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March 27, 2023

**Via Electronic Submission**

Lauren Alder Reid, Assistant Director  
Office of Policy  
Executive Office for Immigration Review, Department of Justice  
Falls Church, VA

Daniel Delgado, Acting Director  
Border and Immigration Policy,  
Office of Strategy, Policy, and Plans,  
U.S. Department of Homeland Security  
Washington, D.C.

**RE: Comments in Opposition to the Joint Notice of Proposed Rulemaking entitled  
*Circumvention of Lawful Pathways*; [RIN: 1125-AB26 / 1615-AC83](#) / Docket No:  
USCIS 2022-0016 / A.G. Order No. 5605-2023**

Dear Assistant Director Reid and Acting Director Delgado:

The Texas Civil Rights Project (TCRP)<sup>1</sup> submits this comment to the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), and the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR) (“the Departments”) in response and opposition to the above-referenced Joint Notice of Proposed Rulemaking (“NPRM” or “the Rule”) issued by the agencies on February 23, 2023. This Rule will deny current and future asylum seekers from accessing protections under U.S. federal and international law, will result in the return of many refugees to harm, will leave others in the United States without stable protection, and will lead to family separations. A fair and equitable asylum system must be available for all those seeking refuge in this country – and this Rule denies them one. TCRP urges the Departments to rescind the Rule in its entirety.

The Texas Civil Rights Project is a 501(c)(3) legal advocacy organization with offices across Texas. TCRP is dedicated to defending the rights and dignity of all those in Texas in the courtroom, in partnership with our communities, and with meaningful policy changes. Since our founding in 1990, TCRP has fought for the rights of immigrants. We are lawyers and advocates for Texas communities, boldly serving the movement for equality and justice.

More specifically, TCRP’s Beyond Borders Program is dedicated to advancing human dignity, protecting freedom of movement, and advocating on behalf of Texas border communities, in

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<sup>1</sup> See *About TCRP*, TEXASCIVILRIGHTS.ORG (2019), <https://txcivilrights.org/about-us/>.



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particular immigrants. As U.S. border policies have changed dramatically in the last years, and continue to do so, TCRP has been at the forefront of protecting the right to seek asylum. During the height of the family separation crisis in 2018, TCRP intervened on behalf of asylum seekers and separated families, and we continue to work with them in the aftermath of their separation.

In January 2021, TCRP, along with the ACLU and other partner organizations, sued the Biden Administration on behalf of families subject to expulsion and denied asylum under Title 42.<sup>2</sup> As part of this litigation, TCRP conducted hundreds of intakes with asylum-seeking families, and we continue advocating for justice inside and outside the courts.

Because of our continued presence on the Texas – Mexico border and our on-the-ground work with asylum seekers, we have firsthand accounts of the harms caused along our border due to faults in our immigration system, especially when deterrence-based policies are implemented. This Rule, which is in line with the understood “foundation shift” that happened under the Trump Administration, makes denying access to our asylum system the status quo.<sup>3</sup> The Rule’s central function of deterrence illustrates this Administration’s continued adoption of a policy approach that is contrary to this Administration’s previously stated ideals – and whose “entire focus and the entire concept of controlling the border means reducing numbers.”<sup>4</sup> TCRP urges the Departments to rescind this Rule and instead focus on policies whose central function is to ensure access to a dignified asylum process.

## **I. TCRP objects to the limited comment period for the Rule.**

The Executive Orders<sup>5</sup> governing the regulatory process require federal agencies to “afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of *not less than 60 days*.” In this case, however, the agencies

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<sup>2</sup> See *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022); *Ord. Suspending Introduction of Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 85 Fed. Reg. 201 (Oct. 16, 2020), [https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons\\_Final\\_3-20-20\\_3-p.pdf](https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf). The Trump Administration relied on 42 U.S.C. § 265 to close the border and restrict immigration access, citing a public health emergency in light of the COVID-19 pandemic.

<sup>3</sup> Hamed Aleaziz, *News Analysis: Why the border may ‘never go back to what it was before Trump,’* L.A. TIMES (Mar. 2, 2023), <https://www.latimes.com/politics/story/2023-03-02/biden-asylum-proposal-trump>.

<sup>4</sup> *Id.*

<sup>5</sup> See *Exec. Order No. 12866*, 58 Fed. Reg. 190, Sec. 6(a)(2) (Sept. 30, 1993), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>; *Exec. Order No. 13563*, 76 Fed. Reg. 14, Sec. 2(b) (Jan. 18, 2011), [https://www.reginfo.gov/public/jsp/Utilities/EO\\_13563.pdf](https://www.reginfo.gov/public/jsp/Utilities/EO_13563.pdf).



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have provided only 30 days for the public to provide comment, and they have done so over the objection of more than 170 national, state, and local organizations.<sup>6</sup>

There is no compelling reason to shorten the minimum prescribed public comment period by 30 days. There is also no justification for denying an extension of the 30-day comment period requested by the 172 national, state, and local expert organizations who outlined the harms in providing only a 30-day comment period to this Rule.<sup>7</sup> The justification provided in the Rule and in your denial letter largely relies on the Administration's anticipation of the end of the Title 42 policy on May 11, when the COVID-19 public health emergency will expire. This justification makes little sense, however, given that the Biden administration itself tried to end the Title 42 policy nearly one full year ago, in April 2022,<sup>8</sup> and DHS announced publicly its efforts to prepare for the policy's end that same month.<sup>9</sup>

The end of Title 42 is no surprise, and because this Rule proposes sweeping changes to asylum law, it warrants a full comment period to consider its varied implications – especially in light of other restrictive immigration measures continued, reinstated, or adopted by this Administration. The 30 days provided are not enough time for TCRP to provide a thorough public comment on a Rule that will ensconce new restrictions in our asylum system and will cause inevitable harm to real individuals.

TCRP has staff located throughout the Rio Grande Valley, along the Texas – Mexico border and our team has a strong presence in the Hidalgo – Reynosa and Brownsville – Matamoros area, home to two of the top three ports of entry processing the largest number of people under CBP One.<sup>10</sup> Our team is heavily involved in coalition work with direct service providers and other humanitarian organizations working directly with asylum seekers in Mexico. With additional time, even the minimum 60 days required for a public comment, TCRP would have been able to submit on the ground testimonies pertaining to asylum seekers' experiences with CBP One, especially families and Black and Indigenous asylum seekers, who have been uniquely disadvantaged by DHS' reliance on an app.

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<sup>6</sup> Azadeh Erfani, *172 Organizations Call For Extension On Public Comment Period For Proposed Asylum Ban*, NAT'L IMMIGRANT JUST. CENTER (Mar. 1, 2023), <https://immigrantjustice.org/staff/blog/172-organizations-call-extension-public-comment-period-proposed-asylum-ban>.

<sup>7</sup> *Id.*

<sup>8</sup> *CDC Public Health Determination and Termination of Title 42 Order*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 1, 2022), <https://www.cdc.gov/media/releases/2022/s0401-title-42.html>.

<sup>9</sup> *Statement of U.S. Customs and Border Prot. Comm'r Chris Magnus Concerning Title 42*, U.S. CUSTOMS AND BORDER PROT. (Apr. 4, 2022), <https://www.cbp.gov/newsroom/speeches-and-statements/statement-us-customs-and-border-protection-commissioner-chris>.

<sup>10</sup> *Defendants' Monthly Report for the Month of January 2023 Pursuant to the Court's Preliminary Injunction at 6, Louisiana v. CDC*, 603 F.Supp.3d 406 (W.D. La. 2022).



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With additional time, TCRP would have been able to submit testimonies regarding the most recent experiences of harm and violence encountered by asylum seekers in the countries where they will now be expected to seek asylum – harms that will continue to be extended as they wait to confirm appointments through an app.

With time, TCRP would have also documented asylum seekers' ability to seek asylum in any of the applicable third countries through which they may have traveled, especially Mexico – including whether they would be safe in that country, how accessible that country's asylum system was to them, and whether they had any knowledge of or support in accessing that country's system. Our years of experience tell us the answer to those questions would likely be no.

With the minimum required comment period, TCRP would have developed a more thorough analysis of this Rule's harm in requiring individuals to undergo asylum screenings while in CBP custody. The implementation of the Rule mirrors the Trump Administration's PACR and HARP programs. Having been on the ground during PACR/HARP, and having directly advocated for individuals forced to seek asylum under these programs while in CBP custody, with additional time, TCRP would have more thoroughly elaborated on the unique harms in undergoing asylum processing in CBP custody.

## **II. Asylum should not be contingent on access to technology.**

The central function of this proposed Rule is to limit asylum eligibility at the southern border in various ways, but most central here, via an asylum seeker's access to technology. The proposed Rule conditions asylum, among other things, on people's ability to effectively access and use the CBP One application—a flawed mobile app through which individuals will be required to schedule appointments prior to presenting at a port of entry.

This Rule relies on a number of faulty assumptions regarding asylum seekers and technology. This Rule disadvantages the most vulnerable populations including families, Black and Indigenous asylum seekers, the most economically disadvantaged asylum seekers, and those who flee their home without the luxury of time or forethought (as tends to happen when an individual experiences persecution). Thus, the exclusion of any vulnerable population from our asylum system, especially due to their inability to successfully access technology, is contrary to the principle of non-discriminatory asylum access codified by the Refugee Act of 1980.

Furthermore, denying an asylum seeker access to our asylum system due to technicalities will directly place many in harm's way, in regions that have been proven dangerous. Inevitably, many



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asylum seekers will have to wait in Mexico – either while registering for CBP One, as well as confirming and then waiting for one of the few available appointments – the pattern that we have seen play out for months under CBP One’s Title 42 processing. And while asylum seekers have had to wait for an appointment in Mexico using the current glitch-y CBP One system, they have been robbed, assaulted, extorted, kidnapped, and killed.<sup>11</sup>

Since President Biden took office in January 2021, Human Rights First has tracked more than 13,480 reports of violent attacks on individuals blocked in or expelled to Mexico, including murder, kidnapping and rape.<sup>12</sup> Even U.S. citizens are not immune from the violence endemic to Mexican border towns,<sup>13</sup> while asylum seekers are expected to wait for weeks, months, or years in those same dangerous conditions. Many of the families with whom we have spoken in the Reynosa and Matamoros areas have been forced to seek shelter in open air encampments patrolled and preyed upon by cartels; they have suffered from lack of medical care, and have traveled with minors at risk for human trafficking. These asylum seekers have shared their experiences of having their children kidnapped, trafficked, threatened, and physically and sexually assaulted – and these threats continue every day they are denied access to our asylum system. Adults also reported being robbed, extorted, threatened, and being subjected to physical and sexual violence. These families have witnessed people disappear or die, both at home and in Mexico. This Rule incorrectly assumes that an asylum seeker has the time and safety necessary to register themselves and their family, and also confirm an appointment.

As noted above, this Rule’s reliance on access to technology inherently creates inequitable access to our asylum system and places asylum seekers in direct danger – and no technological updates will change that.

***a. Asylum seekers do not have equitable access to technology.***

Currently, CBP One is used throughout the southwest border to process Title 42 exemptions and, even in this limited roll out, the app has already proven extremely flawed.<sup>14</sup> Since its inception,

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<sup>11</sup> Jack Herrera, “*Fleeing For Your Life? There’s An App For That.*” TEX. MONTHLY (Mar. 2, 2023), <https://www.texasmonthly.com/news-politics/cbp-app-asylum-biden-administration>.

<sup>12</sup> Julia Neusner, Kennji Kizuka, & Eleanor Acer, *Evasion of Asylum Law and Title 42 Abuse Must End – and Never Be Reversed*, HUM. RTS. FIRST (Dec. 15, 2022), <https://humanrightsfirst.org/library/human-rights-stain-public-health-farce/>.

<sup>13</sup> Natalie Kitroeff, Maria Abi-Habib, Jack Nicas & Jacey Fortin, *A Trip to Mexico Ends in a Kidnapping and the Deaths of 2 Americans*, THE N.Y. TIMES (Mar. 7, 2023), <https://www.nytimes.com/2023/03/07/world/americas/americans-kidnapped-mexico.html>.

<sup>14</sup> Raul Pinto, *CBP One Is Riddled With Flaws That Make the App Inaccessible to Many Asylum Seekers*, IMMIGR. IMPACT (Feb. 28, 2023), <https://immigrationimpact.com/2023/02/28/cbp-one-app-flaws-asylum-seekers/?emci=c9fe0b55-bcb7-ed11-a8e0-00224832e811&emdi=43e52f43-37b8-ed11-a8e0-00224832e811&ceid=10978806>.





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TCRP has been working with our on the ground partners to monitor and advocate against CBP One's harms, especially as evidenced in the Hidalgo port of entry, and the Brownsville port of entry – which processes the largest exemption numbers.<sup>15</sup>

Through this monitoring, we have identified many systemic issues already present with the CBP One App – and these harms have been most evidenced in the most vulnerable populations. Reliance on CBP One for Title 42 exemptions has resulted in the most economically disadvantaged populations being excluded from the exemption process. For example, this Rule assumes all individuals have access to a cell phone to use the app, but we have systematically come across asylum seekers who do not have cell phones or whose cell phones are somehow incompatible with the CBP One app – like those with older phones or phones from manufacturers not used in the U.S. These individuals have asked to borrow phones from other asylum seekers to create their separate accounts – but this is difficult because those asylum seekers who do own compatible phones are constantly on the app trying to secure the elusive appointments themselves.

Through its current usage, we have seen economic disadvantages further impact all asylum seekers – including those who have cell phones compatible with the app – a problem which will continue through implementation of this Rule because the inequities persist. Having a cell phone does not, on its own, mean that an individual has wifi connectivity or cell phone minutes. Most asylum seekers do not have cell phone plans like we do in the U.S. – in fact, most countries from which asylum seekers originate do not have access to unlimited talking or data plans. Most asylum seekers TCRP has encountered at the busy Hidalgo and Brownsville ports only have access to purchasing a finite number of cell phone minutes or data usage at a time. Many times, they are forced to spend what little money they have to ensure cell phone connectivity instead of food or medication. The data usage they buy is usually used up in one day because asylum seekers will stay on the app all day long, refreshing the app – hoping that new appointments will show up in case there is a cancellation. All of the above assumes that asylum seekers are in an area where they actually have a stable cell service, which is spotty across Mexico and especially along the Texas – Mexico border.

Furthermore, access to wifi is similarly tenuous and expensive, and individuals are faced with the choice of having to spend limited money on wifi or other basic needs. Connectivity issues have already led to the exploitation of these vulnerable individuals in many instances – most recently, individuals in Mexico charged asylum seekers a thousand dollars for access to stable wifi to register and confirm appointments via CBP One – and exploitation like this is par for the course when deterrence measures are in place. Since CBP One's inception, the Departments have stated

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<sup>15</sup> *supra*, n.10.



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there will be a desktop version of the CBP One app available for asylum seekers. However, a desktop version of the app will not solve these basic accessibility issues and further lends itself to asylum seekers being preyed upon to access this technology.

This Rule also assumes that individuals have some awareness of how to navigate apps, but as we have witnessed with CBP One, many of the asylum seekers have no knowledge on how to use the app and have relied on advocates to successfully register and/or confirm appointments for them. Even those individuals who are somewhat tech savvy have also had problems navigating the app and confirming appointments – especially due to the app’s frequent and new technical glitches. A general unfamiliarity with app usage has further restricted many individuals’ willingness to lend their cell phones to other individuals, which in the past has led to glitches and to the cell phone owner’s CBP One application being deleted due to this lack of technological savvy.

To bridge this technological gap, our partners on the ground have had to teach individuals how to navigate the CBP One app, which has proven to be cumbersome and ripe with new glitches that appear daily. Our partners have had to support asylum seekers in registering themselves, their families, and with confirming appointments. However, advocates on the ground are limited and are not always able to assist the many individuals in need of support. Because of this pronounced need, many advocates, TCRP included, have put together training materials for individuals trying to access this app.<sup>16</sup> As part of this work, advocates are continually identifying, troubleshooting, and reporting new glitches in the app, as well as addressing external harms created by the required use of this app.

However, training materials and advocate support cannot fix the overall economic disadvantages impacting individuals’ ability to access our immigration system. They do not resolve the technological divide that is inherent among economically marginalized populations, they do not resolve the fact that the app is only available in a few languages also inaccessible to many vulnerable individuals, and they do not address the literacy gaps that exist within economically disadvantaged individuals – all of which will impermissibly impact a person’s ability to use the app and access our asylum system.

Further evidence of the particular harm technology-based requirements impose on particularly vulnerable individuals was presented on the first day of CBP One processing at the Brownsville port of entry. When it initially launched for Title 42 processing, the app was only available in English and Spanish – leaving out a large percentage of vulnerable populations who have no access

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<sup>16</sup> *Know Your Rights*, TEX. CIV. RIGHTS PROJECT, <https://www.txborderrights.org/english> (last visited Mar. 23, 2023).



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to English or Spanish. This led to many Black and Indigenous asylum seekers in line at the port of entry who did not have CBP One appointments, and, many were confused and unaware that CBP One even existed – they simply saw many of their fellow asylum seekers in line. Although the app later became available in Kreyol, that doesn't cure the initial inequity and exclusion experienced by these individuals or any subsequent harm – nor does it remedy the harms still being enacted due to ongoing exclusion. The app continues to be inaccessible to many indigenous language speakers, as well as many others, given that CBP One is available only in a handful of languages. Just asylum reforms would consider these baseline factors and provide protections ensuring the most vulnerable are safe. However, reforms like this Rule have instead focused on creating punitive systems that prioritize removals and “efficiency” over humane treatment and due process.

***b. CBP One's tech problems demonstrate that access to asylum should not be conditioned on access to technology.***

Even those with access to the app encounter a whole host of new problems once they have access. Users have reported<sup>17</sup> frequent glitches, including new glitches that pop up daily. These glitches prevent asylum seekers from completing their or their family's registration and prevent them from confirming one of the few available appointments. Even in Brownsville, the port of entry with the most available appointments per day, one day missed in confirming an appointment translates to at least a few extra weeks in Mexico – assuming the individual is later able to confirm appointments.

As noted, new glitches pop up in the app frequently, sometimes daily. These glitches result in error messages and in the app crashing, freezing or timing out for people – leading to failed registrations and failed appointment confirmations. Individuals accessing the app in Reynosa and Matamoros have also had frequent issues with the app's geolocation technology. In these two regions, many asylum seekers are forced to live in open air encampments right along Mexico's northern border with the U.S., but the app's geolocation technology frequently erroneously tags their location as being in the U.S. or somehow being outside of the geographic range permitted by the app. This problem has been a constant since the app's inception and continues to be a problem today, as evidenced by the screenshot of error messages received by asylum seekers just days before the deadline for filing of this comment.

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<sup>17</sup> Kate Morrissey, *Asylum seekers in Tijuana are scrambling through mobile app error messages for few appointments into the U.S.*, THE SAN DIEGO UNION-TRIBUNE (Jan. 22, 2023), <https://www.sandiegouniontribune.com/news/immigration/story/2023-01-22/cbp-one-app-asylum-tijuana>.





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**Cannot be programmed**

You are too close to the Mexico border to schedule an appointment at the port of entry.

**SUBMITTED – NOT SCHEDULED**

Don't forget to check back later for available timeslots to present at the port of entry!



These technological problems are not just concerning in terms of access, they also put asylum seekers through a stressful process that leads to deflated hopes at the end of every single day that these individuals and their families are unable to confirm an appointment.

Some recent examples of glitches we've encountered include problems with the photograph requirements of the app. Through various stages of CBP One's use for Title 42 exemptions, asylum seekers have had to take various versions of either a "live" photograph or submit a regular photograph to register in the app, access the app, and/or confirm appointments. New and emerging problems with the photograph requirements are constant.



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Since its inception, asylum seekers have had difficulty taking a photo that is acceptable to the app. For example, even when asylum seekers were successful in registering for the app, the app has required that a separate photo be captured in order for that individual to access the app and/or confirm appointments. However, there have been numerous instances where the app prevented an asylum seeker from even logging on – translating to delays in being able to confirm an appointment and seek safety. Many of the asylum seekers in Reynosa and Matamoros, and throughout the U.S. – Mexico border, live in open-air encampments with minimal light or cell and wifi connectivity. The app has consistently failed to capture the asylum seeker because there is not enough lighting where the asylum seekers is standing – but they have no access to appropriate lighting. This restricts their ability to access the app to certain daylight hours. However, we also identified difficulties with asylum seekers’ photos being captured appropriately during cloudy days – where the CBP One app did not “recognize” the asylum seeker trying to access their account, or did not recognize an asylum seeker trying to register for an account. Again, these delays result in individuals being unable to register or confirm appointments, leading to longer waiting times in dangerous conditions.

The problems with CBP One’s photo capturing technology are far more common for individuals with darker skin tones, especially Black asylum seekers.<sup>18</sup> Technology requiring forms of facial identification has proven to be inherently flawed and biased and should not be used for “serious decisions that have such major consequences on people’s lives.”<sup>19</sup> Along the U.S. – Mexico border, it is common for Black and other darker-skinned asylum seekers to spend hours trying to capture a photograph acceptable to the app. This has led to an economic burden and exclusion, as many have to continually pay for cellular data and/or wifi in order to connect to CBP One. This additional time spent also means time and days lost to not being able to get an appointment for themselves or their families – which translates to additional weeks of having to remain in dangerous conditions in Mexico.

Another recent issue, illustrative of the many varied issues that routinely pop up – the CBP One app failed to recognize asylum seekers trying to access their account unless they were wearing the exact shirt they wore when they first registered with CBP One. Although this problem appeared to be momentary, it is indicative of the many issues within the app that drive inequity. Fortunately, in this case, these asylum seekers still had access to the clothes they wore when they registered for the app, but not all do. Many individuals’ clothes are stolen or taken/thrown by the Mexican government if they clear out asylum seekers encampments. Many other asylum seekers are

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<sup>18</sup> Bernd Debusmann Jr., *At US border, tech issues plague new migrant applications*, BBC NEWS (Mar. 8, 2023), <https://www.bbc.com/news/world-us-canada-64814095>.

<sup>19</sup> *Id.*



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kidnapped or harmed in other ways that cause them to lose their clothing or the phones they use for CBP One.

Furthermore, because of these many varied issues, requiring the use of CBP One to access asylum will lead to asylum seekers being targeted for fraud. Asylum seekers have already received fraudulent emails supposedly confirming appointments, and requiring payments as part of the process. These fraudulent emails look official and advocates have had to confirm directly with CBP whether the information contained therein is true or not. Instances of fraud will continue because the Rule does not address the underlying problems already identified under CBP One.



With regards to the application sent via electronic mail, we are notifying [NAME], of the following communication, requiring the following payment amounts:

\$1,000 USD Thursday 23 of March 2023

\$950 USD Thursday 23 of March 2023

It is important to note that this communication was granted based on your good character as a person not nationalized within United States territory.

This communication requires strict compliance please comply and notify.



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*c. Reliance on technology like CBP One leads to separation of families.*

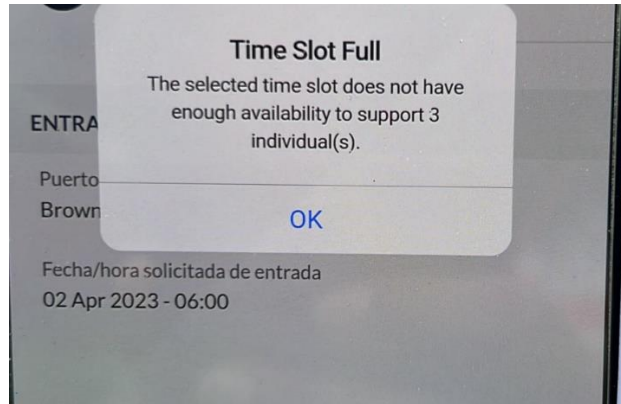
The use of CBP One for Title 42 processing has led to families being separated. First, the app's photo requirements have proven difficult for families, many of whom have been unable to capture an acceptable photograph of their children in the app, especially newborn or young children. This has led to delays in families being able to register themselves and their children, which then leads to further delays in their scheduling and confirming appointments, which leads to them being in Mexico longer under dangerous conditions.

The Rule states the Departments have determined that implementation of the "proposed rule would not impose a negative impact on family well-being or the autonomy of the family as an institution."<sup>20</sup> CBP One has already shown the Departments that this statement is inaccurate. In the Reynosa and Matamoros areas, which feed into the Hidalgo and Brownsville ports of entry, many families have been forced to separate in order to access our immigration system. Unable to complete registration or confirm appointments, these families – fearing for their children's safety and lives in Mexico – conclude that having their children present alone at the port of entry or otherwise cross the border alone is a safer option than having them continue to wait in Mexico.

In trying to secure CBP One appointments, families face a unique disadvantage. If an asylum seeker passes the first test and successfully registers every family member under one lead family member, they still face the challenge of having to secure appointments for every single member – as is required by CBP One for Title 42 exemptions, and as will be required under the Rule. However, because there are not enough appointments available to meet the demand, securing an appointment for a family of four or five (or more) members, as required by the Rule, is sometimes impossible. And, this Rule does not guarantee that the Departments will ensure enough appointment availability at all times to meet demand. So, as has happened during CBP One's use during the Title 42 exemption process, families have struggled, and will continue to struggle in order to obtain the required appointments for each family member. This, coupled with the constant threat of violence they face in Mexico, has led to families sending their children across, or in some cases, children making that impossible decision on their own to avoid their parents having to decide. These families' separations were the predicate for them to access our asylum system under CBP One – a trend that will inevitably continue due to this Rule's technology and appointment-based requirements.

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<sup>20</sup> Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11749 (proposed Feb. 23, 2023)(to be codified at 8 C.F.R. pt. 208).



Furthermore, although the rule offers possibilities for an asylum seeker subject to the Rule to not be separated from their family – the Rule itself does not guarantee family unity. In addition to the family separation risks inherent in simply trying to access an app-based asylum system, asylum seekers face additional family separation risks once within the asylum system set out by the Rule. Asylum seekers subject to the Rule who are unable to rebut the presumption, but who are ultimately successful in Convention Against Torture (CAT) or Withholding of Removal claims, would be unable to bring their families simply because they lacked access to this technology. Reliance on CBP One will absolutely lead to permanent family separations, as well as families stranded in harm’s way.

Again, the inequity and tech problems encountered through the CBP One app are aggravated by the fact that there are simply not enough appointments to meet the need – and that is likely to continue with this Rule. Not having enough appointments inherently creates inequity because experience has shown that an individual’s inability to confirm an appointment has been due to factors beyond their control – economic disadvantage, language ability, race, disability, being targeted in transit and/or in Mexico due to immutable characteristics, or being part of a family. These are the exact factors that warrant asylum protections under domestic and international law.

**III. Recent history shows the Rule’s implementation will lead to due process violations and other harms.**

As written, the Rule requires asylum seekers to go through its new asylum processing while in CBP custody – a practice first implemented by the Trump Administration under the Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP). By requiring this, the Departments are not only further entrenching this Trump era shift, but are also ignoring the long history of documented CBP abuse. Abuses by CBP officers, horrific conditions of





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detention in CBP jails, CBP's overall lack of accountability, and asylum seeker's lack of access to counsel,<sup>21</sup> are the norms underlying the operationalization of this Rule.

For those forced to undergo this screening while in detention, the obstacles to due process are so high as to render success unachievable for most, regardless of the merits of their asylum claim. In its review of PACR/HARP, the Department of Homeland Security Office of Inspector General noted that PACR/HARP are inconsistent with CBP detention standards and design.<sup>22</sup> The Government Accountability Office also issued reports highly critical of PACR/HARP, and included data showing that before PACR/HARP, 74% of individuals passed an initial asylum screening interview, compared to 19-29% who passed under PACR/HARP.<sup>23</sup> In a system where reducing the number of people is the priority, the Departments may laud these decreased passage rates, but the cost of this decrease is borne by real human beings with valid asylum claims who were denied an opportunity because their lives are not the policy priority.

Under the Rule, asylum seekers will be forced to have their fear interviews while in government custody in notoriously difficult<sup>24</sup> and abusive<sup>25</sup> conditions, with no prior knowledge as to the Rule's details or workings, and without ever having spoken to an attorney. CBP is notorious for denying asylum seekers access to attorneys, and also specifically denying attorneys access to asylum seekers.<sup>26</sup>

Data revealed in a congressional hearing showed that out of more than 4,700 asylum seekers placed into PACR and HARP, just 31 people managed to get a lawyer.<sup>27</sup> During PACR/HARP, TCRP attorneys were able to speak with only a handful of asylum seekers – all of whom underwent their credible fear interview without access to an attorney, and all of whom required medical attention. During our attempts to intervene on their behalf, TCRP experienced many obstacles in representing and even just speaking with our detained clients placed in the program. TCRP was only able to speak with asylum seekers over the phone, and we experienced difficulties in coordinating calls.

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<sup>21</sup> "They Treat You Like You Are Worthless" *Internal DHS Reports of Abuses by US Border Officials*, HUM. RTS. WATCH (Oct. 21, 2021), [https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials#\\_ftn53](https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials#_ftn53).

<sup>22</sup> See DHS OIG, *DHS Has Not Effectively Implemented the Prompt Asylum Pilot Programs*, OIG-21-16 (2021), <https://www.oig.dhs.gov/sites/default/files/assets/2021-01/OIG-21-16-Jan21.pdf>.

<sup>23</sup> Am. Immigr. Council, *Asylum Is In Danger After Court Upholds Rushed Screening Process at the Border*, IMMIGR. IMPACT (Dec. 14, 2020), <https://immigrationimpact.com/2020/12/14/asylum-pacr-harp-court-decision/>.

<sup>24</sup> *Challenging Unconstitutional Conditions in CBP Detention Facilities*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/litigation/challenging-unconstitutional-conditions-cbp-detention-facilities> (last visited Mar. 26, 2023).

<sup>25</sup> *supra*, n. 21.

<sup>26</sup> *Id.*

<sup>27</sup> *supra*, n. 22.



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Furthermore, asylum seekers confirmed they were uncomfortable detailing certain parts of their experience (as necessary for their asylum claims) over the phone because CBP officers, or other asylum seekers, were within hearing distance. In a few occasions, asylum seekers noted that CBP officers were standing immediately next to them as they were attempting to have confidential conversations with their attorneys, and the asylum seekers felt intimidated. As previously noted, instances of abuse are not uncommon for CBP officers, and yet these same officers will be the only ones with access to asylum seekers while they're undergoing the Rule's processes.

This Rule's prioritization of efficiency means that the number of individuals with access to our asylum system will plummet. But, TCRP's experience on the ground tells us what those numbers mean. Those are asylum seekers with valid claims who were simply unable to navigate the bureaucracy. They included indigenous people fleeing persecution, as well as individuals fleeing political and religious persecution – including a mother and her young child, a sexual abuse survivor, who fled their home due to persecution experienced for speaking up against sexual violence against children. All of them were deported under PACR/HARP while TCRP attorneys attempted to intervene on their behalf – an example of the cost of “efficiency.”

The harms of this Rule will be further exacerbated because the Rule provides no guarantees that it will not be coupled with other harmful policies, like this Administration's fast tracked asylum screenings<sup>28</sup> or the Interim Final Rule.<sup>29</sup> On the contrary, it is likely that many individuals will be submitted to the Kafkaesque interplay of these punitive policies, further leading to individuals with valid asylum claims being denied access to our system and sent to harm's way.

#### IV. Conclusion

TCRP strongly opposes the proposed Rule because it violates the existing statutory framework and mandate of the Departments to protect and provide a fair process to asylum seekers. Our goal should be to uphold and strengthen our asylum laws and truly offer protection for those seeking refuge. President Biden's Executive Order No. 14012 underscored our supposed character as a “nation of opportunity and welcome.”<sup>30</sup> To ensure we are a nation of welcome, we should readily

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<sup>28</sup> *Human Rights First Condemns Administration Plan to Fast-Track Asylum Screenings*, HUM. RTS. FIRST (Jan. 27, 2023), <https://humanrightsfirst.org/library/human-rights-first-condemns-administration-plan-to-fast-track-asylum-screenings/>.

<sup>29</sup> Rebecca Gendelman, *Rushed Timelines, Inadequate Access to Legal Representation Impede Meaningful Opportunity to Seek Asylum Under New Asylum Processing Rule*, HUM. RTS. FIRST (Oct. 21, 2022), <https://humanrightsfirst.org/library/rushed-timelines-inadequate-access-to-legal-representation-impede-meaningful-opportunity-to-seek-asylum-under-new-asylum-processing-rule/>.

<sup>30</sup> See *Exec. Ord. No. 14012*, 86 Fed. Reg. 23, 8277 (Feb. 2, 2021) (stating “it is essential to ensure that our laws and policies encourage full participation by immigrants . . .” and “that immigration processes and other benefits are delivered effectively and efficiently). *But see* Julia Neusner & Kennji Kizuka, *A Shameful Record: Biden Admin. 's Use of Trump Policies Endangers People Seeking Asylum*, HUM. RTS. FIRST (Jan. 13, 2022),



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receive those who have fled persecution and violence. The Departments should immediately rescind this Rule.

Thank you for considering these comments in response and opposition to this Rule.

Sincerely,

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