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

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

Dear Assistant Director Reid and Acting Director Delgado:

The Southern Poverty Law Center (SPLC) respectfully submits the following comments to the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), and the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR) (“the agencies”) in response and opposition to the above-referenced Notice of Proposed Rulemaking (“NPRM” or “the Proposed Rule”) issued by the agencies on February 23, 2023. SPLC strongly opposes the Proposed Rule, which will prevent asylum seekers from accessing protection they merit under domestic and international law, result in the return of many individuals to harm, and leave others in the United States without stable protection. The Proposed Rule, which has been welcomed by anti-immigrant hate groups,<sup>1</sup> is a new version of similar asylum bans promulgated by the Trump administration that federal courts repeatedly struck down by federal courts as unlawful. SPLC urges EOIR and DHS to withdraw the Proposed Rule in its entirety and ensure that a full and fair asylum system is made accessible to all those who seek refuge in the United States. SPLC already publicly voiced its concerns about this Proposed Rule when it was announced.<sup>2</sup> In this comment, SPLC now provides a more comprehensive technical analysis of the Proposed Rule and reasons why it should not move forward.

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

<sup>2</sup> Press Release, SPLC Statement on Biden Administration’s Proposed Asylum Ban (Feb. 21, 2023), <https://www.splcenter.org/presscenter/splc-statement-biden-administrations-proposed-asylum-ban>.

## **SPLC and Its Interest in the Issue**

Founded in 1971, SPLC is a civil rights organization dedicated to litigation and advocacy that make justice and equal opportunity a reality for all. SPLC’s Immigrant Justice Project (IJP) represents noncitizens across the Southeast and nationally. Through its litigation team, IJP provides legal representation and support to immigrants in civil rights cases and on issues of regional and national importance, including efforts to protect the integrity of the U.S. asylum system. In April 2017, IJP launched the Southeast Immigrant Freedom Initiative (SIFI), which engages in advocacy and *pro bono* legal representation in immigration detention centers in Georgia, Louisiana, and Mississippi. Through SIFI, SPLC represents clients, including many individuals seeking asylum,<sup>3</sup> in custody proceedings, removal proceedings before the EOIR, appeals to the Board of Immigration Appeals, and petitions for review to federal courts of appeal. SIFI also represents clients in Credible Fear Interviews (CFIs), Reasonable Fear Interviews (RFIs), review of negative CFI/RFI determinations before immigration judges, Requests for Reconsideration (RFRs) of negative CFI/RFI determinations, and Further Information Gathering interviews, and conducts other advocacy for detained people placed in expedited removal proceedings. In 2022, SIFI conducted more than 1,000 legal visits with clients and potential clients and represented more than 300 clients from 45 countries who spoke more than 15 different languages.

### **A. Overview of the Proposed Rule**

Asylum is a fundamental right and a central component of the post-World War II international and domestic order. Article 14 of the Universal Declaration of Human Rights states that people have the right to “seek and enjoy” asylum.<sup>4</sup> The Refugee Act of 1980 established a right to apply for asylum for any noncitizen “who is physically present in the United States or who arrives in the United States . . . irrespective of such [noncitizen]’s status” and “whether or not [the noncitizen arrives] at a designated port of arrival.”<sup>5</sup>

Despite the fundamental and unconditional nature of the right to access the asylum system in the United States, the Proposed Rule seeks to effectively and arbitrarily curtail the number of people who will be granted asylum, increase the number of people who will be removed, and ultimately deter individuals who are seeking asylum from coming to the U.S. in the first place—a blatantly improper motive. The Proposed Rule incorporates a new, sweeping ground of ineligibility for asylum seekers arriving at the U.S.’s southwest border based on their manner of entry into the United States and transit through other countries, factors that are irrelevant to their fear of return and have no basis in U.S. law. Government officials have privately acknowledged that the Proposed Rule will constitute a foundational shift in the U.S. asylum system,<sup>6</sup> making access to asylum for those who enter the United States at the southwest border the exception rather than the norm.

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<sup>3</sup> Throughout this comment, the term “asylum seeker” or “individual seeking asylum” is used to refer to individuals seeking humanitarian protection in the form of asylum, withholding of removal (including under the Convention Against Torture (CAT)), and/or deferral of removal under CAT.

<sup>4</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 14 (Dec. 10, 1948).

<sup>5</sup> 8 U.S.C. § 1158(a)(1).

<sup>6</sup> Hamed Aleaziz, *News Analysis: Why the Border May ‘Never Go Back to What it Was Before Trump’*, L.A. Times (Mar. 2, 2023), <https://www.latimes.com/politics/story/2023-03-02/biden-asylum-proposal-trump>.

The Proposed Rule provides that individuals seeking asylum arriving at the southwest border without permission to enter are presumptively ineligible for asylum if they did not seek and receive a denial of asylum in a transit country or countries, and/or if they entered between Ports of Entry or at a Port of Entry without having obtained an appointment via a mobile application called CBP One. Asylum seekers subject to the Proposed Rule may “rebut” this presumption by showing the presumption was incorrectly applied to them or they fall within an exception to the rule, including those facing an imminent threat of harm such as rape or murder, trafficking victims, and those facing acute medical emergencies or other “exceptionally compelling circumstances.” Those who fail to rebut the presumption will be removed unless they can meet a heightened standard to establish their fear of return. Even then, those who meet this heightened standard will only be permitted to seek a lesser form of protection than asylum, known as Withholding of Removal under INA § 241(b)(3) or protection under the Convention Against Torture (CAT).<sup>7</sup> These lesser forms of protection provide no path to citizenship, expose people to the perennial risk of removal, and proscribe their ability to petition for reunification with their spouse or children.

Expedited removal is a process that allows the U.S. government to remove people arriving at the border without the due process protections afforded in removal proceedings in immigration court. Individuals who have recently arrived in the United States are subject to expedited removal unless an individual asserts a desire to seek asylum or a fear of persecution *and* they pass a “credible fear” screening interview where they must show a significant possibility that they could establish asylum eligibility in a full hearing.<sup>8</sup> People subject to the Proposed Rule must “rebut” a new presumption of ineligibility during their credible fear screening interviews as described above.<sup>9</sup> In expedited removal, asylum seekers covered by the Proposed Rule will be required to gather the evidence and arguments necessary to rebut the presumption of ineligibility while detained in government custody and with extremely limited access to legal counsel or family and friends who might have supporting documents or testimony. Those who fail to rebut the presumption will be swiftly deported unless they can meet the heightened standard to establish their fear of return (in violation of U.S. law governing credible fear interviews<sup>10</sup>).

The Proposed Rule will also apply to immigrants in full asylum proceedings before USCIS and the immigration court.<sup>11</sup> In these proceedings, asylum seekers would be denied asylum if they cannot rebut the presumption of ineligibility, resulting in the removal of many individuals seeking asylum and leaving others with only those lesser forms of protection available to them that place a higher burden of proof on the applicant.

Requiring asylum seekers to register through CBP One to avoid the presumption of ineligibility sets up an unnecessary and cruel hurdle for people fleeing persecution. CBP One is a dysfunctional and flawed government tool to request an appointment at a Port of Entry that is inaccessible to many individuals seeking asylum due to financial, language, technological, and other barriers; discriminates against Black and Indigenous asylum seekers; is geo-fenced such that it can only be used within a certain range of the U.S.-Mexico border; and has such limited appointment slots that requiring asylum seekers to use the app essentially turns asylum access into a lottery. The Proposed

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<sup>7</sup> United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984), S. Treaty Doc. No. 100-20 (1988).

<sup>8</sup> See 8 U.S.C. § 1225(b)(1)(A)-(B).

<sup>9</sup> See NPRM at 11724–25.

<sup>10</sup> See 8 U.S.C. § 1225(b)(1).

<sup>11</sup> See NPRM at 11725.

Rule attempts to establish CBP One as the *only* mechanism to request asylum at the southwest border and seeks to punish those who cannot wait indefinitely in danger while they attempt to schedule an appointment on an app.

The Proposed Rule violates U.S. obligations under domestic and international law, which ensure access to protection for those fleeing persecution. Prior to the Proposed Rule’s issuance, nearly 300 civil society organizations, more than 150 faith-based organizations, and nearly 80 members of the House and Senate called on the administration to abandon its plans to resurrect these Trump-era asylum bans.<sup>12</sup>

In the Proposed Rule’s preamble, the agencies highlight the pressures at the border caused by increasing arrivals of people seeking protection and fleeing persecution. The U.S. is not alone in facing these pressures; the world faces record global displacement caused by political instability and oppression, violence, and climate change.<sup>13</sup> However, much of the “pressure” at the border is due to the government’s own decisions to cut off access to the U.S. asylum process for over six years—first, through illegal metering and turnbacks of individuals seeking asylum,<sup>14</sup> and second, pursuant to the Title 42 policy. Crucially, the U.S. government does not need to respond to these self-imposed pressures by implementing increasingly restrictive measures such as this Proposed Rule. Many humane and practical solutions are available to the administration, including increasing funding to and coordination with civil society organizations providing respite on the border and throughout the country.<sup>15</sup>

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.”<sup>16</sup> 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.<sup>17</sup> The

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<sup>12</sup> Letter from Civil Society Organizations to J. Biden (Jan. 18, 2023), <https://humanrightsfirst.org/wp-content/uploads/2023/01/Letter-to-President-Biden-re-asylum-ban-NPRM-1.pdf>; Letter from Faith-Based Organizations to J. Biden, et al. (Jan. 23, 2023), [https://www.interfaithimmigration.org/wp-content/uploads/2023/01/Final-Faith-Letter-Opposing-Proposed-Asylum-Ban\\_Jan2023.pdf](https://www.interfaithimmigration.org/wp-content/uploads/2023/01/Final-Faith-Letter-Opposing-Proposed-Asylum-Ban_Jan2023.pdf); Letter from Members of Congress to J. Biden (Jan. 25, 2023), [https://www.menendez.senate.gov/imo/media/doc/letter\\_to\\_president\\_biden\\_on\\_the\\_administrations\\_border\\_policies.pdf](https://www.menendez.senate.gov/imo/media/doc/letter_to_president_biden_on_the_administrations_border_policies.pdf).

<sup>13</sup> See, e.g., Sarah Diab, Niamh Kennedy & Sana Noor Haq, *UK Asylum Bill Would ‘Undermine’ International Law, Says UN Refugee Agency*, CNN (Mar. 8, 2023), <https://www.cnn.com/2023/03/08/uk/uk-immigration-asylum-law-intl-gbr/index.html>; *UNHCR: Global Displacement Hits Another Record, Capping Decade-Long Rising Trend*, UNHCR USA (June 16, 2022), <https://www.unhcr.org/en-us/news/press/2022/6/62a9d2b04/unhcr-global-displacement-hits-record-capping-decade-long-rising-trend.html>.

<sup>14</sup> *Al Otro Lado v. Mayorkas*, --- F. Supp. 3d ---, 2022 WL 3135914, at 1 (S.D. Cal. Aug. 5, 2022), *appeal docketed*, No. 22-55988 (9th Cir. Oct. 25, 2022).

<sup>15</sup> See, e.g., *Solutions For a Humane Border Policy*, NIJC (Jan. 17, 2023), <https://immigrantjustice.org/staff/blog/solutions-humane-border-policy>.

<sup>16</sup> *Executive Order on 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 of Asylum Seekers at the United States Border*, The White House (Feb. 2, 2021), <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/>.

<sup>17</sup> *The Biden Plan for Securing Our Values as a Nation of Immigrants*, JoeBiden.com, <https://joebiden.com/immigration/#> (last visited Mar. 21, 2023).

Proposed Rule blatantly contravenes these promises and attempts to instead remove individuals seeking asylum back to danger based on manner of entry and transit in circumvention of existing refugee law and treaty obligations.

**B. The Proposed Rule is a *de facto* Asylum Ban that embraces Trump administration anti-asylum policies and betrays both this administration’s promises and the U.S.’s historic commitment to offering protection to people fleeing persecution.**

The Proposed Rule is a new iteration of similar asylum bans the Trump administration attempted to advance. Federal courts repeatedly struck down those bans, which similarly barred individuals from asylum protection based on manner of entry and transit.<sup>18</sup> The Trump asylum ban making people ineligible for asylum unless they previously applied for and were denied asylum in a transit country, which was in effect for a year before it was vacated, inflicted enormous damage, including removal of asylum seekers to harm, separation of families, and prolonged detention.<sup>19</sup> The legal implications of the asylum ban are still being felt. SPLC, as co-counsel in *Al Otro Lado v. Mayorkas*, has been fighting for years to ensure that asylum seekers to whom the government applied that ban after illegally metering them and turning them away have a chance to reopen their cases.<sup>20</sup> This Proposed Rule would similarly be wielded to deny asylum and block and rapidly remove individuals without access to full asylum hearings by pushing them through expedited removal, resulting in the same horrific harms. This would likewise lead to years of litigation to attempt to mitigate or recompense the harm that will certainly result from the Proposed Rule.

Despite the Biden administration’s attempts to distinguish its Proposed Rule from the previous administration’s bans, it would similarly operate as an asylum ban for people fleeing persecution based on factors that do not relate to their fear of return. It 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 individuals seeking asylum—many of whom have suffered persecution and violence and underwent a harrowing journey to reach safety—to prove that the Proposed 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 Proposed Rule works or what they need to prove.

In addition to representing a return to the cruelty of the Trump administration’s anti-immigrant policies, the Proposed Rule represents a rejection of decades of American leadership on asylum—just when people need access to the U.S. asylum system the most.

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<sup>18</sup> *E. Bay Sanctuary Covenant v. Barr*, 519 F. Supp. 3d 663 (N.D. Cal. 2021); *Cap. Area Immigrant Rts. Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020); *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019).

<sup>19</sup> *See, e.g., Kiakombua v. McAleenan*, No. 2019-cv-01872, ECF No. 84 (D.D.C. 2020); *see also Asylum Denied, Families Divided: Trump Administration’s Illegal Third-Country Transit Ban*, Human Rights First (July 15, 2020), <https://humanrightsfirst.org/library/asylum-denied-families-divided-trump-administrations-illegal-third-country-transit-ban/> (hereinafter “Asylum Denied”).

<sup>20</sup> *Al Otro Lado v. Mayorkas*, No. 17-cv-02366-BAS-KSC, 2022 WL 3142610 (S.D. Cal. Aug. 5, 2022), *appeal docketed*, No. 22-55988 (9th Cir. Oct. 25, 2022); *see generally CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry* at 5, DHS Office of Inspector General, OIG-21-02 (Oct. 27, 2020) <https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf> (explaining that metering refers to CBP’s practice since 2016, in collaboration with Mexican government officials, of stopping asylum seekers from crossing the international boundary into U.S. ports of entry and instead requiring them to wait in Mexico before they could be inspected and processed at ports) (hereinafter, “CBP Steps”).

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 committed 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 Trump 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.<sup>21</sup> The Proposed Rule attempts to unlawfully use the alleged existence of lawful pathways as a justification to deny access to asylum at the border. However, 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.”<sup>22</sup>

The Refugee Act of 1980 incorporated these principles into U.S. law.<sup>23</sup> The Refugee Act was spearheaded by Sen. Ted Kennedy (D-MA) and was co-sponsored by then-Sen. Biden. It passed the Senate unanimously, and was signed by President Jimmy Carter in early 1980. For nearly four decades—until the government began illegally turning back asylum seekers in late 2016 and later “metering” access to the POEs under the Trump administration<sup>24</sup>—presidents of both parties ensured that the Refugee Act meant something to people fleeing persecution and seeking protection on our shores.

### **C. The Proposed Rule violates domestic and international law**

The Proposed Rule includes numerous blatant violations of U.S. and international law.

First, the Refugee Act established a right to apply for asylum for any noncitizen “who is physically present in the United States or who arrives in the United States . . . irrespective of such [noncitizen]’s status” and “whether or not [the noncitizen arrives] at a designated port of arrival.”<sup>25</sup> On its face, the Proposed Rule violates § 1158(a)(1) by making individuals who enter without inspection or at a port of entry without an appointment ineligible for asylum, subject to extremely narrow exceptions. In contrast, § 1158(a)(1) explicitly provides for the right to apply for asylum for any noncitizen who is “physically present in the United States,” regardless of their manner of entry. Courts analyzing the Trump administration’s asylum bans repeatedly held that manner of entry cannot be a basis for asylum ineligibility in light of the text of § 1158(a)(1).<sup>26</sup> It is also not

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<sup>21</sup> Brief of the Office of the United Nations High Commission for Refugees as Amicus Curiae, *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2020) (Nos. 19-16487, 19-16773), ECF No. 78, available at <https://www.refworld.org/topic,50ffbce4120,50ffbce4123,5dcc03354,0,,AMICUS,USA.html>; Brief of the Office of the United Nations High Commission for Refugees as Amicus Curiae, *O.A. v. Trump*, No. 19-5272 (D.C. Cir. Aug. 13, 2020), <https://www.refworld.org/topic,50ffbce53a,50ffbce54f,5f3f90ea4,0,,AMICUS,,html>.

<sup>22</sup> *UNHCR, IOM and UNICEF Welcome New Pathways for Regular Entry to the US, Reiterate Concern Over Restrictions on Access to Asylum*, UNHCR USA (Oct. 14, 2022), <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>.

<sup>23</sup> Pub. L. No. 96-212, 94 Stat. 102; see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (discussing the Refugee Act and its incorporation of the Protocol’s definition of “refugee” into U.S. law).

<sup>24</sup> See *Al Otro Lado v. Mayorkas*, Case No. 17-cv-02366-BAS-KSC, 2021 WL 3931890, at \*1–4 (S.D. Cal. Sept. 2, 2021).

<sup>25</sup> 8 U.S.C. § 1158(a)(1).

<sup>26</sup> See *E. Bay Sanctuary Covenant v. Barr*, 519 F. Supp. 3d 663 (N.D. Cal. 2021); *Cap. Area Immigrant Rts. Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020); *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019).

clear if noncitizens without an appointment seeking inspection and processing at a port of entry will in fact be inspected and processed, or whether CBP will block their access to the ports.<sup>27</sup> The latter would constitute an unlawful withholding of CBP’s mandatory duty to inspect all noncitizens in the process of arriving in the United States.<sup>28</sup>

Second, § 1158(a)(1) contains no limit on the number of people who may seek asylum, and the Administration lacks the power to impose a limit when Congress set none.<sup>29</sup> The plain purpose of the Proposed Rule is to cut the number of people with access to asylum, and the logic of the Proposed Rule is that a relatively high number of people seeking humanitarian protection overall justifies limiting access to asylum.<sup>30</sup> The Proposed Rule would effectively cap the number of people who may seek asylum based on the number of appointments available through the government’s internet-based scheduling application, CBP One. CBP One, which is already in use under the Title 42 border regime, is ostensibly supposed to allow migrants to sign up for a finite number of slots at set times, and those who are unable to claim a slot are out of luck. Thus, in addition to unlawfully curtailing access to the asylum process for people who enter away from ports of entry, the Proposed Rule also unlawfully curtails such access for people who enter lawfully and seek inspection at ports of entry by setting an unauthorized limit on the number of people who may seek access to the asylum process, subject to extremely limited exceptions.

Third, the Refugee Act delineates limited exceptions where an asylum seeker may be barred from asylum based on travel through another country, but these restrictions only apply where an individual was “firmly resettled” in another country (meaning the person “received an offer of permanent resident status, citizenship, or some other type of permanent resettlement” in another country<sup>31</sup>) 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.<sup>32</sup> The statute prohibits the administration from issuing restrictions on asylum that are inconsistent with these provisions.<sup>33</sup> Yet the Proposed Rule is plainly inconsistent with these provisions by effectively applying a “safe third country” eligibility bar even where the statutorily required safe third country agreement does not exist, and by effectively applying a bar based on presence in a third country without a showing of firm resettlement.

Fourth, in 1996, Congress created the expedited removal process through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>34</sup> Under this process, asylum seekers placed

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<sup>27</sup> See NPRM at 11739, n.216 (noting the agencies’ position that “the Government does not withhold mandatory statutory processing by preventing someone outside the territorial United States from immediately crossing the border for inspection and referral for a fear screening”).

<sup>28</sup> See *Al Otro Lado v. Mayorkas*, --- F. Supp. 3d ---, 2022 WL 3135914, at 1 (S.D. Cal. Aug. 5, 2022), *appeal docketed*, No. 22-55988 (9th Cir. Oct. 25, 2022).

<sup>29</sup> See *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1214 (S.D. Cal. July 29, 2019).

<sup>30</sup> See, e.g., NPRM at 11727 (explaining that “[s]hifts in the current or projected migration patterns could indicate that the rebuttable presumption is no longer required because a significant decrease in actual and expected migrants”).

<sup>31</sup> 8 C.F.R. §§ 208.15, 1208.15 (2014). As the BIA explained in *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011), circuit courts have generally adopted one of two approaches to determine whether the firm resettlement bar applies. *Id.* at 495. At least one circuit has not made an explicit determination about which approach should be used. *Id.* at 496. Hence, to expect Asylum Officers and asylum seekers to determine whether the bar applies during the CFI/RFI stage would create significant delays and incorrect determinations.

<sup>32</sup> 8 U.S.C. §§ 1158(a)(2)(A), (b)(2)(A)(vi).

<sup>33</sup> 8 U.S.C. § 1158(b)(2)(C).

<sup>34</sup> Pub. L. 104-208, 110 Stat. 3009-546; see 8 U.S.C. § 1225.

in expedited removal who establish a credible fear of persecution must be referred for full asylum adjudications.<sup>35</sup> 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.<sup>36</sup> The Proposed Rule attempts to unlawfully circumvent the credible fear screening standard established by Congress, which was intended to be a low screening threshold.<sup>37</sup> The Proposed Rule would eviscerate this intentionally low screening standard by first requiring asylum seekers to prove to an asylum officer by a preponderance of evidence that 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.<sup>38</sup> Thus, the Proposed Rule’s imposition of a higher standard of proof than the “significant possibility” standard in credible fear screenings violates the standard enacted by Congress.<sup>39</sup>

Fifth, the government is prohibited from returning noncitizens to countries where they face persecution or torture.<sup>40</sup> The Proposed Rule, which conditions access to asylum on manner of entry and transit, would result in the return of individuals to danger and unequivocally contravenes these statutory prohibitions. On its face, the Proposed Rule does not foreclose protection in the United States for individuals who do not meet one of the exemptions to the presumption of asylum ineligibility, allowing individuals subject to the Proposed Rule to obtain withholding of removal or protection under CAT.<sup>41</sup> But in reality, the implementation of the higher standard of proof required to establish eligibility for withholding of removal or protection under CAT will result in the wrongful deportation of individuals to harm.<sup>42</sup> In order to establish eligibility for asylum, an individual needs to establish “persecution or a well-founded fear of persecution.”<sup>43</sup> An asylum seeker has the burden to demonstrate that there is at least a ten percent chance of persecution—a relatively lenient burden of proof.<sup>44</sup> To establish eligibility for withholding of removal, on the other hand, an individual must prove that they are more likely than not to suffer persecution, meaning there must be a greater than 50 percent chance of persecution.<sup>45</sup>

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<sup>35</sup> 8 U.S.C. § 1225(b)(1)(B)(ii).

<sup>36</sup> *Id.* § 1225(b)(1)(B)(v).

<sup>37</sup> *See, e.g., DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1965 (2020); Immigration and Naturalization Service, Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999); 142 Cong. Rec. S11491-S11492 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch), *available at* <https://www.govinfo.gov/content/pkg/CREC-1996-09-27/html/CREC-1996-09-27-pt1-PgS11491-2.htm> (explaining that the credible fear standard “is intended to be a low screening standard for admission into the usual full asylum process”).

<sup>38</sup> NPRM at 11720.

<sup>39</sup> 8 U.S.C. § 1225(b)(1)(B)(v).

<sup>40</sup> 8 U.S.C. § 1231(b)(3) & note; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988); 23 I.L.M. 1027 (1984).

<sup>41</sup> *See* NPRM at 11725.

<sup>42</sup> *See Asylum Denied*, *supra* note 19 (discussing the impact of the Trump administration’s transit ban, which similarly applied the heightened standard to individuals requesting asylum at the southwest border and who did not first seek asylum in a country they had transited through).

<sup>43</sup> 8 U.S.C. § 1101(a)(42)(A).

<sup>44</sup> *See INS v. Cardozo-Fonseca*, 480 U.S. 421, 440 (1987); *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (“[E]ven a ten percent chance of persecution may establish a well-founded fear.”); *Kllokoqi v. Gonzales*, 439 F.3d 336, 344–45 (7th Cir. 2005).

<sup>45</sup> *See, e.g., Aden v. Wilkinson*, 989 F.3d 1073, 1085–86 (9th Cir. 2021) (“The ‘clear probability’ standard for withholding is a more stringent burden of proof than the standard for asylum, which does not require that the applicant demonstrate that harm would be more likely than not to occur.”).



Sixth, 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.<sup>46</sup> 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.<sup>47</sup> 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 stated that “[n]either the 1951 Convention nor the 1967 Protocol permits parties to condition access to asylum procedures on regular entry.”<sup>48</sup>

Seventh, the agencies claim the authority to re-implement an asylum ban and apply it to members of a certified class for purposes of a permanent injunction (PI) in *Al Otro Lado v. Mayorkas*, 2022 WL 3142610 (S.D. Cal. Aug. 5, 2022).<sup>49</sup> The PI bars the application of one of Trump’s asylum bans to class members who were subjected to the ban only because CBP prevented them from entering the United States prior to the issuance of the ban, and further requires the agencies to apply “pre-Asylum Ban practices for processing the asylum applications” of class members.<sup>50</sup> If the agencies subject *Al Otro Lado* PI class members to the Proposed Rule, they will likely be in violation of the injunction in that case.

This proposed asylum ban violates these key provisions of U.S. law and treaty commitments. Indeed, similar Trump administration asylum bans targeting individuals seeking asylum at the border based on manner of entry and transit were enjoined and vacated by federal courts for violating these provisions of U.S. law. In 2021, when the Biden administration first considered adopting an asylum ban, legal counsel for the White House warned that it could be struck down as illegal for the same reason that federal courts struck down the Trump administration bans.<sup>51</sup> Nonetheless, the agencies have decided to proceed with this patently illegal policy.

#### **D. 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, such as during the Credible Fear Interview and subsequent analysis, the Proposed Rule would eliminate critical safeguards for asylum seekers who receive negative credible fear determinations because they are barred under the Proposed Rule. It would 1) deprive people seeking asylum 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 submit Requests for Reconsideration to USCIS.<sup>52</sup> These changes would apply to all asylum seekers banned under the rule and would accelerate their wrongful removal to harm.

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<sup>46</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>47</sup> NPRM at 11707.

<sup>48</sup> Brief of the Office of the United Nations High Commission for Refugees as Amicus Curiae at 13, *O.A. v. Trump*, No. 19-5272 (D.C. Cir. Aug. 13, 2020), <https://www.refworld.org/topic,50ffbce53a,50ffbce54f,5f3f90ea4,0,,AMICUS,.html>.

<sup>49</sup> NPRM at 11739, n. 216.

<sup>50</sup> *Al Otro Lado v. McAleenan*, 423 F. Supp. 3d 848, 878 (S.D. Cal. No. 19, 2019).

<sup>51</sup> Camilo Montoya-Galvez, *U.S. Officials Clashed Over Asylum Restriction, and its Legality, Before Biden Proposed It*, CBS News (Mar. 1, 2023), <https://www.cbsnews.com/news/immigration-biden-asylum-restrictions-legality/>.

<sup>52</sup> See NPRM at 11747.

The Proposed Rule would change existing regulations to deny asylum seekers EOIR review of negative credible fear determinations if they do not affirmatively request review.<sup>53</sup> This provision would apply to asylum seekers issued negative credible fear determinations due to the Proposed Rule. EOIR review of negative credible fear determinations is a crucial safeguard guaranteed by statute;<sup>54</sup> from Fiscal Years 2018 to 2021, over a quarter of credible fear determinations were reversed through review.<sup>55</sup> In its December 11, 2020 “death to asylum” rule, the Trump administration previously imposed a similar hurdle on asylum seekers, depriving them of immigration court review of negative credible fear decisions where they did not affirmatively request review,<sup>56</sup> a change that the Biden administration reversed in the May 31, 2022 asylum processing rule. 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.”<sup>57</sup> Despite the agencies’ conclusion less than a year ago, they now seek to deprive asylum seekers subject to the Proposed Rule of the right to immigration court review where they do not affirmatively request it.

Requiring individuals 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 if they cannot seek review of a wrongful negative credible fear determination. Due to language and other barriers, asylum seekers may not understand the requirement to affirmatively request EOIR review.

SPLC has represented several individuals with negative CFI and RFI decisions in EOIR review. For example, SPLC represented an eighteen-year-old asylum seeker who was detained for several months in different DHS detention centers and separated from her family members, including her mother and older her brother. An Asylum Officer found she did not establish a credible fear of returning to her home country. SPLC counsel reached out to the Asylum Office and ICE ERO and OPLA on several occasions, requesting she have an EOIR review of the decision. SPLC represented her at the review and had the decision vacated. She was subsequently released from detention, and her immigration court case is pending. In another case, SPLC represented a client, a member of the LGBTQI+ community seeking humanitarian protection in the United States, with an EOIR review. The client had previously been removed, so she had an RFI after returning to the U.S. SPLC represented her in her EOIR review of the negative RFI, and the IJ vacated the decision. She is now in removal proceedings, and SPLC helped secure *pro bono* counsel for her immigration court case.

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<sup>53</sup> NPRM at 11744.

<sup>54</sup> 8 U.S.C. § 1225(b)(1)(3)(iii)(III).

<sup>55</sup> *Immigration Judge Decisions Overturning Asylum Officer Findings in Credible Fear Cases*, TRAC (Mar. 14, 2023), <https://trac.syr.edu/reports/712/>.

<sup>56</sup> Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (proposed Dec. 11, 2020) (to be codified at 8 C.F.R. §§ 208, 235, 1003, 1208, 1235), <https://www.federalregister.gov/documents/2020/12/11/2020-26875/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>.

<sup>57</sup> Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (proposed Mar. 29, 2022) (to be codified at 8 C.F.R. §§ 208, 212, 235, 1003, 1208, 1235, 1240), <https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.

The Proposed Rule also seeks 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 Proposed Rule. For decades, this safeguard has shielded many individuals from deportation to persecution and torture.<sup>58</sup>

As a part of last year's 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.<sup>59</sup> Advocates and attorneys have condemned these new restrictions, which have barred asylum seekers issued erroneous negative credible fear determinations from obtaining reconsideration due to draconian temporal and numerical restrictions.<sup>60</sup> UNHCR has opposed elimination of this safeguard and warned that it may increase the risk of refoulement.<sup>61</sup> 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 subject to the Proposed Rule. This provision would prevent many asylum seekers wrongly found to be banned from seeking asylum under the Proposed Rule from subsequently presenting evidence to USCIS that they should have been exempted or qualified for an exception, which would especially harm unrepresented asylum seekers rushed through the credible fear process without any meaningful opportunity to present their claim. According to data provided in the Asylum Processing Rule, between FY 2019 to FY 2021, USCIS reconsideration of erroneous negative credible fear determinations saved at least 569 asylum seekers from deportation to persecution or torture without an opportunity to apply for asylum.

The ability to have EOIR review and to submit an RFR is particularly important because of the low representation rates during CFIs and RFIs. The regulations permit an applicant to have a "consultant" at a CFI or RFI,<sup>62</sup> but the majority of the asylum seekers SIFI is in contact with do not have a consultant of any kind during their CFI or RFI. In January 2023, for example, SPLC submitted a Request for Reconsideration for a Nicaraguan asylum seeker who came to the United States in April 2021 and who had been unrepresented during his CFI and his review, where his negative CFI was affirmed. The Arlington Asylum Office ultimately vacated the decision and issued a Notice to Appear. That client was subsequently released from ICE custody, and his immigration court case is currently pending. In several of SIFI's cases, their clients did not have their CFI or RFI where SPLC has offices. Rather, SPLC began its representation once the person was transferred to an area where SPLC has offices.

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<sup>58</sup> *Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture*, Human Rights First (Sept. 2021), <https://humanrightsfirst.org/wp-content/uploads/2022/09/RequestsforReconsideration.pdf>.

<sup>59</sup> DHS Docket No. USCIS-2021-0012 - Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (March 29, 2022).

<sup>60</sup> *Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies*, Human Rights First (Aug. 2022), <https://humanrightsfirst.org/wp-content/uploads/2023/01/PretenseofProtection-21.pdf>.

<sup>61</sup> Comment Submitted by UNHCR, USCIS-2021-0012-5305 (June 1, 2022), <https://www.regulations.gov/comment/USCIS-2021-0012-5305>; Comment Submitted by UNHCR, USCIS-2021-0012-5192 (Oct. 21, 2021), <https://www.regulations.gov/comment/USCIS-2021-0012-5192>.

<sup>62</sup> 8 CFR § 208.30(d)(4).

## **E. Deterring people from seeking asylum is not a legitimate purpose or goal**

It is plain from the text of the NPRM that the purpose of the Proposed Rule is deterrence.<sup>63</sup> There is no justification or legitimate purpose behind the Proposed Rule's abandoning nearly four decades of adherence to the Refugee Act. The NPRM states that it is being issued "in anticipation of a potential surge of migration at the southwest border . . . following the eventual termination of the Centers for Disease Control and Prevention's public health Order."<sup>64</sup> The administration should welcome a return to being able to comply with its international and moral obligations after the pandemic-related disruption of pre-pandemic operations at the border, not seek to permanently cut off access to asylum.

Instead, through the Proposed Rule, the administration makes clear that they want to make the system so cumbersome and difficult to navigate, and the ways through so narrow, that potential asylum seekers are deterred from coming to the United States. In 2021, Vice President Harris drew attention for telling would-be migrants in Guatemala, "do not come."<sup>65</sup> At the time, the administration sought to clarify that the Vice President was merely concerned about the dangerous journey. But the Proposed Rule casts doubt on that explanation and doubles down on the Vice President's message to people fleeing danger that they should not seek protection in the United States. Instead of honoring our long-standing commitments to asylum seekers, the Proposed Rule undermines our administrative asylum system in an effort to make Vice President Harris' "do not come" message a legal reality.

SPLC strongly believes that everyone, regardless of manner of entry, manner of transit, nationality, or any other arbitrary restriction, should have the right to seek asylum in the United States based on past persecution or well-founded fear of future persecution or torture. SPLC has represented asylum seekers who arrived at airports, land ports of entry, and between ports of entry. Some have crossed one country, others have crossed 10. They fled their homes for various reasons, including after being beaten, raped, held captive, and/or threatened with death on account of their political opinion, race, religion, gender, and/or sexual orientation. SPLC has helped them document and explain their legal claims without regard to how they got here, because what matters for securing relief from removal is the harm they suffered in the past and the persecution and torture they are likely to face if returned, *not* their manner of entry into the United States or the existence of any asylum applications in other countries.

## **F. The Proposed Rule will cause immeasurable harm by limiting access to asylum**

### **a. The Proposed Rule will result in removals to places where people face great risk of harm**

If implemented, the Proposed Rule will deny people their statutory right to access the asylum process, and many will be sent back to danger and persecution. People who fled their homes and made the dangerous journey to the United States, and could otherwise win asylum, would be banned based on their manner of entry and/or their travel through other countries. These factors are irrelevant to their fears of return and will lead to denials of asylum for people who are otherwise

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<sup>63</sup> See, e.g., NPRM at 11727 ("The Departments believe that a 24-month period is sufficiently long that it would be an effective deterrent to irregular migrants who might otherwise make the dangerous journey to the United States.").

<sup>64</sup> NPRM at 11704.

eligible. People who are otherwise eligible for asylum but banned by the Proposed Rule would likely be removed to danger.

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 adjudication 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 subject to the Proposed 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 the United States while they are 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.<sup>65</sup> Resurrecting this policy and imposing the asylum ban in these fear screenings would be a due process fiasco that would undoubtedly result in people with meritorious asylum claims having their cases denied.

Individuals detained in CBP custody have frequently reported being provided insufficient or inedible food and water; lack of access to showers and other basic hygiene; and inability to sleep because of overcrowding, lack of adequate bedding, cold conditions, and lights that are kept on all night.<sup>66</sup> 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.<sup>67</sup>

Asylum seekers subject to expedited removal who are banned from seeking asylum by the Proposed Rule would have to meet a heightened screening standard during their credible fear interview 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

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<sup>65</sup> See *Executive Order on Creating a Comprehensive Regional Framework*, *supra* note 16.

<sup>66</sup> *Biden Administration Detains Women Seeking Safety and Separates Them From Their Families*, Human Rights First & Physicians for Human Rights (Dec. 2022), [https://humanrightsfirst.org/wp-content/uploads/2022/12/Final-Berks-Factsheet-12.1.2022\\_FINAL-1.pdf](https://humanrightsfirst.org/wp-content/uploads/2022/12/Final-Berks-Factsheet-12.1.2022_FINAL-1.pdf); *"They Treat You Like You Are Worthless": Internal DHS Reports of Abuses by US Border Officials*, Human Rights Watch (Oct. 21, 2021), <https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials>; *In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells*, Human Rights Watch (Feb. 28, 2018), <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>.

<sup>67</sup> *Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies*, Human Rights First (Aug. 2022), <https://humanrightsfirst.org/wp-content/uploads/2023/01/PretenseofProtection-21.pdf>.

fear standard established by Congress violates the statute and Congressional intent in setting a low screening threshold.

We already know the harm these heightened standards cause: we saw this harm play out under the Trump administration's transit ban. SPLC represents clients who were wrongly denied the chance to seek asylum or were wrongly denied asylum under that ban. We represent asylum seekers made vulnerable to robbery, extortion, abduction, and worse in Mexico. We have also received reports of families separated when some members were arbitrarily detained, and those in detention received negative credible fear determinations or were denied asylum in removal proceedings, while those who were not detained had access to the non-adversarial affirmative asylum process.

**b. The Proposed Rule will be especially harmful for Black migrants, Indigenous migrants, and other migrants of color**

An arbitrary ban like the one in the Proposed Rule would further exacerbate racist enforcement of immigration policy. Historically, the United States has failed to provide the same procedural protections to all migrants, notably being quicker to classify Haitians as “economic migrants” in order to delegitimize their asylum claims and treat them markedly worse than people fleeing left-wing regimes the U.S. government historically opposed (i.e. Cuba).<sup>68</sup> The Proposed Rule would provide cover for more mistreatment and quick deportation to harm of Black migrants.

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 southwest 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.<sup>69</sup> Imposing a ban on individuals seeking safety at the border will, like the Trump 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 southwest 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 southwest border. 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 ban began to affect asylum seekers' claims, according to data analyzed by Syracuse University's Transactional Records Access Clearinghouse.<sup>70</sup>

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<sup>68</sup> See, e.g., *The Politics of Violence in Latin America* (Pablo Policzer, ed. 2019).

<sup>69</sup> *Visa Regimes: A Threat to Migrants' Access to Safety and Asylum*, Women's Refugee Commission (June 8, 2022), <https://www.womensrefugeecommission.org/wp-content/uploads/2022/06/Visa-Regimes-A-Threat-to-Migrants-Access-to-Safety-and-Asylum.pdf>.

<sup>70</sup> *Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Depots Refugees*, Human Rights First (June 11, 2020), <https://humanrightsfirst.org/library/grant-rates-plummet-as-trump-administration-dismantles-u-s-asylum-system-blocks-and-deports-refugees/>.

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 and is inaccessible to many Indigenous, African, and other asylum seekers due to language barriers. This proposed asylum ban will significantly thwart the Biden administration’s stated commitment to racial justice and equity.<sup>71</sup>

The ban also builds in nationality-based discrimination in access to asylum. The Proposed Rule largely bans asylum for people who do not enter the United States via limited parole initiatives or previously scheduled appointments at ports of entry, despite the fact that the United States only affords limited access to parole initiatives for certain nationalities, as described below.

The racial and national origin discrimination inherent in the Proposed Rule are deeply at odds with the principles of racial justice and equality, as well as the Refugee Convention’s requirement that states shall apply the Convention’s provisions “without discrimination as to race, religion or country of origin.”<sup>72</sup>

**c. Withholding of removal and relief under the Convention Against Torture are inadequate substitutes for asylum**

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

As a result, many migrants who should be granted asylum under U.S. law will languish in the United States in legal limbo, indefinitely separated from spouses and/or children who remain abroad in danger. Under the Trump transit ban, migrants barred from seeking asylum due to the transit ban who were granted withholding of removal faced inadequate protection and potentially permanent separation from their spouses and children.<sup>73</sup>

Exceptions in the Proposed Rule that promote family unity where migrant families travel to the United States together will not prevent the separation of families where spouses and children

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<sup>71</sup> Exec. Order 14091, 88 Fed. Reg. 10825 (Feb. 16, 2023), *available at* <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> (hereinafter, “Racial Equity EO”).

<sup>72</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Art. 3.

<sup>73</sup> *See, e.g.*, Adolfo Flores, *A Venezuelan Dad Was Allowed Into the US, But His 18-Year-Old Daughter Was Sent Back to Mexico Alone*, BuzzFeed News (Feb. 17, 2020), <https://www.buzzfeednews.com/article/adolfoflores/venezuelan-father-separated-teen-daughter-asylum-mexico>; Adolfo Flores, *An Immigrant Woman Was Allowed to Stay in the US – But Her Three Children Have a Deportation Order*, BuzzFeed News (Dec. 21, 2019), <https://www.buzzfeednews.com/article/adolfoflores/an-immigrant-woman-was-allowed-to-stay-in-the-us-but-not>.

remain abroad. Like the Trump transit ban, this asylum ban would leave these families indefinitely separated.

The Proposed Rule targets asylum, which is the only form of humanitarian protection available in the United States that provides for full participation in society, with a path to citizenship and to family unity. The Refugee Convention requires that contracting states “facilitate the assimilation and naturalization of refugees.”<sup>74</sup> Yet the Proposed Rule will relegate to a second-class position countless individuals who should be eligible for asylum, but for the Proposed Rule’s arbitrary eligibility criteria. Those who are lucky enough to navigate the many administrative hurdles required to obtain withholding of removal or CAT relief will have no hope of ever fully participating in U.S. society for lack of status.

### **G. The exceptions are far too narrow and would have perverse consequences**

The exceptions to the Proposed Rule—which either make the presumption of asylum ineligibility inapplicable or allow for rebuttal of that presumption—are far too narrow and pose unfounded barriers to accessing the asylum process, even for people who clearly fall within an exception.

#### **a. The “lawful pathways” set out in the Proposed Rule are not meaningfully available for many people in need of protection**

The Proposed Rule sets out three “lawful pathways” for seeking protection in the United States; if a migrant has utilized one of these pathways, the presumption of asylum ineligibility does not apply. SPLC agrees with the goal of expanding access to humanitarian protection in the United States; however, the Proposed Rule will limit, not expand, access to protection, and extends access in a plainly discriminatory manner. The three “lawful pathways” set out in the Proposed Rule—use of a parole program, arriving at a port of entry with an appointment through CBP One, and applying for and being denied asylum in a transit country—are all going to be unworkable for many of the people most desperately in need of protection, effectively excluding them from accessing asylum in the United States.

##### *1. Existing parole initiatives are not an adequate substitute for access to asylum at the border*

While SPLC applauds the creation of parole initiatives such as those for Cuban, Haitian, Nicaraguan, and Venezuelan migrants (“CHNV Program”), those programs, in addition to grants of parole outside of these initiatives, are limited in reach and scope and include restrictions that bar many from accessing them. First, the CHNV Program<sup>75</sup> and other parole programs (such as Uniting for Ukraine) are limited parole initiatives for individuals from a small number of countries; there are no similar parole initiatives for people from the countries where a large portion of non-Mexican migrants hail from—such as Guatemala, Honduras, and El Salvador—thereby effectively cutting out a substantial population of immigrants from access to one of the three lawful pathways. Recent reporting has indicated the Biden administration plans to wield the asylum ban against these

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<sup>74</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Art. 34.

<sup>75</sup> See *Process for Cubans, Haitians, Nicaraguans, and Venezuelans*, U.S. Citizenship & Immigration Services, <https://www.uscis.gov/CHNV> (last updated Feb. 22, 2023)



nationalities.<sup>76</sup> Basing access to a “lawful pathway” to asylum based solely on eligibility for programs that are based on country of origin will, by default, fail to encourage a large number of asylum seekers from countries not included in these parole programs to access “lawful pathways,” as they are simply not available to them.

Second, even within the nationalities that have access to specific parole initiatives, access to those programs is functionally restricted to those who have the means and resources to meet the requirements of these programs. Eligibility for the CHNV Program, for example, is contingent on the applicant (1) having one or more sponsors who have legal status in the United States who meet federal poverty guidelines, (2) having an unexpired passport, and (3) being able to pay for their plane ticket to the United States.<sup>77</sup> That means that individuals who lack the resources to pay hundreds of dollars for plane tickets to the United States, those that fled their home country without a valid passport, or those that have no sponsors in the United States are foreclosed from accessing this “lawful pathway.” Access to asylum in the United States is not and cannot be contingent on having sponsors, the ability to pay, or the ability to obtain an unexpired passport.

SPLC represents many clients seeking asylum who entered through the southwest border fleeing countries that are not covered by any parole program. Our clients left their countries out of fear for their lives; under the Proposed Rule, they would not have the ability to seek parole because there is no parole program they could have applied for.

2. *The CBP One app is flawed, and reliance on it will not result in a “safe” or “orderly” process*

The Proposed Rule introduces an entirely new concept into the U.S. asylum system: it renders asylum at the southwest border contingent on migrants’ ability to access and properly utilize a mobile phone app prior to their arrival. All asylum seekers attempting to enter the United States between ports of entry and those arriving at ports who are subject to the Proposed Rule (and have not applied and been denied asylum in a country through which they transited) will be ineligible for asylum unless they are either (1) able to secure an advance appointment to present at the port of entry using the CBP One app or (2) they are able to *prove by a preponderance of the evidence* “that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.”<sup>78</sup>

CBP launched the CBP One app on October 28, 2020.<sup>79</sup> Despite beginning to develop the app more than two years before its launch date, the app has limited “capabilities.”<sup>80</sup> Further, CBP acknowledged in January 2023 that, due to demand, “not all individuals seeking appointments have

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<sup>76</sup> Julia Ainsley, *Rights Groups Threaten to Sue Biden Administration Over Plan to Block Migrants with What Groups Call a Trump-Era Tactic*, NBC News (Feb. 20, 2023), <https://www.nbcnews.com/politics/immigration/biden-block-migrants-trump-era-stephen-miller-tactic-rcna71282>.

<sup>77</sup> See *Process for Cubans, Haitians, Nicaraguans, and Venezuelans*, *supra* note 75. The CHNV Program also bars from eligibility individuals who entered Mexico, Panama, or the United States without authorization after January 9, 2023, and anyone who has been ordered removed from the United States in the last five years. *Id.*

<sup>78</sup> NPRM at 11751.

<sup>79</sup> *Government Documents Reveal Information about the Development of the CBP One App*, American Immigration Council (Feb. 28, 2023), <https://www.americanimmigrationcouncil.org/FOIA/government-documents-reveal-information-about-development-cbp-one-app>.

<sup>80</sup> *Id.*

yet been able to schedule them.”<sup>81</sup> CBP made this announcement the same month CBP One became the only (with limited exceptions) mechanism by which someone could seek an exemption to Title 42. Although Secretary of Homeland Security Alejandro Mayorkas described CBP One as “innovative,” the reality is that requiring access to technology to secure asylum access fails to account for differences in access to technology, language access, and the economic disparities between groups trying to use the app while fleeing harm.<sup>82</sup> The result will be an asylum system that leaves behind those with fewer resources, often those in the greatest need.

First, SPLC has major concerns for asylum seekers accessing and successfully scheduling an appointment using CBP One due to language access issues. SPLC regularly collaborates with other organizations and advocates to bring attention to language access issues and to advocate for greater language access, including for asylum seekers,<sup>83</sup> as speakers of rare and indigenous languages face numerous obstacles coming to the U.S.<sup>84</sup> The Proposed Rule will exacerbate existing language access issues. CBP One was initially only available in English and Spanish.<sup>85</sup> The app was later made available in Haitian Creole.<sup>86</sup> The CBP One fact sheet is only currently available in five languages.<sup>87</sup> All error messages are in English, barring many asylum seekers from using the app. The number of languages available in the CBP One app pales in comparison to the number of languages spoken by individuals seeking asylum. As of the end of January 2021, for example, TRAC reported that at least forty different languages were spoken by respondents in removal proceedings under the Remain in Mexico policy.<sup>88</sup> While EOIR lists the twenty-five most common languages in court, it does not provide the number of speakers of each language,<sup>89</sup> making it difficult to accurately determine whether language access needs are being met. At a minimum, the fact that CBP One is available in so few languages is alarming and certainly does not comport with the Biden administration’s stated commitment to improving language access.<sup>90</sup>

Second, the Proposed Rule requires asylum seekers at the southwest border to schedule appointments through the CBP One app and would generally deny asylum to those 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

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<sup>81</sup> *CBP Releases January 2023 Monthly Operational Update*, CBP (Feb. 10, 2023),

<https://www.cbp.gov/newsroom/national-media-release/cbp-releases-january-2023-monthly-operational-update>.

<sup>82</sup> *DHS Scheduling System for Safe, Orderly and Humane Border Processing Goes Live on CBP One App*, DHS News Release (Jan. 12, 2023), <https://www.dhs.gov/news/2023/01/12/dhs-scheduling-system-safe-orderly-and-humane-border-processing-goes-live-cbp-onetm>.

<sup>83</sup> See, e.g., *Guides for Detainees Without Access to Language and Legal Support*, Respond Crisis Translation (Apr. 13, 2021), <https://respondcrisistranslation.org/en/news/splc-pro-se-project>.

<sup>84</sup> See Matthew Boles, *Language Access in Immigration Court: Guatemalan Indigenous Languages*, 3 *New Florida Journal of Anthropology* 1 (2022).

<sup>85</sup> Lauren Villagran, *New Legal Pathways for Asylum Seekers: CBP One Launches Digital Application Feature*, *El Paso Times* (Jan. 12, 2023), <https://www.elpasotimes.com/story/news/2023/01/12/cbp-one-app-website-desktop-login-migrants-title-42-immigration/69801582007>.

<sup>86</sup> 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>.

<sup>87</sup> *CBP One™ Mobile Application*, CBP, <https://www.cbp.gov/about/mobile-apps-directory/cbpone> (last modified Mar. 7, 2023).

<sup>88</sup> *40 Languages Spoken Among Asylum Seekers with Pending MPP Cases*, TRAC (Apr. 26, 2021), <https://trac.syr.edu/immigration/reports/644>.

<sup>89</sup> See Blake Gentry, *O’odham Niok? In Indigenous Languages, U.S. “Jurisprudence” Means Nothing*, 37 *Chicanx-Latinx L. Rev.* 29, 29-63 (2020).

<sup>90</sup> See *Racial Equity EO*, *supra* note 71.

who do not have the resources to obtain a smartphone or ability to navigate the app.<sup>91</sup> It also disparately harms Black asylum seekers due to racial bias in its facial recognition technology,<sup>92</sup> which has prevented many from obtaining an appointment.<sup>93</sup> Asylum seekers who can access and navigate the app are still often unable to schedule appointments due to extremely limited slots and are forced to remain in danger indefinitely. Requiring individuals and families seeking asylum to use CBP One at the southwest border also raises concerns that the system will be used for illegal metering (based not on wait time but on luck, technology skills, or resources to secure an appointment—turning asylum access in effect into a lottery).<sup>94</sup> Moreover, lawmakers and other groups have raised privacy concerns.<sup>95</sup> These concerns are not merely theoretical: last year, ICE erroneously published “sensitive personal information”<sup>96</sup> of more than 6,200 people who claimed fear returning to their home country.<sup>97</sup> were included as part of the disclosure. SPLC represents several clients impacted by the ICE data breach and has witnessed first-hand the legal ramifications of asylum seekers’ personal information being publicly available.

Third, 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+ individuals, 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, stable income, or health care 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 which they initially fled.<sup>98</sup> Many LGBTQI+ asylum seekers, families, and other vulnerable populations have already been unable to secure appointments through CBP One, leaving them in extreme danger. However, the Proposed Rule’s exception that excuses failure to use CBP One to schedule an appointment at a port of entry is very narrowly drawn, requiring a showing by preponderance of the evidence, that using the app to schedule an appointment was “*not possible*.”<sup>99</sup> Many asylum seekers will not possess any evidence demonstrating that use of CBP One was not possible, and the Proposed Rule is clear that this exception is intended to be narrow. Thus, it is not clear what is necessary to show impossibility. Is an error message on one day enough? Ten days of error messages in a row? If a person could have theoretically hired an interpreter to assist with the app, but did not do so, does their claim of

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<sup>91</sup> Stephanie Leutert & Caitlyn Yates, *Asylum Processing at the U.S.-Mexico Border: February 2023*, Robert Strauss Center for International Security and Law (Feb. 2023), [https://www.strausscenter.org/wp-content/uploads/Feb\\_2023\\_Asylum\\_Processing.pdf](https://www.strausscenter.org/wp-content/uploads/Feb_2023_Asylum_Processing.pdf).

<sup>92</sup> 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>.

<sup>93</sup> Lindsay Toczyłowski, Twitter (Mar. 1, 2023, 5:48 PM), [https://twitter.com/L\\_Toczyłowski/status/1631063774210785280](https://twitter.com/L_Toczyłowski/status/1631063774210785280).

<sup>94</sup> *Al Otro Lado v. Mayorkas*, Case No. 17-cv-02366-BAS-KSC, 2021 WL 3931890 (S.D. Cal. Sept. 2, 2021).

<sup>95</sup> *CBP App Raises Privacy and Accessibility Concerns for Asylum Seekers*, Boundless (Mar. 10, 2023), <https://www.boundless.com/blog/cbp-one-app-privacy-concerns/>.

<sup>96</sup> *ICE Inadvertently Discloses Personal Data Online of 6,252 Immigrants*, NPR (Dec. 1, 2022), <https://www.npr.org/2022/12/01/1140040642/ice-inadvertently-discloses-personal-data-of-6-252-immigrants-online>.

<sup>97</sup> Statement on Improper Disclosure of Noncitizen Personally Identifiable Information, ICE News Release (Nov. 30, 2022), <https://www.ice.gov/news/releases/statement-improper-disclosure-noncitizen-personally-identifiable-information>.

<sup>98</sup> *Surviving Deterrence: How Us Asylum Deterrence Policies Normalize Gender-Based Violence*, Oxfam & Tahirih Justice Center (Oct. 11, 2022), [https://www.tahirih.org/wp-content/uploads/2022/10/Oxfam\\_Tahirih\\_Surviving-Deterrence\\_English\\_2022.pdf](https://www.tahirih.org/wp-content/uploads/2022/10/Oxfam_Tahirih_Surviving-Deterrence_English_2022.pdf) (hereinafter “Surviving Deterrence”).

<sup>99</sup> NPRM at 11707.

impossibility fail? Requiring a migrant to litigate this issue in the first place, in addition to being unlawful, adds a wholly meaningless and unnecessary layer of bureaucracy to an already bureaucratic process.

Finally, 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.<sup>100</sup> Families unable to secure CBP One 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 border regions.<sup>101</sup> Like the Title 42 policy and other policies that block, ban, and deny asylum to individuals fleeing harm or persecution, this Proposed Rule would fuel family separations at the border.

Asylum seekers should not be forced to use the CBP One app to schedule an appointment and present themselves at a POE to request asylum. The Proposed Rule incorrectly presumes literacy, language access, technology literacy, a working phone with access to CBP One, and WiFi capabilities. The Proposed Rule also assumes CBP One works without issues, which is also incorrect. Therefore, asylum seekers should not be obligated to use the app in order to be eligible for asylum.

3. *Seeking and being denied asylum in a transit country will be impossible standard to meet in many cases*

The Proposed Rule is a blatant attempt to circumvent the United States' requirements regarding safe third countries for individuals seeking asylum. Given the reality of current migration flows through Central America to the United States, the Proposed Rule would require individuals seeking asylum to apply for asylum in transit countries that have no formal safe third country agreement with the United States. The Proposed Rule relies on outright misrepresentations regarding the availability of protection in other Western Hemisphere countries.

Mexico—a transit country for any non-Mexican asylum seekers at the southwest border—is not a safe place for non-Mexican individuals fleeing persecution and harm. Title 42 has stranded migrants in Mexico while the U.S. border has been effectively closed to asylum seekers since March 2020. In the past two years, there have been over 13,000 attacks reported against migrants stranded in Mexico.<sup>102</sup> Mexico has systemic gang and gender-based violence issues which make it an unsafe location for people seeking asylum, who are “regularly targeted by cartels and other transnational criminal organizations who take advantage of their vulnerability.”<sup>103</sup> Black asylum

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<sup>100</sup> See Leutert & Yates, *supra* note 91.

<sup>101</sup> See, e.g., Valerie Gonzalez, *Families Consider Separation to Seek Asylum as They Face Limited Appointments Through CBP App*, MyRGV.com (Feb. 21, 2023), <https://myrgv.com/local-news/2023/02/21/families-consider-separation-to-seek-asylum-as-they-face-limited-appointments-through-cbp-app/>.

<sup>102</sup> *Title 42: “Human Rights Stain, Public Health Farce”*, Human Rights First (Dec. 16, 2022), <https://humanrightsfirst.org/library/title-42-human-rights-stain-public-health-farce/>.

<sup>103</sup> Arturo Castellanos-Canales, *Mexico's Asylum System: Good in Theory, Insufficient in Practice*, Nat'l Immigration Forum (Mar. 15, 2023), <https://immigrationforum.org/article/mexicos-asylum-system-good-in-theory-insufficient-in-practice/>.

seekers and migrants face pervasive anti-Black violence, harassment, and discrimination, including widespread abuse by Mexican authorities.<sup>104</sup>

Moreover, migrants cannot avail themselves of a fair asylum process in Mexico, and many are at risk of deportation to persecution in their home countries.<sup>105</sup> The Mexican agency responsible for processing asylum applications, COMAR, has been severely underfunded for many years, even in the face of exponentially increasing numbers of asylum applications.<sup>106</sup> Mexican law also includes a number of barriers to seeking asylum that will make it difficult if not impossible to apply in the first place or to wait for a denial, including the requirements that a person must apply within 30 days of entry and must remain in the same state where they applied until their application is resolved, even if they face violence or are unable to meet their basic needs in that location.<sup>107</sup>

In practice, it is Mexico's relatively well-funded immigration enforcement agency—INM—and not COMAR, that interacts with most migrants in need of protection in Mexico. INM, which has been accused of colluding with criminal networks, emphasizes apprehension, detention, and deportation, not access to asylum; asylum seekers who are encountered by INM are often not even given the opportunity to apply for asylum.<sup>108</sup> One SPLC client traveling through Mexico to seek asylum in the United States was apprehended by INM, detained in an INM facility controlled by a cartel, affirmatively dissuaded from pursuing his claim for protection in Mexico, and ultimately deported from Mexico, even though he had notified INM of his fear of return. Simply put, it is unrealistic to expect migrants to be able to avail themselves and obtain meaningful protection from the Mexican asylum system.

El Salvador, Honduras, and Guatemala—other likely transit countries and also countries where a large portion of asylum seekers originate due to systemic violence and corruption—similarly do not have functional asylum systems that can protect large numbers of asylum seekers, and many transiting through these countries face extreme dangers, including gender-based violence, anti-LGBTQI+ attacks, race-based violence, and other persecution.<sup>109</sup> While the agencies point to

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<sup>104</sup> S. Priya Morley et al., “*There is a Target on Us*” – *The Impact of Anti-Black Racism on African Migrants at Mexico’s Southern Border*, Black Alliance for Just Immigration (2021), <https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf>.

<sup>105</sup> *Title 42: “Human Rights Stain, Public Health Farce”*, Human Rights First (Dec. 16, 2022), <https://humanrightsfirst.org/library/title-42-human-rights-stain-public-health-farce/>.

<sup>106</sup> Ana Martín Gil & Kelsey Norman, *Biden’s New Border Policies Will Put Further Strain on Mexico’s Struggling Asylum System*, Baker Inst. for Pub. Pol’y (Mar. 16, 2023), <https://www.bakerinstitute.org/research/bidens-new-border-policies-will-put-further-strain-mexicos-struggling-asylum-system>.

<sup>107</sup> *Key Issues on Access to Asylum in Mexico, Protections for Migrant Children, and U.S. Cooperation*, Washington Office on Latin America (Mar. 23, 2021), <https://www.wola.org/analysis/key-points-migration-march-2021>.

<sup>108</sup> *Id.*

<sup>109</sup> *2022 Country Reports on Human Rights Practices: El Salvador*, U.S. Dep’t of State, <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/el-salvador/> (explaining that El Salvador’s asylum system “has major regulatory and operational gaps,” and describing widespread violence and corruption); *2022 Country Reports on Human Rights Practices: Guatemala*, U.S. Dep’t of State, <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/guatemala> (explaining serious limitations in Guatemala’s asylum process, and describing widespread societal violence and corruption including retribution towards human rights defenders); *2022 Country Reports on Human Rights Practices: Honduras*, U.S. Dep’t of State, <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/honduras/> (explaining that Honduras has a “nascent” system to provide protection to asylum seekers that relies on funding from outside of Honduras and that people seeking asylum are particularly vulnerable to abuse and sexual exploitation); *Deportation with a Layover: Failure of Protection under the US-Guatemala Asylum Cooperative Agreement*, Human Rights

Guatemala as a potential transit country where applying for asylum will be a viable option, they acknowledge that Guatemala received a mere 1,054 asylum applications in 2021, which was a double the number received in 2019 and 2020.<sup>110</sup> It is simply not reasonable to point to Guatemala’s fledgling asylum system as an adequate alternative for a meaningful number of people who would otherwise seek asylum in the United States. The agencies do not even attempt to point to El Salvador and Honduras as potentially viable receiving countries for people seeking protection.<sup>111</sup>

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-documented that the countries survivors of GBV pass through while trying to reach the southwest U.S. border provide very little—if any—true protection, even when they are granted asylum there.<sup>112</sup> 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.

The asylum systems in Mexico, Central America, and other parts of the Western hemisphere are inadequate; migrants rightly understand that it will often be pointless to seek protection there. The Proposed Rule’s reliance on applying for—and being denied— asylum in a transit country as a “lawful pathway” simply adds a bureaucratic hurdle that will prolong access to protection and, in many cases, cut off that access altogether.

#### **b. It will be too difficult to rebut the presumption of asylum ineligibility**

In order to rebut the presumption of asylum eligibility established by the Proposed Rule, a person must prove by a preponderance of evidence that there are “exceptionally compelling circumstances.”<sup>113</sup> The Proposed Rule recognizes three situations where—if established—there is a *per se* rebuttal of the presumption: (1) an “acute medical emergency,” (2) “imminent and extreme threat to life or safety, such as an *imminent threat* of rape, kidnapping, torture, or murder,” or (3) that the person satisfies the statutory definition of a “victim of a *severe* form of trafficking in persons.”<sup>114</sup> The Proposed Rule leaves open the possibility that situations other than the three specified could count as “exceptionally compelling circumstances,” but the wording of the Proposed Rule, using narrowing terms such as “exceptionally compelling,” “imminent and extreme,” and “severe,” suggests that merely demonstrating a risk of harm, or demonstrating harm itself, may not be enough.<sup>115</sup>

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Watch (May 19, 2020), <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative>.

<sup>110</sup> NPRM at 11721–22.

<sup>111</sup> NPRM at 11720–23 (describing countries other than the United States that, according to the agencies, may provide opportunities for people to seek protection).

<sup>112</sup> See *Surviving Deterrence*, *supra* note 98.

<sup>113</sup> NPRM at 11723.

<sup>114</sup> NPRM at 11707 (emphases added).

<sup>115</sup> See also NPRM at 11723 (explaining that the three *per se* examples of “exceptionally compelling circumstances” are intended to exemplify situations where a person could not comply with the Proposed Rule “without putting their life or well-being at *extreme risk*,” and that “generalized threats of violence” do not constitute “exceptionally

In addition, it will be very difficult for people to make the required showing during a credible fear interview. Documents demonstrating that they are a trafficking victim, faced an acute medical emergency, or faced an imminent threat to life or safety, simply may not exist. Not every incident en route to the United States will happen with documentation. People escaping violence, abduction, or death threats may not have something in writing explaining what happened. And if they did have written proof at one time, they may not be carrying it with them, given that it is well-known that CBP officers confiscate property, including documents and phones, when processing people seeking asylum. So a reasonable person might leave a copy in a safe place, or stored in a phone or email that they cannot access from the border or while in detention. Finally, for those fortunate enough to have a document, perhaps a police report or medical record, they may need to find someone to translate their proof into English. These are just some of the many reasons that people need time to document their asylum claims.

Moreover, most people who will be subjected to the Proposed Rule at the border will not have access to counsel. They may not speak English or understand the requirements of the Proposed Rule. It is likely that they will be scared and overwhelmed at the time of the interview. These individuals will then have to proceed with their screening interviews without the benefit of a legal representative who could explain that this is one opportunity to demonstrate the limited exceptionally compelling circumstances to be allowed to seek asylum.

Finally, the design of the expedited removal process is inherently flawed as a method for collecting accurate information, particularly in light of the trauma experienced by people seeking asylum. Someone who has been the victim of extreme trafficking or is in imminent and extreme danger is not in the best circumstances to advocate for themselves and meet a high standard of proof. Their arrival to a safe place should be a moment to try to meet their immediate needs and help them feel safe. SPLC staff work with individuals experiencing trauma and re familiar with having to meet with clients multiple times in order to build rapport and confidence before learning key details about a client's case, such as when a client was the victim of a violent crime. However, the rapid processing that occurs during expedited removal is not trauma-informed. Thus, applying the Proposed Rule in credible fear interviews will lead to the rebuttable presumption being applied to people who have genuinely experienced "exceptionally compelling circumstances."<sup>116</sup>

These issues will result in a disparate impact on the most vulnerable asylum seekers, including rare language speakers, anyone with severe trauma, and people who are unable to access legal representation or guidance.

Beyond that, the Proposed Rule will almost certainly lead to family separation. The Proposed Rule allows for the presumption of asylum eligibility to be rebutted when one family member is eligible for withholding of removal but another accompanying family member is not.<sup>117</sup> This provision does not account for the many asylum seekers who travel without a spouse or child and, if deemed ineligible for asylum under the Proposed Rule, will have no way to reunite with their families.

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compelling circumstances." The Proposed Rule does not define "generalized threats of violence," nor does it acknowledge that high levels of "generalized" societal violence may in fact make it unreasonable to expect a person to following the strict requirements of the Proposed Rule because doing so could put their life or well-being at risk.)

<sup>116</sup> NPRM at 11723.

<sup>117</sup> NPRM at 11723–24.

This purported “family unity” provision demonstrates just how untethered the Proposed Rule is from considerations relevant to a person’s, or a family’s, actual claims of fear. Under the Proposed Rule, if all accompanying family members’ claims of fear are extremely strong—so strong as to justify a grant of withholding of removal in each case—then the family will all receive withholding of removal. However, if some family members’ claims are weaker, such that not all are eligible for withholding of removal, then the whole family would be eligible for the much more favorable status of asylum.<sup>118</sup> SPLC believes all people—traveling alone and in family groups—should have equal access to asylum, including access to asylum for all if one family member is eligible, free from arbitrary restrictions on asylum eligibility unrelated to their claims of fear.

The Proposed Rule is also inapplicable to unaccompanied minors. Denying access to adults and some families but not to unaccompanied minors (as required under TVPRA) creates a perverse incentive for parents to try to protect their children by sending them across the border alone. A family would never know in advance if they will be eligible for asylum under the “family unity” provision, so a parent who wants their child to have the basic rights that are lacking with a grant of withholding of removal might easily make the decision to protect their child by sending them to the United States unaccompanied. Unfortunately, SPLC knows these children are not actually safe once they come into the United States. They are detained at unlicensed and/or abusive facilities.<sup>119</sup> Once released, DHS has been unable to keep track and protect them.<sup>120</sup> Many are exploited and subjected to child labor.<sup>121</sup> The agencies should be creating and supporting systems that provide meaningful ways for families seeking protection to stay together as part of the asylum system, not drawing arbitrary lines that push families apart.

Nobody should be cut off from access to the asylum process, and the Proposed Rule not only cuts off access for adults, but will also lead to family separation and endangerment of children.

#### **H. The factual underpinnings for the Proposed Rule are flawed**

The Proposed Rule relies on faulty assumptions about migrants and migration.

First, migration flows have changed over the past decades, with a greater proportion of migrants traveling in family groups and seeking humanitarian protection. This rise in asylum seekers is a result of increasing instability, the rise of authoritarian governments, and the collapse of functional states throughout the world, with a corresponding rise in the incidences of risk of harm and persecution. These are circumstances that the framework for humanitarian protection is meant to address. But the Proposed Rule identifies the increased numbers as the underlying problem that needs to be curtailed,<sup>122</sup> not meaningfully acknowledging that the purpose of U.S. asylum law is to provide humanitarian protection to people who need it. A rise in asylum seekers may pose logistical or political challenges for the U.S. government, but it is a grave mistake to respond to the increasing

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<sup>118</sup> NPRM at 11724.

<sup>119</sup> See Dara Lind, ‘No Good Choices’: HHS Is Cutting Safety Corners to Move Migrant Kids Out of Overcrowded Facilities, ProPublica (Apr. 1, 2021), <https://www.propublica.org/article/no-good-choices-hhs-is-cutting-safety-corners-to-move-migrant-kids-out-of-overcrowded-facilities>.

<sup>120</sup> See Ron Nixon, *U.S. Loses Track of Another 1,500 Migrant Children, Investigators Find*, N.Y. Times (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/us/politics/us-migrant-children-whereabouts-.html>.

<sup>121</sup> See Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across U.S.*, N.Y. Times (Feb. 28, 2023), <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html>.

<sup>122</sup> See, e.g., NPRM at 11704–06.



need with efforts, such as the Proposed Rule, to intentionally *weaken* U.S. asylum protections when people most need them.

Second, while there is some evidence of a long-term trend of increasing numbers of asylum seekers, the Proposed Rule mistakenly assumes that encounters documented during the Title 42 period are the equivalent of individual asylum seekers.<sup>123</sup> As DHS has itself documented, Title 42 expulsions have led people to try to cross the border multiple times in their efforts to seek protection. Thus, the “encounters” number is artificially inflated by U.S. policy.<sup>124</sup>

Third, the Proposed Rule gives lip service to a desire to “reduc[e] the reliance by migrants on dangerous human smuggling networks” and to “discourage irregular migration.”<sup>125</sup> But smuggling networks proliferate and profit when an item is artificially scarce, and the Proposed Rule is one in a series of U.S. policies that have progressively weakened access to asylum, incentivizing rather than dissuading migrant smuggling. Access to the U.S. asylum system has been made artificially scarce since late 2016,<sup>126</sup> and was essentially foreclosed beginning in 2020 with the adoption of Title 42. It is not surprising that desperate people seeking protection are resorting to smugglers in order to gain access to something the U.S. government has been illegally restricting for over six years.

Fourth, aggregate statistics about asylum grant rates do not justify attempting to cut off access to asylum for people who may very well meet the substantive standard for asylum eligibility and have a statutory right to apply.<sup>127</sup> The number or percentage of people who are granted asylum is not representative of whether they actually deserved protection. The asylum system is notoriously hard to navigate, especially if a person is unrepresented, detained, illiterate, or a minority-language speaker.<sup>128</sup> There are many reasons why a person may not be granted asylum that do not relate to whether they qualify under the substantive eligibility standards.<sup>129</sup>

Moreover, U.S. law requires that removal decisions made in immigration court must be individualized. Under 8 U.S.C. § 1229(c)(1)(A), in immigration court proceedings, “[t]he determination of the immigration judge shall be based only on the evidence produced at the hearing.” The Proposed Rule is an attempt to short-circuit that legal process before it starts by

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<sup>123</sup> NPRM at 11708.

<sup>124</sup> *Most Border Patrol Apprehensions are for Repeat Crosses, But Agency Data Doesn't Yet Provide the Full Picture*, TRAC (Sept. 9, 2022), <https://trac.syr.edu/reports/694/>; *A Guide to Title 42 Expulsions at the Border*, American Immigration Council (May 25, 2022), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>.

<sup>125</sup> NPRM at 11704, 11706–07.

<sup>126</sup> *See Al Otro Lado v. Mayorkas*, No. 17-cv-02366-BAS-KSC, 2022 WL 3142610 (S.D. Cal. Aug. 5, 2022), *appeal docketed*, No. 22-55988 (9th Cir. Oct. 25, 2022); *CBP Steps*, *supra* note 2020.

<sup>127</sup> *See* NPRM at 11716.

<sup>128</sup> *Asylum in the United States*, American Immigration Council (Aug. 2022), [https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum\\_in\\_the\\_united\\_states\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states_0.pdf) (noting that detained individuals in removal proceedings are nearly five times less likely to secure legal counsel than those who are not detained, and that having counsel increases the likelihood of applying for and being granted humanitarian protection).

<sup>129</sup> *See, e.g.*, John Washington, *These Jurisdictions Have Become 'Asylum Free Zones'*, *The Nation* (Jan. 18, 2017), <https://www.thenation.com/article/archive/these-jurisdictions-have-become-asylum-free-zones> (noting the existence of a number of immigration court jurisdictions where the asylum denial rate is close to 100% and where immigration judges “systematically discourage[e] potential asylum applicants from applying in the first place, and overwhelmingly deny[] their claims when they do,” regardless of the nature of those claims).

effectively denying people asylum before they have a chance to present their claims, justified by aggregate data about who ultimately has won asylum in the past rather than by the evidence produced in any individual case.

Fifth, the Proposed Rule relies on the “resources and time” required to operate the credible fear screening process designed by Congress.<sup>130</sup> But Congress designed the credible fear process to set a low bar—overcoming that bar merely leads to a right to submit an asylum application and have it decided on the merits, with all the attendant procedural rights available in immigration court. If only those individuals who ultimately win asylum were found to have a credible fear of return—a goal the agencies appear to be striving for through the Proposed Rule—the agencies would not be applying the credible fear standard as Congress intended.<sup>131</sup>

### **I. SPLC’s Client Stories**

Although SPLC has provided several client stories above, we now provide additional client stories in this section to illustrate how the Proposed Rule would harm asylum seekers and violate the United States’ international and domestic laws and obligations.

First, as discussed above, the differences between the protections under asylum, withholding of removal, and protection under the Convention Against Torture differ greatly. SPLC has assisted individuals in obtaining these varied forms of protection and observed the vast differences in their level of protection. The individuals SPLC has represented who have been granted a final order of asylum in immigration court have been allowed to work in the U.S. incidental to that status (and apply for an Employment Authorization Document) and their families have been unified as their asylum grants include derivatives. Additionally, after one year, they have been eligible to file an I-485 with USCIS to apply for Adjustment of Status to become a Lawful Permanent Resident, and ultimately naturalize. SPLC has helped several clients with one or more of these processes and applications. In contrast, the scope of relief for SPLC’s clients who are granted withholding of removal is much more limited. For example, SPLC represented a client in withholding-only proceedings who was previously removed from the U.S. but passed an RFI. After an IJ granted withholding of removal in December 2022, the client was released from ICE custody. However, this client does not have a pathway to becoming a legal permanent resident or ultimately a U.S. citizen; his application does not include derivatives; and the U.S. could remove the client to a different country at any point.

Given the different standards for asylum, withholding of removal, and protection under CAT, SPLC has grave concerns that asylum seekers who otherwise could have been granted asylum will be denied protection and may be removed from the United States as a result of the Proposed Rule.

Second, SPLC has represented clients who faced dangerous situations traveling to and remaining in Mexico before being able to seek asylum in the United States. SPLC clients have been abducted, held captive, and raped. For example, one of SPLC’s clients was kidnapped in Mexico and held

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<sup>130</sup> NPRM at 11716 (“The fact that large numbers of migrants pass the credible fear screening, only to be denied relief or protection on the merits after a lengthy adjudicatory process, has high costs to the system in terms of resources and time.”).

<sup>131</sup> See 8 U.S.C. § 1225(b)(1)(B)(v) (defining “credible fear of persecution” as “a significant possibility, taking into account the credibility of the statements made by the [noncitizen] in support of the [noncitizen]’s claim and such other facts as are known to the officer, that the [noncitizen] could establish eligibility for asylum”).

captive in a home for several days. During that time, they were physically and psychologically harmed. That client is now in immigration detention in the U.S. while they pursue their asylum claim. This client—and many other individuals SPLC represents who have suffered similar harms in Mexico—now have to litigate their claims for protection while experiencing trauma related to these horrific experiences. Under the Proposed Rule, individuals seeking asylum would have to rebut the presumption and litigate their claims for protection while experiencing the impact of trauma.

Third, the Proposed Rule states that it is temporally limited two years.<sup>132</sup> However, the consequences of the Proposed Rule will apply well after the two years and could last a lifetime. For example, under an expedited order of removal, a person is barred from returning to the U.S. for five years.<sup>133</sup> Even after the five years, however, the person may not be eligible for asylum if they return to the United States.

SPLC currently represents a client who is in withholding-only proceedings after he was previously subject to expedited removal and deported from the United States. Even though he returned to the U.S. more than sixteen years after being removed, CBP has sought to reinstate his prior removal order, which renders the client statutorily ineligible for asylum and ineligible for a bond from EOIR while his case is pending. Individuals subject to the Proposed Rule and denied protection—even if they would have otherwise been eligible for asylum—will experience similar and other harms many years past the sunset of the Proposed Rule.

As these examples show, the Proposed Rule would create irreparable harm to thousands of asylum seekers, which would result in family separation, incorrect denials, and return individuals to harm. SPLC opposes the Proposed Rule.

#### **J. The 30-day comment period provides insufficient time to comment on the Proposed Rule**

SPLC strongly opposes the limited thirty-day window for public comment on this Proposed Rule, which effectively denies the public the right to meaningfully comment 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 the SPLC, wrote to the agencies urging them to provide at least 60 days to comment on the complex 153-page Proposed Rule that would have enormous implications for asylum access at the border and in USCIS and immigration court asylum proceedings.<sup>134</sup>

Although the Administrative Procedure Act does not mandate a comment period of any particular length, it does require that agencies provide a “reasonable and meaningful opportunity to

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<sup>132</sup> NPRM at 11726.

<sup>133</sup> INA § 212(a)(9)(A)(i).

<sup>134</sup> Ltr. From 172 Civil Society Organizations to Att’y Gen. M. Garland, et al. (Mar. 1, 2023), <https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2023-03/Biden%20Asylum%20Ban%20-%20Extension%20letter%20to%2030-days%20comment%20period%20FINAL.pdf>.

participate in the rulemaking process.”<sup>135</sup> “In most cases,” this reasonable and meaningful opportunity will be “not less than 60 days.”<sup>136</sup>

Executive Orders 12866 and 13563 require federal agencies to “afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of *not less than 60 days*.” This standard 60-day timeframe is especially crucial here, given the Proposed Rule’s attempt to cut off access to asylum for refugees who have been prevented from accessing it for nearly three years under the Title 42 policy and for three additional years before that due to the government’s own illegal metering and turnbacks of asylum seekers.

The agencies have provided no compelling reason to truncate the public comment period in this way. The justification provided in the Proposed Rule largely relies on the administration’s anticipation of the end of the Title 42 policy on May 11, when the COVID-19 public health emergency will expire. The agencies’ responses to the March 1, 2023 letter seeking an extension of the comment period *solely* rely on that rationale. This justification makes little sense, however, given that the Biden administration itself formally sought to end the Title 42 policy nearly one full year ago, in April 2022 and the Department of Homeland Security announced publicly its efforts to prepare for the policy end that same month.<sup>137</sup>

Providing a 30-day comment period for the proposed asylum ban is reminiscent of Trump administration practices, when agencies routinely provided 30-day comment periods on sweeping asylum rules, leaving the public little time to meaningfully assess and respond to proposed rules.

This unnecessarily shortened comment period is particularly challenging for an organization like the SPLC, which is involved in significant on-going litigation, provides direct services to individuals in detention centers, and monitors the legislative and administrative activities of the federal government and five Southern states. Specifically, SPLC staff are in the midst of finalizing important motions in cases suing the federal government for damages resulting from its family separation policy, litigating habeas petitions to free clients from immigration detention in the Deep South, and responding to the varied and urgent requests for assistance we regularly receive from detained individuals and community members. In addition, all five Southern states’ legislatures are currently in session, which diverts significant staff time as we monitor and analyze proposed legislation. Had the government allowed for the standard 60-day comment period in response to the Proposed Rule, SPLC staff would have had more time to speak with current clients and people who are likely to be affected by the Proposed Rule should it go into effect.

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<sup>135</sup> *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977).

<sup>136</sup> Exec. Order No. 12866, § 6(a), 58 Fed. Reg. 51735 (Oct. 4, 1993); *see also* Regulatory Timeline, Regulations.gov, [https://www.regulations.gov/docs/FactSheet\\_Regulatory\\_Timeline.pdf](https://www.regulations.gov/docs/FactSheet_Regulatory_Timeline.pdf) (“Generally, agencies will allow 60 days for public comment.”).

<sup>137</sup> *Statement of U.S. Customs and Border Protection Commissioner Chris Magnus Concerning Title 42*, U.S. Customs & Border Protection (Apr. 4, 2022), <https://www.cbp.gov/newsroom/speeches-and-statements/statement-us-customs-and-border-protection-commissioner-chris>; *CDC Public Health Determination and Termination of Title 42 Order*, Centers for Disease Control and Prevention (Apr. 1, 2022), <https://www.cdc.gov/media/releases/2022/s0401-title-42.html>; <https://www.cdc.gov/media/releases/2022/s0401-title-42.html>; *CDC Public Health Determination and Termination of Title 42 Order*, Centers for Disease Control and Prevention (Apr. 1, 2022), <https://www.cdc.gov/media/releases/2022/s0401-title-42.html>.

## Conclusion

SPLC strongly opposes the Proposed Rule because it violates the existing statutory framework and mandate of the Departments to protect and provide fair process to asylum seekers. The Departments should immediately rescind the NPRM and stop pursuing asylum bans that advance the Trump administration's xenophobic, anti-immigrant agenda. The Proposed Rule specifically requested comment on "[w]hether the proposed rule appropriately provides migrants a meaningful and realistic opportunity to seek protection."<sup>138</sup> This comment clearly illustrates that the answer is No.

Thank you for considering these comments in response and opposition to this NPRM, and please contact us to provide any additional information you might need. We look forward to your response.

Sincerely,

Efrén C. Olivares  
Deputy Legal Director, Immigrant  
Justice Project

*On behalf of the Southern Poverty Law  
Center*

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<sup>138</sup> NPRM at 11708.