pdf)).

4. Florence Immigrant & Refugee Rights Project, Hope Border Institute, Human Rights First, Immigrant Defenders Law Center, Kino Border Initiative, Las Americas Immigrant Advocacy Center, National Immigrant Justice Center, National Immigration Law Center, Refugees International, and Women's Refugee Commission, "Six-Week Report: Implementation of the Biden Administration's June 2024 'Securing the Border' Asylum Ban," July 2024  
(<https://immigrantjustice.org/research-items/Biden-June-2024-asylum-ban-six-week-report>)
5. Human Rights First, "Two Weeks of the Biden Border Proclamation and Asylum Shutdown," June 2024  
(<https://humanrightsfirst.org/wp-content/uploads/2024/06/Two-Weeks-of-the-Biden-Border-Proclamation-Asylum-Shutdown.pdf>).
6. Human Rights First, "U.S. Asylum Bans Strand LGBTQI+ Refugees in Danger and Risk Return to Persecution," June 2024  
([https://humanrightsfirst.org/wp-content/uploads/2024/06/Factsheet\\_Asylum-Bans-Strand-LGBTQI-Refugees\\_final-formatted.pdf](https://humanrightsfirst.org/wp-content/uploads/2024/06/Factsheet_Asylum-Bans-Strand-LGBTQI-Refugees_final-formatted.pdf))
7. CGRS, Haiti Justice Partnership, UC College of the Law, San Francisco, and Haitian Bridge Alliance, "Precluding Protection: Findings from Interviews with Haitian Asylum Seekers in Central and Southern Mexico," May 8, 2024  
(<https://cgrs.uclawsf.edu/our-work/publications/precluding-protection-findings-interviews-haitian-asylum-seekers-central-and>).
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12. Human Rights First, “U.S. Border and Asylum Policies Harm Black Asylum Seekers,” February 12, 2024  
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(<https://humanrightsfirst.org/wp-content/uploads/2023/01/PretenseofProtection-21.pdf>).
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(<https://humanrightsfirst.org/wp-content/uploads/2024/09/POE-processing-recommendations-factsheet-09.16.24.pdf>).
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18. Human Rights First, “Upholding And Upgrading Asylum: Recommendations for the Biden Administration,” October 2023  
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