



American Academy
of Pediatrics



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March 27, 2023

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

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

RE: Women's Refugee Commission and American Academy of Pediatrics 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; DHS Docket No. USCIS 2022-0016; A.G. Order No. 5605-2023

Dear Acting Director Delgado and Assistant Director Alder Reid:

The Women's Refugee Commission ("WRC") and the American Academy of Pediatrics ("AAP") submits this comment in response to the joint notice of proposed rulemaking issued by the Department of Homeland Security ("DHS") and Department of Justice ("DOJ") (collectively, the "Departments") on February 23, 2023, entitled "Circumvention of Lawful Pathways" (the "Proposed Rule").¹

The Proposed Rule would impose unprecedented new barriers to accessing asylum protection and would effectively cut off access to asylum entirely for many people seeking asylum at the US-Mexico border. WRC and AAP are particularly concerned with the impact the Proposed Rule would have on women, children, and families who would face persecution and death if denied meaningful access to seeking protection as provided by U.S. laws. Not only does the Proposed Rule run contrary to U.S. law and our international obligations, it is a dramatic departure from our nation's tradition as a place of refuge and the Biden Administration's commitment to create a humane, orderly asylum system for those seeking

¹ Circumvention of Legal Pathways, 88 Fed. Reg. 11,704 (February 23, 2023) (to be codified at 8 C.F.R. pt. 208 and 1208).

safety. Because it fails to appropriately provide asylum seekers a meaningful and realistic opportunity to seek protection, WRC and AAP strongly advise that the Proposed Rule be withdrawn in its entirety.

I. The Women’s Refugee Commission and the American Academy of Pediatrics’s Interest in Commenting on the Proposed Rule

The WRC is a non-profit organization that advocates for the rights of women, children, and youth fleeing violence and persecution. We are leading experts on the needs of refugee women and children and the policies and programs that can protect and empower them. The Migrant Rights and Justice (“MRJ”) Program focuses on the right to seek asylum in the United States and strives to ensure that migrants and refugees, including women and children, are provided with humane reception in transit and in the United States, given access to legal protection, and are protected from exposure to gender discrimination or gender-based violence.

Since 1996, MRJ staff have made numerous visits to the southwest border region, including along Mexico’s northern border, as well as to immigration detention centers for adult women and families and to shelters housing unaccompanied children throughout the country. WRC has interviewed hundreds of detained women, families, and children seeking asylum in the United States.² Based on the information that we collect on these visits and our analysis of the laws and policies relating to these issues, we advocate for improvements, including by meeting with government officials and service providers and by documenting our findings through fact sheets, reports, backgrounders, and other materials. We make recommendations to address identified or observed gaps or ways in which we believe the corresponding department or agency can improve its compliance with the relevant standards.

The American Academy of Pediatrics (AAP) is a non-profit professional membership organization of over 67,000 primary care pediatricians and medical and surgical pediatric subspecialists dedicated to the health and well-being of all infants, children, adolescents, and young adults. The mission of the AAP is to protect the health and well-being of all children, no matter where they or their parents were born. As pediatricians, our primary responsibility is to support families in order to optimize child health. We strive to help all children to grow, develop, and reach their full potential to contribute to our collective America.

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

² Reports of our findings include: Women’s Refugee Commission, *Inequity at the US-Mexico Border: Ukrainians Seeking Safety and Implications for US Asylum Processing* (2023); Women’s Refugee Commission and Instituto para las Mujeres en la Migración A.C., *Stuck in Uncertainty and Exposed to Violence: The Impact of U.S. and Mexican Migration Policies on Women Seeking Protection in 2021* (2022); Women’s Refugee Commission, *Prison For Survivors: The Detention of Women Seeking Asylum in the United States* (2017); Women’s Refugee Commission, Lutheran Immigration and Refugee Service, and Kids in Need of Defense, *Betraying Family Values: How Immigration Policy at the United States Border is Separating Families* (2017); Women’s Refugee Commission and Lutheran Immigration and Refugee Service, *Locking Up Family Values, Again: A Report on the Renewed Practice of Family Immigration Detention* (2014); Women’s Refugee Commission, *Migrant Women and Children at Risk: In Custody in Arizona* (2010); Women’s Refugee Commission, *Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention* (2010); Women’s Refugee Commission, *Innocents in Jail: INS Moves Refugee Women From Krome to Turner Guilford Knight Correctional Center* (2001); Women’s Refugee Commission, *Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center* (2000); and Women’s Refugee Commission, *Liberty Denied: Women Seeking Asylum Imprisoned in the U.S.* (1997).

The Biden Administration has 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 time frame is insufficient for a sweeping proposed rule that would unlawfully deny many people access to asylum. On March 1, 2023, 172 organizations, including WRC, 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 U.S. Citizenship and Immigration Services and immigration court asylum proceedings.³

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

With a longer comment period, WRC and AAP would have provided a more thorough analysis of the Proposed Rule and the concerns it raises, including by elaborating on issues like legal access and expedited removal, as well as demonstrated in more detail the alternative steps the Biden Administration could take to build an orderly and humane asylum system and bolster a regional response to migration.

III. The Proposed Rule Violates U.S. Law and Treaty Obligations and Contradicts the Biden Administration's Immigration, Migration Management, Regional Cooperation, Humanitarian, and Gender Equality Policies and Commitments

a. Violation of U.S. Law and International Treaties

The United States is a State party to the 1967 United Nations Protocol Relating to the Status of Refugees ("Refugee Protocol"), and is therefore bound to comply with the obligations deriving from the Refugee Protocol as well as, by incorporation, articles 2-34 of the 1951 United Nations Convention Relating to the Status of Refugees ("Refugee Convention").⁴ Furthermore, as a State party, the United States has agreed to cooperate with United Nations High Commissioner on Refugees (UNHCR) to facilitate its duty of supervising, in particular, the application of the provisions of the Refugee Protocol, and, as incorporated therein, the Refugee Convention.⁵

Moreover, the Proposed Rule contravenes U.S. law governing asylum access, expedited removal procedures, and prohibitions on the return of refugees to persecution and torture. Congress passed the Refugee Act of 1980 to codify the United States' obligations under the Refugee Convention and Protocol.

³ 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) (Mar. 1, 2023), <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>.

⁴ See Protocol Relating to the Status of Refugees, art. II, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

⁵ "The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions." *Id.*, art. II.

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 manner of entry. The Refugee Act of 1980 incorporated these principles into U.S. law. 8 U.S.C. 1158, which provides that people may apply for asylum regardless of manner of entry into the United States. By denying asylum where an individual has not used certain limited migration pathways and conditioning access to asylum on manner of entry and transit, the Proposed Rule seeks to unlawfully use the existence of lawful pathways as a justification to deny access to asylum at the U.S.-Mexico border. Such a policy would result in the return of refugees to danger and unequivocally contravenes these provisions of U.S. law.

Further, the Proposed Rule attempts to unlawfully circumvent the credible fear screening standard established by Congress in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which was intended to be a low screening threshold.⁶ The U.S. 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.⁷

Indeed, similar Trump Administration rulemaking that would have effectively functioned as asylum bans targeting people seeking protection at the border based on manner of entry and transit have been repeatedly struck down by federal courts as unlawful.⁸ Like the Trump Administration’s transit ban, the Proposed Rule would inflict enormous damage by denying access to asylum, separating families, and exacerbating the harm and trauma these extremely vulnerable populations already endure.⁹

The Proposed Rule proposes that the condition on eligibility will apply to those who enter between the effective date of the final rule and 24 months after that effective date,¹⁰ and DHS asserts that “the proposed rule is an emergency measure that is intended to respond to the elevated levels of encounters anticipated after lifting of the Title 42 Order.”¹¹ The Departments assert that “the rule would be subject to a review prior to its scheduled termination date, to determine whether rebuttable presumption should be extended, modified, or sunset as provided in the rule.”¹² Under international human rights law binding on the United States, access to territory cannot be suspended based on emergencies. While States may, in emergencies, take certain measures to ascertain and manage risks at their borders

⁶ Congressional Record Volume 142, Number 136 (Sept. 27, 1996), <https://www.govinfo.gov/content/pkg/CREC-1996-09-27/html/CREC-1996-09-27-pt1-PgS11491-2.htm>.

⁷ Circumvention of Lawful Pathways, 88 Fed. Reg. 11704 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. pt. 208).

⁸ See *Capital Area Immigrants’ Rights Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020); *East Bay Sanctuary Covenant v. Barr*, 500 F. Supp. 3d 1030 (N.D. Cal. 2020).

⁹ Camilo Montoya-Galvez, “US officials clashed over asylum restriction, and its legality before Biden proposed it,” CBS News (Mar. 1, 2023), <https://www.cbsnews.com/news/immigration-biden-asylum-restrictions-legality/>.

¹⁰ Circumvention of Lawful Pathways, 88 Fed. Reg. at 11750, 11751.

¹¹ Department of Homeland Security, “DHS and DOJ Propose Rule to Incentivize Lawful Migration Processes” (Feb. 21, 2023), <https://www.dhs.gov/news/2023/02/21/dhs-and-doj-propose-rule-incentivize-lawful-migration-processes>.

¹² Circumvention of Lawful Pathways, 88 Fed. Reg. at 11708.

(including public health risks), those measures cannot include preclusion of access to asylum.¹³ The Proposed Rule threatens the right to seek asylum and puts individuals at risk of refoulement, putting the United States in violation of its international legal obligations. No time frame or “sunset” provision can overcome that legal flaw.

b. The Proposed Rule Undermines the Biden Administration’s Immigration, Migration Management, Regional Cooperation, Humanitarian, and Gender Equality Policies and Commitments

At the beginning of its term, the Biden Administration clearly articulated its commitments to pursuing humane migration policies and policies that promote gender equality. In February 2021, the Biden Administration issued three Executive Orders to celebrate the value immigrants bring to the United States; to advance safe and orderly asylum processing; and to protect family unity at the U.S.-Mexico border.¹⁴ WRC and AAP commended the creation of the Interagency Task Force on the Reunification of Families to reunify the nearly 4,000 children who were separated from their parents under the Trump Administration’s “zero tolerance” policy, which aimed to criminally prosecute all people who entered into the U.S. without authorization. Through its National Strategy on Gender Equity and Equality, the Biden Administration also conveyed its support of “policies to reduce vulnerability to abuse and exploitation faced by immigrants and noncitizens, especially women, girls and LGBTQIA+ individuals, and increase their ability to seek safety and justice,” and of “improved pathways to safety, including asylum and humanitarian relief, for those fleeing persecution.”¹⁵ These commitments were widely welcomed and celebrated by civil society organizations, which sought to work with the Biden Administration to help advance them.

WRG also supported several Biden Administration actions that advanced its migration and gender equality commitments, including the creation of a process—in collaboration with international organizations, regional task forces, and local nongovernmental organizations—that processed individuals into the United States after they were forced to wait in Mexico under the Migrant Protection Protocols (MPP) or “Remain in Mexico” policy. WRC also agreed with Secretary Mayorkas’ termination of and

¹³ UNHCR, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response* (Mar. 2020), <https://www.refworld.org/docid/5e7132834.html>.

¹⁴ Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans (Feb. 2, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-restoring-faith-in-our-legal-immigration-systems-and-strengthening-integration-and-inclusion-efforts-for-new-americans/>; Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border (Feb. 2, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>; Executive Order on the Establishment of Interagency Task Force on the Reunification of Families (Feb. 2, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-the-establishment-of-interagency-task-force-on-the-reunification-of-families/>.

¹⁵ The White House Gender Policy Council, *National Strategy on Gender Equity and Equality*, <https://www.whitehouse.gov/wp-content/uploads/2021/10/National-Strategy-on-Gender-Equity-and-Equality.pdf>.

assessment that MPP imposed “unjustifiable human costs.”¹⁶ In addition, the Biden Administration advanced its gender equity commitments through its reversal of legal decisions made under the previous Administration that made it nearly impossible for survivors of domestic and gang violence to qualify for asylum.¹⁷

The Proposed Rule also fails to uphold the Biden Administration’s previous policies and commitments to promote regional cooperation and shared migration management. WRC welcomed the United States and 20 other countries in the region signing the Los Angeles Declaration on Migration and Protection (“LA Declaration”) in June 2022, which includes a commitment to protect the rights of migrants, refugees, and asylum seekers, access to international protection, and family reunification.¹⁸ This follows the Biden Administration’s Collaborative Migration Management Strategy (“CMMS”), which promotes humane and orderly migration management, including through building and improving asylum systems in the region.¹⁹ Because the Proposed Rule shifts, rather than shares, responsibility throughout the Americas, it contradicts the LA Declaration and CMMS’ stated commitments.

The Proposed Rule runs counter to the Biden Administration’s commitments and previous actions to promote gender equality and undo the cruelty of the previous Administration’s immigration policies, as demonstrated throughout the comment. WRC and AAP are particularly dismayed that the Proposed Rule would require noncitizens to seek protection in a country they transited through and have their claim denied there first before being able to seek protection in the United States. As elaborated on throughout the comment, the Proposed Rule would force people to seek protection in countries like Mexico, which we saw under MPP and other policies results in extortion, kidnappings, sexual violence, and even deaths.²⁰ The Proposed Rule would also bolster human trafficking, rather than undermine it as intended. Policies that require people who are trying to seek asylum in the United States to remain in Mexico have led to exploitation and increased risk of human trafficking.²¹

IV. Parole Programs and CBP One are Inaccessible to the Most Vulnerable Asylum Seekers and Cannot Be the Exclusive Manners of Entry to Access Asylum in the United States

The “legal pathways” detailed in the Proposed Rule—including parole programs for Cubans, Haitians, Nicaraguans and Venezuelans and the CBP One application for pre-scheduled appointments at the U.S.

¹⁶ Department of Homeland Security, Explanation of the Decision to Terminate the Migrant Protection Protocols (Oct. 29, 2021),

https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf.

¹⁷ Center for Gender and Refugee Studies, Matter of A-B-, <https://cgrs.uchastings.edu/our-work/matter-b-0>.

¹⁸ The White House, Los Angeles Declaration on Migration and Protection (June 10, 2022),

<https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/>.

¹⁹ National Security Council, Collaborative Migration Management Strategy (July 2021),

https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf?utm_medium=email&utm_source=govdelivery.

²⁰ Human Rights First, *Fatally Flawed: “Remain in Mexico Policy Should Never Be Revived”* (Sept. 13, 2022),

<https://humanrightsfirst.org/wp-content/uploads/2022/10/FatallyFlawed.pdf>.

²¹ Women’s Refugee Commission, *Why Policies That Attempt to Deter People from Seeking Asylum Create Both Harm and Chaos* (Apr. 2022),

<https://www.womensrefugeecommission.org/wp-content/uploads/2022/03/Why-Policies-That-Attempt-to-Deter-People-from-Seeking-Asylum-Create-Both-Harm-and-Chaos.pdf>.

southern border—are not accessible to many asylum seekers and cannot be the exclusive manners of entry to access asylum in the United States.

a. The CBP One Application for Making Pre-scheduled Appointments at U.S. Ports of Entry at the Southwest Border is Inaccessible to the Most Vulnerable Asylum Seekers

The Proposed Rule seeks to generally require asylum seekers arriving at the U.S.-Mexico border to acquire a pre-scheduled appointment at a U.S. port of entry with the government mobile application, CBP One, in order to access asylum. In addition to its technological shortcomings, CBP One is inaccessible to many asylum seekers due to financial, language, literacy, technological, and other barriers and has limited appointment slots,²² effectively turning asylum access into a lottery. Asylum seekers without access to a smartphone or WiFi or those who lack the ability to navigate the app are unable to make an appointment. The app is only available in English, Spanish, and Haitian Creole, and most error messages are in English, barring many asylum seekers—including Indigenous language speakers—from using the app.²³

Requiring asylum seekers to use CBP One at the southwest border to make pre-scheduled appointments also raises concerns that the system will be used for illegal metering²⁴ and that asylum seekers who cannot access the CBP One application will be unable to present at a port of entry. The Proposed Rule states that the Departments would exempt individuals who prove by a preponderance of the evidence that they could not access the CBP One app due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacles. However, the Proposed Rule does not state what sort of evidence individuals will be required to provide. In the absence of specific guidance from the Department of Homeland Security and regular independent monitoring of ports of entry to ensure compliance, WRC is concerned that those individuals—who are often the most vulnerable asylum seekers—will be turned away at ports of entry and unable to request asylum.

The difficulty and waiting times for securing advance appointments can significantly exacerbate the grave danger that asylum seekers are desperately trying to escape.²⁵ Asylum seekers who are already facing precarious and often life-threatening situations in Mexico can be forced to wait weeks for an appointment or endure long, dangerous journeys to a distant port of entry if unable to secure one at the port nearest to them.²⁶ Asylum seekers who were waiting for their CBP One appointments in Mexico have already been exposed to horrific violence and even death. A 17-year-old Cuban teenager was murdered in Mexico while waiting for his appointment.²⁷

As described above, women—who are often survivors of domestic and other forms of gender-based violence—will be forced to wait in dangerous conditions at the border, often with no access to safe housing or resources for their basic needs, drastically increasing their likelihood of being targeted for

²² See Stephanie Leutert and Caitlyn Yates, *Asylum Processing Update*, University of Texas Austin Strauss Center (Feb. 2023), https://www.strausscenter.org/wp-content/uploads/Feb_2023_Asylum_Processing.pdf.

²³ Nick Miroff, “How Biden officials aim to use a mobile app to cut illegal U.S. entries,” *Washington Post* (Feb. 20, 2023), <https://www.washingtonpost.com/immigration/2023/02/20/cbpone-boder-app-biden-migrants/>.

²⁴ United States District Court of Southern California, *Al Otro Lado Inc v Mayorkas* (Sept. 2, 2021), https://fingfx.thomsonreuters.com/gfx/legaldocs/zjvqkzdwvx/IMMIGRATION_METERING_LAWSUIT_decision.pdf.

²⁵ Leutert, *Asylum Processing Update*.

²⁶ *Id.*

²⁷ See Jack Herrera, “Fleeing for Your Life: There is An App for That,” *Texas Monthly* (Mar. 2, 2023), <https://www.texasmonthly.com/news-politics/cbp-app-asylum-biden-administration/>.

further harm. In February 2023, WRC staff interviewed women attempting to make CBP One appointments in the Mexican cities of Ciudad Juárez and Piedras Negras, including survivors of gender-based violence. One woman from El Salvador interviewed had been kidnapped and sexually assaulted since arriving at the Mexican border city. She feared for her life waiting in Mexico and was struggling to navigate the trauma caused by the horrific incidents that occurred only miles away from where she was staying. She did not have access to WiFi at the shelter where she was staying, requiring her to leave the shelter terrified in order to recharge her phone and try to make a CBP One appointment. She was forced to wait in fear for weeks in order to secure an appointment.

In addition, the application is especially onerous for families seeking to coordinate asylum appointments for multiple family members, especially in cities with fewer appointments.²⁸ Several Venezuelan families waiting in Ciudad Juárez interviewed by WRC struggled to make group appointments. These struggles have resulted in some families deciding to separate so that the few who secured appointments could enter the U.S. and be safe.²⁹

b. *New Parole Programs Cannot Replace Access to Asylum at the US-Mexico Border*

New parole programs, including Uniting for Ukraine and the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans, are welcomed as additional legal migration pathways. However, such pathways cannot replace territorial access to asylum. In violation of international law, the Proposed Rule presents these narrow parole programs and CBP One appointments as the exclusive manners of entry for people seeking protection, made available at the expense of eligible individuals' ability to access territory and request asylum.

Under the Proposed Rule, authorization to travel to the United States through a DHS-approved parole process is one exception to the presumption of ineligibility. Thus, if one is eligible, the individual's only way to access U.S. territory is by being granted pre-authorized entry via a parole process or meeting one of the other exceptions. Like CBP One, these parole programs are not available to every individual seeking protection in the United States. For example, the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans are available only to those who are nationals of one of these four countries—or who are traveling with an immediate family member who is—and require a valid passport for international travel; an approved Form I-134A from a US-based supporter; and an airplane ticket to the United States purchased by the beneficiary. In November 2022, WRC staff interviewed dozens of Venezuelan asylum seekers in Chiapas and Oaxaca, Mexico;³⁰ in January 2023, WRC staff interviewed 12 Venezuelan asylum seekers in Monterrey, Mexico; and in February 2023, WRC staff interviewed dozens of asylum seekers of the four nationalities in Ciudad Juárez and Piedras Negras, Mexico, only identifying in each of the visits a select few individuals possibly eligible for these parole programs. Many asylum seekers lack valid passports, and even if present in their home country, cannot request one due to the political persecution

²⁸ Leutert, *Asylum Processing Update*.

²⁹ Andrea Castillo, "Asylum seekers face decision to split up families or wait indefinitely under new border policy," Los Angeles Times (Feb. 24, 2023), <https://www.latimes.com/politics/story/2023-02-24/asylum-seeking-families-consider-separation-shortage-mobile-app-appointments>.

³⁰ Apoyo a Migrantes Venezolanos, The Institute for Women in Migration (IMUMI), Women's Refugee Commission (WRC), The Center for Democracy in the Americas (CDA), *The consequences of US and Mexican immigration policies on the protection of Venezuelan women and LGBTIQ+ individuals in Southwest Mexico* (Dec. 2022), <https://reliefweb.int/report/mexico/consequences-us-and-mexican-immigration-policies-protection-venezuelan-women-and-lgbtqi-individuals-southwest-mexico>.

they are fleeing or because the country is experiencing severe turmoil.³¹ Other asylum seekers do not have family members or other contacts in the U.S. who could sponsor them. The Proposed Rule continues to diminish the right to access asylum in the United States regardless of one's nationality.

For the most vulnerable families, children, and individuals, waiting to be granted parole is impossible. When fleeing for their lives, many asylum seekers cannot seek out a US-based sponsor, apply for a parole program, and wait for approval. Further, reserving access to territory to only those with pre-approved authorization violates U.S. law and international treaties.³²

V. The Proposed Rule Would Significantly Harm Women, Undermine Family Unity, and Exacerbate the Trauma of Children

a. Harm to Women Already Traumatized by Gender-based Violence

The Proposed Rule's presumptive ineligibility framework exacerbates the immeasurable harms already faced by women and other victims of gender-based violence. The advance appointment requirement would result in asylum seekers waiting for extended periods at the U.S.-Mexico border or in other dangerous environments before having an opportunity to request asylum. Women seeking protection are often escaping violence based on their gender, which includes any form of sexual, physical, mental, and economic harm.³³ WRC has worked extensively to monitor and document the experiences of women navigating the asylum process, and we are deeply concerned that the new framework would exacerbate prior traumas and force women to remain in extremely dangerous conditions with very few resources and very little support as they wait to secure an appointment.

A report WRC issued in partnership with the Instituto para las Mujeres en la Migración (IMUMI) in 2022 documented the experiences of women from various countries including Haiti, Venezuela, El Salvador, Guatemala, and others as they waited in Mexico to seek protection in the United States.³⁴ The report found that women in these situations faced various grave challenges and dangers at Mexico's northern and southern borders. Women often do not feel safe in border cities and are under constant fear that they can be pursued by those who have harmed them. IMUMI interviewed Central American women, for instance, who were tracked down by their persecutors in Mexico.³⁵ Women are also subjected to violent

³¹ See, e.g., Jaqueline Charles, "New U.S. parole program for Haitians leads to long passport lines, cops fleeing the country," Miami Herald (Feb. 13, 2023),

<https://www.miamiherald.com/news/nation-world/world/americas/haiti/article272389513.html>.

³² A "well-founded fear of persecution is recognized in itself as a 'good cause' for illegal entry. To 'come directly' from such country via another country or countries in which s/he is at risk or in which generally no protection is available, is also accepted as 'good cause' for illegal entry. There may, in addition, be other factual circumstances which constitute 'good cause.'" See Cathryn Costello, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, UNHCR Legal and Protection Policy Research Series (July 2017),

<https://www.refworld.org/docid/59ad55c24.html>.

³³ The United Nations Refugee Agency, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* (2015), <https://www.unhcr.org/5630f24c6.html>.

³⁴ See Women's Refugee Commission and IMUMI, *Stuck in Uncertainty and Exposed to Violence: The Impact of US and Mexican Migration Policies on Women Seeking Protection in 2021* (Feb. 2, 2022), <https://www.womensrefugeecommission.org/research-resources/stuck-in-uncertainty-and-exposed-to-violence-the-impact-of-us-and-mexican-migration-policies-on-women-seeking-protection-in-2021/>.

³⁵ See IMUMI, *Análisis de la violencia de género: mujeres solicitantes de asilo en México* (Oct. 2021), <https://imumi.org/wp-content/uploads/2021/12/Analisis-de-la-violencia-de-genero.pdf>.

gender-based crimes while in Mexico with no recourse, either because some assaults involve Mexican authorities or because Mexican authorities may not meaningfully follow up on cases of assault or crimes against migrants.³⁶ This trauma is further exacerbated for women traveling with their children, as WRC has found instances of some women attacked or sexually assaulted in front of their kids.

Tahirih Justice Center and Oxfam America carried out a survey with service providers that showed that the rates of gender-based violence for asylum seekers in Mexican border cities are very high.³⁷ Survey respondents estimated that between 30 and 90 percent of their clients experience gender-based violence while waiting in those cities to seek asylum in the U.S. In addition, 68 percent of service providers indicated that their clients have been frequently sexually assaulted or raped at the U.S.-Mexico border. Further, 25 percent of survey respondents indicated that increased wait times at the border led to women en route to the U.S. being found and harmed by the very persecutors they fled in their home countries.

b. Failure to Account for Children's Special Vulnerability

As detailed above, the conditions faced by those currently forced to wait in Mexico to seek protection can be extremely precarious, particularly for women and children. Amid threats of violence and lack of resources, asylum seekers often find themselves sleeping on the streets or staying in squalid conditions with limited access to basic hygiene.³⁸ Parents waiting to secure an appointment for the family, or who have been deemed ineligible for asylum for not following the prescribed manner of entry under the Proposed Rule, would face similar circumstances.

The Proposed Rule also fails to recognize the special vulnerability of all children, whether accompanied or unaccompanied, exacerbating the trauma and harm the Rule would cause to families. Immigrant children have systematically higher rates of Adverse Childhood Experiences compared to non-immigrant children³⁹; among children in migratory situations, up to 97 percent of children may experience one or more ACE *prior to* migration, in addition to ACEs that ensue during the migratory journey.⁴⁰ These experiences are salient because as part of child development, children's brains perceive, process, store, and recall information in different ways from adult brains. Traumatized children—children who have had

³⁶ WOLA, *Migrant Shelters and Organizations Denounce that 99% of Crimes Against Migrants in Mexico Remain in Impunity* (June 2017), <https://www.wola.org/2017/07/99-crimes-migrants-mexico-remain-impunity/>.

³⁷ See Oxfam America and Tahirih Center for Justice, *Surviving Deterrence: How US asylum deterrence policies normalize gender-based violence* (Oct. 11, 2022), <https://www.oxfamamerica.org/explore/research-publications/surviving-deterrence/>.

³⁸ See, e.g., Women's Refugee Commission and IMUMI, *Stuck in Uncertainty and Exposed to Violence: The Impact of US and Mexican Migration Policies on Women Seeking Protection in 2021* (Feb. 2, 2022), <https://www.womensrefugeecommission.org/research-resources/stuck-in-uncertainty-and-exposed-to-violence-the-impact-of-us-and-mexican-migration-policies-on-women-seeking-protection-in-2021/>; Oxfam and Tahirih Center for Justice, *Surviving Deterrence: How US asylum deterrence policies normalize gender-based violence* (Oct. 11, 2022),

<https://www.oxfamamerica.org/explore/research-publications/surviving-deterrence/>.

³⁹ Naomi Schapiro, Samira Soleimanpour, Sophia Navarro, and Claire D. Brindis, *Screening Adolescents for Adverse Childhood Experiences (ACEs): Addressing the Unique Needs of Immigrant Youth* (Dec. 2021), <https://www.acesaware.org/wp-content/uploads/2021/12/Screening-Adolescents-for-ACEs-Addressing-the-Unique-Needs-of-Immigrant-Youth.pdf>.

⁴⁰ Anne Elizabeth Sidamon-Eristoff, Emily Cohodes, Dylan G. Gee, and Catherine Jensen Peña, *Trauma exposure and mental health outcomes among Central American and Mexican children held in immigration detention at the United States–Mexico border*, *Developmental Psychobiology* (Jan. 2022), <https://doi.org/10.1002/dev.22227>.

two or more ACEs as well as those who have suffered or witnessed trafficking, abuse, or violence—require time, trust, and professional guidance to be able to process and consolidate their memories and experiences.⁴¹ Without such time, trust, and guidance, many children will be unable to arrange and narrate their lived experience adequately—a prerequisite for demonstrating a qualifying legal claim but unrelated to the substantive events that an asylum claim should be judged on.

Crucially, this special vulnerability applies to all children in need of international protection, explicitly inclusive of children who arrive with parents or legal guardians. Finally, WRC and AAP further note that because children are dependent on their caregivers—whether parents, guardians, or other adults—the Proposed Rule would appear to penalize children with valid asylum cases for procedural errors made by their adult caregivers. Such a penalization is clearly unjust and inappropriate for children with protection needs.

c. Increased Pressure on Parents and Impacts of the Rule on Family Unity

In addition to the impact on women and children, WRC and AAP are extremely troubled by the impact that family separations will have on family unity. Under the Proposed Rule, asylum seekers who are unable to rebut the presumption of ineligibility would have no option to reunify with their families through the lesser forms of protection available to them in the United States. These individuals would be eligible only for lesser forms of protection such as Convention Against Torture (CAT) protection or Withholding of Removal, which do not provide permanent status or a pathway to citizenship, do not permit people to travel abroad, and which leave people with a permanent removal order and subject to deportation at any time. Individuals with these lesser forms of protection are unable to petition for their spouses and children, indefinitely separating families and leaving family members languishing abroad in danger—which would significantly impede family reunification.

VI. Increased Strain on Asylum Systems in Transit Countries in the Region, Barriers to International Protection, and Vulnerability for Some Asylum Seekers in Transit Countries

WRC and AAP are concerned that the Proposed Rule will place an increased strain on asylum systems in transit countries in the region, which already have limited capacity and many of which are overburdened with large backlogs of cases and long wait times. The denial of asylum access to individuals seeking protection in the U.S. who have transited through other countries could risk undermining years of the U.S. government’s investment made through substantial funding to international organizations to strengthen regional asylum systems and support capacity building efforts to effectively receive, process, and adjudicate asylum claims.

This responsibility shifting from the U.S. to countries in the region goes against the rights-respecting principles of regional frameworks such as the LA Declaration, which aims to strengthen and expand access to international protection and renews the signatory countries’ commitment to respect and ensure the human rights of all migrants and persons in need of international protection. The Proposed Rule would also work against the Biden Administration’s CMMS, which seeks to promote humane and

⁴¹ Kelly Edyburn and Shantel Meek, *Seeking Safety and Humanity in the Harshes Immigration Climate in a Generation: A Review of the Literature on the Effects of Separation and Detention on Migrant and Asylum-Seeking Children and Families in the United States during the Trump Administration*, Social Policy Report (2021), <https://doi.org/10.1002/sop2.12>.

orderly migration management, including through building and improving asylum systems in the region.⁴²

a. Increased Strain on Mexico's Already Overstretched Asylum System, Barriers for Applicants in Accessing International Protection in Mexico, and Vulnerability for Asylum Seekers in Mexico

Despite steps taken by the Government of Mexico with the support and financial assistance of UNHCR in recent years to strengthen la Comisión Mexicana de Ayuda a los Refugiados (COMAR),⁴³ Mexico's asylum system still has limited capacity and resources. While COMAR has expanded the number of offices throughout Mexico from four to nine in 2022, these offices have been unable to keep up with requests from the entire country.⁴⁴ In addition, COMAR currently processes a fraction of the asylum applications adjudicated by the United States.⁴⁵

COMAR has struggled to process the increasing number of protection claims it has received in recent years, leading to a growing backlog of cases. From 2013 through February 2023, COMAR received 443,617 applications, and to date it has only adjudicated 148,650 cases, roughly 33.5 percent of the total cases received.⁴⁶ In 2021, Mexico became the third top destination worldwide for individuals seeking protection, according to UNHCR.⁴⁷ That year, COMAR received a historic 129,780 applications, and the head of COMAR said in a February 2023 interview that in 2021 "we were at risk of collapsing; it was terrible."⁴⁸ 2021 saw a marked increase from prior years, with COMAR having received 71,230 in 2019, 29,635 applications in 2018, and even fewer in previous years. More recently, COMAR only adjudicated 36,347, approximately 31 percent, of the 118,745 applications received in 2022. So far in 2023, COMAR has already received 24,025 applications in January and February, and it is currently on pace to receive a record number of asylum applications this year.⁴⁹

WRC and AAP concerned that a further increase in cases due to the implementation of the Proposed Rule would overwhelm an already stretched COMAR and undermine the progress achieved in strengthening and expanding COMAR's capacity in recent years, which was achieved with the extensive support of international organizations that received substantial U.S. government funding. In a recent interview following the announcement of the Proposed Rule, the head of COMAR said that "for us it's very important to take care of the asylum system in Mexico," and "If the asylum system collapses, we're

⁴² National Security Council, Collaborative Migration Management Strategy (July 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf?utm_medium=email&utm_source=govdelivery.

⁴³ University of Texas Austin Strauss Center, Andres Manuel Lopez Obrador's Migratory Policy in Mexico (May 2020)

⁴⁴ Grupo de Trabajo Sobre la Política Migratoria, *Falta de coordinación de autoridades y endurecimiento de la política migratoria, principales retos en la protección de las personas en movilidad en Tabasco* (Mar. 2023), <https://gtpm.mx/falta-de-coordinacion-de-autoridades-y-endurecimiento-de-la-politica-migratoria-principales-retos-en-la-proteccion-de-las-personas-en-movilidad-en-tabasco/>.

⁴⁵ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS January 16, 2023 <https://www.justice.gov/eoir/workload-and-adjudication-statistics>

⁴⁶ Comisión Mexicana de Ayuda a Refugiados, *La COMAR en números febrero de 2023* (Mar. 14, 2023), <https://www.gob.mx/comar/es/articulos/la-comar-en-numeros-328946?idiom=es>.

⁴⁷ See ACNUR, *Principales resultados de ACNUR en México en 2021: Protección y soluciones en pandemia* (2022), https://www.acnur.org/es-mx/publications/pub_inf/6261d3ee4/principales-resultados-de-acnur-en-mexico-en-2021-proteccion-y-soluciones.html.

⁴⁸ Rosa Flores, "Mexico rethinks asylum initiative after controversial US announcement," CNN (Feb. 24, 2023), <https://www.cnn.com/2023/02/24/americas/mexico-asylum-policy-intl-latam>.

⁴⁹ Comisión Mexicana de Ayuda a Refugiados.

done.”⁵⁰

In addition to COMAR’s limited capacity, there are various barriers for individuals in applying for international protection in Mexico.⁵¹ Mexico’s contention policy—which aims to detect migrants who entered irregularly and deport them or bus them south—serves as an obstacle for individuals in need of international protection. Mexican law prohibits officials from returning individuals to a situation where their “life would be threatened or where there are reasonable grounds to believe that they would be in danger of being subjected to torture or other cruel, inhuman, or degrading treatment or punishment.”⁵² However, Mexican authorities do not always adequately screen for protection needs or inform migrants of their right to ask for asylum in Mexico before returning them to their countries or origin.⁵³ In addition, Mexican law stipulates that individuals have to submit their application to COMAR within 30 days of entering Mexico, which goes against the best practice not to set a deadline, as recommended by UNHCR.⁵⁴ While the number of civil society organizations that offer legal assistance has grown over the last several years, due to the increasing number of applications, organizations are unable to serve the majority of applicants,⁵⁵ which is crucial to ensuring due process. WRC and AAP are concerned that an increase in applications would further strain COMAR and exacerbate these barriers in accessing protection in Mexico.

Although COMAR protection officers are required to make a decision on a case once it is filed within 45 business days, this timeline is often not met.⁵⁶ WRC and IMUMI have interviewed individuals who have waited for many months and in some cases up to 2 years for their cases to be adjudicated.⁵⁷ Extended wait times have left many people in southern Mexico—where the vast majority submit their applications—to wait for decisions on their protection claims in precarious conditions for long periods of time. Mexican refugee law requires that applicants remain in the jurisdiction where they applied throughout the adjudication process, which prevents individuals applying for protection from reuniting with family and community networks in safer regions of the country with better employment opportunities.⁵⁸ These long wait times and dire conditions have led many applicants to withdraw their applications to COMAR.⁵⁹ WRC and AAP are concerned that the dire situation in southern Mexico attributable to the already overburdened COMAR would be exacerbated by the implementation of the Proposed Rule.

In addition, some migrants lack sufficient protections in Mexico, and WRC staff have repeatedly heard from individuals about the violence and other abuses they have experienced at the hands of organized

⁵⁰ Flores, Rosa.

⁵¹ Colegio de la Frontera Norte (COLEF), *The Mexican Asylum System: Between Protecting and Control* (Sept. 2021), https://www.scielo.org.mx/scielo.php?pid=S0187-73722021000100107&script=sci_arttext&lng=en.

⁵² University of Texas, Austin Strauss Center, *Central American Refugees in Mexico: Barriers to Legal Status, Rights, and Integration* (June 2019), https://www.strausscenter.org/wp-content/uploads/prp_206-central_american_refugees_in_mexico_barriers_to_legal_status_rights_and_integration-2019.pdf.

⁵³ See COLEF, the Mexican Asylum System.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Helen Kerwin, *The Mexican Asylum System in Regional Context*, Maryland Journal of International Law (2018), <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1680&context=mjil>.

⁵⁷ See WRC and IMUMI, Stuck in Uncertainty.

⁵⁸ *Id.*

⁵⁹ See COLEF, the Mexican Asylum System.

criminals and corrupt officials. These individuals might not reasonably feel safe pursuing their protection claims with COMAR. Through WRC's joint endeavor with Barnard College, "Separated: An Oral History Project,"⁶⁰ WRC interviewed a Central American father who had been kidnapped with his child by cartels in Mexico after being barred from seeking safety in the United States under the MPP or "Remain in Mexico" program. When the father tried to tell U.S. border officials that he and his child could not return to Mexico because it was too dangerous, the U.S. officials told him it did not matter. Then, the father and child were kidnapped by cartels directly outside of their migrant shelter in Mexico and missed their MPP immigration court date in the U.S. To this day, the father suffers, observing that "it is something I will never forget, and I have not gotten over it because there are nights that I go to bed crying, thinking about everything we went through, what we lived through there in Mexico." Because of the barriers for some individuals in accessing international protection and the security risks in Mexico, WRC and AAP are deeply concerned that individuals would be required to seek asylum there before being eligible to seek asylum in the United States under the Proposed Rule.

b. Strain on Guatemala's Unprepared Asylum System and Vulnerability for Asylum Seekers in Guatemala

In cooperation with international organizations, the Government of Guatemala has expanded its capacity to receive, process, and adjudicate asylum claims, including by establishing the new Refugee Status Recognition Department of Guatemala's Migration Institute (IGM) in 2021.⁶¹ Guatemala received 3,157 asylum requests from 2017 through September 2022.⁶² However, Guatemala's asylum system still has limited capacity, leaving asylum seekers waiting for years for the adjudication of their claims, with only 708 individuals having received asylum as of fall 2022.⁶³ In addition, WRC is concerned about the functioning of Guatemala's asylum system and the safety of asylum seekers. According to a June 12, 2019 cable from the U.S. Embassy in Guatemala City transmitted to Washington assessing the Guatemalan asylum system, Guatemala "does not provide sufficient safeguards against refoulement." The Embassy assessment additionally included detailed data demonstrating that Guatemala was "among the most dangerous countries in the world."⁶⁴

c. Increased Strain on Costa Rica's Overstretched Asylum System

Enjoying a high level of political and economic stability, Costa Rica has historically hosted individuals seeking protection from countries in Central America and South America. However, with a drastic increase in requests in recent years, especially due to the exodus of Nicaraguans fleeing political repression since 2018, Costa Rica's asylum system has experienced capacity constraints. As a result,

⁶⁰ We extend deep thanks to the parents who generously shared their experiences with family separation in the joint WRC-Barnard College endeavor "Separated: An Oral History Project."

⁶¹ UN Refugee Agency, "UNHCR welcomes expansion of Guatemala's asylum capacity" (Feb. 10, 2021), <https://www.unhcr.org/news/press/2021/2/6023f7d918/unhcr-welcomes-expansion-guatemalas-asylum-capacity.html>.

⁶² ACNUR Guatemala, *Hoja Informativa* (Oct. 2022), https://www.acnur.org/op/op_fs/6351cc6f4/acnur-guatemala-hoja-informativa-octubre-2022.html.

⁶³ *Id.*

⁶⁴ A Democratic Staff Report Prepared for the use of the Committee on Foreign Relations, *CRUELTY, COERCION, AND LEGAL CONTORTIONS: The Trump Administration's Unsafe Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador* (Jan. 18, 2021), <https://www.foreign.senate.gov/imo/media/doc/Cruelty,%20Coercion,%20and%20Legal%20Contortions%20--%20SFRC%20Democratic%20Staff%20Report.pdf>.

Costa Rica’s backlog reached 200,000 pending asylum requests by the end of 2022, in addition to another 50,000 people waiting to file an application.⁶⁵ Currently, asylum seekers account for four percent of Costa Rica’s population. To date, Costa Rica has only adjudicated 2,392—or four percent—of the 59,424 requests received in 2021 and 4,500—or five percent—of the 86,788 requests received in 2022.⁶⁶ As a result, asylum seekers in Costa Rica often wait for years for the adjudication of their protection claims, struggling to access medical services and often forced to work irregularly in the informal economy without labor protections.⁶⁷

VII. The Proposed Rule’s Rebuttable Presumption Framework Will Result in Erroneous Removals and Produce Serious Due Process Violations

The existing U.S. asylum infrastructure is woefully inadequate to administer the extensive changes outlined in the Proposed Rule and will result in erroneous removals and serious due process concerns. Among other avenues, the Proposed Rule would occur in the expedited removal process, where asylum seekers would be deported without a 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 extremely challenging for asylum seekers to overcome the ineligibility presumption in preliminary screenings.⁶⁸ Many would be unable to prove to an asylum officer that they should not be banned by the Rule despite *bona fide* asylum claims.

The Migrant Protection Protocols (MPP) policy highlighted the existing deficiencies in the asylum system, particularly in regards to exempting individuals based on vulnerabilities, such as medical vulnerabilities and increased risk based on sexual orientation or gender identity. While the Proposed Rule’s outlined exceptionally compelling circumstances—including victims of human trafficking and acute medical emergencies—may provide an opportunity for certain asylum seekers to overcome the ineligibility presumption, DHS has exhibited a poor track record in making such determinations in other circumstances. Indeed, within the first month of the reimplementing of the MPP policy, attorneys identified more than two dozen individuals who were enrolled in the program who should have been exempted, including LGBTQ individuals and people suffering from known medical conditions.⁶⁹ DHS subsequently created a redress mechanism where individuals placed in the MPP could request a review

⁶⁵ Moises Castillo and Christopher Sherman, “Fleeing Nicaraguans Strain Costa Rica’s Asylum System,” Associated Press (Sept. 2, 2022), <https://apnews.com/article/covid-health-elections-presidential-caribbean-52044748d15dbbb6ca706c66cc7459a5>.

⁶⁶ Dirección General de Migración y Extranjería de Costa Rica, Informes Estadísticos Anuales (Mar. 3, 2023), <https://www.migracion.go.cr/Paginas/Centro%20de%20Documentaci%3b3n/Estad%3adsticicas.aspx#collapse2022Refugio>.

⁶⁷ Michelle Vargas, *Seeking Integration in a City Lacking Economic Opportunities: A Case Study of Refugees in Towns San Jose, Costa Rica* (Mar. 2020), <https://www.refugeesintowns.org/san-jose>.

⁶⁸ See, e.g., Women’s Refugee Commission, *Prison for Survivors: The Detention of Women Seeking Asylum in the United States* (Oct. 1, 2017), <https://www.womensrefugeecommission.org/research-resources/prison-for-survivors-women-in-us-detention-oct-2017/>.

⁶⁹ Adolfo Flores and Hamed Aleaziz, “US Border Authorities Have Incorrectly Placed Immigrants With Medical Conditions In The Relaunching “Remain In Mexico” Program, Attorneys Say,” BuzzFeed News (Dec. 20, 2021), <https://www.buzzfeednews.com/article/adolfoflores/us-border-authorities-wrongly-sought-to-force-asylum>.

of their enrollment.⁷⁰ However in May 2022, WRC staff identified a handful of asylum seekers in shelters in Monterrey, Mexico, who should have been exempt due to their known vulnerabilities and never returned to Mexico via the policy,⁷¹ and had not known about or struggled to access the redress mechanism. DHS has historically failed to effectively screen asylum seekers for certain characteristics and processes.⁷² Placing the burden on asylum seekers to establish that they satisfy certain circumstances in order to make an asylum claim is entirely impractical and at odds with the current system's repeated failure to accurately make those determinations.

To further exacerbate the due process concerns, WRC and AAP have for years documented the inappropriate treatment and conditions of ICE and CBP custody, including grave concerns over due process. CBP and ICE detention facilities are essentially prisons or jails, often located in remote areas with few existing local service providers to help provide legal information to inform asylum seekers of the application process. Unless explicitly required to occur outside of government custody and with adequate time for an asylum seeker to articulate a claim for protection, this Proposed Rule may result in rushed adjudications and erroneous removals of individuals with meritorious claims to harm or death. These due process violations would be magnified if the Biden Administration pursues its reported plan to conduct credible fear interviews within days of asylum seekers' arrival in CBP custody, where dire conditions and lack of access to counsel⁷³ would exacerbate the due process nightmare.

The Trump Administration similarly conducted credible fear interviews in CBP custody through the Prompt Asylum Claim Review ("PACR") and Humanitarian Asylum Review Process ("HARP") pilot programs, which the Biden Administration ended.⁷⁴ The Proposed Rule would likely result in similar due process violations that occurred during PACR and HARP. For asylum seekers subjected to these programs, 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.⁷⁵

⁷⁰ U.S. Department of Homeland Security, MPP Additional Resources (Feb. 10, 2022),

<https://www.dhs.gov/mpp-additional-resources>.

⁷¹ Stef Knight, "Trump-era Remain in Mexico program under new scrutiny" Axios (June 22, 2022),

<https://www.axios.com/2022/06/22/remain-in-mexico-migrant-suicide-attempt>.

⁷² Women's Refugee Commission, Human Rights First, Center for Gender and Refugee Studies, the Center for Victims of Torture, and NETWORK Lobby for Catholic Social Justice, *Do Expedited Asylum Screenings and Adjudications at the Border Work?* (May 2021),

<https://www.womensrefugeecommission.org/wp-content/uploads/2021/05/Expedited-Border-Screening-Adjudication-Factsheet.pdf>.

⁷³ See, e.g., Human Rights Watch, *They Treat You Like You Are Worthless: Internal DHS Reports of Abuses by US Border Officials* (Oct. 21, 2021),

<https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials>.

⁷⁴ Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, (Feb. 2, 2021),

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>.

⁷⁵ Government Accountability Office, *Southwest Border: DHS and DOJ Have Implemented Expedited Credible Fear Screening Pilot Programs, but Should Ensure Timely Data Entry* (Jan. 2021),

<https://www.gao.gov/assets/gao-21-144.pdf>.

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

VIII. The Proposed Rule's Approach to Acute Medical Emergency Lacks Necessary Guidance and Poses Serious Risks to Asylum Seekers

The Proposed Rule presents three specific exceptionally compelling circumstances that would allow an asylum seeker to rebut the presumption of ineligibility for asylum. The Proposed Rule classifies an "acute medical emergency" as one of the exceptionally compelling circumstances an asylum seeker could establish by a preponderance of the evidence that they, or an accompanying family member, were suffering from a life-threatening emergency or faced "acute and grave" medical needs that could not be adequately addressed outside the United States at the time of entry. WRC and AAP are deeply concerned with the Proposed Rule's approach to humanitarian needs, including that it excludes non-life-threatening and other non-medical needs. As discussed in Section 3, reserving access to asylum only for those with the most extreme of threats violates the 1951 Refugee Convention.

Further, the Proposed Rule fails to provide guidance to inform assessments of an acute medical emergency or the other exceptionally compelling circumstances an asylum seeker may demonstrate to overcome the presumptive bar. Nor does the Proposed Rule specify which officials will be making this determination or whether any medical training or expertise would be required. Tasking immigration officials to make medical assessments would yield inconsistent application of the rebuttable presumption and undermine the welfare of asylum seekers. The Proposed Rule's evidentiary standards for establishing an acute medical emergency, or the other narrow circumstances, to overcome the presumptive bar put asylum seekers at risk of chain refoulement to countries where they face persecution.

Indeed, there are a variety of potential circumstances where a family may separate and evidence of the particular medical emergency necessary to rebut the presumption of ineligibility is no longer accessible to those who require it to make their claim. We are therefore concerned that viable asylum claims may be erroneously denied due to the Proposed Rule's standards for overcoming the presumption.

The acute medical emergency assessment is particularly concerning for its impact on children and the potential consequences for their health. The Proposed Rule inadequately contemplates the unique physical attributes of children's physical and mental health. Children are not little adults. For certain conditions, signs differentiating a child with illness from one with severe illness are quite subtle. A child can be happily playing, even running around, while their body systems begin to shut down. Many signs of serious physical distress are not easily visible, particularly to an untrained eye.

It is therefore extremely concerning that the Proposed Rule does not prescribe a certain level of medical training, nor require that children are assessed by trauma-informed physicians. Immigration officers are both ill-equipped and structurally ill-suited arbiters to assess the medical conditions of adult asylum seekers. For children with medical needs—who present a unique set of vulnerabilities—immigration officers are wholly inappropriate as arbiters. Further, under the Proposed Rule, parents traveling with children suffering acute medical conditions would be required to establish that the child's condition is an emergency. In such situations, it is critical that children receive immediate trauma-informed care by

trained professionals. The Proposed Rule as currently written offers no indication that appropriate protocols will be required to meet the child’s needs. Nor does the Proposed Rule contemplate that its text may essentially require that parents wait until the most severe symptoms present in their vulnerable children before asking for assistance, in order to meet an arbitrary threshold of urgency that neither they nor immigration officials are qualified to assess.

Overall, even if the Final Rule requires trauma-informed physicians to assess medical conditions, it does not negate the fact that these exceptions overwhelmingly restrict access to territory to the most vulnerable. While WRC and the AAP strongly advise that the Proposed Rule be withdrawn in its entirety, we outline serious issues with the rebuttable grounds to demonstrate how such exceptions fail to align with international law and may lead to erroneous denials of meritorious claims.

IX. Conclusion

WRC and AAP are deeply concerned that the Proposed Rule will harm asylum seekers, particularly women escaping gender-based violence and parents, families, and children, by limiting their ability to seek protection, erroneously denying meritorious asylum claims, and deporting them to persecution and torture. We therefore urge the Departments to withdraw the Proposed Rule in its entirety.

Sincerely,

Women’s Refugee Commission

American Academy of Pediatrics