



Submitted via www.regulations.gov

March 27, 2023

Daniel Delgado
Acting Director
Border and Immigration Policy
Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security
telephone (202) 447-3459

Lauren Alder Reid
Assistant Director,
Office of Policy, EOIR
U.S. Department of Justice
telephone (703) 305-0289

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

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

Innovation Law Lab submits this comment in response to the Department of Homeland Security (DHS) and Department of Justice (DOJ)'s proposed rule¹ published in the Federal Register on February 23, 2023, that would ban many individuals from asylum protection in the United States and deprive asylum-seeking individuals of the ability to reunite with their families and pursue a path to citizenship. The proposed rule is a new version of similar asylum bans promulgated by the previous administration that were repeatedly struck down by federal courts as unlawful.²

The asylum ban attempts to cut off access to asylum for individuals at the southern border; discriminates against Black, Brown, and Indigenous asylum seekers; and seeks to circumvent U.S. law and treaty obligations. In favoring expediency over accuracy, the proposed rule will result in erroneous removals, returning people to countries where they will be tortured or killed purely based on their manner of entry. Innovation Law Lab strongly urges the agencies to withdraw the proposed rule in its entirety. The administration should instead uphold the law of asylum, restore full access to asylum at ports of entry, ensure fair and humane asylum adjudications, and cease discriminatory restrictions on protection based on individuals' manner and place of entry.

¹<https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf>

² <https://www.aclu.org/cases/east-bay-v-barr?document=pi-order>

Innovation Law Lab and its Interest in the Issue

Innovation Law Lab is a nonprofit organization dedicated to upholding the rights of immigrants and refugees. Founded in 2014 in response to the mass detention and deportation of asylum-seeking immigrant families, Innovation Law Lab specializes in the creation of scalable, highly replicable, and connected sites of resistance that create paradigm shifts in immigration representation, litigation, and advocacy. By bringing technology to the fight for immigrant justice, Innovation Law Lab empowers advocates to scale their impact and provide effective representation to immigrants in detention and in hostile immigration courts across the country. Innovation Law Lab works directly with low-income immigrants and the pro bono attorneys who serve them, providing legal services, direct representation, and tactical support before USCIS and the Executive Office for Immigration Review (EOIR).

Innovation Law Lab provides direct representation to asylum seekers through the Equity Corps of Oregon (ECO) program. ECO is a universal representation model that allows individuals in deportation proceedings to receive pro bono legal services. Over time, the program aims to scale to provide legal representation for every eligible Oregonian facing removal proceedings in the Portland Immigration Court who lack the means to secure a private attorney. ECO also supports those who are seeking affirmative immigration services. Through ECO, Innovation Law Lab provides legal orientations, limited scope legal service workshops, and legal representation.

Innovation Law Lab also provides direct legal services to individuals in immigration detention and engages in community organizing and movement-rooted litigation through its Anticarceral Legal Organizing project (AcLO). AcLO builds interconnected coalitions focused on getting people out of immigration prisons and organizing to shut them down.

The populations served by Innovation Law Lab's initiatives are immigrants and their families. Our direct legal services work provides us with intimate and direct knowledge of how asylum seekers interact with the United States immigration system, and the ways this proposed rule would deny many of our clients their legal right to apply for protection in the United States.

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

The Biden administration has provided only 30 days for the public to comment on the proposed rule, effectively denying the public the right to meaningfully provide input under the notice and comment rulemaking procedures required by the Administrative Procedure Act. This timeframe is insufficient for a sweeping proposed rule that would deny many people access to asylum in violation of U.S. law. On March 1, 2023, 172 organizations (including Innovation Law Lab) wrote to the agencies urging them to provide at least 60 days to comment on the complex 153-

page rule that would have enormous implications for asylum access at the border and in USCIS and immigration court asylum proceedings.³

Executive Orders 12866 and 13563 state that agencies should generally provide at least 60 days for the public to comment on proposed regulations. A minimum of 60 days is especially critical given the rule's attempt to place restrictions on asylum in violation of U.S. law and international commitments and return many to death, torture, and violence. While the agencies cite the termination of the Title 42 policy in May 2023 as a justification to curtail the public's right to comment on the proposed rule, this reasoning is specious, especially as the administration itself sought to formally end Title 42 nearly a year ago and has had ample time to prepare for the end of the policy.

The proposed changes would make dramatic changes to the current asylum system, significantly curtailing both the rights of people fleeing persecution who are seeking safety in the United States and the capacity of organizations like ours to fulfill their mission of providing assistance and representation to people in asylum proceedings. 30 days is an insufficient amount of time in which to respond to the proposal of such dramatic changes, leaving the public little time to meaningfully assess and respond to the rule; the customary 60-day comment period should be observed.

Overview of Proposed Rule

The proposed rule bans individuals from asylum protection based on their manner of entry into the United States and transit through other countries – factors that are irrelevant to individuals' fear of return and have no basis in U.S. law.

The rule would create a presumption of asylum ineligibility for individuals who (1) did not apply for and receive a formal denial of protection in a transit country; and (2) entered between ports of entry at the southern border or entered at a port of entry without a previously scheduled appointment through the CBP One mobile application, subject to extremely limited exceptions.

The asylum ban violates U.S. law, which ensures access to asylum regardless of manner of entry or transit and prohibits restrictions on asylum that are inconsistent with provisions in the U.S.

³ <https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2023-03/Biden%20Asylum%20Ban%20-%20Extension%20letter%20to%2030-days%20comment%20period%20FINAL.pdf>

asylum statute. Members of Congress,⁴ human rights advocates,⁵ faith-based organizations,⁶ and many others urged the administration not to issue the proposed rule and voiced strong opposition when the administration announced its intention to publish it.

President Biden’s February 2021 Executive Order promised to “restore and strengthen our own asylum system, which has been badly damaged by policies enacted over the last 4 years that contravened our values and caused needless human suffering.”⁷ As a candidate, he pledged that his administration would not “deny[] asylum to people fleeing persecution and violence” and would end restrictions on asylum for those who transit through other countries to reach safety.⁸ The proposed rule blatantly contravenes these promises and attempts to instead deport refugees to danger based on manner of entry and transit, in circumvention of existing refugee law and treaty obligations.

The asylum ban would apply in the fundamentally flawed expedited removal process as well as in full asylum adjudications before USCIS and the immigration court. Expedited removal is the process that allows the U.S. government to deport people arriving at the border without ever seeing an immigration judge if they do not express fear or do not pass a “credible fear” screening interview where they must show a significant possibility that they could establish asylum eligibility in a full hearing. In expedited removal, asylum seekers covered by the proposed rule would be required to gather the evidence and arguments necessary to “rebut the presumption of ineligibility” (i.e. prove they fall within one of the few exceptions to the rule). Those who fail to do so would be automatically subject to a higher screening standard (in violation of U.S. law governing credible fear interviews)⁹ and would face deportation to danger if they cannot pass the screening. Even individuals who do pass would be subject to a presumption of ineligibility in their immigration hearing.

The rule will also apply to immigrants in full asylum hearings before USCIS and the immigration court. In these proceedings, asylum seekers would be denied asylum if they cannot rebut the presumption of ineligibility, resulting in the deportation of many individuals and leaving others with only lesser forms of protection available to them. If barred from asylum, individuals would only be eligible for forms of withholding of removal which, significantly, do

⁴https://www.menendez.senate.gov/imo/media/doc/letter_to_president_biden_on_the_administrations_border_policies.pdf

⁵ https://humanrightsfirst.org/wp-content/uploads/2023/01/Letter-to-President-Biden-re_-asylum-ban-NPRM-1.pdf

⁶ https://www.interfaithimmigration.org/wp-content/uploads/2023/01/Final-Faith-Letter-Opposing-Proposed-Asylum-Ban_Jan2023.pdf

⁷ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>

⁸ <https://joebiden.com/immigration/>

⁹ 8 U.S.C. § 1225(b)(1)(B).

not provide a pathway to any lawful permanent status and do not allow individuals to petition for reunification with spouses and children still located abroad.

The proposed rule also erroneously incorporates the required use of CBP One, an extremely flawed government tool recently designed to request an appointment at a port of entry. As elaborated below, this new technological system is inaccessible to many asylum seekers due to financial, language, technological, and other barriers; discriminates against Black and Indigenous asylum seekers; and has such limited appointment slots that requiring asylum seekers to use the application essentially turns asylum access into a lottery. The proposed rule attempts to establish CBP One as the only mechanism to request asylum at the southern border, thus effectively punishing individuals who cannot wait indefinitely in danger while they attempt to schedule an appointment.

The Asylum Ban Violates U.S. Law and Treaty Obligations

The proposed rule contravenes U.S. law governing asylum access, expedited removal procedures, and prohibitions on the return of refugees to persecution and torture. Congress passed the Refugee Act of 1980 to codify the United States' obligations under the Refugee Convention and Protocol.

The United States played a lead role in drafting the Refugee Convention in the wake of World War II. By later acceding to the Refugee Protocol, the United States promised to abide by the Convention's legal requirements, including non-discriminatory access to asylum, its prohibition against returning refugees to persecution, and its prohibition against imposing improper penalties on people seeking refugee protection based on manner of entry. The U.N. Refugee Agency (UNHCR) previously warned, with respect to the previous administration's entry and transit bans, that such asylum bans are not consistent with fundamental protections of refugee law, including the right to seek asylum, the principle of non-refoulement, and the prohibition against penalties for irregular entry.¹⁰ By denying asylum where an individual has not used certain limited migration pathways, the proposed rule attempts to unlawfully use the existence of lawful pathways as a justification to deny access to asylum at the border. UNHCR, IOM, and UNICEF recently warned that the provision of safe pathways "cannot come at the expense of the fundamental human right to seek asylum."¹¹

The Refugee Act of 1980 incorporated these principles into U.S. law. 8 U.S.C. § 1158 provides that people may apply for asylum regardless of manner of entry into the United States. It also delineates limited exceptions where an asylum seeker may be denied asylum based on travel

¹⁰ <https://www.refworld.org/topic,50ffbce4120,50ffbce4123,5dcc03354,0,,AMICUS,USA.html>

¹¹ <https://www.unhcr.org/en-us/news/press/2022/10/63497be44/unhcr-iom-and-unicef-welcome-new-pathways-for-regular-entry-to-the-us-reiterate.html>

through another country, but these restrictions only apply where an individual was “firmly resettled” in another country (defined to mean the person was eligible for or received permanent legal status in that country) or if the U.S. has a formal “safe third country” agreement with a country where refugees would be safe from persecution and have access to fair asylum procedures. The statute prohibits the administration from issuing restrictions on asylum that are inconsistent with these provisions. 8 U.S.C. § 1231 codified the prohibition against returning refugees to countries where they face persecution. The proposed rule, which conditions access to asylum on manner of entry and transit, would result in the return of refugees to danger and unequivocally contravenes these provisions of U.S. law.

In 1996, Congress created the expedited removal process through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Under this process, asylum seekers placed in expedited removal who establish a credible fear of persecution must be referred for full asylum adjudications.¹² The proposed rule attempts to unlawfully circumvent the credible fear screening standard established by Congress, which was intended to be a low screening threshold.¹³ The government is required to refer asylum seekers in expedited removal for full asylum adjudications if they can show a “significant possibility” that they could establish asylum eligibility in a full hearing. The proposed rule attempts to eviscerate this standard by first requiring asylum seekers to by a preponderance of evidence that they can rebut the presumption of asylum ineligibility, and then requiring those who cannot overcome the presumption to meet a higher fear standard before being permitted to seek protection. This provision is inconsistent with U.S. law.

The proposed rule also violates the Refugee Convention’s prohibition against imposing improper penalties on asylum seekers based on their irregular entry into the country of refuge. The agencies explicitly note that the asylum ban would inflict “consequences” on people seeking asylum – a blatant attempt to punish people based on their manner of entry into the United States. These consequences could include the denial of access to asylum, deportation to harm, family separation, and deprivation of a path to naturalization. With respect to the Trump administration’s entry ban, UNHCR has stated that “[n]either the 1951 Convention nor the 1967 Protocol permits parties to condition access to asylum procedures on regular entry.”¹⁴

The proposed asylum ban violates these key provisions of U.S. law and treaty commitments. Indeed, similar Trump administration asylum bans targeting refugees at the border based on manner of entry and transit were vacated and enjoined by federal courts for violating these provisions of U.S. law, as discussed below. In 2021, when the Biden administration first considered adopting an asylum ban, legal counsel for the White House warned that it could be

¹² 8 U.S.C. § 1225 (b)(1)(B)(iii)(III)

¹³ <https://www.govinfo.gov/content/pkg/CREC-1996-09-27/html/CREC-1996-09-27-pt1-PgS11491-2.htm>

¹⁴ <https://www.refworld.org/topic,50ffbce53a,50ffbce54f,5f3f90ea4,0,,AMICUS,.html>

struck down as illegal for the same reason that federal courts struck down the Trump administration bans.¹⁵ Nonetheless, the agencies have decided to proceed with this patently illegal policy.

The proposed rule in its current form would cause significant harm to Law Lab's organizational mission and programming, and to the clients we serve. Law Lab was founded in 2014 in response to the mass detention and deportation of asylum-seeking immigrant families. Since then, Law Lab has built several massive collaborative representation projects centered around preventing unjust deportations, many of which focus on intervention and representation during credible fear interviews, as well as direct representation before EOIR on claims for asylum, withholding of removal and CAT relief.

If the proposed changes are enacted, Law Lab will have to make significant changes in its programming to provide meaningful representation and pro bono services to the populations that it serves. Without access to counsel, or the ability to research country conditions prior to a credible fear interview, asylum seekers would be less likely to be able to meet the heightened standard that would be imposed upon them solely based on their manner of entry or meet the rigid standards to qualify for an exception from the presumption. This will result in the erroneous expulsion of asylum seekers back to countries where they will face persecution and death and will limit Law Lab's ability to provide meaningful representation to asylum seekers in the United States. Law Lab may also have to divert more resources to track all asylum seekers who may be subject to the presumption of ineligibility during the time period prescribed, and to represent them under a heightened standard of proof throughout the course of their proceedings. Given the delays and backlogs in the immigration system, Law Lab will be shouldering the burden of this proposed rule for years.

Many of Law Lab's clients are disproportionately targeted by this proposed rule, as Law Lab serves a large number of migrants from Central and South America minority and indigenous groups who are fleeing persecution. These people often have no choice but to make the dangerous trip from their countries of origin, often over land and on foot, to the United States. Under this proposed rule, many individuals with strong claims to asylum will be unlawfully and unjustly denied the right to seek the protection to which they are solely due to their inability to access the proposed asylum infrastructure. As a result, they will be sent back to countries where they face harm, persecution, and even death. The consequences of these proposed changes in its current stage would be devastating for tens of thousands of refugees whom the United States has committed to protecting.

¹⁵ <https://www.cbsnews.com/news/immigration-biden-asylum-restrictions-legality/>

Resurrecting Illegal Policies Used By the Last Administration to Ban Asylum Seekers

The proposed rule is a new iteration of similar asylum bans the Trump administration attempted to advance. Those bans, which similarly barred refugees from asylum protection based on manner of entry and transit, were repeatedly struck down by federal courts as unlawful.¹⁶ The Trump administration's transit ban, which was in effect for a year before it was vacated, inflicted¹⁷ enormous damage including deportation of refugees to harm, separation of families, and prolonged detention. This proposed rule would similarly be wielded to deny refugees asylum and block and rapidly deport refugees without access to asylum hearings through expedited removal, resulting in the same horrific harms.

Despite the Biden administration's attempts to distinguish its proposed rule from the previous administration's, it would similarly operate as an asylum ban for refugees based on factors that do not relate to their fear of return and would result in asylum denials for all who are unable to establish that they qualify for the extremely limited exceptions. Its use in expedited removal will require asylum seekers – many of whom have suffered persecution and violence and have undergone a harrowing journey to reach safety – to prove that the rule does not apply to them in a credible fear interview shortly after arrival in the United States, while detained and with little to no access to counsel, likely without knowledge of how the rule works or what they need to prove. As explained below, Law Lab's experience working with detained individuals has highlighted significant deficiencies in the implementation of the current credible fear process; introducing this rule into an already flawed system would have devastating results for individuals' ability to access protection under U.S. law.

CBP One is a high-tech version of metering, a policy which illegally turned away people seeking asylum at ports of entry along the U.S. border with Mexico that the Biden administration ended in November of 2021.¹⁸ Similarly to the metering policy, requiring asylum seekers to obtain scarce appointments through the CBP One app will force most to wait in dangerous border towns indefinitely. This is a boon to organized crime organizations who make a business of kidnapping and extorting vulnerable asylum-seekers. The unrealistic and unattainable exceptions required to rebut the presumption of ineligibility under the proposed rule ostensibly amount to an outright ban for the majority of non-Mexican asylum seekers at the southern border.

¹⁶ <https://www.aclu.org/cases/east-bay-v-barr?document=pi-order>; <https://casetext.com/case/capital-area-immigrants-rights-coal-v-trump>;

<https://www.caircoalition.org/sites/default/files/Memo%20Opinion%20Dkt.%2092.pdf>

¹⁷ <https://humanrightsfirst.org/library/asylum-denied-families-divided-trump-administrations-illegal-third-country-transit-ban/>

¹⁸ <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf>

The last attempt at an asylum transit ban created a bewildering and, because of inevitable challenges, constantly changing set of rules and distinctions based on arbitrary dates which respondents and legal service providers had to navigate. Many were harmed in this process, as many will be again if this rule goes into effect.

Asylum Ban Would Disparately Harm Black, Brown, and Indigenous Asylum Seekers

This rule discriminates against asylum seekers based on manner of entry and transit and will have a racially disparate impact on asylum seekers from Africa, the Caribbean, and Latin America. The proposed ban, which applies only to people who seek protection at the southern border, will disproportionately harm people of color who do not have the resources or ability to arrive in the United States by plane.

The United States and other countries employ visa regimes to prevent people from reaching their countries' territories to seek asylum while often allowing access to people from wealthier and predominantly white nations.¹⁹ Imposing a ban on refugees seeking safety at the southwest border will, like the Trump third-country transit ban, disproportionately harm people of color who must undertake an often difficult and dangerous journey to arrive in the United States by way of the southern border. During the period that the Trump transit ban was implemented, immigration court asylum denial rates skyrocketed for many Black, Brown, and Indigenous asylum seekers requesting safety at the southern border.²⁰ For instance, asylum grant rates declined by 45 percent for Cameroonian asylum applicants, 32.4 percent for Cubans, 29.9 percent for Venezuelans, 17 percent for Eritreans, 12.9 percent for Hondurans, 12 percent for Congolese (DRC), and 7.7 percent for Guatemalans from December 2019 to March 2020, compared to the year before the third-country transit asylum ban began to affect refugee claims, according to data analyzed by Syracuse University's Transactional Records Access Clearinghouse.

Additionally, as discussed below, requiring asylum seekers to use CBP One to seek asylum at the border disparately harms Black asylum seekers due to racial bias in its facial recognition technology. CBP One is also inaccessible to many Indigenous, African, and other asylum seekers due to language barriers. This proposed asylum ban will significantly undermine the Biden administration's stated commitment²¹ to racial justice and equity.

The ban also builds in nationality-based discrimination in access to asylum, as it largely bans asylum for people who do not enter the United States via limited parole initiatives or previously

¹⁹ <https://www.womensrefugeecommission.org/wp-content/uploads/2022/06/Visa-Regimes-A-Threat-to-Migrants-Access-to-Safety-and-Asylum.pdf>

²⁰ https://humanrightsfirst.org/wp-content/uploads/2023/01/AsylumBanFactsheet_final2.pdf

²¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>

scheduled appointments at ports of entry while simultaneously only affording limited access to parole initiatives for certain nationalities. For instance, while there are currently limited parole initiatives for some nationalities, there are no similar parole initiatives for people from Guatemala, Honduras, and El Salvador — and recent reporting has indicated the Biden administration plans to wield the asylum ban against these nationalities.²²

Innovation Law Lab consistently sees in our work and analysis that Black, Brown, and indigenous asylum seekers have disproportionately low access to the technology mandated by this rule because of racial-economic hierarchies and power differentials within and between the countries that individuals are compelled to flee. They also disproportionately lack the ability to travel to the United States directly and avoid a third country. These dynamics are already, under the current rules, deeply harmful and reflective of systemic racism; the proposed rule would make them worse. It is even more burdensome to require Black, Brown, and Indigenous asylum seekers to first seek protection in transit countries that are often particularly unsafe for these groups due to racism and anti-migrant sentiment. This creates an illusory exception to what is essentially a ban for asylum seekers who are forced to make a dangerous trip through unsafe third countries only to be barred from their legal right to asylum based on their inability to find refuge on their way to the United States.

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

The rule requires asylum seekers at the southwest border to schedule appointments through the CBP One app and would generally deny asylum to refugees who arrive at a border port of entry without a previously scheduled appointment and were not denied protection in a transit country. CBP One is impossible for many asylum seekers to access or use, including those who do not have the resources to obtain a smartphone or ability to navigate the app.²³ The app is not available in most languages—including Indigenous languages—and all error messages are in English, barring many asylum seekers from using the app. It also disparately harms Black asylum seekers due to racial bias in its facial recognition technology,²⁴ which has prevented many from obtaining an appointment.²⁵ Asylum seekers who can access and navigate the app are still often unable to schedule appointments due to extremely limited slots, forcing them to remain in danger indefinitely while attempting to secure an appointment. Requiring refugees to use CBP One at the southwest border also raises concerns that the system will be used for illegal metering

²² <https://www.nbcnews.com/politics/immigration/biden-block-migrants-trump-era-stephen-miller-tactic-rcna71282>

²³ https://www.strausscenter.org/wp-content/uploads/Feb_2023_Asylum_Processing.pdf

²⁴ <https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias>

²⁵ https://twitter.com/L_Toczylofski/status/1631063774210785280

(based not on wait time but on luck, technology skills, or resources to secure an appointment — turning asylum access in effect into a lottery).²⁶

Requiring asylum seekers to schedule an appointment through CBP One has already resulted in horrific violence and death, including the murder of a 17-year-old Cuban child in Mexico who was required to wait weeks for an appointment.²⁷ A Venezuelan family unable to secure an appointment at a port of entry near them in Piedras Negras and forced to travel over 1200 miles to another port of entry for an appointment was kidnapped, tortured, and extorted by a criminal group while traveling to their appointment.²⁸ After 20 days, their abductors blindfolded them and brought them to the U.S.-Mexico border, threatening to murder them if they did not cross. After crossing, the family tried to explain to Border Patrol that they had been kidnapped and forced to cross, but agents told them they were criminals for crossing illegally and expelled them back to Mexico.

By requiring people at the southwest border to use CBP One, the proposed rule would leave many vulnerable asylum seekers in grave danger, including LGBTQI+ asylum seekers, women, and survivors of gender-based violence. Asylum seekers unable to secure appointments through the CBP One app will be forced to remain indefinitely at the border in dangerous conditions, often with no access to safe housing or stable income as they continue to try to make an appointment. These conditions increase the likelihood that they will be targeted for violence by cartels, traffickers, and the abusers from whom they initially fled.²⁹ Many LGBTQI+ asylum seekers and families and other vulnerable populations have already been unable to secure appointments through CBP One, leaving them in extreme danger.

Requiring asylum seekers to use the CBP One app will also separate families. The administration's use of the CBP One app and denial of access to asylum for people who cannot schedule appointments through the app has already forced families to separate.³⁰ Families unable to secure CBP One app appointments together as a family unit have made the impossible choice to send their children across the border alone to protect them from harm in Mexican border regions. Like the Title 42 policy and other policies that block, ban, and deny asylum to refugees, this proposed rule would fuel family separations at the border.

Innovation Law Lab routinely encounters detained people seeking asylum who were forced to flee home with few or no resources and have neither the tools nor the knowledge needed to navigate an online application. Many asylum seekers also have little to no awareness of the

²⁶https://fingfx.thomsonreuters.com/gfx/legaldocs/zjvqkzdwvx/IMMIGRATION_METERING_LAWSUIT_decisi on.pdf

²⁷ <https://www.texasmonthly.com/news-politics/cbp-app-asylum-biden-administration/>

²⁸ <https://twitter.com/ReichlinMelnick/status/1631400369266872322>

²⁹ https://www.tahirih.org/wp-content/uploads/2022/10/Oxfam_Tahirh_Surviving-Deterrence_English_2022.pdf

³⁰ https://www.strausscenter.org/wp-content/uploads/feb_2023_Asyllum_Processing.pdf

complicated legal process required to request asylum in the United States. Most are simply seeking the only safe haven available. The United States' international obligations under refugee law, and moral obligations, require that we remove unnecessary bureaucratic obstacles that prevent individuals from reaching their intended new homes instead of creating further technological hurdles that create more uncertainty and chaos for people fleeing persecution in their home countries.

Deportation of Refugees to Danger

If implemented, the asylum ban would lead to the deportation of refugees to countries where they are at risk of persecution and torture. The rule largely bans asylum for refugees based on their manner of entry into the U.S. and travel through other countries—factors that are irrelevant to their fears of return and will lead to denials of asylum for refugees. Refugees who are otherwise eligible for asylum but banned by the rule would likely be deported to danger.

While the Trump administration's transit ban was in effect, asylum seekers were denied all relief and ordered deported due to the ban, including a Venezuelan opposition journalist and her one-year-old child; a Cuban asylum seeker who was beaten and subjected to forced labor due to his political activity; a Nicaraguan student activist who had been shot at during a protest against the government, had his home vandalized, and was pursued by the police; a gay Honduran asylum seeker who was threatened and assaulted for his sexual orientation; and a gay Nicaraguan asylum seeker living with HIV who experienced severe abuse and death threats on account of his sexual orientation, HIV status, and political opinion.³¹

Many asylum seekers were summarily ordered deported through expedited removal without an asylum hearing due to the transit ban, including Indigenous asylum seekers fleeing gender-based and other persecution in Guatemala and a Congolese woman who had been beaten by police in her country when she sought information about her husband, who had been jailed and tortured due to his political activity.³²

We are currently working with many individuals seeking refuge from countries including Afghanistan, Haiti, Nicaragua, and Venezuela. Many of these clients have fled significant violence and suffered harm at the hands of oppressive regimes; among other reasons, their lives are at risk due to their political activities, status as former government employees, and their religious and cultural identities. To a person, they have had to cross through several countries to seek safety in the United States. All of these clients would be at risk of being denied asylum outright under the new proposed rule.

³¹ https://humanrightsfirst.org/wp-content/uploads/2023/01/AsylumBanFactsheet_final2.pdf

³² https://humanrightsfirst.org/wp-content/uploads/2023/01/AsylumBanFactsheet_final2.pdf

Use of Asylum Ban in Expedited Removal Will Fuel Mass Deportations, Due Process Violations

Like the Trump administration, the Biden administration plans to implement this asylum ban in the expedited removal process, where asylum seekers would be deported without an asylum hearing if they do not pass their fear screenings. Asylum seekers would be required to show that the asylum ban does not apply to them or that they can rebut the presumption of ineligibility, which will be impossible for many given that these screenings typically occur over the phone while asylum seekers are detained, with little to no access to counsel. Language barriers, abusive and dangerous conditions of confinement, acute trauma, and lack of knowledge of the requirements of this complex rule would make it extremely challenging for asylum seekers to overcome this ban in preliminary screenings. Many would be unable to prove to an asylum officer that they should not be banned by the rule.

These due process violations would be magnified if the administration pursues its reported plan to conduct credible fear interviews within days of asylum seekers' arrival in Customs and Border Protection (CBP) custody, where dire conditions and lack of access to counsel would exacerbate the due process nightmare. The Trump administration similarly conducted credible fear interviews in CBP custody through the Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP) programs, which the Biden administration ended.³³ Resurrecting this policy and imposing the asylum ban in these fear screenings would be a due process fiasco.

Asylum seekers detained in CBP custody have frequently reported receiving insufficient or inedible food and water; a lack of access to showers and other basic hygiene; and an inability to sleep because of overcrowding, lack of adequate bedding, cold conditions, and lights that are kept on all night.³⁴ For asylum seekers subjected to PACR and HARP, positive credible fear determinations plummeted: only 18 percent of individuals in PACR and 30 percent in HARP passed their screenings, compared to 40 percent nationwide (excluding HARP and PACR) during the same period.³⁵

Through Innovation Law Lab's work with asylum seekers detained at the Torrance County Detention Facility, we have learned of extreme abuses committed in immigration custody, including the use of solitary confinement for individuals experiencing suicidal ideation in cells

³³ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>

³⁴ <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>; https://humanrightsfirst.org/wp-content/uploads/2022/12/Final-Berks-Factsheet-12.1.2022_FINAL-1.pdf; <https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials>

³⁵ <https://humanrightsfirst.org/wp-content/uploads/2023/01/PretenseofProtection-21.pdf>

they describe as “Torture Rooms;” widespread sleep deprivation due to uninhabitable conditions; an attempted suicide as recently as January 2023; and patterns of retaliation against individuals who speak out or engage in civil disobedience. Our team has spoken with many dozens of people seeking asylum who have explained that the Credible Fear Interview process conducted there since at least the end of 2022 has largely deprived them of the basic right to speak about their experience.³⁶ If the current process wrongly denies so many of their chance to seek protection, it is unthinkable what layering more constraints on this fear review process will do to individuals and families seeking protection in the United States.

Asylum seekers who are banned by the rule during their credible fear interviews would have to meet a heightened screening standard in order to access immigration court hearings and would be subject to deportation if they cannot pass the screening. As discussed above, the proposed rule’s attempt to illegally elevate the credible fear standard established by Congress violates the statute and Congressional intent in setting a low screening threshold.

The Proposed Rule Attempts to Eviscerate Critical Safeguards in the Expedited Removal Process

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

The proposed rule would change existing regulations to deny asylum seekers immigration court review of negative credible fear determinations if they do not affirmatively request review. This provision would apply to asylum seekers issued negative credible fear determinations due to the asylum ban. Immigration court review of negative credible fear determinations is a crucial safeguard guaranteed by statute;³⁷ from Fiscal Years 2018 to 2021, for instance, over a quarter of credible fear determinations were reversed through immigration court review.³⁸ In its December 11, 2020 “death to asylum” rule, the Trump administration previously imposed a similar hurdle on asylum seekers,³⁹ depriving them of immigration court review of credible fear decisions where they did not affirmatively request review, a change that the Biden administration reversed

³⁶ <https://innovationlawlab.org/press-releases/new-report-tcdf-feb-2023/>

³⁷ 8 U.S.C. §1225

³⁸ Id.

³⁹ <https://www.federalregister.gov/documents/2020/12/11/2020-26875/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>

in the May 31, 2022 asylum processing rule.⁴⁰ In reversing the Trump administration regulation, the agencies explained that “treating any refusal or failure to elect review as a request for IJ review, rather than as a declination of such review, is fairer and better accounts for the range of explanations for a noncitizen's failure to seek review.”⁴¹ Despite the agencies’ conclusion less than a year ago, they now seek to reverse course and deprive asylum seekers of the right to immigration court review where they do not affirmatively request it.

Requiring asylum seekers to affirmatively request review of negative credible fear determinations creates an additional hurdle for asylum seekers, the vast majority of whom are unrepresented during the credible fear process, while they navigate an already convoluted process that carries potentially deadly consequences. Due to language and other barriers, asylum seekers may not understand the requirement to affirmatively request immigration court review.

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.⁴² 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.

In the asylum processing rule, the agencies imposed severe limitations on asylum seekers’ ability to submit requests for reconsideration of negative credible fear determinations, setting an unworkable seven-day deadline for submitting a request for reconsideration (following immigration judge review, which must happen within seven days of the fear determination) and limiting asylum seekers to a single request. Advocates and attorneys have condemned these new restrictions, which have barred⁴³ asylum seekers issued erroneous negative credible fear determinations from obtaining reconsideration due to draconian temporal and numerical restrictions. UNHCR has opposed⁴⁴ elimination of this safeguard and warned that it may increase 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

⁴⁰ <https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>

⁴¹ <https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>

⁴² <https://humanrightsfirst.org/library/biden-administration-move-to-eliminate-requests-for-reconsideration-would-endanger-asylum-seekers-deport-them-to-persecution-and-torture/>

⁴³ <https://humanrightsfirst.org/library/pretense-of-protection-biden-administration-and-congress-should-avoid-exacerbating-expedited-removal-deficiencies/>

⁴⁴ <https://www.regulations.gov/comment/USCIS-2021-0012-5192>

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

The Proposed Rule Would Leave Asylum-Seeking Families Separated And Deprive Asylum Seekers of a Path to Lawful Status

Individuals banned from asylum protection under the rule would have to establish eligibility for Withholding of Removal or protection under the Convention Against Torture (CAT) to obtain protection from deportation. Unlike asylum, these forms of relief do not confer permanent status or a path to citizenship, do not allow people to petition for their spouses and children, do not permit people to travel abroad, and do not provide any security against deportation if country conditions change in the future. Those who are otherwise eligible for asylum but are unable to meet the higher threshold to establish eligibility for withholding of removal or CAT protection would be deported, while many granted these lesser forms of protection would be left in permanent limbo, separated from their families, and left under constant threat of deportation.

As a result, many refugees who should be granted asylum under U.S. law will languish in the United States in legal limbo, indefinitely separated from their spouses and children who remain abroad in danger. The Trump administration's transit ban similarly left many refugee families separated by barring refugees from asylum and leaving them with the inadequate protection of withholding of removal. Under the Trump transit ban, refugees denied asylum due to the transit ban and granted withholding of removal faced potentially permanent separation from their spouses and children, including: an Anglophone Cameroonian refugee who was brutally tortured by the Cameroonian military and could not reunify with his wife and child, who were in hiding in Cameroon because of the threats they faced; a Cuban musician and critic of the government who was jailed and beaten and could not petition for his wife and two children who remained in Cuba; and a Venezuelan refugee who fled after being detained and tortured and could not reunify with his three children who lived in Venezuela.⁴⁵

Exceptions in the proposed rule that promote family unity where refugee families travel to the United States together will not prevent the separation of families where spouses and children remain abroad. Like the Trump transit ban, this asylum ban would leave refugee families indefinitely separated.

Asylum Seekers are Unsafe in Transit Countries, Without Access to Meaningful Protection

The proposed rule attempts to require many refugees to seek asylum in transit countries that have no formal agreement with the U.S. and where refugees would not be safe or have access to meaningful asylum procedures, thereby circumventing U.S. law requirements for safe third

⁴⁵ https://humanrightsfirst.org/wp-content/uploads/2023/01/AsylumBanFactsheet_final2.pdf

countries. In Mexico, which would be a transit country for non-Mexican asylum seekers at the southern border, refugees face life-threatening harms. There have been over 13,000 attacks reported against asylum seekers and migrants stranded in Mexico under the Title 42 policy over the past two years alone.⁴⁶ In fact, in creating an impossibly high standard of “imminent and extreme threat to life or safety,” a standard higher than that required to qualify for asylum or withholding, and by clarifying that the exception does not include generalized threats of violence, the proposed rule seems to acknowledge the well-documented, pervasive violence along the border in Mexico that puts many asylum seekers at grave risk.

Further, refugees do not have access to fair asylum procedures in Mexico, where many are at risk of deportation to persecution in their home countries.⁴⁷ Black asylum seekers and migrants face pervasive anti-Black violence, harassment, and discrimination, including widespread abuse by Mexican authorities.⁴⁸ In addition to the well-documented risk of our direct representation work, Innovation Law Lab has heard asylum seekers recount stories of abuse at the hands of Mexican immigration authorities, including bussing families of migrants to unknown locations in Mexico and leaving them without food or supplies, forcing them to walk for months to reach the border again.

El Salvador,⁴⁹ Honduras,⁵⁰ and Guatemala⁵¹ do not have functional asylum systems that can protect large numbers of refugees and many transiting through these countries face extreme dangers including gender-based violence, anti-LGBTQI+ attacks, race-based violence, and other persecution.

The proposed rule will have a devastating impact on women and LGBTQI+ people who are particularly vulnerable to gender-based violence (GBV) and other persecution. It is well-documented⁵² that countries of transit that survivors of GBV pass through while trying to reach the southern U.S. border provide very little if any true protection even when they are granted asylum there. Women and LGBTQI+ asylum seekers face enormous dangers in many countries of transit, including Mexico and Central American countries, and would be at risk of persecution on the basis of the same immutable characteristics that led them to flee their home countries. Applying and waiting for review of their asylum claims in these countries prolongs survivors’ perilous journeys in search of safe haven.

⁴⁶ <https://humanrightsfirst.org/library/title-42-human-rights-stain-public-health-farce/>

⁴⁷ <https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf>

⁴⁸ <https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf>

⁴⁹ <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/el-salvador/>

⁵⁰ <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/honduras/>

⁵¹ <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative>

⁵² https://www.tahirih.org/wp-content/uploads/2022/10/Oxfam_Tahirh_Surviving-Deterrence_English_2022.pdf

Conclusion

The proposed rule is illegal, inhumane, and discriminatory. Like the previous administration's entry and transit bans, this asylum ban will deport refugees to persecution and torture and separate families. The proposed rule also requires asylum seekers at the border to use a discriminatory and deficient mobile app that is contingent on resources, language skills, and an ability to wait indefinitely for an appointment slot, cutting off asylum access for many of the most vulnerable asylum seekers.

Innovation Law Lab calls on the administration to withdraw this rule in its entirety, stop punishing migrants arriving at the U.S. southern border, and instead allocate resources toward humane asylum processing and fair adjudications.

INNOVATION LAW LAB



Kathryn Paradise
OWR Fellow and Attorney



Jordan Cunnings
Legal Director



Tess Hellgren
Deputy Legal Director