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Submitted Via Federal e-Rulemaking Portal: <http://www.regulations.gov>

Re: Notice of Proposed Rulemaking, “Circumvention of Lawful Pathways,” 88 FR 11704, DHS Docket No. USCIS 2022–0016, A.G. Order No. 5605-2023, RIN 1615–AC83 & 1125-AB26

Mr. Delgado and Ms. Reid:

The American Civil Liberties Union (“ACLU”) submits these comments in strong opposition to the proposed rule of the U.S. Department of Homeland Security (“DHS”) and Department of Justice (“DOJ”) entitled “Circumvention of Lawful Pathways,” 88 FR 11704 (Feb. 23, 2023) (the “NPRM” or “proposed rule”). We urge the agencies to abandon their plans to issue a final rule, because any rule along these lines would constitute a serious departure from the United States’ commitment to refugee protection and would be fundamentally unfair, unwise, and illegal. There is no way to cure the proposed rule’s core defects. If the agencies nonetheless decide to proceed down this path, they must, at a minimum, modify the proposed procedures.

The ACLU and partner organizations are counsel in lawsuits challenging the two rules that the proposed rule would modify and supersede.¹ We write to express our view that this NPRM, if finalized, would be contrary to law and arbitrary and capricious in numerous ways. The proposed rule would cause countless people seeking asylum immense, avoidable suffering.

This comment is structured as follows. While the ACLU strongly opposes the adoption of anything resembling the proposed rule, Section I highlights two critical procedural changes that must be made in any final rule. Section

¹ See *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 FR 55934 (Nov. 9, 2018); *Asylum Eligibility and Procedural Modifications*, 85 FR 82260 (Dec. 17, 2020); *E. Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810-JST (N.D. Cal., filed Nov. 9, 2018); *E. Bay Sanctuary Covenant v. Garland*, No. 19-cv-04073-JST (N.D. Cal., filed July 16, 2019); *I.A. v. Garland*, No. 19-cv-02530-TJK (D.D.C., filed Aug. 21, 2019). If the departments decline to issue the final rule as proposed, they should still issue a rulemaking that rescinds those prior asylum eligibility bar rules in their entirety.



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II proposes that the departments' stated goals could be better achieved by expanding parole programs and resuming lawful Title 8 processing. Section III then addresses some of the many reasons the proposed rule is unlawful, arbitrary and capricious, and should not be adopted. Finally, Section IV presents extensive evidence disproving the NPRM's core assumption that regional transit countries provide safe and viable alternative places of refuge for asylum seekers at the U.S. southern border.

I. At the Very Minimum, Any Final Rule Must Make Critical Changes to the Proposed Expedited Removal Procedures.

The ACLU firmly opposes the proposed rule in any form. However, if any version of this rule is issued, at the very least it must make the following procedural changes.

- A. Any final rule must require adjudicators to apply the “significant possibility” standard at the credible fear stage, which is required by statute.

Any final rule must at the very least be revised to comply with the expedited removal statute's clear mandate that asylum officers apply the “significant possibility” standard in credible fear interviews.² Under that standard, asylum officers determine only whether there is a “significant possibility” that an applicant “*could* establish eligibility” for asylum in a full proceeding—i.e., once the applicant has had time to gather evidence, consult an attorney, and fully present their case to an immigration judge. An asylum seeker is not required to *establish* their asylum eligibility until that full asylum hearing. The proposed rule violates this statutory screening requirement, because it requires applicants to actually establish, at their credible fear interview, that they *are* eligible for asylum despite the proposed rule.

The agencies cannot disregard the standard that Congress mandated. Congress's adoption of this threshold screening standard means that, at the credible fear stage, a noncitizen cannot be held to the ultimate burden of establishing any element of asylum eligibility—such as whether harm rises to the level of persecution or nexus to a protected ground. Instead, the question is whether “there is a significant possibility . . . that the [noncitizen] could establish” those elements *at a later full hearing*.³

² 8 U.S.C. § 1225(b)(1)(B)(v).

³ *See, e.g.*, U.S. Citizenship & Immigration Servs., Lesson Plan: Credible Fear of Persecution & Torture Determinations, at 6, 23, 24 (Feb. 28, 2014) (“there must be a significant possibility the applicant can establish that the harm the applicant experienced was sufficiently serious to amount to persecution”; “there must be a significant possibility the applicant can establish that the persecutor was motivated”



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The same statutory standard must govern the new eligibility grounds the rule seeks to apply in credible fear interviews. The standard applies to all determinations of “eligibility” for asylum, and “eligibility” for asylum is exactly what the proposed rule addresses.⁴ Therefore, at the credible fear stage, the proposed eligibility bar can only be applied by asking whether “there is a significant possibility . . . that the [noncitizen] could establish,” *at a later full hearing*, either that the bar does not apply at all, or that one of the exceptions or rebuttal grounds does apply.⁵ Under the statute, this is the *only* way an eligibility bar could be applied at the credible fear stage.

The proposed rule instead directs asylum officers to do exactly what the statute forbids: hold asylum seekers to their *ultimate* burden at the credible fear stage. The NPRM states that if the “asylum officer were to *find* that a noncitizen is ineligible for asylum” due to the bar, “a negative credible fear determination would be entered as to asylum.”⁶ The officer would *not*—as required by statute—assess the applicability of the eligibility bar and its exceptions under the significant possibility screening standard. The NPRM makes clear that it is jettisoning the statutory standard: It is 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.⁷ This procedure violates the credible fear statute and makes any removals based on the proposed rule unlawful under the expedited removal statute, which only allows for rapid deportation of individuals found not to have a credible fear.⁸ These procedures must be altered in any final rule.

The NPRM resists this conclusion by reasoning that, if an asylum seeker subject to the bar is “not excepted and cannot rebut the presumption” of ineligibility, “there would not be a significant possibility that the noncitizen could establish eligibility for asylum.”⁹ But that cart-before-the-horse approach does not square with the statute. If the NPRM’s approach were

by a protected ground), <https://www.aila.org/infonet/uscis-asylum-division-officer-training-course>.

⁴ Compare 8 U.S.C. § 1225(b)(1)(B)(v) (applying standard to “eligibility” determinations), with 88 FR at 11706-07 (limiting “eligibility” for asylum), and 8 U.S.C. § 1158(b)(2)(C) (authorizing certain rules that address who is “[e]ligible” for asylum).

⁵ See 8 U.S.C. § 1225(b)(1)(B)(v) (defining credible fear as having significant possibility of establishing asylum eligibility).

⁶ 88 FR at 11725, 11746 (emphasis added).

⁷ *Id.* at 11746; see also, e.g., *id.* at 11752 (same for immigration judge review of negative credible fear determination).

⁸ See 8 U.S.C. § 1225(b)(1)(B)(iii), (b)(1)(B)(v).

⁹ 88 FR at 11742.



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correct, the agency could hold the asylum seeker to their final burden on *any* eligibility issue at the credible fear stage, then assert that because the applicant could not prove they were eligible, they have no significant possibility of establishing eligibility either. That makes no sense.

Indeed, by the NPRM’s logic, an asylum officer could issue a negative credible fear determination based on an individual’s failure to meet the *ultimate* burden to prove a single element of asylum eligibility, such as nexus to a protected ground, even though they could show a *significant possibility* as to every aspect of eligibility. That interpretation not only conflicts with the statutory language, it is also plainly at odds with congressional intent that, under the significant possibility standard, “there should be no danger that an alien with a genuine asylum claim will be returned to persecution.”¹⁰

The NPRM thus would entirely bypass the threshold screening standard Congress required, which (as discussed below) accounted for the truncated process and challenging conditions in which asylum seekers are screened in expedited removal. *See* Section III.B. The only permissible way to apply the proposed rule at the credible fear stage is to determine whether there is a significant *possibility* that the noncitizen *could* show, after a full hearing with factual development, that the bar does not apply—including by showing a significant possibility of later establishing that an exception or rebuttal ground applies.

B. Any final rule must make clear that asylum officers are required to affirmatively elicit testimony about whether a person falls within the bar’s exceptions or rebuttal grounds.

The NPRM fails to instruct asylum officers that, during credible fear interviews, they must ask questions to elicit *all* information relevant to the bar’s application, including information about whether the applicant satisfies one of the bar’s many complex exceptions. Without that, many asylum seekers will not know what information they need to provide to demonstrate that they have a significant possibility of establishing asylum eligibility.

Binding regulations—which the proposed rule does not purport to supersede—require asylum officers to affirmatively elicit all information relevant to eligibility.¹¹ However, for decades, asylum officers did not apply eligibility bars in credible fear interviews at all and have never applied one requiring complex, fact-specific inquiries. To ensure there is no question about asylum officers’ obligations, the final rule should explicitly instruct them to affirmatively elicit information about whether a person could qualify for an exception or rebut the presumption.

¹⁰ H.R. Rep. No. 104-469, pt. 1, at 158 (1995).

¹¹ 8 C.F.R. § 208.30(d).



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The bar contains a number of exceptions and so-called “rebuttal grounds,”¹² and the applicant bears the burden to demonstrate one of them by a preponderance of the evidence.¹³ For instance, an individual can avoid the bar if they show that they could not access CBP One,¹⁴ or that they faced “an acute medical emergency,”¹⁵ or “an imminent and extreme threat to life or safety.”¹⁶ These grounds are fleshed out by examples and analysis in the proposed rule’s operative language and in the preamble.¹⁷

Without targeted questions from asylum officers, many asylum seekers will not know about the many complex categories that might preserve their eligibility for asylum despite the bar. Few will have a lawyer to help them parse, for example, whether a particular threat of violence in Northern Mexico was “imminent” versus “generalized,”¹⁸ whether CBP One was unavailable for a *qualifying* reason,¹⁹ or whether a particular situation qualifies as an “exceptionally compelling circumstance.”²⁰ It is therefore critical that asylum officers affirmatively ask about these matters. The final rule should instruct them to ask for details about any family or personal medical emergencies, threats of violence, difficulties using CBP One, and other matters that bear on the exceptions. Otherwise, the final rule risks barring people who not only qualify for asylum under the laws passed by Congress, but who would *also* qualify for asylum under the rule itself at a final hearing with adequate time to prepare.

Affirmatively eliciting this information is already required by law. DHS’s own regulations for conducting credible fear interviews require asylum officers to “elicit all relevant and useful information” that bears on an individual’s asylum eligibility.²¹ Under the new bar, information regarding the exceptions and rebuttal grounds is clearly “relevant” to asylum eligibility. Yet the NPRM does not make this requirement explicit. While it specifies detailed procedures for how asylum officers should apply the bar in credible fear interviews, it makes no mention of the need to elicit information about exceptions or ways to rebut the presumption. Other asylum regulations, by

¹² The NPRM’s description of the proposed rule as a “rebuttable presumption” is a misnomer. The proposed rule simply operates as a bar with exceptions.

¹³ See 88 FR at 11750 (proposed 8 C.F.R. § 208.33(a)(1)(ii), (a)(2)). As discussed above, holding applicants to this high burden at the credible fear stage violates the statute.

¹⁴ *Id.* (proposed 8 C.F.R. § 208.33(a)(1)(ii)).

¹⁵ *Id.* (proposed 8 C.F.R. § 208.33(a)(2)(i)).

¹⁶ *Id.* (proposed 8 C.F.R. § 208.33(a)(ii)).

¹⁷ See, e.g., *id.* at 11707 & n.27.

¹⁸ *Id.* at 11707 n.27.

¹⁹ 88 FR at 11750 (proposed 8 C.F.R. § 208.33(a)(1)(ii)).

²⁰ *Id.* at 11707.

²¹ 8 C.F.R. § 208.30(d).



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contrast, have made this requirement clear.²² The NPRM's break from this practice must be corrected. By supplying detailed credible-fear procedures, while omitting the need to elicit all information about the bar's applicability, the NPRM will lead asylum officers to skip this crucial step.

To correct this error, any final rule should specify that, in credible fear interviews, asylum officers must elicit *all* relevant information that bears on eligibility, including the proposed rule's exceptions and ways to rebut the presumption.

II. The Government Should Adopt an Alternative Approach: Expand Parole Programs and Resume Lawful Title 8 Processing.

The NPRM identifies a preferable alternative to an asylum ban that the agencies have chosen not to pursue. Instead of introducing a new bar to asylum, DHS should expand its recent parole programs to cover all countries from which a significant number of asylum seekers are arriving and make them more broadly accessible. Combined with a return to lawful Title 8 processing, the NPRM itself explains that these parole programs could achieve the departments' stated goal of reducing traffic at the border. And it could do so without the legal violations and extreme suffering that the new ban would impose.

The NPRM is premised in part on lessening any "surge of migration" that could come when the Title 42 policy ends.²³ This purpose is repeated throughout the NPRM, making clear that reducing traffic at the border is a primary goal of the new asylum bar.

Yet the NPRM itself identifies a readily available alternative for achieving the same objective. According to the NPRM, DHS's recent parole programs for specific countries have drastically lowered the number of people from those countries who arrive at the border. For example, border encounters of Ukrainian asylum seekers dropped from 940 per day to 12 per day after DHS began allowing Ukrainians to apply for parole from their home country.²⁴ Encounters of Venezuelans dropped from over 1,100 per day to 28 per day.²⁵ The same was true for multiple other countries where parole programs were introduced.²⁶ Some of these parole programs were coupled with new restrictions, and some were not.²⁷ Yet even the programs without new

²² *See, e.g.*, 8 C.F.R. §§ 208.9(b), 1240.67(b)(1), 240.67(b)(1).

²³ *E.g.*, 88 FR at 11704.

²⁴ *Id.* at 11706.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See, e.g.*, Muzaffar Chishti & Jessica Bolter, *Welcoming Afghans and Ukrainians to the United States: A Case in Similarities and Contrasts*, Migration Policy Inst.



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restrictions succeeded in achieving the precise goal the NPRM identifies.

Instead of introducing a harsh new bar to asylum, with the illegitimate intent of deterring bona fide asylum seekers from seeking safety, DHS should expand these parole programs to nationalities that do not yet have them. The departments' record indicates that these programs can work to dramatically reduce the number of people who come to the border seeking asylum and have the potential to provide increased relief to border resources.²⁸ To achieve this end, the departments should make the programs more accessible to a broader range of individuals. Currently, certain eligibility requirements, like having a U.S. financial sponsor and a valid passport, erect barriers to participation for vulnerable asylum seekers and should be reconsidered.

Expanding access to parole can relieve border resources in a more humane, orderly way, instead of what the bar would do—forcing thousands of desperate asylum seekers to wait indefinitely in extreme danger in Mexico or risk being sent home to their persecutors. Given this alternative, there is no need for a bar. The NPRM provides no explanation for why DHS would not expand a solution that it claims has already begun to achieve the exact goal that the departments claims as their motivation.

At the very least, DHS should expand parole programs to countries that do not yet have them and broaden eligibility criteria. The NPRM asserts that these programs have benefitted thousands of vulnerable migrants and had real impacts at the border. If DHS is serious about offering “safe” and “orderly” pathways to seek protection, it should use this pathway for additional countries where the need is high. Regardless of what else is in the final rule, it should include an expansion of the parole programs.

III. The Proposed Rule is Unlawful, Arbitrary and Capricious, and Must Not Be Adopted.

A. The proposed eligibility bar violates the asylum statute, and its entry- and transit-related restrictions are arbitrary and capricious.

The prior administration enacted two separate bars to asylum eligibility, each of which was held to violate the immigration laws and our country's international commitments to safeguard the right to asylum.²⁹ The proposed

(July 13, 2022) (describing parole programs without new restrictions), <https://www.migrationpolicy.org/article/afghan-ukrainian-us-arrivals-parole>.

²⁸ See 88 FR at 11706.

²⁹ *E. Bay Sanctuary Covenant v. Trump*, 950 F. 3d 1242 (9th Cir. 2020); *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021); *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2020); *E. Bay Sanctuary Covenant v. Barr*, 519 F. Supp. 3d 663 (N.D. Cal. 2021); *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019).



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rule repackages restrictions already held illegal. It would bar countless noncitizens fleeing violence from their statutory right to seek asylum where they have entered the United States without inspection and have not sought protection in any third country transited prior to their entry.

These restrictions violate the statutory right to asylum, which cannot be conditioned on one’s method of entering the United States.³⁰ And because ensuring refugees’ safety is a “critical component” of the asylum statute,³¹ asylum also cannot be barred based on the theoretical availability of protection in a third country. Congress ensured that any alternative option must be “genuinely safe” by requiring a formal safe third country arrangement or firm resettlement in another country.³² Like the Trump administration’s transit asylum ban previously held unlawful, the proposed rule “does virtually nothing to ensure that a third country is a ‘safe option.’”³³

Moreover, the proposed rule is arbitrary and capricious because neither manner of entry nor failing to request protection in transit countries is a valid basis for barring asylum eligibility. As courts have held, those factors are wholly unrelated to the merits of a noncitizen’s asylum claim.³⁴

Yet the proposed rule relies heavily on the Trump administration’s flawed reasoning that asylum seekers who do not first try and fail to seek asylum elsewhere are less likely to have meritorious protection claims.³⁵ There are myriad reasons why asylum seekers with meritorious claims reasonably do not apply for protection in common transit countries—including that they are unsafe and/or have inadequate or overwhelmed asylum systems, as discussed below in Section IV.

Likewise, there is no evidence of any relationship between an individual’s manner of entry and the strength of their protection claims.³⁶ Many asylum seekers cannot reasonably present at a port of entry and instead must enter elsewhere along the southern border. This can be because they are unaware that there are designated locations for entering the country or cannot safely travel there due to dangers along the route. As explained below, even individuals who can reach a port area may be unable to safely wait in Mexico

³⁰ *E. Bay Sanctuary Covenant v. Biden*, 950 F.3d 1242, 1272-74 (9th Cir. 2020).

³¹ *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d at 977.

³² *Id.*

³³ *Id.* (citation omitted).

³⁴ *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d at 982-83 (not seeking protection in transit “has no bearing on the validity of the . . . underlying asylum claim”); *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d at 671-72 (manner of entry “says little about the ultimate merits of [a noncitizen’s] asylum application”).

³⁵ *E.g.*, 88 FR at 11737.

³⁶ *See, e.g., id.*



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for one of a limited number of CBP One appointment slots to request asylum.

B. It is unlawful and arbitrary and capricious to apply the proposed bar at the credible fear stage in any way.

The NPRM proposes to apply the new bar during credible fear interviews conducted in expedited removal. Doing so would violate the expedited removal statute by imposing what the NPRM explicitly frames and justifies as a *discretionary* limitation, whereas only potential *eligibility* can be considered at the credible fear stage. It would also depart from more than two decades of agency practice, harm vulnerable asylum seekers, and create massive inefficiencies in the expedited removal system.

As explained above, the proposed rule would require asylum officers to apply the proposed eligibility bar at the credible fear stage. Only if the applicant is excepted or rebuts the presumption would the officer go on to apply the significant possibility standard to assess whether the applicant is otherwise eligible. First, this approach unlawfully requires adjudicators to apply a concededly discretionary factor during credible fear interviews and reviews, when Congress has expressly limited credible fear screening to issues of eligibility. The departments seek to ground the proposed rule not just in their statutory authority to “establish additional limitations and conditions” on *eligibility*, but also in their distinct power to ultimately deny asylum even to eligible applicants as a matter of discretion.³⁷ The credible fear statute, however, does not permit adjudicators to apply discretionary factors in credible fears interviews. Instead, the statute solely permits a determination of whether “there is a significant possibility . . . that the [noncitizen] could establish *eligibility* for asylum under section 1158.”³⁸ In short, if the proposed rule is justified as a permissible discretionary limitation on the grant of asylum and not an eligibility bar, it cannot be considered or applied at the credible fear stage at all.

Second, imposing the bar in credible fear interviews would be arbitrary and capricious. Until the Trump administration’s asylum transit ban went into effect in 2019, asylum officers had never assessed *any* eligibility bar at the credible fear stage.³⁹ And that is for good reason. The high-stakes credible fear interviews are conducted while often-traumatized asylum seekers are

³⁷ 88 FR at 11733-41.

³⁸ 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added).

³⁹ See 83 FR at 55944; Asylum Procedures, 65 FR 76121, 76137 (Dec. 6, 2000) (expedited removal regulations making clear that bars are not assessed during credible fear). The Trump administration promulgated several other rules that would have assessed various eligibility bars during credible fear interviews, *see* Security Bars Rule, 85 FR 84160 (Dec. 23, 2020); Global Asylum Rule, 85 FR 80274 (Dec. 11, 2020); Proclamation Bar Interim Final Rule, 83 FR 55934 (Nov. 9, 2018), but none of those rules ever went into effect due to court injunctions.



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still recovering from frequently long journeys, usually while they are detained and generally without access to counsel.⁴⁰ CBP often seizes asylum seekers' personal belongings, including important documents, prior to their fear screenings.⁴¹ Asylum seekers typically do not have the time or ability to gather necessary information or documentation that would allow an adjudicator to accurately evaluate whether a complex eligibility bar could apply.⁴² In addition, credible fear interviews are often conducted over patchy phone connections using telephonic interpreters.⁴³ Translation issues are common, particularly for indigenous and other rare-language speakers.⁴⁴ These factors make the risk of error at the credible fear stage exceptionally high.

After the Trump administration's short-lived experience applying the first transit asylum rule at the credible fear stage, DHS rescinded all of the Trump administration's attempts to implement that practice. In the Asylum Processing Interim Final Rule, DHS explained that, in its experience, applying the transit asylum rule at credible fear was inefficient and consumed considerable resources.⁴⁵ There is no basis to suddenly reverse course again now.

Indeed, that rationale applies even more forcefully here, where the proposed bar's application would require much more numerous and complex fact-specific inquiries. For instance, here, asylum officers would have to make judgment calls about complicated medical scenarios and the technological

⁴⁰ See U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, at 36-37, 43-44, 50-53 (2016) ("Barriers to Protection"),

<https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>; Kathryn Shepherd & Royce Bernstein Murray, *The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers*, American Immigration Council, at 1-5 (2017) ("Perils of Expedited Removal"), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the_perils_of_expedited_removal_how_fast-track_deportations_jeopardize_detained_asylum_seekers.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_perils_of_expedited_removal_how_fast-track_deportations jeopardize_detained_asylum_seekers.pdf).

⁴¹ Adam Isacson, *Taken Away: U.S. Border Agents' Widespread Confiscation of Migrants' Valuable Personal Items* (Aug. 25, 2022), <https://www.wola.org/2022/08/taken-away-u-s-border-agents-widespread-confiscation-of-migrants-valuable-personal-items/>; American Civil Liberties Union of Arizona et al., *Letter to CBP Commissioner Chris Magnus re: Arizona Border Patrol Sectors' Practice of Forcing Migrants to Relinquish Their Personal Belongings During Processing* (Oct. 3, 2022), https://www.acluaz.org/sites/default/files/2022.10.03_letter_to_cbp_regarding_treatment_of_migrants_personal_belongings.pdf.

⁴² *E.g.*, *Barriers to Protection* at 55; *Perils of Expedited Removal* at 12, 17.

⁴³ *Barriers to Protection* at 36-37; *Perils of Expedited Removal* at 19-20.

⁴⁴ *Barriers to Protection* at 27-28; *Perils of Expedited Removal* at 15-16.

⁴⁵ 88 FR at 11744.

feasibility of accessing CBP One, neither of which asylum officers have expertise in evaluating, much less in rushed screening interviews. In addition to these time-consuming up-front determinations, the officers would still be required to conduct a full fear screening as to the individual's home country. In cases where the bar is found to apply, that fear screening would be according to the higher reasonable fear standard, an extremely onerous undertaking.

In short, the departments have failed to justify their abrupt about-face on the wisdom of applying eligibility bars during credible fear interviews. Doing so will lead to more complex and resource-intensive screening interviews with a high risk of error that would send bona fide refugees back to danger. The complex inquiries involved in applying the proposed bar must be assessed—if at all—only by an immigration judge after full factual development and with the right to representation by counsel.

- C. Conditioning asylum eligibility on using CBP One is not only illegal, but it will cause disproportionate harm to the most vulnerable asylum seekers.

Our immigration laws guarantee asylum seekers the right to apply for asylum at ports of entry.⁴⁶ Yet the proposed rule will almost certainly result in unlawfully blocking asylum seekers from freely accessing ports and instead force them to wait for limited appointments through CBP One. This aspect of the rule will also cause devastating consequences for the most vulnerable asylum seekers.

Subject to narrow exceptions, the proposed rule would bar asylum to anyone who does not secure a CBP One appointment, unless they first applied for and were denied asylum in a transit country. But as explained in Section IV below, the latter option is practically impossible for most asylum seekers. This means that, under the NPRM, the only way to guarantee access to asylum is to successfully secure an appointment through CBP One and wait as long as necessary to present at the scheduled time.

Critically, the proposed rule creates *no exception* for asylum seekers' inability to secure a timely opportunity to present themselves. This omission is of great concern in light of the departments' prior attempts to restrict port access⁴⁷ and recent experience with CBP One. Since the app was rolled out for migrants to use directly in January 2023, it has been well-documented

⁴⁶ See *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1199-1205, 1213-14 (S.D. Cal. 2019) (holding prior metering policy unlawful); *Al Otro Lado v. Mayorkas*, 2021 WL 3931890, at *10-18 (S.D. Cal. Sept. 2, 2021) (same).

⁴⁷ Stephanie Leutert & Caitlyn Yates, Metering Update: August 2022, University of Texas at Austin, Strauss Center, https://www.strausscenter.org/wp-content/uploads/Aug_2022_Metering.pdf.



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that appointments are drastically limited.⁴⁸ Reports are widespread that CBP One appointments have been extremely difficult to access, and can take weeks or months to secure.⁴⁹ Under current conditions, a lottery occurs daily for appointments two weeks in the future.⁵⁰ There are far fewer appointments than applicants, and the system does not account for how long someone has been waiting to secure an appointment or how vulnerable they are—it is luck of the draw each time.⁵¹ Assuming asylum seekers can find a smart phone, pay for service, and find adequate Wi-Fi, there is still no guarantee that they will *ever* be able to secure an appointment through CBP One, and if they eventually get one, it could easily take weeks or months.⁵²

For many asylum seekers, remaining indefinitely in Mexico while waiting for an appointment is harmful and dangerous. Rates of violence in many border regions of Mexico have reached epidemic levels, especially for migrants. As discussed further in Section IV, refugees in Mexico are at high risk of kidnapping, disappearance, trafficking, and sexual assault, among other harms. Lesbian, gay, bisexual, transgender, Black, and indigenous persons are also regularly subject to identity-based persecution in Mexico.⁵³ By

⁴⁸ See Arelis R. Hernández, Desperate Migrants Seeking Asylum Face A New Hurdle: Technology, Wash. Post (Mar. 11, 2023), <https://www.washingtonpost.com/nation/2023/03/11/asylum-seekers-mexico-border-app/>.

⁴⁹ *Id.*; Elliot Spagat, Online System to Seek Asylum in US Is Quickly Overwhelmed, Assoc. Press (Jan. 28, 2023), <https://apnews.com/article/technology-united-states-government-caribbean-mexico-mobile-apps-49b38b18869ed3b2260fb6d774153456>; Kate Morrissey, Asylum Seekers in Tijuana Are Scrambling Through Mobile App Error Messages for Few Appointments into the U.S., San Diego Union-Tribune (Jan. 22, 2023), <https://www.sandiegouniontribune.com/news/immigration/story/2023-01-22/cbp-one-app-asylum-tijuana>.

⁵⁰ Benjamin Wermund & Elizabeth Trovall, Biden's New CBP One App Panned for Trapping Asylum Seekers in 'Daily Lottery System,' Houston Chronicle (Feb. 26, 2023), <https://www.houstonchronicle.com/politics/texas/article/users-pan-biden-s-new-cbp-one-app-asylum-seekers-17796732.php>.

⁵¹ See, e.g., *id.*; Biden May Revive Family Detention Policies to Handle Migration, Asylum Issues, KQED Forum, at 15:30-25 (Mar. 16, 2023), <https://www.kqed.org/forum/2010101892520/biden-may-revive-family-detention-policies-to-handle-migration-asylum-issues>.

⁵² Raul Pinto, CBP One Is Riddled with Flaws that Make the App Inaccessible to Many Asylum Seekers, Am. Imm. Council (Feb. 28, 2023), <https://immigrationimpact.com/2023/02/28/cbp-one-app-flaws-asylum-seekers/>; Melissa del Bosque, Facial Recognition Bias Frustrates Black Asylum Applicants to US, Advocates Say, The Guardian (Feb. 8, 2023), <https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias>

⁵³ E.g., U.S. Dep't of State, Mexico 2021 Human Rights Report, at 36 (Apr. 2022), https://www.state.gov/wp-content/uploads/2022/02/313615_MEXICO-2021-HUMAN-RIGHTS-REPORT.pdf; Oscar Lopez, Mexico Sees Deadliest Year for LGBT+ People in Five years, Reuters (May 15, 2020),



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forcing many people to wait in dangerous parts of Northern Mexico for months, where every day carries a certain probability of attack, the proposed rule would all but guarantee that many of them will needlessly suffer some of the worst violations imaginable.

The NPRM proposes an extremely narrow exception for people fleeing violence in Northern Mexico that would require an “imminent” threat of “extreme” violence, not a “generalized concern[] about safety.”⁵⁴ But this exception is far too narrow to prevent asylum seekers from suffering violence while they wait for a CBP One appointment—even for those who have already suffered extreme violence. During 2021 and 2022, there was an average of 20 reported violent attacks against migrants expelled to Northern Mexico *every day*—including kidnappings, murders, rapes, and torture—to say nothing of the countless unreported attacks.⁵⁵ It is not as though those perpetrating this violence announce in advance which asylum seekers they plan to target on a given day.⁵⁶ In other words, from the perspective of most asylum seekers, the violence is unpredictable. They may not know when exactly they or their families will be targeted. But they know that, every day they wait, such violence is a very real possibility. That’s why some are in hiding as they wait to seek protection in the United States.⁵⁷ Many asylum seekers will have no safe choice but to enter without inspection and risk ineligibility for asylum.

In short, unlawfully conditioning asylum eligibility on securing a CBP One appointment will expose people to very real dangers of torture, rape, and murder while they wait. Yet the NPRM’s narrow rebuttal grounds will fail to protect most people from these horrific outcomes. This aspect of the proposed rule must be abandoned.

<https://www.reuters.com/article/us-mexico-lgbt-murders-trfn/mexico-sees-deadliest-year-for-lgbt-people-in-five-years-idUSKBN22R37Y>.

⁵⁴ 88 FR at 11707 & n.27.

⁵⁵ Human Rights First, Human Rights Stain, Public Health Farce, at 2 (Dec. 2022), <https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf>.

⁵⁶ See, e.g., Julian Resendiz, Cartels Fighting Over Migrants in Juarez, Border Report (Dec. 8, 2022) (cartel attacked bus carrying migrants on highway without warning and kidnapped passengers; gang members broke into shelter and attempted to kidnap migrants), <https://www.borderreport.com/immigration/border-crime/cartels-fighting-for-migrants-in-juarez>.

⁵⁷ See, e.g., Arelis R. Hernández, Desperate Migrants Seeking Asylum Face A New Hurdle: Technology, Wash. Post (Mar. 11, 2023), <https://www.washingtonpost.com/nation/2023/03/11/asylum-seekers-mexico-border-app/>.



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D. The NPRM’s two-year timeline is much longer than necessary and should be shortened.

The NPRM proposes to keep the bar in place for at least 24 months.⁵⁸ But it offers no explanation why such a long period is necessary. Indeed, the NPRM’s explanation for the ban runs contrary to such an extended period.

The NPRM’s stated purpose is to reduce migration in response to the end of Title 42. But a much shorter period than two years would address this concern. The NPRM marshals no evidence that temporary changes to migration in response to U.S. policy changes last for a full two years, or even one year. To the contrary, the NPRM indicates that such changes often last for a matter of weeks, or at most a few months.⁵⁹ Given the suffering that would be inflicted by the bar, the final rule should have a much shorter effective period. In contrast, a longer effective period for this ban increases both its human cost and the likelihood that—as we have seen all too clearly with Title 42—the agencies will not urgently address capacity issues in the asylum system and ultimately will choose to extend the ban rather than return to lawful Title 8 processing.

IV. Transit countries cannot provide refuge for most asylum seekers.

The NPRM acknowledges that not all transit countries can provide real protection to every migrant.⁶⁰ However, the proposed rule does nothing to ensure that individuals who are barred could actually find safety elsewhere. Indeed, the proposed rule contains no exception to the bar for asylum seekers who were actually unable to access protection in the countries they passed through.⁶¹

The NPRM appears to suggest that the rule’s requirement is nonetheless reasonable because Mexico, Guatemala, Belize, Costa Rica, Colombia, and Ecuador may be viable alternative places of refuge for some asylum seekers.⁶² This discussion ignores extensive evidence—including recent reports from the U.S. Department of State—demonstrating that these countries are too dangerous for migrants and/or unable to accept significant additional numbers of asylum seekers, as contemplated by the proposed rule.

Mexico. Mexico is extremely dangerous for asylum seekers and its “asylum

⁵⁸ 88 FR at 11707, 11750, 11751.

⁵⁹ See, e.g., *id.* at 11706 (describing week-to-week migration changes in response to U.S. policy changes).

⁶⁰ *Id.* at 11720-21.

⁶¹ See *id.* at 11750-52.

⁶² *Id.* at 11721-23.



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system is severely overstretched.”⁶³ “Criminal cartels, common criminals, and sometimes police and migration officials prey upon people migrating through Mexico, although crimes against migrants are rarely reported, investigated, or punished.”⁶⁴ Mexican police often harass, rob, and physically attack Black migrants.⁶⁵ DHS acknowledged in October 2021 that asylum seekers forced to remain in Mexico are “subject to extreme violence and insecurity at the hands of transnational criminal organizations.”⁶⁶ There were nearly 13,500 documented violent attacks on noncitizens expelled from the United States to Mexico in 2021 and 2022.⁶⁷

According to the State Department, “[u]nprecedented numbers of migrants arriving at [Mexico]’s southern border and requesting refugee status stretched [its] capacity to process requests.”⁶⁸ These “capacity limitations” caused “[o]bstacles to accessing international protection” in Mexico, as the budget of its asylum agency (“COMAR”) is “not commensurate with the growth in refugee claims in the country.”⁶⁹ As a result, “Mexico’s refugee



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⁶³ Human Rights Watch, World Report 2023, at 417 (2023), https://www.hrw.org/sites/default/files/media_2023/01/World_Report_2023_WEBS_PREADS_0.pdf.

⁶⁴ *Id.* at 416.

⁶⁵ Black Alliance for Just Immigration, “There is a Target on Us”: The Impact of Anti-Black Racism on African Migrants at Mexico’s Southern Border, at 41 (2021), <https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf>; see also Caitlyn Yates & Jessica Bolter, African Migration Through the Americas, Migration Policy Institute, at 2 (Oct. 2021), https://www.migrationpolicy.org/sites/default/files/publications/mpi-african-migration-americas-eng_final.pdf (“[African migrants are] the subject of harassment from not only authorities but also from other migrants and criminal groups. In Mexico, for example, Africans have experienced worse detention conditions than other migrants and are more easily targeted for extortion.”); *id.* at 34 (“[In Mexico] there is wide-ranging direct and structural racism, including discrimination in detention centers, police violence, employment discrimination, and a lack of access to Mexico’s education system. [Research has documented] African migrants being refused food in Mexican migrant detention centers unless there is food left after all non-Black migrants have eaten; factory workers refusing to work on the line with Black employees; and teachers walking out of classrooms to avoid teaching Black children. Africans are also targeted by criminal groups, based on the understanding that the Mexican police will not punish them for crimes committed against Black migrants. Local police forces themselves also reportedly extort some African migrants, threatening to report them to the migration authorities if they do not pay.”).

⁶⁶ U.S. Dep’t of Homeland Security, Termination of the Migrant Protection Protocols, at 3 (Oct. 29, 2021), https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-memo.pdf.

⁶⁷ Human Rights First, Human Rights Stain, Public Health Farce, at 4.

⁶⁸ U.S. Dep’t of State, Mexico 2021 Human Rights Report, at 22.

⁶⁹ *Id.* at 21.

system has been overwhelmed.”⁷⁰ The number of applications received in 2021 had COMAR “at the risk of collapsing.”⁷¹ In response to these strains, COMAR “launched a pilot program in southern Mexico [in February 2023] to explore expediting asylum denials to those it deems likely to travel onward to the US,” but abandoned the idea after the NPRM was published.⁷² Also in February 2023, COMAR’s director stated that the agency is “in a situation of near-breakdown.”⁷³

Even as increased applications overwhelm Mexico’s system, they do not reflect the number of asylum seekers who can actually find refuge in Mexico. According to COMAR’s director, many asylum seekers apply in Mexico only because they believe it will make it possible for them to reach the United States without being deported back to the countries they have fled.⁷⁴ Those actually seeking to stay in Mexico face “multiple obstacles”: they must apply in person but there are only ten COMAR offices in the country; they must remain in the state where they filed their application and must present themselves at the COMAR office weekly; “many of COMAR’s offices are situated in some of the country’s poorest states where labor opportunities are scarce”; and, more generally, “Mexico’s economic and demographic circumstances are not well-situated to absorb large numbers of refugees.”⁷⁵ Mexico also has an “untenable 30-day filing deadline” for asylum.⁷⁶ Additionally, as in previous years,⁷⁷ Mexican authorities continue



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⁷⁰ Humans Rights Watch, Mexico: Asylum Seekers Face Abuses at Southern Border (June 6, 2022), <https://www.hrw.org/node/382107/printable/print>.

⁷¹ Rosa Flores, Mexico Rethinks Asylum Initiative After Controversial US Announcement, CNN (Feb. 24, 2023), <https://www.cnn.com/2023/02/24/americas/mexico-asylum-policy-intl-latam/index.html>

⁷² *Id.*

⁷³ Daina Beth Solomon & Lizbeth Diaz, Mexico Seeks to Curb “Abuse” of Asylum System by Migrants Who Do Not Plan to Stay, Reuters (Feb. 13, 2023), <https://www.reuters.com/world/americas/mexico-seeks-curb-abuse-asylum-system-by-migrants-who-do-not-plan-stay-2023-02-13/>.

⁷⁴ *Id.*

⁷⁵ National Immigration Forum, Mexico's Asylum System: Good in Theory, Insufficient in Practice (Mar. 15, 2023), <https://immigrationforum.org/article/mexicos-asylum-system-good-in-theory-insufficient-in-practice/>.

⁷⁶ Human Rights First, Is Mexico Safe for Refugees and Asylum Seekers? (Nov. 2018), https://humanrightsfirst.org/wp-content/uploads/2022/10/MEXICO_FACT_SHEET_PDF.pdf; Refugees International, A New Way Forward: Strengthening the Protection Landscape in Mexico (Nov. 12, 2020), <https://www.refugeesinternational.org/reports/2020/11/9/a-new-way-forward-strengthening-the-protection-landscape-in-mexico>.

⁷⁷ Amnesty International, Overlooked, Under-Protected: Mexico’s Deadly Refoulement of Central American Asylum Seekers, at 5 (Jan. 2018),

to unlawfully return asylum seekers to persecution, including by discouraging them “from applying for asylum even when they say their life could be in danger if sent back.”⁷⁸

Guatemala. The State Department reports that Guatemala is “among the most dangerous countries in the world,” and has a “high murder rate.”⁷⁹ Guatemala has serious issues with rape, violence against women, trafficking, violence against LGBTQI+ persons, gang recruitment of children, and corruption.⁸⁰ The State Department also explains that the poor design of Guatemala’s asylum system has led to “major delays,” even though Guatemala receives a very small number of asylum applications.⁸¹ UNHCR data indicates that between 2000 and mid-2022—a period of more than 20 years—Guatemala granted asylum to a cumulative total of just 660 people.⁸² The country received just 962 asylum applications in 2022.⁸³ By the end of 2022, Guatemala had still granted asylum to just 773 people—ever.⁸⁴ It is obviously in no position to accept any meaningful number of asylum seekers. Indeed, the administration recognized as much in February 2021 by terminating the Trump administration’s so-called “asylum cooperative agreement” with Guatemala.⁸⁵

<https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf>.

⁷⁸ Human Rights Watch, World Report 2023, at 416.

⁷⁹ U.S. Dep’t of State, Overseas Security Advisory Council, Guatemala Country Security Report (Aug. 15, 2022), <https://www.osac.gov/Country/Guatemala/Content/Detail/Report/2013f384-296b-4394-bfcb-1c9c40b9c7df>.

⁸⁰ U.S. Dep’t of State, Guatemala 2021 Human Rights Report, at 9-11, 14, 20-22, 24-25, 31-36 (Apr. 2022), https://www.state.gov/wp-content/uploads/2022/02/313615_GUATEMALA-2021-HUMAN-RIGHTS-REPORT.pdf.

⁸¹ *Id.* at 18.

⁸² UNHCR, Refugee Data Finder: Guatemala, Asylum Decisions, 1951-2022 (accessed Mar. 16, 2023), <https://www.unhcr.org/refugee-statistics/download/?url=w0Auu0>.

⁸³ Guatemalan Migration Institute, Through December 30, 962 Refugee Applications Have Been Received in the Country (Jan. 20, 2023), <https://igm.gob.gt/hasta-el-30-de-diciembre-se-recibieron-962-solicitudes-de-refugio-en-el-pais/> (certified English translation attached).

⁸⁴ *Id.*

⁸⁵ U.S. Dep’t of State, Suspending and Terminating the Asylum Cooperative Agreements with the Governments of El Salvador, Guatemala, and Honduras (Feb. 6, 2021), <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/>. The ACLU and partner organizations have also challenged the interim final rule that created procedures to implement these “asylum cooperative agreements.” *U.T. v. Barr*, Case No. 1:20-cv-116-EGS (D.D.C., filed Jan. 15, 2020). We urge the departments to rescind those regulations along with the Trump administration’s two asylum bans.



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Belize. According to the State Department, Belize “has one of the highest per capita murder rates in the world” and “[v]iolent crime—such as sexual assault, home invasions, armed robberies, and murder—are common even during daylight hours.”⁸⁶ Like Guatemala, Belize is unequipped for any significant increase in asylum applicants. The NPRM incorrectly states that “as of October 2022, a total of 4,130 individuals . . . *have been granted asylum in Belize.*”⁸⁷ In fact, the cited UNCHR document states that this number includes “asylum seekers”—and it is asylum seekers (not individuals granted asylum) who account for nearly the entire figure.⁸⁸ According to the State Department, as of September 2021, Belize had granted asylum to only around 100 people (just 15 percent of 640 people recommended for approval).⁸⁹ As with Guatemala, this is the cumulative all-time figure, not that for 2021. UNHCR data indicates that by mid-2022, Belize had still only ever granted asylum or “complementary protection” to 129 people.⁹⁰ While an amnesty program will allow some asylum seekers in Belize to regularize status, to qualify they must have registered with the government before March 31, 2020.⁹¹ That program thus does nothing to indicate that Belize has the will or capacity to accommodate any significant number of asylum seekers going forward.

Costa Rica. Costa Rica—a nation of just five million people—is already tightening its asylum policies “in the face of an overwhelmed system,” and cannot be expected to absorb any significant increase in asylum seekers from Nicaragua or elsewhere.⁹² In recent years, Costa Rica has received eight

⁸⁶ U.S. Dep’t of State, Belize Country Information (last updated Feb. 28, 2023), <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Belize.html> (select “Safety and Security”); U.S. Dep’t of State, Belize Travel Advisory (Oct. 4, 2022), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/belizetravel-advisory.html>.

⁸⁷ 88 FR at 11722 (emphasis added) (citing UNHCR, Fact Sheet: Belize September–October 2022 (Nov. 28, 2022), <https://data.unhcr.org/en/documents/details/97161>).

⁸⁸ UNHCR, Fact Sheet: Belize September–October 2022 (Nov. 28, 2022), <https://data.unhcr.org/en/documents/download/97161>.

⁸⁹ U.S. Dep’t of State, Belize 2021 Human Rights Report, at 11-12 (Apr. 2022), https://www.state.gov/wp-content/uploads/2022/02/313615_BELIZE-2021-HUMAN-RIGHTS-REPORT.pdf.

⁹⁰ UNHCR, Refugee Data Finder: Belize, Asylum Decisions, 1951-2022 (accessed Mar. 16, 2023), <https://www.unhcr.org/refugee-statistics/download/?url=D2dAH7>.

⁹¹ Government of Belize, Ministry of Foreign Affairs, Foreign Trade & Immigration, Amnesty 2022: Who Qualify? (2023) (accessed Mar. 16, 2023), <https://immigration.gov.bz/amnesty-who-qualify/>.

⁹² Javier Cordoba, Costa Rica Tightens Overwhelmed Asylum System, Associated Press (Dec. 14, 2022), <https://apnews.com/article/latin-america-mexico-caribbean-germany-costa-rica-0e2db787358228fe308023ba259d1d3f>.



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times more asylum requests per capita than the United States.⁹³ In March 2022, UNCHR reported that ongoing migration will “strain Costa Rica’s already stretched asylum system and overwhelm support networks in the country.”⁹⁴ As of September 2022, Costa Rica had “more than 200,000 pending [asylum] applications and another 50,000 people waiting for their appointment to make a formal application,” and “Nicaraguans account for nearly nine out of 10 applicants.”⁹⁵ “The exodus of Nicaraguans fleeing political repression has neighboring Costa Rica’s asylum system teetering under the weight of applications that exceed even the 1980s when civil wars ravaged Central America.”⁹⁶ Meanwhile, UNHCR data indicates that between 2000 and mid-2022, Costa Rica granted asylum or “complementary protection” to only around 20,000 people.⁹⁷ The NPRM mentions that Costa Rica has responded to the overwhelming strain on its system in part by offering Nicaraguan, Cuban, and Venezuelan asylum applicants an option to “withdraw their [asylum] applications” and instead request temporary status.⁹⁸ However, this program is only available to people who applied for asylum in Costa Rica by September 30, 2022.⁹⁹ As with Belize, this program in no way suggests that Costa Rica is able to accept additional asylum seekers going forward, much less timely process their claims and provide them meaningful, permanent protection.

Colombia. It is just as unrealistic to expect Colombia to take in additional asylum seekers, especially non-Venezuelans. Colombia already accommodates more foreign refugees than any country except Turkey.¹⁰⁰

⁹³ Center for American Progress, Taking Migration Seriously: Real Solutions to Complex Challenges at the Border (Oct. 26, 2022), <https://www.americanprogress.org/article/taking-migration-seriously-real-solutions-to-complex-challenges-at-the-border/#f7>.

⁹⁴ UNHCR, Number of Displaced Nicaraguans in Costa Rica Doubles in Less Than a Year (March 25, 2022), <https://www.unhcr.org/news/briefing/2022/3/623d894c4/number-displaced-nicaraguans-costa-rica-doubles-year.html>.

⁹⁵ Moises Castillo & Christopher Sherman, Fleeing Nicaraguans Strain Costa Rica’s Asylum System, Associated Press (Sept. 2, 2022), <https://apnews.com/article/covid-health-elections-presidential-caribbean-52044748d15dbbb6ca706c66cc7459a5>.

⁹⁶ *Id.*

⁹⁷ UNHCR, Refugee Data Finder: Costa Rica, Asylum Decisions, 1951-2022 (accessed Mar. 16, 2023), <https://www.unhcr.org/refugee-statistics/download/?url=3RtvGy>

⁹⁸ 88 FR at 11722.

⁹⁹ Fragomen, Del Rey, Bernsen & Loewy LLP, Costa Rica: Special Permit for Cuban, Nicaraguan & Venezuelan Refugees Will Reopen (Dec. 19, 2022), <https://www.fragomen.com/insights/costa-rica-special-permit-for-cuban-nicaraguan-and-venezuelan-refugees-will-reopen.html>.

¹⁰⁰ NYU Center on International Cooperation, Colombia’s Support for Venezuelan Migrants and Refugees, at 9 (Sept. 2022), <https://reliefweb.int/attachments/da9b6b54-37ad-48af-8c35->



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There are more than 9 million displaced people in Colombia: more than 2.3 million displaced Venezuelans, and more than 6.7 million internally displaced Colombians “in vulnerable conditions” as a result of decades of armed conflict.¹⁰¹ While Colombia instituted a temporary protected status program for Venezuelans, it grants asylum to very few people: just 1,528 between 2000 and mid-2022 per UNHCR data.¹⁰² Colombia has thus indicated no ability or willingness to make asylum generally available to those who need it. Even its temporary-status program for Venezuelans “is facing challenges from all sides” due to “[r]ecent years of escalating border violence, growing poverty and food insecurity, strained social systems, domestic discontent, and heightened xenophobia.”¹⁰³ And Venezuelans who entered Colombia irregularly—as many must due to “critical difficulties in obtaining a passport” in Venezuela—are only eligible for the program if they entered before January 31, 2021.¹⁰⁴ Even Venezuelans who enter regularly with passports can only enroll through May 2023.¹⁰⁵ As with Costa Rica, this program does not indicate that Colombia has the capacity or intention to accept meaningful numbers of additional asylum seekers going forward.

Nor is Colombia safe for asylum seekers from Venezuela or elsewhere. Homicide, assault, armed robbery, extortion, robbery, and kidnapping are widespread.¹⁰⁶ “Young people, between the ages of 10 and 29, still face disproportionate risk to forced recruitment by illegal armed actors.”¹⁰⁷ “Gender-based violence, including by armed groups, is widespread,” and perpetrators “are rarely held accountable.”¹⁰⁸ Women account for half of the displaced Venezuelans in Colombia, and they “are repeatedly subjected to attacks and sexual violence in public spaces, both in the host cities where

[27d6c228459b/colombias_support_for_venezuelan_migrants_and_refugees_2022.pdf](https://www.unhcr.org/refugee-statistics/download/?url=4PoXr3).

¹⁰¹ UNHCR, Colombia Operational Update: July-October 2022, at 1, <https://reporting.unhcr.org/document/3936>.

¹⁰² UNHCR, Refugee Data Finder: Colombia, Asylum Decisions, 1951-2022, (accessed Mar. 16, 2023) <https://www.unhcr.org/refugee-statistics/download/?url=4PoXr3>.

¹⁰³ NYU Center on International Cooperation, Colombia’s Support for Venezuelan Migrants and Refugees, at 2.

¹⁰⁴ María Gabriela Trompetero Vincent, The Colombian Temporary Protection Status for Migrants from Venezuela, Routed Magazine (Sept. 17, 2022), <https://www.routedmagazine.com/colombia-tps-venezuelan-migrants>.

¹⁰⁵ *Id.*

¹⁰⁶ U.S. Dep’t of State, Colombia Travel Advisory (Jan. 4, 2023), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/colombia-travel-advisory.html>.

¹⁰⁷ U.S. Dep’t of State, Integrated Country Strategy, Colombia, at 15 (April 3, 2022), https://www.state.gov/wp-content/uploads/2022/05/ICS_WHA_Colombia_Public.pdf.

¹⁰⁸ Human Rights Watch, World Report 2023, at 168.

they live and along the migration route.”¹⁰⁹ While transiting Colombia, “Venezuelan women travel in fear and with the constant threat of being targeted for different forms of gender-based violence by men” including rape and sexual violence.¹¹⁰ Venezuelan transgender women are especially vulnerable.¹¹¹ Moreover, the State Department reports that Venezuelans in Colombia are at heightened “risk of forced labor, domestic servitude, forced begging, and forced recruitment,” and that Colombian authorities do “not make efforts to investigate cases . . . of forced labor.”¹¹²

Ecuador. It is likewise unreasonable to think Ecuador can accommodate any significant increase in asylum seekers, and unreasonable to expect people fleeing persecution to seek safety in Ecuador. Notably, transiting Ecuador would require asylum seekers fleeing danger by land to enter an additional country unnecessarily, as Ecuador is not on the way from any other country in South America to the United States. Thus, the theoretical availability of protection there cannot support the departments’ assumption that available alternatives exist in transit. Moreover, as the NPRM acknowledges, Ecuador has granted asylum or “complementary protection” to only around 2,300 people on average in recent years.¹¹³ Although Ecuador has an ongoing program to regularize status of displaced foreigners (the vast majority of whom are Venezuelan), it is not a safe or viable place of refuge. Ecuadoran officials have discouraged Venezuelans, including survivors of gender-based violence, from applying for asylum.¹¹⁴ The State Department reports that murder, assault, express kidnapping, and armed robbery are widespread.¹¹⁵ Increasing cartel violence led to the highest rate of violent deaths in Ecuador’s history in 2022, including a “series of attacks reported [in several] refugee-hosting locations.”¹¹⁶ Indeed, “in certain areas, the state has been

¹⁰⁹ Amnesty International, *Unprotected: Gender-Based Violence Against Venezuelan Refugee Women in Colombia and Peru*, at 5, 11 (July 2022), <https://www.amnesty.org/es/wp-content/uploads/2022/07/AMR0156752022ENGLISH.pdf>.

¹¹⁰ *Id.* at 19.

¹¹¹ *Id.*

¹¹² U.S. Dep’t of State, *Colombia 2021 Human Rights Report*, at 40 (Apr. 2022), https://www.state.gov/wp-content/uploads/2022/03/313615_COLOMBIA-2021-HUMAN-RIGHTS-REPORT.pdf.

¹¹³ 88 FR at 11722-23.

¹¹⁴ Amnesty International, *Unprotected in Ecuador*, at 17-18 (Sept. 2022), <https://www.amnesty.org/en/wp-content/uploads/2022/11/AMR2861372022ENGLISH.pdf>.

¹¹⁵ U.S. Dep’t of State, *Ecuador Travel Advisory* (Nov. 4, 2022), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/ecuador-travel-advisory.html>.

¹¹⁶ UNHCR, *Ecuador Monthly Update: November 2022*, at 1, <https://data.unhcr.org/en/documents/download/97705>.



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displaced” by criminal groups.¹¹⁷ In 2022, the mayor of Ecuador’s most populous city stated that “criminal gangs have become a state within a state.”¹¹⁸ Migrant women and children experience “violence and human trafficking, including forced labor, sex trafficking, and the forced recruitment of individuals into criminal activity, such as drug trafficking and robbery, on the northern border, particularly by organized-crime gangs that also operated in Colombia.”¹¹⁹ Gender-based violence is “systemic and prevalent” and Venezuelan women are at heightened risk of physical and sexual violence, “both along their migration route and at their destination.”¹²⁰ As in Colombia, Venezuelans face “rising xenophobia and discrimination” in Ecuador.¹²¹

Other transit countries. The NPRM does not discuss four common transit countries in Central America: El Salvador, Honduras, Nicaragua, and Panama. All four countries are unsafe and lack meaningful asylum systems.

El Salvador. According to the State Department, “El Salvador has high levels of homicides,” “crimes such as extortion, assault, and robbery, are common,” and “[g]angs have traditionally controlled a majority of the space” in the country.¹²² In 2022, El Salvador declared a state of emergency in response to the high number of murders and suspended basic rights.¹²³ The state of emergency remains in effect, resulting in “widespread human rights violations, including mass arbitrary detention, enforced disappearances, ill-treatment in detention, and due process violations.”¹²⁴ According to the State Department, “[p]olice and gangs continue to commit acts of violence against LGBTQI+ individuals,” “[t]hese actions were tolerated by the government,

¹¹⁷ Dan Collens, Headless Bodies and Deadly Bombs: Cartel Violence Escalates in Ecuador, *The Guardian* (Nov. 2, 2022), <https://www.theguardian.com/world/2022/nov/02/ecuador-violence-deadly-attacks-gangs-cartels>

¹¹⁸ International Crisis Group, Ecuador’s High Tide of Drug Violence (Nov. 4, 2022), <https://www.crisisgroup.org/latin-america-caribbean/andes/ecuador/ecuadors-high-tide-drug-violence>.

¹¹⁹ U.S. Dep’t of State, Ecuador 2021 Human Rights Report, at 18-19 (Apr. 2022), https://www.state.gov/wp-content/uploads/2022/02/313615_ECUADOR-2021-HUMAN-RIGHTS-REPORT.pdf.

¹²⁰ Amnesty International, Unprotected in Ecuador, at 4.

¹²¹ Paula Dupraz-Dobias, In a Region Hit Hard by COVID, the Welcome for Venezuelan Migrants Wears Thin, *The New Humanitarian* (July 14, 2022), <https://www.thenewhumanitarian.org/analysis/2022/07/14/South-America-Venezuelan-migrants-COVID>.

¹²² U.S. Dep’t of State, El Salvador Country Information (last updated Oct. 6, 2022), <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/ElSalvador.html>.

¹²³ Human Rights Watch, *World Report 2023*, at 199-202.

¹²⁴ *Id.*



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and perpetrators were rarely prosecuted.”¹²⁵ Women and girls also face serious risk of sexual violence: “Sixty-three percent of women ages 15 to 19 and 72 percent of women ages 30 to 34 reported having suffered sexual violence.”¹²⁶ Meanwhile, the State Department reports that El Salvador’s asylum system has “major regulatory and operational gaps” and lacks clear “criteria for case decisions.”¹²⁷

Honduras. Homicide, armed robbery, kidnapping, extortion, rape, and human trafficking are widespread in Honduras.¹²⁸ The country has the highest rate of femicide in Latin America.¹²⁹ The State Department reported that in 2021, “[t]ransiting migrants and asylum seekers with pending cases were vulnerable to abuse and sexual exploitation by criminal organizations”; and “[w]omen, children, and LGBTQI+ migrants and asylum seekers with pending cases were especially vulnerable to abuse.”¹³⁰ The State Department also stated that Honduras has only a “nascent” asylum system.¹³¹ UNHCR data indicate that between 2000 and mid-2022, Honduras granted asylum to a total of only 234 people.¹³²

Nicaragua. As DHS recognized in January 2023, “widespread and violent repression and human rights violations and abuses by the Ortega regime” have been “driving hundreds of thousands of Nicaraguans to flee their home country.”¹³³ That regime engages in arbitrary killings, forced disappearances, torture, and arbitrary arrests and prosecutions.¹³⁴ Nicaragua also fails to enforce its rape and domestic violence laws, “leading to widespread impunity and reports of increased violence from released

¹²⁵ U.S. Dep’t of State, El Salvador 2021 Human Rights Report, at 33-35 (Apr. 2022), https://www.state.gov/wp-content/uploads/2022/02/313615_EL-SALVADOR-2021-HUMAN-RIGHTS-REPORT.pdf.

¹²⁶ *Id.* at 26.

¹²⁷ *Id.* at 19.

¹²⁸ U.S. Dep’t of State, Honduras Travel Advisory (March 1, 2023), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/honduras-travel-advisory.html>.

¹²⁹ Human Rights Watch, World Report 2023, at 283.

¹³⁰ U.S. Dep’t of State, Honduras 2021 Human Rights Report, at 11-12 (Apr. 2022), https://www.state.gov/wp-content/uploads/2022/02/313615_HONDURAS-2021-HUMAN-RIGHTS-REPORT.pdf.

¹³¹ *Id.*

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¹³³ Implementation of a Parole Process for Nicaraguans, 88 FR 1255, 1256 (Jan. 9, 2023).

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offenders emboldened by their release.”¹³⁵ The State Department reports that Nicaragua’s refugee commission has not met since 2015.¹³⁶ UNHCR likewise reports that the “asylum system in Nicaragua [has been] *de facto* suspended since 2015.”¹³⁷

Panama. Refugees and migrants transiting Panama routinely experience violent attacks, including sexual violence.¹³⁸ “Homicides and violent attacks in broad daylight” have increased.¹³⁹ Panama’s asylum system is onerous and “woefully deficient.”¹⁴⁰ According to the State Department, Panama’s commission that decides asylum applications “meets only a few times,” “adjudicates fewer than 50 cases annually,” and grants “less than 1 percent” of applications.”¹⁴¹

For all of these reasons and others identified in comments by our partner organizations, the departments should abandon their plan to issue the rule as proposed. If the departments ill-advisedly decide to finalize a version of the proposed rule, they must make key changes to the proposed procedures to comply with the governing statute and regulations. However, even those changes would not cure proposed rule’s core defects. The rule would still expose far too many asylum seekers to grave danger and would constitute a deeply disappointing departure from the United States’ commitment to humanitarian protection.



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¹³⁵ *Id.* at 33.

¹³⁶ *Id.* at 26-27.

¹³⁷ UNHCR, Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report Universal Periodic Review: 3rd Cycle, 33rd Session, Nicaragua, at 1 (Oct. 2018), <https://www.refworld.org/pdfid/5ccabf2b7.pdf>.

¹³⁸ Center for Democracy in the Americas, Panama’s Role in Regional Migration Management, at 5 (March 2022), <https://static1.squarespace.com/static/5e3d7cf054f8264efecdf2ef/t/623349a8ecdbce19b749dcc9/1647528366521/Panama+Issue+Brief+%282%29.pdf>.

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¹⁴⁰ Migration Policy Institute, Laying the Foundation for Regional Cooperation, at 47 (April 2021), https://www.migrationpolicy.org/sites/default/files/publications/mpi-latam_foundation-regional-cooperation_eng-final.pdf.

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The following documents are attached in support of this comment:

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