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Submitted online via the Federal eRulemaking Portal

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Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security

Lauren Alder Reid,
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Re: Docket No. USCIS 2022-0016
A.G. Order No. 5605-2023

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

The Massachusetts Law Reform Institute (MLRI) respectfully submits this comment on behalf of the Immigration Coalition (IMCO) of the Massachusetts Law Reform Institute, which consists of the 14 regional legal aid programs in the Commonwealth of Massachusetts and 140 other immigration service providers, representing thousands of low-income immigrants in the state and the region. A list and brief description of the coalition members signing on to these comments individually is attached as an Appendix. We submit these comments to oppose the Department of Homeland Security and Department of Justice's Notice of Proposed Rulemaking entitled Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023 (published in the Federal Register on February 23, 2023), and urge that the Proposed Rule be withdrawn.

IMCO service providers represent individuals and families who live below the federal poverty level and have a mission to serve this population, as well as advance laws, policies and practices which secure economic security for this population and reduce the number of persons living in poverty. Denying the right to apply for asylum to destitute refugees is antithetical to the coalition's mission of providing access to legal services, ensuring an immigration system that is fair and just, and helping immigrant clients access protections and opportunities, including the ability to find safety in a country that is not their own.

As a coalition deeply committed to protecting the rights of immigrants, IMCO members are greatly alarmed at the proposed rule's evisceration of the rights of asylum seekers at the southern border to access protection in the United States. The rule appears to continue the Trump administration's efforts to dismantle the asylum system such that refugees seeking protection under the laws of the United States will be left unaided and turned away for reasons that have nothing to do with the merits of their claims, but rather with irrelevant factors not included in U.S. law. Restricting asylum because of manner of entry or transit through third countries

violates Congressional intent and international obligations, as well as the fundamental priority the United States places upon being a beacon of freedom to those seeking protection from persecution.

The services and expertise of local legal aid programs, social service, health care and human service providers, and community organizations that serve low-income people, inform our concern about the disastrous effect the Proposed Rule will have on asylum seekers, and in particular asylum seekers who are low-income and *pro se*, and on their families as well. The essential need for physical safety from persecution is recognized in our asylum law as codified in the Immigration and Nationality Act, Section 208, and the international conventions that the United States has signed on to. As well, asylum-seeking immigrants across the country and in our New England area fill critical roles in our employment workforce and add to the fabric of our society. Denying their right to seek safe haven in our country not only contravenes existing law, but stands in direct contradiction to the freedom to secure a safe life for oneself and one's family which this country has been built on.

As detailed below, this Proposed Rule is deeply troubling for a number of reasons. If finalized, it would eliminate asylum protections in the United States for large numbers of refugees by barring individuals at the southern border from even applying for asylum for irrelevant reasons such as manner of entry and transit through a third country. As written, the rule would create a rebuttable presumption of ineligibility for asylum for those who have traveled through another country unless they (1) have been allowed entry through a limited parole program; (2) have presented at a port of entry after securing an appointment through the CBP One app; or (3) have applied for and been denied asylum in another country. The presumption may only be rebutted if they can show evidence of an acute medical emergency, an imminent threat to life and safety, or that they have been a victim of trafficking.

The exceptions are few and ill-defined, and appear difficult, if not impossible, for vulnerable and *pro se* asylum seekers to establish at the border. Implementation of the CBP One App will not rectify the severe violation of asylum seekers' right to apply for asylum, as it forces asylum seekers to wait in dangerous locations for long periods of time due to limited appointment slots (with many comparing it to a lottery) and is inaccessible to many due to lack of internet and smartphone access and discrimination against Black and Indigenous asylum seekers because of faulty facial recognition software. The narrow parole program created for Cubans, Nicaraguans, Haitians, and Venezuelans, as well as the third country exception, also fail to replace current asylum protections and procedures. Given the severe deficiencies in the proposed rule, most asylum seekers presenting at the border will be categorically denied the right to asylum without ever having an opportunity to have their claim evaluated on the merits. Even those who manage not to be removed at the border will continue to face this presumption during removal proceedings and affirmative asylum interviews, further eviscerating the asylum standards that have been in place for decades.

For the reasons detailed below, we strongly urge the Departments to withdraw the rule proposal in its entirety, and instead ensure that refugees fleeing harm in their home countries have full and fair access to asylum protections in the U.S.

I. The 30-Day Comment Period Provides Insufficient Time to Comment on the Rule.

Executive Orders 12866 and 13563 state that agencies should generally provide at least 60 days for the public to comment on proposed regulations. A minimum of 60 days is especially critical given the rule's attempt to ban asylum for many refugees in violation of U.S. law and international commitments and return many to death, torture, and violence. While the agencies cite the termination of the Title 42 policy in May 2023 as a justification to curtail the public's right to comment on the proposed rule, this reasoning is specious especially given that the administration itself sought to formally end Title 42 nearly a year ago and has had ample time to prepare for the end of the policy.

The proposed rule is sweeping in its elimination of the right to apply for asylum for many asylum seekers at the southern border. Sufficient time must be provided for organizations to meaningfully review the comment and fully examine all of its provisions and their implications for clients. Providing a 30-day comment period for the proposed asylum ban is reminiscent of Trump administration practices, when agencies routinely provided 30-day comment periods on sweeping asylum rules, leaving the public little time to meaningfully assess and respond to proposed rules.

II. The Proposed Rule Violates the U.S's Obligations under Domestic and International Asylum Law and Will Cause Irreparable Harm to Refugees.

The proposed rule contravenes U.S. legal commitments governing asylum access, both on a federal and international level. Congress passed the Refugee Act of 1980 to codify the United States' obligations under the Refugee Convention and Protocol, which the U.S. played a lead role in drafting in the wake of World War II. 8 U.S.C. § 1158. The Refugee Convention and Protocol laid a foundation for the protection of refugees and asylum seekers worldwide. By acceding to the Refugee Protocol, the U.S. legally bound itself to upholding the Convention's legal requirements, including non-discriminatory access to asylum, bars on returning refugees to persecution, and prohibition on imposing penalties on refugees who enter in an irregular manner. *See e.g.* Convention Relating to the Status of Refugees, art. 31 (prohibiting penalizing a refugee based on her illegal entry or presence); *See also* Protocol, Art. 1, 19 U.S.T. 6223 (adopting Articles 2 through 34 of the Convention).

Federal asylum law dictates that people may apply for asylum regardless of which manner of entry they use to enter the United States. 8 U.S.C. § 1158. It also requires that people who passed through a third country still be allowed to apply for asylum, with only limited exceptions

such as when an applicant has been "firmly resettled" in a third country, which usually requires an offer of some sort of permanent immigration status.

By promulgating a rule which expands the bars to asylum beyond those incorporated by Congress into the Refugee Act, the Departments will subject great numbers of individuals who have established, or can establish, that they are, in fact, refugees, to summary deportation or, even in the best case scenario, will limit them to withholding of removal under INA §241(b)(3)(B), which does not offer the same protections as asylum.

A. The proposed rule will subject many refugees to summary deportation without basic procedural rights.

The already controversial practice of expedited removal, which allows immigration officials to deport people without judicial review, has stripped many individuals at the border of the procedural protections guaranteed under federal and international law. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §302(b)(1)(A)(i), 110 Stat.3009-546, 3009-580 (codified as amended at 8 U.S.C. §1225(b)(1)(A)(i)(2012))). Through its transit and entry bans, and subsequent stripping of the protections offered by the credible fear process, the proposed rule vastly expands the number of refugees who will be denied the opportunity to present their claims for protection and summarily deported through the expedited removal process. In short, the proposed system leaves noncitizens with no realistic pathway to asylum, denying them both due process and their right to apply for protection on American soil. It condemns these vulnerable asylum seekers to a charade of process through expedited removal and uncaringly returns them to the danger from which they fled.

Under the current expedited removal process, an immigration officer conducts an interview with an arriving noncitizen who expresses fear of return to their country, and if the asylum officer finds that the person has a "credible" fear of returning to their country, the individual is placed in removal proceedings. In these proceedings, the noncitizen will have the opportunity to present their claims for protection to an immigration judge, more time to seek legal counsel and gather evidence, and the opportunity to appeal denials of relief.

The proposed rule would strip refugees who cannot affirmatively show that they have applied for and been denied asylum in a third country through which they traveled (or that they have used the CBP One app or been paroled as a Cuban, Haitian, Venezuelan, or Nicaraguan) of basic procedural protections. Instead – on their own and without access to legal counsel--they will have to show they can rebut the presumption that they are ineligible for asylum due to "exceptionally compelling circumstances." Refugees arriving at the border, most of whom will be *pro se,* and many of whom have language barriers, extensive trauma, and other severe stresses, will find themselves forced to confront an evidentiary burden marked by vague and ill-defined criteria in order to even be able to access the right to apply for asylum. If they fail to

meet this heavy burden to rebut the presumption by "a preponderance of the evidence," the credible fear interview turns into a reasonable fear interview, which requires a higher standard of proof than asylum, and only allows an individual to apply for the lesser form of protection known as withholding of removal. Again, without legal counsel to explain to noncitizens the burden they need to meet and its various exceptions and exemptions, and to help them compile evidence, many refugees will be unable to meet the higher standard demanded in a reasonable fear interview. As a result, they will remain in expedited removal and never make it to full immigration proceedings; the end result of this will, for most, be deportation. They thus will be deported without even having the opportunity to apply for asylum, all through the decisions of a first-level immigration official and right after crossing the border, often in some of the most difficult circumstances imaginable. Importantly, most of the asylum seekers that will be affected by the proposed rule will be detained, meaning they have even less access to legal counsel and other resources needed to fully explain their claims to the asylum officer and thus gain access to full immigration proceedings.

Expedited removal and quick deportation will be a devastating yet unavoidable reality for countless asylum seekers because the proposed rule strips noncitizens of their existing right to seek judicial review and their ability to request reconsideration of a negative credible fear determination from USCIS. Under the proposed rule, asylum seekers must request affirmative review in order to appeal a negative credible fear determination. A detained asylum-seeker, lacking access to counsel, living in poor conditions, traumatized from persecution in their home country, and often with low-English proficiency, would have to understand and proactively seek out the process for affirmatively requesting such review in an already convoluted immigration system. With over a quarter of credible fear determinations being reversed through immigration court review, preserving the right to judicial review, rather than keeping it out of noncitizens' reach, is imperative. Otherwise, the Biden Administration will revert to the harmful Trump Administration "death to asylum" rule that it reversed less than a year ago.

B. The proposed rule will relegate many refugees to an inferior form of protection than the asylum for which they would otherwise be eligible.

As stated above, those asylum seekers unable to rebut the presumption of ineligibility imposed by the proposed rule would either be deported through expedited removal or subject to withholding-only proceedings. However, withholding of removal without asylum deprives individuals of a number of benefits provided for by the Convention and the Refugee Act. *See e.g.* Convention Relating to the Status of Refugees, art. 17 ("Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees."); Convention Relating to the Status of Refugees, art. 28 ("Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require.").

An individual granted asylum becomes eligible for a host of benefits, including the right to work with authorization, the right to petition for family members, the right to obtain a travel document to travel abroad, the right to apply for lawful permanent resident status, and, ultimately, the right to apply for U.S. citizenship. Those granted withholding of removal, on the other hand, have none of those benefits. They are protected against return to the country from which they fled, but must live under removal orders, deprived of the right to bring family to the U.S., and unable to travel outside of the U.S. to see them. They will never be able to assimilate in the U.S., as they will never obtain permanent status, and remain subject to possible removal to an alternative country. *See Burbiene v. Holder*, 568 F.3d 251, 256 (1st Cir. 2009) (there can be no derivative beneficiaries of a grant of withholding of removal); *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 434 (BIA 2008) (withholding of removal is not discretionary and does not afford the respondents any permanent right to remain in the United States); *Re A-K-*, 24 I. & N. Dec. 275, 279 (BIA 2007) (the Act does not permit derivative withholding of removal under any circumstances).

Rulemaking can be used to interpret otherwise ambiguous statutory provisions, but an agency cannot simply rewrite the law through regulation, and an agency, through its interpretation of a statute, cannot abrogate a treaty. Federal law "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); *see Weinberger v. Rossie*, 456 U.S. 25, 32 (1982); *United States v. Lachman*, 387 F.3d 42, 55 (1st Cir. 2004); *United States v. Hensel*, 699 F.2d 18, 27 (1st Cir. 1983). By relegating individuals who would otherwise be eligible for asylum to the lesser protection of withholding of removal through regulations, the Departments will unlawfully place the U.S. in violation of its obligations under the Convention and Protocol.

III. The CBP One App Provides an Unequal and Insufficient Mechanism to Apply for Asylum.

The Department states that the CBP One app is a free, public-facing application that can be downloaded on a mobile phone and whose use is required for asylum seekers waiting at the border to schedule an appointment to be able to apply for asylum at a land border port of entry. Those who enter the United States without authorization instead of scheduling an advance appointment with CBP will be barred from asylum unless they can establish by a preponderance of the evidence that they qualify for limited exceptions. The Department intends on expanding its existing use of the CBP One app to schedule arrivals at the ports of entry. In practice, however, the app presents significant challenges for asylum seekers, imperiling their ability to access the U.S. asylum system in violation of U.S. domestic law and international treaty obligations. The reintroduction of a de facto metering system, coupled with racial bias in the app's facial recognition features and a range of technological and logistical obstacles, could serve to effectively bar asylum seekers from accessing the asylum process.

A. The requirement to schedule appointments through the CBP One app will provide for a return to metering at the southern border.

Under the Trump administration, restrictions on processing at ports of entry resulted in long backlogs of asylum seekers waiting for months – often in squalid and dangerous conditions[1] – for their turn to present themselves and exercise their right to seek protection. This metering system was found to violate both the INA and the due process rights of asylum applicants. *See Al Otro Lado, Inc. v. Mayorkas*, No. 17-CV-02366-BAS-KSC, 2021 WL 3931890 (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 risks creating what is effectively a new system of metering. The regulation will systematically deny migrants the right to seek protection until they can obtain an appointment through the CBP One app unless they are able to meet one of the narrow exceptions. While the app does not create a physical line or directly turn people away from the border, the limitations of the appointment-based system will lead to the same results and, thus, will violate asylum seekers' due process rights.

The proposed rule does not provide information on the number of appointments available daily. Instead, it notes that CBP expects to be able to process multiple times more individuals than the 326 inadmissible individuals that they processed each day prior to Title 42. However, they have not provided any explanation of what multiplier they envision being able to achieve. This creates a space in which it is nearly impossible to assess the true impact of this rule. If CBP can triple its processing time and process 978 individuals a day for two years, assuming the encounter rate remained at 1,100 individuals a day, at the end of two years, there would still be 89,060 people waiting to have an appointment through the CBP One app. However, this proposed rule is premised on the idea that CBP predicts as many as 11,000 to 13,000 encounters daily once Title 42 is rescinded. Even if CBP could process ten times their pre-Title 42 amount, resulting in 3,260 appointments a day, 5,650,200 individuals would be left unprocessed after two years. While it seems farfetched to assume 11,000 individuals will arrive daily to be processed, it is that logic on which this proposed rule is based and, thus, should be taken into account when we analyze its practicality.

Regardless of the exact numbers, a system predicated on a limited and opaque number of appointment slots seems designed to ensure that individuals seeking protection at the border will be met with significant wait times. Without gaining access to the coveted appointments, these individuals will be left without any recourse to seek asylum. This issue will be exacerbated for the most vulnerable asylum seekers - those, for example, who lack a smartphone, cannot travel to a point with wifi access, or experience racial bias in utilizing the app. They will be left waiting

[1] *See* Julian Aguilar, The Texas Tribune, *Report: Crimes against migrants waiting in Mexico to seek U.S. asylum continue to climb*, https://www.texastribune.org/2019/12/05/report-crimes-against-migrants-waiting-mexico-continue-climb/.

for an even longer – perhaps indefinite – time period in often dangerous conditions. The rule thus creates the same effect as physically turning individuals away from the border and will violate the due process rights of asylum seekers.

B. The CBP One technology disproportionately harms Black asylum seekers and creates technological barriers that are inherently racist.

The facial recognition features in the app demonstrate racial bias and prevent many Black asylum seekers from uploading their photos in order to obtain asylum appointments.[2] Since the app's rollout, in January of 2023, advocates have recognized that the algorithm problems are sharply reducing the number of Black asylum seekers who can fill out their applications.[3]

Racial bias in facial recognition platforms is, unfortunately, not a novel issue. Various studies have been conducted on such platforms and these studies have concluded that Black individuals, as with so many aspects of the justice system, were the most likely to be scrutinized by facial recognition software in cases.[4] Further, such software was most likely to be incorrect when used on Black individuals – a finding corroborated by the research completed by the FBI.[5] Research done by ProPublica in May of 2016 concluded that a computer program used by a US court for risk assessment was biased against Black prisoners. The program, Correctional Offender Management Profiling for Alternative Sanctions (Compas), was much more prone to mistakenly label Black defendants as likely to reoffend – wrongly flagging them at almost twice the rate as white people (45% to 24%).[6] This program and others similar to it were used in hundreds of courts across the US, potentially informing the decisions of judges and other officials.[7]

The issue with these computer programs, including the CBP One app, lay in the algorithm. While the hope with using artificial intelligence is to find more efficient ways to achieve certain results, if the information fed to the machine is biased, there is a risk that the machine will operate based off those biases. Further, if these biases are automated, the communities that are likely to be

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[2]Melissa Del Bosque, The Guardian, *Facial Recognition Bias Frustrates Black Asylum Applicants to US, advocates say*, https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias.

[3] *Id.*

[4] Ali Breland, The Guardian, *How white engineers built racist code – and why it's dangerous for black people*, https://www.theguardian.com/technology/2017/dec/04/racist-facial-recognition-white-coders-black-people-police.

[5] *Id.*

[6] Julia Angwin, Jeff Larson, Surya Mattu and Lauren Kirchner, ProPublica, *Machine Bias --There's software used across the country to predict future criminals. And it's biased against blacks*, https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing ; https://www.theguardian.com/inequality/2017/aug/08/rise-of-the-racist-robots-how-ai-is-learning-all-our-worst-impulses

[7] *Id.*

more affected are the most vulnerable – in this case, people of color and specifically, Black asylum seekers.

Experts at MIT, including Joy Buolamwini, believe that "facial recognition software has problems recognizing black faces because its algorithms are usually written by white engineers who dominate the technology sector. These engineers build on pre-existing code libraries, typically written by other white engineers. As the coder constructs the algorithms, they focus on facial features that may be more visible in one race, but not another. These considerations can stem from previous research on facial recognition techniques and practices, which may have its own biases, or the engineer's own experiences and understanding. The code that results is geared to focus on white faces, and mostly tested on white subjects."

The CBP One app has already proven that there are significant flaws in the algorithm with regards to recognizing Black faces[8] -- asylum seekers from Africa and Haiti have experienced significant challenges uploading their photos[9]. The continued rollout of this app, as is, would only create more damage and bar thousands more asylum seekers from obtaining relief. It would be both dangerous and improper to continue the use of this app while it has the potential of closing the door to many vulnerable individuals and preventing them from accessing their right to seek asylum because of the color of their skin.

C. The CBP One app creates logistical barriers to accessing the asylum process that penalize the most vulnerable.

In addition to its disparate impact on Black asylum seekers, the requirement to use the CBP One app to request an appointment at a port of entry presents a number of other issues for people who have fled persecution in their home countries. The CBP One app creates a tiered and discriminatory asylum system that favors asylum seekers with access to smartphones, technology, and English language skills, in conflict with the aim of creating a safe haven in the United States for the most vulnerable. Establishing a technological barrier for persons desperately fleeing to safety is foundationally contrary to the principles of asylum law.

As an initial matter, the requirement to use the CBP One app assumes that all immigrants traveling to the United States' southern border have the means to buy or acquire a smart telephone. In reality, buying a smartphone is financially unfeasible for many people fleeing violence. Immigrants traveling without phones are those most likely to be unable to afford to purchase a new one. Requiring a phone to make a claim of asylum thus compounds the challenges for the most economically marginalized asylum applicants. Though the proposed rule cites the fact that 95% of immigrants traveling to the southern border do have smartphones, this

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[8] Marcela Garcia, Boston Globe, *Haitians are desperately looking for sponsors in Boston* (Mar. 3, 2023) https://www.bostonglobe.com/2023/03/03/opinion/haitians-are-desperately-looking-sponsors-boston/

[9] Melissa Del Bosque, The Guardian, *Facial Recognition Bias Frustrates Black Asylum Applicants to US, advocates say*, https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias.

statistic is based on a very discrete sample size: a survey of migrants at the Hidalgo and Brownsville Ports of Entry on a single day in December 2022. It tells us little about the overall access that asylum seekers have to smartphones. It also tells us nothing about whether those phones function, have service, or can effectively download and use the app. A smartphone that is unable to successfully download and utilize the app is of as much use as a rotary phone to a desperate asylum seeker.

The CBP One app requires users to have a strong mobile wifi connection, which is not often present in Mexico, in order to download the app.[10] Users have reported difficulty staying connected for long enough to enter their information. Furthermore, the CBP One app requires a level of technological understanding and savviness that some asylum seekers may not have. The app requires users to first make an account with Login.gov, as well as set up two-factor authentication to sign in. Darryl Morin, the CEO of the advocacy group Forward Latino, found himself frustrated by the app when he tested it out. "I consider myself an educated man and still found it extremely complicated," he told NBC News.[11]

Concerns about privacy and safety are also paramount. The CBP One app requires users to share their location, as well as biometric data, in order to use the app. In addition to the concerns listed above, these fundamental concerns about user privacy and safety while using the app led U.S. Senator Edward J. Markey (D-Mass) to send a letter to the Department of Homeland Security urging it to cease use of the app forthwith.[12]

IV. Parole Programs Do Not Serve As a Replacement for a Fair and Functional Asylum System.

The proposed rule presents a recently-instituted parole program as an alternative means for asylum seekers to access safety in the United States. The parole pathways for Cubans, Nicaraguans, Haitians, and Venezuelans, while a useful initiative, are not a replacement for a robust asylum process as they inherently exclude certain populations and do not offer the same protections as asylum. By indicating that parole is the "lawful" alternative to seeking asylum at the border, the proposed rule undermines the legal right to ask for asylum. The process also excludes those migrants who are ineligible for parole or who cannot access it because of gaps in language access, technological literacy, or economic resources.

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[10] *See* Immigration Impact, *CBP One Is Riddled With Flaws That Make the App Inaccessible to Many Asylum Seekers*, https://immigrationimpact.com/2023/02/28/cbp-one-app-flaws-asylum-seekers/.

[11] Suzanne Gamboa and Reuters, NBC News, *Migrants now asked to use app to seek U.S. asylum; advocates raise concerns*, https://www.nbcnews.com/news/latino/migrants-app-us-asylum-immigration-advocates-concerns-rcna66574.

[12] *Senator Markey Calls on DHS to Ditch Mobile App Riddled with Glitches, Privacy Problems, for Asylum Seekers,* 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#:~:text=The%20CBP%20One%20app%20has,have%20cellular%20or%20internet%20access.

While the other recent parole program Uniting for Ukraine provides a humanitarian response to the ongoing war, the parole pathway for Cubans, Nicaraguans, Haitians, and Venezuelans serves in contrast as a restriction on asylum in response to large migrant flows from these countries. Meanwhile, vulnerable migrants from other countries such as Guatemala, Honduras, and El Salvador are ineligible for parole, but will nevertheless face restrictions on their ability to seek asylum at the southern border.[13] This allows the administration to exclude large groups of migrants fleeing danger in countries that are not part of the parole program.

Even for migrants from the countries included in the parole program, there are many reasons why parole may be an inadequate substitute for asylum. The parole program requires access to a U.S.-based sponsor and a valid passport, thereby excluding the most vulnerable migrants who do not have the resources to obtain these before applying. The fact that the parole application requests financial information from the beneficiary as well as the sponsor risks penalizing beneficiaries who are indigent and may be most at risk. Some of us have assisted parole applicants through our work as legal service providers, and we have observed anecdotally that those with a more stable financial situation seem more likely to have been approved. While eligibility for the asylum system is based on a credible fear of harm, the parole system is based on access to a sponsor in the U.S. and on financial resources. An additional issue with the parole program as a substitute for asylum is that it forces migrants facing imminent danger to stay in their home country until they are approved for travel.

The parole application process also requires the use of the CBP One app, which as discussed has been criticized for frequently crashing, limiting appointment availability, and rejecting picture submissions from migrants with darker skin tones. The app also requires a certain level of both technological knowledge and literacy in the limited available languages. The obstacles presented by usage of the app will exclude at-risk applicants from having a fighting chance of gaining entry to the U.S.

While increased pathways to lawful immigration are welcome, parole must be viewed as a temporary and limited solution, not an equal alternative to the right to seek asylum at the border.

V. The Third-Country Asylum Requirement Will Serve to Place Asylum Seekers at More Risk of Harm Rather than Afford Them Meaningful Protection.

Under the new rule, one of the limited circumstances in which migrants may access the U.S. asylum system is if they have already applied for and been denied asylum in a third country.

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[13] *See* CNN, *Rights groups threaten to sue Biden administration over plan to block migrants with what groups call a Trump-era tactic*, https://www.nbcnews.com/politics/immigration/biden-block-migrants-trump-era-stephen-miller-tactic-rcna71282.

This restriction is presented as a way to decrease the number of arrivals to the southern border and to provide an alternate manner for asylum-seekers to obtain protection. However, the proposed rule might in fact decrease the odds that asylum-seekers will be granted protection in another country, and it also risks trapping them in a situation that may be as violent as the one they fled.

The proposed rule ignores the realities of how regional migration policies are inevitably connected- especially those of Mexico, which most asylum-seekers must necessarily travel through, and the United States. Requiring asylum seekers to prove that they applied for and were denied asylum in a third country may have negative impacts on asylum seekers' likelihood of obtaining a grant of asylum in Mexico. Mexican border officials monitoring Mexico's southern border with Guatemala are already refusing to allow people to seek refugee status in Mexico because of their belief that those trying to enter Mexico are not truly fleeing violence or persecution but rather just attempting to get to the United States.[14] If the purpose of the proposed rule is to encourage resettlement in Mexico and other third countries, this policy may actually cause the opposite effect as the governments of those countries deny asylum and other humanitarian protections to applicants in reaction to the U.S.'s new policy.

Even a grant of asylum in Mexico would fail to afford many noncitizens true protection. Whether it be new dangers or their past persecutors following them there, asylum seekers risk experiencing life-threatening harm in Mexico without recourse. In the last two years alone, over 13,000 asylum seekers have reported violence; this statistic does not encompass the countless number of noncitizens who do not report attacks against them out of fear of retaliation or because of the Mexican police's ineffectiveness. The most vulnerable noncitizens, such as Black and indigenous people, women, and LGBTQ+ people, are disproportionately likely to face abuse in Mexico. Racist, gender-based, and homophobic violence is incredibly common in Mexico, with much of it perpetrated by the Mexican police themselves. For many of our clients, who fled such abuse in their home countries, Mexico is not a safe or realistic home.

Additionally, many would-be asylum seekers would reencounter, in Mexico, the same persecution that they fled their own countries to escape. For example, many of our noncitizen clients have fled their home countries because MS-13 or Barrio 18 targeted them and their families for violence. MS-13 and Barrio 18 are notorious, transnational gangs, spanning across Central and South America. They have a dangerously high presence in Mexico as well; MS-13, in particular, has deep connections with Mexican cartels. These gangs perceive asylum seekers fleeing their threats and violence as a slight. Due to their international connections and institutional knowledge, gang members in a noncitizen's home country would likely learn of their target's new whereabouts in Mexico; their affiliates in Mexico would then retaliate, with

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[14] Human Rights Watch, *Mexico: Asylum Seekers Face Abuses at Southern Border*, https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border.

potentially deadly consequences for the noncitizens. The Mexican police can offer little protection; many Mexican police officers themselves belong to gangs, further exacerbating the safety risk to noncitizens who seek help. Ninety-eight percent of violent crimes go unsolved in Mexico, demonstrating both the overwhelming strength of gangs and the lack of adequate law enforcement resources in Mexico.

An influx of asylum seekers could be catastrophic for Mexico, which does not have the resources to protect even its own citizens. Accordingly, the Mexican government may consider restricting its asylum protections rather than strengthening its asylum system. This would leave asylum seekers with even fewer options, condemning them to deportation to and persecution in their home countries.

VI. The Proposed Rule Will Exacerbate the Asylum Backlog.

One of the stated goals of the proposed rule is to increase efficiency in the asylum system. However, the rule will in fact place an increased burden on all actors in the system and lead to longer wait times for those who have already filed affirmative as well as defensive asylum applications.

First, this rule will likely increase affirmative processing times at the Asylum Offices. Credible fear interviews will likely become longer given that officers must consider additional eligibility requirements. Officers will need to determine whether the individuals they interview are barred from applying for asylum based on the new rule. As part of the analysis, they must assess whether the individuals qualify for one of the exceptions to the rule. Each step of these new determinations creates numerous factual questions that the officer must investigate. This will result in lengthier credible fear interviews, likely necessitating the assignment of additional asylum officers to the border. The current credible fear process already diverts asylum officers – of which there are a limited number – from their work adjudicating affirmative asylum applications. Pulling additional officers to support this proposed rule will exacerbate the already long wait times of the affirmative system. Many of us represent affirmative asylum seekers who have been waiting years to be interviewed on their applications. This rule will extend their limbo for the foreseeable future.

Second, this rule will likely increase defensive processing times at the Immigration Courts. With most individuals barred from seeking asylum, they will be forced to seek only withholding of removal or CAT protection. The higher standards of withholding and CAT will likely lead to an increased credible fear denial review docket. Individuals who would have met their burden to show the credible fear requirements for asylum but are found not to have met the burden for withholding of removal or CAT will now appear before judges in preliminary hearings (if they are able to assert their right to judicial review). This will likely increase the need for judges to

hold credible fear review hearings, removing the availability of judges to hear merits cases that have long been pending on their dockets. Additionally, for cases in which applicants are found to be barred from asylum but have a well-founded fear of persecution such that they may qualify for withholding of removal or CAT, the applicant will need to submit evidence to support their claim that they qualify for the family separation exception to the rule.

Finally, this entire process will lead to many appeals. This rule creates a multitude of legal questions, which will need to be litigated in order to create any sort of standard. Due to this litigation and the already long processing times, the impact of this proposed rule, which is meant to help with a potential two-year influx of individuals at the border, will result in years, if not decades, of continued litigation and additional backlogs to processing time.

VII. Instead of an Allowable Use of Discretion, the Restrictions Created by the Proposed Rule Constitute an Arbitrary and Categorical Bar.

The proposed rule's strictures are described as being an allowable part of the discretion inherent in the asylum system. We are reminded that "asylum is a discretionary benefit," and that the federal government has historically used this discretion to impose other limitations on asylum eligibility. The rule as proposed, however, serves not as an exercise of discretion but rather, in practical terms, as a categorical and arbitrary bar to many vulnerable migrants' ability to seek protection in this country.

As explained in detail in other parts of this comment, the narrow pathways and exemptions contained in the rule lack due process protections and are riddled with practical pitfalls. Discretion is thus turned into luck - the luck of having a sponsor who meets the financial guidelines for parole, for example, or the luck of finding wifi reception while living in a shelter in Mexico.

Historically, discretion has been used to deny asylum where there were negative factors present such as national security issues, safety concerns, or credibility issues. Manner of entry has not traditionally been used, at least on its own, as a dispositive factor in exercising discretion against an asylum applicant. Indeed, the proposed rule acknowledges that it departs from the Board of Immigration Appeals' treatment, in *Matter of Pula*, I. & N. Dec. 467 (BIA 1987), of manner of entry as only one, non-dispositive factor in a discretionary analysis. The proposed rule claims that a departure from this precedent is necessary "to allow for an orderly application process" and that "nothing in the INA requires asylum eligibility criteria to focus only on individual-specific considerations to the exclusion of other factors, such as the overall efficiency of the asylum system or the broader public interest." However, a barrier to asylum based on manner of entry would violate, at a minimum, the spirit of the law. In a system designed to assess and provide protection to those fleeing violence and potential death, discretion should be weighted

towards at-risk applicants rather than against them. The possibility of providing applicants a safe haven from credible harm should take precedence over efficiency.

The proposed rule states that its aim is "to process, detain, and remove, as appropriate, those who cross the SWB without authorization and do not have a valid protection claim." Manner of entry is thus conflated with the validity of an applicant's claim, and those who enter without inspection are presumed not to have a valid claim. In our work, we have not found the claims of our clients who entered without inspection to hold any less weight than those who were processed at a port of entry or who entered with a visa. If anything, some of our most vulnerable clients have entered without inspection because the very factors that put them so much at risk have left them without the means or ability to seek protection in another manner. By predicating asylum eligibility on manner of entry, the proposed rule thus utilizes discretion in a way that is unrelated to the substance of applicants' claims and to their actual risk of harm.

VIII. The Proposed Rule, Though Described As Temporary, Risks Causing Permanent Damage to the U.S. Asylum System.

The proposed rule risks turning restrictions that are framed as temporary measures into something much more permanent. As an initial matter, the duration of the rule – 24 months – goes far beyond any timeline that could plausibly be needed to address what is characterized as an emergency situation at the border. (We also disagree with the premise that such drastic restrictions are warranted for *any* length of time.) The proposed rule points to the imminent lifting of Title 42 as a key rationale for such urgent measures, and yet the rule will stay in effect far past the point when Title 42 is lifted. Any changes to the asylum system that do go into effect (and again, we disagree with the need for and the legality of these changes in the first place) should be narrowly tailored in terms of duration of time.

Additionally, the provision for the potential extension of the proposed rule beyond 24 months is concerning. As currently worded, the proposed rule allows for a review prior to the scheduled termination date "to determine whether the rebuttable presumption should be extended, modified, or sunset as provided in the rule." The longer that this "temporary" rule goes on, the more chance that it will become the status quo and that the burden will fall on those opposing it to show why it should be discontinued. The rule is poised to rewrite and decimate, through regulation, the law as it applies to asylum and credible fear.

Conclusion

We strongly object to and oppose the implementation of the proposed rule. The tremendous vulnerability of this population cannot be understated, as asylum seekers often arrive in this country with no means and assets, having fled for their lives. Obtaining safety as soon as possible is essential for them to access basic means of survival - food, shelter, and clothing. It is

unconscionable to establish barriers such as those contained in this rule for asylum applicants fleeing for safety, and highly objectionable to create such barriers to obtaining safe haven in violation of our domestic law and contrary to the International obligations of our government. For the reasons outlined above, we strongly urge you not to finalize this proposed rule.

Respectfully submitted,

/S/
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/S/
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On behalf of the MLRI Immigration Coalition

Appendix *attached* of individual signatory organizations

Ascentria Care Alliance
Boston College Legal Services LAB Immigration Clinic
Boston University Law Immigrants' Rights and Human Trafficking Program
Central West Justice Center
Children's Law Center of Massachusetts
De Novo Center for Justice and Healing
Greater Boston Legal Services
HarborCOV
Harvard Immigration and Refugee Clinical Program (HIRCP)
Justice Center of Southeast Massachusetts
Mabel Center for Immigrant Justice
Massachusetts Law Reform Institute
MetroWest Legal Services
MLPB (formerly known as Medical-Legal Partnership Boston)
New Hampshire Legal Assistance
Northeastern University School of Law Immigrant Justice Clinic
Political Asylum/Immigration Representation (PAIR) Project

APPENDIX OF INDIVIDUAL SIGNATORY ORGANIZATIONS

The Massachusetts Law Reform Institute (MLRI) is a nonprofit statewide poverty law and policy center that provides advocacy and leadership in advancing laws, policies, and practices that secure economic, racial, and social justice for low-income people and communities. Ensuring access to justice is one of the three fundamental frameworks guiding MLRI's mission, along with addressing chronic poverty and advancing racial equity.

Greater Boston Legal Services, a nonprofit legal aid organization, is the primary provider of legal aid in Massachusetts in matters ranging from the need to escape a domestic abuser, to stopping no-fault eviction from affordable housing, to rectifying the wrongful withholding of disability benefits or the unlawful exploitation of workers in low-paying jobs. Each year GBLS provides assistance to more than 10,000 working-class families and individuals in the Greater Boston area. GBLS works closely with a wide network of community partners and social service agencies to establish comprehensive solutions to social issues. Its work ranges from brief service to full representation, impact advocacy, policy education, and community legal education. The GBLS Immigration Unit serves approximately 1,000 individual immigrants each year, providing individual representation in immigration matters, including appellate litigation; engaging in impact advocacy on critical immigration issues affecting our clients; and working with numerous community organizations to provide policy education and community legal education. Ascentria Immigration Legal Assistance Program provides free and low-cost legal services to immigrants in Massachusetts. Ascentria's ILAP serves a wide range of new Americans and survivors of violent crime, including asylum seekers, immigrants & refugees, unaccompanied minors, and survivors of violent crime, domestic violence, rape, sexual violence, and human trafficking.

Ascentria Immigration Legal Assistance Program provides free and low-cost legal services to immigrants in Massachusetts. Ascentria's ILAP serves a wide range of new Americans and survivors of violent crime, including asylum seekers, immigrants & refugees, unaccompanied minors, and survivors of violent crime, domestic violence, rape, sexual violence, and human trafficking.

The Boston College Law School Legal Services LAB Immigration Clinic ("the Clinic") provides an opportunity to second and third-year law students to gain experience and develop skills in the field of immigration law. Originally founded in 1968, LAB was a pioneer in the field and has served as a model for programs around the country. Within the LAB Immigration Clinic, students represent noncitizens in the Immigration Court of Boston for the following types of cases: asylum and other relief based on fear of persecution, deportation waivers for long-term U.S. residents, adjustment of status for noncitizens with family members who are U.S. citizens or

permanent residents, and visas and relief for victims of violent crimes. The Immigration Clinic also works at the intersection of immigration and juvenile legal matters, collaborating with the Juvenile Rights Advocacy Program.

The Boston University School of Law Immigrants' Rights and Human Trafficking Program ("the Clinic") advocates on behalf vulnerable immigrants and survivors of human trafficking in a broad range of complex legal proceedings before the immigration courts, state, local and federal courts and before immigration agencies. The Clinic also collaborates with local, state and national immigrants' rights and human rights groups to advance protections for vulnerable immigrants and survivors of human trafficking. Under the direction of law school professors and instructors who practice and teach in the field of immigration and human trafficking law, law students represent children and adults seeking protection in the United 74 States. This includes survivors of torture and trauma, survivors of domestic violence, abandoned and abused children, and the mentally ill and incompetent, as well as the representation of detained and non-detained individuals in removal proceedings before the Boston Immigration Court.

The Central West Justice Center (CWJC), a wholly-owned subsidiary of Community Legal Aid, provides free legal help to low-income residents of Central and Western Massachusetts. CWJC advocates focus on cases involving humanitarian-based immigration law, employment rights, housing and homelessness issues, and access to public benefits. CWJC provides free consultations on immigration law questions to low-income residents and free representation before the U.S. Citizenship and Immigration Services or the EOIR/Immigration Court to individuals applying for humanitarian immigration relief, such as asylum.

The Children's Law Center of Massachusetts (CLCM) is a non-profit legal services agency that provides direct representation to children in immigration, school discipline, and juvenile justice matters. CLCM attorneys represent immigrant youth in removal proceedings before the Immigration Courts, U.S. Citizenship and Immigration Services of the Department of Homeland Security, and in Massachusetts juvenile, family, and probate courts.

DeNovo Center for Justice and Healing ("De Novo") (formerly Community Legal Services and Counseling Center/Cambridgeport Problem Center) provides free civil legal assistance and affordable psychological counseling to low-income people and is listed on the EOIR Boston Immigration Court referral list of providers. De Novo's services combat the effects of poverty and violence by helping clients and their children meet basic human needs for safety, income, health and housing. De Novo draws on the expertise of hundreds of dedicated volunteer professionals to serve the community's most vulnerable members and help protect the rights of immigrants and refugees through passionate legal representation, education and advocacy. De Novo provides high-quality, free legal assistance to low-income immigrants, 75 refugees and

asylum seekers statewide in Massachusetts in cases involving: Asylum, Violence Against Women Act, T-Visa, U-Visa and Special Immigrant Juveniles.

HarborCOV provides free safety and support services, along with housing and economic opportunities that promote long-term stability for people affected by violence and abuse. Founded in 1998, HarborCOV specializes in serving survivors who face additional barriers, such as language, culture and economic, by working to create connections to the supports survivors need to rebuild their lives through a continuum of options. HarborCOV is committed to social and economic justice and takes a comprehensive approach to addressing violence within the context of family, culture and community.

The Harvard Immigration and Refugee Clinical Program (HIRCP) has worked with thousands of immigrants and refugees since its founding in 1984. Its advocacy includes the representation of individual applicants for asylum and related relief and the development of theories and policy relating to asylum law, crimmigration, and immigrants' rights. HIRCP has an interest in the proper application and development of U.S. asylum law to ensure that the claims of individuals seeking asylum and related relief receive fair and proper consideration under standards consistent with U.S. law and treaty obligations.

The Justice Center of Southeast Massachusetts is a subsidiary of South Coastal Counties Legal Services, Inc. (SCCLS), a non-profit corporation which provides free civil legal services to low-income residents in Barnstable, Bristol, Dukes, Nantucket, and Plymouth Counties, and surrounding towns. SCCLS's mission is to achieve equal justice for the poor and disadvantaged through community based legal advocacy, and provide representation in housing, family, immigration, elder, benefits, and education.

Mabel Center for Immigrant Justice (Mabel Center) is a nonprofit that provides free legal representation for asylum seekers who reside in Massachusetts. Mabel Center is committed to representing clients that have been targeted by never ending changes in border processing of vulnerable immigrants. As such, Mabel Center has established partnerships with several legal service organizations at the US/Mexico border who refer clients to Mabel Center that are relocating to Massachusetts. We specialize in representing families that have been separated at the border, detained in family detention centers, or placed in the dedicated docket at the Boston Immigration Court.

MetroWest Legal Services' (MWLS) mission is to provide legal advocacy to protect and advance the rights of the poor, elderly, disabled and other disenfranchised people in MWLS' service area and to assist them in obtaining legal, social and economic justice. MWLS helps their clients secure access to basic needs and challenge institutional barriers in order to achieve equal justice for all. MWLS provides free immigration legal services to immigrants with a low income,

and full representation for immigration matters including, primarily, Applications for Asylum, Petitions for Special Immigrant Juvenile Status, VAWA Self Petitions, and U visa petitions. MWLS's Immigration Assistance for Victims of Domestic Violence Project represents both documented and undocumented battered immigrants. MWLS also provides free civil legal aid in matters related to housing, public benefits, family law, special education, and wage and hour disputes.

MLPB equips communities of care with legal education and problem-solving insight that fosters prevention, health equity and human-centered system change. MLPB helps teams and organizations more effectively connect people to the health-promoting resources and legal protections they seek by providing law and policy-based training, consultation, and technical assistance. MLPB operates under the fiscal sponsorship of TSNE (tsne.org) and serves partners in MA, RI and nationally through the DULCE Learning Network and other initiatives.

New Hampshire Legal Assistance ("NHLA") is a nonprofit law firm that provides civil legal services to people with low income, including immigrants. NHLA works on civil cases impacting our clients' survival and basic human needs. NHLA represents individual clients and also engages in systemic litigation and policy advocacy related to poverty. NHLA provides full representation of people in removal proceedings, including asylum seekers living in New Hampshire as well as other noncitizens residing in New Hampshire or in immigration detention at the Strafford County Correction Facility in Dover, New Hampshire. Access-to-justice barriers arising from indigency pose a grave threat to NHLA's clients as well as to NHLA's ability to seek justice alongside them.

The Northeastern University School of Law Immigrant Justice Clinic ("IJC") is a pro bono legal services provider housed within the Office of Clinics at the law school. In the IJC, law students, working under the supervision of clinical faculty, represent noncitizen clients in a variety of immigration matters and engage in immigrant rights' advocacy projects.

The Political Asylum/Immigration Representation Project (PAIR) is a nonprofit organization and the leading provider of pro bono legal services to indigent asylum-seekers in Massachusetts and immigrants detained in Massachusetts. PAIR's Pro Bono Asylum Program recruits, mentors and trains over 1,100 active volunteer attorneys from private law firms to represent, without charge, low-income asylum-seekers who have fled from persecution throughout the world, from over 90 countries worldwide. All of PAIR clients are low-income, and face a significant barrier in affording counsel, and often must rely on pro bono counsel to seek protection from the persecution they have suffered or fear.