

March 27, 2023

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

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

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

**Re: Comment in Response to Notice of Proposed Rulemaking:
Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No. USCIS
2022-0016; A.G. Order No. 5605-2023**

Dear Acting Director Daniel Delgado and Assistant Director Lauren Alder Reid,

The Tahirih Justice Center (“Tahirih”) submits this comment¹ in response to the Notice of Proposed Rulemaking on the Circumvention of Lawful Pathways (NPRM or “Proposed Rule”) published by the Department of Homeland Security (DHS) and Department of Justice (DOJ)’s (collectively, “the Departments”) in the Federal Register on February 23, 2023, that would ban many eligible survivors of gender-based and other violence from asylum protection in the United States.

Tahirih is the largest multicity direct services and policy advocacy organization specializing in assisting immigrant survivors of gender-based violence. In five cities across the country, Tahirih offers legal and social services to women, girls, and other immigrants fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital mutilation/cutting (“FGM/C”). Since its beginning in 1997, Tahirih has provided free legal assistance to more than 31,000 individuals, many of whom have experienced the significant psychological and neurobiological effects of trauma. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant survivors and promotes a world where they can live in safety and dignity.

¹ All sources cited shall be incorporated into the administrative record as if set forth fully herein.

Since its founding, Tahirih has also served as an expert resource for the media, Congress, policymakers, and others on immigration remedies for survivors fleeing gender-based violence. *See, e.g.,* Tahirih Justice Center, *Tahirih in the News*;² Tahirih Justice Center, *Congressional Testimony*;³ Tahirih Justice Center, *Comments*.⁴

The current Proposed Rule recycles previous misguided efforts to deter vulnerable survivors from seeking asylum within the United States by imposing restrictions that bear no relation to the merits of an asylum claim. This latest version of an “asylum ban” forecloses meaningful access to asylum for survivors of gender-based and other violence seeking safety and security at all stages of their journeys. Further, it violates U.S. and international law, which unequivocally allows people to seek asylum regardless of their pathway to the United States. The Tahirih Justice Center strongly urges the Departments to withdraw the Proposed Rule in its entirety.⁵

I. The Proposed Rule Will Have Serious Detrimental Effects on Vulnerable Migrants, Especially Survivors of Gender-Based Violence.

The Proposed Rule imposes a series of barriers to asylum access that will prevent most asylum seekers from levying their claims. Every survivor of gender-based and other violence will face monumental challenges to the fair consideration of her asylum case under the proposed scheme. After fleeing domestic violence, sexual assault, human trafficking, or forced marriage, she is expected to seek asylum in unsafe countries that lack functioning asylum systems, as explained in Section I.B. Upon reaching the U.S. southern border, she must use a flawed and failing smartphone app to schedule an appointment to make her asylum claim, as explained in Section I.C. When she faces an agent or officer, she must—without access to counsel and likely while detained—prove that she qualifies for an exception to the rebuttable presumption that she is not eligible for asylum, as explained in Section I.D. If she is unsuccessful, she must satisfy an elevated standard of proof showing fear of return to her country of origin, as explained in Section I.E. If she is unable to satisfy that unfairly heightened standard, she must affirmatively seek what little opportunity for review remains to her—likely still without sufficient time to prepare her claim or consult with counsel, as explained in Section I.F. If she fails to run this gauntlet of draconian conditions, she will be deemed ineligible for essential relief despite her meritorious asylum claim and promptly removed from the United States—directly back into the hands of her persecutors.

² See <https://www.tahirih.org/news-media/latest-updates/?tab=tahirih-in-the-news>.

³ See https://www.tahirih.org/news-media/publications/?_publication_categories=congressional-testimony.

⁴ See https://www.tahirih.org/news-media/publications/?_publication_categories=comments.

⁵ The preamble suggests that this Proposed Rule rescinds the third country transit ban and the asylum entry ban. *See* 88 Fed. Reg. at 11,727-28. Tahirih welcomes the rescission of both illegal and unjust rules. As written, however, the Proposed Rule does not effect a rescission of any rule. Tahirih advocates for the unambiguous, long-overdue rescission of these two unconscionable rules.

The devastating result of the application of these constraints to survivors of gender-based and other violence is that many people who legally qualify for asylum—and who cannot find safety outside U.S. borders—will be excluded from the U.S. asylum system. Tahirih submits that this outcome is in direct opposition to the “best interests of the United States.” 88 Fed. Reg. 11,704, 11,741 (Feb. 23, 2023). The moral authority of the United States derives from its longstanding commitment to protect the vulnerable, however they enter the country. *See, e.g.*, Refugee Act of 1980 § 101, P.L. 96-212, 94 Stat. 102. Abandoning these survivors—who risk everything to seek safety and security—based on an inability to satisfy arbitrary conditions compromises the moral standing of the United States on the world stage.⁶ The assertion to the contrary subverts the paramount interest in protection of the vulnerable in favor of compliance with meritless, near-insurmountable conditions on eligibility for survivors fleeing violence.

A. Immigrant Survivors of Gender-Based Violence Are Particularly Vulnerable, and the Prevalence of Gender-Based Violence Is Growing.

Survivors of gender-based violence are particularly vulnerable as they flee to safety. At the same time, the prevalence of gender-based violence continues to surge, as this administration acknowledges. These rules will work serious injustice by turning a blind eye to the challenges faced by survivors and erecting further barriers to their journey to safety. The Proposed Rule violates the administration’s moral and legal obligations to consider its impact on vulnerable populations.

Tahirih clients are survivors of violence in countries and cultures around the world. They have survived rape, severe and routine beatings, FGM/C, and attempted femicide. They have been trafficked for profit, subjected to slavery, and coerced into relationships with men who use violence—sexual, verbal, emotional, and physical abuse—to establish power over them. They have been subject to acid attacks and attempted murder as a matter of family “honor.” Escaping such persecution often entails sudden decisions to flee in haste, making it impossible to prepare or plan. Faced with a narrow window of opportunity to flee, a survivor often has no chance to collect personal belongings such as a mobile phone, identity documents, police reports, or hospital records.

Sonia* endured many years of abuse by her husband, who routinely beat and sexually assaulted her, hid and destroyed her religious texts, and prevented her

⁶ In November, the administration echoed this moral imperative, explaining that “as is too often the case, women and girls from historically marginalized communities—including people of color, people with disabilities, and people who identify as LGBTQI+—are disproportionately affected [by gender-based violence]. We must recommit ourselves to ending violence against women and girls in all their diversity—*wherever and whenever* it occurs. Ending this scourge is a moral imperative, and it is in our strategic interest to strengthen security and stability for us all. When women are safe and fully integrated into their societies, everyone does better.” Statement by President Joe Biden on the Occasion of International Day for the Elimination of Violence Against Women (Nov. 23, 2022) (emphasis added), available at: [Statement by President Joe Biden on the Occasion of International Day for the Elimination of Violence Against Women | The White House](#).

* Names have been changed for privacy and confidentiality.

from attending her place of worship. After a heinous incident in which her husband strangled her to near unconsciousness and sexually assaulted her in front of her young son, Sonia picked up her small child—and nothing else—and ran out the door of her house, never to return. She made her way to the United States, where she was granted asylum.

Gender-based violence in all of its forms involves a unique set of common characteristics that leave survivors of such violence uniquely vulnerable.⁷ That set of characteristics includes (i) persecution at the hands of family members, communities, and other non-state or state actors; (ii) severe ostracization and searing social stigmas; (iii) disbelief of survivors; (iv) internalized shame; (v) the inability to disclose gender-based violence to or in the presence of children or male family members; (vi) the absence or nonenforcement of laws to protect survivors; (vii) laws permitting gender-based discrimination or violence; (viii) cultural acceptance of gender-based violence; (ix) barriers to medical or mental health treatment for survivors; (x) forced dependence or unequal caretaking responsibilities; (xi) multiple victimization and revictimization; and (xii) ongoing gender-based violence even after a survivor reaches the United States.

The COVID-19 pandemic caused a sharp rise in gender-based violence, even in countries where such violence existed at epidemic levels before the onset of COVID-19.⁸ It is no surprise then, that in August 2022 DHS-Office of Immigration Statistics (OIS) reported that the “number of women and girls encountered at the border in 2021 reached a historic high.”⁹

As DHS-OIS explained, “increases in female migration may indicate that people are fleeing gender-based violence in their home countries, which has larger implications about stability and about potential policy approaches to mitigate such migration.” DHS-OIS Aug. 2022 Rep. at 9-10. Prior to the publication of the Proposed Rule, DHS was aware of the growing trend in

⁷ See generally UNFPA, *Against My Will: Defying the Practices That Harm Women and Girls and Undermine Equality* (2020), https://www.unfpa.org/sites/default/files/pub-pdf/UNFPA_PUB_2020_EN_State_of_World_Population.pdf.

⁸ See, e.g., Int’l Rescue Comm., *IRC data shows an increase in reports of gender-based violence across Latin America* (June 9, 2020), available at: <https://www.rescue.org/press-release/irc-data-shows-increase-reports-gender-based-violence-across-latin-america>; Nat’l Task Force to End Domestic Violence, *Fast Facts: Survivors of Domestic and Sexual Violence are at Heightened Risk Now, and Will Remain So Long After the Current Crisis*, available at <https://static1.squarespace.com/static/57d7477b9de4bb8b14256cf4/t/5e9dc0e935d08275a98b9925/1587396842687/NTF+Fact+Sheet.DV-SA+survivors+and+the+COVID19+crisis.pdf>; Refugees Int’l, *Exacerbating the Other Epidemic: How COVID-19 Is Increasing Violence Against Women and Girls* (Aug. 4, 2020), available at: <https://www.refugeesinternational.org/reports/2020/7/31/exacerbating-the-other-epidemic-how-covid-19-is-increasing-violence-against-displaced-women-and-girls>; see also Tahirih Justice Center, *The Impact of COVID-19 on Immigrant Survivors of Gender-Based Violence* (Mar. 23, 2020) (describing similar dynamics in the United States), available at: https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence_Final-March-23-2020.pdf

⁹ Dep’t of Homeland Sec. Office of Immigration Statistics, *Fiscal Year 2021 Southwest Border Enforcement Report* (Aug. 2022) (“DHS-OIS Aug. 2022 Rep.”), at 9, available at: https://www.dhs.gov/sites/default/files/2022-09/2022_0818_plcy_southwest_border_enforcement_report_fy_2021.pdf

gender-based violence and the special needs of this survivor population, yet it made no effort to consider the impact of the Proposed Rule on this vulnerable group or address the differing needs of these asylum seekers in the NPRM.

B. Transited Countries Are Unable to Provide Safe Haven or Workable Asylum Systems.

Upon flight with little notice or opportunity to plan, a survivor must endure a journey through dangerous and unfamiliar countries to reach safety in the United States. The Proposed Rule asserts that Mexico, Guatemala, and other countries provide potential safe havens for asylum seekers outside the United States, even as it acknowledges that these nations “are the origin for sizable numbers of asylum seekers in the region.” 88 Fed. Reg. at 11,721. But the NPRM ignores overwhelming evidence that these countries fail to keep their own citizens safe, provide only cumbersome and ineffectual asylum systems, and cannot address the basic needs—especially safety—of asylum seekers. Particularly for those fleeing gender-based violence, countries transited on the way to the United States cannot provide safety pending the asylum process, which is ineffectual in any event.¹⁰

Rose,* a survivor of brutal domestic violence in Honduras, attempted to come to the U.S. via Mexico to escape her abusive partner. While traveling through Mexico, she was kidnapped by a cartel that trafficked human organs, sequestered for months, forced to work, and raped. When she was finally able to escape, she fled to the U.S. where she has applied for asylum.

1. Guatemala

Guatemala is not a viable option for asylum seekers fleeing gender-based and other violence. In a dangerous environment rife with violence against women and LGBTQIA+ populations, the Guatemalan Migration Institute (IGM) manages a deeply dysfunctional and ineffectual asylum system.

Mariana* was kidnapped and sex trafficked in Guatemala. Police officers were among the men with whom she was forced to have sex. She was eventually sold to another group of traffickers in Mexico where police officers and government officials were again among her perpetrators. She was forced into pregnancy, and

¹⁰ In this comment, Tahirih discusses the lack of safety and adequate asylum processes in Mexico and Guatemala, two of the countries named as alternatives to the United States. With additional time, Tahirih would address the accuracy of the Departments’ claims that other countries cited in the preamble, including Belize, Costa Rica, Colombia, and Ecuador, manage functioning asylum systems capable of providing safe refuge to persecuted immigrants seeking safe haven. Tahirih also notes that some countries commonly transited by overland asylum seekers, including Honduras and El Salvador, are not even addressed in the Proposed Rule—an omission tantamount to an admission that these countries are neither safe nor capable of fairly processing asylum applications in any meaningful volume.

her traffickers threatened to sell her baby at birth. She escaped to the United States just days before giving birth.

Guatemala cannot provide safety for survivors of gender-based violence; in fact, it “remains among the most dangerous countries in the world.”¹¹ Guatemala reports alarmingly high rates of violent crime, including femicide, sexual assault, and other gender-based violence.¹² Sexual assaults increased year over year from 2020 to 2021.¹³ Laws against gender-based crimes are not effectively enforced, and rape and other sexual offenses are rampant.¹⁴ Police receive minimal training to investigate sexual crimes or to support survivors of gender-based crimes.¹⁵

Extreme violence against people who identify as LGBTQIA+ is widespread.¹⁶ In the first half of 2021, 17 LGBTQIA+ people were killed in hate crimes.¹⁷ Forced marriages and “corrective rape,” intended to cause pregnancy, are perpetrated with impunity against people identifying as LGBTQIA+.¹⁸ Police abuse of LGBTQIA+ people is rampant, contributing to low reporting rates.¹⁹ Other prevalent human rights abuses include violence targeting people with disabilities and indigenous people.²⁰

In Guatemala, human traffickers target women, children, and LGBTQIA+ people, particularly those from other Latin American countries.²¹ LGBTQIA+ people are at particular risk of exploitation for sex trafficking in Guatemala.²²

¹¹ U.S. Department of State Overseas Security Advisory Council, *Guatemala Country Security Report* (Aug. 15, 2022) (“2022 DOS Guatemala Security Report”), available at: <https://www.osac.gov/Content/Report/2013f384-296b-4394-bfcb-1c9c40b9c7df>

¹² U.S. Department of State Bureau of Consular Affairs, *Guatemala Travel Advisory* (Mar. 1, 2023), available at: <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/guatemala-travel-advisory.html>

¹³ *2022 DOS Guatemala Security Report*.

¹⁴ U.S. Department of State Bureau of Democracy, Human Rights and Labor, *2021 Country Reports on Human Rights Practices: Guatemala* (“2021 DOS Guatemala Human Rights Report”), at 24, available at: <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/guatemala/>

¹⁵ *Id.* at 24.

¹⁶ *2022 DOS Guatemala Security Report*.

¹⁷ *2021 DOS Guatemala Human Rights Report*, at 34-5.

¹⁸ *Id.* at 35.

¹⁹ *2022 DOS Guatemala Security Report*.

²⁰ *2021 DOS Guatemala Human Rights Report*, at 1.

²¹ U.S. Department of State Office to Monitor and Combat Trafficking in Persons, *2022 Trafficking in Persons Report: Guatemala* (“2022 DOS Guatemala Trafficking Report”), available at: <https://www.state.gov/reports/2022-trafficking-in-persons-report/guatemala/>

²² *Id.*

Guatemala cannot provide meaningful safety to survivors of gender-based violence. Even if a survivor could live in Guatemala in safety, she faces a very low chance of access to asylum there. Although a law makes asylum available and a process has been established for accessing it,²³ the process is so murky and rife with delays as to render it meaningless.

The administration's own report highlights serious flaws in the circuitous process, which requires representatives from four ministerial entities to approve an asylum application.²⁴ Of 486 asylum applications filed in 2020, only 29 were adjudicated by October of that year.²⁵ The administration notes that Guatemala received more than 1,000 asylum applications in 2021, which is more than double the number of any previous year.²⁶ But it glaringly omits any adjudication rate for this increased number of applications. Increased reliance on this unproven process all but assures that it will be unable to absorb increases in application volume and will result in delays of justice for applicants.

Similarly, the Proposed Rule asserts improvements in Guatemala's rates of asylum processing, but it mischaracterizes the actual numbers. 88 Fed. Reg. at 11,722. The NPRM says that IGM received 300 applications in the first three months of 2022, and "granted asylum to 590 individuals." 88 Fed. Reg. at 11,722. But in the first three months of 2022, IGM granted only 54 asylum applications.²⁷ The figure of 590 refers to the total number of asylees who have ever been granted status in Guatemala²⁸—a number that hardly inspires confidence in IGM's ability to process the high number of people who may be required to apply for status there should this Proposed Rule be implemented.

The woeful rates of asylum application processing are especially important when viewed in the context of the danger faced in Guatemala. Asylum seekers who must apply in Guatemala or lose eligibility in the United States—even though they know they cannot be safe in Guatemala—will be required to wait in extremely risky conditions while a poorly functioning system slogs through a glut of applications.

2. Mexico

²³ 2021 DOS Guatemala Human Rights Report, at 18.

²⁴ *Id.*

²⁵ *Id.*

²⁶ The White House Briefing Room, *Fact Sheet: Update on the Collaborative Migration Management Strategy* (Apr. 20, 2022), available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/20/fact-sheet-update-on-the-collaborative-migration-management-strategy/>

²⁷ Instituto Guatemalteco de Migración, Información Sobre Personas Solicitantes y Refugiadas en Guatemala, Enero 2002-Marzo 2022 (Mar. 2022) ("2022 IGM Report"), available at: <https://igm.gob.gt/wp-content/uploads/2022/04/Informe-con-Graficos-Marzo-2022.pdf>

²⁸ *Id.*

Like Guatemala, Mexico fails to offer a safe environment where survivors of gender-based violence can seek asylum. Asylum seekers in Mexico—the country through which everyone approaching the southern border must transit—“are (1) subject to violence and abuse from third parties and government officials, (2) denied their rights under Mexican and international law, and (3) wrongly returned to countries from which they fled persecution.”²⁹ Mexico is, in other words, not safe. In a moment of candor, the government has conceded as much: Deputy Assistant Attorney General Scott Stewart admitted at oral argument in federal court that migrants who seek to transit Mexico might be subject to “murders” or other violence.³⁰

The Proposed Rule improperly ignores the un rebuttable evidence that asylum seekers in the United States are applying for relief in the first *safe* country in which they arrive.

Dania* fled Peru to protect herself and her teenage daughter from gender-based violence. In Mexico, a group of men identified themselves as immigration officials and called Dania by her name. They kidnapped her and her two children, held them captive, extorted them, and physically and sexually abused them. Dania is now seeking asylum in the United States.

Serena* is a survivor of incestual sexual violence who fled Honduras, her country of origin. In Mexico, a member of the MS-13 gang, who was traveling with her group of migrants, sexually assaulted and threatened to kill her. While Serena traveled through Mexico, she was detained by Mexican immigration officials, but she was not offered any protection or opportunity to seek legal status in Mexico. After her release a few days later, she continued to the U.S., where she is seeking asylum.

Notwithstanding the Proposed Rule’s contention that Mexico “has made notable strides in strengthening access” to asylum and other protections, “receiv[ing] nearly 130,000 asylum applications” in 2021, 88 Fed. Reg. at 11,721, the Director of the Mexican Refugee Assistance Commission (COMAR) characterizes his own asylum system as “overwhelmed.”³¹ The application volume has increased 100-fold over ten years,³² leaving the system rife with

²⁹ *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 955 (N.D. Cal. 2019); *see also id.* at 951-5 (canvassing the record evidence).

³⁰ *CAIR Coalition v. Trump*, D.D.C. No. No. 19-cv-2117 (July 22, 2019) (oral argument on plaintiffs’ motion for a temporary restraining order).

³¹ Daina Beth Solomon and Lizbeth Diaz, *Mexico seeks to curb ‘abuse’ of asylum system by migrants who do not plan to stay*, Reuters (Feb. 13, 2023), available at: <https://www.reuters.com/world/americas/mexico-seeks-curb-abuse-asylum-system-by-migrants-who-do-not-plan-stay-2023-02-13/>

³² Stephanie Brewer, Lesly Tejada, and Maureen Meyer, *Struggling to Survive: the Situation of Asylum Seekers in Tapachula, Mexico* (June 2022), WOLA at 6, available at: <https://www.wola.org/wp-content/uploads/2022/06/FINAL-Struggling-to-Survive-Asylum-Seekers-in-Tapachula.pdf>

protracted delays³³ and “at risk of collapsing.”³⁴ The Proposed Rule touts an infusion of “aid for humanitarian and development assistance for refugees and vulnerable migrants across the hemisphere” and claims that Mexico’s tremendous increase in asylum application receipts reflects “dividends from these efforts.” 88 Fed. Reg. at 11,720. But COMAR’s annual budget remained “essentially stable from 2021 to 2022 despite skyrocketing levels of asylum claims.”³⁵ Given that COMAR faces an enormous volume of applications with virtually no increase in resources, it is no surprise the system is “near breakdown.”³⁶

Mexico’s protracted and draconian asylum system does nothing to make the process accessible for asylum seekers, especially those surviving gender-based violence. Mexico imposes a draconian thirty-day deadline to file an asylum application, a near-impossible hurdle, particularly for those who have survived the trauma of violence and are fleeing in fear.³⁷ Survivors require time to adequately build sufficient trust and process trauma in order to present a coherent story without overwhelming retraumatization. A thirty-day deadline ignores trauma-informed practice and compounds the harm to survivors.

Further, Mexico’s asylum process also prohibits applicants from moving among states, deeming applications abandoned in the event of relocation. Many applicants are subjected to indefinite detention, compounding trauma, and many others are confined to the city of Tapachula, near the Guatemala border, until their applications are decided.³⁸ Tapachula lacks sufficient resources to support this migrant population, leaving many without basic needs including shelter and food and vulnerable to violence and exploitation.³⁹ Women, children, and survivors of gender-based violence face heightened risk due to exploitation, violence, and lack of police protection.⁴⁰ These severe limitations on movement and resources retraumatize those who have survived intrafamily violence, stalking, and other gender-based violence.

³³ *Id.* at 1.

³⁴ Rosa Flores, CNN, *Mexico rethinks Asylum initiative after controversial US announcement*, CNN, available at: <https://www.cnn.com/2023/02/24/americas/mexico-asylum-policy-intl-latam/index.html>

³⁵ *Struggling to Survive* at 15 (citing COMAR’s annual budget, which can be viewed at line N00 of the Ministry of the Interior’s annual budget, available at: https://www.pef.hacienda.gob.mx/work/models/aVbnZty0/PEF2022/kgp8I9cM/docs/04/r04_aae.pdf (2022) and https://www.pef.hacienda.gob.mx/work/models/PEF2021/docs/04/r04_aae.pdf (2021)).

³⁶ Daina Beth Solomon and Lizbeth Diaz, *Mexico seeks to curb ‘abuse’ of asylum system by migrants who do not plan to stay*, Reuters (Feb. 13, 2023), available at: <https://www.reuters.com/world/americas/mexico-seeks-curb-abuse-asylum-system-by-migrants-who-do-not-plan-stay-2023-02-13/>

³⁷ UNHCR Help Mexico, *How to Apply for Refugee Status in Mexico*, available at: <https://help.unhcr.org/mexico/en/como-solicitar-la-condicion-de-refugiado-en-mexico/>

³⁸ *Struggling to Survive* at 9.

³⁹ *Id.* at 10.

⁴⁰ *Id.* at 2.

Sonia*, who escaped her abusive husband in Guatemala with just her child in her arms, reported that even if she had been eligible for asylum in Mexico, she could not have been safe there. She was confident that her husband would track her down in Mexico, kidnap her, and force her to return to Guatemala, where he would continue to harm and possibly kill her.

As a general matter, the serious dangers associated with waiting in Mexico are well documented and admitted by myriad groups including this administration itself. Just days before the filing of this comment, the State Department published its 2022 Country Report on Human Rights Practices: Mexico, which notes the severe risks faced by migrants in Mexico, particularly asylum seekers and survivors of gender-based violence.⁴¹ “[P]olice, immigration officers, and customs officials” target and victimize asylum seekers.⁴² Criminal groups extort, threaten, and kidnap asylum seekers.⁴³ Local authorities collude with human smuggling organizations.⁴⁴ Asylum seekers are subjected to gender-based violence, domestic servitude, forced labor, restrictions against movement, and detention.⁴⁵ Migration authorities often dissuade migrants from seeking asylum and other types of migratory regularization.⁴⁶

Among arrested and detained women, 79 percent of women had been tortured by police personnel during their incarceration.⁴⁷ “Of these, 44 percent were subject to acts of sexual torture.”⁴⁸

Violence against women is prevalent, with 40 percent of women reporting recent physical domestic violence and 23 percent reporting sexual violence within the last year.⁴⁹ The prevalence of domestic violence continues to worsen.⁵⁰ Only two percent of women who survived violence received help.⁵¹

⁴¹ U.S. Department of State Bureau of Democracy, Human Rights and Labor, *2022 Country Reports on Human Rights Practices: Mexico* (“2022 DOS Mexico Human Rights Report”), available at: <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/mexico/>.

⁴² *Id.* at 19.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 19-20, 41.

⁴⁶ *Id.* at 20.

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 7.

⁴⁹ *Id.* at 26.

⁵⁰ *Id.* at 26.

⁵¹ *Id.* at 25.

Gender-based violence also seriously endangers the LGBTQIA+ community. Police mistreat people who are LGBTQIA+ in detention.⁵² The government does not routinely investigate or punish abuses against people who are LGBTQIA+.⁵³ Hate crimes target people who are LGBTQIA+, particularly transgender women, with impunity.⁵⁴

Against this backdrop, two U.S. government policies have already exposed migrants to serious danger in Mexico while they wait to bring their asylum claims: the Title 42 policy of rapid expulsions of asylum seekers and other migrants, and the now-terminated Remain in Mexico (“Migrant Protection Protocols”) program. These two programs have laid bare the serious risks associated with stranding vulnerable migrants at the U.S. southern border without reasonable access to asylum processing.

During Remain in Mexico, asylum seekers reported kidnapping, rape, and other violence when they were forced to return to Mexico to await processing.⁵⁵ This administration noted the program’s “endemic flaws” and “unjustifiable human costs,”⁵⁶ and that enrollees “lack[ed] . . . stable access to housing, income, and safety.”⁵⁷ In the first two years of this administration, asylum seekers excluded from the U.S. under Title 42 reported more than 13,400 incidents of “kidnapping, torture, rape, and other brutal attacks.”⁵⁸

These reports only begin to capture the violence and danger rampant in Mexico for those whom the government has already forced to wait for an opportunity to seek asylum in the United States. The Proposed Rule works a serious injustice in requiring that survivors attempt to avail themselves of a malfunctioning asylum system in Mexico—and become targets for further violence while they do so.

⁵² *Id.* at 34.

⁵³ *Id.* at 33-34.

⁵⁴ *Id.* at 34.

⁵⁵ Julia Neusner & Kennji Kuzika, *Fatally Flawed: “Remain in Mexico” Policy Should Never Be Revived*, Human Rights First (Sept. 13, 2022), <https://humanrightsfirst.org/library/fatally-flawed-remain-in-mexico-policy-should-never-be-revived/>

⁵⁶ Department of Homeland Security, *DHS Statement on U.S. District Court’s Decision Regarding MPP* (Aug. 8, 2022), <https://www.dhs.gov/news/2022/08/08/dhs-statement-us-district-courts-decision-regarding-mpp>

⁵⁷ Alejandro D. Mayorkas, *Memorandum: Termination of the Migration Protection Protocols Program* (June 1, 2021), Department of Homeland Security at 4, available at: https://www.dhs.gov/sites/default/files/2022-02/21_0601_termination_of_mpp_program.pdf.

⁵⁸ Human Rights First, *Biden Administration Use and Expansion of Trump Policy to Ban People Seeking Asylum Endangers Lives, Tramples Human Rights* (Jan. 5, 2023), available at: <https://humanrightsfirst.org/library/biden-administration-use-and-expansion-of-trump-policy-to-ban-people-seeking-asylum-endangers-lives-tramples-human-rights/>; see generally Human Rights First, *Human Rights Stain, Public Health Farce: Evasion of Asylum Law and Title 42 Abuse Must End—and Never Be Revived* (Dec. 2022), available at: <https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf>.

C. The CBP One App Is Ineffectual, Illegally Imposes Metering, and Causes Delays Resulting in Increased Danger and Harm.

The Proposed Rule imposes an unreasonable requirement that asylum seekers who cannot prove an asylum denial in a country of transit must schedule an appointment at a port of entry. This requirement, resting on use of the deeply flawed and biased CBP One app, severely disadvantages those fleeing gender-based violence. The app is deeply flawed, countenances bias, and requires access to and familiarity with technology. The severe restriction in the number of available appointments effectively imposes an unlawful metering requirement. Finally, the requirement to wait long periods to schedule an appointment to enter the U.S. knowingly exposes survivors to further violence and danger.

1. The App Is Inaccessible and Error-Ridden

Those who flee domestic violence, stalking, and other gender-based violence often travel without a phone because of fear of continued stalking, haste in flight, or lack of resources. Some survivors flee in the midst of a final life-threatening violent incident, without the chance to collect even essential belongings, such as a mobile phone. Some survivors know their persecutors can track their movements and hunt them down if they keep a cell phone. Many shelters, especially those over-taxed and under-resourced shelters near the U.S. southern border, lack reliable internet access. Requiring access to a smartphone and a stable internet connection severely disadvantages survivors of violence.

Moreover, the technical flaws and unreliability of the CBP One app are well established. Many individuals spend hours attempting to register with the app, only to have the system terminate the process without warning, requiring them to restart the process.⁵⁹ Others struggle to provide a photograph from which the app can discern their facial features—resulting in a disparate impact on people of color.⁶⁰ The app is available in only a limited number of languages, including no indigenous languages.⁶¹ And use of the app requires such extensive technical knowledge and involves a process so arcane that one advocate has created a manual more than sixty pages long guiding applicants in its use.

⁵⁹ Kate Morrissey, *Asylum seekers in Tijuana are scrambling through mobile app error messages for few appointments into the U.S.*, The San Diego Union-Tribune (Jan. 22, 2023), available at: <https://www.sandiegouniontribune.com/news/immigration/story/2023-01-22/cbp-one-app-asylum-tijuana>; John Washington, *Glitchy CBP One app turning volunteers into Geek Squad support for asylum-seekers in Nogales*, Arizona Luminaria (Mar. 20, 2023), available at: <https://azluminaria.org/2023/03/20/glitchy-cbp-one-app-turning-volunteers-into-geek-squad-support-for-asylum-seekers-in-nogales/>

⁶⁰ *Id.*; see also Melissa del Bosque, *Facial Recognition Bias Frustrates Black Asylum Applicants to US, Advocates Say*, The Guardian (Feb. 8, 2023), available at: [Facial recognition bias frustrates Black asylum applicants to US, advocates say | US immigration | The Guardian](https://www.theguardian.com/us-news/2023/feb/08/cbp-one-app-asylum-applicants)

⁶¹ Rachel Sheridan, *CBP One App May Do More Harm Than Good for Survivors of Gender-Based Violence*, Tahirih Justice Center (Mar. 15, 2023), available at: <https://www.tahirih.org/news/cbp-one-app-may-do-more-harm-than-good-for-survivors-of-gender-based-violence/>

The Departments acknowledge “concerns regarding the accessibility of the CBP One app,” 88 Fed. Reg. at 11,720, but they offer no meaningful recourse for those adversely affected. The exceptions to the requirement to use the app—for those who face language barriers, illiteracy, significant technical failure, or other ongoing and serious obstacles—lack clarity and are insufficient to address these concerns. There is no guidance clarifying what might constitute “significant technical failure” or “other ongoing and serious obstacle,” leaving a troubling amount of discretion to officers conducting credible fear interviews. There is no exception for survivors who lack smartphones—and the app is not available on any other hardware such as a laptop or kiosk. These exceptions are also logistically vague, engendering serious questions of when, where, and under what standard seekers of asylum must prove they meet an exception and deserve consideration for asylum.

2. The App Imposes an Illegal Metering Scheme

The Departments disingenuously claim that the app will “significantly increase the number of individuals, including those who may be seeking asylum, that CBP can process at land border ports of entry.” 88 Fed. Reg. at 11,719. But to date the app has been used only to severely curtail the number of people who can present their asylum claims at a port of entry—effectively imposing an unlawful metering scheme. CBP acknowledged that as of March 15, 2023, “not all individuals seeking appointments have yet been able to schedule them” via the CBP One app, despite the app having been in operation for months.⁶²

The number of appointments provided does not approach the demand, with the result that the app imposes an unlawful metering scheme much like the ones federal courts have previously deemed illegal. For an extended discussion, *see* Section II.A.2. *infra*.

3. Use of the App and Its Associated Wait Times Expose Survivors to Increased Risk

Finally, survivors of gender-based violence are at increased risk of continued danger from their persecutors as they wait in Mexico for an opportunity to present themselves at a port of entry. Oxfam America and Tahirih Justice Center, *Surviving Deterrence: How US Asylum Deterrence Policies Normalize Gender-Based Violence*, at 14 (2022) (hereinafter “*Surviving Deterrence*”).⁶³ Some service providers report that the border serves as a “conduit for abusers,” where persecutors can track down and harm those who have escaped, compounding their trauma because they are required to wait for a chance to present their asylum claim. *Id.* Moreover, women, girls, LGBTQIA+ migrants, and Black migrants are all at elevated risk of continued or

⁶² U.S. Customs and Border Protection, *CBP Releases February 2023 Monthly Operational Update* (Mar. 15, 2023), available at: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-february-2023-monthly-operational-update>

⁶³ Oxfam America and Tahirih Justice Center, *Surviving Deterrence: How US Asylum Deterrence Policies Normalize Gender-Based Violence*, at 2 (2022) (hereinafter “*Surviving Deterrence*”), available at: https://www.tahirih.org/wp-content/uploads/2022/10/Oxfam_Tahirh_Surviving-Deterrence_English_2022.pdf

new gender-based violence while waiting at the border. *Id.* For example, sixty-eight percent of the service providers surveyed indicated that their clients had been raped and/or sexually assaulted frequently at the border. *Id.* The measures imposed by this rule thus expose vulnerable migrants to continued increased risk of harm.

It is the height of injustice to impose a presumption of ineligibility for asylum against those who are at highest risk when they comply with the conditions required to escape that presumption. In that way, the Proposed Rule creates a cruel Sophie's choice for survivors: they can endure increasing danger to comply with one of the Proposed Rule's unreasonable preconditions, or they can accept a presumption that they cannot seek the relief they so clearly deserve.

D. The “Exceptionally Compelling Circumstances” Required to Rebut the Presumption of Ineligibility for Asylum Are Insufficient to Protect Vulnerable Survivors

Further complicating an already complex scheme, the Proposed Rule creates narrow categories of “exceptionally compelling circumstances” that may be used to rebut the presumption against ineligibility. If a migrant can prove by a preponderance of the evidence that, at the time of entry, she or a family member with whom she is traveling faces an acute medical emergency, faces an imminent and extreme threat to life or safety, or is a victim of a severe form of trafficking, she can rebut the presumption and preserve her opportunity to seek asylum. But these grounds for rebuttal are unclear, narrow, legally complex, and fail to adequately protect those fleeing harm.

The exceptionally compelling circumstances are vague regarding the contours and standards of the exceptions, the forum in which a survivor will be expected to establish such circumstances, and the modicum of proof required. No definitions are provided for “acute medical emergency” or “imminent and extreme threat to life or safety,” leaving an inordinate amount of discretion to the official making the determination. The definition of “victim of a severe form of trafficking” is highly technical and requires a thorough analysis of several components usually (in the T nonimmigrant status context, from which the definition derives) completed after review of a complete application package, including extensive supporting evidence and briefing prepared by legal counsel. A survivor presenting at the border under the circumstances described above is unlikely to be able to meet this complex standard.

Border officials have repeatedly failed to faithfully execute existing screening requirements. Complicating the analysis further will only result in erroneous decision-making.

Simone,* a survivor of brutal domestic violence in Mexico, presented at a port of entry in Texas but was turned away without being asked why she had come to the U.S., whether she needed assistance, or whether she required communication in her best language.

Aretha,* who had survived sexual violence in Guatemala, was detained upon presenting at a port of entry, but was never asked why she had fled her country or if she required assistance. She was never given a credible fear interview.

The practical use of these grounds for rebuttal are deeply problematic and fail to adequately protect survivors. As a concrete example, the identical exception for “victims of severe forms of trafficking” included in the prior transit ban was “essentially insurmountable” because it was “rarely used and narrowly applied.”⁶⁴ Similarly, the limitations on the “imminent and extreme threat to life and safety” basis for rebuttal swallow the exception itself. While the generalized danger to survivors in border areas is both extreme and irrefutable (*see* Section I.B. above), the Proposed Rule emphasizes that “the threat cannot be speculative, based on generalized concerns about safety, or based on a prior threat that no longer poses an immediate threat.” 88 Fed. Reg. at 11,707 n.27. Proving a specific threat may be near impossible, as individualized threats are frequently made orally and in person, not in writing and amenable to proof in a formalized setting—and are usually directly followed by the harm itself. By requiring proof of an imminent and extreme threat in a country known to be unable to prevent violence, the Proposed Rule is *designed* to expose migrants to continued harm.

Further, it is the height of irony that a survivor of violence must prove additional risk or harm in order to prove that she is eligible for asylum. In fact, the exceptionally compelling circumstances appear to require a showing that the survivor is *doubly* eligible—first, on the basis of her underlying persecution, and again on the basis of her qualification for one of the exceptionally compelling circumstances.

E. The Improper Elevated Standard of “Reasonable Fear” Is Applied to the Most Disadvantaged.

As discussed above, the special vulnerabilities of survivors of gender-based violence make them likely to be unable to use the app to make an appointment or meet an exception, provide proof of denial of asylum in a transited country, or rebut the presumption by showing exceptionally compelling circumstances. Yet these survivors—who have suffered genuine persecution and truly fear return to their countries of origin—will, as a direct result of their own survivorship, be subjected to an elevated standard of fear review. At the same time, survivors are among the most poorly equipped to prove they meet these requirements or satisfy a higher standard of fear. Due to the crippling impact of trauma, pervasive social stigmas, and accompanying fear of reporting gender-based violence, particularly to government officials, it is highly unlikely that survivors will be able to sufficiently (1) disclose key, required elements of their claims; or (2) gather and provide objective documentation or proof to be able to corroborate such claims by a preponderance of the evidence.⁶⁵

⁶⁴ Human Rights First, *Asylum Denied, Families Divided: Trump Administration’s Illegal Third-Country Transit Ban* (July 2020) (providing an example of a 16-year-old victim of trafficking to whom an officer nevertheless applied the transit ban because the trafficking did not occur during the victim’s flight), available at: <https://humanrightsfirst.org/wp-content/uploads/2022/10/AsylumDeniedFamiliesDivided.pdf>.

⁶⁵ U.S. Commission on International Religious Freedom (USCIRF), *Asylum Seekers in Expedited Removal* (Feb. 8, 2005), available at: <https://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited->

Notwithstanding the severe disadvantages for survivors to prove their eligibility for asylum, the standard is elevated for this vulnerable group. A survivor who cannot satisfy the conditions, prove she qualifies for an exception, or rebut the presumption is subject to a far higher reasonable fear standard of review, where the same challenges that triggered this standard will again plague her attempt to satisfy it—even though the reason she is subjected to this higher standard is her very experience of trauma and violence.

1. Trauma Impacts a Survivor’s Ability to Coherently and Compellingly Present an Asylum Claim

The asylum seekers at issue here—to whom this discompassionate rule would apply—are survivors of violence in countries and cultures around the world. Finding the courage to escape that violence—often in haste and without warning, as described above—does not mean escaping the associated trauma. Like survivors of other traumatic events—war, hurricanes, criminal attacks—immigrant survivors of gender-based violence are marked by that trauma in ways both visible and invisible. For those who successfully make their way to the U.S. border to seek asylum or other relief based on such persecution, that trauma is likely to be, if anything, sharpened by a dangerous journey, fear of the asylum process, fear of being returned to their conditions of persecution, and fear of border officials.

Tahirih knows from its decades of experience working with survivors of gender-based violence that survivors, and other people seeking asylum, have undergone severe trauma.⁶⁶ Even the Departments have recognized this fact.⁶⁷ Rates of post-traumatic stress disorder, depression, anxiety, and other mental health challenges occur in far higher rates among people seeking asylum than the general population.⁶⁸ And the simple fact of trauma has several well-understood, well-established effects that deeply affect survivors’ ability to navigate any asylum system—let alone one stacked against survivors.

[removal](#); see also *Surviving Deterrence*, at 18 (“Due to both acute and/or prolonged trauma, a survivor of GBV may be unable to articulate their need for asylum on the spot in a way that is acceptable to CBP.”).

⁶⁶ See, e.g., Stuart L. Lustig, *Symptoms of Trauma Among Political Asylum Applicants: Don’t Be Fooled*, 31 *Hastings Int’l & Comp. L. Rev.* 725, 726, 728 (2008); U.S. Dep’t of Justice, Office on Violence Against Women, *The Importance of Understanding Trauma-Informed Care and Self-Care for Victim Service Providers* (July 30, 2014) (“*Trauma-Informed Care*”).

⁶⁷ *Id.*; see also USCIS RIAO Directorate – Officer Training: *Interviewing Survivors of Torture and Other Severe Trauma* (Dec. 20, 2019), available at: https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Survivors_of_Torture_LP_RAIO.pdf

⁶⁸ See U.N. High Comm’r for Refugees (UNHCR), *Refugee Resettlement: An International Handbook to Guide Reception and Integration*, at 233 (2002), available at: <https://www.unhcr.org/3d98623a4.html>

As an initial matter, trauma has serious effects on memory.⁶⁹ The result is that many trauma survivors suffer from an “impairment of recall” as a result of the trauma.⁷⁰ Memory problems can cause confusion around “details of particular incidents,” especially times, dates, and “which specific actions occurred on which specific occasion.”⁷¹ And survivors may also have difficulty identifying details that those who have not experienced trauma would view as central. To take a well-known example, many survivors are unable to identify the person who inflicted violence or torture on them, often because their minds were focused on other, more immediately salient details—such as the presence or use of a weapon.⁷²

In addition to its effects on memory, trauma has severe emotional consequences.⁷³ The recollection of trauma can also be emotionally overwhelming, especially when survivors recount their experiences. Doing so effectively retraumatizes a survivor by forcing her to “relive the

⁶⁹ Severe stress—which is routinely occasioned by traumatic events—can “inhibit processing of and memory for peripheral details.” Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. Air L. & Com. 1421, 1455-56 (2001). Moreover, traumatic experiences “are often stored in the memory as sensations or emotional states” that are not immediately recorded as personal narratives. Evert Bloemen et al., *Psychological and Psychiatric Aspects of Recounting Traumatic Events by Asylum Seekers*, Care Full 62, 74 (2006). Traumatic memories may therefore be available only “as isolated, nonverbal, sensory, motor, and emotional fragments.” *Id.*

⁷⁰ Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 Geo. Immigration L.J. 367, 388 (2003) (quoting Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 Int’l J. Refugee L. 293, 298, 308 (2001)); Jessica Chaudhary, *Memory and Its Implications for Asylum Decisions*, 6 J. Health & Biomedical L. 37, 44-45 (2010). Such loss of memory can take the form of broad “psychogenic amnesia,” or “loss of memory caused by psychological trauma.” Davis & Follette, *supra*, at 1462. It can also manifest as much more narrow memory loss that goes only to “selected components of the traumatic event.” *Id.* at 1462-63.

⁷¹ Davis & Follette, *supra*, at 1514; see J. Douglas Bremner, *Traumatic Stress: Effects on the Brain*, 8 Dialogues Clinical Neuroscience 445, 448-49 (2006). Dates are particularly problematic, because human brains are skilled at recalling relative sequences of events but not exact dates. See Cohen, *supra*; Melanie A. Conroy, *Real Bias: How Real ID’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 Berkeley J. Gender L. & Just. 1, 37 (2009); Carol M. Suzuki, *Unpacking Pandora’s Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 Hastings Race & Poverty L.J. 235, 257 (2007).

⁷² Davis & Follette, *supra*, at 1457.

⁷³ T. K. Logan et al., *Understanding Human Trafficking in the United States*, 10 Trauma, Violence, & Abuse 3, 16 (January 2009). Trauma can, for instance, lead to avoidance and dissociation. Maureen E. Cummins, *Post-Traumatic Stress Disorder and Asylum: Why Procedural Safeguards Are Necessary*, 29 J. Contemp. Health L. & Pol’y 283, 289 (2013).

crime mentally and emotionally, leading some to feel as though the sexual assault is recurring.”⁷⁴ Indeed, sometimes just “remembering constitutes new trauma.”⁷⁵

These effects of trauma are uniformly severe, but individual responses to trauma are not uniform.⁷⁶ Despite this variation, the effects of trauma generally lead to two results that have great significance for the asylum process. The first is that it is difficult for survivors to tell their story. The effects of trauma on memory naturally contribute to this problem, given that a “difficulty in information processing and in the logical, verbal reconstruction and description of the memory is at the very core of trauma reactions.”⁷⁷ A person who was tortured, for instance, may be left with memories of “the sensory data from the traumatic event—the sights, sounds, smells, and bodily sensations—but without the linguistic narrative structure that gives a person’s ordinary memories a sense of logical and chronological coherence.”⁷⁸

The emotional effects of trauma also significantly impede survivors’ ability to recount events. Detachment can “make it difficult for people to coherently communicate what they have survived.”⁷⁹ And being emotionally overwhelmed can lead survivors to appear “ambivalent in telling their stories of abuse” or to “minimize[] the seriousness of the abuse.”⁸⁰ Indeed, survivors of gender-based persecution who manage to flee in pursuit of safe haven often cannot meaningfully recount their stories in meaningful detail until and unless they receive medical, mental health, and other services. And even when they can, survivors of sexual and other severe

⁷⁴ Meg Garvin et al., *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, Nat’l Crime Victim Law Institute, *Violence Against Women Bulletin* at 1-2 (Sept. 2011) (internal quotation marks and alteration omitted); Gangsei & Deutsch, *supra*, at 86; Piwowarczyk, *supra*, at 157; Mosley, *supra*, at 321; Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 Santa Clara L. Rev. 457, 486 (2016).

⁷⁵ Conroy, *supra*, at 35 (emphasis added).

⁷⁶ See U.S. Dep’t of Health & Hum. Servs., Substance Abuse & Mental Health Servs. Admin., *A Treatment Improvement Protocol (TIP) Series No. 57, Trauma-Informed Care in Behavioral Health Services* 61 (2014) (“Trauma-Informed Care”), available at: <https://store.samhsa.gov/sites/default/files/d7/priv/sma14-4816.pdf>; Heather J. Clawson et al., U.S. Dep’t of Health & Hum. Servs., *Treating the Hidden Wounds: Trauma Treatment and Mental Health Recovery for Victims of Human Trafficking* 1 (2008), available at: <https://aspe.hhs.gov/system/files/pdf/75356/ib.pdf>.

⁷⁷ Bloemen, *supra*, at 78.

⁷⁸ Paskey, *supra*, at 487; see Davis & Follette, *supra*, at 1459; Epstein & Goodman, *supra*, at 411; Mosley, *supra*, at 326; Hannah Rogers et al., *The Importance of Looking Credible: the Impact of the Behavioural Sequelae of Post-Traumatic Stress Disorder on the Credibility of Asylum Seekers*, 21 *Psych., Crime & L.* 139, 140 (2015).

⁷⁹ Kagan, *supra*, at 396.

⁸⁰ Catrina Brown, *Women’s Narratives of Trauma: (Re)storying Uncertainty, Minimization, and Self-Blame*, 3 *Narrative Works* 1, 11-12, 17 (2013).

trauma may need “second and subsequent interviews ... in order to establish trust and to obtain all necessary information.”⁸¹

The second, equally straightforward result is that many trauma survivors will behave in ways that untrained people may read as indicating a lack of credibility. As shown above, trauma will lead to apparent inconsistencies as survivors become able to recount additional details over time. Trauma can also lead survivors to dissociate, or to be nervous, passive, unable to make eye contact, or reluctant to speak, and it also affects their cadence, affect, and tone.⁸² Trauma can cause survivors to “hesitate,” “waver,” or seem uncertain when describing traumatic experiences.⁸³ Survivors can also appear mechanical or unemotional as they do so.⁸⁴

These factors can and do affect survivors’ ability to tell their stories, and they are especially important in the fear interview at the border when trauma is likely to be freshest and the asylum seeker at her most vulnerable. Survivors arriving at the border are ill equipped to effectively communicate with immigration officials due to profound traumatization, hunger, exhaustion, lack of understanding of our legal process, and language and cultural barriers. They might still be suffering acute physical effects of violence in addition to emotional trauma. With no time to collect their thoughts, it is highly inappropriate to expect them to meet newly restrictive standards of proof and presumptions.

Yet the Proposed Rule bans survivors who have not been denied asylum in a third country nor scheduled an appointment, unless they qualify for an exception or rebut the ban with proof of exceptionally compelling circumstances. Survivors in this common situation will need to meet a far higher standard of proof to be eligible only for withholding of removal or protection under the U.N. Convention Against Torture. Both escaping the rebuttable presumption and satisfying the reasonable fear standard require a clear understanding of complex asylum laws and regulations, the capacity to formulate and express a legal theory, and the wherewithal to summon, organize, and express the relevant facts—all with virtually no access to counsel and likely while in detention. Many of those who qualify for an exception, or a rebuttal of the presumption, or for asylum even under the higher reasonable fear standard, will be unable to prove their eligibility to an officer.

The question of proof is further complicated by the many difficulties survivors face in gathering and providing objective documentation or evidence to corroborate their claims by a preponderance of the evidence. Access to corroborating evidence to support their claims is very

⁸¹ UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees* 9 (May 2, 2002) (“*Gender Guidelines*”), available at: <https://www.unhcr.org/3d58ddef4.pdf>.

⁸² See, e.g., *Trauma-Informed* 61-62, 69; Conroy, *supra*, at 34; Kagan, *supra*, at 396.

⁸³ Paskey, *supra*, at 484, 489; Scheppele, *supra*, at 126-27.

⁸⁴ See Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 *Geo. Immigr. L.J.* 155, 157-58 (2001); Lustig, *supra*, at 726.

limited. In “gender-related claims, the usual types of evidence used in other refugee claims may not be readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution.”⁸⁵ The formidable obstacles survivors already face in seeking safety have only been amplified by the global pandemic.⁸⁶

The second irrefutable fact faced by survivors for which the Departments must account is that. There are at least four reasons that survivors’ corroborating evidence is largely elusive. *First*, given the desperate circumstances under which they flee their homes in pursuit of a safe haven, survivors do not stop to gather paperwork. And even if they did so, they would need a sophisticated understanding of the U.S. asylum system to understand what documents would be helpful.

Second, just as trauma makes it effectively impossible for survivors to tell full and coherent stories, it also severely interferes with survivors’ ability to carry out even the basic administrative tasks needed in order to obtain evidence.⁸⁷ Further, the trauma associated with reviewing evidence of violence can prevent survivors from fully documenting their cases. For example, the abusive intimate partner of Marya,* Tahirih’s client, had their daughter killed. Overwhelmed with grief, Marya could not bring herself to view the photographs of her daughter’s deceased body and would not permit their submission as evidence in support of her asylum case.

Third, it is well established that external actors often bar survivors from retaining or gathering corroborating evidence. Human traffickers and people who commit domestic violence notoriously prevent survivors from holding bank accounts, purchasing bus passes, or even obtaining library cards—all potential sources of evidence in other types of cases. People who perpetrate domestic violence also routinely prevent survivors from seeking medical and law enforcement assistance, eliminating the initial creation of evidence. People who abuse survivors often confiscate documents ranging from passports to personal correspondence to further manipulate, isolate, and punish survivors and prevent them from escaping or seeking help. A

⁸⁵ UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01, at 10 (2002) (UNHCR Gender Guidelines), available at: <https://www.unhcr.org/3d58ddef4.pdf>.

⁸⁶ See, e.g., Rená Cutlip-Mason, *For Immigrant Survivors, the Coronavirus Pandemic is Life-Threatening in Other Ways*, Ms. Magazine (Apr. 14, 2020), available at: <https://msmagazine.com/2020/04/14/for-immigrant-survivors-the-coronavirus-pandemic-is-life-threatening-in-other-ways/>; Tahirih Justice Center, *The Impact of COVID-19 on Immigrant Survivors of Gender-Based Violence* (Mar. 23, 2020), available at: https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence_Final-March-23-2020.pdf

⁸⁷ See, e.g., Tahirih Justice Center, *Precarious Protection: How Unsettled Policy and Current Laws Harm Women and Girls Fleeing Persecution* (Oct. 2009), available at: https://www.tahirih.org/wp-content/uploads/2009/10/Precarious-Protection_Tahirih-Justice-Center.pdf

survivor might thus have to risk her safety trying to retain or regain control over her own documents and other belongings that could serve as key evidence in her case.⁸⁸

Fourth, although expert evidence is likely to be available in the United States and not in the control of those from whom a survivor is fleeing, survivors and other people seeking asylum are typically in no position to gather that type of evidence. Indeed, people seeking asylum are unlikely to know what expert evidence is, much less that it is frequently helpful in immigration cases; what kinds of expert evidence, such as country-conditions evidence and psychological evaluations, are most useful; or where to find experts. And even if survivors somehow had all of that knowledge, communication and payment would remain effectively insurmountable obstacles. The result is that survivors are exceptionally unlikely to be able to procure expert evidence until they have retained counsel, built a relationship of trust with counsel, and sufficiently processed trauma to be able to relay their experiences to counsel. All of that takes significant amounts of time—as does the process of counsel then finding relevant experts and securing reports, declarations, and the like.

In short, as noted by UNHCR, in “gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution.”⁸⁹ Thus, “cases in which an applicant can provide” documentary “evidence of all of his statements will be the exception rather than the rule.”⁹⁰

Taken together with the effects of trauma, the general unavailability of documentary evidence means that the very people who have suffered the worst persecution are often the *least* able to present evidence, be it oral or written, in support of their claims that they qualify for an

⁸⁸ See, e.g., Anne L. Ganley, *Health Resource Manual* 37 (2018); Rachel Louise Snyder, *No Visible Bruises: What We Don't Know About Domestic Violence Can Kill Us* (2019) (“*No Visible Bruises*”); Margaret E. Adams & Jacquelyn Campbell, *Being Undocumented & Intimate Partner Violence (IPV): Multiple Vulnerabilities Through the Lens of Feminist Intersectionality*, 11 *Women's Health & Urb. Life* 15, 21-24 (2012); Misty Wilson Borkowski, *Battered, Broken, Bruised, or Abandoned: Domestic Strife Presents Foreign Nationals Access to Immigration Relief*, 31 *U. Ark. Little Rock L. Rev.* 567, 569 (2009); Nat'l Domestic Violence Hotline, *Abuse and Immigrants*, available at: <https://www.thehotline.org/is-this-abuse/abuse-and-immigrants-2>; Edna Erez & Nawal Ammar, *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study* (2003); available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/202561.pdf>; Memorandum from Paul Virtue, General Counsel, Immigration & Naturalization Service (Oct. 16, 1998), at 7-8, available at: <https://asistahelp.org/wp-content/uploads/2018/10/Virtue-Memo-on-Any-Credible-Evidence-Standard-and-Extreme-Hardship.pdf>; Edna Erez et al., *Intersection of Immigration and Domestic Violence: Voices of Battered Immigrant Women*, 4 *Feminist Criminology* 32, 46-47 (2009); Immigration & Customs Enforcement, *Information for Victims of Human Trafficking* (2016), available at: <https://www.ice.gov/sites/default/files/documents/Document/2017/brochureHtVictims.pdf>; National Sexual Violence Resource Center, *Assisting Trafficking Victims: A Guide for Victim Advocates 2* (2012). available at: https://www.nsvrc.org/sites/default/files/publications_nsvrc_guides_human-trafficking-victim-advocates.pdf.

⁸⁹ UNHCR, *Gender Guidelines* at 10, available at: <https://www.unhcr.org/3d58ddef4.pdf>.

⁹⁰ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* § 196 (1979).

exception or for exceptionally compelling circumstances or meet an elevated reasonable fear standard.

2. The Heightened Reasonable Fear Standard Is Inappropriate to Apply to Survivors.

For all of these reasons, application of a reasonable fear standard to survivors of gender-based and other violence serves only to expedite the return of survivors to harm despite the fact that they are in greatest need of protection. The Departments previously admitted that the heightened reasonable fear standard is not appropriately imposed against survivors and other asylum seekers in an earlier rulemaking. Yet with this Proposed Rule the Departments impose exactly that approach, irrationally reversing their own previous admissions that such a standard undermines congressional intent, is inefficient, is ineffective at screening out non-meritorious claims, and does not adequately protect against *refoulement*.

Congress imposed a standard that those in expedited removal proceedings show a “significant possibility” that they would be subject to persecution if returned to their country of origin. INA § 235(b)(1)(B)(v). This longstanding rule was abrogated briefly by a series of rules promulgated by the previous administration, later deemed unlawful, and—until now—abandoned by the current administration. *See* “Asylum Eligibility and Procedural Modifications,” 84 Fed. Reg. 33,829 (July 16, 2019) (“Third Country Transit Bar IFR”), *vacated by Capital Area Immigrants’ Rights Coal. v. Trump*, 471 F. Supp. 3d 25, 45–57 (D.D.C. 2020); “Asylum Eligibility and Procedural Modifications,” 85 Fed. Reg. 82,260 (Dec. 17, 2020) (“TCT Bar Rule”), *preliminarily enjoined by E. Bay Sanctuary Covenant v. Barr*, 519 F. Supp. 3d 663, 668 (N.D. Cal. Feb. 2021); “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review,” 85 Fed. Reg. 80,274 (Dec. 11, 2020) (“Global Asylum rule”), *preliminarily enjoined by Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021) (“*Pangea II*”); “Security Bars and Processing,” 85 Fed. Reg. 84,160 (Dec. 23, 2020) (“Security Bars Rule”), *delayed by* “Security Bars and Processing; Delay of Effective Date,” 86 Fed. Reg. 73,615 (Dec. 28, 2021).

Since the promulgation of and rulings against those rules, this administration has distanced itself from the unjust “reasonable possibility” standard and returned to “defining ‘credible fear of persecution’ as ‘a significant possibility, taking into account the credibility of the statements made by the [noncitizen] in support of the [noncitizen’s] claim and such other facts as are known to the [asylum] officer, that the [noncitizen] can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act.’” 87 Fed. Reg. at 18,084. The Departments provide no good reason for this change.

Application of a consistent “significant possibility” standard for those in expedited removal proceedings promotes efficiency at a time when the Departments are underfunded, understaffed, and facing significant backlogs. *See* 87 Fed. Reg. at 18,091 (“[K]eeping one standard in screening for asylum, statutory withholding, and CAT protection better promotes an efficient credible fear screening process.”). In the Departments’ recent view, elevating the standard in some situations “defeat[s] their intended purpose, and complicates and extends the initial

screening process.” 87 Fed. Reg. at 18,092. “In the Departments’ view, the delays associated with complicating and extending every credible fear interview likely outweigh any efficiencies gained by potential earlier detection of individuals who may be barred from or ineligible for certain types of protection.” 87 Fed. Reg. at 18,092. Here, as with those previous, now-abandoned rules, “[the] additional time spent developing the record when the higher reasonable fear standard applied decreased the efficiency of the screening interviews themselves and complicated the analysis asylum officers were required to perform, thus contributing to the overall lengthening of the entire process.” 87 Fed. Reg. at 18,092. Efficiencies were also lost based on the time required for supervisory review, training, quality assurance, development and delivery of guidance and training, monitoring, review, and advice. 87 Fed. Reg. 18,092. In other words, no efficiencies were gained by imposition of a reasonable fear standard, and instead, Congressional intent was “undermined.” 87 Fed. Reg. at 18,092.

More importantly, “based on the Departments’ experience, . . . no evidence has been identified that this approach resulted in more successful screening out of nonmeritorious claims while ensuring the United States complied with its nonrefoulement obligations.” 87 Fed. Reg. at 18,092. As the Departments themselves acknowledge, the “congressionally intended purpose” of the fear screening is “a fail-safe to minimize the risk of refoulement,” 87 Fed. Reg. at 18,093, and the “significant possibility” standard is essential to protect against that risk. The Departments themselves recognized the inadequacy of the “reasonable possibility” approach and made the reasoned choice to abandon it. There is no justification to now reinstate it and risk violating the U.S.’s legal and moral obligation of nonrefoulement.

F. The Proposed Rule Severely Curtails Meaningful Review.

Late in this asylum process that is already heavily stacked against survivors, should a survivor fail to receive a positive fear determination, the Proposed Rule requires a survivor to affirmatively request immigration court review and fully eliminates the possibility to request USCIS reconsideration of the fear determination. These provisions remove essential protections for survivors who are traumatized, unfamiliar with the U.S. legal system, and lack meaningful access to counsel.

Meaningful review of the fear determination is essential to protect the rights of survivors and other asylum seekers. A survivor facing trauma, language barriers, and often lacking access to counsel is unlikely to possess sufficient familiarity with the legal system to understand and request the right to review—or the consequences of failing to do so. In the context of the rapid asylum processing system underway at select locations since May 2022, NGOs have observed serious failures to provide asylum seekers with notice of their right to request reconsideration or opportunity to do so, with the result that many asylum seekers miss the draconian seven-day deadline and are subject to *refoulement* in violation of their rights. By eliminating even that restricted opportunity for a request for reconsideration, and severely curtailing availability of immigration court review to those who affirmatively request it, the Departments assure that many survivors who might be able to better show their eligibility for asylum will lose that opportunity.

Even if review by an immigration judge is properly requested, the promise of *de novo* review by an immigration judge is hollow in practice. Although the Proposed Rule guarantees a clean slate for a survivor who seeks review at EOIR, *see* 88 Fed. Reg. at 11,752 (proposed § 1208.33(c)(1)), in practice immigration judges routinely defer to the findings and conclusions found in credible fear interview notes. This is true whether the conclusion of the credible fear interview is negative or positive; when the facts presented in immigration court vary from those noted in the fear interview, in many cases immigration judges draw adverse conclusions about an asylum seeker's credibility, deeming the notes valid and accurate even where their reliability is plausibly challenged. True *de novo* review is rarely granted, and this asserted protection is, more often than not, meaningless.

The requirement to affirmatively request immigration court review and the removal of the request for reconsideration together severely limit a survivor's access to due process. Without them, the risk of *refoulement* skyrockets.

G. Withholding of Removal and CAT Protection Provide Inadequate Protection for Survivors.

For survivors banned from seeking asylum under this Proposed Rule, the remaining availability of withholding of removal and relief under the U.N. Convention Against Torture (CAT) is inadequate to ensure their and their families' full protection from harm. But these types of status are both harder to prove and provide fewer benefits, leaving survivors with even fewer tools to rebuild their lives.

Withholding of removal and relief under the Convention Against Torture have stricter legal standards and are therefore more difficult to prove. Those who would otherwise be granted asylum but are foreclosed from that relief because of the Proposed Rule will have to satisfy a higher burden of proof for withholding of removal—despite all of the challenges they face to proving their claim as a result of their survivorship. *See* Sections I.A-F *supra*.

Survivors accorded withholding of removal or relief under the CAT will remain at grave risk of return to persecution. These types of status provides no path to U.S. citizenship and render applicants subject to deportation at any time with minimal procedural protections—leaving survivors without the security and stability they need in order to fully heal from trauma. Holders of these types of status also lack many benefits provided to asylees, including the ability to apply for legal permanent residency, longer-term employment authorization leading to job stability, and access to U.S. travel documents. Without these benefits, survivors remain in limbo and struggle to build a secure and stable life.

Denise's* partner became abusive after she had her first child, striking her with a belt, kicking her, and hitting her in the head. Her abuser forced her to travel to the United States from Guatemala, and she was ordered removed *in absentia*. Her partner then forced Denise to return to Guatemala by threatening to permanently separate her from her children. After she returned, the abuse continued, and Denise tried to seek help unsuccessfully from the police. She fled to the United

States and was granted withholding of removal. If Denise had been granted asylum, she would have been able to include her children as dependents on her application and build a stable life for her family in the U.S. Instead, she has been separated from her children for many years.

When Talia* was fifteen years old in Honduras, her aunt sold her to a man 25 years her senior. He treated her like a prisoner, abusing her physically and sexually for ten years and forcing her into two pregnancies. Talia’s captor was arrested, but the charges against him were dismissed. He threatened to kill Talia if she ever reported him again. Talia finally escaped but when she arrived at the U.S. port of entry, CBP failed to ask her if she wanted to apply for asylum as required by law. Talia was given an expedited removal order, returned to Honduras, lived in hiding for several months, and fled again. Because of her expedited removal order, Talia was no longer eligible for asylum. She satisfied the higher legal threshold for withholding of removal and her case was granted, but her feelings of insecurity continue. Talia has been separated from her two children for many years.

In 2013, Sonora* fled severe physical and sexual abuse from her husband in Honduras. At the U.S. border, CBP neglected to ask if she had a fear of return, and she was removed through the expedited removal process. Her husband continued to abuse her upon her return to Honduras. She reported his abuse to the police, but they failed to protect her. She fled again in 2015, this time taking her young daughter with her. She applied for and was granted withholding of removal in 2018; her daughter was granted asylum and is now a legal permanent resident. Sonora’s withholding status requires her to renew her employment authorization regularly, with lengthy wait times often exceeding the automatic renewal interval. The lapses in valid work authorization threaten her job security as well as her continued driver’s license. She has no valid travel documents. She lives with the fear that she could lose her legal status in the U.S. at any time, preventing her from counting on a secure future with her daughter.

* * *

In sum, at every step of a survivor’s journey to safety, the Proposed Rule will “systemically harm[] and devalu[e] the lives of women, girls, and LGBTQIA+ individuals desperately seeking access to safe haven through the asylum process as enshrined in U.S. law.” Oxfam America and Tahirih Justice Center, *Surviving Deterrence: How US Asylum Deterrence Policies Normalize Gender-Based Violence*, at 2 (2022) (hereinafter “*Surviving Deterrence*”). In doing so, not only does the United States “fail its moral obligations to respect the dignity of all migrants,” but it also “repudiat[es] its legal obligations under both domestic U.S. law and the United Nations 1951 Convention and 1967 Protocol Relating to the Status of Refugees.” *Id.*

II. The Proposed Rule Violates Domestic and International Law.

The NPRM violates domestic and international law in numerous ways. First, it exceeds the authority given to the executive branch by Congress in the Immigration and Nationality Act (“INA”). Second, it is arbitrary and capricious in violation of the Administrative Procedure Act (“APA”). Third, it directly contradicts U.S. commitments under the 1951 United Nations Refugee Convention and 1967 Protocol that specifically shield refugees from punishment for “irregular entry.” Finally, it also violates the constitutional guarantees of equal protection and due process.

A. The Proposed Rule Is Not a Valid Exercise of Authority Under Title 8.

The Proposed Rule exceeds the authority given to the Departments by Congress in the Immigration and Nationality Act (“INA”). In the NPRM, the Departments assert that their authority to issue the Proposed Rule rests on the provision in the INA allowing the executive branch to “establish additional limitations and conditions . . . under which an [individual] shall be eligible for asylum.” 8 U.S.C. § 1158(b)(2)(C). Those limitations and conditions, however, must be “consistent with” the other provisions of § 1158. *Id.*

1. Method of Entry

In 8 U.S.C. § 1158(a), Congress enshrined U.S. asylum law by explicitly declaring that:

Any [individual] who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* and including [a noncitizen] who is brought to the United States after having been interdicted in international or United States waters), irrespective of such [individual’s] status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1) (emphasis added). Far from being consistent with the statute, however, the Proposed Rule directly contradicts § 1158(a)(1). The parenthetical language in that section specifies that an individual may apply for asylum “whether or not” she arrived “at a designated port of arrival . . .” § 1158(a)(1). Congress therefore made clear that an individual’s method of arrival in the United States does not affect her eligibility for asylum. In direct contrast, however, the Proposed Rule will subject most asylum seekers to a presumption of ineligibility if they did not arrive at a designated port of arrival.

The Departments proffer the farcical argument that the Proposed Rule is consistent with 8 U.S.C. § 1158(a)(1) because asylum seekers would still be permitted to *apply* for asylum, even though they would not be *granted* asylum due to the ineligibility presumption for failure to arrive at a designated port of entry. 88 Fed. Reg. at 11,735. To support their assertion, the Departments point to Congress’s structuring of the statute at 8 U.S.C. § 1158(b)(1)(A) and the exceptions at § 1158(b)(2) to argue that there is nothing inconsistent in allowing an application to be made while simultaneously precluding a grant of asylum on the basis of that same application. This argument misses the important distinctions that (1) those exceptions were codified into the statute by

Congress; and (2) the Proposed Rule’s POE language directly contradicts specific language to the contrary in the statute. Here, the Departments proffer a Proposed Rule containing a presumption of ineligibility for asylum based on a non-POE entry ban that is in direct conflict with the statutory language in 8 U.S.C. § 1158(a)(1).

2. Duty of Inspection

Additionally, under the Proposed Rule, it is not sufficient that the asylum seeker present at a port of entry, but rather they must first use the CBP One app to schedule *and wait* for an appointment to present themselves at a port of entry, or suffer the consequences of the asylum ineligibility presumption. *See* Section I.C., *supra*. Such a requirement, however, conflicts with the inspection requirement in 8 U.S.C. § 1225(a)(3) requiring that all applicants for admission “shall be inspected by immigration officers.”

“Under a straightforward reading of the statutes, a noncitizen must do two things for inspection and referral to be triggered: first, arrive at a POE, which prompts inspection (8 U.S.C. § 1225(a)(1), (3)) and second, indicate an intention to apply for asylum, which prompts referral (8 U.S.C. § 1225(b)(1)(A)(ii)). At each stage, once arriving asylum seekers satisfy their end of the bargain, immigration officers must satisfy theirs.” *Al Otro Lado*, 2021 U.S. Distr. LEXIS 167128, at *56 (Sept. 2, 2021), citing *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 774 (9th Cir. 2018). By barring survivors from seeking asylum when they arrive at a POE, simply because they did not use the CBP One app or did not prove to the officer’s satisfaction that they met one of the exceptions for app use, the Proposed Rule illegally conflicts with Congress’s mandate that all applicants for admission be inspected by immigration officers. Not all asylum seekers can safely wait days or longer on the dangerous southern border for a CBP One app appointment to become available.

Defendants, by turning away immigrants at POEs who are lawfully seeking admission into the United States, sending them to shelters in Mexico, and requiring them to make their way back to the POE at least a second time to access asylum, create additional, logistical barriers to entry that contravene the attempt of [Illegal Immigration Reform and Immigration Responsibility Act of 1996] to put all those not lawfully admitted “on equal footing.” *Id.* (See OIG Report at 7, 14 (noting that implementation of queue management in 2018 and creation of other “barriers to ports of entry” created incentive to cross illegally).

Id. With the CBP One app, the number of appointments provided does not approach the demand, and thus the app imposes an unlawful metering scheme that federal courts have deemed illegal previously. In *Al Otro Lado v. McAleenan*, the District Court for the Southern District of California unambiguously held that the U.S. statutes requiring inspection and referral apply to

asylum seekers arriving at ports of entry and remaining outside the United States.⁹¹ In multiple decisions, federal courts have held that metering—akin to the limits on entry imposed by the limited number of appointments available via the CBP One app—unlawfully withholds the Departments’ duties of inspection and referral of asylum seekers.⁹² Those rules are substantively indistinct from the Proposed Rule—which fails for the same reasons.

B. The Proposed Rule Violates the APA.

In addition to violating U.S. law, the Proposed Rule is arbitrary and capricious in violation of the APA.

1. The Proposed Rule has a disproportionate impact, lack of nexus, and high risk of unfair harm.

First, the Proposed Rule is arbitrary and capricious because it has the disproportionate, unacknowledged, undefended, and indefensible effect on women, girls, and LGBTQIA+ individuals fleeing gender-based violence, as discussed further in Section I above. This disproportionate impact is even further compounded for Black women, girls, and LGBTQIA+ individuals fleeing gender-based violence. *See, e.g., Surviving Deterrence* at 2, 15-16; *see also* U.S. State Dep’t, *Mexico 2022 Human Rights Report*, at 30 (Mar. 20, 2023).⁹³

Second, the Proposed Rule is arbitrary and capricious because it imposes an arbitrary punishment on the very individuals whom the asylum laws were intended to protect and who will be least capable of meeting the strict requirements of the new rule.

Despite meeting the requirements of the U.S. asylum laws, women and LGBTQIA+ individuals, including those asylum seekers traveling with their children, will be most at risk of being unfairly punished by this rule. As discussed above, the harms of metering will disproportionately impact them, in part, because (a) they will be more likely to be subjected to gender-based violence while

⁹¹ *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1198-1205 (S.D. Cal. 2019); *see also Al Otro Lado v. Wolf*, 952 F.3d 999, 1011-13 (9th Cir. 2020) (noting this statutory analysis “has considerable force” and “is likely correct”).

⁹² *Al Otro Lado v. Mayorkas*, 2021 U.S. Distr. LEXIS 167128, at *56; *see also E. Bay Sanctuary Covenant v. Trump*, 993 F.3d at 675.

⁹³ ASISTA & Ujima, Inc: The National Center on Violence Against Women in the Black Community, *Practice Advisory: Anti-Blackness and Immigrant Survivors of Gender-Based Violence* (Feb. 2023) (“When we apply an analysis that considers the interaction of a Black immigrant survivor’s multiple identities, we see that Black immigrant survivors may experience several obstacles to relief due to society’s harmful treatment of their multiple identities.”).

waiting for appointments at the border,⁹⁴ and (b) they will be the least likely to have sufficient access to the CBP One app for the variety of reasons discussed above in Section I.C.

Third, the Proposed Rule is arbitrary and capricious because the Departments wholly failed to consider an important aspect of current migration: women and LGBTQIA+ individuals, including those asylum seekers traveling with their children, who are fleeing gender-based violence.⁹⁵ In August 2022, DHS acknowledged that the “rising number of women and the shift from single adults to children and families present different processing needs and policy responses. Humanitarian concerns and legal protections make processing children and families in immigration proceedings much more complex and resource intensive than processing single adults.” DHS-OIS Report at 9. Despite DHS-OIS’s acknowledgement that the high number of women fleeing violence would require different policy responses, the NPRM fails to include *any* discussion about the impact of the Proposed Rule on women, girls, or LGBTQIA+ individuals fleeing gender-based violence. This aspect is important because mitigation policies based on punishment and deterrence will not prevent asylum seekers from crossing the border but will have a disparate, unfair impact on survivors.⁹⁶ The Proposed Rule will perpetuate conditions that cause gender-based violence to proliferate at the southern land border and creates an unfair system that will disadvantage and re-traumatize survivors fleeing gender-based violence. *See Surviving Deterrence* at 2.

For many, fleeing to the United States is not a choice, but a matter of survival. As a result, the statements in the NPRM regarding deterrence will not apply to them. But they will feel the unjust pain of the Departments’ chosen punishment acutely.

2. The Proposed Rule relies on unsupported assumptions and rationales.
 - a. The NPRM rests wholly on the unsupported assumption that an alarming critical “surge” in migration will occur post-Title 42.

The NPRM states that the purpose of the Proposed Rule is to “address the surge in migration that, in the absence of this rule, is anticipated to follow the lifting of the Title 42 public health Order” 88 Fed. Reg. at 11,727. The Departments have proffered the sudden “surge”

⁹⁴ *See Surviving Deterrence* at 10 (“Our data indicate that rates of GBV in border cities in Mexico . . . are very high: respondents estimate that anywhere between 30 percent and 90 percent of their clients experience GBV there. And 75 percent of survey respondents indicate that their clients have faced kidnapping and/or extortion at the border either frequently or about half the time; 68 percent indicate that their clients have been raped and/or sexually assaulted frequently at the border. While various factors can impact the risk of GBV in any setting, 87 percent of interview respondents (26 out of 30) note that by forcing vulnerable individuals to wait at the border indefinitely, US deterrence policies foster conditions that significantly increase the risk of exposure to GBV.”).

⁹⁵ *See, e.g., Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that a rule is arbitrary and capricious if the agency failed to consider an important aspect of the issue).

⁹⁶ *See Surviving Deterrence* at 22 (citing J. Hiskey, A. Córdova, M. Malone, and D. Orcés, “Leaving the Devil You Know: Crime Victimization, US Deterrence Policy, and the Emigration Decision in Central America,” *Latin American Research Review* 53, no. 3 (2018): 429–447, doi:10.25222/larr.147).

justification repeatedly over the past 4-5 years, using panicky language while simultaneously ignoring the fact that any alleged surge could, in part, be a response to the attempted suppression of normal migration due to immigration policies, such as Title 42 and Remain in Mexico. *Compare* 88 Fed. Reg. at 11,727 *with* 84 Fed. Reg. at 33,840 (2019) (“The United States has experienced an overwhelming surge in the number of non-Mexican [migrants] crossing the southern border and seeking asylum.”).

First, the NPRM admits that the suggested “surge” numbers are unreliable at best.⁹⁷

Second, the NPRM then couples this unsupported alarmist “surge” assumption with the assumption that quickly removing individuals can “reduce migratory flows – whereas, conversely, the inability or failure to do so risks yielding increased flows.” 88 Fed. Reg. 11,713. The NPRM points to Figure 3, which depicts the average daily encounters of Guatemalan and Honduran Nationals in 2021 declining from August 2021 to November 2021. But this ignores the typical seasonality of migration, which generally shows declining migration numbers from August to December. *See, e.g.*, DHS-OIS 2022 Rep. at 4 (“For decades, encounter numbers routinely peaked in the spring and declined from late summer through winter.”).

Despite the NPRM’s urgent warning statement that instability is fueling “the highest levels of migration since World War II,” DHS-OIS recently reported that the number of entries between official ports of arrival was higher two decades ago than it has been in recent years. *See, e.g.*, DHS-OIS 2022 Report at 3 (explaining that, for 2021, “the number of estimated entries without inspection was lower than any year in 2000–2010 and only one-third as high as the estimates for 2000–2006 (1.9 million/year)”); *see also* 84 Fed. Reg. at 33,838 (2019).

The NPRM attempts to justify the Proposed Rule’s punishment of legitimate asylum seekers by stating that the Departments are only applying the presumption due to these “emergent circumstances” 88 Fed. Reg. at 11,737.

- b. The Proposed Rule is arbitrary and capricious because it relies on the unsupported assumption that it will reduce human smuggling.

Based on circular reasoning, the Departments assert that the Proposed Rule will lead to a reduction in the numbers of migrants who seek to cross the southern land border without authorization. But there is no evidence that the punishments in the Proposed Rule will deter asylum seekers from crossing the border or decrease incidents of human smuggling. Rather, human smuggling is, like the alleged surge, a problem of the U.S. government’s own making

⁹⁷ 88 Fed. Reg. at 11,705 n.11 (“The complexity of international migration limits the Department’s ability to precisely project border encounters under the best of circumstances. The current period is characterized by *greater than usual uncertainty* due to ongoing changes in the major migration source countries (i.e., the shift from Mexico and Northern Central America to new countries of origin, discussed further below), the growing impact of climate change on migration, political instability in several source countries, the evolving recovery from the COVID pandemic, and uncertainty generated by border-related litigation, among other factors.”).

based on metering policies that hold asylum seekers in Mexico rather than promptly addressing them.

The CBP One app is a classic example of this type of metering policy, as discussed further above in Sections I.C. and II.A.2. Under metering practices and policies, such as the required usage of the flawed CBP One app, the government unlawfully forces asylum seekers to wait in dangerous Mexican border cities until they can secure an appointment. *See, e.g., Al Otro Lado v. McAleenan*, 2019 U.S. Dist. LEXIS 126173 (S.D. Cal. July 29, 2019). This dangerous and illegal wait then exacerbates border crossings between ports as a result. For example, DHS-OIG described precisely this phenomenon in a 2020 report:

In 2018, as surges of [noncitizens] sought asylum in the United States, the DHS Secretary and CBP leadership urged asylum seekers to come to ports of entry to be processed. However, DHS and CBP took actions to reduce the number of asylum seekers CBP processed daily. Under the INA, the U.S. Government must process all those who are physically in the United States and express fear of persecution in their home country or an intention to seek asylum. The law does not set limits as to the number of asylum seekers the Government can or must process. Nevertheless, the Secretary and CBP have effectively limited access for [noncitizens] wishing to claim asylum in the United States, sometimes without notice to the public. As a result, the numbers of asylum seekers in Queue Management lines grew. As the lines grew and asylum seekers were redirected to other ports, some [noncitizens] attempted to enter the United States illegally, exacerbating the very problem DHS sought to solve.⁹⁸

Despite acknowledging that suppressing entries at ports has consistently resulted in increased entries between ports, the Departments rely on this reasoning to support the Proposed Rule now. Such circular reasoning is irrational. In other words, the Departments argue that they will be able to significantly expand processing noncitizens at the border, but only if the deterrence measures in the Proposed Rule have an impact on the number of migrants seeking asylum.

CBP expects to process multiple times more individuals on average per day using CBP One. This significant expansion of processing noncitizens at land border ports of entry, including those who may be seeking asylum, would ensure that a safe and orderly process exists for such noncitizens. Notably, however, the level of resources required to expand port of entry processing in this way would only be feasible if, as DHS projects, encounters at the border are driven down by the application of a consequence for not taking advantage of the expanded range of procedures in partner countries or the United States.⁹⁹

⁹⁸ DHS Office of Inspector General, OIG-21-02 (Oct. 27, 2020), available at: <https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf>

⁹⁹ 88 Fed. Reg. at 11,729.

As discussed in Section I.B. above, the prevalence of gender-based violence in Mexico means that women, girls, and LGBTQIA+ asylum seekers are extremely vulnerable to violence at the border. The NPRM ignores them entirely, however. The one true purpose of the NPRM—one that it pursues regardless of the cost to survivors fleeing gender-based violence—is to attempt to diminish the number of asylum seekers who ask for relief from the United States without regard to the merit of their claims.

- c. The Proposed Rule is based on unsupported and dangerous assumptions about the meritoriousness of asylum seekers' claims.

The Proposed Rule is based on the repeated unsupported assumption that the so-called “lawful pathways condition is expected to increase asylum processing efficiency by increasing to some degree the percentage of meritorious asylum claims that are considered.” 88 Fed. Reg. at 11,737. Indeed, this assumption in turn rests on the following two unsupported and baseless assumptions: (1) the “understanding that many individuals who avail themselves of the credible fear process do not have meritorious claims,” and (2) that those who would enter between POEs and decline to seek third country protection are “less likely to have a well-founded fear of persecution than those individuals who do avail themselves of an available lawful opportunity.” *Id.*

The NPRM then admits that the Departments recognize these are flawed assumptions (*e.g.*, “Of course, the Departments recognize it will *not* be the case for all noncitizens who do not avail themselves of alternative options in other countries or lawful pathways to enter the United States that they would not be found to have meritorious asylum claims.”). *Id.* The Departments should not base the entirety of the Proposed Rule on such flawed and unsupported assumptions.

First, the Departments erroneously assume throughout the NPRM that individuals must not have had a meritorious asylum claim if they passed a credible fear interview but were not granted asylum in the end. This faulty view ignores the reality that numerous factors – beyond merit – impact whether an asylum seeker’s case is granted ultimately, including but not limited to the availability of counsel and whether the asylum applicant is represented throughout the process, the availability of experts, constantly changing regulations and standards in the asylum realm, which immigration judge decides their case,¹⁰⁰ and lengthy backlogs in the system, which can have an impact on the availability of witnesses, evidence, and other proof.¹⁰¹

¹⁰⁰ TRAC, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2017-22* (Oct. 26, 2022), <https://trac.syr.edu/immigration/reports/judge2022/>

¹⁰¹ Notably, despite leaning heavily on the number of positive credible fear interviews, the NPRM also ignores the significant fact that IJ decisions over the past 25 years have overturned an average of 25% of asylum seekers’ initial negative credible fear determinations. *See* TRAC, *Immigration Judge Decisions Overturning Asylum Officer Findings in Credible Fear Cases (3/14/23)*, available at: <https://trac.syr.edu/reports/712/>

For example, representation by counsel is critical to a survivor’s chance of success on the merits.¹⁰² The availability of counsel might depend on the time and place of an asylum seeker’s interview. Interviews held shortly after the credible fear interview will not give survivors a chance to find free or affordable counsel, because the demand for counsel greatly exceeds the supply. Similarly, interviews held while survivors are in detention make it much more difficult to be able to find counsel.¹⁰³ Likewise, interviews held at the southern border, as opposed to a survivor’s intended destination in the United States, also make finding counsel more difficult, because supply and demand issues are exacerbated at the border.

Second, the NPRM rests on the major erroneous and unsupported assumption that those who would enter between POEs and decline to seek third country protection are “less likely to have a well-founded fear of persecution than those individuals” who are able to register and wait indefinitely at the border for an appointment using the CBP One app. The Departments offer nothing to support this harmful assumption—because there is nothing to offer. In fact, for survivors fleeing gender-based violence, the opposite is typically true. Thus, while the Departments will likely argue that this is a rule of equal application that does not bar any particular class of asylum applicants from seeking relief due to the nature of the harm the applicant has suffered or the applicant’s race or membership in a particular social group, the reality is that the Proposed Rule is anything but equal in its application of harm to women and LGBTQIA+ survivors fleeing gender-based violence.

The NPRM admits that “the costs of the proposed rule are borne primarily by migrants,” including migrants with meritorious asylum claims “who would be made ineligible for asylum under the presumptive condition” established by the rule. 88 Fed. Reg. at 11,748. Tellingly, the NPRM also states that “[s]ome of these benefits would accrue to migrants *who wish* to pursue safe, orderly, lawful pathways and processes, such as the ability to schedule a time to apply for admission at a port of entry, whose ability to present their claim might otherwise be hampered by the severe strain that a further surge in irregular migration would impose on the Departments.” *Id.* (emphasis added). This statement ignores the circumstances of one of the fastest growing group of asylum seekers: women and LGBTQIA+ individuals. For these extremely vulnerable groups of asylum seekers, the choice between the so-called “safe, orderly, lawful pathways and

¹⁰² TRAC, *Asylum Decisions*, available at: <https://trac.syr.edu/phptools/immigration/asylum/>; Congressional Research Service (CRS), *U.S. Immigration Courts: Access to Counsel in Removal Proceedings and Legal Access Programs* (July 6, 2022), available at: [3 \(congress.gov\)](https://www.congress.gov); Eagly & Shafer, *Access to Counsel in Immigration Court* (Sept. 28, 2016), available at: <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>; Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. Mich. J. L. Reform 1001 (2015), available at: <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1141&context=mjlr>.

¹⁰³ See TRAC, *Asylum Decisions*; Eagly & Shafer, *supra*; Maria Benevento, *Legal representation for detained migrants hindered by access issues*, Nat’l Catholic Reporter (Dec. 2018), available at: <https://www.ncronline.org/news/justice/legal-representation-detained-migrants-hindered-access-issues>; Niskanen Center, *Legal Representation for Asylum Seekers: An Overlooked Area of Reform for a System in Crisis* (Aug. 2021), available at: <https://www.niskanencenter.org/legal-representation-for-asylum-seekers-an-overlooked-area-of-reform-for-a-system-in-crisis/>

processes,” such as waiting indefinitely at the dangerous border in Mexico or applying for asylum in a country that has continuously proven it cannot and will not protect people like you, is a matter of life and death; in other words, there is no real “choice.” The Proposed Rule will not provide vulnerable migrants fleeing gender-based violence with a meaningful and realistic opportunity to seek protection.¹⁰⁴

C. The Proposed Rule Would Disparately Harm Women, Girls, and LGBTQIA+ Asylum Seekers.

In addition to violating federal and international law, the Proposed Rule violates the constitutional guarantee of equal protection. There can be no question that enforcement of the Proposed Rule would disproportionately impact women, girls, and LGBTQIA+ people who are survivors of gender-based violence, particularly survivors who are Black, Brown, or Indigenous,¹⁰⁵ and expose them to additional persecution. The available evidence clearly shows that the COVID-19 pandemic has caused a sharp rise in gender-based violence—even in countries where such violence existed at epidemic levels before the onset of COVID-19.¹⁰⁶

As discussed in Section I above, DHS failed to address this data, the fact that different policy approaches would be needed to help survivors fleeing gender-based violence, and the resulting disparate harm that women, girls, and LGBTQIA+ would suffer under the proposed rule. Yet the

¹⁰⁴ See Section I.A-C. above. As noted above in Section I.D., the Proposed Rule’s exceptions also fail to protect survivors of gender-based violence from harm. The “imminent and extreme threat to life or safety” language has long-failed women seeking protection, particularly where the word “imminent” is interpreted as synonymous with immediate, because more vulnerable groups cannot afford to wait until the attack is right in front of them, for instance. The “imminence” requirement has long been a source of inequity for women fleeing violence due to the power dynamic. For instance, in a different context, survivors of repeated, brutal domestic violence have encountered difficulty proving that they were acting in self-defense where proof of an “imminent” threat is required to assert the defense. Where the violence is repeated, the power dynamic is imbalanced, and PTSD or other trauma shapes the survivor’s response to threats, a different lens must be applied to the meaning of “imminent” when working with survivors of gender-based violence. In sum, the “imminent” threat proof requirement here will likely fail to protect survivors fleeing gender-based violence and the imbalanced power structure will once again harm them by making them ineligible for asylum, despite the merits of their claim.

¹⁰⁵ See *Surviving Deterrence*, at 9.

¹⁰⁶ See, e.g., Int’l Rescue Comm., *IRC data shows an increase in reports of gender-based violence across Latin America* (June 9, 2020), available at: <https://www.rescue.org/press-release/irc-data-shows-increase-reports-gender-based-violence-across-latin-america>; Nat’l Task Force to End Domestic Violence, *Fast Facts: Survivors of Domestic and Sexual Violence are at Heightened Risk Now, and Will Remain So Long After the Current Crisis*, available at: <https://static1.squarespace.com/static/57d7477b9de4bb8b14256cf4/t/5e9dc0e935d08275a98b9925/1587396842687/NTF+Fact+Sheet.DV-SA+survivors+and+the+COVID19+crisis.pdf>; Refugees Int’l, *Exacerbating the Other Epidemic: How COVID-19 Is Increasing Violence Against Women and Girls* (Aug. 4, 2020), available at: <https://www.refugeesinternational.org/reports/2020/7/31/exacerbating-the-other-epidemic-how-covid-19-is-increasing-violence-against-displaced-women-and-girls>; see also Tahirih Justice Center, *The Impact of COVID-19 on Immigrant Survivors of Gender-Based Violence* (Mar. 23, 2020), available at: https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence_Final-March-23-2020.pdf; see also DHS-OIS Aug. 2022 Rep. at 2.

Rule proposes no rational explanation linking this disproportionate impact on women, girls, and LGBTQIA+ individuals to a legitimate government policy.¹⁰⁷

III. The NPRM Provided Insufficient Time for Public Comment.

DHS and DOJ have provided insufficient time for public comment, and it has done so without justification. The NPRM proposes drastic and sweeping changes to the asylum process—but the public has been given a mere 30 days to respond. At least 60 days are needed for the public to submit thorough, considered comments on a rule with such sweeping consequences. The only justification for the shortened comment period is the impending termination of the illegal Title 42 policy—a policy that has been on the verge of ending since the start of this administration’s tenure in January 2021 and the termination of which was scheduled by the same administration now claiming to be hamstrung by its own brief timeline. 88 Fed. Reg. at 11,708.

The NPRM includes significant substantive and procedural changes to rules governing several stages of the asylum application process administered by two Departments; its lengthy preamble makes numerous unsupported or conflicting assumptions and assertions regarding migration at the southern U.S. border, many of which are belied by respected research and the administration’s own previous statements. Had the Departments provided an appropriate period for public comment, Tahirih would have included in this comment a number of additional points, arguments, and resources, including but not limited to a thorough refutation of the error-ridden assumptions embedded in the Proposed Rule, such as misapprehensions about the safety and availability of asylum processing in transited countries. With additional time, Tahirih would also have had the opportunity to gather additional firsthand client accounts of the various adverse impacts of the Proposed Rule. The limits of time and staffing—just two full-time employees who also carry a significant number of additional responsibilities—have prevented this fulsome review and comment. Thus, these comments do not—and cannot—represent Tahirih’s full response to the rule. And they do not, because they cannot, include all of the analysis and evidence that Tahirih would have provided if given at least 60 days to respond to the rule. The Departments’ decision not to provide more than 30 days for comment has therefore impaired Tahirih’s opportunity and ability to comment on the rules.

The six weeks remaining between the deadline for submission of comments on this NPRM and the end of the Title 42 policy is similarly insufficient. As of the date of filing of the instant comment, 11,374 comments have been filed, and the notice and comment period has not yet closed. It defies credulity to assert that the Departments have the capacity to review, consider, and respond to all comments in the abbreviated timeframe anticipated.

The abbreviated timeframe for comment combined with the shortened timeframe before promulgation of the final rule on or before May 11 can hardly be said to satisfy the requirement for public opportunity to participate in rulemaking provided for in the Administrative Procedure Act.

¹⁰⁷ See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

IV. Conclusion

For the reasons stated above, Tahirih Justice Center strongly urges the Departments to withdraw the proposed rule in its entirety.

Sincerely,

A handwritten signature in cursive script that reads "Rachel A. Sheridan".

Rachel Sheridan
Senior Litigation Counsel
Tahirih Justice Center