March 27, 2023

Submitted via: https://www.regulations.gov/commenton/USCIS-2022-0016-0001

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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 Acting Director Delgado and Assistant Director Reid:

Project ANAR (Afghan Network for Advocacy and Resources) submits this comment in response to the Department of Homeland Security (DHS) and Department of Justice (DOJ)'s proposed rule published in the Federal Register on February 23, 2023, that would effectively ban countless families and individuals from accessing safety and family reunification in the United States. The proposed rule is a new version of similar asylum bans promulgated by the Trump administration that were repeatedly struck down by federal courts as unlawful.

Project ANAR is submitting the following comments 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 agencies") in response and opposition to the above-referenced Notice of Proposed Rulemaking ("NPRM" or "the Rule") issued by the agencies on February 23, 2023. We strongly oppose the Proposed Rule, which will prevent current and future asylum seekers from accessing protection they merit under domestic and international law, result in the return of many refugees to harm, and leave others in the United States without stable protection.

Project ANAR urges EOIR and DHS to withdraw the Rule in its entirety and ensure that a full and fair asylum system is made accessible to all those who seek refuge in the United States. Project ANAR is an Afghan community immigration justice organization that works nationally in the U.S. and directly assists Afghan asylum-seekers primarily in California. Our organization was founded specifically to assist Afghans seeking family reunification and refuge in the United

States. We have directly assisted more than 1,500 Afghans outside of the U.S., including those applying for Humanitarian Parole. The barriers faced by Afghans in accessing those protections from Afghanistan and in third countries have forced Afghans to make the journey to the southern border. This proposed rulemaking would directly harm the Afghans we assist.

Introduction and Overview of the Rule

The proposed Rule incorporates a new, sweeping ground of ineligibility for asylum seekers arriving at the U.S. southern border who did not seek asylum in a country of transit and/or did not obtain an appointment to present at the border using a mobile phone application known as "CBP One." Government officials have privately acknowledged that this Rule will constitute a foundational shift in the U.S. asylum system, making access to asylum at the southern border the exception rather than the norm.

The proposed Rule provides that people arriving at the southern border without permission to enter will be presumed ineligible for asylum if they did not seek and receive a denial of asylum in a transit country or countries, and/or if they entered between ports of entry or at a port of entry without having obtained an appointment via a mobile application called CBP One. People subject to the Rule must "rebut" this presumption by showing the presumption was incorrectly applied to them or they fall within an exception to the rule, including rape survivors, trafficking victims, and those facing acute emergencies or other "exceptionally compelling circumstances." Those who fail to rebut the presumption will be swiftly deported unless they can meet a heightened standard to establish their fear of return. Even then, those who meet this heightened standard will only be permitted to seek a lesser form of protection than asylum, known as withholding of removal or protection under the Convention Against Torture. These lesser forms of protection provide no path to citizenship, expose people to the perennial risk of removal to other nations, and proscribe their ability to petition for reunification with their spouse or children.

The proposed Rule violates U.S. obligations under both domestic and international law, which ensure access to protection for people fleeing persecution. Prior to the Rule's issuance, nearly 300 civil society organizations, more than 150 faith-based organizations, and nearly 80 members of the House and Senate called on the Administration to abandon its plans to resurrect these Trump-era asylum bans.

Project ANAR offers large-scale full scope and pro se representation to Afghan asylum seekers. It is because of U.S. policy failures that Afghans who were evacuated by the U.S. are now forced through the burdensome, difficult, and backlogged asylum process. Nearly 80,000 Afghans in the U.S. are coming up against the expiration of their temporary status and must all seek asylum at once. We have clients who include disabled Afghans, unaccompanied children, and large

families. Our clients are vulnerable and already face barriers because of the trauma they have lived through and are forced to recount. Our clients are all separated from loved ones in Afghanistan, and need to access permanent protections here to begin reuniting with family. This rule will add another barrier to family reunification.

This new rule will force us to use additional time and resources to update our training, our community resources in multiple languages, and also to address and possibly amend or supplement pending asylum applications.

In the preamble to the Rule, the agencies highlight the pressures at the border caused by increasing arrivals. The United States is not alone in facing these pressures; the world faces record global displacement caused by political instability and oppression, violence, and climate change. However, the U.S. government does not need to respond to these pressures by implementing increasingly restrictive measures such as this Rule. Many humane and practical solutions are available to the administration including increasing funding to and coordination with civil society organizations providing respite on the border and throughout the United States.

Our organization is one of the only Afghan community organizations that offers direct legal services. This allows us to assist Afghans and offer technical assistance to other legal services providers assisting Afghans. We have a pro bono network of hundreds of attorneys and a significant portion of our work involves volunteer training and supervision, and community education for Afghans and those who serve Afghans. For this reason, we are increasingly a resource for those who assist Afghans who arrived via the U.S.-Mexico border. We have rapidly expanded our capacity to meet this need, and will continue to do so. Project ANAR and others we work with are nimble, flexible, and adaptive, and have support from countless community members who seek to welcome new Afghans. The administration can support our work by promoting access to counsel and allowing organizations like ours to distribute resources to asylum seekers.

Project ANAR represents or has represented Afghans in expedited removal proceedings, and those in detained and non-detained removal proceedings. Our clients and others report that CBP and ICE officers consistently obtain the wrong interpreter for them. Afghans speak Dari (the Afghan dialect of Persian) and Pashto, but CBP notes their language as either Arabic or Farsi, the Iranian dialect of Persian that is not the best language for Afghans. The same language issues are encountered by Afghans in front of ICE, USCIS, and EOIR. This fundamental lack of language access gives us serious concerns for the ability of DHS and EOIR offices to properly assess for exceptions to the rule. The detention setting already imposes barriers to due process, and hinders access to counsel. It is a reflection of the barriers in place–that this proposed rule would only worsen–that many applicants do not ultimately win their cases. It is not a reflection of the validity or the strength of their claims.

Objection to limited comment period

Executive Orders governing the regulatory process (Executive Order 12866 and 13563) 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 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.

The agencies have provided no compelling reason to truncate the public comment period in this way. The justification provided in the rule 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 formally sought to end the Title 42 policy nearly one full year ago, in April 2022 and the Department of Homeland Security announced publicly its efforts to prepare for the policy end that same month.

The shortened comment period significantly hindered our ability to review our cases and fully assess the impact this rule would have on our clients, so our comments are limited in their ability to fully convey the harm this rule would cause us.

Concerns regarding domestic and international refugee and asylum law obligations

The United States is obligated to the requirements of the international Refugee Convention by virtue of its 1967 Protocol. Congress codified these obligations through the Refugee Act of 1980, which provides any person arriving at a U.S. border the right to seek asylum, regardless of their status or manner of entry. The central function of this proposed Rule is to limit asylum eligibility at the southern border based on a person's manner of entry or transit, their ability to access technology, and/or the number of appointments that DHS decides to make available on a given day. The presumption of ineligibility that arises from this function directly contravenes the principle of non-discriminatory asylum access codified by the Refugee Act.

Indeed, this central premise of the Rule recalls similar bans issued by the Trump administration, which were repeatedly struck down by federal courts. During the time it was in place, the Trump-era rule that banned asylum seekers based on their manner of transit resulted in migrants with strong claims to asylum being rapidly deported to their persecutors, and separated countless families when refugees barred from asylum under the rule obtained lesser protections that did not allow them to apply for family members abroad. These harms will inevitably recur under the proposed Rule.

This rule effectively circumvents domestic and international norms with regards to access to asylum. The administration should instead uphold refugee law, restore full access to asylum at ports of entry, ensure fair and humane asylum adjudications, and rescind the Trump administration entry and transit bans in their entirety. Project ANAR urges the administration to expand accessible pathways for those who need protection, including through the USRAP program and accessible parole programs. Those can only serve as a complement to, not a replacement for, asylum access at the border.

Concerns regarding the CBP One app and making asylum access contingent on access to technology

The proposed Rule introduces an entirely new concept into the U.S. asylum system – it renders asylum at the southern border contingent on migrants' ability to access and properly utilize a mobile phone app prior to their arrival. All asylum seekers attempting to enter the United States between ports of entry and those arriving at ports who are subject to the new transit grounds of ineligibility will be ineligible for asylum unless they made an advance appointment to present at the port of entry using the CBP One app.

Requiring access to technology to secure asylum access fails to account for gaps in technology, language access, and economic disparities between groups of migrants attempting to use the app while fleeing harm. The result will be an asylum system that leaves behind those with fewer resources, often those in the greatest need.

It is deeply concerning that access to asylum is limited based on one's access to technology. Furthermore, it is discriminatory that the app is not available in the full scope of languages that asylum seekers speak. The Afghans we assist inconsistently have access to smartphones, at best. The majority of our clients are not fluent in English and have varying literacy skills, and the CBP One App is not available in any of the languages that Afghans speak.

Furthermore, the CBP One app in its limited roll-out has already proven extremely flawed: users have reported frequent glitches and appointments that fill up before they can access them; and the facial recognition technology is racially disparate in application, often rejecting photos of migrants with darker skin.

As an Afghan community organization, we do not take lightly that such technology is an extension of the surveillance to which our communities have been subject in the United States, both as Afghans and as Muslims. The reality is that these technologies are often inequitable and these reports demonstrate the racial biases inherent in the process. We also cannot underscore

enough our concerns that asylum seekers will be forced to disclose their details in such a non-secure setting and while living in uncertainty, likely in temporary shelter and with little privacy. Our most vulnerable community members, who are fleeing harm in Afghanistan, and seeking family reunification and safety here in the United States, should not be subject to submitting such sensitive information prior to entering the United States.

New limited parole pathways are not a replacement for asylum access at the border

As a threshold matter, this Rule pits individuals exercising their lawful right to seek asylum at the U.S. border against individuals who can afford to apply for parole programs — describing only the latter as using "lawful" pathways. This distorts domestic and international asylum law and undermines the Biden administration's own commitment to protect the right to asylum.

The proposed Rule attempts to justify a restrictionist approach to asylum access at the border by referring to new limited parole programs the administration has unrolled which allow a capped number of Ukrainians, Venezuelans, Haitians, Cubans and Nicaraguans to come to the United States on a time-limited parole grant. As the National Immigrant Justice Center and many other civil rights organizations have noted, parole pathways are welcome and important in the larger context of U.S. immigration policy, they should never be considered a replacement or substitute for non-discriminatory access to asylum at the border.

The new parole programs require people to apply from their country of origin or a nearby country, while seeking a passport from the government that may be persecuting them and arranging air travel and sponsorship in the United States. Practically, this means those who are in most desperate need of protection and whose flight is the most urgent will not be able to utilize the parole programs.

Our organization has led a coalition of more than 200 organizations in requests for an accessible, functional, and equitable parole process and also requested a parole program formally in October 2021, December 2021, and February 2022. We understand that parole is a discretionary authority that can and must be used to bring large groups of people to safety, especially as we wait for the USRAP program to be rebuilt and scaled to meet the needs of countless humanitarian crises. However, the fact that Afghans have made this journey to the border is a testament to the shortcomings of any existing pathways. Even if the administration creates an Afghan parole program, Afghans and others will be forced to make this journey. The response cannot be to shirk responsibility and turn them away.

Even for Afghans that received parole through the U.S. evacuation, and arrived under Operation Allies Welcome or Operation Allies Refuge, parole is only a temporary protection. The reality is that the parole status that nearly 80,000 Afghans evacuated to the U.S. have, is temporary, and

leads to instability and uncertainty. One of our organization's priorities is to serve this population of Afghans and assist them with pursuing permanent protections here.

There is no clear pathway to extension of parole or reparole, and the traditional parole process requires financial resources which most refugees and asylum seekers do not have. It is also ignorant of the realities that someone who is seeking asylum and cannot avail themselves of their government's protection will likely face challenges in obtaining documentation like passports. While parole must be utilized as a pathway, it cannot become the norm as it still limits who can access safety.

Realities of asylum access in Mexico and other transit countries

The proposed Rule bans migrants from asylum eligibility if they arrive at the southern border and did not receive a denial of asylum in a country of transit. In addition to contravening what the Ninth Circuit Court of Appeals has referred to as a "long line of cases" holding that failure to apply for asylum in a transit country "has no bearing on the validity of a [person's] claim for asylum in the United States," this ban in practice constitutes a nearly categorical bar to asylum access at the southern border. The bar will apply to the vast majority of African, Caribbean, Central American, and Latin American asylum seekers arriving at the southern border because of the lack of meaningful asylum systems in Mexico and other common transit countries.

Deficiencies and abuses in Mexico's asylum system are well documented, and those who do attempt to stay and try to seek protection in Mexico endure systematic violence and discrimination against migrants. Other common transit countries including Guatemala, El Salvador, Honduras, and Nicaragua, are no less protective. As noted asylum scholar Karen Musalo recently explained: "...[N]ot one of the four countries has anything approaching an adequate refugee protection system. Guatemala's system has been described as 'inadequate' and cumbersome, and El Salvador's as having 'major regulatory and operational gaps.' The system in Honduras is 'nascent,' and those individuals who try to access it, especially women, children, and LGBTQ+ individuals, are especially vulnerable to abuse and sexual exploitation. Nicaragua is even more of an outlier, having ceased any cooperation with the UNHCR; in 2015 it suspended meetings of its refugee determination body, the National Commission for Refugees."

Those who do attempt to seek asylum in Mexico or another country of transit will likely be forced to wait in conditions that are particularly dangerous for migrants for months or years while their application is adjudicated. Human Rights First has tracked more than 13,480 reports of violent attacks on migrants blocked in or expelled to Mexico, including murder, kidnapping and rape, since President Biden took office in January 2021. Even U.S. citizens are not immune from the violence endemic to Mexican border towns, while asylum seekers are expected to wait for weeks, months, or years in those same dangerous conditions. Furthermore, it is well

documented that many of the common transit countries along the journey to the United States' southern border are particularly perilous for women and LGBTQI+ migrants, who are vulnerable to the same gender-based violence many of them fled in the first place.

Compromised due process and access to counsel

The proposed Rule will be implemented during the expedited removal process, where asylum seekers are swiftly deported without a day in court if they do not pass their fear screenings. During the threshold fear interview, asylum seekers will be required to show that the ban does not apply to them or, if it does, that they can rebut the presumption of ineligibility by proving they fall within one of the Rule's exceptions. Those who cannot rebut the presumption will then be forced to meet a "more likely than not" standard just to be able to present a claim to lesser protections in the form of withholding of removal or CAT protection.

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. Asylum seekers will be forced through their fear interviews while in government custody in notoriously difficult and abusive conditions, without prior knowledge as to the Rule's details or workings, and only a few hours or days away from the dangers and horrors of their flight. Even if legal service providers are able to obtain the ability to provide brief orientation or consultation services prior to a credible fear interview, there will be no meaningful access to representation for refugees navigating this complex process.

As mentioned above, Project ANAR has represented detained Afghans remotely, and witnessed the abysmal language access they face, the retraumatization they experience, and the medical challenges and stress they experience that impact their recollection. We have represented several detained Afghans and been reached out to by even more, and only once have they been able to make contact with us prior to having their Credible Fear Interview. Their interviews were rapidly scheduled, with little notice, and little ability to thoroughly prepare. Such processes are conducive to serious due process violations.

During a visit to court for one of our clients, a Project ANAR attorney noticed that the Immigration Judge sought an Arabic interpreter, despite having at least 6 Dari-speaking Afghans on the docket. Such routine errors, especially when there are no advocates present, produce systemic problems for the communities that we assist, and would only be heightened under the process proposed by this rule.

Conclusion

Project ANAR strongly opposes the proposed rule because it violates the existing statutory framework and mandate of the Departments to protect and provide fair process to asylum seekers. We strongly oppose this rule, because it will prevent Afghans and others from accessing family reunification and safety. As an Afghan community immigration justice organization, we know very well that parole, USRAP, and other pathways must be made accessible. However, there will never be an excuse for the failure to welcome those who seek asylum at the border. The U.S. cannot for any reason abandon its legal responsibilities and the administration must turn its back on restrictive Trump era policies. The Departments should immediately rescind the NPRM.

Thank you for considering these comments in response and opposition to this NPRM, and please contact Project ANAR to provide any additional information you might need. We look forward to your response.

Sincerely,
Project ANAR