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

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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 Florence Immigrant & Refugee Rights Project (Florence Project) respectfully submits this comment in response to the Department of Homeland Security (DHS) and Department of Justice (DOJ)’s proposed rule – which, given that seeking asylum is indeed a legal and protected pathway, is somewhat disingenuously titled “Circumvention of Lawful Pathways” – and hereafter referred to as the “proposed rule,” that was published in the Federal Register on February 23, 2023. The proposed rule would change the face of asylum as we know it, directly contravening clear statutory language mandating that any non-citizen who is physically present in the U.S. or arrives in the U.S., whether or not at a designated port of arrival and irrespective of the noncitizen’s status, may apply for asylum. This proposed rule would presumptively bar many refugees from critical asylum protection in the United States, certain to result in the unlawful refoulement of people fleeing persecution and violence. It also will force many people fleeing persecution and violence to try to remain in unsafe conditions in countries with dysfunctional and ineffective asylum systems and will deprive refugees who otherwise would have been eligible for asylum of their right and ability to reunite with their families and have access to a path to citizenship in the U.S.

The proposed rule is a new version of similar asylum and transit bans promulgated under the Trump administration that were repeatedly struck down by federal courts as unlawful. The Florence Project strongly urges the agencies to withdraw this proposed rule in its entirety and stop pursuing border and asylum policies that seek to circumvent U.S. law and treaty obligations to refugees, particularly those like this proposed rule that will disproportionately discriminate against Black, Brown, and Indigenous asylum seekers at our southern border. The administration should instead uphold its promise to rescind Trump administration entry and transit bans in their entirety, uphold refugee law, and restore full access to asylum at the border. This must include ensuring fair and humane asylum adjudications by ending the reliance on and proposed expansion of expedited removal procedures and properly funding USCIS to conduct full and fair
adjudications as well as legal service providers and NGOs who provide welcoming services to support refugees as they move through the legal process.

I.   Florence Project Is Well-Positioned to Offer Meaningful Feedback on the Many Harms of This Proposed Rule

The Florence Project is a 501(c)(3) non-profit organization that provides free legal and social services to the thousands of adults and children detained in immigration custody in Arizona on any given day. The Florence Project was founded in 1989 to provide free legal services to asylum seekers and other migrants in a remote immigration detention center in Florence, Arizona where people had no meaningful access to counsel. We have expanded significantly since that time and now provide free legal and social services to thousands of detained adults and unaccompanied children throughout Arizona. This includes providing services to thousands of people seeking asylum, withholding of removal, and Convention Against Torture protections each year, including hundreds of individuals who are going through the expedited removal credible fear or a reasonable fear screening process.

Additionally, in 2017, the Florence Project partnered with the Kino Border Initiative (“KBI”), a binational organization, to provide legal services to asylum seekers at the U.S.-Mexico border. Through that partnership, the Florence Project’s Border Action Team now provides regular group and individual legal orientations and representation to asylum seekers in Heroica Nogales, Sonora, Mexico (hereafter referred to as Nogales, Sonora), just across the border from the Port of Entry into Nogales, Arizona. As the only 501(c)(3) non-profit organization in Arizona dedicated to providing free legal and social services to people in immigration detention, our vision is to ensure that every person facing removal proceedings has access to counsel, understands their rights under the law, and is treated fairly and humanely.

In 2021, the Florence Project provided legal case assistance over 4,000 times and provided over 8,600 legal educational packets to adults detained in Arizona. Our services include legal orientation services to detained pro se asylum seekers in Eloy and Florence to empower them to represent themselves in bond and removal proceedings. In 2021, our attorneys also represented 249 adults before the EOIR, including 115 people who were appointed counsel after an Immigration Judge found them incompetent to represent themselves pursuant to *Franco-Gonzalez v. Holder*. Our Border Action Team provided legal orientations to 2,600 people passing through KBI’s humanitarian aid center in Nogales, Mexico; these services directly impacted 4,200 people when considering the accompanying family members. Finally, in 2021, our Social Service Team provided lifesaving social services to 628 people.

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

Providing only 30 days for the public to comment on the proposed rule effectively denies the public the right to meaningfully engage in the notice and comment process, forcing both organizations and individuals to quickly draft comments under extreme and unnecessary time-pressure. This dramatically abbreviated comment window is not
in keeping with the notice and comment rulemaking procedures required by the Administrative Procedure Act.

In particular, the 30-day-window for comments for this proposed rule is insufficient given the sheer size and sweeping scope of the proposed rule as well as the fact that the rule, if enacted, would deny many people access to asylum in violation of U.S. law and international law. On March 1, 2023, 172 organizations, including the Florence Project, wrote to the agencies urging them to provide at least 60 days to comment on the complex 153-page rule that would have enormous implications for asylum access at the border and in USCIS and immigration court asylum proceedings. That request was summarily denied in a scant two-page letter dated March 14, 2023, that merely reiterated that the abbreviated comment period was “because the Departments seek to be in a position to finalize the proposed rule, as appropriate, before the Title 42 public health Order is lifted” without engaging with any of the substance of the organizational letter that noted the myriad flaws with that analysis.

As addressed more fully in the organizations’ March 1, 2023 letter, the government’s alleged rationale for the expedited comment window – the expected termination Title 42 – is specious. The organizations’ March 1, 2023 letter specifically noted the many flaws with the Government’s alleged rationale for the expedited timeframe, given that the Biden administration has long been aware that the emergency public health measure would end at some point, vowed to end it themselves both before and upon coming into office, and indeed formally sought to end the policy themselves nearly a full year ago in April 2022. Moreover, the administration has received significant Congressional appropriations to prepare for this policy’s inevitable, eventual demise. To now claim the impending end of Title 42 as an emergency that outweighs the public’s right to meaningfully engage in notice and comment on a sweeping rule that directly contravenes U.S. law and would fundamentally alter the entire asylum process is hyperbolic at best and disingenuous at worst.

Moreover, the language quoted above from the Government’s letter declining to extend the deadline clearly indicates the administration’s intention to finalize and issue some version of this proposed rule prior to May 11, 2023, regardless of the results of this comment period. This is particularly troubling because we seek full rescission of this proposed rule in its entirety. As addressed more below, it is contrary to U.S. law and treaty obligations, as is evidenced by numerous federal court rulings vacating and enjoining strikingly similar Trump administration asylum bans targeting refugees at the border based on manner of entry and transit because they violated key provisions of U.S. law. The administration’s language clearly indicates that, regardless of the findings of this comment period, some version of this proposed rule will likely be implemented by May 11, 2023, and further evidences that this abbreviated comment window is not in keeping with the concept of meaningful notice and comment required by the Administrative Procedure Act.

The abbreviated 30-day comment period also goes against established practice and guidance. Executive Orders 12866 and 13563 state that agencies should generally provide at least 60 days for the public to comment on proposed regulations. A minimum of 60 days in this case is especially critical given the proposed rule’s attempt to ban
asylum for many refugees in violation of U.S. law and international commitments, which would result in the refoulement of many people to persecution, torture, and death.

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. Indeed, the extent of the damage and suffering that the proposed regulation would cause is difficult to quantify, especially in the short 30-day period that the Departments have proffered for the public to comment on the proposed regulation. The Florence Project is the sole 501(c)(3) organization providing exclusively pro bono services to the thousands of adults and children detained in Arizona. In Mexico, our small team of four staff members is inundated with work, explaining the constantly shifting information and systems to asylum seekers stranded at the border, who are confused, in danger, and confronting frustrating and challenging new technological barriers. The abbreviated comment period has strained our resources as we have struggled to fit our analysis of and response to the proposed rule in with our already overwhelming workload. This has impacted our ability to gather additional supporting client case examples from prior transit bans, interview asylum seeking clients stranded at the border, provide robust and complete references to relevant articles, reports, and other documentary evidence in support of our positions, and otherwise limited our ability to fully address several major areas of concern in the rule.

III. The Proposed Rule Violates U.S. Law and Treaty Obligations

The proposed rule directly contravenes U.S. law governing asylum access, expedited removal procedures, and prohibitions on the return of refugees to persecution and torture. Additionally, it violates U.S. international treaty obligations as it directly contravenes several key provisions of the Refugee Protocol, to which the U.S. acceded, including the mandate that States provide non-discriminatory access to asylum, the prohibition against returning refugees to persecution, and the prohibition against imposing improper penalties on people seeking refugee protection based on manner of entry.

a. The Proposed Rule Directly Violates U.S. Law


First, 8 U.S.C. §1158 specifically provides that people may apply for asylum regardless of manner of entry into the United States. However, by creating a presumption of ineligibility for asylum precisely based on one’s manner of entry, this proposed rule directly contravenes this fundamental principle of U.S. asylum law. The rule is explicit that this presumption is conceptualized as a new consequence – a penalty – for those who do not avail themselves of the new alternative processes and nonetheless crossed the Southwest border without authorization. This presumptive elimination of asylum access based on manner of entry into the U.S. as a penalty for the unauthorized entry is in direct violation of U.S. law. While the proposed rule acknowledges federal court
rulings that support this reading of the statute, it merely states that it disagrees with the federal court’s reading, splitting hairs between the right to apply for asylum regardless of manner of entry as compared with actually being eligible for asylum. However, the right to apply for protection where that form of relief is all but foreclosed to you is no right at all.

The proposed rule’s procedure placing the burden on asylum seekers to rebut this presumption of ineligibility for asylum does not save the proposed rule. The proposed rule makes it incumbent on the asylum seeker to prove by a preponderance of the evidence – a heightened standard of proof – that an exception or rebuttal of the presumption against asylum eligibility should apply. However, as discussed in more detail below, as a practical matter it will often be extraordinarily difficult, if not impossible, for migrants to obtain the necessary evidence and explain their situation sufficiently to obtain exemptions or rebut the presumption. The proposed rule puts the burden on those who are most vulnerable to gather evidence and make complex factual and legal claims when they are often actively in harm’s way. When, inevitably, individuals are unable to meet these exacting requirements, the proposed rule will result in refoulement of refugees in violation of U.S. law at 8 U.S.C. §1231, which codified the prohibition from our treaty obligations against returning refugees to countries where they face persecution.

Second, the transit ban portions of the proposed rule also run afoul of clear provisions of U.S. law. 8 U.S.C. §1158 delineates specific limited exceptions where an asylum seeker may be denied asylum based on travel through another country. These restrictions only apply where an individual was “f Firmly resettled” in another country (defined to mean the person was eligible for or received permanent legal status in that country) or if the U.S. has a formal “safe third country” agreement with a country where refugees would be safe from persecution and have access to fair asylum procedures. The statute prohibits the administration from issuing restrictions on asylum that are inconsistent with these provisions. Moreover, under the common canon of statutory construction, expressio unius est exclusio alterius, Congress’s inclusion of these specific circumstances in which transit through a third country before seeking asylum in the U.S. disqualifies a person from asylum implies the exclusion of other scenarios, like those proposed in this rule, in which transit can permissibly be used to bar individuals from asylum. Had Congress intended the agencies to be allowed to presumptively bar asylum access to anyone who ever passed through any third country without seeking asylum in that third country, no matter the circumstances or ability of that country to provide the person with protection, it could and would have said that. It did not. This proposed rule, thus, directly contravenes these aspects of U.S. law and clear Congressional intent.

Third, the proposed rule attempts to unlawfully circumvent the credible fear screening standard established by Congress. In 1996, Congress created the expedited removal process through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). In establishing the standards and procedures for expedited removal and credible fear screenings, Congress purposefully designed initial credible fear screenings to be a low screening threshold that would then grant applicants the right to full asylum proceedings. Indeed, Congress explicitly rejected various heightened standards that
were proposed and instead mandated that asylum seekers placed in expedited removal who passed the purposefully low screening threshold of credible fear of persecution must be referred for full asylum adjudications.

Thus, under the law, the government must 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. However, the proposed rule attempts to eviscerate this standard in at least two ways: first, by requiring asylum seekers to prove to an asylum officer by a preponderance of evidence that they can rebut the presumption of asylum ineligibility, and second, by requiring those who cannot overcome the presumption to meet a higher fear standard before being permitted to seek protection. This scheme is completely at odds with U.S. law.

The proposed asylum ban violates these key provisions of U.S. law and treaty commitments. Indeed, similar Trump administration asylum bans targeting refugees at the border based on manner of entry and transit were repeatedly struck down by federal courts as unlawful. The Trump administration’s transit ban, which was in effect for a year before it was vacated, inflicted enormous damage including deportation of refugees to harm, separation of families, and prolonged detention. Florence Project staff directly witnessed and reported numerous instances of harm under the prior transit bans, some of which were included in the linked report. We see little reason to believe that the limited exceptions envisioned in this proposed rule would resolve the greater underlying problems with imposing presumptive bars to asylum in violation of U.S. law.

For example, we had one client, “Angel,” during the Trump transit ban who was a transgender woman from Guatemala. She was denied asylum exclusively based on the transit ban, after she crossed Mexico to seek protection in the U.S. Though she was ultimately granted withholding of removal, because Angel was banned from asylum she faced months of detention in ICE custody in dangerous conditions, a heightened burden of proof before both the Asylum Office and Immigration Judge, and ultimately was only able to acquire a form of relief that was less protective and did not provide a path to citizenship. She will forever be denied certain rights because of the transit ban.

Clients like Angel will face the same obstacles under this proposed rule as Angel did under the Trump transit ban. Indeed, because Mexico is considered one of the most dangerous countries to be a transgendered woman, it would be neither reasonable nor safe to ask such a person to seek asylum from Mexican authorities, nor would it be reasonable or safe to ask them to wait patiently in Mexico to navigate the CBP One application with all of its many flaws to obtain an appointment to present. The proposed rule’s limited exceptions, for example that based on “an imminent and extreme threat of rape, kidnapping, torture, or murder” is so narrowly formulated that effectively no one will be able to establish this exception as it “cannot be speculative, based on general concerns about safety, or based on a prior threat that no longer poses an immediate threat.” Effectively, this exception only protects those who are literally running from their persecutors directly to the border and, even then, those people will only qualify for an exception if they can prove, by a preponderance of the evidence and not based on

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1 All names provided in this comment are pseudonyms to protect our clients’ privacy.
speculation, that the threat was sufficiently grave to qualify – i.e. rape, kidnapping, torture, or murder.

Thus, the practical effect of the proposed rule would be effectively identical to the harms suffered by people wrongfully denied access to asylum under the Trump bans. It will be used to deny refugees asylum, blocking and rapidly deporting many asylum seekers without access to asylum hearings in expanded expedited removal where there is little to no access to counsel and no time to help someone meaningfully understand their rights and burdens under the proposed rule. The alleged saving grace of the exceptions is mere window dressing as the exceptions and opportunities to rebut the presumption are so narrowly tailored that few people will, as a practical matter, be able to meet their burdens to establish asylum eligibility by a preponderance of the evidence. As a result, the proposed rule will inevitably result in the same horrific harms as the prior Trump transit and entry bans. Indeed, 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. Nonetheless, the agencies have decided to proceed with this patently illegal policy.

For these reasons, the proposed rule should be withdrawn in its entirety.

b. The Proposed Rule Contravenes Key Provisions of the Refugee Convention and Protocol Including the Fundamental Right of Non-Refoulment

The adoption of this proposed rule would also fly in the face of the requirements of the Refugee Convention of 1951 and the Refugee Protocol. Following the horrors of World War II, the United States played a lead role in drafting the Refugee Convention and then later adopted and consented to the Refugee Protocol, thereby promising to abide by the Convention’s legal requirements. However, this proposed rule runs afoul of various fundamental requirements of the Refugee Convention and Protocol, including providing non-discriminatory access to asylum, the prohibition against returning refugees to persecution, and the prohibition against imposing improper penalties on people seeking refugee protection based on manner of entry.

The Departments are surely aware of these foundational defects, as the very conceptualization of bans based merely on transit through third countries (not formally identified as Safe Third Countries) and manner of entry run contrary to both the letter and spirit of the Convention and Protocol. Indeed, 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. They have reiterated those concerns with regard to this proposed rule. Nonetheless, the administration is moving forward with the proposed rule despite clear indications that it is unlawful and contrary to international law norms.

The proposed rule contravenes the Refugee Convention and Protocol in several major ways.
First, by denying asylum to anyone who fails to follow specific limited migration pathways, the proposed rule attempts to unlawfully use the mere existence of some lawful pathways as a justification to deny access to asylum at the border. To be clear, the creation of some additional, limited lawful pathways for entry for some people, while laudable, in no way changes the United States’ obligation to follow its own laws and the Refugee Convention’s clear prohibition against penalizing asylum seekers for their manner of entry.

Indeed, the Refugee Convention explicitly acknowledges that the seeking of asylum can require refugees to breach immigration rules and not follow the limited legal pathways that exist. However, by creating a presumptive bar to asylum for any person who enters the U.S. in a manner other than through the CBP One application, this rule directly contravenes that mandate. Placing the burden on refugees to establish exceptions to this presumption does not obviate the fact that this procedure clearly penalizes asylum seekers for their manner of entry and thus contravenes the plain language and intent of the Refugee Convention. The administration must take heed of the experts’ warning, including that of UNHCR, IOM, and UNICEF who have warned that the provision of safe pathways “cannot come at the expense of the fundamental human right to seek asylum.” Yet, that is precisely what this proposed rule seeks to do.

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

Third, the proposed rule will lead to refoulement of many asylum seekers. The principle of non-refoulement is the cornerstone of the Refugee Convention and Protocol, yet by creating sweeping presumptions of asylum ineligibility, this proposed rule creates a framework that would significantly undermine the principle of non-refoulement. The limited exceptions established in the proposed rule are insufficient to protect against non-refoulement. First, as addressed above with the example of Angel, effectively very few people will be able to access the exceptions or successfully rebut the presumption as a practical matter because the grounds for exception or rebuttal are extremely narrow, and they place a heightened burden on the asylum-seeker to demonstrate the existence of a grounds for exception/rebuttal. Many individuals will face refoulement simply because they sought protection when, in some government agent’s discretion, the risk was not imminent enough, or because they failed to flee with their evidence in hand.

Additionally, it bears noting that withholding of removal is not an acceptable substitute protection against non-refoulement both because the heightened standard of proof applied does not offer protection in keeping with U.S. obligations to honor all parts of the 1951 Convention and because the benefits of withholding are substantially narrower.
than those for asylum. As such, withholding is an insufficient substitute under international standards applying to non-refoulement and asylum.

Fourth, the proposed rule violates the Refugee Convention’s foundational principle of non-discrimination in access to asylum. It does this in several notable ways. The proposed rule privileges limited alternative pathways to legal entry to the U.S. for individuals from some countries while not creating viable alternative pathways for others. Yet, recent reporting has indicated the Biden administration plans to wield the asylum ban against individuals from countries where no such parole initiatives exist, such as those from Guatemala, Honduras, and El Salvador. Thus, the proposed rule subjects all asylum seekers to the same draconian bars to asylum regardless of whether an alternative viable pathway exists.

Indeed, the language of the proposed rule touts the successes of programs like Uniting for Ukraine and the Venezuelan parole process that was later expanded to Cubans, Haitians, and Nicaraguans (hereafter referred to as the CHNV parole program) that created limited pathways to parole for only citizens of those countries. By their very nature, programs like these discriminate between countries whose citizens the U.S. deems worthy of alternative legal pathways and those it does not. Additionally, while the creation of additional pathways for parole is in many ways laudable, it is no replacement for asylum. These new legal pathways discriminate against the most vulnerable because it is only viable for those who have the privilege of: being able to wait in their home country; having connections that allow them to identify a fiscal sponsor in the U.S. with lawful status in the U.S.; being able to obtain necessary travel documents, including passports from a government that may well be persecuting them; and having the financial means to purchase air fare directly to the U.S. The reality is that many of those who are most susceptible to violence and most vulnerable will be utterly unable to meet all these requirements, and therefore will be forced to still travel to the U.S./Mexico border to access asylum. Basing the elimination of asylum as a legal pathway to enter the United States for such individuals on the creation of these separate programs fundamentally fails to appreciate the critical differences between the populations served by the parole programs and other asylum seekers.

Also, as addressed in further detail below, the proposed rule’s reliance on the CBP One smartphone application introduces numerous levels of potential discrimination particularly in terms of language access and the technology’s limitations on recognizing those with darker skin for photo and biometric requirements.

Finally, because the proposed ban only applies to people who seek protection at the southern border, will disproportionately harm people of color who do not have the resources or ability to arrive in the United States by plane. The U.S. visa regimes predominantly privilege individuals traveling from majority white nations, leaving those from countries in Africa, the Caribbean, South and Central America often with few options but to undertake an often difficult and dangerous journey to arrive in the United States by way of the southern border. During the period that the Trump transit ban was implemented, immigration court asylum denial rates skyrocketed for many Black, Brown, and Indigenous asylum seekers requesting safety at the southern border. For instance, asylum grant rates declined by 45 percent for Cameroonian asylum applicants,
32.4 percent for Cubans, 29.9 percent for Venezuelans, 17 percent for Eritreans, 12.9 percent for Hondurans, 12 percent for Congolese (DRC), and 7.7 percent for Guatemalans from December 2019 to March 2020, compared to the year before the third-country transit asylum ban began to affect refugee claims, according to data analyzed by Syracuse University’s Transactional Records Access Clearinghouse. This is in many ways the predictable and unavoidable impact of any rule, like the proposed rule, that penalizes those who do not have the privilege of being from countries whose citizens can more readily obtain travel visas to the U.S.

This proposed asylum ban will significantly increase systemic and structural discrimination in the U.S. immigration system, undermining the credibility of the Biden administration’s stated commitment to racial justice and equity.

For these reasons, the proposed rule should be rescinded in its entirety.

IV. The Proposed Rule’s Reliance on the CBPOne Application as the Sole Gateway for Asylum Access at the Border is Misguided, Particularly as CBPOne is Riddled With Problems Including Accessibility, Discrimination, Efficiency and Safety.

The CBPOne application was introduced to improve efficiency in border processing, but any asylum system that relies solely on this flawed technology cannot justly and adequately process asylum seekers. The application has already proven to have significant flaws, yet the proposed rule relies upon it as the sole access point for asylum. Under the proposed rule, asylum seekers at the border are required to schedule an appointment through CBPOne. Any asylum seeker who arrives at a port of entry without a scheduled appointment will likely be denied and forced to wait in violent and unsafe conditions until they find a smartphone, a secure WiFi connection, and eventually are able to secure one of an extremely limited number of appointments. The reliance of the proposed rule upon this app will result in asylum seekers being unlawfully turned away, often to the very countries where their lives were at risk. The application’s flaws have also already resulted in discriminatory access to asylum, including racial bias in facial recognition and limited language access. Advocates have raised these concerns to the government since the application’s original rollout. The proposed rule’s attempt to utilize the application as a singular asylum processing point is even more egregious due to the government’s awareness of the serious flaws and discrimination present.

a. Many Asylum Seekers Lack Access to Technology and WiFi

CBP One has proven challenging for asylum seekers to access, especially those who cannot afford a smartphone or do not have the technological experience to navigate one. Given that many asylum seekers are fleeing situations of poverty in addition to violence, it is an unreasonable hurdle for many to obtain a smartphone. Victor Yanez, Director of Migrant Services at our partner the Kino Border Initiative (KBI) in Nogales, Sonora, estimates that 3 out of every 10 migrants they encounter has to purchase a new cellphone in order to access CBPOne. A smartphone that can access the application can
cost $3,000 - $5,000 pesos in Mexico ($163 - $271 USD), the equivalent of ten days’ work. The real cost is much higher, however, when you factor in the cost of food and shelter while a person attempts to find work to raise the money for the phone – those ten days can stretch to weeks when a migrant must juggle basic survival needs with purchasing a smartphone. To make matters worse, both Florence Project staff and our partners at the Kino Border Initiation have observed that certain features of the app, including facial recognition, operate better on brand-new, more expensive devices. For migrants waiting in Nogales, Sonora while trying to obtain an appointment, KBI has tried to support by providing food and shelter so they can save money for a phone. The organization has also tried to gather donations of smartphones for asylum seekers to use, but only a few phones have been donated. Absent the needed donations, KBI has encouraged the community of asylum seekers to share their phones with one another to help schedule appointments. While asylum seekers are trying to support one another in this manner, it is clear from this information that it is erroneous to assume asylum seekers arrive at the border with a smartphone and unreasonable for the proposed rule to rely upon this assumption.

Additionally, while the proposed rule cites to an extremely limited survey of how many people at one port of entry on one day had smart phones as evidence of the prevalence of smartphone ownership to justify reliance on the CBPOne app, the mere possession of a smartphone does not guarantee people access to CBPOne. First, because the application requires certain bandwidth and other technological features, not all smartphones are actually able to access the CBPOne app. Second, the mere possession of a smartphone does not obviate the significant barriers that remain for individuals with limited literacy or who speak languages in which CBPOne is not provided.

It is also a large hurdle for migrants trapped at the border to obtain a secure WiFi connection. The information being input into CBPOne contains personally identifiable information, which could be a safety risk for asylum seekers if the WiFi connection they are on is not private. Seeking out a WiFi connection can also put asylum seekers at risk if they are forced to leave a secure location and go out into public. Additionally, some shelters have limitations on hours and spaces in which migrants may access their phones which can force some migrants to have to decide between having safe shelter for the night or being able to access the app. Ultimately, as has been documented, not being able to access a smartphone or a wifi connection could lengthen their journey through unsafe areas and delay asylum seekers’ opportunity to submit their fear claim.

b. CBPOne Is Discriminatory In Terms of Both Language Access and Literacy Concerns

In addition to the technological access barriers, there are serious language access barriers with CBPOne. The app is currently only available in a limited number of languages that does not include the Indigenous languages many of our clients speak. Additionally, key advisals regarding the terms and conditions of use and the repercussions of fraud or willful misrepresentation are provided exclusively in English. The discriminatory impact of language access in the use of the CBPOne app came into stark relief on January 5, 2023, when the Departments announced a limited parole program for Cubans, Haitians, and Nicaraguans premised on use of the app, yet
somewhat remarkably did not provide access in any language commonly spoken in Haiti. Indeed, CBPOne was not available in Haitian Creole until late January, causing unfair delays for a specific language group and nationality. Asylum processing must be equitable and accessible to all and cannot unfairly discriminate against specific countries or language groups. Moreover, most, if not all, error messages in the CBPOne application are in English only, discriminating against anyone who does not have at least a basic grasp of English to decipher those error messages.

The Florence Project Border Action Team has submitted requests on behalf of five different families who speak indigenous languages, and those requests have been pending for nearly four weeks at the time of comment submission. Without assistance from an NGO like the Florence Project, these families would have no mechanism to access the CBPOne app because it is simply unavailable in languages that they speak. In order to get the information necessary to properly make a request on behalf of an indigenous family, our team must spend an estimated 3 to 4 hours with each family and an independent interpreter. Our staff members must review current border policy, asylum basics, the unaccompanied minor process in case of family separation, and the substance of their fear claim. We have submitted requests on behalf of five families (totaling 12 people, including minor children) so far and have five more indigenous families (totaling 28 persons, including minor children) scheduled for the coming week. In total, these 40 persons speak six different indigenous languages from southern Mexico and Guatemala. This is yet another example of the government offsetting the work of asylum processing to nongovernmental organizations such as our own and requires a large amount of time and resources.

Another glaring issue is requiring literacy to obtain an appointment to express a fear claim. Many asylum seekers have not had the opportunity to attend formal schooling or otherwise have very limited literacy. The issue of literacy combined with language access creates an even bigger problem – many indigenous language speakers cannot read in their language nor in Spanish, and literacy among indigenous language speakers drops to only the 20th or 30th percentile. Therefore, translating the app into new languages does not resolve the issue of access and any proposed system that effectively requires literacy as a prerequisite for the person seeking protection is doomed to failure. An asylum system that relies on CBPOne or any other app as a singular point of entry into processing will unfairly discriminate against certain groups and will rely upon nongovernmental organizations to do the labor of helping asylum seekers submit valid fear claims.

c. CBPOne, Like Most Facial Recognition Software, is Racially Discriminatory

The CBPOne App has demonstrated racial bias in the facial recognition technology it relies upon. The reliance on this app is inherently harmful to Black asylum seekers who have been prevented from scheduling an appointment due to the flawed technology. The facial recognition feature has been unable to process images with a darker skin tone, effectively blocking Black migrants from access to our asylum system. Black asylum seekers are already more vulnerable while waiting for an appointment in Mexico, with widespread reports of harassment, racially targeted violence, and abuse by Mexican
authorities. In yet another example of nongovernmental organizations working overtime to compensate for the flaws of the government’s system, some advocacy groups have brought in construction lights to brighten the faces of asylum seekers so the app will recognize them. In Nogales, while we have not had to bring in construction lights, we routinely witness the additional difficulties faced by migrants with darker skin tones in getting the app to recognize and detect their faces and we have witnessed people holding the phone to their faces for 15 minutes before the app was able to recognize their features. This is difficult, but not insurmountable when it comes to adults, but can pose even greater hurdles when dealing with children.

The proposed rule’s plan to utilize CBPOne as a singular access point for asylum seekers when the government is aware of the inherent racial bias of the app is discriminatory and unjust. It works in direct opposition to the Biden administration’s stated commitment to advance racial equity. The United States asylum system must be equitable and accessible to all, regardless of race. The proposed rule cannot achieve that while relying upon an app that has clear, unresolved racial bias.

d. CBPOne Requires Asylum Seekers to Obtain Unnecessary Information That They May Not Have Access To

While DHS maintains that CBPOne only requires asylum seekers to provide basic biographical information, there are many presumptions about what information is considered “basic”. In reality, this results in certain groups of asylum seekers being privileged over others. One of the required fields for asylum seekers to complete in the CBPOne application is their height and weight. While this may be standard practice within the U.S., it is not universal knowledge, particularly for asylum seekers from more remote communities that lack access to medical care or other agencies where they may have been able to weigh and measure themselves. To wit, KBI estimates that approximately 70% of the asylum seekers who were displaced in its’ shelter in the Fall of 2022 had never had access to a primary care doctor. Therefore, when the CBP One application became publicly accessible for the Title 42 exemptions process, KBI has had to place two different scales as well as a height ruler on the wall so that migrants can measure and weigh themselves. Florence Project staff witness persons routinely using these devices in order to complete the CBPOne requisite information. However, if an asylum seeker does not have access to an NGO such as KBI, and they do not know their height and weight, they would not be able to complete the CBPOne application. This means they would first have to seek out a medical clinic or other system by which they could weigh and measure themselves. Access to asylum should not be predicated on this information that can be – and is still – routinely gathered by CBP officers at the Port of Entry.

e. Reliance on CBPOne as the Sole Access Point to Asylum Causes Delays That Force Asylum Seekers to Wait in Unsafe Conditions

While CBPOne’s implementation was intended to expedite processing, the reliance on it as the singular way to obtain an appointment causes delays and leaves people in danger.
For example, a 17-year-old Cuban child was murdered in Mexico while waiting for an appointment. Unfortunately, we have also seen such a tragic result in Nogales, Sonora as well. Another legal service provider in Nogales, Sonora represented a young man who – in addition to fleeing harm in his country of origin and seeking asylum with his family – was suffering organ failure. The legal service provider had escalated the case to the Tucson Office of Field Operations (OFO), requesting that the man receive an urgent exemption from Title 42 and/or humanitarian parole. The legal service provider explained to Tucson OFO that, due to the exigent circumstances, the family could not wait even more weeks or months for an appointment via the CBP One application. Tucson OFO failed to address their request, and sadly the young man died.

Additionally, over-reliance on the app as the sole access point for asylum forces many people to expose themselves to further danger when they are only able to obtain an appointment at a distant port of entry. This is what happened to one Venezuelan family who were kidnapped, tortured and extorted during a 1,200 mile journey to another port after there was no appointment available where they were. Their kidnappers threatened to murder them if they did not cross. When they were apprehended, they informed Border Patrol about the threat to their life but were expelled back to unsafe conditions in Mexico.

Many of the asylum seekers we serve in Nogales, Sonora who do not yet have a scheduled appointment are ultimately unable to obtain an appointment to present at the Nogales Port of Entry and instead must travel to one of the other ports of entry that are hundreds of miles away. This is deeply concerning, as the Sonora state is designated by the U.S. State Department as one in which people should “reconsider travel due to crime and kidnapping.” The U.S. State Department recognizes that Sonora is a key location used by the international drug trade and human trafficking networks. Violent crime is widespread. And, U.S. government employees are prohibited from traveling within large parts of Sonora, yet, these are the very highways and routes that asylum seekers must travel to access ports of entry along the Texas/Mexico border. Moreover, in other parts of Sonora, U.S. government employees are only permitted to travel directly into certain cities, but are not permitted to go outside of the city limits due to the aforementioned dangers of kidnapping and crime. Yet, the highways in the northern and western parts of the state that are outside the city limits of many of the named cities in Sonora are the exact highways that asylum seekers must travel to access ports of entry along the California/Mexico border.

Moreover, the time and efficiency savings of the CBPOne app are dramatically overstated. In fact, after an asylum seeker requests an appointment via CBPOne, they still have to fill out paperwork containing much of the same biometric and biographical information at their appointment. As recently as last week, our Border Action Team staff members saw the form and confirmed that it is the exact same information as the CBP One app gathers. Because some of the information provided can change over time, it must be checked against the information originally provided in the app. As such, the CBPOne process is actually slower than having applicants provide their biographical information one time, whenever they are encountered and processed by border officials be that at a port of entry or otherwise. This most neatly aligns with what is clearly contemplated in U.S. asylum law and with international norms.
f. Delays in Access Disproportionately Harm Vulnerable Groups

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

To the extent that this rule is designed to prevent people from entering at places other than ports of entry, there will inevitably be significant delays in obtaining appointments through CBPOne. Just as the exemption process under Title 42 has led to delays of several weeks or months to gain an opportunity to enter, we can expect the same issues to arise with CBPOne appointments under Title 8 processing. Over the past three years, Florence Project staff have witnessed how excessive delays in processing has consistently led to those who are most vulnerable to harm feeling they have no other option but to risk attempting to enter without inspection, despite or without knowledge of the consequences, out of desperation in face of harm in Mexico. Such was the case for “Belen,” a lesbian woman from Guatemala who faced threats of harm and unsafe conditions while in Nogales due to her sexual orientation. Desperate in the face of this harm, she attempted to cross through the desert, but was raped repeatedly, left to die, and then expelled by Border Patrol officials back to face additional harm in Mexico.

Indeed, for many LGBTQI+ individuals, even a short delay at the border can result in extreme violence. Such was the case for “Santiago,” a young man who had fled his home state in Mexico because of threats he received because of his sexual orientation. Despite being a Mexican citizen seeking asylum, he was subject to Title 42 and required an exemption to seek asylum in the U.S. After being displaced for only a few weeks, Santiago was brutally attacked and raped by two men while running an errand in Nogales, Sonora. As Santiago and Belen's cases show, even short delays in allowing asylum seekers to request protection can have serious harmful impacts on particularly vulnerable populations.


The proposed rule cites to the significant asylum backlogs and change in migratory flows as key rationalizations for the changes it proposes. While backlogs and undue delay in the asylum system are undoubtedly challenges, this proposed rule improperly shifts the burden of the United States’ failure to properly fund and design a functional asylum system onto the individuals seeking protection. The proposed rule’s primary
means of resolving these issues is to presumptively deny people the right to seek asylum. This response is based in large part on statistics comparing disparities between how many people pass a credible fear interview and how many actually win asylum. However, this analysis fails to account for the fact that the credible fear interview was purposefully designed as a low threshold to avoid wrongfully turning potential refugees away and fails to account for the complexity of asylum law which contributes greatly to both delayed adjudication and disparity in ultimate grant rates. For example, the jurisprudence on what constitutes a viable particular social group in U.S. asylum law for victims of gender-based violence has been the subject of substantial and often conflicting litigation for nearly fifteen years, with numerous contradictory BIA and Attorney General decisions issued on the topic. For many asylum seekers caught in this cycle of changing law, their success or failure before the agencies after the CFI had little to do with the merits or lack thereof of their individual case, but with the changing legal landscape in which they found themselves. The Biden administration has recognized the need for clarity around aspects of asylum law like this one, but has thus far failed to propose rule changes that would provide such clarity. Yet, troublingly, we now have this proposed rule being moved through on an expedited timeframe that will presumptively deny people access to asylum as a way to manage migration flows and backlogs. This leans into the most broken aspects of our asylum system and improperly places the burden for our systemic failures on asylum seekers.

a. The Proposed Rule Will Result in People Being Refouled in Violation of Law

As addressed above, the proposed rule would lead to the deportation of refugees to countries where they are at risk of persecution and torture in direct violation of the U.S. obligation of non-refoulement. The proposed rule creates a difficult to overcome presumption against asylum eligibility for refugees based on their manner of entry and/or the travel through third countries – factors that have nothing to do with the person’s underlying fear claim. As such, factors that are ultimately irrelevant to individuals’ fear claims will nonetheless be the sole reason why some individuals are denied asylum and ordered removed. This is in direct violation of the fundamental principle of non-refoulement.

Under the Trump administration’s iteration of the transit ban, Florence Project worked with clients who were improperly refouled to countries where they faced violence and persecution after failing to meet the heightened standards for reasonable fear and withholding that they were held to. As is well-documented by Human Rights First, such refoulement was a regular occurrence under the Trump administration’s transit ban and included a Honduran family who were attacked after the mother participated in political protests; a Venezuelan opposition journalist and her one-year-old child; Cuban and Nicaraguan political activists targeted by their governments for their political opinions; a gay Honduran asylum seeker who was threatened and assaulted by both the policy and the public for his sexual orientation; and a gay Nicaraguan asylum seeker living with HIV who experienced severe abuse and death threats on account of his sexual orientation, HIV status, and political opinion.
In one case, Florence Project represented a woman, “Maria,” who had been a police officer in her native Nicaragua, but began facing persecution by her fellow officers when they learned she had voted against President Ortega. Other police badly beat her at a political protest and threatened to disappear her if she failed to return to duty and arrest those opposed to President Ortega. Denied access to asylum as the result of the Trump transit ban, both the Asylum Officer and Immigration Judge agreed that her facts did not meet the heightened threshold for withholding of removal or protection under the Convention Against Torture – a more likely than not instead of a 10% likelihood of persecution – and federal courts ultimately found that they had no jurisdiction to review the propriety of that determination. As such, as a direct result of the transit ban, she was improperly subject to refoulement to Nicaragua.

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

The proposed rule places yet more limitations on asylum access, building upon expanded expedited removal procedures and fast-track credible and reasonable fear screenings, that will exclude the most vulnerable populations from seeking protection in the United States. On March 13, 2023, the Florence Project joined 93 other civil, human, and immigrant rights groups to decry this administration’s enhancement of expedited removal and the asylum processing rule. Of particular concern, is this administration’s planned tactic to remove more people by placing “fast-tracked asylum screenings withing Customs and Border Protection (CBP) detention facilities.” Under similar Trump administration programs, PACR and HARP, asylum screenings conducting in the CBP facilities showed a nearly 69% decrease in positive credible fear findings. These interviews are for many asylum seekers their sole opportunity to explain their reasons for seeking protection in the United States. CBP conditions, and warp speed credible fear screenings are unsuitable for an asylum seeker to meaningfully request asylum under our laws.

First, the proposed rule, further erodes access to protections that the INA ensures asylum seekers will receive in the name of expeditious processing at a time of exigent circumstances. However, exigent circumstances cannot justify widespread violations of due process. In addition to implementing the proposed rule’s transit and entry bans during the credible fear process, the proposed rule disposes of critical safeguards for asylum seekers who receive negative credible fear determinations. First, the proposed rule seeks to curtail asylum seekers’ access to immigration court review of any negative credible or reasonable fear determination. Second, the rule eliminates asylum seeker’s long-standing right to request USCIS to reconsider previous negative fear findings. The administration’s push to accelerate credible fear screenings requires more – not fewer – procedural protections for erroneous determinations, yet the proposed rule does just the opposite.

The proposed rule further narrows the scope of who gets IJ review over their negative credible fear determinations, limiting access to that review for only those who affirmatively request review and not those who refuse to sign or indicate if they would like review. However, based on the Florence Project’s experience, this proposal will unwittingly limit review on some of the most vulnerable individuals’ cases as we have
time and again observed cases where people who “refused to indicate” if they wanted an IJ review were in fact suffering from serious mental health conditions or were experiencing significant language barriers that the asylum officer did not catch or appreciate and such that they did not understand what they were being asked to sign. Moreover, the level of trauma and fear asylum seekers experience, especially communicating their persecution for the first time, heightens the likelihood of communication barriers and incomplete information provided at these interviews. The high stakes of the credible and reasonable fear process require automatic procedural protections, especially in the rushed system the administration envisions. Instead, this proposed rule unravels decades of regulatory protection to the review process by mandating that only an affirmative statement requesting a review is enough to trigger the review process.

Credible and reasonable review hearings are necessary to ensure the integrity of the asylum screening process. On average, over a twenty-five-year period, immigration judges have reversed around twenty-five percent of negative credible fear findings. The proposed rule’s affirmative request requirement mirrors the Trump administration’s December 11, 2020 rule. This rule, commonly referred to as the “death to asylum rule,” similarly deprived asylum seekers access to credible fear review hearings, by requiring asylum seekers to affirmatively request immigration court review of any negative findings. The Trump administration responded to critics of the provision by emphasizing the need to lessen the burden on the immigration court and reasonableness to require an affirmative request.

On May 31, 2022, the Biden administration reversed the affirmative request requirement in its 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.” The agencies’ reversion to the Trump-era requirement for asylum seekers to affirmatively request IJ review of a negative fear determination shows that this rule prioritizes efficiency over fairness. This has wide ranging consequences for asylum seekers who may not fully grasp the role of the IJ review in credible fear proceedings.

It is critical that the agencies’ err on the side of referring cases for more review hearings, rather than fewer. It is reasonable that an asylum seeker will find the phrasing, question, and concept of an IJ review hearing confusing in the initial stages of the proceeding. Referring cases that are not affirmatively declined provides critical safeguards to ensure these asylum seekers are not unfairly punished for their confusion. Given the high, life or death stakes of the credible fear process, every effort to ensure access to procedural protections like review hearings, is essential to protecting the integrity and credibility of the U.S. asylum system. More importantly, erring on the side of “yes” ensures that asylum seekers genuinely confused or unsure about the IJ review process will have access to potentially life-saving protections that the INA ensures. Language barriers, interpretation issues, mental health concerns, and simply the trauma left by persecution and torture, can impact an asylum seeker’s ability to perfectly say “yes” to an IJ review.
Second, the proposed rule seeks to eliminate decades of procedural protections for asylum seekers at the USCIS level by eliminating an asylum seeker’s ability to request USCIS reconsideration of negative credible fearing determinations. The agencies seek to entirely bar asylum seekers from requesting that USCIS reconsider negative credible fear findings in their protection claims. Instead, the agency limits the power to seek reconsideration to USCIS alone and its \textit{sua sponte} authority. However, it is unclear under the rule, when or how USCIS would \textit{sua sponte} reconsider a negative fear finding. Thus, as a practical matter, if the proposed rule were to go into effect, the reconsideration safeguard for asylum seekers would no longer exists as a meaningly protection from wrongful expedited removal. The departure from longstanding protections could bar hundreds of credible fear claims, who received wrongful negative findings.

This administration has cited to the number of people saved from wrongful removal in its 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 asylum processing rule already almost gutted asylum seekers’ right to request reconsideration of erroneous credible fear findings, limiting requests to those filed seven days after an IJ review hearing and giving asylum seekers at best a total of around 14 days from the negative findings to petition USCIS for reconsideration. The amount of time is insufficient considering that many asylum seekers are held in remote immigration detention centers, with limited access to counsel and support to defend their claim. The rule also limited an asylum seeker to one request – which is unreasonable considering the volatility of asylum law. The rapidly evolving caselaw and changing circumstances of applicants may require additional requests depending on each applicant’s unique circumstances.

However, instead of addressing the significant deficiencies in the asylum processing rule, the agencies now attempts to outright bans asylum seekers from making any reconsideration requests to USCIS. Similar to requiring asylum seekers affirmatively request IJ review hearings, the agencies further erode meaning safeguards in expedited removal. Many asylum seeker with meritorious claims will carry this burden, potentially with their lives, as they are wrongfully removed from the United States.

The real life consequences of these issues are seen in cases like that of Aalim. Aalim was initially held in an isolated detention facility in Pearsall, Texas where he had his CFI. The process was not explained to him clearly and the interpreter at his CFI interview often said that the interpreter did not understand what Aalim was trying to say, causing Aalim to doubt the accuracy of the interpretation. Without counsel, Aalim did not know how to express his concerns about the process and the asylum office issued a negative CFI decision. Aalim went through the IJ review process unrepresented, confused, and unable to submit evidence on his behalf and was later transferred to Arizona where he was able to secure representation from Florence Project staff for his RFR, months after the IJ had affirmed his CFI’s negative finding. Due to multiple transfers, Aalim lost possession of pertinent documents including his CFI transcript. This experience is common and under the proposed rule, someone like Aalim
would likely have less likelihood of even getting an IJ review, because it depends on him understanding his obligation to request such a review affirmatively despite translation issues, and would have no chance of obtaining a reinterview request at all. Under the proposed rule, a refugee like Aalim would be refouled.

c. Exceptions Do Not Cure What is Broken and Unlawful in this Proposed Rule

The proposed rule relies on several very narrow exceptions to the presumption against asylum based on transit countries or manner of entry in an attempt to distinguish this rule from previous transit and entry bans initiated by the Trump administration that were subsequently found to be unlawful. However, the limited exceptions giving rise to an opportunity to rebut are both facially insufficient to save the rule and, as a practical matter, will help few if any asylum seekers.

First, the single exemption that is likely to have widespread impact is the exemption for unaccompanied children removing them entirely from the scope of the proposed rule. However, as documented by various outlets, that reality is one of several factors that mean that this proposed rule will result in significant instances of family separation.

Second, under the proposed rule individuals who can demonstrate by a preponderance of the evidence that it was not possible to access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacles may be exempted from the asylum ban. However, the proposed rule leaves a great deal to the exercise of discretion by individual border agents and gives little guidance to officials who will need to make these calls for what should constitute preponderance of the evidence in cases such as these. This is a cause for significant concern because border patrol has a decidedly spotty history of providing meaningful language access in peoples’ best languages. In our own practice, we routinely see critical border interviews conducted in Spanish, such as those that produce the I-213 and I-867 A and B, where the individual interviewed in reality speaks little to no Spanish. Given this track record, there is little reason to have confidence in CBP’s ability to adequately screen for and exempt people from the application of the presumption due to language or literacy barriers. Moreover, the lack of guidance on what constitutes a preponderance of the evidence also undermines individual migrants and NGO efforts to understand what is actually required to rebut the presumption and how to obtain such evidence. What does seem clear is that someone’s word, even if credible, will rarely be enough alone to satisfy this requirement and, as such, the proposed rule will result in the improper refoulement of many asylum seekers.

Third, the preponderance of the evidence standard being applied to persons seeking an exemption from the asylum ban due to exigent circumstances will be nearly impossible for asylum seeker to meet due to the inherent nature of said circumstances. Someone who was previously kidnapped or raped while displaced in Mexico would not be able to pass the preponderance of evidence threshold either because they likely have no physical evidence to proffer and/or because we anticipate DHS or USCIS officers using their discretion to find that the threat to their safety no longer exists because the asylum seeker survived the rape or kidnapping and escaped that area. To be clear, we anticipate
this response, because throughout various border closures including Title 42 and Migrant Protection Protocol, we routinely saw border officers return individuals to Mexico despite having recently escaped violence and kidnapping, determining that such harm was either no longer imminent or too speculative to warrant an exception. The narrowly tailored language of the proposed rule envisions evidentiary standards that defies the reality of most displaced asylum seekers. The nature of kidnapping means kidnapping victims often do not have any sort of direct proof – they are held hostage, without access to their belongings and typically have no way to document the kidnapping occurred outside of their own testimony. Likewise, requiring victims of rape or other physical or sexual violence to provide additional evidence of the harm suffered is not only highly burdensome, but extremely revictimizing. This requirement would effectively require a rape or other violence victim who is homeless in Mexico due to U.S. border policies to first seek out medical attention in Mexico – which is incredibly difficult, costly, and fraught with discrimination, even towards other Mexicans let alone non-Mexican nationals who have no legal status nor healthcare coverage in Mexico - and then submit themselves to a potentially invasive examination just to corroborate that they suffered physical or sexual assault. The reality is that few, if any, asylum seekers will be able to satisfy the heightened burden to establish the extremely narrow grounds for exception to the rule.

Fourth, the proposed rule also creates an opportunity to rebut the presumption of asylum ineligibility in cases where the individual can establish by a preponderance of the evidence that they sought, but were formally denied asylum or other protection in a country through which the noncitizen traveled. This is an extremely narrow exception that will leave asylum seekers in unsafe conditions seeking protection in places where they may face many of the same forms of persecution they fled in their home country.

Such would be the case for people like Angel, whose case is described above, a transgender woman from Guatemala who transited through Mexico to seek asylum in the U.S. at the time of the Trump administration’s transit ban. Because Mexico is one of the most dangerous countries for transgender women, it would do Angel and people like her no good to seek protection in that country. Yet, under the language of the rule, this alone would not be sufficient reason for Angel to have failed to apply for protection in Mexico. Instead, she would have to perversely have to wait patiently in danger Mexico to navigate the CBP One application with all of its many flaws or until something sufficiently egregious occurred that it qualified her for the other limited exception based on “an imminent and extreme threat of rape, kidnapping, torture, or murder” – an exception so purposefully narrowly drawn that effectively no one will be able to establish this exception as it “cannot be speculative, based on general concerns about safety, or based on a prior threat that no longer poses an immediate threat.”

Additionally, this aspect of the proposed rule fails to account for the many ways in which asylum systems in the Americas fail asylum seekers. This includes, for example, Mexico’s asylum system refusing to even allow some Black migrants to begin the process of seeking asylum or delaying the processing of asylum applications for Black refugees. Such individuals would be unable to rebut the presumption because they never had a final adjudication and denial of their claim, but were de facto denied pre-emptively in a variety of less-formal ways.
Fifth, it is not mere speculation that the exceptions offered those who can demonstrate “exceptionally compelling circumstances” such as “an imminent and extreme threat of rape, kidnapping, torture, or murder” or “an acute medical emergency” would be interpreted very narrowly by border agents. Indeed, the Florence Project has already experienced this firsthand in recent years, when we have elevated urgent humanitarian situations to the Tucson OFO via requests for exemption from Title 42 and/or requests for humanitarian parole. From August 2021 through early December 2021, the Florence Project submitted twenty (20) requests for humanitarian parole on behalf of cases with clearly demonstrated need, including severe medical problems, high-risk pregnancy, and LGBTQ+ individuals with significant safety concerns. Nineteen (19) of the twenty requests were ignored entirely, and the one response the Florence Project received provided no articulated reasons for why the request was denied nor what factors had been considered on the “case-by-case basis” as mandated under the regulations.

Likewise, the experience of one of our partner organizations in Nogales demonstrates this sad reality to be true. In that case, a young man who – in addition to fleeing harm in his country of origin and seeking asylum with his family – was suffering organ failure had his case escalated to the Tucson Office of Field Operations (OFO), requesting that the man receive an urgent exemption from Title 42 and/or humanitarian parole. Despite explaining that the exigent medical circumstances meant the family could not wait for processing through the CBPOne app, their request went unanswered and, sadly, the young man passed away while awaiting a response.

Finally, as was demonstrated by the first time a transit ban like this was in place, border officers, asylum officers, and immigration judges understand the clear subtext of deterrence that is the foundation of this proposed rule and are quick to err on the side of denial.

For example, in the case of Maria, despite having been beaten and threatened with enforced disappearance from her fellow police officers because of her political opinion in Nicaragua, both the asylum officer and Immigration Judge summarily concluded that she had not shown a reasonable probability of persecution or torture in Nicaragua. The federal courts lacked jurisdiction to review the merits of that analysis. This demonstrates how individuals with strong, facially valid claims will also be swept up by the proposed rule with little to no recourse to correct erroneous decisions.

Additionally, the lack of training – or perhaps the natural confusion that occurs when the proposed rule is at direct cross-purposes with the clear statutory language and Congressional intent – results in poor screening of applicants to determine whether they have applied for asylum in a transit country. In the last iteration, there were inconsistencies that led to uneven and unjust results for asylum seekers. Due to the serious nature of an asylum claim, a mistake in screening can lead to unnecessary detention or worse, refoulment to the dangers they were fleeing.

For example, “Pedro” fled from Nicaragua with his wife and sister. When the family crossed into Mexico, they spoke to Mexican immigration officials and applied for humanitarian visas and asylum. Pedro and his family members tried to hire a private
lawyer, who extorted money from them. They found the process confusing and rushed because they did not receive adequate information from the authorities nor the attorney. Neither Pedro nor his family members understood what they had applied for. They received temporary, one-year humanitarian visas in Mexico, but did not get asylum. Later, they presented at a Port of Entry to request asylum in the United States. The transit ban was applied, but the family members were all referred to an Immigration Judge for withholding only. However, the judge failed to screen Pedro and his sister’s cases appropriately to identify that they had applied for asylum in Mexico. A few clarifying questions would have shown that they indeed had applied and were denied asylum in Mexico and were thus not subject to the Transit Ban. The IJ wrongly applied the Transit Ban and denied their asylum applications. Even worse, the same IJ failed to properly screen the wife for eligibility and blamed her for her confusion over whether she had applied for asylum in Mexico or not, ultimately finding that she was not credible. The lack of consistency in screening for Transit Ban applicability resulted in months of unnecessary detention and hardship for a family that was not even supposed to be subject to it. If the new Transit Ban is implemented, we will see the same poor screening, understanding, and implementation across EOIR thus unfairly impacting thousands.

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

The United States law has requirements for safe third country agreements, yet the proposed rule would require many refugees to request asylum in transit countries that do not meet those requirements. Indeed, many of the transit countries have the same unsafe conditions of the countries the refugees are fleeing from. The Florence Project collected over 70 unique stories of unsafe conditions in third countries from asylum seekers arriving at the border. This number is particularly striking because of the limited 30-day time frame our team had to collect said stories, and because they come from a singular port of entry (Nogales).

Mexico, for example, would be considered a transit country for anyone requesting asylum at our southern border who is not a Mexican national. Migrants and asylum seekers have already been stranded in unsafe conditions in Mexico for the past three years due to Title 42. In that time period alone, there have been over 13,000 reported attacks against asylum seekers and refugees. Due to inequitable access to a fair asylum system, the proposed rule’s demand that refugees request asylum in Mexico could risk their deportation back to danger.

For example, “Eduardo”, his wife and their two children were kidnapped while travelling through Mexico. The family sought help and information from Mexican immigration authorities, who instructed the family to go to a shelter in Nuevo Laredo. When the family arrived to that shelter, they were held hostage and separated. While in captivity, the family faced threats and abuse. Afraid for their lives, Eduardo told their kidnappers that they wanted to leave the “shelter”. The people holding them hostage responded that, in order to leave, they would have to pay the exorbitant amount of 15,000 Mexican pesos (approximately $816.00 U.S. dollars) per person. For a family of
four, this amounted to 60,000 Mexican pesos (approximately $3,267 U.S. dollars). The family encountered both authorities and shelter services in a third country, yet still experienced violence and extortion.

Reports of the lack of security for asylum seekers in Mexico have been widespread for decades, so the government should be well aware that Mexico cannot serve as a safe transit country. In 2015, “Wilmer” was in Mexico after fleeing Guatemala due to fear. He was able to obtain a humanitarian visa for transit purposes only, with no permanent status conferred. While in Mexico, he was assaulted by Mexican immigration officials. The officials undressed him, stole his belongings, and left him naked and alone. He was later deported from Mexico back to danger.

El Salvador, Honduras, and Guatemala also do not have safe third country agreements with the U.S., nor do they have asylum systems that would meet the requirements for one. These countries are unsafe for many asylum seekers passing through them, especially for women, LGBTQIA+ people, and Black migrants. Members of vulnerable groups are at risk of violence due to the same immutable characteristics that they were persecuted for in their home country. Even when victims of gender-based violence are granted asylum in these countries, there is ample evidence that they receive insufficient protection from further harm.

“Adolfo”, a Cuban man, encountered violence and harm in several different transit countries before making it to the United States border. First, he was abused by military officials in Panama and moved on to Nicaragua out of fear. There, he was robbed and fled to Guatemala. In Guatemala, he faced extortion by the police and was unable to find safety. He then moved to Mexico, where he was the victim of fraud by a lawyer selling a permit with no validity. He travelled through four transit countries and was unsafe in each of them.

The countries of transit that asylum seekers pass through to reach the southern border of the United States are highly dangerous for women and LGBTQIA+ asylum seekers. However, we have encountered numerous reports of members of these vulnerable groups being refused at the U.S. border or expelled back to unsafe conditions without their asylum claim being heard. “Miriam” fled for her life from Guatemala and was kidnapped in Mexico while 36 weeks pregnant. She managed to escape her kidnappers and, in the process of escaping, was unknowingly driven into the United States without inspection. When she encountered U.S. immigration officials, she was expelled back to Mexico where her kidnappers remained. “Juana”, a lesbian woman from Guatemala, fled her country after experiencing persecution due to her sexuality. She was denied entry after seeking asylum at the Tijuana port of entry. Desperate to find safety, she entered the United States but faced severe dehydration in the desert. Fearing for her life, she called 911. At the hospital, she expressed fear of return to her home country due to her identity as a lesbian. Juana asked for help numerous times. Despite her fear of return home due to past persecution, no official would speak to her to hear her claim. After just a few hours at the hospital, she was placed on a bus and expelled back to Mexico.

“Estefania” is a trans woman from Guatemala who left her home country fearing for her life due to her gender identity. She requested asylum in Mexico and was told by
authorities that they would not help. Estefania reported that the Mexican police gathered a number of trans women, beat them, stole their belongings and deported them back to danger. One of the trans women was murdered a short time after being returned to Guatemala. Estefania was forced into sex work upon her return.

These stories serve to highlight the serious danger asylum seekers face in transit countries, danger that the proposed rule will only serve to heighten. Lengthening the amount of time that asylum seekers must spend in unsafe transit countries exposes them risk of further harm, violence, and even death. From a legal standpoint, the asylum systems in the countries highlighted cannot sufficiently process claims for the number of asylum seekers flowing through them and provide just outcomes. The proposed rule not only circumvents the law in forcing refugees to seek asylum in these countries, but it will also have grave moral consequences.

VII. Proposed Rule Would Fuel Family Separation

The proposed rule will fuel family separation in a number of critical ways.

a. The Proposed Rule’s Reliance on the Availability of Other Forms of Legal Relief Disregards That Those Forms of Relief Will Force Families Apart

Without meaningful access to asylum, many refugees will be left to hope for legal relief in the forms of Withholding of Removal and/or protection under the Convention Against Torture. Besides the fact that Withholding of Removal does not afford the same protections as asylum, it also would force more families apart.

Withholding of Removal does not confer permanent status or a path to citizenship, which leaves the person in constant legal limbo under threat of deportation. Because these are refugees with credible fear claims, a permanent order of removal means that at any time they could be deported back to the countries where their lives were threatened or persecuted. This form of legal relief also does not allow refugees to petition for family members or travel internationally, leaving them permanently separated from loved ones who remain in other countries.

Moreover, under Withholding of Removal, families are unable to request that their cases be adjudicated together like they would be able to do with asylum cases. When cases move through the legal system separately, they are more likely to have uneven results for different family members. Families can easily be separated when some members are deported back to danger while others win protection from removal. The family members that remain in the U.S. in this case are left with no ability to petition for their family members or to reunify with them through travel.

The proposed rule would not be the first transit ban implemented in the United States, and the stories of families who faced permanent separation under the Trump administration’s transit ban should serve as a warning of the harm that the proposed rule could cause.
b. CBPOne Implementation Has Already Resulted In Family Separation

The scheduling feature of the CBPOne application makes it difficult and in many ways discriminates against families trying to schedule an appointment to present together. This is a matter of basic logistics in that the more people you have to schedule in, the harder it will be to get them all scheduled for the same day. Limited informal exceptions allowing people to present as a family so long as one member had an appointment have been discontinued. As a result, families are faced with the impossible choice between separating or keeping their children in dangerous conditions. Some families have already been separated as a result.

The Florence Project Border Action Team has already encountered families facing this unimaginable situation. In one instance, a family of four, two parents and two children, created different profiles on the CBPOne Application in order to apply for Title 42 exemptions. The family was informed that other families had success when only one family member scheduled the appointment, and that officers at the border were allowing entire family units to enter the United States. When one of the members of this family was successful in obtaining an appointment for himself, he and his family traveled to Nogales, MX to present at the border. When they arrived and presented themselves, they were informed that only the family member who obtained the appointment could come. The officer turned away his wife and two children and told them they could not continue. As a result, the family had to decide whether to remain together in violent, unsafe conditions or to separate and allow one family member to move forward. Their difficult situation is the result of unclear information and poor application design. The proposed rule is contributing to a harrowing history of families being separated by the United States immigration system.

VIII. Conclusion

For all of the reasons stated above, the proposed rule is in direct contravention of U.S. asylum law and international treaties. It should be withdrawn in its entirety. The Florence Project welcomes the opportunity to provide additional comments if the timeframe is extended and is equally open to discussing this Comment with you further.

Submitted on behalf of the Florence Immigrant & Refugee Rights Project on March 27, 2023, by

/s/
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