



CENTER FOR IMMIGRATION STUDIES

March 27, 2023

Daniel Delgado
Acting Director, Border and Immigration Policy
Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security
2707 Martin Luther King Jr Ave SE
Washington, DC, 20528

RE: DHS Docket No. USCIS 2022-0016, Circumventing Lawful Pathways

Dear Mr. Delgado:

The Center for Immigration Studies (CIS) submits the following public comment to the U.S. Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) in response to the request for comments on the proposed rule titled *Circumventing Lawful Pathways*, as published in the Federal Register on February 23, 2023.

CIS is an independent, non-partisan, non-profit, research organization. Founded in 1985, CIS has pursued a single mission – providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. CIS is the nation’s only think tank devoted exclusively to the research of U.S. immigration policy to inform policymakers and the public about immigration’s far-reaching impact. CIS is animated by a unique **pro-immigrant, lower-immigration** vision which seeks fewer annual admissions but a warmer welcome for those admitted.

I. Background

Asylum is a discretionary immigration benefit that generally can be sought by eligible aliens who are physically present or arriving in the United States.¹ The Immigration and Nationality Act (INA) provides the Secretary of Homeland Security or the Attorney General the discretion to grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General, consistent with section 208 of the INA, if the alien is determined to be a refugee as defined by section 101(a)(42)(A) of the INA.² While an alien

¹ INA § 208.

² INA § 101(a)(42)(a) defines refugee as “any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term ‘refugee’ does not include any person who ordered, incited, assisted, or otherwise participated in

does not have to be lawfully present in order to apply for asylum, Congress has limited which classes of aliens may receive asylum and further delegated to the Attorney General and the Secretary of Homeland Security the authority to further restrict asylum eligibility by promulgating regulations that are consistent with statute.³

Over the past decade, the United States has experienced a dramatic increase in the number of inadmissible aliens encountered along or near the southwest border, resulting in an historic humanitarian crisis that has remarkably worsened with nearly each passing month since January 2021. U.S. Customs and Border Protection (CBP) reported encountering over 4 million aliens at the southern border between fiscal years (FY) 2021 and FY 2022 (approximately 1.7 million and 2.2 million, respectively), not including an estimated 1.125 million aliens who were detected by officers but evaded apprehension (known colloquially as “got-aways”).⁴ Alarming, CBP reported encountering over 251,000 migrants at the southern border in the month of December 2022 alone, exceeding the number for any month in recorded history during a season when apprehensions should be at their lowest levels.⁵ DHS reports that encounters in the first quarter of FY 2023 (October-December 2022) exceeded the same period in 2022 by more than a third, and non-Mexican encounters in this same period were up 61 percent over the previous year.⁶

This increase corresponds with a sharp increase in the number of aliens claiming asylum, or a fear of persecution or torture when encountered by DHS, the majority of which have been determined to be meritless or fraudulent.⁷ Indeed, the Supreme Court noted when it evaluated the expedited removal process in 2020 that a random sampling of asylum claims found 58 percent possessed indications of fraud, while 12 percent were conclusively fraudulent.⁸ Moreover, of the applicants determined to have a credible fear (or a significant possibility of establishing eligibility for asylum or withholding of removal), about 50% over the same 10-year period, ultimately did not submit an asylum application after their fear screening.⁹ Between 2014 and 2019, a grant of asylum or some other form of protection followed a positive credible fear determination just 15% of the time.¹⁰ This percentage would be significantly smaller if all credible fear claims were taken into account.

The large number of meritless asylum claims places an extraordinary strain on the nation's immigration system, undermines many of the humanitarian purposes of asylum, and has exacerbated the humanitarian crisis of human smuggling.¹¹ In addition to costs borne by state and local taxpayers, the

the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion....”

³ INA § 208(b)(2)(C).

⁴ U.S. Customs and Border Protection, *Southwest Land Border Encounters* (Feb. 2023).

⁵ U.S. Customs and Border Protection, *CBP Enforcement Statistics Fiscal Year 2023* (Feb. 2023).

⁶ 88 Fed. Reg. 11704, 11078 (Feb. 23, 2023).

⁷ See U.S. Department of Homeland Security, OIS Enforcement Lifecycle data through September 30, 2022; See U.S. Department of Justice, Executive Office of Immigration Review, *EOIR Adjudication Statistics: Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim* (Oct. 13, 2022).

⁸ *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. at 1959, 1967-68.

⁹ See Executive Office of Immigration Review, *Adjudication Statistics: Rates of Asylum Filings in Cases Originating With a Credible Fear Claim* (Nov. 2018); see also 84 Fed. Reg. 33841 (noting that many instead abscond).

¹⁰ See Executive Office of Immigration Review, *Asylum Decision Rates in Cases Originating With a Credible Fear Claim* (Oct. 2019).

¹¹ See 88 Fed. Reg. 11704, 11705 (Feb. 23, 2023); 84 Fed. Reg. 33829, 33831 (Jul. 16, 2019).

border crisis poses significant health and safety concerns to both migrants, federal officers, and the general public, and “creates a situation in which large numbers of migrants – only a small portion of whom are likely to be granted asylum – are subject to extreme exploitation” by smuggling networks.¹² Additionally, the Departments report that the exceedingly high rate of migration risks overwhelming the government’s ability to effectively process, detain, and remove migrants encountered.¹³

II. Proposed Presumption Against Asylum Eligibility

In response to the urgent and extreme crisis on the southern border, DHS and the U.S. Department of Justice (DOJ) published a notice for proposed rulemaking (NPRM) on February 23, 2023 to create a rebuttable presumption against asylum eligibility.¹⁴ Specifically, under this NPRM, the presumption would apply to certain inadmissible aliens entering the United States at the southwest land border after traveling through a country that is party to the 1951 United Nations Convention relating to the Status of Refugees (Refugee Convention) or the 1967 Protocol relating to the Status of Refugees (Protocol).¹⁵ Similar to the third-country transit bars published by the Trump administration in 2019 and 2020, the presumption created under this NPRM would be a condition on asylum eligibility that would apply in affirmative and defensive asylum application merits adjudications, as well as during credible fear screenings.¹⁶ The presumption would not apply to aliens who sought protection in a third country and were denied. The NPRM, however, does not condition eligibility for withholding of removal or deferral of removal.

The NPRM is a part of the Biden administration’s strategy it announced on January 5, 2023 to prepare for the end of its use of the Center for Disease Control and Prevention (CDC)’s Title 42 public health order.¹⁷ Once the Title 42 public health order is no longer in effect, DHS must process inadmissible aliens encountered at the border pursuant to Title 8 immigration authorities, as required by statute.¹⁸ These reforms include a significant expansion of DHS’s use of parole and creation of a mobile phone application (app), called CBP One, to allow prospective migrants to schedule their arrival at a port-of-entry.

DHS expects migrant encounters in the border region to increase significantly once the CDC’s Title 42 public health order is lifted, stating that “the current level of migratory movements and the anticipated increase in the numbers of migrants following the lifting of the Title 42 public health order threaten to exceed the capacity to maintain the safe and humane processing of migrants who have crossed the border without authorization to do so.”¹⁹ Accordingly, DHS and DOJ issued this NPRM for the purpose of encouraging inadmissible aliens to enter the United States in accordance with the Biden administration’s new pathways (i.e., in accordance with the Biden administration’s unlawful parole

¹² 88 Fed. Reg. 11704, 11705 (Feb. 23, 2023).

¹³ *Id.*

¹⁴ 88 Fed. Reg. 11704 (Feb. 23, 2023).

¹⁵ *Id.*

¹⁶ *See* 85 Fed. Reg. 82260 (Dec. 17, 2020); 84 Fed. Reg. 33845 (Jul. 16, 2020).

¹⁷ The White House, *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions* (Jan. 5, 2023).

¹⁸ 88 Fed. Reg. 11704, 11705 (Feb. 23, 2023).

¹⁹ *Id.* at 11706.

programs or after scheduling an arrival at a port of entry using the CBP One app, regardless of whether the alien is admissible under law) rather than “making the journey to the border.”²⁰

Unlike the third-country transit bar issued by the Departments in 2019 and 2020, this NPRM does not require aliens to submit an application for protection in a country they have transited through *en route* to the United States to be eligible for asylum in the United States. Rather, the Departments propose to allow aliens to circumvent the presumption against asylum eligibility so long as they merely pursue an option DHS has implemented to facilitate the entry of inadmissible aliens in the United States. Specifically, aliens may overcome the presumption if they: 1) schedule their arrival using DHS’s new CBP ONE mobile phone application (app) or 2) enter via an issuance of parole, facilitated by the creation of new (albeit ultra vires) parole programs.²¹

The NPRM also includes several additional exceptions to the presumption against asylum eligibility, including some that are both wide in scope and easy to exploit. Under the NPRM, an alien can circumvent application of the presumption against eligibility to their case if they can demonstrate to an asylum officer or immigration judge that:

- 1) The alien (or an accompanying family member) faced an acute medical emergency;
- 2) The alien (or an accompanying family member) faced an imminent or extreme threat to life or safety (such as a threat of rape, kidnapping, torture, or murder);
- 3) The alien falls under the definition of a “victim of a severe form of trafficking in persons” as defined in 8 C.F.R. § 214.11;
- 4) The alien is an unaccompanied alien child, as defined in 6. U.S.C. § 279(g)(2);
- 5) The alien faced a language or technical barrier that posed a “serious obstacle” in operating the CBP One App;²² or
- 6) The alien is a principal applicant for a family unit, is eligible for withholding of removal under INA § 241(b)(3) or 8 C.F.R. § 1208.16, would be granted asylum but for the presumption against eligibility created by this NPRM, and where an accompanying spouse or child does not independently qualify for protection.²³

Finally, the regulation allows an alien who has received a negative credible fear determination pursuant to the proposed regulation to request an immigration judge to review the case *de novo*.²⁴

CIS strongly agrees that the Departments have the legal authority to restrict asylum eligibility on the basis an alien’s failure to seek protection in a third-country they have transited through *en route* to the United States, and that such policy is consistent with domestic law and the United States’ *nonrefoulement* obligations. As drafted, however, CIS believes that the NPRM’s presumption against asylum eligibility will be largely ineffective at deterring mass asylum fraud or supporting the scheme Congress created to regulate immigration into the United States. CIS strongly urges the Departments to eliminate the overbroad and easy to exploit exceptions to the presumption against asylum eligibility that threaten to swallow the whole rule and recommends raising the screening standard for withholding and

²⁰ *Id.* at 11714.

²¹ Proposed 8 C.F.R. § 208.33(a).

²² *Id.*

²³ Proposed 8 C.F.R. § 1208.33(d).

²⁴ Proposed 8 C.F.R. §§ 208.33(b) and 1208.33.

deferral of removal to from “significant possibility” to “reasonable possibility” for all credible fear screenings. Finally, CIS recommends that the Departments issue a modified condition on asylum eligibility on a permanent basis to support the long term interests of the United States.

a. DHS and DOJ may lawfully promulgate a third-country transit bar to asylum or presumption against asylum eligibility.

CIS strongly disagrees with commenters who argue that DHS and DOJ may not lawfully restrict asylum eligibility from inadmissible aliens who fail to seek protection in a country they transit through *en route* to the United States where asylum or other forms of humanitarian protection are available. Proposed 8 C.F.R. § 208.33(a), which creates the presumption against eligibility for asylum, is consistent with the INA, the United States’ *nonrefoulement* obligations, and applicable laws.

Congress delegated the Departments broad authority to establish limits or conditions on asylum with the enactment of the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA).²⁵ Here, Congress laid out three categories of aliens who are barred from applying for asylum and six other mandatory bars to asylum eligibility. Congress also expressly provided the Attorney General the authority to create, by regulation, “any other conditions or limitations on the consideration of an application for asylum,” so long as those limitations are “not inconsistent with this chapter.”²⁶ Congress further expressly authorized the Departments to designate additional offenses that may be considered “particularly serious crimes” and “serious nonpolitical offenses,” and thus expand the types of conduct that would bar an alien from asylum eligibility.²⁷

As the Tenth Circuit has recognized, “[t]his delegation of authority means that Congress was prepared to accept administrative dilution of the asylum guarantee in § 1158(a)(1)” that aliens generally may file asylum applications, given that “the statute clearly empowers” the Attorney General and the Secretary to “adopt[] further limitations” on eligibility to apply for or receive asylum.²⁸ Congress only requires that the additional limitations on eligibility are to be established “by regulation,” and must be “consistent with” the rest of section 208 of the INA Act.²⁹

The presumption against asylum eligibility set forth in this NPRM is consistent with section 208 of the INA and, therefore, Congress’s delegation of authority. CIS disagrees with commenters that argue that a third-country transit policy violates section 208(a)(1) of the INA (which permits aliens to apply for asylum whether or not at a designated port of entry), the safe-third country or firm-resettlement bars, or the United States’ international *nonrefoulement* obligations.

i. The NPRM’s presumption against asylum eligibility is consistent with INA § 208.

CIS agrees with the Departments that the third-country transit policy is also consistent with the safe-third country and firm resettlement bars to asylum eligibility. A presumption or bar against asylum

²⁵ Public Law 104-208, div. C, sec. 604.

²⁶ See INA § 208(d)(5)(B).

²⁷ See INA § 208(b)(2)(C).

²⁸ *R-S-C v. Sessions*, 869 F.3d 1176, 1187 & n.9 (10th Cir. 2017).

²⁹ See INA § 208(b)(2)(C), (d)(5)(B).

eligibility is not a prohibition from applying for asylum. In section 208 of the INA, Congress created a distinction between eligibility to apply for asylum, which is governed by section 208(a) (titled “Authority to apply for asylum”) and eligibility to receive a grant of asylum, which is governed by section 208(b) (titled “Conditions for granting asylum”). Accordingly, the Departments may lawfully restrict asylum eligibility from aliens who are authorized to apply for the discretionary benefit.

Additionally, the NPRM is consistent with section 208(a)(1), which authorizes an alien who is “physically present in the United States or who arrives in the United States []whether or not at a designated port of arrival . . . , irrespective of such alien’s status” to apply for asylum. Neither the third-country transit policy proposed in this NPRM nor the third-country transit bar issued in 2019-2020 apply to aliens solely on the basis of their immigration status or unlawful entry into the United States. In the case of the current proposal and previous third-country transit bar issued in 2019-2020, any alien who demonstrates that they meet one of the regulations exceptions (outlined above) may circumvent the presumption against eligibility or bar to asylum eligibility, regardless of their manner of entry.³⁰

Both policies are also consistent with the INA’s safe-third country and firm-resettlement bars to asylum eligibility. The safe-third country bar generally restricts asylum eligibility from aliens that “may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.”³¹ The firm-resettlement bar, on the other hand, restricts asylum eligibility from aliens who are determined to be “firmly resettled in another country prior to arriving in the United States.”³²

The NPRM’s presumption against asylum eligibility and the stronger third-country transit bar to asylum are distinct from the safe-third country and firm-resettlement bars. While both the safe-third country and firm-resettlement bars seek to limit forum-shopping in the asylum context, these transit policies both take a different approach from the safe-third country and firm resettlement bar. Neither the presumption against eligibility nor the bar to asylum eligibility entirely eliminates asylum eligibility based on an alien's presence or stay in another country.³³ Under both third-country transit frameworks, aliens remain eligible for asylum so long as they applied for and were denied protection in the relevant third country or fall under another exception.³⁴

The bars to eligibility contained in section 208 are not exhaustive. As explained above, section 208 of the INA imposes minimum restrictions on asylum eligibility but authorizes the Departments to impose additional restrictions on eligibility through issuance of regulations.

³⁰ See proposed 8 C.F.R. § 208.33(b).

³¹ INA § 208(a)(2)(A).

³² INA § 208(b)(2)(A)(vi).

³³ See proposed 8 C.F.R. § 208.33.

³⁴ *Id.*

ii. The NPRM is consistent with the United States' international *nonrefoulement* obligations.

CIS strongly disagrees with commenters that argue that the NPRM is inconsistent with the United States' obligations under the 1967 Refugee Protocol, which incorporates Articles 2-34 of the 1951 Refugee Convention, and CAT. These treaties are not self-executing, and therefore are only enforceable to the extent that they have been implemented by domestic law and regulations.³⁵

As the Supreme Court has explained, asylum corresponds to Article 34 of the Refugee Convention, which provides that contracting states “shall as far as possible facilitate the assimilation and naturalization of refugees.”³⁶ It does not correspond to Article 33 of the Convention, which generally prohibits parties to the Convention from expelling or returning “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”³⁷

Unlike Article 33, Article 34 “is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible.”³⁸ The United States' *nonrefoulement* obligation under Article 33 of the Convention, however, is implemented by statute through in section 241(b)(3) of the INA, which governs *mandatory* withholding of removal (also known as statutory withholding of removal). The NPRM, as well as the previous iteration of the third-country transit bar, do not alter eligibility requirements for statutory withholding of removal.

Likewise, the NPRM is also consistent with the United States' *nonrefoulement* obligations under Article 3 of CAT. Consistent with the *Foreign Affairs Reform and Restructuring Act of 1998* (FARRA), DHS and DOJ have promulgated various regulatory provisions implementing the government's obligations under Article 3. This NPRM, however, does not alter eligibility for withholding or deferral of removal under these regulations.

Moreover, third-country transit policies are not unique to U.S. immigration policy. As the Departments explained in 2019, a third-country transit bar “is in keeping with the efforts of other liberal democracies to prevent forum-shopping by directing asylum-seekers to present their claims in the first safe country in which they arrive. ... [T]he [European Union's] Dublin III Regulation ... instructs that asylum claims ‘shall be examined by a single Member State.’ ... Typically ... the member state by which the asylum applicant first entered the EU ‘shall be responsible for examining the application for international protection.’ ... [and other member states] may transfer the asylum-seeker back to the state of first safe entry.”³⁹ The principles underlying the NPRM's third-country transit restriction have historically been recognized and implemented by fellow signatory countries.

³⁵ See *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009) (“[T]he [Refugee] Protocol is not self-executing.”); *Auguste v. Ridge*, 395 F.3d 123, 132 (3d Cir. 2005) (CAT “was not self-executing”).

³⁶ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987).

³⁷ *Id.*

³⁸ *Id.*

³⁹ 84 Fed. Reg. 33845, 33840 (Jul. 16, 2019).

b. DHS and DOJ must eliminate exceptions in the NPRM that swallow the rule.

While CIS believes that DHS and DOJ are operating within lawful authority to implement a presumption against asylum eligibility, the exceptions included in the Departments' proposal threaten to swallow the entire rule and encourage further lawlessness on the southern border. The proposed rule is so fraught with easy to exploit exceptions and loopholes that the Departments should expect few prospective migrants to be deterred by the rule's presumption against asylum eligibility.

The NPRM is currently drafted to exempt any alien from application of the presumption if they demonstrate to an asylum officer or immigration judge that:

- 1) The alien (or an accompanying family member) faced an acute medical emergency;
- 2) The alien (or an accompanying family member) faced an imminent or extreme threat to life or safety (such as a threat of rape, kidnapping, torture, or murder);
- 3) The alien falls under the definition of a "victim of a severe form of trafficking in persons" as defined in 8 C.F.R. § 214.11;
- 4) The alien is an unaccompanied alien child, as defined by 6 U.S.C. § 279(g);
- 5) The alien faced a language or technical barrier that posed a "serious obstacle" in operating the CBP One app;⁴⁰ or
- 6) The alien is a principal applicant for a family unit, is eligible for withholding of removal under INA § 241(b)(3) or 8 C.F.R. § 1208.16, would be granted asylum but for the presumption against eligibility created by this NPRM, and where an accompanying spouse or child does not independently qualify for protection.⁴¹

An asylum officer or immigration judge, however, will have difficulty determining whether an alien has fabricated evidence to support a claim that they faced an imminent threat to life or safety, such as a threat of rape, kidnapping, or torture, especially when strong evidence exists that migrants who travel to the U.S.-Mexico border by way of smuggling networks are frequently subject to such violence.⁴² Evidence of an acute medical emergency may also be easy to feign or fabricate. As the Supreme Court noted in 2020, fraudulent asylum claims are common and can be "difficult to detect," given the expedited nature of the screening process and the large caseload.⁴³ Likewise, there is no reason to believe that a fraudulent claim that an alien received a threat to safety or an acute medical emergency *en route* to the United States would be easier to uncover, especially given that the volume of cases officers must process has increased significantly since 2020.⁴⁴

⁴⁰ Proposed 8 C.F.R. § 208.33(a).

⁴¹ Proposed 8 C.F.R. § 1208.33(d).

⁴² Refugees International, *Life on the Edge of the Darien Gap* (Jun. 2022); United Nations Office on Drugs and Crime, *Abused and Neglected: A Gender Perspective on Aggravated Migrant Smuggling Offences and Response* (2021); Gilardi, Jasper, Migration Policy Institute, *Ally or Exploiter? The Smuggler-Migrant Relationship is a Complex One* (Feb. 2020).

⁴³ *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1967-68 (2020).

⁴⁴ 88 Fed. Reg. 11704, 11716 (Feb. 23, 2023).

DHS and DOJ must also eliminate the loophole new 8 C.F.R. § 208.33(a)(ii) that allows aliens to circumvent the presumption against asylum eligibility if they faced a language or technical barrier that posed a “serious obstacle” to using DHS’s new CBP One app. This loophole is both broad and easy to exploit. First, the CBP One app is currently only available in five languages: English, Spanish, Haitian Creole, Portuguese, and Russian, but CBP has reported encountering nationals from dozens of countries from around the globe at the southern border since 2021.⁴⁵ Including a literacy or language-related barrier is a wide loophole that aliens can exploit to circumvent the rule’s application.

Second, this loophole is so broad that it can encompass a wide variety of difficult to verify claims, such as an alien losing his or her mobile phone, losing access to cell service, being unable to pay for a new mobile phone or data plan. Additionally, in its current form, the CBP One app is not reliable or easy to use, and has received low ratings from users and migrant advocacy groups. CBP One has been the subject of numerous reports claiming that the app is “riddled with flaws” and frequent “systemic failures” that prohibit migrants from completing essential tasks on the app or accessing the app entirely.⁴⁶ Allowing aliens to circumvent application of the presumption against asylum eligibility solely on the basis of an undefined “serious obstacle” to using CBP One will open a large loophole that will undermine the effectiveness of the NPRM as a whole and render the rule any effect on conditions at the southern border.

Finally, CIS strongly urges the Departments to eliminate the family unit carve-out, which will allow aliens who are subject to the presumption against asylum eligibility to nevertheless receive asylum if they are eligible for withholding of removal, would be eligible for asylum if not for the presumption, and an accompanying spouse or child does not independently qualify for asylum or other protection from removal.⁴⁷ CIS has serious concerns that this carve out will encourage aliens to smuggle children into the United States in the same way that the 1997 *Flores* Settlement Agreement and related non-detention policies covering family units have encouraged mass exploitation and smuggling of children into the United States.⁴⁸

A bipartisan Homeland Security Advisory Council made alarming findings in 2019 that many migrant adults accompanied by a child revealed during CBP processing that they were encouraged to bring a child with them by criminal smuggling organizations that are paid to transport the migrant and child to the U.S. border from Central America.⁴⁹ The Council also found that children are being “exploited and placed in danger in many ways,”⁵⁰ emphasizing that migrant adults frequently fraudulently claim parentage to a child to gain entry to the United States, some children are being “re-cycled by criminal smuggling organizations, i.e. returned to Central America to accompany a separate, unrelated adult on another treacherous journey through Mexico to the U.S. border,” and that human traffickers extract additional fees as a form of indentured servitude from family units who were released with notices to

⁴⁵ U.S. Customs and Border Protection, *CBP One Mobile Application* (Feb. 2023); U.S. Customs and Border Protection, *CBP Enforcement Statistics Fiscal Year 2023* (Mar. 2023).

⁴⁶ See Pinto, Raul, Immigration Impact, *CBP One Is Riddled with Flaws that Make the App Inaccessible to Many Asylum Seekers* (Feb. 28, 2023); Yurrita, Regina, CBS8, *Asylum Seekers met with issues from new CBP One App* (Feb. 1, 2023).

⁴⁷ Proposed 8 C.F.R. § 1208.333(d).

⁴⁸ See Homeland Security Advisory Council, *Final Emergency Interim Report, CBP Families and Children Care Panel* (Apr. 2019); see also *Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015).

⁴⁹ *Id.*

⁵⁰ *Id.*

appear and made their way into the interior of the United States.⁵¹ Additionally, the Council stated that “the risk for commercial sexual exploitation of these children and teens is predictably high and will be very difficult to prevent after transport or release into the interior of the U.S.”⁵²

Accordingly, providing a carve out to the presumption against asylum eligibility for family units will; likely serve as another strong pull-factor for child smuggling and exploitation. If the Departments are serious about reducing family separation at the southern border, the Departments must take action, consistent with the bipartisan Homeland Security Advisory Council’s 2019 report, to end the 1997 *Flores* Settlement Agreement, increase family detention capacity and schedule expeditious repatriation for those who are subject to expedited removal. The bipartisan panel confirmed that the likelihood of release from DHS custody is a primary pull-factor for aliens seeking to enter the United States illegally to bring a child with them.⁵³ While CIS agrees that the principle of family unity is an important concern, it should not be used to add another pull factor for migrants to exploit children for the purposes of entering the United States, especially when more effective alternatives have been identified that will both discourage illegal immigration and mitigate family separation at the border.

Alarming, the NPRM only provides a cursory explanation of the Departments’ rationale for adding these wide and easy to exploit exceptions to the presumption against asylum eligibility, and merely justify the family unit carve out as a means to ensure family unity.⁵⁴ The Departments likewise fail to provide any analysis of the costs these exceptions will impose to the U.S. government, state and local governments, taxpayers, or communities by including them to the rule. It is reasonable to conclude that the inclusion of these exceptions will result in higher numbers of aliens unlawfully crossing the southern border than if they were not included, as well as longer credible fear interviews and immigration court hearings, in addition to the higher numbers of aliens attempting to evade CBP apprehension as a result of the rule generally. Finally, the Departments failed to provide a legal basis for granting asylum to a family unit on the basis of one member’s non-eligibility for protection in the United States.

Accordingly, CIS urges the Departments to limited the exceptions to the presumption against asylum eligibility to:

- 1) Aliens who demonstrated that they applied for protection from persecution or torture in at least one of the countries through which they transited through *en route* to the United States (other than their home country), and that they received a final judgement denying them protection in such country;
- 2) Aliens who falls under the definition of a “victim of a severe form of trafficking in persons” as defined in 8 C.F.R. § 214.11;
- 3) Aliens who have transited *en route* to the United States through only a country or countries that are not parties to the Refugee Convention, the Refugee Protocol, or CAT; and
- 4) Unaccompanied alien minors, as defined in 6 U.S.C. § 279(g).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 88 Fed. Reg. 11704, 11749 (Feb. 23, 2023).

As explained above, these exceptions are consistent with domestic law, the United States' international *refoulement* obligations, and compelling humanitarian concerns, but do not threaten to swallow the rule in its entirety or encourage additional fraud and child exploitation at the southern border.

c. DHS and DOJ should make a modified presumption against asylum eligibility permanent.

CIS recommends that DHS and DOJ amend the proposal to require to permanently impose a presumption against asylum eligibility for aliens who fail to seek protection in a third-country they transit *en route* to the United States. Currently, the NPRM proposes implementing the presumption against asylum eligibility on a temporary basis, for an undetermined duration of at least 24 months.⁵⁵

The rationale the Departments put forward to justify the NPRM's presumption against asylum eligibility, however, supports important, long-term goals to distribute the asylum burden to countries that are able to provide protection against persecution within the Western Hemisphere. As the Departments themselves acknowledge, "Indeed, access to protection is more available now throughout the region than at any time in the recent past. This proposed rule takes account of these regional efforts and is designed to promote their further development by demonstrating to partner countries and migrants that there are conditions on the United States' ability to accept and immediately process individuals seeking protection, and that partner countries should continue to enhance their efforts to share the burden of providing protection for those who qualify."⁵⁶

Notably, the Government of Mexico has significantly expanded access to humanitarian protection through its Mexican Refugee Assistance Commission (COMAR) in recent years, and as a result has now "emerged as one of the top countries receiving asylum applications in the world."⁵⁷ As the Departments also reported, in 2021, COMAR received nearly 130,000 asylum applications—almost double the number of applications it processed in 2019, and the third most of any country in the world, after the United States and Germany.⁵⁸ Of those applications in 2021, COMAR granted asylum in 72 percent of cases; an additional two percent of applicants were granted complementary protection.⁵⁹

Asylum seekers may also find their cases resolved significantly faster outside the United States. Currently, the average protection claim takes COMAR 8-12 months to adjudicate - compared with numerous years in the United States.⁶⁰ The Departments reported that of all credible fear claims made in the United States between 2014 and 2019 (between five and nine years ago), 39 percent are still pending a final resolution.⁶¹

CIS also disagrees with commenters that argue that Mexico does not provide adequate asylum procedures or a sufficiently safe environment for asylum seekers. Reports from the U.S. Ambassador to

⁵⁵ *Id.* at 11707-8.

⁵⁶ *Id.* at 11730.

⁵⁷ *Id.* at 11721.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*; see also U.S. Department of Homeland Security, Office of Immigration Statistics, Analysis of Enforcement Lifecycle data as of September 30, 2022.

⁶¹ 88 Fed. Reg. 11704, 11716 (Feb. 23, 2023).

Mexico from 2020 explained that reports on localized violence in particular areas of Mexico do not indicate security conditions in the country as a whole, which spans nearly 7,600,000 square miles.⁶² As the Departments have acknowledged, “Discussions about conditions in Mexico oftentimes conflate the perils that refugees might face traversing across dangerous parts of Mexico *en route* to the United States with the ability to seek protection in a safe place in Mexico.”⁶³ It is reasonable to conclude many migrants from who voluntarily transit through Mexico and other signatory countries may be able to obtain adequate protection in these countries, especially considering that nationals from dozens of countries worldwide have been encountered in the border region after transiting through Mexico.

Additionally, limiting asylum eligibility to migrants who demonstrate the greatest need for protection is necessary to preserve the integrity of the immigration system as a whole. The continued maintenance of effective deterrence policies is essential to stemming the flow of illegal immigration into the United States, which has reached historic rates since 2021 and poses grave dangers to migrants, U.S. citizens, and lawful residents, costs federal, state, and local taxpayers billions annually, while strengthening transnational criminal organizations. Until Congress closes loopholes in the asylum laws, the asylum system will continue to be abused as a means for entry into the United States. The U.S. government will be unable to obtain and maintain operational control of its borders unless effective deterrence policies are in place to discourage mass asylum fraud.

d. DHS should raise the screening standard of withholding and deferral of removal to the reasonable possibility standard for all credible fear cases.

CIS recommends that DHS raise the screening standard from “significant possibility” to “reasonable possibility” for all screenings of withholding and deferral of removal eligibility conducted during credible fear interviews. Applying a higher standard of proof to withholding and deferral of removal screenings is consistent with the INA, consistent with the United States’ *nonrefoulement* obligations, and will reduce the strain of mass-asylum fraud of the asylum system.

Under the framework proposed by the NPRM, an asylum officer must determine whether each alien referred to an asylum officer for a credible fear interview is covered by the presumption of ineligibility proposed at 8 C.F.R. § 208.33(a)(1).⁶⁴ If the asylum officer determines that the alien is subject to the presumption, then the officer would proceed to determine whether the alien can establish a reasonable possibility of persecution or torture under section 241(b)(3) of the INA or under the regulations implementing CAT, otherwise understood as a reasonable possibility for eligibility for withholding or deferral of removal. Aliens who are determined to not be subject to the presumption against asylum eligibility, however, would be screened for withholding of removal and deferral of removal using the “significant possibility” standard, a lesser standard of proof that is currently employed by policy in the withholding and deferral of removal contexts.⁶⁵

The Departments explained that applying the “reasonable possibility” of persecution or torture standard to the remaining claims for statutory withholding of removal and United Nations Convention against

⁶² See U.S. Department of State, U.S. Embassy and Consulates in Mexico, Memorandum from Christopher Landau, U.S. Ambassador to Mexico, on Mexico's Refugee System (Aug. 31, 2020).

⁶³ 85 Fed. Reg. 82260, 82271 (Jan. 19, 2021).

⁶⁴ 88 Fed. Reg. 11704, 11724-5 (Feb. 23, 2023).

⁶⁵ *Id.* at 11725.

Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment (CAT) protection would “better further the Departments’ systemic goals of border security and lessening the impact on the immigration adjudication system overall.”⁶⁶ The Departments directly acknowledge that “fewer [aliens] with nonmeritorious claims would be placed into section 240 proceedings if the ‘reasonable possibility’ of persecution or torture standard is applied than if the lower ‘significant possibility’ of establishing eligibility for the underlying protection standard is applied.”⁶⁷ The Departments further acknowledge that, “using the ‘reasonable possibility’ standard to screen for statutory withholding and CAT protection in this context would further these systemic goals while remaining consistent with the INA, Congress’s intent, the United States’ treaty obligations, and decades of agency practice.”⁶⁸

CIS agrees with this analysis and, for the same reasons DHS has chosen to apply the reasonable possibility standard to applicants who are subject to NPRM’s presumption against asylum eligibility, recommends that officers apply this standard to all credible fear cases when analyzing eligibility for withholding or deferral of removal, regardless of whether an alien is subject to the presumption. As the Departments have repeatedly stated, the credible fear system is experiencing historic and unsustainable strains as a direct result of the historic numbers of inadmissible aliens CBP is encountering at the southern border, month after month of President Biden’s term.

Because the standard for demonstrating eligibility for withholding and deferral of removal is a significantly higher standard than for asylum eligibility, it is appropriate for the screening standard to reflect the difference in all cases, not just cases in which the NPRM’s presumption against asylum eligibility applies. Applying a “reasonable possibility” standard in when screening for withholding or deferral of eligibility in credible fear screenings is consistent with the INA, FARRA, and *nonrefoulement* obligations under CAT. Reducing the likelihood of fraudulent or otherwise non-meritorious claims from receiving positive credible fear determinations, and therefore receiving a near-guarantee of release into the United States and adding to EOIR’s years-long backlog, will support the integrity of the credible fear process as a whole and help deter illegal immigration into the United States.

III. Conclusion

CIS generally supports the promulgation of a third-country transit policy that restricts asylum eligibility from inadmissible aliens who transited through a third-country without first seeking protection there. Such regulation is consistent with the INA, Congressional intent, and the United States’ international *nonrefoulement* obligations.

The Departments, however, must amend the presumption against asylum eligibility proposed by this NPRM to eliminate the rule’s overbroad and easy to exploit loopholes that threaten to swallow the whole rule. Additionally, CIS recommends that the Departments make the presumption against asylum eligibility permanent, as it supports the United States’ long term interests in securing the border, strengthening the integrity of the asylum system, and preserving government resources for cases that demonstrate the greatest need for protection in the United States. Finally, CIS recommends the

⁶⁶ *Id.* at 11742.

⁶⁷ *Id.*

⁶⁸ *Id.*

Departments raise the screening standard for withholding of removal and deferral of removal to “reasonable possibility” in order to further support these important interests.

Respectfully Submitted,

A handwritten signature in black ink that reads "Elizabeth Jacobs". The signature is written in a cursive, flowing style.

Elizabeth Jacobs

Director of Regulatory Affairs and Policy
Center for Immigration Studies