



July 2, 2024

Human Rights First Comment on the Departments of Justice and Homeland Security's Interim Final Rule, *Securing the Border*, DHS Docket No. USCIS-2024-0006

Human Rights First submits the following comment in response to the Departments of Justice and Homeland Security's ("the Departments") Interim Final Rule, *Securing the Border* ("Interim Final Rule"), incorporating and providing for the implementation of President Biden's proclamation of the same name ("the Proclamation").¹ Human Rights First requests the Departments publish a notice in the Federal Register withdrawing the Interim Final Rule.

The Interim Final Rule represents an aggressive expansion of the Departments' Circumvention of Lawful Pathways ("CLP Rule") manner of entry bar, with fewer exceptions, higher standards, and a laser focus on keeping the Credible Fear screen-in rate lower (and more politically palatable).² As reported by asylum seekers to Human Rights First, U.S. officers have said, "There is no asylum" and that "the border is now closed."

It is nearly identical to a Trump administration interim final rule already found to be unlawful by the federal courts, despite the Departments' strenuous exhortations to the contrary. Formally and functionally, the Interim Final Rule is more restrictive than the Trump administration ban because it eliminates the long-required credible fear referral safeguards, invents a higher standard for screening for withholding of removal and protection under the Convention Against Torture ("CAT") eligibility, and effectively limits access to asylum to those who can access and secure a CBP One appointment and survive in Mexico long enough to present themselves at a port of entry at the appointed time. The Interim Final Rule denies equal access to asylum and is inconsistent with federal law and the United States' treaty obligations.

This politically motivated rulemaking from the Departments betrays the United States' commitments to refugees and the commitments made by the Biden-Harris administration. The Departments must withdraw it, and instead, as Human Rights First has detailed in its recommendation reports, strengthen and improve the asylum system.³

¹ 89 Fed. Reg. 48,710; Exec. Order No. 10773 of June 3, 2024, 89 Fed. Reg. 48,487 (June 7, 2024).

² *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31,314 (May 11, 2023).

³ Human Rights First, "Upholding and Upgrading Asylum," 17-22 (Oct. 2023), <https://humanrightsfirst.org/library/upholding-and-upgrading-asylum>.

I. Human Rights First's interest in the Interim Final Rule

For over 40 years, Human Rights First has provided pro bono legal representation to refugees seeking asylum in the United States and advocated for the protection of the human rights of refugees. Human Rights First grounds its work in the legal standards of the 1951 Refugee Convention, its 1967 Protocol, and other international human rights instruments, and advocates adherence to these standards in United States law and policy. Human Rights First operates one of the largest and most successful pro bono asylum representation programs in the country. Working in partnership with volunteer attorneys at many of the nation's leading law firms, we provide legal representation, without charge, to hundreds of refugees each year in California, New York, and Washington, DC. This extensive experience working directly with refugees seeking protection in the United States is the foundation for Human Rights First's advocacy and informs the observations that follow.

Human Rights First has long monitored and documented the impact of the use of expedited removal on people seeking asylum, and represented many people seeking asylum who were subjected to that process. Human Rights First has also documented the impact of both the Trump administration and Biden administration asylum bans, including in a series of reports on the CLP Rule.⁴

II. The Thirty-Day comment period is insufficient to fully respond to the Interim Final Rule.

The public has not been given adequate time to respond to the Interim Final Rule, which attempts to circumvent U.S. law to eviscerate asylum protections at the border. It makes fundamental changes to asylum eligibility that will send refugees to death, persecution, and torture while leaving other refugees with lesser forms of relief conditioned on meeting much higher standards. The changes made by the Interim Final Rule should have been proposed in a Notice of Proposed Rulemaking. Additionally, the Interim Final Rule's effective date before final publication in the Federal Register is wholly inappropriate considering the significant changes it makes.

Limiting the comment period to 30 days effectively denies the public the right to meaningfully comment as required by the Administrative Procedure Act.⁵ Upon taking office, President Biden formally recognized and stressed the importance of the principles set out in Executive Order

⁴ Human Rights First, "Trapped, Preyed Upon, and Punished: One Year of the Biden Administration Asylum Ban" (May 7, 2024) [hereinafter Trapped, Preyed Upon, and Punished], www.humanrightsfirst.org/library/trapped-preyed-upon-and-punished; Human Rights First, "Inhumane and Counterproductive: Asylum Ban Inflicts Mounting Harm" (Oct. 12, 2023) [hereinafter Inhumane and Counterproductive], www.humanrightsfirst.org/library/inhumane-and-counterproductive-asylum-ban-inflicts-mounting-harm; Human Rights First, "Refugee Protection Travesty: Biden Asylum Ban Endangers and Punishes At-Risk Asylum Seekers" (July 12, 2023) [hereinafter Refugee Protection Travesty], www.humanrightsfirst.org/library/refugee-protection-travesty; Human Rights First, "Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies" (Aug. 3, 2022), <https://humanrightsfirst.org/wp-content/uploads/2023/01/PretenseofProtection-21.pdf>; Asylum Denied, Families Divided: Trump Administration's Illegal Third-Country Transit Ban (July 2020) [hereinafter Asylum Denied], <https://humanrightsfirst.org/wp-content/uploads/2022/10/AsylumDeniedFamiliesDivided.pdf>.

⁵ 5 U.S.C. § 533(c).

12866, requiring agencies to “afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.”⁶ A 60-day comment period is necessary because the Proposed Rule makes fundamental changes, including a novel standard for eligibility for lesser forms of humanitarian relief and an effective cap on asylum applications. The false urgency of “emergency border circumstances” the Departments press is belied by a near 50% drop in unlawful crossings from “record highs” in December 2023 and cannot justify a truncated comment period.⁷

III. The Interim Final Rule is Contrary to United States law and treaty obligations to refugees.

A. The Interim Final Rule violates U.S. treaty commitments to refugees.

The United States acceded to the Protocol Relating to the Status of Refugees in 1968, which incorporated the substantive obligations of the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”).⁸ The Protocol forms the basis of United States refugee law.⁹

The Interim Final Rule pushes forward with policies that have demonstrably violated these commitments, fueling refoulement, imposing prohibited penalties, barring refugees from a path to citizenship, and driving impermissible discrimination based on manner of entry, race, and nationality. The policy is contrary to multiple provisions of the Refugee Convention and Protocol, including Articles 3, 31, 33 and 34. The Interim Final Rule’s flouting of the Refugee Convention and international refugee law set a terrible example for the rest of the world, including the many countries that actually host the vast majority of the world’s refugees.¹⁰

During “emergency border circumstances,” the Interim Final Rule establishes a bar to asylum eligibility for anyone who crosses or presents themselves at a Port of Entry along the southern border, unless they present with a CBP One appointment or through another process approved by the Secretary.¹¹ If they do not, the Interim Final Rule indicates that an individual can demonstrate, by a preponderance of the evidence, there were “exceptionally compelling circumstances” that except them from the ban.¹² “Exceptionally compelling circumstances” are described as including 1) an acute medical emergency, 2) an “imminent and extreme threat to

⁶ *Improving Regulation and Regulatory Review*, Exec. Order of Jan. 18, 2011, § 2(b), 76 Fed. Reg. 3,821, 3,821-22 (Jan. 21, 2011).

⁷ Camilo Montoya-Galvez, *Migrant crossings at U.S.-Mexico border plunge 54% from record highs, internal figures show*, CBS News (May 23, 2024), <https://www.cbsnews.com/news/immigration-us-mexico-border-crossings-mayorkas-may-2024>.

⁸ Protocol Relating to the Status of Refugees art. 1, § 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

⁹ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (“If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968.”) (internal citation omitted).

¹⁰ See Refugee Data Finder, U.N. High Comm’r for Refugees (last visited Jul. 1, 2024), <https://www.unhcr.org/refugee-statistics/>.

¹¹ Interim Final Rule at 48,754.

¹² *Id.*

life or safety, such as an imminent threat of rape, kidnapping, torture, or murder,” or 3) a “victim of a severe form of trafficking in persons.”¹³

The Interim Final Rule’s limited application during “emergency border circumstances” is neither limited nor restricted to an emergency. The Interim Final Rule’s “emergency border circumstances” would apply during “58 percent of all months this century (172 of 296).” The threshold under which normal processing could resume has not been met since July 2020 — in the midst of the COVID-19 pandemic which led to lock-downs and sharply decreased travel globally.¹⁴

1. *Non-refoulement*

Chief among these obligations is the principle of non-refoulement, which prohibits States Parties from returning an individual to a country where their “life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion.”¹⁵ It is “the cornerstone of asylum and of international refugee law” and incorporated into federal law.¹⁶ The Interim Final Rule bars access to asylum and ostensibly provides exceptions based on factors that have no relation to a person’s risk of persecution.

As with the CLP Rule, the United Nations High Commissioner for Refugees (“UNHCR”) has warned that such a ban “will lead to the refoulement of large numbers of asylum-seekers of many different nationalities, ethnic backgrounds or religions, and of a very wide range of people at risk.”¹⁷ The Interim Final Rule’s pretense of adherence to the Refugee Convention, through the deeply deficient screening it invents from thin air, does not remedy this breach of international law and certainly will not actually, in practice, protect refugees from return to persecution.

The Interim Final Rule goes further by 1) eliminating the long-standing requirements, necessary to identify which migrants require fear screenings, that U.S. border officers must ask whether they have a fear of return, 2) not adopting an exception for the inability to use the CBP One application, due to language barriers, illiteracy, or technical difficulties, and 3) elevating the fear screening standard to “reasonable probability” for withholding of removal and protections under the Convention Against Torture. The Interim Final Rule exponentially increases the risk of refoulement, increasing the likelihood that bona fide refugees will fail to be referred for a fear screening or will fail their fear screenings and be wrongfully refouled to persecution or torture, particularly given the significant barriers to accessing a legal consultation let alone representation.

The principle of non-refoulement under international law applies to anyone who meets the refugee definition. The Departments note that a person barred from asylum under the proposed

¹³ *Id.*

¹⁴ Adam Isacson, *The Futility of “Shutting Down Asylum” by Executive Action at the U.S.-Mexico Border*, WOLA (June 4, 2024), <https://www.wola.org/analysis/futility-of-shutting-down-asylum-by-executive-action-us-mexico-border/>.

¹⁵ Refugee Convention at art. 33.

¹⁶ Brief of the U.N. High Comm’r for Refugees as Amicus Curiae in Support of Plaintiffs at 18, *East Bay Sanctuary Covenant v. Barr*, No. 19-16487 (9th Cir. 2019) [hereinafter UNHCR *East Bay II* Brief] <https://www.refworld.org/jurisprudence/amicus/unhcr/2019/en/123048>; 8 U.S.C. §1231(b)(3)(A).

¹⁷ UNHCR CLP Comment at 3.

rule may still qualify for withholding of removal, yet refugees with well-founded fears of persecution who are unable to meet the Interim Final Rule's new "reasonable probability" preliminary fear screening standard for withholding of removal would be wrongfully deported to potential persecution. While the United States considers withholding of removal rather than asylum to be its fulfillment of non-refoulement obligations, the grant of that protection rather than asylum denies asylum seekers any path to permanency, stability, and basic rights. As UNHCR noted, "withholding of removal does not provide an adequate substitute for the asylum process required to ensure access to rights conferred by the 1951 Convention and 1967 Protocol and does not fully implement Article 33(1)'s prohibition against refoulement."¹⁸ Like prior policies wielded to ban and block refugees from asylum, the Interim Final Rule will lead to the refoulement and chain refoulement of refugees.¹⁹

Glaringly, unlike the CLP Rule, which excepted Mexican nationals from its manner of entry bar, the Interim Final Rule does not adopt a similar exception.²⁰ Suspending asylum processing of Mexican asylum seekers at ports of entry is refoulement in trapping Mexican asylum seekers in their own country of alleged persecution. The limited availability of CBP One port of entry appointments, which require Mexican nationals to wait many months in danger in their country of feared harm, falls far short of compliance with the Refugee Convention and Protocol.

2. *Non-discriminatory access to asylum*

As UNHCR has noted, the Convention's "extension of protection to refugees who have not received formal recognition of their status necessarily requires a process for identifying refugees among asylum-seekers."²¹ This process necessitates an individualized determination of whether each asylum seeker meets the definition of a refugee.

Regulations that deny access to asylum based on arbitrary factors that do not relate to a person's status as a refugee are inconsistent with these principles because, as UNHCR noted, the United States has an obligation under the Convention to provide a "fair and efficient refugee status determination procedure" to asylum seekers.²² Closing off access to the asylum process for people who have entered the United States irregularly or without a scheduled appointment, do not speak English or other languages used by a mobile app, many of whom would qualify as refugees, is at odds with these requirements.

The Departments claim that this Interim Final Rule does not violate legal obligations to refugees because people can remain eligible for asylum if they use a Secretary approved process, like the CBP One app, to enter the United States.²³ UNHCR has repeatedly rejected such an argument because access to asylum cannot be conditioned on regular entry or cut off for categories of asylum seekers without an individualized determination of whether they qualify as a refugee.²⁴ Moreover, the creation of new pathways for a few nationalities who meet specific criteria, such as the parole processes for Cubans, Haitians, Nicaraguans, Venezuelans, and Ukrainians, cannot

¹⁸ UNHCR *East Bay II* Brief at 21; *see also* UNHCR CLP Comment at 16.

¹⁹ Trapped, Preyed Upon, and Punished at 4.

²⁰ Interim Final Rule at 48,738.

²¹ UNHCR *East Bay II* Brief, at 12-13.

²² UNHCR CLP Comment at 3.

²³ Interim Final Rule at 48,754.

²⁴ Brief of the U.N. High Comm'r for Refugees as Amicus Curiae in Support of Plaintiffs at 11, *O.A. v. Trump*, No. 1:18-CV-02718-RDM (D.D.C. 2018), <https://www.refworld.org/jurisprudence/amicus/unhcr/2018/en/123317>.

justify the denial of access to asylum. UNHCR, the International Organization for Migration, and UNICEF recently warned the Biden administration that the provision of safe pathways “cannot come at the expense of the fundamental human right to seek asylum.”²⁵ In its comment on the CLP Rule, UNHCR reiterated that “reliance on such pathways at the expense of other ways to access territory for persons seeking admission at the U.S.’s borders in order to seek asylum there violates international law.”²⁶ The U.N. High Commission for Refugees confirmed, again, in a June 2024 speech at Georgetown University, that such pathways must not be used “as trade-offs to access to asylum at borders,” explaining that UNHCR had “repeatedly raised” this concern with the United States.²⁷

Additionally, by penalizing asylum seekers who do not or are unable to comply with a Secretary approved process the Interim Final Rule inaccurately paints the seeking of asylum as an unlawful act. Seeking asylum is, and has been for decades, a lawful pathway to protection for people seeking refuge at a U.S. port of entry or inside the United States, regardless of manner of entry. Individuals have a legal right to request asylum despite the existence of other migration pathways or how they enter the country, as discussed below.

The Interim Final Rule denies access to asylum on a discriminatory basis, which also conflicts with Article 3 of the Refugee Convention. Article 3 prohibits discrimination based on race, religion, or country of origin. The Interim Final Rule applies only to people who enter at the southern border, the overwhelming majority of whom are people of color. As has the CLP Rule, the Interim Final Rule will disproportionately harm Black, Brown, and Indigenous asylum seekers, many of whom do not have the resources or ability — due to a U.S. visa regime that favors applicants from richer, whiter countries — to arrive in the United States by plane.²⁸ Moreover, the Interim Final Rule builds in nationality-based discrimination by punishing people who do not use parole processes or enter the United States through other designated pathways. The administration has only made its new parole initiatives accessible to people from five countries who can meet specific requirements — Cuba, Haiti, Nicaragua, Venezuela, and Ukraine. Denying asylum to people who have not used certain pathways to reach the United States while making some of these pathways available only to certain nationalities constitutes nationality-based discrimination.

The Interim Final Rule conditions access to asylum on use of the CBP One app, which is only available in three languages, discriminating against those who do not speak one of the three languages and are otherwise unable to use the application, including due to illiteracy and limited

²⁵ Press Release, *UNHCR, IOM and UNICEF Welcome New Pathways for Regular Entry to the US, Reiterate Concern Over Restrictions on Access to Asylum* (Oct. 14, 2022), <https://www.unhcr.org/en-us/news/press/2022/10/63497be44/unhcr-iom-and-unicef-welcome-new-pathways-for-regular-entry-to-the-us-reiterate.html>.

²⁶ UNHCR CLP Comment at 13.

²⁷ Filippo Grandi, U.N. High Comm’r for Refugees, Remarks at Georgetown University (June 3, 2024), <https://www.unhcr.org/news/speeches-and-statements/remarks-filippo-grandi-united-nations-high-commissioner-refugees>.

²⁸ See Women’s Refugee Comm’n, *Visa Regimes: A Threat to Migrants’ Access to Safety and Asylum* 5 (June 2022), <https://www.womensrefugeecommission.org/wp-content/uploads/2022/06/Visa-Regimes-A-Threat-to-Migrants-Access-to-Safety-and-Asylum.pdf>; see also U.S. Border and Asylum Policies Harm Black Asylum Seekers (Feb. 2024), <https://humanrightsfirst.org/wp-content/uploads/2024/02/Asylum-Policies-Harm-Black-Asylum-Seekers-FACTSHEET-formatted.pdf>.

financial means to procure a smartphone and daily internet access.²⁹ Even those with the ability to use the application must still wait up to eight months in Mexico for a limited, lottery-based appointment.³⁰ Failure to affirmatively ask about fear for the purposes of referrals for Credible Fear Interviews, and instead adopting a manifestation of fear requirement, will also discriminate against asylum seekers who do not speak English.

3. *Non-penalization*

Article 31 of the Refugee Convention generally prohibits states from imposing penalties on refugees on account of their illegal entry or presence. The introductory note to the Refugee Convention underscores this fundamental provision, noting that “the seeking of asylum can require refugees to breach immigration rules.”³¹ UNHCR has repeatedly emphasized that “neither the 1951 Convention nor the 1967 Protocol permits parties to condition access to asylum procedures on regular entry.”³² In its comment on the CLP Rule, UNHCR concluded that the presumption of ineligibility “amounts to penalization of irregular entry in violation of Article 31(1).”³³

The Departments make clear that the central purpose of the rule is precisely what Article 31 prohibits: punishment of asylum seekers based on how they enter the United States. They repeatedly make clear that the goal of the Interim Final Rule is to “deliver consequences” against people seeking asylum who cross the border irregularly.³⁴ These consequences would be inflicted on many asylum seekers, including those who are refugees under U.S. law. These consequences — i.e., penalties — would take the form of denial of asylum, deportation to harm, family separation, deprivation of a pathway to citizenship, and other harms. Premising the denial of asylum on manner of entry is incompatible with Article 31.

The Departments’ rhetoric regarding the Interim Final Rule makes it all the more evident that it is intended to punish asylum seekers for entering unlawfully or not entering through designated procedures. Dehumanizing “carrot and stick” language has permeated media reports about this Interim Final Rule and other recent administration policies, with the “stick” referring to the penalty inflicted on asylum seekers who enter without authorization.

4. *Integration*

Article 34 of the Refugee Convention provides that states, “shall as far as possible facilitate the assimilation and naturalization of refugees.”³⁵ By barring asylum for many refugees and leaving some with the inadequate protections of withholding of removal or CAT protection — for those who are not denied relief altogether — the Interim Final Rule leaves refugees in a potentially

²⁹ Trapped, Preyed Upon, and Punished; Human Rights Watch, “We Couldn’t Wait” Digital Metering at the US-Mexico Border (May 2024), https://www.hrw.org/sites/default/files/media_2024/04/us_mexico0524%20web.pdf.

³⁰ Trapped, Preyed Upon, and Punished.

³¹ Refugee Convention at Introductory Note.

³² Brief of the U.N. High Comm’r for Refugees as Amicus Curiae in Support of Plaintiffs at 15, *E. Bay Sanctuary Covenant v. Trump*, No. 18-17274 (9th Cir. 2018), <https://www.refworld.org/jurisprudence/amicus/unhcr/2019/en/123054>.

³³ UNHCR CLP Comment at 13.

³⁴ See Interim Final Rule at 48,714.

³⁵ Refugee Convention at art. 3.

permanent state of limbo. They would have an order of removal and no pathway to status or citizenship. They would be unable to reunite with their spouses and children and unable to obtain a refugee travel document to allow them to travel abroad even to visit them in a third country. They would be unable to access certain benefits and would face barriers in obtaining and renewing their employment authorization.

As a result, this Interim Final Rule prevents refugees from integrating and deprives them of an ability to naturalize, in violation of Article 34. The Trump administration's transit ban inflicted the same harm by denying refugees asylum and leaving them with lesser forms of protection.

B. The Interim Final Rule ignores federal law establishing eligibility for asylum.

Congress passed the Refugee Act of 1980 to bring the United States into compliance with international treaty obligations. The legislative history reflects that the Act was intended to ensure “greater equity in our treatment of all refugees” and “conform[] to our International treaty obligations under the United Nations Convention and Protocol Relating to the Status of Refugees.”³⁶

1. *Manner of entry*

The provisions of the Refugee Act and subsequent amendments relating to asylum eligibility are codified at 8 U.S.C. §1158. The first provision of this section states that anyone who is physically present in the United States or who arrives in the United States, whether or not at a designated port of entry, and regardless of status, may apply for asylum.³⁷ By enacting this provision, Congress sought to ensure that asylum seekers could apply for asylum regardless of where or how they entered the United States or whether they had status.³⁸ In enacting the Refugee Act of 1980, Congress adopted language from the House bill, which stated that anyone “physically present in the United States or at a land border or port of entry, irrespective of such [noncitizen’s] status” may apply for asylum, and rejected the Senate bill that excluded the language about the land border and ports of entry.³⁹

Representative Holtzman, the author of the House bill, wrote the provision to guarantee uniform treatment of asylum seekers, including at land ports of entry.⁴⁰ Holtzman’s correspondence on the bill included a letter from the U.N. High Commissioner for Refugees recommending a “uniform” procedure for handling of asylum cases and a letter from the General Counsel of the Immigration and Naturalization Service indicating that the language of the asylum provision in the House version would require the Attorney General to apply the same

³⁶ 126 Cong. Rec. S1753-55 (daily ed. Feb. 26, 1980); 125 Cong. Rec. S11999-12003; 125 Cong. Rec. 12006-12017; 125 Cong. Rec. 12030 (daily ed. Sept. 6, 1979); *Yusupov v. Attorney Gen.*, 518 F.3d 185, 203 (3d Cir. 2008) (footnote omitted); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1060-61 (9th Cir. 2017) (en banc); Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1980), <https://digital.sandiego.edu/sdlr/vol19/iss1/3>.

³⁷ 8 U.S.C. § 1158(a)(1).

³⁸ Brief of Yael Schacher and Refugees International as Amicus Curiae in Support of Plaintiffs at 7, *Immigrant Defenders vs. Wolf*, No. 2:20-cv-09893 (C.D. Cal. Nov. 20, 2020), https://www.splcenter.org/sites/default/files/documents/2020.11.20_77_mtn_for_leave_to_participate_as_amici_curiae.pdf.

³⁹ *Id.* at 9.

⁴⁰ *Id.*

asylum procedures at land border ports as were applied at air or sea ports of entry.⁴¹ In enacting the House version of the bill, Congress decided to make clear that asylum seekers at the land border could apply for asylum, regardless of status, and should be treated the same as other asylum seekers.⁴² In 1996, Congress added the language “whether or not at a designated port of arrival” to the provision, making it even more clear that people who enter without authorization must be accorded the same access to asylum procedures.⁴³

Congress also later amended 8 U.S.C. §1158 to delineate specific exceptions where an individual would not be eligible for asylum. An asylum seeker may be denied based on their travel through other countries only if they were “firmly resettled” in a transit country or if the United States has a formal “safe third country” return agreement with a country where refugees are both safe from persecution and have access to fair asylum procedures. The statute provides that the administration may not issue regulations that are inconsistent with these provisions.⁴⁴

The statutory language and Congressional record make clear that it is illegal to deny an individual the right to apply for asylum based on how a person entered the United States, and therefore illegal to create a bar to asylum eligibility based on manner of entry.⁴⁵ The Interim Final Rule violates these provisions by making people ineligible for asylum if they entered a certain way at the border. Indeed, every regulation promulgated by the Trump administration that attempted to deny asylum based on manner of entry, among other things, into the United States was struck down by federal courts as unlawful.

The Trump administration’s entry ban, which barred asylum for refugees who enter the United States between ports of entry, was quickly blocked by a federal court.⁴⁶ The court concluded that the policy “flout[ed] the explicit language” of U.S. asylum law.⁴⁷ The decision to enjoin the entry ban was later upheld by the United States Court of Appeals for the Ninth Circuit.⁴⁸ In a separate decision in a lawsuit brought by Human Rights First and other organizations, another federal court vacated the policy, also holding that it was inconsistent with asylum law.⁴⁹ Federal courts enjoined the Biden administration’s manner of entry bar, the Circumvention of Lawful Pathways rule, on similar grounds.⁵⁰

2. *Credible fear*

The Interim Final rule also violates U.S. law that sets forth requirements for screening asylum seekers in expedited removal. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, which created the expedited removal process.⁵¹ Under this process, asylum seekers who establish a credible fear of persecution must be referred for full

⁴¹ *Id.* at 8-9.

⁴² *Id.* at 9.

⁴³ Pub. L. No. 104-28, Div. C, § 302(a), 110 Stat. 3009-546, 3009-583 (1996).

⁴⁴ 8 U.S.C. §1158(d)(5)(B).

⁴⁵ *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 844 (N.D. Cal. 2018); *E. Bay Sanctuary Covenant v. Trump*, No. 18-17274 (Feb. 28, 2020) (slip op. at 40).

⁴⁶ *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018).

⁴⁷ *Id.* at 858.

⁴⁸ *E. Bay Sanctuary Covenant v. Trump*, No. 18-17274 (Feb. 28, 2020) (slip op.).

⁴⁹ *O.A. v. Trump*, 404 F. Supp. 3d 109, 118 (D.D.C. 2019).

⁵⁰ *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023), *stayed pending appeal*, 2023 WL 11662094 (9th Cir. Aug. 3, 2023), *appeal held in abeyance*, 93 F.4th 1130 (9th Cir. 2024).

⁵¹ Pub. L. No. 104-28, Div. C, § 302(a), 110 Stat. 3009-546, 3009-583 (1996) (codified at 8 U.S.C. §1225).

asylum adjudications. A credible fear of persecution is defined as a “significant possibility” that the asylum seeker could establish eligibility for asylum in a full hearing. This determination is made in a preliminary screening (a “Credible Fear Interview”) that is not intended to be a full adjudication. Congress made clear that this standard was intended to be a “low screening standard for admission into the usual full asylum process.”⁵²

Like the CLP Rule and the Trump administration’s asylum bans before it, the Interim Final Rule attempts to unlawfully circumvent the credible fear screening standard. The Interim Final Rule requires asylum seekers in expedited removal demonstrate a, “significant possibility that [they] would be able to establish by a preponderance of the evidence that they were not subject to the rule’s limitation on asylum eligibility or that they will be able to establish by a preponderance of the evidence exceptionally compelling circumstances.”⁵³ Only if they overcome this barrier — which will be impossible for many asylum seekers given the narrow exceptions and the due process barriers in fear screenings — can they then be screened under the “significant possibility” standard. Otherwise, they would be subjected to a more stringent screening standard, that of “reasonable probability” and ordered deported if they do not pass.⁵⁴

The CLP Rule already unlawfully increased the fear screening standard to “reasonable possibility,” which led to asylum seekers subject to the presumption being three times more likely to fail, who would otherwise have been able to establish a “significant possibility” of asylum eligibility. The screening process that the Interim Final Rule would put in place is completely incompatible with the statutory credible fear standard. It would convert the preliminary screening into a full adjudication of whether the Interim Final Rule’s limitation applies or not, and based on the outcome of that determination it would eliminate the “significant possibility” standard entirely for all asylum seekers covered and force them to meet an even higher “reasonable probability” standard to pass the fear screening. It is not legally permissible for the agencies to deny full hearings to asylum seekers who could show a “significant possibility” of establishing asylum eligibility.

Even the Asylum Officers Union has cautioned that the adjudication of a mandatory bar subject to exceptions under the CLP Rule and raising the burden of proof to reasonable possibility for those subject to the bar is “imposing significant new burdens on the credible fear process for both asylum seekers and asylum officers, and causing individuals with bona fide protection claims to be returned to danger,” explaining that requiring officers to “break[] the law by applying the new Rule in screening interviews” is “significantly and negatively impacting the morale” of asylum officers.⁵⁵ Nonetheless, the Departments pressed forward with an entry ban that now faces the same legal headwinds as before, and, along with the Interim Final Rule, ultimately run into the plain text of the asylum statute.⁵⁶

3. *“Emergency border circumstances”*

⁵² 142 Cong. Rec. 136, S11491 (Sept. 27, 1996).

⁵³ Interim Final Rule at 48,739.

⁵⁴ *Id.*

⁵⁵ Brief of Nat’l Citizenship and Immigration Servs. Council 119 as Amicus Curiae in Support of Plaintiffs at 7, 22, *M.A. v. Mayorkas*, No. 1:23-cv-01843 (D.D.C. Oct. 6, 2023), <https://storage.courtlistener.com/recap/gov.uscourts.dcd.256826/gov.uscourts.dcd.256826.46.1.pdf>.

⁵⁶ *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023), *stayed pending appeal*, 2023 WL 11662094 (9th Cir. Aug. 3, 2023), *appeal held in abeyance*, 93 F.4th 1130 (9th Cir. 2024).

The Departments' limitation of the Interim Final Rule's application to times during which "emergency border circumstances" exist does not reduce its illegality and would subject refugees to deportation and other harms as long as it is in effect.⁵⁷ Illegal and inhumane policies, even when temporary, can become entrenched and may be renewed and perpetuated by administrations or other branches of government, as the trajectory of the Title 42 policy confirms. The Departments' claim that the Interim Final Rule is needed as a temporary urgent measure to address the arrival of asylum seekers and migrants is not a justification to violate U.S. and international refugee law. As UNHCR stated in its comment on the CLP rule, "access to territory cannot be suspended based on emergencies" and "no timeframe or 'sunset' provision" can mitigate the fact that the proposed rule denies access to asylum and places refugees at risk of refoulement.⁵⁸

"Emergency border circumstances" are likely to continue indefinitely. As noted, "emergency border circumstances" as defined by the Interim Final Rule would have existed during "58 percent of all months this century (172 of 296)," and the threshold under which normal processing could resume has not happened since July 2020.⁵⁹ This "emergency" is pretextual, as southern border apprehensions before the Proclamation's issuance had already reduced by approximately 50% since their peak in December 2023 due to Mexican authorities' actions blocking asylum seekers and migrants from reaching or remaining at the northern Mexico border.⁶⁰

IV. The Interim Final Rule's elimination of long-required questions to identify Credible Fear Interview referrals will lead to refoulement.

The Interim Final Rule lays bare its commitment to refoulement by attempting to relieve Customs and Border Protection ("CBP") of its long-standing and current affirmative duty to ask several questions on Form I-867B to ascertain whether a person may have a fear or concern of return, triggering their referral for a Credible Fear Interview. These questions, along with a short advisal and other questions relating to an individual's potential removal, have long been required to be asked of an individual. Instead, the Interim Final Rule creates a confusing, chaotic, non-transparent, and unjust situation where a CBP officer only needs to refer people for a Credible Fear Interview if they seem — even though most do not speak English — to be somehow "manifesting" a fear of return.⁶¹ This approach, used during maritime interdiction of groups that typically consist of people of the same nationality or who speak the same language — is so deficient from a refugee protection perspective that it has been facetiously labeled as the "Shout Test." It is certainly far from a real or fair "test" or a "standard." And it's already leading to failures to properly refer to people who fear return.

These three questions — including the simple question that asks whether a person has a fear or concern of return — are critical to ensuring that CBP does not wrongfully return refugees in need of asylum back to persecution by actually identifying who requires fear screening

⁵⁷ Interim Final Rule at 48,715.

⁵⁸ UNHCR CLP Comment at 17.

⁵⁹ Adam Isacson, *supra* note 14.

⁶⁰ Compare CBP Releases April 2024 Monthly Update (May. 15, 2024) ("128,900 encounters"), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-april-2024-monthly-update#>, with CBP Releases December 2023 Monthly Update (Jan. 26, 2024) ("249,785 encounters"), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-december-2023-monthly-update>.

⁶¹ Interim Final Rule at 48,739.

interviews. Research confirms that when questions are not asked, people who express fear are not referred for credible fear screenings.⁶²

Most recently, CBP employed only the Shout Test — rather than the referral questions — for members of family units subject to expulsion under Title 42 in connection with a court order preventing their return to persecution or torture.⁶³ Recent research by the Center for Gender and Refugee Studies showed the use of the Shout Test or “manifestation” approach resulted in CBP failing to refer people who expressed a fear of return to the fear screening interviews they are due under law.⁶⁴ Of 97 families interviewed by advocates and expelled during 2022, DHS failed to refer for a screening any of the 73 families that verbally or non-verbally expressed fear.⁶⁵ Instead, CBP officers, “verbally abused them, telling them to ‘shut up,’ declaring they had ‘no right’ to an interview, or completely ignoring their attempts to communicate.”⁶⁶

Eliminating these crucial referral questions will endanger vulnerable and at-risk asylum seekers including rape survivors, people who do not speak English or Spanish, LGBTQI+ asylum seekers, political dissidents, and victims of trauma or torture. For example, if an asylum seeker from China, Russia, Syria, Sudan, or the Democratic Republic of Congo, expresses in their language that they fear return, a CBP officer would likely not understand that expression of fear. Many asylum seekers speak only Indigenous languages, so their expressions of fear will go unrecognized. The expectation that people must somehow start “shaking, crying,” or “fleeing” (while in CBP custody) in order to be identified as an asylum seeker who should be referred for a screening interview is absurd and disingenuous.⁶⁷ The Interim Final Rule treats CBP officers as though they are mind readers. The Supplementary Information Section asserts that officers will observe for “unconscious behavior” and “will use their expertise and training to determine whether the noncitizen is manifesting a fear” or instead shaking or engaging in other behavior because they are cold, hungry or tired.⁶⁸ Certainly asking three simple questions would be more effective, accurate, and efficient than expecting CBP officers to spend time trying to ascertain what only a mind reader could discern: whether various obvious or unconscious behaviors or statements in a language the officer does not understand constitute manifestations of fear of harm, persecution, and torture.

Moreover, people who have suffered torture, rape, and trauma often have great difficulty raising their fears of return in non-confidential group settings. LGBTQI+ refugees who do not speak English, do not know they can raise, or are hesitant to raise fears of harm that relate to their sexual orientation, gender identity or other persecution would not be properly identified and referred for fear screenings. In addition, as CBP regularly tells people in its custody that they are

⁶² See U.S. Comm’n on Int’l Religious Freedom, Barrier to Protection: Report Highlights 1-2 (2016), <https://www.uscirf.gov/sites/default/files/Report%20Highlights.%20CBPs%20Record%20Identifying%20Asylum%20Seekers.pdf>.

⁶³ Mem. from Exec. Dir., Office of Field Operations, Customs and Border Protection, *Processing of Noncitizens Manifesting Fear of Expulsion Under Title 42* (May 21, 2022), <https://www.aila.org/library/cbp-issues-guidance-on-processing-of-noncitizens>.

⁶⁴ Ctr. for Refugee and Gender Studies, “Manifesting” Fear At the Border: Lessons from Title 42 Expulsions (Jan. 30, 2024), <https://cgrs.uclawsf.edu/our-work/publications/%E2%80%9Cmanifesting%E2%80%9D-fear-border-less-ons-title-42-expulsions>.

⁶⁵ *Id.* at 2.

⁶⁶ *Id.*

⁶⁷ Interim Final Rule at 48,744.

⁶⁸ *Id.*

being deported, some do not even know that they can raise their fears of harm. A sign or video is entirely inadequate to ensure proper identification of asylum seekers and is no substitute for a few simple questions asked in the person's language.

Indeed, failure to refer under the newly imposed Shout Test is already underway.⁶⁹ Human Rights First interviewed Mexican families and adults who were summarily removed to Mexico during the first two weeks of the IFR's implementation and were denied an opportunity to express their fear, describing an intimidating and hostile environment in CBP and Border Patrol custody in which they were not allowed to speak. Some individuals reported to Human Rights First that they expressly requested asylum, a hearing with an immigration judge, and relayed the facts of their asylum claims, including the past persecution they had suffered, as well as others who were visibly sobbing and begging to be heard, but were instead ignored, told "there is no asylum" and "the border is closed." Other families recounted to Human Rights First that not only were they not asked whether they had a fear of return or what motivated their arrival, but they were not allowed to speak.

These Mexican families and adults were denied their statutory right to be referred for a credible fear screening or asylum hearing, and were deported back to potential persecution. Among them were three separate female survivors of gender-based violence, including a Mexican woman who was so violently harmed by her husband that she suffered a miscarriage, and a seven-month-pregnant woman escaping harm and death threats by her partner who explicitly requested asylum to a DHS border officer who replied, "I don't speak good Spanish," before summarily deporting her back to danger.

The Interim Final Rule's elimination of the simple fear questions and advisal is cloaked in the language of efficiency, with the Departments noting that it takes "20 to 30 minutes" to fill out Forms I-867A and I-867B that contain not only the three simple questions crucial to help identify asylum seekers but also some initial explanatory language.⁷⁰ The three simple questions and the explanation take only a few minutes to read. Indeed, reading the question as to whether a person has a fear of return takes only seconds. Avoiding the provision of necessary interpretation, which thwarts language access, is entirely improper.

The true purpose of the elimination of these essential questions appears to be a desire to reduce referrals of asylum seekers for Credible Fear Interviews — a goal of the Interim Final Rule that is confirmed repeatedly throughout the preamble. The Departments baselessly claim that the questions are "suggestive and account for part of the high rates of referrals and screen-ins that do not ultimately result in a grant of asylum or protection."⁷¹ This assertion is belied by the fact that these questions have been included in the expedited removal process since its very inception. Over the years, the United States Commission on International Religious Freedom ("USCIRF") and other researchers have confirmed that these questions are critical to ensuring

⁶⁹ Emily Bregel, *Migrants Report Overnight Deportations, Family Separations*, Arizona Daily Star (June 22, 2024), https://tucson.com/news/local/subscriber/arizona-sonora-us-mexico-border-asylum-deportation-rule-violations-alleged/article_d2ef785c-2e62-11ef-ab2d-e772ff84e1d6.html; Emily Bregel, *Border Agents Ignoring Fear Claims, Migrants Say, In Violation of Biden Border Exception*, Arizona Daily Star (June 16, 2024), https://tucson.com/news/local/border/us-mexico-border-arizona-biden-order-asylum-seekers/article_461bd3a4-29b1-11ef-b884-5f9fc26ba81b.html.

⁷⁰ Interim Final Rule at 48,739.

⁷¹ Interim Final Rule at 48,743.

that people who fear or express fear of return are actually referred for Credible Fear Interviews, and USCIRF repeatedly called on CBP to improve training due to officers' failures to actually ask the required questions.⁷²

The bottom line is that Departments are obliged to uphold the principle of nonrefoulement and ensure that no one fleeing persecution or torture is wrongfully returned to danger, which requires assessing whether an individual has a fear of return to this harm. It is shameful and pretextual to allege efficiency gains of twenty to thirty minutes by eliminating critical affirmative fear screening questions that will almost certainly result in refoulement.

While the Interim Final Rule should be rescinded in full for all the reasons we outline in this comment, to the extent the rule continues in force, it must restore the long required questions that identify asylum seekers who must be provided Credible Fear Interviews, and at the very least restore the simple required question, asked in a language the person understands, whether the person has a fear of return.

V. The Interim Final Rule will cause credible fear pass rates to plummet and lead to refoulement.

For those who can successfully pass the Shout Test and are referred by CBP for a fear screening, the Interim Final Rule erects an unjustly elevated barrier to humanitarian relief, which will result in refoulement.

A. Heightened fear screening standard

Individuals subject to expedited removal who express a fear of return must be referred for a preliminary fear screening conducted by an Asylum Officer. Congress deliberately established this as a "low screening standard," defined as a "significant possibility" that the asylum seeker could establish eligibility for asylum in a full hearing. By law, anyone determined to have a credible fear of persecution cannot be deported without a full hearing on their asylum claim.

Since May 2023, adults and families with children in this process who sought safety without a CBP One appointment have had to demonstrate they are exempt from the CLP Rule's presumption against asylum eligibility or meet a narrow exception, which are more generous than the Interim Final Rule — requirements that are completely unrelated to the merits of their asylum claim. Should they fail to demonstrate they are exempt or meet an exception, they are presumed ineligible for asylum and denied the opportunity to establish a credible fear of persecution.

In violation of the fear standard created by Congress, the CLP Rule and the Interim Final Rule impose a higher screening standard on asylum seekers who, because they are deemed to be subject to the CLP and Interim Final Rule's bans, are limited to being considered for withholding of removal and protection under the Convention Against Torture, which are more difficult to secure and provide lesser long-term protections. UNHCR has repeatedly explained that heightening the fear screening standard, which was already inconsistent with what international law would allow, would endanger refugees, deny them asylum hearings, and increase risks of refoulement to persecution. Initial outcomes following the implementation of the CLP Rule confirm this fear.

⁷² See U.S. Comm'n on Int'l Religious Freedom, *supra* note 62.

People subject to CLP Rule’s higher “reasonable possibility” screening standard are more than three times as likely to fail their screenings and be ordered deported without a chance to apply for asylum compared to those not subject to the ban.⁷³ While people who established an exception to the CLP Rule’s presumption and proceeded under the correct credible fear standard passed their screenings approximately 80% percent of the time, between May 12, 2023 and May 1, 2024, those who were subjected to the CLP Rule and had to meet the higher screening fared far worse — with approximately 52 percent passing their screenings and the rest ordered deported.⁷⁴ The Interim Final Rule’s more stringent screening standard of “reasonable probability” will cause credible fear pass rates to plummet even further and lead to refolement.

Those who do not pass Credible Fear Interviews are ordered deported without an opportunity to apply for asylum or other protection unless the decision is reversed by an Immigration Judge or reconsidered by the United States Citizenship and Immigration Services (“USCIS”) Asylum Office. While people are entitled to request an Immigration Judge review of their negative credible fear decision (also referred to as a negative credible fear review), these reviews are often cursory, with some asylum seekers prohibited from speaking, submitting evidence, or having their attorney speak on their behalf. The Biden administration has also eliminated long-standing safeguards in the credible fear process to severely limit the ability of asylum seekers and their attorneys to request reconsideration of a negative credible fear determination from the Asylum Office. This restriction is also included in the Interim Final Rule.⁷⁵

Even before the Interim Final Rule, Human Rights First learned of some cases where refugees’ summary deportation were prevented only because attorneys or advocates learned of these potential returns to persecution and successfully intervened. While advocacy by attorneys spared a few from unlawful returns, access to counsel in expedited removal is extremely limited and the vast majority of people subject to expedited removal may be deported without ever consulting an attorney.

Human Rights First, through its research and reports, has identified examples of asylum seekers placed in peril in the wake of the CLP Rule’s heightened screening standard — and these refolement risks will only escalate under the Interim Final Rule’s even more unduly high screening standard. These examples include:⁷⁶

- A Venezuelan air force lieutenant, the son of a known opponent to the Maduro regime, was found not to meet the heightened asylum ban fear screening standard, deported without an asylum hearing to Venezuela in December 2023 where he was immediately sent to a military prison.
- A Chinese pro-democracy activist jailed as a political prisoner for years and whose persecution was documented by Western media was ordered deported under the higher screening standard imposed by the CLP Rule. He was found to not meet an exception and subjected to the CLP Rule’s higher screening standard. His deportation order was only reversed after a legal service organization learned of his case and conducted extensive advocacy.

⁷³ Inhumane and Counterproductive at 46.

⁷⁴ *Id.*; see Exec. Order No. 10773 of June 3, 2024, 89 Fed. Reg. 48,487, 48,488 (June 7, 2024).

⁷⁵ Interim Final Rule at 48,770.

⁷⁶ Trapped, Preyed Upon, and Punished at 24-26.

- A Senegalese man fleeing politically motivated attacks from Senegalese authorities was deported to Senegal under the asylum ban. USCIS conducted his Credible Fear Interview while he was in Immigration and Customs Enforcement (“ICE”) custody and found he did not meet an exception to the CLP Rule. He only speaks Wolof and suffered abuse in Mexico, including unlawful detention and demands for bribes by Mexican officers. This abuse, and his fear of further violence in Mexico, motivated his irregular crossing into the United States to seek protection. The asylum officer also failed to record the man’s relaying of the details of his assault by the Senegalese police, and when he brought this up at the negative credible fear review, the Immigration Judge claimed the man was changing his story and was not credible, even though negative credible fear reviews are meant to be conducted de novo.
- A Transgender Venezuelan woman living with HIV, who suffered years of physical abuse and was threatened with rape in Venezuela due to her sexual orientation and gender identity, was subjected to the CLP Rule and ordered deported. USCIS conducted her Credible Fear Interview in ICE detention, and she was held to the asylum ban’s higher screening standard. The officer conducting the Credible Fear Interview repeatedly instructed her to answer questions about past persecution with “yes” or “no” responses and did not include any analysis or explanation of the negative determination in the interview records. She remained detained for months, suffering enormous trauma while ICE prepared to deport her to Venezuela, where she feared she would be killed. The deportation order was reversed only after Immigration Equality learned of her case and provided her assistance.
- A Venezuelan torture survivor and military deserter was found to not meet an exception to the CLP Rule despite surviving an attempted kidnapping in Mexico, and was ordered deported. During his Credible Fear Interview in ICE custody, he described his escape from a kidnapping attempt in Mexico by three armed men who chased him, but the asylum officer found he did not meet an exception to the ban, and he failed the CLP Rule’s higher screening standard. He was only spared from summary deportation to his country of persecution after securing legal representation by RAICES. An Immigration Judge subsequently concluded he met the CLP Rule’s extreme threat to life or safety exception and vacated the deportation order.
- A Nicaraguan illiterate man who was severely beaten by Nicaraguan police and threatened with imprisonment was ordered deported to Nicaragua under the CLP Rule. The asylum officer found he did not meet an exception, although he could not use the CBP One app due to illiteracy, a fact which he shared in his Credible Fear Interview. During a negative credible fear review, the Immigration Judge conceded the CLP Rule should not apply to him due to his illiteracy but nonetheless upheld the expedited removal order despite risk of torture by Nicaraguan authorities if returned.
- An Egyptian man targeted and beaten because he is Christian and who fears he will be killed if returned to Egypt, was ordered deported under the CLP Rule. The man only speaks Arabic, a language that is not available on the CBP One app. Like the vast majority of people put into expedited removal, he was not represented in his Credible Fear Interview. His deportation order was only vacated after a legal service organization learned of his case and conducted extensive advocacy.

- A Honduran man who escaped forced recruitment by the MS-13 gang under threat of death was subjected to the CLP Rule in ICE detention and deported because he did not meet the higher screening standard. In Honduras, gangs control widespread territory across the country, collude with government agents, and target, attack, and murder people who resist their demands. In his Credible Fear Interview, this asylum seeker testified that he escaped a kidnapping in Mexico, but the asylum officer found no exception to the asylum ban and did not include an explanation in the Credible Fear Interview records as to why these facts did not constitute an imminent and extreme threat to life or safety. He was ordered deported because he did not meet the CLP Rule's higher screening standard. At his negative credible fear review, an Immigration Judge upheld the negative fear determination and the man was deported to Honduras.

B. Due process undermined in expedited removal

1. *CBP custody*

The harm caused by the Interim Final Rule's manifestation of fear requirement and heightened fear screening standard will be exacerbated in enhanced expedited removal. At the same time the CLP Rule was implemented in 2023, the Biden administration relaunched a Trump-era policy of conducting Credible Fear Interviews in CBP custody, leading to prolonged detention of adults seeking asylum in dangerous, sometimes life-threatening, and subpar border holding cell conditions in violation of CBP guidelines. Families with children are now also undergoing Credible Fear Interviews in CBP custody, if they manage to get referred for a fear screening.

Despite attempts by the administration to provide access to consultations with legal counsel, the vast majority of those in this program do not have meaningful access to legal assistance before, or legal representation in, these life-or-death interviews. The systemic due process issues with expedited removal, amplified while in CBP custody, combined with the CLP Rule has led to people with refugee claims being returned to harm. Unofficial data from CBP indicate that the credible fear interview pass rate for those in CBP custody subjected to the CLP Rule has been an abysmal 23%.⁷⁷

Meaningful access to legal counsel was already obstructed under rushed fear screenings in CBP custody, yet recent changes render it nearly impossible, reducing legal access to as little as four hours – down from an already deficient 24 hours – for interviews that are conducted seven days a week.⁷⁸ For example, an asylum seeker was deported with no notice to their attorney or opportunity to have a hearing with an Immigration Judge despite the attorney's request.⁷⁹ As a result, families with children and adults are being denied access to legal advice or representation if they manage to get referred for fear screenings.

⁷⁷ Trapped, Preyed Upon, and Punished at 26; Pablo Balcazar, *Volunteers Needed for Credible Fear Interview Preparation in CBP Hotline*, Immigration Impact (May 3, 2024), <https://immigrationimpact.com/2024/05/03/volunteers-credible-fear-interview-cbp-hotline/>.

⁷⁸ Nat'l Immigrant Justice Project, *Obstructed Legal Access: June 2023 Update* (June 20, 2023), <https://immigrantjustice.org/staff/blog/obstructed-legal-access-june-2023-update>; Trapped, Preyed Upon, and Punished at 26-27; Rebecca Schneid, 'We've Been Here Before.' *Immigrant Advocates See Echoes of Trump in Biden's Asylum Actions*, TIME (June 12, 2024), <https://time.com/6987846/biden-asylum-us-mexico-border-immigration-policy/>.

⁷⁹ @L_Toczykowski, X (June 13, 2024 8:39 PM), https://x.com/L_Toczykowski/status/1801414059696525388.

2. *Family Expedited Removal Management Program*

Since May 2023, the administration has also subjected families seeking protection to the CLP Rule, in combination with expedited removal, unduly short timelines, home curfews, and other punitive policies, raising the risk of refoulement and inflicting extreme trauma on families and children who have just fled harm. Credible Fear Interviews conducted in this program—dubbed “Family Expedited Removal Management” (“FERM”) — take place within days or weeks of a family’s arrival in the United States.⁸⁰ As of November 2023, only 2.6% of all families enrolled in FERM were represented.⁸¹

As Human Rights First documented in its October 2023 report, these interviews are replete with instances of parents, babies, and children crying; young children questioned by asylum officers; and parents having to comfort their children or informing the officers that a child is hungry or needs a diaper change. Families have suffered additional trauma during these interviews due to the CLP Rule because they had to testify about the brutal violence they suffered in Mexico in order to meet an exception to or rebut the presumption of the CLP Rule. Indigenous families in the FERM process face even more significant barriers because the government fails to interview them in their best and native language, leading to deportation orders and severe trauma.⁸²

The risk of refoulement for families who manage to be referred for fear screenings under this program will further increase given due process barriers and the Interim Final Rule’s unduly elevated fear screening standard.

VI. The Interim Final Rule’s Secretary approved process requirement to use CBP One app is illegal, perpetuates inequity, and denies asylum to the most vulnerable.

While “emergency border circumstances” exist, as they do now and will likely continue indefinitely, the border closes to individuals seeking asylum. The Proclamation suspends the entry of and the Interim Final Rule establishes a bar to asylum eligibility for anyone who crosses or presents themselves at a port of entry along the southern border, unless they present with a CBP One appointment or through another process approved by the Secretary.⁸³ If they do not, an individual can demonstrate, by a preponderance of the evidence, there were “exceptionally compelling circumstances” that except them from the ban.⁸⁴ “Exceptionally compelling circumstances” include: 1) an acute medical emergency, 2) an “imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder,” or 3) being a “victim of a severe form of trafficking in persons.”⁸⁵

⁸⁰ Too Fast for Fairness: “Expedited Removal” and the Family Expedited Removal Management Program (Jan. 2024), <http://www.womensrefugeecommission.org/wp-content/uploads/2024/01/Family-Expedited-Removal-Management-Program-Explainer.pdf>.

⁸¹ Office of Representative Jayapal, *Jayapal, Barragán Inquiry Reveals 2.6% of Immigrant Families in Removal Process Have Legal Counsel* (Jan. 11, 2024), <https://jayapal.house.gov/2024/01/11/jayapal-barragan-inquiry-reveals-2-6-of-immigrant-families-in-removal-process-have-legal-counsel/>.

⁸² Trapped, Preyed Upon, and Punished at 55.

⁸³ Interim Final Rule at 48,754.

⁸⁴ *Id.*

⁸⁵ *Id.*

Critically, unlike the CLP Rule, in which asylum officers and Immigration Judges solely adjudicate the application of its presumption of asylum ineligibility and exceptions, the Proclamation and Interim Final Rule's bar will first in effect be adjudicated at the limit line by CBP officers who will decide whether an asylum seeker is exempted from the suspension of entry under an exceptional circumstance and will be processed at the port of entry.⁸⁶ In its first three weeks of implementation, this suspension of entry at ports of entry has already resulted in vulnerable and at-risk asylum seekers being denied access to ports of entry. These asylum seekers included people who have survived or are at risk of kidnapping, rape, and torture, women with high-risk pregnancies, and others with urgent medical conditions.⁸⁷ Suspending entry at ports of entry will spur irregular crossings and cruelly punish people who cross, subjecting them to improper penalties that violate the Refugee Convention.

As Human Rights First has documented in multiple reports, policies that meter and limit access to U.S. ports of entry spur irregular crossings by at-risk people who cannot safely wait in Mexico. Human Rights First interviewed many asylum seekers subject to the CLP rule over the last year who recounted that they crossed the border, or were contemplating doing so, due to their inability to seek asylum at a port of entry and on account of the risks they faced while waiting in Mexico. Their accounts are detailed in the five CLP Rule asylum ban reports issued by Human Rights First.⁸⁸ The Department of Homeland Security's Office of Inspector General has also confirmed, in its prior research, that CBP officers understand that CBP steps to limit access to asylum at ports of entry encourage irregular crossings.⁸⁹

Such policies are also a boon to cartels and smugglers, who target migrants and asylum seekers left stranded in highly dangerous areas for kidnapping, violence and extortion.⁹⁰ Indeed, the Chihuahua Attorney General stated in April 2024 that the increase in kidnappings and murders in Chihuahua is linked to the fact that organized crime groups have now taken up migrant smuggling.⁹¹

- A. The Interim Final Rule's Secretary approved process requirement is a form of digital metering.

⁸⁶ Plaintiff's Brief Regarding Presidential Proclamation at 5, *Al Otro Lado v. Mayorkas*, No.

3:23-cv-01367-AGS-BLM (S.D. Cal. June 20, 2024),

<https://storage.courtlistener.com/recap/gov.uscourts.casd.764598/gov.uscourts.casd.764598.80.o.pdf>.

⁸⁷ Two Weeks of the Biden Border Proclamation and Asylum Shutdown (June 2024),

<https://humanrightsfirst.org/wp-content/uploads/2024/06/Two-Weeks-of-the-Biden-Border-Proclamation-Asylum-Shutdown.pdf>.

⁸⁸ Trapped, Preyed Upon, and Punished; Inhumane and Counterproductive; Refugee Protection Travesty; Human Rights First, "A Line that Barely Budes: U.S Limiting Access to Asylum Nogales, Arizona Port of Entry" (June 2023) [hereinafter *A Line That Barely Budes*],

https://humanrightsfirst.org/wp-content/uploads/2023/06/A-Line-That-Barely-Budes_Nogales-Arizona-1.pdf; Lives at Risk: Barriers and Harms As Biden Asylum Ban Takes (May 2023),

<https://humanrightsfirst.org/wp-content/uploads/2023/05/Barriers-and-Harms-As-Biden-Asylum-Ban-Takes-Effect31.pdf>.

⁸⁹ Office of Inspector General, Dep't of Homeland Sec., OIG-18-84,

Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy 6 (Sept. 17, 2018),

<https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf>.

⁹⁰ Human Rights Watch, "We Couldn't Wait" Digital Metering at the US-Mexico Border (May 2024),

https://www.hrw.org/sites/default/files/media_2024/04/us_mexico00524%20web.pdf.

⁹¹ Trapped, Preyed Upon, and Punished at 16.

The Interim Final Rule’s requirement to use a “process approved by the Secretary,” like the CBP One app, effectively caps asylum through a form of digital metering.⁹² Wait times for CBP One appointments have risen from two to four months to up to seven months, while daily CBP One appointments have stagnated at 1450 since June 2023.⁹³ CBP One appointments are offered at only eight ports of entry along the almost 2,000 miles of the southern land border. The number of arrivals at the border far exceeds the number of appointments made available by CBP.⁹⁴ Like other forms of metering, long wait times for CBP One appointments spur crossings outside official ports of entry, making them counterproductive to effective migration policy and detrimental to the safety of people seeking asylum.

While the Interim Final Rule should be rescinded in full for all the reasons we outline in this comment, to the extent the rule continues in force, it must ensure equal access to asylum at ports of entry, including by providing that people seeking asylum must be permitted to present at a port of entry upon presentation and without delay, including when they do not have a CBP One appointment.

B. The Interim Final Rule’s Secretary approved process requirement is discriminatory.

The CBP One smartphone app is only available in English, Spanish, and Haitian Creole. Conditioning access to asylum, and essentially to ports of entry, on use of a smartphone app to request an appointment that is only available in three languages blatantly denies equal access to asylum to people in need of protection who are unable to use the app.⁹⁵ Significant barriers to the use of CBP One, including limited language access, disproportionately impact Indigenous, many Black, and other asylum seekers who do not speak one of these three languages. People seeking asylum who are illiterate, have limited language and digital literacy, or have disabilities that impede their ability to use the app, are also denied equal access to asylum and to ports of entry under this Interim Final Rule. So too are people with limited financial means to access daily internet or purchase a smartphone — a very real challenge for the many migrants who have told Human Rights First that their phones have been stolen by Mexican authorities and cartels or lost or damaged during their travels. These severe language, disability, resource, and other access issues disparately impact and discriminate against impacted asylum seekers.

Unlike with the CLP Rule, the Interim Final Rule’s asylum eligibility ban, the Departments, “decline[d] to adopt an exception . . . for those who present at a POE without a pre-scheduled time and place but show that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.”⁹⁶ While this CLP exception has not been properly applied, the lack of an exception in the Interim Final Rule will further condemn individuals unable to use the CBP One application to the risk of refoulement as they are pushed to cross between ports of entry, subjecting

⁹² Interim Final Rule at 48,754; Amnesty Int’l, CBP One: A blessing or a trap? (May 8, 2024), <https://www.amnesty.org/en/documents/amr51/7985/2024>; see also Capping Asylum: Illegal, Dangerous, and Counterproductive (Dec. 2023), https://humanrightsfirst.org/wp-content/uploads/2023/12/Capping-Asylum-Fact-sheet_Dec-2023_for_matted.pdf.

⁹³ Trapped, Preyed Upon, and Punished at 10.

⁹⁴ Human Rights Watch, *supra* note 90.

⁹⁵ Trapped, Preyed Upon, and Punished at 14-16.

⁹⁶ Interim Final Rule at 48,732 n.172.

themselves to the Interim Final Rule's asylum eligibility ban and heightened standard for lesser forms of protection.⁹⁷ The following examples documented by Human Rights First of asylum seekers unable to use the CBP One app under the CLP Rule illustrate people in need of protection that the Interim Final Rule will similarly harm:⁹⁸

- A Black Senegalese gay asylum seeker who speaks Wolof and Fulani is at risk under the CLP Rule asylum ban. The man's boyfriend was killed in Senegal, and he fled a stoning, beatings, and death threats because of his sexuality. Once in Mexico, he sought protection after crossing into the United States between ports of entry and was unaware of the asylum ban's consequences for entering without an appointment. He only speaks Wolof and Fulani, languages the CBP One appointment system is not available in and was unable to access the app. He is now in ICE detention and risks return to persecution under the CLP Rule.
- Three Hazara men, a persecuted ethnic and religious minority, fled Afghanistan after the fall of Kabul to the Taliban. Lacking any safe pathways to protection they crossed irregularly into the United States and immediately turned themselves in to seek asylum. They speak Dari and were unfamiliar with the CBP One app, which is not available in their language. Under the CLP Rule asylum ban, they now risk potential return to the Taliban and their certain deaths in Afghanistan. Even if they are subsequently found eligible for withholding of removal, they will be denied a path to permanent residence, citizenship, and stability.
- A Turkish transgender male asylum seeker who does not speak a CBP One language reported to Human Rights First that he was unable to use the app to schedule an appointment at a port of entry due to the language barrier, as he speaks Turkish. He crossed between ports of entry in California and will now risk being barred from asylum under the CLP Rule despite his potential eligibility for asylum.
- A Black Mauritanian human rights advocate who was unaware of, and does not speak CBP One languages, is at risk under the CLP Rule asylum ban. Imprisoned for his anticorruption work in Mauritania, the human rights advocate fears arrest, torture, and death if returned to Mauritania. He was unaware of the CBP One app or of the asylum ban's consequences when seeking protection at the U.S. southwest border. As an Arabic and French speaker, he would not have been able to use the CBP One scheduling system. While in Mexico, he was robbed and beaten by gangs and extorted by Mexican police which motivated his crossing to the U.S. to seek protection. He now risks being barred from asylum and returned to persecution under the ban.
- An Indian Sikh family fleeing persecution on religious grounds crossed between ports of entry into southern California. The family are Hindi speakers and were unaware of the CBP One app.
- A Black Senegalese man who speaks only Wolof is at risk under the CLP Rule. He fled torture and sexual assault in Senegal due to his imputed LGBTQI+ status. The man has limited literacy and only speaks Wolof. While on a bus in Mexico, armed men pulled him and other Black migrants off the bus and robbed them at gunpoint. Shortly after,

⁹⁷ Trapped, Preyed Upon, and Punished at 14-16.

⁹⁸ *Id.* at 15-16.

Mexican immigration officers detained them and held them for four days before releasing them near the U.S. border and informing them they had ten days to leave the country. He entered the United States between ports of entry to seek asylum, was sent into ICE detention, and is at risk of return to persecution under the CLP Rule asylum ban.

While the Interim Final Rule should be rescinded in full for all the reasons we outline in this comment, to the extent the rule continues in force, it must include an exception for all asylum seekers, whether they present at ports of entry or cross irregularly, who do not speak a language in which the CBP One app is provided, are unable to use the application due to illiteracy, disabilities, lack of resources or other difficulties, fail to secure appointments after multiple attempts, or did not know about the application's existence.

- C. The Interim Final Rule's Secretary approved process requirement subjects asylum seekers to kidnapping, torture, and rape in Mexico.

The CLP Rule's CBP One appointment requirement already strands asylum seekers in Mexico while they wait to secure an appointment or wait until the day and time of their appointment — and those wait times will grow longer under the Interim Final Rule. CBP One appointments are only available at eight ports of entry across the entire southwest border, concentrating people seeking asylum at these locations. In Reynosa, Matamoros, and Nuevo Laredo, Mexican border cities where the Department of Homeland Security ("DHS") issues over 40% of its CBP One appointments, kidnappings, torture, and sexual assault by cartels of people seeking asylum, including those waiting for or with CBP One appointments, have risen since the ban took effect.⁹⁹

These areas were already designated by the Department of State as "Do Not Travel" locations due to life-threatening risks — designations that are akin to those issued for war zones. In Nuevo Laredo, the Strauss Center for International Security and Law has reported that conditions are so dangerous that migrant shelters continue to be closed due to "members of organized crime threatening and perpetrating violence against shelter staff and migrants."¹⁰⁰ Reports of sexual violence against migrants in Reynosa and Matamoros increased 70% during the last months of 2023 according to Doctors Without Borders, in addition to the already sharply escalating instances of kidnappings in Reynosa following the implementation of the ban. In January 2024, Doctors Without Borders teams in northern Mexico reported more cases of sexual violence than in any month of the previous year.¹⁰¹

Humanitarian aid workers in these areas have informed Human Rights First researchers that the frequency and brutality of the kidnappings has only gotten worse. Aid workers recounted that men and women have suffered from horrific torture and sexual violence, including women gang raped and sexually assaulted in the presence of children. Migrant survivors of kidnapping in Tamaulipas also report extreme physical violence such as acid burns, fractures, beatings with a slab of wood, and even mentioned having witnessed homicides, as told to Doctors Without Borders. After suffering these horrors, children and their families remain terrified and trapped in danger. Aid workers reported to Human Rights First that they have observed that increased

⁹⁹ *Id.* at 7.

¹⁰⁰ Strauss Ctr. for Int'l Sec. and Law, Asylum Processing at the U.S.-Mexico Border: February 2024, at 7 (Feb. 2024), https://www.strausscenter.org/wp-content/uploads/Feb_2024_AsylumProcessing.pdf.

¹⁰¹ Trapped, Preyed Upon, and Punished at 7.

numbers of asylum seekers have missed their CBP One appointments because of these escalating abuses.¹⁰²

Those who secure CBP One appointments are often specifically targeted by cartels, with Mexican authorities complicit or actively engaged in the abuse against migrants. They will be at even greater risk due to the Interim Final Rule's additional bar on port of entry access for people who do not have CBP One appointments and the even longer wait times the Interim Final Rule will spur. Human Rights First has tracked reports of over 2,500 migrant survivors of kidnapping, rape, torture, extortion, and other violent harm while stranded in Mexico as they wait to seek U.S. asylum in the year since the CLP Rule asylum ban took effect.¹⁰³ For Mexican nationals, this danger is compounded by being trapped in their own country of feared persecution under the Interim Final Rule. Given the under-reporting of kidnappings and other crimes in Mexico and substantial increase in kidnappings in parts of the northern Mexico border reported by aid workers and Mexican authorities, this figure certainly represents the tip of the iceberg.

Human Rights First has documented the horrific abuses inflicted on migrants and asylum seekers when they are blocked, turned away, or left to wait in Mexico, including over 13,000 survivors of murder, kidnapping, rape, and other violent attacks against asylum seekers blocked in or expelled to Mexico under the Title 42 policy¹⁰⁴ during the first two years of the Biden administration and similar reports of targeted harm against asylum seekers forced to wait in Mexico under the "Remain in Mexico" Migrant Protection Protocols.¹⁰⁵

In its prior reports on the CLP Rule asylum ban, Human Rights First documented numerous examples of adults, children, and families who survived these harms while stranded in Mexico as they attempted to secure a CBP One appointment. These included: a Venezuelan young adult kidnapped and tortured by having his finger cut off; a Honduran mother kidnapped with her family and raped; a Venezuelan man kidnapped and shot in the head leading to the loss of his eye; Honduran teenage boys kidnapped and raped; a Latin American mother and her minor children sexually assaulted; a Colombian LGBTQI+ woman sexually assaulted by a Mexican official; and a Latin American man kidnapped and tortured by Mexican officials in Reynosa.¹⁰⁶

Asylum seekers must not only contend with cartels, but also Mexican authorities. Human Rights First's research over the last year has confirmed, for example, that Mexican immigration authorities are apprehending migrants and people seeking asylum, including those waiting for or with CBP One appointments, separating families, committing abuses, and forcibly relocating them to southern Mexico where they are stranded, at risk, outside the CBP One app's geo-fence and unable to request an appointment. Humanitarian aid providers reported to Human Rights First that some people seeking asylum have missed their CBP One appointments because they were detained by Mexican authorities. For instance:¹⁰⁷

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Human Rights First, "Human Rights Stain, Public Health Farce: Evasion of Asylum Law and Title 42 Abuse Must End — and Never Be Revived" (Dec. 15, 2022), <https://humanrightsfirst.org/library/human-rights-stain-public-health-farce/>.

¹⁰⁵ Fatally Flawed: "Remain in Mexico" Policy Should Never Be Revived (Sept. 13, 2022), <https://humanrightsfirst.org/library/fatally-flawed-remain-in-mexico-policy-should-never-be-revived/>.

¹⁰⁶ Trapped, Preyed Upon, and Punished at 8.

¹⁰⁷ *Id.* at 21-22.

- An Afghan family with a CBP One appointment was extorted by Mexican immigration officers in the Mexico City and Tijuana airports in January 2024. The officers demanded the family open the CBP One app, took their phone, and threatened to eliminate their appointment if they did not pay them a bribe.
- A Venezuelan family with a CBP One appointment flew from Mexico City to Ciudad Juárez where they were questioned by Mexican immigration officers upon arrival who tore up the family's CBP One appointment print out, wrongly accusing them of fraud, and threatened to bus them to southern Mexico or deport them. Another officer eventually arrived and acknowledged their appointment and allowed them to leave in April 2024.
- An Ecuadorian mother and teenage son separated by Mexican immigration officers from her husband and eighteen-year-old son. After the freight train the family was traveling on was stopped as it approached Juárez in March 2024, they were caught by Mexican officers. The mother pleaded with the officers, indicating that they were a family and had documentation to prove it. The officers separated the family. She was left in Chihuahua with her minor son while her husband and 18-year-old son were forcibly transported to Tapachula. When Human Rights First interviewed the mother, the family had already been separated, and unable and to reunite, for a month.
- A Venezuelan family with minor children prevented from seeking U.S. asylum and instead detained by Mexican officers and transported to Tapachula in January 2024. The family was removed from a bus at the last checkpoint as they approached Reynosa. Mexican officers took their cell phones and transported them to a detention center. When the family asked immigration officers why they were being held and what was going to happen, the officers deceived them and said they would be taken to Mexico City to regularize their legal status. Instead, they were taken to the Reynosa airport and forcibly flown to Tapachula, bordering Guatemala, and forced to start their journey to seek U.S. asylum again.

VII. The Interim Final Rule illegally traps Mexican asylum seekers in their own country of feared persecution, effectuating refoulement.

Glaringly, unlike the CLP Rule, which excepted Mexican nationals from its manner of entry bar, the Interim Final Rule does not adopt a similar exception.¹⁰⁸ People fleeing persecution in Mexico, a country that directly borders the United States, cannot wait. The Proclamation and Interim Final Rule's suspension on entry restricts access to asylum for Mexican asylum seekers, forcing them to remain at risk of persecution in their own country, equivalent to refoulement.

For Mexican individuals and families, the threat of persecution by those they are fleeing – such as violent cartels and other organized crime groups that exercise control over territory and often work in collusion with Mexican authorities – is still palpable as they are forced to continue to wait in northern Mexico in the hopes of finally having access to safety. Conditioning access to asylum on securing a limited, lottery-based CBP One appointment requires Mexican nationals to wait many months in danger in their country of feared harm, violating the Refugee Convention and Protocol.

¹⁰⁸ Interim Final Rule at 48,738.

As a consequence of restricted and blocked access at ports of entry during the past year under the CLP Rule, Human Rights First has spoken with Mexican families and individuals facing life-threatening risks who were stranded in Mexico, struggling to secure a CBP One appointment or waiting on metering lists and were targeted for harm. For example:¹⁰⁹

- A Mexican LGBTQ+ asylum seeker was found dead the first week of September 2023 in the apartment he was renting in Nogales. Since mid-July, he had been on the waitlist of asylum seekers waiting to be processed by CBP at the Nogales port of entry administered by the Nogales municipality. His partner was already in the U.S. initiating an asylum request. The Nogales municipality informed the Kino Border Initiative of his death.
- A Mexican five-year-old girl was sexually assaulted, and her uncles killed while waiting for CBP One appointments: A family consisting of a mother, father, two teenage children, and a five-year old daughter, along with the father's two adult brothers, were kidnapped by people who identified themselves as members of a cartel in Reynosa in September 2023 while waiting to secure a CBP One appointment. The cartel tortured and killed the two adult brothers and forced the family to witness the sexual assault of their five-year-old daughter, as they subsequently recounted to a humanitarian aid worker. The family was released after relatives paid the ransom, but they remain in danger in Mexico and in need of critical trauma-related psychiatric care.
- While waiting to seek asylum in the U.S., a Mexican man was kidnapped in Reynosa in August 2023 and held by the cartel for one month. He was tortured, and his finger was cut off with images sent to his relatives demanding immediate payment of a ransom, as confirmed by a humanitarian aid worker.
- A Mexican lesbian woman from Guanajuato, Mexico had been waiting over three months for a CBP One appointment after fleeing torture and threats of rape on account of her sexual orientation by cartel members and Mexican police acting in complicity with them. After picking up medication for her girlfriend, the woman was attacked by cartel members and Mexican police, who tortured her, forced her to remove all her clothing, beat her, forcibly shaved her head, and murdered her friend who was defending her. The cartel members and the Mexican police were threatening her with corrective rape and threatened her children. She was unable to access the Nogales port of entry to seek asylum protection due to a six to seven month wait for those without CBP One appointments at the time.¹¹⁰
- A transgender woman who fled Michoacán, Mexico after cartels tried to forcibly recruit her to work for them, has been waiting for over five months for a CBP One appointment. During this time, cartels, who often work with impunity or active assistance from Mexican law enforcement, have threatened her life on four separate occasions.¹¹¹

¹⁰⁹ Inhumane and Counterproductive at 44-45.

¹¹⁰ U.S. Asylum Bans Strand LGBTQI+ Refugees in Danger and Risk Return to Persecution 9 (June 2024) [hereinafter U.S. Asylum Bans Strand LGBTQI+ Refugees], https://humanrightsfirst.org/wp-content/uploads/2024/06/Factsheet_Asylum-Bans-Strand-LGBTQI-Refugees_final-formatted.pdf.

¹¹¹ *Id.* at 10.

- A family from Sonora, Mexico, consisting of a U.S. citizen child, Lawful Permanent Resident father and pregnant mother without U.S. legal status fled imminent harm and death threats by the cartel when they approached the Nogales port of entry in August 2023. They were informed they would need to wait more than two months to be processed by CBP as they did not have CBP One appointments, despite not requiring one to seek asylum as a Mexican national under the CLP Rule. If they waited by the port, they would not only risk their lives but the lives of others waiting. As a result, they were denied access to asylum processing and were forced to transit Mexico to another port of entry and continue to risk their lives, as recounted by the Kino Border Initiative.
- A Mexican Indigenous language speaker survivor of repeated rape who had been impregnated by her abuser who was looking for her in Matamoros, fled to Reynosa. She approached the port of entry to seek asylum accompanied by a local humanitarian worker, as they reported to Human Rights First. CBP officers asked the woman her name but due to trauma and language issues, the woman did not answer. Because of this, CBP officers denied processing her and turned her away. As the woman's life was in danger, she attempted again the next day accompanied by a different local humanitarian worker and was finally processed by CBP there.¹¹²
- A single mother traveling with her three young daughters aged four, six, and 11 who recounted to a Human Rights First researcher that she was fleeing violent harm in Mexico, was sleeping with them outside the Nogales port of entry where they had spent the last eight days and nights. She shared her incessant fears: "I'm afraid for my girls. You can't sleep because you don't know if they'll be snatched. You start to become psychologically traumatized. Because I'm a woman, I can't defend myself. There's no security [here]." Nearly three weeks later, on June 1st, the same Mexican single mother with her three young daughters was going on her 18th night waiting to seek asylum protection, having at one point lost her spot in the line, and likely faced an additional night or two of waiting.¹¹³
- A female-headed multi-generational family, including two young children, aged four and one, were waiting to seek asylum outside the Nogales port of entry for eight days at the time they spoke to a Human Rights First researcher in early June 2023. They had spent the last five nights sleeping outside the port on the concrete of the public thoroughfare with blankets other asylum seekers had left behind. They recounted fleeing death threats and gender-based violence by violent cartel members in Mexico who burned the four-year-old, killed the mother's sister and disappeared her husband, while the grandmother was kidnapped and beaten and her brother was kidnapped and found dead.

The grandmother shared: "The days feel eternal. Every day we're still trying to get a [CBP One] appointment. Each time we get in a taxi, we're asked where we're from, and I'm afraid to tell them. Wherever we go, we're constantly afraid they [the cartel] will find us. They're everywhere." These women and their children arrived in Nogales a month prior under Title 42 and were blocked from seeking asylum. The 11-year-old daughter fell ill with diarrhea and vomiting while they were living out on the street. An elderly man approached them and offered them a room, which turned out to be the same room he slept in and where he strategically placed his bed blocking the front door. Shortly after,

¹¹² Refugee Protection Travesty at 45.

¹¹³ A Line that Barely Budes at 6.

he began to sexually harass them, leading Zenaida and Yaneth to fear the worst for themselves and their children. They managed to escape and fled directly to the Nogales Port of Entry where they had been sleeping the past five nights outside on the concrete. The grandmother expressed: “Why does no one hear us? We are so scared. We’re afraid when people look at us and ask us where we’re from. We cannot wait here.”¹¹⁴

VIII. The Interim Final Rule will disproportionately harm Black, Indigenous, and LGBTQI+ asylum seekers.

Black, Indigenous, LGBTQI+, HIV+, women, children, and other vulnerable groups, including people with disabilities or urgent medical conditions will continue to face particular and egregious barriers, dangers, and disparities in seeking asylum because of the Interim Final Rule, as they do under the CLP Rule. The Interim Final Rule and related restrictions deny equal access to asylum at ports of entry to most African, Indigenous, and other asylum seekers who are unable to use the CBP One app or wait for an appointment.

A. Black asylum seekers

Due to the CLP Rule, the new Interim Final Rule, and other restrictions, Black asylum seekers are forced to wait at risk in Mexico where they are targets of anti-Black violence, discrimination, and harm by Mexican authorities. They are also at risk from violent cartels that control vast territory, often with the complicity of some Mexican authorities. In Reynosa, Haitian asylum seekers are also being targeted for kidnapping for ransom. Earlier this year, four Haitian asylum seekers were kidnapped and held by a cartel for six weeks, while Haitian pregnant women have been kidnapped and raped.¹¹⁵

As Human Rights First explained in a May 2024 report, Haitian Bridge Alliance (“HBA”) reported that Mexican immigration officers and municipal police target Haitians and migrants and asylum seekers of African-descent for extortion, detention, and other harm as they transit through Mexico, including at airports and on buses. Over the last several months, Mexican immigration officers have targeted African migrants in Tijuana at specific hotels and have threatened to arrest, detain, and transfer the migrants and asylum seekers to southern Mexico if they refused to pay bribes to the officers.

Earlier this year, Mexican immigration officers unlawfully arrested and detained 45 Haitian asylum seekers with CBP One appointments in Tijuana for two hours outside the city. HBA’s advocacy helped secure the release of nearly all of the victims, but Mexican authorities forcibly moved one family with three children to Tabasco in the south of Mexico who were waiting for their CBP One appointment. HBA also reports that between November 2023 and April 2024, Mexican authorities detained approximately 500 Haitian men, women, and children who were waiting for CBP One appointments in Tijuana and forcibly transferred them to Tabasco and Tapachula in the south of Mexico.

Discriminatory barriers to medical care facing Black asylum seekers and migrants in Mexico forced to wait under the CLP Rule have also resulted in the preventable deaths of Haitian asylum seekers. Some Haitians have been forced to wait with untreated chronic medical issues

¹¹⁴ *Id.* at 9-10.

¹¹⁵ Trapped, Preyed Upon, and Punished at 8-9.

in inhumane conditions for many months while waiting for CBP One appointments. For example:

- A 67-year old Haitian man died in Tijuana in November 2023 while waiting for a CBP One appointment. He had suffered paralysis due to three strokes but was unable to access medical care, as confirmed by the Haitian Bridge Alliance.
- A 36-year-old Ghanaian intending to seek U.S. asylum died in December 2023 outside the San Luis Potosí immigration jail shortly after having been released by Mexican immigration officers late at night. Mexican authorities reported that the Ghanaian man entered their facility at 9:00 p.m. and at around 11 p.m., paramedics arrived and he was already deceased. According to the state Attorney General's office, he died as a result of a heart condition, while other reporting indicates suspected hypothermia.
- A humanitarian aid worker confirmed that a Haitian woman who had been waiting in Reynosa to seek U.S. asylum died of health complications in December 2023 due to barriers in accessing urgent medical care.
- A humanitarian aid worker confirmed that a Haitian man who had been waiting with his wife and children in Reynosa for a CBP One appointment died of suspected diabetes-related complications in July 2023.
- A humanitarian aid worker confirmed that a Haitian woman waiting to seek asylum in the U.S. died in front of her two-year-old outside a migrant shelter in Reynosa in September 2023.
- The Haitian Bridge Alliance reported that in late August 2023, a Haitian mother who had been waiting with her husband and three children in Matamoros for a CBP One appointment died of a stroke after being hospitalized. The family had a CBP One appointment, but as the mother was critically ill it came too late.
- The Haitian Bridge Alliance confirmed that a Haitian man who had been waiting for a CBP One appointment in Tijuana died after suffering two strokes in June 2023. The Haitian Bridge Alliance organized a funeral for him.
- A humanitarian aid worker reported that in August 2023 a pregnant Haitian woman was forced by CBP to wait for two days at the Reynosa port of entry while experiencing pregnancy complications. She later lost her baby.
- A pregnant Haitian woman in her third trimester who was unhoused and living outside the entrance to a migrant shelter in Reynosa while waiting to seek U.S. asylum fell ill in July 2023. Seeking emergency medical care, a taxi took her to a private hospital; she was denied treatment. By the time a humanitarian aid worker brought her to a public hospital, she suffered a stillbirth.

B. LGBTQI+ asylum seekers

The Interim Final Rule exacerbates and adds new barriers that further endanger LGBTQI+ and other people seeking asylum. The Interim Final Rule endangers LGBTQI+ people seeking

asylum by requiring them to wait months in Mexico to obtain a CBP One appointment where they face acute risks of anti-LGBTQI+ persecution and suffer kidnappings, sexual assault, and other harms due to their sexual orientation, gender identity, race, language, and nationality. It punishes and will contribute to the potential refoulement to persecution of LGBTQI+ people seeking asylum. In expedited removal, those found ineligible for asylum because of the Interim Final Rule's limitation on asylum eligibility will face an improperly high fear screening standard. As a result, LGBTQI+ asylum seekers from Venezuela and Colombia have been ordered deported while others risk refoulement to persecution. This is even if they are referred for a fear screening, as the Interim Final Rule's manifestation of fear standard disproportionately impacts LGBTQI+ refugees who may be hesitant to raise in Border Patrol encounters fears of harm that relate to their sexual orientation, gender identity or other persecution.¹¹⁶

Human Rights First documented cases of LGBTQI+ asylum seekers targeted for harm while stranded in Mexico under the CLP rule, some unable to access the CBP One app due to language barriers, and facing lack of access to safe housing, employment, medical care, and other basic services due to discrimination because of their gender identity, sexual orientation, as well as race, nationality, migratory status, and language barriers.¹¹⁷

- A Cuban HIV+ transgender woman and her husband waited nearly seven months for a CBP One appointment that never arrived. They were discriminated against by a migrant shelter on account of the woman's gender identity and sexual orientation. After their first night in the shelter, they were kicked out in the rain after dark and told the shelter did not have the right conditions to house them. The transgender woman is HIV+ and spent six months in Mexico unable to obtain medication, having been denied treatment by a clinic in Mexico City.
- A Venezuelan gay couple escaped a kidnapping, witnessed a violent assault, and lived in fear while waiting five months for a CBP One appointment. In September 2023, a Venezuelan gay man and his partner had been waiting in Matamoros for nearly five months trying to secure a CBP One appointment, living in fear that they would be kidnapped and harmed on account of their sexual orientation and status as migrants, as recounted to Human Rights First. They spent two months living in a tent in the Matamoros river encampment where they witnessed a violent assault on a family by the cartel and other situations of danger, motivating them to seek shelter elsewhere. They also escaped an attempted kidnapping in the city.
- A transgender migrant woman waiting in Ciudad Juárez to seek asylum was extorted by the cartel under threat of sexual exploitation: A young transgender woman waiting to seek asylum in the U.S. was targeted and forced by the cartel to pay them 1,500.00 Mexican pesos a week under threats of sexual exploitation. She was afraid she would be killed if she missed a payment and had not yet been able to safely seek asylum in the U.S. despite these serious protection issues in Mexico, as told to Las Americas Immigrant Advocacy Group in late August 2023.
- A French-speaking Senegalese lesbian woman traveling alone to seek U.S. asylum was unaware of and ultimately unable to use the CBP One app because it is not offered in

¹¹⁶ U.S. Asylum Bans Strand LGBTQI+ Refugees.

¹¹⁷ *Id.*

French. She survived an attempted sexual assault in the Mexican border city of Nogales, but remained trapped as the wait time to enter at the Nogales port of entry for those without appointments was six to seven months at the time.

- A Honduran trans woman who survived a sexual and physical assault in Honduras on account of her gender identity and who fears being killed if returned described the increasing desperation she felt waiting for a CBP One appointment: “I feel desperate. There are people who obtain appointments in 12 or 15 days, and I’ve been waiting for four months. You feel depressed. At the shelter, others are stressed. Another person cries and it’s contagious — I do, too. All you think about is ‘the appointment, the appointment.’ I request it every day and check every day and still nothing. Tomorrow will be four months of waiting.”
- A Turkish transgender male asylum seeker who does not speak a CBP One language reported to Human Rights First that he was unable to use the app to schedule an appointment at a port of entry due to the language barrier. He entered the United States between ports of entry in California and will now risk being barred from asylum despite his potential eligibility for asylum.
- A gay man from Senegal who was stoned and beaten while his boyfriend was murdered and only spoke Wolof and Fulani could not use the CBP One application. Because of the language barrier, he was not aware of the CBP One application or the asylum ban. He is now in Immigration and Customs Enforcement (ICE) detention, at risk of return to his persecutors because of the asylum ban.
- An LGBTQI+ and HIV+ Venezuelan young adult traveling alone to seek U.S. asylum was stranded in Matamoros without resources where he was living in a tent in an open-air encampment. As his phone had been stolen, and he had no financial resources to replace it, he was unable to access the CBP One app to request an appointment to enter at a port of entry. Blocked from accessing the port of entry without an appointment, he expressed despair at being trapped in danger.

C. Indigenous asylum seekers

The Interim Final Rule, like the CLP Rule, punishes people who do not have CBP One appointments, yet the government has made it available only in English, Spanish, and Haitian Creole. This lack of equitable language access discriminates against and denies equal access to asylum to Indigenous and other asylum seekers who speak other languages by subjecting them to the Interim Final Rule’s penalties.

The International Mayan League warned that conditioning asylum access on the CBP One app would further marginalize Indigenous individuals and especially endanger Indigenous girls, women, and LGBTQ+ people who are at heightened risk for sex and human trafficking. In June 2023, over 140 non-Indigenous allies, including many human rights and immigration organizations, wrote to DHS to underscore the disproportionate harms the manner of entry bar in the CLP Rule, mirrored in the Interim Final Rule, inflicts on Indigenous people and the insurmountable barriers Indigenous people face in using and accessing CBP One, and in

accessing ports of entry for those without appointments, as documented by Human Rights First's.¹¹⁸ For example:

- A Mayan woman from Guatemala who is illiterate and speaks Akatek entered the United States between ports of entry without an appointment with her infant son. After the mother survived sexual assault in Guatemala, and family members were murdered, they received death threats from MS-13. While transiting Mexico by bus, they were stopped by armed, uniformed Mexican officials who beat the mother and threatened to kill her and her infant if she did not pay a bribe. She arrived near the U.S.-Mexico border terrified of further abuse by Mexican authorities and of being located by MS-13. She had no knowledge of CBP One, had never owned a smartphone, only speaks Akatek, and is illiterate. The family crossed into Arizona between ports of entry and would now risk potential return to persecution under the CLP Rule.¹¹⁹
- A Maya Ixil woman and her infant were blocked from accessing a port of entry multiple times despite written permission from DHS to present themselves there. A Maya Indigenous woman, the granddaughter of a survivor of the Ixil genocide in Guatemala, who only speaks Ixil, had not heard of the CBP One app and attempted to seek U.S. protection by crossing the Rio Grande to Eagle Pass, Texas. Once on U.S. soil, U.S. authorities blocked them from seeking protection and stranded them on the U.S. side of the riverbank overnight. Without being able to exercise their right to seek asylum, U.S. authorities forced them to cross back to Mexico where they were treated for hypothermia. After surviving this ordeal, the mother learned of the CBP One appointment system and attempted to secure an appointment for nearly two months but struggled due to limited internet access, technological and language barriers as the app is not available in any Indigenous language. The family attempted to seek protection at two ports of entry in Piedras Negras, Coahuila but were repeatedly blocked by Grupo Enlace, Mexican municipal employees, from accessing the port of entry despite permission from DHS to present. One Mexican agent even implied that she would have to pay a bribe, or they would deport her to Guatemala. During a later attempt, the family was again denied entry despite having a letter from DHS confirming their permission to present. The family was finally allowed to present at the port of entry and were processed into the country following significant intercession by U.S. non-profit groups. These aggressive tactics not only violated their right to seek asylum, but worsened the mental, emotional and spiritual state of an already traumatized mother and child.¹²⁰

D. Women and children seeking asylum

Barriers to asylum access imposed by the Interim Final Rule will harm women and children seeking asylum, who will be forced to wait in Mexico for a CBP One appointment or cross without authorization, subjecting themselves to the Interim Final Rule's bar to asylum. Women migrants in Mexico face gender-based violence, kidnappings, rape, human trafficking, extortion, harassment, difficulty reporting and accessing justice, and institutional and community violence according to the Instituto Nacional para las Mujeres en Migración. The United Nations Committee on Enforced Disappearances in its September 2023 report noted the increase in

¹¹⁸ Refugee Protection Travesty at 38.

¹¹⁹ Trapped, Preyed Upon, and Punished at 15.

¹²⁰ *Id.* at 11-12.

disappearances of girls, adolescents, and women in Mexico predominantly in the states of Mexico, Tamaulipas, Jalisco, and Guerrero.¹²¹

Seven of every 10 migrant girls, adolescents, and women have witnessed situations of exploitation, sexual violence, and human trafficking both in transit and while waiting in Mexico and are the target of human trafficking, according to a survey by Plan International Mexico in August 2023. Similarly, sexual crimes against girls and women as well as human trafficking of girls and women are the most recurrent crimes at the northern Mexico border, according to the International Organization for Migration's Mexico anti-trafficking specialist.

Sexual assault has become so commonplace that some women cynically refer to contraceptives as the "vaccine against Mexico" revealing their awareness that at some point during their journey, they are likely to survive sexual assault, as recounted by Las Americas Immigrant Advocacy Group in Ciudad Juárez in September 2023.¹²²

Reports of sexual violence against migrants in Reynosa and Matamoros increased 70% during the last months of 2023 according to Doctors Without Borders, in addition to the already sharply escalating instances of kidnappings in Reynosa following the implementation of the ban. In January 2024, Doctors Without Borders teams in northern Mexico reported more cases of sexual violence than in any month of the previous year.¹²³

For example, a Haitian unaccompanied teenage girl and three Haitian women seeking asylum survived an enforced disappearance by Mexican authorities who turned them over to cartel members who abused them physically and sexually. The teenage girl and three women were transiting to Reynosa by bus when armed men dressed as Mexican police officers stopped the bus in late December 2024. The Mexican police officers robbed them of their phones and placed them together in a car with black bags over their heads. They were turned over to members of the cartel and held captive for ransom. Cartel members attempted to rape the teenage girl and severely beat her with a stick for resisting. The three Haitian women were raped and beaten. They also witnessed other captive Haitian women who were pregnant and were beaten and raped.¹²⁴

IX. The Interim Final Rule's exceptions do not protect refugees.

Aside from presenting at a port of entry through a Secretary approved process, the Interim Final Rule provides exceptions for acute medical emergencies, imminent threats to life and safety, and victims of a severe form of trafficking. The Interim Final Rule does not provide any exception, unlike the CLP Rule, for failure of or inability to use the CBP One application.

These limited exceptions are insufficient to protect refugees, including vulnerable populations such as LGBTQI+ individuals, Black and Indigenous asylum seekers, women, and children, who face disproportionate harm in Mexico while blocked from seeking protection in the United States. People seeking protection face unremitting violence at the hands of Mexican authorities and cartels who often target them because they are migrants or asylum seekers. Human Rights First has documented the horrific abuses inflicted on migrants and asylum seekers when they are blocked, turned away, or left to wait in Mexico, including over 2,500 victims of murders,

¹²¹ Inhumane and Counterproductive at 32-33.

¹²² *Id.*

¹²³ Trapped, Preyed Upon, and Punished at 7.

¹²⁴ *Id.* at 9.

kidnappings, rapes, and other violent attacks in the year since the CLP Rule took effect.¹²⁵ The brazen and systematic targeting of migrants and asylum seekers waiting in Mexico has sharply escalated in recent months.

One year into the CLP Rule asylum ban, people waiting to seek asylum overwhelmingly did not know about or understand the CLP Rule and its consequences, as Human Rights First's interviews with over 500 asylum seekers have confirmed. This is not a challenge that can be addressed by more information about the asylum ban; it is instead a reflection of the realities of refugees' situations. People waiting to seek asylum continue to express wanting to do so at ports of entry, but in the face of restricted access to ports and increasing security threats and survival needs, asylum seekers' decisions are overwhelmingly driven by urgent protection needs spurring many to cross between ports of entry. The Proclamation and Interim Final Rule's suspension of entry at Ports of Entry will further exacerbate this.

The Interim Final Rule's exceptions mirror those in the CLP Rule. Human Rights First has documented how these exceptions have been construed and interpreted narrowly, resulting in individuals wrongfully being denied an exception, found ineligible for asylum and ordered deported. People seeking protection who entered at or between ports of entry without a CBP One appointment and were found ineligible for the CLP Rule's exceptions include:¹²⁶

- A Venezuelan transgender woman living with HIV who testified that she was robbed and photographed on multiple occasions while in transit, including by armed Mexican police, was found not to meet an exception to the CLP Rule. She explained that the police asked her and other immigrants where they were from and extorted them under threat of sending them back, according to a credible fear record obtained by Immigration Equality and reviewed by Human Rights First. She also testified that at the time she crossed into the United States, she feared imminent kidnapping by people in nearby vehicles who she believed were armed. The asylum officer did not inquire into the harm that she feared in Mexico based on the fact that she is transgender or living with HIV.
- An Indigenous Guatemalan man whose five family members were murdered in the San Fernando massacre in Mexico, which was carried out by a major Mexican cartel in collaboration with Mexican police, was found not to meet an exception to the CLP Rule even though his attorney submitted evidence of the murders to the asylum officer. During his Credible Fear Interview, the man explained to the asylum officer that his family was murdered in Mexico and that he entered the United States after Mexican authorities blocked him at the border from requesting asylum at a port of entry and threatened to deport him.
- A Salvadoran woman who testified that she was forced to work for years as a child and brutally beaten when she refused was found not to meet an exception to CLP Rule even though she should have been granted an exception as a "victim of a severe form of trafficking," according to Americans for Immigrant Justice.
- A Venezuelan man fleeing political persecution who testified that he was repeatedly followed by Mexican police officers and cartels in Juárez who forced him to leave public spaces as he was trying to obtain Wi-Fi to secure a CBP One appointment — and told that

¹²⁵ *Id.* at 8.

¹²⁶ Inhumane and Counterproductive at 65-66.

he had to leave because he is an immigrant — was found not to meet an exception to the CLP Rule despite testifying about these incidents during a Credible Fear Interview, according to the Las Americas Immigrant Advocacy Center.

- A Venezuelan woman who was searched, robbed, and groped by an armed Mexican federal officer after fleeing persecution in Venezuela for her political opposition work, was found not to meet an exception to the CLP Rule, according to a legal service organization.
- An Ecuadorian man who was kidnapped by cartels in Mexico and forced to pay ransom for his release was found not to meet an exception to the CLP Rule, according to a legal service organization.
- An asylum seeker from Ghana was found not to meet an exception to the CLP Rule even though he testified that he entered without a CBP One appointment because he feared that the Mexican government would deport him to danger: “I did not want to be sent back to Ghana. Because we entered Mexico without document, Mexican immigrations were detaining us, I was afraid they would send us back to Ghana.”
- A Colombian asylum seeker who entered the United States while experiencing urgent medical needs and directly fleeing torture he had suffered in Mexico was found not to meet an exception to the CLP Rule, despite testifying about the harm he had suffered in Mexico. While traveling through Mexico, he was kidnapped by a criminal organization that tortured him and hit him in the chest where he had existing stab wounds, leading him to run for his life to the U.S. border, according to his attorney at the New Mexico Immigrant Law Center. He has since been deported.

While the Interim Final Rule should be rescinded in full for all the reasons we outline in this comment, to the extent the rule continues in force, it must ensure exceptions for “acute medical emergencies” and “imminent threats to life and safety” are broad enough to include the medical risks and harms reported by asylum seekers while waiting in Mexico.

X. The Interim Final Rule will result in family separation, indefinite limbo, and no path to citizenship for asylum seekers who are able to receive withholding of removal or protection under the Convention Against Torture.

Refugees barred from asylum under the ban and found to meet the higher burden for withholding of removal or CAT protection would be left in permanent limbo, separated from their families, and unable to obtain U.S. citizenship. This conflicts with Congressional intent to enable refugees to reunite with and extend asylum status to their families as well as to provide refugees with a pathway to permanent residence and citizenship. In response to the Departments’ request for “comment on whether to adopt a non-discretionary family unity provision for the asylum merits interview process in a final rule,” Human Rights First strongly recommends including a non non-discretionary family unit provision for the asylum merits interview process, among other recommendations for the asylum merits interview process.¹²⁷

¹²⁷ Interim Final Rule at 48,733; Letter from Human Rights First, et al., to the Att’y Gen. and Sec. of Homeland Sec., *Recommendations for Final Asylum Processing Rule* (Mar. 15, 2024), <https://humanrightsfirst.org/wp-content/uploads/2024/03/Joint-Letter-to-DOJ-and-DHS-Asylum-Processing-Rule-3.2024.pdf>.

Family unity is a key principle in international law and U.S. immigration law. Refugees granted asylum in the United States may automatically extend asylum protections to their spouses and children if they were included in the asylum application. If the family members are abroad or if the original applicant was in immigration court proceedings but the spouse and child were not, the person granted asylum may subsequently petition to extend asylum status to their family. Through this process, spouses and children may receive authorization to travel to the United States, receive asylum status, and become entitled to the same benefits, including a pathway to citizenship, as the original applicant.

By eviscerating asylum protections, the Interim Final Rule unlawfully deprives refugees of the ability to reunite with their families by leaving them with forms of protection that, unlike asylum, do not enable them to bring their families to safety. Many refugees who flee are unable to travel with their families due to lack of resources, immediate danger, or other circumstances. In many situations, spouses and children remain in their home country until their relative's petition for them is approved. Human Rights First has represented many refugees whose family members faced terrible danger in the country of persecution — often for the same reason that the client had to flee — and had to go into hiding. The Departments' plan to eliminate the reunification process for many refugees will leave families permanently separated, with spouses and children indefinitely in hiding. Blocked from reuniting with their refugee relatives through this process, which allows people to travel by plane to the United States, family members may instead attempt dangerous journeys to the southern border to reach safety, forced to risk their lives because of the Interim Final Rule.

The Interim Final Rule adopts a similar exception as the CLP Rule to promote family unity for asylum-seeking families who are in the United States together, providing that if a principal applicant would be granted asylum but for the asylum ban and where an accompanying spouse or child does not independently qualify for asylum or other protection from removal, the applicant may be granted asylum.¹²⁸ It would perversely leave some families with only withholding or CAT protection if the spouse or child can independently qualify for protection.

Regardless of the family unity exception, many refugee families will be permanently separated. For example, under the CLP Rule, a Georgian asylum seeker fleeing LGBTQI+ persecution was subject to the CLP Rule's presumption in a final merits hearing, denied asylum under the CLP Rule's presumption and granted withholding of removal. The Immigration Judge held that he would have been granted asylum but for the CLP Rule, according to the asylum seeker's pro bono attorneys at Lewis Roca.¹²⁹ The Trump administration's transit ban similarly left refugee families separated by denying asylum and leaving refugees with withholding of removal or CAT protection. Human Rights First documented these family separations in its research and reporting on that ban.¹³⁰

XI. The Interim Final Rule is improperly motivated by the Departments' concern that too many people are seeking asylum, rather than whether individuals are eligible.

¹²⁸ Interim Final Rule at 48,733.

¹²⁹ Trapped, Preyed Upon, and Punished at 18.

¹³⁰ Asylum Denied.

The Departments openly brag about consequences of the punitive measures the Interim Final Rule adopts, building on the dehumanizing characterizations of asylum seekers in the Circumvention of Lawful Pathways rule.

In touting the success of the CLP Rule to a federal court, DHS bragged, disturbingly, that the presumption “worked as intended” by “significantly” reducing the percentage of positive credible fear determinations for those subject to the presumption.¹³¹ Those subject to the presumption of ineligibility for asylum — for reasons completely unrelated to the merits of their asylum claims — are three times more likely to receive negative credible fear determinations than individuals not subject to the presumption.¹³²

Human Rights First has documented, in a series of reports, examples of asylum seekers subjected to the CLP Rule in expedited removal who were wrongfully ordered deported or deported to persecution or torture, resulting in refoulement — improper returns that will only escalate due to the Interim Final Rule’s imposition of an even more unduly high screening standard and its elimination of the questions necessary to identify asylum seekers who must be referred for Credible Fear Interviews.¹³³ The Departments’ “success” includes the following cases:

- A Venezuelan air force lieutenant, the son of a known opponent to the Maduro regime, was found not to meet the heightened asylum ban fear screening standard, deported without an asylum hearing to Venezuela in December 2023 where he was immediately sent to a military prison.
- A Chinese pro-democracy activist jailed as a political prisoner for years and whose persecution was documented by Western media [readily available to the Asylum Office] was ordered deported under the higher screening standard imposed by the asylum ban. He was found to not meet an exception and subjected to the ban’s higher screening standard. His deportation order was only reversed after a legal service organization learned of his case and conducted extensive advocacy.¹³⁴

There is no doubt that many refugees have already been deported to persecution, torture, and other harms due to the CLP Rule — and now the Interim Final Rule. It is difficult to even learn of such cases as the expedited removal process is conducted increasingly in CBP custody where legal counsel are not permitted to visit, outside monitoring is minimal to non-existent, and telephonic legal access is highly limited.

The Interim Final Rule’s more stringent screening standard of “reasonable probability” will cause credible fear pass rates to plummet even further and increase refoulement. In setting a “significant possibility” screening standard, Congress intended to ensure that no one at risk of persecution would be wrongfully returned to harm. The success of a functioning asylum system must be measured by the absence of the wrongful return to persecution or torture of meritorious

¹³¹ Declaration of Blas Nuñez-Neto at 4-5, *M.A. v. Mayorkas*, No. 23-cv-01843 (D.D.C. Oct. 27, 2023), https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.176.2_1.pdf.

¹³² Trapped, Preyed Upon, and Punished at 4.

¹³³ *Id.* at 23-26; Inhumane and Counterproductive at 46-49; Refugee Protection Travesty at 55-56.

¹³⁴ Trapped, Preyed Upon, and Punished at 24.

cases — such as those with a significant possibility of establishing asylum eligibility — which by these metrics, these rules fail. The Interim Final Rule is focused however on denying access to people who have a significant possibility of establishing asylum but do not meet a new unduly high screening standard.

In making the case for the Interim Final Rule, the Departments rely on mischaracterizations of asylum grant rates resulting from positive credible fear determinations. The Departments claim that the credible fear process, “creates a situation in which large numbers of migrants—only a small proportion of whom are likely to be granted asylum — are not able to be expeditiously removed but are instead referred to backlogged immigration courts.”¹³⁵ The Departments arrive at this “small proportion” by dividing the number of cases in which asylum was granted by the total number of cases completed, regardless of whether there was a decision on the merits. Total completed cases include cases that were not adjudicated, withdrawn, administratively closed (in some cases because the person was eligible for other relief), or where no asylum application was filed. This method artificially deflates the asylum grant rate and creates the false impression that many asylum seekers were ineligible for asylum even where there was no decision on their asylum claim. The reality is that “the majority of people who establish a credible fear of persecution are granted asylum” when their asylum claim is adjudicated.”¹³⁶

XII. Conclusion

Thank you for the opportunity to submit a comment on the Interim Final Rule. Please find attached to this comment the following full versions of selected cited materials for the Departments’ consideration.

1. Two Weeks of the Biden Border Proclamation and Asylum Shutdown (June 2024), <https://humanrightsfirst.org/wp-content/uploads/2024/06/Two-Weeks-of-the-Biden-Border-Proclamation-Asylum-Shutdown.pdf>.
2. U.S. Asylum Bans Strand LGBTQI+ Refugees in Danger and Risk Return to Persecution (June 2024), [https://humanrightsfirst.org/wp-content/uploads/2024/06/Factsheet Asylum-Bans-Strand-LGBTQI-Refugees final-formatted.pdf](https://humanrightsfirst.org/wp-content/uploads/2024/06/Factsheet_Asylum-Bans-Strand-LGBTQI-Refugees_final-formatted.pdf).
3. Trapped, Preyed Upon, and Punished: One Year of the Biden Administration Asylum Ban (May 7, 2024), www.humanrightsfirst.org/library/trapped-preyed-upon-and-punished.
4. U.S. Border and Asylum Policies Harm Black Asylum Seekers (Feb. 2024), <https://humanrightsfirst.org/wp-content/uploads/2024/02/Asylum-Policies-Harm-Black-Asylum-Seekers-FACTSHEET-formatted.pdf>.
5. Inhumane and Counterproductive: Asylum Ban Inflicts Mounting Harm (Oct. 12, 2023), www.humanrightsfirst.org/library/inhumane-and-counterproductive-asylum-ban-inflicts-mounting-harm
6. Refugee Protection Travesty: Biden Asylum Ban Endangers and Punishes At-Risk Asylum

¹³⁵ Interim Final Rule at 48,732.

¹³⁶ Correcting the Record: The Reality of U.S. Asylum Process and Outcomes (Nov. 2023), https://humanrightsfirst.org/wp-content/uploads/2023/11/US-Asylum-process-and-outcomes-Fact-Sheet_Nov-2023.pdf; see also Rhetoric v. Reality: Biden Administration Should Correct Misleading Narrative on Asylum Eligibility (Aug. 2023), <https://humanrightsfirst.org/wp-content/uploads/2023/08/Asylum-grant-rates-fact-sheet-August-2023.pdf>.

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7. A Line that Barely Budes: U.S. Limiting Access to Asylum Nogales, Arizona Port of Entry (June 2023),
<https://humanrightsfirst.org/wp-content/uploads/2023/06/A-Line-That-Barely-Budes-Nogales-Arizona-1.pdf>;
 8. Lives at Risk: Barriers and Harms As Biden Asylum Ban Takes (May 2023),
<https://humanrightsfirst.org/wp-content/uploads/2023/05/Barriers-and-Harms-As-Biden-Asylum-Ban-Takes-Effect31.pdf>.
 9. Comment of Human Rights First, USCIS-2022-0016-12320, Dkt. No. USCIS 2022-0016 (Mar. 27, 2023), <https://www.regulations.gov/comment/USCIS-2022-0016-12320>.
 10. Human Rights Stain, Public Health Farce: Evasion of Asylum Law and Title 42 Abuse Must End— and Never Be Revived (Dec. 2022),
<https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf>.
 11. Fatally Flawed: “Remain in Mexico” Policy Should Never Be Revived (Sept. 13, 2022),
<https://humanrightsfirst.org/library/fatally-flawed-remain-in-mexico-policy-should-never-be-revived/>.
 12. Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies (Aug. 3, 2022),
<https://humanrightsfirst.org/wp-content/uploads/2023/01/PretenseofProtection-21.pdf>
 13. Asylum Denied, Families Divided: Trump Administration’s Illegal Third-Country Transit Ban (July 2020),
<https://humanrightsfirst.org/wp-content/uploads/2022/10/AsylumDeniedFamiliesDivided.pdf>.