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Submitted via: <https://www.regulations.gov>.

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Re: 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;

I am writing on behalf of Justice in Motion, in response to the Department of Homeland Security's (DHS) and the Executive Office of Immigration Review's (EOIR) Notice of Proposed Rulemaking (proposed rule) published in the Federal register on February 23, 2023, to express our strong opposition to the proposed rule to circumvent established asylum law, and in many cases, impede legal pathways for the most vulnerable asylum seekers at the U.S.-Mexico border.

With over 45 Defender organizations located throughout Nicaragua, El Salvador, Honduras, Guatemala and Mexico, Justice in Motion has provided transnational legal support for almost two decades to advocates in the United States and Canada who work tirelessly to deliver protection and justice to their clients. Humanitarian immigration cases often depend upon the existence of evidence that supports a client's testimony. Everything, from the asylum seeker's statements to their very identity, is under review for potential credibility concerns. Many asylum seekers flee without time to gather important papers like birth certificates, police reports, or any other documentary evidence that might later support their claims. Many others who are able to reach our border with these documents must then turn them over to CBP or ICE agents, never to see them again. Attempting to obtain copies of these documents from the home country without local support, or even worse, while in detention, can prove futile and many times can spell the end of any hope for protection. Our Defenders, a proven network of attorneys and human rights advocates, with decades of experience among them, are perfectly and uniquely situated to address these as well as many other needs, making the harrowing experience of being in removal proceedings a little less daunting and hopeless.

This proposed rule would make the asylum process practically inaccessible to the most vulnerable, who have already risked their lives and those of their families in a desperate effort to

seek the protection that the United States once promised. The rule runs counter to well-established asylum law without heed to the dangers it will create and perpetuate for the thousands of children, families, and individuals currently stuck in the ever-changing legal and procedural landscape that has come to define U.S. border policy.

For the reasons detailed in the comments that follow, DHS and EOIR must retract the proposed rule and instead create policies that reflect our values to protect justice, dignity, and life and our commitment to protect human rights at home and abroad.

Please do not hesitate to contact Justice in Motion for further information.

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DETAILED COMMENTS in opposition to Proposed Rule: Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023

I. Overview of Proposed Rule

In spite of DHS's framing of this proposed rule as an effort to streamline and make the asylum process more efficient, it is in effect an asylum ban that purports to deny legal entry to protection seekers based on their manner of entry, a fact that is otherwise irrelevant to eligibility under current U.S. and international asylum law.

The rule creates a new category of ineligibility for people who do not, or cannot, apply for asylum in a country through which they've had to travel on their way to the U.S. border. Should this rule be implemented, a refugee would not only have to apply for asylum in a country where they likely have little ties or resources, they must also wait to receive a formal denial; a process which can take months or even years. Furthermore, anyone who enters or attempts to enter the U.S. at the southern border without first scheduling an appointment to do so will be barred from obtaining asylum, with very few, extremely limited exceptions. Far from creating a more manageable system of entry, the ban would keep the most vulnerable human beings in a state of jeopardy and precarity.

Furthermore, the proposed rule would require asylum seekers to use the extremely flawed CBP One Mobile app to request appointments at ports of entry without regard for the multitudes who lack the adequate resources to reliably access new tech tools or even wi-fi; not to mention those with special abilities, limited capacities, or language barriers that make it impossible to effectively navigate the app.

The rule is in effect discriminatory, unlawful, and nearly indistinguishable from the inhumane policies of the Trump administration that the Biden administration had previously so openly criticized.

II. The Asylum Ban Violates U.S. and International Law Obligations and Forces Asylum Seekers Into Increasingly Dangerous Conditions

The proposed rule runs contrary to existing U.S. law governing asylum access and *non-refoulement*, the related prohibition on the return of refugees to persecution and torture. The United Nations High Commissioner for Refugees (UNHCR) previously warned, with respect to

the Trump administration's entry and transit bans, that such asylum bans are not consistent with fundamental protections of refugee law, including the right to seek asylum, the principle of *non-refoulement*, and the prohibition against penalties for irregular entry.¹

A. Proposed Asylum Ban Violates U.S. and International Obligations

The modern American asylum system can trace its roots to World War II and the subsequent displacement of millions of Jewish and other European refugees. Those first asylum and refugee policies allowed over 400,000 people to seek refuge on our shores. In the 1960s we became signatories to the newly established United Nations refugee protocol, which we then codified into U.S. law with the passing of the 1980 Refugee Act (U.S. law. 8 U.S.C. 1158). The Act also created our first formal system for granting asylum.

The United States is obligated under numerous international agreements to uphold the rights to seek asylum and not be returned to persecution or torture (*non-refoulement*):

1948 Universal Declaration of Human Rights

*1951 Refugee Convention and 1967 Optional Protocol*²

*1966 International Covenant on Civil and Political Rights*³

¹ UN High Commissioner for Refugees (UNHCR), *Brief of the Office of the United Nations High Commissioner for Refugees before the United States Court of Appeals for the Ninth Circuit in the case East Bay Sanctuary Covenant, et al., v. William P. Barr ("East Bay Sanctuary (II)")*, 15 October 2019, Case No. 3:19-CV-04073. Retrieved March 21, 2023, from <https://www.refworld.org/docid/5dccc03354.html>. See also: UN High Commissioner for Refugees (UNHCR), *Brief of the Office of the United Nations High Commissioner for Refugees before the United States Court of Appeals for the District of Columbia Circuit in the case O.A., et al., Plaintiffs-Appellees, v. DONALD J. TRUMP, AS PRESIDENT OF THE UNITED STATES, et al., Defendants-Appellants*, No. 19-5272. Retrieved March 21, 2023, from <https://www.refworld.org/topic.50ffbce53a.50ffbce54f.5f3f90ea4.0..AMICUS..html>.

² International law provisions for the protections of refugees apply to both refugees and asylum seekers as defined under U.S. domestic law.

³ The International Covenant on Civil and Political Rights (ICCPR) does not explicitly prohibit *refoulement*, but requires States to uphold the right to life (art. 6(1)) and right to not be subjected to torture or inhumane treatment (art. 7), both of which are the necessary protections of *non-refoulement*. Furthermore, under ICCPR article 2(1), each party State is to “respect and to ensure to all individuals within its territory and subject to its jurisdiction”. ICCPR general comment no. 15 explains that by writing “all individuals,” the Covenant is to apply to citizens and non-citizens alike “irrespective of his or her nationality or statelessness” (Office of the High Commissioner on Human Rights 1986, ¶ 1). General comment 31 further clarifies the State’s jurisdiction in relation to its implementation of ICCPR over citizens and non-citizens alike, stating that article 2(1) applies to “anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party” (Human Rights Committee 2004, ¶ 10). The Human Rights Committee also defined the State’s jurisdiction in 2(1) to include “those within the power or effective control of the forces of a State Party acting outside its territory...such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation” (Human Rights Committee 2004, ¶ 10). Footnote #3 citations: Office of the High Commissioner on Human Rights. (1986.) *ICCPR General Comment No. 15: The position of aliens under the Covenant*. Retrieved March 22, 2023, from https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11. Human Rights Committee. (2004.) *ICCPR General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*. Retrieved March 22, 2023, from https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11.

1984 Convention against Torture⁴
1993 Vienna Declaration and Programme of Action
2016 San Jose Action Statement
2016 New York Declaration for Refugees and Migrants
2018 Global Compact on Refugees
2022 Los Angeles Declaration

The core of these documents for refugee protection obligations is the 1951 Refugee Convention and its 1967 Optional Protocol. The United States played a lead role in drafting the Refugee Convention in the wake of World War II. By later acceding to the Refugee Protocol, the United States committed to abide by the Convention's legal requirements, including its 1) limited exclusion clauses, 2) non-discriminatory access to asylum, 3) prohibition against imposing improper penalties on people seeking refugee protection based on manner of entry, and 4) prohibition against returning refugees to persecution (*non-refoulement*).

1) Limited exclusion clauses -

The Refugee Convention allows State parties to expel a refugee or asylum seeker under very limited circumstances: individuals already receiving U.N. assistance (art. 1(D)), individuals recognized as legally entitled to rights in their country of residence (art. 1(E)), and individuals to whom the Refugee Convention will not apply due to having committed a crime against peace, humanity or a war crime (art. 1(F)(a)), committed a serious non-political crime outside the country of refuge prior to being admitted as a refugee (art. 1(F)(b)), or been guilty of acts contrary to the purposes and principles of the United Nations (art. 1(F)(c)).

Every return of refugees or asylum seekers by the U.S. without meeting these narrow exception clauses are in violation of the U.S.'s commitment to the Refugee Convention.

2) Non-discriminatory access to asylum -

There is abundant evidence demonstrating that the CBP One Mobile Application discriminates against particularly vulnerable asylum seekers, as further demonstrated in section IV. The requirement that asylum seekers use CBP One, which is inherently discriminatory in its current state, is in direct violation of U.S. obligations to end discrimination.

The U.S. has committed to end discrimination in multiple international instruments, namely the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and

⁴ The Convention against Torture (CAT) significantly expands *non-refoulement* protections from a threat to life or freedom due to race, religion, nationality, membership of a particular social group or political opinion (Refugee Convention art. 33(1)) to "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted upon a person" for a confession, punishment for an act, intimidation or coercion, "or for any reason based on discrimination of any kind", when inflicted by a public official or another person in an official capacity (CAT art. 1(1)).

the Refugee Convention and its Optional Protocol. To require asylum seekers to use CBP One goes against the U.S.'s commitment to anti-discrimination against "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (ICERD art. 1(1)). Furthermore, the U.S. has committed that its obligation to end discrimination will "not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens" (ICERD art. 1(2)).

Furthermore, the U.S. has committed to non-discrimination in its provision of asylum and non-return to persecution or torture under refugee law. The Refugee Convention requires that States "apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin" (art. 3). The U.S. has also committed to non-discriminatory access to asylum in multiple declarations: Vienna Declaration, New York Declaration, San Jose Action Statement, and only seven months ago in the Los Angeles Declaration.

3) Prohibition against imposing improper penalties on people seeking refugee protection based on manner of entry -

The drafters of the Refugee Convention and its Optional Protocol understood that many vulnerable asylum seekers fleeing persecution and torture would not have the money, papers, or time to apply for a visa to travel to an asylum-providing State. So States included article 31(1), a provision that refugees and asylum seekers cannot be disqualified from seeking asylum due to illegal entry: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened...provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence" (Refugee Convention art. 31(1)).

By denying asylum where an individual has not used certain limited migration pathways, the proposed rule penalizes asylum seekers and attempts to unlawfully use the existence of lawful pathways as a justification to deny access to asylum at the border. The United Nations High Commissioner for Refugees (UNHCR), International Organization for Migration (IOM), and United Nations International Children's Fund (UNICEF) recently warned that the provision of safe pathways "cannot come at the expense of the fundamental human right to seek asylum".⁵ The Wall Street Journal reported in March 2020 that record numbers of migrants are dying at the

⁵ United Nations High Commissioner for Refugees. (2022, October 14). *UNHCR, IOM and UNICEF welcome new pathways for regular entry to the US, reiterate concern over restrictions on access to asylum* [press release]. Retrieved March 21, 2023, from <https://www.unhcr.org/en-us/news/press/2022/10/63497be44/unhcr-iom-and-unicef-welcome-new-pathways-for-regular-entry-to-the-us-reiterate.html>.

U.S. southern border, navigating treacherous waters and terrain since all other pathways have been closed to them.⁶

4) Prohibition against returning refugees to persecution or torture -

Non-refoulement, the obligation to not return a migrant or refugee to where they will face persecution or torture, has been called the “corner-stone of the international protection of refugees” in the Americas,⁷ and is protected in international humanitarian law, refugee law, and human rights law. *Non-refoulement* is under States’ *ratione loci* jurisdiction, meaning that States must protect refugees from return if they were encountered on U.S. territory or anywhere else they came under the jurisdictional authority of the U.S., for example met by U.S. officials on the Mexican side of the southern U.S. border or by Mexican officials who were acting under the orders/in cooperation with the U.S.⁸ Requiring asylum seekers to start their applications via the CBP One Mobile app instead of at the U.S. border does not circumvent the U.S.’s obligation to protect them from *non-refoulement*, because the obligation applies to any asylum seekers under the jurisdictional authority of the U.S. - not only U.S. territory.

The prohibition against return to persecution or torture is so significant within international law that it is considered a peremptory, or *jus cogens*, norm. This means that returning an asylum seeker to danger can never under any circumstances be committed and is deemed as grave a crime as slavery, genocide and human trafficking. The International Law Commission in May 2022 released draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*).⁹ Under the Articles for the Responsibility of States for Internationally Wrongful Acts, peremptory norms, like *non-refoulement*, “give rise to obligations owed to the international community as a whole” and therefore “Any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm...in accordance

⁶ Perez, S. and Caldwell, A. (2023, March 17). ‘It’s Like a Graveyard’: Record Numbers of Migrants Are Dying at the U.S. Border. *The Wall Street Journal*. Retrieved March 21, 2023, from <https://www.wsj.com/articles/illegal-immigration-mexico-us-border-deaths-c35cf892>.

⁷ UN High Commissioner for Refugees (UNHCR). (1984). *The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America*, PPLA/2013/03. Retrieved March 22, 2023, from <https://www.refworld.org/docid/51c801934.html>.

⁸ The United Nations High Commissioner for Refugees (UNHCR) explains *non-refoulement* “applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State...[anywhere that refugees] come within the effective control and authority of that State” (UNHCR 2007, ¶ 24, 43). It does not matter if the refugee “is on the State’s national territory, or within a territory which is de jure under the sovereign control of the State, but rather whether or not he or she is subject to that State’s effective authority and control” (UNHCR 2007, ¶ 43). Footnote #7 citation: UNHCR. (2007). *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol**. Retrieved March 22, 2023, from <https://www.unhcr.org/4d9486929.pdf>.

⁹ United Nations International Law Commission. (2022). *Peremptory norms of general international law (jus cogens) A/CN.4/L.967*. Retrieved March 21, 2023, from <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G22/339/00/PDF/G2233900.pdf?OpenElement>.

with the rules on the responsibility of States for internationally wrongful acts”.¹⁰ As obligations of the international community, “States shall cooperate to bring to an end...any serious breach by a State of an obligation arising under a peremptory norm”.¹¹ Because the proposed policy will *de facto* result in the refoulement of asylum seekers, the U.S. government will commit an internationally wrongful act and therefore be subject to rebuke from the international community as a whole.

B. Proposed Asylum Ban Abandons U.S. Commitment to International Community

The U.S. has committed to meet refugee protection needs with its international and regional partner States through cooperative responsibility-sharing. The current proposed rule would almost completely abandon its commitment to work with other States to meet growing refugee and asylum seeker protection needs, instead placing the burden on transit States. This approach to responsibility-abandon, rather than responsibility-share, protection needs goes against the spirit of international and regional commitments to cooperate to protect refugee and asylum seekers.

As a Member State of the United Nations, the U.S. pledged in the U.N. Charter to “achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights” (preamble), through “joint and separate action in co-operation” (arts. 55-56). The U.S. agreed to continental cooperation “for the essential rights of man” in the Organization of American States Charter (preamble). The U.S. declared its commitment to responsibility-share refugee and asylum protection needs in the Vienna Declaration and Program of Action, Mexico Declaration, San Jose Action Statement, New York Declaration and Refugee Response Framework, Refugee Compact, and Los Angeles Declaration. Last year, only seven months before the Circumvention of Lawful Pathways was proposed, the U.S. committed in the Los Angeles Declaration to cooperation with fellow American States, stating that in: “a spirit of collaboration, solidarity, and shared responsibility among States” (¶ 6), signatories “reiterate our will to strengthen national, regional, and hemispheric efforts...and to strengthen frameworks for international protection and cooperation” (¶ 1).¹²

The outsourcing of asylum protections to “safe third countries” abandons the U.S.’s duty to cooperate in the responsibility-sharing with other States. The Refugee Act and Refugee

¹⁰ United Nations International Law Commission. (2022). *Peremptory norms of general international law (jus cogens)* A/CN.4/L.967. Conclusion 17(1)-(2). Retrieved March 21, 2023, from <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G22/339/00/PDF/G2233900.pdf?OpenElement>.

¹¹ United Nations International Law Commission. (2022). *Peremptory norms of general international law (jus cogens)* A/CN.4/L.967. Conclusion 19(1). Retrieved March 21, 2023, from <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G22/339/00/PDF/G2233900.pdf?OpenElement>.

¹² United States White House. (2022). *Los Angeles Declaration on Migration and Protection*. Retrieved March 22, 2023, from <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/>.

Convention clearly dictate that people may apply for asylum regardless of how they made their way to or into the United States. The only restriction placed on individuals who arrive from a country other than the one they are fleeing, is that they not have “firmly resettled” in that or any other third country. While there is an exception that requires refugees to seek permanent legal status in certain countries through which they have transited, this only applies to countries with whom the U.S. has a formal “safe third country” agreement, purportedly ensuring that said country is safe and will provide a fair asylum process. At present the U.S. only has one such agreement in place: with Canada.

There is no indication that this administration has performed an analysis of the asylum processes to which migrants at the southern border would be subjected if and when they are required to apply for protection elsewhere. The asylum process in Mexico, for example, is fraught with inequities that make it difficult for the most vulnerable victims of persecution and torture to succeed.¹³ For example, a person seeking to be recognized as a refugee in Mexico must apply within 30 days of entering the country, an unduly burdensome requirement for people who lack even the most basic necessities for survival, i.e. food or shelter.¹⁴ The Mexican asylum system is overwhelmed with its own historically high application rates and the process from application to a grant or denial is taking upwards of a year to complete with few, if any, protections or resources in place for people awaiting a response.¹⁵ COMAR, the Mexican Refugee Agency, received only \$17 in funding per asylum applicant in 2021, versus \$1,800 in 2011.¹⁶ Further compounding the dangers that migrants already face in Mexico from criminal cartels and human

¹³ Asylum Access Mexico. (2020). *Asylum in Mexico by the Numbers*. Retrieved March 22, 2023, from <https://asylumaccess.org/wp-content/uploads/2020/01/Asylum-in-Mexico-by-the-Numbers.pdf>. See also: Asylum Access Mexico. (2019). *Mexican Asylum System for U.S. Immigration Lawyers FAQ*. Retrieved March 22, 2023, from <https://asylumaccess.org/wp-content/uploads/2019/11/Mexican-Asylum-FAQ-for-US-Immigration-Lawyers.pdf>. See also: The Washington Office on Latin America (WOLA). (2021). *Key Issues on Access to Asylum in Mexico, Protections for Migrant Children, and U.S. Cooperation*. Retrieved March 21, 2023, from <https://www.wola.org/analysis/key-points-migration-march-2021/>. See also: Kosten, D. (2019). *Mexico's Asylum System Is Inadequate*. National Immigration Forum. Retrieved March 21, 2023, from <https://immigrationforum.org/article/mexicos-asylum-system-is-inadequate/>.

¹⁴ United Nations High Commissioner for Refugees. (n.d.) *¿Cómo solicitar ser refugiado en México?* Retrieved March 21, 2023, from <https://help.unhcr.org/mexico/como-solicitar-la-condicion-de-refugiado-en-mexico/#:~:text=Ac%C3%A9rcate%20a%20la%20Comisi%C3%B3n%20Mexicana,cuales%20no%20fue%20posible%20presentarte>. See also: Gobierno de México. (n.d.) *Requisitos para solicitar Refugio en México*. Retrieved March 21, 2023, from <https://www.gob.mx/comar/articulos/requisitos-para-solicitar-refugio-en-mexico?idiom=es>.

¹⁵ Asylum Access Mexico. (2020). *Asylum in Mexico by the Numbers*. Retrieved March 21, 2023, from <https://asylumaccess.org/wp-content/uploads/2020/01/Asylum-in-Mexico-by-the-Numbers.pdf>.

¹⁶ Human Rights Watch. (2022). *Mexico: Asylum Seekers Face Abuses at Southern Border*. Retrieved March 21, 2023, from <https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border>.

traffickers,¹⁷ the head of the Instituto Nacional de Migración recently announced their intent to begin taking children away from immigrants transiting through Mexico.¹⁸

El Salvador,¹⁹ Honduras,²⁰ and Guatemala,²¹ for their part, do not have functional asylum systems that can protect large numbers of refugees. Many transiting through these countries face extreme dangers including gender-based violence, anti-LGBTQI+ attacks, race-based violence, and other persecution.²² Due to the erosion of rule of law in Guatemala²³ and El Salvador,²⁴ individuals from these countries are just as likely to seek asylum themselves.

III. The Asylum Ban Creates Unsafe Conditions at the Border and Permanently Blocks Access to Meaningful Protection

Since March 2020, when the United States - in response to the COVID-19 pandemic - essentially closed off the southern border, violence against asylum seekers and migrants stranded in Mexico

¹⁷ Meza, A. (2021, October 1). These are the cartels that capture, extort and torture migrants in 8 Mexican states. *Noticias Telemundo Investiga*. Retrieved March 21, 2023, from <https://www.nbcnews.com/news/latino/are-cartels-capture-extort-torture-migrants-8-mexican-states-rcna2454>. See also: Castaneda Perez, J.I. (2022, December 16). ‘Boom of opportunities’: How smugglers, Mexican cartels profit from US border restrictions. *AZ Central*. Retrieved March 21, 2023, from <https://www.azcentral.com/in-depth/news/politics/border-issues/2022/12/16/how-cartels-profit-migrants-desperation-along-u-s-mexico-border/10704315002/>.

¹⁸ Instituto Mexicano de la radio (2023, March 14). INM le quitará sus hijos a migrantes que intenten cruzar la frontera con EU. Retrieved March 21, 2023, from <https://noticias.imer.mx/blog/inm-le-quitará-sus-hijos-a-migrantes-que-intenten-cruzar-la-frontera-con-eu/>.

¹⁹ United States Department of State. (2021). *2021 Country Reports on Human Rights Practices: El Salvador*. Retrieved March 21, 2023, from <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/el-salvador/>.

²⁰ United States Department of State. (2021). *2021 Country Reports on Human Rights Practices: Honduras*. Retrieved March 21, 2023, from <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/honduras/>.

²¹ United States Department of State. (2021). *2021 Country Reports on Human Rights Practices: Guatemala*. Retrieved March 21, 2023, from <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/guatemala/>.

²² Human Rights Watch. (2020). *Deportation with a Layover: Failure of Protection under the US-Guatemala Asylum Cooperative Agreement*. Retrieved March 21, 2023, from <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative>.

²³ Human Rights Watch. (2021). *Guatemala: Events of 2021*. Retrieved March 22, 2023, from <https://www.hrw.org/world-report/2022/country-chapters/guatemala>. See also: World Justice Project Rule of Law Index. (2022). *Guatemala*. World Justice Project. Retrieved March 22, 2023, from <https://worldjusticeproject.org/rule-of-law-index/country/2022/Guatemala/>.

²⁴ Human Rights Watch. (2021). *El Salvador: Events of 2021*. Retrieved March 22, 2023, from <https://www.hrw.org/world-report/2022/country-chapters/el-salvador>. See also: World Justice Project Rule of Law Index. (2022). *El Salvador*. World Justice Project. Retrieved March 22, 2023, from <https://worldjusticeproject.org/rule-of-law-index/country/2022/El%20Salvador/>.

has grown following the Migrant Protection Protocols program and metering.²⁵ While many incidents go unreported, Human Rights Watch reported at least 13,480 reports of murder, torture, kidnapping, rape and other violent attacks in the first year and a half of Title 42's implementation.²⁶ The State Department dissuades American citizens from traveling to Mexican border states such as Baja California, Sonora, Chihuahua, and Coahuila due to increased risk of violent crime and kidnappings, yet sends migrants and asylum seekers into those same threatening situations.²⁷

Women are at particular risk of violence when stuck in limbo at the U.S. southern border.²⁸ A 2015 study by the U.N. determined that over 60% of asylum-seeking women from Honduras, Guatemala, El Salvador, and Mexico were fleeing domestic violence and thus already suffering from unresolved trauma when presenting at the border to seek protection.²⁹ Many women are followed all the way to the border by their aggressors³⁰ and over 30% report that they were assaulted during their migration journey through México.³¹ Life as a migrant in a Mexican border city, without the certainty of shelter, exposes women to a greater risk of sexual and other gender-based violence.

Forcing vulnerable people to seek asylum in a country that has proven itself unprepared to protect them from violence is ineffective and contrary to the purpose of asylum. Furthermore,

²⁵ Mukpo, A. (n.d.) *Asylum Seekers Stranded in Mexico Face Homelessness, Kidnapping, and Sexual Violence*. American Civil Liberties Union. Retrieved March 23, 2023, from <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/asylum-seekers-stranded-mexico-face>.

See also: American Immigration Council. (2022). A Guide to Title 42 Expulsions at the Border. Retrieved March 23, 2022, from <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>. See also:

²⁶ Human Rights First. (2022). *Title 42: "Human Rights Stain, Public Health Farce"*. Retrieved March 21, 2023, from <https://humanrightsfirst.org/library/title-42-human-rights-stain-public-health-farce/>. See also: Human Rights Watch. (2022). *Mexico: Asylum Seekers Face Abuses at Southern Border*. Retrieved March 21, 2023, from <https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border>. See also:

Montoya-Galvez, C. (2021, August 24). Migrants stuck in Mexico faced 6,356 violent attacks since January, report finds. *CBS News*. Retrieved March 23, 2023, from <https://www.cbsnews.com/news/immigration-migrants-mexico-violent-attacks-report/>.

²⁷ United States Department of State. (2022). *Mexico Travel Advisory*. Retrieved March 21, 2023, from <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>.

²⁸ Women's Refugee Commission. Instituto para las Mujeres en la Migración A.C. (2021). *Stuck in Uncertainty and Exposed to Violence: The Impact of US and Mexican Migration Policies on Women Seeking Protection in 2021*. Retrieved March 23, 2023, from <https://www.womensrefugeecommission.org/wp-content/uploads/2022/02/Stuck-in-Uncertainty-2.pdf>.

²⁹ United Nations High Commissioner for Refugees. (2015). *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*. Retrieved March 21, 2023, from <https://www.unhcr.org/5630f24c6.html>.

³⁰ Instituto para las Mujeres en la Migración A.C. (2021). *Análisis de la violencia de género: mujeres solicitantes de protección internacional en México*. Retrieved March 21, 2023, from <https://imumi.org/wp-content/uploads/2021/12/Analisis-de-la-violencia-de-genero.pdf>.

³¹ Women's Refugee Commission. Instituto para las Mujeres en la Migración A.C. (2021). *Atrapadas en la incertidumbre y expuestas a la violencia. El impacto de las políticas migratorias de Estados Unidos y Mexico en las mujeres solicitantes de protección internacional en 2021*. Retrieved March 21, 2023, from <https://www.womensrefugeecommission.org/wp-content/uploads/2022/02/Atrapadas-en-la-incertidumbre-1.pdf>.

there have been no assurances from this administration that a denial of asylum in another country will not be used against an asylum applicant here in the United States, where our asylum eligibility guidelines are many times more stringent. This creates a hopeless situation where an asylum seeker is forced to seek a denial elsewhere before being allowed to apply - and then having that same denial that ensured their eligibility be used as proof that they also are not eligible for asylum here.

IV. Requiring the Use of CBP One Denies Asylum Access to the Most Vulnerable Migrants

The proposed rule will require asylum seekers at the U.S. southern border to schedule appointments at a port of entry through the CBP One mobile app. Asylum seekers without a previously scheduled appointment will be denied entry, with few exceptions. In the few short weeks since it broadly launched, the app has proven to be exceptionally flawed, particularly for use by communities of color and those with disabilities or language barriers.³²

First of all, CBP One is only available to download directly into a smartphone. No desktop application is currently available. Since most asylum seekers awaiting entry at the border live in abject poverty, the ban would limit access to those who can afford or otherwise access a smartphone and who have a reliable source of internet access. Importantly, because this is an individual process that must be completed on a phone, support from local legal services providers is severely limited with the introduction of CBP One.

Second, the app is only available in English, Spanish, and more recently, Creole, thus effectively excluding asylum seekers from indigenous communities or countries where they speak other languages. Further, all error messages are in English, leaving most asylum seekers stuck and unable to advance without meaningful instructions on how to remedy their mistakes.

Third, the app requires that asylum seekers take live pictures of themselves in order to proceed with requesting an interview slot. However, racial bias in CBP One's facial recognition technology, a widespread problem in artificial intelligence,³³ has proven disproportionately

³² American Immigration Council. (2023). *CBP One: An Overview* [Fact sheet]. Retrieved March 22, 2023, from https://www.americanimmigrationcouncil.org/sites/default/files/research/2022-11-22_cbp_one_fact_sheet_feb.2023_update.pdf.

³³ Anguin, J., Larson, J., Mattu, S., and Kirchner, L. (2016). Machine Bias: There's software used across the country to predict future criminals. And it's biased against blacks. *ProPublica*. Retrieved March 22, 2023, from <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>. See also: Cossins, D. (2018). Discriminating algorithms: 5 times AI showed prejudice. *NewScientist*. Retrieved March 22, 2023, from <https://www.newscientist.com/article/2166207-discriminating-algorithms-5-times-ai-showed-prejudice/>. See also: Resnick, B. (2019). Yes, artificial intelligence can be racist. *Vox*. Retrieved March 22, 2023, from <https://www.vox.com/science-and-health/2019/1/23/18194717/alexandria-ocasio-cortez-ai-bias>. See also: Molnar, P. (2019). New technologies in migration: human rights impacts. *Forced Migration Review*. Retrieved March 22, 2023,

harmful to darker complexion and Black asylum seekers,³⁴ which has prevented many from obtaining an appointment.³⁵

Fourth, there are not enough available appointment slots to meet the amount needed, and those lucky or savvy enough to access and navigate the app are still often unable to schedule appointments.³⁶

Fifth, requiring use of the CBP One app will also continue to separate families. Because CBP One requires that each individual submit a separate application, families must be able to secure appointments for all members or risk that those without one will be denied entry, no matter their age or who they are traveling with.³⁷ This has already forced families to make the impossible choice to send their children across the border alone to protect them from harm in Mexican border regions.³⁸

Finally, the administration has said little about how the personal information and location of applicants - information that they are required to provide - will be used and protected. Recent data leaks at Immigration and Customs Enforcement (ICE) prove that this is a legitimate and imminent concern.³⁹

from <https://www.newscientist.com/article/2166207-discriminating-algorithms-5-times-ai-showed-prejudice/>. See also: Hadavas, C. (2020). How Automation Bias Encourages the Use of Flawed Algorithms. *Slate*. Retrieved March 22, 2023, from <https://slate.com/technology/2020/03/ice-lawsuit-hijacked-algorithm.html>.

³⁴ del Bosque, M. (2023, February 8). Facial recognition bias frustrates Black asylum applicants to US, advocates say. *The Guardian*. Retrieved March 21, 2023, from <https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias>.

³⁵ Toczyłowski, L. [@L_Toczyłowski]. (2023, March 1). *In Tijuana doing a legal clinic and trying to explain to people that the reason they can't take their photo within the CBP One app is because it has trouble recognizing darker complexions. Two @ImmDef lawyers have been working to take one person's photo for 20 minutes* [Tweet]. Twitter. Retrieved March 21, 2023, from https://twitter.com/L_Toczyłowski/status/1631063774210785280.

³⁶ Spagat, E. (2023, January 28). Online system to seek asylum at U.S. border overwhelmed with errors, heavy traffic. *PBS*. Retrieved March 21, 2023, from <https://www.pbs.org/newshour/nation/online-system-to-seek-asylum-at-u-s-border-overwhelmed-with-errors-heavy-traffic>.

See also: Morrissey, K. (2023, January 22). Asylum seekers in Tijuana are scrambling through mobile app error messages for few appointments into the U.S. *The San Diego Union-Tribune*. Retrieved March 22, 2023, from <https://www.sandiegouniontribune.com/news/immigration/story/2023-01-22/cbp-one-app-asylum-tijuana>.

³⁷ Strauss Center for International Security and Law. (2023). *Asylum Processing at the U.S.-Mexico Border: February 2023*. The University of Texas at Austin. Retrieved March 21, 2023, from https://www.strausscenter.org/wp-content/uploads/Feb_2023_Asylum_Processing.pdf.

³⁸ Sanchez, S. (2023, February 23). Parents sending migrant children alone across border into South Texas. *Border Report*. Retrieved 27 March, 2023, from <https://www.borderreport.com/immigration/parents-sending-migrant-children-alone-across-border-into-south-texas/>.

See also: Sanchez, S. (2023, Feb 28). DHS tweaks CBP One app after reports of family separations, agency says. *ABC 6 Wate*. Retrieved 27 March, 2023, from <https://www.wate.com/news/dhs-tweaks-cbp-one-app-after-reports-of-family-separations-agency-says/>.

³⁹ United States Immigration and Customs Enforcement. (2022, November 30). *Statement on improper disclosure of noncitizen personally identifiable information* [Press release]. Retrieved March 21, 2023, from <https://www.ice.gov/news/releases/statement-improper-disclosure-noncitizen-personally-identifiable-information>.

V. This Policy Perpetuates the Inhumane and Illegal Policies of the Last Administration to Circumvent Our Obligations to Asylum Seekers

In the months leading up to the 2020 presidential election, then-candidate Biden campaigned aggressively against the inhumane border policies implemented under Trump and vowed to restore meaningful access to asylum.⁴⁰ That promise seemed at the root of President Biden's Executive Order in February 2021, which promised to "restore and strengthen our own asylum system, which has been badly damaged by policies enacted over the last 4 years that contravened our values and caused needless human suffering".⁴¹ Just a few weeks ago, during an appearance at Fordham University Law School, Alejandro Mayorkas, Secretary of the Department of Homeland Security assured that what this administration inherited is "a system that was dismantled".⁴² There is little evidence, however, to support this claim of dismantlement and in fact, the current rule this administration is proposing is nearly indistinguishable from President Trump's, a ban that was repeatedly struck down by federal courts for being illegal.⁴³

If implemented, this rule will only serve to deny protection to the most vulnerable asylum seekers, including women, children, persons with disabilities, and those with the least resources to meet the onerous and unnecessary eligibility requirements imposed by this newest version of the asylum ban. If the Biden administration truly aims to meet its promise of creating "an immigration policy that reflects our highest values as a nation" it must begin by retracting the proposed asylum ban and instead work on policies that will truly dismantle the disastrous and inhumane systems that have created the current human crisis at our southern border.⁴⁴

⁴⁰ Joe Biden. (n.d.). *The Biden Plan for Securing Our Values as a Nation of Immigrants*. Retrieved March 21, 2023, from <https://joebiden.com/immigration/#>.

⁴¹ The United States White House. (2021, February 2). *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*. Retrieved March 27, 2023, from <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/>.

⁴² University of California, Los Angeles (UCLA) Center for Immigration Law and Policy. (2023, March 9). *Looking Back and Looking Forward: Fifteen Years of Advancing Immigration Representation* [Video]. YouTube. Retrieved March 27, 2023, from <https://www.youtube.com/watch?v=Ns7XCYY7JYk>.

⁴³ O.A., et al., v. Donald Trump, et al. S.M.S.R. et al., v. Donald Trump, et al. 404 F.Supp.3d 109 (2019). Retrieved March 27, 2023, from <https://www.caircoalition.org/sites/default/files/Memo%20Opinion%20Dkt.%2092.pdf>. See also: East Bay Sanctuary Covenant, et al., v. William Barr, et al. 934 F.3d 1026 (2019). Retrieved March 27, 2023, from <https://www.aclu.org/cases/east-bay-v-barr?document=pi-order>. See also: Capital Area Immigrants' Rights Coalition et al., v. Donald Trump et al., I.A. et al., v. William P. Barr et al. 471 F.Supp.3d 25 (2020). Retrieved March 27, 2023, from <https://casetext.com/case/capital-area-immigrants-rights-coal-v-trump>.

⁴⁴ Joe Biden. (n.d.). *The Biden Plan for Securing Our Values as a Nation of Immigrants*. Retrieved March 21, 2023, from <https://joebiden.com/immigration/#>.

VI. Conclusion

Justice in Motion is in strong opposition to the proposed Circumvention of Lawful Pathways policy. For the reasons explained above: 1) the proposed policy is a violation of U.S. and international legal obligations to the right of asylum, non-return to persecution or torture, and non-discrimination; 2) it unnecessarily endangers the safety of asylum seekers at our southern border and permanently blocks access to meaningful protection; 3) required use of the flawed CBP One app is discriminatory and denies access to asylum protections for those most in need; and 4) it perpetuates the inhumane and illegal policies of the last administration to circumvent U.S. obligations to asylum seekers, Justice in Motion urges the Biden administration to not implement the proposed policy.

As an organization that has provided transnational legal support for almost two decades to advocates in the U.S. and Canada, and over 45 Defender organizations in Nicaragua, El Salvador, Honduras, Guatemala and Mexico, Justice in Motion has a firm understanding of the consequences this proposed rule would have upon the men, women and children seeking asylum at our southern border. We urge the Biden administration to set aside this proposed policy, and instead work with Justice in Motion and our fellow legal organizations to develop policy which would create lawful, regulated pathways while upholding U.S. and international law and the dignity and safety of the people seeking asylum.