



March 27, 2023

Merrick Garland
Attorney General
U.S. Department of Justice

Alejandro Mayorkas
Secretary of Homeland Security
Department of Homeland Security

**RE: Comment to Proposed DHS/DOJ Regulation
Circumvention of Lawful Pathways, 88 FR 11704**

Dear Attorney General Garland and Secretary Mayorkas:

Please accept this letter, submitted by Frente Accion Latinx de Minnesota (FALM), as a comment to the proposed regulation by the U.S. Department of Homeland Security (DHS) and U.S. Department of Justice (DOJ), *Circumvention of Lawful Pathways*, published in the Federal Register at 88 FR 11704 on February 23, 2023. FALM, the organization submitting this comment to the proposed DHS/DOJ regulation, is a medical-legal coalition comprised of medical professionals and healthcare providers, immigration lawyers and legal services organizations and community organizations. FALM, as an umbrella medical-legal coalition group, is engaged in various activities to eliminate structural barriers negatively impacting health outcomes for immigrants and other marginalized communities. FALM's activities have included one-day medical-legal clinics, providing legal consultations and healthcare services to community members in the Twin Cities and Greater Minnesota, co-hosting a medical-legal symposium, *La Triste Frontera*, raising awareness of medical-legal issues at the U.S. border, and advocacy to support law and policy advancing health equity.

As a Medical-Legal Coalition, FALM envisions and works towards creating a society where all individuals achieve their highest potential for health. FALM opposes the proposed DHS/DOJ regulation in its entirety because it runs counter to this goal. The proposed rule negatively affects the health of asylum seekers, a vulnerable population fleeing harmful conditions and if put into place as proposed, this rule will put both the health and lives of asylum seekers at grave risk. Accordingly, FALM submits this comment in opposition to the proposed DHS/DOJ regulations

due to their harmful impact to health and safety of asylum seekers and urges DHS and DOJ to withdraw the proposed rule in its entirety.

A. The Proposed Rule Places Asylum Seekers in Dangerous and Vulnerable Situations.

The proposed rule imposes significant procedural and logistical barriers on asylum seekers requesting asylum at a port of entry, namely by requiring asylum seekers to make an appointment using the CBP One Smartphone App before they are allowed to request asylum at a port of entry.¹ Additionally, the proposed rule imposes draconian penalties on asylum seekers apprehended by Customs and Border Protection (CBP) Agents after unlawfully entering the U.S. between points of entry. Penalties for asylum seekers apprehended after unlawfully entering the U.S. include being deemed presumptively ineligible for asylum if the asylum seeker travelled through a third country enroute to the U.S. and streamlined procedures making it easier for the U.S. government to quickly deport asylum seekers through expedited removal.²

While this letter will focus on how the proposed DHS/DOJ rule will negatively impact the health and safety of asylum seekers, as a legal matter, the proposed rule marks a significant departure from past policy of admitting individuals fleeing harm and processing their asylum claims, regardless of their manner of entry. Furthermore, the changes proposed under the rule are contrary to both domestic³ and international law⁴, which impose a legal obligation on the U.S. government to offer refuge to those fleeing harm⁵ and prohibit punishing asylum seekers for their manner of entry⁶ or returning them to a country where they would suffer harm.⁷ The proposed rule's attempt to skirt our country's legal and moral obligation to admit and process the asylum claims of those fleeing persecution is reason enough to discard the proposed rule in its entirety.

¹ 88 FR 11704, 11719

² 88 FR 11704, 11742-11748

³ See generally, Refugee Act of 1980

⁴ 1951 Refugee Convention; 1967 Protocol Relating to the Status of Refugees (The United States, while not a signatory to the 1951 Refugee Convention, signed on to become a party to the 1967 Protocol Relating to the Status of Refugees on November 1, 1968. The 1967 Protocol included all of the obligations contained in the 1951 Refugee Convention and eliminated the temporal and geographic limitations contained in the original agreement so that the 1951 Refugee Convention would apply universally.)

⁵ See, supra note 3 and 4.

⁶ See, 8 USC § 1158(a)(1), INA § 208 (a)(1) (Any 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** and including an alien who is brought to the United States after having been interdicted in international or United States waters), **irrespective of such alien's status**, may apply for asylum in accordance with this section)

⁷ 1951 Refugee Convention, Article 33 (The principle of *non-refoulement* is found in Article 33 of the 1951 Refugee Convention, which states: *no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion*)

Additionally, as a practical matter, the barriers imposed by the proposed DHS/DOJ rule restricting access to asylum will place asylum seekers in desperate situations, ultimately forcing them to choose between two bad options which will place their health and safety at risk:

- Attempting to enter the U.S. at dangerous areas along the U.S./Mexico border to avoid detection and apprehension by CBP; or
- Remaining in dangerous conditions in Mexico indefinitely while attempting to schedule an appointment through the CBP One App to request asylum at a port of entry.

1. The Proposed DHS/DOJ Rule will Force Asylum Seekers to Cross at Dangerous Points Along the Border, Likely Resulting in Serious Injury or Death for Many who Attempt to Cross into the U.S.

Many asylum seekers facing life threatening situations in Northern Mexico will choose to make the harrowing trek into the U.S. crossing an ocean, river, or desert between ports of entry out of desperation to reach safety inside the U.S. This choice has become even more perilous for asylum seekers over the past three years since the March 2020 implementation of the Title 42 policy. Under Title 42, a policy implemented on public health grounds at the start of the COVID-19 pandemic, DHS is allowed to summarily expel and return most asylum seekers appearing at ports of entry or apprehended between ports of entry before they have the opportunity to request asylum.⁸ Unlike the past, when asylum seekers unlawfully crossing into the U.S. between ports of entry would voluntarily turn themselves in to CBP officers to request asylum, many asylum seekers now chose to cross at more dangerous points along the border to evade detection by CBP and avoid summarily expulsion back to Mexico or their home country under Title 42. With increased enforcement along the southern border, more migrants have attempted to enter the U.S. along the northern border with Canada, which has also resulted in fatalities when individuals were exposed to the harsh elements while attempting to cross in the winter. Because Title 42 has pushed asylum seekers to cross the border at more dangerous points to evade detection, there has been a significant increase in migrant deaths over the past three years. Both FY2021 and FY2022 set a record for most migrant deaths on the southern border in a single year, with over 560 deaths in FY2021 and over 800 deaths in FY2022.⁹ The total number of migrant fatalities is even higher when it includes those who died while attempting to cross via the northern border.

Because the proposed DHS/DOJ rule imposes severe penalties on asylum seekers who are apprehended after entering unlawfully between ports of entry, it will continue to place asylum seekers in a position where they are forced to take these risks, often with dangerous or fatal consequences.

⁸ *Fact Sheet: A Guide to Title 42 Expulsions at the Border*, American Immigration Council, May 2022, https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border_0.pdf

⁹ J. Rose, M. Penaloza, *Migrant Deaths at the U.S.-Mexico Border hit a Record High, in Part due to Drownings*, NPR, September 29, 2022, <https://www.npr.org/2022/09/29/1125638107/migrant-deaths-us-mexico-border-record-drownings>

i. The number of drowning deaths while crossing the Rio Grande has steadily increased over the years.

Many migrants who enter the U.S. between ports of entry along the U.S.-Mexico border do so by crossing the Rio Grande, a river that serves as a natural land border spanning approximately 1,000 miles between Mexico and Texas. Crossing the Rio Grande places migrants in a particularly dangerous situations where they face serious injury or death. The riverbed is uneven, and the currents are unpredictable, particularly in the darkness of night when many migrants cross to evade detection by CBP. Yet, families, many with little children in tow, take this risk – hoping to reach safety and achieve the quintessential American Dream.

While access to appointments to seek asylum at ports of entry continues to be severely restricted and backlogged, migrants facing harm in Mexico are often left with no choice but to undertake this perilous journey at dangerous points along the Rio Grande to evade CBP detection. These migrants are also vulnerable to cartels and smugglers, as most points along the river where people can cross without being apprehended by CBP are controlled by “coyote” smugglers who charge a high fee before allowing a migrant to cross over to the U.S. Groups of migrants with access to minimal resources and at the mercy of coyotes often use flimsy floatation devices not made to withstand strong river currents or support the large number of people on them. It is not uncommon for as many as 9 or 10 people to clamber on to a small inflatable raft or for multiple people to hang on to a pool noodle for dear life as they attempt to cross the Rio Grande. The few lucky migrants who manage to successfully make it across the Rio Grande report being dragged underwater by the currents, with their feet touching the bottom of the river, as the top of their head is submerged below the surface. They got cramps, their arms were tired, and they went into shock. Often, migrants sustain serious injuries while crossing the river which requires medical intervention.

For others, crossing the Rio Grande led to fatal results. Of note, on September 2, 2022, nine migrants drown while attempting to cross the Rio Grande near Eagle Pass, Texas and another thirty-seven migrants need to be rescued after being swept downstream by the current.¹⁰ In news reports covering the nine drowning deaths, Manuel Mello, the Eagle Pass Fire Chief, reported drownings deaths had become an everyday occurrence near that section of the border, typically with as many as one drowning death per day and sometimes more.¹¹ Should the proposed DHS/DOJ regulation be implemented as written, it will likely result in more drowning deaths as desperate asylum seekers attempt to cross the Rio Grande to seek safety in the U.S.

ii. Crossing the ocean is a perilous gamble.

Earlier this month, on March 12, 2023, the US witnessed one of the deadliest maritime border crossing incidents in its history when two smuggling boats capsized in the Pacific Ocean

¹⁰ D. Montgomery & M. Jordan, *Nine Migrants Drown as Dozens are Swept Down Rio Grande*, New York Times September 2, 2022, <https://www.nytimes.com/2022/09/02/us/migrants-rio-grande-texas.html>

¹¹ Id.

near La Jolla, California, roughly 35 miles from the US Mexico border.¹² There were eight confirmed drowning deaths from this incident and authorities were uncertain if there were more fatalities whose bodies could not be retrieved from the ocean.

At a news conference covering the March 12, 2023 drowning deaths near La Jolla, Coast Guard Captain James Spitler remarked that there had been a 771% increase in human smuggling in the Pacific Ocean near the border between Mexico and Southern California since 2017. This increase coincides with increased enforcement and measures blocking access to asylum along the border in Southern California during the Trump Administration, which included metering¹³ (a practice limiting the number of individuals allowed to seek asylum each day at ports of entry), the Migrant Protection Protocols (MPP) or “Remain in Mexico” program¹⁴, and Title 42. Captain Spitler also noted that since 2021, there had been 23 confirmed migrant drowning deaths at sea and that the total number of drowning deaths was likely higher.¹⁵

iii. Crossing the desert involves battling the harsh terrain and triple digit temperatures, resulting in a number of fatalities.

In addition to crossing into the U.S. by water, many asylum seekers attempt to evade detection by crossing into the U.S. through the desert in New Mexico, Arizona and California. Crossing into the U.S. through the desert is especially dangerous for migrants during the summer, with average daily highs in Southern Arizona of over 100 degrees. The dangers migrants face crossing the border through the desert are only expected to worsen as the summer months in Arizona grow hotter due to climate change.¹⁶ Additionally, to avoid detection and expulsion into Mexico under Title 42, migrants have begun crossing into the U.S. at remote parts of the desert typically five miles or further from the nearest road, over mountain ranges and other inhospitable terrain.¹⁷

Because of the dangers of this perilous journey across the desert, many migrants suffer from dehydration, heat stroke or even death when attempting to enter the U.S. through the desert. Before even reaching the U.S./Mexico border, many migrants may have been forced by smugglers to walk for days or weeks via dangerous routes in Mexico and Central America.¹⁸ Dehydrated or injured migrants are often unable to complete their journey and are left behind by smugglers to die in the desert. Between October 1999 and December 2021, the nonprofit

¹² K. Kucher, A. Riggins, M. Hamilton, *8 Reported Dead After 2 Suspected Smuggling Boats Crash at Black’s Beach in San Diego*, Los Angeles Times, March 12, 2023, <https://www.latimes.com/california/story/2023-03-12/8-reported-dead-after-2-suspected-smuggling-boats-crash-at-blacks-beach-in-san-diego>

¹³ *Fact Sheet: Metering and Asylum Turnbacks*, American Immigration Council, March 2021, https://www.americanimmigrationcouncil.org/sites/default/files/research/metering_and_asylum_turnbacks_0.pdf

¹⁴ *Fact Sheet: The Migrant Protection Protocols*, American Immigration Council, January 2022, https://www.americanimmigrationcouncil.org/sites/default/files/research/the_migrant_protection_protocols_0.pdf

¹⁵ Los Angeles Times, *supra* note 12

¹⁶ C. Prendergast, A. Devold, *Migrant Deaths: A Crisis Deepens in the Desert*, Arizona Daily Star, December 2, 2021, <https://humaneborders.org/migrant-deaths-a-crisis-deepens-in-the-desert/>

¹⁷ *Id.*

¹⁸ *Id.*

organization, Humane Borders, reported nearly 4,000 deaths had occurred in the Arizona desert, with 239 deaths in 2020 and 222 deaths between January and September of 2021.¹⁹ These fatalities will likely continue if the proposed DHS/DOJ rule is implemented as currently drafted.

iv. Increased Crossings Along the Northern Border Where Migrants are Exposed to the Harsh Winter Elements

While the total number of migrants who attempt to enter the U.S. across the northern border is significantly lower compared to the southern border, both U.S. and Canadian officials have noted a significant increase in attempted crossings into the U.S. through Canada.²⁰ Entering the U.S. across the northern border presents its own hazards, particularly for migrants who attempt to cross into the U.S. from Canada during the frigid winter months, with average temperatures below freezing.

Like border crossings across dangerous terrain at the southern border, the increase in migrant border crossing at the northern border has resulted in several fatalities. On January 19, 2022, the Royal Canadian Mounted Police found the bodies of four people, including an infant and one teenage boy, roughly seven miles from the U.S. border with Minnesota, in the Canadian Province of Manitoba. The four people, later identified as migrants from India attempting to cross into the U.S., died of exposure and hypothermia when they were travelling on foot, in a blizzard with temperatures of minus-31 degrees Fahrenheit.²¹ More recently, there were reports of additional fatalities near the northern border. These included the death of a Haitian citizen in December 2022 who was found in Quebec, near Champlain, New York, and a Mexican man whose frozen body was found in February 2023 in rural Vermont, near the Canadian border.²²

v. Death by Drowning, Heat Stroke and Hypothermia, in Medical Terms

As a coalition organization with members who are physicians and other medical professionals, FALM wishes to underscore the horrific nature of the deaths, in medical terms, suffered by asylum seekers attempting to cross the border via the ocean, river or desert.

For those who perished while attempted to cross the Pacific Ocean or Rio Grande, the cause of death is drowning. When a person drowns, the brain senses hypoxia (i.e., oxygen deprivation) and triggers a series of nervous system reactions in an attempt to preserve life. The water pressure when a person is submerged under water is so great that it causes their chest cavity to fill with fluid, putting pressure on the heart and preventing it from pumping blood effectively. Their airways close off as their head goes underwater, making it difficult to breathe naturally. Without

¹⁹ Id.

²⁰ FY2022 (Oct. 2021-Sept 2022) saw a total of 109,535 encounters by CBP at the Northern Land Border, marking a significant increase from FY2021 (Oct 2020-Sept 2021), where only 27,180 encounters were reported. See, U.S. Customs and Border Protection, Nationwide Encounters, <https://www.cbp.gov/newsroom/stats/nationwide-encounters>

²¹ A. Coletta, *Florida Man Arrested After 4 People, Including Infant and Teenage Boy, Found Dead Near U.S.-Canada Border*, Washington Post, January 20, 2022, <https://www.washingtonpost.com/world/2022/01/20/canada-border-migrant-death/>

²² *U.S. Northern Border Immigrant Death Highlights Crossing Spike*, Associated Press, February 26, 2023, <https://www.voanews.com/a/us-northern-border-immigrant-death-highlights-crossing-spike/6977624.html>

air or oxygen, hypoxia sets in quickly, causing brain damage and death.²³ To think that children as young as a few months old are being sent to their watery graves in this manner is appalling to say the least.

Death by heat stroke, suffered by migrants who attempt to cross through the desert, is equally horrific. Migrants who cross the border through the desert are ravaged by extreme temperatures – the sweltering heat of the day and bitter cold at night. With not enough potable drinking water available, they are often severely dehydrated. Dehydration starts as dry mouth. Dry mouth turns to dry heaving. The veins constrict and muscles begin to cramp. The body will stop sweating and begin seizing - signs of heat stroke. When a heat stroke occurs, body temperature can rise to 106 degrees or higher within 10 to 15 minutes. As the body's internal temperature continues to rise above 110 degrees, the body's cells to break down and the sheaths of blood vessels begin leaking, causing hemorrhaging throughout the body and multi-system organ failure, effectively boiling to death in their own body.²⁴

Those who died from hypothermia while attempting to cross the northern border also suffered a painful death. Death from hypothermia occurs when your body loses heat faster than it can produce heat, causing the body's internal temperature to plunge. The first symptom of hypothermia is shivering, when the body begins to shake in an attempt to warm itself. As the body's internal temperature drops, which can happen in a matter of minutes when exposed to sub-zero temperatures, the heart, nervous system, and other organs are not able to work properly. Eventually, a person's heart will stop beating and they will die.²⁵

Should the proposed DHS/DOJ rule go into effect as written, it is certain to result in more people suffering unimaginably painful deaths, spending their final moments on earth in agony.

B. The proposed DHS/DOJ rule, creating a rebuttable presumption of ineligibility for asylum for the majority of migrants who enter unlawfully between ports of entry, will disproportionately harm those most in need of protection.

One especially punitive provision in the proposed DHS/DOJ regulation is the asylum transit ban language, imposing a rebuttable presumption of ineligibility for asylum for any migrant apprehended by CBP after unlawful entry if they did not seek asylum or protection in any third country, they travelled through enroute to the U.S. This rebuttable presumption of ineligibility for asylum, if implemented, will severely restrict access to asylum and effectively punish the most vulnerable who are left with no choice but to cross the border unlawfully to reach safety in the U.S. DHS and DOJ have argued that the proposed rule does include safeguards to rebut the presumption of ineligibility for asylum, for example, if the asylum seeker can demonstrate by preponderance of the evidence, they were unable to access the CBP One App to make an

²³ *The Science of Drowning: What Happens to the Body Underwater?*, American Academy of CPR and First Aid, <https://www.onlinecprcertification.net/blog/the-science-of-drowning-what-happens-to-the-body-underwater/>

²⁴ A. Ragsdale, P. Stark, *What it Feels Like to Die From Heatstroke*, Outside, June 18, 2019, <https://www.outsideonline.com/health/wellness/heat-stroke-signs-symptoms/>

²⁵ *Hypothermia: Overview*, The Mayo Clinic, <https://www.mayoclinic.org/diseases-conditions/hypothermia/symptoms-causes/syc-20352682#:~:text=When%20your%20body%20temperature%20drops,or%20immersion%20in%20cold%20water.>

appointment. However, rebutting the presumption of ineligibility for asylum under the rule is a technically complex process that will be extremely difficult for asylum seekers to navigate without the assistance of a lawyer.

Additionally, asylum seekers who are survivors of trauma will face additional challenges rebutting and overcoming the presumption of ineligibility for asylum. Asylum seekers often have experienced significant trauma and have complex physical and mental health needs that should be treated with medical care. Asylum status, if granted, is a form of lawful status granting the right to stay in the U.S. indefinitely, with a path to permanent residence and citizenship, and entitlement to government funded healthcare programs, like Medicaid. By eliminating the possibility of even being allowed to apply for asylum for most applicants, a form of status that grants access to healthcare benefits, the proposed rule denies access to crucial health services (leading to untreated mental health needs and trauma), increased emergency service use, lower immunization rates, and increased likelihood of deportation, resulting in re-traumatization and worsening of health problems.

The Proposed Rule also perpetuates uncertainty for asylum seekers and exacerbates their trauma and mental anguish. Migrants seeking asylum often are fleeing traumatic experiences stemming from past persecution that forced them to flee their home country and seek asylum in the U.S. In fact, one of the requirements for seeking asylum in the United States is that the individual must demonstrate a well-founded fear of persecution if forced to return, which is typically established by showing they suffered past persecution in their home country.²⁶ The Proposed Rule will compound the trauma and vulnerabilities that asylum seekers already face by punishing them, denying them access to asylum and deporting them back to the harm that caused them to flee and seek safety in the U.S. in the first place.

C. Requiring asylum seekers to schedule an appointment through the CBP One Smartphone App before they can seek asylum will result in catastrophic health consequences.

Under the proposed DHS/DOJ rule, asylum seekers are required to secure an appointment through the CBP One App before being allowed to request asylum at a port of entry. For a number of reasons, this requirement is impractical and will deny many seeking protection on the southern border access to asylum.

This requirement under the proposed rule is incredibly burdensome and requires asylum seekers to have access to a smartphone and reliable internet to download the CBP One App. Assuming they have access to a smartphone and are able to download the CBP One App and register, the asylum seeker must then attempt to schedule an appointment through the app's glitchy, often impossibly difficult lottery-based scheduling process. As a result, thousands of people will be trapped waiting for weeks or months at a time in dangerous conditions in Northern Mexico while they try to navigate the CBP One App, schedule an appointment, and then wait for said appointment to take place. It is unknown how many appointments are available each day. Advocates estimate that in camps in Reynosa and Matamoros, there are as many as 10,000 migrants at any given time competing for likely fewer than 500 appointments made available in

²⁶ See 8 U.S.C. § 1158(b), INA § 208(b)

those cities each day.²⁷ According to a CBP official, 200,000 profiles had been created on the app. Of those 200,000 profiles, only 35,000 profiles had scheduled appointments as of Feb 22.²⁸ While the number of active users is unknown, it is evident many who have created a profile have not been able to successfully schedule an appointment and remain waiting indefinitely for their chance to request asylum at a port of entry in dangerous conditions in Northern Mexico with no safe or healthy housing.

From a medical perspective, the proposed CBP One App appointment requirement is concerning for a number of reasons. First, the health dangers and harm resulting from acts of violence, rape, and murder that many asylum seekers are subjected to in Northern Mexico while waiting for an appointment are inherent. Second, the lottery process is indifferent toward, (and in many cases disadvantages) the most vulnerable, including those with medical needs seeking protection through asylum. Third, the impact of CBP One's "Liveness Check" facial recognition technology has a discriminatory impact on Black people and indigenous or mestizo people with dark skin, which causes additional harms to the mental and physical health of asylum seekers most likely to face discrimination. Fourth, the dangerous circumstances, violence, and uncertainty asylum seekers will endure while waiting for an open slot through the CBP One App will have significant mental and physical health implications, especially for adolescents.

i. The frequent crime, violence, rape, and murder asylum seekers are exposed and susceptible to while waiting in dangerous areas near the border in Northern Mexico are an obvious threat to the health and safety asylum seekers.

The border communities in Northern Mexico are not safe for asylum seekers to stay while waiting to secure an appointment to request asylum through the CBP One App. On March 3, 2023, four U.S. citizens visiting Mexico for medial tourism were kidnapped by armed men connected to the cartels in Matamoros, Mexico (directly across the border from McAllen, Texas) because the gunman reportedly mistook them for Haitian drug traffickers.²⁹ Unfortunately, two of the four were murdered and another victim of the kidnapping suffered serious injuries.³⁰ Asylum seekers are especially vulnerable in border towns where they are regularly victims of murders, shootings, rapes, extortions, kidnappings, and human trafficking. They are often targeted on account of their race, nationality, refugee status, sexual orientation, gender identity, and other factors.³¹ Migrants waiting for an asylum appointment, particularly Black and dark-skinned migrants, are also at risk of deportation by Mexican migration officers from Instituto Nacional de Migracion (INM), Mexico's immigration enforcement agency. Further, "Mexican police, immigration officers, and other government authorities continue to be responsible, often in collusion with cartels, for brutal

²⁷ B. Wermond, E. Trovall, *Biden's New CBP One App Panned for Trapping Asylum Seekers in Daily Lottery System*, Houston Chronicle, February 26, 2023, <https://www.houstonchronicle.com/politics/texas/article/users-pan-biden-s-new-cbp-one-app-asylum-seekers-17796732.php>

²⁸ Id.

²⁹ M. Halpert, W. Grant, *Two Dead, Two Alive After Americans Kidnapped in Mexico*, BBC, March 8, 2023, <https://www.bbc.com/news/world-latin-america-64878721>

³⁰ Id.

³¹ Barred at the Border: Wait "Lists" Leave Asylum Seekers in Peril at Texas Ports of Entry, Human Rights First, April 2019, https://humanrightsfirst.org/wp-content/uploads/2022/10/BARRED_AT_THE_BORDER.pdf

attacks on migrants and asylum seekers after they are returned to, or while they are passing through Mexico.”³²

ii. The CBP One App disadvantages the most vulnerable people.

The proposed rule includes exceptions for those who can’t access the app because of technical issues, illiteracy, no access to a phone, or language barriers. There are also exceptions for unaccompanied children and those with serious medical conditions. However, the individual bears the burden of proving by preponderance of the evidence (i.e., greater than a 50% chance) that they were unable to use the app, and it is unclear how officers would judge whether a person has established they meet an exception. Further, families with young children and infants, the elderly, and pregnant women are given no priority when scheduling appointments or exemptions from the CBP One App appointment requirement. Instead of a triage system that prioritizes appointments based on need and vulnerability, the CBP One App appointment scheduling process is a lottery where securing an appointment seems to be a matter of luck or chance. In fact, it tends to disadvantage the most vulnerable groups such as children and infants travelling with a parent, elderly people, and people with disabilities, and those in poverty who cannot afford a smartphone or access to the internet.

a. Pregnant women and families with children are disadvantaged by the CBP One App scheduling process.

Pregnant women nearing their due dates have the same chance of getting an appointment as the thousands of other asylum seekers attempting to secure a slot from the excessively limited pool. The proposed rule also imposes difficulty on children and their parents because it requires each child to have a separate appointment versus allowing family units to schedule a single appointment to request asylum together. This has proven challenging given the surplus of people seeking appointments, and the deficiency in appointment slots available each day. Further, the CBP One App requires facial recognition for young children (and at one point required it for infants) before the app will allow an appointment to be scheduled on behalf of the child. For anyone who has interacted with a toddler or young child, it is clear that requiring a young child to sit still on command to complete a facial recognition “liveness check” is before being allowed to use an app which is their only legal avenue to request asylum is inherently unreasonable. There is also at least one report of facial software rejecting an identical twin mistakenly receiving it as an already-existing user.³³

³² Id.

³³ N. Miroff, *How Biden Officials aim to use a Mobile App to cut Illegal U.S. Entries*, Washington Post, February 20, 2023, <https://www.washingtonpost.com/immigration/2023/02/20/cbpone-boder-app-biden-migrants/>

- b. People with disabilities, elderly people, those living in poverty, and people who speak languages other than English, Spanish, or (recently) Haitian Creole, are disadvantaged by the CBP One App Process.

The accessibility of the CBP One App for users with disabilities is questionable at best. There is at least one report of a person who was blind having difficulty accessing the app.³⁴ Many people have reported difficulty understanding and using the complicated app. Only those who can read and write in Spanish, English, or Haitian Creole are able to use the app since these are the only language options the CBP One App provides. Further, the most isolated and economically distressed are left with no means to request an appointment because they do not have a smartphone. Similarly, many struggle accessing the CBP One App and securing an appointment with outdated phones and bad Wi-Fi connections. In practice, the people in the gravest danger with the least resources have and will continue to be excluded from the opportunity to seek asylum because of the CBP One App requirement.³⁵

iii. The CBP One App’s “Liveness Check” facial recognition discriminates against Black people and people with dark skin, which perpetuates racism and carries negative health ramifications.

The CBP One App has excluded thousands of people from the asylum process based on the color of their skin. There are numerous reports that the CBP One “liveness check” requirement routinely rejects the photos of Black and dark-skinned migrants, leaving these individuals with no recourse to access asylum appointments at ports of entry. At least one study found that facial recognition technology encounters its greatest rates of error for Black women.³⁶ Another study found facial recognition has an error rate of over 30% for women with darker skin tones.³⁷

It is now well-established that racism is a Public Health issue. Whether intentional or not, the CBP One App, especially the “Liveness” facial recognition requirement, has a discriminatory impact on asylum seekers based on the color of their skin and darkness of their complexions. These asylum seekers have already experienced racial discrimination, which comes with health implications.

Racism is linked with higher stress, which can result in high blood pressure, weakened immune system, and other long-term health effects. (*See more discussion about stress’ impact on health in Section iv, below*). A recent study found physiological functioning in midlife and sleep is impaired in people of color who have experienced unfair discrimination over their lifetime.³⁸ Another recent

³⁴ Houston Chronicle, *supra* note 27

³⁵ Washington Post, *supra* note 33

³⁶ *NIST Study Evaluates Effects of Race, Age, Sex on Facial Recognition Software*, National Institute of Standards and Technology, U.S. Department of Commerce, December 19, 2019, <https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software>

³⁷ A. Najibi, *Racial Discrimination in Face Recognition Technology*, Harvard University, October 24, 2020, <https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/>

³⁸ A.D. Ong, D.R. Williams, *Lifetime Discrimination, Global Sleep Quality, and Inflammation Burden in Multi-Ethnic Sample of Middle-Aged Adults*, American Psychological Association, 2019, <https://psycnet.apa.org/doiLanding?doi=10.1037%2Fcdp0000233>

research review found associations between reports of racial discrimination, and physical and mental health conditions.³⁹ These conditions included cardiovascular disease, coronary artery calcification, mental health disorders, obesity, hypertension, alcohol use and misuse, poor sleep, cortisol dysregulation, engagement in high-risk behaviors, and inflammation.⁴⁰ Inability to access asylum protections because of the immutable characteristic of being Black or having dark skin preventing proper use of the necessary CBP One App is a severe form of racism that could exacerbate racial health disparities.

iv. Asylum seekers waiting to schedule an appointment through the CBP One App experience uncertainty, stress, trauma, adverse childhood experiences, sexual and physical abuse, and inadequate housing. All these hardships negatively impact health.

In addition to the discriminatory impact of the CBP One App appointment requirement described in the previous section above, this requirement will cause many additional harms negatively impacting health outcomes.

a. The CBP One App appointment process makes many asylum seekers experience uncertainty and stress.

Asylum seekers desperately waiting in Northern Mexico for weeks or months to secure an asylum appointment live in a perpetual state of uncertainty over their futures. This uncertainty caused by not knowing if or when they will be able to secure an appointment through CBP One App is likely a long-term stressor that may negatively impact health for years to come. Further, an asylum seeker's stress is compounded by the stress of living in dangerous conditions where crimes, violence, robberies, kidnappings, rapes, and threats against migrants are common.

This is especially troubling since asylum seekers have typically already endured trauma from past persecution they suffered, which forms the basis of their asylum claims. "Before being forced to flee, refugees may experience imprisonment, torture, loss of property, malnutrition, physical assault, extreme fear, rape and loss of livelihood."⁴¹ Those who have experienced persecution or economic distress in their home country, and the resulting trauma from these incidents, need timely access to assistance from medical and mental health professionals. At the very least, they need to be in a more secure and safe environment versus the extreme danger they face while vulnerably waiting "in limbo" near the border. Tortured refugees have significant challenges for emotional and sometimes physical healing that must be carefully assessed and treated⁴² and this healing cannot begin until asylum seekers reach safety and stability inside the U.S.

³⁹ D.R. Williams, J.A. Lawrence, B.A. Davis, *Racism and Health: Evidence and Needed Research*, Annual Review of Public Health, April 2019, <https://www.annualreviews.org/doi/pdf/10.1146/annurev-publhealth-040218-043750>

⁴⁰ *What are the Effects of Racism on Health and Mental Health?*, Medical News Today, last reviewed on December 14, 2022, <https://www.medicalnewstoday.com/articles/effects-of-racism#summary>

⁴¹ *Traumatic Experiences of Refugees*, Refugee Health Technical Assistance Center <https://refugeehealthta.org/physical-mental-health/mental-health/adult-mental-health/traumatic-experiences-of-refugees/>

⁴² *Id.*

Uncertainty is often referred to as a trigger for several negative mental health outcomes, such as stress and anxiety.⁴³ When a person perceives a threat, or otherwise feels stressed, their adrenaline and cortisol levels rise. These hormones can cause blood pressure and heart rate to spike. If the stressors are always present, or a person feels constantly under attack, their fight-or-flight reaction stays turned on and they risk “overexposure to cortisol and other stress hormones.”⁴⁴ “The long-term activation of the stress response system... can disrupt almost all the body's processes. This puts an asylum seeker with long-term stress activation at increased risk of many health problems: Anxiety; Depression; Digestive problems; Headaches; Muscle tension and pain; Heart Disease, Heart Attack, High Blood Pressure and Stroke; Sleep problems; Weight gain; Memory and concentration impairment.”⁴⁵

b. The Children forced to wait for a CBP One App appointment slot are vulnerable to adverse childhood experiences (ACE) and other potential health concerns.

As discussed in Section ii, thousands of children are waiting in these torturous conditions to secure an asylum appointment through the CBP One App. The impact that inadequate housing, exposure to violence, chronic stress, physical and sexual abuse has on a child’s health, cannot be understated. Lourdes Gonzalez houses at-risk asylum seekers in the border state of Tamaulipas, Mexico and reports tending to sexually assaulted children and bandages these victims' wounds of violence.⁴⁶ A mother waiting at the border, Cardona, said (through tears) that she and her family were stuck in “The most dangerous place on the continent. Kids can’t play outside because of gunshots. Taxi drivers help kidnap people. We had to sleep on the streets for days before finding a shelter.”⁴⁷

Lifelong health outcomes, such as chronic disease and mental disorders, are linked to adverse childhood experiences (ACES). Youth exposed to violence (whether as direct witness, victim, or hearing about the crime) are at risk for poor long-term behavioral and mental health outcomes. These outcomes include anxiety, depression, and post-traumatic stress disorder.⁴⁸ People with higher ACE burdens have increased risk of heart disease, cancer, substance abuse, depression, impaired social relationships, aggression, and risk-taking behavior, compared to those with lower ACE burdens.⁴⁹ Therefore, children stuck waiting in dangerous areas of Northern

⁴³ A. Massazza, H. Kienzler, S. Al-Mitwalli, N. Tamimi & R. Giacaman, *The Association Between Uncertainty and Mental Health: A Scoping Review of the Quantitative Literature*, Journal of Mental Health, January 11, 2022, <https://www.tandfonline.com/doi/full/10.1080/09638237.2021.2022620>

⁴⁴ *Chronic Stress Puts Your Health at Risk*, Mayo Clinic, July 8, 2021, <https://www.mayoclinic.org/healthy-lifestyle/stress-management/in-depth/stress/art-20046037>

⁴⁵ Id.; See also, A. Aly, *The Effects of Stress on the Heart*, MedStar Health, February 21, 2021, <https://www.medstarhealth.org/blog/heart-and-stress>

⁴⁶ A. Hernandez, *Desperate Migrants Seeking Asylum Face a New Hurdle: Technology*, Washington Post, March 11, 2023, <https://www.washingtonpost.com/nation/2023/03/11/asylum-seekers-mexico-border-app/>

⁴⁷ Id.

⁴⁸ S. Monnat, R. Chandler, *Long Term Health Consequences of Adverse Childhood Experiences*, Socio Q, September 2015, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4617302/>

⁴⁹ J. Shonkoff, D. Phillips, *From Neurons to Neighborhoods: The Science of Early Childhood Development*, U.S. National Research Council and Institutes of Medicine Committee on Integrating the Science of Early Childhood Development, 2000, <https://pubmed.ncbi.nlm.nih.gov/25077268/>

Mexico are at heightened risk for adverse childhood experiences, and consequently, a plethora of potential resulting health issues for the rest of their lives.

c. Asylum seekers' vulnerability to sexual and physical abuse and assault while waiting for a CBP One App appointment involves serious health risks.

As discussed in Section i, asylum seekers are targeted by cartels for crimes of violence, including rape, shootings, kidnapping, sexual and physical assault, and murder. The CDC recognizes sexual violence as “a serious public health problem” that “profoundly impacts lifelong health, opportunity, and well-being.”⁵⁰ At least one study has found that people who were exposed to gun violence fatalities experienced relatively higher levels of depression and suicidal ideation than those not exposed.⁵¹

Physical or sexual abuse during a person's childhood is associated with increased risk of mental illness, suicide attempts and suicidal ideation, substance abuse, obesity, sexually transmitted infections, risky sexual behavior, and chronic diseases such as arthritis, ulcers, and migraines. Roughly half of people with bipolar disorder have experienced sexual assault. Additionally, “sexual assault is associated with shortened telomere lengths, which is a sign of cellular stress and aging.”⁵²

d. Asylum Seekers are forced to wait in unsafe, unhealthy housing, which contributes to adverse health outcomes.

Every day, thousands of asylum seekers experience homelessness and are forced to sleep on the streets in border towns. A home that lacks safety, shelter, or privacy is not healthy housing. Asylum seekers living and sleeping in the streets of Northern Mexico are experiencing the opposite of healthy housing. A lack of healthy housing contributes to adverse health outcomes, including: “asthma morbidity, tuberculosis, and developmental delay.” Heat waves in summer months are also a threat to asylum seekers' health. An inability to keep cool during extreme hot weather or to keep warm during cold weather can lead to serious illness and even death. The fact that some children cannot play outside because of gunshots and other dangers also raises obvious health concerns as children need exercise, fresh air, and light. Lack of light is related to depression.⁵³

⁵⁰ *Fast Facts: Preventing Sexual Violence*, Center for Disease Control and Prevention (CDC), last reviewed June 22, 2022, <https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html>

⁵¹ *Social Determinants of Health Summaries: Crime and Violence*, Office of Disease Prevention and Health Promotion, U.S. Department of Health and Human Services, <https://health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/crime-and-violence>

⁵² X. Li, J. Wang, J. Zhou, P. Huang, J. Li, *The Association Between Post-Traumatic Stress Disorder and Shorter Telomere Length: A Systematic Review and Meta-Analysis*, *Journal of Affective Disorders*, Volume 218, Pgs. 322-326, 2017, <https://www.sciencedirect.com/science/article/abs/pii/S0165032716317621>

⁵³ Office of the Surgeon General (US), *The Connection Between Health and Homes*, The Surgeon General's Call to Action to Promote Healthy Homes, 2009, <https://www.ncbi.nlm.nih.gov/books/NBK44199/>

D. Conclusion

The proposed DHS/DOJ rule, as written, will result in serious and substantial harm to asylum seekers. These harms include placing their personal safety at risk by attempting to enter the U.S. across dangerous conditions via the ocean, river or desert, and the continuous threats to safety and resulting harm to physical and mental health while attempting to secure an appointment through the CBP One App.

As a Medical-Legal Coalition group working toward achieving health equity for immigrants and marginalized communities, FALM, together with the other undersigned individuals and organizations, oppose the proposed rule in its entirety because of the unjust health consequences that will result from its implementation. Furthermore, FALM encourages DHS and DOJ to work toward alternative solutions to guarantee all fleeing persecution are able to exercise their legal right to apply for asylum and be welcomed with dignity.

Sincerely,

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