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Submitted via: <https://www.regulations.gov>.

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Re: Comment on the Proposed Rule by the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) on Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023

Dear Acting Director Daniel Delgado and Assistant Director Lauren Alder Reid;

Las Americas Immigrant Advocacy Center (Las Americas, LAIAC, or we) submits this comment in response to the Department of Homeland Security (DHS) and Department of Justice (DOJ)'s proposed rule published in the Federal Register on February 23, 2023, that would ban thousands of refugees from asylum protection in the United States and deprive them of the ability to reunite with their families and pursue a path to citizenship in this country. Upon a close read of the proposed rule and its intended application, we find that the new rule operates similarly to the asylum bans promulgated by the Trump administration in 2018 and 2019 that were repeatedly struck down by federal courts as unlawful. As the details below will underscore, we ask that the Departments bring themselves into compliance with U.S. immigration law by withdrawing the proposed rule and working together with advocacy organizations instead to create human-centered and effective asylum and border crossing case management that legitimately provides migrants a meaningful and realistic opportunity to seek protection.

Summary of concerns and recommendations

The proposed rule amounts to an asylum ban that cuts off access to asylum for many refugees at the southern border, discriminates against Black, Brown, and Indigenous asylum seekers, and circumvents U.S. law and treaty obligations to refugees. Las Americas strongly urges the agencies to withdraw the proposed rule in its entirety and stop pursuing asylum bans that both advance the Trump administration's agenda and have been welcomed by anti-immigrant hate groups.¹ The administration should instead uphold campaign promises to abide by refugee law and restore full access to asylum at ports of entry, ensuring fair and humane asylum adjudications. Given the egregious and illegal consequences that would result from implementation of this proposed rule, we recommend that the Administration rescind all entry and transit bans, and abandon reliance on the CBP One application. We also urge the Departments to cease to pursue regulatory changes that would limit or eradicate the screening role of the credible fear interview (CFI) process, including all rules seeking to impose higher burdens on the applicant, and access to agency review and counsel during the CFI process.

It is fundamental to a working, fair, and equitable asylum system that individuals fleeing harm be allowed to apply for in-country protection regardless of where they come from or how they reach United States territory. **Rather than focus tax-payer expenditures on how to block the largest number of individuals from meaningful access to the asylum process, DHS should apply funding to: bolster the number of asylum officers, provide more training for these asylum officers using materials developed in accordance with existing immigration laws, create processing times that allow for meaningful access to counsel during the application and adjudication process, increase the scale, pace, and geographic scope of refugee processing and resettlement, and work with non-governmental organizations to design and facilitate a detention-free immigration adjudication system.**

The proposed rule relies on numbers that do not tell the entire story of the situation at the U.S.-Mexico border. Rather than creating a measured, fair, and accessible asylum system consistent with U.S. international commitments and federal law, this proposed rule expands reliance on expedited removal—a harmful process that denies access to asylum to many individuals with bona fide claims. In doing so, the rule attempts to justify measuring the success of the U.S. asylum process by seeking to achieve a significant reduction in the number of individuals granted asylum, and attempts to reach this goal via arbitrary bureaucratic roadblocks irrelevant to the asylum seeker's actual circumstances. For example, this rule erroneously suggests that most

¹ Michael Capuano, Federation for American Immigration Reform (FAIR), *Embattled Biden Administration Finally Figures Out Asylum Can't Be a Free-for-All* (Dec. 5, 2022), <https://www.fairus.org/blog/2022/12/05/embattled-biden-administration-finally-figures-out-asylum-cant-be-free-all>.

people removed by U.S. border patrol entering via the U.S.-Mexico border have unmeritorious asylum claims. The proposed rule similarly claims that CBP One can serve as a safeguard to capture anyone who falls through the cracks and is incorrectly blocked from asylum. These assumptions are both dangerous and false: Even one person forcibly returned to their home countries who is later killed, tortured or persecuted again, is one too many. Moreover, as evidence below shows, limiting entry at the southern border to CBP One users is untenable because the system is open to fraud and abuse by the very same criminal organizations this rule purports to protect migrants from.

To offer just one example of the types of failures of the existing border system and dangers that will be exacerbated under the proposed rule, Las Americas worked with one young woman who was deported under an expedited removal order and later gang raped by the very attackers she told DHS about in her credible fear interview. She later returned to the United States and was granted withholding of removal. Had her claim been correctly reviewed and asylum afforded to her from the start, she would not have been subjected to such violence. In other words, the risk of wrongful exclusion from asylum access already exists, particularly within the expedited removal system; the proposed rule will increase that error many times over.

Assuming that it is an acceptable risk to return persons seeking protection to the places causing them harm ignores the United States' direct role in the dysfunction of the U.S.-Mexico Border. It is the continued use immigration as a political tool and the continued implementation of temporary, piece-meal immigration policies at fault for the bottleneck of asylum seekers seeking entry at our border, and not the fault of the migrants themselves. For example the creation of nationality-specific parole programs, the ongoing use of Title 42, the use of metering, and even the substantive changes to asylum law are all examples of how the United States continues to change the landscape at the U.S.-Mexico border in ways that exacerbate, rather than resolve, the challenges that exist in that region.

Separately, the proposed rule relies on incorrect assumptions about the merits of protection cases for individuals coming to the United States and seeking asylum. For example, we have one client, B., who married a U.S. Citizen after she passed a credible fear interview. As a result of her marriage, her removal proceedings were dismissed to afford her the opportunity to adjust status through her marriage. The fact of her dismissal from proceedings does not diminish her asylum eligibility, it merely means she had multiple pathways to safety available to her and the immigration court agreed that family reunification was a better alternative than continuing with asylum. This kind of use of discretion by immigration judges is a common example of alternate tools available to afford both (a) efficient use of government resources and (b) access to a pathway to safety for vulnerable populations. Alarming, the proposed rule incorrectly assumes the result in B.'s case is evidence that she entered the U.S. without a bona fide asylum claim and

therefore does not merit access to U.S. territory. **This is an egregious error on the part of the Biden Administration at best, and a willful misrepresentation of the facts at worst.**

For these reasons, and as further expanded on below, Las Americas calls on the Administration to immediately reject these rules. Separately, we urge that — if the proposed rule does go forward — the timeline for a sunset be much, much shorter. A timeline closer to 90 days or six months would be sufficient to address any purported influx of applicants waiting at the U.S.-Mexico border for the end of Title 42.

I. Las Americas Immigrant Advocacy Center and its Interest in the Issues Presented by the Proposed Rule

Las Americas is a non-profit legal services organization based in El Paso, Texas. The organization and its staff are dedicated to serving the legal needs of vulnerable immigrants and other persons on the move, including refugees and asylum seekers. Our attorneys and staff commit every day to provide legal representation to those who otherwise would not be able to afford it and who otherwise would not be likely to access the pathways to safety they are seeking. After seeing firsthand the use of U.S. immigration policy to implement U.S. immigration law in the physical territory of Mexico, we also incorporated an arm of our organization in Ciudad Juarez, Mexico to reach those migrants and asylum seekers impacted by the Migrant Protection Protocols, Title 42, PACR/HARP, and other metering and ban-like policies.

Our mission is to provide immigration counseling and legal services to immigrants detained by the U.S. government in and around west Texas and New Mexico, including by representing individuals through their CFI and reasonable fear interview (RFI) process. We also assist them with accessing humanitarian parole via exceptions to the Title 42 process and access to CBP One, and we provide legal information presentations centered on clarifying the purpose and consequences of documents received upon crossing the border. We separately provide ongoing legal representation for individuals fighting deportation outside of detention, including those who are victims of crimes in the United States. To make this work successful, in Juarez our team has partnered with Consejo Estatal de Población (COESPO) — a regional branch of Mexican government — to provide free legal education targeted at helping persons seeking humanitarian protection in their attempts to access the CBP One program and to provide direct assistance with particularly vulnerable individuals and families unable to navigate the application on their own, even after finding limited access to wifi networks in the city.

As a border city, the El Paso community's success is tied closely to federal immigration policy — we are intimately aware of the continuous push factors drawing vulnerable people to the U.S. border and the traumatic conditions they face as they brave the journey to our physical borders.

Despite this knowledge, and in fact because of it, we strongly oppose proposed rules that stand to limit access to protection for individuals who have fled dangerous persecution and torture in their home countries and who seek refuge in the United States.

II. The 30-Day Comment Period Provides Insufficient Time to Comment on the Rule

Las Americas agrees with the more than 170 organizations that submitted a letter requesting that the comment period be longer than 30 days.² “The human cost [of this rule] is beyond measure and demands the most careful research, analysis, and public consultation. It is highly inappropriate to afford the public a mere 30 days to comment on a proposal that violates domestic laws and international obligations on its face.”³

These proposed changes require careful consideration and evaluation of their impact on people seeking asylum. Doing so further requires considering a range of possibilities that may arise under this proposed new system and how those possibilities might fluctuate from one administration to the next.⁴ The timeframe for this NPRM does not afford us the time and opportunity to dedicate the resources and expertise needed for such careful review. Our failure to comment on every feature of this NPRM or to provide more concrete examples and supporting data is not a tacit endorsement; it simply means we lacked the resources to respond within the time allotted to every single issue we see ingrained in the language of the rule.

For example, with more time, Las Americas would have been able to provide additional specific examples of how the proposed rule is very likely to impact individuals with meritorious asylum claims who are wrongfully denied protection as a result of not having an attorney assist them with their credible and reasonable fear interviews or with their appeals of negative credible fear findings; we also would have been able to provide more details regarding the serious impact of utilizing CBP One as the sole means of accessing the border. With more time, Las Americas could also provide more information about negative fear findings and the consequences of

² See National Immigrant Justice Center, *172 Organizations Call for Extension on Public Comment Period For Proposed Asylum Ban* (Mar. 1, 2023), <https://immigrantjustice.org/staff/blog/172-organizations-call-extension-public-comment-period-proposed-asylum-ban>.

³ *Id.*

⁴ This Rule proposes to “sunset” upon 24 months with the possibility of indefinite extension, making it more likely than not that this change would straddle the next Presidential term. Dep’t of Homeland Security & Executive Office for Immigration Review, *Circumvention of Lawful Pathways*, 88 Fed. Reg. 11704, 11726, RIN 1125–AB26 (Feb. 23, 2023). Though Las Americas believes the rule should be rejected in its entirety, we separately urge that — if the proposed rule does go forward — the timeline for a sunset be much, much shorter. A timeline closer to 90 days or six months would be sufficient to address any purported influx of applicants waiting at the U.S.-Mexico border for the end of Title 42.

subsequent deportations. This information would further exemplify why the rule is inherently misguided and misinformed, and that its reliance on data without context is a flawed justification for doing away with due process measures designed to give vulnerable and traumatized persons a fair chance at seeking protection in the United States.

III. Requiring Refugees at the Southwest Border to Use CBP One Denies Asylum Access to the Most Vulnerable Refugees

The proposed Rule's reliance on the CBP One app is especially concerning to Las Americas. In the short time that the app has been in use for individuals who are asylum seekers seeking an exemption under Title 42, Las Americas has observed that its use results in discrimination against people of color, especially Black, Brown, and Indigenous people. It is also prohibitively difficult to use for people who have older or cheaper cell phones, and it forces longer wait times on families. The use of the app forces NGOs like Las Americas to spend resources helping people use the app rather than putting those resources toward assisting asylum seekers with CFI's, reviews of negative determinations, and representation in immigration court.

The proposed rule also relies on faulty assumptions about access to functional smartphones by people seeking asylum in the United States, citing the CBP One app's use with Venezuelan people seeking entry to the United States, and CBP encounters with migrants who have made it to the United States.⁵ Specifically, the proposed rule incorrectly extrapolates that because most individuals who are encountered by CBP have a smartphone, they should be able to use the application. That is inaccurate. In Las Americas' experience many people lose or have their phones stolen en route to the United States, and for the ones who arrive at the border with it in their possession the phone often does not function at the level needed to use CBP One.⁶ That is because the phones tend to have no service and access to reliable internet in the area is limited.

The Departments rely on these inaccurate assumptions to create an unworkable system. It requires people to wait outside the United States for an indeterminate amount of time until they are able to get the app to function properly. It alternatively requires that a person who was not able to use the app show by a "preponderance of the evidence that it was not possible to access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle."⁷ However, in our experience, people who are unable to use the app are also unlikely to be able to meet this burden of proof to show that they could not use the app.

⁵ Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11719 (Feb. 23, 2023).

⁶ See, e.g., Raul Pinto, IMMIGRATION IMPACT, *CBP One Is Riddled With Flaws That Make the App Inaccessible to Many Asylum Seekers* (Feb. 28, 2023) <https://immigrationimpact.com/2023/02/28/cbp-one-app-flaws-asylum-seekers/>.

⁷ 88 Fed. Reg. at 11720.

Our organization’s experience assisting individuals with the CBP One app over the last two months highlights its many shortcomings and should be analyzed by the Departments and weighed seriously against any perceived benefits of “reducing” the number of individuals seeking asylum at the U.S.-Mexico border. Ignoring reality on the ground will not lead to fruitful results.

Through our work with COESPO, we see about 100 people per day waiting in line for access to services that are available to migrants stranded on the Mexico side of the U.S. border. People are waiting for wifi-enabled safe spaces for families to use to try to register the application on their phones, loaner phones supporting the technology required by the app, information about the legal implications of using the application to make an appointment, information about the legal implications of entering the United States via a Title 42 exception, and individualized legal advice for families separated or otherwise stranded at the border.

In theory, the app should immediately show a scheduled date for the applicant to cross the border as soon as the applicant has registered. This is not the case: Appointments fill up early each day.⁸ After registering, migrants have to go back into the app on a daily basis and keep checking every day until they can find an open appointment for them to cross the border.⁹ LAIAC knows of migrants who have waited in Mexicali and Ciudad Juarez, Mexico, for weeks — sometimes months — trying to get an appointment. Sometimes, migrants who are able to travel between border cities can access appointments much faster.¹⁰ This generates additional frustration and mistrust, leading migrants to rely on people who fraudulently charge money for appointments or who fill out the app with incorrect information, which can cause the applicants to face credibility issues down the line. Overall, even for technically savvy or educated migrants, the CBP One process comes across as arbitrary and confusing, which undermines trust in the integrity of the U.S. asylum system overall.

The system is even more obscure and difficult to access for particularly vulnerable migrants. First, because the app is available in English, Spanish, and Haitian Creole only,¹¹ it particularly inhibits speakers of indigenous languages, asylum seekers who only speak a little Spanish, or those who speak less common languages or dialects by requiring these individuals to spend many more hours with the app and in search of translation assistance. Even for applicants who speak Creole, they must first create an account through login.gov, which is only available in French,

⁸ Jack Herrera, *Fleeing for Your Life? There’s An App for That.*, Texas Monthly (Mar. 2, 2023) <https://www.texasmonthly.com/news-politics/cbp-app-asylum-biden-administration/>.

⁹ Stephanie Leutert & Caitlyn Yates, ROBERT STRAUSS CENTER FOR INTERNATIONAL SECURITY AND LAW, ASYLUM PROCESSING AT THE U.S.-MEXICO BORDER, 1-3 (Feb. 2023) <https://www.strausscenter.org/publications/asylum-processing-at-the-u-s-mexico-border-february-2023/>.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 2-3.

Spanish, and English. Once a login.gov account is created, the initial registration page for CBP One is only available in English, meaning that an applicant must agree to a long page of terms and conditions about the privacy of their information — *in English* — before they can get to the portions of the app that are translated. Most importantly, when entering information into the app, all answers must be in English. So even Spanish and Haitian Creole speakers need assistance filling in their answers to the app’s forms.

Because it can take up to a week to find interpretation for the indigenous languages, it is difficult to access translation of the questions, and even more difficult to be able to translate responses to the questions. These questions and answers must be entered before applicants are able to request an appointment at a port of entry. Our staff has put many resources over the last two months toward helping people try to get appointments. Attorneys, caseworkers, and other aid workers conduct interviews with the people who speak indigenous or rare languages, using interpreters to gather the information the app requires. In our experience, the appointment slots are usually filled by 8:00 A.M., Mountain Time, each day. Because it takes more time to enter the information using interpreters, people who speak languages other than English, especially languages other than Spanish and Haitian Creole, find it very difficult to obtain an appointment using CBP One.

The use of the app to administer the Venezuelan parole program is not a good indicator of how it will work with people from countries that are not as wealthy or educated. In our experience, the Venezuelan population generally has better access to newer phones, thus enabling them to have easier access to appointments through CBP One. And many Venezuelan migrants had sufficient technological experience and expertise to be able to fill out the applications and navigate the app quickly without significant assistance. Venezuelan migrants are more likely to have a college degree and are often younger than immigrants from other countries.¹² In our experience, non-Venezuelan migrants require more assistance with the app, especially those who are older or less educated.

When looking at all of the migrants we have worked with, the CBP One app often requires cell phone capabilities that theirs don’t have. Some brands of cell phones, such as Huawei, fail to load the app effectively, and for those who are able to load it, frequent and mandatory updates are often required. Many people do not have the required operating system or memory for the CBP One app to function properly on their phone. So when they try to register for an appointment through the app, the system kicks them out before they are able to complete the process. As mentioned above, by the time people have traveled all the way to the border, their cell phones are already very damaged (if not already stolen from them), and their touch screen

¹² Ari Hoffman & Jeanne Batalova, *Venezuelan Immigrants in the United States*, MIGRATION POLICY INST. (Feb. 15, 2023) <https://www.migrationpolicy.org/article/venezuelan-immigrants-united-states>.

capability does not match what is necessary to answer the questionnaire in the app. As a result, it can be difficult to take, save, then upload the photograph of the traveler. Once a technical issue arises, individuals are forced to start the registration process all over again from the beginning.

Additionally, not all migrants have economic resources to pay for roaming data on their cell phone. It often falls to people assisting migrants to share data from their personal cell phones so that people can access the CBP One app. About two weeks ago, the Mexican government offices started sharing the internet so that migrants could access the app. But there are often capacity restrictions, and the wifi reception is not always accessible throughout this specific Mexican government building.

In our experience, the CBP One process is equally untenable for families, as well. First, the sign up process is cumbersome and time-consuming because each individual family member is required to submit their own application. Second, families often have trouble finding an appointment time before the slots fill up because their appointment cannot be scheduled unless there are enough slots for every member of the family available. Because the appointments fill up in a matter of minutes, it is often impossible for a family to submit multiple applications fast enough. This results in families waiting in Mexico for longer periods, and puts them in danger of harm. For example, we worked with one family that had two disabled children. They were unable to stay in the shelter they had found and in the meantime, the CBP One appointments kept filling up before they could get an appointment. After some weeks, the family reported to LAIAC staff that they went directly to CBP to request that they be allowed to pursue asylum without the app. They were denied entry and told they had to use the app, which meant they ended up forced to wait longer in Mexico in unstable conditions without access to healthcare for their children. In another instance, a family of seven from Venezuela, traveling with a disabled father, has been attempting to access an appointment with CBP One for two months and as of March 27, 2023, are still waiting.

Las Americas' data shows that when put in this situation, most families have not been able to present and enter via CBP One because of how long it is taking to actually get an appointment. When we raised this issue with CBP earlier this month (March 2023), we were told this is not a technical issue or an error on the part of CBP, but rather evidence of fraudulent appointments created by criminal groups to lure information and funds from asylum seekers seeking entry to the United States. **In other words, though the government touts CBP One as a means of avoiding dangerous exploitation en route to the United States, it is well aware that the very app that it created to do so is creating yet another avenue for such exploitation.** When presented with this concerning pattern in March 2023, CBP did not offer any alternative methods for individuals subjected to fraud in Mexico to find relief other than to continue trying to get an appointment via the app.

In fact, it is nearly impossible for a family to predict how long they will need to wait for appointments through CBP One - we have seen some families wait more than four weeks once they are actually able to make it through to the end of the application and complete registration. However, the wait time overall is neither predictable or reliable. That uncertainty creates additional stress and difficulty. Some families have tried to speed up the process by registering with the app more than once. For example, they will create a family account and an individual account. Or they will send their children alone ahead of them.¹³ Others will register just one member of the family and then be denied entry when they show up with their family members — Las Americas encountered at least one single mother traveling with her 12-year old son who was denied entry by CBP after she showed up to her appointment with the child, stating it was because she did not register her son with CBP One. This occurs despite the fact that all ports of entries are equipped and well-trained on running in-person processing of families and had done so without the use of CBP One up until January 2023.

Once families obtain appointments, they are not always guaranteed the ability to cross the border. We have heard from families who have been turned back from the border, even though they are on time for a valid appointment. In other circumstances, we have also come across people who are granted appointments at a different port of entry far from where they are physically located, despite the app's purported use of geolocational technology. As a result, these individuals are forced to risk travel within Mexico, leaving them exposed to dangerous highway routes where migrants face a significant risk of violence and extortion by gangs and cartels within Mexico. Mexican authorities do not consistently issue and renew temporary humanitarian visas (known in Mexico as "FMMs") to migrants, despite the fact that these visas are required to access bus and airline travel.

When encountering particularly vulnerable families impacted by CBP One, Las Americas has attempted to work with the El Paso port of entry authorities to find a solution, however these efforts have not proved successful. Officers at the port of entry in El Paso often refuse to exercise their discretion to grant port parole in a reasonable manner, even under the Title 42 policy. We have attempted to flag at least two separate cases to CBP Port authority via email in which we explained that there were exceptional circumstances interrupting our clients' access to CBP One. In one case, we raised that our client had been kidnapped in Juarez. In another case, our client had an infant living with a serious disability, and as a result, the app was unable to recognize the child's face. In both cases, CBP refused entry on the basis that DHS policy requires all access to

¹³ This practice of sending children ahead represents another way in which the proposed rule exacerbates a problem that it is purporting to solve. The proposed rule exempts unaccompanied children from the presumptions against asylum access, but in doing so the Departments are asking families to make the impossible choice of deciding to enter together using the app, which will expose them to danger as they wait and might be impossible in the end, or sending children along alone so that they can access protection faster while parents struggle to navigate the app.

ports be done via the app. These are examples of the sorts of unreviewable (and erroneous) exercises of discretion that will become the norm for anyone trying to invoke an exception to the proposed rule's requirement to use CBP One.

The overall result is that large groups of people must wait in Mexico for extended periods of time, left in precarious positions and unable to plan ahead as to how long their wait will be and what resources they need. This wait will force them to rely on limited and often over-encumbered migrant spaces. Every person forced to wait in Mexico is faced with a risk of kidnapping, exploitation by criminal groups and government officials looking to exploit their desperation, as well as other issues caused by living in temporary conditions without security. And each day that a person waits puts them at further risk for kidnapping. Criminal elements in Mexico will kidnap people and hold them for ransom, draining already limited resources and putting lives in danger. Many of the conditions that led people to flee their homes are replicated at the border. Las Americas has observed domestic abuse victims being abused again, while waiting to be allowed to enter the United States. And some clients of Las Americas were robbed in broad daylight by Mexican police officers while they were in Juarez. Forcing people to wait before entering the United States only increases their vulnerability and the likelihood that they will face the same persecution from which they are fleeing.

The fact that the proposed rule seems to contemplate the use of the CBP One app earlier in an individual's migration journey, i.e. from locations other than the U.S.-Mexico border, will not alleviate the risk of violence that migrants face. For one thing, at least at the moment, the app seems to only function within Mexico. Even though the proposed rule seems to contemplate expanding access, successful use of the app would require a person to show up at a specified time and date at the border for their appointment, a task that would not be possible for someone making an appointment before completing their journey to the border. Further, even if such issues could be resolved, expecting people to use the CBP One app from locations other than the U.S. border means that when technical issues using the app inevitably arise, migrants will not have access to U.S.-based organizations like Las Americas to help them troubleshoot that process.

Additionally, we commonly see asylum seekers with health problems that make it even more untenable for them to wait in Mexico, particularly when they are forced to live in shelters, in camps, or on the street. All of these situations serve to exacerbate pre-existing conditions such as asthma, cerebral palsy, leukemia and other cancers, and other serious illnesses, including mental health concerns related to trauma experienced on the journey north. Access to medical care on the Mexican side of the border is limited for migrants. While community organizations help migrants access initial consultations with doctors, in most cases, these are general check-ups. When a referral to a specialist is necessary, access to that specialist is either cost-prohibitive, unavailable in the area, or not available to non-residents. In most situations, migrants are not

afforded access to the medicine they need. The wait times at the border make it more likely that people living with illnesses will run out of life-saving medications and be unable to access refills.

The CBP One app has consistently excluded many of the most vulnerable asylum seekers fleeing persecution, whom the United States has a legal obligation to protect. Migrants who do not speak one of the languages available on the app, migrants who are not cell phone savvy, do not have data or wifi sufficient to apply, who do not have smartphones, who may not read or write, who have to apply for an entire family, and who may have physical or mental health limitations are just some of the people that this rule will knowingly exclude. The Departments seek to propose a rule that “appropriately provides migrants a meaningful and realistic opportunity to seek protection” and yet if this rule goes into effect, it will only provide a small number of **certain** migrants that opportunity, and will *exclude* many others entirely from ever even initiating the asylum. The Departments will no doubt then measure the putative success of this program based on the number of people who do use the app, once again failing to account for those excluded from the process entirely, rather than measuring fair, sustainable, and equitable access and adjudication.

IV. Resurrecting Illegal Policies Used By the Last Administration to Ban Asylum Seekers will separate families and unfairly deny protection to meritorious asylum claims

The proposed rule is a new iteration of similar asylum bans the Trump administration attempted to advance. Those bans, which similarly barred refugees from asylum protection based on manner of entry and transit, were repeatedly struck down by federal courts as unlawful.¹⁴ The Trump administration’s transit ban, which was in effect for a year before it was vacated, inflicted enormous damage including deportation of refugees to harm, separation of families, and prolonged detention. This proposed rule would similarly deny refugees access to asylum by blocking access to the system entirely for some and rapidly deporting others without access to asylum hearings, resulting in the same horrific harms.

Despite the Biden administration’s attempts to distinguish its proposed rule from the previous administration’s, it would similarly operate as an asylum ban for refugees based on factors that do not relate to their fear of return and would result in asylum denials for all who are unable to establish that they qualify for the extremely limited exceptions. Its use in expedited removal will require asylum seekers — many of whom have suffered persecution and violence and underwent

¹⁴ See *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019) *appeal pending sub nom O.A. v. Biden*, No. 19-5272 (D.C. Cir.) (vacating prior rule); *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1121 (N.D. Cal. 2018) *affirmed by East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021) (enjoining rule); see also *Al Otro Lado, Inc. v. Mayorkas*, No. 17-CV-02366-BAS-KSC, 2021 WL 3931890, at *20 (S.D. Cal. Sept. 2, 2021) (enjoining the practice of metering for violating the due process rights of those subject to the policy).

a harrowing journey to reach safety — to prove that the rule does not apply to them in a credible fear interview shortly after arrival in the United States, while detained and with little to no access to counsel, likely without knowledge of how the rule works or what they need to prove.

Las Americas had multiple clients who were denied asylum because of the Trump administration's asylum bans. **Two of our clients were granted withholding of removal under the INA, with the IJ recognizing that they *could have been granted asylum absent the Trump administration's asylum bans.*** As a result, they had a higher burden of proof in establishing their need for protection, were limited to temporary protection (withholding can be withdrawn if a judge determines that conditions have changed in their country of origin), had no pathway to lawful permanent residency, and their family members were not able to follow-to-join them. After the Trump bans were enjoined by courts, we were able to file motions to reopen and obtain a grant of asylum with the IJ who had granted both of them withholding of removal. They were both ultimately granted asylum solely because the rules were no longer enforceable.

With legal representation, T. succeeded in proving by a preponderance of the evidence that he would be persecuted for his political opinion if returned to his native Cuba. In his grant of withholding of removal, the Immigration Judge stated that he would have granted asylum but for the policy in place by the prior administration. T.'s wife and daughter remain in Cuba and were denied the opportunity to follow-to-join because of this.

B., a Honduran woman, applied for asylum because she was persecuted in her native Honduras for being lesbian. She had no family or sponsor in the United States and would not have been able to apply through any parole program like the CHNV program. With legal representation, B. succeeded in proving by a preponderance of the evidence that she was persecuted by the general population and also not protected by the State on account of her sexual orientation. In his grant of withholding of removal, the Immigration Judge stated that he would have granted her asylum but for the policy in place denying access to asylum to those who entered the United States without inspection in order to ask for protection. B. did not feel safe in Mexico either on account of her sexual orientation, so she was unable to seek asylum there.

We believe we would be able to present more case examples similar to the above if given more time to respond to the proposed rule. The modest changes in between the Trump administration's transit ban and this proposed ban are not sufficient and, and the limit to withholding of removal will continue to cause significant harm to refugees and the organizations that serve them.

First, withholding removal comes with a removal order and allows the government to remove a person to a third country. Additionally, there is no pathway to citizenship, and recipients must apply annually for work authorization, an application that is subject to frequent delays in adjudication. These factors mean that even people like T. and B. who are able to win withholding

cases will face long-term limbo that is incompatible with the United States' obligations to allow refugees a path to permanence and resettlement in this country.

Second, withholding of removal causes family separation. In the ordinary course, a person who receives withholding of removal cannot petition for their family members to be considered as derivatives on their applications. And they likewise cannot travel abroad, even to a third country, to visit or reunite with family members. Though Las Americas welcomes the fact that the proposed rule contemplates an exception for family unity that would allow an immigration judge to essentially convert a grant of withholding into a grant of asylum to enable family unity, that exception will not ameliorate the problems associated with a limited grant of withholding. We and other organizations like us will still have to submit applications for would-be derivatives on an asylum case because the proposed rule's family unity exception would apply only at the end of proceedings. We would also have to expend resources continuing to help applicants who have withholding of removal to comply with supervision requirements that they might face and to apply annually for work authorization. And in states like Texas, where a valid work authorization is required for a driver's license, our clients would face ongoing perpetual harm from being relegated to withholding status and forced to live as second-class refugees.

And most fundamentally, requiring people to meet the higher standard that applies to withholding applications means that many people will be deported to persecution and torture because, even though they could have met the well-founded fear standard contemplated by law, they cannot satisfy the higher burden for demonstrating eligibility for withholding of removal.

V. The Proposed Rule Eviscerates Critical Safeguards in the Expedited Removal Process

In addition to imposing an asylum ban during the credible fear process, the proposed rule would eliminate critical safeguards for asylum seekers who receive negative credible fear determinations because they are barred under the rule. It would 1) deprive asylum seekers of the right to immigration court review of negative credible fear determinations where they do not affirmatively request review and 2) eliminate asylum seekers' ability to request USCIS reconsideration of negative credible fear determinations. These changes would apply to all asylum seekers banned under the rule and would accelerate their wrongful deportation to harm.

The proposed rule would change existing regulations to deny asylum seekers immigration court review of negative credible fear determinations if they do not affirmatively request review. This provision would apply to asylum seekers issued negative credible fear determinations due to the asylum ban. Immigration court review of negative credible fear determinations is a crucial safeguard guaranteed by statute; from Fiscal Years 2018 to 2021, for instance, over a quarter of negative credible fear determinations were reversed through immigration court review. In its

December 11, 2020, omnibus asylum rule known by advocates as the “death to asylum” rule, the Trump administration previously imposed a similar hurdle,¹⁵ depriving asylum seekers of immigration court review of credible fear decisions where they did not affirmatively request it. The Biden administration rightly reversed this change in the May 31, 2022, interim final rule on asylum processing. There the agencies explained that “treating any refusal or failure to elect review as a request for IJ 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.” Despite the agencies’ conclusion less than a year ago, they now seek to deprive asylum seekers of the right to immigration court review where they do not affirmatively request it. The proposed rule offers no reasoned justification for this abrupt about face.

Requiring asylum seekers to affirmatively request review of negative credible fear determinations creates an additional hurdle for asylum seekers, the vast majority of whom are unrepresented, while they navigate an already convoluted process that carries potentially deadly consequences of removal to persecution or torture. In a system that is most often confusing to an unrepresented migrant and serves to deny access to justice more times than it serves to afford protection, expecting migrants to understand that they have to “affirmatively” request judicial review is unreasonable and shows a concerted effort to reduce due process protections for asylum seekers. Due to language, education, time in custody, and other barriers, asylum seekers may not understand this requirement to affirmatively request immigration court review.

Las Americas has some examples of successful requests for reconsideration (RFRs) and IJ reviews, which demonstrate the absolute necessity of access to counsel and the importance of maintaining access to these safeguards. In our experience, non-English speaking individuals may not share enough information during CFIs for multiple reasons that have nothing to do with the merits of their cases. First, they often have no knowledge of how the U.S. asylum system works and what information they need to share to demonstrate their eligibility to be considered for asylum. Further, those who are fleeing countries where they were threatened by people in uniform often have trouble sharing personal information with people in uniform, like those who are conducting CFI’s. This information would provide additional context to the data that the Rule relies on. For example, the lack of access to counsel and the procedural barriers already in place operate to deprive migrants of a legitimate opportunity to state their case. Contrary to the proposed rule’s theory that RFRs are a waste of resources because so few are granted, the experiences of Las Americas’ clients demonstrate that so few are granted because migrants

¹⁵ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (proposed Dec. 11, 2020) <https://www.federalregister.gov/documents/2020/12/11/2020-26875/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>.

cannot adequately state their fear in the initial interview nor can they access assistance with the appeal process.

Expedited removal denies migrants a meaningful opportunity to explain their fear of returning to their country of origin. Many migrants who flee persecution and violence are not aware of the exact requirements of U.S. asylum law and do not know that they have to state their fear immediately to a uniformed official in order to avoid being deported under expedited removal. At the CFI phase, very few people are prepared to tell their story or understand the consequences of the CFI process. Furthermore, there are plentiful procedural problems with how CFIs are conducted that prevent people with meritorious claims from telling their story. For example, in the Torrance County Detention Facility, CFIs are conducted over the phone in crowded, non-confidential spaces, where asylum seekers must risk their stories being used against them by other people in the detention center with them if they share everything in the interview.

Las Americas has seen countless situations where access to immigration court review was critical to saving our clients from unlawful removal. For example, Y. is a gay man from Senegal, a country that criminalizes same-sex sexual conduct. He was held in a private prison in the United States, was routinely shackled, and consistently felt very unsafe. Y. had spent his entire life working very hard to hide his sexual orientation from his family — and most importantly — from government officials. As a result, when Y. was asked about his fear of returning to Senegal by government officials while he was in jail, he did not feel safe disclosing his sexual orientation and fear of return. This reality is common for claims based on sexual-orientation based harm and other forms of sexual abuse.¹⁶ He failed his credible fear interview. Las Americas met with him before he was removed, and, after multiple meetings with him, he finally felt safe disclosing the true reason he fled Senegal. Las Americas assisted him with requesting reconsideration of the denial. If not for Las Americas' legal representation and the time to compile and file the RFR, he would have returned to danger and persecution on account of his sexual orientation.

Another client, R. from Haiti, eventually received protection under the Convention Against Torture (“CAT”) after initially receiving a negative credible fear finding. The asylum officer failed to consider country conditions that demonstrated people in R.'s situation are regularly detained and tortured upon deportation to Haiti. The IJ, as often occurs, deferred to the asylum officer's findings without meaningfully reviewing them. With his attorney's assistance, R. was able to file a RFR and have those initial decisions reversed. Without access to the RFR process, R. would likely be facing torturous conditions in Haiti today.

¹⁶ See, e.g., *Moab v. Gonzales*, 500 F. 3d 656 (7th Cir. 2007) (reluctance to disclose sexual orientation at CFI); *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052–53 (9th Cir. 2002) (failure to mention a sexual assault at a credible fear interview “cannot reasonably be characterized as an inconsistency”).

It is just as important that people have access to IJ review without barriers like requiring an affirmative request. Las Americas sees CFI denials for complex legal reasons that our clients do not understand, and therefore, don't realize are erroneous. For example, S. was found not to have a credible fear based on the horrific domestic violence she experienced after the asylum officer failed to consider multiple plausible particular social groups ("PSGs"). The PSG analysis is often too complicated for a pro se individual to understand, and therefore, S. needed to have the assistance of a lawyer to even know that the officer had erred. Similarly, O. was originally denied credible fear after the asylum officer wrongly applied the reasonable fear standard. Because they had the assistance of Las Americas, O. and S. are now released from ICE custody and pursuing asylum. Without automatic review, it is not clear these clients would have gotten to have an IJ review at all.

The proposed rule also attempts to entirely eliminate asylum seekers' longstanding right to submit requests to USCIS to reconsider erroneous negative credible fear determinations if they are barred under the rule. This safeguard has, for decades, shielded many refugees from deportation to persecution and torture. According to data provided with the Asylum Processing Interim Final Rule establishing asylum merits interviews, between FY 2019 to FY 2021, USCIS reconsideration of erroneous negative credible fear determinations saved at least 569 asylum seekers from deportation to persecution or torture without an opportunity to apply for asylum.

In the Asylum Processing Interim Final Rule, the agencies imposed severe limitations on asylum seekers' ability to submit requests for reconsideration of negative credible fear determinations, setting an unworkable seven-day deadline for submitting a request for reconsideration (following immigration judge review, which must happen within seven days of the fear determination) and limiting asylum seekers to a single request. Advocates and attorneys have condemned these new restrictions, which have barred asylum seekers issued erroneous negative credible fear determinations from obtaining reconsideration due to draconian temporal and numerical restrictions.¹⁷ UNHCR has opposed elimination of this safeguard and warned that it may increase the risk of refoulement.¹⁸ Rather than fully restoring the right to request reconsideration, the agencies now seek to eliminate it completely for asylum seekers who are determined during their credible fear screenings to be banned under the proposed rule. This provision would prevent many asylum seekers wrongly found to be banned under the rule from subsequently presenting evidence to USCIS that they should have been exempted or qualified for an exception, which

¹⁷ Rebecca Gendelman, Human Rights First, *Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies* (Aug. 3, 2022) <https://humanrightsfirst.org/library/pretense-of-protection-biden-administration-and-congress-should-avoid-exacerbating-expedited-removal-deficiencies/>.

¹⁸ See United Nations High Commissioner on Refugees (UNHCR), Comment on Proposed Rule on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers (Oct. 20, 2021), <https://www.regulations.gov/comment/USCIS-2021-0012-5192>.

would especially harm unrepresented asylum seekers rushed through the credible fear process without any meaningful opportunity to present their claim.

In Las Americas’ experience, RFRs — like the CFIs that precede them — are often denied for reasons that have nothing to do with the validity of the underlying protection claim. Low RFR grant rates are attributable to procedural barriers that serve to prevent adjudicators from even evaluating the merits of the applicant’s fear of return. For example, one staff member at Las Americas submitted a RFR for a Haitian Creole speaker with a mental disability and a strong political asylum claim. The Houston Asylum Office denied the RFR without even considering the merits, because it was submitted over seven calendar days after the IJ affirmed the decision. This was a procedural denial, not a merits one. And creating further barriers based on procedural denials will only cause more meritorious claims to be denied unjustly.

Additionally, many asylum seekers falling under this rule will be denied access to asylum and will be subject to the higher standard of a reasonable fear interview. The statute requires that asylum claims be adjudicated at the CFI stage under a “significant possibility” standard.¹⁹ The proposed rule elevates that standard by requiring applicants to actually establish, at their credible fear interview, that they *are* eligible for asylum. The Rule states that if the “asylum officer where to *find* that a noncitizen is ineligible for asylum” due to the bar, “a negative credible fear determination would be entered as to asylum.”²⁰ The officer would *not*—as required by statute—assess the applicability of the eligibility bar and its exceptions under the significant possibility screening standard. Only “where the lawful pathways condition does not apply at all or the asylum officer determines that the noncitizen qualifies for an exception or has rebutted the presumption of its application” that “the asylum officer would apply the ‘significant possibility’ standard” to assess the remaining aspects of asylum eligibility.²¹ This higher burden cannot stand.

Evidence readily available and already in the public record shows why the higher burden imposed by this rule will make it impermissibly challenging for applicants to prevail at a CFI. Most of these asylum seekers are *pro se*, with no legal representation or even access to a legal orientation. The arduous journey to the U.S. border often eliminates the possibility of providing documentary evidence at this preliminary stage – migrants we have worked with often report documents lost or stolen on their journey. Moreover, trauma as a result of past persecution and

¹⁹ Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11725 (Feb. 23, 2023) (referencing 8 U.S.C. § 1225(b)(1)(B)(v)).

²⁰ *Id.* at 11725, 11746 (emphasis added).

²¹ *Id.* at 11746; *see also, e.g., id.* at 11752 (same for immigration judge review of negative credible fear determination).

the journey itself often interferes with memory and ability to explain their history.²² Finally, use of detention prevents access to outside sources of evidence or support for their claims, including organizations like ours, access to friends and family, and access to medical professionals including therapists and psychologists. Yet, in spite of these challenges, the proposed rule proposes impermissibly heightening the standard for credible fear interviews.

Historically, as the NPRM recognizes, Congressional intent has always been that there be few barriers to establish the right to seek asylum in the United States, hence why the CFI standard has required little from asylum seekers given the early stage of the asylum process.²³ Yet, despite recognizing Congress’s intent, the proposed rule’s effect is to subvert that intent and turn the credible fear process into the actual adjudication of the underlying asylum claim.

VI. The Proposed Rule Would Leave Refugee Families Separated, Deprive Refugees of a Path to Citizenship

Refugees banned from asylum protection under the rule would have to establish eligibility for withholding of removal or protection under CAT to obtain protection from deportation. As discussed above, those who are otherwise eligible for asylum but are unable to meet the higher threshold to establish eligibility for withholding of removal or CAT protection would be deported, while many granted these lesser forms of protection would be left in permanent limbo, separated from families, and under constant threat of deportation. Unlike asylum, these forms of relief do not confer permanent status or a path to citizenship, do not allow people to petition for their spouses and children, do not permit people to travel abroad, and leave people with a permanent removal order, subject to deportation at any time.

One Las Americas client who received withholding of removal, a young indigenous woman from Guatemala, is worried she will not ever see her parents again. Were she to travel to see them — even to a country other than Guatemala — she would be barred from returning to the United States for ten years and subject to summary removal if she returned. This family separation is a significant hardship for her and her parents.

As a result, many refugees like her who should be granted asylum under U.S. law will languish in the United States in legal limbo, indefinitely separated from spouses and/or children who

²² Human Rights Watch, *Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies*, 18-22 (Aug. 2022), <https://humanrightsfirst.org/library/pretense-of-protection-biden-administration-and-congress-should-avoid-exacerbating-expedited-removal-deficiencies/> (citing further evidence of this proposition).

²³ See, e.g., H.R. Rep. No. 104-469, pt. 1, at 158 (1995) (explaining that under the significant possibility standard imposed by Congress, “there should be no danger that [a noncitizen] with a genuine asylum claim will be returned to persecution”).

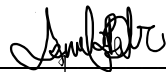
remain abroad in danger. The Trump administration's transit ban similarly left many refugee families separated by barring refugees from asylum and leaving them with the inadequate protection of withholding of removal.

Conclusion


The proposed rule is illegal, inhumane, and discriminatory. Like the Trump administration's entry and transit bans, this asylum ban will deport refugees to persecution and torture and separate families without ever having a chance to present their claim and request for protection. The proposed rule also requires asylum seekers at the border to use a discriminatory and deficient mobile app that is contingent on resources and ability to use smartphones, language skills, and an ability to wait indefinitely for an appointment slot, cutting off asylum access for many of the most vulnerable asylum seekers.

Las Americas Immigrant Advocacy Center calls on the administration to withdraw this rule in its entirety, stop punishing migrants arriving at the U.S. southern border, and instead allocate resources toward building more humane asylum processing and fair adjudications.

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