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Via Federal e-Rulemaking Portal
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Re: Circumvention of Lawful Pathways
88 Fed. Reg. 11,704 (Feb. 23, 2023)
OMB Control Number 1651-0140
Doc. No. 2023-03718

Dear Daniel Delgado and Lauren Adler Reid,

Brooklyn Defender Services ("BDS") submits this comment in response to Circumvention of Lawful Pathways, a Notice of Proposed Rule ("NPRM") published on February 23, 2023 by the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ") (collectively, "the Departments"). For the reasons set forth below, BDS firmly opposes the NPRM in its entirety. If implemented, the NPRM would eviscerate the right to asylum by imposing unlawful manner of entry and transit bans on refugees entering the United States via the southwest border. These measures revive unlawful and racist plans created by the Trump administration and betray the Biden administration's commitment to strengthening the US asylum system. BDS urges the Departments to rescind the unlawful NPRM in its entirety.

BDS is a public defense office in Brooklyn, New York, that provides multi-disciplinary and client-centered criminal, family, and immigration defense, and civil legal services, along with social work and advocacy support. BDS represents low-income people in nearly 22,000 criminal, family, civil, and immigration proceedings each year. Since 2009, BDS has counseled, advised, or represented more than 16,000 clients in immigration matters, including deportation defense, affirmative applications, advisals, and immigration consequence consultations in Brooklyn's criminal court system. About a quarter of BDS' criminal defense clients are foreign-born, roughly half of whom are not naturalized citizens and therefore are at risk of losing the opportunity to obtain lawful immigration status as a result of criminal or family defense cases. Our criminal-immigration specialists provide support and expertise on thousands of such cases. In addition, BDS is one of three New York Immigrant Family Unity Project ("NYIFUP") providers and has represented more than 1,700 people in detained deportation proceedings since the inception of the program in 2013. BDS represents noncitizens in non-detained removal proceedings in New York's

immigration courts, in petitions for review before the U.S. Circuit Court of Appeals for the Second and Third Circuits, and in writs of mandamus and habeas corpus in U.S. district courts.

I. Overview of Proposed Rule

The NPRM proposes to unlawfully ban refugees from asylum protection based on manner of entry into the United States and transit through other countries. It does so through a presumption of non-eligibility for sweeping categories of people seeking refuge in the United States. According to the NPRM, all people entering the United States via the southwest border who are not Mexican nationals will be presumptively ineligible for asylum unless: (1) they are preapproved nationals of the five countries subject the administration's parole programs (Cuba, Haiti, Nicaragua, Venezuela, and Ukraine); (2) they have preregistered at a port of entry using the CBP One application; or (3) they have requested and failed to obtain asylum in a transit country.[1] The presumption would also be rebuttable through a showing of "exceptionally compelling circumstances by a preponderance of the evidence." As described below, these restrictions are unmistakable violations of U.S. asylum law and of the United States' commitments under international refugee law.[2]

The ban would apply to anyone physically present in the United States after crossing the southwest border, "without regard to whether the noncitizen has been inspected by an immigration officer, evaded inspection by an immigration officer, or was free from official restraint or surveillance."[3] Therefore, even people not in removal proceedings who apply affirmatively for asylum would still be subject to a presumption of ineligibility.

In addition, many refugees subject to the bans will not have the opportunity to a full removal proceeding as they will be subject to expedited removal proceedings following apprehension near the southwest border or presentation at a port of entry. Through these already flawed proceedings,[4] the government is able to deport noncitizens without a hearing unless they express a fear of return and show *either* a significant possibility of establishing eligibility for asylum in a "credible fear interview" *or*, if ineligible for asylum, the higher standard of a reasonable fear of persecution or torture in a "reasonable fear interview."[5]

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[1] 88 Fed. Reg. 11,723.

[2] *See infra* Part II.G.

[3] 88 Fed. Reg. 11,723.

[4] *See infra* Part II.G.3.ii; *see also, e.g.*, American Civil Liberties Union 63, American Exile: Rapid Deportations That Bypass the Courtroom (2014) (describing erroneous expedited removal of Mexican citizen who had lived in the United States for 14 years); *id*. at 38 (recounting case of a Guatemalan citizen and mother of four U.S. citizen children who was removed under an expedited removal order even though she told the CBP officers that she was afraid to be deported to Guatemala, where her father had been murdered and her mother had been the target of extortion by gangs); *id*. at 39 (describing 22-year-old woman who fled domestic violence removed to El Salvador without being provided a credible fear interview).

[5] *See generally* 8 U.S.C. § 1125(b); 8 C.F.R. § 253.3.

Under the NPRM, asylum officers first would determine whether the presumption of ineligibility applies and, if so, whether the noncitizen has rebutted it.[6] Those who fail would automatically be subjected to the higher reasonable fear standard and would be eligible only for the lesser forms of relief known as withholding of removal and protection under the Convention Against Torture ("CAT").[7] Refugees barred from applying for asylum under the NPRM would generally have no opportunity to gather evidence and prepare arguments to rebut the presumption of ineligibility. While a negative determination could be reviewed *de novo* by an immigration judge, the NPRM requires noncitizens to affirmatively request such review, rather than being asked by an officer if they want administrative review by an immigration judge.[8]

According to the NPRM, the Departments expect that their asylum bans will push refugees to avail themselves of several "lawful pathways" the Departments put forward.[9] It is, however, doubtful that these pathways provide anything like the protection of the United States asylum system or respond to the urgent needs of people seeking persecution.[10]

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The NPRM's deficiencies are myriad. Among other issues discussed below, it is a revival of previously enjoined and inhumane policies made by the Trump administration to further its xenophobic and racist platform;[11] it exposes refugees to extreme physical danger and contravenes U.S. law and international obligations; and it is based on unsupported and erroneous assumptions about the efficacy of immigration deterrence, the safety of transit countries, and the usability of a Customs and Border Patrol's ("CBP") online application.

The Departments must rescind the NPRM in its entirety and recommit to strengthening the statutory right of refugees to apply for asylum in the United States regardless of manner and place of entry or their path to the United States.

II. Analysis and Recommendations

A. The 30-day comment period is insufficient for a rule of the NPRM's magnitude.

Despite the magnitude of their proposed changes to asylum law, the Departments have only provided 30 days for public comment on the NPRM. This abbreviated comment period effectively

[6] 88 Fed. Reg. 11,724-5.

[7] 88 Fed. Reg. 11,725.

[8] *Id*.

[9] *See, e.g.*, 88 Fed. Reg. 11,728.

[10] *See infra* Part II.C.

[11] *See, e.g.*, Michele Goodwin and Erwin Chemerinsky, *The Trump Administration: Immigration, Racism, and COVID-19*, 169 U. PENN. L.R. 313, 318 (2021) ("[W]e raise alarm about the unconstitutional legal policies that flow from racist ideology, manifesting harmful racial ideologies into law.")

denies the public its right to meaningfully comment on the NPRM,[12] including, for example, to discuss the NPRM with other stakeholders or with clients whose family members may be impacted. A minimum comment period of 60 days is necessary to allow the public to comment on the NPRM's attempt to create a wholesale reordering of asylum at the border in a way that violates U.S. and international law.

As with much in the NPRM, the Departments' decision to truncate the comment period is reminiscent of the practices of the previous administration. In *Centro de la Raza v. EOIR*, for example, the District Court for the Northern District of California found that the previous administration violated the Administrative Procedures Act ("APA") by providing only 30 days to comment on a rule that would have significantly changed immigration court procedures.[13] In addition to highlighting the magnitude of the rule, the court noted that, as here, the Departments "acknowledged that the Rule constituted a 'significant regulatory action,' and stated that they 'drafted the rule consistent with the principles of Executive Orders 12866 and 13563.'"[14] Those executive orders, in turn, state that "a comment period . . . should generally be at least 60 days."[15] The court found it "curious" that EOIR had not explained its departure from those executive orders despite stating that it had complied with them.

The situation is no different here. In discussing their compliance with the aforementioned executive orders, the Departments do not explain why this NPRM, with its massive changes to the treatment of refugees at the southwest border, should deviate from recommended procedures for significant regulatory actions. Moreover, the Departments invoke the impending end of the Title 42 public health order, which allows DHS to expel arriving noncitizens at the border, as a reason for rapid action.[16] But they neglect to mention that the administration has been seeking to end Title 42 for the past year. Similarly, they say that the resolution of litigation seeking to end Title 42 would create chaos at the border, but omit that the litigation has been pending for over one year. They also discuss the administration's decision to end the Covid-19 public health emergency as if it were an external factor that they could not have anticipated.[17]

Because the possibility of Title 42's end was clearly foreseeable, the Departments have had ample time to craft their policy and provide an appropriate amount of time for public comment.[18] The Departments should withdraw the NPRM in its entirety and instead pursue a

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[12] 5 U.S.C. § 553(b), (c); *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (noting that the requirement under the APA is for a "meaningful opportunity" for comment).

[13] 524 F. Supp. 3d 919, 954-56 (N.D. Cal. 2021).

[14] *Id*. at 955 (quoting 85. Fed Reg. 81,463) (cleaned up).

[15] Exec. Order No. 13,563, 76 Fed. Reg. 3821, 2821-22 (Jan. 18, 2011); *see also* Exec. Order. 12866, 58 Fed. Reg. 51,735 § 6(a)(1) (Oct. 4 1993).

[16] *See* 88 Fed. Reg. 1170.

[17] *See id*.

[18] *Cf. Centro de la Raza*, 524 F. Supp. 3d at 955 ("DOJ did not identify any exigent circumstances requiring a compressed comment period.").

lawful and humane asylum policy. At a minimum, should the Departments continue their course to circumvent U.S. law and treaty obligations, they must provide at least 60 days to meet their obligations under the APA and provide the public sufficient time to provide comment on its catastrophic effects for refugees.

B. The NPRM revives the Trump administration's cruel and illegal asylum bans and abandons the idea of fair and humane asylum procedures.

The Departments' proposed restrictions on asylum based on manner of entry and transit are alarmingly similar to the bans that the Trump administration sought to implement. In 2018, the Trump administration issued an interim final rule that categorically barred asylum for any applicant who entered the United States via the southwest border outside of a port of entry.[19] (The Departments refer to this regulation as the "Proclamation Bar.") In 2019, the administration issued an interim final rule that would deny asylum to anyone crossing the southwest border who had not applied for humanitarian protection in a transit country, was not a victim of trafficking, or only transited through countries that were not parties to the relevant United Nations conventions.[20] (The Departments refer to this regulation as the "TCT ban" or "transit ban.") Both regulations were repeatedly enjoined for violating U.S. asylum law.)[21]

During the approximately one year in which the transit ban was in effect, it inflicted immense hardship on refugees deported to unsafe countries, on families separated at the border, and on people subject to prolonged detention. Among the documented deportations due to the transit ban were those of a Venezuelan opposition journalist and her one-year-old baby, a Cuban asylum seeker persecuted and subjected to forced labor for his political activity, a Nicaraguan student shot during an antigovernment protest, and a gay Honduran threatened and assaulted for his sexual orientation.[22]

The Departments try repeatedly to distinguish their proposal from the Trump-era bans by saying that they are merely creating a rebuttable presumption of ineligibility, rather than categorical bars.[23] The current proposal would nonetheless bar scores of refugees from asylum eligibility, and, as discussed *infra* Part II.G, rebuttal does not save the bans from violating the asylum statute or the United States' commitments under international law.

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[19] *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018); Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661, 57,663 (Nov. 9, 2018).

[20] *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019).

[21] *See E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2020) (*"East Bay I"*); *E. Bay Sanctuary Covenant v. Barr*, 519 F. Supp. 3d 663 (N.D. Cal. 2021) (*"East Bay II"*); *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021).

[22] *See* Asylum Denied, Families Divided 6-7, Human Rights First (2019), https://humanrightsfirst.org/wp-content/uploads/2022/10/AsylumDeniedFamiliesDivided.pdf.

[23] *See* 88 Fed. Reg. 11,735, 11,736, 11,739, 11,740.

Regardless, the Departments' attempt to place such extreme restrictions on the right to asylum is irredeemably misguided. The Departments support their authority to make these restrictions on the basis of the alleged breadth of their discretion and by interpreting the asylum statute as narrowly as possible. In doing so, they give the impression that they hope to provide persecuted people the meagerest protection they can. As BDS has learned in hundreds of asylum cases, people seeking refuge in the United States need *more* avenues for protection and *more* safeguards to ensure that their claims are fully and fairly adjudicated. Far from burdening the country, asylees enrich the United States and contribute to the vibrancy of countless communities across the country.

Early on, it appeared that the Biden administration understood the need to welcome and protect people fleeing persecution. As a candidate, President Biden campaigned on *not* "denying asylum to people fleeing persecution and violence"[24] and on reversing President Trump's asylum restriction.[25] In Executive Order 14,010, President Biden pledged to "restore and strengthen our own asylum system, which has been badly damaged by policies enacted over the last 4 years that contravened our values and caused needless suffering."[26] While President Biden did mention "enhanc[ing] lawful pathways" as part of a comprehensive policy platform, it is dismaying that his administration has now abandoned one half of this formula and chosen instead what the press has accurately called "a Trump-style plan"[27] and an "embrace of Trumpian border policies."[28] The administration's plan is also one that the United Nations High Commissioner for Refugees ("UNHCR") has warned is "not in line with refugee law standards" because it "establish[es] a link between [the expansion] of safe and legal pathways" and the right to asylum.[29]

The Departments are completely wrong to revive the inhumane and illegal practices of the Trump administration. They must rescind the NPRM in its entirety and renew their commitment to a lawful, just, and compassionate asylum system.

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[24] Biden Harris, The Biden Plan for Securing Our Values as Nation of Immigrants, https://joebiden.com/immigration/#, last accessed March 21, 2023.

[25] Elena Moore, *Trump's and Biden's Plans On Immigration*, NPR (Oct. 16, 2020), https://www.npr.org/2020/10/16/919258401/trumps-and-biden-s-plans-on-immigration.

[26] Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 2, 2021).

[27] *Biden unveils Trump-style plan to deter asylum seekers at Mexico border*, THE GUARDIAN (Feb. 21, 2023), https://www.theguardian.com/us-news/2023/feb/21/us-mexico-border-immigration-joe-biden-donald-trump.

[28] Nicole Narea, *How Biden came to embrace Trumpian border policies*, VOX (Feb. 22, 2023), https://www.vox.com/policy/2023/2/22/23610849/biden-border-asylum-app-transit.

[29] *New US border measures 'not in line with international standards', warns UNHCR*, UN NEWS (Jan. 6, 2023), https://news.un.org/en/story/2023/01/1132247.

C. The Departments do not show that implementing a rebuttable presumption of ineligibility would discourage refugees from seeking protection in the United States.

The Departments' primary justification for the new asylum restrictions is the need to reduce "border encounters, [which] could rise, and potentially rise dramatically . . . subsequent to the lifting of the Title 42 public health Order."[30] Even if, *arguendo*, this were an acceptable reason to broadly deny access to asylum—which it is not—the Departments have not provided adequate evidence for their assertion that the proposed restrictions will "deter" refugees from arriving at the southwest border.

The Departments' estimation of the number of border encounters it expects when Title 42 is lifted is critical to its justification of the NPRM. The Departments cite a "DHS Office Immigration Statistics planning model [that] assumes that, without a meaningful policy change, border encounters could rise, and potentially rise dramatically—up to as high as 13,000 a day."[31] The Departments aver that DHS does not have the capacity to process "migratory flows of this magnitude" and must therefore take immediate action.[32] While the Departments' footnotes includes a reference to "DHS SWB Encounter Planning Model generated January 6, 2023,"[33] there is no link to that model and it does not appear on a search of DHS' website. Without more information on the model (such as methodology, data sources, and alternative figures), the public is unable to evaluate a piece of data that underpins the Departments' supposed need for the NPRM.

Moreover, the Departments' own data shows that Title 42—which allows the summary expulsion of refugees—has not deterred people from seeking refuge by crossing the southwest border.[34] Similarly, the implementation of expedited removal in 1997 was not correlated with a drop in apprehensions of people who crossed the southwest border without authorization.[35] It was, however, associated with a drop in asylum applications,[36] suggesting that a primary effect of expedited removal was to deny asylum to people apprehended along the southwest border whether or not they were eligible. There is also no correlation between the previous restrictions on asylum—the ban on applications filed after one year from entry to the United States, the safe third country bar, or firm resettlement, for example—and a rise or drop in apprehensions.

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[30] 88 Fed. Reg. 11712.

[31] 88 Fed. Reg. 11,713.

[32] *Id*.

[33] *Id*. n.76.

[34] *See, e.g.*, Fed. Reg. 11,710.

[35] *See* U.S. Border Patrol, Southwest Border Sectors – Total Illegal Alien Apprehension By Fiscal Year (1960-2018), https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-apps-fy1960-fy2018.pdf, last accessed March 14, 2023.

[36] *See* 2003 Yearbook of Immigration Statistics 56, Office of Immigration Statistics (2004), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2003.pdf.

As discussed throughout this comment, there are many compelling moral, policy, and legal reasons to reject the Departments' proposal. The Departments' failure to provide substantial evidence that the NPRM will accomplish the goals they profess is an independent reason that it must be rejected.

D. The Departments obfuscate or fail to address the grave humanitarian consequences of their asylum bans.

1. The Departments incorrectly vouch for the safety of transit countries that cannot adequately protect refugees.

The Departments claim that there is no issue in requiring refugees to first apply for and be denied asylum in a transit country because the most common transit countries have become safe places for asylum seekers.[37] The Departments ignore significant evidence that these countries do not offer refugees safety and protection comparable to the United States.

For example, the Departments refer to Colombia as "one of the leaders in the Western Hemisphere—and the world—in its response to the unprecedented surge in irregular migration from Venezuela."[38] In fact, 40 percent of Venezuelan women in Colombia reported being victims of both psychological and physical violence between 2020 and 2022.[39] Moreover, Colombia continues to suffer from chronic internal displacement, which affected 61,396 people in 2022.[40]

In Mexico, too, another country whose humanitarian record the Departments tout, the reality is much grimmer. Human Rights First, for example, documented over 13,480 reports of violence against asylum seekers in Mexico between January 2021 and December 2022.[41] These include the rape of a Guatemalan trans woman by Mexican police after she was denied entry to the United States and a 13-year-old Venezuelan child abducted at gunpoint after being expelled under Title 42.[42] Funding per refugee status applicant in Mexico fell from approximately $1,800 in 2011 to just $17 in 2021.[43] Asylum seekers in Mexico also reported in 2021 and 2022 that

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[37] *See* 88 Fed. Reg. 11,720.

[38] 88 Fed. Reg. 11,722.

[39] Everado Esquivel, For Venezuelan women, gender-based violence is a widespread risk at home and abroad, warns IRC, International Rescue Committee (Nov. 25, 2022), https://www.rescue.org/press-release/venezuelan-women-gender-based-violence-widespread-risk-home-and-abroad-warns-irc.

[40] Internal Displacement/Colombia, UNHCR (Dec. 2022), https://reporting.unhcr.org/document/4248.

[41] Human Rights Stain, Public Health Farce 4, Human Rights First (2022), https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf.

[42] *See id*.

[43] *See* Mexico: Asylum Seekers Face Abuses at Southern Border, Human Rights First (2022), https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border.

immigration agents tried to dissuade them from applying for refugee status or turned them away at the southern border of Mexico.[44]

In other Western Hemisphere transit countries, the U.S. Department of State is itself a source for information on the inadequacy of asylum procedures. In the NPRM, the Departments claim, for example, that "the Government of Guatemala has taken key steps to continue to develop its asylum system."[45] Their colleagues at the Department of State, however, state in their latest country report that "identification and referral mechanisms for asylum seekers were inadequate" and that "there continued to be gaps and lack of clarity in the procedures for implementing the [asylum] framework."[46] In Honduras, a transit country the Departments do not even address, the Department of State says that the asylum system is "nascent" and that "asylum seekers with pending cases were vulnerable to abuse and sexual exploitation."[47]

The Departments simply ignore the reality that transit countries are dangerous for asylum seekers and do not offer adequate protection. Their revival of the Trump-era transit ban is therefore arbitrary and lacking support in substantial evidence.

2. The Departments do not address the likelihood that the NPRM will lead to mass deportations, leave families separated, and deprive refugees of a path to citizenship.

The Departments do not adequately address the consequences of the NPRM in terms of the conditions under which refugees will be deported or the otherwise precarious status of people barred from asylum under the proposed bans.

To begin—as discussed *infra* Part II.G.3.ii—the constraints of the expedited removal process and of credible fear screenings make it almost certain that vast numbers of refugees will face summary removal from the United States if the NPRM is implemented. Language barriers, abusive and dangerous conditions of confinement, acute trauma, and lack of knowledge of the complexities of both existing asylum law and the new presumption would all contribute to making it challenging for asylum seekers to overcome the presumptions in initial screenings. Just as occurred when the Trump ban was in effect and during Title 42, these mass deportations at the border will unlawfully put refugees in harm's way and endanger their lives.

The Departments offer the possibility of withholding of removal or protection under the CAT as alternative forms of protection for people denied asylum under the NPRM. However,

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[44] *See id*. ("Some said immigration agents tried to dissuade them from applying for refugee status and pressured them to agree to voluntary return, even when they said they would be at risk of violence and persecution in their home countries.").

[45] 88 Fed. Reg. 11,721.

[46] 2021 Country Reports on Human Rights Practices: Guatemala, Department of State (2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/guatemala/.

[47] 2021 Country Reports on Human Rights Practices: Guatemala, Department of State (2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/honduras/.

withholding of removal and CAT are not replacements for people with a valid asylum claim. First, both require applicants to meet a higher standard of proof in order to receive protection. Moreover, neither is a permanent status, nor do they provide definitive relief from deportation or a pathway to permanent residence or citizenship. BDS represents many people who seek withholding of removal or CAT because of statutory asylum restrictions. Those who are successful live with the stress and precarity of knowing how thin their protection from deportation is. Unable to request derivative status for their family members, they also face the possibility of permanent separation and worry for the safety of loved ones who could not escape persecution or torture.

It is unfair and arbitrary to subject refugees to a higher standard of proof and an inferior form of relief based on factors unrelated to the strength of their claim or even to their statutory eligibility for asylum.

The Departments do not adequately address the likelihood that the NPRM will result in large-scale deportations of people with valid asylum claims or that people with such claims will never have access the protection they deserve.

E. CBP One is a cumbersome and inaccessible platform that cannot be trusted to facilitate appointments at ports of entry.

Under the NPRM, the only way refugees can request asylum is by prescheduling an appointment at a port of entry through the CBP One app. Because of the app's deficiencies and the uncertainty of DHS' expansion plans for it, this restriction will further limit the number of refugees able to exercise their right to apply for asylum.

CBP One is and will remain inaccessible to many asylum seekers. The app requires the use of a working smartphone connected to a cellular network or Wi-Fi, which a significant number of asylum seekers do not have. The Departments acknowledge this "access concern," but provide only a vague assurance that an "ongoing and serious obstacle" will overcome the presumption of ineligibility created when a refugee does not use the app.[48] It is alarming that CBP agents would have discretion to turn away refugees without a smartphone, leaving them vulnerable to victimization as they try to access the app in Mexico. Additionally, the app does not clearly identify the option to schedule an appointment at a port of entry (confusingly, users must press an icon labeled "Traveler"), features many other unrelated services, and requires multiple login and authentication steps.

Furthermore, the app is available in only three languages: English, Spanish, and Haitian Creole.[49] It is completely inaccessible to refugees who cannot read. The Departments do not indicate any plan to add new language capabilities. Many refugees BDS has represented, including indigenous people from Central America, may have basic communication skills in English or Spanish, but cannot read or write proficiently in those languages, and are instead fluent in

[48] 88 Fed. Reg. 11,720.

[49] *See* Asylum Processing at the U.S.-Mexico Border: February 2023 1, Strauss Center for International Security and Law (2023), https://www.strausscenter.org/wp-content/uploads/Feb_2023_Asylum_Processing.pdf.

indigenous languages. CBP agents and asylum officers will likely wrongly conclude that people in this position do not have a "language barrier" that would exempt them the requirement to use the app.

The app also discriminates against Black refugees because its facial recognition system rejects images of people with darker skin tones, a well-documented problem in facial recognition technologies that the Departments have full knowledge of, but do not address.[50]

Even if refugees have access to the app, appointment slots are extremely limited and inadequate for the number of people *already* trying to book an appointment. In February 2023, there were a total of approximately 500 unique appointments per day (with one appointment for one person), and thousands of people with pending appointments were seeking shelter in Mexican border cities.[51] The Departments say that "CBP will, upon the lifting of the Title 42 public health Order, expand access to the CBP One app."[52] They provide no details on their expansion plans, including how many appointments will be available and what new information the app—which does not currently ask about intent to apply for asylum[53]—will solicit. Without any information beyond the existence of a goal to expand CBP One's use, the pubic cannot meaningfully comment on the Departments' expansion plan for CBP One, a central component of the processing scheme they propose.

Requiring asylum seekers to schedule an appointment through CBP One, often weeks or months ahead of time, has already resulted in horrific violence, including the murder of a 17 year-old Cuban child while he was waiting for weeks for his appointment.[54] A Venezuelan family unable to secure an appointment at a port of entry near them in Piedras Negras and forced to travel over 1,200 miles to another port of entry for an appointment was kidnapped, tortured, and extorted by a criminal group while traveling to their appointment. After 20 days, their abductors blindfolded them and brought them to the U.S.-Mexico border, threatening to murder them if they did not cross. After crossing, the family tried to explain to Border Patrol that they had been kidnapped and forced to cross, but agents told them they were criminals for crossing illegally and expelled them back to Mexico.[55] Women, LGBTQI+, and survivors of gender-based violence ("GBV") will be

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[50] *See, e.g.*, Melissa del Bosque, *Facial recognition bias frustrates Black asylum applicants to US, advocates say*, THE GUARDIAN (Feb. 8, 2023), https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias.

[51] Strauss Center, *supra* n.51, at 4-9.

[52] 88 Fed. Reg. 11,729.

[53] Jack Herrera, *Fleeing for Your Life? There's an App for That.*, TEXAS MONTHLY (Mar. 2, 2023), https://www.texasmonthly.com/news-politics/cbp-app-asylum-biden-administration/.

[54] *See id*.

[55] *See* @ReichlinMelnick, TWITTER (Mar. 2, 2023) https://twitter.com/ReichlinMelnick/status/1631400369266872322.

especially vulnerable to harm.[56] The Departments completely ignore these well-documented dangers, an extremely important aspect of the problem they seek to address.[57]

It is alarming the Departments would allow CBP One—an inaccessible and cumbersome platform with long wait times—to play such a central role in determining eligibility for asylum. The Departments' reliance on the platform demonstrates once more how deeply flawed, poorly considered, and dangerous their proposal is.

F. The asylum bans would disparately harm Black, brown, and indigenous asylum seekers and discriminate based on national origin.

The policies within the NPRM will have a disparate on asylum on refugees of color and on refugees from Latin America, the Caribbean, and Africa.

The proposed restrictions apply only to people who seek asylum at the southwestern border, where the vast majority of asylum seekers are people of color and people from Latin American and the Caribbean countries.[58] It does not apply to people arriving by land at the northern border, by sea, or by plane (where most asylum seekers are traveling with a visa), whose demographics differ sharply from those of people entering the United States at the southwestern border. During the period that the Trump transit ban was in effect, immigration court asylum denial rates skyrocketed for many Black, brown, and indigenous asylum seekers at the southwestern border. For example, asylum grant rates declined by 45 percent for Cameroonian asylum seekers, 32.4 percent for Cubans, 29.9 percent for Venezuelans, 17 percent for Eritreans, 12.9 percent for Hondurans, 12 percent for Congolese (Democratic Republic of the Congo), and 7.7 percent for Guatemalans, compared to the same time period the year before.[59]

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[56] *See, e.g.*, Surviving Deterrence: How US Asylum Deterrence Policies Normalize Gender-Based 21, Oxfam America and Tahirih Justice Center (2022), https://www.tahirih.org/wp-content/uploads/2022/10/Oxfam_Tahirh_Surviving-Deterrence_English_2022.pdf ("[O]ur data show how policies such as expulsions under Title 42, returns under [Remain in Mexico], and turnbacks contribute to conditions that foster various forms of GBV at the US-Mexico border such as rape, human trafficking, sexual assault, psychological trauma, and other abuses[.]").

[57] *Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (stating it is arbitrary and capricious under the APA for an agency to fail to consider an important aspect of the problem).

[58] *See, e.g.*, John Gramlich, *Monthly encounters with migrants at U.S.-Mexico border remain near record highs*, Pew Research Center (Jan. 13, 2023), https://www.pewresearch.org/fact-tank/2023/01/13/monthly-encounters-with-migrants-at-u-s-mexico-border-remain-near-record-highs/#:~:text=But%20that%20is%20no%20longer,%2C%20Nicaragua%2C%20Peru%20and%20Venezuela (noting that Mexico, Guatemala, El Salvador, and Honduras account for 37% percent of border encounters and that there have been steep increases in the number of encounters with nationals of Colombia, Cuba, Nicaragua, Peru, and Venezuela).

[59] *See* Biden Administration Plan to Resurrect Asylum Ban Advances Trump Agenda 4-5, Human Rights First (2023), https://www.pewresearch.org/fact-tank/2023/01/13/monthly-encounters-with-migrants-at-u-s-mexico-border-remain-near-record-

As stated *supra* Part II.F, the Departments' reliance on CBP One also has a disparate impact on Black asylum seekers due to its facial recognition technology and to indigenous asylum seekers less likely to be able to access and use the app.

The NPRM also introduces nationality-based discrimination into asylum by providing an exception for people who benefit from DHS' new parole processes, which allow certain people from Cuba, Haiti, Nicaragua, and Venezuela to enter or temporarily remain in the United States. While this exercise of DHS' parole authority provides a much-needed procedure for family reunification, it is inappropriate and unfair to use it to determine who can apply for asylum. In the context of the proposed bans, parole functions as a "legal pathway" expressly available only to people from Cuba, Haiti, Nicaragua, and Venezuela.[60] Asylum procedures may not deny refugees from other countries equal protection by treating them differently based on their nationality.[61] The Departments' plan harnesses parole—an otherwise positive development—to do just that.

This discrimination based on race, ethnicity, and national origin is yet another reason that the Departments' bans are untenable and wrong and that they must be rescinded in their entirety.

G. The NPRM unequivocally violates United States law and international humanitarian law.

In addition to the defects and shortcomings discussed above, the NPRM must be rescinded in its entirety because it is fundamentally unlawful. The NPRM violates the plain meaning of United States refugee law and the United States' commitments under international refugee law.

The foundational texts of both U.S. and international refugee law are the 1951 United Nations Convention Relating to the Status of Refugees ("1951 Convention"), which defined the term refugee and delineated state parties' obligations towards refugees, and the 1967 United Nations Protocol Relating to the Status of Refugees ("1967 Protocol"), which gave the 1951 Convention universal application. In acceding to the 1967 Protocol, the United States committed itself "to comply with the substantive provisions of Articles 2 through 34 of the [1951 Convention] with respect to 'refugees' as defined in Article 1.2 of the [1967] Protocol."[62]

.highs/#:~:text=But%20that%20is%20no%20longer,%2C%20Nicaragua%2C%20Peru%20and%20Venezuela.

[60] *See* USCIS, Processes for Cubans, Haitians, Nicaraguans, and Venezuelans (Feb. 22, 2023), https://www.uscis.gov/CHNV.

[61] *See, e.g.*, *United States v. Windsor*, 570 U.S. 744, 774 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."); *Huynh v. Carlucci*, 679 F. Supp. 61, 66 (D.D.C. 1988) ("Discrimination on the basis of national origin is subject to strict scrutiny and can be sustained only if there is a close relationship between the classification and promotion of a compelling interest, the classification is necessary to achieve that interest, and the means or procedures employed are precisely tailored to serve that interest.").

[62] *INS v. Stevic*, 467 U.S. 407, 416 (1984).

These provisions include the requirement for a nondiscriminatory framework to determine refugee status[63] and prohibitions on imposing penalties based on unauthorized entry,[64] on expelling a refugee without a proceeding in accordance with due process of law,[65] and on expelling a refugee to a territory "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[66]

In 1980, Congress enacted the Refugee Act, which standardized refugee and asylum procedures in the United States and aligned them with the 1951 Convention and 1967 Protocol. As a contemporary commentator put it, the law was intended to "reconcile [American] rhetoric with our law, our national immigration policy and our international treaty obligations so that we could maintain a consistent posture towards the world as a nation with a strong humanitarian tradition and a unique historic role as a haven for persons fleeing oppression."[67] "Both House and Senate sponsors [of the Refugee Act] emphasized that the purpose was to create a nondiscriminatory definition of a refugee and to make United States law conform to the UN Convention."[68]

For the reasons below, the NPRM is an affront to both the language and the principles of U.S. and international humanitarian law.

1. By restricting asylum based on manner and place of entry, the NPRM violates the plain language of the foundational statute of U.S. asylum law—8 U.S.C. § 1158(a).

The Refugee Act provides at 8 U.SC. § 1158(a)(1) that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not a designated port of arrival . . .) irrespective of such alien's status, may apply for asylum in accordance with [this statute]."[69] Both Article III courts and the Board of Immigration Appeals ("BIA") have consistently interpreted this provision to mean that place and manner of entry may not be the basis for the denial of an asylum application.[70]

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[63] *See* Convention Relating to the Status of Refugees, art 4. July 28, 1951, 19 U.S.T. 6259 (*"1951 Convention"*).

[64] *Id*., art. 31.

[65] *Id*., art. 32

[66] *Id*., art. 33.

[67] Deborah Anker, *The Refugee Act of 1980: An Historical Perspective*, 5 IN DEFENSE OF THE ALIEN 89, 89 (1982), https://www.jstor.org/stable/23141008?read-now=1&refreqid=excelsior%3A1060953608aa0bdd30d5d506e1ff6318&seq=1#page_scan_tab_contents.

[68] Deborah E. Anker and Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L.R. 9, 60 (1980) (citing S. Rep. No. 590, 96th Cong., 2d Sess. 1 (1980)).

[69] Refugee Act of 1980, § 208, Pub. L. 96-212, 94 Stat 102 (codified at 8 U.S.C. § 1158(a)(1)).

[70] *See, e.g.*, *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987), *superseded in part by statute on other grounds as stated in Andriasian v. INS*, 180 F.3d 1033, 1043-44 (9th Cir. 1999) ("[Manner of entry]

The NPRM clearly violates this provision by denying the possibility to apply for asylum based on place and manner of entry, *i.e.*, by barring all applications not filed at a port of entry during an appointment scheduled on CBP One. The Departments' attempt to support the legality of the NPRM falls resoundingly flat.

The Departments' discretion to regulate the asylum system does not extend to rules like the NPRM, which violates the asylum statute. The Departments point to their history of "exercis[ing] discretion, now expressly authorized by Congress [since 1996], to create new rules governing the granting of asylum."[71] The direct statutory authority they invoke requires that any "limitations and conditions" be "consistent with [section 1158]."[72] The proposals are not consistent with section 1158 and therefore cannot be justified using the Departments' discretionary authority.

The Departments also cite examples of previous restrictions on asylum eligibility to support their contention that they have discretionary authority to impose the bans in the NPRM. These examples do not support that contention. To begin, the examples they cite do not directly violate the plain language of section 1158 and primarily reflect restrictions contemplated by the 1951 Convention and the 1967 Protocol.[73] Moreover, many of those restrictions were codified by Congress as exceptions or bars to section 1158(a) and therefore have little bearing on the Departments' discretionary authority. The Trump administration cited these same examples in defending its asylum bans, to which the Ninth Circuit Court of Appeals responded that "the statutory bars in the INA do not separately conflict with explicit text in section 1158(a)"[74] and that "[t]he asylum bars in the INA and in the 1951 Convention appear to serve either the safety of those already in the United States or . . . the safety of refugees."[75] The same is true here.

The Departments also list previous rulemaking that asserted broad discretion to limit the availability of asylum. However, three of the six rules they list are proposed or interim final rules issued by the Trump administration that were struck down as violations of section 1158.[76] Thus, these examples demonstrate the exact opposite of what the Departments attempt to show: the

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should not be considered in such a way that the practical effect is to deny relief in virtually cases."); *East Bay III*, 993 F.3d at 669 ("Section 1158(a) provides that migrants arriving anywhere along the United States' borders may apply for asylum."); *Huang v. INS*, 463 F.3d 89, 99 (2d Cir. 2006) ("[I]f illegal manner of flight and entry were enough independently to support a denial of asylum, . . . virtually no persecuted refugee would obtain asylum.") (quoted in *East Bay III*, 993 F.3d at 671); *Hussam F. v Sessions*, 897 F3d 707, 718 (6th Cir. 2018) ("[A]lthough the BIA may consider an alien's failure to comply with established immigration procedures, it may not do so to the practical exclusion of all other factors.").

[71] 88 Fed. Reg. 11,734.

[72] 8 U.S.C. § 1158(a)(2)(C).

[73] *See id*.

[74] *East Bay III*, 993 F.3d at 670.

[75] *Id*. at 674.

[76] *See* 88 Fed. Reg. 11,735.

government does *not* have limitless discretion to regulate the asylum system in order to further *ultra vires* policies.

Simply put, the Departments have proposed a rule that is inconsistent with section 1158. They do not show—and could not show—that they have discretion to enact regulations that are inconsistent with the asylum statute.[77]

The Departments attempt to skirt the violation of section 1158, by emphasizing that a rebuttable presumption of ineligibility cannot violate section 1158 because it is "not a categorical bar."[78] The presumption is not comparable, they say, to the previous administration's enjoined manner of entry ban because "[t]he circumvention of orderly refugee processing would only be relevant where the applicant cannot demonstrate [a] compelling reason why they did not avail themselves of a growing number of legal pathways to the United States."[79] These distinctions do not make a difference. The possibility of a rebuttal presumption does not make the manner of entry ban consistent with the statute. The Departments' proposal impermissibly conditions access to asylum on manner of entry. All legal issues in an asylum matter—including categorical statutory bars—are contestable. That does not mean that the Departments can craft restrictions, however elaborate and circuitous, that violate the plain language of section 1158. Regardless of the possibility of rebuttal, conditioning asylum eligibility on manner of entry is unlawful.

Furthermore, the Departments also rely on an alleged distinction in the INA between limitations on *applying* for asylum and limitations on *eligibility* for a favorable grant of asylum.[80] Section 1158(a), according to the Departments, enshrines only the right to apply for asylum, and their proposal, they continue, is only a restriction on eligibility for a favorable grant, with which section 1158(a) is not concerned. However, this distinction is illogical. The previous administration unsuccessfully made the same argument in defending its manner of entry ban.[81] There, the Ninth Circuit rejected the idea that Congress would make such a distinction. As the court stated, "[e]xplicitly authorizing a refugee to file an application *because* he arrived between ports of entry and then summarily denying the application for the same reason borders on absurdity. The consequences of denial at the application or eligibility stage are, to a refugee, the same."[82] The notion that the statute makes the distinction the Departments put forward—and that

[77] *See* 5 U.S.C. § 706(2)(A), (C) (permitting courts to hold unlawful and set aside agency action that is "not in accordance with the law" or "in excess of statutory jurisdiction, authority, or limitations.").

[78] 88 Fed. Reg. 11,735.

[79] 88 Fed. Reg. 11,739.

[80] *See* 88 Fed. Reg. 11,735 ("Section 208 draws a distinction between those permitted to apply for asylum and those eligible to receive a grant of asylum.").

[81] *See East Bay III*, 993 F.3d at 670 ("Critical to the government's argument is that section 1158 splits asylum applications (§ 1158(a)) and eligibility (§ 1158(b)) into two different subsections; therefore, the government explains, Congress intended to allow DOJ to promulgate limitations on asylum eligibility without regard to the procedures and authorizations governing asylum applications.").

[82] *Id*. (emphasis in original).

such a distinction would support the legality of the rule—is no less absurd now than when the Ninth Circuit issued its decision.

For these reasons, the manner of entry ban is plainly inconsistent with section 1158(a). The Departments' justifications are unavailing. The effect of the ban would be to unlawfully condition asylum based on manner and place of entry, and thousands of refugees—including many similarly situated to people BDS assists in presenting meritorious asylum claims—would be denied access to protection.

2. By requiring refugees to apply for asylum in transit, the NPRM is for similar reasons inconsistent with the asylum statute.

The NPRM's transit ban is unlawful for similar reasons. The requirement that people seeking asylum in the United States (except Mexican nationals) first apply for asylum in any country through which they transit violates the asylum statute.

The Departments claim that their proposal does not conflict with existing restrictions in section 1158. This is incorrect. The safe third country bar applies in cases where a refugee can be removed "pursuant to a bilateral or multilateral agreement" to a country where the refugee's life or freedom would not be in danger on account of a protected characteristic *and* "where the [refugee] would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection."[83] The firm resettlement bar applies where a refugee "received[] an offer of permanent resident status, citizenship, or some other type of permanent resettlement."[84]

In all other cases, "the failure to apply for asylum in a country through which [a refugee] has transited has *no bearing* on the validity of [the refugee's] claim for asylum in the United States."[85]

The NPRM, however, makes asylum eligibility broadly dependent on whether or not a refugee has applied for asylum while transiting to the United States (in any country of transit). It is therefore unlawful. As with the manner of entry ban, the Departments rely heavily on the possibility of rebutting the presumption of ineligibility to argue that its transit ban is consistent with the statute. They reason that their proposal is not a ban because the presumption is rebutted on a showing of "imminent and extreme threat to life or safety at the time of entry into the United States."[86] But, just as with the manner of entry ban, the simple fact of conditioning eligibility based on whether a refugee applied for asylum in transit is itself inconsistent with the statute. The possibility of rebutting the presumption based on an imminent danger at the time of entry has nothing to do with a refugee's lawful choice to prefer to avail themselves of protection in the

[83] 8 U.S.C. § 1158(a)(2)(A).

[84] 8 C.F.R. § 208.15 (implementing 8 U.S.C. § 1158(b)(2)(vi)).

[85] *East Bay I*, 994 F.3d at 982 (citing cases) (emphasis added).

[86] 88 Fed. Reg. 11,736.

United States, a safe country with adequate asylum procedures that guarantees them the right to apply.

Even if the transit ban were consistent with the statute, the Departments misrepresent the safety of the countries through which refugees transit enroute to the United States, as well as the adequacy of their asylum procedures. As discussed above, refugees face significant physical danger in countries such as Mexico, Colombia, Guatemala, and Honduras, none of which can guarantee a full and fair asylum procedure. In enjoining the Trump-era transit ban, the Ninth Circuit stated that "the agencies' conclusion . . . ignores extensive evidence in the record documenting the dangerous conditions in Mexico and Guatemala that would lead [refugees] with valid asylum claims to pursue those claims in the United States rather than in those countries." The same is true here.

The proposed transit ban is unlawful because it is inconsistent with the asylum statute and ignores the compelling and lawful reasons that a refugee would prefer to seek asylum in the United States.

3. The NPRM violates the United States' commitments under international refugee law.

In addition to its incompatibility with U.S. refugee law, the NPRM violates various provisions of the 1951 Convention and the 1967 Protocol, such as the ban on penalties based on unauthorized entry, the ban on expulsion of refugees without due process of law, and the guarantee of nondiscrimination in asylum proceedings. In determining that the Trump-era manner of entry ban was unreasonable, the Ninth Circuit factored in provisions of the 1951 Convention and 1967 Protocol,[87] and the same reasoning applies here.

First, the NPRM violates Article 31 of the 1951 Convention by imposing a penalty on asylum seekers based on unauthorized entry.[88] The Departments make clear that at least one goal of the NPRM is punitive: "[t]he proposed rule would also position the Departments to impose consequences on certain noncitizens who fail to avail themselves of lawful, safe, and orderly means for seeking protection in the United States or elsewhere."[89] That consequence is the denial of the right to asylum and summary expulsion based on manner of entry or transit. UNCHR addressed this type of penalty in a brief supporting an injunction against the Trump's administration's manner

[87] *See East Bay III* 993 F.3d at 672 ("The Attorney General's interpretation of section 1158(a) is also unreasonable, as the district court discussed, in light of the United States's treaty obligations.").

[88] 1951 Convention, art. 31(1) ("The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."). UNHCR has explained that the term "coming directly" "does not disenfranchise refugees who have passed through, or even have been previously admitted to, another country." Brief of *Amicus Curiae*, UNHCR, *O.A. v. Biden*, No. 19-5272, Dkt. No. 1856344 at 19 (D.C. Cir. Aug. 13, 2020) (quotations omitted).

[89] 88 Fed. Reg. 11,735.

of entry ban. As UNHCR explained, the drafters of the Protocol sought "to prohibit *any* penalties imposed on refugees due to their unlawful entry."[90] UNHCR continued, "[t]he nature of the penalty imposed [by the transit ban]—the categorical denial of asylum process . . . will likely result in the return of some refugees to countries where they will be persecuted."[91] The Departments' current proposal creates exactly the same type of penalty and therefore violates the Protocol in the same way.

Second, the NPRM violates Article 32 of the 1951 Convention by proposing to expel refugees without due process of law[92]—also a serious cause for concern under U.S. law. The Departments' scheme would add obstacles to the statutory procedure for expedited removal by (1) depriving asylum seekers of immigration court review unless affirmatively requested, and (2) removing their ability to request USCIS reconsideration of negative credible fear determinations. This would strip the expedited removal process—which already suffers from serious procedural deficiencies[93]—of two important safeguards built into the statute creating the extraordinary form of removal proceedings. It is especially concerning that the new credible fear interviews would take place in the crushing environment of CBP custody—without access to counsel or an opportunity to prepare. Given the hurdles placed before review of the determination, the NPRM would result in summary expulsions without due process of law.

Third, the NPRM violates Article 3 of the 1951 Convention by discriminating in refugee proceedings[94] for the reasons listed in the discussions of discrimination above. It will only bar asylum for people entering the United States via the southwest border and, as such, will have a discriminatory impact based on race, ethnicity, and national origin.[95] By incorporating the Biden administration's parole scheme for certain countries, it will have a discriminatory impact based on

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[90] Brief of UNHCR, *supra* n.90, at 28.

[91] *Id*. at 29.

[92] 1951 Convention, art. 32(2) ("The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law.").

[93] *See, e.g.*, "You Don't Have Rights Here:" US Border Screening and Returns of Central Americans to Risk of Serious Harm, Human Rights First (2014), https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk ("Research by Human Rights Watch and others show that the CBP's methods for interviewing migrants in expedited removal procedures are seriously flawed."); Sara Campos and Guillermo Cantor, Ph.D., Deportations in the Dark: Lack of Process and Information in the Removal of Mexican Migrants 12, American Immigration Council (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/deportations_in_the_dark.pdf ("[A]s noted in some of the testimonies, immigration authorities often ignore these significant requirements [to inform migrants of charges against them and the opportunity to review their sworn statement.]").

[94] 1951 Convention, art. 3 ("The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.").

[95] *See supra* Part II.F.

national origin.[96] And the NPRM's reliance on CBP One will have a discriminatory impact on Black refugees, who may not be able to use the app due to faulty face recognition that does not accept dark-skinned faces.[97] These discriminatory effects violate the 1951 Conventions.

For these reasons, the NPRM violates specific provisions of the United States' commitments under international law, further demonstrating how incompatible the NPRM is with a humane, fair, and lawful asylum system.

* * *

Starting from its euphemistic title, "Circumventing Lawful Pathways," and all the way to its end, the NPRM is a betrayal of the United States' moral and legal obligations to respect the right to asylum. Without any demonstrated benefit, the NPRM would deny asylum to thousands of refugees regardless of the strength of their claims and on bases that are patently illegal.

The right to asylum is not and cannot be conditioned on manner and place of entry or on whether an applicant has requested asylum in a transit country. It does not matter that the Departments mask what amount to bans in the language of presumptions and rebuttals. The Departments must rescind the NPRM in its entirety.

Sincerely,

/s/ *Kevin Siegel*
Kevin Siegel
Staff Attorney, Civil Rights and Law Reform

/s/ *Lucas Marquez*
S. Lucas Marquez
Director, Civil Rights and Law Reform

[96] *See id*.

[97] *See supra* Part II.E.