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Via <https://www.regulations.gov>

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**Re: Comments on “Circumvention of Lawful Pathways,” 88 Fed. Reg.
11704 (Feb. 23, 2023)**

*Department of Homeland Security, Docket No. USCIS 2022-0016; RIN
1615-AC83*

*Department of Justice, Executive Office for Immigration Review, A.G.
Order No. 5605-2023; RIN 1125-AB26*

Dear Ms. Reid and Mr. Delgado:

We represent the National Citizenship and Immigration Services Council 119 (“Council 119”), and we write on its behalf to provide comments on the above-referenced proposed rule by the Department of Justice (“DOJ”) and Department of Homeland Security (“DHS,” collectively the “Departments”) seeking to make three fundamental changes to our nation’s immigration procedures:

- (1) imposing a presumption of ineligibility for asylum for asylum seekers who enter the United States lacking proper entry documentation at the southwest land border absent authorization through a parole process, presentation at a port of entry pursuant to a pre-scheduled time and place, or having sought and been denied protection in a transit country;
- (2) requiring asylum officers to apply this presumption in credible fear screenings; and
- (3) requiring asylum officers to screen asylum seekers who fail to rebut the presumption under the higher “reasonable possibility” standard for purposes of determining whether they will face persecution or torture if removed.

88 Fed. Reg. 11704 (the “Proposed Rule”).

As detailed below, with the exception of the proposal to rescind the Third Country Transit Bar Final Rule and the Proclamation Bar Interim Final Rule, Council 119 opposes the Proposed Rule in its entirety.¹ It also objects to the inappropriately short 30-day comment period on a proposal that would so fundamentally alter the existing legal standards for asylum eligibility and protection of refugees in our country.

I. Executive Summary

The commitment to providing a safe haven to persecuted people is etched into our nation’s identity. That commitment is perhaps best reflected in the sonnet enshrined at the pedestal of the colossal sculpture sitting in New York Harbor that has welcomed many generations of Americans: “*Give me your tired, your poor, / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore. / Send these, the homeless, tempest-tost to me, / I lift my lamp beside the golden door!*”²

The promise of safety and an opportunity to build a life without persecution is a part of our nation’s moral fabric. This promise has been reinforced by our nation’s laws, which, over the course of several decades, have established a standardized and agile system for identifying, vetting, and protecting refugees. That system endured for decades across multiple presidential

¹ This comment does not address every concern that Council 119 has with respect to the Proposed Rule but focuses on a few of the most problematic provisions.

² Emma Lazarus, *The New Colossus*, Nov. 2, 1883.

administrations, ensuring that refugees would not be returned to territories where they would face persecution or torture.

The cornerstone of that system are the requirements set forth in the 1951 Convention Relating to the Status of Refugees (the “1951 Convention”)—to which our country is bound through its signing and ratification of the 1967 United Nations Protocol Relating to the Status of Refugees—and the 1994 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the “CAT”). Together, these treaties and the statutes and regulations designed to implement them prohibit our country from (i) penalizing refugees for their illegal entry or stay in the country, (ii) discriminating against them on the basis of their race, religion, and national origin, and (iii) returning them to territories where they may be tortured or their lives or freedoms would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.

Council 119 was steadfast in opposing rules and policies of the Trump administration that sought to dismantle our carefully crafted system of vetting asylum claims, and with it, America’s position as a global leader in refugee protection.³ Unfortunately, while the current administration committed itself to changing course, the Proposed Rule, if implemented, would have the effect of undermining one of the most important protections provided by our immigration system. The Proposed Rule is fundamentally problematic in at least five respects.

First, the Proposed Rule undermines our nation’s longstanding commitment to providing safe haven to the persecuted. At a time when the global crisis of displacement should mean greater commitments to supporting refugees and providing them with safety, the Proposed Rule instead sets up new obstacles for obtaining safe haven in the United States.

Second, the Proposed Rule is inconsistent with our asylum law. In defiance of Congressional mandates, the Proposed Rule imposes new restrictions on asylum seekers who cross the southwest border outside ports of entry (or at a port of entry without a pre-scheduled time and place) and rewrites the careful balance set by Congress in the statutory safe third country exception and firm resettlement bar.

³ See, e.g., Council 119, “Comments on ‘Security Bars and Processing’” (Aug. 10, 2020), available at <https://www.regulations.gov/comment/USCIS-2020-0013-1897>; Council 119, “Comments on Joint Notice of Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review” (July 15, 2020), available at <https://www.regulations.gov/comment/EOIR-2020-0003-6096>.

Third, the Proposed Rule would undermine the longstanding credible fear screening system. By imposing a presumptive bar to obtaining asylum that must be implemented in those screenings, and by raising the burden of proof to access procedures for withholding of removal or CAT protection at the credible fear stage, the Proposed Rule subjects asylum seekers to new burdens in circumstances where they may have difficulty marshalling evidence and increases the complexity and burden of credible fear screenings for asylum officers and the asylum system.

Fourth, the Proposed Rule rests on incomplete and misleading premises. Asking asylum seekers to seek protection in countries of transit, e.g., Mexico or Guatemala, or to wait for an appointment at a port of entry using the flawed CPB One app, ignores the actual circumstances facing them.

Fifth, the Proposed Rule is not the right approach, and indeed it is the wrong approach, to handle the flow of migrants at the border. The United States has faced large flows of refugees before. The United States is capable of processing and absorbing asylum seekers without putting up new obstacles to asylum eligibility and removing asylum seekers who have shown a credible fear of persecution.

At their core, the measures that the Proposed Rule seeks to implement are inconsistent with the asylum law enacted by Congress, the treaties the United States has ratified, and our country's moral fabric and longstanding tradition of providing safe haven to the persecuted. Rather, it is draconian and represents the elevation of a single policy goal—reducing the number of migrants crossing the southwest border—over human life and our country's commitment to refugees.

Council 119's members are steadfast in their commitment to serving our country by continuing its proud tradition as a refuge for the persecuted while ensuring the safety and security of Americans. The Proposed Rule betrays this tradition and would force Council 119's members to take actions that would violate their oath to faithfully discharge their duty to carry out the immigration laws adopted by Congress.⁴ It could make them complicit in violations of U.S. and international law. Accordingly, for the reasons set forth herein, Council 119 urges DOJ and DHS to immediately rescind the Proposed Rule and instead focus their efforts on advancing policies that ensure refugees can find protection in the United States.

⁴ See 5 U.S.C. § 3331.

II. Council 119's Interest in the Proposed Rule

Council 119 is a labor organization that represents the interests of over 14,000 bargaining unit employees of United States Citizenship and Immigration Services (“USCIS”) throughout the United States and abroad. Council 119’s members are federal employees who are responsible for, among other things, adjudicating affirmative asylum claims, processing refugees overseas, performing “credible fear” and “reasonable fear” screenings, researching conditions in refugee-producing countries and regions, and providing relief for survivors of human trafficking and those who assist law enforcement.

Council 119 has a special interest in the Proposed Rule because its members are at the forefront of interviewing and adjudicating the claims of individuals seeking asylum in the United States. Council 119’s members have firsthand knowledge as to how the Proposed Rule, if adopted, will impact asylum adjudications and pre-screening operations, as well as how it will comport with international and domestic laws concerning the protection of refugees.

This comment relies solely upon information that is publicly available, and it does not rely on any information that is law enforcement sensitive, classified, or protected under the Privacy Act of 1974. It represents only the views of Council 119 on behalf of its members and does not represent the views of USCIS or USCIS employees in their official capacities.

III. The Proposed Rule Undermines Our Nation's Longstanding Commitment of Providing Safe Haven to the Persecuted

The Proposed Rule seeks to eviscerate the longstanding protections afforded to refugees by our country. Even before our country’s founding, its lands served as a safe haven to those fleeing religious persecution in England and Holland.⁵ Although the impact of these refugees’ arrival is complex because of their treatment of the First Nations who already lived here,⁶ it cannot be denied that they serve as a symbol of America’s promise as a safe haven for the persecuted.

⁵ See William Bradford, *Of Plymouth Plantation* (Harold Paget ed. 2006); Jeremy Dupertuis Bangs, *Strangers and Pilgrims, Travellers and Sojourners: Leiden and the Foundations of Plymouth Plantation*, vii, 7, 605, 614, 630 (2009).

⁶ See, e.g., David J. Silverman, *This Land is Their Land: The Wampanoag Indians, Plymouth Colony, and the Troubled History of Thanksgiving* (2019).

The mid-19th century brought millions more refugees to America's doorstep.⁷ Between 1847 and 1851, an estimated two million Irish fled starvation and disease wrought by the Great Famine, with 840,000 passing through the port of New York and many more arriving by way of Canada.⁸ During the same period, German political refugees fleeing reactionary reprisals in the wake of the 1848 Revolution came to America seeking freedom of thought and expression.⁹

Our nation's treatment of refugees, however, is not unblemished, as demonstrated by American policy toward Jewish refugees during World War II.¹⁰ Although the United States accepted approximately 250,000 refugees fleeing Nazi persecution prior to the country's entry into World War II, it refused to accept more as Nazi Germany increased its atrocities.¹¹ American indifference to refugees fleeing German aggression is perhaps best reflected in the United States' denial of entry in 1939 to the *St. Louis*, an ocean liner carrying 907 German-Jewish refugees stranded off the coast of Miami.¹² The ship returned to Europe where many of its occupants met the worst possible fate—254 would die in the Holocaust.¹³

In many ways, our nation's refugee policy since World War II has sought to rectify our wartime humanitarian failures. Immediately after the war, the United States played a leading role in the formation and funding of international aid organizations such as the United Nations International Children's Emergency Fund and the World Food Programme, both of which

⁷ While U.S. policy during the 19th century did not draw a distinction between immigrants and refugees, historians have characterized groups whose emigration during this period was motivated by persecution, oppression, or natural disaster as refugees. See Philip A. Holman, *Refugee Resettlement in the United States, in Refugees in America in the 1990s: A Reference Handbook* 3, 5 (David W. Haines ed., 1996).

⁸ Timothy J. Meagher, *The Columbia Guide to Irish American History* 77 (2005). See generally William A. Spray, et al., *Fleeing the Famine, North America and Irish Refugees, 1845-1851* (Margaret M. Mulrooney ed., 2003). Many historians refer to these Irish migrants as refugees because their plight had roots in British colonial repression and conditions of serfdom. See, e.g., Meagher, at 66-71 (discussing various historians' assignment of culpability for the famine's devastation to British colonial rule).

⁹ See generally Adolf Eduard Zucker, *The Forty-Eighters: Political Refugees of the German Revolution of 1848* (1967).

¹⁰ Richard Breitman & Alan M. Kraut, *American Refugee Policy and European Jewry, 1933-1945*, 1-10 (1988).

¹¹ Holman, *supra* note 4, at 5 (citing Congressional Research Service 1991:556).

¹² The American Jewish Joint Distribution Committee, Minutes of the Meeting of the Executive Committee (June 5, 1939), available at https://archives.jdc.org/wp-content/uploads/2018/06/stlouis_minutesjune-5-1939.pdf.

¹³ *Id.*

provide support for refugees and displaced persons.¹⁴ In response to reports that Jewish survivors of the Holocaust were kept in poor conditions in Allied-occupied Germany, President Harry S. Truman directed the issuance of 40,000 visas to resettle the survivors in the United States.¹⁵ Congress also took action by enacting the Displaced Persons Act of 1948, which allowed for the admission of 415,000 displaced persons by the end of 1952.¹⁶

American compassion toward refugees following World War II was not limited to Holocaust survivors. In 1953, Congress enacted the Refugee Relief Act, which, along with its amendments, authorized the admission of 214,000 refugees, including escapees from Communist-dominated countries.¹⁷ The Refugee-Escapee Act that followed in 1957 allowed for the resettlement of “refugee-escapees,” persons fleeing persecution in Communist or Middle Eastern countries.¹⁸ In the next three decades, the United States welcomed refugees escaping violence, conflict, persecution, or natural disaster, at times in waves of hundreds of thousands, from the Azores,¹⁹ Cuba, Southeast Asia, Eastern Europe, the Soviet Union, and Afghanistan.²⁰

The United States also began to undertake international treaty obligations related to resettlement of refugees who set foot on American soil. In 1968, the United States ratified the 1967 Protocol Relating to the Status of Refugees, a treaty drafted by the U.N. High Commissioner for Refugees (“UNHCR”).²¹ Through the 1967 Protocol, the United States became bound by the substantive provisions of an earlier treaty, the 1951 Convention,²² agreeing that it would not: (i) discriminate against refugees on the basis of race, religion, or nationality; (ii) penalize refugees for their illegal entry or stay in the country; or (iii) engage in

¹⁴ See Maggie Black, *The Children and the Nations: The Story of UNICEF*, 25-35 (1986); Bryan L. McDonald, *Food Power: The Rise and Fall of the Postwar American Food System* 143 (2017).

¹⁵ See Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America’s Half-Open Door 1945-Present* 4-6 (1986).

¹⁶ Displaced Persons Act of 1948, ch. 647, Pub. L. No. 80-774, 62 Stat. 1009; Holman, *supra* note 4, at 5.

¹⁷ Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400; Holman, *supra* note 4, at 5.

¹⁸ Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639; Holman, *supra* note 4, at 6

¹⁹ Carl J. Bon Tempo, *Americans at the Gate: The United States and Refugees During the Cold War* 107-15 (2008).

²⁰ See USCIS, *Refugee Timeline*, <https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline>.

²¹ U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

²² Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 Berkeley J. Int’l L. 1, 1 n.1 (1997).

“refoulement”—to “expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.”²³ The United States reaffirmed its commitment to non-refoulement with its ratification in 1994 of the CAT.²⁴ Article 3(1) of the CAT provides: “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”²⁵

Embracing its role as a global leader in refugee protection, the United States has effectuated these international commitments by developing a sophisticated system for vetting claims for asylum. Beginning in 1972, the Immigration and Naturalization Service (the “INS”) used existing procedures, such as parole, stays of deportation, and adjustment of status, to allow foreign nationals who feared persecution in their homeland to remain in the country.²⁶ The Refugee Act of 1980 created the first statutory basis for asylum in the United States²⁷ and codified the 1951 Convention’s principle of non-refoulement.²⁸ Then, in 1990, the INS established an Asylum Corps, comprised of professional asylum officers trained in international law and having access to information on international human rights.²⁹ This specialized training allows asylum officers to more accurately and efficiently assess asylum claims. Recognizing the value of this approach, Congress authorized funding to double the number of asylum officers in 1994.³⁰ The asylum program was further modified in 1995 and 1996 to allow asylum officers to process expedited removal of persons who cannot demonstrate a credible fear of persecution.³¹

²³ *Id.* at 2.

²⁴ See U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988).

²⁵ *Id.*

²⁶ See USCIS, *Refugee Timeline*, <https://www.uscis.gov/history-and-genealogy/our-history/refugeetimeline>.

²⁷ The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; Tom K. Wong, *The Politics of Immigration: Partisanship, Demographic Change, and American National Identity* 52-53 (2017).

²⁸ Compare U.N. Convention Relating to the Status of Refugees art. 33(1), 189 U.N.T.S. 137, with 8 U.S.C. § 1231(b)(3)(A).

²⁹ Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 Am. U. Int’l L. Rev. & Pol’y 43 (1994); see also 8 C.F.R. § 208.1(b); *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

³⁰ Steven Greenhouse, *U.S. Moves to Halt Abuses in Political Asylum Program*, N.Y. Times, Dec. 3, 1994, p. 8.

³¹ See 8 U.S.C. § 1225(b)(1)(B)(iii).

Since the creation of USCIS in 2003, the responsibility for maintaining an asylum system in accordance with international and domestic law has rested with USCIS’s Asylum Division, which reviews claims of three categories of asylum-seekers: (1) those not in removal proceedings who affirmatively apply for asylum, referred to as the “affirmative” asylum process; (2) those subject to expedited removal who indicate an intention to apply for asylum or a fear of return to their home country; and (3) those who have already been ordered removed or convicted of certain crimes but express a fear of return to their home country. In the first instance, the Division is tasked with adjudicating “affirmative” asylum applications. In the second instance, the Division determines whether the individual has a “credible fear” of persecution or torture.³² If the Division so determines, the individual may apply for asylum, withholding of removal, and protection under the CAT as a defense to removal in a formal removal proceeding before an immigration judge or have their case retained by USCIS for an Asylum Merits interview. In the third instance, the Division must determine whether an individual who has already been ordered removed or convicted of certain crimes but expresses a fear of return to the removal country has a “reasonable fear” of persecution or torture in that country.³³ If the Division determines as such, the individual is referred to an immigration judge for withholding-only proceedings, in which the individual may seek withholding of removal under INA § 241(b)(3) (codified as 8 U.S.C. § 1231(b)(3)) or withholding or deferral of removal under regulations implementing CAT obligations. This agile process strikes an appropriate balance between offering protection to qualified asylum seekers, enforcing applicable laws, addressing national security and public safety concerns, and combatting fraud and abuse.

American leadership in refugee protection and the effectiveness of our processes for dealing with displaced people are perhaps best reflected in the sheer number of refugees—nearly 5 million representing well over 70 nationalities³⁴—successfully absorbed into the United States since World War II. Forging new lives out of turmoil and trauma, refugees have contributed much to the fabric of American life and are integral to our success as a nation.

To be sure, our country has also made missteps. Widespread improper denials of asylum to Salvadorans and Guatemalans fleeing civil strife and government repression in the 1980s resulted in the ABC settlement, shielding 300,000 asylum seekers from deportation and

³² See 8 U.S.C. § 1225(b)(1)(B); see also 8 C.F.R. §§ 208.30, 235.3.

³³ See 8 C.F.R. §§ 238.1, 241.8, 208.31.

³⁴ David W. Haines, *Safe Haven? A History of Refugees in America* 4 (2010); Refugee Processing Center, *Refugee Admissions Report as of February 28, 2023* (Mar. 6, 2023), available at <https://www.wrapsnet.org/admissions-and-arrivals/>.

permitting them to reapply for asylum.³⁵ It was out of an effort to right this wrong of politicized decision making on asylum claims that the Asylum Corps was created as an independent, professionally trained cadre of immigration officers with a refugee protection mandate. The Trump Administration repeatedly sought to destroy the asylum system by erecting arbitrary barriers. But that is not the path that accords with our nation’s deepest and most cherished values and traditions.

Today, as the Proposed Rule acknowledges, the world is in the throes of a migration crisis that continues to grow.³⁶ In 2021, there were 89.3 million individuals forcibly displaced from their homes.³⁷ This displacement spans the globe, from the Middle East to Africa to Asia to Central America.³⁸ Now, perhaps more than ever, America needs to continue its longstanding commitment to offering protection, freedom, and opportunity to the vulnerable and persecuted.³⁹ But the Proposed Rule ignores these concerns.

IV. The Proposed Rule is Inconsistent with Our Asylum Law

Subject to our nation’s international treaty obligations, Congress has “plenary power” to make rules governing which group of aliens may be admitted or excluded from the United States. *Boutilier v. INS*, 387 U.S. 118, 123 (1967); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). “[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.” *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

Congress has decreed that a noncitizen who is physically present in the United States or who arrives in the United States may apply for asylum in the United States. Importantly, the individual may do so “whether or not” the person arrives in the United States through “a designated port of arrival” and “irrespective of such alien’s status,” subject to specific and narrow exceptions. *See* 8 U.S.C. § 1158(a)(1).

³⁵ Library of Congress, “American Baptist Churches (ABC) v. Thornburgh,” available at <https://guides.loc.gov/latinx-civil-rights/abc-v-thornburgh>.

³⁶ *See* UNHCR, *Global Trends: Forced Displacement in 2021* at 5 (June 16, 2022), available at <https://www.unhcr.org/62a9d1494/global-trends-report-2021>; Proposed Rule at 11704 (“Economic and political instability around the world is fueling the highest levels of migration since World War II, including in the Western Hemisphere.”)

³⁷ *Id.* at 2.

³⁸ *Id.* at 2-3.

³⁹ *See* Examining the Syrian Humanitarian Crisis from the Ground (Part II) Before the Subcomm. on the Middle East and North Africa of the House Comm. on Foreign Affairs, 114th Cong. 114-115 (2017) (written testimony of Leon Rodriguez, Director, U.S. Citizenship and Immigration Servs., Dep’t of Homeland Security), <http://docs.house.gov/meetings/>.

These exceptions to the right to apply for asylum are set forth in section 1158(a)(2) of Title 8 of the United States Code, and they include, among others, the “safe third country” exception. The “safe third country” exception has its roots in the Preamble to the 1951 Convention Relating to the Status of Refugees (“1951 Convention”), which acknowledges that “the grant of asylum may place unduly heavy burdens on certain countries, and [that] a satisfactory solution . . . therefore cannot be achieved without international co-operation.”⁴⁰ The exception is designed to address “the phenomenon of refugees and asylum seekers ‘who move in an irregular manner from countries *in which they have already found protection*, in order to seek asylum or permanent resettlement elsewhere.’”⁴¹

Separately, mandatory bars to asylum are set forth in section 1158(b). That section provides that “[t]he Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established” by them under this section. Section 1158(b)(2)(A) provides that asylum may not be granted to a noncitizen who falls within six categories of individuals specified within that section: (i) have engaged in persecution themselves; (ii) were convicted of a particularly serious crime in the United States; (iii) committed a serious nonpolitical crime outside the United States; (iv) present a danger to the security of the United States; (v) have engaged in terrorist activity or are affiliated with a terrorist organization; or (vi) were firmly resettled in another country prior to arriving in the United States. 8 U.S.C. § 1158(b)(2)(A). These exceptions stem from the “exclusion” and “cessation” clauses of the 1951 Convention, which set forth circumstances in which individuals are either not entitled to protection or no longer need protection.⁴² In addition to creating six specific mandatory bars to asylum, Congress also delegated authority to the Attorney General to “establish additional limitations and conditions *consistent* with this section, under which an alien shall be ineligible for asylum under paragraph (1).” 8 U.S.C. § 1158(b)(2)(C) (emphasis added).

The Proposed Rule is not consistent with our asylum laws in several respects:

- ***Port of entry.*** DHS and DOJ distinguish the Proposed Rule from a general limitation on asylum by asylum seekers who pass through third countries by emphasizing that it does not apply to those who present “at a port of entry, pursuant to a scheduled time and place.” Proposed Rule § 208.33(a)(1)(ii). But Congress has expressly rejected conditioning eligibility for asylum on presenting at a port of entry, making clear that eligibility is extended whether or not an asylum seeker arrives “at a designated port of

⁴⁰ 1951 Convention Relating to the Status of Refugees Preamble, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

⁴¹ María-Teresa Gil-Bazo, *The Safe Third Country Concept in International Agreements on Refugee Protection*, 33/1, Netherlands Quarterly of Human Rights 42 (2015) (emphasis added) (quoting the Executive Committee of the UNHCR’s Conclusion No. 58(XL)).

⁴² See 1951 Convention Relating to the Status of Refugees arts. 1(E), 1(F), and 32(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

arrival” and “irrespective of such alien’s status.” 8 U.S.C. § 1158(a)(1). While an asylum seeker’s method of entry may be a factor in adjudicating an asylum claim, the Proposed Rule grants it near-dispositive weight over a wide swathe of cases—with the presumption of ineligibility only rebuttable by narrowly defined “exceptionally compelling circumstances.” Proposed Rule § 208.33(a)(2).⁴³ The Departments’ argument that they are permitted to apply a presumption of ineligibility against a population Congress has specifically decreed may apply for asylum is totally lacking in merit: if Congress had intended manner of entry to be a permissible basis for a finding of ineligibility for asylum, it would not have taken pains to codify the right of migrants to apply for asylum “whether or not” they arrived in the United States through “a designated port of arrival” and “irrespective of [their] status.”

- ***The “safe third country” exception.*** In the “safe third country” exception, Congress carefully balanced the need to afford asylum to persecuted people against the need to share that burden with other countries that are willing and able to provide similar protection.⁴⁴ Congress did so by decreeing that, for the “safe third country” exception to apply, the Attorney General must “determine that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country . . . in which the alien’s life or freedom would not be threatened on account of [a protected class], and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection . . .” 8 U.S.C. § 1158(a)(2)(A). But the Proposed Rule’s presumption applies to asylum seekers who do not meet the specific criteria that Congress has required in the “safe third country” exception. The presumption applies if the asylum seeker “travel[ed] through a country other than the alien’s country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention Relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees,” irrespective of whether that country is a safe place for the asylum seeker or whether it has a “full and fair” asylum system. Proposed Rule § 208.33(a)(1). The three sets of circumstances the Proposed Rule lists as sufficient to constitute “exceptionally compelling circumstances” to rebut the presumption include neither the threat of persecution nor the absence of meaningful access to asylum. *Id.* § 208.33(a)(2). The Proposed Rule includes only a narrowly circumscribed exception for an “imminent and extreme threat to life or safety,” requiring an asylum seeker to wait until the moment of imminent danger to qualify, and even then mandating that the asylum seeker demonstrate this circumstance (in a preliminary credible fear screening usually held shortly after a border crossing) by a preponderance of the evidence. *Id.* §

⁴³ The Departments also rely on a formalistic distinction between permission to apply for asylum and eligibility to obtain it. 88 Fed. Reg. at 11735. The use of this distinction to read Congress’s enactment as unrelated to eligibility has been rejected by the Ninth Circuit Court of Appeals as “border[ing] on absurdity.” *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 670 (9th Cir. 2021).

⁴⁴ See María-Teresa Gil-Bazo, *The Safe Third Country Concept in Int’l Agreements on Refugee Protection*, 33/1, *Netherlands Quarterly of Human Rights* 42 (2015).

208.33(a)(2)(ii). The Proposed Rule abandons Congress’s criteria for the “safe third country” exception and, as such, is inconsistent with it in several respects.

- **“Firm resettlement” bar.** This bar applies only to individuals who have firmly resettled in another country. But the Proposed Rule applies on the basis that an individual has merely transited through a third country before reaching our southern border. Again, the Proposed Rule runs afoul of the criteria set forth by Congress for the “firm resettlement” bar to apply.

In sum, the Proposed Rule defies Congress’s command that eligibility for asylum is to not be conditioned on whether an asylum seeker arrives at a designated port of arrival. And it also runs afoul of the careful balance that Congress has struck in the “safe third country” exception and the “firm resettlement” bar, which govern the circumstances in which the potential availability of protection in a third country may lawfully prevent that person from obtaining asylum relief.

The Departments cannot justify this departure from the statutory framework by reference to their authority to “establish additional limitations and conditions, consistent with this section,” on asylum eligibility. 8 U.S.C. § 1158(b)(2)(C). Here, the Proposed Rule bars eligibility for asylum on bases that Congress has either rejected outright (arrival outside a port of entry) or circumscribed far more narrowly than the Proposed Rule (transit through a third country). The Proposed Rule does not write on a clean slate; instead, it rewrites the statute Congress enacted. In sum, the Proposed Rule is not “consistent” with our asylum law, and it is therefore void.

V. The Proposed Rule Would Yield Increased Injustice and Dysfunction in Credible Fear Screenings

Asylum officers are dedicated public servants who carry out several functions within the asylum system, but their role is limited by statutory and regulatory authority. Asylum officers are tasked with conducting “credible fear” screening interviews for asylum seekers referred to them by Customs and Border Protection agents. *See* 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. § 208.30. During this screening interview, the asylum officer must determine whether the asylum seeker has a “credible fear of persecution.” 8 U.S.C. § 1225(b)(1)(B)(iii). During the same interview, asylum officers also inquire into the individual’s fear of torture, for the purpose of identifying potential bases for protection under the CAT.

Asylum officers do not grant asylum (or any other affirmative relief) during a credible fear screening interview. If a positive credible fear determination is made with respect to persecution or torture, the asylum seeker may move forward with her claims before an Immigration Judge in a full hearing or is scheduled for an Asylum Merits interview with an asylum officer. *See* 8 C.F.R. § 208.30(f). If a negative credible fear determination is made, the asylum seeker is ordered removed. She may then request review of the asylum officer’s finding by an Immigration Judge. *See* 8 C.F.R. § 208.30(g).

Although asylum officers are responsible for noting in an asylum seeker's file that a mandatory bar to eligibility *may* apply, the statutory exceptions are not used as a basis to find that the asylum seeker lacks a "credible fear of persecution." *See* 8 C.F.R. § 208.30(e)(5)(i). Indeed, USCIS's website notes that "[a]n Asylum Officer does not make a final decision whether you are subject to a mandatory bar to asylum or withholding of removal in the credible fear determination process. An asylum officer will note in their credible fear decision that a mandatory bar to asylum or withholding of removal may apply in a subsequent Asylum Merits Interview before an asylum officer or in immigration proceedings before an IJ."⁴⁵

But the Proposed Rule creates two exceptions to the general rules governing "credible fear" interviews.

First, application of the Proposed Rule's presumption is, absent rebuttal, a mandatory basis for a negative credible fear finding. *See* Proposed Rule § 208.33(c)(1)(i). Thus, even if an asylum seeker subject to the presumption establishes that there is a significant possibility they could prove in a full hearing that they would face persecution in their home country based on a protected characteristic, the Proposed Rule compels the asylum officer to find that they did not have a credible fear of persecution—unless the asylum seeker establishes that "exceptionally compelling circumstances" exist, a difficult hurdle for an unrepresented asylum seeker facing expedited removal, and a standard that apparently does not include the lack of a safe country in which to apply for asylum. *Id.* § 208.33(a)(2).

Second, for individuals subject to the Proposed Rule's presumption, and *only* for those individuals, claims for withholding of removal and relief under the CAT must be evaluated in the screening using the more stringent "reasonable possibility"—not "significant possibility"—standard. Proposed Rule § 208.33(c)(2)(i). Prior to the Proposed Rule, asylum officers applied the "reasonable possibility" standard in reasonable fear screenings, which take place only in two specific situations: (1) after the reinstatement of a prior removal order; and (2) after a final administrative removal order, which ensues from certain felony convictions. There is a good reason why this standard was reserved for individuals with prior violations of our nation's laws: Individuals subject to reasonable fear screenings by definition have prior experience with the U.S. immigration system, and many have lived in the United States for extended periods of time. Because it entails a higher burden of proof, it is an inappropriate standard for an initial screening interview following a person's first entry into the United States. But the Proposed Rule requires the application of this standard in the "credible fear" screening process for those individuals who have been found to lack "credible fear of persecution" because they did not apply for and were denied asylum in a third country, did not use CBP One to schedule an appearance at a port of entry, or did not receive prior authorization to travel to the United States to seek parole. To rebut the presumption by a showing of "exceptionally compelling circumstances," the Proposed Rule

⁴⁵ U.S. Citizenship and Immigration Services, *Questions and Answers: Credible Fear Screening*, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening> (last visited Mar. 15, 2023).

requires asylum seekers to meet the even higher preponderance-of-the-evidence standard. Proposed Rule § 208.33(a)(2).

The new procedures set forth by Proposed Rule are a dramatic departure from the screening process that was designed decades ago, and represent a stark re-interpretation of asylum officers' role. Until recently—when this long-standing framework was altered by rulemakings that have now largely been enjoined or rescinded—asylum officers had never been authorized (let alone directed) to make negative credible fear findings based on the applicability of a mandatory bar. The Proposed Rule changes that long-standing approach *only* with respect to asylum seekers entering our country through the southern border who had not applied for and been denied protection in a third country, used CBP One to schedule an appearance at a port of entry, or received prior authorization to travel to the United States to seek parole. *See* Proposed Rule § 208.33(c)(2)(i).⁴⁶

The context of a credible fear screening is poorly suited for the higher burden of proof the Proposed Rule seeks to impose on asylum seekers, and for the stringent “exceptionally compelling circumstances” test required to rebut the presumption of asylum ineligibility. Noncitizens undergoing credible fear screenings often do so mere days after their initial encounter with DHS. They are frequently detained and face inadequate access to counsel. Most have undertaken a long and difficult journey to the U.S. border. Many have recently suffered traumatic events. Certain classes of applicants, such as torture victims, may suffer from severe psychological trauma—such as denial, memory lapses, and inability to communicate. Our country's existing law recognizes the challenges faced by individuals seeking protection under the asylum system or the CAT, and thus requires them to meet the requirements of their claim in proceedings where they are afforded due process rights. The Proposed Rule, however, ignores these realities. It would require asylum seekers to show a reasonable possibility of persecution or torture, or “exceptionally compelling circumstances” by a preponderance of the evidence, at the credible fear screening stage, without the more fulsome procedural protections of a full hearing. It ignores that a credible fear screening is just that—a screening—and is not suited for a full adjudication of an asylum seeker's claim or full consideration of a presumption against eligibility.

The Departments themselves have recently recognized the due process problems with an approach akin to that of the Proposed Rule. In justifying their rescission of the requirement to consider certain mandatory bars to asylum at the credible fear screening stage, the Departments explained that “due to the intricacies of the fact-finding and legal analysis often required to apply mandatory bars, the Departments now believe that individuals found to have a credible fear of persecution generally should be afforded the additional time, procedural protections, and opportunity to further consult with counsel that the Asylum Merits process or section 240

⁴⁶ To be sure, Council 119 agrees with the Departments that credible fear screenings are generally an inappropriate context for adjudicating mandatory bars, as discussed below. But this only highlights the incongruity of requiring this bar, which has its own legal and factual complexities, to be adjudicated at a credible fear screening, and not the others.

removal proceedings provide.” Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers (“Asylum Processing IFR”), 87 Fed. Reg. 18078, 18094 (Mar. 29, 2022). Here, the Departments propose to impose what amounts to another mandatory bar at the credible fear screening stage—one with its own factual and legal complexities, including whether an asylum seeker was subject to the “exceptionally compelling circumstances” necessary to rebut the presumption.

The new protocol also leads to absurd and irrational results. Under the new regime, an individual who articulates a credible fear of persecution to an asylum officer, but who also admits to terrorism in her home country, will receive a positive credible fear finding if he demonstrates that he applied for and was denied asylum in a third country or if he presents at a port of entry pursuant to a pre-scheduled time and place, because he is not subject to the presumption. But a refugee fleeing political violence in South America who did not apply for asylum and a third country and who crossed the southwest border outside a port of entry and without authorization to request parole will receive an automatic negative credible fear determination, notwithstanding the fact that she faced persecution on account of a protected ground in her home country, unless she meets the narrowly delineated standard for “exceptionally compelling circumstances.” *See* 8 C.F.R. § 208.33(a), (b).

Even more, after making a negative credible fear finding based on the Proposed Rule’s presumption, asylum officers must then apply a “reasonable possibility” standard to assess the individual’s claims for statutory withholding of removal or CAT protection. This higher standard is applied in the screening interview *only* for individuals subject to the Proposed Rule’s presumption. *See* Proposed Rule § 208.33(c)(2)(i). It does not apply to those suspected of terrorism, engaging in persecution, or those who present a threat to our national security, so long as they are able to demonstrate that they applied for and were denied asylum in a third country, received authorization to request parole, or presented at a port of entry pursuant to a pre-scheduled time and place. *Id.* § 208.33(a).

Significantly, the Proposed Rule would impose substantial additional burdens on asylum officers performing credible fear screenings. The Proposed Rule tasks asylum officers during the credible fear screening with assessing whether the presumption applies and whether it has been rebutted, and if the presumption applies, with assessing qualification for withholding of removal or CAT protection under the higher “reasonable possibility” standard. It has long been recognized that asylum cases are a cooperative effort. New asylum officers are trained that while the burden of proof is always on the asylum seeker, officers and applicants have a shared responsibility for developing the record, with the officer responsible for effectively eliciting testimony in a non-adversarial interview and researching relevant country conditions.⁴⁷ The

⁴⁷ *See, e.g.*, RAIO Combined Training Program, “Interviewing - Eliciting Testimony” (Dec. 20, 2019), available at: <https://www.uscis.gov/sites/default/files/document/foia/Interviewing - Eliciting Testimony LP RAIO.pdf> (last visited Mar. 25, 2023); RAIO Combined Training Program, “Interviewing - Introduction to the Non-Adversarial Interview” (Dec. 20, 2019), available at: <https://www.uscis.gov/sites/default/files/document/foia/Interviewing - Intro to the NonAdversarial Interview LP RAIO.pdf> (last visited Mar. 25, 2023).

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection recognizes this principle, explaining:

It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.⁴⁸

The Board of Immigration Appeals has recognized the same principle, noting that “various guidelines for asylum adjudicators recommend the introduction of evidence by the adjudicator.” *See In re S--- M--- J*, 21 I. & N. Dec. 722, 729 (B.I.A. January 31, 1997). If the Proposed Rule goes into effect, asylum officers will have the duty to elicit any testimony that could impact whether the presumption applies and whether it has been rebutted, and whether the higher reasonable possibility standard has been met for screening withholding of removal or CAT protection. The rebuttable presumption thus gives rise to additional factual complexities that an asylum officer must explore in a credible fear screening, adding to the workload and time expenditure of asylum officers and further taxing the asylum system as a whole.

The Departments have also recently recognized this point. In rescinding prior rules requiring consideration of mandatory bars and raising the standard of proof in credible fear screenings, the Departments explained that “[h]aving asylum officers apply varied legal standards would generally lead to the need to elicit additional testimony from noncitizens at the time of the credible fear screening interview, which lengthens credible fear interviews and increases adjudication times.” Asylum Processing IFR, 87 Fed. Reg. at 18092. Specifically referencing the Departments’ experience with the Trump Administration’s Third Country Transit Bar, the Departments recounted that “asylum officers were required to spend additional time during any interview where the bar potentially applied developing the record related to whether the bar applied, whether an exception to the bar might have applied, and, if the noncitizen appeared to be barred and did not qualify for an exception to the bar, developing the record sufficiently such that a determination could be made according to the higher reasonable fear standard.” *Id.* Thus, the Departments stated, “no evidence has been identified that this approach resulted in more successful screening out of nonmeritorious claims while ensuring the United States complied with its nonrefoulement obligations.” *Id.* Furthermore, in the experience of

⁴⁸ United Nations High Commissioner on Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ¶ 196 (2019).

Council 119's members, there is no correlation between an asylum seeker's manner of entry or transit route and the merits of their legal claim for protection.

Those considerations apply today just as much as they did last March. The Departments suggest that the Proposed Rule is not akin to the "legally and factually complicated" bars in INA Section 208(b)(2)(A), but the Proposed Rule requires assessment of multiple complex factors, including whether the presumption has been rebutted by "exceptionally compelling circumstances" and whether an asylum seeker who presents at a port of entry was unable "to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle." 88 Fed. Reg. at 11744. The Departments say that they will implement the new bar better than the last time and that they consider the gains from rejecting nonmeritorious claims early to justify the additional inefficiencies in credible fear screenings. 88 Fed. Reg. at 11744-47. But these arguments are speculative and unsupported by evidence, just as they were when the Departments rejected similar arguments a year ago.

VI. The Proposed Rule Rests on Incomplete and Misleading Premises

The Proposed Rule purports to offer options to asylum seekers to avoid its presumption against eligibility for asylum. Asylum seekers, the Departments suggest, could simply seek asylum in the country they pass through before entering the United States. Or, they could simply schedule an appointment at a port of entry using the CBP One app. Or, they could make use of one of the parole programs. But the Proposed Rule ignores the actual circumstances facing asylum seekers on the ground, which, in the experience of Council 119's members, makes these options unrealistic and not meaningfully available to most.

A. Safety and access to asylum in transit countries

The Departments present cherry-picked facts from certain countries so as to suggest that asylum is adequately and safely accessible there. But a reasoned and objective analysis of the facts on the ground belies this narrative: the transit countries asylum seekers pass through en route to the southwest border are often unable or unwilling to provide a safe haven. The following are some of the most common transit countries for migrants traveling to the southwest border. Each poses obstacles for asylum seekers to adequately and safely access protection.

Mexico. An asylum seeker crossing the southwest border who is not a Mexican national will ordinarily have passed through Mexico and thus will qualify as having "travel[led] through a country other than the alien's country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees." Proposed Rule § 208.33(a). But for many asylum seekers, Mexico is not a safe haven. The U.S. Department of State has noted reports of asylum seekers being victimized by criminal armed groups and, at times, by

police, immigration officers, and customs officials.⁴⁹ Human Rights First tracked “at least 13,480 reports of murder, torture, kidnapping, rape, and other violent attacks on migrants and asylum seekers blocked in or expelled to Mexico under Title 42 since President Biden took office”—a situation that would be perpetuated by removing asylum seekers back to Mexico on the theory that they could apply for asylum there.⁵⁰ Another recent report from the Washington Office of Latin America described how migrants seeking asylum in Tapachula, where (due to its proximity to Mexico’s southern border) the vast majority of asylum claims are filed, are vulnerable to maltreatment and violence as they try to navigate Mexico’s backlogged asylum system—including, sometimes, violence from the gangs from which they fled.⁵¹ Notwithstanding its recent expansions, the Mexican Refugee Assistance Commission (“COMAR”) still has only ten locations across the country.⁵²

Guatemala. Guatemala, which is among the most dangerous countries in the world,⁵³ is not safe for asylum seekers, not only due to their inherent vulnerabilities as migrants, but also on account of their race, nationality, gender, sexual orientation, gender identity, and other reasons.⁵⁴ Guatemala is itself a major originator of asylum applicants in the United States, with Guatemalan nationals making up 10.4% of affirmative asylum applications and 17.2% of defensive asylum applications in FY 2021.⁵⁵ The U.S. Department of State has noted “gaps and shortcomings” in Guatemala’s asylum procedures and a complex process that “contributed to major delays on final case decisions and an increased backlog.”⁵⁶

⁴⁹ U.S. Dep’t of State, *Mexico 2022 Human Rights Report*, at 19 (Mar. 20, 2023), available at <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/mexico/>.

⁵⁰ See Human Rights First, *Human Rights Stain, Public Health Farce*, at 2 (Dec. 12, 2022), available at <https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf>

⁵¹ Washington Office on Latin America, *Struggling to Survive: the Situation of Asylum Seekers in Tapachula, Mexico*, at 20-21 (June 2, 2022), available at <https://www.wola.org/wp-content/uploads/2022/06/FINAL-Struggling-to-Survive-Asylum-Seekers-in-Tapachula.pdf>.

⁵² See UNHCR, “How to Apply for Refugee Status in Mexico,” available at <https://help.unhcr.org/mexico/en/como-solicitar-la-condicion-de-refugiado-en-mexico/>.

⁵³ OSAC, “Guatemala Country Security Report” (Aug. 15, 2022), available at <https://www.osac.gov/Content/Report/2013f384-296b-4394-bfcb-1c9c40b9c7df>.

⁵⁴ See Human Rights First, *Is Guatemala Safe for Refugees and Asylum Seekers?* (June 2019), available at <https://humanrightsfirst.org/wp-content/uploads/2022/10/IsGuatemalaSafeForRefugeesandAsylumSeekers.pdf>.

⁵⁵ Office of Immigration Statistics, *2021 Refugee and Asylees Annual Flow Report*, at 9 (Oct. 3, 2022), available at https://www.dhs.gov/sites/default/files/2023-03/2022_0920_plcy_refugees_and_asylees_fy2021_v2.pdf.

⁵⁶ U.S. Dep’t of State, *Guatemala 2022 Human Rights Report*, at 16 (Mar. 20, 2023), available at https://www.state.gov/wp-content/uploads/2023/03/415610_GUATEMALA-2022-HUMAN-RIGHTS-REPORT.pdf.

Belize. Recent reports from the State Department indicate that migrants in Belize are sometimes arbitrarily denied the ability to apply for refugee status.⁵⁷ The Belizean government, pursuant to an agreement it has with Cuba to return all irregular immigrants with Cuban citizenship, recently “repatriated Cuban nationals who claimed their lives or freedom would be threatened due to their opposition to the government.”⁵⁸

El Salvador. The State Department has noted “major regulatory and operational gaps” in El Salvador’s refugee protection system.⁵⁹ The commission responsible for refugee status determinations does not have its own budget.⁶⁰ And asylum seekers must file their claims within only five days of entering the country—something that is impossible for the vast majority of asylum seekers who have traveled for days after being uprooted from their homelands.⁶¹

Honduras. Far from being a safe country in which to seek asylum, Honduras is a top originator for asylum applications worldwide, with 59,800 in 2021.⁶² UNHCR found that when refugees from Nicaragua sought protection in Honduras, “[t]he legal framework and reception capacities severely limit[ed] an adequate response,” and multiple persons of concern were murdered in southern border towns.⁶³ The State Department noted that migrants and asylum seekers “were vulnerable to abuse and sexual exploitation by criminal organizations,” and that women, children, and LGBTQI+ people were particularly vulnerable.⁶⁴

Nicaragua. Nicaragua is not a safe haven for refugees—instead, it was the second largest source country for asylum applications in 2021, with 111,600 Nicaraguan nationals applying for asylum elsewhere.⁶⁵ Nicaragua’s government does not cooperate with UNHCR or other

⁵⁷ See U.S. Dep’t of State, *Belize 2022 Human Rights Report*, at 10 (Mar. 20, 2023), available at <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/belize/>; U.S. Dep’t of State, *Belize 2021 Human Rights Report*, at 11-12 (Apr. 12, 2022), available at <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/belize/>.

⁵⁸ U.S. Dep’t of State, *Belize 2022 Human Rights Report*, at 10 (Mar. 20, 2023), available at <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/belize/>.

⁵⁹ U.S. Dep’t of State, *El Salvador 2022 Human Rights Report*, at 18-19 (Mar. 20, 2023), available at <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/el-salvador/>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² UNHCR, *Global Trends: Forced Displacement in 2021* (hereafter “*Global Trends*”), at 32 (June 16, 2022), available at <https://www.unhcr.org/62a9d1494/global-trends-report-2021>.

⁶³ UNHCR, *Honduras factsheet*, at 1 (March 2022), available at <https://reporting.unhcr.org/document/1831>.

⁶⁴ U.S. Dep’t of State, *Honduras 2022 Human Rights Report*, at 11 (Mar. 20, 2023), available at <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/honduras/>.

⁶⁵ *Global Trends* at 32.

organizations in providing protection to refugees and has not provided updated information on refugees or asylum seekers since 2015.⁶⁶ Human rights organizations have documented widespread violations of human rights in Nicaragua, including arbitrary detention, torture, sexual violence, and indiscriminate targeting.⁶⁷

Costa Rica. Costa Rica, a country of five million people, has received more than 200,000 requests for refugee status, mostly from neighboring Nicaragua.⁶⁸ As a result, the asylum system is backlogged and overburdened, with applicants having to wait months to file an asylum claim and up to 10 years to obtain a final resolution.⁶⁹

Panama. The State Department has noted barriers to access and long delays in refugee protection in Panama, with thousands of persons unable to benefit from international protection.⁷⁰ The National Refugee Office lacked presence in government-run migrant reception centers and airports.⁷¹ UNHCR noted that asylum seekers had trouble accessing protection when transiting the country, and there have been cases of refoulement.⁷² Approval rates for asylees were less than 1 percent in 2021.⁷³

Colombia. Millions of refugees and migrants from Venezuela currently reside in Colombia as a consequence of the largest forced displacement crisis ever in Latin America.⁷⁴ Colombia has its own forced displacement crisis from violence and armed conflict, however, with 6.7 million internally displaced persons living in the country and tens of thousands displaced in 2022.⁷⁵ This crisis has increasingly affected Venezuelans residing in Colombia as

⁶⁶ U.S. Dep't of State, *Nicaragua 2022 Human Rights Report*, at 23 (Mar. 20, 2023), available at <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/nicaragua/>.

⁶⁷ UNHCR, *International Protection Considerations with Regard to People Fleeing Nicaragua* (Jan. 2023), available at <https://www.refworld.org/docid/63bc17264.html>.

⁶⁸ Daniel Zawodny, *Nicaraguan Migrants Face Uncertainty in Costa Rica*, North American Congress in Latin America (Dec. 22, 2022), available at <https://nacla.org/nicaraguan-migrants-face-uncertainty-costa-rica>.

⁶⁹ See U.S. Dep't of State, *Costa Rica 2022 Human Rights Report*, at 7 (Mar. 20, 2023), available at <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/costa-rica/>.

⁷⁰ U.S. Dep't of State, *Panama 2022 Human Rights Report*, at 9 (Mar. 20, 2023), available at <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/panama/>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ U.S. Dep't of State, *Panama 2021 Human Rights Report*, at 10 (Apr. 12, 2022), available at <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/panama/>.

⁷⁴ UNHCR, "Colombia," available at <https://www.unhcr.org/colombia.html>.

⁷⁵ U.S. Dep't of State, *Colombia 2022 Human Rights Report*, at 21-22 (Mar. 20, 2023), available at <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/colombia/>.

well.⁷⁶ Refugees have also been subjected to human trafficking and sexual exploitation by organized crime networks.⁷⁷

Ecuador. The State Department cited UN agency and NGO reports that migrants and refugees in Ecuador, especially women, children, and LGBTQI+ people, have sometimes faced sexual and gender-based violence and human trafficking.⁷⁸ In 2022, authorities reported an increase in migrants being subjected to forced labor, sex trafficking, and forced recruitment into criminal activity, particularly by transnational criminal organizations.⁷⁹

The Proposed Rule ignores these realities. It is true that some asylum seekers may find safety in the countries discussed above. But the asylum seekers who seek asylum in the United States are not among those who found lasting and durable protection in transit countries. The rebuttable presumption's apparent premise that the migrants arriving at the U.S. border have safe and adequate opportunities to apply for protection in transit countries is without support.

B. Scheduling appointments at ports of entry

The Departments indicate that the Proposed Rule is supposed to be accompanied by quicker and smoother processing at ports of entry, achieved through use of the CBP One app. *See* 88 Fed. Reg. at 11719-20. But as widespread reporting has shown, the app is plagued by accessibility issues and technical failures. Many migrants have reported issues with the facial recognition software, including that it fails to recognize the faces of Black and dark-skinned people.⁸⁰ Migrants may not have access to a smartphone or to sufficiently reliable internet access to use the app.⁸¹ Some migrants may also have difficulties using the app because of literacy issues or unfamiliarity with smartphones. Even when migrants can make use of the app, limited appointments go quickly.⁸² The Departments cannot rely on this flawed technology to

⁷⁶ UNHCR, *supra* note 74.

⁷⁷ International Crisis Group, *Hard Times in a Safe Haven: Protecting Venezuelan Migrants in Colombia*, at 19-21 (Aug. 9, 2022), available at <https://www.crisisgroup.org/latin-america-caribbean/andes/colombia-venezuela/hard-times-safe-haven-protecting-venezuelan>.

⁷⁸ U.S. Dep't of State, *Ecuador 2022 Human Rights Report*, at 16 (Mar. 20, 2023), available at <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/ecuador/>.

⁷⁹ *Id.*

⁸⁰ *See, e.g.*, Bernd Debusmann Jr, *At US border, tech issues plague new migrant applications*, BBC News (Mar. 8, 2023), available at <https://www.bbc.com/news/world-us-canada-64814095>.

⁸¹ *See, e.g.*, Melissa del Bosque, *Facial recognition bias frustrates Black asylum applicants to US, advocates say*, The Guardian (Feb. 8, 2023), available at <https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias>.

⁸² *See, e.g.*, Eileen Sullivan and Steve Fisher, *At the End of a Hard Journey, Migrants Face Another: Navigating Bureaucracy*, New York Times (Mar. 10, 2023), available at <https://www.nytimes.com/2023/03/10/us/politics/migrants-asylum-biden-mexico.html>.

justify denying asylum to asylum seekers who cannot safely wait for an appointment at a port of entry before crossing the border.

C. Limitations on parole programs

The Departments reference the parole programs for Cubans, Haitians, Nicaraguans, and Venezuelans as alternatives available to asylum seekers. But these alternatives, while a valuable pathway for some migrants, are laden with requirements that, in the experience of Council 119's members, make them inaccessible to most asylum seekers migrating to the southwest border. A beneficiary of these parole programs must be a national of one of the covered countries.⁸³ They must have a supporter who agrees to receive, maintain, and support the beneficiary throughout the parole period.⁸⁴ They must have an unexpired passport valid for international travel.⁸⁵ They must secure the resources for commercial air travel to the United States.⁸⁶ And their admission is subject to a cap of 30,000 individuals, across all four nationalities, a month.⁸⁷ For asylum seekers who lack resources or who justifiably fear contact with their government, the parole programs are not an adequate substitute for the traditional asylum process and cannot lawfully serve as a prerequisite to accessing regular asylum procedures.

VII. The Proposed Rule is Not the Appropriate Mechanism to Handle the Flow of Migrants at the Border

The Administration contends that the Proposed Rule is necessary to deal with the dramatic increase in the number of asylum seekers encountered at the southern border who do not have a valid claim to asylum but who strain the resources of our system. But the flow of migrants could be addressed through other means that are consistent with our longstanding tradition of providing a safe haven to the persecuted and that are consistent with our nation's laws.

Our nation has faced influxes of refugees many times before. For instance, immediately after the Second World War, the United States admitted nearly 40,000 survivors of the Holocaust

⁸³ See U.S. Citizenship and Immigration Services, "Processes for Cubans, Haitians, Nicaraguans, and Venezuelans," available at <https://www.uscis.gov/CHNV>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ U.S. Citizenship and Immigration Services, "Frequently Asked Questions About the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans," available at <https://www.uscis.gov/humanitarian/frequently-asked-questions-about-the-processes-for-cubans-haitians-nicaraguans-and-venezuelans>.

and over half a million displaced persons and escapees from Communist-dominated countries.⁸⁸ Later, in 1956, the United States permitted entry of over 30,000 refugees fleeing persecution in Hungary.⁸⁹ And in 1957, it allowed for the resettlement of “refugee-escapees,” defined as persons fleeing persecution in Communist or Middle Eastern countries.⁹⁰ Our country processed these people by, among other things, “setting up a complex organization” that vetted them before they entered the country.⁹¹

The process continued to adapt as new refugee crises emerged. After the Cuban Revolution in 1959, the United States admitted more than 58,000 Cubans fleeing persecution.⁹² And in 1965, President Lyndon B. Johnson opened the country to all Cubans seeking refuge from Fidel Castro’s communist regime.⁹³ In order to more safely and efficiently bring Cubans to the United States, the federal government created an airlift program which brought more than 250,000 Cuban refugees to the United States.⁹⁴ And around the same time, our nation also welcomed thousands fleeing persecution from the Soviet Union, Eastern Europe, and Afghanistan.⁹⁵

The end of the Vietnam War created a large flow of refugees, with about 300,000 Southeast Asians entering the United States between 1975 and 1980. The Indochinese Immigration and Refugee Act of 1975 funded their transportation and resettlement, and, in 1977, Congress enacted a law allowing Southeast Asian refugees who had entered the United States the opportunity to become lawful permanent residents.⁹⁶ In 1977, the Immigration and

⁸⁸ See Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America’s Half-Open Door 1945-Present* 4-6 (1986); Displaced Persons Act of 1948, ch. 647, Pub. L. No. 80-774, 62 Stat. 1009; Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400.

⁸⁹ Carl J. Bon Tempo, *Americans at the Gate: The United States and Refugees During the Cold War 70-73* (2008).

⁹⁰ Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639.

⁹¹ See President Dwight D. Eisenhower, Special Message to the Congress Recommending Amendments to the Refugee Relief Act, May 27, 1955, available at <https://ilw.com/articles/2004.0105-eisenhower.shtm>.

⁹² See U.S. Citizenship and Immigration Services, *Refugee Timeline*, <https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline>.

⁹³ *Id.*

⁹⁴ *Id.* Later, in 1980, after the Castro regime announced that all Cubans wishing to go to the United States were free to board boats at the Port of Mariel, the United States allowed around 125,000 Cubans to enter the country under the Attorney General’s parole authority. *Id.*

⁹⁵ Mark Gibney, *Global Refugee Crisis* 91-92 (2d ed. 2010).

⁹⁶ *Id.*

Naturalization Services (“INS”) also created a special Office of Refugee and Parole to address global refugee crises and implement refugee policies.⁹⁷

Then, in 1990, the INS established an Asylum Corps, which comprises professional asylum officers trained in international law and with access to a center containing information on human rights.⁹⁸ This specialized training allows asylum officers to more accurately and efficiently assess asylum claims. Recognizing the value of this approach, Congress authorized funding to double the number of asylum officers in 1994.⁹⁹ The asylum program was further modified in 1995 and again in 1996 to allow asylum officers to determine whether persons subject to expedited removal have a credible fear of persecution.¹⁰⁰

Simply put, our country has dealt with the challenges posed by large influxes of refugees seeking a safe haven here by promulgating highly adaptable processes that effectively ensured protection to qualified asylum seekers while guarding against abuse of the system by bad actors. The agility and success of the system is perhaps best reflected in the sheer number of refugees absorbed into the United States since the Second World War—nearly five million—and the mechanisms that the country instituted to accommodate their arrival and processing.¹⁰¹

These considerations point the way to a better response to the problems recounted by the Departments. The answer to long backlogs in asylum processing, and the associated delays in granting meritorious claims and denying unmeritorious ones, is not to devise new ways to shut the door to refugees. It is to allocate adequate resources to the asylum system: to ensure there are enough asylum officers, immigration judges, and administrative staff to fairly, humanely, and expeditiously hear and adjudicate asylum claims. A fair and speedy system is the best deterrent for frivolous claims—and also lives up to America’s promise.

VIII. The Third Country Transit Bar FR and the Proclamation Bar IFR Should be Rescinded

In connection with the Proposed Rule, the Departments indicate their intent to rescind Asylum Eligibility and Procedural Modifications, 85 FR 82260 (Dec. 17, 2020) (the “Third Country Transit Bar FR”) and Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018) (the

⁹⁷ *Id.*

⁹⁸ Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 Am. U. Int’l L. Rev. & Pol’y 43 (1994). *See also* 8 C.F.R. § 208.1(b) (1990).

⁹⁹ Steven Greenhouse, *U.S. Moves to Halt Abuses in Political Asylum Program*, N.Y. Times (Dec. 3, 1994), p. 8.

¹⁰⁰ 8 U.S.C. § 1225(b)(1)(B)(iii).

¹⁰¹ David W. Haines, *Safe Haven?: A History of Refugees in America* 4 (2010); Refugee Processing Center, *Refugee Admissions Report as of February 28, 2023* (Mar. 6, 2023), available at <https://www.wrapsnet.org/admissions-and-arrivals/>.

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“Proclamation Bar IFR”). Council 119 opposed both the Third Country Transit Bar FR and the Proclamation Bar IFR,¹⁰² which have both been enjoined, and welcomes their rescission.

IX. Conclusion

Council 119’s members are duty bound to protect vulnerable asylum seekers from persecution or torture. However, under the Proposed Rule, they would face a conflict between the directives of their departmental leaders to follow the new rules and adherence to our nation’s legal and moral commitment to not return refugees to territories where they will face persecution. Asylum officers should not be forced to honor rules that are fundamentally contrary to the moral fabric of our nation and to our international treaty and statutory obligations. For the foregoing reasons above, Council 119 opposes the Proposed Rule.

Very truly yours,



Muhammad U. Faridi
Jonah Wacholder

cc: Ruark Hotopp, President, National Citizenship and Immigration Services Council 119

Michael A. Knowles, Special Representative, National Citizenship and Immigration
Services Council 119

¹⁰² See, e.g., Hamed Aleaziz, *Asylum Officers Are Urging A Court To Strike Down Trump's Asylum Ban And Saying It “Rips At The Moral Fabric Of Our Country”*, BuzzFeed News (Oct. 15, 2019), at <https://www.buzzfeednews.com/article/hamedaleaziz/asylum-officers-urge-ban-block-court-border-law>.