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RE: DHS RIN 1615-AC83/EOIR RIN 1125-AB26 or Docket No. USCIS 2022-0016/A.G. Order No. 5605-2023 Public Comment Opposing Proposed Rule: Circumvention of Lawful Pathways

The Catholic Legal Immigration Network, Inc. or CLINIC¹, submits these comments regarding the Notice of Proposed Rulemaking, or proposed rule, titled Circumvention of Lawful Pathways, which would deny most people the right to seek asylum at the southern border and disqualify asylum seekers who don't seek asylum at an official U.S. port of entry. Our organization strongly urges the Department of Justice (DOJ) and Department of Homeland Security (DHS) to withdraw this proposed rule in its entirety.

Embracing the Gospel value of welcoming the stranger, CLINIC has promoted the dignity and protected the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs since its founding in 1988. CLINIC's network, originally comprised of 17 programs, has now increased to more than 450 diocesan and community-based programs in 49 states and the District of Columbia. CLINIC is the largest nationwide network of nonprofit immigration programs. In partnership with its affiliates, CLINIC advocates for the just and humane treatment of noncitizens. Many of CLINIC's affiliates offer legal services to help qualified noncitizens apply for asylum, an immigration benefit that will be affected by this proposed rule.

As a Catholic organization, we base our work with immigrants on our belief in the fundamental and equal dignity of all people as created in the image of God, as well as our call as Christians to welcome the stranger and care for the vulnerable. Catholic social teaching on immigration strongly supports the right of migrants to seek asylum. The U.S. Conference of Catholic Bishops has consistently condemned policies that would weaken asylum access, including this and previous iterations of an asylum or transit ban.

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This proposed rule is all too reminiscent of the previous administration’s transit ban and is also very similar to its metering² policy, which denied migrants the ability to seek protection from persecution and harm. Asylum is a lifeline for tens of thousands of vulnerable noncitizens seeking refuge, and this proposed rule violates the United States’ obligations under both domestic and international law to accept applications for asylum and offer asylum seekers protection if they meet certain criteria. The rule on its face would erase the possibility of asylum protections for nearly all individuals who seek asylum at the southern border. The proposed rule would leave many applicants who qualify for asylum only eligible to be considered for withholding of removal or protection under the Convention Against Torture. While both avenues allow for some limited protection in the United States, they do not provide the full rights and protection of asylum, including family reunification and permanent immigration status.

Our organization objects to the proposed rule for the following reasons:

I. Thirty days is insufficient time to comment on and respond to the Notice of Proposed Rule Making.

The Biden administration is providing a 30-day comment period for the proposed rule, which is an insufficient timeframe given the complexity of the rule and that the rule denies people the right to seek asylum in violation of U.S. law. Executive Order 12866³ states that “each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.”

The proposed rule is approximately 50 pages long and many of these pages include technical background language. The proposed rule includes very detailed language concerning asylum procedures, specifically credible fear interviews, and how the rule purportedly differs from similar rules enacted by the previous administration. Given this complexity, it is unconscionable for the government to give a brief 30-day comment period on such a procedurally complicated rule that will have an impact so severe on asylum seekers that it will surely result in significant harm, and even worse, death. Thus, we urge the administration to rescind the proposed rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comprehensive comments. On March 1, 2023, 172 organizations wrote to the agencies urging them to provide at least 60 days to comment on this complex rule.⁴

² *US: Mexican Asylum Seekers Ordered to Wait*, HUMAN RIGHTS WATCH, (December 23, 2019), <https://www.hrw.org/news/2019/12/23/us-mexican-asylum-seekers-ordered-wait>.

³ Exec. Order No. 12866, 3 C.F.R, Vol. 58, No. 190 (1993), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

⁴ Letter from Nongovernmental Organizations to Merrick Garland, Attorney General, et al., *Request to Provide a Minimum of 60 days for Public Comment in Response to the Department of Homeland Security (DHS), United States Citizenship and Immigration Services (USCIS), and Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) (the Departments) Joint Notice of Proposed Rulemaking (NPRM): Circumvention of Lawful Pathways* (March 1, 2023), <https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2023-03/Biden%20Asylum%20Ban%20-%20Extension%20letter%20to%2030-days%20comment%20period%20FINAL.pdf>.

II. The Notice of Proposed Rule Making conflicts with U.S. and international law on asylum eligibility.

Should this proposed rule move forward, most migrants seeking refuge at the U.S. southern border would be found ineligible for asylum and sent into harm's way. The proposed rule would require that asylum seekers jump through unnecessary hoops to access the U.S. asylum system—contrary to the intent of the 1980 Refugee Act and the United States's treaty obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Indeed, the Ninth Circuit explicitly found an earlier proposed regulation restricting eligibility for asylum based on manner of entry ran afoul of these treaty obligations, as an unlawful entry is not considered a serious crime or danger to the United States that would justify barring asylum eligibility under these treaties.⁵

This proposed rule is contrary to Congress's intent for asylum eligibility. By law, asylum seekers can apply for asylum regardless of how and where they enter the United States.⁶ Specifically, the statutory language provides 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...)” the right to apply for asylum in accordance with this section.⁷ This proposed rule is in direct conflict with this statutory language. While the statute does provide authority to the Attorney General to “establish... limitations and conditions” on asylum eligibility, the proposed rule introduces severe restraints on the availability of asylum, going above and beyond the other restrictions on asylum specified in the statute itself.⁸ While prior administrations have invoked their authority to enact bars beyond those required by statute, most of these proposed rules were enjoined by federal courts as unlawful.⁹

The proposed rule attempts to distinguish between those who may “apply” for asylum and those who may be “granted” asylum.¹⁰ This is a distinction without a difference, as the practical implication is the same. Those with meritorious asylum claims will be denied relief, contrary to Congressional intent, which allowed for expansive access to the asylum system. Indeed, the Ninth Circuit explicitly rejected such reasoning when it struck down a prior regulation severely curtailing eligibility for asylum, finding that drawing a distinction between those who may apply and those who may be granted asylum “borders on absurdity.”¹¹

The proposed rule offers various policy rationale for its adoption, arguing that the asylum system was designed “decades ago” when migratory flows were “dramatically different” than they are today.¹² However, if the asylum system needs reforms, Congress has the authority to enact legislation addressing these concerns. Congress's failure to do so does not justify enacting regulations that are in clear conflict with the statute.

III. The conditions under which asylum seekers may still request asylum under the rule are so limited as to make nearly all asylum seekers ineligible to apply for asylum.

The proposed rule creates an unreasonable “rebuttable presumption” that an asylum seeker is **ineligible** for asylum unless the individual is granted parole prior to arrival or has presented themselves at a port of entry through

⁵ *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2020).

⁶ Immigration and Nationality Act (INA) § 208(a)(1), 8 USC 1158 (2006).

⁷ *Id.*

⁸ INA § 208(b)(2)(C).

⁹ *See, e.g.*, *Circumvention of Lawful Pathways*, 88 Fed. Reg. 11704, at 11735 (proposed Feb. 23, 2023) (listing five regulations limiting asylum eligibility proposed by prior administrations, three of which were enjoined as unlawful by courts).

¹⁰ *Id.*

¹¹ *E. Bay Sanctuary Covenant*, 993 F.3d 640 (9th Cir. 2020).

¹² *Circumvention of Lawful Pathways*, 88 Fed. Reg. 11704, at 11715.

a pre-scheduled time and place by using the CBP One app and has sought asylum or other protection in any country they traveled through and received a final denial. It is nearly impossible for an asylum seeker without the assistance of a legal representative to establish any of these three prerequisites to preserve asylum eligibility, and furthermore, setting these additional standards is currently inconsistent with U.S. law.

A. A majority of asylum seekers who arrive at the U.S. southern border are not and will likely never be eligible to enter the United States through one of the established humanitarian parole programs.

One of the exceptions to the proposed rule's application is that the asylum seeker must travel to the United States through one of the newly established parole programs. While these programs are a welcome opportunity for individuals to travel to the United States, they should not be a substitute for a fair asylum system. The recently implemented humanitarian parole programs only apply to a select number of nationalities, namely Cuban, Haitian, Nicaraguan or Venezuelan.

While these humanitarian parole programs may help some people fleeing conflict zones and/or authoritarian regimes, they are no trade-off for a safe, fair, transparent and humane asylum system. These programs only benefit those who have the ability to obtain passports or travel documents and who have contacts with ample resources to provide money for airfare and a place to stay in the United States.

For instance, a family of three from Venezuela has been in Juarez for over six months. They fled Venezuela and once they arrived in Mexico, they made their way to the United States-Mexico border, in hopes of seeking asylum, only to be expelled back to Mexico under Title 42. The U.S. immigration officers who processed and expelled them, took their passports and did not return them. When the parole program for Venezuelans was rolled out, they thought they would be eligible; however, as it turns out, without their passports they discovered they are not eligible to apply. To make matters worse, they are not able to return to Venezuela to obtain new passports due to receiving death threats. If this family tries to contact anyone to initiate any kind of renewal process from afar, which is likely to take months, it might alert those who are threatening to harm them. This family is now stranded in an overcrowded shelter in Juarez and they are ineligible to apply for the parole program, nor can they present themselves at an official U.S. port of entry to request asylum.

Significantly, migrants who enter the U.S., Mexico or Panama, after January 9, 2023, without meeting the eligibility requirements, or Venezuelans who arrive before October 19, 2022, will be barred from the parole programs. Effectively, these parole programs punish those who would benefit from it the most— asylum seekers in search of safety. Most asylum seekers fleeing for their lives should not have to risk jeopardizing their safety, and they certainly do not have the privilege to wait in their home countries in order to apply for humanitarian parole.

The commentary in the proposed rule mentions the countries chosen for the parole programs—Cuba, Haiti, Nicaragua and Venezuela—had the highest border encounters for FY 2021 and FY 2022.¹³ While Venezuela and Cuba have seen the highest net increases since 2021, in the number of pending asylum cases before EOIR, the number of cases pending from Northern Triangle (Guatemala, Honduras, El Salvador), for example, remain

¹³ Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, at 11708.

high.¹⁴ Similarly, the three Northern Triangle countries remain in the top ten countries for numbers of affirmative asylum grants by USCIS.¹⁵ And although the numbers of asylum seekers from the Northern Triangle at the border have dropped in recent years,¹⁶ this drop is likely due to the use of Title 42 policies curtailing asylum access at the border, not to a decrease in viable claims for asylum. A program that only benefits those who can wait patiently in their home countries, demonstrate proven connections with those in the United States that have resources, have access to passports and only benefit a small subset of the countries of origin for all migrants arriving at the border, is not a sufficient substitute for an asylum system in the United States.

B. Requiring the use of the CBP One application as a precondition for asylum eligibility violates U.S. asylum law.

The proposed rule requires that asylum seekers download the CBP One application on their phones and search for an appointment to present themselves to Customs and Border Protection, or CBP, in order to seek asylum. Given the technical difficulties many have with using CBP One, its existence has been equated to another ‘metering’ system, which the courts have found to be illegal.¹⁷ Under the metering system, asylum seekers had to schedule a time to come to the U.S. Port of Entry to seek asylum.

The administration’s requirement that asylum seekers must access this application in order to be eligible to apply for asylum is also concerning for a variety of other reasons.¹⁸ For one, advocates and asylum seekers have both complained that the application requires reliable internet for a sustained period of time in order to successfully and consistently search within it for an appointment with CBP. Many asylum seekers on the border do not have access to reliable and consistent internet, which means scheduling an appointment via their mobile phones is not a viable option for them. These asylum seekers should not be deemed ineligible for asylum simply because they lack the technological capacity to make an appointment on a mobile application or because the government has placed an unlawful condition on the right to seek asylum.

The proposed rule indicates that the majority of asylum seekers at the border have cellphones. However, the CBP One app is not compatible with all cellphones. Many times, the glitches are due to the incompatibility between app and cellphone. It is plainly inequitable to condition the right to seek asylum on an individual’s ability to obtain a smart phone, particularly a recent model, just to be able to schedule an appointment and present themselves at a port of entry.

Another significant glitch in the CBP One app is in the facial recognition feature. As a requirement to complete registration, asylum seekers must have their faces scanned for facial recognition. Many times, this feature freezes or marks error.

¹⁴ *A Sober Assessment of the Growing U.S. Asylum Backlog*, TRAC IMMIGR. (Dec. 22, 2022), trac.syr.edu/reports/705/.

¹⁵ *Yearbook of Immigration Statistics 2021*, U.S. DEP’T OF HOMELAND SEC., tbl 17, “Individuals Granted Asylum Affirmatively by Region and Country of Nationality: Fiscal Years 2012 to 2021,” <https://www.dhs.gov/immigration-statistics/yearbook/2021> (last updated 3/3/2023).

¹⁶ Diana Roy, *Ten Graphics that Explain the U.S. Struggle with Migrant Flows in 2022*, COUNCIL ON FOREIGN RELATIONS, Dec. 1, 2022, <https://www.cfr.org/article/ten-graphics-explain-us-struggle-migrant-flows-2022>

¹⁷ *Al Otro Lado Inc., Et al. V. Mayorkas, et al.*, S. POVERTY L. CENTER, <https://www.splcenter.org/seeking-justice/case-docket/al-otro-lado-inc-et-al-v-mayorkas-et-al> (last visited Mar. 24, 2023).

¹⁸ Jack Herrera, *Fleeing for Your Life? There’s an App for That*, TEX. MONTHLY, March 2, 2023, <https://www.texasmonthly.com/news-politics/cbp-app-asylum-biden-administration/>.

In Juarez, an advocate who was trying to assist asylum seekers complete their registration, struggled for one hour to take the picture of a young man. This young asylum seeker was one of several dozen awaiting assistance. The facial recognition feature in the app is a serious limitation for asylum seekers to complete registration and be able to utilize the app to schedule an appointment. Another asylum seeker shared she had finalized her registration, and when she tried to enter the app later in the day, it failed to recognize her. After many attempts, she was able to access the platform; however, she continues to have this recurring issue.

The CBP One app has a feature that does consider the loss or destruction of the cellphone which allows for people to access their accounts through borrowed cellphones with a series of codes as a security measure. This in practice, translates into people locking themselves out of the app and having to re-register. Also, despite an asylum seeker having the option to borrow a phone to register, the app continues to place asylum seekers who do not own a compatible smart phone at a disadvantage because it reduces their probability to obtain an appointment. It is taking months for someone who does own a compatible smart phone to schedule an appointment; for someone who does not own a phone, it is essentially impossible. The CBP One app is inequitable and marginalizes those who are already in dangerous circumstances.

The proposed rule does allow for an exception to asylum ineligibility if a person is unable to utilize the CBP One app, but the individual bears the burden of proving that they were unable to use the app. A person arriving at the southern border can rebut the presumption of asylum ineligibility if they can show by “a preponderance of the evidence that it was not possible to use the scheduling system [due to illiteracy, a language barrier or significant technical challenge] and other compelling reasons.” However, those who face language barriers and illiteracy are the most vulnerable and unlikely to be able to explain how their challenges make it harder for them to navigate these intricate asylum procedures. Many people who are unable to use the app will find it difficult or impossible to demonstrate that the app was inaccessible to them.

There is an extremely vulnerable group of people who are disenfranchised by the CBP One app, such as those without cellphones, those who are illiterate, those who lack access to a working internet, and those with disabilities. The proposed rule does carve out exceptions for this group but only in theory. In practice, this population is not able and/or is unaware of how to make these circumstances known to an officer without being intimidated by them or threatened and physically assaulted by Mexican authorities.

For instance, Magdalena*¹⁹, a woman fleeing her home in Guerrero, Mexico with her three minor children has been stranded in a border town for three months. She and her children are perceived as foreigners in their own country. They are Mixteco and speak very little Spanish. They have experienced prolonged homelessness, racial discrimination, and physical abuse while attempting to not be found by the cartel that murdered her husband and her children’s father. Magdalena and her children have unsuccessfully attempted to present themselves at a U.S. port of entry. Mexican authorities serve as the first barrier to safety. U.S. officers have expelled the family, returning them directly to danger. Magdalena never had an opportunity to explain her situation to anyone.

The CBP One app is the ultimate barrier for this family to seek protection. Magdalena does not have a cellphone. She does not know how to read or write in any language and is constantly worried about the safety and well-being of her children, while mourning the loss of her husband and her entire life as she knew it.

¹⁹ Names with asterisks have been changed for privacy purposes.

Conditioning the access to asylum on the use of the CBP One app has left Magdalena and her family in immense danger without an opportunity to explain her circumstance to any U.S. immigration authority. Under the proposed rule, Magdalena bears the burden of proving that she and her children were unable to use the app to be able to rebut the presumption of asylum ineligibility if they can show by a preponderance of the evidence that it was not possible to use the scheduling system due to Magdalena's illiteracy and technical challenge. Despite exceptions in the proposed rule, it is certain that in practice, having an opportunity to prove any of these exceptions would be impossible.

C. Applying for asylum and awaiting a subsequent denial in a third country is nearly impossible for most fleeing asylum seekers.

The proposed rule outlines that one can be exempted from the presumption of asylum ineligibility if they apply for and are denied asylum in a third country. This is essentially a transit ban similar to the one the prior administration issued in 2019, which was finally struck down by the courts in 2021. In *East Bay Sanctuary Covenant v. Barr*, the Ninth Circuit held the prior "transit ban" was "not in accordance with the law" or "in excess of statutory limitations" because it was inconsistent with the safe third country bar to eligibility to apply for asylum or the firm resettlement mandatory bar to asylum.²⁰

The Ninth Circuit made clear that the prior administration's Transit Ban ran afoul of the safeguards established by Congress. One such safeguard, is the safe third country bar which explicitly requires that there be a formal agreement between a 'safe third country', such as we have with Canada, and that there should be a 'full and fair' asylum system.²¹ The second safeguard, found within the exceptions to the firm resettlement mandatory bar to asylum, applies to asylum seekers who face persecution in the country of asylum or those who never intended the country of asylum to be their final destination. The Ninth Circuit stated that "[t]he sole protection provided by the [Final] Rule is its requirement that the country through which the barred [asylum seeker] has traveled be a 'signatory' to the 1951 Convention and the 1967 Protocol" without requiring these countries have any meaningful or established asylum procedures.²² The Ninth Circuit twice held that "[t]his requirement does not remotely resemble the assurances of safety built into the two safe-place bars of § 1158 [firm resettlement bar exceptions and safe third country bar]," and in fact is inconsistent with those provisions.²³ The Transit Ban was finally struck down in 2020.²⁴

The countries asylum seekers most often travel through, namely Mexico and other Central American countries, do not have asylum procedures similarly structured to that of the United States, have backlogged asylum systems, and are generally unsafe.²⁵

For example, in Mexico, asylum seekers must reside in the state where they applied for asylum and cannot go to other parts of the country where they have connections or are able to find work. They also must apply for asylum within 30 days after entering Mexico,²⁶ rendering many migrants ineligible by the time they start to understand

²⁰ *East Bay v. Barr*, 964 F.3d 832, 841, 845-49 (9th Cir. 2021).

²¹ *Id.* at 841.

²² *Id.* at 847.

²³ *Id.* at 845-49.

²⁴ *CAIR Coalition v. Trump*, 19-2117, 2020 WL 3542481 (D.D.C. Jun. 30, 2020).

²⁵ *Is Guatemala Safe for Refugees and Asylum Seekers?*, HUMAN RIGHTS FIRST (June 2019), available at <https://humanrightsfirst.org/wp-content/uploads/2022/10/IsGuatemalaSafeForRefugeesandAsylumSeekers.pdf>.

²⁶ *Key Points on Access to Asylum in Mexico, Protections for Migrant Children and U.S. Cooperation*, WOLA (Mar. 23, 2021), <https://www.wola.org/analysis/key-points-migration-march-2021/>.

the various legal systems to which they are subject. While asylum seekers await decisions, some end up suffering worse persecution from gangs or organized crime or are confronted with the same persecutors from whom they fled.²⁷ The proposed rule does not address the dangers to vulnerable populations, such as members of the LGBTQI community, where Human Rights Watch reports that:

Six asylum seekers and migrant rights workers reported that some of the shelters in Ciudad Juárez that accepted LGBT asylum seekers subjected them to discriminatory treatment, including the shelter where LGBT asylum seekers were forced to go to Christian religious services. Shelters in Ciudad Juárez are at capacity, meaning they would be homeless if they did not agree to go to the service. Some migrant shelters in Ciudad Juárez would not accept LGBT asylum seekers at all, migrant rights workers there said.²⁸

Moreover, indigenous groups, women with children, pregnant women²⁹ and those with disabilities will continue to face discrimination, violence, extortion, sexual and gender-based violence and detention in transit countries such as Mexico and Guatemala. Strikingly, the proposed rule ignores the wealth of reports that highlight the dangerous and even deadly situation Black asylum seekers face in countries of transit, such as Mexico. A recent report from Black Alliance for Just Immigration and Instituto para las Mujeres en la Migración states:

Due to their skin color, African and other Black migrants are often more visible to immigration authorities when travelling without documentation. They are afraid to challenge officials and are also easy targets for local gangs. Some attempt to evade apprehension by travelling north by boat off Mexico's Pacific Coast, but this journey is dangerous and has proved fatal. For example, in October 2019, a small boat carrying Cameroonian migrants sank off the coast of Chiapas, killing two of the men on board.³⁰

Haitian asylum seekers continue to face discrimination and in some cases persecution in transit countries. For example, Haitians are subject to a much narrower definition of asylum than those applicable to Venezuelan and Central American applicants.³¹ According to a recent report from Refugees International, Haitian asylum seekers have also been targeted for attacks, detention and face hurdles even accessing the Mexican asylum system.³²

²⁷ *Mexico: Asylum Seekers Face Abuses at Southern Border, Improve Conditions, Procedures; US Should End Pressure to Block Arrivals*, HUMAN RIGHTS FIRST (June 2022), available at <https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border>.

²⁸ *US: LGBT Asylum Seekers in Danger at the Border*, HUMAN RIGHTS FIRST (May 31, 2022) available at <https://www.hrw.org/news/2022/05/31/us-lgbt-asylum-seekers-danger-border>.

²⁹ *Migrant and Refugee Caravans: Failed Responses to Women and Children in Need of International Protection and Humanitarian Aid*, WOMEN'S REFUGEE COMMISSION (May 2019) available at <http://www.womensrefugeecommission.org/wp-content/uploads/2020/04/Migrant-and-Refugee-Caravans-Failed-Responses-to-Women-Children-in-Need-of-International-Protection-Humanitarian-Aid.pdf>.

³⁰ S. PRIYA MORLEY ET AL., BLACK ALLIANCE FOR JUST IMMIGR., "THERE IS A TARGET ON US" – THE IMPACT OF MEXICO'S ANTI-BLACK RACISM ON AFRICAN MIGRANTS AT MEXICO'S SOUTHERN BORDER, (2021), available at <https://www.immigrationresearch.org/system/files/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf>.

³¹ *Not Safe Anywhere: Haitians On The Move Need Urgent International Protection*, HUMAN RIGHTS WATCH (Dec. 2021), available at www.amnesty.org/en/wp-content/uploads/2021/12/AMR3649202021ENGLISH.pdf.

³² *Pushed into the Shadows: Mexico's Reception of Haitian Migrants*, REFUGEES INT'L (Apr. 2022), available at <https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/6288057cedeca34f11b74610/1653081471581/Mexico+Report+-+April+2022+-+5.20.22+-+ENGLISH.pdf>.

The proposed rule is no different from the prior administration's Transit Ban. The government argues in the commentary that asylum seekers can rebut the presumption of asylum ineligibility with evidence of serious illness, imminent threats, or severe forms of trafficking. As mentioned later in this comment, most asylum seekers will not be able to rebut the presumption with a preponderance of the evidence leaving many to languish in countries of transit, namely Mexico. This proposed rule would have the same deleterious effect as the prior administration's illegal transit ban.

CLINIC Case: One of CLINIC's clients, Inez,* fled Nicaragua with her two minor children after suffering domestic violence from her ex-partner, and after suffering persecution from the Nicaraguan government for her anti-government political activities. En route to the US border, where she wanted rebuild her life, Inez was raped by the "coyote" who was guiding her and her family to the United States. Inez was held captive for days before she was able to escape and eventually arrive to the U.S. border. She was placed in MPP and suffered PTSD, nightmares, headaches, and anxiety thinking about her future and reliving the trauma she suffered in Mexico and Nicaragua. She eventually was allowed to come into the United States and seek asylum when MPP was discontinued.

Under the proposed rule, Inez would not be able to seek asylum. Inez could never have stayed in Nicaragua long enough to apply for parole, nor would she be able to obtain a passport. Moreover, Inez did not seek asylum in Mexico, where she was sexually assaulted and terrified, and needed to get her family to safety.

In another instance, Carmen,* an 18-year-old woman, fled Nicaragua in late 2019, due to her political activism against the ruling political party. She traveled across several countries before reaching the United States-Mexico border. She was returned to Mexico under Migrant Protection Protocols or Remain in Mexico (MPP) and suffered gender-based violence and xenophobia while in Mexico. CLINIC staff met with her and were able to obtain *pro bono* representation for her. At the time, the prior transit ban was in place and *pro bono* counsel was successful in obtaining withholding of removal for Carmen. Despite her grant, she was detained for days. She had overcome all obstacles, survived attempts against her life and met all legal U.S. requirements and yet she was still being detained and denied a pathway to stability and safety within the U.S. Her *pro bono* counsel appealed when the third country transit ban was struck down by federal courts. Carmen was granted asylum and is thriving in her safe and stable new home in the United States.

Under this proposed rule, Carmen would be denied asylum. She is the tangible representation of luck and persistence. Carmen is one of thousands who entered the United States through the southern border in search of asylum and who had to transit through several countries to do so. She also is in the minimal percentage of those who were represented, and even smaller percentage of those who were able to appeal under the previous transit ban and ultimately be granted asylum.

If implemented, this proposed rule will effectively eliminate the possibility for people like Carmen who enter the southern border to seek protection by asylum.

IV. The presumption of asylum ineligibility can be rebutted only in very narrow and extreme circumstances.

The presumption of asylum ineligibility could potentially be rebutted if, at the time they entered the United States, the asylum seeker or a family member traveling with them suffered a severe medical emergency, faced an imminent or extreme threat to their life or safety, was a victim of a severe form of human trafficking, or faced other exceptionally compelling circumstances. The exceptions to the proposed rule are very narrow and require a showing by a “preponderance of the evidence.” These exceptions only cover the most extreme situations, such as imminent harm or a severe medical condition. Moreover, those who could potentially meet one of these exceptions to the presumption of asylum ineligibility may not be in possession of medical documentation or proof of imminent harm other than their own testimony, and asylum officers and immigration judges are not medical experts with the required expertise to evaluate these claims. Pro se asylum seekers will have yet an additional hurdle to contend with to meet the heightened “preponderance of the evidence” standard to rebut the presumption of asylum ineligibility.

Asylum Officers and Immigration Judges are not medical experts and will not have the required expertise to determine whether something is considered an “acute” medical emergency. By the time the determination is made, the asylum seeker’s health emergency may have worsened or the imminent threat they feared may have been carried out. Requiring a separate legal process to determine if asylum ineligibility has been rebutted will further strain limited government resources and will inefficiently prolong the asylum process for legitimate asylum seekers.

In practice, before an asylum officer or immigration judge, border patrol and CBP are the first filter for an asylum seeker to enter the United States. In most instances, these officers are who make the first determination of what is a medical emergency or what constitutes being in imminent threat of danger. Domingo*, a Guatemalan asylum seeker at the southern border was a witness to this:

Domingo* fled Guatemala with his 13-year-old son. While traveling through Mexico, they had endured a great ordeal. Once in northern Mexico, Domingo and son presented at a U.S. port of entry and were pushed back to Mexico. While they decided what their next steps were going to be, Domingo took odd jobs to be able to provide for his son and himself. Both being fully aware of the dangers they could face, they created a pact; if Domingo did not return to his son after four days, his son would do everything possible to enter the United States and flee from there.

One day an unknown man approached Domingo on the street and offered him a job. Domingo eagerly accepted and did not return to his son. Domingo was kidnapped by organized crime. He was released on the condition he would always be available and cooperative with them. By the time Domingo returned, his son was gone. Domingo ran to the border and tried to turn himself in to U.S. immigration officers. Immigration officers told him he was lying because he had no evidence to prove what had happened to him and that he did not look like he was in any danger.

Domingo’s story serves as another reason why the proposed rule should not enter effect. Border officers are demonstrably ineffective at providing protection in situations of imminent threat.

U.S. immigration authorities also do not have the requisite expertise in evaluating medical emergencies.

In another instance, a man by the name of Jesus* arrived in Ciudad Juarez, Mexico in the fall of 2022, after fleeing from the organized crime network that had murdered his spouse, children, and mother by burning them alive. He managed to escape with the help of others and presented himself before U.S. immigration officers at the Santa Fe, port of entry in Ciudad Juarez, completely unaware of the internal injuries he suffered during the attack, yet was unwell and extremely weak. Despite the officers observing Jesus' weak appearance, they informed him that the border was closed due to Title 42. The same night he was expelled back to Mexico, he was rushed to the emergency room and operated on immediately due to the injuries he sustained during his persecution by the organized crime network. Yet again, another asylum seeker is turned away due to the lack of medical expertise officials have to determine whether the individual presenting at the border is suffering from an acute medical emergency.

Finally, this proposed rule, by means of narrow exceptions and asterisks excludes and punishes individuals and families whose only crime is trying to seek safety and peace for themselves and their loved ones. This proposed rule is part of a continued effort to prioritize deterrence at the cost of human life.

Asylum seekers left stranded at the U.S.-Mexico border, are targets of many levels of violence, and the complicity between the United States and Mexico's governments in building intangible walls to deny access to asylum cannot be ignored. Mexico's immigration officers have increased raids and detention and use excessive force to do so. The human rights violations committed in order to implement and carry out policies that revive asylum bans of the recent past such as the proposed rule, should not be overlooked simply because they are being done in another country. The U.S. government's externalization of its legal and moral obligations is reprehensible and should end once and for all.

V. The proposed rule is discriminatory against certain asylum seekers based on racial, economic, and other factors.

Migrants at the southern border should be able to safely seek asylum without discrimination. The proposed rule discriminates against certain asylum seekers based on racial, economic, and other factors.

First, the proposed rule is discriminatory against Black asylum seekers. Advocates and asylum seekers have long complained about the widespread discrimination,³³ disparate treatment, and violence, Black asylum seekers suffer both in Mexico and in the United States. One need only look to the incidents of CBP officers rounding up Black asylum seekers at the border on horseback³⁴ to see that this is true. The proposed rule would only heighten the barriers and dangers these asylum seekers already face. For one, in order to be eligible to apply for asylum, an asylum seeker must apply for asylum and wait for a decision in a transit country, such as Mexico. This can be dangerous for Black asylum seekers who have historically been turned away from the asylum process and have suffered race-based harassment and persecution in Mexico. Second, the CBP One application uses facial

³³ MORLEY, *supra* note 30.

³⁴ *US: Treatment of Haitian Migrants Discriminatory*, HUMAN RIGHTS WATCH (Sep. 21, 2021, 2:49 PM), [hrw.org/news/2021/09/21/us-treatment-haitian-migrants-discriminatory](https://www.hrw.org/news/2021/09/21/us-treatment-haitian-migrants-discriminatory).

recognition software which does not easily recognize children or people with darker complexions.³⁵ Unless these technological glitches are addressed, Black asylum seekers will have a harder time getting appointments to seek asylum and will continue to face further discrimination.

In addition, the proposed rule unfairly privileges asylum seekers with economic means. Some asylum seekers who have connections to sponsors in the United States with economic resources are able to enter via a humanitarian parole program and subsequently apply for asylum. Asylum seekers who lack these connections to sponsors in the United States who have the necessary resources, are unable to seek asylum. This is discriminatory and inequitable.

Even if some asylum seekers were to have connections to people in the United States who can financially support them, a requirement for seeking parole, the humanitarian parole programs currently established are only available to migrants from certain countries. As described above, at present, these countries are Ukraine, Cuba, Haiti, Nicaragua, and Venezuela. Offering humanitarian protection to only these countries ignores the significant numbers of individuals continuing to seek protection from a host of other source countries. Presuming ineligibility for all asylum seekers who do not first seek parole through one of the established parole programs is discriminatory against those whose countries are not part of the programs, particularly those from the Central American countries that continue to represent the greatest numbers of migrants needing protection. Although there is a mechanism to apply for humanitarian parole outside of these programs, it is well known that there are extreme backlogs in the processing of these applications. Further, much is described below in relation to requiring individuals to register through CBP One, individuals who have limited resources to apply for parole through the USCIS website or other agency channels due to financial, educational, linguistic, or other restraints will be prejudiced by this parole requirement. Requiring individuals to apply for and await adjudication of parole before coming to the border to seek asylum places them in danger of further persecution and harm.

The proposed rule also favors those who have the resources to remain in an area with sustained internet to make an appointment using CBP One. Those with better access to technology and the financial resources to wait in Mexico will have increased access to asylum as compared to those without these resources. Life-saving humanitarian protection should not be limited to those who have the educational background, linguistic understanding, or mental or physical ability to access and understand the complicated process of registering through CBP One. Asylum seekers who cannot read or understand English, Spanish or Haitian Kreyol, those with larger families with small children, and people with disabilities all have a hard time making an appointment using CBP One and will therefore have less opportunity to apply for asylum. This is assuming they even know that they need to register for and enroll through CBP One in the first place and speak or read in one of the three languages offered in the app. These same individuals who have limited access due to financial constraints or other cultural, educational, or linguistic limitations will also be less likely to even learn of CBP One.

CLINIC has obtained anecdotal examples from our partners in the field exemplifying the above problems. Recall Magdalena and her Mixteco family from Guerrero, Mexico, fleeing the cartel in their hometown after it murdered the patriarch. This family, which speaks very little Spanish, has already experienced discrimination as indigenous refugees inside Mexico; requiring them to apply for an appointment on CBP One would further discriminate against them on this basis. They do not have a mobile phone to access the application, and even if they did, their limited Spanish skills would make it impossible in practice to use. There is no established parole program for Mexican

³⁵ Kade Crockford, *How is Face Recognition Surveillance Technology Racist?* AMERICAN CIVIL LIBERTIES UNION (June 16, 2020), [aclu.org/news/privacy-technology/how-is-face-recognition-surveillance-technology-racist](https://www.aclu.org/news/privacy-technology/how-is-face-recognition-surveillance-technology-racist).

families seeking protection, and discriminating against an indigenous family with limited resources and even more limited Spanish essentially sends them into the arms of the cartel.

VI. The proposed rule would lead to the permanent separation of families.

The proposed rule makes some effort to maintain family unity for those subject to the “lawful pathways” rebuttable presumption. Specifically, where a principal asylum applicant is eligible for statutory withholding of removal or CAT protection and would be granted asylum but for the “lawful pathways” rebuttable presumption, and where the denial would lead to the separation of the family, the family separation constitutes an “exceptionally compelling circumstance” to rebut the lawful pathways presumption of ineligibility.³⁶

However, this provision does not go nearly far enough to protect family unity. This provision as written benefits only those families who are physically present in the United States and in section 240 removal proceedings together. It does not assist applicants whose family members remain outside the United States. Individuals granted withholding of removal under INA § 241(b)(3) or CAT protection live in a constant state of limbo. They cannot travel internationally; they cannot work if their employment authorization expires; they can never become residents or citizens; and, perhaps most importantly, they can never petition for family members to join them in the United States. With no ability to travel abroad and no ability to petition for relatives, a grant of withholding or CAT only leads to de facto, permanent family separation. This includes the permanent separation of parents from their minor children.

The imposition of the one-year filing deadline by Congress for asylum cases already has a devastating impact on family unity.³⁷ However, it is within Congress’s authority to place such a restriction on asylum eligibility in the statute. The proposed rule looks to the one-year filing deadline as a policy support for its position, stating that “Congress concluded that the interest in ensuring overall system efficiency outweighed the fact that there would be applicants who would have received asylum but for the one-year deadline. The Departments have made a similar calculation in the interest of system efficiency.”³⁸ However, it is only within Congress’s authority to make such a determination. The administration lacks the power to deny asylum to huge numbers of asylum seekers when Congress has not explicitly authorized it. It is unconscionable as a matter of policy for the administration to seek to further separate families from each other. However, it is also illegal as a matter of law to make such sweeping changes to the asylum system and the goals of family unity in the absence of explicit Congressional authorization.³⁹

VII. The proposed rule violates asylum seekers’ due process rights.

The proposed rule violates the due process rights of legitimate asylum seekers. Critically, the proposed rule eviscerates two safeguards for asylum applicants who are given negative credible fear findings. First, when an asylum officer issues a negative credible fear determination to an asylum applicant, the officer explains that the asylum applicant has the right to have the finding reviewed by an immigration judge or IJ. Under the new rule, asylum applicants will have to affirmatively request immigration judge review, or they will be deported. This part

³⁶ Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, at 11752 (Proposed 8 C.F.R. § 1208.33(d)).

³⁷ See Lindsay M. Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 2016 WIS. L. REV. 1185, 1193 (2016) (detailing separation of mothers from their children).

³⁸ Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, at 11737.

³⁹ *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021) (striking down prior transit ban as contrary to statute).

of the proposed rule is identical to the previous administration's attempt⁴⁰ to destroy due process protections for credible fear applicants and contradicts President Biden's promise to a fair immigration system for asylum seekers.

One of the bedrock principles of the credible fear process is full review of a negative credible fear determination by an IJ to ensure full due process. When an asylum officer gives a negative credible fear determination to an applicant, the asylum officer must explain the due process rights available to the asylum seeker. One of these core rights is that the applicant can seek review with the immigration judge. During this explication process, many asylum seekers do not completely understand what is going on, many are still tired and traumatized from their journeys, and some have been separated from their children and families by the U.S. government.⁴¹ During this time, many asylum seekers, mostly unrepresented, will not understand what it means to seek "IJ review" and many will simply not answer the question.⁴² That indication, historically, has meant asylum officers must request this review on behalf of the asylum seekers. The proposed rule would reverse existing policy and force asylum officers to mark that the asylum applicant does not want "IJ review" when the asylum seekers are understandably unresponsive.

The proposed rule does not include any statistics on how many asylum seekers succeeded in their credible fear claims before the IJ without having articulated a desire for IJ review to the asylum officer. Nor does it contain any data on how many of these IJ reviews are, "expeditiously" resolved after the IJ explains the asylum seeker's rights and the asylum seeker may choose to not pursue IJ review. CLINIC has grave concerns that asylum officers will increase denials of credible fear interviews and bona fide asylum seekers will never receive a day in court, not even to have their credible fear interview denial reviewed by an IJ. A recent report⁴³ from Syracuse University states IJs continue to overturn asylum officer decisions nearly a quarter of the time. The highest percentage of overturned decisions are those of Cameroonian and Syrian asylum seekers – both countries with bad human rights records.⁴⁴

In creating the expedited removal system, Senator Patrick Leahy aptly stated in discussing the case of Fauziya Kasinga:

The bill gives virtually final authority to immigration officers at 300 ports of entry to this country. Each is directed to interview people seeking asylum and exclude them if he finds that they do not have 'a credible fear of persecution.' That phrase is unknown to international law. The officer's summary decision is subject only to 'Immediate review by a supervisory office at the port.' The bill prohibits further administrative review, and it says, 'no court shall have jurisdiction' to review summary denials of asylum or to hear any challenge to the new process. (Our present system for

⁴⁰ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264 (June 15, 2020), EOIR Docket No. 18-0002, A.G. Order No. 4714-2020, 8 CFR § 208.20; 8 CFR § 1208.20.

⁴¹ See *Family Separation Policy Continues Two Years After Trump Administration Claims It Ended*, S. POVERTY L. CENTER (June 18, 2020), <https://www.splcenter.org/news/2020/06/18/family-separation-policy-continues-two-years-after-trump-administration-claims-it-ended>.

⁴² Samantha Balaban et al., *Without a Lawyer, Asylum-Seekers Struggle with Confusing Legal Processes*, NPR, Feb. 25, 2018, "<https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes>."

⁴³ *Immigration Judge Decisions Overturning Asylum Officer Findings in Credible Fear Cases*, TRAC IMMIGR. (March 14, 2023), available at <https://trac.syr.edu/reports/712/>.

⁴⁴ *2021 Country Reports on Human Rights Practices: Cameroon*, U.S. DEP'T OF STATE (2021), <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/cameroon/>; *2021 Country Reports on Human Rights Practices: Syria*, U.S. DEP'T OF STATE (2021), <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/syria>.

handling asylum applications works efficiently, so there is no administrative need for change.) Stripping away the protection of the courts may be the most alarming feature of the legislation.⁴⁵

Requiring an asylum applicant to ask for immigration review of a negative credible fear decision would, in many cases, effectively bar them from receiving independent review. Giving one agency unfettered power to decide whether an asylum seeker ever has a day in court goes against the intent of Congress.⁴⁶ Review by an immigration judge is critical to ensure the due process rights of asylum seekers in credible fear cases, and preventing unrepresented asylum seekers the opportunity to request review is wrong and unfair. As with the previous administration's attempt to destroy due process protection to credible fear applicants, this proposed rule will eventually fail.

The second safeguard the proposed rule eviscerates is the opportunity for asylum seekers to request reconsideration of a negative credible fear finding. Currently, when an asylum seeker is given negative credible fear finding, they can request that the decision be reconsidered by the asylum office. The request for reconsideration was placed in the regulations, 8 CFR 208.30, as a safeguard in the expedited removal process. Reconsideration of officer decisions is critical to protecting asylum seekers from erroneous decisions and ensuring their due process.⁴⁷

VIII. Conclusion

This proposed rule contains several procedural elements that require a full 60-day comment period to be adequately addressed. The proposed rule, if enacted in its current form, would return scores of asylum seekers to danger in Mexico, another transit country, or their country of origin. The proposed rule is similar in substance to the asylum bans issued by the Trump administration then struck down by the courts. The United States' asylum system has been a model for countries around the world to welcome refugees who come to its door. This proposed rule is not in line with the American value of welcoming refugees and asylum seekers and, more importantly, the proposed rule is contrary to U.S. and international law which protects the right to safely seek asylum. As stated by Bishop Seitz in a recent article on this administration's proposed rule, "Policies that fail to secure protections for the vulnerable are morally deficient. Death simply cannot be an acceptable part of the overhead costs of our immigration policies."⁴⁸ Therefore, we call upon the administration to withdraw this proposed rule in its entirety.

⁴⁵ 142 Cong. Rec. S4461 (daily ed. May 1, 1996) (statement of Sen. Leahy).

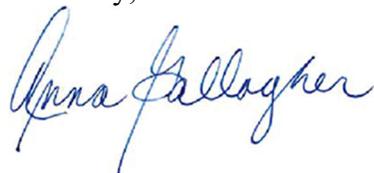
⁴⁶ See Katherine Shattuck, Comment, *Preventing Erroneous Expedited Removals: Immigration Judge Review And Requests For Reconsideration of Negative Credible Fear Determinations*, 93 WASH. L. REV. 459, 459 (2018).

⁴⁷ *Biden Administration Move To Eliminate Requests For Reconsideration Would Endanger Asylum Seekers, Deport Them To Persecution And Torture*, HUMAN RIGHTS FIRST (Oct. 2021), available at <https://humanrightsfirst.org/library/biden-administration-move-to-eliminate-requests-for-reconsideration-would-endanger-asylum-seekers-deport-them-to-persecution-and-torture/>

⁴⁸ Mark J. Seitz, *Bishop Seitz on Biden's new asylum policy: Death cannot be the cost of our immigration laws*, AMERICA: THE JESUIT REV., March 14, 2023, <https://www.americamagazine.org/politics-society/2023/03/14/biden-asylum-immigration-244876>.

Thank you for your consideration of these comments. Please do not hesitate to contact Karen Sullivan, Director of Advocacy, at ksullivan@cliniclegal.org, with any questions or concerns about our recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Anna Gallagher". The signature is written in a cursive style with a large initial 'A'.

Anna Gallagher
Executive Director