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Via Federal e-Rulemaking Portal  
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Acting Deputy Assistant Secretary for Immigration Policy  
Office of Strategy, Policy, and Plans  
Department of Homeland Security

Lauren Alder Reid  
Assistant Director  
Office of Policy  
Executive Office for Immigration Review  
Department of Justice

Re: *Securing the Border*, 89 FR 81156 (Oct. 7, 2024), DHS Docket No. USCIS-2024-0006

Dear Mr. Delgado and Ms. Reid:

The [Center for Gender & Refugee Studies](#) (CGRS) submits this comment in response to DHS Docket No. USCIS-2024-0006 *Securing the Border* (Oct. 7, 2024) (hereinafter “Final Rule” or “Rule”). We include the following outline to guide your review.

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## I. EXPERTISE OF THE CENTER FOR GENDER & REFUGEE STUDIES

CGRS was founded in 1999 by Professor Karen Musalo<sup>1</sup> following her groundbreaking legal victory in *Matter of Kasinga*<sup>2</sup> to protect the rights of asylum seekers fleeing gender-based violence. CGRS advocates with and for refugee women, children, LGBTQ+ individuals, and others who flee persecution and torture in their home countries. CGRS is an internationally respected resource, renowned for our knowledge of the law and ability to combine sophisticated legal strategies with policy advocacy and human rights interventions.

We take the lead on emerging issues, participating as counsel or *amicus curiae* in impact litigation to advance the rights of asylum seekers,<sup>3</sup> producing an extensive library of litigation support materials, maintaining an unsurpassed database of asylum records and decisions, and working in coalitions with refugee, immigrant, LGBTQ+, children's, and women's rights networks.<sup>4</sup> Since our founding, we have also engaged in international human rights work with a strong emphasis on El Salvador, Guatemala, Haiti, Honduras, and Mexico, to address the underlying causes of forced migration that produce refugees, including climate change and environmental disasters.<sup>5</sup>

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<sup>1</sup> Bank of America Foundation Chair in International Law; Professor & Director, Center for Gender & Refugee Studies, University of California College of the Law, San Francisco.

<sup>2</sup> 21 I&N Dec. 357 (BIA 1996).

<sup>3</sup> See, e.g., *Las Americas Immigr. Advoc. Ctr. v. DHS*, No. 1:24-cv-01702 (D.D.C. filed June 12, 2024); *Al Otro Lado v. Mayorkas*, Nos. 22-55988, 22-56036, 2024 WL 4551637 (9th Cir. October 23, 2024) (affirming illegality of metering policy and appropriateness of declaratory relief, and injunctive relief; vacating judgment on constitutional due process claim); *East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. July 25, 2023), appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024); *Immigr. Def. Law Ctr. v. Mayorkas*, No. CV 20-9893 JGBSHKX, 2023 WL 3149243, 18-19 (C.D. Cal., Mar. 15, 2023) (granting in part and denying in part Defendants' motion to dismiss challenge to implementation of MPP 1.0 and granting Plaintiffs' motion for class certification); *Huisha-Huisha v. Mayorkas*, 642 F. Supp. 3d 1 (D.D.C. Nov. 15, 2022) (vacating and setting aside Title 42 policy as arbitrary and capricious), cert. and stay granted sub nom. *Arizona v. Mayorkas*, 143 S. Ct. 478, 214 L. Ed. 2d 312 (2022), and vacated, No. 22-5325, 2023 WL 5921335 (D.C. Cir. Sept. 7, 2023); *Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966 (N.D. Cal. 2021) (preliminarily enjoining the Global Asylum rule); *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), vacated and remanded sub nom. *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842 (2021), and vacated as moot sub nom. *Innovation Law Lab v. Mayorkas*, 5 F.4th 1099 (9th Cir. 2021); *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020); *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. July 2, 2018); *U.T. v. Barr*, 1:20-cv-00116-EGS (D.D.C.); *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021); and *Matter of A-C-A-A-*, 28 I&N Dec. 351 (A.G. 2021).

<sup>4</sup> See, e.g., the [Welcome With Dignity](#) campaign.

<sup>5</sup> See, e.g., Center for Gender & Refugee Studies (CGRS), [Precluding Protection: Findings from Interviews with Haitian Asylum Seekers in Central and Southern Mexico](#) (2024); ["Manifesting" Fear at the Border: Lessons from Title 42 Expulsions](#) (2024) (hereinafter CGRS, Manifesting Fear); [Honduras:](#)

We have particular expertise in expedited removal, one of the processes affected by this Final Rule. Professor Musalo co-authored the first study on the implementation of expedited removal, as well as several follow-up reports.<sup>6</sup> A co-drafter of this comment, Kate Jastram, was one of three experts appointed by the United States Commission on International Religious Freedom for its Congressionally authorized report on asylum seekers in expedited removal.<sup>7</sup>

As a critical part of our mission, CGRS serves as a resource to decision makers to promote laws and public policies that recognize the legitimate asylum claims of those fleeing persecution and torture. Our goal is to create a U.S. framework of law and policy that respects the rights of refugees and aligns with international law. It is in furtherance of our mission that we submit this comment.

## **II. GENERAL OBSERVATIONS ON THE FINAL RULE AS WELL AS ON THE COMPANION CIRCUMVENTION OF LAWFUL PATHWAYS FINAL RULE**

Before turning to the specific questions posed in the Final Rule, we express our deep dismay that the administration has chosen to flout our international treaty obligations, longstanding statutory law, and well-established agency practice, all of which reflect deeply held American values of offering safe haven to the persecuted.

We are aware that the administration is responding to an unprecedented level of toxic, divisive political rhetoric about the border, people seeking asylum, and immigrants generally. Yet we implore the Departments not to accept the terms of the debate as defined by the loudest and most malicious voices, and instead to show real leadership by demonstrating that the United States can have an orderly asylum process that honors our commitment to refugees.

In this regard, we note that – once again – the Office of the United Nations High Commissioner for Refugees (UNHCR) has expressed its commitment to “collaborating with the U.S. in support of much needed reforms to enhance the fairness, efficiency, and

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[Climate Change, Human Rights Violations, and Forced Displacement](#) (2023); [Far from Safety: Dangers and Limits to Protection for Asylum Seekers Transiting Through Latin America](#) (2023).

<sup>6</sup> Karen Musalo *et al.*, “Report on the First Year of Implementation of Expedited Removal,” *Markkula Center for Applied Ethics* (1998). See also Musalo *et al.*, “Report on the Second Year of Implementation of Expedited Removal,” *Center for Human Rights and International Justice* (May 1999); Musalo *et al.*, “Report on the First Three Years of Expedited Removal” (2000); Musalo *et al.*, “Evaluation of the General Accounting Office’s Second Report on Expedited Removal,” *Center for Human Rights and International Justice* (Oct. 2000).

<sup>7</sup> U.S. Commission on International Religious Freedom (USCIRF), [Report on Asylum Seekers in Expedited Removal](#) (2005).

capacity of its asylum and border management systems.”<sup>8</sup> We urge the administration to bear in mind the global impact of closing our border. The countries that host the vast majority of the world’s refugees will rightly ask why they should continue to do so when one of the wealthiest and most powerful nations in the world is no longer willing.

Because so many of the recommendations we made in earlier stages of the rulemaking process have been dismissed or disregarded, we reiterate and incorporate our comments submitted in response to the Securing the Border Interim Final Rule,<sup>9</sup> the Circumvention of Lawful Pathways Final Rule,<sup>10</sup> and the Circumvention of Lawful Pathways Proposed Rule.<sup>11</sup>

Put simply, the rules fail to comply with our international legal commitments not to return people to persecution or torture. The Departments assert that they continue to uphold our *non-refoulement* obligations under international law, Rule 81159, yet this statement lacks all credibility. UNHCR itself has determined that the Final Rule “severely curtails access to protection” and that “[l]imiting or blocking such access is a violation of international refugee law.”<sup>12</sup>

Further, the Final Rule is a clear violation of Article 31 of the Refugee Convention, which prohibits penalizing refugees based on their irregular entry or presence. UNHCR recently released guidance specifying that Article 31 extends to “any discriminatory treatment or procedural detriment to the refugee, including denial, obstruction, delay or limits on access to the territory or asylum procedure.”<sup>13</sup> It is therefore clear that the Final Rule fails to comply with the United States’ obligations under international law.

### **III. THE THRESHOLD FOR LIFTING APPLICATION OF THE SECURING THE BORDER RULE SHOULD NOT BE INCREASED**

Turning to the specific questions posed by the Departments to the public, we begin by stating our opposition to the heightened threshold for lifting restrictions based on “emergency border circumstances.” Any expansion of this already flawed and harmful rule

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<sup>8</sup> UNHCR, [News Comment: UNHCR Reiterates Concern About US Asylum Regulations](#), Sept. 30, 2024, (hereinafter UNHCR News Comment), attached.

<sup>9</sup> See CGRS, [Comment on the Securing the Border Interim Final Rule 89 FR 48710](#) (July 2, 2024), USCIS Docket No. USCIS-2024-0006, Comment ID USCIS-2024-0006-0779, Tracking Number ly6-h3qd-aag2.

<sup>10</sup> See CGRS, [Comment on the Circumvention of Lawful Pathways Final Rule](#) (June 13, 2023), Comment ID USCIS-2022-0016-51965, Tracking Number liw-8k03-9ija.

<sup>11</sup> See CGRS, [Comment on the Circumvention of Lawful Pathways Proposed Rule](#) (Mar. 27, 2023), Comment ID USCIS-2022-0016-12612, Tracking Number lfr-q1e8-fya2.

<sup>12</sup> UNHCR News Comment, *supra* note 8.

<sup>13</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](#), HCR/GIP/24/14 (Sept. 23, 2024), para. 28, attached.

will only result in greater restrictions on accessing asylum and higher rates of *refoulement*, contravening both domestic and international law.

The Final Rule raises the threshold for lifting emergency border circumstances in two ways. First, as outlined in the Presidential Proclamation of September 27, 2024,<sup>14</sup> emergency border circumstances will now remain in place until there have been 28 consecutive days in which the 7-day average for encounter numbers is 1,500 or lower, followed by a 14-day waiting period. Proclamation 80352. Second, unaccompanied children from noncontiguous countries were previously not included in the encounter numbers for the purpose of determining emergency border circumstances. Under the September 27 Proclamation and accompanying Final Rule, these children will now be included in the calculation of encounter numbers. Proclamation 80352.

As we discussed in our comment on the Interim Final Rule, the original threshold for triggering emergency border circumstances was arbitrary, and the temporary nature of emergency border circumstances was illusory. The same arguments apply here, with even greater force. As we noted in our previous comment, “[e]ven if the number of encounters dropped to the level where the Rule could be suspended, the Departments could well issue a new Interim Final Rule to keep the procedure in place.”<sup>15</sup> We are frustrated to see that the Departments have taken other steps to achieve the same goal. Further, the Departments’ continued complaints about alleged operational strain, Rule 81167, do not justify the expansion put in place by the Final Rule. The obligation of *non-refoulement* does not hinge upon the purported capacity, or lack thereof, of Customs and Border Protection personnel to process individuals fleeing harm and cannot be ignored simply because large numbers of people are seeking protection.

The heightened threshold for lifting emergency border circumstances will only exacerbate the problems that have resulted from the Interim Final Rule. Numerous legal services and human rights organizations have documented the harsh consequences of the Interim Final Rule on people seeking safety.<sup>16</sup> These impacts include requiring asylum seekers to wait for a CBP One appointment for up to nine months in Mexico, where they are targeted for harm; individuals being denied equitable access to asylum due to language and other barriers to using CBP One; and the summary deportation of individuals seeking safety to

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<sup>14</sup> Presidential Proclamation 10817, September 27, 2024, 89 FR 80351 (Oct. 2, 2024) (“Proclamation”), *amending* Presidential Proclamation 10773, June 3, 2024, 89 FR 48487 (June 7, 2024).

<sup>15</sup> CGRS, Comment on Securing the Border Interim Final Rule, *supra* note 9, at 18.

<sup>16</sup> See e.g., National Immigrant Justice Center, et al., [Six-Week Report: Implementation of the Biden Administration’s June 2024 “Securing the Border” Asylum Ban](#) (July 2024), attached; Human Rights First, et al., [“Don’t Tell Me About Your Fear”: Elimination of Longstanding Safeguard Leads to Systematic Violations of Refugee Law](#) (Aug. 2024) (hereinafter HRF, “Don’t Tell Me About Your Fear”), attached.

countries of feared persecution and torture without a fear screening or as a result of a deficient screening under the Rule. Expanding the applicability of emergency border circumstances entrenches the Interim Final Rule and its resulting harms, making it even more difficult for people seeking safety to access the legal process they are due under U.S. and international law.

#### **IV. THE GEOGRAPHIC AND TEMPORAL REACH OF THE CIRCUMVENTION OF LAWFUL PATHWAYS RULE SHOULD NOT BE EXPANDED, NOR SHOULD THE APPLICABILITY OF ITS PRESUMPTION AGAINST ASYLUM ELIGIBILITY BE EXTENDED**

We also oppose any attempts to extend or expand the May 2023 Circumvention of Lawful Pathways Rule. CGRS submitted comments opposing the Circumvention of Lawful Pathways Rule, and we reiterate and re-submit those concerns here.<sup>17</sup>

In the Final Rule, the Departments indicate that they are contemplating indefinitely extending the Circumvention of Lawful Pathways Rule. Rule 81274. At the time they proposed the Circumvention of Lawful Pathways Rule, the Departments repeatedly told the public that it was temporary and provided in the rule that it would not apply to people who come to the United States after May 11, 2025. The Departments are also considering expanding the rule to punish and deny asylum to people who cross into the United States at southern coastal borders (whereas the rule currently applies to people who enter at the southwest land border or adjacent coastal borders), and to apply the rule to people who enter by sea regardless of whether they traveled through a third country. Rule 81273. Making the rule permanent, expanding its geographic reach to block or remove even more people seeking safety, and pursuing any action short of rescinding the unlawful rule<sup>18</sup> will add to the mounting human rights violations, instances of *refoulement*, and other abuses and harms inflicted on people in need of protection.

We particularly highlight our concerns regarding the application of the Circumvention of Lawful Pathways Rule beyond the border, in INA § 240 proceedings and to people who apply for asylum affirmatively. As we stated in our comment on the Circumvention of Lawful Pathways Proposed Rule, the application of the rule beyond the context of expedited removal would likely create a unique set of challenges, including confusion, delays, and the rejection of otherwise-meritorious claims.<sup>19</sup> We reiterated these concerns in

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<sup>17</sup> See CGRS, Comment on Circumvention of Lawful Pathways Proposed Rule, *supra* note 11; CGRS, Comment on Circumvention of Lawful Pathways Final Rule, *supra* note 10.

<sup>18</sup> *East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1043, 1054 (N.D. Cal. July 25, 2023) (holding the rule unlawful, vacating the rule, and remanding it to the agency), appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024).

<sup>19</sup> CGRS, Comment on Circumvention of Lawful Pathways Proposed Rule, *supra* note 11, at 84–85.

our comment on the Securing the Border Interim Final Rule, noting that the interplay of the two rules would only compound these problems.<sup>20</sup> The Departments themselves acknowledge in this Final Rule that it will result in delays in reviewing asylum claims, Rule 81211, and similarly acknowledged the likelihood of such delays and confusion in the final Circumvention of Lawful Pathways Rule, 88 FR 31314, 31361.

These concerns have unfortunately been borne out. The minimal protections and exceptions that the Circumvention of Lawful Pathways Rule provides are woefully insufficient and are not being appropriately followed. As an organization that provides technical assistance to attorneys and other representatives, CGRS is aware of multiple instances of immigration judges and DHS attorneys misunderstanding and misapplying exceptions to the Circumvention of Lawful Pathways Rule, most notably the family unity provisions of the Rule.<sup>21</sup>

Attorneys and courtroom observers report that this deficiency is particularly pronounced and detrimental for individuals and families appearing in immigration court *pro se*, whose cases are often adjudicated without any inquiry into whether the family unity exception or any of the rebuttal grounds apply. Extending the Circumvention of Lawful Pathways Rule would only exacerbate these issues into perpetuity, and result in continued denial of meritorious claims that would be granted but for misunderstanding on the part of judges and DHS attorneys. The life and death nature of protection claims, and the United States' *non-refoulement* obligations under domestic and international asylum law, forbid such a result.

We strongly oppose the continued application of the Circumvention of Lawful Pathways Rule and urge the Departments to rescind the rule in its entirety or, at a minimum, adhere to the previously set sunset date. However, should the Rule be extended, it is essential that the Departments clarify and strengthen the existing exceptions, including making clear to adjudicators that rebuttal grounds can be raised in INA § 240 proceedings and providing clear guidance to all involved in adjudications on how to apply those grounds and the family unity exception. We also request that, regardless of whether the Departments extend the Circumvention of Lawful Pathways Rule, all DHS and DOJ guidance materials that are used to train or advise CBP or ICE officials, asylum officers, and immigration judges on the application of the Rule be made available to the public.<sup>22</sup>

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<sup>20</sup> CGRS, Comment on Securing the Border Interim Final Rule, *supra* note 9, at 40–41.

<sup>21</sup> See CGRS, *Practice Advisory: Arguing Against the Circumvention of Lawful Pathways Rule* (March 2024).

<sup>22</sup> The materials requested include but are not limited to the following documents cited in the Final Rule: 1. CBP, Off. of Field Operations, Muster, Documenting Noncitizen Asylum or Fear Claims or Fear Manifestations (July 18, 2024); 2. Memorandum for Dirs., Field Operations, & Dir., Preclearance Operations, Off. of Field Operations, from Acting Exec. Dir., Admissibility & Passenger Programs, Off.



## **V. CGRS'S REPORT ON "MANIFESTING" FEAR AT THE BORDER: LESSONS FROM TITLE 42 EXPULSIONS CONTAINED VALUABLE INFORMATION AND SHOULD NOT HAVE BEEN DISREGARDED**

CGRS's report, *"Manifesting" Fear at the Border: Lessons from Title 42 Expulsions*, was cited by various commenters on the Interim Final Rule and is discussed by the Departments in the Final Rule. Rule 81237. The Departments disregarded our report in part because of the inability of the Departments to independently verify each individual's testimony.

As discussed in the report, in-person interviewing through an established survey instrument was the primary technique used to gather information from asylum seekers.<sup>23</sup> Interviewing is a widely accepted human rights technique and is in fact one of the most common methods for gathering information on human rights violations.<sup>24</sup> Further, repetition of the same or similar facts about incidents tends to confirm rather than undermine their veracity. As shown in the report, various individuals reported experiencing very similar treatment by CBP, which lends credibility to each individual's statements. Further, the concerns expressed by commenters and laid out in the report with respect to Title 42 have unfortunately been realized in the context of the Securing the Border Interim Final Rule, with numerous organizations and asylum seekers reporting that CBP officials frequently ignore or reject expressions of fear.<sup>25</sup>

It was arbitrary and capricious for the Departments to disregard the information contained in our report, which gives us reason to doubt the adequacy of the Departments' review of comments submitted.

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of Field Operations, CBP, Re: Processing Expedited Removal Cases & attach. (Muster); 3. CBP, Securing the Border IFR and Presidential Proclamation CBP Manifesting Fear Guidance (requiring officers and agents to refer any noncitizen who manifests a fear for a credible fear interview with USCIS); 4. Memorandum for All Chief Patrol Agents & All Exec. Directorates, from Jason D. Owens, Chief, USBP, Re: Processing Guidelines for Noncitizens Described in Presidential Proclamation, Securing the Border and Interim Final Rule, Securing the Border at 4-5 (June 4, 2024); 5. Memorandum for Exec. Dirs., Headquarters, & Dirs., Field Operations, Off. of Field Operations, from Ray Provencio, Acting Exec. Dir., Admissibility & Passenger Programs, Off. of Field Operations, CBP, Re: Implementation of Presidential Proclamation and Interim Final Rule, Securing the Border attach. at 3-5 (June 4, 2024) (Muster); 6. ICE, Broadcast message for Field Office Directors and Deputy Field Office Directors, from Asst. Dir. for Field Operations, Re: Procedures for Processing Noncitizens that Fall Under the Presidential Proclamation and Interim Final Rule (June 7, 2024).

<sup>23</sup> CGRS, *Manifesting Fear*, *supra* note 5.

<sup>24</sup> OHCHR, *Chapter 11: Interviewing*, in "Manual on Human Rights Monitoring" (2011), p. 4, attached.

<sup>25</sup> HRF, *"Don't Tell Me About Your Fear," supra* note 16; Emily Bregel, *Border Agents Ignoring Fear Claims, Migrants Say, in Violation of Biden Order Exception*, Ariz. Daily Star (updated Sept. 25, 2024).

## VI. CONCLUSION

For the foregoing reasons, and in the interest of justice and compliance with the United States' domestic and international *non-refoulement* obligations, we urge the Departments to rescind this Rule and the Circumvention of Lawful Pathways Rule in their entirety.

We appreciate the opportunity, although unnecessarily truncated, to submit this comment on the Rule. Should you have any questions, please contact Kate Jastram at [jastramkate@uclawsf.edu](mailto:jastramkate@uclawsf.edu) or 415-636-8454.

Sincerely,

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Director of Policy & Advocacy

Anne Peterson  
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