



March 27, 2023

Attn: U.S. Department of Homeland Security  
Executive Office for Immigration Review  
Submitted via [www.regulations.gov](http://www.regulations.gov)

Re: Comments in Response to the U.S. Citizenship and Immigration Services, DHS; Executive Office for Immigration Review, Department of Justice Notice of Proposed Rulemaking (NPRM or “Proposed Rule”) titled “Circumvention of Unlawful Pathways” CIS No. 2736-22, Docket No. USCIS 2022-0016)

We are writing on behalf of the Coalition for Immigrant Mental Health of Illinois, 7 additional organizations, and 55 individuals from Illinois and other states in opposition to the above referenced Notice of Proposed Rulemaking published on February 23, 2023. Note that some of the signatories are also providing their own detailed comments and specific responses.

### Introduction

We, the Coalition for Immigrant Mental Health (CIMH-IL), represent a diverse alliance of health practitioners, community organizers, researchers, and allies. Our collective mission is to foster collaborative community-based and research-informed partnerships centered on promoting the mental health and well-being of all immigrants through education, resource sharing, and advocacy. The CIMH Policy and Advocacy Workgroup and CIMH leadership team prepared this letter based on our collective knowledge, experience, and commitment to serving the needs of immigrant communities across Illinois, and nationally. We are well-positioned to review policies, analyze their impact on mental health, and mobilize action steps on behalf of the CIMH mission.

Since August 2022, Illinois has served and housed nearly 5,000 asylum seekers from Central and South America as part of a Texas-led operation to bus migrants to sanctuary cities with zero notice. On the ground, community-based organizations have worked tirelessly to ensure that migrants receive emergency resources unlocked by the state, such as food, shelter, mental health care, and that they have access to the legal services necessary to apply for asylum or any other protected status. Despite its challenges, the state of Illinois remains a welcoming state and recognizes the fundamental human right to seek asylum.

### Asylum as a Fundamental Human Right and Response to Forced Migration

Seeking asylum – whether in the U.S. or any other country – is a protected human right codified in international laws, including the Universal Declarations of Human Rights and the Refugee Convention of 1951.<sup>1</sup> It is not determined by one’s country of origin, how one flees persecution, or which borders are crossed in the trajectory to safety. Rather, the sole defining factor for asylum is that the individual is seeking protection from persecution.

Moreover, the process of asylum is not a legal loophole that people are exploiting, but rather a system of regulations that are designed to fairly address the reality of global forced human migration. According to the UNHCR, in 2021 there were 87.3 million forcibly displaced people globally, including 4.6 million asylum seekers. By the end of 2022, 1 in every 78 individuals around the world had been forced to flee their home.<sup>2</sup> Therefore, the proposed rule not only contradicts established law, but it also ignores the realities of forced migration, and constitutes a human rights violation.

### The Fallacy of “Lawful Pathways”

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<sup>1</sup> ACLU: <https://www.aclu.org/news/immigrants-rights/five-things-to-know-about-the-right-to-seek-asylum>

<sup>2</sup> UNHCR Global Trends 2022 Report: <https://www.unhcr.org/flagship-reports/globaltrends/>

As previously stated, there is nothing “unlawful” about seeking asylum. Stating that the proposed rule will facilitate a “lawful, safe, and orderly pathway” to seek asylum is a fallacy. A primary issue with this proposed rule is that it is convoluted, unclear, and designed to create further barriers to asylum that lead to “failed pathways.”<sup>3</sup> Further, the idea of legal pathways implies that these paths exist equally for all people, which is not only an unfounded belief, but one that blatantly ignores the realities that most asylum seekers face. For example, this is the case for individuals facing violence and persecution at the hands of oppressive and corrupt governments or militias. “Scheduling a time” to leave the country may not be a possibility and leaving may be illegal. Thus, the idea of utilizing the CBP One app, which may be easily tracked by government officials and other agents, may place asylum seekers at higher risk of persecution and retaliation rather than on a path to safety. Additionally, many countries with oppressive regimes limit access to the internet, so individuals would not even be able to access the CBP One app, putting them at serious risk of being turned away by CBP, even if the rule says otherwise. Moreover, the app has been highly problematic, as it produces frequent glitches in appointment scheduling and confirmation.<sup>4</sup> In sum, the rule will likely create fear and confusion among individuals who are already dealing with fear of persecution.

### A Transit Ban is Discriminatory and Biased on Factors of Race, Economic Status, and Education

The proposed rule presumes ineligibility unless there is an appointment scheduled ahead of time via the CBP One app or if asylum was denied in a third country; rebutting the presumption would require a “preponderance of the evidence” that is not feasible without access to legal counsel.<sup>5</sup> On the contrary to creating pathways, the proposed rule is clearly intended to deny migrants at the southern border, particularly those from the Northern Triangle (Guatemala, Honduras, and El Salvador) who are majority Black, brown, and Indigenous asylum seekers, entry to the U.S. Fifty-nine percent of pending asylum cases come from just five countries (the Northern Triangle, as well as Mexico, and Venezuela); the so-called Northern Triangle comprised 39% of the court’s asylum backlog.<sup>3</sup> Additionally, newer migration patterns demonstrate that African migrants and Haitians are arriving in South America in order to travel north to the U.S. through the same dangerous journey of their South and Central American comrades.<sup>6,7,8</sup> These asylum seekers have to grapple with yet another obstacle, the racial bias in the face recognition technology used by CBP One app. The CBP One app has been systematically not recognizing photos of individuals with darker skin tones, which is a required step to initiate the asylum process.<sup>9</sup> Moreover, CBP One app has limited language accessibility and does not work on older telephones, which creates further bias based on the asylum seeker’s educational and economic advantages and disadvantages.

Overall, the proposed rule implicitly favors wealthy, majority white immigrants who can secure visas, arrive by plane, have access to advanced technology, or have the means to apply for humanitarian parole programs.

### Legality of the Transit Ban and Legal Impact

The proposed rule will essentially function as an asylum ban, which has no legal precedence and would violate national or international law. Therefore, in addition to the aforementioned concerns, another primary issue we raise is the lawfulness of the proposed rule. It is worth noting that Trump-era Transit Bans were repeatedly struck down in the courts as unlawful.<sup>10</sup> As such, we will be prepared to challenge the legality of this rule and to join national advocates in challenging its implementation.

Moreover, the proposed rule is likely to result in detrimental legal outcomes for asylum seekers. For example, this rule will further push for fast track asylum determinations, which is particularly unjust due to

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<sup>3</sup> <https://immigrationimpact.com/2023/02/22/steps-to-seek-asylum-biden-transit-ban/>

<sup>4</sup> <https://www.pbs.org/newshour/nation/online-system-to-seek-asylum-at-u-s-border-overwhelmed-with-errors-heavy-traffic>

<sup>5</sup> <https://www.cliniclegal.org/training/archive/advocate-asylum-seekers-southern-border>

<sup>6</sup> <https://www.scrip.org/journal/paperinformation.aspx?paperid=110706>

<sup>7</sup> Migration Policy Institute 2021: <https://www.migrationpolicy.org/research/african-migration-through-americas>

<sup>8</sup> <https://www.jrsusa.org/story/under-the-lens-african-migration-across-the-americas/>

<sup>9</sup> <https://www.theborderchronicle.com/p/facing-bias-cbps-immigration-app>

<sup>10</sup> ACLU <https://www.aclu.org/press-releases/federal-court-again-blocks-trump-era-asylum-transit-ban>

the lack of legal counsel made available to those under CBP or ICE custody.<sup>11</sup> The proposed rule also would require additional evidentiary submissions and legal assessments without providing assurance that asylum seekers will have adequate access to legal counsel.<sup>12</sup> This rule would also restrict access to medical care and humanitarian aid if asylum seekers are denied by CBP, which impedes critical linkage to forensic evaluations that are often necessary for evidentiary submissions (Lustig et al., 2008; McKenzie et al., 2019; Sharp et al., 2019). Back in 2017, the American Immigration Council reported that the government's reliance on detention and expedited removal of asylum seekers only serves to disadvantage the most vulnerable.<sup>13</sup> This rule will create additional backlogs within immigration courts as individual judges attempt to apply a complicated, convoluted rule. As of January 2023, there were 35,746 backlog cases in Illinois immigration court with an average wait time of 1,400 days.<sup>14</sup>

### Mental Health Impact

The proposed rule forces individuals to seek asylum in countries where they are likely to also face physical and psychological harm. Research on the implementation of Migrant Protection Protocols demonstrated the harm of restrictive asylum policies (see Mercado et al., 2022; Silverstein et al., 2021). This is counter to the aim of asylum, which is to *not* place individuals in situations of further harm and trauma. Asylum seekers have high rates of Post-Traumatic Stress Disorder (PTSD) due to experiencing complex pre-migration traumas, as well as high rates of depression and anxiety disorders.<sup>15</sup> Additionally, research has shown that relocation and post-resettlement trauma—which is what this proposed rule would create—leads to further psychological harm (Barowsky & McIntyre, 2010; Li et al., 2016; Newnham et al. 2019; Sangalang et al., 2019).

### Erosion of Protections for Migrant Children

An asylum ban will not create order or deter people from seeking safety, but rather erode protections for the most vulnerable. The proposed rule has no specific protections for minors who constitute a growing number of those seeking asylum in the U.S. Children make up more than half of the world's forcibly displaced population, including 1.2 million asylum-seeking children.<sup>16,17</sup> Furthermore, in 2020, there were 35.5 million child migrants worldwide<sup>18</sup> with growing numbers of youth ages 15-24 living outside their home country.<sup>3,19</sup> As a nation, we should not return to Trump-era policies that eroded protections for children and youth.<sup>20</sup> Even though unaccompanied children are exempt from the proposed rule, children arriving in family units are not, and they would bear the burden if this rule was implemented.<sup>21</sup> We also point to the growing research documenting how hostile and restrictive immigration policies directly target, and further traumatize, migrant children and families (see Danaher et al., 2022; Gil-Garcia et al., 2021; Mercado et al., 2021; Muñoz de la Pena et al., 2019).

Family reunification and connection to kinship networks will continue to be a determining factor in where individuals and families seek refuge. That is, those forced to flee their home countries embark on an arduous, dangerous, and traumatic journey to seek safety and the hope of connecting with family and loved ones in the U.S. can foster the emotional protection and resiliency needed to survive the journey. Increasingly restrictive and enforcement-driven immigration policies reverse a commitment to family unity, which not only has deleterious consequences for health and well-being (Gubernskaya & Dreby, 2017) but also runs counter to the social and economic benefits of a family-based migration system (National Academies of Sciences, Engineering, & Medicine, 2016). While family reunification has been touted as a

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<sup>11</sup> TRAC Immigration Dec 2022: <https://trac.syr.edu/reports/705/>

<sup>12</sup> Human Rights First: <https://humanrightsfirst.org/library/biden-administration-plan-to-resurrect-asylum-ban-advances-trump-agenda-would-condemn-refugees-to-return-to-harm-family-separation-and-permanent-limbo/>

<sup>13</sup> American Immigration Council: <https://www.americanimmigrationcouncil.org/research/expedited-removal-asylum-seekers>

<sup>14</sup> TRAC Immigration Data: <https://trac.syr.edu/phptools/immigration/backlog/>

<sup>15</sup> World Health Organization: <https://www.who.int/news-room/fact-sheets/detail/mental-health-and-forced-displacement>

<sup>16</sup> <https://www.refworld.org/docid/4fe875682.html>

<sup>17</sup> UNICEF: <https://data.unicef.org/topic/child-migration-and-displacement/displacement/>

<sup>18</sup> UNICEF: <https://data.unicef.org/resources/idac-data-insight-1/>

<sup>19</sup> UNHCR: <https://www.unhcr.org/en-us/child-and-youth-protection.html?query=Child%20refugee>

<sup>20</sup> Kids in Need of Defense: <https://supportkind.org/resources/timeline-trump-administration-rolling-back-protections/>

<sup>21</sup> First Focus on Children: <https://firstfocus.org/news/press-release/5-ways-the-asylum-ban-punishes-children>

key aspect of the U.S. refugee resettlement program, Trump-era policies contested the importance of reunification beyond “nuclear family units” (Grace, 2019) and we view the proposed transit ban as another way of undermining family reunification.

### Conclusion

In sum, we submit this comment in strong opposition to the proposed rule for its failure to uphold the human and legal right to seek asylum in the U.S., and its explicit discrimination and bias against those arriving at the southern border. President Biden ran for office with a promise to end policies that restrict asylum, and to center the U.S. immigration system on human dignity and inclusion. Therefore, we urge the Biden Administration, the Department of Homeland Security, and the Department of Justice to *not* move forward with the proposed rule. All survivors of violence and persecution deserve *full* access to asylum, including those who must travel across multiple borders to ensure their safety. Lastly, this collective of signatories, which has been working diligently to welcome migrants arriving to Illinois, will continue to support their fundamental right to seek safety— and even further— their access to systems and communities that value their overall health, mental health, and wellness.

Sincerely,

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