UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF HOMELAND SECURITY AND
THE DEPARTMENT OF JUSTICE

Circumvention of Legal Pathways	)	**Docket No. USCIS2022-0016**
	)	**CIS No. 2736-22**
	)	**RIN 1615-AC83**

Background on the Submitting Organization's Qualifications to Comment

The Advocates for Human Rights (hereinafter "The Advocates" or "AHR") is a nonprofit, nongovernmental organization headquartered in Minneapolis, Minnesota. Founded in 1983, The Advocates for Human Rights' mission is to implement international human rights standards to promote civil society and reinforce the rule of law. Holding Special Consultative Status at the United Nations, The Advocates regularly engages UN human rights mechanisms.

For nearly forty years, The Advocates for Human Rights has been the primary provider of free legal representation to asylum seekers in the Upper Midwest. Today our practice includes representation of asylum seekers, unaccompanied children, victims of human trafficking, and people held in civil immigration detention. We have provided free immigration legal services in more than 10,000 cases and are one of the only organizations providing such services free of charge in the region. The Advocates also regularly trains and mentors pro bono lawyers, coordinates and presents on immigration law at conferences and continuing legal education programs and leads numerous efforts around legal services for migrants.

In addition to immigration legal services, The Advocates works in Minnesota and internationally to improve laws to end violence against women and girls. The WATCH Project monitors domestic violence, sexual assault, and sex trafficking cases in Minnesota courts. Globally, with our on-the-ground partners, we have driven key advances in women's rights and

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are now leading a coalition to counter the global anti-gender movement. The Advocates also works across programs to uphold the rights of LGBTIQ+ people and others who are experiencing violence and discrimination based on sexual orientation, gender identity and expression or sex characteristics. The Advocates partners with LGBTIQ+ human rights defenders to promote equality in their countries and empowers LGBTIQ+ asylum seeker clients to share their lived experiences by participating in advocacy at the United Nations. The Advocates is a leading resource for anti-trafficking efforts in Minnesota, working closely with local, state, and federal labor enforcement, law enforcement and prosecutors, and with nonprofit partners. The Advocates monitors and documents government compliance with international obligations, advocates for human rights-based public policy responses, trains government and nongovernmental actors, represent victims, and coordinates legal services responses in large-scale cases. Working with diaspora and in-country human rights defenders, The Advocates leverages pro bono resources to document and advocate to end human rights abuses and to abolish the death penalty worldwide. The Advocates holds Special Consultative Status with the United Nations, where it presents oral and written statements to charter-based bodies such as the Human Rights Council, participates in UN review of compliance with human rights treaties through shadow reporting, and provide technical advice.

Comments of Advocates for Human Rights on Proposed Rule

On February 23, 2023, the Department of Homeland Security and the Department of Justice (hereinafter "Departments" or "agencies") posted their joint proposed rule, "Circumvention of Legal Pathways" and requested comments within 30 days of publication in the Federal Register. The Advocates for Human Rights is complying with this deadline but must voice its objection to the unnecessarily truncated comment period – half the conventional comment period contemplated

under the APA. AHR is further concerned that the anticipated by which the agencies have indicated firm plans for issuance of a final rule in early May will not allow for the agencies' reasoned consideration of the thousands of comments it will have received on a lengthy and complex rule. This complex rule proposes a dramatic departure from clear statutory language, established policies and procedures, well-settled domestic law, and international treaty obligations. It risks serious harm to those people whom it proposes to exclude from asylum eligibility, including return to persecution, torture, and possible death. It demands far greater deliberation and care than that allowed by this truncated timeline. The alleged urgency due to the increasing numbers of people arriving at the border or the planned end to the unlawful Title 42 expulsions does not justify the harm the agencies know will result.

The stated purpose of the proposed rule is to "encourage migrants to avail themselves of lawful, safe, and orderly pathways into the United States, or otherwise to seek asylum or other protection in countries through which they travel, thereby reducing reliance on human smuggling networks that exploit migrants for financial gain." 88 FR 11704. It proposes to achieve this objective by introducing a "rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel." (Id.)

To state the title of the proposed rule is to flag its fatal flaw. It suggests, contrary to settled law and clear statutory language, that persons presenting themselves *at or within* the United States to make claims for asylum are not using "legal pathways" to seek asylum. Instead the proposed rule seeks to exclude people from asylum unless they follow narrowly prescribed paths preferred by the Departments. The agencies' narrow exceptions – a mobile app rife with documented problems; a denied asylum application in countries of transit; narrow, slow, and difficult to access

advanced permission to enter the U.S. before fleeing persecution; or limited exceptionally compelling circumstances – violate the plain language of 8 U.S.C. section 1158(a)(1) and contravene the very intent of the international refugee protection framework. The proposed rule's insistence that applicants alternatively first seek asylum protection in a country through which they travel – *even after expressly declining to find such an alternative to be safe* – is no alternative pathway at all.

AHR shares the agencies' concern about the dangers to asylum seekers from human smuggling networks that exploit their plight for financial gain. And it is supportive of the agencies' aim to encourage the use of safer alternative pathways than to rely on smugglers to cross into the United States. Yet, we also caution agencies that international best practice as reflected in the Global Compact on Migration underscores that closing off paths, such as lifesaving asylum protections, will simply entrench and *increase* reliance on smugglers. The proposed *alternative* pathways to the U.S. are welcome; however, those that endanger existing pathways must be withdrawn.

AHR does not quarrel with DHS's concern about the numbers of people crossing at the Southern border. 88 FR 11704-05. But while AHR shares that concern, AHR cannot agree that DHS's related concern – that these types of border crossings can often be traced to smuggling networks who exploit those trying to emigrate – is the sole or even predominant reason for migrants crossing at other than ports of entry. The reasons for this are multifold, including the exigencies many migrants face, the backlog at border crossings, and the decades-long failure of the United States to invest in expeditious adjudication of asylum claims in favor of billions of dollars of investment in a militarized border. More importantly, the proposed rule gives unlawful weight to reducing backlogs of cases involving individuals "deserving of protection" at the expense of

denying asylum claims outright and without statutorily required process to others who may also be "deserving of protection." (Id.) "This proposed rule," the Departments state, "seeks to mitigate the role of would-be smugglers by incentivizing intending asylum seekers to utilize lawful, safe, and orderly pathways for seeking protection in the United States or elsewhere." 88 FR 11714. But while the rule talks of "incentivizing" the use of safe pathways, the rule goes impermissibly farther. Barring the use of a lawful and lifesaving pathway is not an incentive; it is a punishment, and an unlawful contravention of our international and domestic legal obligations against refoulement to persecution and torture. Put another way, the proposed rule crosses the line from lawful encouragement of alternatives (which would reduce backlogs and unsafe crossings), to unlawful categorical denial of the right to make asylum applications if these alternatives are not utilized. (Id.)

This fundamental defect aside, a defect that AHR discusses in greater detail below, the alternatives themselves are seriously flawed. It may be that in some limited instances would-be asylum applicants would be able to avail themselves of alternatives like a mobile app to obtain an appointment to apply for asylum or would be able to obtain parole or other permission to lawfully enter the US. In such cases, these alternatives could lawfully be *encouraged* by offering individuals who utilize these alternatives expedited processing times for their asylum applications.

But *requiring* would-be applicants first to seek asylum or protected status in countries through which they transit (as discussed below, the exceptions to this requirement do not render the requirement lawful) – even to qualify for expedited processing of their U.S. asylum applications should their applications in these countries be denied -- ignores three fundamental defects. First, the *statutory* third-party transit requirement applies only to "safe" third countries, i.e., countries with which the U.S. has a formal agreement and where the applicant has access to a

full and fair asylum procedure. 8 U.S.C. § 1158(a)(2)(A). Mexico and the other countries identified in the proposed rule, do not meet this test.[1] Second, and related, the requirement ignores differences between the circumstances of asylum applicants even where asylum may technically be available, and provides no guidance to ensure asylum adjudicators are fairly and uniformly judging what is "safe." To take an example drawn from the reality asylum seekers currently face, the country of transit may discriminate on the basis of sexual orientation or gender identity. "Mexico," for example, is "the second most dangerous place in the world to be transgender after Brazil."[2] Third, the proposed rule places no deadline by which a decision on the asylum application in the transit country must be processed. The potential delays expose asylum applicants to serious danger including potential victimization by the very smugglers the proposed rule is supposed to help asylum applicants avoid.

The mobile app has its own problems. Before it can be considered an even-handed alternative meriting expedited review of an asylum application, inherent inequities must be eliminated. AHR is not suggesting that the alternative should be abandoned in the absence of perfect equality. The app can save lives. But the agencies cannot require its use and create a bar as punishment for its non-use given the flaws. The agencies should strive to fix known and suspected defects, especially those which amplify racial, linguistic, and economic status, e.g., its difficulty in discerning the faces of darker skinned applicants, the language barriers posed by the application

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[1] AHR shares the Departments' concerns about the dangers to migrants of smuggling operations. If resort to the proposed rule's alternative pathways is not voluntary, however, the proposed rule may have the perverse effect of *increasing* smuggling: those unable to use these pathways may resort to reliance on smugglers.

[2] Arelis R. Hernández, *Desperate migrants seeking asylum face a new hurdle: Technology* (Washington Post March 11, 2023), https://wapo.st/4014KYw.

in its current form and its inaccessibility on older mobile phones. AHR discusses these points in more detail below.

Finally, the agencies can similarly *encourage* individuals to seek one of the few lawful pathways available to obtain advanced permission to enter—parole or visa—but cannot bar asylum access for those who either are unable or unwilling to do so. An asylum applicant may not be able to seek an alternative lawful form of entry for myriad reasons. Most notably, very few people qualify for these pathways, as it is notoriously difficult to obtain a visa for the U.S. While the United States has made welcome efforts to expand some access through new parole programs, these cannot *replace* asylum processing. This requirement harms most those individuals who oppose or who are otherwise oppressed by their governments and who are unable to use these routes because the governments they are fleeing control access to passports, exit visas, and airport security checkpoints. Likewise, these pathways all require at least some financial means—something many individuals in need of protection may lack. And, most notably, they all require time to wait while U.S. parole or visa applications are adjudicated, consular interviews are conducted, and background checks are completed. Individuals *fleeing* harm by the very nature of their claims do not have the luxury of waiting for U.S. visa or parole processing—they must make the difficult choice to leave, often with only hours to gather personal belongings and escape.

I. The "Presumptive Conditions" Placed on Asylum Seekers Who do not Utilize the Agencies' "Alternative Pathways" or Qualify for its Limited Exemptions are Unlawful.

A. The Departments acknowledge that "categorical bars" to seeking asylum that are inconsistent with INA section 208 would be unlawful.

As justification for their proposed rebuttable presumption rule, the Departments maintain that they may "permissibly determine that, for a 24-month period as proposed by this rule, it is in the 'best interest of the United States' to prioritize noncitizens who pursue lawful paths." 88 FR

11741. Again, AHR does not dispute that the grant of asylum involves a degree of agency discretion, nor does AHR contest that prior pursuit of asylum in a safe transit country or the prior use of the agency's app before presentation at the border *could*, in limited circumstances (i.e., where the applicant *voluntarily* chooses such options), justify prioritizing these pathways to asylum. Nor, finally, does AHR contest the agencies' authority to adopt rules of general applicability that establish this priority.

Rather, our objection to the proposed rule is that it unlawfully creates *categorical* bars to seeking asylum for those who do not use these pathways. The Departments acknowledge that categorical bars to the right to seek asylum would run afoul of the INA,[3] but maintain, somewhat inconsistently, both that the proposed rule creates no categorical bars[4] and that its bars are "*less* categorical" than those they have been enjoined from adopting in the *East Bay Sanctuary* series of cases.[5] Neither explanation passes legal muster.

1. The case law is clear that categorical bars on seeking asylum other than those specified by statute or lawful regulation consistent with the INA are unlawful.

The Departments maintain, and AHR does not dispute, that under section 208 of the INA, both Departments may establish by general regulation limits on asylum other than those expressly contained in statutory provisions "*so long as those limitations and conditions are 'consistent with'*

[3] 88 FR 11739 (maintaining that its proposed rule, were "fully consistent" with the *East Bay* decisions given the proposed rule's rebuttable presumption in contrast to "the categorical bars at issue in [the East Bay] cases")
[4] 88 FR 11739 (maintaining that third country transit and manner of entry bars on asylum eligibility are not categorical because they are limited by a rebuttable presumption)
[5] 88 FR 11740 ("In short, the proposed rule is more limited and *less categorical* than the prior bars."

the asylum statute." 88 FR 11740 (emphasis added). The proposed eligibility limitations, however, do not meet that test.[6]

First, requiring someone to use the agencies' app, as a prerequisite to seeking asylum violates the plain language of the INA, which expressly makes one "who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival...)" eligible to apply for asylum. 88 FR 11734; 88 FR 11739; 8 U.S.C. § 1158(a)(1). The Departments respond that "section 208(a)(1) by its plain terms requires only that a noncitizen be permitted to 'apply' for asylum, regardless of the noncitizen's manner of entry" and that the statute "does not require that a noncitizen be eligible to be granted asylum, regardless of their manner of entry." 88 FR at 11741.[7] But this response makes our point. As the Departments admit, section 208 is "plain" that a noncitizen is "permitted to apply for asylum, regardless of the noncitizen's manner of entry." (Id.) Under its proposed rule, however, applicants who do not qualify for its exceptions to the rebuttable presumption may not even apply for asylum.

Second, requiring asylum applicants to demonstrate that they have applied for and been denied protection while in a third country through which they transited *en route* to the United States as a precondition to avoid the rebuttable presumption is another unlawful categorical bar on even seeking asylum under the proposed rule. The Departments purport to distinguish this condition from the TCT Bar Final Rule – a rule that is currently enjoined[8] *and that the Departments propose to rescind*.[9] But they offer as explanation only a distinction without a difference. "The

[6] See footnote 1, *supra*.
[7] As the Departments note elsewhere in their proposed rule: "Any noncitizen 'who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* . . .)' may apply for asylum unless the noncitizen is subject to a statutory exception. INA 208(a)(1), 8 U.S.C. 1158(a)(1)." 88 FR 11734 (emphasis added).
[8] *E. Bay Sanctuary Covenant v. Barr*, 519 F. Supp. 3d 663, 668 (N.D. Cal. Feb. 16, 2021).
[9] 88 FR 11728 ("proposing to rescind it alongside proposing this rule").

proposed rule," they state, "takes into account whether individuals sought asylum or other forms of protection in third countries en route to the United States but unlike the TCT Bar final rule, the proposed rule would not require that all noncitizens make such an application, as long as they pursue a lawful pathway or rebut the presumption." 88 FR 11728. The problems with this distinction are multifold:

> (1) it presumes, illogically and subject only to irrelevant exceptions, that failure to apply for asylum in countries the agencies admit they cannot verify as "safe"[10] – and do not even require to be safe options, much less define "safe" -- will disqualify applicants from receiving a credible fear screening if they have not tried the other "lawful" pathway;[11]
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> (2) if an applicant does not qualify for an exemption from the rebuttable presumption, the applicant is categorically denied a credible fear determination; and
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> (3) the proposed rule ignores entirely the impracticality – no, impossibility – of overcoming the presumption where there is no time limit by which a third country must deny an asylum application before the applicant may apply for asylum. Put another way, the agencies give applicants the "option" of applying for asylum in countries it cannot verify as safe and compounds the illusion of an "alternative pathway" by telling them they must wait for a denial indefinitely in concededly unsafe conditions.

2. The Departments' categorical bars to asylum are not saved by characterizing them as "less categorical bars" or even as rebuttable presumptions.

"[T]he proposed rule," the Departments proclaim, "is more limited and *less categorical* than the prior bars, establishing only a rebuttable condition applicable to an individual noncitizen

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[10] 88 FR 11731 ("The Departments considered whether to use section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), by negotiating safe-third-country agreements or asylum cooperative agreements," but rejected this as unachievable within a reasonable time frame).

[11] It is a fundamental tenet of administrative law that there must be "a rational connection between the facts found and the choice made" by the administrative agency. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983). A "critical component" of the "safe-third-country" bar to asylum is that it "be genuinely safe." *East Bay Sanctuary, supra*, 994 F.3d at 977. Having declined to find that first seeking asylum in a country of transit is "genuinely safe," the Department's "choice made" -- to make application for asylum in a transit country the Departments expressly decline to find safe a precondition for a credible fear screening - is not rational.

who, after traveling through a third country, fails to avail themselves of other options to request entry to the United States or to seek asylum or other protection in this country or elsewhere." 88 FR 11740. They maintain in this regard that:

> 'whether the alien passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States' are relevant factors that can be considered as part of the totality of circumstances with respect to whether an individual warrants the favorable exercise of discretion in granting asylum.

(Id.) But the Departments' authority to consider an applicant's use or non-use of these pathways as *factors* in determining whether to *grant* asylum is distinctly different from deploying these factors as *conditions* or – to use the agencies' own words, simply "*less* categorical" **bars** – even to entertaining asylum *claims* in a credible fear screening. The rebuttable presumption would be a ‘‘condition[ ]’’ on asylum eligibility, INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B), that would *also* apply in affirmative and defensive asylum application merits adjudications, as well as during credible fear screenings." 88 FR 11707. Thus, while applicants for asylum in affirmative and defensive asylum applications would bypass the credible fear screening, their fate, like those of applicants interceded at the border, would be sealed by the rebuttable presumption, too. That is, their failure to utilize one of the alternative pathways or to qualify to rebut the presumption would not be a mere *factor* in the totality of circumstances evaluation, but would be a *conclusive*, *categorical* bar to asylum.[12] This is particularly the case given that the extremely limited avenues to rebut the presumption will essentially render it impossible to rebut in all but the rarest cases. AHR notes as comparison that a *statutory* bar to asylum, the one-year

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[12] These comments focus on the applicability of the condition to credible fear screenings. But, as discussed above, AHR's concerns extend to their application to the other types of adjudications as well.

deadline, provides greater opportunity for rebuttal by allowing an individual to show a number of exceptional circumstances beyond those that the agencies—*not* Congress—suggests here. Even under the less expansive one-year bar, numerous reports have shown the harsh impact such bars have on returning individuals to face harm from which we have promised to protect them.

Nor does the fact that these "less categorical" bars are to be in effect for "only" two years make them statutorily legitimate. As the Supreme Court has stated, because the Natural Gas Act "makes unlawful all rates which are not just and reasonable, *and does not say a little unlawfulness is permitted*." *FPC v. Texaco, Inc*., 417 U.S. 380, 399 (1974). (emphasis added) Categorical bars are unlawful and making them "less categorical" does not mean that "a little unlawfulness is permitted."

B. The Departments' proposed rule conflates *eligibility for discretionary asylum* with the right to *apply* for asylum.

The proposed rule reiterates numerous times that the decision to grant asylum is discretionary. Thus, for example, it reasons that a *bar* to granting asylum under agency rules would not constitute an unlawful penalty under the Article 31(1) of the Refugee Convention because a noncitizen "remains eligible to apply for withholding of removal under section 241(b)(3) of the INA." 88 FR 11739. Similarly, it maintains that the Departments "would not treat the manner of entry as dispositive in determining eligibility, but instead as the basis for a rebuttable presumption." (Id.) As legal support for their proposed regulation, Departments quote from the section 208(d)(B)(5) that The Attorney General may "provide by regulation for any other conditions or limitations on the consideration of an application for asylum *not inconsistent with this chapter*." (emphasis added). 88 FR 11733. But as the agency elsewhere acknowledges, "*Any* noncitizen 'who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival . . .*)' may *apply* for asylum unless the noncitizen is

subject to a *statutory* exception. INA 208(a)(1), 8 U.S.C. 1158(a)(1)." 88 FR 11734 (emphasis added).

Since there is no statutory exception, this concession undercuts the premise for its proposed rule.[13] AHR does not dispute that the *grant* of asylum involves a degree of agency discretion. But the proposed rule conflates the lawful consideration of a myriad of factors in deciding whether to grant asylum with the unlawful bar to entertaining a *claim* for asylum to those "present in the United States" however or wherever they arrived. We discuss these points in more detail below.

C. Because asylum applicants present in the United States who do not overcome the proposed rule's rebuttable presumption are (1) automatically disqualified from a "credible fear" screening and (2) conclusively presumed ineligible for asylum in affirmative and defensive asylum proceedings, they are categorically – and unlawfully denied the right to *apply* for asylum.

While the Departments describe the rebuttable presumption as different from a categorical bar to asylum, the plain effect of the proposed rule is to create a categorical bar. Its position cannot logically be explained any other way:

> Under the amendments proposed here, the lawful pathways condition on eligibility for asylum would be applied to noncitizens during credible fear screenings. Where a noncitizen is found subject to the lawful pathways condition on eligibility for asylum and *where no exception applies and the noncitizen has not rebutted the presumption of the condition's application, the asylum officer would enter a negative credible fear determination*. See proposed 8 CFR 208.33(c)(1).

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[13] *See also East Bay Sanctuary Covenant, supra*, 994 F.3d at 976 (to be "consistent with" section 1158, statutory bars created by regulation must fit into one of two categories: (1) "aliens who may otherwise be entitled to asylum but who pose a threat to society—aliens who have persecuted others, aliens who have been convicted of particularly serious crimes, aliens who may have committed serious non-political crimes outside the United States, and aliens who may be terrorists or a danger to the security of the United States" or (2) "aliens who do not need the protection of asylum in the United States—aliens who may be removed to a safe third country, and aliens who have firmly resettled in another country.") The rebuttable presumptions fit into neither of these categories.

88 FR 11742. (emphasis added). Put plainly, under the proposed rule *every* asylum applicant present in the United States (regardless of how they arrived), but who does not overcome the rebuttable presumption will automatically (1) be denied a positive "credible fear" determination *without a hearing allowing the applicant to show that he or she has a credible fear* if they are interceded at the border and (2) conclusively be determined ineligible in an affirmative or defensive asylum proceeding if they had initially entered the U.S. through the Southern Border. That, by definition, is a categorical rule. It is no less categorical simply because not *every* asylum applicant interceded at the border will be denied a credible fear hearing or because some applicants in affirmative or defensive asylum proceedings will also be able to overcome the presumption. Surely, the Departments would not claim that a general rule making credible fear hearings or positive asylum determinations available only to men, or only to women, or only to applicants from a single country, would not create a categorical bar.

1. Because a "credible fear" screening is a statutory right for applicants who are present in the United States and not subject to a statutory exclusion, the Departments cannot lawfully substitute the higher screening bar applicable in removal and CAT proceedings.

As the Departments concede, and as AHR has emphasized, INA section 208(a)(1) is quite plain. "*Any* noncitizen 'who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .)" may apply for asylum *unless the noncitizen is subject to a statutory exception*. INA 208(a)(1), 8 U.S.C. 1158(a)(1)." 88 FR 11734 (emphasis added). The rule, however, unambiguously *de facto* denies the right to "apply for asylum" to noncitizens who meet the statute's qualifications, but cannot overcome the proposed rule's rebuttable presumption: under proposed 8 CFR 208.33(c)(1), "where no exception applies and the noncitizen has not rebutted the presumption of the condition's application, the asylum officer would enter a negative credible fear determination." 88 FR 11734. This means that such

individuals get no credible fear interview and, as a result, cannot even apply for asylum. It is no answer to this defect, moreover, that for those categorically denied a "credible fear" screening "the condition would not bar statutory withholding of removal or protection under the CAT" (88 FR 11737) or that applicants will still have an opportunity to satisfy the "*higher* 'reasonable' possibility standard [applicable under CAT and statutory withholding of removal] to determine the likelihood of persecution or torture for those whose asylum claims are precluded by the lawful pathways condition." (Id.) As the Ninth Circuit has pointed out, not only is the standard for relief higher, but "relief under withholding of removal and under CAT is less advantageous than asylum relief." *East Bay Sanctuary Covenant v. Garland*, 994 F. 3d 962, 973 (9th Cir. 2020). More specifically, it "is not a basis for adjustment to legal permanent resident status, family members are not granted derivative status, and [the relief] only prohibits removal of the petitioner to the country of risk but does not prohibit removal to a non-risk country." (Id.). The proposed rule would bar legitimate protection claims that simply lack the evidence to prove the higher “reasonable” fear standard. The rule also undermines the ability of people who have fled to the United States to integrate in our community and rebuild their lives in safety by leaving them in the eternal limbo of withholding of removal, without the chance to reunite with family or to become lawful permanent residents of the United States.

The Departments point to no "statutory exception" that would justify their proposed rule. Rather, citing *Yang v INS*, 79 F.3d 932, 935 (9th Cir. 1996), they maintain that a rule establishing a "categorical discretionary bar to asylum eligibility" is permissible "if it rationally pursues a purpose that it is lawful for the [immigration agencies] to seek.” 88 FR 11741. There is, however, no lawful "statutory exception" to a noncitizen's right to apply for asylum who is present in the United States but who does not utilize the agency's alternative pathways. And it is certainly not a

purpose "lawful for the [immigration agencies] to seek" to deny noncitizens credible fear hearings because they'd likely not qualify for asylum anyway. 88 FR 11711, 11719, 11737-38.[14] This argument falls of its own weight.

The *Yang* case, which the agencies selectively and creatively quote, is wholly inapplicable. There, DHS had adopted a rule providing that the "totality of circumstances" test for evaluating an applicant's asylum claim would not apply where an applicant had "firmly resettled in a third country."[15] The agency's rule provided that "a finding of firm resettlement trumps any other equities in the applicant's favor."[16] The appellants in that case had argued that "this rule contravenes the INA by precluding the INS from exercising its discretion in individual cases."[17] Sections 207 and 209, they acknowledged, "*explicitly* bar applications from firmly resettled aliens," but argued that "section 208 does not."[18] But the court, citing *Chevron*, concluded that the statute's silence on this specific issue created ambiguity and that the categorical eligibility denial was a permissible application of the statute to which it would defer.[19] Here, by contrast, the statute *explicitly* provides that a person – not otherwise ineligible -- may apply for asylum once present in the U.S.

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[14] The agency attempts to justify this approach by pointing to INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D), which allows exceptions to the statutory time limit for "extraordinary circumstances" excusing an otherwise untimely application, but which does "not provide any exception based on the strength of the applicant's asylum claim alone." 88 FR 11737. This, it reasons, means that "Congress concluded that the interest in ensuring overall system efficiency outweighed the fact that there would be applicants who would have received asylum but for the one-year deadline." *Id*. The cited provision, however, involves an express *statutory* limitation on asylum - the time bar. The proposed rule, by contrast, creates a priority for expedition both wholly unrelated to the *statutory* time limit and directly contradictory to the express statutory protection of the right to apply for asylum.

[15] *Yang, supra*, 79 F.3d 932, 935.

[16] Id.

[17] Id.

[18] Id. at 936-37.

[19] Id. at 937-38.

In other words, there is no *Chevron* deference issue because the statute on this point is unambiguous: unless there is a "statutory exemption" that applies, applicants present in the United States are entitled to apply for asylum. Denying them a credible fear hearing is a denial of that unambiguous right.

But even assuming there was some ambiguity in section 208(a)(1), the Departments' proposal to deny non-citizens a credible fear interview constitutes a "major question" of great "economic and political significance." In such circumstances, the Supreme Court has held that the agency may only act if it has "clear congressional authorization" to do so. *West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022). A general statutory authorization to adopt regulations consistent with "this chapter" does not constitute the "clear congressional authorization" required to justify agency action.

2. On its own terms, the rebuttable presumption rationale would logically deprive even those applicants *meeting* the rebuttable presumption of the statutory right to a "credible fear" determination.

As noted above, the rationale central to the proposed rule's bar on a credible fear screening for applicants unable to overcome the rebuttable presumption is that it will speed up the asylum process by eliminating credible fear hearings for many who would not ultimately qualify for asylum. 88 FR 11737.[20] The large majority of asylum applicants, even those who have passed the credible fear determination, are not granted asylum. 88 FR 11716. Many of these individuals, it has found are "seeking economic opportunity, not asylum." 88 FR 11719. But even assuming a balancing test weighing these factors was lawful, the balance the proposed rule seeks to strike is

[20] To be sure, the proposed rule does provide an exceedingly narrow path to asylum for those categorically denied a credible fear determination. Such persons would be placed in removal proceedings where the "higher standard" of "reasonable possibility" of persecution or torture applies. Only if they survive that gauntlet would they be eligible for asylum in a Section 240 proceeding. 88 FR 11725.

counter to the purpose behind the protections for refugees and asylees under both international treaties and the INA.

The Supreme Court has stated that a chance of persecution as low as ten percent may result in a well-founded fear sufficient for asylum.[21] Eliminating the right to a credible fear interview for those failing the rebuttable presumption means that more cases of bona fide asylum claims might be lost because these applicants will be barred at the doorstep from making that ten percent showing. For those who are applying in affirmative or defensive proceedings in the U.S. who entered at the Southern Border, the proposed rule will bar numerous *bona fide* claims as these individuals will largely be unable to prove any exception to overcome the presumptive bar based solely, and unlawfully, on manner of entry and transit. That is simple math. If every applicant who does not overcome the rebuttable presumption is barred from showing credible fear or regulatorily barred from meeting the standard for asylum, some percentage of those denied the right to make an asylum claim, by definition, would have otherwise qualified for asylum. *The Departments admit as much*: "[I]t will not be the case," the Departments recognize, "for all noncitizens who do not avail themselves of alternative options in other countries or lawful pathways to enter the United States that they would not be found to have meritorious asylum claims." 88 FR 11737. Indeed, that would seem obvious. The agencies' recognition that many applicants have given their life savings to smugglers underscores the fear that many of these migrants have for their safety and the safety of their families and for persecution if they return home. Denying a bona fide asylum claim – and putting the would-be applicant at risk of persecution is a much bigger mistake than making a credible fear determination that does not result in asylum.

[21] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

The illogic and unfairness of this balancing test is underscored by its underlying rationale. Departments maintain that eliminating the credible fear screening for asylum applicants who do not overcome the rebuttable presumption will speed the process because most of them would not have gotten asylum anyway.[22] But by that logic, *no* asylum applicant should be entitled to an initial credible fear determination—and the ensuing right to apply for asylum – because their claims will probably be denied given the low approval rating of asylum. That rationale is as cruel as it sounds.

AHR further objects to the cruelty and illogic of this assessment because the approval rate of asylum cases is not indicative of the underlying merits of those cases. We know from research and experience that asylum cases are notoriously difficult to win and that the standards and judicial discretion are skewed toward denial *even where a case meets the asylum standard*. Asylum claims require English language fluency; a knowledge of extensive statutory, regulatory, and case law and agency procedure; the ability to access technology to download forms and access supporting evidence. Yet, an individual navigating an asylum claim is *not provided an attorney*. This despite evidence that the chance of success on an asylum claim increases three-fold when a person has a lawyer to help navigate the complex laws and evidentiary standards, articulate issues, ensure access to adequate translation and trauma supports, and more that increase the ability of an individual to succeed on their case.[23] Notwithstanding, the agencies wrongly choose to use the low

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[22] 88 FR 11737 (Departments' objective "to channel meritorious asylum claims for faster resolution" rests on the unsubstantiated "understanding" that "many individuals who avail themselves of the credible fear process do not have meritorious claims, and that those who would circumvent orderly procedures and forgo readily available options may be less likely to have a well-founded fear of persecution than those individuals who do avail themselves of an available lawful opportunity.") The "ends justifies the means" nature of the agencies' rationale is apparent in another passage from the preamble just a few pages later:

> The Departments have further determined that, where the proposed lawful pathways condition would apply, applying the ''reasonable possibility'' of persecution or torture standard to the remaining claims for statutory withholding of removal and CAT protection would better further the Departments' systemic goals of border security and lessening the impact on the immigration adjudication system overall.

88 FR 11742.

[23] *See* https://perma.cc/A834-LCZH

numbers of asylum grants in removal proceedings to support their claim that too many individuals found to have credible fear do not have bona fide asylum claims. Yet, they fail to note the relatively low numbers of claims to actually be found fraudulent or without merit.

The data the agencies choose to rely upon also fails to account for the fact that asylum cases were routinely improperly denied from 2017-2020 due to changing standards and policies that forced asylum judges to issue harsher decisions. For example, the agencies fail to acknowledge how the Attorney General's decision in 2018 related to cases involving gender-based violence resulted in denials of numerous meritorious claims, which would now be approved with the overruling of the prior decisions and reissuance of precedent that uphold the basis of those claims in-line with international standards.[24]

D. Requiring asylum applicants to apply for asylum in another country through which they transit if they do not choose the first "pathway" to overcome the rebuttable presumption is arbitrary and unreasonable.

1. By the Departments' own account, they cannot certify this "pathway" as safe.

In *East Bay Sanctuary Covenant, supra*, the Ninth Circuit upheld a preliminary injunction barring asylum claims by applicants who, "after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States" did not first seek asylum or protected status in one of those countries and have "received a final judgment denying" them such relief. 994 F.2d at 973, citing 8 C.F.R. § 208.15. The court

[24] *See* 28 I&N Dec. 307 (A.G. 2021), which overturned *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) ("A-B- I"), and *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021) ("A-B- II") and directed EOIR to follow *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014). Under the pre-2018 and post-2021 standards, "The Board has long held that harm may qualify as "persecution" if it is inflicted either by a government or by non-governmental actors that the relevant government is "unable or unwilling to control." Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985). Such a change reflects the international standard, which follows *Matter of Acosta*, and ensures individuals are not denied asylum protections to which Congress intended they be entitled simply because the actor is a non-governmental entity. As a result, the numbers of bona fide asylum claims post-CFI should reflect greater grant rates as individuals will no longer be denied on this improper basis.

found that such a condition was likely unlawful because it was not consistent with the "safe-third-country" bar to asylum claims, which requires that such option be "genuinely safe." (Id.) at 977. As the court observed in *East Bay Sanctuary:*

> [T]here are two core requirements that must be satisfied before the safe-third-country bar applies. First, there must be an agreement between the United States and another country to which the alien would be removed and in which the alien would not be subject to persecution. Second, the country with which the United States has such an agreement must allow access to a "full and fair" procedure for determining eligibility for asylum or equivalent temporary protection.

994 F.2d at 971. Departments candidly both acknowledge this in the preamble to their proposed rule (88 FR 11731-32) and concede that they could not assure that any of the countries through which an asylum applicant might transit on the way to the U.S. could meet this standard during the time the proposed rule would be in effect. "Negotiating such agreements," they complain, "is a lengthy and complicated process that depends on the agreement of other nations" and could not be accomplished in time even given the "substantial" period between publication of the proposed rule and promulgation of a final one and "given partner countries' resistance to entering into such agreements." (Id.). Yet, the *inconvenience* to the Departments of having to follow the congressionally-mandated processes and ensure that the U.S. is note illegally returning individuals to face persecution and torture is irrelevant to whether the rule is permissible. Congress spoke clearly when enacting the Safe Third Country provision as to the conditions needed to bar people who do not have the luxury of travelling directly from their countries of persecution to the United States from asylum. The Departments cannot seek to avoid the inconvenience of being subject to a process designed to ensure the U.S. continues to meet its treaty and statutory obligations.

2. The Departments' treatment of the availability of this pathway presumption as rebuttable is illusory: proof that the pathway is unsafe is irrelevant under the proposed rule.

As AHR has noted earlier, it is a fundamental tenet of administrative law that there must be "a rational connection between the facts found and the choice made" by the administrative agency. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 43 (1983). A "critical component" of the "safe-third-country" bar to asylum, as discussed above, is that it "be genuinely safe." *East Bay Sanctuary, supra*, 994 F.3d at 977. Having declined to find that first seeking asylum or protected status in a country of transit is "genuinely safe," the Department's "choice made" – to make application for asylum or protected status in a transit country the Departments expressly decline to find safe a precondition for a credible fear screening - is not rational..)

3. All these defects aside, the lack of a reasonable timeframe within which the transit country must act on the asylum application, also renders this pathway illusory.

It is impossible to put aside the arbitrary nature of the third party transit precondition to obtaining a credible fear screening. But the rule illogically requires even more. Not only must an asylum applicant have first sought asylum or other protected status in an unsafe country, the applicant must wait in unsafe conditions until the country issues a ruling on the claim. Even if one *could* put the threshold fatal defect aside, the proposed rule ignores entirely the impracticality – no, impossibility – of overcoming the presumption where there is no time limit by which a third country must deny an asylum or other protected status application before the applicant may apply for asylum. Put another way, the agencies give applicants the "option" of applying for asylum or protected status in countries it cannot verify as safe and compounds the illusion of an "alternative pathway" by telling them they must wait for a denial indefinitely in concededly unsafe conditions. For a rule premised on "protecting" individuals from smuggling, forcing them to face unknown dangers in unsafe third country processing further undercuts the alleged interest of the agencies in

proposing the instant rule. Not only does this create serious risk to individuals, but again prolongs family separation and trauma as asylum seekers will be forced to wait unknown months or years for a decision in the unsafe country before they may even begin the years-long wait for possible adjudication in the U.S. that would allow access to crucial trauma supports and family reunification.

II. Even Assuming Creation of a Rebuttable Presumption against entitlement to Credible Fear Interviews and Asylum Were Lawful, the Agencies' Catch-All Rebuttal Based on "E*xceptionally* Compelling Circumstances" is Vague, Arbitrary and Capricious.

As the Departments explain it, their proposed rule:

> would establish a rebuttable presumption that certain noncitizens who enter the United States without documents sufficient for lawful admission are ineligible for asylum, if they traveled through a country other than their country of citizenship, nationality, or, if stateless, last habitual residence, unless they were provided appropriate authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process; presented at a port of entry at a pre-scheduled time or demonstrate that the mechanism for scheduling was not possible to access or use; or sought asylum or other protection in a country through which they traveled and received a final decision denying that application.

88 FR 11707. The presumption could be rebutted on two express grounds:

- if, at the time of entry, the noncitizen or a member of the noncitizen's family had an acute medical emergency; faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder;
- or satisfied the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11. 88 FR 11723.

AHR has explained previously why these limited grounds for rebuttal of the presumption do not make lawful the categorical bar on *applying* for an asylum-based credible fear hearing for those who do not overcome the presumption but otherwise satisfy the requirements of section 208 to apply for asylum. But the proposed rule adds a third catch-all ground for overcoming the presumption: "The presumption also would be rebutted in other *exceptionally* compelling

circumstances, as the adjudicators may determine in the sound exercise of their judgment may determine." (Id.) (emphasis added).

On its face, the idea of "*exceptionally* compelling circumstances" seems at best redundant and at worst, excessive. *See e.g., Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1504 (D.C. Cir 1984). (noting that statute barred pipeline from charging "exploitative" rates and rejecting an agency standard that "guards against only *grossly* exploitative pricing practices." (emphasis added). How is one, including both claimants as well as adjudicators, to know when already compelling circumstances rise to the level of exceptionally compelling ones?

The Departments' one example of an exceptionally compelling circumstance is where the applicant has demonstrated the possibility of separating family. 88 FR 11749, 11752. But even this exception underscores the problematic nature of the rebuttable presumption. The proposed rule would extend to a family member that does not independently qualify for asylum the right to seek asylum only if the applicant met the higher standard for withholding of removal. 88 FR 11752. This flaw threatens to result in arbitrary and capricious decisions as one adjudicator may determine a certain issue to be exceptionally compelling and grant the credible fear or asylum claim while another will find the same factors do not meet the exception and instead return the individual to face persecution if they cannot prove the higher standard for withholding of removal or CAT.

III. By the Agency's Own Account, Its Inducement Programs are Working to Reduce Unsafe Border Crossings. Those Programs Should be Improved and Expanded and the Inducements Enhanced, but Cannot Lawfully be Made Prerequisites for Asylum Claims.

As noted at the outset of these comments, the Departments highlight a number of steps they have already taken to reduce unsafe methods of migration to the United States. Reducing processing times for work visas and making it easier to apply for them, establishing new parole programs for certain, limited categories of individuals, and creating an app that allows would-be

asylum applicants to schedule credible fear interviews at recognized ports of crossing and within predictable time frames are the most prominent of these efforts. While use of these processes cannot be a precondition to having an asylum application considered by the agency, it can give priority to those who take advantage of this option in processing asylum claims.

There are problems with these approaches to be sure. AHR has highlighted problems with use of the app that must be addressed by the Departments.[25] Other problems require legislative fixes. Some of the work authorizations are of relatively short duration and, while they may relieve some of the dangers for non-citizens seeking to migrate for economic opportunities in our country, the Departments are constrained by statute. The Departments should urge Congress to expand both the availability of visas and incorporate protections for visa applicants highlighted by organizations, including AHR, that close gaps currently exploited by traffickers and other abuses. As relates to asylum seekers, however, short-term work visas are not a lawful alternative. They do uphold the United States' obligations to protect individuals who are fleeing persecution, torture, and other human rights abuses. The U.S. may not substitute such protections and due process for individuals by forcing them to utilize processes aimed entirely for other groups.

AHR further notes serious issues with *requiring*, rather than rewarding and encouraging, the use of the newly-established parole programs or other existing visa processes for individuals to obtain advanced permission to enter and then pursue asylum. As the agencies well know, the U.S. immigration processing standards and procedures come with many hurdles a person fleeing harm simply cannot, or should not have to, overcome. For example, visa and parole processing

[25] Some barriers, like access to wifi, would seem to be beyond the Departments' ability to rectify, underscoring the unfairness (not to mention unlawfulness) of making use of the app a precondition for eligibility even to apply for asylum. *See* Arelis R. Hernández, *Desperate migrants seeking asylum face a new hurdle: Technology* (Washington Post, March 11, 2023), https://wapo.st/4014KYw.

times can be extensive—some family-based visa processing times can be more than 10 years. An individual whose life is in imminent danger of harm does not have the luxury of awaiting the adjudication of such processes. In addition, these processes, including the parole processes the agencies continually use to try and distinguish the instant rule from the *East Bay* standards, are not accessible to many in need. The processes require: 1) a passport, 2) a U.S.-based sponsor, 3) financial ability to purchase a plane ticket, and 4) the ability to navigate and pay for parole paperwork. While such processes are a welcome *additional* lawful pathway for those who have the luxury of time, passports, U.S connections, and financial means to utilize them, failure to use them cannot lawfully form the basis of denying asylum protections. Indeed, many who will have *bona fide* asylum claims will use their inability to obtain a passport or safely exit the country by plane as proof of their underlying fear of persecution and torture—something the U.S. has already recognized in case law allowing asylum claims for those who were forced to make fraudulent statements in connection with their application for a visa necessary to escape.[26]

IV. Even Assuming the General Legality of Alternative Pathway Presumptions, The Proposed Presumptions Are Not Reasonable Without Providing Applicants Meaningful Opportunities to Receive Assistance of Counsel.

V. Even Assuming the General Legality of Alternative Pathways Presumptions, The Proposed Presumptions Are Not Reasonable Without Providing Applicants Meaningful Opportunities to Receive Assistance of Counsel.

[26] *In re O-D-,* 21 I. N. Dec. at 1083 ("[T]here may be reasons, fully consistent with the claim of asylum, that will cause a person to possess false documents, such as the creation and use of a false document to escape persecution by facilitating travel."); *Mamouzian v. Ashcroft,* 390 F.3d 1129, 1138 (9th Cir. 2004) ("When a petitioner who fears deportation to his country of origin uses false documentation or makes false statements in order to gain entry to a safe haven, that deception does not detract from but supports his claim of fear of persecution.") (citation and internal quotation marks omitted); *Akinmade v. INS,* 196 F.3d 951, 955 (9th Cir. 1999) ("[W]e recognize that a genuine refugee escaping persecution may lie about his citizenship to immigration officials in order to flee his place of persecution or secure entry into the United States."). We have recently stated that "if illegal manner of flight . . . were enough independently to support a denial of asylum, . . . virtually no persecuted refugee would obtain asylum." *Wu Zheng Huang v. INS,* 436 F.3d 89, 100 (2d Cir. 2006).

AHR has explained at length in these comments why the Departments' proposed rebuttable presumptions are instead illegal categorical bars to the right to apply for asylum. But even assuming rebuttable presumptions regarding transit or the use of an app to make asylum application appointments could be lawful, the bars to rebut these presumptions will be difficult to hurdle. Considering the consequences of failure mean asylum will be denied and individual will face return to persecution or torture, the Departments need to give applicants a fighting chance to overcome these presumptions. The Departments are aware of the stark differences in success rates for asylum applicants with versus without assistance of counsel. Essential to the fairness of a rule with consequences as dramatic as the agencies have proposed is the need to provide applicants with a reasonable opportunity to obtain the assistance of counsel.

VI. Conclusion

In sum, because this proposed rule is illegal under both international and U.S. law, The Advocates for Human Rights urges the Departments to immediately withdraw the proposed rule. Going forward with finalizing the rule risks putting the U.S. in violation of our international legal obligations. It will also likely result in legal action against the U.S. for violating Congressional intent, the Administrative Procedures Act, and the due process rights of numerous individuals. Moreover, the harm wrought by the proposed rule will seriously harm individuals by returning people to face persecution and torture.

The proposed rule provides too little guidance to ensure decisions are not arbitrary and capricious, placing individuals, especially those who aren't able to access counsel, at risk of harm. In addition, AHR is extremely concerned about the indication that the Departments plan to finalize the rule just over one month after comments close. This short timeline will not allow adequate time

to thoughtfully consider the thousands of comments submitted and will certainly not allow a legal and clear rule.

While AHR supports the Departments' desire to provide additional, legal pathways to safe, orderly and fair migration, and to ensure additional processes that make applying for asylum safer and more orderly, the Departments cannot condition any asylum protections on use of such pathways. AHR urges the Departments to issue a rule that replaces any bars to asylum with methods that reward or encourage such use only. The U.S. can, and must, uphold our commitments to people seeking safety will protecting our borders. And, as international best practices show, creating additional bars to those seeking safety undermines such protections and will simply entrench harmful networks of smuggling and trafficking as people become more desperate to seek entry despite illegal hurdles erected by the U.S. Government. Therefore, the Departments must withdraw this proposed rule as illegal and ineffective in obtaining the purpose it alleges underpins the need.

Respectfully submitted,

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