Center for Gender & Refugee Studies

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Daniel Delgado
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. 31314 (May 16, 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 (May 16, 2023)* (hereinafter "Final Rule" or "Rule"). We include the following outline to guide your review.

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I. INTRODUCTION

In finalizing the Circumvention of Lawful Pathways Rule, the Department of Justice (DOJ) and the Department of Homeland Security (DHS) invited comments on the proposed extension of the Rule's applicability to those who enter via adjacent coastal borders as well as some or all maritime arrivals, as discussed in Section V of the preamble. Rule 31314, 31440.

CGRS submitted the attached comment on the Notice of Proposed Rulemaking (NPRM) on Circumvention of Lawful Pathways issued in February 2023.[1] We are dismayed to see that the concerns raised in our comment regarding the Rule's violation of both international and domestic law remain almost entirely unaddressed. We reiterate those objections and incorporate them into this comment.

For the reasons set forth below, we recommend that the Final Rule be withdrawn in its entirety and fully reconsidered in light of U.S. and international law, in the collaborative process called for in Executive Order 14010.[2] To ensure that our response is noted in relation to the specific question of maritime arrivals, we emphasize that neither the extension of the Rule to adjacent coastal borders, nor any of the three additional alternatives under consideration, provides people seeking asylum with a meaningful and realistic opportunity to seek protection.

II. EXPERTISE OF THE CENTER FOR GENDER & REFUGEE STUDIES

CGRS was founded in 1999 by Professor Karen Musalo[3] following her groundbreaking legal victory in *Matter of Kasinga*[4] 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.

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[1] CGRS, Comment on Proposed Rule from the U.S. Department of Justice (Executive Office for Immigration Review) and the U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services): "Circumvention of Lawful Pathways" (Mar. 27, 2023), https://www.regulations.gov/comment/USCIS-2022-0016-12612.

[2] 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/.

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

[4] 21 I&N Dec. 357 (BIA 1996).

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,[5] produce an extensive library of litigation support materials, maintain an unsurpassed database of asylum records and decisions, and work in coalitions with refugee, immigrant, LGBTQ+, children's, and women's rights networks.[6] 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.[7]

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.

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[5] *See, e.g.*, *East Bay Sanctuary Covenant v. Biden*, No. 4:18-cv-06810-JST (N.D. Cal.); *Immigrant Def. Law. Ctr. v. Mayorkas,* No. 20-9893, 2023 WL 3149243 (C.D. Cal., Mar. 15, 2023); *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 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).

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

[7] *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.

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 maritime arrivals portion of the Final 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 necessary research, and to consult with other stakeholders.[8] As noted in our comment on the NPRM, the Departments had ample time to prepare for the end of Title 42 expulsions yet failed to publish the NPRM or this Final Rule in a timely manner; the rule-making process did not follow Executive Order 14010's directive to consult with affected organizations; and our organization did not have sufficient time to prepare this comment.

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."[9] The addition of adjacent coastal borders to the Final Rule is clearly linked to the need for planning at land borders, as the Departments themselves acknowledge. Rule 31365.

CGRS is not aware of any consultation or planning at any point in the more than two years between February 2021 when the Executive Order was issued and May 2023 when the Final 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 31324-26.

IV. IMPOSING A REBUTTABLE PRESUMPTION OF INELIGIBILITY FOR ASYLUM BASED ON PLACE OR MANNER OF ENTRY, INCLUDING FOR MARITIME ARRIVALS, VIOLATES DOMESTIC AND INTERNATIONAL LAW

Subject to the unworkable exceptions and unrealistic grounds of rebuttal discussed in our NPRM comment, the Rule would make people ineligible for asylum based on their "circumvention" of "lawful pathways," that is, their place or manner of entry.

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[8] These would include, for example, 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 the Caribbean.

[9] *See* Executive Order, *supra*, n.2.

The Rule expands the scope of the rebuttable presumption of ineligibility for asylum by allowing its application to asylum seekers "who enter[] the United States from Mexico at the southwest land border *or adjacent coastal borders*." Rule 31450 (emphasis added). The Rule fails to clearly define "adjacent coastal borders," stating merely that it includes "*any* coastal border at or *near* the U.S.-Mexico border." Rule 31320 (emphasis added). This definition is too vague and broad to allow for uniform application of the presumption to asylum seekers traveling by sea.

The Departments do not clarify the geographic scope of the Rule by explaining that it mirrors the definition found in Title 42.[10] Rule 31320. Instead, as the Departments acknowledge, the scope of the term under Title 42 was developed during its implementation. Rule 31321. Essentially, the Rule gives broad deference to the determination of what constitutes "adjacent" or "near" that can only lead to arbitrary application of the rebuttable presumption.

All of the international and domestic law obligations noted and all the objections raised in our NPRM comment apply with equal force to the situation of asylum seekers who enter the United States from adjacent coastal borders.

The Rule then requests comment on three possible extensions of the rebuttable presumption of ineligibility for asylum to: (1) [N]oncitizens who enter the United States without documents sufficient for lawful admission… at a maritime border, whether or not they traveled through a third country; (2) noncitizens who enter the United States without documents sufficient for lawful admission… at any maritime border, while continuing to limit the presumption's applicability to those who traveled through another country before reaching the United States; and (3) noncitizens who enter the United States by sea, who departed from the Caribbean or other regions that present a heightened risk of maritime crossings. Rule 31440. We discuss each in turn below.

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[10] The fact that Title 42 never defined "adjacent" creates further confusion as to why the Departments use it as a guide. Instead, Title 42 provided only the following definition, which, if applied in the context of this new Rule, would violate its own language by being too broad and covering more than the mandated "adjacent" borders with Mexico:

> '[C]oastal borders' refers to any U.S. border that is adjacent to a waterway, rather than land. DHS has further advised CDC that 'waterway' refers to any large body of water (e.g., Pacific Ocean, Atlantic Ocean, and Gulf of Mexico). For the purpose of this Order, 'coastal' applies to any waterway from which persons traveling through Canada and Mexico may enter the United States (e.g., Pacific, Gulf of Mexico, Lake Michigan, Rio Grande).

85 F. R. 31503-02, FN. 25 (2020).

A. The Proposed Extension to All Maritime Asylum Seekers Regardless of Third Country Transit Violates Domestic and International Law and Will Result in *Refoulement*

In the first alternative, the Rule proposes that the presumption of ineligibility for asylum should be expanded to all maritime arrivals. Rule 31440. This would significantly increase the coverage of the Rule by applying the presumption to anyone who reaches the United States by sea, including Haitians and Cubans who travel directly from their country to the United States. Rule 31443. The Departments acknowledge that this proposal is a "departure" from the rest of the Rule. This is a serious understatement, to say the least, as the entire premise of the Rule is that the rebuttable presumption applies only to asylum seekers who travel through a country other than their own, Rule 31450 (8 C.F.R. 208.33(a)(1)(iii)).[11]

And yet, the Departments assert that this alternative is independently justified due to the dangers that both migrants and DHS personnel face in the maritime context, the added deterrence factor as a "supplement" to interdiction, the availability of lawful pathways, and the "safeguards" incorporated into the Rule. Rule 31443. This is a remarkable shift in the scope of the Rule, as well as its stated rationale, and provides yet another reason that a thirty-day comment period is insufficient.

Nevertheless, we address these justifications one by one. First, while the dangers of seeking asylum by sea are well-known, the accepted standards for States in responding to such humanitarian challenges are equally well-established.[12] What is not acceptable is for a State to make asylum on its territory unavailable for those who arrive by boat.[13]

Second, creating an additional deterrent measure to further enforce interdiction is equally in violation of international law. Even those asylum seekers who are fortunate enough to escape interdiction and forced return will still be barred from asylum in the vast majority of cases because they will be unable to rebut the presumption or meet one of the exceptions. Additionally, targeting Cubans and Haitians arriving by sea directly from their own country

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[11] As explained in response to a comment expressing concern about Mexican asylum seekers, the Final Rule states "This concern is based on a misunderstanding of the rule. … Mexican nationals would not have traveled through a country other than Mexico en route to the SWB, and therefore are not subject to the rebuttable presumption." Rule 31415.

[12] UNHCR, RESCUE AT SEA, STOWAWAYS AND MARITIME INTERCEPTION: SELECTED REFERENCE MATERIALS (2d ed. 2011), https://www.refworld.org/docid/4ee087492.html.

[13] *See, e.g.,* UNHCR Representation in Canberra, "On 9th anniversary of 'Offshore Processing' UNCHR renews call for policy to end," 19 July 2022, https://www.unhcr.org/au/news/news-releases/9th-anniversary-offshore-processing-unhcr-renews-call-policy-end

for unequal treatment violates the non-discrimination obligation in Article 3 of the Refugee Convention.

Third, the reference to availability of lawful pathways and "safeguards" in the context of arrivals by sea is unclear at best, if not entirely illusory. As noted above, the Rule is directed entirely at asylum seekers who have traveled through a country other than their own to reach the United States. It appears that this alternative would apply the Rule to direct maritime arrivals even though they have not traveled through a country other than their own and therefore could not have applied for asylum in that country and received a denial. In such a scheme, the Departments must acknowledge that the Rule's most important remaining exception – making an appointment at a port of entry – would also not be available.

Scheduling an appointment would be impossible for most asylum seekers who arrive by sea because they would not have any control over where they make landfall. This is true for any number of reasons: because they do not know where they are, they are not personally in control of their vessel, and/or the vessel is not capable of being steered. If, as is likely, they enter the United States between ports of entry, they would be subject to the Rule because they had not presented at a port of entry with, or even without, an appointment.[14] Yet application of the Rule in this context would be deeply unjust, as people would not have a meaningful opportunity to choose the "lawful pathway" of scheduling an appointment once they are at sea. Adoption of this alternative would put asylum out of reach for nearly everyone arriving by boat, leading to their r*efoulement* to countries where they face persecution, torture, and death.

The Departments suggest that instead of traveling by sea to the United States, many Haitians and Cubans could simply travel by air to a third country to obtain asylum there. Rule 31443. They acknowledge that "there may be individuals for whom air travel is not an option" and invite information and comments on "access to air travel and whether any aspect of this rule's presumption should be adjusted to account for differences among individuals in access to air travel." Rule 31443.

We are somewhat mystified by the Departments' request for information on access to air travel, data which is surely available to them. In order for air travel to be a realistic protection option, Haitians and Cubans must have a passport, which requires supporting civil documentation to obtain, the ability to pay the necessary fee, and a government office

[14] We assume that people arriving by sea at a port of entry would not have been able to access or use the DHS scheduling system while at sea and would thus fall under the "significant technical failure" exception to requirement of presenting with an appointment, Rule 31450.

able and willing to issue it. Most destinations also require a visa, which is an additional expense, presupposes a functioning embassy in Haiti or Cuba, and is always subject to the complete discretion of the issuing country. The person who must flee would also have to have the financial ability to travel by air. Finally, the destination country would have to meet the requirements of a safe third country, meaning that it is in fact safe for people seeking asylum and provides access to a full and fair asylum procedures. Only in rare circumstances would all these factors align. It is disingenuous for the Departments to suggest that air travel is a protection option for more than a tiny handful of people.

The Departments must be aware that Cubans and Haitians are not able to easily travel by air to other countries. In fact, Haitian and Cuban passports are considered the worst and second-worst passports, respectively, in the Americas, with respect to the number of countries their holders can visit without a visa.[15]

In a footnote accompanying the Rule's text on air travel by Cubans and Haitians, the Departments note that Cubans do not need a visa to enter Nicaragua. Rule 31443, n. 367. However, Cubans do need a passport; problems in obtaining passports are discussed below. In addition, as documented in our comment on the NPRM, Nicaragua does not meet the requirements of a safe third country. The country is in such dire straits that its nationals are eligible for the special humanitarian parole program, and its Temporary Protected Status designation was just extended for another 18 months.[16] The other two countries named in the footnote regarding air travel, Chile and Brazil, do require Cubans to obtain visas.

Similarly, while the same footnote states that Haitians reach the United States on by flying to Brazil or Chile then traveling north, both of those countries require Haitians to have a visa. Rule 31443, n. 367. And even this visa route is almost impossible for Haitians as diplomatic missions in Haiti are limited and frequently curtail operations due to insecure country conditions.[17]

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[15] Cubanet, *Pasaporte cubano: Segundo menos útil en toda América* (Apr. 7, 2023), https://www.cubanet.org/noticias/pasaporte-cubano-segundo-menos-util-en-toda-america/.

[16] DHS Rescinds Prior Administration's Termination of Temporary Protected Status Designations for El Salvador, Honduras, Nepal, and Nicaragua (June 13, 2023), https://www.dhs.gov/news/2023/06/13/dhs-rescinds-prior-administrations-termination-temporary-protected-status.

[17] *E.g.,* La Prensa Latina, *Violence, looting, protests in Haiti prompt shuttering of embassies* (Sept. 15, 2022) (reporting the continued closure of embassies from Spain, France, the Dominican Republic, and Canada, among others.), https://www.laprensalatina.com/violence-looting-protests-in-haiti-prompt-shuttering-of-embassies/.

Finally, even if a Cuban or Haitian national had the financial resources for air travel and for a visa application, they would first have to be in possession of a valid passport. In fact, as the United States has recognized, many Haitians and Cubans do not have, and cannot get, passports.[18]

Obtaining a Haitian passport is particularly out of reach for most people. The national government is on the brink of complete collapse and is in no condition to offer the support or resources that Haitians require to apply for the U.S. parole program or air travel to other countries.[19] There is only one passport-issuing office in the country, in Port-au-Prince, which has become overwhelmed by citizens following the announcement of the U.S. parole program.[20] It has become difficult to secure new appointments and there have been numerous outbursts of violence, including beatings and stampeding, as Haitians struggle to obtain a passport.[21] And even when individuals do secure an appointment, there is no guarantee that they will be able to access the office—even the office's own employees cannot enter at times.[22]

The issuance of passports has also become mired in corruption. There have been accusations leveled against immigration officials and the police who demand sexual favors from women and young girls in exchange for the limited number of passports.[23] Other Haitians sometimes pay as much as twice the standard fee to certain agencies in the hope

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[18] U.S. DEP'T. STATE, BUREAU OF DEMOCRACY, HUM. RTS, AND LAB., 2022 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: HAITI, 1 (2022), https://www.state.gov/wp-content/uploads/2023/02/415610_HAITI-2022-HUMAN-RIGHTS-REPORT.pdf; U.S. DEP'T. STATE, BUREAU OF DEMOCRACY, HUM. RTS, AND LAB., 2022 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CUBA, 25-26 (2022), https://www.state.gov/wp-content/uploads/2023/02/415610_CUBA-2022-HUMAN-RIGHTS-REPORT.pdf.

[19] U.S. DEP'T. STATE, BUREAU OF DEMOCRACY, HUM. RTS, AND LAB., 2022 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: HAITI, 1 (2022), https://www.state.gov/wp-content/uploads/2023/02/415610_HAITI-2022-HUMAN-RIGHTS-REPORT.pdf.

[20] Danica Coto, *Passport rush blamed on US policy stalls adoptions in Haiti*, Associated Press (Feb. 10, 2023), https://apnews.com/article/biden-politics-united-states-government-caribbean-haiti-f98a84e03e56e2702fb6880ec1825f0f.

[21] Harold Isaac & Sarah Morland, *Haitians seen crushing into migration centers seeking passport to U.S.*, Reuters (Feb. 3, 2023), https://www.reuters.com/world/americas/haitians-seen-crushing-into-migration-centers-seeking-passports-us-2023-02-04/.

[22] Danica Coto, *Passport rush blamed on US policy stalls adoptions in Haiti*, Associated Press (Feb. 10, 2023), https://apnews.com/article/biden-politics-united-states-government-caribbean-haiti-f98a84e03e56e2702fb6880ec1825f0f.

[23] Juhakenson Blaise, *Haiti Launches Site For Passport, ID Card Applications*, Texas Metro News (Apr. 5, 2023), https://texasmetronews.com/53235/haiti-launches-site-for-passport-id-card-applications/.

of expediting their passport applications.[24] Similarly, fraudulent activity has spiked as people pretending to have influence in the passport office attempt to charge as much as five times the standard fee for expedited applications.[25] The Haitian government itself has significantly increased passport fees in an attempt to mitigate the wave of applications it is receiving.[26] The price for a passport has doubled from around $100 to about $200.[27] This appears to exclude the additional $50 cost of a stamp for the application—a "fortune in the poorest country in the Americas."[28]

As a consequence of Haiti's failing civil registration system, statelessness remains a "major issue" where "thousands" lack identification documents such as passports.[29] This effectively prevents Haitians from seeking other pathways to protection, including air travel, because they cannot obtain the necessary documentation from their government to do so.[30]

Cubans face different problems in obtaining a passport. There, passports are arbitrarily withheld from certain individuals whom the government does not want to leave the island, such as dissidents, human rights defenders, journalists, and academics.[31] So while permission to travel abroad is technically no longer necessary, Cubans are subject to a

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[24] AFP News, *Haitians Flock For Passports to Reach U.S. Under New Program*, Barrons (Jan. 10, 2023), https://www.barrons.com/news/haitians-flock-for-passports-to-reach-us-under-new-program-01673401208.

[25] Juhakenson Blaise, *Haiti Launches Site For Passport, ID Card Applications*, Texas Metro News (Apr. 5, 2023), https://texasmetronews.com/53235/haiti-launches-site-for-passport-id-card-applications/.

[26] AFP News, *Haitians Flock For Passports to Reach U.S. Under New Program*, Barrons (Jan. 10, 2023), https://www.barrons.com/news/haitians-flock-for-passports-to-reach-us-under-new-program-01673401208.

[27] St. Kitts & Nevis Observer, *Haiti: Passport Prices Double Over New US Immigration Options* (Jan. 18, 2023), https://www.thestkittsnevisobserver.com/107905-2/.

[28] AFP News, *Haitians Flock For Passports to Reach U.S. Under New Program*, Barrons (Jan. 10, 2023), https://www.barrons.com/news/haitians-flock-for-passports-to-reach-us-under-new-program-01673401208.

[29] U.S. DEP'T. STATE, BUREAU OF DEMOCRACY, HUM. RTS, AND LAB., 2022 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: HAITI, 19 (2022), https://www.state.gov/wp-content/uploads/2023/02/415610_HAITI-2022-HUMAN-RIGHTS-REPORT.pdf; *see also* AUSTRIAN CTR. COUNTRY ORIGIN INFO. & ASYLUM RSCH. & DOCUMENTATION, HAITI COUNTRY OF ORIGIN COMPILATION, 105 (2023) ("[A] quarter of the Haitian population is not registered anywhere and does not officially exist") (internal quotations omitted), https://www.ecoi.net/en/file/local/2091510/ACCORD_Haiti_April+2023.pdf.

[30] AUSTRIAN CTR. COUNTRY ORIGIN INFO. & ASYLUM RSCH. & DOCUMENTATION, HAITI COUNTRY OF ORIGIN COMPILATION, 105 (2023) (citing the Director General of Haiti's National Archives as explaining that this state administrative failure "is the result of an outdated, dysfunctional civil status system over a century old."), https://www.ecoi.net/en/file/local/2091510/ACCORD_Haiti_April+2023.pdf.

[31] U.S. DEP'T. STATE, BUREAU OF DEMOCRACY, HUM. RTS, AND LAB., 2022 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CUBA, 25-26 (2022), https://www.state.gov/wp-content/uploads/2023/02/415610_CUBA-2022-HUMAN-RIGHTS-REPORT.pdf.

wide array of bars to receiving a passport, including extremely broad prohibitions such as a national interest bar that can be anything the government chooses.[32] Basically, there is a *de facto* state authorization requirement for those applying for a passport before they can travel. Further, there is a law which "restricts the rights of citizens to leave the country" which can lead to "imprisonment, a moderate fine, or both for those who attempt to depart the country illegally." Worse, there are reports that government officials and those traveling with children risk even more severe punishment. For example, the families of those who flee are "arbitrarily denied passports" in order to prevent them from reunifying with their refugee relative.[33]

For the Departments to contemplate some type of exemption based on lack of access to air travel does not cure the illegality of the Rule any more than the other grounds of rebuttal or exceptions do. It simply multiplies the inefficiencies of the Rule by requiring adjudicators to make complicated factual findings on multiple legal elements that have nothing to do with the merits of the asylum claim, and would worsen existing backlogs.

These new legal tests would require the asylum seeker arriving by sea to prove a negative, namely, that they did not have access to air travel. Would it be sufficient for an asylum seeker to affirm that they did not have enough money for a plane ticket, or would adjudicators then require documentation that the asylum seeker had tried unsuccessfully to borrow money from others? Similarly, what kind of proof would be required for an asylum seeker who was unable to get a passport, or obtain a visa to some third country? The Departments must recognize that the "choice" to take an extremely dangerous voyage by sea from Haiti or Cuba should be *per se* proof that air travel was not an option.

B. The Proposed Extension to All Maritime Asylum Seekers Who Have Transited a Third Country Violates Domestic and International Law and Will Result in *Refoulement*

In the second alternative, the Rule proposes that the presumption of ineligibility for asylum should be expanded to asylum seekers who enter the United States at any maritime border, and who traveled through another country before reaching the United States. Rule 31440. This second alternative is based on the same defect as the Rule itself, a fundamental misunderstanding and misapplication of the notion of a safe third country. As explained in detail in our NPRM comment, the major countries of transit for people seeking

[32] Opapeleo, *Restricciones al solicitar pasaporte Cubano* (Nov. 30, 2022), https://opapeleo.com/pasaporte-cubano/restricciones-al-solicitar-pasaporte-cubano/.
[33] U.S. DEP'T. STATE, BUREAU OF DEMOCRACY, HUM. RTS, AND LAB., 2022 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CUBA, 25 (2022). https://www.state.gov/wp-content/uploads/2023/02/415610_CUBA-2022-HUMAN-RIGHTS-REPORT.pdf.

asylum in the United States offer neither safety nor a functioning asylum system.[34] And as noted above, asylum seekers traveling by sea will most likely end up entering the United States between ports of entry through no fault of their own and will therefore not have the option of trying to use the "lawful pathway" of presenting themselves at a port of entry.

C. The Proposed Extension to All Maritime Asylum Seekers Who Have Departed from the Caribbean or Other Regions That Present a Heightened Risk of Maritime Crossings Violates Domestic and International Law and Will Result in *Refoulement*

The Rule's third alternative would apply the presumption of ineligibility for asylum to people who enter the United States by sea, and who departed from the Caribbean or other regions that present a heightened risk of maritime crossings. Rule 31440. This alternative raises a number of questions and concerns.

First, it is entirely unclear. Neither "the Caribbean" nor "other regions" is defined, leaving its geographic scope open to seemingly unlimited interpretation.

Second, to the extent that asylum seekers from one or more geographic regions are treated differently from all other asylum seekers, the United States would be in violation of the non-discrimination obligation found in Article 3 of the Refugee Convention. As with the two other alternatives under consideration, the Rule appears to be targeting asylum seekers from Haiti. This is consistent with, and should be seen as an extension of, the long history of blatant attempts by the United States to exclude people fleeing Haiti by any means possible.[35]

Third, no explanation is provided as to how a "heightened risk" of maritime crossings will be determined, leaving the threshold for triggering the Rule's application opaque. While the Rule states that maritime migration "continues to increase," Rule 31441, the Departments do not indicate if there is some baseline level of risk of maritime crossings against which a heightened risk could be measured. Adoption of this alternative would give the Departments virtually unlimited discretion to impose the Rule at any time, on nearly anyone arriving by sea, from any point of departure.

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[34] *See also,* CGRS, *Far from Safety: Dangers and Limits to Protection for Asylum Seekers Transiting Through Latin America* (April 2023), https://cgrs.uchastings.edu/sites/default/files/Transit%20Countries%20Report_4.21.23_FINAL.pdf

[35] *See, e.g.,* Brief for Haitian Bridge Alliance, et al. as Amici Curiae Supporting Plaintiffs' Motion for Summary Judgment, *Al Otro Lado, Inc., et al. v. Wolf,* No. 3:17-cv-02366-BAS-KSC (S.D. Cal. 2020)(attached); Plaintiff Class Action Complaint for Injunctive and Declaratory Relief, *Haitian Bridge Alliance, et al. v. Biden,* et al., No. 1:21-cv-03317 (D.D.C. 2021) (attached).

Fourth, in the absence of any limiting language, this alternative would apparently apply the Rule to all asylum seekers who departed from the Caribbean or other regions regardless of their transit through a third country. It appears that this alternative will function much like the first alternative, such that the presumption of ineligibility for asylum will apply to all maritime arrivals. To the extent that the Departments consider this to be a third, and different, option, they have failed to reflect that in their description. This lack of clarity defeats the purpose of notice-and-comment rulemaking, as we can only guess about the contours of this alternative. We therefore reiterate our concerns about the first and second alternatives in the context of this third alternative.

V. THE RULE DOES NOT MEET THE DEPARTMENTS' STATED GOAL OF DETERRING MARITIME ARRIVALS AND WILL IMPERMISSIBLY RESULT IN *REFOULEMENT*

The Rule will neither deter individuals fleeing persecution from seeking protection at adjacent coastal borders nor prevent criminal organizations from exploiting their desperation. History shows that desperate people, deserving of protection, often circumvent orderly procedures to escape persecution and death,[36] and that restrictive, xenophobic asylum policies place them in greater danger.[37] Due to a range of dire circumstances in countries that produce refugees, coupled with dangerous conditions and inadequate asylum systems in countries of transit, people will continue to be compelled to seek asylum in the United States. Furthermore, there is nothing to suggest that people seeking protection have a sophisticated understanding of the United States' complex and ever-changing asylum rules and policies, such that the Rule would influence their decision of when, where, and how to seek protection in this country.

There is also no basis for the Departments' suggestion that the Rule will stymie human trafficking networks. Indeed, the Departments insist that "[s]mugglers routinely prey on migrants using perceived changes in domestic immigration law." Rule 31446. If smugglers are known to be deceitful and to misrepresent U.S. immigration law, it is difficult to understand how the inclusion of "adjacent coastal borders" would undermine their

[36] 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, 1974), https://www.nytimes.com/1974/10/13/archives/oskar-schindler-saved-1200-jews-outwitted-the-gestapo.html.

[37] *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/.

operations. That is, common sense dictates that criminal organizations will continue to lie, to exploit, and to endanger asylum seekers, irrespective of whether the United States has supposedly created a legal "loophole" by omitting a particular phrase, as the Departments claim. Rule 31320. Additionally, 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, or to take even more dangerous and hard-to-detect sea voyages in the hope of evading interdiction and the application of the Rule.

VI. CONCLUSION

We urge the Departments to withdraw this Rule in its entirety, and to consult with UNHCR, AFGE Local 1924, CGRS, and other experts. We appreciate the opportunity, although unnecessarily truncated, to submit comments on the Final 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

Exhibit A

CGRS Comment

Center for Gender & Refugee Studies

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.

TABLE OF CONTENTS

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.

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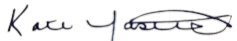
1974), https://www.nytimes.com/1974/10/13/archives/oskar-schindler-saved-1200-jews-outwitted-the-gestapo.html.

[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

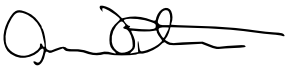


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Exhibit B

Brief for Haitian Bridge Alliance, et al

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

AL OTRO LADO, INC, *et al.*,

Plaintiffs,

v.

CHAD F. WOLF, *et al.*,

Defendants.

Case No.: 3:17-cv-02366-BAS-KSC

BRIEF OF HAITIAN BRIDGE ALLIANCE, INSTITUTE FOR JUSTICE & DEMOCRACY IN HAITI, IRA KURZBAN, AND IRWIN STOTZKY AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1 and CivLR 40.2. proposed *Amici curiae* Haitian Bridge Alliance ("HBA"), Institute for Justice & Democracy in Haiti ("IJDH"), Ira Kurzban, and Irwin Stotzky (together, the "*Amici*"), by their undersigned counsel, hereby certify that *Amici* have no parent corporation and that no publicly held corporation owns 10% or more of their stock, if any.

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INTRODUCTION AND STATEMENT OF INTEREST

Amici HBA, IJDH, Ira Kurzban and Irwin Stotzky respectfully submit this brief in support of the Motion for Summary Judgment filed by Plaintiffs *Al Otro Lado, Inc.*, *et al*. (Dkt. #535).[1]

HBA is a non-profit community organization based in San Diego that provides direct services to asylum seekers and other detained immigrants in California, and across the U.S., from Haiti and Africa. The organization responds to the ongoing Haitian immigration crisis that has affected Southern California and the U.S. more broadly as Haitians attempt to seek refuge from the tumultuous political and economic conditions in Haiti, and/or acclimate to new lives in America.

Similarly, IJDH is a U.S.-based, non-profit human rights organization that joins human rights practitioners in the U.S. and Haiti to advance justice for Haitian communities in Haiti and abroad through pursuit of legal claims, dissemination of information about human rights abuses, advocacy, and partnership with grassroots organizations.

Messrs. Kurzban and Stotzky are experts in the field of immigration, particularly as it pertains to Haitian migrants. Mr. Kurzban is a founding partner in the law firm of Kurzban, Kurzban, Tetzeli, & Pratt P.A. in Miami and chair of the firm's immigration department. Mr. Stotzky is Professor of Law at the University of Miami School of Law. For over thirty years, Mr. Kurzban and Professor Stotzky have advocated for Haitian refugees in constitutional and human rights cases, including several before the U.S. Supreme Court.

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[1] The parties to this action have consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party or counsel to any party contributed money intended to fund preparing or submitting this brief. No person other than *Amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. "Dkt. #" refers to documents filed in the instant action.

Amici have a direct and deep-seated interest in this litigation, as Haitian migrants account for a significant number of those being unlawfully turned back from multiple ports of entry ("POE") under Defendants' present metering policy. *Amici*'s unique experience and perspective concerning the plight of Haitian migrants is directly relevant to the substantive issues to be decided in this case. *Amici* therefore respectfully ask that this Court consider this brief in connection with Plaintiffs' Motion for Summary Judgment.

SUMMARY OF ARGUMENT

"Metering" constitutes an unprecedented infringement on the rights of foreign migrants trying to enter America. In contradiction to the clear processes established by the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1225, 1229, Defendants' metering policy mandates summarily turning back asylum seekers and refugees at the border before they are ever given a meaningful opportunity to plead their legal case for entry. With no safe home country to return to, migrants wait, in squalid and dangerous conditions, for their opportunity to seek asylum. Haitians are disproportionately impacted by metering due to longstanding racial and ethnic animus. Haitians have historically been denied access to the U.S., and continue to be disproportionately denied such access, despite conditions that clearly entitle them to refuge under the law.

Looking back on the history of relations between Haiti and the U.S., it is clear that anti-Haitian sentiment drives U.S. immigration policy. This discrimination and disparate treatment continue to this day, as Haitians struggle to recover from the 2010 earthquake, Hurricane Matthew in 2016, and the largest cholera outbreak in modern times, all of which have led to increased economic and political turmoil. Haitians validly seek asylum in America, only to be systematically denied access due to Defendants' illegal metering policy. This policy reflects yet another discriminatory measure designed to make it more difficult for Haitian immigrants to apply for asylum. It should be struck down to

ensure that domestic and international laws are respected, and that all migrants are treated equally under U.S. immigration policy.

ARGUMENT

An examination of the history of U.S. discrimination against Haitians and Haitian migration to the U.S. underscores that Defendants' present metering policy constitutes yet the latest of a long series of illegal and discriminatory policies designed to keep Haitian and other Black migrants out of the U.S. The history of U.S. anti-Haitian animus and disparate treatment is long and sordid, and Defendants will continue that tradition unless they are forced by the Court to follow the law as it was enacted. This is a matter of utmost urgency because Haiti is currently experiencing a profound economic and political crisis. Accordingly, the metering policy should be struck down.

I. U.S. IMMIGRATION POLICY HAS LONG DISCRIMINATED AGAINST HAITIAN MIGRANTS.

To understand the full implications of Defendants' metering policy, it is crucial to understand the plight of Haitian migrants and the legacy of injustices that have been perpetrated against Haitians and other Black migrants.

The U.S. has a long history of discrimination in the application of its immigration laws. In the first codification of U.S. naturalization law, the Naturalization Act of 1790, Congress specified that "any alien, *being a free white person*" could apply for citizenship. Naturalization Act of 1790, § 1, 1 Stat. 103, (emphasis added). It was not until 1870, after the passage of the Fourteenth Amendment, that the naturalization laws were extended to persons of "African nativity and . . . descent." Naturalization Act of 1870, Pub. L. 41-254, § 7, 16 Stat. 254, 256.

A. American Influence Led to the Destruction of Haiti's Economy and the Rise of Authoritarianism, Forcing Haitians to Flee.

America's history has long been intertwined with Haiti's. While the U.S. was enacting discriminatory immigration laws, the enslaved people of Haiti were fighting to overthrow the richest colony in the Americas, the French colony of Saint Domingue. *See generally*, Thomas Reinhardt, *200 Years of Forgetting: Hushing up the Haitian Revolution*, 35 J. Black Stud. 246 (2005). In 1804, Haiti declared its independence and became the first country to abolish slavery, threatening the U.S. racial hierarchy and driving fears in the U.S. that news of the Haitian Revolution could lead to violent uprisings by enslaved people at home. *Id.* at 247, 249-51. In response, the U.S. refused to recognize the new Haitian state and helped France impose "reparations" with high interest rates on Haiti—paid to former French slaveholders for their lost slaves—that crippled the young country's economy for decades. *See* Dan Sperling, *In 1825, Haiti Paid France $21 Billion To Preserve Its Independence—Time for France To Pay It Back*, Forbes (Dec. 6, 2017), https://www.forbes.com/sites/realspin/2017/12/06/in-1825-haiti-gained-independence-from-france-for-21-billion-its-time-for-france-to-pay-it-back/#2a3d48e7312b.

Following its independence, Haiti served as America's military stronghold in the Caribbean, and the U.S. military occupied Haiti from 1915 to 1934. *See* Malissia Lennox, *Refugees, Racism, and Reparations: A Critique of the U.S.' Haitian Immigration Policy*, 45 Stan. L. Rev. 687, 692 (1993) [hereinafter "*Refugees, Racism and Reparation*"]. During that time, Congress passed the Immigration Act of 1924, establishing new immigration laws under which the whiteness of European immigrants was considered to "facilitate[] their Americanization," while non-European immigrants were racialized, rendering them "unalterably foreign and unassimilable to the nation." Mae M. Ngai, *The*

Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924, 86 J. Am. Hist. 67, 70 (1999).

By the time the U.S. exited Haiti, "twenty years of racism and exploitation had created an economically crippled and politically bankrupt nation." *Refugees, Racism, and Reparations* at 695. Worse yet, the U.S.'s intervention left Haiti vulnerable to authoritarianism, and the U.S. even supported Francois Duvalier's rise to the presidency in 1957. *Id.* at 696. The Duvalier regime has been called "the most oppressive regime in the hemisphere," and was responsible for the deaths of over 30,000 people, leading hundreds of thousands of Haitians to flee for safety. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 475-77 (S.D. Fla. 1980); *see also, Refugees, Racism, and Reparations*, at 696 n. 74. But America turned them away.

B. The Arrival of the Haitian "Boat People" and Accelerated Processing To Remove Them.

In 1972, Haitian migrants began arriving in Southern Florida at scale in rickety and often unseaworthy boats. *See* Alex Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy*, 45 U.S. Immigr. Pol'y 163, 163 (1982). Upon arriving in Miami, migrants were typically met by unsympathetic Immigration and Naturalization Service ("INS") officials. *Id.* at 164. INS regularly contended that the Haitians were economic refugees merely attracted to U.S. employment opportunities, rather than fleeing true political persecution that would obligate the U.S. to protect Haitians under both domestic and international law. *Id.* at 164-65.

In furtherance of this exclusionary practice, INS established a "Haitian Program" in 1978. *See Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1029 (5th Cir. 1982). Described (in Orwellian fashion) as "accelerated processing," "[t]he goal of the [Haitian] Program was to expel Haitian asylum applicants as rapidly as possible." *Civiletti*, 503 F. Supp. at 512-13, 519. As the court in *Civiletti*

observed, "[t]he existence of the program, and its impact, [were] uncontroverted. All of the asylum claims were denied." *Id.* at 510-11. A judicial determination that the procedures used to process asylum claims were violations of due process came too late for over 4,000 Haitians processed under the Haitian Program. *Smith*, 676 F.2d at 1039. Upon being returned to Haiti, persons who had fled and sought asylum elsewhere were seen as opponents of the Duvalier regime and imprisoned, persecuted, and in many cases, killed. *Civiletti*, 503 F. Supp. at 476-82.

C. **A Rise in the Use of Detention of Haitian Migrants as a Deterrent.**

In the early 1980s, immigration judges were removed from the purview of INS. *See* Southern Poverty Law Center, *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool* (June 2019), https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool. The stated intent was "to increase judicial independence and remove the appearance of prosecutorial bias." *Id.* In practice, however, "the newly formed immigration courts faced immediate critique for their biased treatment of asylum seekers from Haiti and Central America." *Id.* at 11.

For example, an eighteen-month study that concluded in 1988 examined one immigration court and reported that "although there existed extensive documentation of human rights abuses and high levels of politically motivated violence in Guatemala, Haiti, and El Salvador, the immigration court . . . granted asylum to no Guatemalans or Haitians and granted asylum to only one Salvadoran application." Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. Rev. L. & Soc. Change 433, 455 (1992). The study also found that immigration judges viewed asylum claims with "presumptive skepticism" and "appeared to be reluctant to grant asylum claims over the objections of the government's attorney." *Id.* at 450.

1. **Disparate Treatment of Haitian as Compared to Cuban Migrants.**

The evident bias displayed by immigration courts and INS became even more pronounced when Cuban refugees also began arriving to the U.S. in large numbers. While Haitians were fleeing the U.S.-backed Duvalier regime, boats began to leave South Florida for Cuba's Mariel Harbor, kicking off the Mariel Boatlift of 1980, during which some 125,000 Cuban migrants were brought to the U.S. *See Louis v. Nelson*, 544 F. Supp. 973, 978 (S.D. Fla. 1982). By contrast to Haitians, escaping Cubans were immediately greeted with preferential treatment. *See Refugees, Racism, and Reparations* at 712-16. For example, under the Cuban Adjustment Act, Pub. L. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (1988)), which remains in effect to this day, any native or citizen of Cuba or their immediate relatives may apply for lawful permanent residence just one year after inspection, admission, or parole in the U.S. *Refugees, Racism, and Reparations*, at 716. Haitians, by contrast, were consistently portrayed as economic refugees "lacking any political conviction." *Louis*, 544 F. Supp. at 979.

Prior to the 1980s, the U.S. rarely jailed people for alleged immigration violations. *See* National Immigrant Justice Center, *A Better Way: Community-Based Programming As An Alternative to Immigrant Incarceration* (Apr. 2019), https://immigrantjustice.org/research-items/report-better-way-community-based-programming-alternative-immigrant-incarceration. But as Haitian migrants continued to arrive in the U.S., President Reagan convened a special task force to address illegal immigration in 1981. *Louis*, 544 F. Supp. at 979. The task force issued several recommendations, including that the U.S. return to a policy of detaining migrants until they established a prima facie claim for admission, rather than granting parole. *Id.* at 979-80. Thus, in 1983, the Mass Immigration Emergency Plan was formed, requiring that 10,000 immigration detention beds be located and ready for use at any given time. *See* Rachel Ida Buff, *How President*

Trump is dismantling the world's refugee regime, Washington Post (Feb. 11, 2019), https://www.washingtonpost.com/outlook/2019/02/11/why-president-trump-has-won-immigration-standoff-even-if-he-doesnt-get-wall-funding/.

Haitian petitioners who were incarcerated, rather than paroled, upon arrival in the U.S. under this plan, challenged their parole denials in federal court as discriminatory based on race or national origin. *Louis*, 544 F. Supp. at 984. The district court acknowledged that INS' use of parole was racially inconsistent, stating:

> The evidence shows that both Haitians and non-Haitians are being detained, but that more Haitians are being detained and for longer periods of time than non-Haitians. The evidence also demonstrates that a larger percentage of non-Haitians are granted parole or deferred inspection than the percentage of Haitians. The only conclusion that can be drawn from this evidence is that Haitians are being impacted by the detention policy to a greater degree than aliens of any other nationality at the present time.

Id. at 982. On appeal to the Supreme Court, however, the Court avoided addressing why Haitians were being detained more often and for longer periods than other migrants. *See Jean v. Nelson*, 472 U.S. 846, 854-57 (1985). Instead, the Court decided, based only on statutory grounds, that neither the parole statute at issue, nor the INS regulations that implemented it, authorized race or national origin based discrimination. *Id.*

2. **Detention Gives Rise to Interdiction of Haitian Refugees.**

In September 1981, Haiti and the U.S. entered into an unprecedented agreement whereby the U.S. would interdict vessels in the high seas transporting Haitian migrants and return them to Haiti.[2] Harold Koh *et al.*, *The Haiti Paradigm*

[2] Carl Lindskoog, *How the Haitian refugee crisis led to the detention of immigrants*, Washington Post (Apr. 9, 2018), https://www.washingtonpost.com/ne

in United States Human Rights Policy, 103 Yale L.J. 2391, 2392-93 (1994) [hereinafter "*The Haiti Paradigm in United States Human Rights Policy*"]. Interdiction was never before used for immigration purposes. A.G. Mariam, *International Law and the Preemptive Use of State Interdiction Authority on the High Seas: The Case of Suspected Illegal Haitian Immigrants Seeking Entry Into the U.S.*, 12 Md. J. Int'l L. & Trade 211, 213, 225 (1988) [hereinafter "*International Law and the Preemptive Use of State Interdiction Authority on the High Seas*"].

When interdiction began, the U.S. generally viewed Haitians as economic migrants deserting one of the poorest countries in the world, rather than seeking political asylum. Under the 1981 interdiction agreement, an inspector from INS and a Coast Guard official would check the immigration status of the passengers and return to Haiti those passengers deemed to be undocumented. Although President Reagan tasked the Coast Guard with screening interdicted migrants and allowing those with a credible fear of persecution to enter the U.S., in practice, an alien must have *volunteered* information regarding her fear of persecution in order to have been considered for asylum. *The Haiti Paradigm in United States Human Rights Policy* at 2392-93; *see also U.S. Immigration Policy on Haitian Migrants*, 3-4 (2011), https://www.everycrsreport.com/files/20110517_RS21349_c6a8bc391c450f3244b

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ws/made-by-history/wp/2018/04/09/how-the-haitian-refugee-crisis-led-to-the-indefinite-detention-of-immigrants/ (explaining that, "[w]hile oppressive, the Haitian regime was an anti-communist ally that the U.S. government did not want to alienate. When state and local officials began to protest the arrival of these overwhelmingly poor and black migrants, the U.S. government classified them as economic migrants rather than as refugees, making them ineligible to receive asylum and remain in the United States. And to deter future asylum seekers from Haiti, the government placed the Haitians in a hastily-assembled network of detention centers, jails and prisons.") [hereinafter *How the Haitian refugee crisis led to the detention of immigrants*].

0151c20deab7110d31290.pdf [hereinafter "*U.S. Immigration Policy on Haitian Migrants*"]. In fact, there was "no indication that individual 'interviews' were undertaken," and it was unlikely that migrants were given a meaningful chance to state a credible fear. *International Law and the Preemptive Use of State Interdiction Authority on the High Seas*, at 239-40.

Between 1981 and 1991, the U.S. interdicted approximately 25,000 Haitians. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1034 (E.D.N.Y. 1993). Not all vessels were bound for the U.S.; it is likely that many would have landed on the shores of other countries. *See id.* at 1034-35. Nevertheless, the Coast Guard interdicted these vessels, removed all passengers, and destroyed the vessels. *Id.* at 1035.

Because so many interdicted Haitians could not be safely processed by the Coast Guard, the Department of Defense established temporary facilities at the U.S. Naval Base in Guantanamo, Cuba, to hold Haitian migrants during the screening process. INS began interviewing Haitians at Guantanamo Bay, where the migrants were denied legal representation. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163, 166-67 (1993) When Guantanamo Bay filled to capacity, President George H. Bush signed the Kennebunkport Order, directing the Coast Guard to turn around interdicted Haitian vessels without screening migrants for asylum claims. Carlos Ortiz Miranda, *Haiti and the U.S. in the 1980s and 1990s: Refugees, Immigration, and Foreign Policy*, 32 San Diego L. Rev. 673, 697 (1995).

II. PRESENT DAY TREATMENT OF HAITIAN AND BLACK MIGRANTS.

A. The U.S. Government Recognized the Discriminatory Treatment of Haitians in the 1990s, But This Recognition was Short-Lived.

In November 1997, Congress enacted the Nicaraguan Adjustment and Central American Relief Act ("NACARA"), Pub. L. No. 105-100, 111 Stat. 2160

(1997) (as amended, Pub. L. No. 105-139, 111 Stat. 2644 (1997), which enabled Nicaraguans and Cubans to become legal permanent residents and permitted certain unsuccessful Central American and East European asylum applicants to seek another form of immigration relief. However, Congress deliberately opted not to include Haitian asylum seekers in that relief, concerned that including Haitians would "kill the bill." Elizabeth M. Iglesias, *Identity, Democracy, Communicate Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. Miami L. Rev. 575, 601 (1999) (noting that "thousands of refugees and immigrants from Nicaragua, Cuba, El Salvador, Guatemala, the former Soviet Union and Warsaw pact countries are enjoying the benefits of NACARA, leaving Haitians to wonder whether their self-restraint and self-sacrifice in this instance [would] be remembered and reciprocated in the next.").

The following year, Congress enacted the Haitian Refugee Immigration Fairness Act of 1998 ("HRIFA"), which enabled Haitians who filed asylum claims or were paroled into the U.S. before December 31, 1995 to adjust to legal permanent residence. *See U.S. Immigration Policy on Haitian Migrants* at 5. The bill was modeled on NACARA, and, in a major departure from historical U.S. policy, was motivated by a desire to treat Haitian immigrants fairly and consistently with other immigrant populations. Shayna S. Cook, *The Exclusion of HIV-Positive Immigrants Under the Nicaraguan Adjustment and Central American Relief Act and the Haitian Refugee Immigration Fairness Act, Statutory Interpretation, Communicable Disease, Public Health, Legislative Intent*, 99 Mich L. Rev. 452, 471-72 (2000). However, HRIFA nonetheless was more restrictive than NACARA, as it excluded individuals who entered the U.S. with false or fraudulent documents and Haitians who were not issued parole. *See* Jordan E. Dollar & Allison D. Kent, *In Times of Famine, Sweet Potatoes Have No Skin: A Historical Overview and Discussion of Post-Earthquake U.S. Immigration Policy*

Towards the Haitian People, 6 Intercultural Hum. Rts. L. Rev. 87, 102-03 (2011). Unfortunately, Haitian migrants were often forced to use fraudulent or photo-switched documents to protect themselves from government-sponsored violence, and INS did not issue parole to all Haitians before 1995. *Id.* As such, HRIFA failed to protect many vulnerable Haitians validly seeking asylum.

B. Recent Government Actions Perpetuate Discrimination Against Haitian Migrants.

Although the Obama-Biden administration implemented the Haitian Family Reunification Parole Program ("HFRP") in 2014 (seven years after Cubans were offered the same benefit), Implementation of HFRP, 79 Fed. Reg. 75,581 75,582 (Dec. 18. 2014), which allowed U.S. citizens and lawful permanent residents to apply for parole for family members in Haiti, the current administration abruptly discontinued that program. Geneva Sands, *Trump admin ends family-based reunification programs for Haitians and Filipino World War II vets* (Aug. 2, 2019), https://www.cnn.com/2019/08/02/politics/trump-end-two-family-reunification-programs/index.html.

The Trump administration continues to erode lawful protections and treat Haitians and other Black migrants discriminatorily. In November 2017, the Department of Homeland Security ("DHS") ended Temporary Protected Status ("TPS") for Haitians that were the victims of the 2010 earthquake that reportedly killed more than 200,000 people and left over one million homeless. *See Saget v. Trump*, 375 F. Supp. 3d 280, 323, 360, 379 (E.D.N.Y. 2019) (issuing preliminary injunction and enjoining termination of TPS, citing "political motivations" and "the White House's grander 'America First' strategy" as reasons for the government's ending TPS). The current administration also abruptly, and without justification, removed Haiti from the list of nations whose citizens may participate in the H-2A and H-2B visa programs, meaning Haitians may no longer enter the U.S. to do temporary work. *See* Letter to Biden, 2 (Oct. 13, 2020),

http://www.ijdh.org/wp-content/uploads/2020/10/Biden-Harris-Letter-10-2020-k-grouped-FINAL-full-letter-2.pdf.

That the present administration is motivated by racial animus is made manifest by its own public statements. For example, the government's disdain towards Haitian and Black immigrants was on full display when President Trump stated: "Why are we having all these people from shithole countries come here?" and "Why do we need more Haitians? . . . Take them out." Ibram X. Kendi, *The Day Shithole Entered the Presidential Lexicon* (Jan. 13, 2019), https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/. President Trump also expressed a preference for immigrants from European and Asian countries, continuing the construction of a racial hierarchy in U.S. immigration law. *Id.* Journalists have even commented that "[w]e are in a moment that is strikingly reminiscent of the early 1980s, when fear and hatred of Haitians was used to justify the reinstitution and expansion of immigration detention." *How the Haitian refugee crisis led to the detention of immigrants*.

Moreover, under the Trump administration, African migrants are being deported at far higher rates than migrants from other countries. Joe Penney, *Despite closed borders, the US is still deporting Africans during the pandemic* (July 27, 2020), https://qz.com/africa/1885398/us-ice-deporting-africans-even-with-closed-borders-due-to-covid/ [hereinafter "*Despite closed borders, the US is still deporting Africans during the pandemic*"]. In fact, although the overall numbers of removals have declined, Immigration and Customs Enforcement ("ICE") removed African nationals at an increased rate in 2017. Karla McKanders, *Immigration and Blackness: What's Race Got to Do With It?*, 44 Human Rights Magazine No. 1 (May 16, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/immigration-and-blackness/ [hereinafter "*Immigration and Blackness: What's Race Got to Do With It?*"]. The removal of African nationals

appears to be on the rise again. For example, in 2020, Cameroonian and Congolese asylum seekers experienced an increase in deportations, and have reported being tortured and forced to sign their own deportation orders. Julian Borger, *U.S. Ice officers 'used torture to make Africans sign own deportation orders'* (Oct. 22, 2020), https://www.theguardian.com/us-news/2020/oct/22/us-ice-officers-allegedly-used-torture-to-make-africans-sign-own-deportation-orders.

The indisputable common denominator for this disparate treatment of Haitians and Africans is the color of their skin. President Trump has made very clear that his policies are not based on capacity constraints, or even on the legitimacy of migrants' asylum claims. Instead, his administration has based its immigration policies on race and exclusionism, perpetuating racist and xenophobic opposition to Haitian and Black migrants.

III. METERING DISPROPORTIONATELY AFFECTS HAITIANS.

A. Metering Is Illegal.

Pursuant to the INA, asylum seekers fleeing their home countries out of fear are supposed to be referred to an asylum officer for an interview, *see* 8 U.S.C. §§ 1225(a)(1), (3), b(1)(A)(i)-(ii), or to be placed into removal proceedings, where they may pursue their claim in immigration court, *see* 8 U.S.C. §§ 1225(b)(2), 1229(a). The metering policy, which began in 2016, contradicts these practices without justification or process. *See Munyua v. United States*, 2005 U.S. Dist. LEXIS 11499, at *16 (N.D. Cal. Jan. 10, 2005) (holding that inspection and processing provisions of Section 1225 are "not discretionary").

Under the current metering policy, asylum seekers passing through Mexico to various POE along the Southern border of the U.S. are turned back to Mexico in lieu of formal inspection and processing. Hillel R. Smith, *The Department of Homeland Security's Reported "Metering" Policy: Legal Issues*, 2-3 (Aug. 13 2019) https://fas.org/sgp/crs/homesec/LSB10295.pdf. The government seeks to justify this practice by arguing that it is done only when POE are at operational

capacity. *See id*. However, as detailed by Plaintiffs in their briefing, the metering policy specifically violates the INA because, *inter alia*, Defendants are defying the asylum processing framework without following the procedure required by the Administrative Procedure Act. S*ee* 5 U.S.C. § 704. This is in addition to the separate and distinct violations of the Due Process Clause, *see* U.S. Const. amend. V, and the Alien Tort Statute, *see* 28 U.S.C. § 1350. *See* Dkt. #535-1 at 18-36.

B. Metering is Colored by Deep-Seated Racial and Ethnic Animus and is Used to Deny Haitians Access to the Asylum Process.

1. Life at the Border under the Metering Policy.

This illegal metering policy is especially relevant to Haitians as they continue to grapple with the desperate political and other circumstances that have required them to seek sanctuary in the U.S. Multiple environmental and health crises, such as the 2010 Earthquake and Hurricane Matthew in 2016, coupled with the Haitian government's failure to adequately protect its citizens from harm, have destabilized Haitian government infrastructure and undermined the rule of law. Ensuing political and economic instability, as well as increased political violence, forced Haitians to flee, causing them to arrive at the U.S. border in record numbers in 2016 as metering went into effect. *See* Kira Olsen-Medina & Jeanne Batalova, *Haitian Immigrants in the U.S.*, Migration Policy Institute (Aug. 12, 2020), https://www.migrationpolicy.org/article/haitian-immigrants-united-states-2018. To this day, Haitians continue to flee to the U.S.-Mexico border, despite the high risk of deportation, because of the volatile political situation in Haiti, which includes daily riots, civil unrest, and the targeting of disfavored groups. *See* Kirk Simple, *'There is No Hope': Crisis Pushes Haiti to Brink of Collapse*, N.Y. Times (Oct. 21, 2019), https://www.nytimes.com/2019/10/20/world/americas/Haiti-crisis-violence.html.

Life at the border for Haitians turned away because of metering is dangerous and tragic. One Haitian woman, Nounoune Jules, says that living in Tijuana requires being constantly vigilant. *See* Maya Averbuch, *Stranded in Tijuana: A*

Forgotten Community of Haitians with No Place to Go, The Progressive (Apr. 1, 2018), https://progressive.org/magazine/stranded-in-tijuana-immigration-haiti/. Jules says that she must try to keep her children safe from warring drug cartels, sex workers, and drug users. *Id*. Other Haitians are forced to live in shelters, which face supply shortages, or otherwise set up tents in parking lots and city streets throughout Mexico. *See* Laura Ley, *The American dream of Haitians ends at the border between Tijuana and San Diego*, Univision Noticias (Sept. 28, 2016), https://www.univision.com/noticias/amexica/el-sueno-americano-de-los-haitianos-acaba-en-la-frontera-entre-tijuana-y-san-diego. Living on the streets in Mexico puts Haitians at risk of violent attack as "organized crime groups . . . prowl the streets," and kidnap, rape, and torture stranded migrants. Robbie Whelan, *Violence Plagues Migrants Under U.S. 'Remain in Mexico' Program*, Wall Street Journal (Dec. 28, 2019), https://www.wsj.com/articles/violence-plagues-migrants-under-u-s-remain-in-mexico-program-11577529000. Mexican officials have also begun extorting vulnerable Haitian asylum seekers who face unexpected extended stays in the country. Ariane Francisco & Josefina Salomon, *Mexican Officials Extort Asylum Seekers on Way to USA*, InSight Crime (Mar. 25, 2019), https://www.insightcrime.org/news/analysis/mexican-officials-extort-asylum-seekers/.

Border conditions also have worsened because of COVID-19. Haitians are not only dealing with a devastating sickness, but they have been losing the few menial jobs they managed to secure along the border and are being cut off from outside aid due to the virus' spread. *See* Maya Srikrishnan, *Border Report: Surviving in Tijuana Has Gotten Even Harder for Haitian Migrants,* Voice of San Diego (July 20, 2020), https://www.voiceofsandiego.org/topics/news/border-report-surviving-in-tijuana-has-gotten-even-harder-for-haitian-migrants/. Doctors have described the conditions at border clinics as "tinderboxes for infectious diseases such as varicella, mumps, and norovirus, and now COVID-19" and have noted "[t]he situation on the border is a public health crisis of our country's own

manufacturing." C. Nicholas Cuneo & Hannah Janeway, *From Icebox to Tinderbox—A View from the Southern Border,* N. Engl. J. Med. 2020; 383: e81(2) (Sept. 24, 2020), https://www.nejm.org/doi/pdf/10.1056/NEJMp2009985?articleTools=true. The government has exacerbated the pandemic by deporting thousands of detainees, some of whom have contracted COVID-19 in ICE detention facilities. *See Despite closed borders, the US is still deporting Africans during the pandemic*. For example, as of July 2020, ICE sent over 270 deportation flights to countries in the Caribbean and Latin America. *Id.*

These desperate and degrading conditions, in and of themselves, warrant reconsideration of the metering policy. Failure to directly address the metering policy will only result in more death and devastation for the already disadvantaged Haitian people.

2. **Haitians are Illegally Denied Asylum under the Metering Policy.**

As Plaintiffs note, the current administration's metering policy is unlawful because agency determination cannot be pretextual, arbitrary and capricious, or an abuse of discretion. *See* Dkt. #535-1 at 26-31 (citing 5 U.S.C. § 706(2)(A); *San Luis & Delta-Mendota Walter Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014)). In response, Defendants claim that POE are at operational capacity, and that metering is necessary for effective border maintenance. *See id.* However, the available evidence demonstrates that these capacity arguments are spurious, and there also is clear evidence of Haitian and Black discrimination at POE, as well as in immigration policy more generally. S*ee* DHS, Off. of Inspector General, *Special Review-Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, 4-7 (Sept. 27, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf.

Given existing immigration law's extensive protections for asylum-seekers, these race-based barriers to entry make a mockery of our laws. As one Black

migrant at the border noted, "[w]e are suffering . . . [t]hey tell us to wait and write down our names[,] but nothing happens." Rick Jervis, *At US-Mexico border, migrants from Africa, Haiti wait to seek asylum*, USA Today (June 4, 2019), https://amp.usatoday.com/amp/1319996001. This sentiment tracks with the fact that migrants of African descent, particularly Haitians, are detained and deported at a greater rate, face higher bail rates, have higher percentages of family detention, and have among the highest asylum denial rates, when compared to their non-African peers. *See Immigration and Blackness: What's Race Got to Do With It*; *Black Immigrants Lives Are Under Attack*, The Refugee and Immigrant Center for Education and Legal Services (2020), https://www.raicestexas.org/2020/07/22/black-immigrant-lives-are-under-attack/.

Haitians also face another barrier at the border in that they predominantly speak Haitian Creole. S*ee* Embassy of Haiti in Washington D.C., http://www.haiti.org/haiti-at-a-glance. (last visited Oct. 26, 2020). English is the primary language employed at the border, followed by Spanish. Limited French or Haitian Creole interpreters or materials are available. *See* Tom Jawetz & Scott Shuchart, *Language Access Has Life-or-Death Consequences for Migrants*, Center for American Progress (Feb. 20, 2019), https://www.americanprogress.org/issues/immigration/reports/2019/02/20/466144/language-access-life-death-consequences-migrants/. For example, one Haitian woman was deported in absentia due to a communication gap, which caused her to miss her court appearance. Nancy Adossi, *et al.*, *Black Lives at the Border*, Black Alliance for Just Immigration (Jan. 2018), http://baji.org/wp-content/uploads/2020/03/black-lives-at-the-borderfinal-2.pdf.

In sum, both the history of U.S. treatment of Haitian migrants and the application of Defendants' present metering policy reflect clear racial discrimination and the uncontested abdication of the INA's mandatory processing and inspection requirements. Accordingly, the metering policy reflects the

arbitrary and capricious implementation of the INA and should be deemed unlawful. *See East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1273-74 (9th Cir. 2020) (finding that interpretation of immigration statute to summarily deny entry to certain types of people, in contradiction to Congressional intent, was arbitrary and capricious).

CONCLUSION

For all of the reasons stated above, as well as those submitted to this Court by Plaintiffs, Defendants' metering policy should be found unlawful. *Amici* respectfully request that summary judgment be granted to Plaintiffs affording them both declaratory relief and a permanent injunction.

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Exhibit C

Plaintiff Class Action Complaint for Injunctive and Declaratory Relief

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Atlanta, GA 30329;

Defendants.

CLASS ACTION COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

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INTRODUCTION

1. On a hot day in mid-September, Mirard Joseph crossed the Rio Grande with his wife Madeleine and their one-year-old daughter. As they stepped onto the riverbank in Del Rio, Texas, Mirard and Madeleine were greeted by countless others who, like them, had fled danger and instability in Haiti and traveled thousands of miles to the United States to save their own and their families' lives.

2. For days, Mirard and Madeleine waited patiently for an opportunity to seek asylum, a process they are entitled to access under U.S. law. They and at least 15,000 Haitian asylum seekers were kept in a makeshift encampment set up by U.S. Customs and Border Protection near the Del Rio International Bridge (the "CBP Encampment"). During the day, Mirard sweltered in triple-digit temperatures. At night, the family kept close as they slept on the ground, hopeful that they could soon request protection and begin new lives in the safety of the United States.

3. With each passing day, Mirard's situation became more dire. U.S. officials in the encampment distributed only bottled water and bread to his family, and not enough to sustain anyone. He watched as Madeleine and their daughter suffered from hunger and dehydration. On September 18, 2021, Mirard crossed to Mexico to buy the food and water that his family desperately needed, but which U.S. officers had repeatedly denied. While in Mexico, Mirard made a note to return the next day for a treat for his daughter's second birthday.

4. What Mirard met as he returned to Del Rio was captured in heartrending photos and video that stirred the national conscience and placed a spotlight on the treatment of Haitians in the CBP Encampment. After Mirard stepped out of the river, holding two bags of food for Madeleine and his daughter, he encountered a mounted officer. As other officers looked on—some on foot, others on horseback or in official vehicles—the mounted officer shouted at Mirard, lashed at him with split reins, grabbed his neck, and held his collar. For several minutes, the officer attempted to drag Mirard back to the river, destroying Mirard's shirt and causing his shoes to fall off in the process. The officer released Mirard only when the horse was about to trample him. Two days later, Mirard and his family were taken to a detention facility. From there, Mirard and

Madeleine were shackled, placed on a plane with their young daughter, and expelled to Haiti.

5. Mirard now reflects that when he was grabbed and dragged by the horse-mounted officer, it "was the most humiliating experience of my life. The second most humiliating moment was when they handcuffed and chained me to go back to Haiti."

* * *

6. What happened to Mirard and many others was neither bad luck nor an isolated experience. It was the expected result of two policies applied by U.S. officials in Del Rio.

7. Acting pursuant to purported public health authority under Title 42 of the U.S. Code, immigration officials detained Haitian asylum seekers for field processing in the CBP Encampment and summarily expelled them—either on flights to Haiti or by forcing them back into Mexico—from the United States. When this "Title 42 Process" was introduced by former President Donald Trump in March 2020, his own Centers for Disease Control and Prevention experts objected that there was no sound public health rationale for an order expelling asylum seekers to the countries they fled. Since President Biden's inauguration, his administration has embraced Title 42. Indeed, consistent with the United States' long history of anti-Haitian and anti-Black immigration policies, the Biden Administration has used the Title 42 Process as a cudgel to deny thousands of Haitians an opportunity to access the U.S. asylum process. After witnessing Department of Homeland Security officials' mass expulsions of asylum seekers from the CBP Encampment, a senior advisor in the Biden Administration decried the Title 42 Process as "violat[ing] our legal obligation not to expel or return [ ] individuals who fear persecution, death, or torture, especially [for] migrants fleeing from Haiti."

8. But U.S. officials' abuse of Haitians in Del Rio did not stop with the Title 42 Process. Despite President Biden's promises to restore dignity and compassion to the U.S. asylum system, senior White House and Department of Homeland Security officials developed a "Haitian Deterrence Policy" to apply the Title 42 Process in a way that subjected Haitian asylum seekers in Del Rio to deplorable conditions while in government custody, was deliberately indifferent to humanitarian concerns, and focused on expelling Haitian asylum seekers as quickly as possible.

Pursuant to this policy, U.S. officials refused to prepare sufficient infrastructure, personnel, and resources in Del Rio to provide for migrants' basic necessities. They also directed the expedited, mass expulsions of migrants to deter other Haitians from seeking asylum in the United States.

9. Unfortunately, Mirard is not alone in the suffering he experienced in Del Rio from the Title 42 Process and the Haitian Deterrence Policy. Thousands of other Haitian asylum seekers in the CBP Encampment were similarly impacted by U.S. officials' calculated indifference. They were denied food, water, and medical care. They were physically and verbally abused. And they were summarily expelled without an opportunity to request asylum and without consideration of the danger they would face in Haiti or Mexico.

10. When the world witnessed the events unfold in Del Rio, President Biden said he "takes responsibility" for the "horrible" treatment of Haitians and promised a swift investigation. In the ensuing three months, however, there has been no accountability for these acts. Instead, U.S. officials have reaffirmed their commitment to the Title 42 Process and continue to use it to expel asylum seekers to Haiti at alarming levels—at least 99 expulsion flights to Haiti carrying more than 10,000 asylum seekers have occurred since the government began to clear the CBP Encampment in September. And the Biden Administration has shown no evidence that it has abandoned its cruel Haitian Deterrence Policy.

11. Plaintiffs—eleven Haitian asylum seekers who were victims of U.S. officials' abusive treatment in the CBP Encampment and expelled without an opportunity to access the U.S. asylum system, and Haitian Bridge Alliance, a community-based organization that has led the legal and humanitarian response to that conduct—bring this lawsuit to ensure accountability and an end to the Biden Administration's harmful, discriminatory, and unlawful policies.

JURISDICTION AND VENUE

12. This case arises under the Fifth Amendment of the U.S. Constitution; the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"); the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* ("INA"), and its implementing regulations; the Convention Against Torture, 8 U.S.C. § 1231 note ("CAT"), *see also* Foreign Affairs Reform and Restructuring Act of

1998, Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681, 2681-82 (1998) ("FARRA"); and the Public Health Service Act of 1944, 42 U.S.C. § 201, *et seq.*

13. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The United States has waived sovereign immunity with respect to the claims alleged in this case. *See* 5 U.S.C. § 702. This Court has jurisdiction to enter declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, Federal Rules of Civil Procedure 57 and 65, and the Court's inherent equitable powers.

14. Venue is proper in this District under 28 U.S.C. §§ 1391(b)(2) and (e)(1) because defendants are agencies of the United States and federal officers of the United States acting in their official capacities and are headquartered or reside in this District and because a substantial part of the events or omissions giving rise to the claims occurred in this District.

PARTIES

I. Plaintiffs

15. Plaintiff **Haitian Bridge Alliance** ("Haitian Bridge") is a grassroots and community-based nonprofit organization incorporated in California. Its mission is to advocate for fair and humane immigration policies and to provide humanitarian, legal, and social services to migrants—particularly Black migrants, the Haitian community, and other vulnerable populations. Since 2015, Haitian Bridge has provided services to asylum seekers and other migrants at the border and throughout their U.S. immigration proceedings. As a Haitian-led, Haitian Creole-speaking organization, Haitian Bridge also provides social and humanitarian assistance to and advocacy alongside Black migrant communities at the border, across the United States, and in Mexico, and educates the public about anti-Black racism in the U.S. immigration system. Haitian Bridge provided aid and legal services to asylum seekers in the CBP Encampment in September 2021. Since the encampment was cleared, Haitian Bridge has continued to provide humanitarian assistance and legal services to Haitian asylum seekers expelled from Del Rio.

16. Plaintiffs **Mirard Joseph and Madeleine Prospere** are citizens of Haiti. They fled to Chile in 2017 because they felt unsafe in Haiti and feared they could be kidnapped every time

they left their home. Due to their lack of stability in Chile, the couple decided to travel to the United States with their one-year-old daughter to seek asylum.[1] On or around September 11, 2021, Mirard, Madeleine, and their baby arrived in Del Rio, Texas, and were given a numbered ticket by U.S. officials. While waiting to seek asylum, they experienced extreme hunger because U.S. officials provided insufficient food to meet their basic needs. Mirard was thus forced to cross the Rio Grande into Mexico several times to buy food for his wife and their daughter. On September 18, 2021, as Mirard was returning to the CBP Encampment with food, U.S. officials on horseback chased and lashed Mirard, and tried to force him back to Mexico. Two days later, after Mirard and Madeleine had been in the CBP Encampment for approximately nine days, officials called their ticket number and transported the family to a detention center. After being detained there for several days, Mirard and Madeleine were shackled and—without being told where they were going—expelled with their young child to Haiti. They never received an opportunity to seek asylum or explain why they feared returning to Haiti. Mirard is currently in Haiti, where he remains in hiding out of fear of being attacked or kidnapped if he ventures outside. Madeleine has been forced to separate from their family to take their young daughter to Chile for medical care that was unavailable in Haiti for the illnesses she developed in the CBP Encampment. They plan to return to the United States to seek asylum.

17. Plaintiffs **Mayco ("Michael") Celon and Veronique Cassonell** are citizens of Haiti. Michael fled Haiti after his mother was murdered when he was fifteen years old. Because it was not safe to return to Haiti, his family remained in the Dominican Republic and Chile for over two decades. During that time he married Veronique and they had two children. After suffering discrimination in Chile and seeing multiple Haitians murdered there, Michael and Veronique traveled to the United States with their children, intending to seek asylum. In mid-September 2021,

[1] As used in this Complaint, references to "asylum" or the "U.S. asylum process" are understood to encompass the statutory and regulatory processes by which any noncitizen may seek all relevant forms of non-refoulement relief available under U.S. immigration laws, including asylum, withholding of removal, and relief under the Convention Against Torture. *See* 8 U.S.C. §§ 1158, 1231 & note.

Michael, Veronique, and their children crossed into Del Rio and presented themselves at the CBP Encampment. They experienced terrible conditions, received very little food and water, slept on the ground, and saw officers on horseback using reins as whips against people in the river. After approximately ten days, U.S. officials sent Michael and Veronique to a detention center, where they were detained separately, each with one of their children. After approximately nine days separated in detention, Michael, Veronique, and their children were expelled in shackles to Haiti, having never been given an opportunity to seek asylum. Conditions in Haiti were so bad that the family has since returned to Chile. Although they face discrimination and threats in Chile because of their race and Haitian nationality, they are marginally safer there than in Haiti. They plan to return to the United States to seek asylum.

18. Plaintiff **Wilson Doe** and his wife Wideline are Haitian nationals who fled Haiti after Wideline was kidnapped and held for ransom. They eventually made their way to the United States with their two children to seek asylum. On or around September 11, 2021, Wilson, Wideline, and their children crossed the U.S.-Mexico border near Del Rio. They remained in the CBP Encampment for approximately four days hoping they would be given the opportunity to seek asylum. While in the encampment, Wilson, Wideline, and their children received only water, and no food. On or around September 14, 2021, U.S. officials removed Wilson and his family from the CBP Encampment and held them in a detention center for about four or five days, where they separated Wilson and his older child from each other and from the rest of the family. On or around September 19, 2021, U.S. officials expelled Wilson, Wideline, and their two children to Haiti, without giving them an opportunity to seek asylum. Wilson, Wideline, and their children are currently in Haiti, where they remain in constant fear that Wideline or others in their family will again be kidnapped. Wilson and Wideline plan to return to the United States with their children to seek asylum.

19. Plaintiff **Jacques Doe**, a citizen of Haiti, fled Haiti because a gang had targeted him for death, even following him into the countryside when he tried to escape their reach. He fled to Brazil and then made an arduous journey to the United States to seek asylum. In mid-September

2021, Jacques came to the CBP Encampment, where U.S. officials gave him a numbered ticket. Jacques understood that he would need to identify himself when officials called the number, which they did around eight days later. Instead of receiving the chance to seek asylum, Jacques was taken to two different detention centers for approximately one week, after which he was expelled Haiti. On the expulsion flight, Jacques tried to tell officials that he could not return to Haiti because he faced danger there. But the officials responded only that "there were too many Haitians in the United States" and that they had to send Jacques and others back to Haiti. Jacques is currently in hiding in Haiti, hoping the gang that previously threatened his life will not learn that he is back in the country. Jacques plans to return to the United States to seek asylum.

20. Plaintiffs **Esther and Emmanuel Doe** are citizens of Haiti. They fled Haiti after receiving numerous threats of violence from a gang affiliated with the majority political party. On or around September 18, 2021, Esther, Emmanuel, and their baby son arrived in Del Rio to seek asylum in the United States. In the CBP Encampment, their baby became very sick. When Esther tried to cross the river to find food for him, she was terrorized by officers on horseback. U.S. officials attempted to expel Esther and Emmanuel back to Haiti without giving them an opportunity to seek asylum. Because they were afraid of being expelled to Haiti, Esther and Emmanuel were forced to cross with their son back into Mexico. They are currently living in precarious conditions in Mexico and intend to return to the United States to seek asylum.

21. Plaintiffs **Samuel and Samentha Doe** are Haitian nationals who fled Haiti after Samuel was attacked by a rival political party and threatened at the school where he worked by men armed with machetes. They originally escaped to Chile but struggled to survive there, eventually deciding to seek asylum in the United States. On or around September 16, 2021, Samuel, Samentha, and their two children crossed into the United States near Del Rio, where they were given a numbered ticket and told to wait until their number was called. While in the CBP Encampment, Samuel developed stomach ulcers, their daughter became very sick, and their son contracted an eye infection and a rash after falling on the ground and injuring his eye while running away from U.S. officers on horseback. Everyone in the family went hungry because there was not

enough food in the encampment. Eventually, Samuel and Samentha decided they could not keep their children in such conditions and felt compelled to cross back into Mexico. They are currently in Mexico because they cannot return to Haiti and plan on returning to the United States to seek asylum.

22. Plaintiff **Paul Doe** is a citizen of Haiti.[2] A gang affiliated with the dominant political party in Haiti killed his uncle after he failed to pay back money he owed, then targeted Paul for recruitment. Paul fled because he had only two options in Haiti: join the gang or die. He first escaped to Chile and then made his way to the United States, hoping he would be granted asylum. On or around September 17, 2021, Paul arrived in Del Rio. U.S. officials gave him a numbered ticket and told him to wait until his number was called. While waiting in the CBP Encampment, Paul was provided no shelter and very little food or water. He slept on the ground in the dust and went hungry for several days. He knew he could not survive much longer without adequate food and water. Eventually, Paul saw people being taken from the encampment and heard they had been sent back to Haiti. As more and more people were taken away, he realized that he had no option but to cross back to Mexico because he was weak from lack of food and knew that if he were sent back to Haiti, he was a dead man. Paul was never given an opportunity to speak with U.S. officials to seek asylum. Paul is currently in Mexico and plans to return to the United States to seek asylum.

II. Defendants

23. Defendant Joseph R. Biden, Jr., is President of the United States. He is sued in his official capacity. In that capacity, President Biden is the Chair of the National Security Council ("NSC"), a forum of the President's senior advisors, and the Domestic Policy Council ("DPC"), which is tasked with driving and implementing the President's domestic policy agenda in the White House and across the Federal Government. Under President Biden's authority, the NSC and

[2] A motion for leave of the Court for Wilson and Wideline Doe, Jacques Doe, Esther and Emmanuel Doe, Samuel and Samentha Doe, and Paul Doe to proceed under pseudonyms will be filed separately.

DPC each contributed to devising, developing, and implementing the Haitian Deterrence Policy applied to Individual Plaintiffs and others seeking asylum in Del Rio. In his official capacity, President Biden also delegated authority to the Secretary of the U.S. Department of Health and Human Services ("HHS"), the Director of the U.S. Centers for Disease Control and Prevention ("CDC"), and the Secretary of the U.S. Department of Homeland Security ("DHS") to review, determine, and implement the Title 42 Process that was used to expel Individual Plaintiffs and thousands of others from Del Rio. Pursuant to that delegation of authority and the Haitian Deterrence Policy devised by his White House senior staff, President Biden enabled DHS to prioritize the rapid expulsion of approximately 15,000 Haitian asylum seekers from Del Rio, Texas, to Haiti and Mexico without giving them access to the asylum process or screening them for a fear of return to their home country.

24. Defendant Alejandro N. Mayorkas is the Secretary of Homeland Security. He is sued in his official capacity. In that capacity, Secretary Mayorkas is responsible for the administration of U.S. immigration laws. *See* 8 U.S.C. § 1103. Secretary Mayorkas directs each of DHS's components, including the components responsible for the processing, apprehension, detention, and removal of noncitizens present at or between U.S. ports of entry and the components charged with implementing and applying the Title 42 Process and the Haitian Deterrence Policy to Individual Plaintiffs and others seeking asylum in Del Rio.

25. Defendant U.S. Department of Homeland Security is a federal cabinet-level department of the U.S. government. DHS is an "agency" within the meaning of the APA. *See* 5 U.S.C. § 551(1). It is responsible for administering U.S. immigration laws, including those relating to the processing, apprehension, detention, and removal of noncitizens present at or between U.S. ports of entry. *See* 8 U.S.C. § 1103. DHS, in coordination with HHS and CDC, is responsible for implementing the Title 42 Process. Its components include U.S. Customs and Border Protection ("CBP") and U.S. Immigration and Customs Enforcement ("ICE"), which are responsible for implementing and applying the Title 42 Process and the Haitian Deterrence Policy.

26. Defendant Chris Magnus is the Commissioner for CBP. He is sued in his official

capacity. In that capacity, Mr. Magnus is a supervisory official responsible for overseeing the processing, apprehension, and detention of noncitizens arriving at or between U.S. ports of entry. Mr. Magnus is also responsible for implementing the Title 42 Process and the Haitian Deterrence Policy and for conducting expulsions of noncitizens subject to the Title 42 Process and the Haitian Deterrence Policy.

27. Defendant William A. Ferrara is the Executive Assistant Commissioner of CBP's Office of Field Operations ("OFO"). He is sued in his official capacity. OFO is responsible for border security, including immigration and facilitating travel through U.S. ports of entry. As Executive Assistant Commissioner, Mr. Ferrara oversees OFO personnel and the operation of 20 major field offices and 328 ports of entry along the U.S. border. He is a supervisory official responsible for implementing the Title 42 Process at U.S. ports of entry and applying the Haitian Deterrence Policy.

28. Defendant Raul L. Ortiz is the Chief of U.S. Border Patrol ("Border Patrol"), which is a sub-office of CBP. He is sued in his official capacity. Border Patrol is the mobile, uniformed law-enforcement arm of CBP and is the primary federal law enforcement agency responsible for border security and enforcement of U.S. immigration laws between U.S. ports of entry. As Chief of Border Patrol, Mr. Ortiz oversees all Border Patrol personnel and is a supervisory official responsible for implementing the Title 42 Process between U.S. ports of entry and applying the Haitian Deterrence Policy.

29. Defendant U.S. Customs and Border Protection is a sub-agency of DHS and an "agency" within the meaning of the APA. *See* 6 U.S.C. § 271; *see also* 5 U.S.C. § 551(1). It is responsible for the processing, apprehension, and detention of noncitizens present at or between U.S. ports of entry. CBP has primary responsibility for implementing the Title 42 Process and the Haitian Deterrence Policy and conducting expulsions of noncitizens subject to the Title 42 Process and the Haitian Deterrence Policy.

30. Defendant Tae D. Johnson is the Acting Director of ICE. He is sued in his official capacity. In that capacity, Mr. Johnson oversees all ICE personnel and is a supervisory official

responsible for overseeing immigration detention, including the detention of noncitizens subject to the Title 42 Process and the Haitian Deterrence Policy, and carrying out expulsion flights of noncitizens subject to the Title 42 Process and the Haitian Deterrence Policy.

31. Defendant U.S. Immigration and Customs Enforcement is a sub-agency of DHS and an "agency" within the meaning of the APA. *See* 6 U.S.C. § 271; *see also* 5 U.S.C. § 551(1). It is responsible for executing removal orders and overseeing immigration detention, including the detention of noncitizens subject to the Title 42 Process and the Haitian Deterrence Policy. It also conducts air operations to expel or remove noncitizens from the United States through its Office of Enforcement and Removal Operations. ICE is responsible for scheduling and coordinating expulsion flights of noncitizens subject to the Title 42 Process and the Haitian Deterrence Policy who cannot be expelled directly to Mexico through a U.S. port of entry.[3]

32. Defendant Xavier Becerra is the Secretary of HHS. He is sued in his official capacity. In that capacity, Secretary Becerra directs each component of HHS, including CDC.

33. Defendant U.S. Department of Health and Human Services is a federal cabinet-level department of the U.S. government. HHS is an "agency" within the meaning of the APA. *See* 5 U.S.C. § 551(1). It is responsible for administering health and human services aimed at promoting public health. Its components include CDC. HHS, through CDC, is responsible for issuing the public health orders and regulations underlying the Title 42 Process.

34. Defendant Rochelle P. Walensky, M.D., M.P.H., is the Director of CDC. She is sued in her official capacity. In that capacity, Dr. Walensky issued the public health orders underlying the Title 42 Process in this case.

35. Defendant Centers for Disease Control and Prevention is a sub-agency of HHS and an "agency" within the meaning of the APA. *See* 5 U.S.C. § 551(1). CDC is charged with fighting

[3] Defendants Magnus, Ferrara, Ortiz, and CBP are referred to collectively as "CBP Defendants." Defendants Johnson and ICE are referred to collectively as "ICE Defendants." CBP Defendants, ICE Defendants, and Defendants Mayorkas and DHS are referred to collectively as "DHS Defendants."

public health threats, including communicable diseases. It is responsible for issuing the public health orders and regulations underlying the Title 42 Process.[4]

FACTUAL ALLEGATIONS

I. The United States' history of anti-Haitian immigration policies.

36. Anti-Black racism and white supremacy motivated the earliest U.S. immigration policies and have continued to shape immigration laws through the present.[5] Haitians have been one of the most common targets of the United States' racist, exclusionary policies.[6]

37. Haiti's history as an independent country begins in the early 1800s, when Black Africans liberated themselves from slavery and colonial rule. The Haitian Revolution in 1804 marked not only the end of nearly two centuries of French control, but also the creation of the first free Black nation in the Western Hemisphere, and the only one to gain independence through the uprising of enslaved people. With this revolution, Haiti abolished slavery almost sixty years before President Abraham Lincoln's Emancipation Proclamation. Today, Haiti is at least 95% Black and has one of the highest percentages of Black nationals in the Western Hemisphere. With its independence, Haiti inspired enslaved Black people across the world and offered freedom and citizenship to all Black and indigenous people of the Americas.

A. The United States has long supported the economic and political subjugation of Haitians.

38. Following the Haitian Revolution, the United States viewed the new nation as an

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[4] Defendants Becerra, HHS, Walensky, and CDC are referred to collectively as "HHS Defendants."

[5] *See, e.g.*, Kat Murdza and Walter Ewing, Ph.D., The Legacy of Racism within the U.S. Border Patrol, American Immigration Council (2021), https://www.americanimmigrationcouncil.org/research/legacy-racism-within-us-border-patrol.

[6] *See, e.g.*, Fabiola Cineas, *Why America Keeps Turning Its Back on Haitian Migrants*, Vox (Sept. 24, 2021, 2:40 PM), https://www.vox.com/22689472/haitian-migrants-asylum-history-violence ("[E]very presidential administration since the 1970s has treated Haitians differently than other migrant groups, rejecting asylum claims, holding them longer in detention, and making it harder for them to settle down in safety.").

existential threat of Black uprising and liberation and did not diplomatically recognize Haiti for more than half a century. Throughout the subsequent 200 years, the United States has actively oppressed and discriminated against Haitians.

39. In 1825, when France demanded that Haiti pay the present-day equivalent of billions of dollars for the so-called loss of enslaved human labor, American banks lent to Haiti at usurious interest rates so the nation could avoid French reoccupation.[7]

40. In part to ensure continued payment of this debt, the United States forcibly occupied Haiti from 1915 to 1934. During that period, U.S. officials engaged in violent and deadly repression of Haitians while restructuring the nation's economy and constitution to benefit American interests.[8] The United States ultimately withdrew, following mass, organized resistance by the Haitian people.

41. Following this occupation, the United States continued to promote its financial and political interests in Haiti to the detriment of the Haitian people. It supported the brutal dictatorships of Francois and Jean-Claude Duvalier, which, over a thirty-year-period, contributed to inequality, impunity, destabilization, and mass poverty in Haiti and resulted in the deaths of tens of thousands of Haitians and a diaspora of thousands of others fleeing violence.

42. In more recent years, the United States has intervened to prop up corrupt leaders in Haiti, further undermining the rule of law and human rights. The United States was instrumental in the election of Michel Martelly and his hand-picked successor Jovenel Moïse, despite Martelly's increasing slide toward authoritarianism and Moïse's fraudulent election and subsequent dissolution of parliament.

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[7] *See* Marlene Daut, *France Pulled Off One of the Greatest Heists Ever. It Left Haiti Perpetually Impoverished*, Miami Herald (July 15, 2021), https://www.miamiherald.com/opinion/op-ed/article252809873.html.

[8] *See* Emmanuela Douyon and Alyssa Sepinwall, *Earthquakes and Storms Are Natural, but Haiti's Disasters Are Man-Made, Too*, Wash. Post (Aug. 20, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/08/20/earthquakes-storms-are-natural-haitis-disasters-are-man-made-too/.

43. In the face of this long history of political and economic instability, Haitians have remained steadfast in their struggle for autonomy against external and internal forces seeking to exploit them. It was this resolute spirit that U.S. Special Envoy to Haiti Daniel Foote referenced in his September 22, 2021 letter resigning his post in protest of the Biden Administration's actions in Del Rio that month. Citing the United States' long history of intervention and the inhumane treatment of Haitians, Ambassador Foote remarked: "[W]hat our Haitian friends really want, and need, is the opportunity to chart their own course, without international puppeteering and favored candidates."

B. The United States uses its immigration policy to discriminate against Haitians.

44. As the United States was interfering with Haitian affairs and contributing to burgeoning political and economic unrest, it was also crafting immigration policies that specifically targeted Haitians for disparate treatment to keep them off U.S. soil.[9]

45. In 1978, the United States created a policy dubbed the "Haitian Program," which jailed arriving Haitians and universally denied their asylum claims despite the known atrocities being committed by the Duvalier regime at the time.[10]

46. The Haitian Program was struck down in *Haitian Refugee Center v. Civiletti*, which held the government systematically discriminated against Haitian asylum seekers. 503 F. Supp. 442, 450 (S.D. Fla. 1980) ("This case involves thousands of [B]lack Haitian nationals, the brutality of their government, and the prejudice of ours."). The United States quickly implemented a new policy requiring them to be detained without an opportunity to post bail. The policy appeared

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[9] "It is instructive to note that, despite the ideological differences between the Carter, Reagan, Bush I, Clinton, and Bush II administrations, each has persistently discriminated against Haitian entrants . . . ." Roger Daniels, *Guarding the Golden Door: American Immigration Policy and Immigrants Since 1882*, at 213-14 (2004).

[10] *See* Carl Lindskoog, *Violence and Racism Against Haitian Migrants Was Never Limited to Agents on Horseback*, Wash. Post (Sept. 30, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/10/02/violence-racism-against-haitian-migrants-was-never-limited-horseback-riders/.

neutral on its face, but statistics showed selective application to Haitians and discovery sought in a legal challenge to the policy in *Jean v. Nelson* showed that the government was using this policy to continue its "Haitian Program." 711 F.2d 1455, 1493 (11th Cir. 1983), *on reh'g*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985). U.S. officials adopted this policy to deter Haitian asylum seekers, even as the then-Deputy Attorney General acknowledged it could create an appearance of "concentration camps" filled with Black people. An Eleventh Circuit panel in *Jean v. Nelson* held that the selective application of the policy to Haitians violated equal protection, particularly in light of the government's history of discriminatory policies against Haitians. *Id.*

47. During the 1980s and 1990s, the United States began an aggressive interdiction policy to intercept Haitians at sea and return them to Haiti.[11] The policy was designed to prevent Haitian migrants from reaching U.S. soil, where they could request access to the U.S. asylum process and to evade its non-refoulement obligations under international law not to return asylum seekers to a country in which they would be likely to face persecution. Under this policy, U.S. authorities intercepted tens of thousands of Haitian asylum seekers at sea and prevented them from seeking relief in the United States. Indeed, from 1981 to 1991, only *twenty-eight* out of over 25,000 interdicted Haitians were allowed to enter the United States.

48. While the Haitian interdiction policy was in place, the United States singled out Haitian migrants for detention at Guantanamo Bay. At the height of this policy, at least 12,000 Haitians were held at the U.S. military prison.

49. This disproportionate use of detention continues today. Not only are Black migrants in general more likely to be held in immigration detention, but Haitians are particularly targeted. In 2020, Haitians constituted the largest nationality group in family detention. While accounting for only 1 percent of asylum decisions adjudicated in 2020, Haitians represented more than 44

[11] *See Pushing Back Protection: How Offshoring and Externalization Imperil the Right to Asylum*, National Immigrant Justice Center and FWD.us, 6 (2021), https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2021-09/Offshoring%20Asylum%20Report_Chapter4.pdf.

percent of all families locked in ICE detention during summer 2020. Throughout 2020, the U.S. consistently detained more Haitian families than any other nationality.

50. Contemporary immigration schemes have also aimed to prevent Haitian migrants from reaching the United States to seek asylum. Under a policy known as "metering," first implemented under President Barack Obama in 2016 in response to an increase in Haitian migrants seeking asylum, U.S. officials limited the number of migrants permitted to request asylum at ports of entry and turned back most asylum seekers to wait in dangerous Mexican border cities for an opportunity to request protection. The policy has since been held unlawful by a federal court, but not before it prevented thousands of Haitians from exercising their rights under U.S. law.

51. In January 2018, DHS announced the termination of Temporary Protected Status for Haitians, despite dire conditions in Haiti. The policy was enjoined after a district court found that the policy was likely "based on race and/or national origin/ethnicity against non-white immigrants in general and Haitians in particular." *Saget v. Trump*, 345 F. Supp. 3d 287, 303 (E.D.N.Y. 2018); *Saget v. Trump*, 375 F. Supp. 3d 280, 374 (E.D.N.Y. 2019) ("Based on the facts on this record, and under the factors prescribed by *Arlington Heights*, there is both direct and circumstantial evidence a discriminatory purpose of removing non-white immigrants from the United States was a motivating factor behind the decision to terminate TPS for Haiti.").

C. The United States' recent Title 42 Process has been brutally deployed against Haitians.

52. The most recent example of the United States' discriminatory immigration policies is the implementation of a purported public health order under the Public Health Service Act, 42 U.S.C. § 265.

53. While the use of Title 42 began under former President Trump, President Biden has continued its use—with alarming increases against Haitians. During 2018 and 2019, former Trump Administration official Stephen Miller advocated using the government's public health powers to restrict immigration and end migrants' access to asylum. This proposal followed a history of bigoted and xenophobic policies advanced by the Trump Administration to scapegoat immigrants,

particularly those from predominantly Black countries like Haiti that then-President Trump referred to as "shithole countries."

54. In early 2020, the Trump Administration seized upon the global COVID-19 pandemic as an opportunity to execute Miller's proposal. Despite objections from CDC public health experts that "there was no valid public health reason" for an order under Section 265, then-President Trump announced on March 20, 2020, that Defendant CDC would issue an order "to suspend the introduction of all individuals seeking to enter the U.S. without proper travel documentation" along the U.S. border. Any migrant subject to the order would be "immediately return[ed]" "without delay."

55. To implement this immigration authority consistent with then-President Trump's direction, Defendant CDC issued a regulation, without advance notice and comment, permitting the agency to prohibit the "introduction into the United States of persons" from foreign countries. *See* 42 C.F.R. § 71.40 (the "Title 42 Regulation").

56. Pursuant to this purported regulatory authority, Defendant CDC issued an order directing the "immediate suspension of the introduction of" certain noncitizens seeking entry at ports of entry or between ports of entry without proper travel documents. Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060, 17,061 (Mar. 26, 2020) (eff. date Mar. 20, 2020). Defendant CDC has since reissued similar orders, most recently in August 2021, that continue to prohibit covered noncitizens from entering the United States purportedly to "protect" the public "during the COVID-19 public health emergency." Public Health Assessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 42,828, 42,828 (Aug. 5, 2021). In December 2021, Defendant CDC announced that it would keep the Title 42 order in place.

57. Shortly after Defendant CDC's issuance of the Title 42 Regulation and the March 2020 public health order, Defendant CBP began developing standards implementing the order.

Cf. 42 C.F.R. § 71.40(d)(2). By April 2020, Defendant CBP issued an internal memorandum establishing procedures for applying Defendant CDC's order under "Operation Capio" (the "CBP Capio Memo" or the "Memo").[12] The CBP Capio Memo provides that "all processing [of covered noncitizens] will be done in the field" "[t]o the maximum extent possible." It also directs that covered noncitizens should be "immediately returned to Mexico or Canada" at the nearest port of entry or transported to "a dedicated facility for limited holding prior to expulsion" to their home country. The CBP Capio Memo provides no process for covered noncitizens to seek access to the U.S. asylum process and indicates that U.S. immigration officials are purportedly "not operating pursuant to [their] authorities" under U.S. immigration laws when processing and summarily expelling covered noncitizens.

58. Since January 2021, DHS Defendants have increased the rate of expulsions for Haitians under the Title 42 Process. During the first weeks of the Biden Administration, DHS Defendants effectuated the expulsion of more Haitians under the Title 42 Process than during the entire prior fiscal year under the former Trump Administration. In the past eleven months, Defendant ICE has conducted nearly 130 expulsion flights to Haiti.

II. DHS Defendants violate the rights of thousands of Haitian asylum seekers in Del Rio.

59. DHS Defendants' enforcement of the Title 42 Process against Haitians has always had devastating effects, but it has taken on additional dimensions since September 2021, when thousands of Haitian migrants began to arrive near the Del Rio Port of Entry in Del Rio, Texas.

60. President Biden, through the NSC and DPC, and DHS Defendants began receiving intelligence reports in August 2021 indicating that they could soon anticipate an increase in the number of Haitians seeking asylum in Del Rio. Since that time, their response has been to adopt a series of decisions and policies designed to suppress the growing number of Haitians arriving at the border and to deter Haitians from seeking asylum in the United States in the future

[12] https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html.

(collectively, the "Haitian Deterrence Policy").

61. The Haitian Deterrence Policy resulted from a series of discrete decisions made by President Biden's senior advisors on the NSC and DPC in September 2021, under authority delegated by President Biden. From approximately September 9 to 24, 2021, at least 15,000 Haitians were held in a makeshift CBP field encampment for field processing pursuant to the CBP Capio Memo near the Del Rio International Bridge (the "CBP Encampment"). As directed by the White House and Defendant Mayorkas pursuant to the Haitian Deterrence Policy, DHS Defendants and personnel took no steps to prepare to receive thousands of asylum seekers in Del Rio—in contrast to DHS's approach to similar circumstances involving non-Haitians. As a result, CBP officers deprived individuals in the CBP Encampment of basic human necessities like sufficient food and water, ignored their medical needs, and provided no shelter to protect them from the blazing sun, triple-digit heat, and copious dust. When asylum seekers attempted to provide for such needs themselves, they were often physically or verbally assaulted by CBP officers. Upon information and belief, after allowing Haitian asylum seekers to suffer for days, DHS officers did not screen these individuals for fear of return to their home country or process them for asylum, instead acting to expel them as quickly as possible under the Haitian Deterrence Policy, either on expulsion flights to Haiti or by forcing individuals to Mexico. In the resulting series of expulsion flights to Haiti, ICE officials expelled at least one mother with a days-old-baby *born in the United States*. Some expelled individuals did not even realize they had been sent to Haiti until they got off the plane, because officers had lied about where the asylum seekers were being taken. Many individuals were expelled in shackles; upon information and belief, none were given an opportunity to request asylum or screening for fear or risk of torture and death upon return to Haiti or Mexico.

62. This brutal and rapid expulsion of asylum seekers was intentional. Under the Haitian Deterrence Policy devised by White House senior officials, DHS Defendants applied the Title 42 Process in Del Rio in a manner indifferent to humanitarian concerns and focused on removing Haitian asylum seekers as quickly as possible to discourage other Haitians from

exercising their right to seek asylum. DHS Defendants implemented the policy while taking steps to shield their actions from accountability, including by preventing media access to the CBP Encampment, restricting the air space over the encampment, and expelling thousands of individuals before any human rights abuses could be documented, investigated, or pursued. On information and belief, the adoption and implementation of the Haitian Deterrence Policy was informed by a perception that Haitian asylum seekers are dangerous, violent and criminal; a discriminatory purpose toward Black and Haitian migrants; a desire to keep Black and Haitian migrants out of the country; and a plan to send a message to other Haitian asylum seekers not to come to the United States. For example, a senior DHS official told White House and other DHS officials, including Secretary Mayorkas, that the Haitian migrants in Del Rio were more likely to be violent—with no facts to support this statement. On information and belief, this view was adopted by the White House and DHS and resulted in their Haitian Deterrence Policy.

A. DHS Defendants take no steps to prepare for the anticipated arrival of large groups of Haitian asylum seekers in Del Rio.

63. By early 2021, President Biden's staff and DHS Defendants were aware that instability and desperate conditions in Haiti had forced numerous Haitians to flee to various Latin American countries and that many Haitians were traveling toward the U.S. border to seek asylum.

64. One month before thousands of Haitians arrived at the CBP Encampment, Defendant Secretary Mayorkas redesignated Haiti for Temporary Protected Status. *See* Designation of Haiti for Temporary Protected Status, 86 Fed. Reg. 41,863, 41,863-71 (Aug. 3, 2021). In the notice, Secretary Mayorkas concluded that protected status was appropriate because of extraordinary conditions in Haiti, including "a deteriorating political crisis, violence, and a staggering increase in human rights abuses," as well as "rising food insecurity and malnutrition, [. . .] waterborne disease epidemics, and high vulnerability of natural hazards, all of which have been further exacerbated by the [COVID-19] pandemic." 86 Fed. Reg. 41,864 (citation omitted).

65. Meanwhile, local officials in Del Rio began alerting the Biden Administration that they expected increasing arrivals of asylum seekers and lacked the resources necessary to manage

those arrivals. As early as February 2021, Del Rio Mayor Bruno Lozano publicly warned President Biden and DHS Defendants that Del Rio needed federal support to assist with growing numbers of border crossings; at least President Biden's senior advisors on the NSC and DPC, as well as DHS Defendants, were informed of the mayor's concerns.

66. In April 2021, President Biden's staff and DHS Defendants received data indicating that Haitian migrants disproportionately arrived and crossed into the United States in the CBP Del Rio Sector. In the following months, they continued to receive intelligence reports that migrant border crossings, particularly of single, male Haitian asylum seekers, continued to increase and that Del Rio lacked resources to meet the needs of arriving Haitians.

67. President Biden and his senior staff and DHS Defendants received regular intelligence in July and August 2021 reflecting the movement of Haitians from South and Central America toward the United States. Western Hemisphere immigration experts warned the Biden Administration of the impending arrival of thousands of Haitians. This information was corroborated by internal intelligence reports and information received from Latin American and local government officials.

68. Despite these warnings, the White House and DHS Defendants decided to take no action to plan for the arrival of these asylum seekers. Senior White House officials dismissed reports from immigration experts and local officials and prevented staff from taking steps to prepare for thousands of arriving Haitians given the known resource shortages in Del Rio.

69. The Haitian Deterrence Policy grew out of and encompassed these decisions. Neither President Biden's senior staff nor DHS Defendants attempted to arrange appropriate infrastructure, personnel, and resources to support the legal processing of the anticipated Haitian asylum seekers and the provision of necessary and appropriate food, water, shelter, and medical care. Instead, as part of the Haitian Deterrence Policy, senior White House and DHS officials blocked internal efforts to prepare humanitarian infrastructure in Del Rio. President Biden's senior staff also stopped efforts to prepare public health resources, including COVID-19 testing and vaccinations, for arriving Haitians.

70. Moreover, while CBP Defendants had, in months prior, coordinated with local officials to create a respite center at a local Del Rio church for arriving migrants, they refused to leverage this additional resource as thousands of Haitians approached the border.

71. President Biden, his senior advisors, and DHS Defendants also refused to take steps to ensure appropriate infrastructure and resources to facilitate screenings for asylum or withholding of removal and protection under the INA or CAT. Senior White House and DHS officials did not make such preparations despite receiving an August 2021 memorandum from DHS's Office for Civil Rights and Civil Liberties advising against expulsions of migrants to Haiti and emphasizing a "strong risk" that such expulsions would violate DHS Defendants' non-refoulement obligations under U.S. and international law. In addition, senior White House staff and DHS Defendants declined to take any steps to arrange for CAT screenings for the Haitians approaching Del Rio, even though they had ordered and implemented the adoption of such CAT screenings for Mexicans in San Diego in July 2021.

72. Pursuant to the Haitian Deterrence Policy, senior White House officials and DHS Defendants blocked efforts to prepare for the arrival of thousands of Haitian asylum seekers in Del Rio, including ensuring the presence of sufficient infrastructure, personnel, and resources to meet Haitians' basic needs and provide adequate screenings for relief required by law. On information and belief, senior NSC, DPC, and DHS officials believed that refusing to make appropriate preparations for arriving asylum seekers would not only deter approaching Haitians from coming to the border to seek asylum, but also deter asylum seekers already in Del Rio from attempting to return if they were expelled.

B. Thousands of Haitian asylum seekers arrive in Del Rio in September 2021.

73. As President Biden, his senior staff, and DHS Defendants received reports of large groups of Haitian asylum seekers traveling to the U.S. border through the late summer, border personnel in the Del Rio Sector began to observe an increase in crossings by Haitians. Daily encounters with arriving asylum seekers grew to hundreds and eventually thousands. As the processing of migrants under the Title 42 Policy slowed, in late August 2021 CBP officials set up

a "temporary intake site" near the Del Rio International Bridge, the primary port of entry in Del Rio. The site was located under the bridge to facilitate the field processing of migrants under the CBP Capio Memo.

74. The intake site, however, lacked sufficient resources to meet the basic needs of the arriving Haitian asylum seekers and to provide them adequate screenings for relief under U.S. law. The under-resourced intake station reflected the White House and DHS's steadfast refusal to organize any appropriate infrastructure to address the anticipated arrival of thousands of Haitian migrants, even as Del Rio Sector personnel continued to report a lack of processing capacity.

75. Beginning in September 2021, thousands of people began crossing the Rio Grande near the Del Rio Port of Entry to seek relief in the United States. Most of the individuals were Haitian and had come to Del Rio to request asylum.

76. According to DHS Defendants, at least 15,000 individuals crossed near the Del Rio Port of Entry by mid-September 2021. Many of the asylum seekers arriving in Del Rio at this time were part of family units. Public reports estimate that approximately 40 percent of those who arrived near the Del Rio Port of Entry in September 2021 were children.

77. As Haitian asylum seekers entered the United States in early to mid-September, the temporary intake site under the Del Rio International Bridge turned into the CBP Encampment as U.S. officials required asylum seekers to remain at the site for longer periods of time to be processed. CBP officers adopted a ticketing system to process arriving migrants, separating them into four groups that were identifiable by a numbered, color-coded ticket: families with children, pregnant women, single men, and single women. When officers called out numbers, the corresponding ticket holders were expected to identify themselves for processing. Migrants were also directed to different sections of the CBP Encampment based on the color of their tickets.

78. As the number of asylum seekers in the CBP Encampment grew, CBP increased the number of personnel monitoring and patrolling the encampment to congregate and secure arriving Haitians. These personnel prohibited asylum seekers from moving freely throughout the CBP Encampment and informed Individual Plaintiffs and other asylum seekers that they were to

wait until their number was called for processing. Upon information and belief, at no point during the existence of the CBP Encampment were arriving migrants given a reasonable opportunity to present themselves to a U.S. immigration officer and request access to the asylum process. They also were not screened for a fear of return to their home country or vulnerability to persecution or torture upon return, as required under U.S. law.

C. CBP personnel abuse Haitian asylum seekers in Del Rio pursuant to the Haitian Deterrence Policy.

79. The lack of amenities near the CBP Encampment meant that any food, water, shelter, and medical care provided to Haitians would need to be provided by CBP personnel. As part of their Haitian Deterrence Policy, however, DHS Defendants made decisions that deprived Haitians in the encampment of such basic human necessities despite knowing for months that thousands of Haitian asylum seekers were approaching Del Rio.

80. Due to the DHS Defendants' deliberate lack of preparation, there was insufficient food, water, and shelter in the CBP Encampment for the thousands of Haitians arriving there in mid-September. At the same time, CBP personnel monitoring the encampment generally prevented Individual Plaintiffs and other migrants from leaving to provide for their own needs. Plaintiff Jacques Doe, for example, was in the CBP Encampment for approximately one week and suffered from severe hunger and thirst. He never tried to leave to find food in Mexico, however, because he saw that personnel patrolling the encampment would not allow it. Defendants also blocked non-governmental and legal organizations, including Plaintiff Haitian Bridge, from entering the CBP Encampment to assist the Haitian asylum seekers or to hand out know-your-rights materials.

81. Plaintiff Samuel Doe reflects that "no human being should have been" in the CBP Encampment. The conditions in the encampment, however, were a direct result of decisions made pursuant to the Haitian Deterrence Policy by President Biden's closest advisors and DHS Defendants to deter other Haitian and Black migrants from seeking asylum in the United States.

82. For example, in a September 2021 meeting addressing how to respond to conditions at the CBP Encampment, senior DHS officials described the Haitian migrants in Del Rio as

"particularly difficult" to deal with when implying that little could be done for the asylum seekers and discussing the need for swift and universal removal of Haitians in the encampment.

83. In a meeting including White House senior advisors to President Biden, Secretary Mayorkas, and DHS leadership, a senior DHS official made a comment implying that the Haitian migrants had engaged in criminal conduct in Mexico, without any evidence.

84. A CBP official in the Del Rio Sector leadership expressed a fear that Haitian asylum seekers would "tear through the walls" if put in detention.

85. Additionally, in internal discussions around the time of the increase in crossings in Del Rio, top DHS officials repeatedly evinced the belief that arriving Haitian asylum seekers in the CBP Encampment were uncivilized, unclean, and like animals—reflecting language and attitudes that, upon information and belief, were not used to describe non-Black migrants arriving at the U.S. border.

86. The result of President Biden and DHS Defendants' Haitian Deterrence Policy was rampant abuse in the CBP Encampment. Thousands of Haitians who fled violence and persecution were met with insufficient food, water, shelter, and medical care, and physical and verbal abuse, conditions described by one Congressman as "unacceptable by any human standard." After images of a White CBP officer on horseback assaulting a Black Haitian man went viral, President Biden said he "takes responsibility" for the "horrible" treatment of Haitians in Del Rio.[13]

1. CBP personnel deprive thousands of asylum seekers in their custody of basic human needs.

87. As asylum seekers arrived in Del Rio and were given tickets for processing, they lost the ability to provide for themselves and their families. They were forced instead to rely on the CBP personnel supervising the encampment for food, water, and shelter. As a result of the Haitian Deterrence Policy, however, President Biden and DHS Defendants decided not to prepare

[13] Marissa Dellatto, "Biden 'Takes Responsibility' for Mishandling of Haitian Migrant Crisis," Forbes (Sept. 24, 2021, 11:21 AM), https://www.forbes.com/sites/marisadellatto/2021/09/24/biden-takes-responsibility-for-mishandling-of-haitian-migrant-crisis/?sh=5fc379fc319b.

or provide sufficient resources to meet these most basic needs until there was a serious humanitarian crisis in the encampment.

(a) CBP personnel provide inadequate food and water.

88. Consistent with the Haitian Deterrence Policy, the distribution of food and water to migrants in the CBP Encampment was woefully inadequate.

89. CBP personnel arranged a minimal number of service stations in the CBP Encampment to distribute food and water. Anyone wishing to receive water or food was required to wait in line, often for extended periods of time. And because CBP's service stations were set up in only one section of the CBP Encampment, not all migrants could access the stations while food and water were being distributed. Many who could not receive food or water fainted from lack of nutrition or dehydration.

90. Plaintiff Paul Doe and others describe receiving only one or two pieces of bread or an equivalent and one or two bottles of water each day in the CBP Encampment. Appropriate food was not available in reasonable quantities until World Central Kitchen, a non-governmental organization, was able to negotiate access to the encampment and set up operations to begin providing meals the week of September 19, 2021. But by the time World Central Kitchen had scaled its operations, DHS Defendants had already started clearing out the CBP Encampment. For much of the period between September 9 and 24, CBP personnel denied most individuals in the encampment food and water beyond some bread and water each day.

91. The bottles of water distributed by CBP personnel were often undrinkable when hydration was most needed. They were left on containers covered in plastic with no protection from the sun. With daily temperatures hovering near triple digits, the water in the bottles became so hot that it could not be consumed when it was handed out. Some Individual Plaintiffs and other asylum seekers in the CBP Encampment were forced to drink from the Rio Grande, which is not potable. This lack of clean drinking water caused many Haitians in Del Rio to get sick, including the common development of gastrointestinal illness, particularly among babies and children.

92. CBP Defendants also failed to provide formula or age-appropriate food to migrants

with young children. Plaintiff Esther Doe repeatedly requested age-appropriate food for her one-year-old son, but was told there was only the food and water being provided to adults. When Esther pleaded for something that her baby could eat, CBP personnel refused. Esther was only able to feed her son some rice pudding, which was distributed occasionally at the CBP Encampment. Esther's baby went hungry for days because Esther could not find enough food for him.

93. As starving and dehydrated asylum seekers pleaded without success for additional food and water, many looked to the city across the river in Mexico, Ciudad Acuña, for the resources needed to save themselves, their family members, and other vulnerable people in the CBP Encampment. Pursuant to the Haitian Deterrence Policy, CBP personnel often blocked individuals from leaving the encampment to obtain their own food and water in Ciudad Acuña. This meant that individuals seeking to buy food in Mexico often had to cross the river outside the view of CBP personnel.

94. Asylum seekers wishing to cross to Mexico in search of food and water faced a variety of risks: being stopped by CBP personnel while attempting to leave the CBP Encampment, drowning in the river, and being prevented from returning to the encampment by Mexico or U.S. border officials, which could lead to separation from their families.

95. Despite these risks, many individuals risked the river crossing to secure basic necessities. Plaintiff Mirard left the encampment to find food for his family after he and his wife, Plaintiff Madeleine, received insufficient food and water and were denied age-appropriate food for their one-year-old daughter. Plaintiff Paul Doe also crossed to Mexico to get food for himself and others in the CBP Encampment after surviving several days on only a bottle of water and a tortilla per day. Plaintiff Esther Doe was in the CBP Encampment with her husband Plaintiff Emmanuel Doe and one-year-old son for at least two days during which CBP personnel provided no baby-appropriate food. Esther's son, in desperate need of nourishment, was sick with a fever and diarrhea. Watching her child suffer from sickness and hunger, Esther decided she had no other choice but to cross the river in search of food for her baby.

96. Individuals returning to the CBP Encampment often encountered resistance from

CBP personnel. U.S. border officials, including some on horseback, regularly patrolled the riverbank and physically tried to prevent asylum seekers from crossing the river. Moreover, CBP personnel frequently confiscated and deliberately disposed of the food that starving individuals had brought from Mexico.

(b) CBP personnel deny asylum seekers any shelter.

97. Pursuant to the Haitian Deterrence Policy, CBP personnel also failed to meet the basic shelter needs of the migrants in the CBP Encampment. As Haitian asylum seekers first entered the United States and were processed into the encampment, CBP personnel refused to provide beds, cots, blankets, tents, or shelters of any kind.

98. With no shelter, migrants in Del Rio were left fully exposed to the elements. The CBP Encampment was extremely dusty, and the wind—as well as the arrival and departure of helicopters near the bridge—kicked up dirt that gave many individuals, including children, respiratory problems, eye infections, and rashes. Most migrants in the CBP Encampment were held adjacent to the Del Rio International Bridge rather than under it, meaning they were left with no protection from the sun as daily high temperatures reached from 90 to over 100 degrees Fahrenheit. Although some migrants were fortunate to have their own tents, others made makeshift shelters from reeds pulled from the nearby riverbank to offer shade. Plaintiff Samuel Doe recalls seeing pregnant women suffering in the heat and the dirt under the bridge because they had nowhere else to go: "I have never seen anything more horrible in my life."

99. Asylum seekers with their own tents became targets of CBP searches, with officers regularly opening, or demanding that individuals open, their tents, in the middle of the night. These searches were alarming and disorienting for asylum seekers.

100. Having been denied bedding, most individuals in the CBP Encampment were forced to sleep directly on the ground, often in the dirt or on cardboard. Plaintiffs Esther and Emmanuel Doe and their sick baby, for example, were forced to sleep in the dirt each night.

2. CBP personnel refuse to provide effective medical care.

101. CBP personnel also refused to provide effective medical care to the thousands of

individuals in the CBP Encampment.

102. Pursuant to the Haitian Deterrence Policy, President Biden and DHS Defendants refused to take the steps needed to secure necessary resources and personnel to meet the anticipated and reasonable medical needs of migrants, including the large number of babies, children, and pregnant and otherwise vulnerable people in the CBP Encampment.

103. For individuals able to seek out medical attention, the care offered to sick and injured Haitians was shamefully inadequate, to the extent any was provided.

104. In some cases, CBP personnel flatly denied migrants' requests for medical care, telling migrants to go back to Mexico instead. Plaintiff Samuel Doe's one-year-old daughter was severely ill while held in the CBP Encampment. As his daughter experienced severe coughing, diarrhea, and vomiting, Samuel begged officers for help. Each time, CBP personnel denied Samuel's pleas, just telling him he should give his daughter water. It was only after Samuel and his family were forced to return to Mexico that his daughter was able to obtain medical treatment.

105. At other times, CBP personnel ignored pleas for assistance, often from pregnant people and children, only acting when the condition became an obvious medical emergency. In one situation, a pregnant Haitian asylum seeker went into labor while sitting in the dirt. CBP eventually took the woman out of the CBP Encampment, but returned her to the encampment mere hours after delivery. Plaintiff Mirard also observed a pregnant woman complain of pain. On information and belief, she went into labor in the CBP Encampment, but was not taken to another facility to deliver her child until she had suffered for hours.

106. Ms. Jozef, Founder and Executive Director of Plaintiff Haitian Bridge, encountered several infants who had been transported to hospitals after suffering dehydration in the CBP Encampment. One baby nearly died; he survived only after Haitian Bridge intervened and advocated for his admission to a hospital in Del Rio. The newborn's condition had grown so precarious that, after he was finally removed from the CBP Encampment, he had to be airlifted to a hospital in San Antonio where specialists were able to save his life.

107. The medical care others received often had no effect. Plaintiff Esther Doe's baby

developed a fever and diarrhea while they were being held in the CBP Encampment. When Esther took him to the medical tent to seek help, the medical personnel appeared more focused on taunting her about being deported and going to jail than on treating her baby. They gave Esther some liquid medication and an ice pack, which did nothing to alleviate her baby's illness.

108. Similarly, Plaintiff Paul Doe suffered from bloating and diarrhea because of the inadequate food and water provided in the CBP Encampment. When Paul sought treatment, an on-site doctor provided him a single pill without explaining what the pill was. The pill did not improve Paul's symptoms, and he soon learned that others seeking medical treatment were provided the same unidentified pill, regardless of their symptoms.

109. Many asylum seekers were unaware that medical personnel were even available. After his baby daughter developed a severe cough and diarrhea in the CBP Encampment, Plaintiff Mirard was unaware that any medical treatment was potentially available for her, and CBP personnel in the encampment did not offer any assistance to Mirard as his daughter suffered. His daughter is still ailing from health conditions that developed during their time in Del Rio.

110. CBP Defendants' refusal to provide adequate medical care resulted in prolonged illness and lasting suffering for many Haitians in the CBP Encampment. Even today, months after DHS Defendants unlawfully expelled thousands of asylum seekers from the encampment, Individual Plaintiffs, their families, and others continue to experience persistent illness from their ordeal in Del Rio. On information and belief, at least one Haitian who was in the CBP Encampment died after the encampment was cleared, due in part to the poor conditions and lack of medical care.

3. CBP personnel physically and verbally abuse asylum seekers in Del Rio.

111. The Haitian Deterrence Policy did not merely result in the willful deprivation of life-sustaining necessities in the CBP Encampment. Haitian asylum seekers also found themselves to be victims of physical and verbal assaults by CBP personnel who were enabled by the policy.

112. CBP personnel frequently targeted migrants for abuse when they were returning to the CBP Encampment from Mexico with desperately needed food and water. One of the most well-

known examples of the Haitian Deterrence Policy occurred on or about September 18, 2021, and involved CBP personnel, supported by mounted Border Patrol officers, driving Haitian asylum seekers back into the river as they returned to the CBP Encampment.

113. Plaintiff Mirard was one of those asylum seekers. While crossing back to the CBP Encampment with food for his wife and their daughter, Mirard encountered a mounted officer who lashed at him with split reins and attempted to drag Mirard back to the river. All Mirard could think about through the ordeal was his duty to hold onto the food at all costs, and his need to return to the CBP Encampment so he could feed his sick and hungry baby. The officer released him only when his horse was about to trample Mirard.

114. Plaintiff Esther Doe was also assaulted by mounted officers after going to Mexico to get food for her sick baby. As Esther attempted to return to the CBP Encampment, she was chased back into the river by mounted officers who attempted to force her back to Mexico. As Esther pleaded in English that she was attempting to return to reach her baby in the encampment, the officers ignored her. They continued to force her deeper into the river, nearly running her down with their horses. Esther needed to get back to her husband and baby, so she tried to reach the shore in Del Rio again, slightly away from the officers on horses. When the officers turned their horses to chase other people crossing the river, she was able to pass by them and reunite with her family.

115. Officers did not merely target Haitians returning from Mexico with food. They also chased individuals who even gathered near the river, which was commonly used for bathing, washing clothes, and cooling off. For example, when Plaintiff Samuel Doe brought his eight-year-old son to the river to clean themselves, mounted officers appeared and began running after migrants. As his terrified son tried to run away from the horses, he fell and hurt himself.

116. Through this ordeal, CBP personnel spewed racist and demeaning invective at Haitian asylum seekers in the CBP Encampment. One example captured on video includes a mounted officer shouting at a group of migrants: "This is why your country's shit, because you use your women for this." The officer then reared his horse, directing it at a group of children.

117. CBP officers also deliberately imperiled the safety of migrants crossing in the river in an attempt to keep them from entering the CBP Encampment.

118. As Plaintiff Paul Doe was attempting to return to the United States with food for himself and others, an officer deliberately cut a rope that had been set up to help migrants maintain balance as they traversed the river. Paul was in the middle of the Rio Grande when the officer threw the cut rope into the water and shouted to the crossing Haitians that they could not return. As the officer cut the rope, Paul watched in terror as numerous other Haitians crossing in front of him who were deeper in the water went under the water and struggled not to drown. He also saw other migrants closer to the Del Rio side of the river, including one of Paul's friends, who were hit and shoved back into the river by CBP personnel. While the CBP personnel were busy knocking Haitians into the water, Paul walked and swam downstream to find a place to cross that was not blocked by officers.

119. Haitians crossing the river observed that the water level of the river would also change throughout the day. At most times, the water level was below migrants' waists, permitting individuals to safely wade across with the assistance of a guide rope. Sometimes when individuals would cross from Mexico, the water level would inexplicably rise, often to an unsafe shoulder-high level that risked causing drownings. On information and belief, authorities could and did manipulate the flow of water in the Rio Grande to prevent Haitian asylum seekers from crossing. On information and belief, at least three Black migrants believed to be Haitian asylum seekers drowned while attempting to cross the river and reach the CBP Encampment.

120. CBP personnel also used helicopters, motorcycles, and other official vehicles to stir up dust in areas of the CBP Encampment where Haitians were congregating and sleeping. On information and belief, this conduct created respiratory problems that persist today.

121. While these abuses occurred, DHS personnel deliberately restricted the press and humanitarian aid and legal service organizations from entering the CBP Encampment or documenting the conduct of DHS personnel therein. For example, when Haitian Bridge attempted to enter the CBP Encampment to provide Know Your Rights information and humanitarian

assistance, CBP officials told Haitian Bridge staff they were not permitted to enter and denied their entry. The only press DHS personnel permitted to access the encampment was Fox News. DHS personnel also restricted the air space over the CBP Encampment to prevent aircraft from taking aerial footage of the encampment. On information and belief, DHS personnel prevented press and neutral observers from entering the CBP Encampment in an attempt to conceal the concerted and deliberate misconduct that occurred pursuant to the Haitian Deterrence Policy.

D. DHS Defendants summarily expel thousands of Haitian asylum seekers from Del Rio in unprecedented fashion.

122. After refusing for weeks to take action to prevent or mitigate the growing humanitarian crisis in the CBP Encampment, senior advisors in the White House and DHS Defendants suddenly switched into swift and unprecedented action in mid-September to expel thousands of Haitian asylum seekers to Haiti and Mexico. Indeed, in the final days of the CBP Encampment, DHS officials rushed to clear the camp as quickly as possible and began to force groups of people onto buses for expulsion, often by tying their hands with plastic zip ties, rather than reading their ticket numbers one by one. Many people did not want to get on the buses as they feared deportation to Haiti, but were nevertheless forced on by DHS personnel.

123. The move to rapidly expel Haitians from the CBP Encampment was likely prompted by a district court decision issued on September 16, 2021, which found that the Title 42 Process was likely unlawful and enjoined the process from being enforced against families with minor children, but temporarily stayed the injunction until September 30. *See Huisha-Huisha v. Mayorkas*, ---F. Supp. 3d---, 2021 WL 4206688 (D.D.C. Sept. 16, 2021), *appeal docketed*, No. 21-5200 (D.C. Cir. Sept. 17, 2021). If the preliminary injunction went into effect, it would take away DHS Defendants' authority to expel Haitian families.

124. On September 15, 2021—the day *before* the district court's decision—Defendant Border Patrol stated that it would take between ten and fourteen days to set up infrastructure necessary to complete the processing of the Haitian migrants in the CBP Encampment. But within days after the day the district court issued its injunction, Defendant Ortiz, Chief of the U.S. Border

Patrol, stated that the CBP Encampment would be cleared within *seven days*. On information and belief, it was around this same time that senior White House and DHS officials met and expanded the Haitian Deterrence Policy to include a rapid mass expulsion strategy, and directed DHS Defendants to expel the Haitian asylum seekers in Del Rio as quickly as possible.

125. The number of daily expulsion flights to Haiti rose swiftly after September 16. After a single expulsion flight on September 15, daily flights began on September 19, increasing from three flights per day on September 19 to five flights per day on September 23, and then seven flights per day on September 30. Each flight carried at least 100 people. The number of Haitian asylum seekers in the CBP Encampment dwindled as migrants were processed and sent to detention centers to be staged for expulsion flights. Other migrants, already suffering from the conditions in the CBP Encampment, learned that fellow asylum seekers were being deported to Haiti and felt compelled to flee the CBP Encampment back to Mexico to avoid being returned to Haiti.

126. In authorizing and carrying out expulsions pursuant to the Haitian Deterrence Policy and the Title 42 Process, President Biden and DHS Defendants ignored the high risk of unlawful refoulement that their own attorneys had warned would arise from expulsions of Haitians. Upon information and belief, President Biden or DHS Defendants did not take steps to ensure that migrants were allowed to request asylum or were screened for fear or vulnerability.

127. President Biden's advisors and DHS Defendants were aware that some of the asylum seekers in the CBP Encampment either were not Haitian nationals, were adult nationals of other countries, or otherwise had no ties to Haiti, such as children of Haitian nationals who had been born and grew up in countries other than Haiti. Upon information and belief, President Biden's advisors and DHS Defendants affirmatively decided not to adopt any processes or protections to ensure that such individuals were not expelled to Haiti, a country that these individuals may have never visited in their lives. This decision was consistent with the Haitian Deterrence Policy and the desire to send a message to future Haitian and Black asylum seekers that they are not welcome in the United States.

128. When crafting and implementing the rapid mass expulsion strategy under the Haitian Deterrence Policy, a senior CBP official also stated that personnel should prioritize expelling single Haitian men because they were likely to be dangerous and violent, despite offering no evidence for the assertion.

129. In mid-September, DHS personnel expelled nearly 4,000 people to Haiti, including hundreds of families with children. By the end of the month, DHS Defendants had effectuated the expulsion of thousands of asylum seekers of Haitian descent to Haiti and Mexico. ICE had chartered close to 40 expulsion flights to Haiti in one of the largest mass expulsions in recent American history, and some 8,000 Haitian asylum seekers had fled to Mexico to avoid being returned to Haiti. The expulsion flights continued after the CBP Encampment was empty: between September 19 and October 19, 2021, DHS personnel expelled approximately 10,831 migrants to Haiti, including nearly 2,500 women and 1,800 children.

1. DHS Defendants expel thousands of asylum seekers from Del Rio to Haiti.

130. As DHS Defendants began implementing their unprecedented expulsion plan, CBP officers were charged with summoning asylum seekers in the CBP Encampment at all hours of the day and night for expulsion. CBP personnel would make loud announcements on speakers throughout the CBP Encampment, broadcasting numbers on the color-coded tickets that each migrant had received after arriving in the encampment.

131. Individuals whose numbers were announced were placed onto buses. Once the buses were full, DHS personnel transported the asylum seekers to formal detention facilities to await expulsion.

132. At DHS detention facilities, guards continued to harass and abuse migrants. Some guards taunted the migrants, calling them "pigs" and saying they would "trash this place like they trashed their country." Migrants were denied adequate food, medical care and sanitation, and sleeping provisions. Plaintiff Jacques Doe, for example, was only given two small pieces of bread

and two bottles of water per day and was forced to sleep on the ground in a holding cell with approximately 30 other men before he was eventually expelled.

133. DHS personnel also separated some family units and prevented family members from contacting each other. For example, on or about September 14, 2021, officers took Plaintiff Wilson Doe, and his wife Wideline, and their family to a detention facility, where they remained for four or five days. Wilson and his sixteen-year-old son were separated from each other and from the rest of the family. U.S. authorities did not allow Wilson to speak to anyone. When he asked a guard what they were planning to do to the detained migrants, the guard answered that Wilson had to wait to be called upon to speak. Every time Wilson tried to see anyone in his family, the guards would yell at him and prevent him from doing so. At one point, an officer screamed at Wilson, yelling that "no one told you to come to the U.S." Wilson and his family were unable to shower, wash their faces, or brush their teeth at this facility. When Wilson asked for a painkiller for a toothache, an official laughed, responded that he, too, had a toothache, and provided no medication.

134. Plaintiff Michael and his family experienced similarly abusive conditions. When his family arrived, officers told Michael and others that they smelled because they were Haitian. Michael and his wife Veronique were detained separately, with each keeping one of their two children with them. When Michael requested milk for his child, he was handcuffed, told to "shut up," and separated from his child for an hour. The experience brought Michael and his family to tears. No one in Michael's family was provided an opportunity to bathe while detained.

135. After spending at least a few days in more formal detention settings, Haitian asylum seekers subject to expulsion were transported to airports in large groups, made to board airplanes, and returned to Haiti. Upon information and belief, they were given no opportunity to access the U.S. asylum process, request the assistance of counsel, or receive any legal information. If asylum seekers asked where they were being transported, DHS officers not only withheld information but sometimes lied, stating that they were being transferred to another detention facility and were not

going to be deported. Compounding the trauma and abuse they inflicted, DHS personnel indiscriminately handcuffed and shackled nearly all adults during the long flights to Haiti.

136. For example, on or about September 19, 2021, officers woke Plaintiff Wilson Doe and his family in their detention cells in the middle of the night and placed them on a bus with other migrants. When Wilson asked where they were going, officers lied and said they were transferring Wilson and his family to another "prison" in Florida. After the bus drove for approximately two hours, Wilson realized that they were arriving at an airport.

137. When the bus parked at the airport, none of the migrants wanted to get off the bus because it was clear they were going to board a plane. Wilson and others tried to stay on the bus, stating that they did not want to leave the United States and get on the plane without knowing where they were going. In response, officers boarded the bus and beat Wilson and several others. In front of Wideline and their children, the officers beat Wilson so savagely that they ripped his clothes off and he lost his shoes. Eventually the officers forced Wilson off the bus. Wilson saw officers strike at least four other migrants.

138. When Wilson got to the steps to board the plane, he said he would not board the plane without knowing where it was going. The officers beat Wilson again, and at one point, an officer placed a foot on Wilson's neck, while pinning his arms against his back. As the officer continued to apply pressure, Wilson tried to say, "I can't breathe."

139. After beating Wilson, officers handcuffed him. The restraints were placed so tightly that they cut into his wrists and drew blood. Officers forced Wilson on the plane. They also threatened a sobbing Wideline that they would arrest Wilson if she did not get on the plane. Wilson sat through the entire flight without a shirt or shoes. Wilson and Wideline's family, and everyone else on the plane, were expelled to Haiti.

140. Now in Haiti, Wilson has scars on his wrists from the handcuffs. His oldest child, who once dreamed of living in the United States and joining the U.S. Army, cries every day. His younger child keeps repeating "they hurt you, they hurt you." The entire family is devastated to be back in Haiti after all that they endured to seek asylum in the United States.

141. Similarly, after approximately nine days at a detention facility, Plaintiffs Michael and Veronique's names were called. Michael asked an officer if they were being sent back to Haiti. The officer replied that Michael, Veronique, and the others were being transferred to a different detention facility. U.S. officials then handcuffed the adults on waists, legs, and hands before loading them onto a bus. Seeing Michael being handcuffed made his daughter cry. The bus left the detention facility with a police escort.

142. On the bus, Michael again asked another officer if they were being returned to Haiti. He told the officer that sending them to Haiti would be the equivalent of a death sentence—"You might as well just kill us." The officer replied that they were not being returned to Haiti, but instead being transferred to another detention facility.

143. Veronique had the couple's two-year old daughter on her lap during the bus trip. At one point, their daughter fell off her lap and became stuck under the seat. Veronique was unable to pick up her child because she was handcuffed. In tears, Michael and Veronique pleaded with the officers for help, saying: "Our baby is under there, we need to get the baby out. Please help us." The officers did not respond until other migrants also began shouting that there was a baby stuck under the seat. An officer eventually released one of Veronique's hands so she was able to reach down and pull her child back into her lap.

144. It was not until they arrived at the airport that Michael and Veronique realized they were being expelled to Haiti. They remained handcuffed on the waist, legs, and hands during the duration of the flight to Haiti. Although Michael asked for his handcuffs to be removed so he could use the restroom, officers refused to remove them for the entire trip from the detention facility to Haiti, preventing him from using the restroom.

145. Michael saw a woman on the bus who had given birth to a baby a few days earlier while in the CBP Encampment. That woman was also handcuffed, and she and her newborn were expelled to Haiti on the same flight as Michael and Veronique's family.

146. Similarly, when Plaintiffs Mirard and Madeleine and their two-year-old daughter were expelled, all the adults on their flight were shackled at the waist and legs. Any adult who did

not have to hold a small child was also handcuffed, including Mirard. The humiliation alone caused Mirard, a proud father and man of faith, to break down in tears. At no time did Defendants inform Mirard or Madeleine that they were being returned to Haiti. Only when they landed in Port-au-Prince did Mirard realize that they were being sent back to the country that he and Madeleine had fled and his daughter had never known.

147. Upon information and belief, at no time during the entire expulsion process—from processing at the CBP Encampment to holding at the detention facility to being transported to the airport and expelled to Haiti—did U.S. officials ever ask if Individual Plaintiffs or any other asylum seeker had a fear of returning to Haiti or wished to seek asylum.

148. Officers' refusal to screen for fear or vulnerability to refoulement was not a mistake. In authorizing and enabling mass expulsions under the Haitian Deterrence Policy, President Biden and DHS Defendants understood that asylum seekers would be expelled without further access to the statutory or procedural protections required under U.S. law.

149. DHS Defendants' failure to abide by their statutory obligations resulted in erroneous expulsions. In at least one case, a Black migrant from Angola was expelled to Haiti on the presumption that he was Haitian, despite repeatedly explaining to officers that he was not Haitian and had never been to Haiti. On information and belief, such errors were reported to senior DHS officials and President Biden and DHS Defendants took no action to prevent similar erroneous expulsions from occurring.

2. DHS Defendants expel thousands of asylum seekers from Del Rio to Mexico.

150. Through their conduct taken pursuant to the Haitian Deterrence Policy, DHS Defendants also effectuated the expulsion of approximately 8,000 asylum seekers to Mexico. These asylum seekers were compelled to cross back to Mexico because despite the dangerous conditions they would face there, many believed that being summarily expelled to Haiti posed an even graver threat.

151. For example, Plaintiffs Samuel and Samentha Doe were unwilling to risk being sent back to Haiti because they knew if they went back, they would die there. In addition, their children were sick, their son had been injured after running away from a mounted CBP officer chasing Haitians in the river, and they were starving from lack of food. Samuel describes the CBP Encampment as "the worst thing in my life that I can describe." Because Samuel feared the family would be returned to Haiti, they took their children back to Mexico.

152. Similarly, after Plaintiffs Esther and Emmanuel Doe had spent about one week suffering in the CBP Encampment waiting to seek asylum, they were awoken early in the morning by U.S. officials and told to get on the "last" bus. Because they were afraid of being sent back to Haiti if they got on the bus, Esther and Emmanuel crossed into Mexico with their son. Although Esther and her family had come to the CBP Encampment to request asylum, they were never asked if they wanted to seek asylum and were not given the chance to express a fear of return to Mexico or Haiti. "They never asked me that. Even if you wanted to, they didn't give you the chance to talk to them."

E. Asylum seekers expelled from Del Rio face danger in Haiti and Mexico.

153. The common consequence of Defendants' implementation of the Title 42 Process and Haitian Deterrence Policy is that thousands of Haitian asylum seekers now live under constant threat in Haiti and Mexico. The danger faced by these asylum seekers is the predictable result of deliberate choices by President Biden's senior staff and DHS Defendants to expel Individual Plaintiffs and other vulnerable individuals without first affording them any access to the U.S. asylum process or required non-refoulement screenings.

154. Individuals expelled to Haiti face constant threats to their safety due to that country's political instability, violent crime by gangs and cartels, and acute food insecurity. Years of devastating natural disasters have crippled critical infrastructure and local economies, while progressively brutal feuds among cartels and political factions have left the government unable to provide basic services or to prevent violence and kidnappings.

155. This situation has deteriorated in recent months following the assassination of President Jovenel Moïse and the 7.2 magnitude earthquake that debilitated the country's south. Aid groups in Haiti believe that the insecurity is the worst they have seen in decades. The State Department has issued a "Level 4" Travel Advisory for Haiti, advising U.S. citizens not to travel there because "kidnapping is widespread" and "violent crime, such as armed robbery and carjacking, is common." U.S. government employees are encouraged not to walk in the capital city of Port-au-Prince at any time and must receive approval to visit certain parts of the city.

156. Fearing the escalating violence, many expelled migrants in Haiti have gone into hiding. Plaintiff Jacques Doe is currently in hiding from the gangs that forced him to flee Haiti originally. Plaintiff Wilson Doe and Wideline likewise do not venture far beyond their front porch, fearful that Wideline or others in their family could be kidnapped again. Other individuals have no choice but to live on the street or sleep in temporary shelters. Most migrants struggle to find food, housing, and jobs in a country they had fled and no longer recognize. They spend their days trying to survive amidst rampant robberies, murders, and kidnappings.

157. President Biden and DHS Defendants were aware of these circumstances and the danger that awaited Individual Plaintiffs and asylum seekers in Haiti when they were expelled.

158. One month before thousands of Haitians arrived at the CBP Encampment, around the same time Secretary Mayorkas redesignated Haiti for TPS because of the extraordinary conditions there, DHS's civil rights office confirmed that there would be a strong risk of unlawful refoulement if DHS were to expel asylum seekers to Haiti.

159. President Biden and DHS Defendants nonetheless ignored these warnings and authorized and effectuated the expulsion of thousands to Haiti where there is no infrastructure in place to receive and provide resources to expelled individuals. Many individuals had not been to Haiti for years and have no network, family members, or place to call home. In fact, the head of Haiti's National Migration Office protested in mid-September that Haiti was unable to receive expelled migrants. As DHS personnel were expelling Haitians from the CBP Encampment, U.S. Special Envoy for Haiti Daniel Foote resigned, declaring that he refused "to be associated with the

United States[’] inhumane, counterproductive decision to deport thousands of Haitian refugees” to Haiti. Ambassador Foote noted that the “collapsed state is unable to provide security or basic services” and “simply cannot support the forced infusion of thousands of returned migrants lacking food, shelter, and money without additional, avoidable human tragedy.”

160. Individual Plaintiffs and other Haitian asylum seekers expelled from Del Rio to Mexico also face insecurity and experience harm. Black migrants encounter increased challenges in Mexico due to pervasive anti-Black racism from Mexican immigration authorities, the police, and the local community. For example, after fleeing to Mexico to avoid being expelled to Haiti, Plaintiff Paul Doe had difficulty finding a room to rent and still has not been able to find a job, despite making multiple applications. He has also been stopped multiple times by the police, who question him about who he is and where he is going. To avoid being targeted this way, he now remains at home as much as possible.

161. These migrants are regularly denied adequate medical care, housing, and employment in Mexico. Vendors frequently refuse to serve Haitians and other Black migrants food or water and Mexican police officials are known to extort these migrants, threatening to deport them to their country of persecution. Scores of Haitian migrants have been kidnapped and held for ransom as they traveled to the United States and after being expelled by U.S. officials. Because of these dangers, many migrants are in hiding in Mexico.

III. President Biden and DHS Defendants’ Haitian Deterrence Policy applied in Del Rio diverges from standard practices and is driven by discriminatory purpose.

162. The suffering and harm experienced by Individual Plaintiffs and thousands of others in the CBP Encampment and during their subsequent detention and expulsions are a direct result of President Biden and DHS Defendants’ Haitian Deterrence Policy. This overarching policy, which aimed to remove Haitians from the United States and prevent others from coming to seek protection under the U.S. asylum system, resulted from a series of discrete decisions that departed from standard practices and were made by senior White House and DHS officials as the situation in the CBP Encampment evolved.

A. The treatment of Haitian migrants in Del Rio diverged from standard practices Defendants applied to other asylum seekers.

163. The decision to deprive Haitian asylum seekers of necessities like food, water, shelter, and medical care departed from DHS Defendants' typical procedures for processing asylum seekers pursuant to the Title 42 Process and for providing humanitarian aid to large groups of arriving migrants in several ways.

164. First, the high level of involvement by top White House and agency officials in decision-making relating to the treatment of asylum seekers in Del Rio was unusual. On information and belief, senior and Cabinet-level officials do not generally take an active role deciding how aid and necessities are provided at field processing centers like the CBP Encampment.

165. Second, President Biden, his senior advisors in the NSC and DPC, and DHS Defendants disregarded months of intelligence indicating that thousands of Haitian asylum seekers were traveling to the U.S. border and stopped internal efforts to discuss and organize necessary infrastructure, personnel, and resources to prepare for their arrival. It is uncommon for an agency to ignore its own intelligence and the recommendations of its experts, particularly where, as here, the intelligence is corroborated by reports from sources and partners with first-hand knowledge.

166. Third, despite the insufficient resources available at the CBP Encampment to meet the needs of Haitian asylum seekers, DHS Defendants did not seek out assistance from non-governmental organizations ("NGOs"). In similar situations, agencies like DHS and CBP generally engage with humanitarian aid organizations when circumstances prevent the agency from meeting reasonably anticipated needs.

167. Fourth, Defendants diverged from their typical practice of accounting for people in CBP custody and tracking important information about them, including the existence of fear-based claims. On information and belief, DHS Defendants lacked information regarding the number of fear-based claims Haitians in the CBP Encampment had raised, did not know how many people were in their custody, and lost at least one child for hours. On information and belief, this lack of

information represented a marked departure from DHS Defendants' protocols and processing of other large groups of asylum seekers at the border.

168. The decision to expel Haitians in the CBP Encampment as quickly as possible was also inconsistent with DHS Defendants' standard practice in similar situations.

169. First, DHS Defendants departed from how they typically addressed the needs of groups of asylum seekers arriving at the border, including other large and fast-growing groups. For example, when thousands of people were severely overcrowded without food or other necessities in a temporary outdoor processing site under the Anzalduas International Bridge in Mission, Texas, in spring 2021, DHS personnel relocated individuals to other sites for processing to alleviate the humanitarian crisis near the port of entry. They also engaged local NGOs and provided greater resources to asylum seekers, including food, cots, benches, and water misters.

170. Second, despite being informed in advance that expulsions of Haitian asylum seekers would create a "high risk of refoulement" in violation of U.S. and international law, President Biden and DHS Defendants did not take this risk into account and failed to ensure that any non-refoulement screenings or interviews were offered to asylum seekers prior to expulsion. This lack of screenings is a departure from general practice, mandated by law, to ensure adequate safeguards against unlawful refoulement of asylum seekers.

171. Third, DHS Defendants expelled asylum seekers to Haiti despite knowing that there was no infrastructure set up to receive and process them. Only days after the expulsion flights began, on or about September 20, 2021, did White House officials and DHS Defendants discuss the lack of infrastructure and any steps to be taken to remedy it. These actions are inconsistent with standard procedures, which call for reception infrastructure prior to expulsions on the scale that DHS Defendants were conducting.

172. Fourth, DHS Defendants and personnel did not discuss or take any steps to mitigate the health risks of expulsion, including COVID-19, to vulnerable asylum seekers who were sick, tender-aged, or pregnant, even though Defendants generally consider health vulnerabilities of

migrants when making expulsion decisions under the Title 42 Process. At least one woman went into labor while on the tarmac awaiting expulsion.

173. Fifth, DHS Defendants had a default policy not to subject families from Central America and Mexico to the Title 42 Process. This policy included screening families for vulnerability and providing family units with minor children with humanitarian exemptions to the Title 42 Process. DHS Defendants departed from this default policy specifically for Haitian families in Del Rio, expelling large numbers of families, including those with infants, and including at least one family with a days-old U.S. citizen child born in the CBP Encampment, without screening them for vulnerability or exemptions.

B. Discriminatory intent drove the treatment of Haitian asylum seekers in Del Rio.

174. The Haitian Deterrence Policy also arose from discriminatory intent based on race and national origin.

175. At the direction of the White House and DHS Defendants, CBP personnel treated all asylum seekers in the CBP Encampment as presumed Haitian nationals, regardless of whether they were in fact Haitian. DHS personnel also initially miscounted the number of Haitians in the encampment because they assumed that non-Haitian Black asylum seekers were Haitian. On information and belief, DHS Defendants took no action to prevent errors in reporting the nationality of individuals in Del Rio.

176. On information and belief, DHS officials tasked with addressing the developing humanitarian crisis in Del Rio viewed Haitian and Black asylum seekers as dangerous, barbaric, and criminal. On one occasion, a CBP official in senior leadership for the Del Rio Sector remarked to DHS officials that Haitians would "tear through the walls" of a detention facility. In a meeting relating to the CBP Encampment, top DHS officials described Haitians as "particularly difficult," and a senior DHS official reported to Secretary Mayorkas, without evidence, that Haitian asylum seekers had engaged in criminal conduct in Mexico.

177. On information and belief, DHS Defendants believed that Haitians were more likely to break the law, be embedded with smugglers, or move through irregular channels than other groups. On September 16, 2021, when preparing the mass expulsion strategy, a senior CBP official stated that removing single Haitian men must be a priority because they were likely to be dangerous and violent. DHS personnel also refused to allow the inclusion of toothbrushes or combs in some hygiene kits that were distributed at the CBP Encampment, out of concern that the Haitian asylum seekers might use them as weapons.

178. On information and belief, perspectives such as these shaped the decisions that senior White House and DHS officials made in adopting and implementing the Haitian Deterrence Policy. These decisions included, among others, the decision not to prepare adequate food, water, medical care, or shelter for asylum seekers arriving in the CBP Encampment; the decision that DHS personnel effectuating the expulsions of Haitians should lie about where such Haitians were being transported; the decision that DHS personnel should shackle Haitians, including mothers with children, on expulsion flights; and the decision to expel Haitians swiftly, without access to non-refoulement screenings, in one of the largest mass expulsions in U.S. history.

IV. Defendants' Title 42 Process applied in Del Rio is unlawful.

179. Beyond the abuses described above, the procedures ostensibly being applied to Individual Plaintiffs and Haitians in Del Rio in connection with the Haitian Deterrence Policy—the Title 42 Process—are themselves unlawful. The Title 42 Process deprives asylum seekers of their statutory and procedural protections under U.S. law despite lacking any authority to do so. Moreover, although Defendants pretextually portray the Title 42 Process as a public health measure, it instead undermines public health.

A. The federal government's public health powers provide no support for the mass, summary expulsion of asylum seekers.

180. The Title 42 Process that was used to expel thousands of Haitian asylum seekers in Del Rio is grounded in the federal government's purported public health authority.

181. These statutory public health powers have their origins in an 1893 statute

authorizing the Executive Branch to undertake certain acts to address the spread of contagious diseases originating outside of the United States. *See* Act of Feb. 15, 1893, ch. 114, § 7, 27 Stat. 449, 452. Now codified at 42 U.S.C. § 265, the statute authorizes the CDC Director to address "a serious danger of the introduction of" a "communicable disease" from a foreign country "into the United States" by "prohibit[ing], in whole or in part, the introduction of persons or property."

182. Over the 128 years that the statute and its predecessors have been in force, this provision has never been used to expel noncitizens from the United States. Indeed, despite several infectious disease outbreaks during that period, no regulation has ever before been promulgated purporting to authorize the immigration powers asserted through the Title 42 Process.

183. This historical context fits with the framework of the Public Health Service Act, which confirms that these public health powers do not include the broad powers claimed by Defendants. Among other reasons, the statutory language expressly provides the power to prohibit "the introduction of persons and property," but makes no reference to an authority to expel individuals under the act. That Section 265 applies to U.S. citizens and noncitizens further supports the plain language interpretation that "introduction" does not mean "expulsion." Finally, the act references Section 265 as a "quarantine" provision, and provides specific penalties for its violation, none of which include expulsion. *See* 42 U.S.C. § 271(a) (violation of Section 265 "shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or both").

184. In short, the sole statutory authority underlying the Title 42 Process and relied on in applying the process to Individual Plaintiffs and Haitian asylum seekers in Del Rio does not authorize the expulsion of noncitizens from the United States.

B. Defendants' Title 42 Process deprives asylum seekers of protections guaranteed under U.S. law.

185. Defendants' Title 42 Process relies not only on a novel, atextual construction of Section 265, but also on the unprecedented and extraordinary claim that Defendants may ignore clear protections for asylum seekers mandated under U.S. immigration laws.

186. The United States' modern asylum system has its roots in the aftermath of World War II, when U.S. lawmakers created the nation's first formal asylum protections to prevent a recurrence of the United States closing its borders to individuals seeking safety from Nazi persecution.

187. Currently, three primary statutory frameworks operate to protect individuals fleeing persecution and torture. Together, they provide individuals coming to the United States with a right to seek immigration relief through the specific procedures set forth in those laws.

188. First, the INA provides that "[a]ny [noncitizen] who is physically present in the United States or who arrives in the United States"—regardless of their place of entry, interdiction, or status—"may apply for asylum[.]" 8 U.S.C. § 1158(a)(1).

189. Second, the INA sets forth the duty of non-refoulement, an international law principle providing that a country may not expel or return an individual to a country where they have a well-founded fear of persecution or serious harm. Consistent with the United States' obligations under the 1951 Convention on the Rights of Refugees and the 1967 Protocol, the INA's withholding of removal provision prohibits the United States from removing any individual to a country where it is more likely than not that the individual's "life or freedom would be threatened in that country because of [their] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

190. Third, FARRA implements the United States' non-refoulement duties set forth in Article 3 of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In relevant part, FARRA prohibits the United States from expelling an individual to a country where it is more likely than not that they will be tortured. *See* 8 U.S.C. § 1231 note.

191. DHS Defendants and personnel have applied the Title 42 Process in a manner that violates each of these fundamental protections of the U.S. asylum system.

192. When applying the Title 42 Process to persons in the CBP Encampment, DHS personnel refused to allow Individual Plaintiffs and thousands of others to "apply for asylum" as

required under the INA. 8 U.S.C. § 1158(a)(1). Rather than inspect all people in the encampment to determine whether they would "indicate[] either an intention to apply for asylum . . . or a fear of persecution," 8 U.S.C. §§ 1225(a)(3), (b)(1)(A)(i)-(ii), DHS personnel actively refused to engage with Individual Plaintiffs or other asylum seekers.

193. DHS Defendants also effectuated the expulsion of Individual Plaintiffs and others to Mexico and Haiti without considering whether they would likely be persecuted or tortured upon their return. DHS Defendants' refusal to provide adequate safeguards against refoulement, including screenings for withholding of removal and protection under CAT, is inconsistent with their mandatory duties under the INA and FARRA.

194. Indeed, in a memorandum dated shortly after DHS cleared the CBP Encampment, entitled "Ending Title 42 return flights to countries of origin, particularly Haiti," senior State Department advisor Harold Koh concluded that Defendants' "current implementation of the Title 42 authority continues to violate our legal obligation not to expel or return ('refouler') individuals who fear persecution, death, or torture, especially migrants fleeing from Haiti." Koh explained that the Title 42 Process, particularly as it was applied to asylum seekers in Del Rio, was inconsistent with DHS Defendants' duties under the INA and FARRA and created "an unacceptably high risk that a great many people deserving of asylum" will be unlawfully returned to countries where they fear persecution, death, or torture.

195. Finally, DHS Defendants' expulsions of Haitian asylum seekers under the Title 42 Process also conflicts with the INA's provisions governing the removal of noncitizens. With few exceptions, removal proceedings before an immigration judge are the "sole and exclusive procedure" for determining whether an individual may be removed from the United States. 8 U.S.C. §§ 1229a(a)(3); 1225(b)(1). Summary expulsions under the Title 42 Process offer none of the procedural protections mandated by the INA for noncitizens who fear removal.

C. Defendants' Title 42 Process does not advance public health.

196. Although Defendants' purported goal in implementing the Title 42 Process is to promote public health, scientific experts and legal scholars have denounced the process as

undermining public health and welfare.

197. Defendants' Title 42 Process has never been about public health. Instead, the government's public health powers were used to serve former President Trump's political ends of restricting immigration and circumventing critical protections for asylum seekers.

198. When HHS Defendants' own public health experts initially refused to sign onto the first Title 42 health order, top Trump Administration officials ordered them to fall in line. It is widely reported that former Vice President Mike Pence directed former CDC Director Dr. Robert Redfield to issue the Title 42 order and Title 42 Regulation after Redfield expressed that there was no valid public health reason to issue such an order. In her testimony to Congress shortly after Defendants' use of the Title 42 Process at the CBP Encampment, Anne Schuchat, the former Deputy Director of CDC, testified that the issuance of the first Title 42 order "wasn't based on a public health assessment at the time."

199. The public health justifications for the Title 42 Process are no more compelling now than they were twenty months ago. Indeed, any public health justifications are weaker now due to the wide availability in the U.S. of vaccines that are highly effective in combatting the transmission and spread of COVID-19.

200. Shortly after Defendants applied the Title 42 Process to thousands of Haitians in Del Rio, Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases and the Chief Medical Advisor to the President, stated that "expelling" immigrants "is not the solution to an outbreak." He affirmed: "Certainly immigrants can get infected, but they're not the driving force of this, let's face reality here." Dr. Raul Gutierrez, co-chair of the American Academy of Pediatrics' Council on Immigrant Child and Family Health, echoed this sentiment, stating: "I don't think that there's a defensible public health reason to keep Title 42 in place."

201. After observing the expulsion of Individual Plaintiffs and thousands of Haitians "without any assessment of their safety," hundreds of Defendant Walensky's former colleagues signed a letter to oppose Defendants' Title 42 Process, calling it "a political measure to prevent legal immigration under the rhetoric of public health."

202. A principal justification for Defendants' continued extension and application of the Title 42 Process is the "congregate nature" of CBP and Border Patrol stations along the U.S. border, which purportedly risks the introduction, transmission, and spread of COVID-19 from arriving migrants.

203. Although HHS Defendants "recognize[] the availability of testing, vaccines, and other mitigation protocols [that] can minimize risk in this area," and "anticipate[] additional lifting of restrictions" as DHS facilities employ these protocols, DHS Defendants have continued to enforce the Title 42 Process for months without taking advantage of any widely available mitigation measures. For example, the CBP Capio Memo provides no policies or procedures related to COVID-19 testing or the provision of COVID-19 vaccinations. And, although President Biden and DHS Defendants were aware for months that thousands of Haitian asylum seekers were traveling towards Del Rio, they refused to make any preparations for offering testing or vaccination to asylum seekers as they waited days or weeks in the CBP Encampment.

V. Defendants' Title 42 Process and Haitian Deterrence Policy continue, even as tens of thousands of Haitians again head to the U.S. border.

204. The abuses that occurred in the CBP Encampment and in connection with the expulsion of thousands of Haitians are likely to continue under DHS Defendants' enforcement of the Title 42 Process and the Haitian Deterrence Policy.

205. Public reporting indicates that thousands of individuals, many of whom are Haitian, are traveling to the United States to seek asylum at this time. Each Individual Plaintiff has likewise expressed an intent to return to the United States to seek asylum.

206. No Defendant, however, has taken any appropriate corrective steps to ensure that the abuses and mass expulsions that happened in Del Rio are not repeated and to discontinue either the Title 42 Process or the Haitian Deterrence Policy.

207. In December 2021, CDC conducted its periodic reassessment of the circumstances underlying CDC's August 2021 order and announced that the Title 42 Process would remain in place for at least another sixty days. In addition, President Biden and DHS Defendants have

blocked the efforts of internal staff to engage in an after-action review of the events at the encampment and DHS Defendants' treatment of Haitian asylum seekers. On information and belief, President Biden and DHS Defendants have not taken appropriate corrective action to end the Haitian Deterrence Policy.

208. With Defendants' Title 42 Process and Haitian Deterrence Policy still in place, there are no safeguards to ensure that the abuses that occurred in Del Rio will not reoccur if and when Individual Plaintiffs and other Haitians arrive at the border to seek access to the U.S. asylum process. As the local sheriff stated shortly after the CBP Encampment was cleared, "I've never seen anything like [the Del Rio Encampment], but it's going to happen again."

VI. Individual Plaintiffs were harmed by Defendants' policies implemented in Del Rio

209. Defendants' adoption and implementation of the Title 42 Process and the Haitian Deterrence Policy has caused Individual Plaintiffs and all other similarly situated individuals substantial, concrete, particularized, and irreparable injury.[14]

210. As Defendants' relevant policies are ongoing, so too is the harm these policies cause. As detailed below, Individual Plaintiffs suffer ongoing harm from their treatment at the CBP Encampment and their unlawful expulsions to Haiti or Mexico. Because Individual Plaintiffs intend to return to the United States to seek asylum and Defendants' policies are ongoing, the harms detailed herein are likely to continue and recur.

A. Plaintiffs Mirard Joseph and Madeleine Prospere

211. Mirard and Madeleine fled Haiti around 2017 in fear for their lives, escaping to Chile. They had a baby in Chile, but Mirard could not secure residency or work authorization there. After months of instability in Chile, the family decided to travel to the United States to seek asylum. The arduous journey to Mexico took the family almost a month with their young child.

[14] In addition to the claims asserted in this Complaint, each Individual Plaintiff is exploring individual claims based on the Federal Tort Claims Act and reserves the right to amend this Complaint to add such claims after satisfying the necessary administrative exhaustion requirements.

While traveling, bandits robbed Mirard and Madeleine and took all their money and belongings.

212. On or around September 11, 2021, Mirard, Madeleine, and their young daughter finally arrived in Del Rio. U.S. officials gave Mirard a blue ticket. He understood that the blue ticket was being assigned to families and meant he should wait until his number was called.

213. In the CBP Encampment, the family was forced to sleep on cardboard. Temperatures soared during the day and there was no shade. As a result, Mirard was severely sunburnt and dehydrated. The encampment was so dirty and dusty that their daughter developed respiratory and gastrointestinal issues that persist to this day. Mirard never saw or was aware of a doctor in the encampment who might assist his daughter.

214. Mirard, Madeleine, and their daughter were given only water and bread, plus a single diaper each day. There was so little food available in the CBP Encampment that Mirard and others were forced to cross the river to Mexico to purchase food and water for their families.

215. On or about September 18, 2021, when crossing back from Mexico with food for his family, Mirard was assaulted by a horse-mounted officer who lashed at him with reins, attempted to drag him back into the water, and nearly trampled him. This abuse has left him traumatized.

216. Approximately two days after this trauma, officials transported Mirard, Madeleine, and their daughter to a detention facility. After being held there in conditions unfit for human life, U.S. immigration authorities called Mirard and his family, along with other detained Haitians, and handcuffed them and put shackles on their feet and waist. Madeleine, though shackled, was not handcuffed so that she could hold the baby. No authorities informed Mirard and Madeline where they were being taken when they were forced onto a plane and expelled to Haiti. Neither Mirard nor Madeline had ever been given an opportunity to seek asylum or otherwise explain why they feared being sent back to Haiti.

217. Mirard is now in hiding in Haiti. Madeleine and their daughter were forced to travel to Chile to access medical treatment for the illnesses their daughter developed in the CBP Encampment. If they had the means, they would come back to the United States "right this second"

to seek asylum. They plan to save any money they can so that they can make another journey to the U.S. border to seek asylum.

B. Plaintiffs Mayco ("Michael") Celon and Veronique Cassonell

218. Michael's family fled Haiti when he was only fifteen years old after the murder of his mother and lived in the Dominican Republic and then in Chile for over two decades. During that time, Michael and Veronique married and had two children. Michael, Veronique, and their children—now ages two and eight—fled Chile after conditions became extremely difficult for Haitians, who were being targeted there for violence and discrimination.

219. After crossing the river in mid-September 2021 to seek asylum near Del Rio, Michael and his family experienced deplorable conditions at the CBP Encampment. U.S. officials provided very little food and water to Michael's family. Michael and Veronique often gave what little they received to their children. Michael saw fellow migrants pass out from thirst, heat, and hunger. "After days of being outside like that I realized I couldn't stay there anymore and thought about returning back to Mexico."

220. In the CBP Encampment, migrants were using their own clothes to shade themselves from the sun and to sleep on the ground. In the morning, officers would yell "wake up, wake up" and kick migrants to awaken them. When people complained about the sun, asked about the availability of food and water, or asked when they would be processed, officers would yell and tell them to "sit down and shut up." Michael saw U.S. officials handcuff other migrants, seemingly because they had been asking questions. He also saw mounted officers using reins as whips against people in the river. He felt like the officers did not treat the Haitians in the encampment as people.

221. After about three days in the CBP Encampment, Michael was given a numbered ticket. Other Haitians in the CBP Encampment had explained to Michael that he had to wait to receive a ticket, and then wait for his ticket number to be called in order to be interviewed about his case and either remain in the United States or be deported.

222. About a week later, Michael, Veronique, and their two children had their number called and they were taken to a detention facility. After being separated and detained for over one

week, Michael and Veronique were shackled and expelled to Haiti with their children.

223. After being expelled to Haiti, Michael and his wife did not have enough money to feed their family. One of their daughters became ill from drinking Haiti's contaminated water, and the family was unable to obtain medical care for her due to the country's instability. While back in Haiti, Michael expressed extreme fear for his and his family's safety. "Ever since I've been here I've been fearing for my life. I'm in hiding. I'm at risk every day."

224. Michael and his family have since returned to Chile, where they face discrimination and threats because of their race and Haitian nationality. They plan to seek asylum in the United States again.

C. Plaintiff Wilson Doe

225. Plaintiff Wilson Doe and his wife Wideline fled Haiti in 2016 after Wideline was kidnapped and held for ransom. Wilson's family had to collect a great deal of money to secure her release, and they still do not know exactly who kidnapped her. After receiving more kidnapping threats, Wilson, Wideline, and their young son fled Haiti to seek safety in Chile.

226. Wilson and Wideline lived in Chile for almost five years, and their daughter was born there. As the family faced instability and Wilson and Wideline could not obtain employment documents or seek asylum, the couple decided to seek asylum in the United States.

227. On or about September 11, 2021, Wilson and Wideline arrived in Del Rio with their sixteen-year-old son and their four-year-old daughter. They spent around four days in the CBP Encampment. During this time, U.S. officials gave them only water, but no food. The family had nothing to eat for a full day and was eventually able to eat only after a friend gave them some money, which allowed Wilson to cross into Mexico to purchase food and water.

228. On or about September 14, 2021, U.S. officials took Wilson and his family to what Wilson described as a "prison," where they separated Wilson from his children and held them for what he thinks was four or five days. While in detention, Wilson was never given an opportunity to state that he had a fear of returning to Haiti. When Wilson tried to speak to a U.S. official, the official told Wilson that he had to wait to be called to speak to someone.

229. On or about September 19, 2021, U.S. officials woke Wilson and his family in the middle of the night and placed them on a bus with other detained migrants. When Wilson asked where they were going, U.S. officials lied and said they were transferring Wilson and his family to another "prison" in Florida. After seeing they were brought to an airport, Wilson and others tried to stay on the bus, stating that they did not want to leave the United States and get on the plane without knowing where they were going. In response, U.S. officials boarded the bus and physically beat Wilson and several others. In front of Wideline and their children, the U.S. officials beat Wilson so savagely that they ripped his clothes off and he lost his shoes. Eventually the officials forced them off the bus and beat them further on the tarmac. Wilson tried to run on the tarmac, but an officer stopped him, threw him on the ground, and placed a foot on his neck while pinning his arms against his back, temporarily cutting off Wilson's ability to breathe.

230. U.S. officials then handcuffed Wilson so tightly that the handcuffs cut into Wilson's wrists and drew blood. Officers forcibly placed Wilson on the plane and threatened a sobbing Wideline that they would arrest Wilson if she did not get on the plane. Wilson sat through the flight without a shirt or shoes and with the handcuffs cutting into his wrists. Wilson and Wideline's family, and everyone else on the plane, was expelled to Haiti. The entire family is traumatized.

231. With nowhere else to go, Wilson, Wideline, and their family are staying with a relative, never leaving the house out of fear of being attacked or kidnapped. Haitians who have recently been deported back to Haiti are often targeted by gangs because the gangs believe that such people have money. Although Wilson and his family have no financial resources, they live in constant fear that someone will learn where they are and target them. Their plan is to save money so that they can travel back to the United States to seek asylum again. "We didn't want to go back to Haiti," Wilson has said. "My wife especially didn't want to return because of what happened to her. There was nothing left in Haiti for us. There is insecurity, kidnappings, and no money. Haiti is in a very difficult situation right now and that's why I resisted getting on the plane."

D. Plaintiff Jacques Doe

Jacques used to be a trade student and worked in construction before he was forced to flee

Haiti in 2019. A gang threatened his life after he refused their recruitment efforts and reported them to the police. Although the police arrested several gang members based on Jacques's tip, a neighbor told the gang what Jacques had done, and the gang started threatening his life. The death threats continued even when he tried to escape by moving out of the city, into the countryside.

232. Fearing for his life, Jacques fled Haiti for Brazil. He then decided to seek asylum in the United States. The journey was difficult and took many days, including some days when Jacques walked up to 40 miles at a stretch.

233. When he finally arrived in Del Rio on or about September 17, 2021, U.S. officials gave Jacques a numbered ticket. Other asylum seekers in the CBP Encampment told him that if officials called his number, he would need to identify himself to them. Although Jacques knew that people whose numbers were called were taken to prison, he thought that in prison he would be able to ask for a lawyer and get an interview with an immigration official, who would hear why he left Haiti and decide whether he could stay in the United States. He spent approximately one week in the CBP Encampment, waiting for his number to be called. Because officers called ticket numbers at all hours of the night and day, he often stayed awake at night so that he would not miss his number being called.

234. While in the CBP Encampment, Jacques and other asylum seekers had no choice but to sleep on the ground. Some resorted to cleaning themselves in the river because there was no other option, but he saw people get sick from the river water. "A lot of people were sick. That's what shocked me the most." Apart from the riverbank, U.S. officials typically did not allow Jacques or others to go anywhere else. But there was not enough food in the encampment: "People were starving there." During the week Jacques spent in Del Rio, U.S. officials gave him only two small sandwiches and two bottles of water per day. The bottles of water were left out in the hot sun, so whenever he got one, the water was so hot it burned his mouth. When Jacques asked for more food, U.S. officials turned him away.

After approximately one week in the CBP Encampment, U.S. officials called Jacques's ticket number in the middle of the night. He was relieved to have his number called, because he

thought his chance to ask for asylum had finally come.

235. Instead, Jacques was sent to two detention facilities. U.S. officials conducted a short interview and took his biometrics, but at no point did they ask him if he was afraid to return to Haiti or if he intended to seek asylum in the United States; nor was he allowed to ask questions or say anything other than answer the officials' questions. At the second detention facility, the officials did not provide Jacques with bedding, a change of clothing, or an opportunity to shower or brush his teeth. Jacques slept on the floor with around thirty other individuals. Generally, he was given only two pieces of bread and two water bottles each day.

236. After Jacques had been detained for approximately four days at the second facility, U.S. officials woke him up at midnight and placed him on a bus. They refused to tell Jacques where they were being taken. When Jacques asked whether he was being taken back to Haiti, U.S. officials said no. "They lied to us." Jacques did not realize he was being expelled to Haiti until he was shackled with chains across his ankles, thighs, and hands and put on the airplane. "It was absolutely terrible; I couldn't do anything. The situation made me cry. I felt helpless." When he realized that he was being deported, Jacques tried to tell officials on the plane that he could not return to Haiti because he faced danger there. But the officials said there were too many Haitians in the United States, so he had to go back.

237. When Jacques landed in Haiti, he was terrified that the gang would find out he was back and carry out their death threats. He immediately went into hiding, where he has been ever since, because he does not currently have enough money to leave Haiti. As a result, even though he got sick with a bad flu he contracted after being expelled, he has not been able to get any medical treatment. Because his life is in danger, Jacques plans to travel to the United States to seek asylum again.

E. Plaintiffs Esther and Emmanuel Doe

238. Esther fled Haiti in 2017 due to threats to her life because of her family's political connections. After Esther's family suffered home invasions and threats of violence from a gang supporting a rival political party, Esther's father decided to send her to Chile for her own safety.

Emmanuel joined her there in 2018.

239. Esther and Emmanuel lived in Chile and had a baby there. They struggled to survive in Chile, where they were unable to obtain permanent residence, and also faced repeated threats and extortion from drug dealers who targeted them because they were Haitian. Esther and Emmanuel decided to seek asylum in the United States, where they hoped that they could build a new life with their child.

240. On or about September 18, 2021, Esther, Emmanuel, and their then-fifteen month-old son crossed the U.S. border near Del Rio. When they arrived at the CBP Encampment, a U.S. immigration official gave them a numbered ticket. They observed that U.S. officials would call out numbers, and people with those numbers on their tickets would identify themselves and be taken away from the camp. Esther and Emmanuel believed that when their number was called, they could request the opportunity to remain in the United States.

241. In the CBP Encampment, the family slept on the ground and their son became sick with diarrhea and fever. U.S. officials distributed almost no baby-appropriate food, and Esther's son went hungry. Despite her fear of Mexican immigration officials, Esther crossed the river alone because she was desperate to find food for her sick and hungry son.

242. Esther bought what she could on the Mexico side of the river and tried to hurry back to the encampment. But when she was in the middle of crossing the river, she was charged by CBP officers on horseback yelling, "Go back to Mexico!" Although she shouted in English that she had a baby who was in the CBP Encampment, they told her "no, go back to Mexico." She had to run backwards towards Mexico to avoid being trampled by the horses. It was only because the officers then turned their horses to chase other migrants in the river that Esther was able to pass by them and reunite with her family.

243. For several more days in the encampment, Esther, Emmanuel, and her family slept on the ground and went hungry. Her son had constant diarrhea and developed a high fever. Eventually Esther's son was so ill that she twice sought help at a medical tent where there were personnel who appeared to be doctors. Visiting the doctors was an incredibly hurtful experience

for Esther, because the medical personnel treated her baby "like he was nothing." Instead of paying attention to and treating her son, they kept taunting her by asking Esther when her number would be called so that she would be put in jail and then deported. Eventually they gave her some liquid drops and some ice gel packs for his fever, but they did not appear to help.

244. Esther and Emmanuel saw the numbers in the encampment dwindle as people's numbers were called and they were taken away. Finally, Esther and Emmanuel were awoken early in the morning by officials calling for people to get on the "last" bus. It was clear that officials were trying to clear the encampment. But they were afraid of being sent back to Haiti because of the threats of violence made against their family, and knew it was safer for them to cross the river back to Mexico than to get on the bus and be expelled.

245. Esther, Emmanuel, and their son are currently living in precarious conditions in Mexico. Emmanuel has already been attacked a knifepoint, and Esther feels very visible, and vulnerable, as a Haitian in the Mexican town where they are renting a room. They plan on waiting until conditions are safer before returning to the United States to seek asylum.

F. Plaintiffs Samuel and Samentha Doe

246. Samuel is a primary school teacher and credit union employee who fled Haiti in 2016 after being attacked by a rival political party and receiving death threats by armed men at his workplace. After seeking safety in Chile, he saved enough money for his wife Samentha and their son to join him. Samuel, Samentha, and their family struggled in Chile, where they faced discrimination. Around July 2021, Samuel, Samentha, their eight-year-old son, and their one-year-old daughter, who was born in Chile, began their journey to the United States to seek asylum.

247. On or about September 16, 2021, the family arrived at the CBP Encampment. U.S. officials gave Samuel a numbered ticket and told him to go with the officials when his number was called. He believed that would be his opportunity to speak with U.S. immigration officials.

248. While in the CBP Encampment, Samuel, and his family struggled. Because there was no shelter from the extreme sun, wind, and large amounts of dirt in the air, people had to search for branches to create shade for themselves. His family slept on the ground.

249. The family also suffered from the lack of food at the encampment. When Samuel and his family first arrived, there was no food available for them to eat. As U.S. officials began handing out food and water, Samuel waited in line with hundreds of others to receive a bottle of water and a piece of bread or tortilla. As he waited for food, Samuel observed that the officials distributing the food taunted the asylum seekers by throwing water bottles at them. Samuel recalls, "It was humiliating. It felt like at home how you would throw food for chickens on the floor. That's how they treated us." The food that his family received in the CBP Encampment was not enough to sustain them. "It felt like they did enough so we wouldn't die but no more than that. It felt like a nightmare."

250. Because of the wind and large amounts of dirt in the air, Samuel and Samentha's young daughter became very sick with diarrhea, vomiting, and coughing. She became so ill that Samuel pleaded for help from a U.S. official at the encampment. The official said they could not help them and suggested Samuel give his daughter water.

251. As Samuel and his family waited longer in the CBP Encampment, they began to fear what would happen when their number was called. Samuel and Samentha had heard that people who had their numbers called went to be processed by immigration officials thinking that they were going to be released, but instead were sent back to Haiti. Samuel knew that if his family was returned to Haiti, they would die there.

252. Samuel took their eight-year-old son to the river to clean himself. Officers on horseback showed up and chased after the migrants by the river. Terrified, Samuel's son ran from the horses, fell, and injured his eye, which then became painfully inflamed. After seeing mounted officers charge at migrants returning from Mexico with food, Samuel knew that his family had to leave the CBP Encampment as quickly as possible to protect his children.

253. Given how ill their children were, the lack of food in the CBP Encampment, their encounter with mounted officers, and the possibility of being expelled to danger in Haiti, Samuel and Samentha felt their only choice was to cross the river back into Mexico. At no point while they were in the CBP Encampment did Samuel or Samentha have an opportunity to tell U.S.

immigration officials that they were afraid to return to Haiti and wished to seek asylum.

254. After initially staying at a shelter in Mexico, Samuel, Samentha, and their children were expelled from the shelter. They continue to live in precarious conditions in Mexico. Samuel's son suffers from the painful eye condition he developed in the CBP Encampment. Samuel and Samentha fear that if their family returns to Haiti, they will be killed. "If we were to go back to Haiti, we are 99.9 percent dead. So there was no way I would take that risk." They hope to seek asylum in the United States and plan to return to the border when they can safely do so.

G. Plaintiff Paul Doe

255. Paul was pursuing a degree in economics in Haiti but was forced to flee the country in 2017 after a gang associated with a dominant political party threatened his life because Paul refused to work for them to pay off an uncle's debt. The gang had killed Paul's uncle when he could not repay money he owed. Opposed to the gang's activities and unwilling to engage in their violence, Paul fled Haiti to seek safety in Chile. "I had to leave Haiti because I either had to be involved with the gang, or die. Those were my only two options."

256. Paul traveled from Chile to the United States to seek asylum because it remains his hope that he can live without constant fear that he or his family might be attacked or killed. On or about September 17, 2021, Paul arrived at the CBP Encampment and was directed to a tent with officers who gave him a ticket with a number on it. They told him to wait under the bridge until his number was called. Other asylum seekers explained that Paul would be taken on a bus to a detention center when his number was called.

257. For approximately the next week, Paul waited in the CBP Encampment for his number to be called. The conditions in the encampment were some of the hardest he has ever endured. Paul was forced to sleep on the ground in the dust without even a blanket. For the first several days Paul was at the CBP Encampment, officials gave him no more than a bottle of water and a tortilla each day. Often the water was undrinkable because it had been left sitting out in the sun. Around the fifth day, the officials began giving out a portion of rice and beans with the tortilla, and sometimes a box of juice. The food, however, gave him diarrhea, and when he sought medical

treatment, a doctor only gave him a pill that had no effect. Paul soon noticed it appeared to be the same pill that the doctors gave to anyone seeking care. Although he continued to feel ill, Paul did not seek medical care because everyone was given the same pill, regardless of symptoms.

258. Paul eventually became so hungry that he decided to cross the river to get food in Mexico. He also hoped to get medicine for a friend's sick baby. As Paul reached the river, he observed U.S. officers beating asylum seekers returning to the CBP Encampment and pushing them back into the river. When Paul attempted to cross using a rope that had been set up to aid migrants through the river, officers deliberately cut the rope, threw it back into the river, and told Paul and others that they could not cross. Paul was forced to walk and swim downstream until he could cross safely.

259. Paul was never asked by U.S. immigration officials if he had a fear of return to Haiti or provided an opportunity to request asylum while in the CBP Encampment. As Paul started seeing people leave the encampment, he understood that they were being deported. A U.S. official told him that "the U.S. is not a money tree – you can't just come here and get money."

260. Paul knew that if he were to be sent back to Haiti, the gang would kill him. He felt that he had no choice but to go back to Mexico and wait there for another opportunity to seek asylum in the United States. What troubles Paul most about his experience in the CBP Encampment is that a country he has dreamed about since he was child had humiliated him and so many others from his country, rather than providing them refuge.

261. In Mexico, Paul regularly encounters discrimination. It was incredibly difficult for him to find a room to rent—after being denied by approximately ten people advertising rooms for rent, he finally found someone willing to rent to him. Paul has also been unable to find work. He has applied to approximately six workplaces that advertised they were hiring, but when Paul applied, he was told they were no longer hiring. Without a job, Paul worries about how he will survive. He has been stopped by the police multiple times and questioned about who he is and where he is going. He now avoids going outside as much as possible.

VII. Haitian Bridge is harmed by the application of the Title 42 Process and Haitian Deterrence Policy in Del Rio.

262. The application of the Title 42 Process and Haitian Deterrence Policy to Haitian asylum seekers in the CBP Encampment has impaired Haitian Bridge's normal programming and resulted in a diversion of organizational and programmatic resources.

263. The abuse of Haitians in Del Rio has put severe strain on Haitian Bridge's ability to carry out its work and mission. Haitian Bridge is one of the primary organizations at the center of the massive humanitarian and legal response to the detention, inhumane treatment, and unlawful expulsion of thousands of Haitian and other Black migrants in the CBP Encampment pursuant to the Title 42 Process and Haitian Deterrence Policy. Haitian Bridge diverted six of its nine full-time staff and one full-time contractor to respond to the crisis. A majority of these staff continue to devote significant time to issues flowing from Defendants' application of these policies in Del Rio and have not been able to resume normal work on Haitian Bridge's existing projects.

264. Following media reporting that thousands of Haitians were coming to Del Rio to seek immigration relief, Haitian Bridge's Executive Director Guerline Jozef arrived in Del Rio on September 18, 2021. She was the first responder to the crisis; no other humanitarian organization was present on the ground at that time.

265. As the first responder, and as a Haitian Creole-speaking organization with Haitian staff, Haitian Bridge was compelled to devote substantial resources to provide and coordinate assistance to the thousands of migrants in Del Rio. Haitian Bridge quickly sent staff to Del Rio. Although Defendants did not allow any of these staff to enter the CBP Encampment to directly assist asylum seekers, Haitian Bridge's staff worked quickly to organize an on-the-ground emergency response. Haitian Bridge coordinated culturally sensitive humanitarian services and transportation for individuals permitted to leave Del Rio and arranged support in Haiti to receive the thousands of asylum seekers being expelled there. It also coordinated communications inquiries with the media and received members of Congress, Haitian-American elected officials, and members of Haitian consulates seeking to protect the interests of Haitian nationals. Haitian Bridge staff organized and led advocacy efforts with the federal government in an unsuccessful

attempt to slow or stop expulsion flights and to develop a more humane response that safeguarded the rights of Haitians in the CBP Encampment and in detention facilities.

266. On September 24, 2021, Secretary Mayorkas announced that there were no longer any migrants in the CBP Encampment. But DHS Defendants' mass expulsion of thousands of asylum seekers did not end Haitian Bridge's response work. Even after the camp was cleared, Haitian Bridge staff continued to receive delegations of Haitians and other Black leaders in Del Rio. The numerous human rights violations that Haitian Bridge staff observed at and around the CBP Encampment, including physical assaults and the denial of basic necessities to Haitian asylum seekers, compelled Haitian Bridge staff to travel to Ciudad Acuña and elsewhere in Mexico to interview individuals and gather evidence of these human rights violations.

267. Haitian Bridge continues to divert resources in response to the government's abusive actions. Haitian Bridge continues to provide legal and humanitarian support to affected individuals and respond to media inquiries and speaking requests related to Del Rio.

268. This response effort continues to take a toll on Haitian Bridge, its staff, and their ability to advance Haitian Bridge's mission. Several Haitian Bridge staff members worked in excess of 80–100 hours a week for several weeks, and lost several nights of sleep because of additional work from the crisis in Del Rio. Many of Haitian Bridge's core projects have been delayed since the government began detaining and expelling asylum seekers from the CBP Encampment in min-September. To date, Haitian Bridge staff members responding to the abuses in Del Rio, particularly Black staff members, have suffered and continue to suffer trauma from the brutal anti-Black racist treatment and injustice they witnessed in Del Rio.

269. The need to respond on an emergency basis to the treatment of Haitian migrants at Del Rio has impaired Haitian Bridge's ability to keep up with existing demands for its services. For example, a key program component of Haitian Bridge's work involves assisting Haitians in the United States with their applications for Temporary Protected Status, which protects individuals from deportation and enables them to receive work authorization and permission to travel. But this work has largely stalled since September 2021. Haitian Bridge has had to postpone

several clinics and has not been able to move forward work in preparing a manual and trainings to enable lawyers and law school clinics to provide this assistance around the country. Haitian Bridge has also not been able to complete dozens of TPS applications, with serious adverse consequences for their clients, who consequently have been unable to receive work authorization.

270. The events at the CBP Encampment and aftermath also strained Haitian Bridge's legal support and case management capacity. Haitian Bridge was forced to organize a national hotline to coordinate efforts and respond to hundreds of calls from Haitian asylum seekers in detention centers across the country and who had just been released from the Del Rio Encampment. In order to scale and staff this hotline, Haitian Bridge had to stall several ongoing projects.

CLASS ALLEGATIONS

271. Individual Plaintiffs bring this action pursuant to Federal Rules of Civil Procedure 23(b)(1) and (b)(2) on behalf of themselves and a class of all other persons similarly situated. The proposed class is defined as all Haitian, or presumed Haitian, individuals who (1) sought access to the U.S. asylum process[15] in or around the CBP Encampment near the Del Rio Port of Entry between September 9 and 24, 2021, and (2) were denied access to the U.S. asylum process.

272. Individual Plaintiffs seek to represent the class for all claims.

273. This action meets all Rule 23(a) prerequisites for maintaining a class action.

274. The class is so numerous that joinder of all members is impracticable. *See* Fed. R. Civ. P. 23(a)(1). Between approximately September 9 to 24, 2021, at least 15,000 migrants, the vast majority of whom were Haitian or Black and seeking asylum in the United States, arrived at the U.S. border and were detained in the CBP Encampment near the Del Rio Port of Entry. DHS Defendants used the Title 42 Process to expel at least 10,000 asylum seekers in the encampment

[15] As used in the proposed class definition, "asylum" and "asylum process" are understood to encompass the statutory and regulatory processes by which any noncitizen may seek all relevant forms of non-refoulement relief available under U.S. immigration laws, including asylum, withholding of removal, and relief under the Convention Against Torture. *See* 8 U.S.C. §§ 1158, 1231, 1231 note.

to Haiti or Mexico. Each of these individuals was deprived of access to the U.S. asylum process by Defendants' Title 42 Process and the Haitian Deterrence Policy. Joinder is made further impracticable because class members expelled to Haiti or Mexico generally do not have stable living conditions.

275. There are questions of law and fact that are common to the class. *See* Fed. R. Civ. P. 23(a)(2). Class members allege common harms resulting from adoption and application of Defendants' Title 42 Process and the Haitian Deterrence Policy: all class members were seeking access to the U.S. asylum process, processed in the field pursuant to the CBP Capio Memo, deprived of basic necessities in the CBP Encampment, expelled to Haiti or Mexico, and denied legal rights, including their right to access the U.S. asylum process.

276. All class members assert the same legal claims. These claims raise numerous questions of fact and law common to all class members, including: whether Defendants are engaged in the conduct alleged herein; whether class members are treated differently from similarly situated asylum seekers based on class members' race or nationality in violation of the Fifth Amendment; whether the application of the Title 42 Process and Haitian Deterrence Policy to class members is motivated by discriminatory intent on the basis of race or national origin, in violation of the Fifth Amendment; whether class members are deprived of their substantive and procedural due process rights under the Fifth Amendment by Defendants' Title 42 Process and Haitian Deterrence Policy; whether Defendants fail to consider important issues, including the right to non-refoulement and the danger to human life and welfare resulting from field processing asylum seekers, when issuing and implementing the Title 42 Process and Haitian Deterrence Policy; whether Defendants fail to consider important issues or consider improper factors when applying the Title 42 Process and Haitian Deterrence Policy to class members; whether 42 U.S.C. § 265 authorizes the summary expulsion of asylum seekers; whether the Title 42 Process applied to class members conflicts with the INA; whether the Title 42 Process applied to class members conflicts with FARRA; whether the summary expulsion of class members pursuant to the Title 42 Process violates the United States' non-refoulement obligations under the INA; whether class

members suffer harm as a result of Defendants' conduct; and whether class members are entitled to equitable and declaratory relief. These shared common facts will ensure that judicial findings regarding the legality of the challenged practices will be the same for all class members.

277. Individual Plaintiffs' claims are typical of the class's claims. *See* Fed. R. Civ. P. 23(a)(3). Individual Plaintiffs and class members raise common legal claims and are united in their interest and injury. All Individual Plaintiffs, like class members, are Haitians who crossed the U.S. border at Del Rio to seek asylum and were deprived of access to the U.S. asylum process by Defendants' actions. Like class members, Individual Plaintiffs were subjected to Defendants' Title 42 Process and the Haitian Deterrence Policy: they were processed in the field pursuant to the CBP Capio Memo, subjected to dire conditions and abuse in the CBP Encampment, and expelled to Haiti or Mexico without the opportunity to apply for asylum.

278. Individual Plaintiffs are also adequate representatives of the class. *See* Fed. R. Civ. P. 23(a)(4). Individual Plaintiffs and all class members share a common interest in ensuring that they are permitted to seek asylum under U.S. immigration laws without having their constitutional or statutory rights violated by Defendants. Individual Plaintiffs also seek the same relief as the members of the class they represent. Individual Plaintiffs and class members seek, among other things, an order: (1) declaring that the application of Defendants' Title 42 Process and Haitian Deterrence Policy to detain, process, and expel class members is unlawful and violates class members' constitutional and statutory rights, (2) enjoining the continued application of these policies to class members, and (3) enjoining Defendants to return unlawfully expelled class members to the United States so they can meaningfully access the U.S. asylum process. Individual Plaintiffs have no interest that is now or may be antagonistic to the interests of the class and they will fairly and adequately protect the interests of class members as they defend their own rights.

279. Individual Plaintiffs are represented by attorneys from Justice Action Center, Innovation Law Lab, and Haitian Bridge Alliance. Counsel have demonstrated a commitment to protecting the rights and interests of noncitizens and, together, have considerable experience representing immigrants in complex and class action litigation in federal court aimed at systemic

government misconduct.

280. The class likewise meets the requirements to be certified under Rule 23(b).

281. The class may be certified under Rule 23(b)(1) because prosecution of separate actions by individual class members would create the risk of inconsistent or varying adjudications and would create incompatible standards of conduct for Defendants.

282. The class may also be certified under Rule 23(b)(2). Defendants have acted, have threatened to act, and will act on grounds generally applicable to the class by subjecting them to the unlawful application of the Title 42 Process and the Haitian Deterrence Policy, including field processing under the CBP Capio Memo, expulsion to Haiti and Mexico, and obstruction of access to the U.S. asylum process. Given Defendants' common treatment of class members, final injunctive and declaratory relief is appropriate as to the class as a whole.

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF
Violation of the Due Process Clause of the Fifth Amendment (Equal Protection)
All Plaintiffs Against President Biden and DHS Defendants

283. Plaintiffs reallege and incorporate by reference each allegation contained in the preceding paragraphs as if set forth fully herein.

284. The Due Process Clause of the Fifth Amendment to the U.S. Constitution prohibits the federal government from denying to any person equal protection of the laws. U.S. Const. Amend. V.

285. The Due Process Clause applies to all "persons" on United States soil and thus applied to Individual Plaintiffs and similarly situated individuals during the period they were subjected to the Title 42 Process in the United States, including field processing pursuant to the CBP Capio Memo, as well as Defendants' Haitian Deterrence Policy.

286. Defendants' Title 42 Process and Haitian Deterrence Policy were implemented against Individual Plaintiffs and similarly situated individuals without regard for their health, welfare, humanitarian needs, or statutory rights. The implementation of these policies resulted in

their deprivation of basic necessities such as food, water, shelter, and medical care; the imposition of physical and psychological abuse; and the use of threats, violence, and racial slurs.

287. The adoption and implementation of the Title 42 Process and Haitian Deterrence Policy against Individual Plaintiffs and similarly situated individuals by President Biden, his staff, DHS Defendants, and DHS personnel departed from standard procedures and was motivated at least in part by discriminatory purpose based on race and presumed national origin.

288. Discrimination on the basis of race or presumed national origin in the treatment of migrants in the United States is not necessary to fulfill a compelling government interest.

289. There is a substantial risk that Individual Plaintiffs will again be subject to discriminatory treatment based on race and presumed national origin as a result of President Biden and DHS Defendants' adoption and implementation of the Title 42 Process and Haitian Deterrence Policy.

290. Defendants' conduct has impaired Haitian Bridge's programming and forced Haitian Bridge to divert resources to assist the thousands of Haitian asylum seekers harmed by Defendants' conduct.

291. Defendants' violations of the Due Process Clause cause ongoing harm to Plaintiffs.

SECOND CLAIM FOR RELIEF

Violation of the Due Process Clause of the Fifth Amendment (Substantive Due Process)
All Plaintiffs Against President Biden and DHS Defendants

292. Plaintiffs reallege and incorporate by reference each allegation contained in the preceding paragraphs as if set forth fully herein.

293. The Due Process Clause of the Fifth Amendment to the U.S. Constitution prohibits the federal government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. *See* U.S. Const. Amend. V.

294. The Due Process Clause applies to all "persons" on United States soil and thus applied to Individual Plaintiffs during the period in which they were subject to the Title 42 Process in the United States, including field processing pursuant to the CBP Capio Memo, as well as

Defendants' Haitian Deterrence Policy.

295. The conduct of President Biden, his staff, DHS Defendants, and DHS personnel staff in adopting and enforcing the Haitian Deterrence Policy against Individual Plaintiffs, including enforcing the Title 42 Process in Del Rio in a manner indifferent to humanitarian concerns, expelling thousands of Haitian asylum seekers as quickly as possible, and taking steps to shield such actions from accountability, was gravely unfair and so egregious and outrageous that it may fairly be said to shock the conscience.

296. DHS Defendants and President Biden therefore have violated Individual Plaintiffs' substantive due process rights.

297. There is a substantial risk that Individual Plaintiffs and similarly situated individuals will again be subject to abusive and unconscionable treatment enabled by DHS Defendants and President Biden, including in connection with Defendants' ongoing Title 42 Process and Haitian Deterrence Policy.

298. Defendants' conduct has impaired Haitian Bridge's programming and forced Haitian Bridge to divert resources to assist the thousands of Haitian asylum seekers harmed by Defendants' conduct.

299. Defendants' violations of the Due Process Clause cause ongoing harm to Plaintiffs.

THIRD CLAIM FOR RELIEF

Violation of the Due Process Clause of the Fifth Amendment (Special Relationship)
All Plaintiffs Against DHS Defendants

300. Plaintiffs reallege and incorporate by reference each allegation contained in the preceding paragraphs as if set forth fully herein.

301. Under the Fifth Amendment to the U.S. Constitution, Defendants have an affirmative duty to provide for an individual's basic human needs when they "take[] that person into [their] custody and hold[] him there against his will," thereby creating a "special relationship" with that individual. *DeShaney v. Winnebago Cnty. Svcs.*, 489 U.S. 189, 199-200 (1989). When

the government "so restrains an individual's liberty that it renders him unable to care for himself," it assumes responsibility for that individual's safety and well-being. *Id.*

302. When the government has a special relationship with an individual, "'governmental "deliberate indifference" will shock the conscience sufficiently' to establish a substantive due process violation." *Harvey v. D.C.*, 798 F.3d 1042, 1050 (D.C. Cir. 2015).

303. Through their processing of Individual Plaintiffs at the CBP Encampment pursuant to the CBP Capio Memo and the Haitian Deterrence Policy, DHS Defendants and DHS personnel created a "special relationship" with Individual Plaintiffs by restraining their liberty, keeping them in DHS Defendants' custody, and rendering them unable to care for themselves. DHS Defendants therefore owed Individual Plaintiffs a heightened duty of care and protection.

304. By depriving Individual Plaintiffs in their custody of basic human needs such as adequate food, water, shelter, and medical care, as well as of the ability to act on their own behalf to meet these needs themselves, DHS Defendants and DHS personnel have acted with deliberate indifference to Plaintiffs' basic human needs and engaged in "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998). The conditions in the CBP Encampment were not reasonably related to a legitimate goal and therefore unconstitutional.

305. DHS Defendants therefore have violated Individual Plaintiffs' substantive due process rights.

306. There is a substantial risk that Individual Plaintiffs will again be subject to abusive and unconscionable treatment in DHS Defendants' custody, including in connection with DHS Defendants' ongoing enforcement of the Title 42 Process and Haitian Deterrence Policy.

307. DHS Defendants' conduct has impaired Haitian Bridge's programming and forced Haitian Bridge to divert resources away from its programs to assist the thousands of Haitian asylum seekers harmed by Defendants' conduct.

308. DHS Defendants' violations of the Due Process Clause cause ongoing harm to

Plaintiffs.

FOURTH CLAIM FOR RELIEF
Violation of the Due Process Clause of the Fifth Amendment (Procedural Due Process)
All Plaintiffs Against All Defendants

309. Plaintiffs reallege and incorporate by reference each allegation contained in the preceding paragraphs as if set forth fully herein.

310. The Due Process Clause of the Fifth Amendment to the U.S. Constitution prohibits the federal government from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. Amend. V.

311. Congress has guaranteed asylum seekers, including Individual Plaintiffs, a protected interest in applying for asylum, withholding of removal, and relief under the Convention Against Torture, and in not being removed to countries where they face danger, persecution, and potential loss of life. *See* 8 U.S.C. §§ 1158, 1231.

312. Individual Plaintiffs are thus entitled under the Due Process Clause of the Fifth Amendment to a meaningful opportunity to establish their potential eligibility for asylum and access other forms of relief from removal.

313. By denying Individual Plaintiffs access to the asylum process and access to other relief from removal, Defendants' conduct violates procedural due process.

314. Further, Defendants have adopted and implemented the Title 42 Process and Haitian Deterrence Policy without adequate safeguards against expulsions of asylum seekers to countries where it is more likely than not that the asylum seeker will face persecution.

315. As a result of Defendants' conduct, Individual Plaintiffs have been harmed by the denial of their access to the asylum process. Individual Plaintiffs have also been harmed by being expelled to Haiti or Mexico where they face danger.

316. Defendants' conduct has impaired Haitian Bridge's programming and forced Haitian Bridge to divert resources away from its programs to assist the thousands of Haitian asylum seekers harmed by Defendants' conduct.

317. Defendants' violations of the Due Process Clause cause ongoing harm to Plaintiffs.

FIFTH CLAIM FOR RELIEF
Violation of the Administrative Procedure Act 5 U.S.C. § 706(2)
Not in Accordance with Law and in Excess of Statutory Authority 42 U.S.C. § 265, 8 U.S.C. §§ 1158, 1231 (Title 42 Process)
All Plaintiffs Against All Defendants Other Than President Biden

318. Plaintiffs reallege and incorporate by reference each allegation contained in the preceding paragraphs as if set forth fully herein.

319. Under the APA, a court "shall . . . hold unlawful and set aside agency action" that is "not in accordance with law;" "contrary to constitutional right;" "in excess of statutory jurisdiction, authority, or limitations;" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D).

320. The Title 42 Process must be set aside because Defendants' issuance, administration, and application of the Title 42 Process is "not in accordance with law," "contrary to constitutional right," "in excess of statutory . . . authority," and "without observance of procedure required by law" in at least the following ways:

Contrary to the Public Health Service Act, 42 U.S.C. § 265.

321. Defendants have relied on Title 42 of the U.S. Code, specifically Section 265, for the purported authority to issue, administer, and apply the public health orders, regulations, and memoranda underlying the Title 42 Process.

322. Title 42 of the U.S. Code and Section 265 are public health statutes and do not authorize Defendants to deny asylum seekers an opportunity to access statutory and procedural protections afforded under U.S. law, including the INA. *See* 8 U.S.C. §§ 1158, 1231.

323. Title 42 of the U.S. Code and Section 265 likewise do not authorize Defendants to expel asylum seekers from the United States or to deny asylum seekers an opportunity to access statutory and procedural protections to non-refoulement under U.S. law, including the INA.

324. Defendants have applied the Title 42 Process to expel Haitian asylum seekers in Del Rio, including Individual Plaintiffs, from the United States without affording them an

opportunity to access statutory and procedural protections under U.S. law.

Contrary to the Immigration and Nationality Act, 8 U.S.C. § 1158 (Asylum).

325. The INA provides that any noncitizen "who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such [noncitizen's] status, may apply for asylum . . . ." 8 U.S.C. § 1158(a)(1).

326. Defendants have applied the Title 42 Process to prevent Haitian asylum seekers in Del Rio, including Individual Plaintiffs, from applying for asylum or otherwise accessing the statutory and procedural protections for asylum seekers under the INA and applicable U.S. law.

Contrary to the Immigration and Nationality Act, 8 U.S.C. § 1231 (Withholding of Removal).

327. The international law principle of non-refoulement provides that a country has an obligation to not expel or return an individual to a country where they have a well-founded fear of persecution or serious harm.

328. The INA's withholding of removal provision codifies the United States' duty of non-refoulement. Under the INA, the United States may not remove an individual to a country where it is more likely than not that the individual's "life or freedom would be threatened in that country because of [their] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

329. Defendants have applied the Title 42 Process to prevent Haitian asylum seekers in Del Rio, including Individual Plaintiffs, from accessing their substantive rights and any process for requesting withholding of removal under the INA and applicable U.S. law, and to expel Individual Plaintiffs without access to this mandatory safeguard. Further, Defendants have adopted and implemented the Title 42 Process without adequate safeguards against expulsions of asylum seekers to countries where it is more likely than not that they will face persecution.

Contrary to the Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. § 1231 Note (Convention Against Torture).

330. The Foreign Affairs Reform and Restructuring Act of 1998 implements the United States' non-refoulement duties set forth in Article 3 of the Convention Against Torture. In relevant

part, FARRA prohibits the United States from expelling an individual to a country where it is more likely than not that they will be in danger of being tortured. *See* 8 U.S.C. § 1231 note.

331. Defendants have applied the Title 42 Process to prevent Haitian asylum seekers in Del Rio, including Individual Plaintiffs, from meaningfully accessing withholding of removal under FARRA. Further, Defendants have adopted and implemented the Title 42 Process without adequate safeguards against expulsions of asylum seekers to countries where it is more likely than not that the asylum seeker will face torture. Defendants have applied the Title 42 Process to expel asylum seekers, including Individual Plaintiffs, without access to this mandatory safeguard.

***Ultra Vires* and Contrary to the Immigration and Nationality Act, 8 U.S.C. §§ 1225, 1229a (Removal of Noncitizens).**

332. Congress created the exclusive means for removing a noncitizen from the United States in the INA.

333. As a general matter, removal proceedings before an immigration judge are the "sole and exclusive procedure" for determining whether an individual may be removed from the United States. 8 U.S.C. §§ 1229a(a)(3). These proceedings include mandatory safeguards for noncitizens who fear removal. *Id.*

334. Defendants have implemented the Title 42 Process as a means of removing noncitizens that is not set forth in or subject to the INA. Defendants purport to apply the Title 42 Process outside of U.S. immigration laws and the sole Congressionally authorized procedures for removal set forth in the INA.

335. Defendants have applied the Title 42 Process to expel Haitian asylum seekers in Del Rio, including Individual Plaintiffs, from the United States without allowing them to access the statutory and procedural protections relating to the removal of noncitizens under the INA and applicable U.S. law.

* * *

336. For each of these reasons, Defendants' application of the Title 42 Process to Individual Plaintiffs is *ultra vires* and contrary to law.

337. Defendants' issuance, administration, and application of the Title 42 Process constitute final agency action within the meaning of the APA.

338. Defendants' actions have caused, and will continue to cause, ongoing harm to Plaintiffs. Among other things, Defendants' application of the Title 42 Process to Individual Plaintiffs has harmed them by denying them a meaningful opportunity to apply for asylum and other relief as required by U.S. law and to access procedural protections to which they and other asylum seekers are entitled under the INA, FARRA, and other applicable U.S. law.

339. Defendants' application of the Title 42 Process to Haitian and presumed Haitian asylum seekers, including Individual Plaintiffs, also harms Haitian Bridge by impairing its programming and forcing it to divert resources away from its programs to assist the thousands of Haitian asylum seekers harmed by Defendants' conduct.

340. Plaintiffs, who have no adequate remedy at law, seek immediate review under the APA and declaratory and injunctive relief restraining Defendants from continuing to implement the Title 42 Process against Individual Plaintiffs and similarly situated Haitian asylum seekers.

SIXTH CLAIM FOR RELIEF
Violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)
Arbitrary and Capricious Agency Action (Title 42 Process)
All Plaintiffs Against All Defendants Other than President Biden

341. Plaintiffs reallege and incorporate by reference each allegation contained in the preceding paragraphs as if set forth fully herein.

342. Under the APA, a court "shall . . . hold unlawful and set aside agency action" that is "arbitrary [and] capricious." 5 U.S.C. § 706(2)(A).

343. Agency action is arbitrary and capricious where the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

344. Defendants' issuance, administration, and application of the Title 42 Process to Individual Plaintiffs and similarly situated asylum seekers is arbitrary and capricious, *see* 5 U.S.C. § 706(2)(A), in at least the following ways.

345. Defendants have not provided a reasoned explanation for their decision to apply the Title 42 Process to Haitian asylum seekers in Del Rio, including Individual Plaintiffs, and to expel such asylum seekers from the United States.

346. Defendants relied on improper considerations and factors Congress did not intend to be considered, including the use of a purported public health measure to deter immigration and restrict access to statutory and procedural protections guaranteed under U.S. immigration laws.

347. Defendants have entirely failed to consider important aspects of the problem when applying the Title 42 Process to Individual Plaintiffs. Among other factors, Defendants have failed to consider asylum seekers' fear of persecution or torture in the country to which they will be expelled; humanitarian exceptions to the Title 42 Process as provided for in the CDC Order; that their implementation of the Title 42 Process continues to place asylum seekers in congregate settings, contradicting its stated purpose; and the opinions of scientific experts that the Title 42 Process does not advance public health and in fact actually undermines public health.

348. Defendants also have failed to consider reasonable, less restrictive alternatives to applying the Title 42 Process to Individual Plaintiffs and Haitian asylum seekers in Del Rio. Among other alternatives, Defendants did not consider providing widely available COVID-19 testing or vaccinations to asylum seekers.

349. Defendants have also offered an explanation—public health— that runs counter to the evidence before the agency, as Defendants' own experts have warned that the Title 42 Process undermines public health.

350. Defendants' public health rationale is a pretextual means of restricting immigration and therefore is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

351. Defendants' issuance, administration, and application of the Title 42 Process

constitute final agency action within the meaning of the APA.

352. Defendants' actions have caused, and will continue to cause, ongoing harm to Plaintiffs. Among other things, Defendants' application of the Title 42 Process to Individual Plaintiffs has harmed them by denying them a meaningful opportunity to apply for asylum and other relief as required by U.S. law and to access procedural protections to which they and other asylum seekers are entitled under the INA, FARRA, and other applicable U.S. law.

353. Defendants' application of the Title 42 Process to Haitian and presumed Haitian asylum seekers, including Individual Plaintiffs, also harms Haitian Bridge by impairing its programming and forcing it to divert resources away from its programs to assist the thousands of Haitian asylum seekers harmed by Defendants' conduct.

354. Plaintiffs, who have no adequate remedy at law, seek immediate review under the APA and declaratory and injunctive relief restraining Defendants from continuing to implement the Title 42 Process against Individual Plaintiffs and similarly situated Haitian asylum seekers.

SEVENTH CLAIM FOR RELIEF
Violation of the Administrative Procedure Act, 5 U.S.C. § 706(1)
Unlawfully Withheld or Unreasonably Delayed Agency Action
All Plaintiffs Against Defendants CBP and ICE

355. Plaintiffs reallege and incorporate by reference each allegation contained in the preceding paragraphs as if set forth fully herein.

356. The APA provides that a court "shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

357. CBP officers have failed to take numerous discrete agency actions in connection with Defendant CBP's issuance, administration, and application of the Title 42 Process and implementation of the Haitian Deterrence Policy. Defendant CBP has unlawfully withheld or unreasonably delayed required agency action in at least the following ways:

Inspection and Asylum Referral Process

358. CBP officers have a discrete, mandatory duty to inspect all noncitizens and if "the

[noncitizen] indicates either an intention to apply for asylum . . . or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer." 8 U.S.C. §§ 1225(a)(3), (b)(1)(A)(i)-(ii); 8 C.F.R. § 235.3(b)(4).

359. CBP officers have failed to inspect Individual Plaintiffs and similarly situated Haitian and presumed Haitian asylum seekers in Del Rio. CBP and ICE personnel have also failed to refer Individual Plaintiffs and similarly situated asylum seekers in Del Rio for asylum interviews.

360. By refusing to allow asylum seekers, including Individual Plaintiffs, a meaningful opportunity to apply for asylum or to access any statutory and procedural protections afforded under the INA and applicable U.S. law to which they are entitled, Defendant CBP has unlawfully withheld and unreasonably delayed discrete agency actions mandated by statute.

Withholding of Removal

361. The INA and FARRA prohibit the United States from removing an individual to a country where it is more likely than not that they will face persecution or torture. *See* 8 U.S.C. § 1231(b)(3), note.

362. CBP officers have a discrete, mandatory duty to follow the procedures required by 8 U.S.C. § 1231(b)(3) and FARRA, *see* 8 U.S.C. § 1231 note, to determine whether a noncitizen faces a risk of persecution or torture and is therefore entitled to withholding of removal after full removal proceedings.

363. By refusing to follow those procedures, and thus refusing to allow asylum seekers, including Individual Plaintiffs, meaningful access to procedural protections mandated under the INA and FARRA withholding of removal provisions to which they are entitled, Defendant CBP has unlawfully withheld and unreasonably delayed discrete agency actions mandated by statute.

Removal under the INA

364. The INA sets forth the only processes established by Congress to remove noncitizens from the United States. *See* 8 U.S.C. §§ 1225(b)(1); 1229a; *see generally* 8 U.S.C. § 1101, *et seq.*

365. To the extent Defendants seek to remove asylum seekers, including Individual Plaintiffs, from the United States, CBP and ICE officers have a discrete, mandatory obligation to follow the statutory and procedural protections relating to the removal of noncitizens under the INA and applicable U.S. law.

366. By refusing to follow the removal procedures set forth in the INA, *see* 8 U.S.C. §§ 1225(b)(1); 1229, and therefore refusing to allow asylum seekers, including Individual Plaintiffs, meaningful access to statutory and procedural protections relating to the removal of noncitizens mandated by the INA to which they are entitled, Defendants CBP and ICE have unlawfully withheld and unreasonably delayed discrete agency actions mandated by statute.

* * *

367. CBP and ICE's failure to act as required by law, including the INA, FARRA, and other applicable U.S. law, is final agency action within the meaning of the APA.

368. CBP and ICE's failure to act as required by law has caused, and will continue to cause, ongoing harm to Plaintiffs. Among other things, Defendants CBP and ICE's failure to act as required by law has harmed Individual Plaintiffs by denying them a meaningful opportunity to apply for asylum and other relief as required under U.S. law and an opportunity to access procedural protections to which they and other asylum seekers are entitled under the INA, FARRA, and other applicable U.S. law.

369. CBP and ICE's failure to act also harms Haitian Bridge, which must divert resources away from its programs to assist the thousands of Haitian asylum seekers harmed by CBP and ICE's conduct.

370. Plaintiffs have no adequate alternative to review under the APA and thus seek review and an order compelling Defendants to take actions required by the INA, FARRA, and other applicable U.S. law pursuant to 5 U.S.C. § 706(1).

EIGHTH CLAIM FOR RELIEF
Violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)
Arbitrary and Capricious, An Abuse of Discretion, Not in Accordance with Law and In Excess of Statutory Authority 8 U.S.C. §§ 1158, 1231 (Haitian Deterrence Policy)
All Plaintiffs Against DHS Defendants

371. Plaintiffs reallege and incorporate by reference each allegation contained in the preceding paragraphs as if set forth fully herein.

372. DHS Defendants' Haitian Deterrence Policy subjects Individual Plaintiffs and similarly situated individuals to gross abuses, including the denial of basic human needs, dignity in government detention, access to counsel and to the asylum process, and the right to non-refoulement, in an effort to deter Haitian asylum seekers from coming to the United States.

373. DHS Defendants' issuance, administration, and application of the Haitian Deterrence Policy is arbitrary and capricious because DHS Defendants have failed to consider or factor in Plaintiffs' humanitarian needs or right to access the U.S. asylum process and to access counsel when seeking asylum in the United States; failed to articulate a reasoned explanation for the decision to deny Individual Plaintiffs and similarly situated individuals these rights; and provided an explanation so implausible that it could not be ascribed to agency expertise.

374. The Haitian Deterrence Policy is further arbitrary and capricious because in its adoption and implementation, DHS Defendants considered factors that Congress did not intend for them to consider when engaging with and intercepting asylum seekers.

375. Additionally, by adopting and implementing the Haitian Deterrence Policy, DHS Defendants have acted in a manner not in accordance with law, contrary to constitutional right, in excess of their statutorily prescribed authority, and without observance of procedure required by law in violation of section 706(2) of the APA. *See* 5 U.S.C. §§ 706(2)(A)-(D).

376. By adopting and implementing a policy that contravenes the right to apply for asylum and the right to non-refoulement enshrined in the INA, DHS Defendants act not in accordance with law. *See* 8 U.S.C. §§ 1158, 1231.

377. By adopting and implementing a policy that departs from standard procedures and was motivated at least in part by discriminatory purpose based on race and presumed national

origin, DHS Defendants also act contrary to constitutional right. *See* U.S. Const. Amend. V.

378. DHS Defendants' adoption and implementation of the Haitian Deterrence Policy constitute final agency action within the meaning of the APA.

379. DHS Defendants' actions have caused, and will continue to cause, ongoing harm to Plaintiffs. Among other things, DHS Defendants' application of the Haitian Deterrence Policy to Individual Plaintiffs has harmed them by denying them a meaningful opportunity to apply for asylum and other relief as required by U.S. law and to access procedural protections to which they and other asylum seekers are entitled under the INA, FARRA, and other applicable U.S. law.

380. DHS Defendants' application of the Haitian Deterrence Policy to Haitian and presumed Haitian asylum seekers, including Individual Plaintiffs, also harms Haitian Bridge by impairing its programming and forcing it to divert resources away from its programs to assist the thousands of Haitian asylum seekers harmed by DHS Defendants' conduct.

381. Plaintiffs, who have no adequate remedy at law, seek immediate review under the APA and declaratory and injunctive relief restraining DHS Defendants from continuing to implement the Haitian Deterrence Policy against Individual Plaintiffs and similarly situated Haitian asylum seekers.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

a. An order certifying a class, pursuant to Federal Rules of Civil Procedure 23(b)(1) and (b)(2),), of all Haitian, or presumed Haitian, individuals who (1) sought access to the U.S. asylum process in or around the CBP Encampment near the Del Rio Port of Entry between September 9 and 24, 2021 and (2) were denied access to the U.S. asylum process;

b. An order appointing the undersigned as class counsel;

c. An order declaring unlawful the Title 42 Process as applied to Individual Plaintiffs and class members;

d. An order declaring unlawful the Haitian Deterrence Policy as applied to Individual

Plaintiffs and class members;

e. An order declaring that Defendants' application of the Title 42 Process and the Haitian Deterrence Policy alleged herein deprives Plaintiffs and class members of their Fifth Amendment rights;

f. An order enjoining Defendants from applying the Title 42 Process to Individual Plaintiffs and class members;

g. An order enjoining Defendants from applying the Haitian Deterrence Policy to Plaintiffs and class members;

h. An order staying further expulsions of Individual Plaintiffs and class members under the Title 42 Process, removing them from the Title 42 Process, and affording them the statutory and procedural protections to which they are eligible under the U.S. asylum process and applicable laws, including access to asylum and withholding of removal under the INA and CAT withholding of removal under FARRA;

i. An order allowing each of the Individual Plaintiffs and class members to return to the United States and requiring Defendants to facilitate return, with appropriate precautionary health measures, so that Individual Plaintiffs may pursue their asylum claims in the United States;

j. An order awarding Plaintiffs their costs of suit and reasonable attorneys' fees and expenses pursuant to any applicable statute or regulation; and

k. An order granting such further relief as the Court deems just, equitable, and proper.

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Respectfully submitted,

/s/ Karen C. Tumlin

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