



1400 Eye Street NW Suite 450 | Washington DC 20005 | t. 202.657.0670 | f. 202.657.0671 | www.firstfocus.org

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

March 27, 2023

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  
5107 Leesburg Pike, Suite 1800  
Falls Church, VA 22041

**RE: DHS Docket No. USCIS 2022-0016, “Circumvention of Lawful Pathways”**

Dear Acting Director Delgado and Assistant Director Reid,

I am writing on behalf of First Focus on Children to offer comments in opposition to the notice of proposed rulemaking (NPRM or proposed rule) entitled “Circumvention of Lawful Pathways,” issued by the Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) and the Department of Homeland Security (DHS) U.S. Citizenship and Immigration Services (USCIS). We urge the Departments to withdraw this proposed rule in its entirety and instead uphold the laws establishing our humanitarian protection system and implement policies and procedures that make children’s best interests the primary consideration.

First Focus on Children is a bipartisan child advocacy organization dedicated to making children and families the priority in federal policy and budget decisions. As advocates for children, we are committed to ensuring that all immigration policies are in the best interests of children and advance children’s safety, family unity, and well-being. First Focus on Children and its partner organization, The First Focus Campaign for Children, have long been advocating for both legislative and administrative solutions to ensure that children and families arriving at our border have a full and fair opportunity to make their case for protection and are not returned to the persecution, torture, or abuse they have fled.

Children applying for humanitarian protection have unique experiences that require special consideration. Humanitarian protection through asylum is a lifeline for many children fleeing persecution in their home countries or on their migration journey. However, these children must navigate a complex and confusing immigration system to make their case. Due to their age and stages

of development, children are different from adults. Therefore, ensuring children seeking protection a fair opportunity to make their claim requires child-specific policies and procedures. For children in families whose cases may be tied to those of their parents or legal guardians, due process for the adult is vital and connected to due process for the child.

There are life or death consequences for children who do not receive protection in our immigration system. Without policies that take their experiences and needs into account, children may be wrongfully denied legal protection, separated from family, and returned to persecution. Instead of ensuring due process and access to protection for children, this proposed rule would impose new, unrealistic barriers for children and families seeking asylum, and in practice would be a new version of similar asylum bans promulgated by the Trump Administration that were repeatedly struck down by federal courts as unlawful.

While we are glad that unaccompanied children are exempt from the conditions on asylum eligibility under the proposed rule, the fact is the rule would apply to children who are part of family units. DHS does not disaggregate family unit data by age, therefore obscuring the number of children who would be impacted by this rule. However, analysis by Syracuse University shows that an increasing number of children, both accompanied and unaccompanied, have been arriving at the border for the past 15 years.<sup>1</sup> In a 2020 report, the Young Center for Immigrant Children's Rights stated:

...[P]roviding children with different protections based on the adults with whom they travel or live can force family to make choices that pit the child's own rights against each other—for example, the right to family integrity against the right to liberty and safety.<sup>2</sup>

There should not be disparate treatment of children based on their familial status, that is, their arrival with a parent or legal guardian versus arrival with another adult or arrival by themselves. Yet, this rule would in fact treat children differently based on exactly these factors, increasing their risk of return to the danger they fled.

The following comments specifically address the impact of the proposed rule on children in families.

### **I. The 30-day comment period provides insufficient time to comment on the rule.**

The Departments have provided only 30 days for the public to comment on the proposed rule, effectively denying the public the right to meaningfully comment under the notice and comment rulemaking procedures required by the Administrative Procedure Act. This rule is sweeping in its effect, imposing multiple conditions on asylum eligibility, multiple burdens on people seeking asylum to rebut a presumption of ineligibility, and changing the nature of the expedited removal process.

Executive Orders 12866 and 13563 state that agencies should generally provide at least 60 days for the public to comment on proposed regulations. On March 1, 2023, First Focus joined 171 other

---

<sup>1</sup> *Growing Numbers of Children Try to Enter the U.S.*, TRAC Immigration (June 28, 2022), <https://trac.syr.edu/immigration/reports/687/> (finding that the number of children arriving at the U.S. border has increased five-fold since 2008).

<sup>2</sup> *Reimagining Children's Immigration Proceedings: A Roadmap for an Entirely New System Centered Around Children*, Young Center for Immigrant Children's Rights 37 (October 2020), <https://static1.squarespace.com/static/597ab5f3beba7b0a625aaf45/t/5f9acdcb38fc5b520e882eb1/1603980749320/Reimagining+Children%E2%80%99s+Immigration+Proceedings+Young+Center+for+Immigrant+Children%27s+Rights.pdf>.

organizations urging the agencies to adhere to the suggested common period, given the complex nature of the proposed rule and its implications for asylum access at the border and in USCIS and immigration court asylum proceedings.<sup>3</sup> While the agencies cite the termination of the Title 42 policy in May 2023 as a justification to curtail the public’s right to comment on the proposed rule, the administration itself sought to formally end Title 42 *last year*, nearly a year to the date that Title 42 would end this May, communicated that it was prepared to terminate the policy on May 23<sup>rd</sup> last year,<sup>4</sup> and has had ample time to prepare for the end of the policy. It is unclear why the agencies must now rush this comment process ahead of terminating a policy the Administration has, by all indications, long intended to end.

As mentioned earlier, the proposed rule would impact children in families. With additional time, First Focus would seek to quantify the number of children who have arrived as part of family units in past years to illustrate how many children would be impacted by this rule. It would also seek to speak with families with children or with organizations representing or serving families with children to understand first-hand the obstacles that families face accessing visas, parole systems, CBP One, and protection in other countries through which they transit when coming to the United States. All this information would benefit the agencies by responding to their specific requests for comment and ensuring that the final rule is informed by a child-focused perspective. While this comment does its best to capture these elements, additional time in the comment period would have allowed us to expand on these points. Regardless, this comment demonstrates the likely devastating effects of the proposed rule for children in families.

## II. The proposed rule violates U.S. law and treaty obligations.

The proposed rule is titled “Circumvention of Lawful Pathways.” This title wrongfully obscures the fact that seeking asylum at the border is a lawful pathway to seek protection from persecution that is provided for in our laws and which the United States is obligated to provide based on its ratification of international treaties. The United Nations High Commission for Refugees (UNHCR), the International Organization for Migration (IOM) and the United Nations Children’s Fund (UNICEF), authorities on the interpretation and implementation of international law regarding refugees and children, recently warned that the provision of safe pathways “cannot come at the expense of the *fundamental human right* to seek asylum.”<sup>5</sup> Rather than acknowledge that asylum is a lawful pathway, the proposed rule falsely mislabels seeking asylum at the U.S. southern border through means other than those outlined in the proposed rule as “unlawful” and therefore violates U.S. and international law. Most grievous of all, the proposed rule increases the risk that children in families with valid asylum claims will be returned to a

---

<sup>3</sup> Letter to Attorney General Merrick Garland, 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) Joint Notice of Proposed Rulemaking (NPRM): Circumvention of Lawful Pathways*, National Immigrant Justice Center (March 1, 2023), <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>.

<sup>4</sup> U.S. Department of Homeland Security, *FACT SHEET: DHS Preparations for a Potential Increase in Migration* (March 30, 2022), <https://www.dhs.gov/news/2022/03/30/fact-sheet-dhs-preparations-potential-increase-migration>.

<sup>5</sup> UNHCR, IOM, and UNICEF *welcome new pathways for regular entry to the US, reiterate concern over restrictions on access to asylum*, UNHCR (October 14, 2022), <https://www.unhcr.org/en-us/news/press/2022/10/63497be44/unhcr-iom-and-unicef-welcome-new-pathways-for-regular-entry-to-the-us-reiterate.html> (emphasis added).

place where their life or freedom is threatened, thus violating the Refugee Convention's central principle of *nonrefoulement*.<sup>6</sup>

a. The proposed rule violates U.S. law and international law regarding manner of entry.

The Immigration and Nationality Act's (INA) plain text prohibits the United States from denying protection to those seeking asylum based on the manner of their entry into the country. While Congress did pass limits on asylum eligibility in the INA,<sup>7</sup> it explicitly did not include a restriction on asylum eligibility based on where a person enters the country. Despite many amendments to the INA since the Refugee Act of 1980, Congress has maintained that individuals may apply for asylum regardless of their manner of entry. In fact, Congress amended the INA in 1996 to the law's current language, which states that "any [noncitizen] physically present in the United States or who arrives in the United States (*whether or not at a designated port of entry or arrival...*), *irrespective of such[noncitizen's] status*, may apply for asylum . . ."<sup>8</sup> The INA prohibits the U.S. government from issuing restrictions on asylum that are inconsistent with this provision.<sup>9</sup>

The proposed rule also contravenes the Refugee Convention's prohibition against imposing penalties on those seeking asylum based on irregular entry into a country of refuge. By acceding to the 1967 Protocol Related to the Status of Refugees, which expands the application of the Refugee Convention, the United States is obligated to interpret and apply U.S. law in a manner that does not contradict the Protocol's principles.<sup>10</sup> Article 31 of the Convention explicitly states that obligated countries "shall not impose penalties, on account of their illegal entry or presence" on those seeking asylum who "enter or are present in [the country's] territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."<sup>11</sup> Drafting history of the Convention demonstrates that the fact that someone is fleeing persecution in itself may be good cause for irregular entry.<sup>12</sup>

Yet, the proposed rule would impose a presumption of asylum ineligibility based on manner of entry. It would not only require children and families seeking asylum to approach a designated port of entry, but also require that they first make an appointment to arrive at a designated time at a port of entry. Furthermore, the proposed rule explicitly states that its purpose is to impose "consequences" on those who do not meet its conditions, one of which is pre-authorized entry into the United States.<sup>13</sup> This contravenes the plain text of U.S. and international law.

---

<sup>6</sup> UN General Assembly, *Convention Relating to the Status of Refugees* art. 33(1), 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, <https://www.refworld.org/docid/3be01b964.html> (*hereinafter* Refugee Convention).

<sup>7</sup> 8 U.S.C. § 1101(a)(42)(A).

<sup>8</sup> Pub. L. No. 104-208 sec. 604(a), Div. C., 110 Stat. 3009-690, codified at U.S.C. § 1158(a)(1) (emphasis added).

<sup>9</sup> 8 U.S.C. § 1158(b)(2)(C), d(5)(B).

<sup>10</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

<sup>11</sup> Refugee Convention, *supra* note 6, art. 31(1).

<sup>12</sup> James Hathaway, *The Rights of Refugees Under International Law* 393 (2005). UN High Commissioner for Refugees, Summary Conclusions on Non-Penalization for Illegal Entry or Presence: Interpreting and Applying Article 31 of the 1951 Refugee Convention, para. 18 (Mar. 15, 2017), <https://www.refworld.org/docid/5b18f6740.html>.

<sup>13</sup> 88 FR 11707.

b. The proposed rule violates U.S. and international law regarding applying for asylum in transit countries.

U.S. law provides carefully crafted standards regarding when persons may be denied asylum after passing through another country. The INA states that the government can only deny asylum on this basis if an individual was “firmly resettled” in another country (defined to mean the person was eligible for or received permanent or indefinite legal status in that country) or if the U.S. has a formal “safe third country” agreement with a country where an individual would be safe from persecution and have access to fair asylum procedures.<sup>14</sup>

Furthermore, There is no obligation under international law for a person to seek asylum at the first effective opportunity.<sup>15</sup> Though individuals may not have an unrestricted right to choose a country of asylum, UNHCR has explained that under international law, “asylum should not be refused solely on the ground that it could be sought from another State.”<sup>16</sup> Where a country seeks to return an asylum seeker to a transit country to seek protection, international law requires safeguards to ensure that individuals are not returned to the danger they fled.<sup>17</sup>

Contrary to these requirements, the proposed rule imposes a presumption of asylum ineligibility for those who pass through a country without first applying for and being denied asylum in that country. The proposed rule does not first require the United States to enter into an agreement with any of the countries through which asylum seekers may transit. It does not provide for individualized inquiry of whether each asylum seeker would have had a full and fair opportunity to seek asylum in a transit country.<sup>18</sup> While listing the forms of protection available in certain countries through which asylum seekers may transit, the proposed rule appears to list forms of protection that are temporary and not equivalent to the protections provided with a grant of asylum.<sup>19</sup> Lastly, under the proposed rule, children and families that are unable to rebut the presumption of ineligibility based on third-country transit would not be returned to the transit country in question, but to the very country where they claim to have suffered persecution and from which they are seeking protection. For all these reasons, the proposed rule violates U.S. and international law, and would likely result in the return of children and families to the danger they fled.

---

<sup>14</sup> 8 U.S.C. § 1158(a)(2), (b)(2)(A)(iv). 8 CFR § 208.15(a).

<sup>15</sup> UNHCR, Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers para 14.

<sup>16</sup> UNHCR Executive Committee, Refugees Without an Asylum Country No. 15 (XXX) para. (h)(iv) (October 16, 1979), <https://www.unhcr.org/en-us/excom/exconc/3ae68c960/refugees-asylum-country.html>. UNHCR, the international body that oversees the international treaty governing asylum and refugee determination, has provided further guidance on right to asylum, and U.S. courts have stated UNHCR is authoritative regarding interpretation of the Refugee Convention. *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005).

<sup>17</sup> UNHCR, Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers, *supra* note 15, paras. 16-23 (noting that a third country must provide “access in practice” to asylum). UNHCR, Legal Considerations Regarding Access to Protection and A Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries para. 4, 7 (April 2018), <https://www.refworld.org/docid/5acb33ad4.html>.

<sup>18</sup> UNHCR, Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers, *supra* note 15, para 22 (noting the importance of individual assessments for vulnerable groups, including children).

<sup>19</sup> 88 FR 11720-11723 (listing temporary labor visas, temporary protected status, and temporary resident permits as examples of protections available for migrants in various Central American countries).



c. The proposed rule contravenes international law regarding procedures to ensure children’s access to protection.

Additionally, the U.S. is a signatory to the Convention on the Rights of the Child (CRC) and is obligated to ensure its policies and actions to not “defeat the object and purpose of the Convention.”<sup>20</sup> The CRC rests on four key principles: non-discrimination, the best interests of the child, the child’s right to be heard, and the right to survival and development.<sup>21</sup> The Convention also specifically requires States to take appropriate methods to ensure that a child who is seeking refugee status, whether unaccompanied or with a parent, “receive[s] appropriate protection and humanitarian assistance” to enjoy the rights in the CRC and any other human rights instruments that a country has ratified.<sup>22</sup>

In a comment regarding the rights of children in the context of international migration, the Committee on the Rights of the Child, alongside the Committee on the Rights of All Migrant Workers and Members of Their Families, stated that countries’ legislation, policies, measures, and practices should guarantee child-sensitive due process in asylum proceedings affecting children or their parents.<sup>23</sup> The Committees also state that “all children, *including children accompanied by parents or other legal guardians*, should be treated as individual rights holders, their child-specific needs considered equally and individually and their views appropriately heard and given due weight.”<sup>24</sup> Additionally, in its guidelines regarding child asylum claims, UNHCR explains that due to their age, dependency, and relative immaturity, children should enjoy specific procedural and evidentiary safeguards to ensure due process.<sup>25</sup> Such special protections applies to all claims made by child applicants, “whether they are unaccompanied or not.”<sup>26</sup>

While the proposed rule exempts unaccompanied children from the proposed ineligibility criteria, the rule otherwise contravenes the object and purpose of the CRC by undermining the Convention’s basic principles. As proposed, the rule would discriminate against children based on familial status and likely have a disparate impact on Black, Brown, and Indigenous children; undermine children’s interests of safety and well-being; deny children the right to be heard, both through access to legal representation and the ability to make an independent claim for asylum; and undermine their survival and development by increasing their risk of family separation and return to the very danger they fled.

---

<sup>20</sup> U.S. Citizenship and Immigration Services, RAIO Combined Training Program: Children’s Claims § 2.2 (2009), [https://www.uscis.gov/sites/default/files/files/nativedocuments/Childrens\\_Claims\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/Childrens_Claims_LP_RAIO.pdf); Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331.

<sup>21</sup> *The Four Principles of the Convention on the Rights of the Child*, UNICEF Armenia (June 24, 2019), <https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child>.

<sup>22</sup> UN General Assembly, Convention on the Rights of the Child, art. 22(1), November 20, 1989, 1577 U.N.T.S. 3.

<sup>23</sup> Joint General Comment No. 4 (2017), of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the Human Rights of Children in the Context of International Migration in the Countries of Origin, Transit, Destination and Return para. 15 (November 16, 2017), <https://www.refworld.org/docid/5a12942a2b.html> (pursuant to articles 12 and 40 of the CRC).

<sup>24</sup> *Id.* (emphasis added).

<sup>25</sup> UNHCR, Guidelines on International Protection: Child Asylum Claims under Article 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees para. 65 (December 22, 2009), <https://www.unhcr.org/en-us/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html>.

<sup>26</sup> *Id.* at para. 66.

### III. The proposed rule places unrealistic conditions on asylum eligibility.

The Departments seek comment on whether the proposed rule appropriately provides migrants a meaningful and realistic opportunity to seek protection. Across the board, it does not. Few people will be able to get prior approval to enter the country through parole programs, which are limited and nationality-based. The proposed rule ignores the realities of forcing people seeking protection to use a smartphone-based app to approach the border, especially for children in families who must seek multiple appointments at a time. Lastly, the proposed rule ignores the dangers children and families face in transit countries, such that they cannot safely apply for asylum or other forms of humanitarian protection in those countries.

- a. Parole programs are extremely limited, nationality-based, and cannot be a substitute for asylum at the southern border.

The proposed rule's first condition on asylum eligibility is that the asylum seeker or a family member without whom that person is traveling be provided authorization to travel to the United States through an approved parole process.<sup>27</sup> First Focus welcomes the expansion of parole pathways so that children and families can safely come to the United States. However, parole programs cannot be a substitute for access to asylum at the border. The condition to seek a pathway to the United States through parole ignores that U.S. law states that anyone who approach the border, regardless of their status, is allowed to seek asylum.<sup>28</sup> It also ignores many children and families' limited access to parole.

The United States recently announced parole programs for four countries—Cuba, Haiti, Nicaragua, and Venezuela.<sup>29</sup> Thus, only individuals from those nations<sup>30</sup> have access to these parole programs, leaving others completely unable to meet this condition for asylum eligibility. Furthermore, these parole programs are limited in scope. To qualify for these programs, applicants must have a U.S.-based sponsor that can support them for two years, a valid passport, access to internet and a smartphone to apply through a mobile app, and financial resources to fly to a port of entry within the United States—and even if they meet these requirements, a grant of parole is still discretionary.<sup>31</sup> Many people fleeing Cuba, Haiti, Nicaragua, and Venezuela cannot meet these stringent requirements. Families with children may have a harder time finding a U.S.-based sponsor, as such a sponsor would need to show they can support multiple people. Those from rural or marginalized communities may not have access to technology or finances to apply for these programs. For example, the passport office in Haiti doubled the price to get a passport after the United States announced the new parole program, pricing many Haitians out of getting a valid passport to apply for the program.<sup>32</sup> For many, interacting with the government to get the documentation necessary to apply for these programs isn't an option.

---

<sup>27</sup> 88 FR 11750.

<sup>28</sup> 8 U.S.C. § 1158(a)(1).

<sup>29</sup> U.S. Citizenship and Immigration Services, *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans* (February 22, 2023), <https://www.uscis.gov/CHNV>.

<sup>30</sup> The Administration has also announced a parole program for Ukraine, but has historically exempted Ukrainians from border restrictions. U.S. Citizenship and Immigration Services, *Uniting for Ukraine* (February 2, 2023), <https://www.uscis.gov/ukraine>. U.S. Department of Homeland Security, Memorandum from Matthew S. Davies regarding Title 42 Exceptions for Ukrainian Nationals (March 11, 2022), <https://drive.google.com/file/d/1glEe8MnsNWR15BsfQtiaSR75yKBrCuqe/view>.

<sup>31</sup> *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*, *supra* note 29.

<sup>32</sup> Juhakenson Blaise, *Passport Prices Double in Haiti and US Parole Frenzy Spreads*, *The Haitian Times* (January 17, 2023), <https://haitiantimes.com/2023/01/17/passport-prices-double-in-haiti-as-us-parole-frenzy-spreads/>.

Furthermore, for children and families in immediate danger of losing life or freedom, waiting to be approved for a parole program isn't an option.

The condition of parole also builds in a nationality-based limitation to accessing asylum. While there are currently limited parole initiatives for Cuba, Haiti, Nicaragua, and Venezuela, there are no similar parole initiatives for people from Guatemala, Honduras, and El Salvador, still top countries of origin for asylum seekers coming to the United States.<sup>33</sup> While access to parole is not the only way that children and families can access the U.S. asylum process under this rule, its inclusion in the rule pits individuals exercising their lawful right to seek asylum at the border against those who are more fortunate or better able to access extremely limited parole programs.

- b. Requiring pre-scheduled appointments to enter at ports of entry discriminates against those most at risk of harm, especially children in families and Black and Indigenous asylum seekers.

The proposed rule introduces an entirely new concept to the U.S. asylum system by making access to asylum at the southern border contingent on children and families' ability to access and properly utilize a mobile phone app to make an appointment before their arrival. This requirement fails to account for gaps in technology, literacy, language access, and economic disparities between those seeking asylum. It also fails to acknowledge that children in families have little control over whether their parents can use a mobile app before approaching the border, but still saddles that child with asylum ineligibility based on whether their parent made an appointment. The result is that those most at risk of experience harm, including children, will be unable to access asylum.

The disparities this process will create is evident in the current regime of seeking exemptions to Title 42 expulsions through CBP One. CBP One, which is currently only rolled out in a limited manner, is impossible for many families and individuals to access or use, including those who do not have the resources to obtain a smartphone or ability to navigate the app.<sup>34</sup> The app is not available in most languages—including Indigenous languages—and all error messages are in English, barring many from using the app. It also disparately harms Black people seeking protection, including children, due to racial bias in its facial recognition technology and therefore has prevented many from obtaining an appointment.<sup>35</sup>

*The Washington Post reported that a Haitian family with three children struggled for weeks before the CBP One app recognized and captured their photos and allowed them to make an appointment. However, the app was never able to capture the face of their 7-year-old daughter.<sup>36</sup>*

---

<sup>33</sup> Julia Ainsley, *Rights Groups Threaten to Sue Biden Administration Over Plan to Block Migrants with What Groups Call a Trump-era Tactic*, NBC News (February 20, 2023), <https://www.nbcnews.com/politics/immigration/biden-block-migrants-trump-era-stephen-miller-tactic-rcna71282> (citing four DHS officials as explaining that the proposed rule will “largely block migrants from Central America from attempting to claim asylum at the southern border.”).

<sup>34</sup> Stephanie Leutert and Caitlyn Yates, *Asylum Processing at the U.S.-Mexico Border: February 2023*, University of Texas at Austin Strauss Center for International Security and Law 2-3 (February 2023), [https://www.strausscenter.org/wp-content/uploads/Feb\\_2023\\_Asylum\\_Processing.pdf](https://www.strausscenter.org/wp-content/uploads/Feb_2023_Asylum_Processing.pdf).

<sup>35</sup> Melissa del Bosque, *Facial Recognition Bias Frustrates Black Asylum Applicants to US, Advocates Say*, The Guardian (February 8m, 2023), <https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias>.

<sup>36</sup> Arelis Hernández, *Desperate Migrants Seeking Asylum Face a New Hurdle: Technology*, Washington Post (March 22, 2023), <https://www.washingtonpost.com/nation/2023/03/11/asylum-seekers-mexico-border-app/>.



Families and individuals who can access and navigate the app are still often unable to schedule appointments due to extremely limited slots and are forced to remain in danger indefinitely. This is particularly the case for children in families, as currently only a certain number of slots are available at various ports of entry and some family members get appointments while others do not.<sup>37</sup> This has resulted in family separation, where parents make an impossible choice to continue to wait in dangerous situations for appointments for the whole family, or separate by either leaving their children in Mexico or having their children cross without them.<sup>38</sup> Requiring those seeking protection to use CBP One at the southwest border also raises concerns that the system will become one of electronic metering (which a federal court found to be unlawful),<sup>39</sup> based on luck, technology skills, and access.

Under Title 42 and the so-called “Migrant Protection Protocols” (MPP), asylum-seeking children and families made to wait in Mexico experienced rape, kidnapping, and other violence.<sup>40</sup> Requiring children and families to schedule an appointment through CBP One and wait to cross has already resulted in horrific violence and death, including the murder of a 17-year-old Cuban child in Mexico who was required to wait weeks for an appointment.<sup>41</sup> Requiring all people seeking protection to make an appointment will likely continue to result in harm to children and families.

The proposed rule, in an attempt to acknowledge difficulties some may experience accessing CBP One, allows people seeking protection to seek an exception to the requirement by proving “by a preponderance of the evidence” that they could not access the app due to “language barriers, illiteracy, significant technical failure, or other serious and ongoing obstacles.”<sup>42</sup> First, Customs and Border Protection (CBP) often confiscates people’s phones while they are in CBP custody or people may have borrowed phones to access the app, meaning that they would not have access to the evidence they need to prove they encountered obstacles using CBP One. Second, it is unlikely that asylum-seeking children and families would feel comfortable sharing difficulty using the CBP One app with an armed agent in uniform. Given their lack of training in trauma-informed or child-friendly care and communication, border patrol agents are unlikely to help children and families feel comfortable sharing such information, nor should they be the ones to do so. Additionally, multiple credible reports have found CBP agents to be dismissive or directly hostile to those seeking protection, and they have also repeatedly failed to properly identify indigenous language-speaking families.<sup>43</sup> This exception to the requirement to schedule an appointment to approach the border is insufficient to ensure that all children and families can exercise their right to seek asylum.

---

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Al Otro Lado v. Mayorkas*, Case No. 17-cv-02366-BAS-KSC, order granting in part and denying on part motions for summary judgement (S.D. Cal. September 2, 2021), *available at* [https://fngfx.thomsonreuters.com/gfx/legaldocs/zjvqkzdwvx/IMMIGRATION\\_METERING\\_LAWSUIT\\_decision.pdf](https://fngfx.thomsonreuters.com/gfx/legaldocs/zjvqkzdwvx/IMMIGRATION_METERING_LAWSUIT_decision.pdf).

<sup>40</sup> *Wolf v. Innovation Law Lab*, Brief amicus curiae of Young Center for Immigrant Children’s Rights et al. (January 22, 2021), [https://www.supremecourt.gov/DocketPDF/19/19-1212/167044/20210122180800456\\_19-1212%20Amici%20Curiae.pdf](https://www.supremecourt.gov/DocketPDF/19/19-1212/167044/20210122180800456_19-1212%20Amici%20Curiae.pdf). *Human Rights Stain, Public Health Farce*, Human Rights First (December 2022), <https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf>.

<sup>41</sup> Jack Herrera, *Fleeing for Your Life? There’s An App for That*, Texas Monthly (March 2, 2023), <https://www.texasmonthly.com/news-politics/cbp-app-asylum-biden-administration/>.

<sup>42</sup> 88 FR 11750.

<sup>43</sup> *“They Treat You Like You Are Worthless:” Internal DHS Reports of Abuses by US Border Officials*, Human Rights Watch (October 21, 2021), <https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials>.

c. Children and families cannot realistically seek asylum in Mexico and other transit countries.

The proposed rule would require those seeking protection to seek asylum in transit countries that have no formal agreement with the U.S. and where they would not be safe or have access to meaningful asylum procedures. As explained earlier, this requirement circumvents U.S. and international law standards regarding firm resettlement and safe third country agreements. Furthermore, the proposed rule ignores the realities for children and families who would seek asylum in Mexico and other transit countries.

First, the proposed rule disregards the reality of children's ages, developmental stages, and dependency on adults. Children, particularly those with parents, rarely control how they flee from danger, the route they take to seek safety, or whether they attempted to seek protection in another country before they arrive at the U.S. southern border. A report by UNHCR and UNICEF found that most families fleeing Central America didn't know how to request a visa or asylum in a country through which they transited.<sup>44</sup> For children in families, parents often are making these decisions in haste and under stress to ensure their own safety and that of their child. This rule would illogically penalize children in families for a decision that is not their own and that they could not control.

Second, many children and families cannot safely or fairly seek asylum in transit countries. In their report titled *Families in the Run*, UNHCR and UNICEF found that nearly a third of migrating Central American families they surveyed feared that authorities in transit countries would either detain them or ask for bribes because they did not have legal documentation, and therefore did not seek help when they needed it.<sup>45</sup> Unfortunately, children and families' experiences in transit countries have borne this fear out.

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.<sup>46</sup> Many children and families do not have access to fair asylum or other protection procedures in Mexico, as there are confirmed reports that Mexican police and other government officials extort them by threatening them with deportation.<sup>47</sup> In a report about MPP, Human Rights First reported that of the individuals they interviewed who had been placed in the program, 47 percent reported that Mexican officials had robbed or extorted them.<sup>48</sup> Black asylum seekers, including families with children, face pervasive anti-Black violence, harassment, and discrimination, including widespread abuse by Mexican authorities, such that they cannot safely apply for asylum in Mexico.<sup>49</sup> Similarly, Indigenous people from Central America face xenophobia,

---

<sup>44</sup> UNHCR, UNICEF, *Families on the Run: Why Families Flee from Northern Central America?* (2020), <https://familiesontherun.org/#> (finding that 81.9 percent of families surveyed did not know how to file an asylum claim and 88 percent did not know the institutions to approach to ask for help seeking protection).

<sup>45</sup> *Id.*

<sup>46</sup> *Human Rights Stain, Public Health Farce*, *supra* note 40.

<sup>47</sup> *Id.*

<sup>48</sup> *Fatally Flawed: "Remain in Mexico" Policy Should Never Be Revived*, Human Rights First 14 (September 2022), <https://humanrightsfirst.org/wp-content/uploads/2022/10/FatallyFlawed.pdf>.

<sup>49</sup> S. Priya Morley et al., *There is a Target on Us"—The Impact of Anti-Black Racism on African Migrants at Mexico's Southern Border*, Institute for Women in Migration, Black Alliance for Just Immigration (2021), <https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf>.

discrimination, and language barriers in Mexico and have experienced exploitation, sexual abuse, and convictions for crimes they did not commit.<sup>50</sup>

*A Guatemalan family with two children told the Kino Border Initiative that Mexican immigration officers kidnapped their family and turned them over to a cartel. The cartel held the family hostage for three months, tortured them, and extorted their relatives.<sup>51</sup>*

Asylum-seeking children and families also face harm in other possible transit countries. A UNICEF report on the situation for children in El Salvador found that many communities are effected by gang violence, extortions, death threats and forced recruitment, and the lack of specialized services for children hinders their protection.<sup>52</sup> A similar report for Honduras stated that violence in the form of killings, extortion, abuse, and forced recruitment are a “daily reality” for children and families.<sup>53</sup> In Guatemala, children are exposed to high rates of violence and exploitation, with high rates of impunity and little access to protection services.<sup>54</sup> If these threats are common for children and families from these countries, it is fair to assume such harms are also likely for migrant children and families, particularly those who are more readily identifiable as not from these countries, such as Black children and families.

El Salvador, Honduras, and Guatemala also do not have accessible asylum systems that can protect large numbers of asylum-seeking children and families. The U.S. government describes El Salvador’s asylum system as having “major regulatory and operational gaps.”<sup>55</sup> Similarly, the U.S. government reports that Honduras’ asylum system is “nascent” and that those trying to access the system, including children, were particularly vulnerable to abuse and sexual exploitation.<sup>56</sup> The U.S. government human rights report on Guatemala states that the country’s asylum system fails to adequately identify asylum seekers and limits access.<sup>57</sup> As noted earlier, countries must also have child-specific policies and procedures to ensure children have full and fair access to protection, which these countries’ asylum systems appear to lack. It is illogical that in these circumstances, the United States would expect children and families, particularly those from marginalized communities, to receive a fair and full opportunity to seek protection in countries they pass through on their journey to the United States.

---

<sup>50</sup> René Kladzyk, Maria Ramos Pacheco, and Veronica Martinez, *Indigenous Diaspora: Leaving Home and the Journey Across Mexico*, El Paso Times (May 10, 2021), <https://www.elpasotimes.com/story/news/2021/05/10/texas-immigration-indigenous-diaspora-leaving-home-and-journey-across-mexico/5004360001/>.

<sup>51</sup> *Human Rights Stain, Public Health Farce*, *supra* note 40.

<sup>52</sup> *Country Office Annual Report 2021: El Salvador*, UNICEF 2 (2021), <https://www.unicef.org/media/116261/file/El-Salvador-2021-COAR.pdf>.

<sup>53</sup> *Country Office Annual Report 2021: Honduras*, UNICEF 1 (2021), <https://www.unicef.org/media/117051/file/Honduras-2021-COAR.pdf>.

<sup>54</sup> *Country Office Annual Report 2022: Guatemala*, UNICEF 2 (2022), <https://www.unicef.org/media/135941/file/Guatemala-2022-COAR.pdf> (stating that sexual violence against children represented 72 percent of total cases registered in the country).

<sup>55</sup> U.S. Department of State, *2021 Country Reports on Human Rights Practices: El Salvador*, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/el-salvador/> (last accessed March 22, 2023).

<sup>56</sup> U.S. Department of State, *2021 Country Reports on Human Rights Practices: Honduras*, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/honduras/> (last accessed March 22, 2023).

<sup>57</sup> U.S. Department of State, *2021 Country Reports on Human Rights Practices: Guatemala*, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/guatemala/> (last accessed March 22, 2023).

#### IV. The proposed rule imposes unrealistic barriers to rebut the presumption of asylum ineligibility.

The proposed rule states that people seeking protection can rebut their presumption of asylum ineligibility if they demonstrate by a preponderance of the evidence that they or a family member faced “exceptionally compelling circumstances,” including an acute medical emergency, imminent threat to harm or safety, or that they satisfy the definition for a severe form of trafficking in persons.<sup>58</sup> As explained earlier, there is extensive evidence that forcing children and families to wait in Mexico increasing the risk of rape, kidnapping, torture, or murder—the very types of exceptionally compelling circumstances mentioned in the proposed rule.<sup>59</sup> Making asylum-seeking children and families provide evidence for harms of which the U.S. government is aware—and has stated in official documents<sup>60</sup>—is an unfair burden.

Furthermore, many asylum-seeking children and families would likely be unable meet the standard for these rebuttals while in U.S. custody, with limited language access, and without legal counsel. As mentioned earlier, children and families’ belongings are often confiscated while they are in custody, which likely would deprive them of the evidence they need to support their rebuttal to asylum ineligibility. Additionally, people seeking protection are not likely to understand and meet the legal definitions under U.S. law where they do have these standards explained to them in their best language or do not have access to counsel. Research has made clear that asylum seekers often do not have either in CBP custody or during the credible fear process.<sup>61</sup>

In past contexts, the processes DHS set up for asylum seekers to seek an exception to restrictive border policies have been flawed and deprived them a fair opportunity to find safety. Under the government’s reinstatement of MPP in December 2021, DHS provided an exemption process for those who demonstrated a reasonable possibility of persecution or torture in Mexico,<sup>62</sup> a standard similar to that provided under the proposed rule. However, reports by human rights groups demonstrated that these processes were flawed and often returned asylum seekers to danger in Mexico. The process required a heightened standard beyond the credible fear standard set by Congress, interviews were conducted while individuals were in deplorable conditions in CBP custody, and only 1 percent of individuals were able to have an attorney present during the fear interviews.<sup>63</sup> Those seeking protection also stated that they were not affirmatively asked about their potential fear of return to Mexico.<sup>64</sup> As a result, only 18 percent of those interviewed during these fear screenings were found to meet the heightened standard.<sup>65</sup> It is likely that under the proposed rule, children and families will similarly not

---

<sup>58</sup> 88 FR. 11750.

<sup>59</sup> Wolf v. Innovation Law Lab, Brief amicus curiae of Young Center for Immigrant Children’s Rights et al., *supra* note 40. *Human Rights Stain, Public Health Farce*, *supra* note 40.

<sup>60</sup> U.S. Department of Homeland Security, *Explanation of the Decision to Terminate the Migrant Protection Protocols 12-14* (October 29, 2021), [https://www.dhs.gov/sites/default/files/2022-01/21\\_1029\\_mpp-termination-justification-memo-508.pdf](https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf).

<sup>61</sup> *The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers*, American Immigration Council (May 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_perils\\_of\\_expedited\\_removal\\_how\\_fast-track\\_deportations jeopardize detained asylum seekers.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_perils_of_expedited_removal_how_fast-track_deportations jeopardize detained asylum seekers.pdf).

<sup>62</sup> U.S. Department of Homeland Security, *Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols* (December 2, 2021), [https://www.dhs.gov/sites/default/files/2022-01/21\\_1202\\_plcy\\_mpp-policy-guidance\\_508.pdf](https://www.dhs.gov/sites/default/files/2022-01/21_1202_plcy_mpp-policy-guidance_508.pdf).

<sup>63</sup> *Fatally Flawed: “Remain in Mexico” Policy Should Never Be Revived*, *supra* note 48, at 19.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

be told of their ability to rebut a presumption of asylum ineligibility, will be unable to meet the heightened rebuttal standard, and be returned to the very harm they fled.

## V. The proposed rule relies on the flawed process of expedited removal.

Under the proposed rule, DHS would apply the conditions on asylum eligibility to families in expedited removal. Under expedited removal, CBP officials are required to explain expedited removal and ask families if they have any fear of returning to their country of origin during initial processing. If families express fear of return, CBP refers them for a credible fear interview with an asylum officer. During that interview, asylum seekers must show that they are likely to face persecution if returned to their country of origin.<sup>66</sup> If an asylum officer finds that a person has a significant possibility of being granted asylum or another form of protection, the individual and their family are then referred to immigration court to go through regular immigration proceedings, or, under the asylum processing rule, to an asylum officer for a full asylum interview. If the asylum officer finds that an individual does not have a credible fear of return, the person and their family can be removed from the border, though they can seek review of the decision by an immigration judge.<sup>16</sup>

Expedited removal deprives families and children in them a fair opportunity to articulate their fear of persecution upon return to their country of origin, as First Focus and the Young Center for Immigrant Children's Rights explained in a recently published report.<sup>67</sup> Under the policy, armed and uniformed agents, with whom families are unlikely to recount sensitive facts that may rebut a presumption of asylum ineligibility under the proposed rule, perform the initial processing and screening.<sup>68</sup> Additionally, the speed of expedited removal makes it difficult for individuals or families to access the support of counsel, which would increase their ability to rebut a presumption against asylum eligibility and allow them to access the asylum system.<sup>69</sup>

Detention further makes expedited removal harmful, as it decreases the likelihood that families will find counsel.<sup>70</sup> It also retraumatizes people seeking protection and makes it more difficult for them to share sensitive information, whether with an asylum officer or with counsel. This is especially the case for children, as family detention undermines the physical and mental well-being of children and their parents and strains parent-child relationships.<sup>71</sup> As credible reports indicate that the Biden Administration is considering a return to performing credible fear interviews in CBP custody and family detention, detention for children and families during expedited removal and under the proposed rule is a real

---

<sup>66</sup> 8. U.S.C. 1225(b).

<sup>67</sup> *Issue Brief: Fast Not Fair—How Expedited Processes Harm Immigrant Children Seeking Protection*, First Focus on Children, Young Center for Immigrant Children's Rights (March 6, 2023), <https://firstfocus.org/resources/fact-sheet/fast-not-fair-how-expedited-processes-harm-immigrant-children-seeking-protection>.

<sup>68</sup> Elizabeth Cassidy and Tiffany Lynch, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, U.S. Commission on International Religious Freedom, 30 (2016), <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>.

<sup>69</sup> Karen Berberich and Nina Suilc, *Why Does Representation Matter? The Impact of Legal Representation in Immigration Court*, Vera Institute of Justice (November 2018), <https://www.vera.org/downloads/publications/why-does-representation-matter.pdf>.

<sup>70</sup> Ingrid Eagly, Steven Shafers, and Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, American Immigration Council 14-15 (August 2018), [https://www.americanimmigrationcouncil.org/sites/default/files/research/detaining\\_families\\_a\\_study\\_of\\_asylum\\_adjudication\\_in\\_family\\_detention\\_final.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/detaining_families_a_study_of_asylum_adjudication_in_family_detention_final.pdf).

<sup>71</sup> *Locking Up Family Values, Again*, Lutheran Immigration and Refugee Service and The Women's Refugee Commission (October 2014), [https://www.lirs.org/assets/2474/lirswrc\\_lockingupfamilyvaluesagain\\_report\\_141114.pdf](https://www.lirs.org/assets/2474/lirswrc_lockingupfamilyvaluesagain_report_141114.pdf).



possibility.<sup>72</sup> In cases where children are dependents of their parent or legal guardian's case, expedited removal and its impact on a parent or legal guardian's opportunity to fairly represent their claim of fear or address the proposed rule's conditions on asylum eligibility therefore risks denying a child access to protection for which they and their parent might be eligible.

Expedited removal also denies children the opportunity to make a claim for protection independent of their parent or legal guardian. A report by the U.S. Commission for International Religious Freedom on expedited removal found that children under 14 arriving with parents had few opportunities to make an independent claim for protection from their parents, as border patrol agents question the parent on behalf of the child.<sup>73</sup> When asked about scenarios where children might have a claim independent from their parent or legal guardian, "border patrol agents responded . . . that they were confident that, since the child had made it to the safety of the United States, s/he would voice any concerns s/he had."<sup>74</sup> It is understandable that children recently arriving to the United States would not feel comfortable speaking to an agent in uniform about their fear. Furthermore, border agents often are not trained in speaking to or interviewing children and are unlikely to learn the facts necessary to determine whether a child has a separate fear of return to their country of origin. Thus, by its very nature, expedited removal is harmful to children seeking protection.

Overall, there have been many reports about abuses under expedited removal, including failures by border patrol agents to accurately identify and refer individuals for credible fear interviews; intimidation and coercion of asylum seekers; inadequate screenings by asylum officers, and many others.<sup>75</sup> In the context of the proposed rule, such abuses could deprive children and families from ever being able to rebut presumptions of asylum ineligibility in the first place. The proposed rule's reliance on expedited removal as the context under which children and families would have to rebut a presumption of asylum ineligibility will likely result in swift, unlawful return of children and families to the very danger they fled.

---

<sup>72</sup> Ted Hesson and Kristina Cooke, *Biden Moving to Restart Trump-era Rapid Asylum Screenings at U.S.-Mexico Border – Sources*, Reuters (January 26, 2023), <https://www.reuters.com/world/us/biden-moving-restart-trump-era-rapid-asylum-screenings-us-mexico-border-sources-2023-01-26/>; Eileen Sullivan and Zolan Kanno-Youngs, *U.S. is Said to Consider Reinstating Detention of Migrant Families*, The New York Times (March 6, 2023), <https://www.nytimes.com/2023/03/06/us/politics/biden-immigration-family-detention.html>.

<sup>73</sup> Cassidy and Lynch, *supra* note 68, at 30.

<sup>74</sup> *Id.*

<sup>75</sup> *Deportations in the Dark: Lack of Process and Information in the Removal of Mexican Migrants*, American Immigration Council (September 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/deportations\\_in\\_the\\_dark.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/deportations_in_the_dark.pdf); *Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border*, Borderland Immigration Council (February 2017), [https://docs.wixstatic.com/ugd/e07ba9\\_72743e60ea6d4c3aa796becc71c3b0fe.pdf](https://docs.wixstatic.com/ugd/e07ba9_72743e60ea6d4c3aa796becc71c3b0fe.pdf); *Facing Walls: USA and Mexico's Violations of the Rights of Asylum-Seekers*, Amnesty International (2017), <https://www.amnestyusa.org/wp-content/uploads/2017/06/USA-Mexico-Facing-Walls-REPORT-ENG.pdf>; John Washington, *Bad Information: Border Patrol Arrest Reports are Full of Lies That Can Sabotage Asylum Claims*, The Intercept (August 11, 2019), <https://theintercept.com/2019/08/11/border-patrol-asylum-claim/>; *The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers*, *supra* note 55. NGO Letter to Biden Administration Expressing Profound Disappointment in Continued Violations of Refugee Law, Human Rights First (August 6, 2021), <https://humanrightsfirst.org/library/ngo-letter-to-biden-administration-expressing-profound-disappointment-in-continued-violations-of-refugee-law>; Brief for Amici Curiae Immigration and Human Rights Organizations In Support of Respondent, *U.S. Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959; American Immigration Council, Catholic Legal Immigration Network, Inc., American Immigration Law Association, Refugee and Immigrant Center for Education and Legal Services, Letter to Director of U.S. Citizenship and Immigration Services and Director of Immigration and Customs Enforcement, (December 24, 2015), <https://www.aila.org/File/DownloadEmbeddedFile/66734>. Cassidy and Lynch, *supra* note 68.

## VI. The proposed rule will result in family separation.

The proposed rule will likely result in family separation because of its exemption for unaccompanied children, the limited benefits granted to those who are granted withholding or removal or protection under the Convention Against Torture (CAT), and its application to other adult relatives with whom children may arrive. Our country is all too familiar with the harmful impacts of family separation in the immigration context, particularly the effects of toxic stress on children's physical, mental, and emotional health that could last a lifetime.<sup>76</sup> The proposed rule is unfortunately likely to be another in a long line of policies that traumatizes children through family separation.

First, the proposed rule will likely force families to make the impossible choice to send their children alone across the border to ensure that they have access to the asylum system. While the proposed rule states that it will likely not result in such separation, every other policy where children in families are subject to the policy and unaccompanied children are not is evidence that this type of family separation is likely to occur. A year into the implementation of MPP, government data stated that over 350 children had crossed the border alone after being placed in the program with their parents.<sup>77</sup> According to data requested through a Freedom of Information Act request, more than 12,000 children in Fiscal Year 2021 entered the United States as unaccompanied after previously being expelled with their parents under Title 42.<sup>78</sup> It is very probable that under the proposed rule, family separation of this kind will again occur.

Second, the proposed rule will keep families apart across thousands of miles by eliminating reunification benefits that are given with a grant of asylum. Under the proposed rule, those found to be ineligible for asylum may still establish eligibility for withholding of removal or protection under CAT to obtain protection from deportation. Unlike asylum, these forms of relief do not confer permanent status or a path to citizenship, do not allow people to petition for their spouses and children, and do not permit people to travel abroad. As a result, families who may have left children behind would be unable to sponsor those children to join them in the United States, resulting in possibly indefinite family separation.

*In a report about the Trump Administration's transit ban, Human Rights First recorded the case of an Anglophone Cameroonian man who fled after being brutally tortured by the Cameroonian military but was only granted a lesser form of protection in the United States. As a result, his wife and child, who were hiding in Cameroon because of threats they faced, were unable to reunite with him.<sup>79</sup>*

Lastly, the proposed rule will likely result in the long-term separation of unaccompanied children from non-parent adult relatives with whom they arrive. Under current practice, children arriving with adults

---

<sup>76</sup> Hajar Habbach, Kathryn Hampton, and Ranit Mishori, "You Will Never See Your Child Again": The Persistent Psychological Effects of Family Separation, Physicians for Human Rights (February 25, 2020), [https://phr.org/our-work/resources/you-will-never-see-your-child-again-the-persistent-psychological-effects-of-family-separation/?utm\\_source=webpromo](https://phr.org/our-work/resources/you-will-never-see-your-child-again-the-persistent-psychological-effects-of-family-separation/?utm_source=webpromo).

<sup>77</sup> Priscilla Alvarez, *At least 350 Children of Migrant Families Forced to Remain in Mexico Have Crossed Over Alone to US*, CNN (January 24, 2020), <https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-mexico/index.html>.

<sup>78</sup> Camilo Montoya-Galvez, *12,212 Migrant Children Reentered U.S. Border policy Alone in 2021 After Being Expelled*, CBS News (May 20, 2022), <https://www.cbsnews.com/news/immigration-migrant-children-us-border-custody-unaccompanied-minors-2021/>.

<sup>79</sup> *Asylum Denied, Families Divided: Trump Administration's Illegal Third-Country Transit Ban*, Human Rights First 10 (July 2020), <https://humanrightsfirst.org/wp-content/uploads/2022/10/AsylumDeniedFamiliesDivided.pdf>.

who are not their parent or legal guardian are separated from those adults and transferred to the custody of the Office of Refugee Resettlement (ORR), sometimes remaining separated from that adult for months.<sup>80</sup> While it is true that these children may be arriving at our borders without a legal decisionmaker, this practice fails to acknowledge that there are many families whose bonds are not determined by first-degree biological relationships.<sup>81</sup> Additionally, research shows that when a child is separated from a loving caregiver that is not a parent or legal guardian, they experience the same level of toxic stress and trauma as when they have been separated from a parent.<sup>82</sup> Under the proposed rule, unaccompanied children would be separated from these adult family members, who in turn would face conditions on asylum eligibility under the proposed rule and may be quickly deported under expedited removal. In such circumstances, children may not only be separated from a known and loving family member, but also may be deprived of information critical to their claim for protection in the United States.

## VII. The proposed rule will result in children's return to the harm they fled.

Overall and as stated throughout these comments, the proposed rule is likely to return children in families to the harm they fled. While the Departments seek to distinguish this rule from the Trump Administration's asylum bans by stating that it does not impose a categorical bar to asylum, in practice the high barriers to so called "lawful pathways" to the United States and the burdens placed on individual and families to rebut a presumption of asylum ineligibility would result in a categorical bar. The proposed rule could therefore result in children and families' deportation—not because they fail to meet the statutory definition for asylum, but because of how they fled to or entered the United States in a situation of desperation.

*In a report about the Trump Administration's transit ban, Human Rights First reported that a Venezuelan opposition journalist and her one-year-old child were attacked by the Venezuelan government and fled to the United States. Because of the ban, both the woman and her child were found ineligible for asylum, were also denied other forms of relief, and were ordered deported.<sup>83</sup>*

## VIII. Conclusion

The proposed rule threatens children's safety and well-being and is discriminatory against children in families. Like the Trump administration's entry and transit bans, this asylum ban is likely to deport children in families to persecution and torture and subject them to family separation. Even if this rule is temporary in nature, our comments explain that even for the short time this rule is in place, it will inflict harm on asylum-seeking children. Putting children in danger, and doing so simply because they

---

<sup>80</sup> Erica Bryant, *Children are Still Being Separated From Their Families at the Border*, Vera Institute of Justice (June 23, 2022), <https://www.vera.org/news/children-are-still-being-separated-from-their-families-at-the-border>.

<sup>81</sup> *The American Family Today*, Pew Research Center (December 17, 2015), <https://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/>. Marcia Carteret, *Cultural Differences in Family Dynamics*, Dimensions of Culture (November 2, 2010), <https://www.dimensionsofculture.com/2010/11/culture-and-family-dynamics/> ("In cultures such as American Indian, Asian, Hispanic, African, and Middle Eastern, individuals rely heavily on an extended network of reciprocal relationships with parents, siblings, grandparents, aunts and uncles, cousins, and many others.")

<sup>82</sup> *Key Points: Traumatic Separation and Refugee & Immigrant Children*, The National Child Traumatic Stress Network, [https://www.nctsn.org/sites/default/files/resources/tip-sheet/key\\_points\\_traumatic\\_separation\\_and\\_refugee\\_immigrant\\_children.pdf](https://www.nctsn.org/sites/default/files/resources/tip-sheet/key_points_traumatic_separation_and_refugee_immigrant_children.pdf) (last visited Apr. 23, 2021) (noting that a child's relationships with a primary caregiver is critical to a children's ability to thrive, and that separation is one of the most potent stressors a child can experience).

<sup>83</sup> *Asylum Denied, Families Divided: Trump Administration's Illegal Third-Country Transit Ban*, *supra* note 79, at 6.

arrived at the border with a parent or legal guardian, cannot be an acceptable result of U.S. immigration policies.

In the preamble to the proposed rule, the agencies highlight the pressures at the border caused by increasing arrivals. The United States is not alone in facing these pressures; people across the world face record global displacement caused by political instability, oppression, violence, and climate change,<sup>84</sup> and nearly half of those globally displaced are children.<sup>85</sup> However, the U.S. government does not need to respond to these pressures by implementing deterrence-based policies that inflict documented harm on children. Instead, our country can lead by example and implement solutions to border management that are humane, practical, and put the safety and well-being of children first.<sup>86</sup> First Focus on Children calls on the agencies to withdraw the proposed rule in its entirety and instead allocate resources toward child-centered asylum policies and procedures.

Thank you for the opportunity to comment on the proposed rule. Please reach out to Miriam Abaya, Vice President for Immigration and Children's Rights, at [miriama@firstfocus.org](mailto:miriama@firstfocus.org) with any questions.

Sincerely,



Bruce Lesley  
President, First Focus on Children

---

<sup>84</sup> UNHCR: *Global Displacement Hits Another Record, Capping Decade-long Rising Trend*, UNHCR USA (June 16, 2022), <https://www.unhcr.org/en-us/news/press/2022/6/62a9d2b04/unhcr-global-displacement-hits-record-capping-decade-long-rising-trend.html>.

<sup>85</sup> *Refugee Data Finder*, UNHCR, <https://www.unhcr.org/refugee-statistics/> (last updated October 27, 2022).

<sup>86</sup> Miriam Abaya, *Fact Sheet: Border Policies that Protect and Support Children*, First Focus on Children (January 18, 2023), <https://firstfocus.org/resources/fact-sheet/border-policies-that-protect-and-support-children>.