

# United States Senate

WASHINGTON, DC 20510

March 27, 2023

*Submitted through the Federal eRulemaking Portal: <https://www.regulations.gov>.*

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**Re: Comment on the Proposed Rule by the Department of Homeland Security (DHS) and the 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,

We write to express our strong opposition to the [proposed rule](#) published on February 23, 2023, that would erect multiple new barriers to asylum protections for most refugees who come to the United States by way of the U.S.-Mexico border. The proposed rule is a revised version of asylum bans put in place during the prior administration—bans that were struck down by the courts. Under the proposed rule, most individuals who request asylum at the U.S.-Mexico border would be forced to overcome a presumption of asylum ineligibility unless they (1) are in Haiti, Venezuela, Cuba, and Nicaragua and meet specific [parole requirements](#); (2) applied for and were denied protection in a country through which they transited; or (3) presented at a land port of entry pursuant to an appointment scheduled through the CBP One mobile application. Although we support the administration's goal of managing migration at the U.S.-Mexico border by creating new efficiencies in the asylum system, this rule violates our legal obligations to protect refugees fleeing persecution and usurps Congressional authority by adding unlawful bars to asylum eligibility.

As lawmakers whose millions of constituents rely on us to both protect refugees and maintain border security, we call on the administration to withdraw this proposed rule and take steps to reform the asylum system in a way that honors our nation's legal obligations. We stand ready to work with the administration to provide the resources and authorities needed to realize our shared vision of a fair, orderly, and humane immigration system.

## I. The Proposed Rule is an Unlawful Modification to the Credible Fear Process

The proposed presumption of asylum ineligibility to the credible fear process violates 8 U.S.C. § 1225(b)(1)(B), which establishes that “credible fear” is the relevant test for whether a person processed through expedited removal should be referred for further consideration of a claim for asylum. Instead, the proposed rule requires bona fide asylum seekers who cannot rebut the new presumption of asylum ineligibility to actually establish a higher “reasonable possibility” standard in order to secure the right to have their asylum claim processed. This presumption of asylum ineligibility is in direct contravention to the statutory requirement that any new limitations or conditions on asylum eligibility added by regulation must be “consistent with” the asylum statute.<sup>1</sup> By erecting a new barrier to asylum based on transit through a third country without requesting asylum and being denied—without any consideration whatsoever regarding whether genuine safety was in fact available in such a country—the proposal is inconsistent with both the plain language of the statute and congressional intent.<sup>2</sup>

## II. The Proposed Rule Would Illegally Circumvent the “Credible Fear” Requirement

In 1996, Congress made it clear that noncitizens processed through expedited removal who establish a credible fear of prosecution must receive further consideration of their applications for asylum.<sup>3</sup> The term “credible fear of persecution” is defined as “a significant possibility, taking into account the credibility of the statements made by the [noncitizen] in support of the [noncitizen’s] claim and such other facts as are known to the officer, that the [noncitizen] could establish eligibility for asylum.”<sup>4</sup> At the time, the United Nations Refugee Agency (UNHCR) expressed to Congress its concerns about the legislation under consideration, including its “fear[s] that many bona fide refugees will be returned to countries where their lives or freedom will be threatened.”<sup>5</sup> Although the House-passed bill proposed a more stringent credible fear definition than the Senate-passed bill, the final definition that remains to this day represented a compromise between the two positions. Senator Orrin Hatch (R-UT) described the version that came out of conference as “a low screening standard for admission into the usual full asylum process.”<sup>6</sup> Importantly, the House Judiciary Committee Report accompanying that House version of the legislation, which contained the more strenuous standard involving a heightened credibility requirement, described even that test as “designed to weed out non-meritorious cases,” and the report provided assurances that “[u]nder this system, there should be no danger that [a noncitizen] with a genuine asylum claim will be returned to persecution.”<sup>7</sup> The report

<sup>1</sup> See 8 U.S.C. § 1158(b)(2)(C); (d)(5)(B).

<sup>2</sup> See 8 U.S.C. § 1158(a)(2)(A) (mandating that asylum seekers “have access to a full and fair procedure for determining a claim to asylum” and requiring individualized assessment to claims that another country did not offer the required safety).

<sup>3</sup> See 8 U.S.C. § 1225(b)(1)(B)(ii).

<sup>4</sup> *Id.* § 1225(b)(1)(B)(v).

<sup>5</sup> S. Rep. 104-249, at 55 (1996) (quoting Letter from Anne Willem Bijleveld, Representative of UNHCR, to Chairman Hatch, Mar. 6, 1996, at 1).

<sup>6</sup> 142 Cong. Rec. 25,347 (1996).

<sup>7</sup> H.R. Rep. No. 104-469, pt. 1, at 158.

further stressed that the credible fear standard was “lower than the ‘well-founded fear’ standard needed to ultimately be granted asylum in the U.S.”<sup>8</sup>

Congress was fully aware that there would be a gap between the number of people determined to have a credible fear of persecution and the number ultimately determined to have a well-founded fear. Rather than being motivated in 1996 to keep that gap as small as possible, Congress—even as it was granting the Executive the enormously consequential expedited removal authority—focused on ensuring that noncitizens whose claims for asylum at the screening stage would be permitted to have their claims considered further.

In a clear attempt to circumvent existing statute and congressional intent, the proposed rule creates a new presumption of asylum ineligibility to be applied at this screening phase that would lead to negative credible fear determinations for any individual who is unable to rebut the presumption. In order for such individuals to receive further consideration of their applications for asylum they would need to establish not simply a credible fear of persecution but rather a reasonable possibility of persecution, which U.S. Citizenship and Immigration Services describes as the legal equivalent of a well-founded fear of persecution, the standard applied at the merits stage of an asylum adjudication.<sup>9</sup> In this way, the proposed rule directly contradicts the text of the Immigration and Nationality Act and congressional intent when the expedited removal process and credible fear requirement were created.

The circumvention of the statutory credible fear standard undermines the overarching purpose of the Refugee Act itself. When Congress passed the Refugee Act of 1980, with unanimous support from the Senate, the legislation stated:

it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States.

Pub. L. No. 96–212, 94 Stat. 102. The proposed rule is in contravention of our laws and should be withdrawn in its entirety.

### **III. The Proposed Rule Creates New Barriers to Asylum that are Inconsistent with the Statute and therefore Illegal**

To create a new presumption of asylum ineligibility, the agencies rely on language in the statute authorizing the Executive to adopt by regulation “additional limitations and conditions,

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<sup>8</sup> *Id.*

<sup>9</sup> USCIS, Questions and Answers: Reasonable Fear Screenings, (last updated March 22, 2023) <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-reasonable-fear-screenings> (“The legal standard [to establish a reasonable fear of persecution] is the same standard used to establish a well-founded fear of persecution in an asylum case.”).

consistent with this section, under which [a noncitizen] shall be ineligible for asylum.”<sup>10</sup> The limitations proposed in the rule, however, are unlawful.

*The Obligation to Seek Protection in a Transit Country*

As to the provision requiring an applicant to seek asylum in a third country before arriving in the United States, the agencies recognize that in INA Section 208, Congress already established two circumstances in which an asylum seeker may be rendered ineligible to apply for asylum or be granted asylum based on their passage through or residence in a third country prior to coming to the United States to requesting asylum. The proposed rule states:

Nothing about the text or history of these provisions suggests that they were intended to set out the exclusive conditions relating to an individual seeking protection’s ability to obtain relief in a third country, and therefore they do not prevent the Executive Branch from imposing additional requirements addressing that subject. To the contrary, those and other statutory bars establish minimum requirements for asylum eligibility that the Attorney General and Secretary may not disregard.

88 Fed. Reg. at 11740.

This argument violates common sense and the long held *expressio unius est exclusio alterius* principle of statutory construction.<sup>11</sup> The prior Administration’s transit ban, akin to the one proposed by this Rule, was rejected by federal courts when it was advanced during the last administration.<sup>12</sup>

Moreover, central to both the firm resettlement and safe third country provisions in Section 208 of the INA is the notion that permanent status or genuine safety are available to an individual in the country of transit. The proposed rule instead imposes a condition on the granting of asylum based on mere transit through a third country without any regard for these requirements. Importantly, the year before Congress enacted the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Congress considered and rejected an amendment which would have barred asylum to those who, “before arriving at the United States, passed through another country”—and even then, only if “the Secretary of State ha[d] identified [the transit country] as

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<sup>10</sup> See 8 U.S.C. § 1158(b)(2)(C).

<sup>11</sup> See, e.g., *United States v. Jumaev*, 20 F.4th 518, 551-52 (10th Cir. 2021) (“After all, common sense, reflected in the canon *expressio unius est exclusio alterius*, suggests that the specification of [one requirement] implies the exclusion of others.” (quoting *Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1312 (10th Cir. 2012) (Gorsuch, J.)); accord *Arizona v. United States*, 567 U.S. 387, 432 (2012) (Scalia, J., concurring in part and dissenting in part)); see also, e.g., *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (noting that courts have a “duty to refrain from reading a phrase into [a] statute when Congress has left it out”).

<sup>12</sup> See *East Bay Sanctuary Covenant v. Barr*, 964 F. 3d 832, 847 (9th Cir. 2020) (noting that the Trump Administration’s third-country transit ban, which is substantively equivalent to the ban in the proposed rule “does virtually nothing to ensure that a third country is a safe option” (internal quotation marks and citations omitted)).

providing asylum or safe haven to refugees.”<sup>13</sup> Congress instead made the possibility of protection elsewhere a bar to asylum in only two carefully limited circumstances:

- 1) Whether a noncitizen was previously “firmly resettled in another country prior to arriving in the United States.”<sup>14</sup> In 1996 as now, firm resettlement required that another country had issued the noncitizen “an offer of permanent resident status, citizenship, or some other type of permanent resettlement,” and did not include mere transit.<sup>15</sup> The firm resettlement bar to refugee eligibility has existed for decades.<sup>16</sup>
- 2) Whether a noncitizen may be removed “pursuant to a bilateral or multilateral agreement” to a “safe third country”—and only if the noncitizen would not face persecution in the third country and “would have access to a full and fair procedure for determining a claim to asylum.”<sup>17</sup> The only country in the world with which the United States has entered a safe third country agreement is Canada. The proposed rule fails to demonstrate that asylum seekers—particularly asylum seekers from outside of the Western Hemisphere—will be able to access both safety and a full and fair asylum process in any of the regional partners that the proposed rule expects to rely upon, particularly given that many of the countries listed have nascent or non-existent asylum systems or have created programs exclusively for nationals of a specific, often neighboring, country.

As it relates to the transit ban, these existing provisions relating to firm resettlement only apply at the merits stage of asylum seekers’ cases, not in credible fear interviews. The NPRM presumption not only adds a new bar, but applies it at those initial screenings, in direct contravention of the INA.

#### *The Obligation to Present only at a Port of Entry*

The proposed rule also requires asylum seekers to present at a port of entry or else be subject to the presumption against eligibility. As with the provision requiring applicants to seek protection in a transit country, this provision violates the INA and congressional intent.

The Refugee Act began an era of uniformity for the treatment of asylum seekers, regardless of where they enter the United States or their manner of doing so. Before passage of the Refugee Act of 1980, migrants who arrived at a port of entry were “given an opportunity to have their [asylum] applications heard in a hearing before an immigration judge,” but refugees arriving “at a land border of the United States [were] not given this right.”<sup>18</sup> In the Refugee Act of 1980, Congress sought to “establish a more uniform basis for the provision of assistance to refugees.”<sup>19</sup>

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<sup>13</sup> H.R. 2182, 104th Cong. § 1(a) (1995).

<sup>14</sup> See 8 U.S.C. § 1158(b)(2)(A)(vi).

<sup>15</sup> See 8 C.F.R. § 208.15 (1996); 8 C.F.R. § 208.15 (2020) (operative version).

<sup>16</sup> *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 53-56 (1971).

<sup>17</sup> See 8 U.S.C. § 1158(a)(2)(A).

<sup>18</sup> Refugee Act of 1979: Hearing on H.R. 2816 before the Subcomm. on Immigration, Refugees, and Int’l Law of the Comm. on the Judiciary, 96th Cong. 190 (1979).

<sup>19</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

The Refugee Act therefore established that asylum procedures would be available irrespective of whether a migrant arrived “at a land border or port of entry.”<sup>20</sup>

This provision is codified explicitly in INA Section 208. When Congress amended the asylum statute in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), it reaffirmed its prior explicit authorization of access to asylum for anyone “who is physically present in the United States or who arrives in the United States,” and specifically extended this right to applicants “whether or not” they arrive “at a designated port of arrival.”<sup>21</sup> The proposed rule violates this provision of the INA by creating a presumption against asylum eligibility based on manner of entry. Here too, this same approach was tried and rejected by federal courts under the previous administration.<sup>22</sup>

While the undersigned recognize and agree with the desire to encourage applicants for asylum to present at a port of entry, the proposed rule does not account for the statutory text indicating that failure to do so cannot serve as a bar to asylum, nor does it account for the reality that some people are unable to access the port of entry due to long lines and threats on their lives while waiting on the southern side of the U.S-Mexico border.<sup>23</sup>

Overall, while Congress gave the Attorney General authority to impose additional restrictions to access to asylum, those restrictions need to be consistent with the legislation as written, and the intention of Congress to craft legislation that conforms to international treaty obligations. The provisions of this proposed rule do not achieve that.

## Conclusion

The United States has legal obligations to ensure asylum access to those arriving at U.S. borders and ports of entry. Policies that uphold this obligation are central to a functioning border processing system. Restricting access to asylum in an approach previously rejected by Congress and our courts is counterproductive and ineffective at addressing the government’s stated goals.

We call on the administration to withdraw this rule in its entirety.

Sincerely,

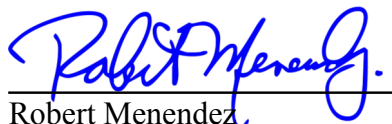
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<sup>20</sup> Pub. L. No. 96-212, § 208(a), 94 Stat. 102, 105 (1980).

<sup>21</sup> Pub. L. No. 104-208, 110 Stat. 3009, at 690; 8 U.S.C. § 1158(a)(1).

<sup>22</sup> See *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019) *appeal pending sub nom O.A. v. Biden*, No. 19-5272 (D.C. Cir.) (vacating prior rule); *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1121 (N.D. Cal. 2018) *affirmed by East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021) (enjoining rule).

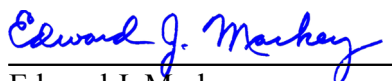
<sup>23</sup> See, e.g., Stephanie Leutert and Caitlyn Yates, University of Texas at Austin, Strauss Center, Metering Update: August 2022, [https://www.strausscenter.org/wp-content/uploads/Aug\\_2022\\_Metering.pdf](https://www.strausscenter.org/wp-content/uploads/Aug_2022_Metering.pdf).



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United States Senator



Alex Padilla  
United States Senator



Edward J. Markey  
United States Senator



Jeffrey A. Merkley  
United States Senator



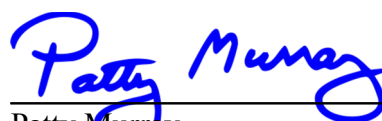
Bernard Sanders  
United States Senator



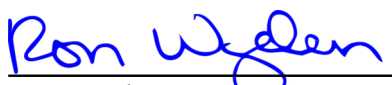
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