



IMMIGRANT LEGAL ADVOCACY PROJECT

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**RE: DOCKET No: USCIS 2022-0016; RIN: 1125-AB26; 1615-AC83; CIRCUMVENTION OF LAWFUL PATHWAYS**

Dear Acting Director Delgado and Assistant Director Reid,

The Immigrant Legal Advocacy Project, (ILAP), respectfully submits the following comments regarding the notice of proposed rulemaking, Circumvention of Lawful Pathways (Docket No: USCIS 2022-0016). ILAP recommends that the proposed rule be withdrawn in its entirety as it undermines U.S. law and international treaty obligations; is based on a flawed and faulty premise that extreme deterrence measures at the U.S.-Mexico border reduce the number of people seeking humanitarian protection; and does not offer meaningful opportunities for vulnerable people to obtain life-saving protections. Elements of the proposed rule that describe complementary pathways to asylum should be separately pursued but the proposed deterrence policies and constriction of access to asylum and humanitarian protection at the border must not be implemented. Even a temporary implementation of this proposed rule would have deadly consequences.

**I. About ILAP and Interest in Proposed Changes:**

ILAP is Maine's only statewide immigration legal services organization, serving more than 1,000 people seeking asylum in Maine each year through direct representation, *pro bono* coordination, *pro se* forms assistance, and legal orientation workshops. In addition to asylum applicants, ILAP provides immigration legal services to an additional 2,000 people each year including vulnerable immigrant children, survivors of domestic violence and trafficking, and people pursuing other forms of humanitarian protection.

Through our practice over the last 30 years and our longstanding community partnerships, ILAP has deep understanding and expertise in the reasons people are forced to seek asylum and otherwise migrate to the United States and the impact that barriers and deficiencies throughout our immigration system have on vulnerable people.

## **II. The 30-Day Comment Period is Not Sufficient to Meaningfully Respond to the Notice of Proposed Rulemaking:**

The proposed rule presents dense and sweeping changes to the U.S. asylum system, with legal, operational, and policy implications. A 30-day public comment period did not provide ILAP with sufficient time for full analysis and information gathering on how this proposed rule impacts migrants' and asylum seekers' access to humanitarian protection, USCIS and immigration court proceedings, or our internal operations and organizational mission.

ILAP signed the footnoted letter, endorsed by more than 170 similarly situated organizations across the country.<sup>1</sup> Executive Orders 12866 and 13563 state that agencies should generally provide at least 60 days for the public to comment on proposed regulations. The Biden administration's justification that a 30-day comment period is necessary to prepare for approaching end of Title 42 in May 2023 is unfounded given 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.

## **III. The Proposed Rule Impermissibly Undermines Statute, Congressional Intent, and International Obligations:**

U.S. asylum law, established by the 1980 Refugee Act, codifies and operationalizes U.S. *nonrefoulement* obligations as a signatory of the U.N. 1967 Protocol Relating to the Status of Refugees.<sup>2</sup> To meet those obligations – to not return people to countries where they face persecution putting their lives or freedom at risk – Congress was clear that people have the right to seek and be eligible for asylum no matter how they have been forced to journey to the U.S. and no matter how they cross U.S. borders. Congress has not modified the statute since then in any way that would change the right to apply for asylum or asylum eligibility on these grounds.

With narrow exceptions, the proposed rule would presume people ineligible for asylum if they do not seek asylum and receive a final order of denial in a third country signatory of the 1967 Protocol that they pass through and/or if they do not seek asylum using a smartphone application. The rule argues that because narrow exceptions exist, the proposed changes to asylum fall within administrative discretion. However, in effect, the rule would place new, categorical bars on access to asylum, and the breadth of the proposal would fundamentally alter and end asylum itself as Congress enacted.

Our asylum law is intentionally constructed without limitations on the manner of travel and entry into the U.S. in order to meet our *nonrefoulement* treaty obligations. People seeking asylum have been forcibly displaced from their homes and countries and are in extraordinarily vulnerable situations. People often have no control or choice in how they get to the U.S. It is a matter of survival. This proposed rule would dramatically decrease access to asylum at ports of entry, which would lead to people being forced to cross between POEs and/or turn to smugglers (a situation the rule purports to want to reduce).

The clear intent of the proposed rule is to drastically limit the number of people who can apply for and be eligible for asylum at the U.S.-Mexico border. In order to achieve this drastic change, the rule adds

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<sup>1</sup> Letter: "Request to Provide a Minimum of 60 days for Public Comment in Response to the Department of Homeland Security (DHS), United States Citizenship and Immigration Services (USCIS), and Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) (the Departments) Joint Notice of Proposed Rulemaking (NPRM): Circumvention of Lawful Pathways," (March 1, 2023), available at: <https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2023-03/Biden%20Asylum%20Ban%20-%20Extension%20letter%20to%2030-days%20comment%20period%20FINAL.pdf>.

<sup>2</sup> Asylum in the United States, American Immigration Council (Aug. 16, 2022), <https://www.americanimmigrationcouncil.org/research/asylum-united-states>.

new bars and categories to limit asylum access, which are beyond permissible discretion. This goal contradicts the very reason asylum law exists and would force the United States to abandon our international obligations and undermine our proclaimed values and credibility related to human rights on the world stage.

#### **IV. The Proposed Rule is Built on a Faulty Premise That Gutting Access to Asylum at the U.S.-Mexico Border Will Have a Largescale and Sustained Impact in Reducing the Number of People Arriving at the Border Seeking Protection:**

The proposed rule heavily focuses on the number of people arriving from Venezuela, Cuba, Haiti, and Nicaragua but ignores the actual root causes of migration – catastrophic and devolving country conditions that are forcing people to flee and seek protection in the United States, including in Maine. If the U.S. government seeks to reduce the number of people in need of asylum and humanitarian protection, it must honestly and meaningfully acknowledge, examine, and address the conditions that make it impossible for people to remain in their countries. Gutting access to asylum at the U.S.-Mexico border does not have any impact whatsoever on those conditions or the number of people facing life-or-death decisions on leaving their homes.

While the rule focuses on people from South and Central America and the Caribbean seeking asylum, the rule would impact people seeking asylum from around the globe. The majority of ILAP’s clients are fleeing persecution and life-threatening conditions in the Democratic Republic of Congo and Angola. As described more below, many asylum seekers from African countries have no other option but to seek protection at the U.S.-Mexico border.

##### **a. High numbers of people from the Western Hemisphere are seeking asylum in the U.S. because multiple countries are experiencing historic humanitarian, human rights, and security catastrophes.**

*Venezuela:* According to the Biden administration’s recent analysis, Venezuela is experiencing “severe economic and political crises ongoing within Venezuela, which have an impact across sectors, including limited access to food, basic services, and adequate healthcare, and the deterioration of the rule of law and protection of human rights.”<sup>3</sup> The Congressional Research Service reports that 77 percent of people who still remain in Venezuela are in “extreme poverty.”<sup>4</sup> The administration has cited Amnesty International’s reporting that Venezuelans are experiencing “crimes under international law and human rights violations, including politically-motivated arbitrary detentions, torture, extrajudicial executions and excessive use of force have been systematic and widespread, and could constitute crimes against humanity.”<sup>5</sup> Those who are or are perceived to be in political opposition to the Venezuelan regime are particularly targeted.<sup>6</sup> More than 6 million people have been forced to flee and the Biden administration acknowledges the deterioration of safe and welcoming conditions in countries where Venezuelans have fled.<sup>7</sup>

*Cuba:* The Biden administration has characterized Cuba as “facing its worst economic crisis in decades due to the lingering impacts of the COVID-19 pandemic, high food prices, and economic sanctions” and the Cuban government’s response “has been marked by further political repression, including

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<sup>3</sup> 87 Fed. Reg. 55024, (Sept. 8, 2022), <https://www.federalregister.gov/documents/2022/09/08/2022-19527/extension-of-the-designation-of-venezuela-for-temporary-protected-status>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

widespread arrests and arbitrary detentions in response to protests.”<sup>8</sup> The State Department’s most recent country conditions report described: “Significant human rights issues included credible reports of: unlawful or arbitrary killings, including extrajudicial killings, by the government; forced disappearance by the government; torture and cruel, inhuman, and degrading treatment of political dissidents, detainees, and prisoners by security forces; harsh and life-threatening prison conditions; arbitrary arrests and detentions; political prisoners; [and] serious problems with the independence of the judiciary.”<sup>9</sup> The effects of recent environmental disasters including Hurricane Ian have deepened the humanitarian crisis and the government has met political protests with violence and internet/communications blackouts.<sup>10</sup>

*Haiti:* Earlier this year the Biden administration characterized the situation in Haiti as “a sharp deterioration in an already fragile security situation,” since the assassination of the President in 2021.<sup>11</sup> It stated that “Haiti is experiencing economic, security, political, and health crises simultaneously” and Haitian citizens have “limited access to safety, healthcare, food, water, and economic opportunity.”<sup>12</sup> Gang violence has reached extreme heights: “In one 10-day period in July 2022, more than 200 people were killed in gang violence in Port-au-Prince; nearly half of the decedents had no gang ties.”<sup>13</sup> The UN High Commissioner for Human Rights says armed violence in Haiti is “unimaginable and intolerable” and “violence has had a severe impact on the most basic human rights of people.”<sup>14</sup> Nearly 5 million Haitians are experiencing severe acute food insecurity and “for the first time ever, 19,000 Haitians are considered to be in the “catastrophe” phase (the most severe classification).”<sup>15</sup> In an interview ILAP staff conducted with a Haitian client in 2022, he said being forced to go back to Haiti “would be like being thrown into a fire.”<sup>16</sup>

*Nicaragua:* The Biden administration recently described the situation in Nicaragua as a “confluence of political, economic, and humanitarian crises ... exacerbated by the widespread and violent crackdown on democratic freedoms by the Ortega regime and the government’s numerous human rights violations against its own population ... causing thousands to leave the country.”<sup>17</sup> The Inter-American Commission on Human Rights (IACHR) states that Ortega’s consolidation of power “has facilitated Nicaragua’s transformation into a police state in which the executive branch has instituted a regime of terror and of suppression of all freedoms . . . supported by the other branches of government.”<sup>18</sup> According to the IACHR: “the state’s violent response to the social protests that started on April 18, 2018, triggered a serious political, social, and human rights crisis in Nicaragua.”<sup>19</sup> As conditions worsen, UNCHR reports that there are more Nicaraguans currently seeking protection in Costa Rica alone than all refugees and asylum seekers combined during the civil wars in Central America in the 1980s.<sup>20</sup>

Given the conditions in these countries, as well as other conflicts and humanitarian disasters globally which are forcing people to seek asylum at the U.S.-Mexico border, any further reductions in access to asylum would have deadly consequences.

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<sup>8</sup> 88 Fed. Reg. 1266, (Jan. 9, 2023), <https://www.federalregister.gov/documents/2023/01/09/2023-00252/implementation-of-a-parole-process-for-cubans>.

<sup>9</sup> 2021 Country Reports on Human Rights Practices: Cuba, Department of State (2022), <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/cuba/>.

<sup>10</sup> *Id.*

<sup>11</sup> 88 Fed. Reg. 5022 (Jan. 26, 2023), <https://www.federalregister.gov/documents/2023/01/26/2023-01586/extension-and-redesignation-of-haiti-for-temporary-protected-status>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Immigrant Beacon, Immigrant Legal Advocacy Project (Fall 2022), <https://ilapmaine.org/ilap-news/2022-fall-newsletter>.

<sup>17</sup> 88 Fed. Reg. 1255 (Jan. 9, 2023), <https://www.federalregister.gov/documents/2023/01/09/2023-00254/implementation-of-a-parole-process-for-nicaraguans>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

**b. The conclusions the proposed rule draws from the changes in migration numbers at the announcement of the Uniting for Ukraine and Venezuelan enforcement/parole program are flawed.**

As described in the section below, the parole programs in this proposed rule are not nearly sufficient to address the humanitarian protection needs being presented at the U.S.-Mexico border and are not a replacement for asylum. The bulk of this rule is an asylum-seeker deterrence program and there is abundant historical data to show that such policies do not reduce the number of people seeking protection in the long-term and only result in punishing the most vulnerable. They force people to make even more dangerous journeys as they seek survival and create an environment where smugglers can thrive.

The proposed rule is largely based on unsubstantiated conclusions that immediate drops in the number of border apprehensions following the announcements of Uniting for Ukraine and the Venezuelan enforcement/parole program prove long-term effectiveness in reducing the number of people appearing at or apprehended at the border. While deterrence programs may result in temporary dips in the number of people presenting at the border or apprehended – along with the many other factors that lead to ebbs and flows in numbers – they have no long-term effect because they do not address the root causes forcing people from their homes. For example, there was a peak in the number of families apprehended at the border in the year *following* the implementation of the Obama administration’s family detention program.<sup>21</sup> Even under the extreme cruelty of the Trump administration’s family separation policy, migration numbers did not significantly change.<sup>22</sup>

**V. The Proposed Rule Does Not Offer Meaningful Opportunities for the Most Vulnerable People to Seek Protection:**

**a. Seeking protection in third countries may not be safe or realistic for a myriad of reasons and ILAP’s majority Black African clients would face particular barriers and unsafe conditions given geography and systemic racism.**

The proposed rule would ban access to asylum if a person has traveled through a third country that is a signatory of the 1967 Protocol and did not apply for asylum or other form of humanitarian protection there and receive a final order of denial. The rule argues that improvements have occurred in asylum/protection systems in some countries in Central America and therefore these are viable and safe options. Even if stipulated to that some improvements in some countries’ systems have been made in recent years, it does not mean that these systems are adequate or viable sources of protection and that this is a realistic basis to deny asylum access in the United States. Clients assisted by ILAP frequently report physical and sexual assaults and robberies of their valuables and documents as they travel through the same countries that this rule claims will offer protection.

Most asylum seekers that ILAP assists are from Angola and the Democratic Republic of Congo. Black African migrants face a specific and unique lack of access to protection under the third country requirement. First, because there are no other options for them to seek asylum in the U.S., African migrants commonly must

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<sup>21</sup> Rising Border Encounters in 2021: An Overview and Analysis, American Immigration Council (March 4, 2022), <https://www.americanimmigrationcouncil.org/rising-border-encounters-in-2021>; Aaron Reichlin-Melnick, Immigration Policies Based on Deterrence Don’t Work, American Immigration Council (April 2, 2021), <https://immigrationimpact.com/2021/04/02/immigrants-coming-to-the-border-deterrence-policies/>.

<sup>22</sup> *Id.*

reach Brazil or Ecuador by plane and then travel thousands of miles on foot through many countries in South and Central America. According to the Migration Policy Institute, Central and South American countries where African migrants pass through “rarely make permanent settlement through humanitarian protection or other legal statuses accessible to African migrants.”<sup>23</sup> Underlying factors include systemic racism both within these countries immigration systems and countries themselves, little to no language interpretation available, and no social or cultural resources in these countries.<sup>24</sup> Accordingly, if an African migrant attempted to remain in a transit country to seek status, they would face additional racist barriers in finding shelter, work, healthcare, and trying to meet other basic needs. Many are targeted for violence, sexual exploitation, extortion, and more.<sup>25</sup> In Mexico, “Africans are also targeted by criminal groups, based on the understanding that the Mexican police will not punish them for crimes committed against Black migrants.”<sup>26</sup>

Regarding claimed improvements in protection systems in transit countries, the rule cites sources (from the Guatemalan government itself) that steps have been taken to develop its nearly brand-new asylum system and points to an increased number of asylum applications. According to a Refugees International report on 945 people who were deprived of the right to seek asylum in the U.S. and deported to Guatemala under the previous administration’s Asylum Cooperative Agreement, not one person has actually received asylum.<sup>27</sup> In Honduras, where the U.S. government has identified “significant human rights issues” committed by government agents<sup>28</sup>, less than 300 people were able to apply for humanitarian protection over the course of an 11-year analysis.<sup>29</sup> Only 50 were granted protection.<sup>30</sup>

The rule also relies heavily on reported improvements in Mexico’s humanitarian protection system in recent years. However, a recent report from Human Rights Watch – which included interviewing 100 people with firsthand experience attempting to seek safety in Mexico – found that people seeking humanitarian protection are frequently pressured to accept voluntary returns to their countries or were otherwise turned away without the opportunity to apply.<sup>31</sup> Migrants in Southern Mexico reported that the gangs persecuting them in Guatemala could still easily operate there and put them at risk.<sup>32</sup> There is well-documented historical categorical rejection of Haitians by La Comisión Mexicana de Ayuda a Refugiados (COMAR).<sup>33</sup> There also continue to be reports, including from a recent study by Human Rights First, that “Mexican police, immigration officers, and other government authorities continue to be responsible, often in collusion with cartels, for brutal attacks on migrants and asylum seekers after being returned to, or while passing through, Mexico.”<sup>34</sup>

While the rule acknowledges that some people would face the same persecution they are fleeing from in their home country in countries they pass through, the rule’s construction does not respond to this situation.

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<sup>23</sup> Caitlyn Yates and Jessica Bolter, African Migration through the Americas: Drivers, Routes, and Policy Responses, Migration Policy Institute (October 2021), <https://www.migrationpolicy.org/research/african-migration-through-americas>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Letter: Immediate Procedural Steps for Fair Treatment of Asylum Seekers Wrongfully Deported to Danger in Guatemala Under the “Asylum Cooperative Agreement” Program, Refugees International (July 9, 2021) <https://www.refugeesinternational.org/reports/2021/7/16/biden-administration-redress-acas-wrongful-return-of-asylum-seekers-to-guatemala>.

<sup>28</sup> 2021 Country Reports on Human Rights Practices: Honduras, Department of State (2022), <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/honduras/>.

<sup>29</sup> Is Honduras Safe for Asylum Seekers?, Human Rights First (May 1, 2020), <https://humanrightsfirst.org/library/is-honduras-safe-for-refugees-and-asylum-seekers-2/>.

<sup>30</sup> *Id.*

<sup>31</sup> Mexico: Asylum Seekers Face Abuses at Southern Border, Human Rights Watch (June 6, 2022), <https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> New Report Documents Devastating Toll of Court-Ordered Reimplementation of Remain in Mexico, Human Rights First (Sept. 15, 2022), <https://humanrightsfirst.org/library/new-report-documents-devastating-toll-of-court-ordered-reimplementation-of-remain-in-mexico/>.

For example, a transgender asylum seeker who may fear persecution in all the countries they pass through would be barred from asylum in the U.S. In reality, even if a person happened to receive legal status in a country they intended to pass through, they may not actually find safety there.

The transit provision of the proposed rule not only denies people meaningful and realistic access to protection, it will affirmatively force them into even more dangerous situations. Those who try to apply for protection in a third country may be stranded for extended periods of time without resources, the ability to work, and may face security risks and be targeted as asylum seekers. For example, the International Crisis Group reports that Venezuelan migrants and asylum seekers are specifically targeted for sexual exploitation and gang recruitment in Colombia, which is hosting millions of people from that country alone.<sup>35</sup> The rule repeatedly states human trafficking as a concern and priority, but this provision will inevitably drive people into traffickers' hands, both by land and water travel.

**b. The CBP One app is faulty and unrealistic and metering will result in vulnerable people stranded in unsafe conditions near the border, depriving them of access to counsel and due process.**

The proposed rule will make people who do not use the Customs and Border Protection (CBP) cell phone app ineligible for asylum, with narrow exceptions for those who can demonstrate by a preponderance of the evidence that CBP One “was not possible for the noncitizen to access or use.” The requirement would both negatively impact the most vulnerable peoples’ ability to meaningfully access asylum and create situations for them to experience further harm.

The rule acknowledges some – but not nearly all – of the well-documented issues with the CBP One app. These include lack of availability in all languages asylum seekers speak, requiring literacy in reading and in technology use, requiring a sufficient quality smartphone, requiring a way to charge a phone, requiring internet access, demonstrated failures in facial recognition technology for people with dark skin, and other technological glitches and errors.<sup>36</sup>

The rule states that CBP has observed that most migrants have smartphones and in the event that a person does not, they could use a third party’s phone to request life-saving protection. Naturally, this scenario could create an opportunity for people seeking to take advantage of migrants trapped at the U.S. – Mexico border to target them and extort them for money, sexual violence, and more.

The metering intent and effect of the CBP One requirement will force vulnerable people to remain stranded in Mexico, making them easy prey for smugglers, gangs, and other bad actors. Instances of violent attacks, sexual violence, kidnapping, torture, and murder of asylum seekers forced to wait in Mexico is well-documented. A study by Human Rights First on Remain in Mexico under the previous administration found more than 1,500 “publicly reported cases of kidnappings, murder, torture, rape and other violent attacks against people returned to Mexico” (emphasis added).<sup>37</sup> A study on the impact of the policy when reinstated by U.S. courts found that 41 percent of people subjected to Remain in Mexico reported violent attacks (with 36 percent being abductions and kidnappings).<sup>38</sup> Similarly, under Title 42, Human Rights First has tracked “at least 8,705 additional reports of kidnapping, rape, human

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<sup>35</sup> Hard Times in a Safe Haven: Protecting Venezuelan Migrants in Colombia, International Crisis Group (Aug. 9, 2022),

<https://www.crisisgroup.org/latin-america-caribbean/andes/colombia-venezuela/hard-times-safe-haven-protecting-venezuelan>.

<sup>36</sup> Bernd Debusmann Jr, At US border, tech issues plague new migrant applications, BBC (March 9, 2023),

<https://www.bbc.com/news/world-us-canada-64814095> (last accessed March 12, 2023); Jack Herrera, Fleeing For Your Life? There's an App for That, Texas Monthly (March 2, 2023), <https://www.texasmonthly.com/news-politics/cbp-app-asylum-biden-administration/>.

<sup>37</sup> New Report Documents Devastating Toll of Court-Ordered Reimplementation of Remain in Mexico, Human Rights First (Sept. 15, 2022), <https://humanrightsfirst.org/library/new-report-documents-devastating-toll-of-court-ordered-reimplementation-of-remain-in-mexico/>.

<sup>38</sup> *Id.*

trafficking, torture, and other violent attacks against migrants expelled to or blocked in Mexico” since the current administration took office.<sup>39</sup> DHS Secretary Mayorkas said the Remain in Mexico policy imposed “unjustifiable human costs.”<sup>40</sup> With such well-documented deadly consequences of similar policies, we know the effects of the CBP One requirement will be the same.

In addition to the threat of additional persecution and harm, the requirement of CBP One – forcing people to wait in Mexico until they can get an appointment – deprives people of a meaningful lack of access to protection because it creates lack of access to counsel. Human Rights First documented that under the previous administration’s Remain in Mexico policy, only 8 percent had access to an attorney; under the court’s reinstatement of the policy under the current administration, only 5 percent had access.<sup>41</sup> It is well documented that few have success securing protection under the U.S. asylum system without a lawyer. A Human Rights First analysis found that of “70,000 people placed in [Remain in Mexico] under the Trump administration, only 523 people – less than one percent – were granted relief.”<sup>42</sup> An analysis of the Biden administration’s dedicated docket program – which creates barriers for asylum seekers to secure counsel – showed that only 75 of 1,557 people who lost their asylum cases had lawyers – 100 percent of those who had won their cases in the same time period had counsel.<sup>43</sup>

**c. Conditions at the border and other procedural aspects of the rule would leave no realistic opportunities for the most vulnerable to show they are not subject to the asylum ban or to overcome the presumption of ineligibility.**

The rule is based on an expedited removal framework that would require asylum seekers to show that they meet one of the exceptions to the rule during their credible fear screening. Additionally, the rule minimizes any opportunity for review or appeal of those determinations.

Expedited removal processes inherently deny vulnerable people the opportunity to present their best cases and deprive them of due process under the law. Border areas where expedited removal takes place suffer from an extreme lack of free or low-cost attorneys, yet the complicated exceptions to the punitive bars in this rule make access to counsel more important than ever. As is well established, people arriving at the border in need of humanitarian protection may have no knowledge of the system, face language, literacy, and cultural barriers, have no resources or chance to obtain counsel, may be under incredible mental and emotional stressors, not have their basic needs around food, water, and healthcare met, and many other factors that may lead to credible fear denials that have nothing to do with their eligibility for protection. Under the proposal, credible fear interviews would be conducted within days of asylum seekers’ arrival in CBP custody, where the barriers they are already facing would be exacerbated by dire conditions under CBP.

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.<sup>44</sup> The previous administration implemented similar processes to the proposed rule in its Prompt Asylum Claim

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<sup>39</sup> Testimony: Examining the Court Ordered Reimplementation of the Remain in Mexico Policy, Human Rights First (March 1, 2022), <https://humanrightsfirst.org/library/examining-the-court-ordered-reimplementation-of-the-remain-in-mexico-policy/>.

<sup>40</sup> *Id.*

<sup>41</sup> New Report Documents Devastating Toll of Court-Ordered Reimplementation of Remain in Mexico, Human Rights First (Sept. 15, 2022), <https://humanrightsfirst.org/library/new-report-documents-devastating-toll-of-court-ordered-reimplementation-of-remain-in-mexico/>.

<sup>42</sup> Testimony: Examining the Court Ordered Reimplementation of the Remain in Mexico Policy, Human Rights First (March 1, 2022) <https://humanrightsfirst.org/library/examining-the-court-ordered-reimplementation-of-the-remain-in-mexico-policy/>.

<sup>43</sup> Unrepresented Families Seeking Asylum on "Dedicated Docket" Ordered Deported by Immigration Courts, TRAC Immigration (Jan. 13, 2022), <https://trac.syr.edu/immigration/reports/674/>.

<sup>44</sup> Biden Administration Detains Women Seeking Safety and Separates Them From Their Families, Human Rights First and Physicians for Human Rights (Dec. 2022), [https://humanrightsfirst.org/wp-content/uploads/2022/12/Final-Berks-Factsheet-12.1.2022\\_FINAL-1.pdf](https://humanrightsfirst.org/wp-content/uploads/2022/12/Final-Berks-Factsheet-12.1.2022_FINAL-1.pdf).



Review (PACR) and Humanitarian Asylum Review Process (HARP) programs, which fast-tracked vulnerable people for removal. For asylum seekers subjected to PACR and HARP, positive credible fear determinations 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.<sup>45</sup>

Asylum seekers who are banned by the rule during their credible fear interviews would have to meet a heightened standard in order to access an immigration court hearing and would be subject to deportation if they cannot pass the credible fear screening. This aspect of the proposed rule would impermissibly raise the credible fear standard established by Congress. The rule additionally proposes to eliminate avenues for appeal and review that are cornerstones of our country's approach to ensuring due process under the law. For example, an asylum seeker who receives a negative credible fear review would automatically be denied immigration court review unless they affirmatively request it (something that unrepresented, vulnerable people would most likely not know or be able to do). The rule would also eliminate the critical safeguard of the right to request USCIS reconsideration of negative credible fear determinations, which has been well documented to save lives.<sup>46</sup> UNHCR has opposed the elimination of requests for reconsideration due to risks of *refoulement*, in violation of the United States' international treaty obligations.<sup>47</sup>

The rule cites overall low numbers of people receiving asylum under current processes and policies as a reason to deny access at the border. In reality, low asylum grant rates reflect a wholly inaccessible and unjust system where people need attorneys to win their cases but do not have access to them. For example, in 2022, ILAP documented bias in the Boston Asylum Office as well as internal pressures that create an intense work environment with time constraints, overwhelming caseloads, and high rates of burnout that lead to erroneous denials and incentivizing referrals that add years of strain and backlogs rather than granting asylum.<sup>48</sup>

**d. The parole programs described in the proposed rule – presented as alternatives to asylum – are not accessible to the most vulnerable, including those in similar situations to ILAP's typical clients.**

The proposed rule heavily relies on parole programs for Venezuela, Nicaragua, Cuba, and Haiti to justify establishing a presumption of ineligibility for asylum at the border. As discussed below, ILAP enthusiastically supports the creation of parole programs and other complementary pathways (as long as they are not paired with deadly and cruel deterrence and enforcement policies). However, the parameters of the parole programs require resources that those in need of humanitarian protection may not have.

These parole programs require having a sponsor with financial resources in the United States, possessing an unexpired passport, having the opportunity and financial resources to come to the U.S. by plane, and to meet vaccination and other requirements. Those without any or very limited financial means, and often in the most vulnerable positions, are automatically unable to access protection. Just examining the passport requirement shows how limited these programs are. People may not be able to afford passports, may have had them confiscated by government officials as part of their persecution, be

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<sup>45</sup> Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies, Human Rights First (Aug. 2022), <https://humanrightsfirst.org/wp-content/uploads/2023/01/PretenseofProtection-21.pdf>.

<sup>46</sup> Rebecca Gendelman, Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers and Deport Them to Persecution and Torture, Human Rights First (Oct. 1, 2021), <https://humanrightsfirst.org/library/biden-administration-move-to-eliminate-requests-for-reconsideration-would-endanger-asylum-seekers-deport-them-to-persecution-and-torture/>.

<sup>47</sup> Comment Submitted by United Nations High Commissioner for Refugees (UNHCR), UNHCR (Oct. 1, 2021), <https://www.regulations.gov/comment/USCIS-2021-0012-5192>.

<sup>48</sup> Lives in Limbo: How the Boston Asylum Office Fails Asylum Seekers, ACLU of Maine, Immigrant Legal Advocacy Project, Refugee and Human Rights Clinic of the University of Maine, Dr. Basileus Zeno (March 23, 2022), <https://ilapmaine.org/ilap-news/3/23/2022>.

targeted at government offices, or be unable to wait for applications to be processed due to risks of harm or death. In Haiti, huge backlogs related to the parole program have overwhelmed the barely functioning system.<sup>49</sup> Haiti's Ministry of the Interior says that she is "terrified" about being killed or kidnapped by gangs as she has attempted to go in person to secure passports for children in U.S. adoptions processes.<sup>50</sup>

The parole programs are inaccessible for the most vulnerable, only available for the four countries and Ukraine, and given their pairing with extreme deterrence and enforcement, create new risks of harm for vulnerable people. Scams taking advantage of the sponsorship requirements in the U.S. create new opportunities for traffickers, exploitation, and violence as described on USCIS' website on the parole programs.<sup>51</sup>

## **VI. The Most Pragmatic, Meaningful, and Lawful Approach to Addressing the Number of People in Need of Humanitarian Protection Arriving at the Border is to Increase Complementary Pathways without Deterrence and to Take Steps to Address Root Causes:**

To meaningfully ensure that people are able to access safety in the United States, in accordance with international obligations (and to address the stated concern of forcing people into the hands of human traffickers and smugglers), the federal government must – at a minimum – focus on promoting access to asylum, building a robust refugee system, and investing in complementary pathways without extreme deterrence and enforcement. Additionally, given its resources and stated values, the United States should play a leadership role on the world stage in addressing the global lack of meaningful humanitarian protection for the most vulnerable.

The administration must also take steps to protect people who are already in the United States to allow them to stabilize and send critical life-line remittances home. For example, the administration should use Temporary Protected Status broadly, including for the countries focused on in the proposed rule and other countries where safe return is impossible. The administration should also take steps to ensure that asylum seekers already in the United States are able to work as soon as possible and without interruptions due to backlogs at USCIS.

Finally, taking steps to improve access to asylum and complementary humanitarian and economic pathways is in the best interest of the United States. In states like Maine, there are critical shortages of labor in all types of work, negatively impacting the economy and access to services.<sup>52</sup> Maine's state government has cited immigration as a key factor for the state's economic health and future as the population continues to age and shrink.<sup>53</sup> Beyond crucial contributions to the workforce, asylum seekers and immigrants strengthen Maine's communities offering the lessons of their experiences, new perspectives, and cultural richness and vibrancy.

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<sup>49</sup> Danica Coto, Passport rush blamed on US policy stalls adoptions in Haiti, AP (Feb. 10, 2023), <https://apnews.com/article/biden-politics-united-states-government-caribbean-haiti-f98a84e03e56e2702fb6880ec1825f0f>.

<sup>50</sup> *Id.*

<sup>51</sup> Processes for Cubans, Haitians, Nicaraguans, and Venezuelans, USCIS, <https://www.uscis.gov/CHNV> (last accessed March 12, 2023).

<sup>52</sup> For e.g., Charlie Eichacker, Maine's hospital systems are working to recover from a tough financial year, MPR (Feb. 21, 2023), <https://www.mainepublic.org/health/2023-02-21/maines-hospital-systems-are-working-to-recover-from-a-tough-financial-year>; Edward D. Murphy, Worker Shortages Hamper Maine Broadband Expansion Efforts, Government Technology (Feb. 16, 2023), <https://www.govtech.com/network/worker-shortages-plague-maine-broadband-expansion-efforts>.

<sup>53</sup> Maine Economic Development Strategy 2020 – 2029, Maine Department of Economic and Community Development (2019), [https://www.maine.gov/decd/sites/maine.gov/decd/files/inline-files/DECD\\_120919\\_sm.pdf](https://www.maine.gov/decd/sites/maine.gov/decd/files/inline-files/DECD_120919_sm.pdf); Hannah LaClaire, Immigrants may hold a key to solving Maine's labor shortage, Portland Press Herald (Sept. 18, 2022), <https://www.pressherald.com/2022/09/18/immigrants-may-hold-a-key-to-solving-maines-labor-shortage/>.

## **VII. Conclusion:**

In conclusion, ILAP recommends that notice of proposed rulemaking be withdrawn in its entirety. Even a temporary implementation of this rule would lead to lack of due process, impermissibly undermine domestic and international law, and deny vulnerable migrants a meaningful opportunity to seek asylum and other protections. ILAP strongly supports separate investments in complementary pathways such as a robust refugee resettlement program, economic pathways, and parole programs, so long as they are not paired or intertwined with deadly deterrence and enforcement measures.

Please contact Lisa Parisio, ILAP's Senior Policy and Outreach Attorney at [lparisio@ilapmaine.org](mailto:lparisio@ilapmaine.org) for any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Sue Roche", with a long horizontal flourish extending to the right.

Sue Roche, Executive Director  
Immigrant Legal Advocacy Project