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

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

The Center for Constitutional Rights is a national, not-for-profit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution, federal statutes, and local and international law. Since our founding in 1966, we have litigated landmark civil rights and human rights cases before the Supreme Court and other tribunals concerning government overreach and discriminatory state policies, including abusive immigration policies that disproportionately impact asylum seekers at the southern U.S. border. The Center for Constitutional Rights was one of the counsel in *East Bay Sanctuary Covenant v. Barr*,¹ in which a federal court found the Trump transit rule upon which this rule is based unlawful and ordered it enjoined, as well as in *Al Otro Lado, Inc. v. Mayorkas*,² which found that the Customs and Border Patrol policy to turn back and “meter” asylum seekers was unlawful and should be enjoined.³

We are writing to express our strong opposition to your agencies’ Proposed Rule—essentially an asylum ban—entitled Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023. This Proposed Rule is unlawful, discriminatory, inhumane, and catastrophic insofar as it will lead to mass displacement and death, as evidenced by the similar asylum ban implemented by the Trump Administration. The Center for Constitutional Rights calls on the Department of Homeland Security and the Executive Office for Immigration Review of the Department of Justice to withdraw this Proposed Rule in its entirety and adopt affirmative protections for asylum seekers, as promised by the Biden Administration.⁴

¹ 519 F. Supp. 3d 663 (N.D. Cal. 2021).

² No. 17-cv-02366-BAS-KSC, 2021 WL 3931890 (S.D. Cal. Sept. 2, 2021), *enforced*, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022).

³ *Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-02366-BAS-KSC, 2022 WL 3135914 (S.D. Cal. Aug. 5, 2022), *enforced*, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022).

⁴ See Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 5, 2021), *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address->

I. The 30-Day Notice and Comment Period is Insufficient

At the outset, we note that the 30-day comment period given for the Proposed Rule by the Biden Administration is insufficient for the public to meaningfully comment under the Administrative Procedure Act. This is especially concerning for a complex 153-page Rule with significant implications on asylum access at the border and in immigration court proceedings. Accordingly, 172 organizations have requested that the Administration provide at least 60 days to comment on the Proposed Rule.

Agencies are generally required to provide at least 60 days for the public to comment on proposed regulations, according to Executive Orders 12866 and 13563.⁵ This is especially crucial for a Rule that attempts to deny asylum to many refugees and violates U.S. law and international commitments, potentially returning vulnerable asylum-seekers to violence, torture, and death.

The agencies' justification for curtailing the comment period based on the termination of the Title 42 policy in May 2023 is unfounded, as the Administration sought to end it a year ago and had ample time to prepare. Providing a 30-day comment period is similar to the Trump Administration's practice of giving insufficient time to comment on sweeping asylum rules and is indicative of a bad faith attempt to evade accountability for a Rule the Biden Administration knows will lead to catastrophic results for thousands of human beings.

II. The Proposed Rule Reinstates Dangerous Trump-Era Policies Previously Deemed Unlawful

The Proposed Rule creates a presumption of asylum ineligibility for individuals who did not apply for and receive a formal denial of protection in a transit country. As such, the Rule effectively imposes an asylum ban on individuals who are fleeing persecution based on their means and place of transit, regardless of whether they have a valid asylum claim. It also hinges asylum determinations on criteria that are wholly irrelevant to the central question of whether they have a credible fear of persecution, as U.S. asylum law requires.

The Proposed Rule also bears a striking resemblance to the policies of the Trump Administration severely restricting asylum, which were struck down by a federal court in 2021, by forcing people to remain indefinitely in countries where they stand a significant risk of harm, and where asylum systems are dysfunctional and obsolete or the odds of receiving asylum are so low that applications are largely futile.

Because the Proposed Rule so closely mirrors Trump-era policies, the endangerment risks it carries are *not* hypothetical. Rather, as experience has already shown, asylum seekers who are forced to remain in Mexico and Central America for extended periods of time as a prerequisite to gaining entry into the United States face significant rates of violence and exploitation, including assault, robbery, extortion, and kidnapping.

the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/.

⁵ Exec. Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

The Trump-era regulations and the Biden Administration’s Proposed Rule both violate the Refugee Act of 1980, which was codified into law as 8 U.S.C. § 1158. This law provides that people may apply for asylum regardless of manner of entry into the United States, subject only to limited exceptions not applicable here. For example, under the statutory law, asylum may be denied based on travel through another country only where the individual was “firmly resettled” in another country—meaning they were eligible for or received permanent legal status in that country—or if the U.S. has signed a formal “safe third country” agreement with a country certifying that refugees there will be safe from persecution and have access to fair asylum procedures.⁶ Because the Biden Administration is prohibited from issuing restrictions on asylum that are inconsistent with these provisions, it should be stricken.

The Proposed Rule also violates the internationally-recognized principle of non-refoulement, codified in the U.S. Code at 8 U.S.C. § 1231, which prohibits the return of refugees and asylum seekers to countries where they could face persecution or harm. Contrary to the principles of non-refoulement, the Rule’s presumption of asylum ineligibility will result in deportation back to the countries from which they fled or face danger, irrespective of whether they may face persecution, torture, or even death. The Proposed Rule, which conditions access to asylum on manner of entry and transit, would result in the return of refugees to danger and unequivocally contravenes these provisions of U.S. law.

The fact that this Proposed Rule is being introduced so soon after the Trump Administration’s asylum ban was struck down by the courts is also deeply troubling. That the Proposed Rule is “time limited” and contains a “presumption of ineligibility,” rather than a categorical ban, only nominally distinguishes the Proposed Rule from the former one; both corrode instantly the fundamental humanitarian systems that took decades, if not centuries, to establish. Indeed, it suggests that contrary to the values it publicly professes, the current Administration is determined to continue the previous Administration’s policy of denying protection to those in need, despite the harm that it causes to some of the most vulnerable individuals in our society.

III. The Proposed Rule Jeopardizes the Health and Safety of LGBTQI+ Migrants and Migrants of Color Disproportionately

The Proposed Rule also significantly harms LGBTQI+ asylum seekers and migrants of color by placing them at risk of violence and persecution and denying them access to a fair asylum process—deepening this country’s shameful, centuries-old legacy of implementing discriminatory and exclusionary immigration policies disfavoring migrants of color.⁷

Applying for and receiving a formal denial of protection in a transit country carries significant risks for LGBTQI+ individuals since they face discrimination and persecution in both their home countries and transit countries, including by Mexican officials. LGBTQI+ individuals may not feel

⁶ 8 U.S.C. § 1158(b)(2)(A)(iv); (a)(2)(A).

⁷ See Brief for Haitian Bridge Alliance et al. as Amici Curiae Supporting Plaintiffs-Appellees at *4-5, *7-18, *Al Otro Lado, Inc. v. Mayorkas*, Nos. 22-55988, 22-56036 (9th Cir. Feb. 28, 2023), ECF No. 37, available at <https://ccrjustice.org/sites/default/files/attach/2023/03/37%20Haitian%20Bridge%20Alliance%20Amicus%202023.02.28.pdf> (explaining how U.S. immigration law restricted naturalization to “free white person[s]” for nearly a century, and was ultimately replaced by a series of immigration rules and policies explicitly targeting Black migrants such as Haitians for exclusion).

safe disclosing their sexual orientation or gender identity to officials in those countries as doing so would expose them to further discrimination and violence, including arrest and arbitrary detention, and even physical or sexual assaults. Indeed, the Department of Homeland Security has acknowledged that LGBTQI+ individuals are particularly vulnerable to an increased risk of harm in Mexico.⁸ Forcing individuals who are already prone to an increased risk of violence to stay or return to unsafe locations is cruel and antithetical to the spirit and letter of U.S. asylum laws.

Migrants of color face similar challenges, especially Black and Indigenous migrants, who face widespread discrimination and harassment due to anti-Blackness and prejudice that interfere with their day to day safety as well as the adjudication of their claims.

As such, the Proposed Rule disproportionately impacts LGBTQI+ migrants and migrants of color by forcing them to remain in countries where they are not safe or where applying for asylum would be futile due to their specific identities.

IV. The Proposed Rule's Insistence on the Use of CBP One by Asylum Seekers is Arbitrary and Capricious

The Proposed Rule's decision to make CBP One—a flawed web-based tool for booking appointments at ports of entry—an effective prerequisite for receiving asylum interviews is also arbitrary and capricious because it ignores the financial, linguistic, and technological barriers common among asylum seekers desperately seeking refuge. In essence, it restricts access to asylum to the most privileged of migrants—those with access to a laptop or smartphone, and the stable Internet connection necessary to utilize CBP One. By offering only a limited number of appointment slots, CBP One also turns the asylum system into a lottery inaccessible to many regardless of the threats of persecution they face.

To make matters worse, the mobile application upon which the Proposed Rule conditions the availability of asylum appointments at ports of entry systematically excludes Black and darker-skinned migrants because of photographic incapability, large portions of Indigenous migrant populations because of language inaccessibility, and many poor and functionally illiterate migrants because of a lack of technological wherewithal.

Moreover, for those fortunate enough to have access to CBP One, numerous technological problems have been reported, including the app unexpectedly freezing, sending unexplained error messages (in English), failing to recognize applicants' proximity to the border, and failing to recognize the faces of applicants with disabilities (for example, blind applicants who are unable to open their eyes for the required photo). These technological failures result in asylum seekers being unable to secure a spot despite their monumental efforts to do so.

Accordingly, the Proposed Rule discriminates against and disproportionately impacts the most vulnerable asylum seekers—those with disabilities and/or limited resources, technology access, or language skills.

⁸ Memorandum from Robert Silvers, Under Sec'y, Off. of Strategy, Pol'y & Plans, Dep't of Homeland Sec., Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols (Dec. 2, 2021), available at https://www.dhs.gov/sites/default/files/2022-01/21_1202_plcy_mpp-policy-guidance_508.pdf.

V. The Proposed Rule Flagrantly Violates International and Treaty Law

In addition to violating the principle of non-refoulement, the Proposed Rule contravenes international laws and treaties to which the United States is a signatory.

The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees unambiguously prohibit discrimination based on the method of entry into a country for refugees seeking asylum. Article 31 of the 1951 Convention states that refugees should not be penalized for entering a country illegally if they are seeking protection from persecution.⁹ It also prohibits States from imposing penalties on refugees who are in the country illegally solely on the basis of their illegal entry or presence.¹⁰ The 1967 Protocol broadened the scope of the 1951 Convention and removed geographic and time limitations, making it applicable to refugees from any part of the world who are seeking protection from persecution.¹¹ It also included the non-discrimination principle based on the method of entry into the country.¹²

Under the 1951 Convention and the 1967 Protocol, the U.S. has an obligation not to discriminate against refugees based on their method of entry into the country when they are seeking asylum. The Proposed Rule by DHS and EOIR on Circumvention of Lawful Pathways would violate this obligation by creating a presumption of asylum ineligibility for individuals who entered between ports of entry at the southern U.S. border or entered at a port of entry without a previously scheduled appointment through the CBP One mobile application, subject to extremely limited exceptions. This would effectively bar many refugees from accessing asylum protection in the U.S. based on their manner of entry, which is contrary to the obligations of the 1951 Convention and the 1967 Protocol. The Proposed Rule also violates the Universal Declaration of Human Rights (UDHR),¹³ to which the United States is a signatory, by tacitly discriminating against migrants based on their means and denying them the ability to seek safety from persecution.

VI. Conclusion

The Center for Constitutional Rights urges the Department of Homeland Security and the Executive Office for Immigration Review of the Department of Justice, in the strongest possible terms, to withdraw its Proposed Rule in its entirety due to the ways that it endangers people fleeing persecution in an arbitrary, capricious, and sweeping manner. This Proposed Rule guarantees that the widespread and unnecessary suffering that asylum seekers have had to endure for several years will continue. It does not have to be this way. We call upon your agencies to carry out the promises made by President Biden and to adopt policies that affirmatively protect the rights of asylum seekers against discrimination and *refoulement*, consistent with domestic and international law and the United States' treaty obligations, and ensure that all persons seeking asylum receive a full and fair adjudication of their legal claims.

⁹ Convention Relating to the Status of Refugees art. 31, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954), *available at* <https://www.unhcr.org/en-us/3b66c2aa10.pdf>.

¹⁰ *Id.*

¹¹ Protocol Relating to the Status of Refugees art. 1, *adopted* Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967), *available at* <https://www.unhcr.org/en-us/3b66c2aa10.pdf>.

¹² *Id.*

¹³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), *available at* <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf>.

Respectfully submitted,

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