March 27, 2023

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

Daniel Delgado
Acting Director
Border and Immigration Policy
Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security

Lauren Alder Reid
Assistant Director,
Office of Policy, EOIR
U.S. Department of Justice

Re: Comment on the Proposed Rule Titled “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;

Lutheran Immigration and Refugee Service (LIRS) submits this comment in opposition to the Department of Homeland Security (DHS) and Department of Justice (DOJ) [Departments] proposed rule, “Circumvention of Lawful Pathways” Docket No: USCIS 2022-0016, A.G. Order No.5605-2023. The proposed rule published in the Federal Register on February 23, 2023, would impose punitive restrictions on asylum seekers solely based on how they traveled to and entered the U.S. As determined by federal courts when the Trump administration attempted to enact a similar version of this rule, asylum bans are unlawful. They are also inconsistent with the views of a majority of the American public who favor providing access to asylum.

LIRS is one of ten resettlement agencies and the largest faith-based nonprofit dedicated to serving immigrants, asylum seekers, and refugees in the United States. With over 80 years of experience, LIRS has welcomed more than 500,000 refugees fleeing violence and persecution in their home countries. Our devoted network of affiliates provide a range of services to help newcomers adjust such as: respite and welcome, case management, cultural orientation, family reunification, and economic empowerment. LIRS Welcome Centers located in cities across the country provide protection-centered and trauma-informed case management services to asylum seekers ineligible for traditional refugee resettlement. These services include mental health and psychosocial

1 East Bay V. Barr, American Civil Liberties Union, February 16, 2021, www.aclu.org/cases/east-bay-v-barr
2 Hamed Aleaziz, “Americans Still Support Asylum for Immigrants Fleeing Persecution, Poll Finds,” Los Angeles Times (Los Angeles Times, December 16, 2022), www.latimes.com/politics/story/2022-12-16/poll-immigration-asylum-benefits-country; Almost 500 letters opposing the proposed ban have been sent by advocates in LIRS’s network
support, legal services, connection to community-based resources, education services, and emergency, food, housing, and financial assistance.

As a service provider to asylum seekers, we express disappointment at the Biden administration's proposal of a rule that would bar them from accessing life-saving protections at our border based on their manner of entry and transit to the United States. The President campaigned on a promise to “reassert America’s commitment to asylum-seekers and refugees” after four years of harmful policies that decimated the asylum and refugee system.\(^4\) As a candidate, he acknowledged the challenges we faced would not be solved by “denying asylum to people fleeing persecution and violence” and pledged to end restrictions on asylum for those who transit through other countries to reach safety.\(^5\) Furthermore, President Biden’s February 2021 Executive Order promised to “restore and strengthen our own asylum system.\(^6\) The proposed rule is a grave departure from those promises and a contradiction to the administration’s claims of upholding the United States as a “nation of welcome.”

In this comment, LIRS shares our concerns and reasons for opposing the proposed rule, “Circumvention of Lawful Pathways.” We also share stories from the field that help to demonstrate its potential impact and our recommendation to scale community-based support services as a humane approach that addresses humanitarian needs at the border.

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

The proposed rule imposes requirements on asylum eligibility that contravene U.S. law on the right to seek asylum as enshrined in the Refugee Act of 1980, which Congress used to codify international treaty obligations under the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees. By acceding to the Refugee Protocol, the United States promised to uphold the Convention’s legal requirements, including non-discriminatory access to asylum, its prohibition against returning refugees to persecution also known as non-refoulement, and its prohibition against imposing improper penalties on people seeking refugee protection based on manner of entry.

While the Departments claim the proposed rule is compliant with international obligations, subsections of Article 1 in the Convention and its Protocol clearly state when a person is ineligible to receive asylum protections. As noted in the United Nations Refugee Agency’s (UNHCR) comment, the proposed rule goes beyond this framework and “will lead to erroneous exclusion,

---


\(^5\) Ibid.


refouling those who need protection and placing them at risk of persecution and/or death.” The Departments also claim continued availability of withholding of removal under the proposed rule fulfills compliance with treaty obligations. However, providing a narrow protection that keeps with a select article (in reference to non-refoulement obligations under Article 33) does not preclude the U.S. from meeting the full extent of obligations outlined in the treaty.

Under U.S. law, the Refugee Act allows a person the right to seek asylum “whether or not at a designated port of arrival.” Furthermore, U.S. asylum law provides that people may apply for asylum regardless of manner of entry into the United States. By denying asylum where an individual has not used certain limited migration pathways, the proposed rule attempts to unlawfully use the existence of lawful pathways as a justification to deny access to asylum at the border. The proposed rule fails to adequately defend how conditions placed on asylum ineligibility would not contravene U.S. law.

The proposed rule is also a reiteration of entry and transit asylum bans implemented during the Trump administration that were struck down as unlawful. As determined by multiple courts, asylum bans are inconsistent with statutory exceptions on the right to asylum. The courts also found there was no safe option where migrants could seek asylum en route to the United States and that the ban lacked a justifiable reason for barring a person who did not seek asylum in a third country.

Ultimately, instituting regulations that prevent a person seeking safety from availing themselves of our U.S. asylum protections because of how they entered is in violation of the Refugee Act and agreed-upon obligations under the 1951 Refugee Convention and its 1967 Protocol. Despite the Biden administration’s attempts to distinguish its proposed rule from the previous administration’s, it would similarly operate as a ban for asylum seekers based on factors that do not relate to their fear of return.

II. The Rule Would Force Asylum Seekers to Remain Unsafe in Transit Countries, Without Access to Meaningful Protection

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

---

countries.\(^{11}\) In Mexico, which would be a transit country for non-Mexican asylum seekers at the southern border, refugees face life-threatening harm. There have been over 13,000 attacks reported against asylum seekers and migrants stranded in Mexico under the Title 42 policy over the past two years alone.\(^{12}\) Refugees do not have access to fair asylum procedures in Mexico, where many are at risk of deportation to their home countries where they face persecution.\(^{13}\)

El Salvador, Honduras, and Guatemala do not have functional asylum systems that can protect large numbers of refugees. Many transiting through these countries face extreme dangers including gender-based violence, anti-LGBTQI+ attacks, race-based violence, and other persecution.\(^{14}\)

LIRS’s San Antonio Welcome Center has served many asylum seekers who have sought protection in neighboring countries before arriving at the U.S. For example, our staff served a family of six from Venezuela who fled their home country when authorities targeted the mother for publicly speaking out against the government’s health care system, which had denied her children with disabilities proper care. When trying to seek asylum in other countries, the family faced discrimination and the children were mistreated due to their disabilities. Through our Welcome Center in San Antonio, the family has finally found safety, stability, and support for their children.

The proposed rule will also have a devastating impact on women and LGBTQI+ people who are particularly vulnerable to gender-based violence (GBV) and other persecution. It is well-documented that countries of transit that survivors of GBV pass through while trying to reach the southern U.S. border provide very little if any true protection even when they are granted asylum there.\(^{15}\) Women and LGBTQI+ asylum seekers face enormous dangers in many countries of transit, including Mexico and Central American countries, and would be at risk of persecution on the basis of the same immutable characteristics that led them to flee their home countries. Mexico is second to Brazil in rankings of the most dangerous countries for transgender people worldwide.\(^{16}\) Applying and waiting for review of their asylum claims in these countries prolongs survivors’ perilous journeys in search of safe haven.

III. The Proposed Rule Leads to Family Separation

The Departments purport that the proposed rule will not have a negative impact on the well-being of families or “the autonomy or integrity of the family as an institution.” However, reports already

---


\(^{13}\) Ibid.


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

The Departments also base their claim that no harm will come to families under the proposed rule due to its provision that families traveling together will receive further consideration for protection. Families, where the principal asylum applicant is eligible for Withholding of Removal or Convention Against Torture (CAT) withholding, will be considered for an exception to the rule’s presumption of ineligibility. An asylum-seeking LIRS client sheltered in Phoenix, Arizona shared the following story about the danger he fled in his home country of Guatemala:

“My family and I owned a small humble home, and I worked as a construction worker. I earned 100 Quetzales a week, which is equal to $12 USD. One day a group of four gang members came to my home to extort and threaten us. They told my family that I had to pay them 50 Quetzales a week to live on our land. I paid the money to them for four months, to keep my wife and daughter safe. I was not allowed to call authorities, or they would take my wife and daughter and possibly kill me. When I was not able to pay the gang members any longer, they said they would be back that night for the money or my wife. I had a friend that lived in another part of Guatemala, and I was able to take my wife and daughter to a safe place where they would not be found by the gang members. My wife was able to travel to the United States two months ago with a coyote. I had to borrow $2000 for her to be brought safely to the U.S. It was a long and dangerous journey, but I thank God, she safely made it to the United States. Twenty days ago, I picked up my daughter and headed on the same hard and dangerous route. At times, we went several days without food and water. I would save my portions for my daughter, so she would not suffer as much. Finally, we made it to the U.S.-Mexican border where we surrendered and were picked up by U.S. Border Patrol. I thank God that we made it and are blessed to come into this church, which graciously opened its doors to my daughter, myself, and many others. I have been able to connect with my wife and our sponsor family in Georgia. I plan to attend my immigration court hearings and will hopefully work a job until God decides my family’s destiny.”

---

As highlighted in the story above, the rationale of the provision is incongruent with the lived experience of asylum seekers. While there is an incentive for families to travel together through the proposed rule, at-risk family members may not have a choice to wait until this is feasible. This story is not uncommon and demonstrates the difficult choice families make to uproot themselves and their loved ones in search of safety. Policy roadblocks such as a transit or entry ban significantly derail timely access to protection for the most vulnerable.

Further, a person granted withholding of removal cannot petition to bring their family to the U.S. or leave without executing the removal order. Unlike asylum, families seeking withholding of removal together may not all be granted protection. Regardless of whether families choose to travel as a unit or the most at-risk member chooses to journey ahead to safety, the proposed rule will still have a harmful impact on families. If the principal asylum seeker is granted withholding of removal but a family member fails to meet the high threshold under this protection category, the family member will eventually be ordered removed. If the principal applicant arrives in the U.S. alone and is granted withholding of removal, the person has no legal method available to reunite with their family in the U.S. or a pathway to citizenship. Leaving families to rely on the limited protections under the Convention Against Torture will put them in more limbo.

IV. The Asylum Ban Would Disproportionately Harm Black, Brown, and Indigenous Asylum Seekers

Previous asylum bans had a devastating impact on migrant families and individuals who were summarily deported without adequate due process.\(^\text{19}\) Immigration court asylum denial rates skyrocketed for many Black, Brown, and Indigenous asylum seekers requesting safety at the southern border.\(^\text{20}\) For instance, asylum grant rates declined by 45 percent for Cameroonian asylum applicants, 32.4 percent for Cubans, 29.9 percent for Venezuelans, 17 percent for Eritreans, 12.9 percent for Hondurans, 12 percent for Congolese (DRC), and 7.7 percent for Guatemalans from December 2019 to March 2020, compared to the year before the third-country transit asylum ban began to affect refugee claims, according to data analyzed by Syracuse University’s Transactional Records Access Clearinghouse.\(^\text{21}\) Resurrecting an asylum ban would raise the hurdles Black, Brown, and Indigenous migrants experience when seeking safety in the U.S.

Black, Brown, and Indigenous asylum seekers also frequently make treacherous journeys to the southern border because they cannot access a visa or afford the comfort of a plane.\(^\text{22}\) As explained above, Mexico is a transit country for non-Mexican asylum seekers at the southern border. In

---


21 Ibid.

22 Anti-Asylum Policies Are a Form of Genocide Against Indigenous Peoples, YouTube (YouTube, 2023), www.youtube.com/watch?v=5fGoZepRUEg.
Mexico, Black asylum seekers and migrants face pervasive anti-Black violence, harassment, and discrimination, including widespread abuse by authorities. Deterrence-focused policies similar to the asylum ban that were implemented such as Title 42 and Remain in Mexico forced Black, Brown, and Indigenous asylum seekers into danger. Accounts of hardship and discrimination faced by these groups were recorded in the *Arizona v. Mayorkas* amicus brief submitted to the Supreme Court in February 2023. Human rights groups have also reported numerous cases of abuse and struggle to obtain legal status that migrants and asylum seekers experience as they transit through Mexico.

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

The proposed rule requires asylum seekers to utilize a technically flawed mobile app to preschedule appointments at a port of entry. Asylum seekers who arrive at a border port of entry without previously scheduling an appointment and were not denied protection in a country of transit would generally be denied asylum.

Since its inception, the application has had pervasive technical issues and limited language options. This causes issues for indigenous populations, Haitians, and other non-Spanish or non-English speaking asylum seekers. The issues with the application have also contributed to racial bias among asylum seekers searching for safety as Black asylum seekers have reported issues with the app’s facial recognition technology. Overly relying on the app through the implementation of the proposed rule will significantly thwart the Biden administration’s stated commitment to racial justice and equity.

Requiring asylum seekers to use CBP One leaves those without a smartphone and reliable Wi-Fi or network coverage unable to access protections. Even if they had this access, migrants fleeing government persecution are rightly wary of using the internet in any capacity. Reports of migrants

---

who do not possess mobile phone being misled by cartels and ill-intent actors into paying a fee to schedule an appointment using the app have also been raised.  

In order to raise issues with the app, an asylum seeker would first need to meet with a CBP Officer but all scheduling must be done through the app itself. In summary, the CBP One application has become another bureaucratic obstacle for individuals to navigate during the asylum process to their detriment.

VI. Use of Asylum Ban in Expedited Removal Will Fuel Mass Deportations, Prolonged Detention, and Due Process Violations

Similar to the Trump administration’s plans, the Biden administration intends to implement this asylum ban through the expedited removal process, where asylum seekers would be deported without an asylum hearing if they do not pass their fear screenings. Expedited asylum screenings disregard the trauma people arriving at the border have experienced and limit access to legal counsel. If the proposed rule is implemented, asylum seekers would be required to show that the asylum ban does not apply to them or that they can rebut the presumption of ineligibility, which will be impossible for many given that these screenings typically occur over the phone while asylum seekers are detained. Language barriers, abusive conditions of confinement, acute trauma, and lack of knowledge of the requirements of this complex rule would make it extremely challenging for asylum seekers to overcome this ban in preliminary screenings.

Due process violations would be magnified if the administration pursues its reported plan to conduct credible fear interviews within days of asylum seekers’ arrival in Customs and Border Protection (CBP) custody. When the Trump administration piloted a similar program to conduct credible fear interviews in CBP custody through the Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP) programs, deportations of people with legitimate asylum claims drastically increased. Lack of due process is fraught within this process. The Biden administration terminated both programs when it took office.

Asylum seekers detained in CBP custody have frequently reported being provided insufficient or inedible food and water; lack of access to showers and other basic hygiene; and inability to sleep because of overcrowding, lack of adequate bedding, cold conditions, and lights that are kept on.

all night. For asylum seekers subjected to PACR and HARP, positive credible fear determinations plummeted: only 18 percent of individuals in PACR and 30 percent in HARP passed their screenings, compared to 40 percent nationwide (excluding HARP and PACR) during the same Period.

In addition, asylum seekers who are banned by the rule during their credible fear interviews would have to meet a heightened screening standard in order to access immigration court hearings and would be subject to deportation if they cannot pass the screening. By elevating the credible fear standard enshrined in the Immigration and Nationality Act (INA), the proposed rule attempts to bypass Congressional intent and violates the statute setting a low screening threshold. Thousands of migrants who meet the standards established by Congress will be removed because they fail to meet the higher threshold set forth in the proposed rule.

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

The Biden administration has declined requests from immigrant advocacy groups to allocate sufficient time for the public to meaningfully comment on the proposed rule. According to Executive Order 13563, “[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.” Providing at least 60 days is especially critical given the rule’s attempt to ban asylum for many refugees in violation of U.S. law and international commitments and return many to death, torture, and violence.

While the agencies cite the termination of the Title 42 policy in May 2023 as a justification to curtail the public’s right to comment on the proposed rule, this reasoning is specious especially given that the administration itself sought to formally end Title 42 nearly a year ago and has had ample time to prepare for the end of the policy. The public has a right to a longer, 60-day comment period so they can make a more informed and meaningful comment on the rule.

VIII. Recommendations

In late December 2022, an LIRS affiliate in Las Cruces, New Mexico saw the arrival of hundreds of Venezuelan asylum seekers caught in legal limbo. In anticipation of the lifting of Title 42, they traveled to the U.S. However, upon arrival they were not processed by CBP. No government-funded migrant shelters would receive them, and most of these clients were left to live on the street. Moreover, they were in danger of immediate expulsion but could not move beyond the 100-mile border zone without the necessary documentation. If the proposed rule is implemented, situations such as these will continue. Asylum seekers will have already risked their lives to arrive at the

---

U.S. southern border and denying their access to the asylum system will present them with unreasonable options: risk their lives again to return to the danger they fled, remain in a transit country that cannot protect them, or attempt to enter the United States without CBP inspection.

At LIRS, we stand ready to work with the Departments to meet the urgency of this moment with compassion and not with measures that force asylum seekers into more precarious situations. The U.S. Refugee Admissions Program (USRAP) reflects a long-standing commitment to ensuring people fleeing persecution have a pathway to safety and resources to rebuild their lives in a new country. Nevertheless, asylum seekers who often face similar hardships as refugees lack robust support and experience numerous challenges accessing basic services. We recognize there are challenges due to the increasing number of migrants arriving at the U.S. southern border. However, we encourage the Departments to address them in ways that honor human dignity and acknowledge the realities forcing people in the western hemisphere to flee persecution and violence.

Rather than a deterrence-oriented approach, the Departments should employ case management programming for asylum seekers that aim to support them towards longer-term stabilization and self-sufficiency. Despite evidence that case management provided by qualified and trusted providers is beneficial to asylum seekers, the administration has yet to scale this solution. Other solutions include increasing support for states and localities to create a welcoming reception for refugees and migrants in their communities. Creating formal channels of communication with state and local policymakers ensures proper coordination of services. We also urge the administration to work with members of Congress on bipartisan immigration solutions in the legislature, including those that impact asylum seekers. In the 117th Congress, LIRS recommended a series of bipartisan policies in which compromise could be found in a divided Congress. We remain ready to productively seek solutions that honor American ideals and long-standing commitments in this 118th Congress.

Finally, we call on the administration to consider and adopt solutions that do not return people to harm and are more closely aligned with international principles on the humane treatment of migrants.

IX. Conclusion

LIRS unequivocally opposes the proposed rule, which would violate our legal and moral obligations to asylum seekers. We affirm the legal right for people to seek asylum in the United States, irrespective of their point of entry, and we firmly oppose this effort by the Departments that would narrow or restrict the protections provided by United States law. The Immigration and

---


Nationality Act (INA) provides that people seeking protection may apply for asylum regardless of the manner of entry and the law does not require them to have first applied for protection in another country. Further, we reject the Biden Administration’s deterrence-oriented approach, which dehumanizes and imposes potentially life-threatening penalties on those exercising their right to seek safety, and we recognize that it would disparately impact Black, Brown, Indigenous, and LGBTQI+ migrants. We call on the administration to rescind this NPRM and instead take progressive action to restore access to asylum at our southern border by bolstering partnerships with the many civil society organizations and communities ready to welcome newcomers to our country.

Thank you for your consideration. Please contact Jill Marie Bussey, Director for Public Policy, and Juliet Ihediohanma, Migrant Children & Families Advocacy Officer, at LIRS with any questions or for further information.