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

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

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

Re: DHS RIN 1615-AC83/EOIR RIN 1125-AB26 or Docket No. USCIS 2022-0016/A.G. Order No. 5605-2023; Public Comments Opposing Proposed Rulemaking on the Circumvention of Lawful Pathways

Dear Mr. Delgado and Ms. Alder Reid:

I am writing on behalf of Futures Without Violence (FUTURES), in response to the Department of Homeland Security (DHS) and the Department of Justice (DOJ) Joint Notice of Proposed Rulemaking Procedures for Asylum published in the Federal Register on February 23, 2023. <https://www.federalregister.gov/documents/2023/02/23/2023-03718/circumvention-of-lawful-pathways>

FUTURES strongly opposes the proposed changes to the asylum process. The changes would be extremely harmful to immigrant survivors of domestic violence, sexual assault, and other gender-based abuses. We urge DHS and DOJ to withdraw the proposed rule in its entirety.

FUTURES is a national nonprofit organization that has worked for close to 40 years to prevent and end violence against women and children in the United States (U.S.) and around the world.¹ We educate about and work to eliminate domestic violence, sexual assault, child abuse, and human trafficking through education and prevention campaigns; training and technical assistance to state agencies, public and private entities, judges and court systems, colleges and universities, and global organizations; and we advance promising policies and practices at the

¹ Futures Without Violence, <http://futureswithoutviolence.org>

state and federal level that prevent violence and help survivors and their children heal and thrive.

FUTURES staff are experts on family violence prevention, sexual assault, child trauma and human trafficking and the services and supports necessary for children and adults to heal from violence and trauma. Based on that experience, we know that violence against women and children is a global pandemic, affecting one in three women in the world and up to ¾ of the world’s children. Recent data from the World Health Organization (WHO) reveals that up to 1 billion children aged 2–17 years, have experienced physical, sexual, or emotional violence or neglect in the past year.² According to WHO, “[o]ver a quarter of women aged 15-49 years who have been in a relationship have been subjected to physical and/or sexual violence by their intimate partner at least once in their lifetime (since age 15).”³ Estimates of lifetime intimate partner violence in WHO Regions of the Americas equals 25%.⁴ A report co-authored by FUTURES in partnership with the Civil Society Working Group on Women, Peace and Security, shows that women and children in the Northern Triangle experience rates of sexual assault and violence higher than global averages.⁵

FUTURES strongly objects to the proposed rule for the reasons stated below.

I. The Proposed Rule Violates U.S. Commitments Under the Refugee Convention and Undermines the Immigration and Nationality Act.

The U.S. has a long history of providing safety and protection for individuals and families forced to leave their home countries because of violence and persecution. As a party to the 1967 Protocol Relating to the Status of Refugees, which binds parties to the United Nations Convention Relating to the Status of Refugees (Refugee Convention), the U.S. developed section 208 of the Immigration and Nationality Act (“INA”), 8 U.S.C. 1158 to extend asylum protections to immigrants fleeing persecution. For over fifty years, the United States has continued to uphold its commitment to helping and protecting those who are fleeing persecution, including gender-based persecution.

The proposed rule which establishes a presumption of ineligibility for asylum and creates significant barriers to applying for asylum, violates U.S. obligations under the Refugee Convention and the INA to provide asylum-seekers with fair access to asylum protections. Both the presumption of ineligibility and the lack of meaningful access to the asylum process are

² World Health Organization, *Violence against children: Key facts*, November 29, 2022,

<https://www.who.int/news-room/fact-sheets/detail/violence-against-children>

³ World Health Organization, *Violence against women: Key facts*, March 9, 2021, <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>

⁴ Ibid.

⁵ Arriaga, A. and Timoney, J., *Policy Brief, Violence and Insecurity in the Northern Triangle of Central America: Dangerous Choices for Women and Girls*, U.S. Civil Society Working Group on Women, Peace, and Security, December 31, 2016, <https://www.futureswithoutviolence.org/wp-content/uploads/5th-US-CSWG-Policy-Brief-December-312c-2017-v7.pdf>.

incongruent with the commitment the U.S. made in the Refugee Convention and the INA to protect vulnerable refugees fleeing persecution.

II. Asylum Provides Critical Safety and Protection for Immigrant Survivors Fleeing Violence and Persecution. The New Rule Denies Immigrant Survivors Meaningful Access to the Asylum Process.

Immigrant survivors of gender-based violence who flee to the U.S. to seek asylum do not make the choice lightly. They must leave everything they know, brace themselves for the tremendous danger and peril that awaits them and their children during their journey, and traverse thousands of miles with very few possessions of their own. They do this because they have no choice. They know that they or their children will be seriously injured or even killed if they stay in their home countries where their governments do little to protect them from their abusers. “Domestic violence is reportedly the leading form of abuse against women and girls in El Salvador and Honduras...In Guatemala, every 46 minutes a new case of sexual violence is reported, but the number of incidents is likely much higher as many go unreported.”⁶ Thus, for many immigrant survivors, asylum is their only pathway to safety and protection.

The DHS and DOJ proposed rule bars many of these vulnerable immigrant survivors of violence from meaningful access to the asylum process. It does so by establishing a presumption of ineligibility for asylum seekers unless they seeks asylum in another country in route to the U.S. and are denied; make an appointment through the CBPOne app to indicate their plans to seek asylum or demonstrates that they could not use the app; or receive approval through the parole process to arrive at the southern border.⁷

As shown below, the new rule violates immigration law and constructs insurmountable legal barriers for immigrant survivors seeking asylum. Rather than restricting access to protection, the Biden Administration should expand opportunities for vulnerable immigrant survivors to be able to seek safety and protection through the asylum process in the U.S.

A. Requiring Asylum Seekers to Seek Asylum in Another Country in Route to the U.S. Is Not A Viable Option for Immigrant Survivors and Exposes Them to Further Harm.

The proposed rule exempts immigrant survivors from the presumption of asylum ineligibility if they can show they applied for and were denied asylum in a country on the way to the U.S. This requirement operates like a transit ban and is similar to a rule proposed by the Trump Administration that was ultimately struck down by the courts.⁸ Like the Trump rule, the Biden transit ban proposed rule is unlawful and should be rescinded.

⁶ Ibid.

⁷ Under the proposed rule, migrants can rebut the presumption of ineligibility by showing that they faced a medical emergency, imminent threats to life, were victims of trafficking, or had been denied asylum from another country in transit to the U.S.

⁸ *Capital Area Immigrant Rights Coalition, et al. v. Donald J. Trump, et al.*, 471 F. Supp. 3d 25 (D.D.C. 2020); *East Bay Sanctuary Covenant, et al. v. Donald J. Trump, et al.*, 354 F. Supp. 3d 1054 (N.D.Cal. 2018).

Countries that immigrant survivors must travel through on their way to the southern border of the U.S. do not have fully functioning asylum systems.⁹ In addition, as reported by Human Rights First, most of these countries are not safe for immigrant survivors to remain in or to return to.¹⁰ Indeed, the proposed rule exacerbates the fear, trauma, and harm experienced by immigrant survivors by requiring them to remain in dangerous situations and seek asylum on their way to the U.S. It also needlessly exposes them to many of the same dangers that they fled – sexual violence, beatings, torture, etc.

B. Requiring the Use of the CBP One App Deprives Immigrant Survivors of Meaningful Access to the Asylum Process.

The required use of the CBP One app disadvantages immigrant survivors and deprives them of meaningful access to the asylum process. Immigrant survivors often flee from an abusive partner with just the bare minimum to subsist. Because of their fear of being tracked by their abusers, survivors may leave behind their telephone or ditch it on the way. We also know that an abusive husband or partner will often not allow an abused partner or spouse access to a phone. Thus, an asylum process that relies on a smartphone app to schedule an appointment means that many immigrant survivors are shut out of the process. This is just one of the many complications that survivors will encounter. Many immigrant survivors will not know how to navigate the app or have adequate access to reliable Wi-Fi to secure an asylum appointment. Unstable internet service is problematic. The Association of Immigration Lawyers (AILA) noted that attorneys have reported that asylum seekers in shelters in Mexico have been unable to get asylum appointments because the “internet freezes and stays frozen.”¹¹ “Users regularly report that the app freezes and stays frozen and that getting an appointment is reduced to luck and the strength of the Wi-Fi access.”¹²

Even if immigrant survivors have a smart phone and access to a stable internet, the app is not available in indigenous languages or in Haitian Creole. There also have been reports that the technology is flawed and does not recognize differing skin colors.¹³ Moreover, the app is currently available only in areas extending south of the border as far as Mexico City. Thus, the

⁹ Andrew Craycroft and Nithya Nathan-Pineau, *The Asylum Transit Ban After CAIR Coalition v. Trump*, October 2020, Immigration Legal Resource Center,

https://www.ilrc.org/sites/default/files/resources/asylum_transit_ban_after_cair_v_trump_10.2020.pdf

¹⁰ Human Rights First, *Title 42: Human Rights Stain, Public Health Farce*, December 2022,

<https://humanrightsfirst.org/library/title-42-human-rights-stain-public-health-farce/>

¹¹ American Immigration Lawyers Association, *The Proposed Asylum Transit Ban Creases Access to Asylum in Name Only*, February 22, 2023, <https://www.aila.org/advo-media/aila-policy-briefs/practice-alert-the-proposed-asylum-transit-ban>.

¹² Ibid.

¹³ Ibid; Doris Meissner, *Revamping Asylum at the U.S.-Mexico Border: A Workable Rescue?*, (Washington, D.C.: Migration Policy Institute, March 2021), <https://www.migrationpolicy.org/news/revamping-asylum-us-mexico-border>

use of the app does not mean that migrants stay in their home country and wait for an appointment; they must be on the move and near Mexico City in order to use it.¹⁴

Further, the app more easily accommodates single individuals rather than families. Securing enough appointments for an entire family before available slots fill up is next to impossible. This means that families must make an untenable decision – separate or wait for an indeterminate time for asylum appointments.¹⁵

The regulations open a narrow door for migrants who make it to a port or entry without the use of the CBP One app and can show “by a preponderance of the evidence that it was not possible to access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.” However, requiring immigrant survivors to know and understand a legal term like the *preponderance of evidence* and to place the burden on survivors to meet this standard is unfair and unjust, especially given the language barriers and the possibility of illiteracy as well as the lack of legal representation.¹⁶

The government’s reliance on CBP One app is misplaced. Immigrant survivors should not have to use a severely flawed tool to access the asylum process.

C. Instituting the Newly Established Humanitarian Parole Program Will Not Address the Needs of Immigrant Survivors.

The Biden Administration incorrectly believes that the new parole process will help meet the needs of asylum seekers.¹⁷ While this new humanitarian parole program may help some migrants – those fleeing specific conflict zones and authoritarian regimes, it will not meet the needs of the majority of asylum seekers, including immigrant survivors. Immigrant survivors who are fleeing for their lives, do not have the privilege of waiting in their home countries to apply for parole. Their need to escape life-threatening violence is immediate. Immigrant survivors also often lack travel documents and resources because their abusive partners control their finances and personal documents as a way of asserting their power and control over them. Additionally, many will not have people in the U.S. who can and will sponsor them. Thus, this new parole process does not work for immigrant survivors.

¹⁴ Doris Meissner, *Revamping Asylum at the U.S.-Mexico Border: A Workable Rescue?*, (Washington, D.C.: Migration Policy Institute, March 2021), <https://www.migrationpolicy.org/news/revamping-asylum-us-mexico-border>

¹⁵ Andrea Castillo, *Asylum seekers face decision to split up families or wait indefinitely under new border policy*, Los Angeles Times, February 24, 2023. <https://www.latimes.com/politics/story/2023-02-24/asylum-seeking-families-consider-separation-shortage-mobile-app-appointments>

¹⁶ American Immigration Lawyers Association, *The Proposed Asylum Transit Ban Creases Access to Asylum in Name Only*, February 22, 2023, <https://www.aila.org/advo-media/aila-policy-briefs/practice-alert-the-proposed-asylum-transit-ban>.

¹⁷ The Biden Administration instituted a new parole process for Cubans, Haitians, Venezuelans, and Nicaraguans in January 2023. Under this program, the U.S. will admit a total of 30,000 migrants a month from Cuba, Haiti, Venezuela, and Nicaragua for a two-year period and provide them with work authorization if they have an eligible sponsor and pass a vetting process and background checks.

D. Rebutting the Presumption of Ineligibility Is Too Restrictive for Immigrant Survivors.

Asylum seekers can rebut the presumption of ineligibility for asylum, if at the time they entered the U.S., they or a family member suffer from an acute medical emergency; faced an imminent threat or extreme threat to their life or safety; were victims of a severe form of trafficking in persons; or, faced exceptionally compelling circumstances. The exceptions in the proposed rule require the asylum seeker to utilize the *preponderance of evidence* standard.

Once again, the proposed rule adds insurmountable legal barriers to the asylum process. It places the onus on immigrant survivors, who often lack legal knowledge and language competency, to show by the *preponderance of the evidence* that one of these exceptions applies to them.¹⁸ The burden is just too high and too unjust.

Many immigrant survivors arrive at the U.S. border exhausted, traumatized, penniless, and fearful. They must face a daunting and complex legal asylum process without the benefit of legal counsel. This additional requirement to rebut the presumption of ineligibility by a *preponderance of the evidence* is unrealistic and cruel.

E. The Presumption of Ineligibility Based on Manner of Entry Violates the Refugee Convention, Contravenes Equal Protection, and Prioritizes Wealthy Migrants Over Poor Migrants.

The proposed rule bars applicants from being eligible for asylum who enter the U.S. through the southern land border without following the procedures outlined in the proposed rule. Barring asylum based on the manner of entry violates the United Nations Convention Relating to the Status of Refugees' prohibition on imposing penalties based on a refugee's manner of entry or presence.¹⁹ This prohibition is critical because it recognizes that individuals fleeing persecution often have little control over the place and manner in which they enter the country where they are seeking protection.

Additionally, the proposed rule violates asylum seekers equal protection. It creates a different standard for processing asylum seekers who enter by the southern land border than those that enter through other ports of entry, including airports which are between ports of entry, and the northern border.

Moreover, because the proposed rule applies to individuals who seek protection at the southern land border, it advantages asylum seekers with economic means. Indeed, asylum seekers who have resources can apply for a visa, arrive by airplane, and seek refuge in other

¹⁸ American Immigration Lawyers Association, *The Proposed Asylum Transit Ban Creates Access to Asylum in Name Only*, February 22, 2023, <https://www.aila.org/advo-media/aila-policy-briefs/practice-alert-the-proposed-asylum-transit-ban>.

¹⁹ Convention Relating to the Status of Refugees, July 28, 1951, 140 U.N.T.S. 1954.

nations. They also can use their working phone and remain in the area with sustained internet to make an appointment using the CBP One app.

III. Withholding of Removal and Protection Under the Convention Against Torture Fail to Adequately Protect Immigrant Survivors of Violence.

According to the proposed rule, migrants who cannot rebut the presumption of ineligibility for asylum may still be able to qualify for Withholding of Removal or protection under the Convention Against Torture (CAT). While immigrant survivors may not be categorically barred from applying, these forms of relief require a higher burden of proof than asylum. This means that many asylum-seekers excluded from eligibility under the proposed rule will face deportation back to harm if they cannot meet this higher burden. Moreover, the protections afforded by CAT and by statutory Withholding of Removal are limited in scope and duration. Withholding of Removal and CAT protection do not provide a path to lawful permanent residence and do not allow for freedom of travel or for family reunification. Limiting protections for immigrant survivors to Withholding of Removal and CAT will leave them in a continued state of limbo that precludes them from building a safe and secure life.

IV. Conclusion

The proposed rule completely ignores the reality that immigrant survivors of violence face. Many survivors flee to escape horrific domestic and sexual violence, desperately hoping that they will be granted asylum and finally be safe. By denying these immigrant survivors meaningful opportunity to seek asylum, the proposed rule denies safety and protection to those with the greatest need.

For the reasons set forth above, Futures Without Violence strongly urges DOJ and DHS to rescind the proposed rule. It violates our nation's laws and moral obligations and cruelly prevents many survivors of domestic violence and sexual assault who are fleeing persecution from obtaining the asylum protections they need and deserve. We instead urge DOJ and DHS to promote policies that account for the desperate reality that immigrant survivors face and seek to maximize their safety throughout the asylum process.

Thank you for the opportunity to submit comments on the Joint Notice of Proposed Rulemaking Procedures on the Circumvention of Lawful Pathways. Please contact me if you have any questions or concerns relating to these comments.

Respectfully submitted,

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