IMMIGRATION &
NATIONALITY LAW COMMITTEE

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Submitted via https://www.regulations.gov

United States Department of Justice
Honorable Merrick Garland, Attorney General

Executive Office for Immigration Review
Director David L. Neal

United States Department of Homeland Security
Honorable Alejandro Mayorkas, Secretary

United States Citizenship and Immigration Services
Director Ur Mendoza Jaddou

RE: RIN 1615-AC83 and 1125-AB26 or CIS No. 2736-22, Docket No: USCIS 2022-0016, A.G. Order No. 5605-2023 Public Comment Opposing Proposed Asylum Procedures "Circumvention of Lawful Pathways"

Dear Attorney General Garland, Secretary Mayorkas, Director Neal, and Director Jaddou:

The Immigration and Nationality Law Committee of the New York City Bar Association ("City Bar") submits this comment in opposition to the above-referenced proposed rule titled "Circumvention of Lawful Pathways," which was published in the Federal Register on February 23, 2023 with a corresponding 30-day allotment for public comments ("the Proposed Rule"). The Proposed Rule is one of the most expansive asylum bans to date, and is reminiscent of recent, failed attempts to eviscerate the asylum protections our nation has heralded since its founding.

Founded in 1870, the New York City Bar Association is an organization of over 23,000 members. The City Bar's mission is to equip and mobilize a diverse legal profession to practice with excellence, promote law reform, and uphold access to justice. The Immigration Committee addresses diverse issues pertaining to immigration law and policy. Our members include staff of legal services organizations, private immigration attorneys, staff of local prosecutor's offices, employees of government immigration agencies, academics, and law students. We submit this comment based on our collective expertise and the experiences of our clients.

Introduction

The Proposed Rule, which effectively bars nationals of certain countries from accessing asylum procedures at the U.S. southern border, is one of the most expansive asylum bans to date. It runs counter to the Biden Administration's promise of improving our immigration system and of treating immigrants more humanely. It also conflicts with current U.S. law and treaty obligations.

Though the Proposed Rule's express purpose is to ensure safety and efficiency in the asylum process, in fact it is a hastily created framework for thwarting legitimate asylum claims while circumventing the Administrative Procedure Act ("APA")'s mandated notice and comment period. Given the complex nature of asylum law and procedures, combined with the massive and technical aspects of patrolling the U.S. border (as laid out in the 153-page Proposed Rule) and our international and human rights obligations, we are deeply troubled by the government's decision to diminish the standard 60-day public comment period to 30 days. These sweeping changes implicate local, state, and federal administrative agencies, public offices and, most importantly, hundreds of thousands of lives.

The Proposed Rule would send vulnerable asylum-seekers to third countries to try to seek asylum under whatever systems those countries may have. Foreclosing asylum for all applicants from designated countries who have not first sought asylum in a country geographically located between their country of origin and the U.S. overlooks the reality that seeking asylum in other countries may not be safe for many people. Under the proposed rule, the U.S. government would turn asylum-seekers away at the border and back into countries where their lives may be threatened, while denying them fair and full access to asylum protections. Such restrictions would flout the U.S.'s international human rights obligations as well as U.S. immigration laws.

1. "Circumvention of Lawful Pathways" is a misleading title for the Proposed Rule

Fleeing the dangers of your country of origin in the hope of seeking protection from persecution by applying for asylum in the United States cannot reasonably be described as "circumvention of lawful pathways" if one takes even a moment to consider what asylum-seekers go through, first to reach the U.S. border and then to navigate our byzantine immigration system. On President Biden's official website, his administration describes its commitment to immigrant communities and "a fair and orderly immigration system that welcomes immigrants, keeps families together, and allows people across the country—both newly arrived immigrants and people who have lived here for generations—to more fully contribute to our country."[1] Nothing is unlawful about fleeing your country of origin and seeking refugee protections in the United States; suggesting otherwise belies this administration's commitment to treating immigrants with dignity and respect.

[1] See https://www.whitehouse.gov/priorities/ (describing the Biden Administration's immigration stance as "centered on the basic premise that our country is safer, stronger, and more prosperous with a fair and orderly immigration system that welcomes immigrants, keeps families together, and allows people across the country—both newly arrived immigrants and people who have lived here for generations—to more fully contribute to our country"). (All websites last accessed on March 27, 2023.)

Furthermore, despite its seemingly innocuous language, the Proposed Rule would have multiple harmful effects on those fleeing atrocious human rights conditions in their home countries. For example, it creates "a rebuttable presumption of asylum ineligibility for certain non-citizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek protection in a country through which they travel." The rule would essentially require asylum-seekers to have access to technology, language skills, and an understanding of complicated rules even before stepping foot in the United States.

2. The Proposed Asylum Rule is Contrary to Both International Refugee Law and United States Asylum Law

As explained above, the title of the Proposed Rule suggests it is aimed at punishing asylum-seekers at the southern border who are allegedly "circumventing lawful pathways to immigration." However, claiming asylum after entering the United States is protected by both international refugee law and U.S. asylum law. Thus, the Proposed Rule would trammel on the rights of certain non-citizens to seek asylum regardless of their manner of entry into the United States and disregard the United States' international obligations.

A. The Proposed Rule violates International Law

The Proposed Rule violates binding international law. It requires that certain migrants either seek asylum in third countries or become ineligible for asylum unless they schedule an appointment with U.S. Customs and Border Protection before reaching a U.S. port of entry. In addition to being confusing, this goes against international obligations that the U.S. has entered into, such as the Universal Declaration of Human Rights (the right to asylum in Article 14), the 1951 Refugee Convention "1951 Convention") and its 1967 Protocol, as well as the Convention against Torture of 1984.

The Proposed Rule imposes an inequitable and insurmountable burden on certain migrants applying for asylum at the southern border, effectively barring this class of applicants from exercising their fundamental right to seek asylum. Moreover, by expeditiously returning non-citizens because they purportedly do not qualify for asylum based solely on their manner of entry into the U.S., the Proposed Rule imposes penalties inconsistent with Article 31(1) of the 1951 Convention. Finally, it also violates the crucial principle of *non-refoulement* set forth in Article 33(1) of the 1951 Convention, which forbids states from returning asylum-seekers to countries where they face certain persecution.[2]

While the United Nations High Commissioner for Refugees has explained that state parties may, with adequate safeguards, impose procedural requirements, such as claim-processing rules on asylum applications to manage their borders efficiently, the United States may not use "border

[2] Under the principle of *non-refoulement,* the United States has an obligation to ensure it does not push asylum-seekers out of its jurisdiction to places where they could face life-threatening conditions or human rights violations. The Proposed Rule would lead to the expedited removal of non-citizens that are unable to enter lawfully into the United States or fail to apply for asylum in transit countries. Returning them to Mexico, another country of transit, or their country of origin could lead to imminent harm or death for asylum-seekers.

management as a means to deter refugees from seeking asylum or to deny protection to whole classes of asylum-seekers."[3]

B. The Proposed Rule violates U.S. Law

Congress passed the Refugee Act of 1980 ("Refugee Act"), which amended the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., to bring "United States refugee law into conformance" with the 1967 Protocol. *Cardoza v. Fonseca*, 480 U.S. at 436. The Refugee Act makes clear that Congress intended "to protect refugees to the fullest extent of [the United States'] international obligations, rendering the scope and meaning of those obligations relevant to any interpretation of the INA's asylum provisions." *Yusupov v. Attorney Gen.*, 518 F.3d 185, 203 (3d Cir. 2008) (footnote omitted); accord, e.g., *Cardoza-Fonseca*, 480 U.S. at 436–38; *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1060–61 (9th Cir. 2017) (en banc).

The U.S. rule related to asylum codified at 8 U.S.C. 1158(a)(1) provides that non-citizens seeking refugee protection may apply for asylum regardless of their manner of entry. However, as described above, the Proposed Rule would unlawfully bar certain targeted non-citizens from asylum based on their manner of entry into the United States. The exceptions to the blanket rule barring asylum for this group of asylum seekers would be limited to "exceptionally compelling circumstances" – an impossible threshold in practice (such as an "acute" medical emergency, or a threat to life or safety to be "imminent and extreme," or being a "victim of a severe form of trafficking in persons")-- and would effectively bar these asylum-seekers from protection even when they can establish that they suffered past persecution or have a well-founded fear of future persecution. Moreover, having to argue these exceptions would only add to the highly complex procedural and substantive rules for asylum and further contribute to vastly unreasonable delays in adjudication of these claims.

As with the Trump administration's proposed asylum ban, which was litigated at length and enjoined on a national level, the Proposed Rule will undoubtedly suffer the same fate when it is litigated.[4] Similar to the Trump-era rule, the Proposed Rule exceeds the authority that Congress conferred on the Attorney General and the Secretary of Homeland Security to "establish additional limitations and conditions" on asylum that are "consistent with" § 1158, 8 U.S.C. § 1158(b)(2)(C) and it is highly likely that it will be found "unlawful" and "in excess of statutory . . . authority." 5 U.S.C. § 706(2)(A), (C).

3. The Proposed Rule intensifies the discrimination that Black, brown, and indigenous asylum-seekers already face.

[3] Case Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Plaintiffs & Affirmance in East Bay Sanctuary Covenant et al v. Donald J. Trump, May 8, 2019, No. 3:18-CV-06810, available at https://www.refworld.org/docid/5dced13f4.html.

[4] Memorandum Opinion from August 2, 2019, Case 1:18-cv-02718-RDM, available at https://www.caircoalition.org/sites/default/files/Memo%20Opinion%20Dkt.%2092.pdf (finding that the Trump asylum rules that certain non-citizens are ineligible for asylum depending on their manner of entry is incompatible with U.S. asylum law that non-citizens may "apply" for asylum, regardless of whether they entered the United States at a designated port of entry).

The Proposed Rule adds unfair and unnecessary additional burdens for the thousands of predominantly Black, brown, and indigenous asylum-seekers at the southern border, and places unreasonable expectations and requirements on the process for them to seek asylum. As immigration attorneys and advocates, we have heard many jarring firsthand accounts of the treacherous journeys that asylum-seekers endure en route to the United States in search of protection. The Proposed Rule sets insurmountable hurdles that would effectively ban many of the most vulnerable asylum-seekers and turn them away to face danger, persecution, and death.

The requirement that an individual must request and be denied asylum in a transit country is unreasonable and unsafe. There are many documented incidents of Black, brown, and indigenous migrants facing violence, discrimination, and homelessness in the very countries where the Proposed Rule would force them to seek asylum in the first instance. By issuing this rule, the administration would effectively require that asylum-seekers live in dangerous conditions for an indefinite amount of time while an asylum case is pending in one of these transit countries. The administration would also be expecting asylum-seekers to navigate legal processes in countries where they do not speak the language and may be unlikely to have fair access to legal counsel.

If an asylum-seeker does not seek asylum in a transit country or has not been denied asylum in one of those countries, the administration requires them to make an appointment through the CBP One application. Notably, the CBP One application is available in only three languages – English, Spanish, and Haitian Creole.[5] This means that the many African asylum-seekers and those who do not speak or read one of those three languages cannot navigate the registration process on the CBP One app. Additionally, Black migrants and those with darker skin tones have reported being unable to complete the registration process because the CBP One app cannot capture their darker skin tones.[6] As such, their ability to proceed via the CBP One app is compromised and so too is their ability to access the asylum procedures.

Rather than basing asylum eligibility on individualized assessments, the Proposed Rule would curtail countless asylum-seekers, including Black, brown, and indigenous migrants, based on their manner of entry into the United States, their ability to work through the asylum processes in a foreign country, and/or their ability to navigate defective and discriminatory technology. This runs counter to our country's longstanding history as a safe haven and every promise of respect, refuge, and equality this administration has made to migrants at our borders and in our country.

4. There is no justification for bypassing the notice and comment rulemaking procedures mandated by the Administrative Procedure Act.

The Biden administration has only given 30 days for the public to comment on the Proposed Rule. Generally, agencies should provide 60 days for comment. The shortened period – particularly in the face of such major changes to the rules as applied to asylum seekers at the southern border, which will affect tens of thousands of people in often dire circumstances -- denies the public the right to meaningfully comment on the Proposed Rule, which the APA prescribes under its notice and comment rulemaking procedures. 30 days is insufficient for a sweeping

[5] *See* "CBP One: An Overview," American Immigration Council, Feb. 28, 2023, https://www.americanimmigrationcouncil.org/research/cbp-one-overview.

[6] *See id.*

proposed rule such as this one, which would deny broad swaths of people access to asylum in violation of U.S. law and international treaties.

Executive Orders 12866 and 13563 state that agencies should generally provide 60 days for the public to comment on proposed regulations. Given the gravity of the Proposed Rule on codified asylum law, the country's international agreements, and the Proposed Rule's implications for asylum-seekers' possible return to death, torture and violence, a minimum of 60 days to comment is critical.

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 seems specious, especially given that the administration itself sought to formally end Title 42 nearly a year ago and has had ample time to prepare for the end of the policy. Their argument for shoehorning the Proposed Rule through a truncated review process incorporates a tacit fear of migrants coming to the United States, presumably in anticipation of Title 42's end-- but that is insufficient grounds to circumvent the APA and hastily enact changes to the asylum rules that will have such profound consequences. At a minimum, providing the standard notice and comment period of 60 days would have permitted a robust public discourse on how to protect asylum-seekers.

The City Bar opposes the Proposed Rule in its entirety, but we also urge the government to allow the public adequate time to review the 153-page Proposed Rule. Although even 60 days may be insufficient, it would at least comport with the APA's standards of notice and comment rulemaking. There is no justifiable reason to cut the comment period in half.

CONCLUSION

The City Bar is deeply troubled by the drastic changes to asylum procedures being proposed. The Proposed Rule forces asylum-seekers at the southern border to remain in and seek asylum in potentially dangerous transit countries. Furthermore, the proposed changes rely on discriminatory and faulty technology. In addition, the proposal violates U.S. obligations under both international law and U.S. immigration law. Hastily making such monumental changes is not justified and evidences a lack of compassion for vulnerable populations and human rights.

We urge this administration to revoke the Proposed Rule or, at a minimum, increase the public comment period to 60 days and seriously consider the concerns and objections raised by immigration advocates, community groups, and other concerned voices.

Respectfully,

Danny Alicea

Immigration & Nationality Law Committee
Danny Alicea, Chair