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RE: Comments in Opposition to the Joint Notice of Proposed Rulemaking entitled *Circumvention of Lawful Pathways;* RIN: 1125-AB26 / 1615-AC83 / Docket No: USCIS 2022-0016 / A.G. Order No. 5605-2023

Dear Assistant Director Reid and Acting Director Delgado:

Denise Gilman and Elissa Steglich, Co-Directors of the Immigration Clinic at the University of Texas School of Law, are submitting the following comments to the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), and the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR) ("the agencies") in response and opposition to the above-referenced Notice of Proposed Rulemaking ("the Rule") issued by the agencies on February 23, 2023.

We strongly oppose the Proposed Rule, which will prevent current and future asylum seekers from accessing protection they merit under domestic and international law, result in the return of many refugees to harm, and leave others in the United States without stable protection. Through this comment, we urge EOIR and DHS to withdraw the Rule in its entirety and ensure that a full and fair asylum system is made accessible to all those who seek refuge in the United States.

We have extensive experience with direct representation of detained and non-detained asylum seekers at all stages of the process, including credible and reasonable fear screenings, Immigration Court review hearing of the fear determinations, Immigration Court merits hearings, agency and federal appeals, and Asylum Office affirmative proceedings. We have particularly robust experience with credible fear screening and asylum proceedings involving individuals and families in detention. We have counseled and represented thousands of individuals over the past two decades detained at the T. Don Hutto Detention Center in Taylor, Texas; the Karnes County

Detention Center in Karnes City, Texas; and other Texas detention facilities. Our comment relies heavily on our experience at the Hutto and Karnes facilities and does not address all components of the proposed regulations.

The proposed rule treats asylum seekers arriving at the U.S. southern border as potential threats to be presumptively excluded, except in rare instances where they navigate the new system by succeeding in using the problematic CBP One app or by overcoming a presumption against asylum for those arriving to the United States from Mexico. This approach runs counter to U.S. and international law norms that envision a meaningful protection system that covers all who qualify, including those who arrive at the border and even when large numbers of asylum applicants seek protection in times of human rights crisis in countries of origin. Rather than the punitive approach outlined in the rule, we urge EOIR and DHS to reconfigure the asylum adjudication process to recognize asylum seekers as vulnerable individuals who are granted a panoply of rights under U.S. and international law and who may merit permanent protection in this country.

The approach of the proposed rule is not a good fit with the current reality that arrivals at the border are predominantly viable asylum seekers. Nor does it further the government's interest in and obligation toward creating a system that receives asylum seekers at the border fairly and efficiently.

Introduction and overview of the Rule

The proposed Rule incorporates a new, sweeping ground of ineligibility for asylum seekers arriving at the U.S. southern border who did not seek asylum in a country of transit and did not obtain an appointment to present at the border using a mobile phone application known as "CBP One." Government officials have privately acknowledged that this Rule will constitute a foundational shift in the U.S. asylum system, making access to asylum at the southern border the exception rather than the norm.

The proposed Rule provides that people arriving at the southern border without permission to enter will be presumed ineligible for asylum if they did not seek and receive a denial of asylum in a transit country or countries and if they entered between ports of entry or at a port of entry without having obtained an appointment via a mobile application called CBP One. People subject to the Rule must "rebut" this presumption by showing the presumption was incorrectly applied to them or they fall within narrow exceptions to the rule, including for rape survivors, trafficking victims, and those facing acute emergencies or other "exceptionally compelling circumstances." Those who fail to rebut the presumption will be swiftly deported unless they can meet a heightened standard to establish their fear of return. Even then, those who meet this heightened standard will only be permitted to seek a lesser form of protection than asylum, known as withholding of removal or protection under the Convention Against Torture. These lesser forms of protection provide no path to citizenship, expose people to the perennial risk of removal to other nations, and proscribe their ability to petition for reunification with their spouse or children.

The proposed Rule violates U.S. obligations under both domestic and international law, which ensure access to protection for people fleeing persecution. Prior to the Rule's issuance, nearly 300 civil society organizations, more than 150 faith-based organizations, and nearly 80 members of the House and Senate called on the Administration to abandon its plans to resurrect these Trump-era asylum bans.

In the preamble to the Rule, the agencies highlight the pressures at the border caused by increasing arrivals. The United States is not alone in facing these pressures; the world faces record global displacement caused by political instability and oppression, violence, and climate change. However, the U.S. government does not need to and may not legally respond to these pressures by implementing restrictive measures such as this Rule that do not comply with U.S. and international law. Many humane and practical solutions are available to the administration including increasing funding to and coordination with civil society organizations providing respite on the border and throughout the United States.

Our Immigration Clinic works in partnership with legal, social and shelter service providers around the state and particularly at the border. Increased and sustained (non-emergency) funding of the organizations already engaged in the work of welcome along the border and around the country would accomplish safe, organized and humane treatment of arriving asylum seekers, as the law guarantees.

Current US policies including required use of CBP One create artificial bottlenecks at the ports of entry. The Rule doubles down on those failures rather than investing in community-based service provision. Critically, it fails to expand access to the ports of entry as necessary to ensure safe passage to asylum seekers. The proposal should be abandoned.

Concerns regarding domestic and international refugee and asylum law obligations

The United States is obligated to the requirements of the international Refugee Convention by virtue of its 1967 Protocol. Congress codified these obligations through the Refugee Act of 1980, which provides any person arriving at a U.S. border the right to seek asylum, regardless of their status or manner of entry. The central function of this proposed Rule is to limit asylum eligibility at the southern border based on a person's place of entry and transit as well as their ability to access technology. The presumption of ineligibility that arises from this function directly contravenes the principle of non-discriminatory asylum access codified by the Refugee Act.

Indeed, this central premise of the Rule recalls similar bans issued by the Trump administration, which were repeatedly struck down by federal courts. During the time it was in place, the Trump-era rule that banned asylum seekers based on their manner of transit resulted in migrants with strong claims to asylum being rapidly deported to their persecutors, and separated countless families when refugees barred from asylum under the rule obtained lesser protections that did not allow them to apply for family members abroad. These harms will inevitably recur under the proposed Rule.

During the previous transit ban, we counseled dozens of individuals with bona fide asylum claims who were improperly denied access to protection. Many of the women and families we met with in detention would have been able to apply for asylum were it not for the transit ban.

Some did not ever even have an opportunity to present their protection claims, because they were immediately deported under expedited removal when subjected to a higher standard in the credible fear interview process because of the transit ban. Others were held to a higher standard in Immigration Court removal proceedings and did not succeed on the merits or obtained only withholding of removal rather than asylum. Yet others passed the credible fear interview but remained detained throughout their proceedings because of the determination, based on the transit ban, that they were only eligible for withholding of removal. Others were eventually able to obtain asylum after an initial determination that they did not qualify, demonstrating the likelihood of error, leading to returns of asylum seekers to danger under the prior transit ban. For example, in one case in which we provided representation, the asylum seeker received asylum, after months of detention, when the Immigration Judge decided on the merits that the initial credible fear determination of ineligibility for asylum based on the transit ban was incorrect. The new Rule would repeat the errors of the Trump administration and send hundreds if not thousands of individuals into the hands of persecutors.

Concerns regarding the CBP One app and making asylum access contingent on access to technology

The proposed Rule introduces an entirely new concept into the U.S. asylum system – it renders asylum at the southern border contingent on migrants' ability to access and properly utilize a mobile phone app to make an appointment prior to arrival. All asylum seekers attempting to enter the United States between ports of entry and those arriving at ports who are subject to the new transit grounds of ineligibility will be ineligible for asylum unless they made an advance appointment to present at the port of entry using the CBP One app.

Requiring access to technology to secure asylum access fails to account for gaps in technology, language access, and economic disparities between groups of migrants attempting to use the app while fleeing harm. The result will be an asylum system that leaves behind those with fewer resources, often those in the greatest need.

Furthermore, the CBP One app in its limited roll-out has already proven extremely flawed. Users have reported frequent glitches and appointments that fill up before they can access them; and the facial recognition technology is racially disparate in application, often rejecting photos of migrants with darker skin.

New limited parole pathways are not a replacement for asylum access at the border

As a threshold matter, this Rule pits individuals exercising their lawful right to seek asylum at the U.S. border against individuals who can afford to apply for parole programs — describing only the latter as using "lawful" pathways. This distorts domestic and international asylum law and undermines the Biden administration's own commitment to protect the right to asylum.

The proposed Rule attempts to justify a restrictionist approach to asylum access at the border by referring to new limited parole programs the administration has unrolled which allow a capped number of Ukrainians, Venezuelans, Haitians, Cubans and Nicaraguans to come to the United States on a time-limited parole grant. Parole pathways are welcome and important in the larger context of U.S. immigration policy, but they should never be considered a replacement or substitute for non-discriminatory access to asylum at the border.

Penalizing individuals who fail to use the limited pathways simply cannot be justified. If the agencies believe that the new legal pathways are sufficient to accommodate most refugees and provide safer means of arriving in the United States, then there is no need to penalize those who do not use the pathways. On this understanding, there would be incentives for use of the pathways, and all those who do not use them should be understood to have had good reason to arrive spontaneously. In practice, though, the pathways are extremely limited and insufficient and so cannot replace access to asylum at the border.

The new parole programs require people to apply from their country of origin or a nearby country, while seeking a passport from the government that may be persecuting them and arranging air travel and sponsorship in the United States. Practically, this means those who are in most desperate need of protection and whose flight is the most urgent will not be able to utilize the parole programs.

Our Clinic has represented multiple Afghan refugees who were evacuated into the United States. Just as it would have been unthinkable to demand every evacuee have a passport and a financial sponsor in the United States, we should not tolerate a policy demanding individuals in harm's way to take such a path. The humanitarian crisis in Afghanistan demonstrated the urgency of the need to flee. Refugees spent days sleeping on the floor of the airport, without any luggage, to escape. In crises like these, refugees with viable asylum claims face conditions that do not allow for the process and criteria required for parole programs.

Realities of asylum access in Mexico and other transit countries

The proposed Rule bans migrants from asylum eligibility if they arrive at the southern border and did not receive a denial of asylum in a country of transit. In addition to contravening what the Ninth Circuit Court of Appeals has referred to as a "long line of cases" holding that failure to apply for asylum in a transit country "has no bearing on the validity of a [person's] claim for asylum in the United States," this ban in practice constitutes a nearly categorical bar to asylum access at the southern border. The bar will apply to the vast majority of African, Caribbean, Central American, and Latin American asylum seekers arriving at the southern border because of the lack of meaningful asylum systems in Mexico and other common transit countries.

Deficiencies and abuses in Mexico's asylum system are well documented, and those who do attempt to stay and try to seek protection in Mexico endure systematic violence and discrimination against migrants. Other common transit countries, including Guatemala, El Salvador, Honduras, and Nicaragua, are even less protective. As noted asylum scholar Karen Musalo recently explained: "...[N]ot one of the four countries has anything approaching an

adequate refugee protection system. Guatemala's system has been described as 'inadequate' and cumbersome, and El Salvador's as having 'major regulatory and operational gaps.' The system in Honduras is 'nascent,' and those individuals who try to access it, especially women, children, and LGBTQ+ individuals, are especially vulnerable to abuse and sexual exploitation. Nicaragua is even more of an outlier, having ceased any cooperation with the UNHCR; in 2015 it suspended meetings of its refugee determination body, the National Commission for Refugees."

Those who do attempt to seek asylum in Mexico or another country of transit will likely be forced to wait in conditions that are particularly dangerous for migrants for months or years while their application is adjudicated. Human Rights First has tracked more than 13,480 reports of violent attacks on migrants blocked in or expelled to Mexico, including murder, kidnapping and rape, since President Biden took office in January 2021. Even U.S. citizens are not immune from the violence endemic to Mexican border towns, while asylum seekers are expected to wait for weeks, months, or years in those same dangerous conditions. Furthermore, it is well documented that many of the common transit countries along the journey to the United States' southern border are particularly perilous for women and LGBTQI+ migrants, who are vulnerable to the same gender-based violence many of them fled in the first place.

Our Clinic has represented clients who fled through Mexico and were victims of human trafficking from the Mexican gangs and cartels. Forcing vulnerable migrants who are fleeing from persecution to seek asylum before reaching the United States leaves them susceptible to gangs, smugglers, cartels, and violence.

The Rule's exception for individuals fleeing individualized and imminent harm in Mexico is too narrow. Kidnapping, assault and rape happens in an instant. To pretend that an individual will have the opportunity to escape such violence with anticipation yet with evidence of its likelihood to pass belies the reality of endemic violence in Mexico.

Compromised due process and access to counsel

The proposed Rule will be implemented during the expedited removal process, where asylum seekers are swiftly deported without a day in court if they do not secure a fear screening and pass that screening. During the threshold fear interview, asylum seekers will be required to show that the ban does not apply to them or, if it does, that they can rebut the presumption of ineligibility by proving they fall within one of the Rule's exceptions. Those who cannot rebut the presumption will then be forced to meet a "more likely than not" standard just to be able to present a claim to lesser protections in the form of withholding of removal or CAT protection.

For those forced to undergo this screening while in detention, the obstacles to due process are so high as to render success unachievable for most, regardless of the merits of their asylum claim. Asylum seekers will be forced through their fear interviews while in government custody in notoriously difficult and abusive conditions, without prior knowledge as to the Rule's details or workings, and only a few hours or days away from the dangers and horrors of their flight. Even if legal service providers are able to obtain the ability to provide brief orientation or consultation services prior to a credible fear interview, there will be no meaningful access to representation for refugees navigating this complex process.

As explained above, our Clinic has witnessed the overwhelming barriers to fair adjudication of protection claims during the expedited removal process, particularly for those individuals in detention. Nothing about the expedited removal process is trauma-informed. Individuals are pulled into interviews without warning or preparation. Asylum seekers cannot see or identify the Asylum Officer or interpreter, since most interviews are conducted by phone. At the Hutto Detention Center, the interviews often occur in non-private cubicles, where other detainees and visitors can observe asylum seekers shaking over phones during the interviews. No tissues, water or food is provided. We repeatedly hear from asylum seekers that they felt pressured to cut their answers short and felt intimated about sharing their experiences. We counseled multiple women who were too ashamed, confused, and fearful to reveal incidents of gang rape and violent sexual assaults during their credible fear interviews.

Language access is another significant concern. In our experience, the Asylum Office often finds it difficult to secure interpreters for less common languages, including Haitian Creole and Lingala as well as indigenous languages from Guatemala, leading to lengthy delays in the credible fear proceedings and problems with the quality of interpretation. Many clients have reported that the interpreter in the credible fear interview did not appear to understand the testimony or the questions of the Asylum Officers. Clients regularly complain that their testimony is cut off to allow for interpretation without an opportunity to continue. Clients report that they are told to keep their answers short for purposes of interpretation and that they feel silenced. The credible fear interviews are not recorded, so there is no means of monitoring the extent to which interpretation issues lead to errors in the Asylum Officer's understanding of the answers provided in the interview.

Raising the screening standards for credible fear interviews for withholding of removal and CAT will further compromise due process for asylum seekers. Furthermore, requiring an affirmative request for immigration judge review of a negative credible fear determination discounts for the high volume of pro se applicants who struggle with language barriers and understanding the complex immigration system.

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 in the asylum processing rule, 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 credible fear and asylum processing rule adopted in 2022, 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

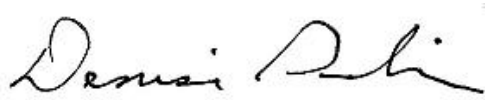
and numerical restrictions. UNHCR opposed the limits on the reconsideration safeguard adopted in the credible fear and asylum processing rule and warned that the changes increased the risk of refoulement.

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

Conclusion

We strongly oppose the proposed Rule because it violates the existing statutory framework and the mandate of the agencies to provide access to the asylum system and to protect refugees. The Rule runs counter to U.S. and international law norms that envision a meaningful asylum system that covers all who qualify. It should be rescinded.

Thank you for considering these comments in opposition to the Rule. Please contact us to provide any additional information you might need. We look forward to your response.



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