

**n a t i o n a l**  
**IMMIGRATION**  
**p r o j e c t**  
of the National Lawyers Guild

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**Re: National Immigration Project's (NIPNLG) Comment on the Proposed Rule by the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) on Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023**

Dear Acting Director Daniel Delgado and Assistant Director Lauren Alder Reid:

The National Immigration Project (NIPNLG) submits this comment in response to the request for comments on the Department of Justice (DOJ) and the Department of Homeland Security (DHS) (the agencies) Notice of Proposed Rulemaking (NPRM) on "Circumvention of Lawful Pathways," CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023," 88 Fed. Reg. 11704 (February 27, 2023).

NIPNLG is a national nonprofit membership organization that provides support, referrals, and legal and technical assistance to attorneys, community organizations, families, and advocates seeking to advance the rights of noncitizens. NIPNLG focuses especially on the immigration consequences of criminal convictions, and its mission is to fight for justice and fairness for noncitizens who have contact with the criminal legal system. Additionally, we fight for fairness and transparency in immigration adjudication systems and believe that all noncitizens should be afforded the right to fair adjudications of their claims to remain in the United States. We have engaged in litigation to ensure that asylum seekers are afforded their right to pursue protection in the United States, especially in the face of unlawful and discriminatory border policies.

NIPNLG strongly urges the agencies to withdraw this proposed rule in its entirety. The rule would be unlawful and conflict with the statutory right to seek asylum as set forth at

Immigration and Nationality Act (INA) § 208(a)(1). By finalizing this rule the Biden administration would renege on its promise to restore faith in the immigration system. Furthermore, as the administration plans to enforce this rule only at the border, and not as to those with greater financial means arriving at airports, the rule will have a disproportionate impact on Black, Indigenous and People of Color (BIPOC) noncitizens, again betraying promises to advance racial equity throughout the federal government.<sup>1</sup>

Throughout the preamble to the rule, the agencies consistently talk about the goal of decreasing “non-meritorious” cases, which it equates with cases where an asylum seeker does not ultimately prevail. We strongly disagree with this fundamental premise of the rule.<sup>2</sup> There are many reasons that an asylum seeker may not be successful with their claim including: being unable to find, or afford counsel;<sup>3</sup> appearing in a “no asylum” zone where immigration judges deny the vast majority of cases without regard to the merit of the case;<sup>4</sup> years-long backlogs may make it more difficult to prove cases;<sup>5</sup> and ever-changing legal standards governing asylum eligibility.<sup>6</sup> The implication throughout the NPRM, that those who pass a credible fear interview but do not ultimately prevail on their claims necessarily had non-meritorious claims that take resources away from claims with merit, is fundamentally flawed and improperly colors the underlying premises of the rulemaking.<sup>7</sup>

As asylum seekers’ procedural rights are curtailed, we have seen administrations in the past create self-fulfilling prophecies— asylum grant rates plummet when they do not have counsel and are placed through expedited proceedings, and administrations then use those low grant rates to justify their reduction in procedural rights claiming that the asylum seekers did not

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<sup>1</sup> President Joe Biden, Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, (Jan. 20, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

<sup>2</sup> The statistics cited in the NPRM are misleading. *See* EOIR, Executive Office for Immigration Review Adjudication Statistics: Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim (Oct. 13, 2022), <https://www.justice.gov/eoir/page/file/1062976/download>. Of cases adjudicated on the merits in the cited statistics, the asylum grant rate is actually higher than the denial rate. Moreover, the “No Asylum Filed” rate which peaked in 2013 at over 56% was below 28% in 2022. Thus, the implication in the NPRM that noncitizens who pass credible fear are not truly coming to the United States to seek asylum, if not borne out by EOIR’s own statistics.

<sup>3</sup> Jacob Czarnecki and Haley Hamblin, “Legal Representation for Asylum Seekers: An Overlooked Area of Reform for a System in Crisis,” Niskanen Center, (Aug. 24, 2021) <https://www.niskanencenter.org/legal-representation-for-asylum-seekers-an-overlooked-area-of-reform-for-a-system-in-crisis/>. (Asylum seekers “represented by counsel are at least three times more likely to have their claims approved.”)

<sup>4</sup> *See*, Innovation Law Lab and Southern Poverty Law Center, *The Attorney General's Judges How The U.S. Immigration Courts Became A Deportation Tool*, 2019, [https://www.splcenter.org/sites/default/files/com\\_policyreport\\_the\\_attorney\\_generals\\_judges\\_final.pdf](https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf).

<sup>5</sup> *See* Guilia McDonnell Nieto del Rio, “Court Cases in New York Are Scheduled Out to 2023, Leaving Asylum Seekers Hopeless,” DOCUMENTED (Aug. 22, 2021) (Heather Axford, legal director at Central American Legal Assistance explains, “Witnesses get hard to find, and facts get old . . . when you’re looking at a forward-looking benefit like asylum where really the question is what happens if we go back now.”)

<sup>6</sup> *See*, for example, *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021) (restoring a 2017 decision recognizing family group membership as a potential protected characteristic for asylum purposes after that 2017 decision had been vacated in 2019.)

<sup>7</sup> The NPRM also implies that noncitizens may be coming to the United States to seek employment authorization, 88 Fed. Reg. 1105, but gives no citation as to how it reached this conclusion.

have meritorious cases from the outset.<sup>8</sup> We call on the administration to live up to the promise it laid out in its early executive orders, and restore faith in our immigration system<sup>9</sup> and advance racial equity<sup>10</sup> rather than repackaging unlawful Trump-era regulations justified by similar disingenuous rationalizations.

### **What the Agencies Laud as “Orderly Processing” Is Actually Prohibiting Vulnerable Noncitizens from Accessing the U.S. Asylum System**

The NPRM claims success in reducing the number of border encounters with Cuban, Haitian, Nicaraguan, and Venezuelan noncitizens, 88 Fed. Reg. 1106, but the primary cause of this “success” is expelling noncitizens from those countries at the border, leaving them with no opportunity to seek protections guaranteed by law in the United States. It is hardly surprising that swift removal “can reduce migratory flows,” 88 Fed. Reg. 11713, but the administration cannot do so by violating asylum seekers’ statutory rights. It is difficult to see how this denial of access to the asylum system and denial of fundamental procedural rights, can be claimed as a “success,” notwithstanding the fact that some percentage of this population that had not yet fled their countries might be able to obtain parole in the future under this rule.

Throughout the preamble, the government focuses on quantitative analysis at the expense of discussing the qualitative issues that are raised by the rule: human beings seeking protection in the United States. For example, the preamble notes that Cubans and Nicaraguans have recently accounted for 32 percent of border encounters, 88 Fed. Reg. 11712, but it does not discuss the human rights abuses that have escalated in those countries, causing their citizens to seek protection elsewhere. In July 2021, the White House issued a plan to address the root causes of migration from the Northern Triangle of Central America,<sup>11</sup> however, it has not issued a similar plan to address the increased migration from Cuba, Haiti, Nicaragua, or Venezuela.

The preamble says that the agencies considered but rejected maintaining the “status quo” because “the numbers of migrants have increased, and demographics of encounters have shifted over the past nine months.” 88 Fed. Reg. 11730-31. Put another way, this rulemaking is the agencies’ response to the increasing numbers of failed states creating humanitarian crises in the Western Hemisphere. For example, UNHCR has recently accused Nicaraguan President, Daniel

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<sup>8</sup> See Jeff Sessions, *Attorney General Sessions Delivers Remarks to the National Association of School Resource Officers* (June 25, 2018) <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-national-association-school-resource-officers>. (“[O]ur courts find that 80 percent of asylum claims are without merit.”)

<sup>9</sup> President Joe Biden, Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans (Feb. 2, 2022) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-restoring-faith-in-our-legal-immigration-systems-and-strengthening-integration-and-inclusion-efforts-for-new-americans/>. [Hereinafter, “Restoring Faith.”]

<sup>10</sup> President Joe Biden, Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

<sup>11</sup> The White House, “U.S. Strategy For Addressing The Root Causes Of Migration In Central America,” (Jul. 2021) <https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf>.

Ortega, of “crimes against humanity.”<sup>12</sup> The shifting demographics have led thousands to flee ruthless dictatorships; this unprecedented rise of violence within the Western Hemisphere should be met with an unprecedented response in welcoming those fleeing harm, not by treating those seeking safety as numbers on a spreadsheet that must be reduced. That is, while the “status quo” may not be a viable option for the government, the NPRM does not seriously consider adding resources to process increased numbers of asylum seekers as a result of the humanitarian crises in Nicaragua, Cuba, Haiti, and Venezuela.<sup>13</sup>

The preamble also considers, and rejects, restarting the so-called Migrant Protection Protocols. 88 Fed. Reg. 11731. Secretary Mayorkas has acknowledged the due process and humanitarian deficiencies in that program, and recognized the need for asylum seekers to be on U.S. soil to have “the ability to appeal, be represented by counsel, and present additional evidence as necessary to ensure due process, respect for human dignity, and equity.”<sup>14</sup> NIPNLG strongly agrees that MPP must not be restarted.

Likewise, the preamble considers and rejects resurrecting so-called Safe Third Country agreements. 88 Fed. Reg. 11731-32. As discussed elsewhere in this comment, many of the countries through which asylum seekers travel are extremely dangerous. It is irrational both to consider sending asylum seekers to unsafe countries with which they have no connection and to force them to seek asylum (as this rule does) in those countries in order to access the U.S. asylum system. NIPNLG strongly agrees that these agreements should not be resurrected.

NIPNLG supports the alternative solution that the preamble rejects—placing asylum seekers into INA § 240 proceedings without going through expedited removal. As the preamble correctly states, 88 Fed. Reg. 11732, this course of action would free up asylum officers to address the affirmative backlog and to conduct asylum merits interviews. The expedited removal process is inherently flawed;<sup>15</sup> NIPNLG would support changes to the rules which would eliminate expedited removal and afford noncitizens who arrive at the border greater due process rights.

While the agencies highlight their claimed inability to fairly implement the 1996 immigration laws, given changes in migration flows at the border over the past three decades, 88 Fed. Reg. 11716, changes in numbers at the border, like increases in population generally,<sup>16</sup> do not justify abandoning the law as devised by Congress. When Congress created the expedited removal process in 1996, it greatly curtailed existing rights that noncitizens presenting at the

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<sup>12</sup> UNHCR, “Nicaragua: Crimes Against Humanity Being Committed Against Civilians for Political Reasons, Investigation Says,” (Mar. 2, 2023) <https://www.ohchr.org/en/press-releases/2023/03/nicaragua-crimes-against-humanity-being-committed-against-civilians>.

<sup>13</sup> See American Immigration Lawyers Association, Policy Brief: What Does a Secure Border Look Like? (Dec. 27, 2022) <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-what-does-a-secure-border-look-like> (emphasizing an “all of government” approach to quickly and fairly processing noncitizens at the border.)

<sup>14</sup> DHS, Explanation of the Decision to Terminate the Migrant Protection Protocols, at 36 (Oct. 29, 2021) [https://www.dhs.gov/sites/default/files/2022-01/21\\_1029\\_mpp-termination-justification-memo-508.pdf](https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf).

<sup>15</sup> 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>.

<sup>16</sup> U.S. population has increased 24 percent since the enactment of 1996 immigration laws.

border had at the time. Rather than receiving a full exclusion hearing before an immigration judge, anyone presenting at a port of entry without a visa, or apprehended near the border, could be given a removal order by DHS that could only be vacated by passing a credible fear interview.<sup>17</sup> The entire expedited removal system has been criticized as having racist origins.<sup>18</sup> President Biden called on agencies to begin a review of procedures for individuals placed in expedited removal through the Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border.<sup>19</sup> Advocates for noncitizens, including NIPNLG, hoped that the administration would reimagine expedited removal, and wrote to the administration urging it to end the use of expedited removal for asylum seekers.<sup>20</sup> Instead, the agencies now seek to further curtail the rights of those arriving at the border, making it impossible for most asylum seekers to access the statutory asylum system. The expedited removal system already prevents bona fide asylum seekers from accessing the U.S. asylum system; the agencies' plans to further vitiate rights at the border flies in the face of this administration's promises to restore faith in the immigration system, and unlawfully restricts statutory rights.

The NPRM devotes considerable space to discussing its view on the authority given to the agencies to issue this proposed rule. 88 Fed. Reg. 11732-35. However, the agencies cannot issue regulations that contradict the INA. Section 208 (a)(1) of the INA unequivocally grants the right to any noncitizen physically present in the United States to apply for asylum. This rule will prevent the vast majority of asylum seekers apprehended near the border from exercising this right. Claiming that "discretion" allows the agencies to foreclose asylum to most asylum seekers at the border, is a misuse of the agencies' discretionary authority, which has been used on a case-by-case basis for asylum seekers. Moreover, the agencies' argument that Congress only required the ability to "apply" for asylum and not to actually "win" asylum contradicts Congress's actual intent and is disingenuous at best. 88 Fed. Reg. 11735.

While NIPNLG shares the administration's goal of decreasing the role of smugglers who prey on noncitizens, 88 Fed. Reg. 11713, we fundamentally disagree that this rule will limit that role. In fact, once it becomes clear to those fleeing harm that they cannot access the asylum system through ports of entry, it is likely that the role of smugglers will **increase** for noncitizens

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<sup>17</sup> 8 CFR § 208.30(f).

<sup>18</sup> See Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, UNIVERSITY OF CHICAGO LEGAL FORUM: Vol. 2007: Iss. 1, Article 18, 565 at 586 -87, <http://chicagounbound.uchicago.edu/uclf/vol2007/iss1/18>. ("By allowing a high level of discretion that is influenced by the racist sentiments of the time, this arrangement aggravates the problem that facially neutral immigration laws can, in practice, discriminate on the basis of race. This could be particularly problematic in the enforcement of expedited removal because statistics covering the first few years of its enforcement clearly indicate that, from its inception, the procedure has been used disproportionately to remove certain nationalities.")

<sup>19</sup> President Joe Biden, Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, (Feb. 02, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>.

<sup>20</sup> Various NGOs, Re: Use of Expedited Removal Process for Asylum Seekers at the Border (Feb. 16, 2021) [https://www.humanrightsfirst.org/sites/default/files/LetterDHSExpeditedRemoval\\_2.16.21.pdf](https://www.humanrightsfirst.org/sites/default/files/LetterDHSExpeditedRemoval_2.16.21.pdf).



who have traveled to Mexico and understand that they will be ineligible for asylum if they present at a port of entry without the difficult-to-obtain CBP One appointments.<sup>21</sup>

### **Parole Is Not a Reasonable Alternative to Border Processing Because Many Asylum Seekers Cannot Safely Remain in Their Countries and Do Not Meet the Parole Criteria**

While NIPNLG commends the agencies for expanding parole options for noncitizens,<sup>22</sup> those options cannot be a substitute for permitting noncitizens to exercise their legal rights to seek protection on U.S. soil.

Among the processes that the preamble states have made a positive difference in border encounters is the parole process it established for Venezuelans. For example, the preamble notes that the “new process for Venezuelans . . . created a strong incentive for Venezuelans *to wait in safe places* to access an orderly process to come to the United States.” 88 Fed. Reg. 11718 [emphasis added]. But for most asylum seekers, their home country is not a “safe place,” and requiring them to remain in danger hoping that their parole applications will be approved is unreasonable and unsafe.

Additionally, as laid out in the preamble, noncitizens abroad can only access the parole pathway if they have a U.S. supporter who can file an application and promise financial support on their behalf. 88 Fed. Reg. 11718. But as was witnessed during the controversial bussing of asylum seekers to interior cities, many Venezuelans (and other asylum seekers) have no U.S. supporters.<sup>23</sup> Thus while the parole program may be politically expedient—preventing mayors in interior cities from complaining of recently arrived noncitizens—it fails to offer protection to those who are most at risk of imminent harm, that is those whom the asylum statute is designed to protect. While NIPNLG supports expanding pathways to entry into the United States, the parole program cannot substitute for access to the asylum system at the border, especially when those at the border are most likely to be people without financial means and BIPOC people.

### **CBP One Provides Insurmountable Barriers to Many Asylum Seekers**

A key aspect of the proposed rule is that asylum seekers who are in Mexico must download a smart phone application (App) to make an appointment with Customs and Border Protection (CBP) prior to presenting at a port of entry. 88 Fed. Reg. 11719-20. This requirement creates unreasonable barriers to protection. Already, there have been reports about the failures of the CBP One system. These failures include:

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<sup>21</sup> See, Ivón Padilla-Rodríguez, “U.S. Policies Like Title 42 Make Migrants More Vulnerable To Smugglers,” WASHINGTON POST, Jan. 3, 2023, <https://www.washingtonpost.com/made-by-history/2023/01/03/us-policies-like-title-42-make-migrants-more-vulnerable-smugglers/>. (“The lesson here is that the multibillion-dollar smuggling industry is enriched, not obstructed, by punitive border enforcement.”)

<sup>22</sup> The preamble also sets forth other steps the administration has taken to ease backlogs and allow noncitizens from Cuba and Haiti to enter the United States. 88 Fed. Reg. 11718-19. While NIPNLG supports efforts to eliminate backlogs in other entry categories, we do not see these proposed improvements as a substitute for complying with the statute that allows noncitizens on U.S. soil to seek asylum.

<sup>23</sup> See PBS NEWSHOUR, “NYC Opens Emergency Shelter For Surge Of Migrants Bused From Border States,” Oct. 19, 2022, <https://www.pbs.org/newshour/nation/nyc-opens-emergency-shelter-for-surge-of-migrants-bused-from-border-states>.

- Asylum seekers may not have smart phones;
- Asylum seekers may not be literate;
- Asylum seekers may not speak one of the five languages that are available on the App<sup>24</sup>
- Asylum seekers may not have adequate access to Wi-Fi or data networks to use the App
- There are not enough appointments available for those seeking them, forcing asylum seekers to remain in dangerous conditions as they did under the unlawful CBP “metering” policy.<sup>25</sup>

As with the parole section of the rule, the need to have a functioning smart phone and access to reliable data or Wi-Fi mean that asylum seekers who are wealthier will have a greater ability to access the asylum system; there should never be a wealth test for protection from persecution or torture. Under the proposed rule, wealthier noncitizens will be more likely to have working smart phones, will be more likely to be tech-savvy, and will be more likely to have access to data plans or rented space with Wi-Fi.

While the proposed rule does include limited exceptions to the requirement to successfully use CBP One, the exceptions will likely prove impractical to access at the border. Proposed 8 CFR § 208.33(a)1(ii) provides the following exceptions to making a CBP One appointment: “if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to [a] language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.” However, neither the proposed rule, nor the explanatory preamble material, provides any guidance on how this provision would be implemented.

Perhaps the most significant flaw in requiring a noncitizen to prove their inability to use CBP One is that in practice it would likely be impossible for the asylum seeker to even access a CBP officer to attempt to prove “by a preponderance of the evidence” that they were shut out of the system by one of these barriers. Since the purpose of CBP One is to limit interaction of CBP officials to only those asylum seekers who have made appointments, how would an asylum seeker without a pre-scheduled appointment even be allowed access to a port of entry?

Even if there is some mechanism for asylum seekers to try to put forth their claimed inability to access CBP One, which is not discussed in the proposed rule, it would be a nearly impossible hurdle for an asylum seeker to have to prove a negative. How does an individual prove that they are illiterate? Does a “significant technical failure” include not being able to afford a smart phone, having that phone stolen or broken, or being unable to access stable Wi-Fi? How would a noncitizen prove any of these facts by a preponderance of the evidence, and to whom would they make this showing?

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<sup>24</sup> CBP One Fact Sheets are available in English, Spanish, Haitian Creole, Portuguese, and Russian. It is not clear whether the App itself functions in these five languages. <https://www.cbp.gov/about/mobile-apps-directory/cbpone#:~:text=Fact%20sheets%20for%20CBP%20One,are%20available%20in%20English%20and> .

<sup>25</sup> *Al Otro Lado, Inc. v. Mayorkas*, No. 17-CV-02366-BAS-KSC, 2021 WL 3931890, at \*18 (S.D. Cal. Sept. 2, 2021), judgment entered, No. 17-CV-02366-BAS-KSC, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022).

Additionally, noncitizens are required to upload a photo and the technology has been rejecting photos of asylum seekers with “darker complexions,”<sup>26</sup> creating barriers based on race to accessing the U.S. border. And there are many languages used by asylum seekers that are not available on the App, including indigenous languages. Similarly, already in the early days of the CBP One rollout, there have been significant reports of the App crashing and of noncitizens waking up at dawn to try to get very limited appointments.<sup>27</sup> Would the inability to get an appointment at all after repeated efforts constitute an “other ongoing and serious obstacle”? Again, to whom would the asylum seeker make that showing and how would they document their many unsuccessful efforts to make an appointment?

Instead of promoting orderly entry at the border, the CBP One will act as a gatekeeper. It is a high tech implementation of the “metering” system that a federal court rejected in *Al Otro Lado, Inc. v. Mayorkas*.<sup>28</sup> In that case, a federal district judge granted summary judgment, finding:

an asylum seeker must only arrive and indicate an intention to apply for asylum for inspection and referral to commence. Requiring asylum seekers to arrive again at POEs requires an additional step neither stated in nor contemplated by [8 U.S.C.] § 1225(b)(1)(A)(ii). Therefore, failing to inspect and refer class members upon arrival, and instead turning them back, conditions the ability to apply for asylum “on a migrant’s manner of entry,” and “flouts this court’s and the BIA’s discretionary, individualized treatment of refugees’ methods of entry[.]” *E. Bay Sanctuary Covenant*, 993 F.3d at 675. Accordingly, the Court concludes that turning back asylum seekers at POEs without inspecting and referring them upon their arrival unlawfully withholds Defendants’ statutory duties under 8 U.S.C. § 1158(a)(1) and § 1225.

If CBP One is simply a high tech roadblock to accessing ports of entry, it will serve the same function as CBP officials turning asylum seekers away and telling them there is no room for them. The agencies cannot limit asylum access through a glitchy App that will disproportionately benefit wealthy (those with high quality smart phones and access to data plans); white (those who do not have “darker complexions”); and educated (literate and tech savvy) asylum seekers.

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<sup>26</sup> See Suzanne Monyak, “House Democrats Call to Improve Border Appointment App Lawmakers Say Glitches, Accessibility Limits on CBP One App Have Caused 'Grave Harm,’” ROLL CALL, Mar. 14, 2023, [https://rollcall.com/2023/03/14/house-democrats-call-to-improve-border-appointment-app/?utm\\_campaign=HubSpot-AILA8-03-15-2023&utm\\_medium=email&hsmi=250418420&hsenc=p2ANqtz-97rsaHGnJV\\_9I7OiLqPTGBYsZywUMh5uWNCmcb7-3loXsBE2IKILrh44QRB\\_wjBzzU3H2ICbphYLN0WZe0f6lmzUFbNQ&utm\\_content=250418420&utm\\_source=hs\\_email](https://rollcall.com/2023/03/14/house-democrats-call-to-improve-border-appointment-app/?utm_campaign=HubSpot-AILA8-03-15-2023&utm_medium=email&hsmi=250418420&hsenc=p2ANqtz-97rsaHGnJV_9I7OiLqPTGBYsZywUMh5uWNCmcb7-3loXsBE2IKILrh44QRB_wjBzzU3H2ICbphYLN0WZe0f6lmzUFbNQ&utm_content=250418420&utm_source=hs_email).

<sup>27</sup> Bernd Debusmann Jr, “At US Border, Tech Issues Plague New Migrant Applications, BBC, Mar. 8, 2023, <https://www.bbc.com/news/world-us-canada-64814095>. (“The CBP One has left thousands of people out of the process,” [Raul Pinto, an attorney at the American Immigration Council,] said.”).

<sup>28</sup> *Al Otro Lado, Inc. v. Mayorkas*, No. 17-CV-02366-BAS-KSC, 2021 WL 3931890, at \*18 (S.D. Cal. Sept. 2, 2021), judgment entered, No. 17-CV-02366-BAS-KSC, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022).



## **The Proposed Rule Would Codify Family Separation**

One of the most insidious aspects of this proposed rule is its resurrection of the Trump-era asylum transit ban. While this administration promised to end family separation, there is no question that limiting those fleeing harm to withholding of removal or Convention Against Torture (CAT) protection will result in family separation. Neither of these forms of protection provide derivative status. Thus, families are likely to face permanent separation and have to make the impossible choice between living in safety in the United States or living forever separated from immediate relatives.

The proposed rule makes a nod to avoiding family separation by allowing family members to enter the United States along with a principal asylum seeker, even though that principal asylum seeker would only be eligible for withholding or CAT protection under the new asylum ban. Proposed 8 CFR 1208.33(d). However, this provision would only preserve family unity for those family members who traveled together, and not for spouses or minor children who traveled separately or remained in the home country. As a result of this provision, there may be an incentive for whole families to travel to the United States together, including young children, rather than having the family member most at risk leave on their own, once noncitizens come to understand that splitting up before travel will likely result in permanent separation.

Whether the family travels together to the United States, or whether only the family member facing the most immediate threat of harm comes to the United States alone, the result would be the same. If the noncitizen is granted withholding or CAT and the family member who is with them cannot meet this very high legal standard, the family member will be ordered removed. Likewise, if the noncitizen came to the United States alone and wins their withholding or CAT case, they will have no ability to bring their family member to the United States. Moreover, with a removal order against the noncitizen, they would never be able to travel abroad to see family members and be permitted to return to the United States. The NPRM discusses the effect of the proposed rule on families in its Family Assessment section and incorrectly concludes that the rule will not have an impact on families because it includes provisions that accommodate families that are traveling together across the border during the credible fear process only. 88 Fed. Reg. 11749. This rule would codify cruelty and legalize separating families, in direct contravention of President Biden's Executive Order on the Reunification of Families.<sup>29</sup>

## **Countries Through Which Asylum Seekers Transit Do Not Provide Adequate Asylum Protections**

Under the proposed rule, asylum seekers who have not been paroled into the United States, or granted a CBP One appointment, would be foreclosed from asylum unless they had applied for asylum and been denied in a country en route to the United States. Proposed § 8 CFR

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<sup>29</sup> President Joe Biden, Executive Order, on the Establishment of Interagency Task Force on the Reunification of Families, (Feb. 2, 2021) (“My Administration condemns the human tragedy that occurred when our immigration laws were used to intentionally separate children from their parents or legal guardians (families). . .”). <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-the-establishment-of-interagency-task-force-on-the-reunification-of-families/>.

208.33(a)(1)(ii). The preamble to the rule devotes considerable space to justifying this aspect of the rule by explaining how the agencies believe that protection systems in other Western Hemisphere countries have improved. 88 Fed. Reg. 11719-23. The agencies acknowledge, without expanding on the point, that many of the countries in which the United States would now be requiring noncitizens to seek asylum, are themselves countries from which high numbers of asylum seekers flee. (“While some of the countries below are the origin for sizable numbers of asylum seekers in the region, they also demonstrably provide protection for others who do consider those countries to be safe options where they are free from persecution or torture.”) 88 Fed. Reg. 11720.

It is difficult to reconcile this language with the realities in the countries from which asylum seekers flee. In fact, it has been well documented that Mexico, one of the primary countries in which those fleeing harm would be expected to seek asylum under the rule, has been extremely unsafe for asylum seekers. Secretary Mayorkas himself recognized the safety concerns for asylum seekers in Mexico in issuing his memo seeking to end the so-called Migrant Protection Protocols, stating, that the “adverse living conditions and violence experienced by migrants returned to Mexico pursuant to MPP are of grave concern to the Secretary.”<sup>30</sup>

The preamble goes on to commend the development of the Guatemalan asylum system, even though it appears to receive fewer than 2,000 application per year 88 Fed. Reg. 11721 and Guatemala continues to be a primary country from which asylum seekers flee.<sup>31</sup> Likewise, the preamble lauds Ecuador for receiving several thousand asylum applications from Venezuelans, 88 Fed. Reg. 11723 but, again, does not acknowledge the recent increase in Ecuadorian asylum seekers, fleeing conditions in that country.<sup>32</sup>

The United States cannot outsource its obligations to provide protection to those fleeing persecution and torture. This is especially true when the countries through which noncitizens travel are themselves documented to be dangerous and lack protections.

A cornerstone of the proposed rule is to cut off asylum eligibility for noncitizens who do not seek asylum in one of the countries through which they transit. Since the vast majority of Northern Triangle asylum seekers, as well as other Central American and South American asylum seekers can neither afford plane tickets nor qualify for tourist visas, they have no choice but to transit over land to seek safety in the United States. As with the CBP One App and the parole options, the third country transit ban disproportionately affects low income asylum seekers including BIPOC asylum seekers. NIPNLG calls on the administration to live up to its

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<sup>30</sup> DHS, Explanation of the Decision to Terminate the Migrant Protection Protocols, at 14, (Oct. 29, 2021) [https://www.dhs.gov/sites/default/files/2022-01/21\\_1029\\_mpp-termination-justification-memo-508.pdf](https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf).

<sup>31</sup> Between 2018 and 2020 more Guatemalans sought asylum defensively than from any other country; Guatemala was also the third highest country for affirmative asylum during that period. DHS, “Fiscal Year 2020 Refugees and Asylees Annual Flow Report,” at 17, (Mar. 8, 2022) [https://www.dhs.gov/sites/default/files/2022-03/22\\_0308\\_plcy\\_refugees\\_and\\_asylees\\_fy2020\\_1.pdf](https://www.dhs.gov/sites/default/files/2022-03/22_0308_plcy_refugees_and_asylees_fy2020_1.pdf).

<sup>32</sup> Vincent Ricci, “More Ecuadorians leaving for US amid ‘burst in migration’” AL JAZEERA, Sep. 23, 2021, <https://www.aljazeera.com/news/2021/9/23/more-ecuadorians-leaving-for-us-amid-burst-in-migration>.

promise of seeking racial equity<sup>33</sup> under U.S. law, rather than codifying racial and economic animus into the regulations.

### **Exceptions to the “Rebuttable Presumption” Are Insufficient**

Under the proposed rule, asylum seekers would be subject to a presumption of ineligibility for asylum unless they meet specific exceptions that very few asylum seekers will be able to meet. Pursuant to proposed 8 CFR §§ 208.33(a)(1) and 1208.33(a)(1), those fleeing harm would be barred from asylum unless they had valid entry documents; entered through the parole programs which are limited to only four countries; applied for asylum in a third country and was denied; or successfully made an appointment using CBP One (unless they qualify for limited exceptions to the CBP One requirement.) Additionally, the presumption can be rebutted if “exceptionally compelling circumstances exist.”

The only categories of per se rebuttable grounds listed at proposed 8 CFR §1208.33(a)(2) are for noncitizens (or immediate family members with whom they are traveling) who: (i) Faced an acute medical emergency; (ii) Faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or (iii) Satisfied the definition of “victim of a severe form of trafficking in persons” provided in 8 CFR §214.11.

These exceptions are inadequate for many of the same reasons that the exceptions to using CBP One are inadequate. First, again, there is no discussion of how a noncitizen would even approach a port of entry to explain to a CBP officer that they fall under one of these exceptions. While it would seem to be easiest to demonstrate an “acute medical emergency,” there is no explanation of how this exception would work in practice. If the emergency is truly severe, the noncitizen might need hospitalization in Mexico. If the noncitizen needs life-saving future treatment, how would they prove to a CBP officer that the issue they face is “acute”?

Similarly, it is difficult to understand, in practice how an asylum seeker would be able to prove to a CBP official that they are in imminent danger of kidnapping, rape, torture, or death. These are the types of claims that require full evidentiary interviews before asylum officers or hearings before immigration judges to prove. Would CBP officers receive specialized training to assess the likelihood that the noncitizen is in “imminent” danger? Would a noncitizen who had already been subjected to one of these harms qualify for an exception, or is the exception only forward-looking?

Finally, again, it is difficult to comprehend how a trafficking victim would be able to prove this harm to a CBP officer. Most trafficking victims do not understand the legal definition of trafficking and require extensive counseling both by mental health and by legal professionals to fully comprehend that the harm they experienced is legally defined as “trafficking.” For these populations all of whom, by definition, are vulnerable, the proposed rule provides no mechanism for them to present their exceptions to a trained CBP official.

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<sup>33</sup> President Joe Biden, Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

The proposed rule does explain that for asylum seekers who have been put into expedited removal, presumably those who entered the United States without inspection, asylum officers will conduct a two-tiered interview, first determining whether any of the three above exceptions have been met, and then, if not, conducting a reasonable fear interview. “Accordingly, the proposed rule would implement changes to and build on this existing system and would instruct asylum officers to apply the lawful pathways rebuttable presumption during credible fear screenings.” 88 Fed. Reg. 11724. While asylum officers have more training on humanitarian relief than CBP officers, the questions still remain how an asylum seeker would be able to prove “imminent” danger or to even comprehend what trafficking is.

Thus, in addition to conducting credible fear or reasonable fear interviews, asylum officers would have to conduct extensive questioning concerning the potential exceptions under the proposed rule. That questioning will add to the length of interviews, further straining asylum office resources, and adding to Asylum Office backlogs that already number over 600,000.<sup>34</sup> The NPRM recognizes the greater resources the rule would require, and it even explains why it was wrong under the “Global Asylum Rule” to have asylum officers apply all bars in fear screenings, 88 Fed. Reg. 11744, yet states that applying the new bars under the current rule will not be that resource-intensive. The preamble further justifies the use of these greater resources at the border finding that increased expenditure of resources acceptable because “fewer will pass the screening process.” 88 Fed. Reg. 11737. Thus, the purpose of the rule is crystalized—allow fewer noncitizens access to asylum protections.

Equally disturbing is the fact that the three exceptions listed in the proposed rule appear to be the only exceptions. That is, the rule does not state that the “exceptionally compelling circumstances” *include* the three listed exceptions; it states that they **are** the exceptions. While the preamble states, “In addition to the per se grounds for rebuttal, the presumption also could be rebutted in other exceptionally compelling circumstances, as the adjudicators in the sound exercise of their judgment may determine,” 88 Fed. Reg. 11707, the language of the actual proposed regulation does not include such expansive language. Thus, it is unclear whether other, “equally compelling exceptions,” would even be considered. For example, a parent could be separated by smugglers from a young child who has already entered the United States, but it does not appear that there would be a way for an asylum seeker to bring that situation to the attention of CBP or to rebut the presumption against asylum in the course of a fear-based interview with an asylum officer.

The preamble expends considerable space discussing litigation that found similar Trump-era regulations to be unlawful. 88 Fed. Reg. 11738-42, and seeking to differentiate the current rule because there are some potential legal pathways, as discussed above, that favor wealthy and well-educated asylum seekers, that some noncitizens may use. Notwithstanding those limited legal pathways, the proposed rule is resurrecting the Trump-era asylum bans, and no number of pages in the NPRM’s preamble can disguise the fact that the agencies are defending the indefensible.

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<sup>34</sup> USCIS, Asylum Quarterly Engagement and Listening Session Script & Talking Points, 5 (Dec. 13, 2022) [https://www.uscis.gov/sites/default/files/document/foia/Asylum\\_Quarterly\\_Engagement-FY23\\_Quarter\\_1\\_Script\\_and\\_Talking\\_Points.pdf](https://www.uscis.gov/sites/default/files/document/foia/Asylum_Quarterly_Engagement-FY23_Quarter_1_Script_and_Talking_Points.pdf).

Further, with the ports of entry essentially closed, other than to the fortunate few who have secured CBP One appointments, asylum seekers in desperate situations, in dangerous border towns, will have no choice but to cross unlawfully into the United States and be placed into the flawed (and, under this rule, more restrictive) expedited removal system. That reality, along with the more in-depth asylum officer interviews, will further strain the asylum system.

Finally, as discussed above, the expedited removal system already severely limits rights of asylum seekers. It is extremely difficult for asylum seekers who have just completed a harrowing journey to the United States, and who often do not have the benefits of consulting with legal counsel, to explain why they fled their country in a way that aligns with the complexities of U.S. asylum law. Under this rule, the stakes would be even higher, as those fleeing harm would have to meet a “reasonable possibility” standard rather than the “significant possibility” standard that Congress enshrined in the INA. Necessarily, thousands of noncitizens who could meet the “significant possibility” standard will be unable to meet the higher “reasonable possibility” standard and will be promptly removed—even though they have met the standard prescribed by Congress.

### **The Proposed Rule Would Constitute an Abrupt Departure from Conclusions Reached by the Agencies Less Than One Year Ago**

The NPRM acknowledges that less than a year ago, in the Asylum Processing Rule regulation, the agencies recommitted to the statutory “significant possibility” standard yet, now the agencies claim that it is acceptable to use the higher “reasonable possibility” because of the high number of expected border encounters. The agencies now claim that “the interests balance differently and warrant a different approach from the one generally applied in credible fear screenings.” 88 Fed. Reg. 11742. They then attempt to justify using the “reasonable possibility” standard for withholding and CAT claims, even though that standard is not set forth in the statute, for future fear claims at the border.

The agencies thus set up a strawman for expedited fear claims: the statute requires the use of the “significant possibility” standard for asylum, so, rather than implement Congressional intent that an inclusive standard be used, the agencies knock out the possibility of seeking asylum so that the Congressional standard is no longer applicable. It is wrong for the agencies to use this gamesmanship to subvert Congressional intent. Moreover, this abrupt change in reasoning from less than a year ago, indicates that the impetus behind this proposed rule is political rather than based on reasoned decision making.<sup>35</sup>

The preamble further explains that if a noncitizen succeeds in demonstrating a reasonable possibility of persecution or torture, they will be placed in INA section 240 proceedings and the immigration judge would not owe deference to the asylum officer’s determination that they did

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<sup>35</sup> Zachary B. Wolf, “Don’t Try to Make Sense of Biden’s Border Policy,” CNN, Jan. 9, 2023, <https://www.cnn.com/2023/01/09/politics/biden-border-title-42-what-matters/index.html>. (“President Joe Biden’s immigration policy is confusing and full of contradictions. . . Even though he is essentially expanding the policy, the president also acknowledged last week his move could makes things worse because it almost encourages people turned away at the border to try repeatedly to enter the US.”)



not rebut the presumption of asylum ineligibility. 88 Fed. Reg. 11742. While that result is better for asylum seekers who still have some possibility of winning their claim (and not facing the permanent legal limbo of withholding of removal), it also reinforces the fundamental unfairness of applying the higher standard at the border, and the likelihood that many thousands of asylum seekers will face summary removal because they were not able to marshal the evidence they needed during expedited removal interviews to demonstrate why they qualify for an exception to the presumptions against asylum eligibility.

### **NIPNLG Strongly Opposes the Removal of Automatic Immigration Judge Review of Negative Fear Interviews and the Ability to Request Reconsideration of Wrongful Credible Fear Interview Decisions**

At the same moment that the agencies propose dramatically altering accepted standards at the border and curtailing the rights of noncitizens, the NPRM simultaneously proposes to require noncitizens to affirmatively request IJ review of negative fear interviews. We strongly oppose this change. Many noncitizens are disoriented and do not understand the American legal system at the time they go through a credible or reasonable fear interview process. Requiring them to affirmatively request immigration judge review of a negative fear finding will result in more people being removed who should have been permitted to pursue fear claims inside the United States. Immigration judges overturn asylum officer credible fear denials in 25 percent of all cases.<sup>36</sup> The proposed rule will likely exacerbate problems with asylum officer fear-based interviews, since officers would have to learn how to implement the two-tiered approach, evaluate exceptions to the new bans, and then apply either the “significant possibility” standard or the “reasonable possibility” standard based on the results of their asylum ban analysis. Given the significant error rate by asylum officers and the incredibly high stakes in expedited removal—removal with no hearing on the merits—the agencies should not remove automatic review of asylum officer denials. Automatic review of asylum officer denials has been an important safeguard against (substantial) asylum officer errors in these interviews; it would be wrong to eliminate this safeguard at the moment that the agencies force noncitizens to meet a higher threshold in their fear interviews. The USCIS Asylum Division continue to be plagued by high attrition rates and is struggling to fill funded positions. As of December 2022 fully 50 percent of its AO2 officers had been on the job for under one year.<sup>37</sup> The stakes for asylum seekers are too high to leave these decisions in the hands of inexperienced asylum officers with no required review.

Likewise, NIPNLG strongly condemns removing the ability of noncitizens and their counsel to request reconsideration from USCIS asylum officers. NIPNLG and partner organizations have filed complaints with CRCL outlining egregious misapplication of the law by Houston Asylum Officers in credible fear interviews.<sup>38</sup> Already under the Asylum Processing Rule’s restrictions on RFRs it has been nearly impossible to gather needed information and file

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<sup>36</sup> TRAC, Immigration Judges Overturn Asylum Officer's Negative Credible Fear Findings in a Quarter of All Cases, (Mar. 14, 2023), <https://trac.syr.edu/whatsnew/email.230314.html>.

<sup>37</sup> USCIS, Asylum Quarterly Engagement and Listening Session Script & Talking Points, 4 (Dec. 13, 2022) [https://www.uscis.gov/sites/default/files/document/foia/Asylum\\_Quarterly\\_Engagement-FY23\\_Quarter\\_1\\_Script\\_and\\_Talking\\_Points.pdf](https://www.uscis.gov/sites/default/files/document/foia/Asylum_Quarterly_Engagement-FY23_Quarter_1_Script_and_Talking_Points.pdf)

<sup>38</sup> See, NIPNLG et al, CRCL Complaint, (Apr. 27, 2022) [https://nipnl.org/PDFs/2022\\_27April-CFI-complaint.pdf](https://nipnl.org/PDFs/2022_27April-CFI-complaint.pdf).

within the 7-day period. Stating that USCIS retains discretion to reconsider its decisions—but no one can ask them to do so—is, in practice, eliminating requests for reconsideration before USCIS. Removing any ability for advocates to seek asylum office review of wrongful credible fear denials—no matter how egregious the error may be or how imminent the danger to the asylum seeker may be—will result in asylum seekers being wrongly returned to the country they fled and put at risk of potential persecution or torture.

### **The 24-Month Sunset Date Is Entirely Arbitrary**

The rule includes a sunset date 24 months after it is finalized. The preamble to the rule primarily cites to the impending end of Title 42 expulsions to justify the radical restrictions on asylum eligibility. 88 Fed. Reg. 11727. While it may be correct that the lifting of Title 42 will temporarily increase border entries, that is a problem of the agencies' own making by using COVID as a pretext to unlawfully expel asylum seekers. The preamble gives *no* explanation of how it arrived at 24 months as a time when the provisions would sunset, simply stating that it needs more than a “short period” to account for the end of Title 42. *Id.* Moreover, while the preamble emphasizes that the rule is temporary, it also makes clear that the rule could be extended beyond this 24 month period.

If the rule actually does end in 2025, (which of course is preferable to a permanent rule), there is no logical reason that two people who are situated identically would have radically different rights and futures in the United States based on the timing of a rule that offers no explanation about its own reasons for this period of time. Cynically, it appears that the 24-month end date was chosen so that the rule would remain in effect through the next presidential election cycle.

### **The NPRM Would Radically Redefine Asylum Eligibility and Should Not Have Been Issued with a Mere 30-Day Comment Period**

The Administrative Procedures Act (APA) § 553 requires that the public “interested persons” have “an opportunity to participate in the rule making.” In general, the agencies, must afford “interested persons a reasonable and meaningful opportunity to participate in the rulemaking process.”<sup>39</sup> Courts have found that for the agencies to comply with this participation requirement the comment period they give must be “adequate” to provide a “meaningful opportunity.”<sup>40</sup> Given the importance of the public’s participation in the rule-making process, Executive Order 12866 specifies that “in most cases should include a comment period of not less than 60 days.”<sup>41</sup> Executive Order 13563 explicitly states, “To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”<sup>42</sup> Despite the radical changes the proposed rule would make to the rights of asylum

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<sup>39</sup> *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977).

<sup>40</sup> *N.C. Growers’ Ass’n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012).

<sup>41</sup> See Exec. Order No. 12866, § 6(a), 58 Fed. R. 51,735 (October 4, 1993)

<sup>42</sup> See Executive Order 13563—Improving Regulation and Regulatory Review (Jan. 18, 2011),

<https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulationand-regulatory-review>. [emphasis added].

seekers, it does not even attempt to justify the short time frame for comments other than the impending end of Title 42 expulsions. Indeed, the NPRM states that the agencies intend to implement the rule on May 11—meaning that they have already determined they will have time to respond to the comments and make any required revision to the rule within just over a month’s time of the close of the comment period. It is arbitrary and capricious for the agencies to decide in advance how long their response to comments will take before the agencies know how many comments they will receive or what the content of the comments will be. Indeed, as of March 23, 2023, over 15,200 comments have been submitted.<sup>43</sup>

### **NIPNLG Supports the Sections of the Rulemaking that Will End Trump-Era Asylum Bans**

The proposed rule would formally rescind several Trump-era asylum rules designed to severely restrict access to the asylum system. NIPNLG fully supports the rescission of “Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims,” 83 FR 55934 (Nov. 9, 2018) and “Asylum Eligibility and Procedural Modifications,” 85 FR 82260 (Dec. 17, 2020). As discussed above, asylum seekers have statutory rights to seek asylum and NIPNLG opposes any rules that restrict these rights. Thus, we fully support a formal rescission of restrictions on asylum access. NIPNLG urges the agencies to withdraw this proposed rulemaking except for the sections that rescind the Trump era rules.

### **Conclusion**

NIPNLG is appalled that the agencies are seeking to reissue some of the worst regulations that were proposed under the Trump administration. The NPRM is designed to curtail the rights of asylum seekers in order to reduce the number of individuals who seek safety at the Southern Border. The administration should not abridge statutory rights and rights under international law in an effort to score political points. This rule resurrects Trump-era policies that have been found unlawful. Moreover, it represents a stark departure from President Biden’s commitment to restoring faith in our immigration system and in addressing historic problems of racial equity.

We request that the agencies withdraw this rule in its entirety or, at a minimum, make significant changes before finalizing it. Please do not hesitate to contact Victoria Neilson at [victoria@nipnlg.org](mailto:victoria@nipnlg.org) if you have any questions or need any further information. Thank you for your consideration.

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<sup>43</sup> See <https://www.federalregister.gov/documents/2023/02/23/2023-03718/circumvention-of-lawful-pathways>.