

March 24, 2023

Daniel Delgado,
Acting Director, Border and Immigration Policy
Office of Strategy, Policy, and Plans
Department of Homeland Security

Lauren Alder Reid,
Assistant Director Office of Policy
Executive Office for Immigration Review
Department of Justice

RE: Public comment on notice of proposed rulemaking on Circumvention of Lawful Pathways - RIN 1615-AC83 / USCIS Docket No. 2022-0016; RIN 1615-AC83 / A.G. Order No. 5605-2023

HIAS respectfully submits this comment in response to the Department of Justice, Executive Office for Immigration Review (DOJ/EOIR) and the Department of Homeland Security, U.S. Citizenship and Immigration Services (DHS/USCIS) (the Departments), notice of proposed rulemaking on the *Circumvention of Lawful Pathways*. The proposed rule would restrict asylum access for those who do not seek asylum in other countries they have traveled through on their way to the United States and those who do not seek asylum through the administration's prioritized methods at ports of entry. While the administration has attempted to distinguish its proposed asylum rule from the previous administration's third-country transit ban, we believe this iteration of the rule will have the same effect.

HIAS objects to restrictive changes to the U.S. asylum system, such as those in the *Circumvention of Lawful Pathways* rule, because we are there for refugees and asylum seekers when and where they need help most. We are the Jewish humanitarian organization that works in the United States and 21 other countries, providing vital services to refugees and asylum seekers of all faiths so they can rebuild their lives. We are operational all along the migration route from Venezuela, through South America and Central America, as well as in Mexico. We see firsthand why people are making the unbearably difficult decision to flee their home countries to make the dangerous trip to the U.S.-Mexico border.

With the Jewish community beside us, we also advocate for the rights of forcibly displaced people globally. Over our extensive history, we've confronted—and overcome—formidable challenges facing refugees and asylum seekers. Today, we are leaders with the expertise, partnerships, and values necessary to respond to refugee crises around the world. We provide legal services and support, including free legal representation for asylum seekers. In addition, we provide asylum seekers with knowledge of their rights and responsibilities, assist them in preparing asylum claims, and help them secure access to health, employment, and social services. This work is driven by our commitment to the fundamental rights and core needs of asylum seekers and other forcibly displaced people as they navigate complex legal systems and work to rebuild their lives.

HIAS asserts that the proposed rule violates the spirit of U.S. law and will separate families and lead to the return of asylum seekers to harm. It will also disproportionately harm Black, Brown, and Indigenous asylum seekers requesting safety at the U.S. southern border – during the previous asylum ban, immigration court asylum denial rates for these groups significantly increased. Our [U.S. laws](#) and the international treaties to which the U.S. accessioned are meant to protect asylum seekers and prohibit their return to persecution and torture. U.S. law also explicitly guards an asylum seeker’s right to seek protection, regardless of how they arrive in the United States. The rule would unlawfully deny protection to asylum seekers and require them to seek asylum in countries that do not have functional asylum systems and where they may still be in harm’s way.

For the reasons detailed below, the Departments should rescind the *Circumvention of Lawful Pathways* NPRM. Please do not hesitate to contact HIAS with any questions or further information.

Vanessa Dojaquez-Torres
Policy Counsel, HIAS

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;

HIAS submits this comment in response to the Department of Homeland Security (DHS) and Department of Justice (DOJ)'s [proposed rule](#) published in the Federal Register on February 23, 2023, that would ban many people from asylum protection in the United States, risking unprecedented levels of refolement, depriving people the ability to reunite with their families and pursue a path to citizenship. The proposed rule is a new version of similar asylum bans promulgated by the previous administration that federal courts repeatedly struck down as unlawful.

HIAS strongly urges the Departments to withdraw the proposed rule and stop pursuing policies that are intended to deter individuals from seeking asylum. The administration should instead uphold refugee law, restore full access to asylum at ports of entry, ensure fair and humane asylum adjudications, and rescind these proposals for entry and transit bans.

The administration will not secure U.S. borders by punishing asylum seekers. Rather than deterrence policies, resources should be focused on increasing humanitarian processing at our ports of entry, ensuring fair and efficient asylum systems, and drastically increasing refugee resettlement out of the Latin Americas and the Caribbean.

HIAS and its Interest in the Issue

HIAS objects to restrictive changes to the U.S. asylum system, such as those in the *Circumvention of Lawful Pathways* proposed rule, because our mission is to support and protect refugees and asylum seekers when and where they need help most. We are a Jewish humanitarian organization that works in the United States and 21 other countries, providing vital services to refugees and asylum seekers of all faiths so they can rebuild their lives. With the Jewish community beside us, we also advocate for the rights of forcibly displaced people globally.

Over our extensive history, we've confronted—and overcome—formidable challenges facing refugees and asylum seekers. Today, we are a leader with the expertise, partnerships, and values necessary to respond to the humanitarian situation along the U.S. southern border. HIAS operations reach along the migration route from Venezuela through South America and Central America, as well as Mexico. Our offices witness exactly why people are making the difficult decision to flee their home countries and make the dangerous trip to the U.S.-Mexico border.

Most relevantly, we provide legal services and support, including free legal representation for asylum seekers. In addition, we provide asylum seekers with knowledge of their rights and responsibilities, assist them in preparing asylum claims, and help them secure access to health, employment, and social services. This work is driven by our commitment to the fundamental rights and core needs of asylum seekers and other forcibly displaced people as they navigate complex legal systems and work to rebuild their lives in a new country.

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

The Biden administration provided only 30 days for the public to comment on the proposed rule, effectively denying the public the right to meaningfully comment under the notice and comment rulemaking procedures required by the Administrative Procedure Act. This timeframe is inadequate for a sweeping proposed rule that would deny many people access to asylum in violation of U.S. law. On March 1, 2023, 172 organizations [wrote](#) to the agencies urging them to provide at least 60 days to comment on the complex 153-page rule that would have enormous implications for asylum access at the border and in USCIS and immigration court asylum proceedings.

Executive Orders 12866 and 13563 states 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 could result in the return of many to violence. While the Departments 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 the administration itself sought to end Title 42 nearly a year ago formally and has had ample time to prepare for the end of the policy. Given that this policy’s implications could place many asylum seekers in extremely dangerous situations, pushing the rule haphazardly through the comment process is reckless. The Departments should provide organizations with a 60 or 90-day comment period.

Overview of Proposed Rule

President Biden’s February 2021 [Executive Order](#) promised to “restore and strengthen our own asylum system, which has been badly damaged by policies enacted over the last four years that contravened our values and caused needless human suffering.” As a candidate, he [pledged](#) that his administration would not “deny[] asylum to people fleeing persecution and violence” and would end restrictions on asylum for those who transit through other countries to reach safety.

The proposed rule in question presents a complete contradiction to the President's previous promises.

Members [of Congress](#), [human rights advocates](#), [faith-based organizations](#), and many others urged the administration not to issue the proposed rule and voiced strong opposition to it when the administration announced its intention to publish it because, if implemented, the proposed rule would ban asylum seekers from access to the asylum system based on their manner of entry into the United States and transit through other countries, factors that are irrelevant to their fear of return and have no basis in U.S. law.

The rule would create a presumption of asylum ineligibility for individuals whom 1) did not apply for and receive a formal denial of protection in a transit country; and 2) entered between ports of entry at the southern border or entered at a port of entry without a previously scheduled appointment through the CBP One mobile application, a flawed appointment app, subject to limited exceptions.

Those limited exceptions include cases where an individual or a family member they're traveling with suffered from an acute medical emergency, faces an imminent and extreme threat to life or safety, a victim of a severe form of trafficking in persons, or other exceptionally compelling circumstances. We are concerned that these exceptions look great on paper but, in reality, will be in name only. The proposed rule places the burden of proving these circumstances by a "preponderance of the evidence" on the asylum seekers themselves. There is no clear guidance on how asylum seekers can demonstrate their eligibility for these exceptions, particularly if they are representing themselves. The decision will therefore be at the discretion of the adjudicator, causing the likelihood of success to depend on which officer or judge is making the decision.

The rule would also be implemented in the fundamentally flawed expedited removal process. [Expedited removal](#) allows the U.S. government to deport people arriving at the border without them ever seeing an immigration judge if they do not express fear or do not pass a "credible fear" screening interview during which they must show a significant possibility that they could establish asylum eligibility in a full hearing. In expedited removal, asylum seekers covered by the proposed rule would be required to gather the evidence and arguments necessary to "rebut the presumption of ineligibility" (i.e., prove they fall within one of the few exceptions to the rule). Those who fail to do so would be automatically subject to a higher screening standard (in violation of [U.S. law](#) governing credible fear interviews) and would face deportation if they cannot pass the screening. Moreover, even those who pass would be subject to the presumption of ineligibility in an immigration hearing. If barred from asylum, they would only be eligible for lesser forms of protection such as Withholding of Removal or Convention Against Torture (CAT) protection. These other forms of protection are *significantly* harder to get. Additionally,

these protections do not provide a pathway to citizenship, are subject to revocation at any time, and do not allow people to petition for their spouses and children.

The rule would also apply to noncitizens in full asylum adjudications before USCIS and the immigration court. In these proceedings, asylum seekers would be denied asylum if they cannot rebut the presumption of ineligibility, resulting in the deportation of many and leaving others with only lesser forms of protection available to them.

The Asylum Ban Violates U.S. Law and Treaty Obligations

The proposed rule contravenes U.S. law governing asylum access, expedited removal procedures, and prohibitions on the return of refugees to persecution and torture.

The United States helped to lead in drafting the 1951 Refugee Convention in the wake of World War II. By acceding to the Convention's Protocol in 1967, the United States promised to abide by the Convention's legal requirements, including non-discriminatory access to asylum, its prohibition against returning refugees to persecution, and its prohibition against imposing improper penalties on people seeking refugee protection based on the manner of entry. However, by denying asylum where an individual has not used specifically limited migration pathways (which may be entirely unavailable for them), the proposed rule attempts to unlawfully use the existence of lawful pathways as a justification to deny access to asylum. The system envisioned under the proposed rule depicts an inaccurate reality where asylum seekers have the simple option of choosing a *lawful* vs. *unlawful* pathway. The policy additionally states it is meant to "disincentivize" unlawful entries in favor of the so-called *lawful pathways*. The assumption that asylum seekers have the time, access, and resources, to take advantage of these other pathways fails to consider the stark reality for many people. Picking and choosing who can access asylum based on nationality and wealth is a violation of the U.S.'s international and domestic responsibilities.

The Refugee Act of 1980 incorporated these principles into U.S. law. 8 U.S.C. 1158 provides that people may apply for [asylum](#) regardless of the manner of entry into the United States. It also delineates limited exceptions where an asylum seeker may be denied asylum based on travel through another country. However, these restrictions only apply where an individual was "firmly resettled" in another country (defined to mean the person was eligible for or received permanent legal status in that country) or if the U.S. has a formal "safe third country" agreement with a country where refugees would be safe from persecution and have access to fair asylum procedures. The [statute](#) prohibits the administration from issuing restrictions on asylum that are inconsistent with these provisions. In addition, 8 U.S.C. 1231 codified the prohibition against returning people to countries where they could face persecution. The proposed rule, which

conditions access to asylum on the manner of entry and transit, could result in the return of people to danger and unequivocally contravenes these provisions of U.S. law.

The proposed rule also violates the Refugee Convention’s prohibition against imposing improper penalties on asylum seekers based on their irregular entry into the country of refuge. The agencies explicitly note that the asylum ban would inflict “consequences” on people seeking asylum – a blatant attempt to punish people based on their manner of entry into the United States. These consequences could include denying access to asylum, deportation to harm, family separation, and deprivation of a path to naturalization. Moreover, examples of U.S. jurisprudence have accepted and protected the fact that it may be necessary for asylum seekers to cross the border by unscrupulous means to escape their persecutors and that this *bolsters* their case for asylum rather than detracts. *See generally Mamoujian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004).

Resurrecting Unlawful Policies Used by the Last Administration to Ban Asylum Seekers

The proposed rule is a new iteration of similar asylum bans the previous administration attempted to advance. Those bans, which similarly barred people from asylum protection based on the manner of entry and transit, were [repeatedly struck down](#) by federal courts as unlawful. The previous transit ban, which was in effect for a year before it was vacated, [inflicted](#) enormous damage, including the deportation of people to harm, separation of families, and prolonged detention. This proposed rule would similarly be wielded to deny access to asylum and block and rapidly deport people without access to asylum hearings, resulting in the same harm.

HIAS observed firsthand the impacts the previous asylum ban had on asylum seekers, including families, and we are concerned that similar impacts will be felt should this rule be implemented. During the previous administration's ban, services providers in HIAS Mexico offices reported that family separations skyrocketed. Families felt compelled to separate from their children and send them to the border alone since unaccompanied minors were supposed to be guaranteed entry into the country. However, witnesses reported that if too many children arrived at the U.S. port of entry, rather than processing the children, U.S. officials would surrender the children to Mexican immigration officials and thus into the Mexican child services system.

Despite the Biden administration’s attempts to distinguish its proposed rule from the previous administration, if implemented, it would similarly operate as an asylum ban based on factors that do not relate to their fear of return and would result in asylum denials for all who are unable to establish that they qualify for the aforementioned extremely limited exceptions. Moreover, its use in expedited removal will require asylum seekers—many of whom have suffered persecution and violence and underwent a harrowing journey to reach safety—to prove that the rule does not

apply to them in a credible fear interview shortly after arrival in the United States, while detained and with little to no access to counsel, likely without the knowledge of how the rule works or what they need to prove.

Asylum Ban Would Disparately Harm Black, Brown, and Indigenous Asylum Seekers

This rule will have a disparate impact on asylum seekers from Africa, the Caribbean, and Latin America. Asylum seekers from these regions are [largely](#) making their journeys by foot to the U.S. Southern border, making them more likely to be subject to this proposed rule. The disparate treatment of asylum seekers of color is also noted in several [reports](#) highlighting how the U.S. seems to welcome [Ukrainian refugees](#) while keeping the doors shut to people from other countries. Even with the current system, noncitizens of African descent are [more likely](#) to be detained and deported than other noncitizens. In addition, the proposed ban, which applies only to people who seek protection at the U.S. southern border, will disproportionately harm people who do not have the resources or ability to arrive in the United States by plane.

The proposed rule also builds in nationality-based discrimination in access to asylum. It bans asylum for people who do not enter the United States via limited parole initiatives or previously scheduled appointments at ports of entry. Currently, these humanitarian parole programs are limited to individuals from [Cuba, Haiti, Nicaragua, and Venezuela](#), or one of the other limited programs for [Ukraine](#) and [Afghanistan](#). These policies of cherry-picking which nationalities may access safety are arbitrary and harmful. HIAS condemns policies that discriminate and grant access to certain asylum seekers based on nationality while then using it to deny access to others.

Requiring People at the U.S. Southern Border to Use CBP One Denies Asylum Access to the Most Vulnerable

The proposed rule requires asylum seekers at the U.S. southern border to schedule appointments through the CBP One application and would generally deny asylum to refugees who arrive at a border port of entry without a previously scheduled appointment and were not denied protection in a transit country. CBP One is impossible for [many asylum seekers to access or use](#), including those who do not have the resources to obtain a smartphone or the ability to navigate the application. The application is unavailable in most languages—including Indigenous languages—and all error messages are in English, barring many asylum seekers from using it. It also disparately harms [Black asylum seekers](#) due to racial bias in its facial recognition technology, which has [prevented](#) many from obtaining an appointment. Asylum seekers who can access and navigate the application are still often unable to schedule appointments due to extremely limited slots and are forced to remain in danger indefinitely.

[Reports](#) also indicate that the application provides limited appointment slots so that requiring asylum seekers to use the application essentially turns asylum access into a lottery. In addition, the system is set up in a way that disfavors family units. Appointment slots fill up so quickly that frequently, there are none left to accommodate everyone in a given family. The proposed rule attempts to establish CBP One as the only mechanism to request asylum at the southern border and seeks to punish those who cannot wait indefinitely in danger while they attempt to schedule an appointment. There is an exception in the proposed rule for those who faced technical difficulties accessing CBP One appointments. However, asylum seekers bear the burden of proof to show they could not access the application and the proposed rule does not provide guidance for how individuals demonstrate this to officers at the border.

Requiring asylum seekers to schedule an appointment through CBP One has already resulted in horrific violence and death, including the [murder](#) of a 17-year-old Cuban child in Mexico who was required to wait weeks for an appointment. In addition, a [Venezuelan family](#) was unable to secure an appointment at a port of entry near them in Piedras Negras and was forced to travel over 1200 miles to another port of entry for an appointment. They were kidnapped, tortured, and extorted by a criminal group while traveling to their appointment. After 20 days, their abductors blindfolded them and brought them to the U.S.-Mexico border, threatening to murder them if they did not cross. After crossing, the family tried to explain to Border Patrol that they had been kidnapped and forced to cross, but agents told them they were criminals for crossing illegally and expelled them back to Mexico. These cases are not unique or unfamiliar to HIAS, which has heard countless similar stories. HIAS Mexico has also reported increased stress and fear within the asylum seeker community in Mexico, sometimes to the point of suicidal ideations. This grim reality directly results from the administration's restrictive and punitive asylum policies.

HIAS offices in Mexico also report that the CBP One phone application has led to family separations. Families cannot get appointments together for family units and are scheduling appointments across several ports of entry. This often results in their cases starting in different parts of the country when they may have otherwise been consolidated into a single case if allowed to enter at the same time and location. This inhumane policy will increase asylum applications and the stress and backlog on an already strained system.

By requiring people at the southern border to use the CBP One appointment process, the proposed rule would leave many [vulnerable asylum seekers](#) in grave danger, including LGBTQI+ asylum seekers, women, and survivors of gender-based violence. Asylum seekers unable to secure appointments through the CBP One app will be forced to remain indefinitely at the border in dangerous conditions, often with no access to safe housing or stable income as they continue to try to make an appointment. These vulnerabilities are expounded when coupled with the other difficulties encountered in the CBP One application. These conditions increase the

[likelihood](#) that they will be targeted for violence by cartels, traffickers, and the abusers from which they initially fled. Many LGBTQI+ asylum seekers, families, and other vulnerable populations have already been unable to secure appointments through CBP One, leaving them in extreme danger.

Deportation of People to Danger

If implemented, the rule would lead to the deportation of people to extremely dangerous circumstances. While the previous administration's transit ban was in effect, asylum seekers were denied all relief and ordered deported due to the ban, [including](#) a Venezuelan opposition journalist and her one-year-old child; a Cuban asylum seeker who was beaten and subjected to forced labor due to his political activity; a Nicaraguan student activist who had been shot at during a protest against the government, had his home vandalized, and was pursued by the police; a gay Honduran asylum seeker who was threatened and assaulted for his sexual orientation; and a gay Nicaraguan asylum seeker living with HIV who experienced severe abuse and death threats on account of his sexual orientation, HIV status, and political opinion.

Many asylum seekers were summarily ordered deported through expedited removal without an asylum hearing due to the transit ban, [including](#) indigenous asylum seekers fleeing gender-based and other persecution in Guatemala and a Congolese woman who had been beaten by police in her country when she sought information about her husband, who had been jailed and tortured due to his political activity.

Use of an Asylum Ban in Expedited Removal Will Fuel Mass Deportations, Due Process Violations

In 1996, Congress created the expedited removal process through the *Illegal Immigration Reform and Immigrant Responsibility Act* (IIRIRA). Under this process, asylum seekers placed in expedited removal who establish a credible fear of persecution [must be referred](#) for full asylum adjudications. The proposed rule undermines the credible fear screening standard established by Congress, which was [intended](#) to be a low screening threshold. The government is required to refer asylum seekers in expedited removal for full asylum adjudications if they can show a “significant possibility” that they could establish asylum eligibility in a full hearing. The proposed rule attempts to eviscerate this standard by first requiring asylum seekers to prove to an asylum officer by a preponderance of the evidence that they can rebut the presumption of asylum ineligibility and then requiring those who cannot overcome the presumption to meet a higher fear standard before being permitted to seek protection. This provision is inconsistent with U.S. law.

Like the previous administration, the Biden administration plans to also implement this rule in the expedited removal process, where asylum seekers would be deported without an asylum hearing if they do not pass their fear screenings. Asylum seekers would be required to show that the asylum ban does not apply to them or that they can rebut the presumption of ineligibility, which will be impossible for many given that these screenings typically occur over the phone while asylum seekers are detained, with little to no access to counsel. Language barriers, abusive and dangerous conditions of confinement, acute trauma, and lack of knowledge of the requirements of this complex rule would make it highly challenging for asylum seekers to overcome this ban in preliminary screenings. Many would be unable to prove to an asylum officer that the rule should not ban them.

These due process violations will be magnified if the administration pursues its reported plan to conduct credible fear interviews within days of asylum seekers' arrival in Customs and Border Protection (CBP) custody, where dire conditions and lack of access to counsel would exacerbate the due process nightmare. The previous administration similarly conducted credible fear interviews in CBP custody through the Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP) programs, which the Biden administration [ended](#). Resurrecting this policy and imposing the asylum ban in these fear screenings would lead to due process violations and increased refoolment.

Asylum seekers detained in CBP custody [have frequently reported](#) being provided insufficient or inedible food and water; lack of access to showers and other basic hygiene; and inability to sleep because of overcrowding, lack of adequate bedding, cold conditions, and lights that are kept on all night. As a result, positive credible fear determinations for asylum seekers subjected to PACR and HARP [plummeted](#): only 18 percent of individuals in PACR and 30 percent in HARP passed their screenings, compared to 40 percent nationwide (excluding HARP and PACR) during the same period.

Asylum seekers who are banned by the rule during their credible fear interviews would have to meet a heightened screening standard to access immigration court hearings and be subject to deportation if they do not pass. As discussed above, the proposed rule's attempt to improperly elevate the credible fear standard established by Congress violates the statute and Congressional intent in setting a low screening threshold.

Proposed Rule Attempts to Eviscerate Critical Safeguards in the Expedited Removal Process

In addition to imposing an asylum ban during the credible fear process, the proposed rule would eliminate critical safeguards for asylum seekers who receive adverse credible fear determinations

because they are barred under the rule. For example, it would deprive asylum seekers of the right to immigration court review of negative credible fear determinations where they do not affirmatively request review. Immigration court review of adverse credible fear determinations is a crucial safeguard guaranteed by [statute](#); from Fiscal Years 2018 to 2021, for instance, over a quarter of credible fear determinations were [reversed](#) through immigration court review. In its December 11, 2020 “death to asylum” rule, the previous administration [imposed](#) a similar hurdle on asylum seekers, depriving them of immigration court review of credible fear decisions where they did not affirmatively request a review, a change that the Biden administration [reversed](#) in the May 31, 2022 asylum processing rule. In reversing the previous administration regulation, the agencies [explained](#) that “treating any refusal or failure to elect review as a request for immigration judge review, rather than as a declination of such review, is fairer and better accounts for the range of explanations for a noncitizen's failure to seek review.” Yet, despite the agencies’ conclusion less than a year ago, they now seek to deprive asylum seekers of the right to immigration court review where they do not affirmatively request it.

The proposed rule also attempts to eliminate asylum seekers’ longstanding right to submit requests to USCIS to reconsider erroneous negative credible fear determinations if they are barred under the rule. This safeguard has, for decades, [shielded](#) many refugees from deportation, persecution, and torture. Earlier in his presidency, President Biden introduced the Asylum Processing Rule, which aimed primarily at speeding up the fear interview process, but it still contained provisions for the review of negative determinations. According to data provided in the [asylum processing rule](#), between FY 2019 and FY 2021, USCIS reconsidering erroneous adverse credible fear determinations saved at least 569 asylum seekers from deportation to persecution or torture without an opportunity to apply for asylum. Under the proposed rule, these individuals all would have been returned to persecution.

Requiring asylum seekers to review negative credible fear determinations affirmatively creates an additional hurdle for asylum seekers, most of whom are trying to navigate this incredibly complicated process [without legal counsel](#). At the same time, they navigate an already convoluted process that carries potentially deadly consequences if they cannot seek a review of a wrongful negative credible fear determination. Moreover, due to language and other barriers, asylum seekers may not understand the requirement to request an immigration court review affirmatively.

In the asylum processing rule, the agencies imposed severe limitations on asylum seekers’ ability to submit requests for reconsideration of adverse credible fear determinations, setting an unworkable seven-day deadline for submitting a request for reconsideration (following immigration judge review, which must happen within seven days of the fear determination) and limiting asylum seekers to a single request. Advocates and attorneys have condemned these new restrictions, which have [barred](#) asylum seekers issued erroneous adverse credible fear

determinations from obtaining reconsideration due to draconian temporal and numerical limits. UNHCR [has opposed](#) eliminating this safeguard and warned that it might increase the risk of refoulement. However, rather than fully restoring the right to request reconsideration, the agencies now seek to eliminate it for asylum seekers determined to be banned under the proposed rule during their credible fear screenings. This provision would prevent many asylum seekers wrongly found to be prohibited under the rule from subsequently presenting evidence to USCIS that they should have been exempted or qualified for an exception, which would significantly harm unrepresented asylum seekers rushed through the credible fear process without any meaningful opportunity to present their claim.

The Proposed Rule Would Leave Families Separated, Deprive a Path to Citizenship

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

As a result, many people who should be granted asylum under U.S. law will languish in the United States in legal limbo, indefinitely separated from spouses and/or children who remain abroad in danger. The previous administration's transit ban similarly separated many refugee families by barring refugees from asylum and leaving them with inadequate protection of withholding of removal. Under the last transit ban, refugees denied asylum due to the transit ban and granted withholding of removal faced potentially permanent separation from their spouses and children. Examples [include](#) an Anglophone Cameroonian refugee who was brutally tortured by the Cameroonian military and could not reunify with his wife and child, who were in hiding in Cameroon because of the threats they faced; a Cuban musician and critic of the government who was jailed and beaten and could not petition for his wife and two children who remained in Cuba; and a Venezuelan refugee who fled after being detained and tortured and could not reunify with his three children who lived in Venezuela.

Exceptions in the proposed rule that promote family unity where refugee families travel to the United States together will not prevent the separation of families where spouses and children remain abroad. Like the previous transit ban, this asylum ban would leave families indefinitely separated.

Asylum Seekers are Unsafe in Transit Countries, Without Access to Meaningful Protection

The proposed rule attempts to require many people to seek asylum in transit countries without a formal agreement with the U.S., where refugees would not be safe or have access to meaningful asylum procedures, thereby circumventing U.S. law requirements for safe third countries. For example, many asylum seekers face life-threatening harms in Mexico, which would be considered to be a transit country for non-Mexican asylum seekers at the southern border. There have been over [13,000](#) attacks reported against asylum seekers and migrants stranded in Mexico under the Title 42 policy over the past two years alone. In addition, asylum seekers do not have access to fair asylum procedures in Mexico, where many are at [risk of deportation](#) to persecution in their home countries. Moreover, Black asylum seekers and migrants face [pervasive](#) anti-Black violence, harassment, and discrimination, including widespread abuse by Mexican authorities.

[El Salvador](#), [Honduras](#), and [Guatemala do not](#) have functional asylum systems that can protect large numbers of refugees, and many transiting through these countries face extreme dangers, including gender-based violence, anti-LGBTQI+ attacks, race-based violence, and other persecution.

In particular, HIAS Mexico offices have reported several examples of how Mexico may be unsafe for many asylum seekers. They report raids by Mexican police and other authorities who frequently detain migrants for lack of documentation, often leading to assault and other harm. They additionally reported the virtual halt of the Mexican asylum system as they are [overwhelmed](#) with the number of cases in recent years. Other barriers to accessing asylum in Mexico include the fact that the process must be finalized in the same state where it was initiated, which is difficult as many migrants need to continue to move around the country for safety. While waiting, they get no formal work permit and face insurmountable challenges just trying to survive.

The proposed rule will devastate women and LGBTQI+ people who are particularly vulnerable to gender-based violence (GBV) and other persecution. It is [well-documented](#) that countries of transit that survivors of GBV pass through while trying to reach the southern U.S. border provides very little, if any, proper protection even when granted asylum there. Women and LGBTQI+ asylum seekers face enormous dangers in many countries of transit, including Mexico and Central American countries, and would be at risk of persecution based on the same immutable characteristics that led them to flee their home countries. Applying and waiting for a review of their asylum claims in these countries prolongs survivors' perilous journeys in search of safe haven.

Conclusion

The proposed rule violates the spirit of U.S. law and could result in massive discrimination and a lack of due process for asylum seekers. Like the previous administration's entry and transit bans, if implemented, this rule will result in the deportation of people into danger and will result in separated families. To put it simply, if implemented, the rule will cut off asylum access for many asylum seekers.

HIAS calls on the administration to withdraw this rule, stop punishing migrants arriving at the U.S. southern border, and instead allocate resources toward humane asylum processing and fair adjudications.