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

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Re: Comment on the Proposed Rule by the Department of Homeland Security (DHS) and the Department of Justice’s Executive Office for Immigration Review (EOIR) on 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:

Immigrant Defenders Law Center (ImmDef) submits this public comment in response to the Department of Homeland Security (DHS)’s and Department of Justice (DOJ)’s proposed rule published in the Federal Register on February 23, 2023.¹ The proposed rule would trap asylum seekers in dangerous parts of Mexico for prolonged periods of time, bar many refugees from asylum protection in the United States, separate families, and deprive refugees of the ability to reunite with their families, loved ones, and sponsors. The proposed rule is akin to the Trump administration’s cruel asylum bans that were previously found unlawful by the federal courts.

The proposed ban severely restricts access to asylum for many refugees from all over the world in need of safety and protection in the United States. It discriminates against poor, low-income, disabled, Black, Brown, and Indigenous asylum seekers. It fails to comply with U.S. law and international treaty obligations to refugees and will cause mental and physical harm to refugee individuals and their families, including those with vulnerable children. ImmDef strongly urges the agencies to withdraw the proposed inhumane asylum ban rule. Instead, the Biden administration should adhere to U.S. and international asylum law, restore full access to asylum at U.S. ports of entry, implement a humane asylum processing system at the southern border that does not rely on CBP One, provide access to counsel to all asylum seekers, and ensure the just adjudication of asylum cases. The administration should increase funding for shelters that welcome refugees at the United States southern border and in the interior of the United States,

¹ Circumvention of Lawful Pathways (unpublished proposed rule accessed Feb. 21, 2023), Federal Register, available at <https://www.federalregister.gov/public-inspection/2023-03718/circumvention-of-lawful-pathways>, (hereafter “Proposed Rule” or “Asylum Ban Rule”) <https://public-inspection.federalregister.gov/2023-03718.pdf>

increase funding to hire more asylum officers and immigration judges, end the use of CBP One, end the use of expedited removal, increase the annual allocation for refugee resettlement, and refrain from detaining asylum seekers, including families.

Immigrant Defenders Law Center and Its Interest in the Proposed Rule

Immigrant Defenders Law Center (ImmDef) is a nonprofit organization incorporated in California and based in Los Angeles—with additional offices in Riverside, San Diego, and Santa Ana—that serves immigrants and asylum seekers throughout Southern California. ImmDef’s mission is to provide universal representation to all immigrants in need of legal assistance so that no immigrant is forced to face removal proceedings without an attorney. ImmDef manages several programs, including the Children’s Representation Program; the National Qualified Representative Program; Community Defense Projects to provide removal defense in Los Angeles, Santa Ana, Long Beach, and the Inland Empire; and the Cross-Border Initiative.

ImmDef established its Cross-Border Initiative in response to the Migrant Protection Protocols (MPP, also known as “Remain in Mexico”) program, which forced asylum seekers to remain in Mexico while their cases were pending in U.S. immigration courts. To represent asylum seekers subjected to MPP, ImmDef provided counsel to individuals in the San Diego immigration court and engaged in cross-border travel and communication to prepare MPP removal cases and provide community education services to refugees. ImmDef diverted funds from its programs to create new infrastructure, hire staff, and develop materials for the Cross Border Initiative. The Biden administration ended the MPP program in June 2022.

In 2020, the Trump administration implemented Title 42 under a public health pretext, closing the southern U.S. border to asylum seekers. Title 42 has remained in place for three years and there have been over one million expulsions of migrants to either Mexico or to their countries of origin. Due to Title 42, the Cross Border Initiative continued providing community education programs, such as Know-Your-Rights presentations in Tijuana, Mexico. Only when MPP ended was ImmDef’s San Diego office able to fully return to providing removal defense work for detainees at Otay Mesa Detention Center and limited representation work for detainees at Imperial Regional Detention Facility.

Based on our experience providing direct legal services to those subjected to MPP, as well as providing legal consultations to those expelled under Title 42 and obtaining humanitarian parole for some of them, we know that the proposed asylum ban rule would divert vast resources away from ImmDef’s primary goal of providing removal defense legal services and toward addressing the urgent needs of asylum seekers at the U.S. southern border wrongfully excluded from requesting protection. ImmDef’s San Diego office will have to take fewer removal defense cases from detainees at Otay Mesa Detention Center and would need to focus instead on responding to inquiries from human rights organizations and attorneys throughout the United States about the status of asylum at the U.S. southern border, provide consultations to asylum seekers stranded in Tijuana, and engage in more community education events in Tijuana such as clinics to assist refugees with completing the CBP One application.

The 30-Day Public Comment Period Provides Insufficient Time for the Public and Impacted Individuals to Comment on the Restrictive Asylum Ban Rule

The Biden administration has provided only a limited time of 30 days to address the proposed asylum ban rule, a rule that has drastic implications for asylum seekers at the southern U.S. border to whom we provide legal services. The Administrative Procedure Act requires that agencies provide a meaningful time for the public to comment on sweeping proposed rules. Here, the administration has not provided sufficient time for the public to fully review the proposed rule and to determine the full extent of its consequences. Nor has the Biden administration provided sufficient time to seek out and obtain comments from those who would be directly impacted by the proposed asylum ban rule.

On March 1, 2023, ImmDef and 171 organizations wrote to your agencies urging them to provide at least 60 days to comment on the complex 153-page asylum ban rule.² On March 14, 2023, the U.S. Department of Justice Executive Office for Immigration Review responded to the letter merely stating that the Biden administration does not intend to extend the comment period. No explanation was given for the denial of the request for an extension of the comment period by any amount of time.

The administration is deviating from the optimal time the public is permitted to comment on regulations, as well as restricting the time for impacted asylum seekers and organizations who serve asylum seekers and refugees to adequately respond to the proposed rule. Executive Order 13563 states that prior to a notice of proposed rulemaking, an agency where possible should seek views from those potentially subject to the rule.³ Executive Orders 12866⁴ and 13563 state that agencies should generally provide at least 60 days for the public to comment on proposed regulations. A minimum of 60 days is especially vital as to this proposed rule given the rule's attempt to limit access to the asylum process for many refugees, in violation of U.S. law and our international commitments, thereby returning many to discrimination, false imprisonment, physical and mental harm, violence, torture, or even death. While the agencies cite the upcoming termination of the Title 42 policy on May 11, 2023, as justification to limit the public's right to comment on the proposed rule, this reasoning is unfounded because the Biden administration sought to end Title 42 almost one year ago. The administration has also publicly stated that it has prepared for the end of Title 42 and has issued a memorandum with information on its plans. In a memorandum dated December 13, 2022, Secretary Mayorkas states, "Since the launch of the Southwest Border Coordination Center in February, DHS has led a whole-of-government plan to

² Erfani, Azadeh, et al., "Request to Provide a Minimum of 60 days for Public Comment in Response to the Department of Homeland Security (DHS), United States Citizenship and Immigration Services (USCIS), and Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) (the Departments) Joint Notice of Proposed Rulemaking (NPRM): Circumvention of Lawful Pathways", March 1, 2023, *available at* [www.immigrantjustice.org](https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2023-03/Biden%20Asylum%20Ban%20-%20Extension%20letter%20to%2030-days%20comment%20period%20FINAL.pdf), <https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2023-03/Biden%20Asylum%20Ban%20-%20Extension%20letter%20to%2030-days%20comment%20period%20FINAL.pdf>, last accessed March 23, 2023.

³ President Barack Obama, "Improving Regulation and Regulatory Review," Office of the Federal Register, National Archives and Records Administration, Executive Order 13563 of January 18, 2011.

⁴ President William Clinton, Regulatory Planning and Review, (58 FR 51735; October 4, 1993).

prepare for and manage increased encounters of noncitizens at our southwest border. ”⁵ Thus, the administration has had ample time to prepare for the end of the Title 42 policy.

A 30-day comment period has proven to be insufficient time for our organization to collect information from our staff about their experience assisting refugees with obtaining appointments using CBP One, the app the proposed rule requires be used to schedule appointments. On January 24, 2023, ImmDef Executive Director Lindsay Toczykowski, Directing Attorney of Policy and Advocacy Margaret Cargioli, Directing Attorney Melissa Shepard, and Managing Attorney Paulina Reyes went to two shelters, Pro Amore Dei and Borderline Crisis Center, in Tijuana, Mexico, to give community education presentations. On March 1, 2023, Lindsay Toczykowski and twelve ImmDef staff members traveled to Tijuana, Mexico, to conduct a Know-Your-Rights (KYR) presentation at Borderline Crisis shelter and a CBP One clinic at Espacio Migrante shelter. There were several problems with the CBP One application, which will be explained in further detail below. Given more time, we would have attempted to conduct interviews of all staff members who attended the Tijuana KYRs and clinics to obtain their feedback. Also, we would have endeavored to contact asylum seekers at shelters in Tijuana who would be impacted by the proposed asylum ban rule to better inform ourselves of the challenges asylum seekers continue to encounter with the CBP One application process, as well as inquire about the other ways the proposed rule would affect asylum seekers in Mexico. With more time before the deadline to comment on the proposed rule, we also would have attempted to meet with shelters in Mexico serving refugees to determine how the proposed rule might impact their work.

The Proposed Asylum Ban Rule Violates U.S. and International Law

The asylum ban would lead to the deportation of refugees to countries where they are at risk of discrimination, mental and physical harm, persecution, torture, and death. Pursuant to Section 208 of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1158, a non-U.S. national physically present in the United States or who arrives in the United States (whether or not at a designated U.S. port of entry) may apply for asylum. Asylum is a humanitarian form of relief available to individuals and families who have suffered persecution or have a fear of future persecution due to at least one of the following grounds: race, religion, nationality, membership in a particular social group, or political opinion. The statute at 8 U.S.C. 1231 codified the prohibition against returning refugees to countries where they may face persecution. The proposed rule contravenes these provisions of U.S. law.

The proposed rule creates a presumption of asylum ineligibility for individuals who 1) did not apply for and receive a formal denial of protection in a transit country; and 2) entered between ports of entry at the southern border or entered at a port of entry without a previously scheduled appointment through the CBP One mobile application, subject to extremely limited exceptions.

The proposed rule violates U.S. law, which ensures the ability to request asylum regardless of the manner of entry or transit and prohibits restrictions on asylum that are inconsistent with

⁵ DHS, Statement by Secretary Mayorkas on Planning for End of Title 42 at 1. (Dec. 13, 2022) [Statement by Secretary Mayorkas on Planning for End of Title 42 | Homeland Security \(dhs.gov\)](#)

provisions in the U.S. asylum statute.⁶ It further violates U.S. and international law because it exposes refugees to harm by removing them to countries where they face persecution and by trapping asylum seekers in Mexico where many are victims of horrendous crimes.

The proposed asylum ban is similar to the Trump administration asylum bans that barred certain asylum seekers at the border based on their manner of entry and transit. The bans were vacated and enjoined by federal courts for violating U.S. law.

Immigrant Defenders Law Center's Cross Border Initiative program performs a key role in advising, assisting, advocating for, and representing people who are seeking asylum at the southern U.S. border. ImmDef believes in the right to asylum and understands the dangers refugees encounter when traveling through Mexico and through other countries or on their way to Mexico.

ImmDef established its Cross Border Initiative program in 2019 at the outset of the Migrant Protection Protocols. We represent refugees who have been robbed, raped, tortured, kidnapped by cartels, or extorted by Mexican authorities, among other atrocities. One family we represented had been kidnapped by a cartel and was forced to watch them torture migrants who challenged their authority. Because harsh border immigration policies were implemented by the Trump administration and continued by the Biden administration, ImmDef has periodically provided vital information to supplement reports by Human Rights First on the danger and harms migrants face in Mexico.⁷

The Proposed Asylum Ban Would Disparately Harm Black, Brown, and Indigenous Asylum Seekers

The proposed rule also discriminates against asylum seekers based on their manner of entry and transit and will have a racially disparate impact on asylum seekers from Africa, the Caribbean, and Latin America. The proposed ban, which applies only to people who seek protection at the southern United States border, will disproportionately harm people of color who do not have the resources or ability to travel to the United States by air.

The United States and other countries, including Mexico, use visa requirements to prevent people from reaching their countries' territories to request asylum, while often allowing access to people from wealthier and predominantly white nations.⁸ Imposing a ban on refugees seeking safety in the United States via the southern U.S. border will, like the Trump administration's third-country transit ban, disproportionately harm people of color who must undertake a dangerous journey to arrive in the United States from the south.

⁶ U.S. Congress (1964) United States Code: Immigration and Nationality, 8 USC 1158 (a) (1)

⁷ Human Rights First, "A Shameful Record: Biden Administration's Use of Trump's Policies Endangers People Seeking Asylum (January 2022), available at www.humanrightsfirst.org, <https://humanrightsfirst.org/wp-content/uploads/2022/09/ShamefulRecord.pdf>, last accessed on March 23, 2023.

⁸ Women's Refugee Commission, "Visa Regimes: A Threat to Migrants' Access to Safety and Asylum," www.womensrefugeecommission.org, last accessed on March 23, 2023.

CBP One disparately harms Black asylum seekers due to racial bias in its facial recognition technology and is inaccessible to many Indigenous, African, and other asylum seekers due to language barriers. Immigrant Defenders Law Center has assisted asylum seekers in Mexico who are not able to register with CBP One because they are Black or Brown. On March 1, 2023, two ImmDef staff tried for twenty minutes to capture the photo of an asylum seeker with a darker complexion to no avail.



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Immigrant Defender Law Center is co-facilitator of the legal sub-group of the California Welcoming Task Force. The California Welcoming Task Force is a bi-national coalition of organizations working together to welcome asylum seekers with dignity. Since the launch of the government's program requiring individuals to submit CBP One application requests in order to be considered for an exemption under Title 42, there have been several discussions about the challenges created by the CBP One application, including the problems Black migrants are encountering with the image capturing requirement of the CBP One application.

The Proposed Asylum Ban Would Disparately Harm Poor and Low-Income Refugees

The proposed rule is targeting people fleeing persecution who enter the United States at the southern U.S. border. Many refugees are poor or low-income and cannot afford to travel by air to the United States. Hence, they risk their lives to make a treacherous journey by foot through Mexico to seek protection in the United States.

The requirement to register through the CBP One app to request asylum in the United States also targets poor and low-income asylum seekers. Flaws with the app force asylum seekers to make many attempts to register. ImmDef Attorney Karina Ramos met with a Haitian man during ImmDef's March 2023 clinic in Tijuana. He was not able to register for the CBP One app because he had not been able to buy more time on his phone's SIM card. The only money he had in his pocket, he said, was enough for the bus ride back to his shelter. This man was effectively denied the opportunity to request asylum because he could not afford to use his phone to make an appointment. Our nation's asylum laws should not create a wealth test for obtaining protection from persecution.

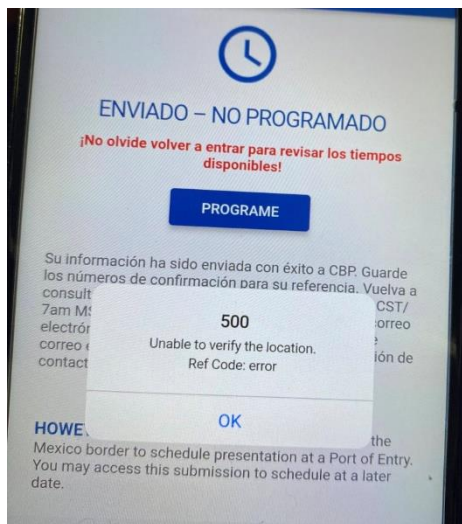
⁹ Immigrant Defenders Law Center, Immigrant Defenders Law Center photo from a legal clinic at Espacio Migrante in Tijuana, Mexico on March 1, 2023.

Requiring Asylum Seekers to Use the CBP One Application Denies Asylum Access to the Most Vulnerable Refugees

The proposed rule requires asylum seekers at the southern U.S. border to schedule appointments through the CBP One app. Access to our asylum system would be denied to refugees who arrive at a border port of entry without a previously scheduled appointment and who were not denied protection in a country through which they transited.

CBP One has proven to be an extremely faulty tool to request an appointment at U.S. ports of entry. There are financial, language, technological, and other barriers, making the application an unjust means to obtain protection in the United States. It discriminates against Black, Brown, and Indigenous asylum seekers and has limited appointments. Many asylum seekers do not have the financial resources to obtain a smartphone or are unable to navigate the application itself even when they do. The application is not available in all languages—it is currently only available in English, Spanish, and Haitian Creole—including Indigenous languages, and all error messages are in English, preventing those with limited English capacity from understanding what has gone wrong. As mentioned above, it also disparately harms Black and Brown asylum seekers due to racial bias in its face capturing technology.

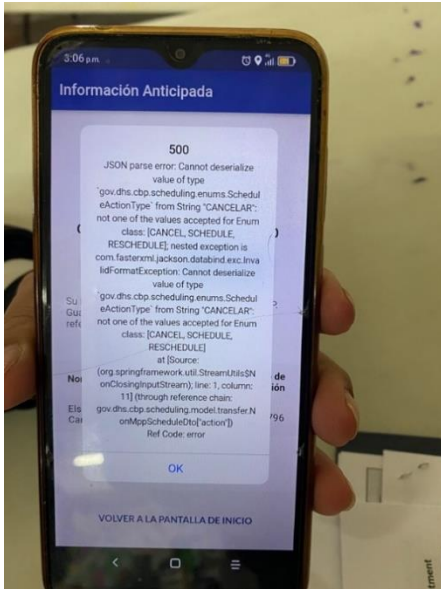
By requiring people at the southwest border to use CBP One, the proposed rule would place many vulnerable asylum seekers in grave danger, including LGBTQI+ asylum seekers, children, women, and survivors of gender-based violence. LGBTQ+ asylum seekers endure discrimination and abuse in Mexico.¹⁰ Immigrant Defenders Law Center represented an LGBTQ+ individual stranded in Mexico under MPP who was targeted and raped based on her sexual orientation. Migrant children are also extremely vulnerable to kidnapping in Mexico.



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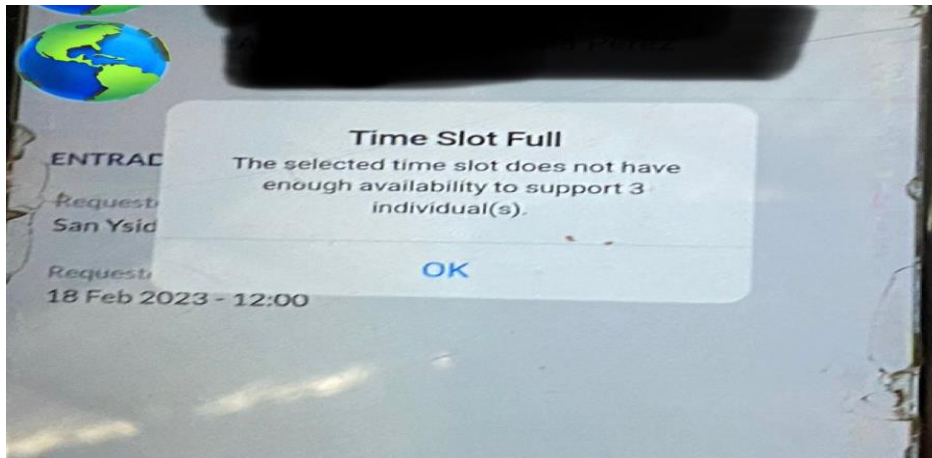
¹⁰ Human Rights Watch, *US LGBT Asylum Seekers In Danger At the Border: Biden Should Immediately Safeguard At-Risk Groups, Restore Asylum Access*, (May 31, 2022), available at <https://www.hrw.org/news/2022/05/31/us-lgbt-asylum-seekers-danger-border>.

¹¹ Immigrant Defenders Law Center, Photo taken at Pro Amore Dei Shelter, February 6, 2023, at Immigrant Defenders Law Center's Know Your Rights presentation to advise asylum seekers about the CBP One requirement under an exemption process to Title 42 to request asylum in the United States.



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As ImmDef’s staff has learned firsthand, the CBP One app is riddled with errors.



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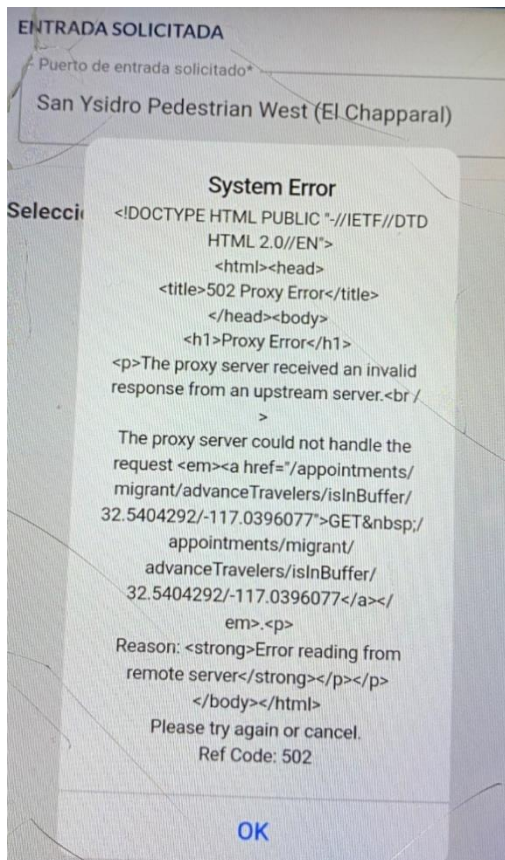
On January 24, 2023, ImmDef’s Executive Director Lindsay Toczyłowski and three ImmDef staff members went to two shelters in Tijuana--Pro Amore Dei and Borderline

Crisis Center--to provide community education presentations. Out of about two hundred people at the Pro Amore Dei shelter, only two had been able to obtain a CBP One appointment on their own. At Borderline Crisis Center, several people told ImmDef staff that they were not able to get appointments, despite multiple attempts.

On February 6, 2023, ImmDef staff were in Tijuana, Mexico, at two shelters to assist with the CBP One application. At the Pro Amore Dei shelter, out of 150 families, not one had successfully made an appointment via the CBP One app. Many refugees could not understand the error messages because those error messages were in English, even for those trying to make appointments using the Spanish version of application. Attorney Lindsay Toczyłowski spent hours translating error messages for people desperately trying to make appointments. Several people asked Attorney Toczyłowski if they can seek an exception to using CBP One because they

¹² Immigrant Defenders Law Center, Photo taken at Espacio Migrante Shelter, March 1, 2023, at Immigrant Defenders Law Center’s clinic to assist asylum seekers with completing the CBP One application.

¹³ Immigrant Defenders Law Center, Photo taken on February 6, 2023, at Espacio Migrante Shelter in Tijuana, Mexico at ImmDef’s clinic to assist asylum seekers with completing the CBP One application.



are not safe in Tijuana. A mother told her about being trafficked with tears in her eyes and a baby on her hip. Many people at the shelter were waking up before dawn to try to get appointments, with no luck. Many people got an error message in English saying, “Time Slot Full.” Some never even got that far because the application glitches and they could not get past the initial screen. In some cases, when people selected “Spanish” as their preferred language an error message appeared in English. Attorney Toczykowski met a 72-year-old woman who was confused and could not access the application at all on her cracked phone.

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On March 1, 2023, twelve ImmDef staff members traveled to Tijuana, Mexico, to assist refugees with CBP One registration and to provide legal information. The ImmDef team members provided community education

presentations at Borderline Crisis Center and a legal clinic at Espacio Migrante. ImmDef served people who fled Haiti, Bangladesh, Honduras, Venezuela, Cuba, and Mexico, among others. Migrant shelters in Tijuana have been helping families from various other countries as well, including Cameroon, Ivory Coast, and Russia.

Over 150 people, including families with children, attended the legal clinic to seek guidance on obtaining an appointment using the CBP One app. The CBP One app is mired with problems. It is only available in Spanish, English, and Haitian Creole leaving indigenous language speakers and people from most parts of the world without any means to seek an exception to Title 42.

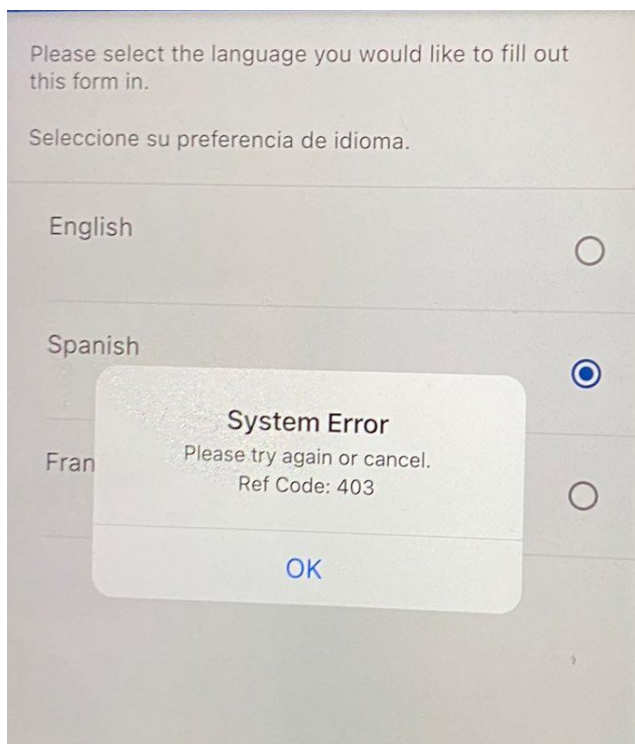
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¹⁴ Immigrant Defenders Law Center, Photo taken by Immigrant Defenders Law Center on February 6, 2023, at Pro Amore Dei depicting a glitch that asylum seekers were getting on their cell phones as they attempted to register for CBP One. ImmDef was providing a Know-Your-Rights presentation to asylum seekers to explain the CBP One requirement to asylum seekers as an exemption process to Title 42 in order to request asylum in the United States.

¹⁵ Immigrant Defender Law Center, Photo taken on February 6, 2023, at Pro Amore Dei shelter in Tijuana, Mexico where ImmDef was providing a legal clinic to assist asylum seekers with completing the CBP One application.

The ImmDef team observed in real time the CBP One app glitching, freezing, and breaking down. Families were unable to obtain appointments together when the app would not let them make an appointment on the same day. The Biden administration has made the CBP One process onerous and inequitable. As we have said before, and it remains true, there is very little justice to be found in the chaotic situation our government has created for migrants at the border.



Mickey Donovan, Legal Services Director at ImmDef, said it was an “absolutely gutting experience. One of the great privileges of being an attorney is to be able to educate people on their rights and empower them with knowledge so that they can at least understand their options and the processes before them. It was so demoralizing to have person after person come up to you and ask for help, and all we could do is offer sympathy, suggest redownloading the app (which didn't help) and wish them luck.”

Oscar Huezo, Staff Attorney at ImmDef, met with ten people who all shared frustrations with the CBP One application. Many of those issues arose in the attempted scheduling of an appointment. Although they logged in at 6:00 a.m., the application was already bereft of any available appointments. Many relayed that they had been trying for weeks, and some stated that they had been trying for months. There were about six people who managed to select an appointment time, but they never received a confirmation email. They took a screenshot of the appointment time they were given, but when they arrived for that appointment at the U.S. port of entry, CBP told them they could not assist them because they did not have the confirmation email. Even

¹⁶ Immigrant Defenders Law Center, Photo by Immigrant Defenders Law Center taken on February 6, 2023, at Pro Amore Dei shelter. This is one of several error messages ImmDef staff witnessed on that day while providing legal information to asylum seekers at the shelter.

when some managed to select their appointment date and time, the application limited the appointments to one single date and one time slot, and many applicants were trying to get that same appointment slot.

Attorney Huezo also met with a couple of people who stated that the application said they could not request an appointment because they were not near the POE, even though their actual location, as determined by the appl, showed they were located near the POE. They lived about 30 minutes away and had to drive to the area every day at 5:00 a.m. in the morning to try and schedule an appointment, often unsuccessfully because of the location issue.

Attorney Huezo met with two separate individuals who could not get past the authentication portion of the application because it would glitch and go back to the log in screen every time, they were asked to enter the code sent to their phone number. One of them had already bought two new cell phones to try and rectify the issue but even a new cell phone did not help. Attorney Huezo tried to help one of them delete and reinstall the application several times and it still did not work.

Attorney Huezo also got complaints about the photograph portion of the application. Many people were saying there was an update to the application where it asks for two photographs: once when you prepare the application and a second photo when you try to make the appointment. They claimed that it was often difficult to take the photographs, and even when they managed to take someone's photo, the appointment was no longer available.

ImmDef Staff Attorney Kiana Ajir stated that she could "sense and see the desperation and frustration in people's faces when they explained that their CBP One Application either did not work, kept crashing, or would not let them schedule an appointment." Several individuals told Attorney Ajir that they even purchased new phones for the sole purpose of scheduling the interview and, even then, they were unable to get to the appointment page. Some individuals had already completed the application but were not clear about whether that meant they had scheduled an interview with CBP. Other refugees needed help filling out the application. There were several times when filling out online forms that the application would crash or show "error" messages on the screen.

Many people Attorney Ajir helped could not even get past the facial recognition phase of the application, as their face was not being captured by the camera. Refugees told her that they would wake up every several hours through the night to check for appointments and could not find any available slots. Furthermore, when individuals wanted to add their family members to the application, their family members would need to be physically present with them at the time of filling out the application because of the facial recognition feature. Many refugees did not know that each family member must fill out the application and did not bring their family members with them to our legal clinic, resulting in them not being able to finalize the online application. Many others were waiting to be approved for an interview in hopes that they could join their family members in the United States.

The Proposed Asylum Ban Rule Would Separate Refugee Families

Like the Title 42 policy and other policies that block, ban, and deny asylum to refugees, this proposed rule would fuel family separations at the border. The administration's use of the CBP One app and denial of access to asylum for people who cannot schedule appointments through the app has already forced families to separate.¹⁷ Families unable to secure CBP One app appointments together as a family unit have made the excruciating choice to send their children across the border alone to protect them from harm in Mexico.

ImmDef Managing Attorney Karina Ramos participated in a legal clinic held by ImmDef at Espacio Migrante shelter in Tijuana, Mexico. She met with families who were concerned about not getting appointments on the same day to enter the United States together. Families are in distress about what to do if one family member obtains a CBP One appointment prior to the rest of their family members. It causes some families to separate, which compounds the trauma they are already enduring as refugees.

Attorney Ramos met with a Guatemalan woman who had secured an appointment for herself but not for her toddler. The woman arrived at her appointment to be processed with her toddler but was told by CBP that only she could be processed. She was forced to remain in Mexico to try to re-register with her toddler. Attorney Ramos also met with another family from Honduras: a mother and father with a child who had been counseled that they could not register together because they were not married. They registered separately and while his partner and child secured appointments, the father had not been able to get a CBP One appointment. It was "wrenching" for Attorney Ramos to see them trying to decide whether the family should separate or try to re-register as a family and risk being stuck in Mexico for an unknown period.

Attorney Ramos met with a family consisting of a grandmother, her daughter who has a disability, and her daughter's two children. They had registered separately for CBP One appointments. The grandmother and toddler were registered together while the older child was registered with her mom. The mother needs help walking, so the older child needed to help her if they made it into the United States. They were questioning whether this was the right decision because the grandmother and toddler might not get an appointment for a long time, leaving them stranded in Mexico and separated from their loved ones.

The Proposed Asylum Ban Traps Asylum Seekers in Danger

The proposed asylum ban rule would have an insidious and devastating impact on the lives of asylum seekers stranded in Mexico waiting to be processed into the United States to seek asylum.

¹⁷ Leutert, Stefanie and Caitlin Yates, The University of Texas at Austin, Strauss Center for International Security and Law, Asylum Processing at the U.S. Southern Border: February 2023, *available at* https://www.strausscenter.org/wp-content/uploads/Feb_2023_Asylum_Processing.pdf

The proposed asylum ban would require refugees to make an appointment using the CBP One app while in certain parts of Mexico closest to the U.S. border. Because the CBP One app is already in use, asylum seekers have been waiting at the U.S.-Mexico border for weeks trying to obtain an appointment. While they wait for appointments, they are trapped in some of the most dangerous cities and towns in the world, such as Tijuana. Forcing asylum seekers to remain in Mexico while they wait to seek asylum in the U.S. has caused harm to asylum seekers. Even the Secretary of Homeland Security has recognized the dangers that asylum seekers face while stranded at the U.S.-Mexico border. As stated by Secretary Alejandro Mayorkas in the Termination of the Migrant Protection Protocols memo dated October 29, 2021, MPP was a catastrophic policy and had to end as it was "...imposing substantial and unjustifiable human costs on the individuals who were exposed to harm while waiting in Mexico."¹⁸

In Mexico, asylum seekers and refugees face life-threatening violence, often from cartel members or even directly from the Mexican authorities. There have been over 13,000 attacks reported against asylum seekers and migrants stranded in Mexico under the Title 42 policy over the past two years alone.¹⁹ Trapping asylum seekers in Mexico also exposes them to kidnapping.²⁰ Kidnappings of asylum seekers forced to remain in Mexico for prolonged periods of time were common under the Remain in Mexico program. In 2021, we provided counsel to a family enrolled in MPP whose two-year-old child was almost kidnapped when the family went to buy diapers. Fortunately, the child's father was able to hold on to his son, and the men drove off. The father reported the attempted kidnapping to the police, but the police officer simply told them not be out that late at night with a child because it is not safe. This happened only weeks after they were forced to leave a shelter because they had been there for about a year and could no longer stay at the temporary shelter.

Aside from kidnappings, asylum seekers wanting to exercise their right to request asylum in the United States are often victims of other horrendous crimes. Since 2019, ImmDef attorneys have given consultations to hundreds of asylum seekers in Tijuana and Mexicali in Mexico. Asylum seekers have recounted stories of extortion by police and other Mexican officials, sexual harassment, rape, torture, and the attempted kidnapping of children. In Mexico, LGBTQ+ and Black refugees are discriminated against and harassed, and they are often victims of physical violence.

For instance, ImmDef assisted a Honduran family enrolled in MPP. In January and February 2021, the mom was threatened by her ex-partner who is member of the MS-13 gang. Her ex-partner told her the gang was looking for her in Mexico. Her ex-partner threatened to kill her and kidnap her 4-year-old son so that he could be raised to become a member of his gang.

ImmDef advised a pregnant Guatemalan woman stranded in Mexico because she could not enter the United States due to the Title 42 border closure. She fled persecution by gangs in Guatemala.

¹⁸ DHS, Termination of the Migrant Protection Protocols DHS, at 2 (Oct. 29, 2021), *available at* https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-memo.pdf

¹⁹ Human Rights First, "Title 42: Human Rights Stain, Public Health Farce" (Dec. 16, 2022); *available at* <https://humanrightsfirst.org/library/title-42-human-rights-stain-public-health-farce/>

²⁰ Jordan, Miriam, New York Times, "I'm Kidnapped": A Father's Nightmare on the Border (Dec. 21, 2019), *available at* <https://www.nytimes.com/2019/12/21/us/border-migrants-kidnapping-mexico.html>

The gang had found her twice in Mexico, and she only narrowly escaped each time. Meanwhile, the gang had located her partner in Tijuana and beat him.

Discrimination and ill treatment of Black migrants in Mexico is also well-documented.²¹ There have been incidents of hate crimes against Black asylum seekers throughout the implementation of the MPP and Title 42 policies under both the Trump and Biden administrations.²² ImmDef represented a Black asylum seeker enrolled in MPP during the Trump administration who was falsely imprisoned and extorted by Mexican authorities, and harassed by local authorities in Tijuana due to his race.

LGBTQ+ migrants also suffer from appalling crimes in Mexico.²³ As reported by Human Rights First, LGBTQ+ asylum seekers who were blocked from entering the United States or expelled back to Mexico under Title 42 faced “grave harms.”²⁴ Immigrant Defenders Law Center represented an Afro Cuban LGBTQ+ asylum seeker who was enrolled in MPP during the Biden administration and who, as she waited for her MPP hearings, was persecuted due to her sexual orientation by Mexican police.

The Proposed Asylum Ban Will Result in Due Process Violations

The proposed ban would result in serious due process violations, particularly as it would expand the use of expedited removal unless an asylum seeker passes a credible fear screening. With limited access to counsel and facing harsh conditions in detention centers, it would be extremely hard for asylum seekers to provide the details necessary to prove that the proposed asylum ban does not apply in their case and then pass a credible fear interview.

Access to counsel while in CBP custody is extremely rare, and CBP often restricts access to counsel for those held in border patrol stations. For example, in March 2022, ImmDef Attorney Margaret Cargioli attempted to speak with her Russian asylum-seeking client while her client was being held in CBP Custody. Attorney Cargioli was speaking with her client when the call was interrupted by a CBP officer who cut off communication between Attorney Cargioli and her client. Attorney Cargioli was not able to contact her client while her client was detained in CBP custody where her client was held for approximately five days.

²¹ Morrissey, Kate, San Diego Union Tribune, “Jamaican Asylum Seekers in Tijuana Facing Racism, Homophobia While They Wait”, (Jan.3, 2022), available at <https://www.sandiegouniontribune.com/news/immigration/story/2022-01-03/jamaican-asylum-seekers-tijuana-racism-homophobia>

²² The Black Alliance for Just Immigration, “There Is a Target on Us: The Impact of Anti-Black Racism on African Migrants at Mexico’s Southern Border,” January 2021, available at <https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf>.

²³ Lopez, Oscar, Reuters, “Mexico Sees Deadliest Year for LGBT+ people in five years, (May 15, 2020), available at <https://www.reuters.com/article/us-mexico-lgbt-murders-trfn/mexico-sees-deadliest-year-for-lgbt-people-in-five-years-idUSKBN22R37Y>

²⁴ Garcia, Teodoro, Human Rights First, “LGBTQ Asylum Seekers Still Facing Grave Danger Due to Title 42”(Aug. 12, 2022), available at <https://humanrightsfirst.org/library/lgbtq-asylum-seekers-still-facing-grave-dangers-due-to-title-42/>

In December 2019, Attorney Cargioli located her MPP client whose case had been terminated by an immigration judge at Chula Vista Border Patrol Station after searching for his whereabouts for about 18 days. Attorney Cargioli called to confirm that she could meet with her client in person. An official at the station confirmed that she could meet with her client, and Attorney Cargioli told them that she would visit her client the next day. A couple of hours after Attorney Cargioli had confirmed the visit, she received a call from the border patrol station that her client had to be transferred to Arizona. He was taken to a detention center in Arizona that day.

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

Detention conditions along the border are also notoriously inhumane. Asylum seekers detained in CBP custody have reported being provided insufficient or inedible food and water; lack of access to showers and other basic hygiene; and inability to sleep because of overcrowding, lack of adequate bedding, frigid conditions, and lights that are kept on all night.²⁵

In 2021, ImmDef's Detained Youth Empowerment Program provided Know-Your-Rights presentations and conducted legal screenings for 2,356 unaccompanied children, many of whom were detained in CBP custody for more than the statutorily mandated 72-hour limit. Many were denied food, water, and medical care. And of those children that ImmDef encountered, 85 reported verbal harassment or abuse, 24 reported physical abuse, and two reported sexual abuse. In March 2020, Attorney Cargioli represented a family in CBP custody that had been held for days without access to a shower. One of the young children was ill and the parent was very concerned about the child's well-being. Instead of releasing the family from detention after an immigration judge terminated their Migrant Protection Protocol case, CBP kept the family in one border patrol station and then transferred them to another border patrol station. The migrant family contact a family member who was able to call an attorney who then referred the matter to ImmDef. It is extremely rare for people detained at border patrol stations to have the ability to contact family and attorneys.

Conclusion

The proposed rule is illegal, inhumane, and discriminatory. The United States has the resources to implement a more humane asylum system at the southern U.S. border. Like the Trump administration's entry and transit bans, this proposed asylum ban will effectively deport refugees to places where they will suffer persecution and possible torture while also separating families. The proposed rule requires asylum seekers to use a deficient mobile app that discriminates based on access to resources, language skills, and an ability to wait indefinitely for an appointment slot, cutting off asylum access for many of the most vulnerable asylum seekers.

²⁵ Human Rights Watch, "They Treat You Like You Are Worthless: Internal DHS Reports of Abuses By U.S. Border Officials, (Oct. 2021), available at <https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials>.

Immigrant Defenders Law Center calls on the administration to withdraw this proposed rule in its entirety. The Biden Administration must stop punishing migrants arriving at the southern U.S. border and instead allocate resources toward restoring a humane asylum processing system.