March 27, 2023

Via Federal e-Rulemaking Portal
https://www.regulations.gov

Daniel Delgado
Acting Director, Border and 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: *Request for Comments: Circumvention of Lawful Pathways,* 88 Fed. Reg. 11704 (February 23, 2023)

DHS Docket No. USCIS-2022-0016

Dear Mr. Delgado and Ms. Reid:

The Center for Gender & Refugee Studies (CGRS) submits this comment in response to DHS Docket No. USCIS-2022-0016, *Request for Comments: Circumvention of Lawful Pathways (February 23, 2023)* (hereinafter "Proposed Rule" or "Rule"). We include the following outline to guide your review.

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I. INTRODUCTION

The Department of Justice (DOJ) and the Department of Homeland Security (DHS) indicate that they particularly welcome comments on a short list of issues. Rule 11708. We note that the list fails to include the foundational question of whether the Rule should go into effect at all and instead frames the opportunities for comment with the Rule as a given.

As explained in this comment, we recommend that the Rule be withdrawn and fully reconsidered in light of U.S. and international law, in the collaborative process called for in Executive Order 14010.[1] But to ensure that our response is noted in relation to the specific prompt, our answer to the question of whether the Rule appropriately provides migrants a meaningful and realistic opportunity to seek protection is: No.

II. EXPERTISE OF THE CENTER FOR GENDER & REFUGEE STUDIES

CGRS was founded in 1999 by Professor Karen Musalo[2] following her groundbreaking legal victory in *Matter of Kasinga*[3] to meet the needs of asylum seekers fleeing gender-based violence. CGRS protects the fundamental human rights of refugee women, children, LGBTQ+ individuals, and others who flee persecution and torture in their home countries. CGRS is an internationally respected resource for gender-based, as well as other bases for asylum, 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, participate as counsel or *amicus curiae* in impact litigation to advance the rights of asylum seekers,[4] produce an extensive library of litigation support materials,

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[1] Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, Sec. 4(i) (Feb. 2, 2021) (hereinafter Executive Order 14010 or Executive Order), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/.

[2] Bank of America Foundation Chair in International Law; Professor & Director, Center for Gender & Refugee Studies, University of California College of the Law, San Francisco.

[3] 21 I&N Dec. 357 (BIA 1996).

[4] *See, e.g.*, *Immigrant Def. Law. Ctr. v. Mayorkas,* No. 20-9893 JGB (SHKx), slip op. at 18-19 (C.D. Cal., Mar. 15, 2023), *available at* https://cgrs.uchastings.edu/content/district-court-order-granting-part-and-denying-part-defendants%E2%80%99-motion-dismiss-and-granting (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*, --- F.Supp.3d ----, 2022 WL 16948610 (D.D.C. Nov. 15, 2022) (vacating and setting aside Title 42 policy as arbitrary and capricious); *Al Otro Lado v. Mayorkas*, 2022 WL 3135914 (S.D. Cal. Aug. 5, 2022) (declaring unlawful Defendants' refusal to provide inspection or asylum processing to noncitizens who have not been admitted or paroled and who are in the process of arriving in the United States at Class A ports of

maintain an unsurpassed database of asylum records and decisions, and work in coalitions with refugee, immigrant, LGBTQ+, children's, and women's rights networks.[5] 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.[6]

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 responds to the rights of refugees and aligns with international law. It is in furtherance of our mission that we submit this comment.

III. THE COMMENT PERIOD OF 30 DAYS IS INSUFFICIENT GIVEN THE IMPORTANCE OF THE RULE AND THE SWEEPING CHANGES IT MAKES TO ASYLUM LAW AND PROCEDURE

Before turning to the substance of the Proposed Rule, we register our strong objection that, due to the failure of the Departments to allow the usual period for comments, we have had insufficient time to analyze its provisions fully, to engage in meaningful research on the many countries referenced in the Rule as well as other potential countries of transit, and to consult with other stakeholders including the United Nations High Commissioner for Refugees (UNHCR), the American Federation of Government Employees (AFGE) Local 1924, the Roundtable of Former Immigration Judges, organizations working to assist asylum seekers on both sides of the U.S.–Mexico border, groups of refugees and asylum seekers, and other legal and country conditions experts in Central and South America.

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entry), *appeal docketed*, No. 22-55988 (9th Cir. Oct. 25, 2022); *Pangea Legal Servs. v. DHS*, No. 20-cv-09253, 2021 WL 75756 (N.D. Cal. Jan. 8, 2021) (preliminarily enjoining the Global Asylum rule); *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *vacated as moot and remanded,* No.3:19-cv-00807-RS (N.D. Cal.); *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).

[5] *See, e.g.*, the Welcome With Dignity campaign, https://welcomewithdignity.org/.

[6] *See, e.g.*, CGRS, *Analyzing Asylum Claims for Individuals Fleeing Climate Change or Environmental Disasters* (2023); Karen Musalo, *El Salvador: Root Causes and Just Asylum Policy Responses*, 18 Hastings Race & Poverty L.J. (2021), https://repository.uchastings.edu/hastings_race_poverty_law_journal/vol18/iss2/4/; CGRS, Haitian Bridge Alliance, and IMUMI, *A Journey of Hope: Haitian Women's Migration to Tapachula,* Mexico (2021), https://cgrs.uchastings.edu/sites/default/files/A-Journey-of-Hope-Haitian-Womens-Migration-to%20-Tapachula%20%281%29.pdf.

We also note that as of today, March 27, 2023, the final day allowed for comments to be submitted, we are aware that the regulations.gov website is not functioning reliably. Amy Grenier posted a screenshot of the regulations.gov website on her Twitter account dated March 26, 2023 showing that she was unable to upload her comment. She later posted that she was able to upload her comment. One of the authors of this comment just checked regulations.gov at approximately 6:30am Pacific Time. It shows a banner stating: "Regulations.gov is experiencing delays in website loading. We apologize for the inconvenience. While we are working on a fix, please try to refresh when you encounter slow responses or error messages."

Nor are these problems limited to the last few days. We are also aware of at least one problem earlier in the comment period, when an attorney contacted us on March 21, 2023, to say she was unable to upload her comment on the regulations.gov website and asked for our advice. This attorney wrote that "I am getting repeated server errors when I try to upload my comment."[7] These technical problems make it even less likely that the public is able to participate in the rulemaking process during the shortened comment period.

As explained more fully below, the Departments had ample time to prepare for the end of Title 42 expulsions yet failed to publish this Rule in a timely manner; the rule-making process did not follow Executive Order 14010's mandate to consult with affected organizations; and our organization did not have sufficient time to prepare this comment.

A. The Departments Had Ample Time to Prepare for This Policy Change Yet Failed to Issue the Notice of Proposed Rulemaking in a Timely Manner

The Departments attempt to justify their rush to regulate by pointing to current and anticipated "exigent" circumstances. Rule 11730. "Exigent" means "requiring immediate aid or action."[8] Yet the administration has had years to prepare for the entirely predictable end of Title 42 expulsions.

Even before taking office, the Biden team was both aware of the need for robust policy planning and, to the best of our knowledge was engaged in that process. A coalition of asylum law experts and advocates, including CGRS, spent much of 2020 writing the humanitarian chapter of the Immigration Hub's so-called "Big Book," a compendium of asylum and immigration priorities and recommendations that was prepared for the benefit of whatever administration took office in January 2021. The "Big Book" included detailed recommendations for ending expulsions under Title 42 and resuming asylum processing at

[7] Private email dated March 21, 2023, on file with CGRS.
[8] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/exigent.

the border. In addition, many organizations, including CGRS, offered their advice and expertise, including on ending Title 42 expulsions, to the incoming administration.[9]

The transition team itself worked on policy options for the end of Title 42 expulsions, an effort we are aware of as one of our directors took part in that process in her personal capacity.

Further demonstrating the administration's awareness of the need for planning, within days of taking office, the president issued Executive Order 14010, which called for restoring and enhancing asylum processing at the border, specifically including review of expulsions under Title 42.[10] The administration then formally moved to end Title 42 expulsions in April 2022, almost one year ago. The Title 42 policy has also been successfully challenged in federal court, further putting the administration on notice. Most recently, a district court vacated the entire policy in November 2022. Though higher court intervention imposed a lengthier stay of the order ending the policy, the administration had initially asked only for a five-week grace period.

On January 5 of this year, DHS announced the policy now published in this Proposed Rule, yet failed to provide key details of its substance, noting only that exceptions to the rebuttable presumption "will be specified."[11] In response to the announcement, nearly 300 advocacy organizations, including ours, expressed profound concerns about the policy change, imploring the administration to reverse course and not publish the Proposed Rule.[12]

Many organizations including our own also sought additional information about what the Proposed Rule would say, in order to better formulate a comment if it was indeed issued. Instead, the Departments withheld the Proposed Rule for more than six more weeks, not making it available until February 21, and then provided only 30 days for comment. To make matters worse, the Proposed Rule includes a caveat that it may go into effect via a temporary or interim final rule prior to the anticipated end of Title 42 expulsions on May

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[9] CGRS, *Asylum Priorities for the Next Presidential Term* (Nov. 2020) p. 3, https://cgrs.uchastings.edu/sites/default/files/CGRS%20Asylum%20Priorities%20-%20Next%20Term_Nov.%202020.pdf.

[10] *See* Executive Order 14010, *supra* n.1.

[11] DHS, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.

[12] Human Rights First, *Rights Groups Oppose Biden Plan to Resurrect Asylum Bans* (Jan. 19, 2023), https://humanrightsfirst.org/wp-content/uploads/2023/01/Letter-to-President-Biden-re_-asylum-ban-NPRM-1.pdf.

11, thus rendering the required notice-and-comment period a mere box-ticking exercise. Rule 11708, 11727.

B. The Departments Appear Not to Have Engaged in Consultation and Planning Directed by Executive Order Prior to Publishing the Notice of Proposed Rulemaking, and the Foreshortened Notice-and-Comment Period Indicates that the Departments Will Not Now Engage in Such Consultation and Planning

In Executive Order 14010 the president mandated that federal departments "shall promptly begin consultation and planning with international and non-governmental organizations to develop policies and procedures for the safe and orderly processing of asylum claims at United States land borders."[13] Some non-governmental organizations are, like CGRS, legal experts. Others work along the border or in the interior of the country, assisting people seeking asylum with social, medical, and legal services. Still other organizations are led by refugees and asylum-seekers.

CGRS is not aware of any consultation or planning at any point in the two years between February 2021, when the Executive Order was issued, and February 2023, when the Proposed Rule was published. Nor does the Rule refer to any such consultations, even though it makes representations and engages in speculation about the capacity of local communities. Rule 11714-16.

The Departments' failure to follow the mandate of the Executive Order is particularly confounding since many of the most knowledgeable stakeholders have made their desire to assist crystal clear. We note in particular that UNHCR has repeatedly emphasized that it:

> stands ready to continue supporting the U.S. government in grappling with these complex challenges, with a view towards building a more resilient, adaptable, fair, and efficient domestic asylum system that upholds international norms and standards.[14]

Similarly, AFGE Local 1924 urged that the administration:

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[13] *See* Executive Order, *supra*, n.1.

[14] *UNHCR Comment* on the current Proposed Rule (Mar. 20, 2023), p. 2, https://www.regulations.gov/comment/USCIS-2022-0016-7428. *See also*, UNHCR's offer of "the technical assistance we have acquired around the world to support the United States in finding solutions to the challenges it faces today in maintaining an asylum system that is safe, fair and humane." *Statement by UN High Commissioner for Refugees Filippo Grandi on U.S. asylum changes* (July 9, 2020), https://www.unhcr.org/news/press/2020/7/5f0746bf4/statement-un-high-commissioner-refugees-filippo-grandi-asylum-changes.html.

> must make sure that the individuals tasked with implementing policy have a voice in crafting new regulations and that RAIO [Refugee, Asylum and International Operations Directorate] staff (and the Union that represents them) play an integral role in helping to formulate policies as the individuals most knowledgeable about on the ground operations.[15]

Because the Departments have given themselves such a short timeframe to review comments and finalize the Rule, aiming for May 11 if not sooner, we assume that they will not at this point engage in consultation and planning as directed by the Executive Order.

For all these reasons, as well as the additional reasons specific to our organization set forth below, CGRS joined over 170 other organizations in seeking an extension of time to comment on the Proposed Rule.[16] The Departments responded that they did not intend to extend the comment period.[17] The only reason given—that they intend to finalize the Rule before Title 42 expulsions end—simply underscores their failure to engage in a serious rulemaking process by revealing that the outcome is predetermined.

C. CGRS Has Not Had Sufficient Time to Formulate a Comment Fully Responsive to the Scope of the Proposed Rule

In addition to the reasons for seeking a minimum of 60 days to comment as outlined in the organizational sign-on letter referenced above, we note two additional reasons that make it impossible for our organization to comment as robustly as we would like to in this short period of time: our capacity limitations, and the scope and complexity of the rule. With respect to the latter, we provide three specific examples of topics for comment that we have not been able to develop fully: country conditions research, assessment of the Customs and Border Protection (CBP) One app, and consultation on the notion of an acute medical emergency.

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[15] American Federation of Government Employees Local 1924, *Union White Paper: Rebuilding the USCIS Refugee, Asylum, and International Operations (RAIO) Directorate* (hereinafter "Union White Paper") (Nov. 23, 2020), p. 11, https://drive.google.com/file/d/1Cz9xyxVaEsunCALdQ_GUb13s80hBduk/view.

[16] *172 Organizations Call for Extension on Public Comment Period for Proposed Asylum Ban*, (Mar. 1, 2023), https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2023-03/Biden%20Asylum%20Ban%20-%20Extension%20letter%20to%2030-days%20comment%20period%20FINAL.pdf.

[17] Letter from Lauren Alder Reid, Assistant Director for Policy, Executive Office for Immigration Review, to Azadeh Erfani, Heartland Alliance, dated March 14, 2023; letter from Brenda F. Abdelall, Assistant Secretary, Office of Partnership and Engagement, DHS, to Azadeh Erfani, dated March 24, 2023, on file with CGRS.

1. Our organization has limited capacity to respond to the Proposed Rule

CGRS is based at the University of California College of the Law, San Francisco. Like most law school centers, we must raise nearly all of our own funding from outside sources. Accordingly, we have only a limited number of staff who regularly work at or beyond capacity. The principal drafters of this comment have had numerous other responsibilities during the comment period, including—in furtherance of our mission to deliver technical assistance and training to attorneys across the nation—the preparation and delivery of a webinar on March 9, 2023 to nearly 800 attorneys and other advocates to inform them about the content of the Proposed Rule and how they could submit a comment.

As described below, CGRS staff also traveled to the U.S.-Mexico border to interview asylum seekers regarding their experiences utilizing the CBP One app, a lynchpin of the administration's Proposed Rule. An understanding of the app is necessary for analyzing the Rule's legal soundness.

In addition, as a key founding member of the #WelcomeWithDignity campaign, we have devoted many hours to increasing general public education and awareness of the Proposed Rule, by working on our own or in coalition with other organizations to write and place op-ed pieces[18] and blog posts,[19] record videos, stage public rallies, organize press calls, craft messaging guidance, set up a click-to-comment portal,[20] and edit draft template comments. All of these necessary activities have taken time away from engaging in the kind of extensive research and analysis required for commenting on this Proposed Rule.

During the truncated comment period, our Center had one previously scheduled full-day, off-site, in-person, mandatory, annual staff strategic planning retreat, which involved cross-country travel for at least one member of our team who is involved in analyzing the Proposed Rule. There was also one law school staff holiday; in addition, there were five days of spring break holiday for the two faculty members on our staff and our student law clerks. Given the extremely short time period for comments, two-plus full working days out of the office were a significant drawback.

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[18] Karen Musalo*, Op-Ed: Enough with the political games. Migrants have a right to asylum*, Los Angeles Times (Jan. 6, 2023), https://www.latimes.com/opinion/story/2023-01-06/biden-border-immigration-asylum-title-42.

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

[20] *See Add Your Comment: Tell the Biden Administration Not to Bring Back Trump's Asylum Ban*, https://immigrationjustice.quorum.us/campaign/44910/.

2. The scope and complexity of the Rule require more than 30 days to address

We can confidently state that fully assessing not only the novel legal elements, but also the numerous assertions contained in the Proposed Rule, requires more than 30 days. CGRS has attempted to fact-check and provide context for as many of the Rule's selectively sourced assertions as possible, in the limited time available to us. However, we have struggled with the astonishing breadth of the subject areas covered by the Rule.

These contentious subject areas include: the historical and projected numbers of asylum seekers at the southwest border and the reasons why such numbers may rise or fall over a period of time going back to the 1980s, Rule 11708; the significance of the gap between the number of people who pass credible fear interviews and the number granted protection and reasons that would explain that gap, Rule 11716; Congressional intent in enacting standards used in credible fear interviews, Rule 11738; the change in standards and procedures used in credible fear interviews, which reverse the administration's own asylum processing interim final rule from last year, Rule 11742; the re-litigation of settled law regarding bans enacted by the previous administration that were found to be illegal (*e.g.,* "[T]he Ninth Circuit's conclusion … is incorrect[,]" Rule 11739–40, *see generally*, Rule 11738–42; the characterizations of asylum law and procedures in numerous countries cited in the Rule that the Departments appear to view as acceptable safe third countries, Rule 11721–23, 11730; and human rights conditions for asylum seekers on the ground in those and other transit countries.

In addition to assessing the overall narrative and framing used by the Departments to justify the Proposed Rule, CGRS has attempted to analyze the Rule's many novel legal concepts for their compliance with existing U.S. law and treaty obligations. These include the imposition of a presumption of ineligibility for asylum for large numbers of people, as well as the exceptions provided, including the standard for showing that use of the CBP One app was not possible, despite its well-documented drawbacks, and the requirement of a denial of protection in another country. We have also attempted to understand and analyze the *per se* grounds of rebuttal, including the notion of an acute medical emergency, and an imminent and extreme threat to life or safety.

Three specific examples illustrate our need for more time to comment.

a. Insufficient time to conduct research on asylum procedures and human rights conditions for asylum seekers in countries of transit

The Proposed Rule contains numerous assertions regarding the asylum or immigration systems in numerous countries, Rule 11721. If we had had an adequate period of time to submit our comment, we could have more fully addressed the actual protection situation in those countries. This would involve, among other things, translating the Proposed Rule into Spanish and Portuguese in order to reach out to our network of experts in the region and seek their views on the accuracy of the Rule's descriptions with respect to each of the countries discussed in the Proposed Rule, as well as other common transit countries.

CGRS does a great deal of work with qualified country specialists in Central and South America in order to obtain expert declarations for our own litigation and for attorneys who represent asylum seekers, as well as to support our Expert Witness Database. We know from experience that working with such experts is a time-consuming process.

At the outset, although we have a network of regional experts, we still need to identify the specialists with the most relevant and current expertise on the issues raised by the Proposed Rule. This involves researching the issues, ascertaining the potential experts' scope of expertise, and conducting outreach in English, Spanish, and Portuguese. We need to conduct preliminary research for each country of transit's asylum system and human rights conditions for asylum seekers to draft the most pertinent questions for the experts to address in their declarations.

Once we find the appropriate experts, we need time to make contractual arrangements across borders in several languages. Experts are generally scholars, high-ranking state officials, non-governmental organization (NGO) directors, or attorneys with institutional constraints. Before they agree to work with us, some must take the time to check internally with their teams, supervisors, or institutions for authorization.

The experts are busy and cannot be expected to set aside their existing work to rush into action on this topic on such a short timeline. Moreover, the most current information on asylum systems or the condition of asylum seekers is not always readily available or accessible. For example, we reached out during the comment period to an expert on migration regulations and policies in Chile, Professor Jaime Esponda Fernandez, who advised us that there are no laws or regulations requiring state institutions to publish any information related to asylum.[21] He further informed us that in some cases to access

[21] Declaration of Professor Jaime Esponda Fernandez, expert on migration laws and policies in Chile (Mar. 18, 2023), *attached*.

official data, one must make an official request (similar to a Freedom of Information Act request), which can take several months.[22]

Most regional experts write in their native language, and translating their documentation takes time. For example, an expert on gender-based violence in El Salvador recently sent us a 25-page declaration. Our translator requested a three-week turnaround time.

Our counterparts in these countries are generally not in a position to provide their expert opinion on a *pro bono* basis, so we need to secure funding to fairly compensate them and to provide professional translation services.

Despite all of these limitations, and notwithstanding the short period of time available, we were able to obtain one declaration, from Prof. Fernandez with his expert opinion on the situation for asylum seekers and refugees in Chile in relation to the Proposed Rule, which is attached to this comment.

b. Insufficient time to conduct research on how well CBP One works, particularly for non-English speakers

A second example of how the limited time to comment impeded our ability to participate in the rulemaking process centers on the Rule's reliance on CBP One. Our legal director took a delegation of law students to Tijuana to make a first-hand assessment of how well the app functions for its intended purpose, in particular for non-English speakers. Her trip could have been longer, allowing her to interview and assist more people seeking asylum, and she could have written a more complete report on her findings if we had more time to comment.

c. Insufficient time to consult with medical professional partners to analyze the notion of an "acute medical emergency"

A third example of how our comment could have been more robust is if we had had more time to analyze the *per se* ground of rebuttal of an "acute medical emergency" and how an asylum seeker might document such a situation either at the time of seeking to enter the United States, or after the fact, when it becomes an important issue in adjudication.

We consulted with our medical colleagues in the Immigrant Health Equity and Legal Partnerships (ImmHELP) collaborative to ask their advice on this concept as outlined in the Rule. Since they are also overstretched, they have had limited time to engage with the Rule and assess the meaning and implications of this ground of rebuttal across their areas of specialty including psychiatry, pediatrics, and emergency medicine.

[22] *Id.*

IV. THE PROPOSED RULE MUST COMPLY WITH U.S. INTERNATIONAL LEGAL OBLIGATIONS NOT TO RETURN PEOPLE TO PERSECUTION OR TORTURE

The relevant international legal obligations with which the United States must comply are found in the 1967 Protocol Relating to the Status of Refugees (Refugee Protocol)[23] and the 1984 Convention Against Torture (CAT).[24] The United States acceded to the Refugee Protocol in 1968 with no relevant declarations or reservations. By doing so, the United States undertook to apply all substantive articles of the 1951 Convention Relating to the Status of Refugees.[25] The United States ratified CAT in 1994 with no relevant reservations, declarations, or understandings. These treaties have been implemented in domestic law in the Refugee Act of 1980 and the Foreign Affairs Reform and Restructuring Act of 1998, other subsequent legislation, and accompanying regulations.

Under the Refugee Protocol, the United States is prohibited from returning refugees to territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.[26] The corresponding provision in U.S. law incorporates the treaty obligation, stating that the Attorney General "may not remove" a person to a country if the Attorney General determines that the person's "life or freedom would be threatened in that country because of the [person's] race, religion, nationality, membership in a particular social group, or political opinion."[27] Additionally, U.S. law incorporates nearly verbatim the definition of a refugee found in the Refugee Protocol, and provides that a person meeting that definition may in the exercise of discretion be granted asylum.[28]

Under CAT, the United States shall not "expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture."[29] The corresponding regulation again incorporates the treaty obligation, providing that a person will be eligible for protection under CAT if they establish "that it is more likely than not that [they] would be tortured if removed to the proposed country of removal."[30]

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[23] 606 U.N.T.S. 267 (entry into force 4 Oct. 1967).
[24] 1465 U.N.T.S. 85 (entry into force 26 June 1987).
[25] 189 U.N.T.S. 137 (entry into force 22 April 1954).
[26] 1951 Convention Relating to the Status of Refugees, art. 33, binding on the United States by means of U.S. accession to the Refugee Protocol, art. I.1.
[27] 8 U.S.C. § 1231(b)(3)(4).
[28] 8 U.S.C. § 1158(b)(1)(A).
[29] CAT, art. 3.
[30] 8 C.F.R. § 208.16(c)(2).

By becoming a state party to these treaties, we have agreed to carry out their terms in good faith.[31] Under the Refugee Protocol, the United States has additionally and specifically undertaken to cooperate with UNHCR in the exercise of its functions and in particular to facilitate UNHCR's duty of supervising the application of the provisions of the Convention and Protocol.[32] Furthermore, drawing on an abundance of legislative history, the Supreme Court has explicitly recognized that in enacting the Refugee Act of 1980, Congress intended to bring U.S. law into conformance with international law.[33]

In relevant part, these treaties require the United States to achieve a specified result—the *non-refoulement* of the persons protected. This, in turn, requires the United States to be able to identify those who fall within the protected classes described in the treaties: persons who fear return to persecution or torture.

International law generally leaves the precise method of fulfilling treaty obligations—in this case adherence to the requirement of *non-refoulement*—to individual States, given differences in their legal frameworks and administrative structures. Nevertheless, authoritative guidance on the procedures and criteria by which the United States may identify the beneficiaries of these treaty protections is found in Conclusions of the UNHCR Executive Committee, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*,[34] and other UNHCR guidelines and analyses. We comment below on specific aspects of the Proposed Rule in light of its compliance, or lack thereof, with international and domestic law.

As a final preliminary observation, we note that because the United States does not provide counsel at government expense to people seeking asylum and applicants are detained at least until a positive credible fear determination is made, with predictable consequences for their ability to obtain their own counsel, the Departments bear an even greater burden to ensure that asylum officers and immigration judges do not make mistakes that will lead to people erroneously being returned to persecution or torture. This risk is heightened because the Proposed Rule calls for application of a number of complex exclusion determinations in the credible fear interview.

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[31] Vienna Convention on the Law of Treaties, art. 26. 1155 U.N.T.S. 331 (entry into force 27 Jan. 1980).
[32] 1967 Protocol Relating to the Status of Refugees, art. II.1.
[33] *INS v. Cardoza-Fonseca,* 480 U.S. 421, 426 (1987).
[34] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,* HCR/1P/4/ENG/REV.4 (Apr. 2019) (hereinafter "UNHCR *Handbook*"), https://www.refworld.org/docid/5cb474b27.html.

V. THE PROPOSED RULE FAILS TO ACCOUNT FOR REFUGEES' RELIANCE INTERESTS AND MISINTERPRETS BOTH THE PUBLIC INTEREST AND U.S. FOREIGN POLICY CONSIDERATIONS

A. Reliance Interests

The Departments make the curious assertion that they "have not identified any persons or entities with justifiable reliance interests in the status quo concerning eligibility for asylum." Rule 11708. Despite this seeming befuddlement on their part, the Departments state that they welcome comments on the existence of reliance interests and the best ways to address them.

Accordingly, we note that refugees have an interest, and indeed a right, not to be returned to persecution or torture. While precise legal definitions of the term have evolved, refugees have been a subject of international law for over a century,[35] and have a reliance interest in states upholding their international and domestic legal obligations. The United States joined the international "status quo" by becoming a party to the Refugee Protocol and CAT and incorporating their *non-refoulement* obligations into domestic law. As explained above, the obligation to ensure that *refoulement* does not occur rests with the government.

Further, we remind the Departments that recognition of refugee status is a declarative, not a constitutive act. A person becomes a refugee as soon as they fulfill the criteria in the definition. Recognition of their status does not therefore make them a refugee but declares them to be one.[36] The Departments must bear in mind that if the Proposed Rule's procedures are deficient, refugees may not be recognized but their removal will still amount to *refoulement.*

Nor does it avail the Departments to insist on the supposed discretionary nature of asylum under U.S. law to argue that no one has a reliance interest in the Proposed Rule. It is particularly incorrect for the Departments to characterize asylum as an "*entirely* discretionary benefit." Rule 11708 (emphasis added). In fact, the role of discretion in U.S. asylum adjudication is carefully circumscribed.

First, even under U.S. law, the right to *apply* for asylum is not a matter of discretion. The United States must allow people to seek asylum, as explicitly provided for in 8 U.S.C. § 1158. The Proposed Rule violates the statutory provision by impermissibly eliminating the

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[35] *See* Guy S. Goodwin-Gill, "International Refugee Law in the Early Years," in Cathryn Costello, Michelle Foster, and Jane McAdam, eds., *The Oxford Handbook of International Refugee Law* (2021), pp. 23-42; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law,* 4th ed. (2021), section on "Refugees defined in international instruments 1922-46," pp. 16-19.

[36] UNHCR *Handbook*, para. 28.

right to apply for asylum for a large number of people who cannot surmount its arbitrary and unjustifiable procedural hurdles.

Second, the determination of *eligibility* for asylum under U.S. law is not a matter of discretion. An applicant must meet the statutory definition of a refugee, which is a question of law and fact. In the terms of the Proposed Rule, a refugee has a reliance interest in the United States making a good faith determination as to whether they meet the refugee definition.[37]

Only then does discretion enter the picture, and that discretion is bound by specific factors. It is limited by the statute, which clearly states that any regulations must be consistent with the statute. The adjudicator's exercise of discretion is also limited by caselaw, which requires a weighing of both positive and negative factors and cannot be interpreted simply as a whimsical decision untethered from relevant factors.

B. Public Interest

The Departments similarly appear to argue that the Proposed Rule is in the "broader public interest." Rule 11737. While we agree that an efficient asylum system is in everyone's interest, the Departments fail to acknowledge that the asylum system must also be fair. As we explain in greater detail below, the Departments here have erred on the side of presumed efficiency at the cost of basic fairness. There is no public interest, "broader" or otherwise, in returning refugees to persecution or torture, which is the foreseeable outcome of the Proposed Rule. The public interest cannot be served by the Departments violating U.S. and international law.

Instead, the reverse is true. It is in the public interest of the United States to adhere faithfully to our treaty obligations. No less an authority than the Constitution declares that treaties are the "supreme law of the land."

[37] The Ninth Circuit has held that "[a]sylum is a two-step process, requiring the applicant first to establish his eligibility for asylum by demonstrating that he meets the statutory definition of a 'refugee,' and second to show that he is entitled to asylum as a matter of discretion." *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004). An immigration judge abuses his discretion when he conflates his discretionary determination of whether an applicant is entitled to asylum with his non-discretionary determination concerning eligibility for asylum. *See Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004). In exercising its discretion, the agency must consider both favorable and unfavorable factors, including the severity of the past persecution suffered. *See Kazlauskas v. INS*, 46 F.3d 902, 907 (9th Cir. 1995); *see also Gulla v. Gonzales*, 498 F.3d 911, 917–19 (9th Cir. 2007) (immigration judge abused his discretion by giving little weight to the fear of persecution, by ignoring strong family ties to the US, by relying on the use of fraudulent documents to reach the US and by relying on the alleged circumvention of asylum and immigration procedures).

It is a basic tenet of international law that States must fulfill their treaty obligations in good faith.[38] It is also the national interest of the United States to abide by international law, not least because it encourages other states to do so when we lead by example. As affirmed in the 2022 National Security Strategy of the United States, respect for international law and reinforcing the multilateral system to uphold the founding principles of the United Nations are key elements of U.S. national security.[39] This is because the United States benefits from a rules-based international order. To explain how observing our treaty commitments benefits the United States, then-State Department legal advisor John Bellinger quoted then-Secretary of State Condoleezza Rice:

> When we observe our treaty and other international commitments, . . . other countries are more willing … to cooperate with us and we have a better chance of persuading them to live up to their own commitments. And so when we respect our international legal obligations and support an international system based on the rule of law, we do the work of making the world a better place, but also a safer and more secure place for America.[40]

C. Foreign Policy Considerations and The Los Angeles Declaration on Migration and Protection

The Departments suffer from a similarly myopic view of U.S. foreign policy considerations, which are listed as a factor in determining whether to modify, terminate, or extend the Rule after the proposed initial 24-month period. Rule 11727. The Departments fail to explain how the United States, by unilaterally and on extremely short notice shirking its own protection obligations, will somehow increase the willingness and ability of neighboring countries to the south to pick up our share of the burden.

Indeed, there is a threatening tone to statements such as "This proposed rule … is designed to demonstrat[e] to partner countries and migrants that there are conditions on the United States' ability to accept and immediately process individuals seeking protection, and that partner countries should continue to enhance their efforts to share the burden of providing protection for those who qualify." Rule 11730.

While the Departments attempt to portray the Rule as consistent with the 2022 Los Angeles Declaration on Migration and Protection, Rule 11720, the Rule actually subverts the

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[38] 1969 Vienna Convention on the Law of Treaties (1155 UNTS 331), Art. 26.
[39] The White House, *National Security Strategy* (Oct. 2022), p. 18, https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf.
[40] John B. Bellinger, *The United States and International Law*, Remarks at the Hague (June 6, 2007), https://2001-2009.state.gov/s/l/rls/86123.htm.

Declaration's reaffirmation of a shared commitment in the region to expanding access to international protection, as well as a coordinated and cooperative approach to situations of mass migration—precisely the concern which ostensibly drives this Proposed Rule. Former presidents of two countries that joined the United States in the Los Angeles Declaration have explained that the Proposed Rule undermines, not promotes, the goals of the Declaration and the interests of the United States and countries to the south.

Former Colombian president Juan Manuel Santos stated that with the Proposed Rule, "a historic opportunity to better manage migration in the Western Hemisphere may be slipping away."[41] He points out that the Departments' short-term thinking intended to deter migration will work against regional cooperation by increasing pressure on countries like Colombia and will empower smugglers. His objections are worth noting in greater detail:

> The LA Declaration's implementation, however, is imperiled by a hard-to-shake impulse, especially in the United States–the pursuit of short-term, imposed solutions thought to deter migration. The Biden Administration's recent proposal to limit access to asylum is just such a misguided move. …
>
> Any burden dumping approach on this side of the Atlantic would be manifestly unfair and run against the spirit of fraternity and solidarity that Colombia and Latin America have demonstrated. It would put unsustainable pressure on countries that have led by example, like Colombia, which is already showing unhelpful signs of backsliding. Compelling us to absorb even larger numbers could make it harder to preserve policies that have stabilized migrant populations. As it has in Europe, it would further incentivize migrants to enlist the support of smugglers to evade detection at borders.[42]

Former Costa Rican president Carlos Alvarado Quesada is even more blunt in pointing out that the new limits on asylum "fly in the face of the Los Angeles Declaration."[43] He is similarly clear in stating that the Proposed Rule does not serve the interests of the United States or its foreign relations, explaining that:

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[41] Juan Manuel Santos, *Time for the Americas to step up (again) on migration,* El País (Mar. 6, 2023), https://english.elpais.com/opinion/2023-03-06/time-for-the-americas-to-step-up-again-on-migration.html.

[42] *Id.*

[43] Carlos Alvarado Quesada, *What Biden's deeply troubling asylum limit means for the economy,* The Hill (Mar. 8, 2023), https://thehill.com/opinion/immigration/3889578-what-bidens-deeply-troubling-asylum-limit-means-for-the-economy/.

> A decision seemingly born of an electoral calculus, it neither benefits the United States nor its relationship with countries throughout Latin America and the Caribbean[.][44]

Like his counterpart in Colombia, he warns that this unilateral action on the part of the United States would endanger asylum in overburdened countries in Central and South America, noting that:

> With this new asylum proposal, countries like Costa Rica in the case of Nicaragua, or Colombia, which has provided stability for more than 2.5 million of the more than 7 million Venezuelans forced to flee during the last 7 years, will be forced to bear even greater burdens. Burdens for which they are ill prepared to deal, and which would deepen polarization around migration. In Costa Rica's case, I fear such an approach would make the country less welcoming, fueling xenophobia and further displacement.[45]

We make two final observations on the Departments' failure to accurately assess foreign policy considerations and the U.S. public interest. In explaining why they chose not to follow the statutory framework for safe third country agreements, the Departments state that such agreements would require "protracted" negotiations. Rule 11732. We note our discussion above on the self-inflicted nature of the Departments' current rush to regulate, given their dereliction over the past two years to plan for the end of Title 42 expulsions.

Finally, the Departments acknowledge "partner countries' resistance to entering into such agreements." (Rule 11732). While this is refreshingly candid, it underscores the alarms raised by the former presidents of Colombia and Costa Rica, that the Proposed Rule is being unilaterally imposed upon countries to the south, to the detriment not only of refugee protection in those countries, but also to the disadvantage of the foreign relations of the United States.

VI. IMPOSING A REBUTTABLE PRESUMPTION OF INELIGIBILITY FOR ASYLUM BASED ON PLACE OR MANNER OF ENTRY VIOLATES DOMESTIC AND INTERNATIONAL LAW

Subject to the unworkable exceptions and unrealistic grounds of rebuttal discussed below, the Rule would make people ineligible for asylum based on their "circumvention" of "lawful pathways," which is another way of saying their place or manner of entry.

[44] *Id*.
[45] *Id,*

The Departments fail to square this Rule with either the statute, discussed below, or U.S. treaty obligations, which we explain here.

A. The Presumption of Ineligibility for Asylum is a Ground of Exclusion, not a "Condition," that Impermissibly adds to Article 1(F) of the Refugee Convention

While the presumption of ineligibility is termed a "condition" in the Rule, this terminology cannot change the fact that the Rule creates a new ground of exclusion. We note that in at least one place in the Proposed Rule, the Departments correctly refer to the presumption as a "bar." Rule 11737. The Rule's references to applicants' "failure" to follow the new processes, and the need to show they are "deserving of being excused from the bar" is further evidence that the rebuttable presumption is actually a ground of exclusion.[46] Rule 11737. As such, it violates the Refugee Convention, as the exclusion grounds in Article 1(F) are exhaustive.[47] Adding an additional ground of exclusion, even if subject to rebuttal in rare instances, is contrary to the Refugee Convention and risks erroneous return to persecution or torture.

B. The Presumption of Ineligibility Based on Transit Through One or More Countries Violates Article 1(E) of the Refugee Convention

In targeting all non-Mexican asylum seekers at the southwest border, who have by definition transited at least one other country before seeking asylum in the United States, the Departments fail to acknowledge that there is no basis in international law for requiring a person seeking asylum to apply in the first country they reach, or indeed in any other country through which they travel on their way to the country where they intend to seek asylum.[48] In fact, doing so is in direct contradiction to the U.S.'s responsibility to adjudicate claims made in this country[49] and undermines what has traditionally been U.S. global leadership in refugee protection. It also undermines the Departments' assertions regarding

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[46] The UNHCR *Handbook,* for example, explains that the Refugee Convention's grounds of exclusion in Article 1(F) enumerate the categories of persons "who are not considered to be deserving of international protection," para. 140.

[47] UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05 (Sept. 4, 2003), para. 3, https://www.refworld.org/docid/3f5857684.html.

[48] UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-seekers,* (Sept. 2019), para. 14, https://www.refworld.org/pdfid/5d8a255d4.pdf. *See also UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom* (May 4, 2021), paras. 12–14, https://www.unhcr.org/uk/60950ed64.html.

[49] UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries* (Apr. 2018), para. 2, https://www.refworld.org/docid/5acb33ad4.html.

the Rule's consistency with the Los Angeles Declaration on Migration and Protection. Rule 11720.

Furthermore, the presumption of ineligibility for asylum simply due to transit through and failure to apply for protection in another country goes far beyond the provisions of Article 1(E) of the Refugee Convention and the corresponding provisions in U.S. law on firm resettlement. The Refugee Convention acknowledges that its provisions do not apply to a person who is recognized by the competent authorities of the country in which he has taken up residence as having the rights and obligations which are attached to possession of the nationality of that country. This is in recognition of the obvious lack of need for international protection in such a case. Accordingly, before the protections of the Convention are made unavailable, the person must be "fully protected" against deportation or exclusion in that country and must actually reside there—this implies continued residence and "not a mere visit."[50]

C. The Presumption of Ineligibility for Asylum Based on "Circumvention of Lawful pathways" constitutes a penalty which is prohibited by Article 31(1) of the Refugee Convention

The Rule runs afoul of Article 31(1) of the Refugee Convention, which prohibits the United States from imposing penalties on refugees "on account of their illegal entry or presence," where such refugees are coming directly from a territory where their life or freedom was threatened on Convention grounds, present themselves without delay to the authorities, and show good cause for their "illegal entry or presence."[51] There is no doubt that the presumption of ineligibility for asylum constitutes a penalty under the meaning of the Refugee Convention. Such a penalty need not be a criminal sanction. UNHCR advises that a penalty prohibited by Article 31 may include "any administrative sanction or procedural detriment."[52]

There is also no doubt that the Departments intend the presumption of ineligibility to be a penalty. The Proposed Rule specifically and repeatedly describes it as a "consequence" (*see*, *e.g.,* Rule 11707, 11708, 11718, 11728) and as a "substantial disincentive" for asylum seekers failing to follow the new procedures. Rule 11729.

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[50] UNHCR *Handbook,* paras. 145–146.
[51] Refugee Convention, Art. 31(1).
[52] UNHCR, *Legal Considerations on State Responsibilities for Persons Seeking International Protection in Transit Areas or "International" Zones at Airports* (Jan. 17, 2019), para. 8, https://www.refworld.org/docid/5c4730a44.html.

D. The Presumption of Ineligibility for Asylum Based on Parole Possibilities Available Only to Certain Nationalities or Based on Successful Use of The CBP One App Violates Article 3 of the Refugee Convention

The United States has laudably initiated limited parole programs to benefit certain individuals from certain countries, namely, Cuba, Haiti, Nicaragua, Ukraine, and Venezuela. We note that as general matter, neither these parole programs nor any other "pathway" are in any way a substitute for access to asylum at the border.[53] We comment here specifically on their function as an exception to the presumption of ineligibility for asylum. Those who have obtained parole are excepted from the presumption, while all others are subject to the presumption and must fall within another exception or rebut the presumption. This explicit privileging of certain people from these five countries, as well as from Mexico, is in direct violation of Article 3's mandate to apply the provisions of the Refugee Convention without discrimination as to country of origin.

The additional exception for individuals who have obtained appointments on CBP One further violates Article 3. The app is not available in less commonly used languages, for example those spoken by Indigenous people, and individuals with darker skin have reported issues with the photo function in the app.

E. The Presumption of Ineligibility For Asylum Based on Failure to Apply For and Be Denied Protection in a Transit Country Fails to Meet Requirements for a Safe Third Country

The Rule is a *de facto* transfer of responsibility for adjudicating asylum claims from the United States to other states, including but not limited to Mexico. While international law allows such a transfer of responsibility, it mandates certain protections to ensure that individual asylum-seekers' rights are upheld.[54] As noted above, the corresponding protections in U.S. law constitute part of the safe third country exception to the ability to apply for asylum. The Departments acknowledge that they considered following the statutory mandate for a safe third country agreement but rejected it in part because it is a "lengthy and complicated process." Rule 11731-32. However, the Departments could have undertaken that process. We note again that the administration has been on notice since

[53] "Resettlement and other legal pathways cannot substitute for or absolve a State of its obligations towards persons seeking asylum at its borders, in its territory, or otherwise under its jurisdiction, including those who have arrived irregularly and spontaneously." *UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom* (May 2021), para. 5, https://www.unhcr.org/uk/60950ed64.html.

[54] UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries* (Apr. 2018), https://www.refworld.org/docid/5acb33ad4.html.

even before it took office more than two years ago that expulsions under Title 42 would come to an end, and that the administration itself announced an end to such expulsions nearly one year ago.

We also observe that the Departments fail to engage with the statutory requirements that safe third countries ensure that the asylum seeker's life or freedom would not be threatened on a Convention ground, and that they would have access to a full and fair procedure for determining their claim to protection. We remind the Departments that mere ratification of the Convention and/or Protocol does not mean that a country provides access to a full and fair asylum procedure.

The Departments are trying to have it both ways, by essentially treating almost any transit country as a safe third country without ensuring that the country actually meets that definition. This is contrary to the law. Either a transit country is safe, provides access to a full and fair asylum procedure, and is willing to enter into an agreement with the United States—which allows the United States not to hear the claim—or those three conditions are not met, which requires the United States to hear the claim without presuming that the applicant is ineligible for asylum.

We discuss some of the most common transit countries in greater detail in Section VIII.C.1 of this comment and explain the folly and cynicism of treating them as safe third countries.

F. The Presumption of Ineligibility for Asylum as a Result of a Real or Perceived Emergency is not Permitted under International Law

The Proposed Rule is justified as a response to exigent circumstances to "protect against an unmanageable flow." Rule 11707. The Departments repeatedly invoke the allegedly large number of people anticipated to seek asylum once Title 42 expulsions end (*see, e.g.,* Rule 11705). We emphasize that these projections are estimates. Given the limited period of time for public comment, we are not able to consult with experts who can assess the Departments' methodology; we hope that other commenters are able to provide an independent perspective on the predicted numbers.

However, even if the predictions are borne out, the United States—a large and extremely wealthy country—has the capacity to welcome and to process asylum seekers. Many other countries accept and host a far larger number of refugees than the United States, whether measured per capita or in relation to gross national product. Looking at absolute numbers, the United States does not even rank in the top five refugee-hosting countries.[55]

[55] The top five refugee-hosting countries as of 2022 were Turkey, Colombia, Germany, Pakistan, and Uganda. https://www.unhcr.org/refugee-statistics/.

We are disappointed that the Departments fail to contextualize the question of numbers in terms of the capacity of the United States, except to insist that U.S. processing systems "were not built" to manage current numbers. Rule 11714. Yet nearly 75% of all refugees are hosted in low- and middle-income countries,[56] and the Departments have failed to make the case why the United States, one of the wealthiest countries in the world, is unable to do so.

The movement of even large numbers of people in need of protection is sadly a common feature of contemporary life, with over 8 million Ukrainians currently hosted in Europe a notable recent example. We note that shortly after the invasion of Ukraine, the U.S. government worked closely with the UN to urge European countries to keep their borders open.[57] If the Departments truly expected large numbers of asylum seekers, we ask that they explain why they are not working with the UN and ensuring that our border remains open.

The Departments are not facing an unprecedented situation, nor a situation with which no other government has ever grappled. We would not consider the predicted number of asylum seekers to constitute a "large-scale influx."[58] However, we note with surprise that although the Departments apparently do, they fail to consider, much less follow, international guidelines on the protection of asylum-seekers in just such situations.

The guidelines should be particularly instructive to the Departments because they were adopted by consensus by UNHCR's Executive Committee, an inter-governmental body that has included the United States since its inception in 1958.[59] We note several of its key provisions below for ease of reference.

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[56] Low- and middle-income countries host 74 per cent of the world's refugees and other people in need of international protection. The least developed countries provide asylum to 22 per cent of the total. https://www.unhcr.org/refugee-statistics/.

[57] [57] "U.N. and American officials described their concerned diplomatic push for Ukraine's neighbors and other European nations to respond to the outpouring of need," in Lara Jakes, *For Ukraine's Refugees, Europe Opens Doors That Were Shut to Others,* New York Times (Feb. 22, 2022), updated Mar. 3, 2022, https://www.nytimes.com/2022/02/26/us/politics/ukraine-europe-refugees.html.

[58] Executive Committee of the High Commissioner's Programme, *Protection of Asylum-Seekers in Situations of Large-Scale Influx No. 22 (XXXII) - 1981*, (Oct. 21, 1981), No. 22 (XXXII), https://www.refworld.org/docid/3ae68c6e10.html.

[59] The United States was also a member of the precursor body, UNHCR's Advisory Committee, since it was established in 1951. Executive Committee's Membership by Year of Admission of Members, https://www.unhcr.org/en-us/excom/announce/40112e984/excom-membership-date-admission-members.html.

A. Admission and non-refoulement

1. In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out below. They should be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity.
2. In all cases the fundamental principle of non-refoulement - including non-rejection at the frontier - must be scrupulously observed.

B. Treatment of asylum seekers who have been temporarily admitted to country pending arrangements for a durable solution

1. Article 31 of the 1951 United Nations Convention relating to the Status of Refugees contains provisions regarding the treatment of refugees who have entered a country without authorization and whose situation in that country has not yet been regularized. The standards defined in this Article do not, however, cover all aspects of the treatment of asylum seekers in large-scale influx situations.
2. It is therefore essential that asylum seekers who have been temporarily admitted pending arrangements for a durable solution should be treated in accordance with the following minimum basic human standards:
(a) they should not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful[.][60]

VII. THE RULE'S PROPOSED MANNER OF ENTRY AND THIRD COUNTRY ASYLUM DENIAL REQUIREMENTS VIOLATE U.S. LAW

As an overarching observation, we note the repeated emphasis throughout the Rule on efficiency and expediency, at the expense of minimum procedural safeguards which are critical in reducing the risk of *refoulement.* The proposed changes are justified on the grounds that they will help the Departments to manage increased migration at the U.S.-Mexico border by allowing for more rapid adjudication of claims at the initial screening stage and weeding out so-called unmeritorious claims. Rule 11728–30, 11744–45. While an efficient asylum process is beneficial to both asylum seekers and the government, it must also be lawful and fair. As discussed in detail in the following sections, the Proposed Rule is neither.

[60] Executive Committee of the High Commissioner's Programme, *Protection of Asylum-Seekers in Situations of Large-Scale Influx No. 22 (XXXII) - 1981*, (Oct. 21, 1981) No. 22 (XXXII), sec. II, https://www.refworld.org/docid/3ae68c6e10.html.

As a threshold matter, the Departments' proposed transit ban violates the asylum statute in two ways. First, by flouting the Section 1158, which allows for asylum applications regardless of manner of entry, and second by imposing what is essentially a safe third country rule, but that is out of compliance with the statutory requirements for such a rule.

The statute is entry-blind and does not discriminate against applicants based on their manner of entry. It requires only that an asylum seeker be in the United States to seek asylum. While the statute authorizes the Departments to create some conditions on asylum through regulation, those conditions must be "consistent" with 8 U.S.C. § 1158.[61] The proposed manner of entry requirements are inconsistent with the plain language of the statute, which bears reprinting:

> Any alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arriva*l and including an alien who is brought to the United States after having been interdicted in international or United States waters), *irrespective of such alien's status*, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1) (emphasis added). Further, there is nothing to suggest that such a bar was envisioned by Congress. To the contrary, when Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amendments, it left intact section (a)(1) and, while it added several enumerated statutory bars to eligibility, none had anything to do with manner of entry.[62]

The legal and temporal context of those amendments lend additional support to the conclusion that Congress never intended entry without an appointment to constitute a bar to eligibility. Significantly, nearly ten years before the IIRIRA amendments, the Board of Immigration Appeals (BIA) issued its decision *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987), which emphasized that manner of entry could be considered, not at the eligibility phase of adjudication, but at the subsequent *discretionary* stage of adjudication, and moreover that manner of entry should be *only one among many factors* considered in the discretionary analysis.[63] Yet Congress chose not to include manner of entry as a broad bar

[61] 8 U.S.C. § 1158(b)(2)(C) ("The Attorney General may by regulation establish additional limitations and conditions, *consistent with this section*, under which an alien shall be ineligible for asylum under paragraph (1).") (emphasis added).
[62] 8 U.S.C. § 1158(b)(2)(A)-(B); *see also* Pub.L. 104–208, Sept. 30, 1996, 100 Stat. 3009; *cf.* Pub.L. 96–212, Mar. 17, 1980, 94 Stat. 105.
[63] 19 I&N Dec. at 473 (withdrawing from the suggestion in *Matter of Salim*, 18 I&N Dec. 311 (BIA 1982), "that the circumvention of orderly refugee procedures alone is sufficient to require the most unusual showing of countervailing equities" and holding that "[t]his factor is only one of a number of

to eligibility, but left it as one relevant factor to be considered in the totality of the circumstances during the discretionary analysis determined *after* the adjudication of eligibility.[64]

Second, as the Departments acknowledge, several courts have found the Trump-era manner of entry ban ("entry ban") and third country transit ban ("transit ban") unlawful. Rule 11738–40. Those bans are not dissimilar from the ban proposed in this Rule, which resurrects and combines the Trump policies with essentially meaningless modifications. The entry ban barred anyone who entered the United States without inspection—i.e. not at a port of entry—from applying for asylum.[65] The initial version of the transit ban[66] barred from asylum eligibility anyone who transited through at least one country other than their country of origin on the way to the United States' southern land border with two exceptions: 1) individuals who qualified as victims of a "severe form of trafficking in persons,"[67] and 2) individuals who "applied for protection from persecution or torture in at least one country outside [their country of origin]" and received "a final judgment" denying such protection.[68] The Trump transit ban final rule, further narrowed the exceptions by no longer exempting individuals who applied for and were denied protection from torture, exempting from the ban only those who were denied asylum in a third country.[69]

As discussed in the Proposed Rule's preamble, in *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021) ("*East Bay III*"), the Ninth Circuit held that the prior administration's entry ban was at odds with the plain language of Section 1158(a)(1).[70] Rule 11738–39. Courts also rejected both the initial and final iterations of the Trump-era transit ban as

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factors which should be balanced in exercising discretion, and the weight accorded to this factor may vary depending on the facts of a particular case.").

[64] *See id.*; *cf.* 8 U.S.C. § 1158(b)(2)(A)-(B). Even assuming arguendo that the Departments had the legal authority to impose a manner of entry ban, which they do not, the Proposed Rule here does not provide any mechanism for consideration of the totality of the circumstances when determining whether the manner of entry requirement should apply.

[65] Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934 (IFR Nov. 9, 2018) (Proclamations Bar).

[66] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (IFR July 16, 2019).

[67] 8 C.F.R. § 214.11.

[68] Transit Ban IFR at 33843-44 (codified at 8 C.F.R. §§ 208.13(c)(4), 1208.13(c)(4)).

[69] Asylum Eligibility and Procedural Modifications, 85 Fed. Reg. 82260 (Dec. 17, 2020); *Id*. at 82262, 82289–90.

[70] *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 670, 972–75 (9th Cir. 2021) ("*East Bay III*") (affirming a preliminary injunction against the entry ban, holding it inconsistent with 8 U.S.C. § 1158(a)(1) and the 1967 Refugee Protocol); *see also O.A. v. Trump*, 404 F.Supp.3d 109 (D.D.C. 2019) (holding that the entry ban was inconsistent with 8 U.S.C. § 1158(a)(1) and vacating the bar.

inconsistent with Section 1158's safe third country and firm resettlement provisions.[71] In enjoining the transit ban final rule, the district court rejected the Departments' contentions that they had addressed the Ninth Circuit's concerns that the initial version was inconsistent with Section 1158's the firm resettlement[72] and safe third country agreement provisions.[73] The Court opined that "[o]nce again, '[t]he sole protection provided by the [Final] Rule is its requirement that the country through which the barred alien has traveled be a 'signatory' to the 1951 Convention and the 1967 Protocol,'" a requirement the Ninth Circuit already held "'*does not remotely resemble the assurances of safety built into the two safe-place bars of § 1158*,' and in fact is inconsistent with those provisions."[74] The changes to those now-enjoined policies that the Biden administration has incorporated into the Proposed Rule's new procedures, *see infra*, do not cure the ban's fundamental illegality.

Though the Departments attempt to distinguish the Proposed Rule from the previous administration's policies, the Proposed Rule's addition of a few exceptions and grounds for rebuttal does not transform the ban into a lawful condition on asylum. Rule 11739–41.[75] Moreover, as discussed above, the Department's reliance on *Pula* is misplaced, because that precedent does not, as the Departments suggests, permit "circumvention of lawful pathways" to be applied as a *bar* to asylum eligibility but rather limits consideration of this factor to the discretionary analysis. Rule 11739.[76] More fundamentally, none of the exceptions or grounds for rebuttal proposed in the Rule sufficiently address the issue considered by the statutory safe-place provisions, the courts in the *East Bay* cases, and the BIA in *Matter of Pula*: whether, in consideration of the totality of the circumstances, there are reasons justifying a failure to enter via a "lawful pathway" or a failure to apply for asylum in a transit country. As such, the Rule contravenes settled U.S. asylum law and should be withdrawn.

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[71] *See, e.g.*, *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2020) ("*East Bay I*") (affirming the district court's preliminary injunction and holding the transit ban inconsistent with the safe third country and firm resettlement provisions of the Act); *E. Bay Sanctuary Covenant v. Barr*, 519 F. Supp. 3d 663, 666 (N.D. Cal. 2021) ("*East Bay II*") (preliminarily enjoining the transit ban and holding it was inconsistent with the safe third country and firm resettlement provisions of the Act).

[72] 8 U.S.C. § 1158(b)(2)(v).

[73] 8 U.S.C. § 1158(a)(2)(A).

[74] *Id.* (quoting and citing *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 845–49 (9th Cir. 2020)) (emphasis added); As discussed in Section VIII.C.b, *infra*, the fact that the Rule has no exception for individuals who were granted asylum in a third country, demonstrates how it conflicts with the firm resettlement and safe third country agreement bars.

[75] *See also* Sections VIII.A–B, *infra.*

[76] *Cf. Pula*, 19 I&N Dec. at 473.

Finally, pursuant to the Refugee Act of 1980, the right to apply for asylum includes the right to uniform treatment by the U.S. government. Specifically, the Refugee Act, mandates the U.S. government must "establish a uniform procedure for passing upon an asylum application."[77] By singling out asylum seekers for different treatment and exclusionary rules based on their nationality (i.e. non-Mexican) and manner and location of entry, the Proposed Rule violates the Refugee Act.[78]

While we recognize the Biden administration would like Congress to overhaul the immigration laws,[79] it cannot circumvent congressional intent through agency action and issue rules in clear violation of the asylum statute as a matter of convenience.

VIII. THE RULE'S "EXCEPTIONS" TO THE PRESUMPTION AND ITS GROUNDS FOR REBUTTAL ARE INSUFFICIENT TO CURE ITS ILLEGALITY

Even assuming arguendo that the Proposed Rule is lawful, which it clearly is not, the proposed exceptions to its application are insufficient to ensure access to the U.S. asylum system as required under domestic and international law.

The Rule creates a presumption of asylum ineligibility for all non-Mexicans who enter through the southern border with these limited exceptions: they or a family member they are traveling with 1) was provided parole authorization before arriving at the border; 2) arrived at a port of entry with a CBP One appointment *or* can demonstrate by a preponderance of the evidence that it was not possible to access the CBP One app; or 3) sought and were denied asylum in a transit country. Rule 11727, 11729. The Rule makes a mockery of the legal concept of a presumption. Generally, presumptions are inferences drawn from facts;[80] in the case of asylum the relevant facts are related to the underlying elements of eligibility. For example, if an individual was persecuted in the past, it is presumed that they are likely to be persecuted in the future.[81] A presumption that internal relocation would not be feasible arises in cases where the government is the feared

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[77] S. Rep. No. 256, 96yh Cong., 2d Sess. (1980), reprinted in 1980 U.S.C.C.A.N. 141, 149.
[78] *See Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 375 (C.D. Cal. 1982) (acknowledging the emphasis that Congress placed on the uniform, nondiscriminatory treatment of refugees).
[79] *See, e.g.*, White House Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/.
[80] *See* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/presumption.
[81] 8 C.F.R. § 1208.13(b)(1).

persecutor.[82] Unlike those presumptions, the Rule's presumption of ineligibility bears no relationship to the underlying claim for protection. The fact that an individual was not paroled through a DHS approved parole program such as CBP One or did not receive an asylum denial in a transit nation has absolutely nothing to do with the elements of asylum and cannot serve as a basis to deny relief. That the Rule provides grounds for rebutting the Rule's arbitrary presumption (which are also unrelated to the merits of the claim) does not cure its fundamental illegality.

And, as discussed in greater detail in the following subsections, the exceptions and rebuttal grounds are insufficient and overly burdensome to meaningfully provide noncitizens fleeing persecution access to the U.S. asylum system.

A. The Rule's Parole Exceptions Are Inadequate to Provide Meaningful Access to Asylum and Will Result in *Refoulement* of Individuals With Meritorious Claims

The Rule proposes to deny asylum at the southern border based solely on an individual's failure to jump through prescribed hoops that may not even be available to them—i.e., parole procedures based on nationality[83] or the CBP One app—and makes those procedures the exclusive means to seek protection. As discussed below, while the new parole procedures may increase accessibility to the U.S. territory for some individuals, they are woefully insufficient to justify denying asylum to others. Thus, while they may supplement access to asylum, they cannot replace it.

1. Requiring use of the CBP One app creates insurmountable obstacles for asylum seekers

The Rule proposes that expanding implementation of the CBP One app will enable asylum seekers to schedule times to arrive at ports of entry on the border and eliminate the need for individuals to enter between borders or seek asylum at ports of entry without an appointment.[84] Rule 11707. The Proposed Rule presents the CBP One app as the only way to access the asylum system at a port of entry on the U.S.-Mexico border.[85] However,

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[82] 8 C.F.R. § 1208.13(b)(3)(ii).

[83] USCIS Processes for Cubans, Haitians, Nicaraguans, and Venezuelans (CHNV), https://www.uscis.gov/CHNV.

[84] CBP, *Fact Sheet: Using CBP OneTM to Schedule an Appointment* (last modified Jan. 12, 2023), https://www.cbp.gov/document/fact-sheets/cbp-one-fact-sheet-english. **Error! Hyperlink reference not valid.**

[85] Under the Rule any non-Mexican who arrives at a port of entry without a CBP One appointment will be subject to the rebuttable presumption unless they "were provided appropriate authorization

despite CBP's alleged "extensive testing" of this "innovated mechanism" it is fraught with technical issues, and is not, as the Departments contend "user-friendly." Rule 11707, 11719. It cannot handle the current volume of asylum seekers seeking appointments and is frequently overwhelmed, malfunctioning, or simply does not work. Even if the app itself worked perfectly, which it inarguably does not, it is simply not a practical or accessible procedure for many asylum seekers, not least because appointments are only available at a limited number of ports.

a. For many asylum seekers the CBP One app is inaccessible

The Rule's requirement that people use the CBP One app is based on the false notion that asylum seekers with limited or no funds, limited access to internet, cellular networks, and charging points, and, in many cases, after having traveled thousands of miles will be able to navigate a lengthy application written in languages that many asylum seekers do not read in order to set up a time to be processed at a port of entry. In reality, many asylum seekers lack the technology and language skills necessary to utilize the application and are therefore wholly denied access to the CBP One process.

For example, many asylum seekers lack access to the fast, reliable Wi-Fi internet necessary to operate the app. Even for those with such access, the CBP One app requires a smartphone, which not all asylum seekers own, and it does not function properly on older smartphones or outdated operating systems, leaving many unable to even log into the app.[86] Additionally, because the app is only available in English, Spanish, and Haitian Creole,[87] asylum seekers who do not speak those languages or have access to translation services cannot use the application. Even those who speak those languages, must be able to read and figure out how to use the application, answer each of its 52 questions, and jump through the various password and verification hoops built into the app. For those who are illiterate, or have limited familiarity with the terminology used in the questions and/or technology, the CBP One app simply presents too many obstacles.

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to travel to the United States to seek parole pursuant to a DHS-approved parole process" or can prove that they were denied asylum in a third country. Rule 11707.

[86] The Departments contend that most asylum seekers possess smartphones, but CBP's straw poll on one day at two ports of entry, upon which that contention is based, did not consider the quality or age of the phones migrants carried. *See* Rule 11720.

[87] Advocates report that, while the CBP One app is supposed to also be available in French, the app has actually hybridized French and Haitian Creole making it unintelligible to native French speakers. This leave nationals of many African countries, for example, unable to use the app. *See Making a Mockery of Asylum: The Proposed Asylum Ban, Relying on the CBP One App for Access to Ports of Entry, Will Separate Families and Deny Protection,* UC Law San Francisco Haiti Justice Partnership, CGRS, and the Haitian Bridge Alliance (Mar. 27, 2023) (HJP Delegation Report), p. 7, *attached*.

By making the CBP One app the sole avenue for seeking asylum at a port of entry (and, at least at present, only a small number of ports), the Departments will open vulnerable populations to greater exploitation by bad actors. For example, individuals may seek to extort money, sex, or servitude from desperate asylum seekers in exchange for use of functional smart phones, Wi-Fi internet services, or translation services. The Departments acknowledge that human traffickers prey on migrants as a matter of course, *see e.g.* Rule 11704–07, 11713, 11748, and there is no reason to believe that those same criminal cadres will not find innovative ways to exploit the fact that asylum will be limited *solely* to those who can access the CBP One app. Even unaccompanied children, unaware of their exemption from the Proposed Rule's ban, are likely to fall into this trap and face exploitation by criminal organizations targeting asylum seekers in Mexico.

b. The CBP One app is riddled with bugs making it unusable

For the limited number of individuals who have the language skills and technology necessary to access the CBP One app, it does not function well enough to remotely justify making it the sole way to access protection. Since its introduction, the online scheduling system has been overwhelmed, causing the app to freeze or asylum seekers to be kicked off before they are able to schedule an appointment.[88] Some reported that after making it through the entire 52-question CBP One registration and scheduling an appointment, they never received a confirmation code, thereby forcing them to start all over again.[89]

The geofencing technology employed by the CBP One app to ensure that applicants are close to the U.S.-Mexico border has also sown confusion, prevented asylum seekers from scheduling appointments, and forced migrants to stay in areas which are not safe.[90] For example, the CBP One app will not schedule an appointment if the locator function is turned off, and many applicants are not aware of this quirk. Additionally, despite being located in Tijuana, Mexico's largest border city, some individuals have gotten messages saying they cannot proceed with CBP One registration because they are not near a U.S. port of entry.[91] Others were told that they could not proceed because the geofencing reported them as already being in the United States, due to cellular signals from Mexico

[88] Elliot Spagat, *Online system to seek asylum in US is quickly overwhelmed, Associated Press* (Jan. 28, 2023) ("Many can't log in; others are able to enter their information and select a date, only to have the screen freeze at final confirmation."), https://apnews.com/article/technology-united-states-government-caribbean-mexico-mobile-apps-49b38b18869ed3b2260fb6d774153456.
[89] *Id.*
[90] *See, e.g.*, Daniela Dib and Ann Louise Deslandes, *Migrants must overcome a new barrier at the border: The U.S. government's terrible app,* Rest of World (Mar. 9, 2023), https://restofworld.org/2023/cbp-one-app-issues-migrants/.
[91] Spagat, *supra* n.88.

pinging off of U.S.-side cell towers.[92] In any event, the geographical limitations of the CBP One app require applicants to stay in locations where the geofencing will allow them to apply, and, as discussed in greater detail in Section VIII.C, below, asylum seekers are often denied basic services and/or face discrimination, exploitation, and other harms in those locations, forcing them to seek safety elsewhere.

c. Limitations on accessibility disproportionately impact and endanger vulnerable populations and separates families

For certain groups, the nature of the technology itself makes it impossible to access appointments. The CBP One app requires live photos so that CBP officers may verify the applicants' identities at their appointments. However, the photo portion of the app has had issues, such as difficulty reading the facial features of asylum seekers with dark complexions and babies.[93] Asylum seekers who fall into those categories have repeatedly had their photos rejected. As a result, the applications of Black asylum seekers and individuals with small children have been disproportionately delayed and/or rejected. Although CBP has reported that it has made some attempts to fix the issue, for many the problem persists.[94] This is particularly troubling, given that these groups are some of the most vulnerable to discrimination, extortion, and violent crime in Mexican border towns where they must continue to languish as they repeatedly try to access a CBP One appointment.

Additionally, despite the Proposed Rule's emphasis on family unification, Rule 11724, 11729, 11749, requiring CBP One appointments harms families because the app has limited families' access to those appointments in numerous ways. The limited number of appointments released at 8 a.m. Pacific Time each day are usually all booked within a few minutes.[95] This has made it impossible for families, particularly large families, to access the U.S. asylum system because they were unable to enter the information, documents, and photos for all of their family members into the app quickly enough to access an appointment before they were all gone.[96] As a result, some families were forced to separate to get appointments, for example, to ensure passage of a family member in extreme danger. Or families have been forced to forfeit appointments if not all members of the family appeared on the appointment notice, including children. Although CBP has allegedly addressed some of the issues for families, no longer requiring back-to-back

[92] *Id.*
[93] *Id.*
[94] *See,* Dib and Deslandes, *supra* n.90.
[95] *Id; see also*, HJP Delegation Report, p. 4.
[96] Spagat*, supra* n.88.

appointments for each member of the group, families still suffer disadvantages and it is unclear if these changes are permanent.[97]

These infirmities were documented by law students and faculty from the University of California College of the Law San Francisco's Haiti Justice Partnership who traveled with CGRS and the Haitian Bridge Alliance (HBA) to Tijuana, Mexico March 4-5 and 11-12, 2023 and interviewed asylum seekers in the border town about their experiences with the CBP One app, as well as their experiences en route to the border and in Mexico.

UC College of the Law SF Haiti Justice Partnership Factfinding Delegation Report Examples[98]

Vulnerable populations: A woman fled Togo after her family threatened to subject her to female genital cutting, a practice she opposes and that killed both her sisters. She never learned to read and write, given patriarchal cultural norms in her community, and had yet to access the app when researchers interviewed her. She was sexually assaulted on the migration journey through South and Central America and living in precarious circumstances in Tijuana. She has extended family in the U.S. that are prepared to receive her and support her in receiving the psychological care she needs to heal from the trauma she has experienced and help her navigate the asylum process including testifying on her behalf and obtaining necessary documentation. However, because she is illiterate, she was unable to download or use the CBP One app until she encountered the HHP delegation, and they assisted her. Since then, she has tried to schedule an appointment daily, but has been unable to secure an appointment and continues to report being confused by the app's error messages which she cannot read.

Technological disparities: One asylum seeker from Haiti reported that she could not secure an appointment for months until she was able to get money to purchase a new smartphone. She succeeded in scheduling an appointment just two days after she obtained the brand new phone. Her experience exemplifies one of the many disparities the CBP One app requirement imposes on people fleeing persecution, many of whom simply lack the financial resources necessary to access the app.

[97] HJP Delegation Report, pp. 5–7.

[98] *See* HJP Delegation Report, *attached*. Note: The UC Law SF Haiti Justice Partnership was formerly known as the Hastings to Haiti Partnership and recently changed its name to reflect the name change of the law school. Nevertheless, due to the short time allotted to complete the report and submit to the Departments, the Partnership was unable to update its logo in the attached and instead uses its former logo.

Separation of families: One Haitian family reported that after many attempts they were able to schedule an appointment through the CBP One app. However, when they arrived at the border the parents were told that their three-year-old child was not included in the appointment. CBP officers callously gave the family three options: 1) one spouse could enter and the other could stay in Mexico with the child and try to make a second appointment; 2) the parents could leave the child behind in Mexico (with whom they did not specify); or 3) the entire family could forego the appointment. The mother entered the U.S. several weeks ago; the father and child are still in Mexico, having been unable to successfully schedule another appointment on CBP One. Many other families reported being told something similar by border officials.

Limited appointments and dangers of waiting in Mexico: Several families reported experiencing kidnappings and violence in Mexico. For example, a Honduran woman and her daughter fled after her husband was murdered. In Mexico, the family was kidnapped and held for fifteen days, during which the kidnappers brutally beat the mother.

A Cuban couple and their seven-year-old twins fled persecution in Cuba and traveled through Mexico to seek asylum in the United States. The family was able to use the CBP One app to schedule an appointment, but they were abducted while waiting in Mexico for that appointment. The wife was repeatedly sexually assaulted by the abductors, until a family member in the U.S. paid a ransom in exchange for the family's release. The kidnappers threatened further harm if they reported the incident to anyone and the family is now in hiding in Tijuana. Because of the abduction, the family missed their CBP One appointment and has been unable to reschedule despite daily attempts. The mother is also suffering from advanced cancer and been told by multiple doctors that she will be unable to receive necessary, lifesaving care in Mexico. The family was recently forced to leave a shelter where they sought refuge due to construction. They were sleeping on the street until a non-profit stepped in to rent them a temporary hotel room because other shelters were at capacity. Like many others, this family has a network of extended family and friends in the U.S. prepared to receive them and help them through the asylum process.

This family's harrowing experiences demonstrate how the Proposed Rule's reliance on the CBP One app disproportionately harms vulnerable populations, including families, and will further endanger asylum seekers and fill the coffers of the very criminal organizations the Departments' proposals purport to thwart.

2. The exceptions for not using CBP One are insufficient, unclear, and difficult to prove

The Rule proposes an exception for asylum seekers who can demonstrate "by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle." Rule 11720, 11730.[99] As discussed in more detail in Section IX.A.2, *infra*, importing a "preponderance of the evidence" standard into the initial credible fear screening is contrary to law.[100] Moreover, as discussed here, this requirement places an unacceptably onerous burden on asylum seekers who cannot use the app.

To begin, it is unclear what applicants will be required to show in order to prove a language barrier or illiteracy. What happens in the case of an illiterate person who is able to find support from a friend or another individual, like the Togolese woman mentioned above, would she no longer then qualify for the exception? Moreover, neither "significant technical failure" nor "ongoing and serious obstacle" are clearly defined, nor is it apparent how one would be able to prove that such failure or obstacle interfered with their ability to utilize the app and make an appointment. Will it be sufficient to show that they tried to use the app and it crashed? What evidence would be required to prove that, e.g. will credible statements alone suffice? Will asylum seekers be required to demonstrate that they tried to schedule the appointment once or will multiple attempts be required? What if the applicant's phone was stolen, creating an obstacle, would they also have to demonstrate that they would never be able to acquire a replacement? Would a broken hand qualify as a serious ongoing obstacle, or would the complete loss of the hand be required? The utter lack of clarity makes it impossible for applicants to know if they qualify for the exception before seeking asylum in the United States which is likely to result in those individuals being subject to the bar despite their best efforts to comply with the Rule's vague guidelines. Additionally, there is no doubt that inconsistent application of these exceptions will lead to erroneous application of the bar in credible fear interviews, asylum interviews, and immigration court proceedings.

Additionally, this exception fails to consider the myriad reasons outside of accessibility—including poor living conditions and lack of safety in Mexico—that may prevent asylum seekers from waiting for a CBP One appointment. More fundamentally, no exception would cure the illegality of the proposed transit ban.

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[99] Proposed 8 C.F.R. § 208.13(a)(2); Proposed 8 C.F.R. § 1208.33(a)(2).
[100] 8 U.S.C. § 1225(b)(1)(B)(v).

By requiring asylum seekers to utilize the CBP One app and seek asylum by appointment only, the Departments' Proposed Rule resembles the metering policy of previous administrations, which required asylum seekers to get on a list for processing, and then forced them to wait indefinitely in dangerous, cartel-controlled border territories for their chance to seek asylum. By reinstituting a high-tech version of metering, the Proposed Rule will create a new group of victims for criminals to exploit. The geofencing requirements of the CBP One app make it critical that asylum seekers scheduling appointments be within a certain distance of the southern border, which makes them sitting ducks for predators while attempting to schedule or waiting for their appointments. Because only eight ports of entry are doing CBP One processing, those individuals who are finally able to schedule an appointment may also be forced to travel hundreds of miles across inhospitable terrain through dangerous, gang-controlled territories in order to keep their appointments. This leaves them vulnerable to the elements and to cartels and human traffickers who seek to harm and exploit them. Far from undermining the operations of criminal organizations, as the Proposed Rule suggests, the cartels and other bad actors who prey on migrants will continue to flourish as a result of this policy.

B. The Grounds for Rebutting the Presumption of Ineligibility Are So Limited as to be Non-Existent and Will Result In Return of Refugees to Persecution and Torture

The Departments suggest that the rebuttable presumption serves to "prioritize" asylum for applicants who pursue "lawful pathways." Rule 11735. However, given the extremely narrow grounds provided for rebuttal, it is more accurate to say the presumption serves as a bar to asylum for those who are unable to follow the new procedures. We use the term "bar" deliberately because the grounds of rebuttal are so limited as to be non-existent.

The Departments provide that the presumption of ineligibility for asylum based on transit through a third country may be rebutted by demonstrating by a preponderance of the evidence that exceptionally compelling circumstances—that have nothing to do with their transit through that third country—exist. Three *per se* grounds are listed, including acute medical emergency, imminent and extreme threat to life or safety, or being the victim of a severe form of trafficking in persons. Rule 11750–51.

While the trafficking victim definition is cross-referenced to existing regulatory language, we note that the other two grounds are novel concepts under asylum or even immigration law. The few additional sentences describing the medical and threat grounds of rebuttal serve to make clear only that these standards are designed to be impossible to meet.

For example, a mere medical emergency would not be sufficient. The medical emergency must be "acute." It would include "situations in which someone faces a life-threatening emergency or faces acute and grave medical needs that cannot be adequately addressed outside the United States." Rule 11723. However, many medical problems are clear only in retrospect, once medical care has been given. For example, severe vertigo might be due to a stroke, an aneurism, or a tumor, or it might simply be a less serious problem with the inner ear. How would the person seeking asylum know if their symptoms would fall within this ground of rebuttal? More to the point, how would the asylum officer or immigration judge make an accurate assessment either close in time to when the applicant entered or potentially years later when their case is adjudicated?

The additional requirement that the acute medical emergency be unable to be adequately addressed outside the United States is also confounding. There is abundant documentation that asylum seekers lack access to medical care, including emergency services, in Mexico. Would an asylum seeker experiencing an acute medical emergency need to try, and fail, to find medical care in Mexico in order to meet this aspect of the rebuttal ground? What if they did seek medical care, but did not receive any documentation of their effort, for example, of being turned away by a healthcare provider? Would that meet that preponderance of the evidence standard?

If adjudicators take this ground of rebuttal seriously, it will lead both to enormous inefficiencies in fact-finding and to wildly inconsistent outcomes, depending on how concepts such as "acute," "life-threatening," "grave," and "adequate" are interpreted. We fear, however, that adjudicators will be swayed by the overwhelming emphasis in the Proposed Rule on driving down numbers, and feel that the safest and easiest course in the vast majority of cases will be to find that the rebuttal ground does not apply.

We have the same concerns for the rebuttal ground of imminent and extreme threat to life or safety. The additional description provided in the Proposed Rule stresses that this would not include generalized threats of violence or generalized concerns about safety, or even situations where there has been a prior threat. Rule 11723. Given extensive reporting on the extreme levels of violence in northern Mexico targeted at asylum seekers, it seems as though all attempts to come within this ground of rebuttal will be rejected due to the widespread nature of the threat.

Nor would this ground of rebuttal necessarily include a threat of serious bodily harm that is not rape or torture, since the Rule specifically mentions only rape, kidnapping, torture, or murder. Rule 11723. And how would an applicant demonstrate this ground by a preponderance of the evidence, when even a prior threat is insufficient? As noted above, if

adjudicators seriously attempt to apply these legal standards, it will be extremely inefficient and outcomes will vary widely depending on how these draconian descriptions are interpreted. Or, much more likely, they will find that the ground of rebuttal does not apply.

Clearly, the message being sent to adjudicators is to find that grounds of rebuttal do not apply. Without any realistic possibility of rebutting the presumption, the Departments' assertions of lawfulness and their attempt to distinguish this Rule from previous policies already found illegal fail.

Like the CBP One app, the purported availability of asylum systems in relevant transit countries, does not provide a sufficient and/or safe alternative for most asylum seekers and their failure to apply for and wait for denial of asylum in any of those countries should not preclude asylum eligibility. This portion of the Rule essentially imposes the statutory safe third country bar to asylum. However, that bar has two bedrock requirements: safety and the availability of a full and fair procedure asylum procedure.[101] The following review of the common transit countries, below, demonstrates that they would fail those requirements.

C. Requiring Asylum Denial From a Transit Country Places an Unreasonable Burden on Asylum Seekers, Fails to Consider the Realities in Transit Countries, and Will Result in Additional Harm to Individuals Fleeing Persecution and Torture

1. Limits to access to protection and new pathways in the Region

The Departments present selective snippets of non-contextualized information on how various countries in Central and South America "have stepped up in significant ways to address the unprecedented movement of migrants throughout the hemisphere . . . by providing increased access to protection" and hosting large numbers of migrants and refugees. The Departments cite a series of favorable facts about the asylum or temporary protection systems in several countries, without providing any meaningful analysis of the capacity of each potential transit country's asylum system or the conditions for asylum seekers therein. Even though many countries have made commendable efforts to address the needs of migrant and refugee populations, these efforts are limited and in practice leave countless refugees unprotected.

This section provides an overview of the shortcomings in the asylum systems or other pathways to protection in various transit countries in the region. As noted in our

[101] 8 U.S.C. § 1158(a)(2)(A).

explanation of why a 30-day comment period is insufficient, we did not have enough time to do a thorough review of all potential countries of transit.

We request the Departments to explain how they evaluated the fairness and efficiency of the asylum systems in the countries mentioned in the Rule, and what sources they consulted for information on actual conditions on the ground for asylum seekers and refugees in those countries.

We turn first to Mexico, the country through which all asylum-seekers affected by this Rule must transit, then address in turn eight additional countries: Guatemala, Belize, El Salvador, Nicaragua, Costa Rica, Panama, Colombia, and Ecuador. We also note that we were able to obtain a declaration from an expert in Chile, which is attached. For each of these countries, we ask that the Departments specify whether the information we provide is consistent with their sources and if not, how their information differs.

Mexico: Mexico is an unsafe country for many asylum seekers. The Department of State recognizes that "[t]he press, international organizations, and NGOs [have] reported targeting and victimization of migrants and asylum seekers by criminal groups." There have been numerous instances of these groups extorting, threatening, or kidnapping asylum seekers and other migrants. "In many parts of the country, human smuggling organizations wield significant power, and media allege frequent collusion among local authorities."[102] Human rights organizations have documented many instances of violence against asylum seekers transiting or returned to Mexico, particularly women, children, LGBTQ+ individuals, and others who are particularly vulnerable.[103] Further, Mexican immigration or law

[102] Department of State, *2022 Country Reports on Human Rights Practices: Mexico* (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/mexico/.

[103] *See, e.g.*, Human Rights First, Fatally Flawed "Remain in Mexico" Policy Should Never Be Revived (Sept. 2022), https://humanrightsfirst.org/wp-content/uploads/2022/10/FatallyFlawed.pdf [Forty-one percent of the interviewed asylum seekers and migrants (1,109 people) initially enrolled in RMX 2.0 reported attacks in Mexico, including kidnapping, rape, torture, and other violent assaults. Kidnappings made up 36 percent (401 reports) of these attack.]; WRC and IMUMI, Stuck In Uncertainty and Exposed to Violence: The Impact of US and Mexican Migration Policies on Women Seeking Protection in 2021 (Feb. 2022), https://www.womensrefugeecommission.org/wp-content/uploads/2022/02/Stuck-in-Uncertainty-2.pdf (Women who are returned to Mexico alone or with their families experience many types of violent attacks. A 2017 Doctors Without Borders survey found that 31.4 percent of women seeking protection had been abused during their transit through Mexico. Some women are kidnapped and raped by their captors, often in front of their children. Many assaults involve Mexican authorities.); Human Rights Watch, Every Day I live in Fear – Violence and Discrimination Against LGBT People in El Salvador, Guatemala, and Honduras, and Obstacles to Asylum in the United States (Oct. 7, 2020), https://www.hrw.org/report/2020/10/07/every-day-i-live-fear/violence-and-discrimination-against-lgbt-people-el-salvador ("The fear of violence leads some

enforcement authorities use excessive force and are responsible for a large share of violence and crimes committed against asylum seekers.[104]

The Departments state that Mexico has become one of the top countries receiving asylum applications due to the government's efforts to strengthen its international protection system. It is true that asylum applications have increased exponentially in Mexico over the last few years.[105] However, this dramatic increase in asylum applications does not indicate that more asylum seekers feel safe in Mexico and are choosing it as a destination. Rather, it coincides with the U.S. government's implementation of policies that severely restricted access to the U.S. territory and asylum system,[106] forcing thousands of individuals –

LGBT asylum seekers, especially trans women, to avoid leaving the shelters in Tijuana in which they are staying, in a kind of self-imposed house arrest.").

[104] *See, e.g.,* LAWG, CGRS and others, Memo: Impacts of U.S. and Mexican migration enforcement on migrant and refugee rights in Mexico (Sept. 2021), https://cgrs.uchastings.edu/sites/default/files/NGO-Memo-Impacts-of-Mexican-U.S.-Migration-Enforcement-9.20.21-1-1.pdf (The INM, National Guard, and Mexican army are using anti-riot gear and vehicles to intercept these migrant groups, disperse them, and detain their members, which include families, young children, pregnant women, as well as many individuals – such as refugees . . ."); *See,* e.g. WRC and IMUMI, Stuck In Uncertainty and Exposed to Violence: The Impact of US and Mexican Migration Policies on Women Seeking Protection in 2021 (Feb. 2022), https://www.womensrefugeecommission.org/wp-content/uploads/2022/02/Stuck-in-Uncertainty-2.pdf (In August 2021, Mexican immigration authorities and the Mexican National Guard were filmed kicking migrants, violently pushing women and children into vehicles, and threatening family separation as tactics to break up large groups. . . In October 2021, a Haitian woman was found dead along a highway in Chiapas. Her clothes had been removed and she had been raped and strangled. Four municipal police officers were detained in relation to the crime."); Human Rights Watch, Mexico: Asylum Seekers Face Abuses at Southern Border (June 6, 2022), https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border#:~:text=People%20applying%20for%20refugee%20status,appointment%20for%20a%20residence%20visa ("In some cases, efforts to apprehend undocumented migrants have led to serious violence and even deaths. In October 2021, National Guard troops opened fire on a truck carrying migrants, in an apparent attempt to detain them, killing two. . . In March 2021, soldiers shot and killed a Guatemalan man who failed to stop at a checkpoint.").

[105] From 2018 to 2019, the numbers of applications went from 29,569 to 70,210. The numbers decreased to 40,912 in 2020, largely due to the pandemic, but grew to 129,780 in 2021 and 118,756 in 2022. *See* COMAR, La COMAR en números – Estadística enero 2023 (Feb. 16, 2023), https://www.gob.mx/comar/articulos/la-comar-en-numeros-327441?idiom=es.

[106] These policies include metering, include the now defunct Migrant Protection Protocols, third country transit rule (or "Transit ban"), processes like Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP), and the continued use of the Title 42 expulsion policy.

particularly Black Haitian and African asylum seekers – to remain in a country through which they only intended to transit.[107]

The Departments indicate that COMAR ("Comisión Mexicana de Ayuda a Refugiados") Mexico's refugee agency, has increased its staffing and field presence. Despite these developments, COMAR cannot meet the demand resulting from an increasing number of applications. COMAR's budget has increased over the years, but only modestly and not commensurate with the increase in asylum applications.[108] For 2023, COMAR was assigned a budget of around 2.5 million U.S. dollars (or 48,339,057 Mexican Pesos). This represents only a 5.8 percent increase over the budget for 2022, and an 8.8 percent increase as compared with 2021.[109] In practice, the unprecedented number of asylum seekers in Mexico has stretched COMAR's capacity to process asylum requests.[110] This lack of capacity has become one of many obstacles to accessing international protection in Mexico.[111]

An illustration of COMAR's lack of capacity is the limited number of requests it adjudicates in comparison with the total number of applications received. Between 2020 and 2022, COMAR resolved on average 32,189 cases per year, while it received 183,555 asylum applications during the same period.[112] While the Departments indicate that COMAR granted asylum or complementary protection in 74 percent of cases filed in 2021, in reality this is a percentage of the total number of adjudications, not applications.[113] Despite this seemingly high number of grants, COMAR treats asylum seekers differently depending on their nationalities. For example, COMAR may grant protection to many Hondurans, Venezuelans, and Salvadorans, "while rejecting most applicants from Haiti, saying they do

[107] See, e.g., Zefitret Abera Molla, The Experiences of Black African and Haitian Migrants Forced to Remain in Mexico Due to Restrictive U.S. and Immigration Policies, Oxford Monitor of Forced Migration (Vol 11, No. 1) (Feb. 2023), https://www.sogica.org/wp-content/uploads/2023/02/OxMo-Volume-11.1.pdf.
[108] Department of State, 2021 *Country Reports on* Human Rights Practices*:* Mexico (2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/mexico/.
[109] La Razón, Crece migración 60% y a COMAR le dan sólo 2.6 mdp más para 2023 (Oct. 2022), https://www.razon.com.mx/mexico/crece-migracion-60-comar-le-dan-2-6-mdp-2023-497779.
[110] Department of State, *2021 Country Reports on Human Rights Practices: Mexico* (2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/mexico/.
[111] Department of State, *2022 Country Reports on Human Rights Practices: Mexico* (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/mexico/.
[112] COMAR adjudicated 22,674 cases in 2020, 38,099 in 2021, and 35,749 in 2022. *See* COMAR, La COMAR en números – Estadística enero 2023 (Feb. 2023),https://www.gob.mx/comar/articulos/la-comar-en-numeros-327441?idiom=es.
[113] *Id.*

not qualify as refugees."[114] The approval rate among applicants for Haiti was only 12 percent in 2022.[115]

Additional barriers to accessing protection in Mexico include a limited period of 30 days to file asylum applications after entering the country,[116] as well as a series of practices and policies that prevent asylum seekers from filing their claims or obtaining proper support during the process. For instance, human rights organizations have documented cases where immigration agents have dissuaded asylum seekers from applying for refugee status and instead pressured them to agree to voluntary returns, "even when they said they would be at risk of violence and persecution in their home countries."[117] At airports, Mexican immigration authorities have turned around individuals intending to seek protection in Mexico.[118] Mexican authorities have also illegally expelled asylum seekers from the interior of the country and from its southern border.[119]

Further, Mexican law forces asylum seekers to remain in the jurisdiction in which they applied for protection during the duration of their proceedings.[120] This has caused a bottleneck of cases at Mexico's southern border. In 2021 and 2022, on average over 66 percent of those who applied for asylum in Mexico did so in Tapachula, Chiapas, where conditions are dire. Shelters in Chiapas have been stretched beyond their capacity, jobs are

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[114] Human Rights Watch, *Mexico: Asylum Seekers Face Abuses at Southern Border* (June 6, 2022), https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border#:~:text=People%20applying%20for%20refugee%20status,appointment%20for%20a%20residence%20visa.

[115] COMAR, *La COMAR en números – Estadística enero 2023* (Feb. 16, 2023), https://www.gob.mx/comar/articulos/la-comar-en-numeros-327441?idiom=es.

[116] Estados Unidos Mexicanos, *Ley sobre refugiados, protección complementaria y asilo político* (Jan. 27, 2011), art. 18., https://www.gob.mx/cms/uploads/attachment/file/211049/08_Ley_sobre_Refugiados__Protecci_n_Complementaria_y_Asilo_Poltico.pdf.

[117] Human Rights Watch, *Mexico: Asylum Seekers Face Abuses at Southern Border, supra* n.114.

[118] WRC and IMUMI, Stuck In Uncertainty and Exposed to Violence: The Impact of US and Mexican Migration Policies on Women Seeking Protection in 2021 (Feb. 2022), https://www.womensrefugeecommission.org/wp-content/uploads/2022/02/Stuck-in-Uncertainty-2.pdf%20 ("Mexican immigration authorities also stepped up restrictive tactics at Mexican airports, where they denied entry to a record 72,895 foreigners in 2021, more than double the number of denials in 2019 (31,008)").

[119] *See* LAWG, CGRS and others, Memo: Impacts of U.S. and Mexican migration enforcement on migrant and refugee rights in Mexico (Sept. 2021), https://cgrs.uchastings.edu/sites/default/files/NGO-Memo-Impacts-of-Mexican-U.S.-Migration-Enforcement-9.20.21-1-1.pdf.

[120] Estados Unidos Mexicanos, *Reglamento a la Ley sobre refugiados, protección complementaria y asilo político* (2012), art. 38.

nearly impossible to find, and individuals waiting for appointments or decisions are provided little to no assistance, forcing many to live in the streets.[121] Asylum seekers in Tapachula are also prevented from accessing healthcare services, as providers often require them to provide documentation they do not have.[122] Further, not only have asylum seekers experienced violence in Tapachula, but many have also reported feeling unsafe due to its proximity to the Guatemalan border, where some of the gangs they have fled operate.[123]

Mexico's immigration detention system presents another serious barrier to accessing or receiving protection. While the national Migration Law sets a maximum of 60 days for immigration detention, the implementing regulation provides that asylum seekers can be detained for the entire duration of their proceedings.[124]

Asylum seekers in detention face overcrowding, unsanitary conditions, lack of services, and inadequate food and healthcare, forcing many to drop their claims in order to be released.[125] Most of them never receive information about their right to apply for asylum or

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[121] Human Rights Watch, *Mexico: Asylum Seekers Face Abuses at Southern Border* (June 6, 2022), https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border#:~:text=People%20applying%20for%20refugee%20status,appointment%20for%20a%20residence%20visa.

[122] WOLA, Struggling to Survive: The Situation of Asylum Seekers in Tapachula, Mexico (June 2022), https://www.wola.org/wp-content/uploads/2022/06/FINAL-Struggling-to-Survive-Asylum-Seekers-in-Tapachula.pdf.

[123] *See, Cfr.* Human Rights Watch, Mexico: Asylum Seekers Face Abuses at Southern Border (June 6, 2022), https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border#:~:text=People%20applying%20for%20refugee%20status,appointment%20for%20a%20residence%20visa; and WOLA, *Struggling to Survive: The Situation of Asylum Seekers in Tapachula, Mexico* (June 2022), https://www.wola.org/wp-content/uploads/2022/06/FINAL-Struggling-to-Survive-Asylum-Seekers-in-Tapachula.pdf..

[124] *See* Estados Unidos Mexicanos, Ley de migración (May 11, 2011), art. 111, https://www.diputados.gob.mx/LeyesBiblio/pdf/LMigra.pdf; and Estados Unidos Mexicanos, Reglamento de la Ley de Migración (Sept. 28, 2012), art. 235, https://www.diputados.gob.mx/LeyesBiblio/regley/Reg_LMigra.pdf.

[125] WOLA, Asylum Access, IMUMI, Key Issues on Access to Asylum in Mexico, Protection for Migrant Children, and U.S. Cooperation (Mar. 23, 2021), https://www.wola.org/analysis/key-points-migration-march-2021; BAJI and IMUMI, There is a Target on Us, The Impact of Anti-Black Racism on African Migrants and Mexico's Southern Border (2021), https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf ("[I]nterviewees shared multiple accounts of anti-Black racism within immigration detention centers. In some cases, the interviewees were denied the basic necessities of water and access to medical care . . . The poor conditions in detention fostered the spread of illnesses, such as flus and fevers. As Adamo, a migrant from Cameroon, stated, 'Black people are dying in detention and the Mexican officials do not even care enough to allow us access to proper medical care.'")

complementary protection while in detention.[126] During 2021, foreign nationals arriving at airports to seek protection were detained by Mexican migration authorities and held in detention for weeks, without any opportunity to apply for asylum.[127] There have also been incidents of torture reported in immigration detention centers.[128]

The asylum-seeking population in Mexico has also shifted over the last few years, with an increasing number of both Black and non-Spanish speaking applicants.[129] These asylum seekers face racism and increased xenophobia.[130] For example, discrimination and racial profiling prevents Haitian asylum seekers from accessing employment, housing, or even

[126] WOLA, Asylum Access, IMUMI, *Key Issues on Access to Asylum in Mexico, Protection for Migrant Children, and U.S. Cooperation* (Mar. 23, 2021), https://www.wola.org/analysis/key-points-migration-march-2021.

[127] WRC and IMUMI, Stuck In Uncertainty and Exposed to Violence: The Impact of US and Mexican Migration Policies on Women Seeking Protection in 2021 (Feb. 2022), https://www.womensrefugeecommission.org/wp-content/uploads/2022/02/Stuck-in-Uncertainty-2.pdf%20.

[128] Department of State, *2022 Country Reports on Human Rights Practices: Mexico* (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/mexico/. ("In June the MNPT received a report from the NGO Asylum Access indicating a Honduran migrant was tortured by immigration and National Guard agents in a migratory station in Piedras Negras, Coahuila").

[129] Just between 2021 and 2022, over 50,000 Haitians applied for asylum in Mexico. *See* COMAR, La COMAR en números – Estadística enero 2023 (Feb. 16, 2023), https://www.gob.mx/comar/articulos/la-comar-en-numeros-327441?idiom=es.

[130] Zefitret Abera Molla, The Experiences of Black African and Haitian Migrants Forced to Remain in Mexico Due to Restrictive U.S. and Immigration Policies, Oxford Monitor of Forced Migration (Vol 11, No. 1) (Feb. 2023), at p. 83, https://www.sogica.org/wp-content/uploads/2023/02/OxMo-Volume-11.1.pdf. ("Black, non-Spanish speaking migrants face intersecting discriminations due to their status as migrants, their race, and their lack of Spanish language skills. These overlapping identities put Black, non-Spanish speaking people at a greater risk of extortion from criminals, hinders their access to justice and assistance from the Mexican government, and increases their vulnerability to racist attacks. In addition to facing discrimination from state agencies, Mexican law enforcement such as the National Guard and the local police, Black, non-Spanish speaking migrants also endure daily discrimination from the local population." At p. 88).

public transportation in Mexico.[131] Language barriers further prevent access to both the asylum system and services such as education and healthcare.[132]

In short, Mexico does not meet the requirements of a safe third country under U.S. law and international standards. The Departments are exceeding their authority by attempting to treat it as such through this Rule.

Guatemala: The Departments recognize that Guatemala is a refugee-producing country. Indeed, in 2021, Guatemalans filed 23,000 asylum cases in the United States, accounting for 12% of the total number of applications filed that year.[133] However, the Departments fail to acknowledge that, conditions in Guatemala can be dangerous for asylum seekers. According to the State Department's own human rights report, rape, femicide, violence against women, trafficking in persons, violent attacks against LGBTQ+ persons, gang-recruitment of displaced children, and sexual exploitation of children, are all serious problems in Guatemala.[134] Guatemala's high rates of violence in large part are due "to the presence of narcotrafficking organizations, particularly in border areas, as well as gangs that control urban neighborhoods. In this context, gender-based violence is particularly rampant, given that many of these groups use this form of violence in order to demonstrate control or power."[135]

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[131] *See,* e.g. WRC and IMUMI, *Stuck In Uncertainty and Exposed to Violence: The Impact of US and Mexican Migration Policies on Women Seeking Protection in 2021* (Feb. 2022), https://www.womensrefugeecommission.org/wp-content/uploads/2022/02/Stuck-in-Uncertainty-2.pdf%20;WOLA, Struggling to Survive: The Situation of Asylum Seekers in Tapachula, Mexico (June 2022), https://www.wola.org/wp-content/uploads/2022/06/FINAL-Struggling-to-Survive-Asylum-Seekers-in-Tapachula.pdf; CGRS, Haitian Bridge Alliance, and IMUMI, A Journey of Hope: Haitian Women's Migration to Tapachula*, Mexico* (2021), https://cgrs.uchastings.edu/sites/default/files/A-Journey-of-Hope-Haitian-Womens-Migration-to -Tapachula.pdf; Zefitret Abera Molla, *The Experiences of Black African and Haitian Migrants Forced to Remain in Mexico Due to Restrictive U.S. and Immigration Policies,* Oxford Monitor of Forced Migration (Vol 11, No. 1) (Feb. 2023), at p. 83, https://www.sogica.org/wp-content/uploads/2023/02/OxMo-Volume-11.1.pdf.

[132] Zefitret Abera Molla, *The Experiences of Black African and Haitian Migrants Forced to Remain in Mexico Due to Restrictive U.S. and Immigration Policies,* Oxford Monitor of Forced Migration (Vol 11, No. 1) (Feb. 2023), at p. 83, https://www.sogica.org/wp-content/uploads/2023/02/OxMo-Volume-11.1.pdf.

[133] UNHCR, Global Trends Report 2021 (2022), https://www.unhcr.org/en-us/publications/brochures/62a9d1494/global-trends-report-2021.html.

[134] Department of State, 2021 Country Reports on Human Rights Practices: Guatemala (2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/guatemala/.

[135] Declaration of Claudia Paz y Paz (2019).

We know that asylum seekers suffer from this violence, as well. Individuals transferred from the United States to seek asylum in Guatemala under the now defunct Asylum Cooperative Agreement reported that:

> they considered Guatemala to be no different than their home countries in terms of safety and opportunity. Indeed, many transferees noted that in their home countries they at least understood the context and had social networks that they could rely on. Few found remaining in Guatemala to be a feasible option because it is a dangerous and poor country where they lack familial or social ties.[136]

As the Departments highlight, over the last few years there has been an increase in the number of individuals seeking asylum in Guatemala.[137] However, there is no indication that asylum seekers seek refuge in Guatemala because they feel safe. In reality, the dramatic increase in asylum requests filed in Guatemala occurred at a time when the U.S. and Mexican governments had implemented increased enforcement measures, such as expulsions, designed to keep asylum seekers from reaching the U.S. border.[138]

The Departments indicate that Guatemala has taken some steps to develop its asylum system. For example, in February 2021 the government created the Refugee Status Recognition Department (DRER), an office dedicated to "establishing an appropriate mechanism to receive asylum requests."[139] However, the mere creation of an office does

[136] Refugees International, Deportation with a Layover, Failure of Protection under the US-Guatemala Asylum Cooperative Agreement (May 19, 2020), https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative#_ftn151.

[137] During 2021, Guatemala received 1,046 asylum applications, a 115 percent increase over the average of the two prior years. The number went down to 962 asylum requests in 2022. *See* UNHCR, Refugee Data Finder: Guatemala, https://www.unhcr.org/refugee-statistics/download/?url=ID9x2z.

[138] *See,* LAWG, CGRS, and others, Impacts of U.S. and Mexican migration enforcement on migrant and refugee rights in Mexico (Sept. 2021), https://cgrs.uchastings.edu/sites/default/files/NGO-Memo-Impacts-of-Mexican-U.S.-Migration-Enforcement-9.20.21-1-1.pdf; and WRC, CGRS, and others, Doubling Down on Deterrence: Access to Asylum Under Biden (Sept. 2021),

[139] *See,* Instituto Guatemalteco de Migración, Funciones del Departamento de Reconocimiento de Estatus de Refugiado – DRER (2021), https://igm.gob.gt/funciones-del-departamento-de-reconocimiento-de-estatus-de-refugiado-drer/; Diario de Centro América, Guatemala fortalece atención y protección (Oct. 2, 2021), https://dca.gob.gt/noticias-guatemala-diario-centro-america/guatemala-fortalece-atencion-y-proteccion/.

not meaningfully address other structural deficiencies in the asylum system, none of which the Departments address.[140]

The asylum system in Guatemala is inefficient; claims go through an extended bureaucratic process. Asylum requests are reviewed by the National Commission for Refugees (CONARE), which is composed of delegates from the Ministry of Labor and Social Security, Ministry of Foreign Affairs, Ministry of Interior, and Guatemalan Migration Institute. CONARE then makes recommendations to the National Immigration Authority (INM) which approves or denies the asylum requests.[141] Further, UNHCR is deliberately excluded from the process, preventing the agency from voicing its position on asylum cases.[142] This "interministerial process contributes to major delays on final case decisions and an increased backlog."[143] At the end of 2022, Guatemala had recognized only 773 refugees in the prior 20 years.[144]

Even with the DRER in place, access to the asylum system is out of reach for many. The Department of State noted that in 2021 some vulnerable individuals in need of protection required the intervention of "central authorities" and the Human Rights Ombudsman (PDH) to be able to apply.[145] Similarly, "UNHCR reported that identification and referral mechanisms for potential asylum seekers were inadequate."[146] Following the initial asylum request—which can be made at immigration control posts at the border or in DRER

[140] For more information on the flaws of Guatemala's asylum system, *see Declaration of Claudia Paz y Paz Bailey* (2019).
[141] Migración Guatemala, Acuerdo No. 2-2019 Reglamento del Procedimiento para la Protección, Determinación y Reconocimiento del Estatuto de refugiado en el Estado de Guatemala (2019), arts. 12 (about CONARE), 14 (CONARE's duties), 17 (asylum procedure), https://igm.gob.gt/wp-content/uploads/2017/09/ACUERDO-2-2019-Reglamento-Refugiado-1.pdf.
[142] Declaration of Claudia Paz y Paz (2019).
[143] Department of State, 2021 Country Reports on Human Rights Practices: Guatemala (2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/guatemala/.
[144] Instituto Guatemalteco de Migración, *Hasta el 30 de diciembre se recibieron 962 solicitudes de refugio en el país* (Jan. 2023), https://igm.gob.gt/hasta-el-30-de-diciembre-se-recibieron-962-solicitudes-de-refugio-en-el-pais/.
[145] Department of State, *2021 Country Reports on Human Rights Practices: Guatemala* (2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/guatemala/.
[146] *Id.*

offices—the asylum seeker must travel to Guatemala City to complete the process.[147] In practice, this onerous travel requirement limits access to asylum.[148]

Access to asylum is also restricted by enforcement practices that limit access to territory. For example, Guatemalan authorities have violently repressed peaceful migrant caravans. Authorities have also illegally expelled potential asylum seekers *en masse*, particularly those from Haiti or Venezuela.[149]

The Departments point to the creation of a process to issue work permits as another step taken to improve Guatemala's protection system. Yet by no means does this new process fully address the economic integration needs of asylum seekers. In reality, the centralized process to issue work permits, the existence of a cap on the number of foreign workers that companies can employ,[150] and lack of knowledge in the public and private sectors about refugee rights, are all obstacles to economic integration.[151] This has a direct impact on asylum seekers in Guatemala, who "struggle to meet their most basic needs."[152]

Further, "access to effective personal documentation for asylum-seekers and refugees is the main obstacle for accessing" services such as education, health, welfare, and financial services.[153] In particular, the Department of State reports that access to education for asylum seekers is difficult due to "the country's onerous requirements for access to formal education, including documentation from the country of origin." Relatedly, the Department of

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[147] UNHCR, The Application Process for Refugee Status in Guatemala (2022), https://help.unhcr.org/guatemala/en/solicitando-la-condicion-de-refugiado/solicitar-la-condicion-de-refugiado/.

[148] Department of State, *2021 Country Reports on Human Rights Practices: Guatemala* (2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/guatemala/.

[149] *See,* BBC, Migrant caravan: Guatemala blocks thousand bound for US (Jan. 18, 2021), https://www.bbc.com/news/world-latin-america-55699540; DW, Guatemala expulsa a medio centenar de migrantes de Haití (2021), https://www.dw.com/es/guatemala-expulsa-a-medio-centenar-de-migrantes-de-hait%C3%AD/a-59702088 (reporting the expulsion of over 50 Haitians); Refugees International, Refugees International Eyewitness: Pushback of Venezuelans on the Guatemalan Border (Oct. 31 2022) (reporting the expulsion of Venezuelans in October 2022), https://www.refugeesinternational.org/reports/2022/10/31/refugees-international-eyewitness-pushbacks-of-venezuelans-on-the-guatemalan-border.

[150] República de Guatemala, Decreto 1441 Código del Trabajo de Guatemala (1961), https://www.wipo.int/edocs/lexdocs/laws/es/gt/gt015es.pdf.

[151] Department of State, *2021 Country Reports on Human Rights Practices: Guatemala* (2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/guatemala/.

[152] *Id.*

[153] UNHCR, Global Focus Guatemala, *https://reporting.unhcr.org/guatemala*.

State noted that "[a]dult asylum seekers often could not obtain accreditation of their foreign university degrees to practice their profession."[154]

Finally, the Departments point to the new Attention Centers for Migrants and Refugees (*Centro de Atención para Migrantes y Refugiados*, or CAMPIRs) as another mechanism created to facilitate access to protection in Guatemala.[155] While the U.S. government reports that over 32,000 individuals accessed these centers, it is not clear what percentage of these individuals were migrants or asylum seekers in Guatemala, how many were screened and referred for protection, or even how many could actually access any kind of protection. UNHCR has already highlighted the need to strengthen services in these centers in order to "provide differentiated care tailored for each population."[156]

Guatemala does not meet the requirements of a safe third country under U.S. law and international standards. The Departments are exceeding their authority by attempting to treat it as such through this Rule.

Belize: Although Belize is a country with lower levels of violence, and greater respect for human rights, its asylum system is barely functional. The Departments err in asserting that, as of October 2022, Belize had granted asylum to a total of 4,130 individuals. In reality, this figure includes both recognized refugees *and* asylum seekers. In fact, by December 2022, Belize had granted asylum to fewer than 100 individuals, resulting in a backlog of over 4,000 cases.[157]

Asylum seekers in Belize face an inaccessible and inefficient asylum system. First, the actual process is cumbersome as it involves a single Eligibility Officer who oversees gathering and reviewing claims before passing them on to the Refugee Eligibility Committee, a 9-member group that reviews only a limited number of cases at monthly meetings.[158] According to the

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[154] Department of State, *2021 Country Reports on Human Rights Practices: Guatemala* (2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/guatemala/.
[155] According to the White House, these centers are "located to benefit communities at risk of displacement, with high levels of emigration, and also along transit routes. They are designed to evaluate individuals' protection, humanitarian, and economic needs in order to provide appropriate services and referrals." *See,* The White House, Factsheet: Update on the Collaborative Migration Management Strategy (Apr. 20, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/20/fact-sheet-update-on-the-collaborative-migration-management-strategy/.
[156] UNHCR, *Global Focus Guatemala, https://reporting.unhcr.org/guatemala.*
[157] *See* Government of Belize Press Office, Announcement of Amnesty 2022 (Dec. 2022), https://www.pressoffice.gov.bz/wp-content/uploads/2019/12/Announcement-of-Amnesty-2022.pdf; UNHCR, Refugee Data Finder Belize, *https://www.unhcr.org/refugee-statistics/download/?url=IG78Vk*.
[158] Submission by the United Nations High Commissioner for Refugees, For the Office of the High Commissioner for Human Rights' Compilation Report, Universal Periodic Review: 3rd Cycle, 31st Session, Belize, https://www.refworld.org/pdfid/5b56e1903.pdf.

Department of State, out of 640 positive recommendations, the Ministry of Immigration has granted asylum in only 15 percent of them.[159] Second, more than 50% of asylum seekers report not applying for asylum in Belize due to not knowing it was an option or not having information on how to do so, a clear barrier to accessing the system.[160]

Worse, there are also reports that Belizean authorities prevent asylum seekers from seeking protection or discriminate against them. For example, the Human Rights Commission of Belize reported that 26 individuals filed complaints for not being allowed to file for refugee status in 2022, while the true number is believed to be much higher.[161] And while the Belizean Refugee Law recognizes the right to seek asylum regardless of the matter of entry into the country, there have been cases reported of asylum seekers being denied this opportunity because they entered irregularly.[162] During 2022, "the government repatriated Cuban nationals who claimed their lives or freedom would be threatened due to their opposition to the government. Belize and Cuba have an agreement that requires Belize to return to Cuba all irregular migrants with Cuban citizenship."[163] Additionally, one government study reported that 15 percent of asylum seekers claimed to have entered Belize irregularly after being rejected at ports of entry due to their nationality.[164] Discrimination also extends to access to basic services.[165]

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[159] Department of State, 2021 Country Reports on Human Rights Practices: Belize (Apr. 12, 2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/belize/.
[160] *Id*.
[161] Department of State, 2022 Country Reports on Human Rights Practices: Belize (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/belize/.
[162] *See* Belize, Refugees Act Chapter 165 Revised Edition 2011(2011), art. 8(1) ["Any person who is within Belize, whether he has entered Belize lawfully or otherwise, and who wishes to remain within Belize as a refugee in terms of this Act shall within fourteen days of his arrival in Belize apply to the Committee for recognition of his status as a refugee."], https://immigration.gov.bz/wp-content/uploads/2021/01/Refugees-Act-2011.pdf; Department of State, 2021 Country Reports on Human Rights Practices: Belize (Apr. 12, 2022) ("HRCB claimed these persons were denied from applying for asylum because they entered the country illegally."), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/belize/.
[163] Department of State, *2022 Country Reports on Human Rights Practices: Belize* (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/belize/.
[164] MIRPS, Annual Report of the Comprehensive Regional Protection and Solutions Framework (Dec. 2022), p. 37, https://mirps-platform.org/wp-content/uploads/2023/01/MIRPS_ENG_WEB.pdf.
[165] Department of State, *2022 Country Reports on Human Rights Practices: Belize* (Mar. 20, 2023) ("Refugees and asylum seekers were able to use the education system and the socialized medical system, but the government offered no assistance with housing or food except in extreme cases that involved children and pregnant women. UNHCR reported that several refugees claimed health providers had discriminated against them when they accessed public clinics and hospitals."), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/belize.

Finally, while the Government of Belize has launched an amnesty program, this measure will benefit only a limited number of individuals. The amnesty is available only to asylum seekers who filed their claims before March 31, 2020, and for migrants who entered irregularly before 2017.[166] In practice, this means that the total number asylum seekers eligible to apply for amnesty is fewer than 5,000, including individuals whose claims have been rejected.[167] Additionally, lack of access to education and employment in Belize is a serious barrier to integration for asylum seekers, in particular due to their inability to obtain employment authorization.[168] As of January 2023, only 222 asylum seekers in the entire country had work permits.[169]

Like Guatemala and Mexico, Belize fails to meet the requirements of a safe third country under U.S. law and international standards. The Departments are exceeding their authority by attempting to treat it as such through this Rule.

El Salvador: El Salvador is a dangerous country for asylum seekers. The Department of State reports that UNHCR and humanitarian organizations that attempt to aid asylum seekers and refugees find it difficult to do so in certain areas due to the control of gangs over neighborhoods.[170] Additionally, human rights conditions in El Salvador have deteriorated over the last year. In 2022, the government of El Salvador instituted a state of emergency as an alleged response to increased gang violence. The state of emergency, initially imposed for one month, has been repeatedly extended for nearly a year now.[171]

During this time, NGOs have documented an increase of human rights violations, including mass arbitrary detentions, torture and other cruel treatments of detainees, enforced disappearances, degrading treatment or punishment by security forces; harsh and life-threatening prison conditions, and corrupt prosecutions.[172] Making matters worse, the

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[166] *See,* Government of Belize Press Office, Announcement of Amnesty 2022 (Dec. 2022), https://www.pressoffice.gov.bz/wp-content/uploads/2019/12/Announcement-of-Amnesty-2022.pdf.
[167] *See*, UNHCR, Belize Amnesty Operational Update (Mar. 1, 2023), https://reliefweb.int/report/belize/belize-amnesty-operational-update-january-2023.
[168] *See*, UNHCR, *Belize Amnesty Operational Update* (Mar. 1, 2023), https://reliefweb.int/report/belize/belize-amnesty-operational-update-january-2023.
[169] MIRPS, *Annual Report of the Comprehensive Regional Protection and Solutions Framework* (Dec. 2022), p. 37, https://mirps-platform.org/wp-content/uploads/2023/01/MIRPS_ENG_WEB.pdf.
[170] Department of State, *2021 Country Reports on Human Rights Practices: Belize* (Apr. 12, 2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/belize/.
[171] Marcos Alemán, El Salvador aprueba prórroga a régimen de excepción, Associated Press (Mar. 16,2023), https://www.latimes.com/espanol/internacional/articulo/2023-03-16/el-salvador-aprueba-prorroga-a-regimen-de-excepcion.
[172] Cristosal and Human Rights Watch, We Can Arrest Anyone We Want, Widespread Human Rights Violations Under El Salvador's "State of Emergency" (Dec. 2022),

state of emergency has also been used as an excuse to limit the right to access public information, advance the closure of civic space, and facilitate acts of corruption.[173] The Department of State has also recognized persistent additional human rights issues such as "serious problems with the independence of the judiciary. . . lack of investigation and accountability for gender-based violence; significant barriers to accessing sexual and reproductive health services; and crimes involving violence against [LGBTQ+] individuals."[174] These factors all impact the ability of vulnerable populations, such as refugees and asylum seekers, to be safe in El Salvador.

Furthermore, according to the Department of State, El Salvador's asylum system "has major regulatory and operational gaps" that restrict access to protection.[175] First, there is an exceptionally short deadline of 5 business days to apply for asylum, so few people apply in the first place.[176]

Second, the entity in charge of adjudicating asylum claims, *Comisión para la Determinación de la Condición de Personas Refugiadas* (or CODER),[177] does not have its own budget, which hampers its capacity and operations. Additionally, CODER is not structured to process asylum requests in a streamlined manner. CODER is made up of the Ministers of Government and Foreign Relations, or their representatives, and in order to grant asylum to individuals, their decision must be unanimous.[178] Between 2014 and 2019 CODER granted asylum to an average of 6 people per year.[179]

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https://www.hrw.org/sites/default/files/media_2022/12/elsalvador1222web.pdf; and *Department of State*, *2022 Country Reports on Human Rights Practices: El Salvador* (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/el-salvador/.

[173] WOLA, Corruption under the State of Emergency in El Salvador: a democracy without oxygen (Sep. 27 2022), https://www.wola.org/2022/09/corruption-state-of-emergency-el-salvador/.

[174] *Department of State*, *2022 Country Reports on Human Rights Practices: El Salvador* (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/el-salvador/.

[175] *Id.*

[176] República de El Salvador, *Ley para la determinación de la condición de personas refugiadas* (Aug. 14, 2002), art 19. Further, in the case of "extraordinary circumstances" asylum claims must be filed within 15 business days of entering El Salvador, *id.* art 24, https://www.acnur.org/fileadmin/Documentos/BDL/2002/1567.pdf

[177] República de El Salvador, *Ley para la determinación de la condición de personas refugiadas (*Aug. 14, 2002), https://www.acnur.org/fileadmin/Documentos/BDL/2002/1567.pdf; and República de El Salvador, *Regulación de la Ley para la determinación de personas refugiadas* (2005), art. 9, https://www.refworld.org.es/type,DECREEES,NATLEGBOD,SLV,57f76b8f22,0.html.

[178] República de El Salvador, Ley para la determinación de la condición de personas refugiadas (Aug. 14,2002), art 28, https://www.acnur.org/fileadmin/Documentos/BDL/2002/1567.pdf.

[179] *See* CODER, *Solicitud de Acceso a la Información Pública SAI-221-2019* (2019), https://www.transparencia.gob.sv/system/documents/documents/000/337/900/original/Informaci%C3%

Third, El Salvador's asylum system has limited due process guarantees. For instance, "the criteria for case decision [are] unclear"[180] and asylum denials cannot be appealed to a higher authority. At best, asylum seekers can request a revision of the decision from the same body that adjudicated their case, CODER, within three business days of being notified of the denial.[181]

El Salvador fails to meet the requirements of a safe third country under U.S. law and international standards. The Departments are exceeding their authority by attempting to treat it as such through this Rule.

Nicaragua: As the Departments note, thousands of Nicaraguan individuals and families have sought refuge in countries like Costa Rica and the United States, among others. Conditions are so dire that Nicaragua is one of the very few countries in the world that benefit from new U.S. parole program.

The Department of State reports significant human rights violations and other abuses in Nicaragua, including arbitrary killings; torture and cruel, inhuman, or degrading treatment; government harassment of human rights organizations; sexual and gender-based perpetrated with impunity; violence against Indigenous communities, trafficking in persons; violence against LGBTQ+ individuals; and "the worst forms of child labor."[182]

The asylum system in Nicaragua [has been] *de facto* suspended since 2015, with a significantly reduced protection space for both asylum seekers and refugees."[183] The

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B3n_sobre_SAI_221-2019_%281%29._Datos_estad%C3%ADsticos_CODER.pdf?1579021889; CODER, *Solicitud de Acceso a la Información Pública SAI-65-2020* (2020), *See,* CODER, Solicitud de Acceso a la Información Pública SAI-221-2019 (2019), https://www.transparencia.gob.sv/system/documents/documents/000/337/900/original/Informaci%C3%B3n_sobre_SAI_221-2019_%281%29._Datos_estad%C3%ADsticos_CODER.pdf?1579021889; CODER, Solicitud de Acceso a la Información Pública SAI-65-2020 (2020), https://www.transparencia.gob.sv/system/documents/documents/000/381/173/original/Informaci%C3%B3n__sobre-_SAI_65-2020_%281%29._Solicitud_de_refugio_o_asilo_ante__la_%28CODER%29.pdf?1596591945.

[180] Department of State, 2021 Human Rights Practices Report El Salvador (Apr. 12, 2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/el-salvador/#:~:text=Significant%20human%20rights%20issues%20included,and%20life%2Dthreatening%20prison%20conditions%3B.

[181] República de El Salvador, Ley para la determinación de la condición de personas refugiadas (Aug. 14, 2002), arts 29 and 32, https://www.acnur.org/fileadmin/Documentos/BDL/2002/1567.pdf .

[182] Department of State, *2022* Human Rights Practices: Nicaragua (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/nicaragua.

[183] Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 3rd Cycle, 33rd Session for Nicaragua (2019), https://www.refworld.org/pdfid/5ccabf2b7.pdf.

Department of State confirms that the Nicaraguan government has not provided updated information on refugees or asylum seekers since 2015.[184]

UNHCR has expressed serious concern about conditions in the country, stating that the:

> current situation in Nicaragua is severely affecting refugees and asylum-seekers. As the socio-political crisis deepens, refugees and asylum-seekers in Nicaragua lack access to basic services, such as education or medical care, a fact which has increased their socioeconomic vulnerability. Many have lost their jobs or have been forced to close their small businesses as the inflation and the reduced demand are not allowing them to make a profit. The insecurity and the protests have also negatively impacted their freedom of movement. As a result, many refugees and asylum-seekers have started to leave the country. Some of them have preferred to return to their country of origin, while others are looking for international protection in neighboring countries.[185]

Since 2017, UNHCR has documented "several cases of refoulement and/or denial of entry of Honduran and Salvadoran families. The persons that are affected include: recognized refugees and asylum-seekers, and persons with international protection needs who could not access the asylum procedures due to the suspension of the asylum system."[186]

Nicaragua fails to meet the requirements of a safe third country under U.S. law and international standards. The Departments are exceeding their authority by attempting to treat it as such through this Rule.

Costa Rica: We begin by requesting that the migration agreement with Costa Rica, Rule 11722, be made available to the public. We assume that it does not meet the statutory requirements for a safe third country agreement, or the Departments would have so indicated.

The Departments point to Costa Rica as a country that has welcomed asylum seekers and migrants, but fail to acknowledge that Costa Rica already has a per capita rate of asylum

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[184] Department of State, 2022 *Human Rights Practices: Nicaragua* (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/nicaragua.
[185] *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 3rd Cycle, 33rd Session for Nicaragua* (2019), https://www.refworld.org/pdfid/5ccabf2b7.pdf.
[186] *Id.*

claims ten times that of the United States.[187] The Proposed Rule would likely result in a dramatic increase of applications in an asylum system that is already overwhelmed, which would be inconsistent with the principles of responsibility sharing agreed upon in the Los Angeles Declaration on Migration and Protection. Just in 2021, over 108,000 asylum seekers filed claims in Costa Rica.[188]As of September of 2022, there were over 200,000 pending asylum applications, and over 50,000 individuals waiting for their appointments to make formal applications.[189] Between 2017 and 2021, Costa Rica granted asylum to only 6,035 individuals.

As noted above, the former president of Costa Rica has denounced the Proposed Rule, warning that it will increase the burden for his country, and make it less welcoming by fueling xenophobia.

Aside from increased numbers of applicants, structural and systemic deficiencies limit Costa Rica's asylum system. According to Obiora C. Okafor, U.N. Independent Expert on human rights and international solidarity, despite the increasing number of asylum seekers there has been a "decrease in access to international development assistance and other forms of international cooperation received from donors,"[190] which negatively impacts Costa Rica's capacity to welcome asylum seekers. In line with this, civil society organizations "have reported significant gaps on the ground in the social protection of migrants and refugees."[191] Also, "[d]ue to the insufficiency of the number of officers processing their applications, migrants and refugees also experience long delays before their applications for the regularization of their status [are] determined."[192]

According to the Department of State, "while the law requires authorities to process claims within 3 months of being filed, in practice there [is] an average two-month wait for appointments to file an asylum claim, and it [takes] up to 10 years to complete the review and

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[187] As of mid-2022, UNHCR reported just under 1.44 million asylum seekers in the United States — a country of 332 million — and 204,730 applications in Costa Rica, a country of 5 million. *See* UNCHR, *Refugee Data Finder*, https://www.unhcr.org/refugee-statistics/download/?url=2bxU2f.

[188] UNHCR, *Refugee Data Finder Costa Rica, https://www.unhcr.org/refugee-statistics/download/?url=uU4Wv9.*

[189] Moisés Castillo and Christopher Sherman, *Fleeing Nicaraguans strain Costa Rica's asylum system*, AP (Sep. 2022).

[190] *Preliminary Findings and Recommendations at the end of the visit of Obiora C. Okafor, U.N. Independent Expert on human right and international solidarity* (March 3, 2022), https://www.ohchr.org/en/statements-and-speeches/2022/03/preliminary-findings-and-recommendations-end-his-visit-costa-rica.

[191] *Id.*

[192] *Id.*

appeals processes."[193] UNHCR also reports that Costa Rica's asylum system does not have a clear prioritization mechanism for applicants with special needs, lacks standard operating procedures, and provides insufficient information to applicants about the process.[194]

In response to its backlog, Costa Rica's new government has severely curtailed eligibility and discouraged people from seeking asylum. In December 2022, President Rodrigo Chaves stated that the asylum system was being abused and announced sweeping reforms and policies to curb this perceived abuse.[195] First, the government issued a decree modifying the country's refugee regulation to enact the following restrictions: a new one month-term to apply for asylum;[196] bans to asylum for reasons such as working without authorization and/or transiting through "safe countries" - as determined by the General Migration Directorate - without requesting asylum and receiving a denial;[197] and expanded the bases for finding claims to be fraudulent or unfounded.[198]

Second, an accompanying regulation restricts access to employment authorization for asylum seekers. Before the new regulation, applicants in most cases were automatically able to work 3 months after filing their claim. Now individuals must apply separately for a work permit after waiting the 3-month period.[199] With the new regulation, work authorization is now tied to a specific employer and requires a detailed job offer.[200] These

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[193] Department of State, *2022 Country Reports on Human Rights Practices: Costa Rica* (Mar. 20, 2023) https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/costa-rica/.
[194] UNHCR, *Strengthening of the Government of Costa Rica's Asylum System through Digitalization* (Oct. 28, 2022), https://reliefweb.int/report/costa-rica/unhcr-factsheet-strengthening-government-costa-ricas-asylum-system-through-digitalization.
[195] DW, *Costa Rica cambia reglamentos para evitar "abuso" migratorio* (Dec. 2022), https://www.dw.com/es/costa-rica-cambia-reglamentos-para-evitar-abuso-migratorio/a-63948338.
[196] Government of Costa Rica, *Decree 43810 MGP* (Dec. 2022), art. 1., https://www.migracion.go.cr/Documentos compartidos/Circulares y Directrices/2022/DECRETO 43810 MGP REFORMA al Reglamento de Personas Refugiadas.pdf.
[197] *Id.,* arts. 3 and 5.
[198] Government of Costa Rica, *Decree 43810 MGP* (Dec. 2022), art. 6 ("Manifestly unfounded requests are defined as those that are impertinent because they have no relationship with the criteria for refugee status established by the Convention; inadmissible because they are not based on conventional or legal norms; or abusive, when they may have a fraudulent connotation."), https://www.migracion.go.cr/Documentos compartidos/Circulares y Directrices/2022/DECRETO 43810 MGP REFORMA al Reglamento de Personas Refugiadas.pdf.
[199] El Empleo, *Reforma y derogatoria en artículos de reglamento de personas refugiadas* (Dec. 2022), https://www.elempleo.com/cr/noticias/mundo-empresarial/reforma-y-derogatoria-en-articulos-del-reglamento-de-personas-refugiadas-6719.
[200] Government of Costa Rica, *Decree JUR-0204-12-2022-ABM* (Dec. 2022), (establishes the Procedure for the Adjudication of Work Permits for Asylum Seekers), arts 1, 3, and 6.,

represent significant restrictions, especially because "refugees and asylum seekers reported that job opportunities were scarce" before the new regulation.[201] Prior to these reforms, at least 3,225 asylum seekers or refugees in Costa Rica already lived in a situation of poverty or extreme poverty.[202]

Third, the new Special Temporary Category (STC) that Costa Rica is extending to Cuban, Nicaraguan, and Venezuelan asylum seekers requires them to withdraw their asylum applications once the STC is granted.[203] This form of temporary protection will only benefit nationals from the three countries who requested asylum between 2010 and September 2022 and whose cases were denied or are pending.[204] Further, the STC does not allow for family reunification.[205] All of this indicates that, even if the STC will benefit thousands of Nicaraguans, Cubans, and Venezuelans already in Costa Rica, it was also created as an instrument to dissuade people from seeking asylum and will leave countless people unprotected.

Additionally, the Departments should take note that Costa Rica can be an unwelcoming place for many asylum seekers. Xenophobia and discrimination have increased as the number of refugees from Nicaragua and other places has grown over the years.[206]The Department of State reports that "access to public services and social welfare is hampered, among other reasons, due to xenophobia. Access to health services is difficult."[207] Nicaraguans in particular face discrimination in the education system to varying degrees. This includes demotion of academically successful children and teens under the pretense that education

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https://www.migracion.go.cr/Documentos compartidos/Refugio/Resoluci%C3%B3n D.JUR-0204-12-2022-ABM Permisos laborales a las personas solicitantes de refugiado.pdf.

[201] Department of State, *2021 Country Reports on Human Rights Practices: Costa Rica* (Apr. 12, 2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/costa-rica/.

[202] MIRPS 2022, *Annual Report of the Comprehensive Regional Protection and Solution Framework* (Dec. 2022), p. 45., https://mirps-platform.org/wp-content/uploads/2023/01/MIRPS_ENG_WEB.pdf.

[203] Government of Costa Rica, *Decree 43809 MGP – Categoría Especial Temporal para personas nacionales de Cuba, Nicaragua, y Venezuela cuyas solicitudes de reconocimiento de la condición de refugiado se encuentren pendientes de resolución o hayan sido denegadas* (Dec. 2022), art 4.f., https://migracion.go.cr/Documentos compartidos/Circulares y Directrices/2022/DECRETO 43809 MGP CATEGORIA ESPECIAL TEMPORAL.pdf.

[204] *Id.,* art. 1.

[205] *Id.,* arts. 2, 9, and 16.

[206] UNHCR, *Preliminary Findings and Recommendations at the end of the visit of Obiora C. Okafor, U.N. Independent Expert on human right and international solidarity* (Mar. 3, 2022), https://www.ohchr.org/en/statements-and-speeches/2022/03/preliminary-findings-and-recommendations-end-his-visit-costa-rica.

[207] Department of State, *2021 Country Reports on Human Rights Practices: Costa Rica* (Apr. 12, 2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/costa-rica/.

levels in Nicaragua are lower than in Costa Rica; social exclusion and harassment, particularly because of their accents; and hostile treatment and denial of information by academic officials.[208]

Furthermore, refugees and asylum seekers in Costa Rica "reported that job opportunities [are] scarce. In the case of professionals, refugees, and asylum seekers [face] significant bureaucratic processes in obtaining a license to practice locally."[209] In turn, "these labor prospects have placed Nicaraguan migrants in an unusually vulnerable economic situation, particularly during the pandemic, with many becoming food insecure and having to sleep in the streets. In mid-2020, more than three-quarters of Nicaraguan immigrants were going hungry."[210] The Department of State has also pointed out that the "forced labor of migrants occurs in the agricultural and domestic service sectors" and that the Government does not enforce minimum wages in rural areas, especially "where large numbers of migrants [are] employed, and in the large informal sector."[211]

According to the Department of State, "[g]roups of exiles in Costa Rica alleged harassment and political oppression by parapolice and [Ortega regime] sympathizers who crossed the border to target exiles, as well as by intelligence officials within the Nicaraguan embassy in Costa Rica."[212]

Costa Rica does not meet the requirements of a safe third country under U.S. law and international standards. The Departments are exceeding their authority by attempting to treat it as such through this Rule.

Panama: As the Departments recognize, large numbers of individuals make the treacherous journey through the Darién Gap into Panama every year. From January 2021 through December 2022, over 382,000 individuals entered Panama irregularly.[213] However,

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[208] María Jesús Mora, Costa Rica Has Welcoming Policies for Migrants But Nicaraguans Face Subtle Barriers, Migration Policy Institute (Nov. 5, 2021), https://www.migrationpolicy.org/article/costa-rica-nicaragua-migrants-subtle-barriers.
[209] Department of State, 2021 Country Reports on Human Rights Practices: Costa Rica (Apr. 12, 2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/costa-rica/.
[210] María Jesús Mora, *Costa Rica Has Welcoming Policies for Migrants But Nicaraguans Face Subtle Barriers*, Migration Policy Institute (Nov. 5, 2021), https://www.migrationpolicy.org/article/costa-rica-nicaragua-migrants-subtle-barriers.
[211] Department of State, *2021 Country Reports on Human Rights Practices: Costa Rica* (Apr. 12, 2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/costa-rica/.
[212] Department of State, *2022 Human Rights Practices: Nicaragua* (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/nicaragua.
[213] Migración Panamá, *Panamá registro cifra récord de migrantes irregulares en 2022* (Jan. 1, 2023), https://twitter.com/migracionpanama/status/1609686798288003074.

despite the high number of individuals transiting through the country, very few opt to seek refuge in Panama. In 2021, Panama received only 542 asylum applications, and the number increased modestly to 703 in 2022.[214] This responds largely to policies and structural deficiencies that prevent asylum seekers from accessing protection in Panama.

The country's migration policy is focused on transit, not on hosting migrants nor much less on protecting asylum seekers. As witnessed by CGRS and partner organizations during a fact-finding trip to Panama in October 2022, the country's main stated and actual policy is to facilitate the transportation of migrants from the Darien region to the border with Costa Rica.[215]

Those who do decide to seek asylum face what advocates on the ground believe is "the single most difficult pathway to regularize in Panama."[216] In practice, Panama's asylum infrastructure lacks procedural guarantees and basic safeguards, leaving asylum seekers largely unprotected.[217] First, individuals can file their claims only in Panama City and must do it within six months after entering the country. [218] Second, according to UNHCR, the National Office for the Attention of Refugees (ONPAR)—the agency charged with receiving claims and determining their admissibility—is not applying the lower "manifestly unfounded" admissibility standard, but instead is deciding on the merits, which is inappropriate at this

[214] UNHCR, *Asylum System in Panama Factsheet* (Sept. 28, 2022), https://reliefweb.int/report/panama/unhcr-panama-factsheet-asylum-system-panama-august-2022; and UNHCR, *Asylum System in Panama Factsheet – February 2023* (Mar. 20, 2023), https://data.unhcr.org/en/documents/details/99653.

[215] Kylie Madry and Milagro Vallecillos, *As Darien arrivals grow, Panama moves migrants north,* Reuters (Mar. 9, 2023), https://www.reuters.com/world/americas/darien-arrivals-grow-panama-moves-migrants-north-2023-03-10/.

[216] Center for Democracy in the Americas, *Panama's Role in Regional Migration Management* (Mar. 2022), https://static1.squarespace.com/static/5e3d7cf054f8264efecdf2ef/t/623349a8ecdbce19b749dcc9/1647528366521/Panama+Issue+Brief+%282%29.pdf.

[217] UNHCR, *Asylum System in Panama Factsheet* (Sept. 28, 2022), https://reliefweb.int/report/panama/unhcr-panama-factsheet-asylum-system-panama-august-2022.

[218] Republic of Panama, *Decreto Ejecutivo No. 5 de 2018* (Refugee Statute) (2018), art. 30, https://www.acnur.org/fileadmin/Documentos/BDL/2018/11494.pdf?file=fileadmin/Documentos/BDL/2018/11494; and UNHCR, *Asylum System in Panama Factsheet* (Sept. 28, 2022) ("Asylum applications are filed with the National Office for the Attention of Refugees (ONPAR in its Spanish acronym) in Panama City alone."), https://reliefweb.int/report/panama/unhcr-panama-factsheet-asylum-system-panama-august-2022.

stage.[219] As an illustration of the impact of this, in 2022, ONPAR only admitted 11 cases while rejecting 957.[220]

In turn, the National Commission for Refugees (CONARE)—the body charged with considering and adjudicating asylum claims referred by ONPAR—is highly inefficient. This committee is composed of representatives of eight different government agencies that meets around four times a year and historically has adjudicated on average fewer than 50 cases annually.[221] In 2021, CONARE recognized only 13 refugees (nine from Ukraine and four from Nicaragua).[222] On average, the Panamanian asylum system has an extremely low one percent admission and approval rate.[223] Moreover, Panama has a backlog of over 11,000 cases.[224]

This backlog "leaves asylum-seekers in precarious circumstances without the right to work and without social assistance."[225] When individuals apply for asylum, they receive a certificate that allows them to remain in the country while their case is reviewed for admission. However, in 2022, ONPAR only issued 208 of these certificates.[226] "[A]s a result of the long wait times to be entered into the asylum system, many applicants encountered difficulties accessing basic services such as health care, financial services, and appropriate

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[219] UNHCR, *Asylum System in Panama Factsheet – February 2023* (Mar. 20, 2023), https://data.unhcr.org/en/documents/details/99653.
[220] *Id.*
[221] Center for Democracy in the Americas, *Panama's Role in Regional Migration Management* (Mar. 2022), https://static1.squarespace.com/static/5e3d7cf054f8264efecdf2ef/t/623349a8ecdbce19b749dcc9/1647528366521/Panama+Issue+Brief+%282%29.pdf; *see* Republic of Panama, *Decreto Ejecutivo No. 5 de 2018* (Refugee Statute) (2018), arts. 22, 24, 26, 47, 48, and 49, https://www.acnur.org/fileadmin/Documentos/BDL/2018/11494.pdf?file=fileadmin/Documentos/BDL/2018/11494.
[222] UNHCR, *Asylum System in Panama Factsheet – February 2023* (Mar. 20, 2023), https://data.unhcr.org/en/documents/details/99653.
[223] *See* Department of State, 2021 Country Reports on Human Rights Practices: Panama (Apr. 12, 2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/panama/; Center for Democracy in the Americas, *Panama's Role in Regional Migration Management* (Mar. 2022), https://static1.squarespace.com/static/5e3d7cf054f8264efecdf2ef/t/623349a8ecdbce19b749dcc9/1647528366521/Panama+Issue+Brief+%282%29.pdf.
[224] Department of State, 2021 Country Reports on Human Rights Practices: Panama (Apr. 12, 2022) ("ONPAR reduced its backlog of asylum cases from nearly 20,000 to 11,000, but most cases were dismissed or asylum seekers had left the country."), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/panama/.
[225] UNHCR, *Asylum System in Panama Factsheet* (Sept. 28, 2022), https://reliefweb.int/report/panama/unhcr-panama-factsheet-asylum-system-panama-august-2022.
[226] MIRPS 2022, *Annual Report of the Comprehensive Regional Protection and Solution Framework* (Dec. 2022), https://mirps-platform.org/wp-content/uploads/2023/01/MIRPS_ENG_WEB.pdf.

housing."[227] Additionally, the certificate issued by Panamanian authorities to asylum seekers is "not always recognized by the National Police and by health and education authorities," and "contains only the main claimant's information, placing the rest of the accompanying family members at risk as they do not have individualized identification."[228]

Only after cases are formally admitted by ONPAR can asylum seekers apply for a work permit. However, this process can take several years, which also limits access to basic rights and leaves asylum seekers at risk of exploitation.[229] In 2022, only 48 work permits were issued to asylum seekers.[230] Aside from difficulties obtaining permission to work, asylum seekers and refugees alike have a challenging time finding work opportunities.[231] "In fact, the exclusion of refugees and migrants from economic participation and other forms of integration into Panamanian life are codified in law."[232] The Panamanian Constitution allows the exclusion of foreigners from certain activities,[233] and in practice there are "56 protected professions, which only Panamanian-born and naturalized citizens can practice. These include a wide variety of skilled and unskilled professions, ranging from doctors, accountants, and lawyers, to cosmetologists, security agents, and gardeners. The law forbids foreigners, even with a work permit, to labor in those professions."[234]

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[227] Department of State, *2021 Country Reports on Human Rights Practices: Panama* (Apr. 12, 2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/panama/.
[228] UNHCR, *Asylum System in Panama Factsheet* (Sept. 28, 2022), https://reliefweb.int/report/panama/unhcr-panama-factsheet-asylum-system-panama-august-2022.
[229] UNHCR, *Asylum System in Panama Factsheet* (Sept. 28, 2022), https://reliefweb.int/report/panama/unhcr-panama-factsheet-asylum-system-panama-august-2022.
[230] MIRPS 2022, *Annual Report of the Comprehensive Regional Protection and Solution Framework* (Dec. 2022), https://mirps-platform.org/wp-content/uploads/2023/01/MIRPS_ENG_WEB.pdf.
[231] Department of State, *2021 Country Reports on Human Rights Practices: Panama* (Apr. 12, 2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/panama/.
[232] Center for Democracy in the Americas, *Panama's Role in Regional Migration Management* (Mar. 2022), https://static1.squarespace.com/static/5e3d7cf054f8264efecdf2ef/t/623349a8ecdbce19b749dcc9/1647528366521/Panama+Issue+Brief+%282%29.pdf.
[233] Political Constitution of the Republic of Panama (2016), art. 20 ("Panamanians and foreigners are equal before the Law, but the Law may, for reasons of work, health, morality, public safety, and national economy, subject to special conditions or deny the exercise of certain activities to foreigners in general. . ."), https://ministeriopublico.gob.pa/wp-content/uploads/2016/09/constitucion-politica-con-indice-analitico.pdf.
[234] Center for Democracy in the Americas, *Panama's Role in Regional Migration Management* (Mar. 2022), https://static1.squarespace.com/static/5e3d7cf054f8264efecdf2ef/t/623349a8ecdbce19b749dcc9/1647528366521/Panama+Issue+Brief+%282%29.pdf. For a list of Panamanian laws that limits foreign nationals from working on certain professions, *see* Legal Solutions Panama, *Profesiones Reservadas sólo para panameños* (2021), https://legalsolutionspanama.com/profesiones-reservadas-para-panamenos/.

The protracted length of the asylum process, the inability to access work permits and job opportunities, and limited available humanitarian assistance, place asylum seekers in Panama at heightened risk.[235] Conditions for refugees and asylum seekers were further exacerbated by the COVID-19 pandemic, where many individuals who had achieved some degree of stability had to rely on humanitarian assistance to meet their most basic needs.[236] As the Department of State acknowledges, there are thousands of individuals in Panama with international protection needs. These include "persons in the asylum and refugee process, persons denied refugee status, and persons who did not apply for refugee status due to lack of knowledge or fear of deportation."[237]

Finally, as the Departments admit, there are alarming rates of sexual violence committed against refugees and migrants who cross the Darién Gap. This violence has been largely committed with impunity against Black women and girls, who are generally unable to access justice, law enforcement, or even health services.[238] CGRS, Haitian Bridge Alliance, and RFK Center for Justice and Human Rights brought this specific issue to the attention of the Secretaries of Homeland Security and State in a letter sent in advance of the April 2022 Ministerial Conference on Migration and Protection that took place in Panama City.[239]

Panama does not meet the requirements of a safe third country under U.S. law and international standards. The Departments are exceeding their authority by attempting to treat it as such through this Rule.

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[235] UNHCR, *Asylum System in Panama Factsheet* (Sept. 28, 2022), https://reliefweb.int/report/panama/unhcr-panama-factsheet-asylum-system-panama-august-2022.
[236] ACNUR, *Misión virtual - Panamá como país de tránsito y asilo (2021),* https://www.acnur.org/61a7e28e4.pdf.
[237] Department of State, *2021 Country Reports on Human Rights Practices: Panama* (Apr. 12, 2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/panama/.
[238] *See* Haitian Bridge Alliance, *Submission for the 81st Session of the United Nations Committee on the Elimination of All Forms of Discrimination against Women: Violence against Black Migrant Women in the Darién Gap* (2022), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCSS%2fPAN%2f47481&Lang=en. For stories of survivors that transited through the Darién Gap, *see* CGRS, Haitian Bridge Alliance, and RFK Human Rights, *Protection Delayed is Protection Denied: Factsheet on Title 42 Expulsions, Haitian Asylum Seekers in Tijuana, and the U.S. Government's Ongoing Evasion of Duty* (Apr. 7, 2022), https://cgrs.uchastings.edu/sites/default/files/Tijuana%20Factsheet_2022.04.07%20FINAL%20v2_0.pdf.
[239] CGRS, Haitian Bridge Alliance and RFK Human Rights, *Sexual and Gender-Based Violence against Migrants in the Darién Gap* (Apr. 18, 2022), https://cgrs.uchastings.edu/sites/default/files/Darien%20Gap_%20Blinken%20and%20Mayorkas_SGBV_EN-SP%20combined.pdf.

Colombia: Colombia is a dangerous country for many asylum seekers and refugees. For example, during the first semester of 2021 alone, Venezuelans in Colombia were targets of violence, including 1059 assaults, 362 homicides, and 335 incidents of sexual violence, although it is widely believed that crimes against migrants are severely underreported. In the same period, there were seven reported events of forced displacement due to violence or conflict that impacted 115 Venezuelans.[240] The Department of State also reports that "Venezuelan migrants, and inhabitants of marginalized urban areas, were at the highest risk of forced labor, domestic servitude, forced begging, and forced recruitment. Authorities did not make efforts to investigate cases or increase inspections of forced labor."[241]

According to the Department of State, there are other serious human rights violations in Colombia, including arbitrary killings; torture and arbitrary detention by government security forces; serious abuses in a conflict, violence against and forced displacement Black and Indigenous persons; and violence against LGBTQ+ individuals.[242] Further, armed groups are known perpetrators of violent crimes such as ". . . human trafficking, bombings, restrictions on freedom of movement, sexual violence, unlawful recruitment and use of child soldiers, and threats of violence against journalists, women, human rights defenders."[243] All of these human rights abuses present a risk for refugees and asylum seekers.

The Departments neglect to discuss Colombia's asylum system, which is deficient, bureaucratic, and cumbersome. A single body, *Comisión Nacional para la Determinación de la Condición de Refugiado* (CONARE), which is made up of nine representatives from different government agencies, reviews asylum applications, conducts interviews, and makes non-binding adjudication recommendations.[244] The Minister of Foreign Relations, a

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[240] Consultoría para los Derechos Humanos y el Desplazamiento (CODHES), *Boletín Especial No. 97: Afectaciones a la vida e integridad de la población refugiada y migrante proveniente de Venezuela en Colombia* (Oct. 2021), pp. 5-10. https://issuu.com/codhes/docs/boletin-97. For more information on violence against Venezuelans in Colombia, *see* American Bar Association, *Understanding the Serious Human Rights Violations Faced by the Venezuelan Refugee and Migrant Population* (Mar. 17, 2022), https://www.americanbar.org/advocacy/rule_of_law/blog/roli-colombia-human-rights-violations-ccd-program/.

[241] Department of State, 2021 *Country Reports on Human Rights Practices:* Colombia (Apr. 12, 2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/colombia.

[242] Department of State, 2022 *Country Reports on* Human Rights Practices*:* Colombia (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/colombia/.

[243] *Id.*

[244] Ministerio de Relaciones Exteriores de Colombia, Decreto 1067 de 2015, por medio del cual se expide el Decreto Único Reglamentario del Sector Administrativo de Relaciones Exteriores (May 26, 2015), art. 2.2.3.1.6.8, https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/decreto_1067_2015.htm.

high-level cabinet position, then makes final determinations.[245] Between 2017 and mid-2022, Colombia's refugee agency granted asylum in only 1,313 cases.

Furthermore, there is little infrastructure to support the asylum system or services for refugees.[246] These factors, added to the increasing number of asylum requests, have resulted in a backlog of over 42,106 pending cases.[247]

In addition, numerous difficulties prevent access to the asylum system. General lack of awareness and information about the asylum process is a significant barrier. [248] The two-month deadline to apply for asylum after entering Colombia presents another substantial roadblock.[249] The process can last for an undetermined amount of time, sometimes years, before an application is adjudicated.[250] While they wait, asylum seekers receive a document (*salvoconducto*) that allows them to remain in the country, sometimes restricted to specific areas, but without the possibility to work or access basic services.[251] This leaves asylum seekers in Colombia in a vulnerable situations where they are unable to provide for themselves or their families for extended periods of time.

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[245] *Id.,* art 2.2.3.1.6.9.
[246] Jose Manuel Luengo, Política pública debe ajustarse a los refugiados, Estoy en la Frontera (2021) https://estoyenlafrontera.com/mis-derechos/politica-publica-debe-ajustarse-los-refugiados.
[247] Consejo Nacional de Política Económica y Social, *Documento CONPES 4100 Estrategia para la Integración Migrante Venezolana como Factor de Desarrollo del País* (July 11, 2022), https://colaboracion.dnp.gov.co/CDT/Conpes/Económicos/4100.pdf.
[248] UNHCR, *Colombia: Monitoreo de Protección. Enero-Junio 2019* (Mar. 19 2020), https://www.refworld.org.es/docid/5e7553d54.html.
[249] Ministerio de Relaciones Exteriores de Colombia, *Decreto 1067 de 2015, por medio del cual se expide el Decreto Único Reglamentario del Sector Administrativo de Relaciones Exteriores* (May 26, 2015), art. 2.2.3.6.1, https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/decreto_1067_2015.htm; Centro de Estudios en Migración and Clínica Jurídica para Migrantes, *Estatuto Temporal de Protección para Migrantes Venezolanos: reflexiones de una política de regularización migratoria* (Mar. 2021), p. 30, https://migracionderecho.uniandes.edu.co/wp-content/uploads/Informe-CEM-3-Estatuto-Temporal-de-Proteccion-para-Migrantes-Venezolanos-reflexiones-de-una-politica-de-regularizacion-migratoria-2.pdf.
[250] *Id.*
[251] Ministerio de Relaciones Exteriores de Colombia, *Decreto 1067 de 2015, por medio del cual se expide el Decreto Único Reglamentario del Sector Administrativo de Relaciones Exteriores* (May 26, 2015), art. 2.2.3.1.4.1, https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/decreto_1067_2015.htm; and Centro de Estudios en Migración and Clínica Jurídica para Migrantes, *Estatuto Temporal de Protección para Migrantes Venezolanos: reflexiones de una política de regularización migratoria* (Mar. 2021), p. 30, https://migracionderecho.uniandes.edu.co/wp-content/uploads/Informe-CEM-3-Estatuto-Temporal-de-Proteccion-para-Migrantes-Venezolanos-reflexiones-de-una-politica-de-regularizacion-migratoria-2.pdf.

There is also little indication that the government's promises to expand its protection system represent a serious commitment. On the contrary, in the national development plan for the next four years (*Plan Nacional de Desarrollo 2022-2026*), which the government submitted to Congress in February of 2023, there is no mention whatsoever of policies for refugees or migrants.[252] The new government also dismantled the President's Office of Attention and Socioeconomic Integration for Migrants, the department in charge of coordinating integration policies at the national level, and instead dispersed its duties within the Ministry of Foreign Relations, an agency that is not charged with developing domestic policy and therefore is ill-equipped to do so.[253]

The Departments point to the Statute of Temporary Protection for Venezuelans (ETPV) as Colombia's effort to regularize over 2 million Venezuelans. However, this program leaves many vulnerable individuals out and limits access to permanent protection, such as refugee status, in favor of temporary regularization.

Significantly, the ETPV is not available to all Venezuelans in Colombia. It excludes Venezuelans who entered Colombia irregularly after January 31, 2021, and will only cover Venezuelans who enter Colombia with recognized travel documents up to May 28, 2023.[254] While the goal of this measure may be to disincentivize irregular migration, it does not respond to the reality of conditions in Venezuela and the reasons that force its nationals to flee.[255] Further, even those who are eligible for the ETPV may have difficulty meeting its stringent requirements and deadlines.[256] In particular, the policy ignores the special needs

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[252] Txomin Las Heras, *Población migrante: los nuevos nadies,* El Espectador (Feb. 16, 2023), https://www.elespectador.com/mundo/america/migrantes-los-nuevos-y-las-nuevas-nadies-ausentes-del-plan-nacional-de-desarrollo-noticias-hoy/.

[253] Maria Gabriela Trompetero, *Gobierno Petro pretende lo imposible: "desvenezolanizar" la migración,* La Silla Vacia (Feb. 26, 2023), https://www.lasillavacia.com/historias/historias-silla-llena/gobierno-petro-pretende-lo-imposible-desvenezolanizar-la-migracion/.

[254] Ministerio de Relaciones Exteriores de Colombia, *Decreto No. 216 de 2021, por medio del cual se adopta el Estatuto Temporal de Protección para migrantes venezolanos* (Mar. 1, 2021), art. 4, https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20216%20DEL%201%20DE%20MARZO%20DE%202021.pdf.

[255] *Cfr.* Centro de Estudios en Migración and Clínica Jurídica para Migrantes, *Estatuto Temporal de Protección para Migrantes Venezolanos: reflexiones de una política de regularización migratoria* (Mar. 2021), p. 20, https://migracionderecho.uniandes.edu.co/wp-content/uploads/Informe-CEM-3-Estatuto-Temporal-de-Proteccion-para-Migrantes-Venezolanos-reflexiones-de-una-politica-de-regularizacion-migratoria-2.pdf.

[256] *See*, *e.g.* Migración Colombia, *Concepto sobre prueba sumaria requisito establecido por el Estatuto Temporal de Protección Temporal para migrantes venezolanos* (June 22, 2021) (Explains the types of evidence admitted to prove irregular entry into Colombia before January 31, 2022. This evidence is limited to documents issued by Colombian agencies, or individualized certifications issued by businesses, non-governmental organizations, and Colombian nationals or immigrants with

of elders, individuals with disabilities, survivors of trafficking, or Indigenous peoples.[257] In turn, the exclusions and restrictions in the ETPV will further overwhelm the asylum system as newly arriving Venezuelans will have no options to regularize other than to seek asylum.

While asylum seekers are eligible to apply for the ETPV, if approved, individuals must choose between receiving the ETPV or continuing their asylum claims.[258] This hardly a voluntary choice given the deficiencies in the asylum system described above. Forcing asylum seekers to make this choice is very concerning, especially given that the ETPV provides only temporary protection on a discretionary basis.[259] Colombian authorities can cancel an individual's ETPV for a variety of ambiguous reasons, including when "*Migración Colombia* considers that the presence of the foreigner in the national territory is inconvenient . . . ."[260] A decision to cancel an ETPV status cannot be appealed.[261] This

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permanent status.), https://www.migracioncolombia.gov.co/infografias-visibles/concepto-prueba-sumaria. For more information on challenges to the implementation of the ETVP, including the difficulties for meetings its requirements, *see* Centro de Estudios en Migración and Clínica Jurídica para Migrantes, *Estatuto Temporal de Protección para Migrantes Venezolanos: reflexiones de una política de regularización migratoria* (Mar. 2021), pp. 17-21, 35-41, https://migracionderecho.uniandes.edu.co/wp-content/uploads/Informe-CEM-3-Estatuto-Temporal-de-Proteccion-para-Migrantes-Venezolanos-reflexiones-de-una-politica-de-regularizacion-migratoria-2.pdf.

[257] Gracy Pelacani, *Estatuto de protección para migrantes venezolanos: grises de una medida aclamada,* Universidad de los Andes (Apr. 9, 2021), https://uniandes.edu.co/es/noticias/derecho/estatuto-de-proteccion-para-migrantes-venezolanos-grises-de-una-medida-aclamada.

[258] Ministerio de Relaciones Exteriores de Colombia, *Decreto 1067 de 2015, por medio del cual se expide el Decreto Único Reglamentario del Sector Administrativo de Relaciones Exteriores* (May 26, 2015), art. 2.2.3.1.4.1, transient paragraph. (Venezuelan asylum seekers may, without affecting their status as asylum seekers, apply for the Temporary Protection Permit (PPT). Once the PPT is authorized and in accordance with article 16 of the Temporary Protection Statute for Venezuelan Migrants under the Temporary Protection Regime, the applicant of Venezuelan nationality will have the option to choose if they wish to continue with the processing of their refugee application, or if they opt for the PPT."), https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/decreto_1067_2015.htm.

[259] Ministerio de Relaciones Exteriores de Colombia, *Decreto No. 216 de 2021, por medio del cual se adopta el Estatuto Temporal de Protección para migrantes venezolanos* (Mar. 1, 2021), art. 12, para. 2 ("Compliance with all the requirements established for the Permit for Temporary Protection is not a guarantee of its granting, which obeys the discretionary and optional power of the Colombian state through the Special Administrative Unit of Colombia Migration as the migration control and enforcement authority."), https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20216%20DEL%201%20DE%20MARZO%20DE%202021.pdf.

[260] Ministerio de Relaciones Exteriores de Colombia, *Decreto No. 216 de 2021, por medio del cual se adopta el Estatuto Temporal de Protección para migrantes venezolanos* (Mar. 1, 2021), art. 15, https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20216%20DEL%201%20DE%20MARZO%20DE%202021.pdf.

[261] *Id.*

indicates that Venezuelan asylum seekers that choose the ETPV are at risk of *refoulement*, especially as advocates have reported that Colombia's migration agency regularly abuses its discretionary authority and violates the due process rights of migrants and refugees, including by conducting mass expulsions.[262]

As noted above, the former president of Colombia has spoken out against the Proposed Rule, warning that compelling his country to accept even more asylum seekers will make it harder to maintain policies that have helped migrants.

Colombia does not meet the requirements of a safe third country under U.S. law and international standards. The Departments are exceeding their authority by attempting to treat it as such through this Rule.

Ecuador: Ecuador poses dangers for many asylum seekers. As the Department of State points out, according to UN agencies and NGOs on the ground, migrants and refugees—especially women, children and LGBTQ+ individuals—face sexual and gender-based violence.[263] Human rights organizations have found that "Venezuelan refugee women face an even greater risk of physical, psychological, sexual, patrimonial, gynecological-obstetric and cyber violence in public and private spaces. . . This vulnerability to violence is exacerbated for women in an irregular migratory situation, as is the case for the majority of Venezuelan women in Ecuador."[264] Additionally, asylum seekers face forced labor and forced recruitment into illegal activities ". . . particularly by transnational criminal organizations and criminal groups that also operated in Colombia."[265] Last, ". . . Colombian

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[262] *See, e.g.,* Carolina Moreno, *"Salidas Voluntarias",* Proyecto Migración Venezuela (Nov. 3, 2020), https://migravenezuela.com/web/articulo/salidas-voluntarias-de-migracion-colombia-no-respetan-el-debido-proceso/2259; and Centro de Estudios en Migración and Clínica Jurídica para Migrantes, *Estatuto Temporal de Protección para Migrantes Venezolanos: reflexiones de una política de regularización migratoria* (Mar. 2021), pp. 22-26, https://migracionderecho.uniandes.edu.co/wp-content/uploads/Informe-CEM-3-Estatuto-Temporal-de-Proteccion-para-Migrantes-Venezolanos-reflexiones-de-una-politica-de-regularizacion-migratoria-2.pdf; Dejusticia*, Los riesgos para el debido proceso y la presunción de inocencia en el Estatuto* (May 15, 2021) ("Experience has already shown us that [extreme discretion] has been used to advance massive and immediate expulsions, as happened in the 2019 national strike and is currently happening, without an individual analysis of the cases and without guaranteeing the right to defense."), https://www.dejusticia.org/column/los-riesgos-para-el-debido-proceso-y-la-presuncion-de-inocencia-en-el-estatuto/.

[263] Department of State, *2022 Country Reports on* Human Rights Practices*:* Ecuador (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/ecuador/.

[264] Amnesty International, *Ecuador: Unprotected in Ecuador: Venezuelan Women survivors of gender-based violence* (Nov. 17, 2022), https://www.amnesty.org/en/documents/amr28/6137/2022/en/.

[265] Department of State, *2022 Country Reports on Human Rights Practices: Ecuador* (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/ecuador/.

refugees, and Venezuelan and Chinese migrant workers are particularly vulnerable to trafficking in Ecuador, as well as Haitians migrating through Brazil into Ecuador. . ..“ [266]

The Departments indicate that the Government of Ecuador has worked to expand protection for migrants and, as an example, point to the number of applications received and refugees recognized in Ecuador in recent years. However, the Departments fail to mention that during the same time, Ecuador denied over 14,000 cases and nearly 23,000 were otherwise closed. Aside from implying that a high number of individuals are unable to access protection in Ecuador, public data also suggests that Ecuador has a backlog of around 10,000 cases.[267]

The Departments also neglect to provide any additional information about Ecuador's asylum system or its capacity to process a significant number of refugees. In practice, asylum seekers in Ecuador face significant barriers in accessing the asylum system. These barriers include a short 90-day period to apply, as well as a general lack of publicly available information about asylum proceedings.[268] Additionally, Ecuadoran migration officials reportedly discourage asylum seekers from applying for refugee status.[269] As an illustration of these barriers, "[b]etween 2018 and 2022, a total of 27,889 Venezuelans applied for refugee status in Ecuador."[270] This is an astoundingly low number of asylum applications, considering that—as the Departments recognize—Ecuador is currently hosting over 500,000 displaced Venezuelans.

Asylum seekers in Ecuador also face barriers to pursuing their asylum proceedings. For example, while individuals may apply for asylum online, they must travel to certain large

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[266] Integral Human Development, *Ecuador Country Profile* (2022), https://migrants-refugees.va/wp-content/uploads/2022/10/2022-CP-Ecuador.pdf.

[267] *See,* UNHCR, *Refugee Data Finder: Ecuador,* https://www.unhcr.org/refugee-statistics/download/?url=Lzen78.

[268] *See* República de Ecuador, *Ley Orgánica de Movilidad Humana* (Jan. 31, 2017), art. 100, https://gobiernoabierto.quito.gob.ec/Archivos/Transparencia/2017/02febrero/A2/ANEXOS/PROCU_LEY_ORG%C3%81NICA_DE_MOVILIDAD_HUMANA.pdf; Amnesty International, *Ecuador: Unprotected in Ecuador: Venezuelan Women survivors of gender-based violence* (Nov. 17, 2022), https://www.amnesty.org/en/documents/amr28/6137/2022/en/.

[269] *Id.* ("Amnesty International has received reports that Venezuelans were discouraged from applying for refugee status by officials of the International Protection Directorate. Civil society organizations explained that '[they] have had cases of officials telling people to forget about this, that [Venezuelans] are never going to be recognized as refugees.'").

[270] In that time, only 1,100 Venezuelans, among them 555 women, were recognized as refugees. *See Id.*

cities for their interviews, a sometimes hours-long journey for applicants in rural areas and even mid-size cities.[271]

Furthermore, migrants and refugees in Ecuador have a hard time accessing basic necessities. According to UNHCR, 82.8 percent of migrants and refugees in Ecuador need access to food and 64.4 percent need housing or shelter.[272] More than half of asylum seekers have a hard time finding employment,[273] and the Department of State highlights that refugees report employers do not accept government issued work authorizations.[274] According to NGOs on the ground, children also face barriers accessing education services, including due to lack of information about the education system, costs, lack of capacity in schools, and xenophobia or discrimination.[275]

Ecuador does not meet the requirements of a safe third country under U.S. law and international standards. The Departments are exceeding their authority by attempting to treat it as such through this Rule.

* * * * *

In sum, contrary to the Departments' blithe assertions, these transit countries provide neither safety nor sanctuary to most asylum seekers and requiring them not only to seek protection, but to also wait in danger and/or inhospitable conditions for a denial of their asylum claim, is not only illegal but immoral. The BIA's decision in *Matter of Pula*, to which the Rule purports to adhere, made clear that in determining whether to grant asylum in a favorable exercise of discretion adjudicators should consider numerous factors, including "whether [the individual] made *any attempts to seek asylum* before coming to the United States," and, critically, "the length of time the [individual] remained in a third country, and *his living conditions, safety, and potential for long-term residency there*," whether the applicant was "forced to remain in hiding to elude persecutors," and "whether orderly refugee

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[271] *Id.*
[272] UNHCR, 2022 Review Ecuador Operation Update (Feb. 10, 2023), https://reliefweb.int/report/ecuador/unhcr-ecuador-operational-update-2022-review.
[273] *Id.*
[274] Department of State, *2022 Country Reports on Human Rights Practices: Ecuador* (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/ecuador/.
[275] *Id.*; *See*, also, UNHCR and Instituto de la Ciudad, *Urban Profiles of the Colombian Population in Quito,* (2014) ("There are significant differences in the attendance rates at education institutions for the schoolage population according to migration category. For children and adolescents of primary school age (5 to 14 years) in refugee/asylum seeker households and rejected/non-asylum seeker households, the rates are 75 and 74%, compared with 94% for those in households with another situation."), https://www.alnap.org/system/files/content/resource/files/main/original-urbanprofilesquito-summary.pdf.

procedures were *in fact* available to him in any country he passed through."[276] However, the Rule considers none of these factors to excuse an individual's failure to apply for asylum and have that application denied in a country of transit. By requiring proof that an asylum seeker not only applied for asylum but also waited around for a decision, without any consideration of safety or adequacy of existing asylum procedures, the Rule runs afoul of *Matter of Pula*[277] and will subject these individuals to harm, discrimination, and racism by civil society and governments in those countries, as well as additional exploitation and harm by the transnational criminal organizations it purports to undermine.

2. The Rule's lack of any exception for individuals who were granted asylum in a transit country underscores its arbitrariness and illegality

Additionally, the Rule inexplicably makes no exception for individuals who applied for and were granted asylum in a transit country. For the reasons just explained there are numerous reasons outside of availability of asylum that might cause a person to leave a transit country. This is no less true even if that person has been granted asylum there. U.S. asylum law allows individuals with an asylum grant in another country (even one with a safe third country agreement) to seek asylum in the United States, though they may need to demonstrate that they are not subject to the firm resettlement bar.[278] Under the Proposed Rule, if that same individual arrived at the boarder without an appointment or entered the U.S. without inspection, they would be ineligible for asylum unless they could rebut the presumption. That preposterous result reflects not only the unreasonableness but the utter illegality of the Rule.

IX. PROCEDURES FOR ASSESSING APPLICATION OF THE PRESUMPTION AND ANY FACTORS IN REBUTTAL VIOLATE EXISTING LAW AND INCREASE THE RISK OF *REFOULEMENT*

A. Applying Heightened Standards to Screen for Credible Fear is Contravenes to U.S. Asylum Law, Thwarts Congressional Intent, and Will Lead to *Refoulement*

The Departments previously took the position, in the Asylum Processing Rule, that asylum eligibility bars should not be applied at the initial fear screening stage and that the "significant possibility" standard should be applied when screening for all protection claims,

[276] 19 I&N Dec. at 473–74.
[277] *Id.*; *see also* Section VIII.A, *supra.*
[278] *See* 8 U.S.C. 1158(b)(2)(A)(v). Indeed, as discussed in section VII, *supra*, the Rule is inconsistent with the firm resettlement and safe third country agreement provisions.

i.e., asylum, withholding of removal, and CAT protection.[279] In a stark reversal, DHS now proposes to apply the new bar and, if not rebutted, apply the heightened "reasonable possibility" standard at the credible fear interview stage. Rule 11744–46.

Alarmingly, in order to overcome the bar, asylum seekers will need to prove by a "preponderance of the evidence" that they fall into one of the narrow exceptions or meet one of the rebuttal criteria, heightening the screening standard even further. Rule 11720, 11723. The Rule's proposed procedures and standards conflict with U.S. asylum law and Congress's intent.

1. Application of eligibility bars at the initial fear screening is unjustified

Determination of whether or not a bar applies at the initial screening stage is inappropriate given the limited nature of the credible fear interview, which is not suited for the complicated legal and factual issues that arise with exclusion from refugee status. The Departments conceded as much in the Asylum Processing Rule, where they concluded that "[r]equiring asylum officers to apply the mandatory bars during credible fear screenings would [make those] screenings less efficient, undermining congressional intent that the expedited removal process be truly expeditious," and further that "procedural fairness" considerations counseled against applying the bars at the initial screening stage.[280] Nevertheless, they now attempt to justify their about face in this Rule by claiming this process is necessary to *ensure* efficiency, the quick removal of individuals lacking meritorious claims, and to deter people from seeking protection at the southern border. Rule 11744–45. Notably, the Departments' concerns regarding procedural fairness have melted away.[281]

First, the Departments' assertion that these measures are necessary to weed out nonmeritorious claims is baseless. Indeed, the Departments acknowledge that the ban "would likely decrease the number of asylum grants" undermining any suggestion that this ban has anything to do with the relative merits or lack thereof of protection claims. Rule

[279] *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18078, 18080, 18084, 18091–92 (March 29, 2022); 8 C.F.R. §§ 208.30(b) and (e).
[280] 87 Fed. Reg. 18078
[281] *Cf.* 87 Fed. Reg. 18094 ("Upon review and reconsideration, due to the intricacies of the fact-finding and legal analysis often required to apply mandatory bars, the Departments now believe that individuals found to have a credible fear of persecution generally should be afforded the additional time, procedural protections, and opportunity to further consult with counsel that the Asylum Merits process or section 240 removal proceedings provide.").

11748. Moreover, the purpose of credible fear screenings is to ensure that people with potentially meritorious claims will not be removed without having an opportunity to present those claims, i.e., to minimize the risk of *refoulement*. The Departments are abusing that process—not to screen out nonmeritorious claims—but to screen out *all* asylum claims. That is clear from the fact that the bar and its exceptions have absolutely nothing to do with the underlying claims of persecution.

Second, the Departments' other stated purpose of deterrence is also an impermissible basis for barring asylum eligibility on grounds wholly unrelated to likelihood of persecution. And, as discussed in Section X.B, below, the Departments have not demonstrated that it will have any effect on the number of people fleeing persecution and seeking protection in the United States.

Finally, as discussed *supra*, the Proposed Rule's exceptions and rebuttal grounds are wholly inadequate to ensure that individuals with valid claims will not be returned to persecution or torture.

2. Applying a heightened standard to asylum applicants who are not statutorily ineligible to seek asylum violates the plain language of the statute and Congressional intent

The Rule proposes to deny credible fear review under the statutorily required "significant possibility" standard to asylum seekers who cannot demonstrate that they entered via parole or the CBP One app except in certain circumstances described above. Instead, it would treat individuals who cannot rebut the presumption as if they were statutorily ineligible to apply for asylum at the time of entry by applying the heightened "reasonable possibility" standard. This would require asylum seekers who may have otherwise meritorious asylum claims to prove the claims under the ultimate well-founded fear standard at the initial screening stage[282]—i.e., 10% chance of persecution[283]—likely in detention and without access to counsel. As above, the Departments' assertion that this is permissible in order to expedite matters and weed out nonmeritorious claims is unsupportable.

First, Congress already settled on the "significant possibility" standard to strike a balance between weeding out nonmeritorious claims and curbing the likelihood of *refoulement*. Before Congress finalized the IIRIRA amendments, the U.S. House of Representatives

[282] USCIS, *Questions and Answers: Reasonable Fear Screenings,* https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-reasonable-fear-screenings, (June 18, 2013).
[283] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987); *Al-Harbi v. INS,* 242 F.3d 882, 888 (9th Cir. 2001).

proposed defining a "credible fear" as requiring both a "significant possibility" of establishing eligibility for asylum and a more stringent credibility requirement[284] whereas the Senate proposed adopting the UNHCR screening standard which would reject only "manifestly unfounded"[285] claims. Ultimately, Congress reached a compromise and adopted the "significant possibility" standard without the requirement that asylum seekers also prove by a preponderance of the evidence that the statements they made in support of their claims were true. In choosing the "substantial possibility" standard, Senator Orin Hatch specified that it was "intended to be a low screening standard for admission into the usual full asylum process."[286] In sum, the statutory credible fear definition, created and adopted by Congress, is meant to be a low standard to weed out unfounded claims, not an ultimate determination of various eligibility criteria or applicability of bars. Nothing, not even efficiency concerns, authorizes the Departments to adopt new, heightened standards that contravene the statute and Congress's intent as they propose to do in this Rule.

Second, the Department's suggestion that heightening the screening standard for asylum seekers based on manner of entry is consistent with "decades of agency practice" is completely unfounded. Rule 11742. In fact, the "reasonable possibility" standard has been used solely in reasonable fear interviews for screening withholding of removal and CAT eligibility to two narrow categories of individuals:[287] those subject to reinstatement of a prior removal order[288] and those who have final administrative removal orders because they were convicted of one or more aggravated felonies.[289] By finding applicants who cannot rebut the presumption ineligible for asylum, the Proposed Rule seeks to circumvent the statutorily required "significant possibility" credible fear screening standard and impose the "reasonable possibility" standard historically reserved for individuals ineligible for asylum pursuant to Sections 1231(a)(5) or 1228(b) onto asylum seekers who are not statutorily excluded by those sections. This contravention of Congressional intent is ultra vires and must be eliminated.

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[284] Immigration in the National Interest Act of 1996, H.R. 2202, 104th Cong. (1996), pp. 60–61, (defining "credible fear" to require both a "significant possibility" of establishing asylum eligibility and a "more probable than not" credibility requirement), https://www.congress.gov/104/bills/hr2202/BILLS-104hr2202eh.pdf.

[285] *See* 142 Cong. Rec. S11491-92 (Sep. 27, 1996) (statement of Sen. Hatch); *see also* UNHCR Executive Committee 34th session, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30*, ¶ 97(2)(e), U.N.G.A. Doc. No. 12A (A/38/12/Add.1) (1983), https://www.refworld.org/docid/3ae68c630.html.

[286] *See* 142 Cong. Rec. S11491-92 (Sep. 27, 1996) (statement of Sen. Hatch).

[287] 8 C.F.R. § 1208.31.

[288] 8 U.S.C. § 1231(a)(5).

[289] 8 U.S.C. § 1228(b).

Finally, by applying a "preponderance of the evidence" standard to the question of whether an exception is met or the presumption is rebutted necessarily heightens the overall standard at the credible fear stage.[290] That is, even if an asylum seeker demonstrates a significant possibility that they "could establish eligibility for asylum under section 1158,"[291] if they cannot prove by at least 51% that they can overcome the Rule's bar they will nevertheless be found not to have established a credible fear necessary for asylum. Such a standard will be insurmountable for most asylum seekers, who in turn will be funneled into reasonable fear interviews and likely removed based not on the credibility of their fear but due to the application of an arbitrary and unlawful bar that bears no relationship to the merits of their claim. As noted above, use of a preponderance of the evidence standard during credible fear screenings was specifically considered and rejected by Congress, and the Departments simply lack the authority to resurrect and implement that congressionally rejected onerous standard through regulation.[292]

At bottom, the Proposed Rule turns the statutory credible fear process on its head and elevates the burden of proof for a credible fear finding to one similar to that of the ultimate determination for withholding or CAT eligibility.[293] There can be no doubt that application of such an onerous standard of proof and will result in improper denial of asylum and erroneous removal of individuals to persecution and torture.

B. The Elimination of Certain Procedures for Review of Negative Fear Findings Will Result in *Refoulement*

Further exacerbating matters, the Rule eliminates the prior practice of automatic immigration court review of negative credible fear findings and prohibits asylum seekers from requesting USCIS reconsideration of negative fear determinations. Both of these proposals will lead to erroneous removal of asylum seekers to persecution and torture.

1. Elimination of presumptive immigration court review

In another stunning departure from the Departments' not-yet-one-year-old position, in the Asylum Processing Rule, the Proposed Rule would change existing regulations to deny

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[290] Proposed 8 C.F.R. § 208.13(a)(iii); Proposed 8 C.F.R. § 1208.33(a)(iii).

[291] 8 U.S.C. § 1225(b)(1)(B)(v) ("For purposes of this subparagraph, the term 'credible fear of persecution' means that there is a significant possibility, taking into account the credibility of the statements made by the [noncitizen] in support of the [noncitizen's] claim and such other facts as are known to the officer, that the [noncitizen] could establish eligibility for asylum under section 1158 of this title.").

[292] 142 Cong. Rec. S11491-92 (Sep. 27, 1996) (statement of Sen. Hatch) ("The conference report struck a compromise by rejecting the higher standard of credibility included in the House bill.").

[293] 8 C.F.R. §§ 208.16(c)(2), 208.17(a).

asylum seekers immigration court review if they do not affirmatively request review.[294] Rule 11738, 11744. In its December 11, 2020 "Global Asylum Rule," the Trump administration previously imposed a similar hurdle on asylum seekers, depriving them of immigration court review of credible fear decisions where they did not affirmatively request review. The Biden administration reversed that change on May 31, 2022.[295] In reversing, the agencies explained that "treating any refusal or failure to elect review as a request for immigration judge review, rather than as a declination of such review, is fairer and better accounts for the range of explanations for a noncitizen's failure to seek review."[296] Now, the Departments abruptly reverse course, proposing that the Rule eliminate the presumption it reinstated less than a year ago. Rule 11744.[297]

The presumption of automatic review the Rule proposes to eliminate assures that review will take place unless the noncitizen affirmatively refuses it, and correctly makes immigration judge review the default procedure. Given the number of obstacles facing a person seeking asylum in expedited removal—detention, short processing times, language difficulties, almost certainly no meaningful access to counsel—the danger of the applicant failing to realize the importance of immigration judge review is too great. This is especially so since review by an immigration judge is currently a key procedural protection to ensure that any mistaken negative credible fear determinations are corrected, and under another provision of the Rule, discussed in the next section, would be the only such protection.[298] Indeed, government data shows that over a quarter of asylum officers' negative credible fear determinations are overturned by immigration judges, demonstrating the crucial nature of that procedural protection.[299] This will be particularly true under the Proposed Rule which applies new bars, vague and confusing exceptions and grounds for rebuttal, and an almost insurmountable burden of proof at the initial screening stage, all of which will no doubt lead to even greater error at the fear determination stage.[300]

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[294] 8 C.F.R. § 208.30(g).
[295] 87 Fed. Reg. 18078, 18084–85 (reinstating presumption of immigration judge review of an asylum officer's negative credible fear determination).
[296] *Id.* at 18094.
[297] *cf.* 87 Fed. Reg. 18078, 18084–85.
[298] *See* proposed 8 C.F.R. § 208.33(c)(2)(v)(C).
[299] Government data analyzed by Syracuse University's Transactional Records Access Clearinghouse (TRAC) shows that in fiscal year 2020 alone immigration judges overturned 30% of the asylum office's negative fear determinations. *See* TRAC, *Immigration Judge Decisions Overturning Asylum Officer Findings in Credible Fear Cases,* TRAC (Mar. 14, 2023), https://trac.syr.edu/reports/712/.
[300] Even when the asylum office considers the entirety of the merits of a claim in full asylum interviews, it often errs. Government data analyzed by Syracuse University's Transactional Records Access Clearinghouse (TRAC) shows that 68% of asylum cases referred from the asylum office were

Citing "the need for an expedited process," the Rule once again favors expediency over accuracy, without consideration of the critical necessity of these review procedures to prevent erroneous *refoulement*. Rule 11744. In light of the life-or-death nature of protection claims, the Departments' justifications for its about-face on this procedural safeguard are unavailing. That is, efficiency and quick removal of applicants cannot justify dispensing with immigration court review of their fear claims where the asylum office so often gets it wrong. Rule 11744.

2. Elimination of requests for USCIS reconsideration

In another troubling change, the Rule would bar asylum seekers from requesting USCIS to reconsider negative credible fear determinations.[301] Rule 11744, 11747. By prohibiting asylum seekers from requesting reconsideration of a negative credible fear determination from USCIS, the Rule would eliminate an important procedural safeguard. Once again, the Departments stray from the recently issued Asylum Processing Rule, which allows for a request for reconsideration (RFR) with certain procedural limitations.[302] This change is presented as necessary to facilitate expedited removal of those without meritorious claims. But the Departments do not adequately explain how eliminating reconsideration—especially against the backdrop of limited immigration judge review—furthers this goal. In CGRS's experience, reconsideration is a lifeline.

The Departments attempt to justify eliminating this procedural protection, claiming that very few RFRs result in reversal of negative fear findings. Rule 11747. Specifically, they state that of 288 requests filed between October 1, 2022, and February 8, 2023, only 13 (or approximately 4.5%) of the underlying negative fear findings were reversed.[303] First, when considering that the purpose of the credible fear process is to prevent *refoulement*, that number is significant enough to demonstrate the value and necessity of the reconsideration process. Second, the data included in the Rule does not reflect whether any of those requests were subject to the Asylum Processing Rule's strict time and numerical limits, which arbitrarily exclude consideration of even meritorious RFRs if they are submitted outside of those parameters.[304] That is, the data does not support the

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subsequently granted protection by an immigration court judge in Fiscal Year (FY) 2021. *See Cora* Wright, *Erroneous Asylum Office Referrals Delay Refugee Protection, Add to Backlogs, Human Rights First* (Apr.19, 2022), https://humanrightsfirst.org/library/erroneous-asylum-office-referrals-delay-refugee-protection-add-to-backlogs/.

[301] *See* proposed 8 C.F.R. § 208.33(c)(2)(v)(C).

[302] *Cf.* 87 Fed. Reg. 18219, 18095.

[303] According to the Departments, an additional 4 requests were still pending. *Id.*

[304] 87 Fed. Reg. at 18219 (allowing only one RFR which must be submitted within seven days of the immigration judge's affirmance of a negative fear finding); *see also* CGRS Comment on Asylum

Departments' contention that the need for expediency outweighs the continued availability of this important check on erroneous credible fear determinations. Rule 11747.

Errors in the credible fear process are inevitable, particularly given the extreme time pressures under which both asylum officers and immigration judges work. Since there is no appellate review, the possibility for reconsideration by the Asylum Office is an important safeguard to ensure that a person seeking asylum is not mistakenly returned to persecution or torture.

In our own practice over the years, we have successfully sought reconsideration for clients who eventually won protection.[305] For example, one of our clients, a Haitian woman who fled gender-based violence and death threats received a negative credible fear determination from an immigration judge, due to inadequate interpretation and lack of counsel. After we submitted a request for reconsideration, the asylum office determined she had a credible fear of persecution. In 2019, she was granted asylum.[306] Were it not for our intervention, however, and the availability of reconsideration requests, she would have been unlawfully refouled due to deficiencies in her credible fear hearing. In short, the Rule's drastic diminution in the limited procedural protections available in expedited removal cannot be justified by vague data which in fact demonstrates that, in some cases, RFRs may prevent *refoulement*. The risks are simply too great.

C. The Assertion That the Rule is Necessary to Quickly Weed out Nonmeritorious Claims is Built on Inconclusive Data and a Misapprehension of the Factors That Lead to Denial of Asylum Claims

As noted above, the Departments claim that raising screening standards is necessary to quickly weed out nonmeritorious claims. However, nowhere in the Rule do the Departments point to any correlation between manner of entry and the ultimate determination of asylum eligibility. Nor have they demonstrated any connection between denial of asylum in a third country and meritoriousness of claims in the United States. That is because, how asylum seekers enter the U.S. or whether they apply for asylum on their way to the U.S.-Mexico border says nothing about the bona fide nature of their claims, particularly given the conditions in those countries, as identified above. Instead, the

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Processing Rule IFR, pp. 11–16 (May 26, 2022) (discussing need for RFR as procedural safeguard and disagreeing with time and numerical limitations), *attached*.

[305] One such example from our practice was featured in Human Rights First, *Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture* (Sept. 2021), p. 4, https://humanrightsfirst.org/wp-content/uploads/2022/09/RequestsforReconsideration.pdf.

[306] *See id.*

Departments rely on inconclusive and outdated data to suggest that a disparity between positive credible fear findings and the percentage of asylum grants in the same period means most asylum claims lack merit. Rule 11716. The data does not prove what the Departments suggest it does.[307]

First, as the Department acknowledges, the majority of cases with positive credible fear interview findings in the relevant period have not been fully adjudicated by the asylum office or immigration court. Rule 11716. Nevertheless, the Department has not adjusted its statistics to reflect that. Notably, in 2018 and 2019, two years of the period the Departments cited (fiscal years 2014–2019), several now-defunct or enjoined Trump Era policies were in place—including the prior transit ban and Remain in Mexico—which led to improper denials. That period was also marred by several now-vacated decisions from Trump's Attorneys General which were frequently applied to preclude applicants with claims based on domestic violence or family membership from obtaining asylum.[308] However, the Departments consider none of this context when alleging that positive credible fear interview rates far exceeded asylum grant rates and that those disparities reflect that claims lack merit.

Additionally, asylum claims may be denied for reasons other than the merits, such as poor interpretation, lack of counsel, and other procedural barriers. This is due to the numerous obstacles faced by asylum seekers in presenting their claims and the complicated nature of the asylum requirements which have led to inconsistent adjudications at all procedural levels.

Lack of counsel significantly affects asylum outcomes. In fact, the ability to find counsel is one of, if not the, single biggest factor in whether an applicant will be successful in their claim. Those who are represented are nearly five times more likely to win their cases than their unrepresented counterparts.[309] Those subjected to Remain in Mexico during the

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[307] The Departments' suggestion that the Rule is necessary to prevent people from absconding after a positive fear finding is unsupportable. Rule 11716. For example, for cases that were decided in fiscal year 2019, 98.7% of non-detained asylum seekers attended all of their court hearings. *See* TRAC, *Record Number of Asylum Cases in FY 2019* (Jan. 8, 2020), https://trac.syr.edu/immigration/reports/588/.

[308] *See Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) ("*A-B- I*"), and *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021) ("*A-B- II*"), vacated by *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021) ("*A-B- III*"); *see also Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) ("*L-E-A- II*"), vacated by *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021) ("*L-E-A- III*").

[309] *See* TRAC, *Record Number of Asylum Cases in FY 2019*, *supra* n. 307.

period the Departments cite faced significant obstacles to obtaining or meeting with counsel which interfered with their abilities to present their claims.[310]

Given the correlation between legal representation and grants of relief, it is essential that asylum seekers be given every opportunity to obtain counsel. However, under the Rule, asylum seekers would be required to prove their eligibility for asylum by a preponderance of the evidence, a standard far exceeding what is required in regular asylum proceedings, at the credible fear screening stage, where most asylum seekers are unrepresented.

Additionally, the lack of clarity and inconsistent application of legal standards to asylum claims can lead to denials of relief. This frequently arises in the context of claims involving persecution based on membership in a particular social group. President Biden has identified the need to clarify and simplify these standards and bring them into alignment with international refugee law through additional rulemaking.[311] However, the Departments have still not issued new rules addressing this fundamental issue. This is particularly harmful to *pro se* individuals who have neither the knowledge nor the resources to navigate the complexities of domestic asylum law and fully present their claims.

While the Departments claim that "the interests of ensuring orderly processing" and expediting "rejection of unmeritorious claims at the outset" justify the rule, they cannot provide any rational explanation for how barring claims based on manner of entry will weed out unmeritorious claims. Instead, the proposed ban and processes hinge on rejection of claims on bases that have nothing to do with the merits of the underlying fear-of-return claims. And, as discussed below, the Departments' other stated goals will not be addressed by implementing this punitive bar to asylum.

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[310] Of the 31,964 individuals in MPP removal proceedings as of May 2020, only 224 were represented (i.e., <1%). TRAC, *Details on MPP (Remain in Mexico) Deportation Proceedings by Hearing Location & Attendance, Representation, Nationality, Month & Year of NTA, Outcome, & Current Status,* https://trac.syr.edu/phptools/immigration/mpp/; American Bar Association, *ABA Testifies on 'Remain in Mexico' Policy* (Nov. 21, 2019) https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/november_2019_washington_letter/hearing-recap-laura-pena/; TRAC, *Access to Attorneys Difficult for Those Required to Remain in Mexico* (July 29, 2019), https://trac.syr.edu/immigration/reports/568/; Kate Morrissey, *Access to Attorneys May Be Additional Challenge for Asylum Seekers 'Remaining in Mexico*,' San Diego Tribune (Feb. 19, 2019), https://www.sandiegouniontribune.com/news/immigration/sd-me-remain-in-mexico-attorneys-20190219-story.html.

[311] *See* Executive Order 14010, *supra* n.1.

X. THE RULE DOES NOT ADDRESS THE DEPARTMENTS' STATED GOALS OF REDUCING ADMINISTRATIVE BACKLOGS AND DETERRING "IRREGULAR" MIGRATION AND WILL IMPERMISSIBLY RESULT IN *REFOULEMENT*

The Rule would require asylum officers and immigration judges to apply the transit ban in cases of asylum seekers who may have entered during the effective period of the Rule. Rule 11723. This application would be required even after the effective period ends. Rule 11726. As discussed below, broad application of the Rule will create insurmountable evidentiary obstacles for individuals seeking protection, and place new burdens on asylum offices and immigration courts, leading to further backlogs and inefficiencies.

Moreover, the Rule's twin proposals to apply the bar to individuals who entered during the effective period—regardless of whether they were apprehended or received a credible fear interview—and to continue applying the bar to those individuals after the Rule sunsets undermines the Departments' explanation that the Rule is required to temporarily manage "exigent circumstances" at the U.S.-Mexico border. Rule 11706, 11732, 11736. In fact, the Rule is unlikely to, as the Departments claim, deter individuals fleeing persecution from seeking protection without appointments or to undermine the criminal trafficking organizations who prey on them. Rule 11706, 11714.

A. The Rule's Provisions for Application of the Bar Beyond the Border and the Sunset Date Will Create New Burdens for Asylum Seekers and Adjudicators

Requiring application of the Rule to individuals who apply affirmatively at the asylum office or who are put into immigration court proceedings without first having a credible fear interview will further complicate the already labyrinthine asylum process. And application of the presumption even after the rule sunsets will complicate asylum adjudications for years to come.

1. The Rule creates insurmountable evidentiary requirements for asylum seekers

Broad application of the Rule, even after it sunsets, will create impossible evidentiary hurdles for asylum seekers. First, asylum seekers who entered the United States without inspection or arrived at a port of entry without an appointment during the effective period of the Rule, will be required to prove by a preponderance of the evidence that they fall into one of the exceptions to the Rule—i.e., that they could not access the CBP One app or that they were denied asylum in a transit country. If they fail that, then they will have to show that they met one of the grounds for rebutting the presumption *at the time of entry*. Because, due to existing backlogs, many of these cases will be adjudicated years after the

date of entry, it is highly unlikely that applicants will be able to meet this burden. For example, absent concurrently issued medical documents an applicant may not be able to show that it was more likely than not they *or a family member they were traveling with* were suffering from an "acute medical emergency" at the time they crossed the border. In transit and over time evidence gets lost and relationships change, making the burden of proof insurmountable. Evidence of an asylum denial in a third country may be similarly difficult to provide. That requirement assumes, contrary to evidence (*see supra*, Section VIII.C) that transit countries will provide clear evidence of application and denial, nor is it reasonable to expect that asylum seekers will be able to hold onto that documentation during their harrowing journeys north. It would be even more difficult to demonstrate that there was an immediate threat to their safety at the moment they crossed several years earlier.

Moreover, contrary to the Departments' baseless assumption that asylum seekers are sophisticated about the many nuanced requirements of U.S. asylum law and the various constantly changing border policies, many of these individuals will have no idea about the presumption, its exceptions, and the rebuttal grounds until well-after they arrive in the United States. In fact, for many, particularly *pro se* individuals, the first time they will learn of the Rule and its evidentiary requirements will be when they arrive in court or at the asylum office, making it even more unlikely that they will have collected evidence to prove that they are not subject to the bar.

2. The Rule would create new burdens for asylum offices and immigration courts, increase backlogs, and lead to erroneous removal of individuals with meritorious claims

Additionally, despite its focus on efficiency and eliminating the backlogs at the asylum office and immigration courts, the Rule will further burden both venues by creating new requirements and heightened, confusing, and vague standards for determining asylum eligibility that have nothing to do with the refugee definition and/or the underlying merits of the claim.

The Rule's requirements will further slow adjudications of these cases, because adjudicators will be required to probe into a new set of facts to determine: 1) manner of entry; 2) whether the applicant falls into any of the exceptions; and, if deemed subject to the presumption of ineligibility, 3) whether the applicant can rebut the presumption. In the case of *pro se* individuals, this will mean that adjudicators will have to carefully question unrepresented individuals about the details of their journeys to the United States, their conditions, the conditions of family members they traveled with, and the conditions they faced in transit countries prior to entering the United States. Adjudicators will further have to decipher whether those conditions fall into any of the *per se* rebuttal categories or

qualify as exceptionally compelling circumstances, and may also have to establish familial relationship pursuant to the Proposed Rule. In order to comport with due process, adjudicators will have to spend an inordinate amount of time delving into facts that are entirely unrelated to the applicant's need for protection at the time the case is being adjudicated.

Worse, the Rule encourages adjudicators to stop the inquiry there and deny otherwise valid asylum claims on the basis of the Rule alone. Specifically, the Rule's focus on manner of entry, and departure from *Matter of Pula*'s determination that entry without inspection and failure to apply for asylum in a transit country, among other factors, should be considered at the discretionary phase of adjudication, will cause asylum officers and immigration judges to pretermit meritorious claims based on an arbitrary ground. Though the Rule permits adjudicators to find the presumption rebutted in "the sound exercise of their judgment" based on "other exceptionally compelling circumstances" (a term it makes no effort to define), the likelihood that adjudicators in understaffed agencies will develop the record beyond the assessment of the presumption and consider evidence relevant to the actual merits of the underlying asylum claim is virtually nil. This is particularly troubling in the cases of traumatized asylum seekers who may be unable to disclose relevant experiences early on[312] and *pro se* individuals who are unlikely to know what evidence might be relevant to either inquiry. However, the Rule fails to account for these factors, instead focusing on reducing the number of asylum grants. Rule 11746.

For the asylum office, where officers must first consider the application and then determine withholding and CAT eligibility, the Proposed Rule will drain resources that could otherwise be spent conducting asylum merits interviews. As the USCIS Ombudsman's 2022 annual report observed, the Asylum Office backlog "continues to be the consequence of the Asylum Division's credible and reasonable fear screening workloads," which "divert staff that would otherwise be assigned to the affirmative asylum caseload." The report concluded that the Asylum Office backlog could be significantly reduced if officers focused on full asylum adjudications, but that these adjudications "remain a collateral duty at most

[312] *See* Treatment Improvement Protocol 57, Trauma-Informed Care in Behavioral Health Services, U.S. Dep't of Health and Human Servs., Substance Abuse and Mental Health Services Administration 61, 73 (2014) (explaining that trauma survivors commonly use avoidance as a coping mechanism), https://store.samhsa.gov/sites/default/files/d7/priv/sma14-4816.pdf; Epstein & Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. Pa. L. Rev. 399, 410-11 (2019); Gangsei & Deutsch, *Psychological evaluation of asylum seekers as a therapeutic process*, 17 Torture 79, 80 (2007) ("[S]urvivors frequently bear the burden of guilt and shame, which makes it too painful and humiliating to tell the outside world about the torture.").

asylum offices" due to credible and reasonable fear screenings.[313] Lengthening credible fear interviews, as the Rule proposes, will therefore not reduce the backlog but will in fact exacerbate it.

Further, at the immigration court stage disagreements about the correctness of the application of the presumption and assessment of the grounds for rebuttal are likely to lead to motions to reconsider, interlocutory and post-decision appeals to the BIA, motions to reopen, and appeals to the federal courts. The Rule, therefore, will not, as the Departments suggest, lead to efficient adjudication, elimination of the backlog, and weeding out of nonmeritorious claims. Quite the opposite, it will further burden the asylum offices and immigration courts by requiring lengthy inquiries into matters that have no bearing on the underlying merits of the protection claim, and will result in individuals who have valid asylum claims being returned to danger based solely on their manner of entry.

If the Departments truly wish to address the backlogs at the asylum office and the immigration and federal courts, there are several alternative approaches that will not similarly eviscerate the right to seek asylum. For example, the Departments could hire more asylum officers, immigration judges, and support staff. DHS could exercise its discretion to place asylum seekers directly into immigration court proceedings and avoid the expedited removal process full stop. They could also, as long promised, issue regulations clarifying aspects of the refugee definition in order to simplify adjudication of claims.[314] They could exercise favorable discretion and decide not to waste limited administrative and judicial resources pursuing removal of individuals who are eligible for asylum or related protection, but instead stipulate to relief on the papers. All of these avenues are available and, unlike the Proposed Rule, comport with domestic and international asylum law.

B. The Rule Will Neither Deter Individuals Fleeing Persecution From Seeking Protection at the Southern Border Nor Prevent Criminal Organizations From Exploiting Their Desperation

Finally, there is nothing to suggest that this punitive measure will actually deter so-called irregular migration. History shows that desperate people, deserving of protection, often circumvent orderly procedures to escape persecution and death,[315] and that restrictive,

[313] USCIS Ombudsman Annual Report (Jun. 30, 2022), pp. 49–52, https://www.dhs.gov/sites/default/files/2022-06/CIS_Ombudsman_2022_Annual_Report_0.pdf.
[314] Executive order 14010, *supra* n.1.
[315] For example, Oskar Schindler forged documents and bribed German Army officers to save people from the Holocaust. *See* The New York Times, *Obituary: Oskar Schindler, Saved 1,200 Jews* (Oct. 13,

xenophobic asylum policies place them in greater danger.[316] For all of the reasons discussed in Section VIII.C, above—e.g., the danger, poor conditions, and lack of full and fair asylum systems in so many of the transit countries—asylum seekers will continue to be compelled to seek asylum in the United States without an appointment, especially when the only way to make an appointment is through the highly problematic, sporadically functioning CBP One app. Additionally, as noted above, there is nothing to suggest that migrants seeking protection have a sophisticated understanding of the United States' complex and ever-changing asylum rules and policies, such that the presumption would influence their decision of when, where, and how to seek protection in the U.S.

There is also no basis for the Departments' suggestion that the Rule will stymie human trafficking networks. Indeed, the Departments acknowledge that "[t]hese smuggling networks have become more and more sophisticated over time, increasingly using social media *to deceive migrants* and *lure them into initiating a dangerous journey* during which they may be robbed and otherwise harmed, often *with false promises about what will happen to them when they reach the United States*." Rule 11713 (emphases added and citation omitted). If those organizations are famously deceitful and "lure" asylum seekers with "false promises" about U.S. asylum policy, there can be no reasonable argument that the existence of a new asylum bar with convoluted exceptions and rebuttal grounds would undermine their operations. That is, common sense dictates that criminal organizations will continue to lie to, exploit, and endanger asylum seekers, irrespective of whether the U.S. has a permissive or restrictive asylum system. And, as discussed in Sections VIII.A and C, *supra*, the Rule would not interfere with those criminal organizations' and cartels' nefarious activities or profits, but will in fact enrich them by forcing asylum seekers to wait in or be turned back to dangerous territories where they operate.

XI. CONCLUSION

We hope that wiser voices within the administration will prevail and withdraw this Rule in its entirety. We strongly urge consultations with UNHCR, AFGE Local 1924, CGRS, and other experts. We appreciate the opportunity, although unnecessarily truncated, to submit

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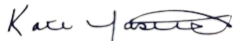
1974), https://www.nytimes.com/1974/10/13/archives/oskar-schindler-saved-1200-jews-outwitted-the-gestapo.html.

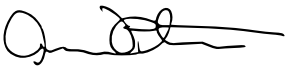
[316] *See, e.g.*, Daniel A. Gross, *The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing That They Were Nazi Spies: In a long tradition of 'persecuting the refugee,' the State Department and FDR claimed that Jewish immigrants could threaten national security,* Smithsonian Magazine (Nov. 18, 2015) ("Most notoriously, in June 1939, the German ocean liner St. Louis and its 937 passengers, almost all Jewish, were turned away from the port of Miami, forcing the ship to return to Europe; more than a quarter died in the Holocaust."), https://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/.

comments on the Proposed Rule. Should you have any questions, please contact Kate Jastram at jastramkate@uchastings.edu or 415-636-8454.

Sincerely,



Kate Jastram
Director of Policy & Advocacy



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