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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 Delgado and Assistant Director Reid:

Muslim Advocates writes to register its strong objection to the Department of Homeland Security (DHS) and Department of Justice (DOJ)'s proposed rule published in the Federal Register on February 23, 2023, that would ban many refugees from asylum protection in the United States and deprive refugees of the ability to reunite with their families and pursue citizenship. Making asylum protections even more difficult to access will not decrease the number of people in desperate need for those protections. Asylum-seekers are *by definition* fleeing persecution or threat of death—they cannot and should not be “disincentivized” from seeking refuge in the United States. The proposed rule should be immediately withdrawn because of its grave human cost, because it is rife with legal and technical problems, and because it evokes and builds on the racist and inhumane legacy of exclusion in U.S. immigration policy.

Muslim Advocates' Interest

Muslim Advocates stands against efforts to exclude and expel people from the United States, especially when such efforts are based on the race, national origin, or religion of the targeted community. Muslim communities understand all too well the violence inflicted upon vulnerable people when the United States turns the sights of its immigration and security apparatus on them. The U.S. immigration system excludes Muslims, for example, largely through denial and delay of visa applications, through denaturalization and deportation efforts, and through extremely restricted



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refugee quotas. The Muslim and African Bans, well-known versions of such identity-based exclusion, continue to separate families despite their nominal rescission; Muslim Advocates is amongst those fighting in court to make the Biden Administration reconsider, under a fair process, visas denied due to illegal aspects of the Bans.¹ Our clients have missed key events in the lives of beloved family members – including adult children’s weddings, grandchildren’s births, and time spent together – because their visas were denied due to the Bans and, despite nominal rescission, have never been issued. We stand with asylum seekers who seek safety and call on the Biden Administration to ensure fair and humane asylum adjudications.

Overview of the Proposed Rule

The proposed rule bans asylum seekers from obtaining protections based on their manner of entry into the United States and transit through other countries, factors that are irrelevant to their fear of return and have no basis in U.S. law. It is thus most accurately characterized as an asylum ban.

The rule would create a presumption of ineligibility for individuals who (1) did not apply for and receive a formal denial of protection in a transit country; and (2) entered between ports of entry at the southern border or entered at a port of entry without a previously scheduled appointment through the CBP One mobile application, subject to extremely limited (and unclear) exceptions.

The proposed rule would apply in the fundamentally flawed expedited removal process as well as in full asylum adjudications before U.S. Citizenship and Immigration Services (USCIS) and the immigration court. Expedited removal is the process that allows the U.S. government to deport people arriving at the border without ever seeing an immigration judge if they do not express fear or do not pass a “credible fear” screening interview in which they must show a significant possibility that they could establish asylum eligibility in a full hearing.

In expedited removal, asylum seekers covered by the proposed rule would be required to gather the evidence and arguments necessary to “rebut the presumption of ineligibility” (i.e., prove that they qualify for one of the few exceptions to the rule). Those who fail to do so will automatically be subject to a higher screening standard (in violation of [U.S. law](#) governing credible fear interviews) and would face deportation if they cannot pass the screening.² The rule applies with equal force in immigration court.

¹ *Emami v. Blinken* (N.D. Cal. 18-CV-015878); *Pars Equality Center v. Blinken* (N.D. Cal. 18-CV-07878).

² Even those who do pass would be subject to the presumption of ineligibility in an immigration hearing and, if barred from asylum, would only be eligible for lesser forms of protection known as Withholding of Removal or Convention Against Torture (CAT) protection. These protections do not provide a

Problems with the Proposed Rule

The Human Cost

The proposed rule puts people, especially Black, Brown, and Indigenous people, in severe danger. If implemented, the asylum ban would lead to the deportation of refugees to countries where they are at risk of persecution and torture. The rule largely bans asylum for refugees based on their manner of entry into the U.S. and travel through other countries—factors that are irrelevant to their fears of return and will lead to denials of asylum for refugees. Refugees who are otherwise eligible for asylum but banned by the rule would likely be deported to danger.

While the Trump administration's transit ban was in effect, asylum seekers were denied all relief and ordered deported due to the ban, [including](#) a Venezuelan opposition journalist and her one-year-old child; a Cuban asylum seeker who was beaten and subjected to forced labor due to his political activity; a Nicaraguan student activist who had been shot at during a protest against the government, had his home vandalized, and was pursued by the police; a gay Honduran asylum seeker who was threatened and assaulted 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.

Many asylum seekers were summarily ordered deported through expedited removal without an asylum hearing due to the transit ban, [including](#) Indigenous asylum seekers fleeing gender-based and other persecution in Guatemala and a Congolese woman who had been beaten by police in her country when she sought information about her husband, who had been jailed and tortured due to his political activity.

This danger is not limited to the countries from which asylum seekers flee but is also present in the very transit countries into which the proposed rule seeks to force asylum seekers. The proposed rule attempts to require many refugees 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. law requirements for safe third countries. In Mexico, which would be a transit country for non-Mexican asylum seekers at the southern border, refugees face life-threatening harms. 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 and refugees do not have access to fair asylum procedures in Mexico, where many are at [risk of deportation](#) to persecution in their home countries. Black asylum seekers and migrants face [pervasive](#) anti-Black violence, harassment, and discrimination, including widespread abuse by Mexican authorities.

pathway to citizenship, are subject to revocation at any time, and do not allow people to petition for their spouses and children.

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

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

Finally, even in the scenario in which the asylum seeker is not expelled from the United States, the protections available to them other than asylum are vastly inferior and will separate them from their families indefinitely. Refugees banned from asylum protection under the rule would have to establish eligibility for Withholding of Removal or protection under the Convention Against Torture (CAT) to obtain protection from deportation. Those who are otherwise eligible for asylum but are unable to meet the higher threshold to establish eligibility for withholding of removal or CAT protection would be deported, while many granted these lesser forms of protection would be left in permanent limbo, separated from families, and under constant threat of deportation. Unlike asylum, these forms of relief do not confer permanent status or a path to citizenship, do not allow people to petition for their spouses and children, do not permit people to travel abroad, and leave people with a permanent removal order, subject to deportation at any time.

As a result, many refugees who should be granted asylum under U.S. law will at best languish in the United States in legal limbo, indefinitely separated from spouses and/or children who remain abroad in danger. The Trump administration's transit ban similarly left many refugee families separated by barring refugees from asylum and leaving them with the inadequate protection of withholding of removal. Under the Trump transit ban, refugees denied asylum due to the transit ban and granted withholding of removal faced potentially permanent separation from their spouses and children, [including](#): an Anglophone Cameroonian refugee who was brutally tortured by the Cameroonian military and could not reunify with his wife and child, who were in hiding in Cameroon because of the threats they faced; a Cuban musician and critic of the government who was jailed and beaten and could not petition for his wife and two children who remained in Cuba; and a Venezuelan refugee who fled after being detained and tortured and could not reunify with his three children who lived in Venezuela.

Exceptions in the proposed rule that promote family unity where refugee families travel to the United States together will not prevent the separation of families where spouses and children remain abroad. Like the Trump transit ban, this asylum ban would leave refugee families indefinitely separated.

Technical Issues

The proposed rule requires asylum seekers at the southwest border to schedule appointments through the CBP One app and would generally deny asylum to refugees who arrive at a border port of entry without a previously scheduled appointment and were not denied protection in a transit country. CBP One is an extremely flawed government tool to request an appointment at a port of entry that is inaccessible to many asylum seekers due to financial, language, technological, and other barriers, discriminates against Black and Indigenous asylum seekers, and has very limited appointment slots such that requiring asylum seekers to use the application essentially turns asylum access into a lottery. The proposed rule attempts to establish CBP One as the only mechanism to request asylum at the southern border and seeks to punish those who cannot wait indefinitely in danger while they attempt to schedule an appointment.

CBP One is impossible for [many asylum seekers to access or use](#), including those who do not have the resources to obtain a smartphone or ability to navigate the app. The app is not available in most languages—including Indigenous languages—and all error messages are in English, barring many asylum seekers from using the app. It also disparately harms [Black asylum seekers](#) due to racial bias in its facial recognition technology, which has [prevented](#) many from obtaining an appointment. Asylum seekers who can access and navigate the app are still often unable to schedule appointments due to extremely limited slots and are forced to remain in danger indefinitely. Requiring refugees to use CBP One at the southwest border also raises concerns that the system will be used for [illegal metering](#) (based not on wait time but on luck, technology skills, or resources to secure an appointment — turning asylum access in effect into a lottery).

Requiring asylum seekers to schedule an appointment through CBP One has already resulted in horrific violence and death, including the [murder](#) of a 17-year-old Cuban child in Mexico who was required to wait weeks for an appointment. A [Venezuelan family](#) unable to secure an appointment at a port of entry near them in Piedras Negras and forced to travel over 1200 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.

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 CBP One, leaving them in extreme danger.

Requiring asylum seekers to use the CBP One app will also separate families. The administration's use of the CBP One app and denial of access to asylum for people who cannot schedule appointments through the app has already [forced](#) families to separate. 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. Like 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.

Legal Flaws

Not only is this rule dangerous, but it is also unlawful. The proposed rule contravenes U.S. law governing asylum access, expedited removal procedures, and prohibitions on the return of refugees to persecution and torture. Congress passed the Refugee Act of 1980 to codify the United States' obligations under the Refugee Convention and Protocol. 8 U.S.C. 1158 provides that people may apply for asylum regardless of manner of entry into the United States. It also delineates limited exceptions where an asylum seeker may be denied asylum based on travel through another country, but these restrictions only apply where an individual was "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. 8 U.S.C. 1231 codified the prohibition against returning refugees to countries where they face persecution. The proposed rule, which conditions access to asylum on manner of entry and transit, would result in the return of refugees to danger and unequivocally contravenes these provisions of U.S. law.

In 1996, Congress created the expedited removal process through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Under this process, asylum seekers placed in expedited removal who establish a credible fear of persecution [must be referred](#) for full asylum adjudications. The proposed rule

attempts to unlawfully circumvent the credible fear screening standard established by Congress, which was [intended](#) to be a low screening threshold. The government is required to refer asylum seekers in expedited removal for full asylum adjudications if they can show a “significant possibility” that they could establish asylum eligibility in a full hearing. The proposed rule attempts to eviscerate this standard by first requiring asylum seekers to prove to an asylum officer by a preponderance of evidence that they can rebut the presumption of asylum ineligibility, and then requiring those who cannot overcome the presumption to meet a higher fear standard before being permitted to seek protection. This provision is inconsistent with U.S. law.

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.”

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 vacated and enjoined by federal courts for violating these provisions of U.S. law, as discussed below. 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.

Fundamentally, this proposed rule is a solution in search of a problem. The only “crisis” in the asylum system is how difficult it is to access it already. The Administration should not gamble with asylum seekers’ lives for spurious domestic political gain and, indeed, should endeavor to make asylum easier to access, not harder. It should also recognize that enacting this Asylum Ban will evoke a long history of using immigration policy to maintain white supremacy in the United States at the expense of the communities about whom the Administration claims to care.

Building on a Legacy of Exclusion

The proposed asylum ban recalls a pattern of exclusion that is as old as the United States itself, which ruthlessly expelled and murdered indigenous people in order to claim their territories and then jealously guarded admittance into the “nation” it built on occupied land. Borders were erected both physically and

ideologically to gatekeep who belongs, privileging the economically, socially, religiously, and of course, racially desirable.

From the start, the federal government expressed its preference for white, Northern European migrants.³ When migrants' numerical representation and success threatened white Americans' sense of "ownership" over colonized land, the legislative reaction took two shapes: exclusion (e.g., the Chinese Exclusion Act of 1882) or absorption—that is, the racialization of certain new immigrants as white (e.g., Irish, Italian, and Ashkenazi Jewish migrants).⁴ This expression of white supremacy was, of course, not unique to immigration policy. It likewise motivated the murder and expulsion of Indigenous people throughout U.S. history and animated hundreds of years of enslavement, followed by a century of Jim Crow, designed to subjugate Black people to white people in the United States.

In time, identity-based justifications for exclusion and subjugation of migrants came to be coded as appeals to economy sustainability and national security.⁵ The rhetoric of economic "replacement" is commonplace in nativist appeals to restrict immigration and is largely directed at migrants from Latin America. The national security rationale has wreaked havoc on the lives of Muslims and those racialized as Muslim in the United States and abroad. Anti-Muslim racism has been intertwined with border panic for decades and has justified massive investments in "security" measures ostensibly aimed at counterterrorism. The result has been a wildly overmilitarized immigration and travel system that has used programs like the No Fly and Selectee lists⁶ and the National Security Entry-Exit Registration System (NSEERS)⁷ to surveil, detain, and exclude people based on their national origin, race, or perceived religious identity. Secretive immigration programs like the Controlled Application Review and Resolution Program (CARRP) conflate Muslim identity with threat, ultimately denying the visa applications of Muslims, people perceived to be Muslim, and people from Muslim-majority countries based on overbroad and discriminatory criteria.⁸

The Muslim and African Bans were a result of these processes as well. The explicit anti-Muslim and anti-Black racism that animated these Bans revealed the

³ See Tina Al-khersan & Azadeh Shahshahani, *From the Chinese Exclusion Act to the Muslim Ban: An Immigration System Built on Systemic Racism*, 17 HARVARD L. & POL'Y REV. 131, 134 (2022) [hereinafter *Built on Systemic Racism*].

⁴ See *id.* at 135-37.

⁵ See *id.*

⁶ See Edward Hasbrouck, *The #NoFly list is a #MuslimBan list*, Papers Please! (Jan. 20, 2023), available at <https://papersplease.org/wp/2023/01/20/the-nofly-list-is-a-muslimban-list/>.

⁷ See Kaveh Waddell, *America Already Had A Muslim Registry*, THE ATLANTIC (Dec. 20, 2016), <https://www.theatlantic.com/technology/archive/2016/12/america-already-had-a-muslim-registry/511214/>

⁸ For more information, see Katie Traverso and Jennie Pasquarella, *Practice Advisory: USCIS's Controlled Application Review and Resolution Program*, ACLU of Southern California (2016) and sources cited within.

throughline from 2017 all the way back to the Naturalization Act of 1790 in its limitation of naturalization to “free white persons’ of ‘good moral character.’”⁹ Outrage rightly followed the Bans’ enactment and the chaos they created. That outrage was motivated—not only by opposition to the naked bigotry of those particular Bans—but by an abiding desire to have the United States turn away from its long history of exclusion on the basis of identity.

Then-candidate Biden [pledged](#) to stand against this legacy in U.S. immigration and refugee policy. On January 20, 2021, immediately after his inauguration, President Biden issued a [proclamation](#) rescinding the Muslim Ban, calling it “a stain on our national conscience.” Nevertheless, Muslim Advocates and other allied organizations represent thousands of people banned under this policy who remain separated from their families and the Biden Administration has defended that status quo in court despite its stated rescission of the Muslim Ban over two years ago.¹⁰

The Administration now threatens to further abandon the President’s inaugural pledge by promulgating what is, in essence, a new asylum ban. This rule will make accessing asylum more difficult and generate more denials and expulsions, disproportionately harming Black, Brown, and Indigenous asylum seekers. But it will not reduce the need for asylum protections. This proposed Asylum Ban will do nothing more than endanger some of the most vulnerable people in the world—in their time of most urgent need—while adding to the United States’ legacy of white supremacist exclusionary immigration policies.

Conclusion

The proposed rule is inhumane, technically flawed, illegal, and discriminatory. It attempts to foreclose asylum for countless refugees at the southern border, discriminates against Black, Brown, and Indigenous asylum seekers, and seeks to circumvent U.S. law and treaty obligations to refugees. Muslim Advocates strongly urges the agencies to withdraw the proposed rule in its entirety and stop pursuing asylum bans. The administration has a duty to uphold refugee law, restore full access to asylum, ensure fair and humane asylum adjudications, and rescind illegal entry and transit bans in their entirety.

⁹ *Id.* at 134.

¹⁰ *Emami v. Blinken* (N.D. Cal. 18-CV-015878); *Pars Equality Center v. Blinken* (N.D. Cal. 18-CV-07878).