

Comments on the Department of Homeland Security’s and the Department of Justice’s
Proposed Rule entitled
“Circumvention of Lawful Pathways,” Docket No. USCIS-2022-0016

Office of Strategy, Policy and Plans
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20588-0009

Office of Policy
Executive Office for Immigration Review
Department of Justice
5107 Leesburg Pike
Falls Church, VA 22041

RE: Department of Homeland Security and Department of Justice-Notice of Proposed Rulemaking, *Circumvention of Lawful Pathways*, DHS Docket No. USCIS-2022-0016

To Whom it May Concern:

Centro Presente and Lawyers for Civil Rights (LCR) respectfully submit these comments in strong opposition to the Proposed Rule entitled “Circumvention of Lawful Pathways” of the U.S. Department of Homeland Security (DHS) and the Department of Justice (DOJ) posted on February 23, 2023.

I. Introduction

As leaders in immigration advocacy and representation, Centro Presente and LCR respectfully submit these comments to protect immigrant families and children.

Centro Presente is a member-driven, state-wide Latin American immigrant organization dedicated to the self-determination and self-sufficiency of the Latino immigrant community in Massachusetts. Centro Presente advances immigrant rights and for economic and social justice. Through the integration of community organizing, leadership development and basic services, Centro Presente strives to give our members voice and build community power.

Lawyers for Civil Rights is a non-profit organization that provides free legal services to individuals and families in Massachusetts. For over 50 years, LCR has fought against discrimination and sought equal opportunity for people of color and immigrants through creative and courageous legal action, education and economic empowerment in collaboration with law firms and community partners.

The Proposed Rule will establish a presumption of asylum ineligibility for migrants who have traveled through specific Latin American countries on their way to the southwest (“SW”) border

of the U.S. and who enter without inspection or documentation. The presumption could only be rebutted, allowing asylum eligibility, in restrictively narrow circumstances. This would have a severely detrimental impact on human lives and the U.S. immigration system. The number of people eligible for asylum at U.S. ports of entry at the SW border will be arbitrarily reduced due to unreliable technology, unstable asylum procedures in transit countries, and a lack of uniformity in policies and procedures at ports of entry. The Proposed Rule will lead countless vulnerable migrants who are escaping torture and persecution in their home country, including families and children, to be further victimized at the SW border. Additionally, previous rules with similar objectives have been enjoined by federal courts, and the Proposed Rule is likely to face a similar outcome.

II. The Proposed Rule Places An Overreliance On Discriminatory and Underdeveloped Technology, the CBP One App.

The Proposed Rule over-relies on the CBP One app to determine asylum eligibility. If an appointment is scheduled through the CBP One app, the individual or family is allowed to apply for asylum. The Proposed Rule creates one exception to an ineligibility decision for asylum: proof of scheduling an appointment to seek asylum through the CBP One app at a port of entry on the SW border.

The technical difficulties associated with the CBP One app are significant. Many immigrants seeking asylum do not have access to reliable internet connections or access to capable smartphones, preventing them from showing attempts at using the app.¹ Similarly, advocates, attorneys and community organizations abroad and in the U.S. have reported major technical issues with the app, including continuous crashing and error messaging.² Further, the app's error messages are only in English, raising serious concerns around language access violations as non-English speakers do not understand the message. Additionally, the app was not created or designed for data gathering, image collection, or traveler use,³ and each of these expansions of the platform have created technological problems.

Reliance on the CBP One app is also problematic due to the limited number of appointments available at certain ports of entry. Once appointments are full at certain locations, asylum seekers must request an appointment at another port of entry. But scheduling an appointment closest to the current location for an asylum seeker is vital to ensure safety. Movement along the Mexican border, especially from Matamoros to Tijuana, is notoriously difficult and unsafe. Migrants often

¹ Letter from Massachusetts Senator Ed Markey to Department of Homeland Security (Feb. 21, 2023), *available at* <https://www.markey.senate.gov/news/press-releases/senator-markey-calls-on-dhs-to-ditch-mobile-app-riddled-with-glitches-privacy-problems-for-asylum-seekers>.

² See Raul Pinto, *DHS Fails to Address Concerns about CBP One as the Agency Expands the App's Use*, Immigration Impact (Jan. 13, 2023), *available at* <https://immigrationimpact.com/2023/01/13/concerns-cbp-one-app-dhs-expands/>; Melissa del Bosque, *Facial recognition bias frustrates Black asylum applicants to US, advocates say*, The Guardian (Feb. 8, 2023), *available at* <https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias>; Kate Morrissey, *Asylum seekers in Tijuana are scrambling through mobile app error messages for few appointments into the U.S.*, San Diego Union-Tribune (Jan. 22, 2023), *available at* <https://www.sandiegouniontribune.com/news/immigration/story/2023-01-22/cbp-one-app-asylum-tijuana>.

³ See American Immigration Council, *available at* <https://www.americanimmigrationcouncil.org/FOIA/government-documents-reveal-information-about-development-cbp-one-app>.

describe the area in close proximity to the U.S. border, as "el infiernito" — little hell — a point at which migrants are often vulnerable to kidnapping, extortion, mutilation, and rape.⁴ This places asylum-seekers at significant risk.⁵ The Proposed Rule's reliance on the CBP One app, coupled with the limited availability of appointments, will force individuals and families to undertake dangerous travel along the border and will exacerbate inequitable access.

Finally, and perhaps most concerning, are the discriminatory effects of the CBP One app. Specifically, the CBP One app creates a profound disparate impact on Black and darker skinned people, because it denies access to appointments at the port of entry to apply for asylum. The CBP One app is not registering the faces of those with darker skin tones, leading to an error message and an additional barrier for asylum-seekers. The flaw in the CBP One app's facial recognition technology furthers racial bias against Black and darker-skinned individuals.

Awareness of the discriminatory effects of smartphone applications is not new. As far back as 2015, President Obama assembled a workgroup to review discrimination issues inherent in over-reliance on technology like smartphone applications. The interim report from the workgroup entitled: *Big Data: Seizing Opportunities, Preserving Values Report* called for the federal government to take affirmative, data-driven steps to identify practices and outcomes that have a discriminatory impact on protected classes.⁶ The discrimination experienced by darker skinned people using the CPB One app should have been identified before its use, but certainly should not be enshrined in the Proposed Rule. The flawed app should not be used for something as significant as securing immigration protection and relief.

In sum, the Proposed Rule's dependence on the CBP One app for the asylum process is deeply problematic and discriminatory. The technical issues with the app, the limited access to reliable internet and smartphones, the scarcity of appointments, and the discriminatory impact on darker skinned people must all be addressed prior to adoption and enforcement of the Proposed Rule.

III. The Proposed Rule Violates Established Immigration Law.

Based on the Proposed Rule, a migrant will be eligible for asylum if they have reached the SW border and can show that they have applied for and were denied asylum in any transit country, also known as the safe third country provision.⁷ This is an exception to the asylum ineligibility presumption.

The ineligibility presumption does not apply to asylum-seekers who applied and were subsequently denied asylum in any transit country. This section of the Proposed Rule is similar to

⁴ Lawyers For Civil Rights, Alianza Americas, Centro Presente & GreenRoots, *Fleeing Not Migrating: Crisis in Central America*,” (Oct. 2022) at 12-13, available at <http://lawyersforcivilrights.org/wp-content/uploads/2022/10/Final-Delegation-Report-for-Public-Release.pdf>.

⁵ Morrissey, *supra* note 2.

⁶ White House, *Big Data: Seizing Opportunities, Preserving Values* (Feb. 2015), available at https://obamawhitehouse.archives.gov/sites/default/files/docs/20150204_Big_Data_Seizing_Opportunities_Preserving_Values_Memo.pdf.

⁷ 8 U.S.C. §1158(a)(2)(A).

previous transit bans that have been successfully challenged in federal court.⁸ For example, in *East Bay Sanctuary Covenant v. Garland*,⁹ the U.S. Court of Appeals for the Ninth Circuit addressed the safe third country provision of the Immigration and Nationality Act (“INA”)¹⁰ and its application to an interim final rule on asylum eligibility published in 2019.¹¹ There are three requirements¹² that must be met before a country is considered a safe third country barring a person from seeking asylum: (1) there must be an existing agreement between the U.S. and the country the migrant would be removed to; (2) the country subject to the agreement must have a “full and fair” asylum procedure; and (3) migrants must be safe in the transit country from the threat of life or freedom based on race, religion, nationality, membership in a particular social group, or political opinion.¹³

For the same reasons outlined in *East Bay*, the Proposed Rule would violate the INA. None of the main countries asylum-seekers travel through to arrive at the SW border are safe third countries. The regional efforts to improve the immigration systems of Mexico, Guatemala, Belize, Costa Rica, Colombia, and Ecuador¹⁴ are not enough to render any of these countries a suitable or viable option under the INA’s safe third country provision.

None of the countries has a full and fair asylum process as required by the safe third country provision. For example:

- Nearly all of the transit countries, including Mexico, have severe asylum restrictions such as 30-day limitations on requesting asylum that begins upon entry into the country.
- Even for asylum seekers who persevere, extremely long delays in the application process are common.
- Some countries also subject asylum-seekers to long periods of detention and confinement.
- A recent U.S. Department of State report found that Belize has not granted any of its pending 4,163 applications since 2018.¹⁵
- Guatemala, for example, has extremely limited capacity to assess asylum claims and grant protections.¹⁶ Many countries also fail altogether to provide asylum information to

⁸ See, e.g., *East Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2020) (amended opinion); *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021) (amended opinion).

⁹ *Garland*, 994 F.3d 962.

¹⁰ 8 U.S.C. § 1158(a)(2)(A).

¹¹ Asylum Eligibility and Procedural Modifications, 84 FR 33829 (published and effective July 16, 2019) (to be codified at 8 CFR 208, 8 CFR 1003, 8 CFR 1208), available at <https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>.

¹² *Garland*, 994 F.3d at 977; see also 8 U.S.C. § 1158(a)(2)(A) (discussing safe third country exception).

¹³ *Garland*, 994 F.3d at 971, 977.

¹⁴ Circumvention of Lawful Pathways, 88 FR 11704 (proposed February 23, 2023) (to be codified at 8 CFR 208 and 8 CFR 1208), pp. 51-57, available at <https://www.federalregister.gov/documents/2023/02/23/2023-03718/circumvention-of-lawful-pathways>.

¹⁵ U.S. Department of State, Belize 2020 Human Rights Report (March 2021), available at <https://www.state.gov/wp-content/uploads/2021/03/BELIZE-2020-HUMAN-RIGHTS-REPORT.pdf>.

¹⁶ Lawyers For Civil Rights, Centro Presente & Alianza Americas, *Fleeing, Not Migrating: Toward A Solution To The Human Rights Crisis Affecting Migrants and Asylum Seekers* (2019), available

migrants. They also fail to provide asylum assistance at points of entry and airports.¹⁷ Guatemalan officials, for example, intentionally withhold information from asylum seekers.¹⁸

- Some countries, such as Colombia, are struggling with millions of internally displaced persons.¹⁹ With their own ongoing humanitarian crisis, ensuring a fair asylum process is not a priority. Resources are strained with efforts centered on assisting displaced families and children.

Additionally, none of the countries can provide safety from the threat of life or freedom based on race, religion, nationality, membership in a particular social group, or political opinion. For example:

- Human rights violations are alarmingly prevalent in transit countries. For example, in 2020, the United Nations and the Inter-American Human Rights system reported human rights violations, widespread discrimination and violent torture against asylum seekers in Mexico.²⁰
- Women and minors are targeted for sexual violence at the border.²¹
- In Honduras, a woman is killed every 16 hours. In El Salvador, a woman is killed every 19 hours.²²
- Human trafficking is also a major concern for asylum seekers, particularly for women and girls in countries such as Ecuador.²³
- Violence against historically marginalized and stigmatized groups — such as asylum seekers who identify as LGBTQI+ — is well-known and documented. These particularly vulnerable populations are especially at risk for violence, discrimination and harassment without police or government protection across much of Central America.²⁴

at <http://lawyersforcivilrights.org/wp-content/uploads/2019/09/Fleeing-Not-Migrating-Toward-A-Solution-To-The-Human-Rights-Crisis-Affecting-Migrants-and-Asylum-Seekers.pdf>.

¹⁷ Washington Office on Latin America and Women in Migration, *Key Issues on Access to Asylum in Mexico, Protections for Migrant Children and U.S. Cooperation* (Mar. 23, 2021), available at <https://www.wola.org/analysis/key-points-migration-march-2021/>.

¹⁸ *Id.*

¹⁹ United States Conference of Archbishops, *Colombian Refugees: No Solutions in Sight*, available at <https://www.usccb.org/issues-and-action/human-life-and-dignity/migrants-refugees-and-travelers/columbianrefugees> (last visited March 14, 2023).

²⁰ American University-Washington College of Law, *Asylum in Mesoamerica: Accessing International Protection in Mexico and Guatemala* (Aug. 8, 2022) at 35, available at <https://www.wcl.american.edu/academics/experientialedu/clinical/news/ihrhc-and-cejil-publish-report-asylum-in-mesoamerica/>.

²¹ Lawyers for Civil Rights, *Deprived and Denied: Refugees Facing Abuses At The Border*, (Nov. 2021) at 16, available at <http://lawyersforcivilrights.org/wp-content/uploads/2021/11/LCR-Border-Report-FINAL.pdf>.

²² Centro Presente, Alianza Americas & Lawyers' Committee for Civil Rights and Economic Justice, *Tantamount to a Death Sentence: Deported TPS Recipients Will Experience Extreme Violence and Poverty in Honduras and El Salvador*, (July 2018) at 7, available at <http://lawyersforcivilrights.org/wp-content/uploads/2018/08/Updated-TPS-Delegation-Report-July-2018.pdf>.

²³ American University, *supra* note 19.

²⁴ *Id.*

Overall, the transit countries specified in the Proposed Rule are not viable options for asylum seekers under the requirements of the INA's safe third country provision. Hinging access to asylum in the U.S. on previous applications in these transit countries is irresponsible and detrimental. The Proposed Rule should be amended to remove this requirement for asylum seekers arriving at the SW border.

IV. Conclusion

Many individuals and families are fleeing their home countries due to internal displacement, human trafficking, extreme poverty, lack of economic opportunity, the impending climate crisis, and violence. This humanitarian crisis requires collaborative, innovative approaches to the asylum system. The Proposed Rule, however, does not prioritize the principle of asylum—protection of vulnerable populations from persecution based on characteristics and circumstances. Asylum is a human right recognized by international and domestic law, that must continue to be honored.

For all the foregoing reasons, Centro Presente and Lawyers for Civil Rights strongly oppose the Proposed Rule and urges that it not be adopted.

Respectfully submitted,

Tasheena Davis
Oren Sellstrom
Ivan Espinoza-Madrigal
Lawyers for Civil Rights
61 Batterymarch Street, 5th Floor
Boston, MA 02110

Patricia Montes
Centro Presente
12 Bennington Street, Suite 202
Boston, MA 02128