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**RE: c; [RIN: 1125-AB26 / 1615-AC83](#) / Docket No:
USCIS 2022-0016 / A.G. Order No. 5605-2023**

Dear Assistant Director Reid and Acting Director Delgado:

We are writing to submit comments for consideration in response to the United States Department of Homeland Security's (Department or DHS) proposed rule, *Circumvention of Lawful Pathways*; RIN: 1125-AB26 / 1615-AC83 / Docket No: USCIS 2022-0016, published February 23, 2023. The proposed *Circumvention of Lawful Pathways* rule threatens to undermine asylum protections for generations to come in violation of our obligations under international law—of particular concern is the harm this rule will inflict on children and other particularly vulnerable populations.

Statement of Interest

The Center for the Human Rights of Children (CHRC) is an interdisciplinary Center representing educators and scholars in the fields of law, child development, child welfare, social work, education, psychology, public health, and mental health. Recognizing that children require special protections due to their vulnerabilities, the CHRC, a University Center of Excellence, was established in 2007 to pursue an agenda of research, outreach, education, and advocacy to address critical and complex issues affecting children and youth, both locally and globally. The CHRC strives to honor and advance the principles derived from the UN Convention on the Rights of the Child and believes that a child's survival and healthy future is dependent on family, community, civil society, and government working toward a shared vision that protects their fundamental rights. Together, CHRC Directors have over thirty years of experience working with vulnerable migrant children across an array of disciplines, including immigration law—in the context of child trafficking and exploitation, child refugee and asylum seekers, and other humanitarian considerations of migrant children.

The proposed rule undermines the rule of asylum law.

The Refugee Convention, ratified by the United States through the Refugee Protocol, forbids the imposition of penalty upon refugees who “enter or are present in their territory without authorization.”¹ The Refugee Convention as it is codified in U.S. law under 8 U.S.C. 1158 specifically requires that “[a]ny [person] who is physically present in the United States or who arrives in the United States arriving at the border has the right to seek asylum whether or not the individual or family arrives at a port of entry” be allowed to seek] asylum. Recent statistics indicate that children comprise over 40 percent of the world’s refugees.² In contravention of international and domestic law, the proposed rule would bar entry of asylum seekers who did not make an appointment with the CBP One app.

Application of the CBP One App punishes vulnerable refugees who cannot access specific technology required to schedule an appointment, especially children.

The CBP One app users are required to obtain a slot for each family member, including minor children, and there are only a limited number of slots available each day. CHRC faculty and students have first-hand knowledge of the unnecessary problems this creates for migrant children and families. Through a recent trip to Nogales, Mexico, faculty and students observed as migrants at a shelter that serves unaccompanied children and families with children had downloaded the CBP One app and were repeatedly frustrated by dysfunctional technology in their attempts to request asylum. Families, following the rules, had not been able to find any available slots to request asylum, let alone to find enough slots for each family member. Shelter staff and U.S.-based attorneys working with migrants in Nogales have been equally as frustrated with technology that simply does not work. Thus, families seeking protection in the U.S. are being “confronted with a seemingly impossible decision: Wait indefinitely for enough appointments for the whole family, or split up.”³

The proposed rule will result in the forced separation of migrant children from their families.

Unnecessary push-back mechanisms that fail to follow the rule of refugee law have already had devastating results for families and children. As we have witnessed under Title 42 and MPP, these mechanisms force families “to ‘choose’ between remaining in dangerous conditions with their children or separate in the hopes that their children will be taken in as unaccompanied children”⁴ in the relative safety of the U.S. The proposed rule banning asylum seekers who are not able to obtain enough slots for each family member through the CBP One app will further drive families to self-separate. The proposed rule will invariably and unnecessarily harm migrant children and families.

The harms to children and families from separation are well documented. Child experts have raised grave concerns that separation of a child from their parent can cause severe emotional

¹ Convention Relating to the Status of Refugees, art. 31, July 28, 1951, 189 U.N.T.S. 150.

² U.N. Children’s Fund, Child Displacement (June, 2022), <https://data.unicef.org/topic/child-migration-and-displacement/displacement/>.

³ Andrea Castillo, *Asylum Seekers Face Decision to Split Up Families or Wait Indefinitely Under New Border Policy*, L.A. TIMES (Feb. 23, 2023), <https://www.latimes.com/politics/story/2023-02-24/asylum-seeking-families-consider-separation-shortage-mobile-app-appointments>.

⁴ The Young Ctr., *What is Title 42 and How Does It Impact Children and Families* (Oct. 12, 2021), <https://www.theyoungcenter.org/stories/2021/10/12/what-is-title-42-and-how-does-it-impact-children-and-families>.

trauma.⁵ Additionally, increasing the likelihood that parents will “choose” to send their minor children to present themselves at the border alone in the hopes the children will be received as unaccompanied children increases the likelihood that the child will be exploited or trafficked.⁶ Even when unaccompanied children are in the custody of the Office of Refugee Resettlement, they are at risk of prolonged detention, mistreatment, and even abuse. Pediatric health experts admonish immigration stakeholders that every day a young immigrant child spends in detention robs them of a day of healthy development.⁷

The proposed rule undermines U.S. children’s rights obligations under international law.

The U.S. is a signatory to the U.N. Convention on the Rights of the Child (CRC)⁸ and has both signed and ratified one of two protocols to the CRC, the Optional Protocol on the Sale of Children (OPSC).⁹ The U.S. is also a signatory to and has ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children¹⁰ (“Palermo Protocol”). The CRC and OPSC are the most comprehensive international legal instruments that promote the rights of children and protect them from sexual exploitation, labor exploitation, and human trafficking. Ratification legally binds the U.S. to implement the OPSC and the Palermo Protocol. These obligations include the prevention of exploitation and trafficking of children and the protection of children who are victims of exploitation and trafficking. The proposed rule would place migrant children and their families at higher risk of being exploited and trafficked in contravention of international law.

In the Concluding Observations of the Third and Fourth Periodic Report of the OPSC, the UN Committee on the Rights of the Child recommends that the U.S. “[p]rioritize primary and secondary prevention measures and ensure that its prevention strategies are not only reactive but also aim at preventing the harm from happening altogether,” and to “[s]trengthen its efforts towards informing and protecting children in vulnerable situations — including children living in poverty; migrant children . . .”¹¹

The harm children and families who are seeking asylum experience while they wait in border towns, including trafficking and exploitation, is well-documented. DHS has even acknowledged that there is a lack of stable housing, income, and safety available for migrants who are pushed back into Mexico.¹² Human Rights First tracked at least 200 cases of alleged kidnapping or

⁵ Heather Stringer, *Psychologists Respond to a Mental Health Crisis at the Border*, AM. PSYCH. ASS’N (July, 2018), <https://www.apa.org/news/apa/2018/border-family-separation>.

⁶ Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 25, 2023), <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html>.

⁷ Laura Santhanam, *How Detention Causes Long-Term Harm to Children*, PBS NEWSHOUR (Aug. 22, 2019), <https://www.pbs.org/newshour/health/how-detention-causes-long-term-harm-to-children>.

⁸ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

⁹ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000).

¹⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, G.A. Res. 55/25.

¹¹ UN Comm. on the Rts. of the Child, Concluding Observations on the Combined Third and Fourth Reports Submitted by the United States of America Under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 5 (Oct. 18, 2007), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/189/43/PDF/G1718943.pdf?OpenElement>.

¹² U.S. Department of Homeland Security, *Termination of the Migrant Protection Protocol Program*, 4 (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

attempted kidnapping of children in Mexico seeking asylum in the U.S. in the year prior to the initiation of Title 42 and more than 800 violent attacks on asylum seekers as a whole, including murder, rape, and kidnapping.¹³ The proposed rule would fail to prevent children and families from being harmed by forcing them to remain in dangerous border towns, and it would place them directly into the type of harm from which they are fleeing.

The proposed rule adversely impacts LGBTQ/H asylum seekers.¹⁴

The rule set out that anyone who does not apply for asylum on their way to the U.S. may be deemed ineligible for asylum. This proposition creates significant risk of harm for children and families in already vulnerable populations. Most common transit countries (such as Mexico, Honduras, El Salvador, and Guatemala) have documented human rights abuses against LGBTQ/H populations, including severe violence and torture of LGBTQ/H people. The rule forces LGBTQ/H people to seek protection in places that do not offer protection, endangering their lives in the process.

LGBTQ/H refugees expose themselves to grave risk of harm in Mexico as they wait for appointments. LGBTQ/H refugees waiting to enter the U.S. face homophobic violence, including rape, torture, and murder, as well as homelessness and lack of medical care. The U.S. government has previously recognized that Mexico is dangerous for LGBTQ/H people, but this rule still forces vulnerable queer and trans refugees to spend prolonged periods of time waiting near the border for an appointment or traveling to distant ports of entry to attend appointments. To get around this requirement, asylum seekers must prove they face an imminent and extreme threat to life and safety in Mexico. This rule has the perverse effect of requiring LGBTQ/H (and other asylum seekers) to expose themselves to more violent persecution before seeking refuge.

The rule is a return to hateful Trump-era policies and rhetoric and reinforces the dangerously false narrative of an “open” U.S.-Mexico border.

The proposed rule’s very title, *Circumventing Lawful Pathways*, implicates the dangerously false narrative that an asylum seeker is somehow engaged in unlawful activity. The title betrays the reality that most asylum seekers are merely reaching for safety and are unaware of the inane rules and regulations of DHS. In crafting these rules, DHS cites data offered to support the proposition that it is important to “quickly return[] migrants without a legal basis to stay”¹⁵ stating that the failure to do so “risks yielding increased flows”¹⁶ of migration. This data is set out to suggest that expedient and restrictive asylum policies are the solution to increased migration from the Global South. The myopia of this lens is staggering: the solution to reduce the flow of migration to the U.S., including refugees seeking protection, is to create a bureaucratic policy of appointments using the CBP One app. This policy imposes even more hurdles to safety and protection when asylum seekers fail yet another regulatory obstacle to attaining basic protection.

¹³ HUM. RTS. WATCH, U.S.: ‘Remain in Mexico’ Program Harming Children (Feb. 12, 2020), <https://www.hrw.org/news/2020/02/12/us-remain-mexico-program-harming-children>.

¹⁴ IMMIGR. EQUAL., *Urgent: Don’t Let President Biden Ban Asylum*, <https://immigrationequality.org/get-involved/take-action/dont-let-president-biden-ban-asylum/> (last visited Mar. 23, 2023).

¹⁵ Circumvention of Lawful Pathways, Fed Reg. 11704, 11713 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. pt. 208 and 8 C.F.R. pt. 1208).

¹⁶ *Id.*

This proposition also suggests those unworthy of refugee protection (“without a legal basis to stay”) somehow take advantage of the refugee system. The narrative of the “asylum loophole” is tired and has already led to enough human suffering under hateful Trump-era policies. The Biden Administration cannot abandon the rule of law to appease the call to “close” U.S. borders. They are closed, and they are heavily militarized. Instead, we implore the Administration to engage in a deeper analysis of what changes to U.S. foreign policies might realistically create a change in the flow of migration. We cannot sacrifice the rule of law and the safety of human beings to appease a false narrative. We demand better governance.

Conclusion

For reasons set forth above, the Center for the Human Rights of Children opposes the proposed rule. The rule violates important tenants of international and U.S. asylum law, and it does not account for the unique needs and vulnerabilities of children, who represent half of global refugees. We urge DHS to abandon this rule.

Sincerely,



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