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March 27, 2023

Submitted via https://www.regulations.gov.
Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review, Department of Justice
Falls Church, VA

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

RE: Comments in Opposition to the Joint Notice of Proposed Rulemaking entitled ; RIN: 1125-AB26 / 1615-AC83 / Docket No: USCIS 2022-0016 / A.G. Order No. 5605-2023

Dear Assistant Director Reid and Acting Director Delgado:

The Southern Poverty Law Center (SPLC) respectfully submits the following comments to the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), and the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR) ("the agencies") in response and opposition totoer- 0.05 Tw 0.3 0 Td[(by)-10 (a)4 (nt)-2 (i)]TJ0 Tw 2.81 0 Td(

[2] Press Release, SPLC Statement on Biden Administration's Proposed Asylum Ban (Feb. 21, 2023), https://www.splcenter.org/presscenter/splc-statement-biden-administrations-proposed-asylum-ban.

SPLC and Its Interest in the Issue

The Proposed Rule provides that individuals seeking asylum arriving at the southwest border without permission to enter are presumptively ineligible for asylum if they did not seek and receive a denial of asylum in a transit country or countries, and/or if they entered between Ports of Entry or at a Port of Entry without having obtained an appointment via a mobile application called CBP One. Asylum seekers subject to the Proposed Rule are [illegible]

Rule attempts to establish CBP One as the *only* mechanism to request asylum at the southwest border and seeks to punish those who cannot wait indefinitely in danger while they attempt to schedule an appointment on an app.

The Proposed Rule violates U.S. obligations under domestic and international law, which ensure access to protection for those fleeing persecution. Prior to the Proposed Rule's issuance, nearly 300 civil society organizations, more than 150 faith-based organizations, and nearly 80 members of the House and Senate called on the administration to abandon its plans to resurrect these Trump-era asylum bans.[12]

In the Proposed Rule's preamble, the agencies highlight the pressures at the border caused by increasing arrivals of people seeking protection and fleeing persecution. The U.S. is not alone in facing these pressures; the world faces record global displacement caused by political instability and oppression, violence, and climate change.[13] However, much of the "pressure" at the border is due to the government's own decisions to cut off access to the U.S. asylum process for over six years—first, through illegal metering and turnbacks of individuals seeking asylum

Proposed Rule blatantly contravenes these promises and attempts to instead remove individuals seeking asylum back to danger based on manner of entry and transit in circumvention of existing refugee law and treaty obligat Tw 12 0 0 12 72 72 Tm [(t)-2 (P)- (arv)-4 (r)5 (ov)-4 (2 ((med)5 (o-0.004 Tc 0.088 Tw 0.08w

clear if noncitizens without an appointment seeking inspection and processing at a port of entry will in fact be inspected and processed, or whether CBP will block their access to the ports.[27] The latter would constitute an unlawful withholding of CBP's mandatory duty to inspect all noncitizens in the process of arriving in the United States.[28]

Second, § 1158(a)(1) contains no limit on the number of people who may seek asylum, and the Administration lacks the power to impose a limit when Congress set none.[29] The plain purpose of the Proposed Rule is to cut the number of people with access to asylum, and the logic of the Proposed Rule is that a relatively high number of people seeking humanitarian protection overall justifies limiting access to asylum.[30] The Proposed Rule would effectively cap the number of people who may seek asylum based on the number of appointments available through the

in expedited removal who establish a credible fear of persecution must be referred for full asylum adjudications.[35] The government is required to refer asylum seekers in expedited removal for full asylum adjudications if they can show a "significant possibility" that they could establish asylum eligibility in a full hearing.[36] The Proposed Rule attempts to unlawfully circumvent the credible fear screening standard established by Congress, which was intended to be a low screening threshold.[37] The Proposed Rule would eviscerate this intentionally low screening standard by first requiring asylum seekers to prove to an asylum officer by a preponderance of evidence that can rebut the presumption of asylum ineligibility, and then requiring those who cannot overcome the presumption to meet a higher fear standard before being permitted to seek protection.[38] Thus, the Proposed Rule's imposition of a higher standard of proof than the "significant possibility" standard in credible fear screenings violates the standard enacted by Congress.[39]

Fifth, the government is prohibited from returning noncitizens to countries where they face persecution or torture.

Sixth, the Proposed Rule also violates the Refugee Convention's prohibition against imposing improper penalties on asylum seekers based on their irregular entry into the country of refuge.[46] The agencies explicitly note that the asylum ban would inflict "consequences" on people seeking asylum—a blatant attempt to punish people based on their manner of entry into the United States.[47] These consequences could include the denial of access to asylum, deportation to harm, family separation, and deprivation of a path to naturalization. With respect to the Trump administration's entry ban, UNHCR stated that "[n]either the 1951 Convention nor the 1967 Protocol permits parties to condition access to asylum procedures on regular entry."[48]

Seventh, the agencies claim the authority to re-implement an asylum ban and apply it to members [redacted] WL 3142610 (S.D. Cal. Aug. 5, 2022).[49] The PI bars the application of one of Trump's asylum

The Proposed Rule would change existing regulations to deny asylum seekers EOIR review of negative credible fear determinations if they do not affirmatively request review.[53]

The Proposed Rule also seeks to entirely eliminate asylum seekers' longstanding right to submit requests to USCIS to reconsider erroneous negative credible fear determinations if they are barred under the Proposed Rule. For decades, this safeguc2 43.4jEMC ET/l5.9 (o)-4e b i (i)8 (tB.48 0 (eek)-4

eligible. People who are otherwise eligible for asylum but banned by the Proposed Rule would likely be removed

fear standard established by Congress violates the statute and Congressional intent in setting a low screening threshold.

We already know the harm these heightened standards cause: we saw this harm play out under the

Additionally, as discussed below, requiring asylum seekers to use CBP One to seek asylum at the border disparately harms Black asylum seekers due to racial bias in its facial recognition technology and is inaccessible to many Indigenous, African, and other asylum seekers due to language barriers. This proposed asylum ban will significantly thwart the Biden administration's stated commitment to racial justice and equity.[71]

The ban also builds in nationality-based discrimination in access to asylum. The Proposed Rule largely bans asylum for people who do not enter the United States via limited parole initiatives or previously scheduled appointments at ports of entry, despite the fact that the United States only affords limited access to parole initiatives for certain nationalities, as described below.

The racial and national origin discrimination inherent in the Proposed Rule are deeply at odds with the principles of racial justice and equality, as well as the Refugee Convention's requirement that states shall apply the Convention's provisions "without discrimination as to race, religion or country of origin."[72]

c. Withholding of removal and relief under the Convention Against Torture are inadequate substitutes for asylum

Migrants banned from asylum protection under the Proposed Rule would have to establish eligibility for withholding of removal or protection under CAT to obtain relief from deportation. Those who are otherwise eligible for asylum but are unable to meet the higher threshold to establish eligibility for withholding of removal or CAT protection would be deported, while many granted these lesser forms of protection would be left in permanent limbo, separated from families, and under constant threat of deportation. Unlike asylum, these forms of relief do not confer permanent status or a path to citizenship, do not allow people to petition for their spouses and children, do not permit people to travel abroad, and leave people with a permanent removal order, subject to deportation at any time.

As a result, many migrants who should be granted asylum under U.S. law will languish in the United States in legal limbo, indefinitely separated from spouses and/or children who remain abroad in danger. Under the Trump transit ban, migrants barred from seeking asylum due to the transit ban who were granted withholding of removal faced inadequate protection and potentially permanent separation from their spouses and children.[73]

Exceptions in the Proposed Rule that promote family unity where migrant families travel to the United States together will not prevent the separation of families where spouses and children

remain abroad. Like the Trump transit ban, this asylum ban would leave these families indefinitely separated.

The Proposed Rule targets asylum, which is the only form of humanitarian protection available in the United States that provides for full participation in society, with a path to citizenship and to family unity. The Refugee Convention requires that contracting states "facilitate the assimilation and naturalization of refugees."[74] Yet the Proposed Rule will relegate to a second-class position countless individuals who should be eligible for asylum, but for the Proposed Rule's arbitrary eligibility criteria. Those who are lucky enough to navigate the many administrative hurdles required to obtain withholding of removal or CAT relief will have no hope of ever fully participating in U.S. society for lack of status.

G. <u>The exceptions are far too narrow and would have perverse consequences</u>

The exceptions to the Proposed Rule—which either make the presumption of asylum ineligibility inapplicable or allow for rebuttal of that presumption—are far too narrow and pose unfounded barriers to accessing the asylum process, even for people who clearly fall within an exception.

a. The "lawful pathways" set out in the Proposed Rule are not meaningfully available for many people in need of protection

The Proposed Rule sets out three "lawful pathways" for seeking protection in the United States; if a migrant has utilized one of these pathways, the presumption of asylum ineligibility does not apply. SPLC agrees with the goal of expanding access to humanitarian protection in the United States; however, the Proposed Rule will limit, not expand, access to protection, and extends access in a plainly discriminatory manner. The three "lawful pathways" set out in the Proposed Rule—use of a parole program, arriving at a port of entry with an appointment through CBP One, and applying for and being denied asylum in a transit country—are all going to be unworkable for many of the people most desperately in need of protection, effectively excluding them from accessing asylum in the United States.

1. Existing parole initiatives are not an adequate substitute for access to asylum at the border

nationalities.[76] Basing access to a "lawful pathway" to asylum based solely on eligibility for programs that are based on country of origin will, by default, fail to encourage a large number of asylum seekers from countries not included in these parole programs to access "lawful pathways," as they are simply not available to them.

Second, even within the nationalities that have access to specific parole initiatives, access to those programs is functionally restricted to those who have the means and resources to meet the requirements of these programs. Eligibility for the CHNV Program, for example, is contingent on the applicant (1) having one or more sponsors who have legal status in the United States who meet federal poverty guidelines, (2) having an unexpired passport, and (3) being able to pay for their plane ticket to the United States.[77] That means that individuals who lack the resources to pay hundreds of dollars for plane tickets to the United States, those that fled their home country without a valid passport, or those that have no sponsors in the United States are foreclosed from accessing this "lawful pathway." Access to asylum in the United States is not and cannot be contingent on having sponsors, the ability to pay, or the ability to obtain an unexpired passport.

SPLC represents many clients seeking asylum who entered through the southwest border fleeing countries that are not covw (a)-6 gshavingovw (-2 ( )-10 12 -0 0 12 70.92 p)2 -1-1-ro3 (rg3 (rra)4 ((c)4 (ovd-0.0

yet been able to schedule them."[81] CBP made this announcement the same month CBP One became

who do not have the resources to obtain a smartphone or ability to navigate the app.[91] It also disparately harms Black asylum seekers due to racial bias in its facial recognition technology,[92] which has prevented many from obtaining an appointment.[93] Asylum seekers who can access and navigate the app are still often unable to schedule appointments due to extremely limited slots and are forced to remain in danger indefinitely. Requiring individuals and families seeking asylum to use CBP One at the southwest border also raises concerns that the system will be used for illegal metering (based not on wait time but on luck, technology skills, or resources to secure an appointment—turning asylum access in effect into a lottery).[94] Moreover, lawmakers and other groups have raised privacy concerns.[95] These concerns are not merely theoretical: last year, ICE erroneously published "sensitive personal information"[96] of more than 6,200 people who claimed fear returning to their home country.[97]were included as part of the disclosure. SPLC represents several clients impacted by the ICE data breach and has witnessed first-hand the legal ramifications of asylum seekers' personal information being publicly available.

Third, by requiring people at the southwest border to use CBP One, the Proposed Rule would leave many vulnerable asylum seekers in grave danger, including LGBTQI+ individuals, women, and survivors of gender-based violence. Asylum seekers unable to secure appointments through the CBP One app will be forced to remain indefinitely at the border in dangerous conditions, often with no access to safe housing, stable income, or health care as they continue to try to make an appointment. These conditions increase the likelihood that they will be targeted for violence by cartels, traffickers, and the abusers from which they initially fled.[98] Many LGBTQI+ asylum seekerfact BM4the0 T_,0 0w 6.48 070.92 463 g69.48 [(,)-4 (,(nc)4 (e)-6 (by)oli Tc 0)2 (m, Td[(a)4 (s)-1P (s)-1

impossibility fail? Requiring a migrant to litigate this issue in the first place, in addition to being unlawful, adds a wholly meaningless and unnecessary layer of bureaucracy to an already bureaucratic process.

Finally, requiring asylum seekers to use the CBP One app will also separate families. The administration's use of the CBP One app and denial of access to asylum for people who cannot schedule appointments through the app has already forced families to separate.[100] Families unable to secure CBP One appointments together as a family unit have made the impossible choice to send their children across the border alone to protect them from harm in border regions.[101]

seekers and migrants face pervasive anti-Black violence, harassment, and discrimination, including widespread abuse by Mexican authorities.[104]

Moreover, migrants cannot avail themselves of a fair asylum process in Mexico, and many are at

Guatemala as a potential transit country where applying for asylum will be a viable option, they

In addition, it will be very difficult for people to make the required showing during a credible fear interview

This purported "family unity" provision demonstrates just how untethered the Proposed Rule is from considerations relevant to a person's, or a family's, actual claims of fear. Under the Proposed Rule, if all accompanying family members' claims of fear are extremely strong—so strong as to justify a grant of withholding of removal in each case—then the family will all receive withholding of removal. However, if some family members' claims are weaker, such that not all are eligible for withholding of removal, then the whole family would be eligible for the much more favorable status of asylum.[118] SPLC believes all people—traveling alone and in family groups—should have equal access to asylum, including access to asylum for all if one family member is eligible, free from arbitrary restrictions on asylum eligibility unrelated to their claims of fear.

The Proposed Rule is also inapplicable to unaccompanied minors. Denying access to adults and some families but not to unaccompanied minors (as required under TVPRA) creates a perverse incentive for parents to try to protect their children by sending them across the border alone. A family would never know in advance if they will be eligible for asylum under the "family unity" provision, so a parent who wants their child to have the basic rights that are lacking with a grant of withholding of removal might easily make the decision to protect their child by sending them to the United States unaccompanied. Unfortunately, SPLC knows these children are not actually safe once they come into the United States. They are detained at unlicensed and/or abusive facilities.[119] Once released, DHS has been unable to keep track and protect them.[120] Many are exploited and subjected to child labor.[121] The agencies should be creating and supporting systems that provide meaningful ways for families seeking protection to stay together as part of the asylum system, not drawing arbitrary lines that push families apart.

Nobody should be cut off from access to the asylum process, and the Proposed Rule not only cuts off access for adults, but will also lead to family separation and endangerment of children.

H. <u>The factual underpinnings for the Proposed Rule are flawed</u>

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need with efforts, such as the Proposed Rule, to intentionally *weaken* U.S. asylum protections when people most need them.

Second, while there is some evidence of a long-term trend of increasing numbers of asylum seekers, the Proposed Rule mistakenly assumes that encounters documented during the Title 42 period are the equivalent of individual asylum seekers.[123] As DHS has itself documented, Title 42 expulsions have led people to try to cross the border multiple times in their efforts to seek protection. Thus, the "encounters" number is artificially inflated by U.S. policy.[124]

Third, the Proposed Rule gives lip service to a desire to "reduc[e] the reliance by migrants on dangerous human smuggling networks" and to "discourage irregular migration."[125] But smuggling networks proliferate and profit when an item is artificially scarce, and the Proposed Rule is one in a series of U.S. policies that have progressively weakened access to asylum, incentivizing rather than dissuading migrant smuggling. Access to the U.S. asylum system has been made artificially scarce since late 2016,[126] and was essentiallun (m s)1 (ymoe)4 (s ID 53 ›w 12 -0 0 127h)-4 (av)-rti ma 24 (s)-1

effectively denying people asylum before they have a chance to present their claims, justified by aggregate data about who ultimately has won asylum in the past rather than by the evidence produced in any individual case.

Fifth, the Proposed Rule relies on the "resources and time" required to operate the credible fear screening process designed by Congress.[130] But Congress designed the credible fear process to set a low bar—overcoming that bar merely leads to a right to submit an asylum application and have it decided on the merits, with all the attendant procedural rights available in immigration court. If only those individuals who ultimately win asylum were found to have a credible fear of return—a goal the agencies appear to be striving for through the Proposed Rule—the agencies would not be applying the credible fear standard as Congress intended.[131]

I. SPLC's Client Stories

Although SPLC has provided several client stories above, we now provide additional client stories in this section to illustrate how the Proposed Rule would harm asylum seekers and violate the United States' international and domestic laws and obligations.

First, as discussed above, the differences between the protections under asylum, withholding of removal, and protection under the Convention Against Torture differ greatly. SPLC has assisted individuals in obtaining these varied forms of protection and observed the vast differences in their level of protection. The individuals SPLC has represented who have been granted a final order of asylum in immigration court have been allowed to work in the U.S. incidental to that status (and apply for an Employment Authorization Document) and their families have been unified as their asylum grants include derivatives. Additionally, after one year, they have been eligible to file an I-485 with USCIS to apply for Adjustment of Status to become a Lawful Permanent Resident, and ultimately naturalize. SPLC has helped several clients with one or more of these processes and applications. In contrast, the scope of relief for SPLC's clients who are granted withholding of removal is much more limited (um)urour pr-6 (f)3 (7.55 -)-1 ex]TJ0.001clee[6 (s)a(, (r)3.1 (ee)]TJ5)-4 (u

captive in a home for several days. During that time, they were physically and psychologically harmed. That client is now in immigration detention in the U.S. while they pursue their asylum claim. This client—and many other individuals SPLC represents who have suffered similar harms in Mexico—now have to litigate their claims for protection while experiencing trauma related to these horrific experiences. Under the Proposed Rule, individuals seeking asylum would have to rebut the presumption and litigate their claims for protection while experiencing the impact of trauma.

Third, the Proposed Rule states that it is temporally limited two years.[132] However, the consequences of the Propose Rule will apply well after the two years and could last a lifetime. For example, under an expedited order of removal, a person is barred from returning to the U.S. for five years.[133] Even after the five years, however, the person may not be eligible for asylum if they return to the United States.

SPLC currently represents a client who is in withholding-only proceedings after he was previously subject to expedited removal and deported from the United States. Even though he returned to the U.S. more than sixteen years after being removed, CBP has sought to reinstate his prior removal order, which renders the client statutorily ineligible for asylum and ineligible for a bond from EOIR while his case is pending. Individuals subject to the Proposed Rule and denied protection—even if they would have otherwise been eligible for asylum—will experience similar and other harms many years past the sunset of the Proposed Rule.

As these examples show, the Proposed Rule would create irreparable harm to thousands of asylum seekers, which would result in family separation, incorrect denials, and return individuals to harm. SPLC opposes the Proposed Rule.

J. The 30-day comment period provides insufficient time to comment on the Proposed Rule

SPLC strongly opposes the limited thirty-day window for public comment on this Proposed Rule, which effectively denies the public the right to meaningfully comment under the notice and comment rulemaking procedures required by the Administrative Procedure Act. This timeframe is

participate in the rulemaking process."[135] "In most cases," this reasonable and meaningful opportunity will be "not less than 60 days."[136]

Executive Orders 12866 and 13563 require federal 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*." This standard 60-day timeframe is especially crucial here, given the Proposed Rule's attempt to cut off access to asylum for refugees who have been prevented from accessing it for nearly three years under the Title 42 policy and for three additional years before that due to the government's own illegal metering and turnbacks of asylum seekers.

The agencies have provided no compelling reason to truncate the public comment period in this way. The justification provided in the Proposed Rule largely relies on the administration's anticipation of the end of the Title 42 policy on May 11, when the COVID-19 public health emergency will expire. The agencies' responses to the March 1, 2023 letter seeking an extension of the comment period *solely* rely on that rationale

Conclusion

SPLC strongly opposes the Proposed Rule because it violates the existing statutory framework and mandate of the Departments to protect and provide fair process to asylum seekers. The Departments should immediately rescind the NPRM and stop pursuing asylum bans that advance the Trump administration's xenophobic, anti-immigrant agenda. The Proposed Rule specifically requested comment on "[w]hether the proposed rule appropriately provides migrants a meaningful and realistic opportunity to seek protection."[138] This comment clearly illustrates that the answer is No.

Thank you for considering these comments in response and opposition to this NPRM, and please contact us to provide any additional information you might need. We look forward to your response.

Sincerely,

Efrén C. Olivares
Deputy Legal Director, Immigrant Justice Project

On behalf of the Southern Poverty Law Center

[138] NPRM at 11708.