



DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

[CIS No. 2744-23; Docket No: USCIS 2022-0016]

RIN 1615-AC83

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003 and 1208

[A.G. Order No. 5660-2023]

RIN 1125-AB26

Circumvention of Lawful Pathways

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

**ACTION:** Final rule; request for comments on expanded applicability in maritime context.

**SUMMARY:** The Department of Homeland Security (“DHS”) and the Department of Justice (“DOJ”) are issuing a final rule in anticipation of a potential surge of migration at the southwest border (“SWB”) of the United States following the termination of the Centers for Disease Control and Prevention’s (“CDC”) public health Order. The rule encourages migrants to avail themselves of lawful, safe, and orderly pathways into the United States, or otherwise to seek asylum or other protection in another country through which they travel, thereby reducing reliance on human smuggling networks that exploit migrants for financial gain. The rule does so by introducing a rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel. In the absence of such a measure, which would apply only to those who enter at the southwest land border or adjacent coastal borders during a limited, specified date range, the number of migrants expected to travel

without authorization to the United States would be expected to increase significantly, to a level that risks undermining the Departments' continued ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system, in the face of exceptionally challenging circumstances. Coupled with an expansion of lawful, safe, and orderly pathways into the United States, the Departments expect the rule to lead to a reduction in the number of migrants who seek to cross the SWB without authorization to enter, thereby reducing the reliance by migrants on dangerous human smuggling networks, protecting against extreme overcrowding in border facilities, and helping to ensure that the processing of migrants seeking protection in the United States is done in an effective, humane, and efficient manner. In addition, the Departments are requesting comment on whether applicability of the rebuttable presumption should be extended to noncitizens who enter the United States without documents sufficient for lawful admission during the same temporary time period at a maritime border.

**DATES:** *Effective date:* This rule is effective on May 11, 2023.

*Comment period for solicited comments:* Comments on expanded applicability in maritime context identified in Section V of this preamble must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The electronic Federal Docket Management System will accept comments before midnight eastern time at the end of that day.

**ADDRESSES:**

*Docket:* To view comments on the proposed rule that preceded this rule, search for docket number USCIS 2022-0016 on the Federal eRulemaking Portal at <https://www.regulations.gov>.

*Comment period for solicited additional comments:* You may submit comments on the specific issue identified in Section V of this preamble via the electronic Federal Docket Management System at <https://www.regulations.gov>, to DHS Docket Number USCIS 2022-0016. Follow the website instructions for submitting comments. Comments submitted in a

manner other than the one listed above, including emails or letters sent to the Departments' officials, will not be considered comments on the rulemaking and may not receive a response from the Departments. Please note that the Departments cannot accept any comments that are hand-delivered or couriered. In addition, the Departments cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs or USB drives. The Departments are not accepting mailed comments at this time. If you cannot submit your comment by using <https://www.regulations.gov>, please contact the Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (240) 721-3000 (not a toll-free call) for alternate instructions.

**FOR FURTHER INFORMATION CONTACT:**

For DHS: Daniel Delgado, Director, Border and Immigration Policy, Office of Strategy, Policy, and Plans, U.S. Department of Homeland Security; telephone (202) 447-3459 (not a toll-free call).

For Executive Office for Immigration Review ("EOIR"): Lauren Alder Reid, Assistant Director, Office of Policy, EOIR, Department of Justice, 5107 Leesburg Pike, Falls Church, VA 22041; telephone (703) 305-0289 (not a toll-free call).

**SUPPLEMENTARY INFORMATION:**

**I. Public Participation**

Interested persons are invited to submit comments on the specific issue identified in Section V of this preamble by submitting relevant written data, views, or arguments. To provide the most assistance to the Departments, comments should explain the reason for any recommendation and include data, information, or authority that supports the recommended course of action. Comments must be submitted in English, or an English translation must be provided. Comments submitted in a manner other than those listed above, including emails or letters sent to the Departments' officials, will not be considered comments on the rulemaking and may not receive a response from the Departments.

*Instructions:* If you submit a comment, you must submit it to DHS Docket Number USCIS 2022-0016. All submissions may be posted, without change, to the Federal eRulemaking Portal at <https://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to the Departments. The Departments may withhold information provided in comments from public viewing that they determine may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice available at <https://www.regulations.gov>.

## **II. Executive Summary**

### *A. Purpose of Action*

Economic and political instability around the world is fueling the highest levels of migration since World War II, including in the Western Hemisphere. Analysis by the DHS Office of Immigration Statistics (“OIS”) found that even while CDC’s Title 42 public health Order<sup>1</sup> has been in place, encounters at our SWB<sup>2</sup>—referring to the number of times U.S. officials encounter noncitizens<sup>3</sup> attempting to cross the SWB of the United States without authorization to do so—reached an all-time high in 2022, driven in large part by an

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<sup>1</sup> See Public Health Determination and Order Regarding Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 87 FR 19941, 19941–42 (Apr. 6, 2022) (describing the CDC’s recent Title 42 public health Orders, which “suspend[] the right to introduce certain persons into the United States from countries or places where the quarantinable communicable disease exists in order to protect the public health from an increased risk of the introduction of COVID-19”).

<sup>2</sup> United States Government sources refer to the U.S. border with Mexico by various terms, including “SWB,” “the southern border,” “U.S.-Mexico border,” or “the land border with Mexico.” In some instances, these differences can be substantive, referring only to portions of the border, while in others they simply reflect different word choices. The “southern border” is both a land and maritime border extending from beyond California to the west to beyond Florida to the east. This rule applies along the entirety of the U.S. land border with Mexico, referred to in the regulatory text as the “southwest land border,” but the Departments use different terms in the preamble to describe the border. This is in large part to reflect the source material supporting the rule, but the Departments believe that the factual circumstances described in the preamble call for applying the rule across the entirety of the U.S. land border with Mexico, referred to throughout as the “SWB.” As discussed in greater detail below, the Departments believe that the factual circumstances described in this preamble call for applying the rule to coastal borders adjacent to that land border as well; accordingly, this final rule applies to those who enter the United States from Mexico, whether at the southwest land border or adjacent coastal borders.

<sup>3</sup> For purposes of this discussion, the Departments use the term “noncitizen” to be synonymous with the term “alien” as it is used in the Immigration and Nationality Act. See INA 101(a)(3), 8 U.S.C. 1101(a)(3); *Barton v. Barr*, 140 S. Ct. 1442, 1446 n.2 (2020).

unprecedented exodus of migrants at different times from countries such as Brazil, Colombia, Cuba, Ecuador, Haiti, Nicaragua, Peru, and Venezuela.<sup>4</sup> The U.S. Border Patrol (“USBP”) completed 221,710 encounters between ports of entry in December 2022, second only to May 2022 (224,371 encounters) for the most monthly encounters since at least Fiscal Year (“FY”) 2000 (the period for which detailed records are available), and very likely the most ever.<sup>5</sup> Daily encounters between Ports of Entry (“POEs”) averaged 7,152 for December 2022 and exceeded 8,000 per day 11 times during the month, as compared to average daily encounters of 1,977 for all of 2000–2019 and average daily encounters of 1,265 in the immediate pre-pandemic period, 2014–2019.<sup>6</sup> Smuggling networks enable and exploit this unprecedented movement of people, putting migrants’ lives at risk for smugglers’ financial gain.<sup>7</sup> Meanwhile, the current asylum system—in which a high number of migrants are initially determined eligible to pursue their claims, even though most ultimately are not granted asylum in the subsequent EOIR removal proceedings<sup>8</sup>—has contributed to a growing backlog of cases awaiting review by asylum officers (“AOs”) and immigration judges (“IJs”). The practical result of this growing backlog is that those with meritorious claims may have to wait years for their claims to be granted, while individuals who are ultimately denied protection may spend years in the United States before being issued a final order of removal.<sup>9</sup> As the demographics of border encounters have shifted in recent years to include larger numbers of non-Mexicans—who are far more likely to assert

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<sup>4</sup> OIS analysis of OIS Persist Dataset based on data through March 31, 2023; OIS analysis of historic U.S. Border Patrol data.

<sup>5</sup> OIS analysis of OIS Production data based on data through March 31, 2023.

<sup>6</sup> OIS analysis of OIS Production data for fiscal year (“FY”) 2000–March 2023 and OIS Yearbook data for FY 1925–FY 1999. As discussed further below, daily encounters between ports of entry fell sharply in January 2023 following the launch of the Cuba, Haiti, and Nicaragua parole processes, and daily encounters between ports of entry at the SWB averaged just over 5,200 a day the 30 days ending April 10, 2023. OIS analysis of Unified Immigration Portal (UIP) data pulled on April 13, 2023.

<sup>7</sup> Miriam Jordan, *Smuggling Migrants at the Border Now a Billion-Dollar Business*, N.Y. Times, July 25, 2022, <https://www.nytimes.com/2022/07/25/us/migrant-smuggling-evolution.html>.

<sup>8</sup> See EOIR, Executive Office for Immigration Review Adjudication Statistics: Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim (Jan. 16, 2023), <https://www.justice.gov/eoir/page/file/1062976/download>. The EOIR adjudication outcome statistics report on the total number of cases originating with credible fear claims resolved on any ground in a FY, without regard to whether an asylum claim was adjudicated. The asylum grant rate is a percentage of that total number of cases.

<sup>9</sup> OIS analysis of EOIR data as of March 31, 2023.

asylum claims—and as the time required to process and remove noncitizens ineligible for protection has grown (during which individuals may become eligible to apply for employment authorization), the deterrent effect of apprehending noncitizens at the SWB has become more limited.<sup>10</sup>

While the CDC’s Title 42 public health Order has been in effect, migrants who do not have proper travel documents have generally not been processed into the United States; they instead have been expelled to Mexico or to their home countries under the Order’s authority without being processed under the authorities set forth in Title 8 of the United States Code, which includes the Immigration and Nationality Act (“INA” or “the Act”). When the Order is lifted, however, the United States Government will process all migrants into the United States under Title 8 authorities, as required by statute. At that time, the number of migrants seeking to cross the SWB without authorization is expected to increase significantly, unless other policy changes are made. Such challenges were evident in the days following the November 15, 2022, court decision that, had it not been stayed on December 19, 2022, would have resulted in the lifting of the Title 42 public health Order effective December 21, 2022.<sup>11</sup> Leading up to the expected termination date, migrants gathered in various parts of Mexico, including along the SWB, waiting to cross the border once the Title 42 public health Order was lifted.<sup>12</sup> According to internal Government sources, smugglers were also expanding their messaging and recruitment efforts, using the expected lifting of the Title 42 public health Order to claim that the border was

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<sup>10</sup> For noncitizens encountered at the SWB in FY 2014–FY 2019 who were placed in expedited removal, nearly 6 percent of Mexican nationals made fear claims that were referred to U.S. Citizenship and Immigration Services for adjudication, compared to nearly 57 percent of people from Northern Central America (*i.e.*, El Salvador, Guatemala, and Honduras), and just over 90 percent of all other nationalities. OIS analysis of Enforcement Lifecycle data as of December 31, 2022. Of note, according to OIS analysis of historic EOIR and CBP data, there is a clear correlation since FY 2000 between the increasing time it takes to complete immigration proceedings, which results in a lower share of noncitizens being removed, and the growth in non-Mexican encounters at the SWB. Both trends accelerated in the 2010s, as non-Mexicans became the majority of border encounters, and they have accelerated further since FY 2021, as people from countries other than Mexico and Northern Central America now account for the largest numbers of border encounters.

<sup>11</sup> See *Huisha-Huisha v. Mayorkas*, No. 21-100, 2022 WL 16948610 (D.D.C. Nov. 15, 2022), *cert. and stay granted*, *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022).

<sup>12</sup> See, *e.g.*, Leila Miller, *Asylum Seekers Are Gathering at the U.S.-Mexico Border. This Is Why*, L.A. Times, Dec. 23, 2022, <https://www.latimes.com/world-nation/story/2022-12-23/la-fg-mexico-title-42-confusion>.

open, thereby seeking to persuade would-be migrants to participate in expensive and dangerous human smuggling schemes. In the weeks between the November 2022 announcement that the Title 42 public health Order would be lifted, and the December 19, 2022, stay order that kept the Title 42 public health Order in place, encounter rates jumped from an average of just under 7,700 per week (early November) to nearly 8,800 per week (mid-December), a change not predicted by normal seasonal effects.<sup>13</sup>

While a number of factors make it particularly difficult to precisely project the numbers of migrants who would seek to cross the SWB without authorization or present at a U.S. POE without documents sufficient for admission after the lifting of the Title 42 public health Order, DHS encounter projections and planning models from early April suggest that encounters could rise to 11,000 per day, absent policy changes and absent a viable mechanism for removing Cuban, Haitian, Nicaraguan, and Venezuelan (“CHNV”) nationals who do not have a valid protection claim.<sup>14</sup> As discussed in greater detail below, data indicate that recently announced enforcement processes, as applied to CHNV nationals, which couple new parole processes with prompt returns of those who attempt to cross the SWB without utilizing these processes, are

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<sup>13</sup> Month over month change from November to December for all of FY 2013–FY2022 averaged negative 2 percent. OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

<sup>14</sup> OIS analysis of DHS SWB Encounter Planning Model generated April 18, 2023. The complexity of international migration limits the Department’s ability to precisely project border encounters under the best of circumstances. The current period is characterized by greater than usual uncertainty due to ongoing changes in the major migration source countries (i.e., the shift from Mexico and Northern Central America to new countries of origin, discussed further below), the growing impact of climate change on migration, political instability in several source countries, the evolving recovery from the COVID-19 pandemic, and uncertainty generated by border-related litigation, among other factors.

OIS leads an interagency SWB Encounter Projections Working Group that generates encounter projections every two to four weeks, with ongoing refinements to the model based on feedback from the working group and model diagnostics. The enterprise encounter projection utilizes a mixed method blended model that combines a Bayesian structural time series statistical model produced by OIS with subject matter expert input to account for real-time policy developments and pending litigation, among other factors, that are not captured by the statistical model. The blended model is run through a standard statistical process (Monte Carlo simulations) to generate 68 percent and 95 percent confidence intervals for each of 33 separate demographic groupings. In light of the greater-than-usual uncertainty at the current time, the Departments’ planning models are designed to prepare the Departments for all reasonably likely eventualities, and therefore focus on the upper bounds of the blended model’s 68 and 95 percent confidence intervals. As noted in Section IV.B.2 of this preamble, in the current context, the Departments must focus their planning efforts on the high and moderately high planning models rather than plan to an optimistic scenario that could leave enforcement efforts badly under-resourced and harm efforts to provide a safe and orderly process.

effectively deterring irregular migration<sup>15</sup> from those countries to the United States, thus yielding a substantial decrease in encounter numbers for nationals of CHNV countries.<sup>16</sup>

However, DHS will no longer have a means to promptly expel migrants without a legal basis to stay in the United States following the termination of the Title 42 public health Order, which means that an important disincentive associated with the parole processes would no longer be present. In addition, there are a number of factors that could contribute to these gains being erased after the lifting of the Title 42 public health Order, including the presence of several large diaspora populations in Mexico and elsewhere in the hemisphere, the unprecedented recent growth in migration from countries of origin not previously typical, the already large number of migrants in proximity to the SWB, and the general uncertainty surrounding the expected impact of the termination of the Title 42 public health Order on the movement of migrants. Thus, the high end of the estimated encounter rate remains a possibility for which the Departments need to prepare. In the absence of the policy changes included in the rule, most non-Mexicans processed for expedited removal under Title 8 would likely establish credible fear and remain in the United States for the foreseeable future despite the fact that many of them will not ultimately be granted asylum,<sup>17</sup> a scenario that would likely incentivize an increasing number of migrants to the United States and further increase the likelihood of sustained, high encounter rates.

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<sup>15</sup> In this preamble, “irregular migration” refers to the movement of people into another country without authorization.

<sup>16</sup> In the week prior to the announcement of the parole processes (ending October 12, 2022, for Venezuela and January 6, 2023, for Cuba, Haiti, and Nicaragua), the daily average of CHNV encounters was nearly 2,000 between POEs. A month after the parole announcements, daily encounters of CHNV nationals averaged just under 300 encounters. In the most recent seven days ending April 10, 2023, CHNV daily encounters averaged 195. OIS analysis of OIS Persist dataset based on data through March 31, 2023, and OIS analysis of CBP UIP data downloaded April 13, 2023.

<sup>17</sup> See Section III.C of the preamble to the notice of proposed rulemaking, Circumvention of Lawful Pathways, 88 FR 11704, at 11715–11716 (Feb. 23, 2023). Overall, 63 percent of non-Mexicans placed in expedited removal from 2014-2019 made fear claims, and 85 percent of those claiming fear (54 percent of all those placed in expedited removal) established fear or were otherwise placed in section 240 removal proceedings as a result of their fear claim. These rates are likely to be higher after May 11, 2023, because of the growing prevalence of extra-regional nationals (*i.e.*, noncitizens not from Mexico or Northern Central America), who are more likely than those from Northern Central American countries to make fear claims and to establish fear. OIS analysis of OIS Enforcement Lifecycle data based on data through February 28, 2023.



A sustained, high encounter rate risks overwhelming the Departments' ability to effectively process, detain, and remove, as appropriate, the migrants encountered. This would put an enormous strain on already strained resources, risk overcrowding in already crowded USBP stations and border POEs in ways that pose significant health and safety concerns, and create a situation in which large numbers of migrants—only a small proportion of whom are likely to be granted asylum—are subject to exploitation and risks to their lives by the networks that support their movements north.

In response to this urgent and extreme situation, the Departments are issuing a rule that—

- incentivizes migrants to use lawful, safe, and orderly means for noncitizens to enter the United States to seek asylum and other forms of protection;
- provides core protections for noncitizens who would be threatened with persecution or torture in other countries; and
- builds upon ongoing efforts to share the responsibility of providing asylum and other forms of protection to eligible migrants with the United States' regional partners.

At the same time, the rule addresses the reality of unprecedented migratory flows, the systemic costs those flows impose on the immigration system, and the ways in which increasingly sophisticated smuggling networks cruelly exploit the system for financial gain. Specifically, this rule establishes a presumptive condition on asylum eligibility for certain noncitizens who fail to take advantage of the existing and expanded lawful pathways<sup>18</sup> to enter the United States, including the opportunity to schedule a time and place to present at a POE, and thus seek asylum or other forms of protection in a lawful, safe, and orderly manner, or to seek asylum or other protection in one of the countries through which they travel on their way to the United States.

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<sup>18</sup> The terms “lawful pathways” and “lawful, safe, and orderly pathways,” as used in this preamble, refer to the range of pathways and processes by which migrants are able to enter the United States or other countries in a lawful, safe, and orderly manner and seek asylum and other forms of protection as described in this rule.

This effort draws, in part, on lessons learned from the successful Venezuela parole process,<sup>19</sup> as well as the similar processes for Cubans, Haitians, and Nicaraguans,<sup>20</sup> under which DHS coupled a mechanism for noncitizens from these countries to seek entry into the United States in a lawful, safe, and orderly manner, with the imposition of new consequences for those who cross the border without authorization to do so—namely returns to Mexico.<sup>21</sup> Prior to the implementation of these processes, the Government of Mexico had not been willing to accept the return of such nationals; the Government of Mexico’s independent decision to allow such returns was predicated, in primary part, on the implementation of these processes.

A week before the announcement of the Venezuela parole process on October 12, 2022, Venezuelan encounters between POEs at the SWB averaged over 1,100 a day from October 5–11. About two weeks after the announcement, Venezuelan encounters averaged under 200 per day between October 18 and 24.<sup>22</sup> U.S. Customs and Border Protection (“CBP”) encountered an average of 106 Venezuelans between POEs per day in March 2023, about one-tenth the number of encounters prior to the announcement of the parole process.<sup>23</sup> Similarly, the number of Cuban, Haitian, and Nicaraguan (“CHN”) nationals encountered between POEs dropped significantly in the wake of the introduction of the new processes, which coupled a lawful, safe, and orderly way for such nationals to seek parole in the United States with consequences (in the form of prompt returns to Mexico) for those who crossed the SWB without authorization.

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<sup>19</sup> See DHS, Press Release, *DHS Announces New Migration Enforcement Process for Venezuelans* (Oct. 12, 2022), <https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans>; see also DHS, *Implementation of a Parole Process for Venezuelans*, 87 FR 63507 (Oct. 19, 2022).

<sup>20</sup> See DHS, Press Release, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), <https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and>.

<sup>21</sup> While the Title 42 public health Order has been in place, those returns have been made under Title 42. As noted below, after the Title 42 public health Order is lifted, affected noncitizens may instead be subject to return or removal to Mexico under Title 8. See The White House, *Mexico and United States Strengthen Joint Humanitarian Plan on Migration* (May 2, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/02/mexico-and-united-states-strengthen-joint-humanitarian-plan-on-migration/> [hereinafter *The White House, Mexico and United States Strengthen Joint Humanitarian Plan on Migration* (May 2, 2023)]; Government of Mexico, *México y Estados Unidos fortalecen Plan Humanitario Conjunto sobre Migración* (May 2, 2023), <https://www.gob.mx/presidencia/prensa/mexico-y-estados-unidos-fortalecen-plan-humanitario-conjunto-sobre-migracion?state=published>.

<sup>22</sup> OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

<sup>23</sup> OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

Between the announcement of these processes on January 5, 2023, and January 21, 2023, the number of daily encounters between POEs of CHN nationals dropped from 928 to 73, a 92 percent decline.<sup>24</sup> CHN encounters between POEs continued to decline to an average of fewer than 17 per day in March 2023.<sup>25</sup> DHS estimates that the drop in CHNV encounters in January through March was almost four times as large as the number of people permitted entry under the parole processes.<sup>26</sup>

This rule, which draws on these successful processes, and which will apply only to those who enter during a limited, specified date range at the southwest land border or adjacent coastal borders, will discourage irregular migration by encouraging migrants to use lawful, safe, and orderly pathways and allowing for swift returns of migrants who bypass such pathways, even after the termination of the Title 42 public health Order. It responds to the expected increase of migrants seeking to cross the SWB following the termination of the Title 42 public health Order that would occur in the absence of a policy shift by encouraging reliance on lawful, safe, and orderly pathways, thereby shifting the incentives that otherwise encourage migrants to make a dangerous journey to the SWB. It is also responsive to the requests of foreign partners that have lauded the sharp reductions in irregular migration associated with the aforementioned process for Venezuelans and have urged that the United States continue and build on this kind of approach, which couples processes for individuals to travel directly to the United States with consequences at the land border for those who do not avail themselves of these processes. The United States has, as noted above, already extended this model to Cuba, Haiti, and Nicaragua, and the Government of Mexico and the United States recently announced a set of additional measures on

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<sup>24</sup> OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

<sup>25</sup> OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

<sup>26</sup> In December 2022, prior to the announcement of the CHN parole processes, the OIS Enterprise Encounter Projection predicted 273,000 total encounters of CHNV nationals in January through March 2023, a projection equivalent to 265,000 unique encounters given CHNV repeat encounter rates. During that same period, following the enactment of the CHN parole processes, unique SWB encounters (excluding scheduled arrivals via the CBP One app) of CHNV nationals was 20,204–245,000 fewer unique encounters than had been predicted. By comparison, a total of 61,967 CHNV nationals entered the United States pursuant to the CHNV parole processes during the same period. OIS analysis of OIS Persist Dataset based on data through March 31, 2023, and of CBP OFO CHNV Advance Travel Authorization reports.

migration, including the United States’ continued commitment to welcoming CHNV nationals under these parole processes and Mexico’s commitment to continue to accept back migrants on humanitarian grounds after May 11, 2023.<sup>27</sup> The Departments assess that continuing to implement and build on this approach is critical to the United States’ ongoing engagements with regional partners, in particular the Government of Mexico, regarding migration management in the region.<sup>28</sup>

Consonant with these efforts, over the past two years, the United States has taken significant steps to expand safe and orderly options for migrants to lawfully enter the United States. The United States has, for example, increased and will continue to increase—

- refugee processing in the Western Hemisphere;
- country-specific and other available processes for individuals seeking parole for urgent humanitarian reasons or significant public benefit on a case-by-case basis; and
- opportunities to lawfully enter the United States for the purpose of seasonal employment.

In addition, once the Title 42 public health Order is terminated, the United States will expand implementation of the CBP One™ mobile application (“CBP One app”),<sup>29</sup> an innovative mechanism for noncitizens to schedule a time to arrive at POEs along the SWB, to allow an increasing number of migrants who may wish to claim asylum to request an available time and location to present and be inspected and processed at certain POEs, in accordance with operational limitations at each POE.<sup>30</sup> Use of this app keeps migrants from having to wait in

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<sup>27</sup> The White House, *Mexico and United States Strengthen Joint Humanitarian Plan on Migration* (May 2, 2023).

<sup>28</sup> See also The White House, *Joint Statement by President Biden and Prime Minister Trudeau* (Mar. 24, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/24/joint-statement-by-president-biden-and-prime-minister-trudeau/> (reaffirming commitment of United States and Canada to a collaborative regional approach to migration centered on expanding legal pathways and humane border management, including deterrence of irregular migration).

<sup>29</sup> The Departments note that unless otherwise specified, references to the CBP One app refer to usage of the CBP One tool, which can be accessed via the smartphone application. Although there is a desktop version of the CBP One app, it does not currently allow users to submit their information in advance. CBP is developing the capability to use the desktop version for this purpose.

<sup>30</sup> As of January 12, 2023, this mechanism is currently available for noncitizens seeking to cross SWB land POEs to request a humanitarian exception from the Title 42 public health Order. See CBP, *Fact Sheet: Using CBP One™ to Schedule an Appointment* (last modified Jan. 12, 2023), <https://www.cbp.gov/document/fact-sheets/cbp-one-fact-sheet-english>. Once the Title 42 public health Order is terminated, and the POEs open to all migrants who wish to

long lines of unknown duration at the POEs, and enables the POEs to manage the flows in a safe and efficient manner, consistent with their footprint and operational capacity, which vary substantially across the SWB. Once present in the United States, those who use this mechanism can make claims for asylum and other forms of protection and are exempted from this rule’s rebuttable presumption on asylum eligibility. They are vetted and screened, and assuming no public safety or national security concerns, may be eligible to apply for employment authorization as they await resolution of their cases.<sup>31</sup>

Moreover, on April 27, 2023, DHS and the Department of State announced several new measures to further reduce irregular migration across the Western Hemisphere, significantly expand lawful pathways for protection, and facilitate the safe, orderly, and humane processing of migrants.<sup>32</sup> These new measures include—

- creating family reunification parole processes for El Salvador, Guatemala, Honduras, and Colombia, as well as modernizing the longstanding Haitian Family Reunification Parole process and the Cuban Family Reunification Parole process;
- committing to referring for resettlement thousands of additional refugees per month from the Western Hemisphere, with the goal of doubling the number of refugees the United States committed to welcome as part of the Los Angeles Declaration on Migration and Protection (“L.A. Declaration”);
- establishing regional processing centers in key locations throughout the Western Hemisphere to reduce irregular migration;

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seek entry into the United States, this mechanism will be broadly available to migrants in central and northern Mexico, allowing them to request an available time and location to present and be inspected and processed at certain POEs.

<sup>31</sup> Under current employment authorization regulations, there is no waiting period before a noncitizen parolee in this circumstance may apply for employment authorization, except where the noncitizen is in expedited removal proceedings, including after a positive credible fear determination, and paroled from custody. *See* 8 CFR 274a.12(c)(11), 235.3(b)(2)(iii), (b)(4)(ii).

<sup>32</sup> *See* DHS, Fact Sheet, *U.S. Government Announces Sweeping New Actions to Manage Regional Migration* (Apr. 27, 2023), <https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration> [hereinafter DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023)].

- launching an aggressive anti-smuggling campaign targeting criminal networks in the Darién Gap and combating smuggler misinformation;
- surging AOs to complete credible fear interviews at the SWB more quickly; and
- ramping up coordination between state and local officials and other federal agencies to provide resources, technical assistance, and support.<sup>33</sup>

These measures will be implemented in close coordination with regional partners, including the governments of Mexico, Canada, Colombia, and Guatemala, as well as the government of Spain.<sup>34</sup>

Available pathways provide lawful, safe, and orderly mechanisms for migrants to enter the United States and make their protection claims. Consistent with the CHNV processes, this rule also imposes consequences on certain noncitizens who fail to avail themselves of the range of lawful, safe, and orderly means for entering the United States and seeking protection in the United States or elsewhere. Specifically, this rule establishes a rebuttable presumption that certain noncitizens who enter the United States without documents sufficient for lawful admission are ineligible for asylum, if they traveled through a country other than their country of citizenship, nationality, or, if stateless, last habitual residence, unless they were provided appropriate authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process; presented at a POE at a pre-scheduled time or demonstrate that the mechanism for scheduling was not possible to access or use due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or sought asylum or other protection in a country through which they traveled and received a final decision denying that application. Unaccompanied children (“UC”) are excepted from this presumption.<sup>35</sup> This

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<sup>33</sup> *See id.*

<sup>34</sup> *See id.*; *see also* The White House, *Mexico and United States Strengthen Joint Humanitarian Plan on Migration* (May 2, 2023) (committing to increase joint actions to counter human smugglers and traffickers, address root causes of migration, and continue to combine expanded lawful pathways with consequences for irregular migration).

<sup>35</sup> The term “unaccompanied child” as used in this rule is the same as “unaccompanied alien child,” which is defined at 6 U.S.C. 279(g)(2) to mean “a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.”

presumption may be rebutted, and would necessarily be rebutted if, at the time of entry, the noncitizen or a member of the noncitizen's family with whom they are travelling had an acute medical emergency, faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder,<sup>36</sup> or satisfied the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11(a). The presumption also may be rebutted in other exceptionally compelling circumstances.

The rebuttable presumption is a "condition[]" on asylum eligibility, INA 208(b)(2)(C) and (d)(5)(B), 8 U.S.C. 1158(b)(2)(C) and (d)(5)(B), that applies in affirmative and defensive asylum application merits adjudications, as well as during credible fear screenings. Individuals who are subject to and do not rebut the presumption remain eligible for statutory withholding of removal and protection under the regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").<sup>37</sup>

With the ability to schedule a time and place to arrive at POEs and the availability of other orderly and lawful pathways, this system is designed to (1) protect against an unmanageable flow of migrants arriving at the SWB; (2) further ongoing efforts to share the responsibility of providing asylum and other forms of protection with the United States' regional partners; (3) ensure that those with valid asylum claims have an opportunity to seek protection, whether in the United States or elsewhere; (4) enable the Departments to continue administering the immigration laws fairly and effectively; and (5) reduce the role of exploitative transnational criminal organizations and smugglers.

The rule applies to noncitizens who enter the United States without authorization from Mexico at the southwest land border or adjacent coastal borders on or after the date of

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<sup>36</sup> The term "imminent" refers to the immediacy of the threat; it makes clear that the threat cannot be speculative, based on generalized concerns about safety, or based on a prior threat that no longer poses an immediate threat. The term "extreme" refers to the seriousness of the threat; the threat needs to be sufficiently grave, such as a threat of rape, kidnapping, torture, or murder, to trigger this ground for rebuttal.

<sup>37</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 114.

termination of the Title 42 public health Order and before a specified date, 24 months from the rule's effective date. However, the rule will continue to apply to such noncitizens who entered the United States during the 24-month time frame in their Title 8 proceedings and in any subsequent asylum applications, except for those applications filed after the two-year period by those who entered the United States as minors and who apply as principal applicants. The Departments intend that the rule will be subject to review to determine whether the entry dates provided in 8 CFR 208.33(a)(1)(i) and 1208.33(a)(1)(i) should be extended, modified, or remain as provided in the rule.

### *B. Effective Date*

Issuance of this rule is justified in light of the migration patterns witnessed in recent months, and the concern about the possibility of a surge in irregular migration upon, or in anticipation of, the lifting of the Title 42 public health Order. The Departments seek to underscore that migrants will not be able to cross the border without authorization to enter without consequence upon the eventual lifting of the Order. Under this rule, the Departments will use their Title 8 authorities to process, detain, and remove, as appropriate, those who enter the United States from Mexico at the southwest land border or adjacent coastal borders without authorization and do not have a valid protection claim.

The Departments are issuing this rule without the 30-day delayed effective date typically required by the Administrative Procedure Act (“APA”)<sup>38</sup> because the Departments have determined that it is necessary to implement the rule when the Title 42 public health Order is lifted. The lifting of the Order could occur as a result of several different litigation and policy developments, including the vacatur of the preliminary injunction entered in *Louisiana v. CDC*, 603 F. Supp. 3d 406 (W.D. La. 2022), *appeal pending*, No. 22-30303 (5th Cir. June 15, 2022); the lifting of the stay entered by the Supreme Court in *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022); or “the expiration of the Secretary of HHS’ declaration that COVID-19 constitutes a

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<sup>38</sup> See 5 U.S.C. 553(d). The Departments further address this requirement in Section VI.A of this preamble.



public health emergency,” Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 86 FR 42828, 42829 (Aug. 5, 2021). The expiration of the declaration by the Secretary of Health and Human Services (“HHS”) that COVID-19 constitutes a public health emergency is expected to occur on May 11, 2023, in light of the recent announcement that “[a]t present, the Administration’s plan is to extend” the public health emergency to May 11 and then allow it to expire “on that date.”<sup>39</sup> The Departments have thus sought to move as expeditiously as possible, while also allowing sufficient time for public comment.

### *C. Changes from Proposed Rule to Final Rule*

On February 23, 2023, the Departments issued a notice of proposed rulemaking (“NPRM” or “proposed rule”)<sup>40</sup> in anticipation of a potential surge of migration at the SWB following the eventual termination of the CDC’s public health Order. Following careful consideration of public comments received, the Departments have made modifications to the regulatory text proposed in the NPRM, as described below. The rationale for the proposed rule and the reasoning provided in the proposed rule preamble remain valid, except as distinguished in this regulatory preamble.

#### 1. Removing Provisions Implementing the Proclamation Bar IFR and the TCT Bar Final Rule

Consistent with the proposed rule, Circumvention of Lawful Pathways, 88 FR 11704, 11727–28 (Feb. 23, 2023), the Departments have added amendatory instructions to remove provisions enacted to implement the bars to asylum eligibility established in an interim final rule (“IFR”) entitled, Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018) (“Proclamation Bar IFR”), and a

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<sup>39</sup> Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administration Policy (Jan. 30, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf>; see also HHS, *Fact Sheet: COVID-19 Public Health Emergency Transition Roadmap* (Feb. 9, 2023), <https://www.hhs.gov/about/news/2023/02/09/fact-sheet-covid-19-public-health-emergency-transition-roadmap.html> (“Based on current COVID-19 trends, the Department of Health and Human Services (HHS) is planning for the federal Public Health Emergency (PHE) for COVID-19, declared under Section 319 of the Public Health Service (PHS) Act, to expire at the end of the day on May 11, 2023.”).

<sup>40</sup> 88 FR 11704.

final rule entitled, Asylum Eligibility and Procedural Modifications, 85 FR 82260 (Dec. 17, 2020) (“TCT Bar Final Rule”).<sup>41</sup>

To remove the provisions enacted to implement the Proclamation Bar IFR and TCT Bar Final Rule, the Departments have made the following changes:

- removed and reserved paragraphs 8 CFR 208.13(c)(3) and 1208.13(c)(3), which previously included the requirements for the Proclamation Bar IFR’s applicability;
- removed and reserved paragraphs 8 CFR 208.13(c)(4) and 1208.13(c)(4), which previously included the requirements for the TCT Bar Final Rule’s applicability;
- removed and reserved paragraphs 8 CFR 208.13(c)(5) and 1208.13(c)(5), which provided that determinations made with regard to whether an applicant met one of the exceptions to the TCT Bar Final Rule would not bind Federal departments or agencies with respect to certain later adjudications;
- amended 8 CFR 208.30(e)(5) to remove paragraphs (ii) and (iii), which regard application during credible fear of the Proclamation Bar IFR and TCT Bar Final Rule, respectively;
- removed reference to 8 CFR 208.30(e)(5)(ii) through (iv) from what was previously (i) and redesignated (i) as (e)(5);
- amended 8 CFR 1003.42(d) to remove paragraphs (1) and (2) and redesignated paragraph (3) as (d) because paragraphs (d)(1) and (2) provided the standard of review for Proclamation Bar and TCT Bar determinations made during credible fear screenings; and
- removed and reserved 8 CFR 1208.30(g)(1), which provided instructions to IJs regarding the application of the Proclamation Bar and the TCT Bar during credible fear reviews.

## 2. Applicability of Rebuttable Presumption after the Two-Year Period

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<sup>41</sup> The TCT Bar Final Rule amended an earlier IFR on the same topic. *See* Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019). The IFR was vacated prior to the issuance of the TCT Bar Final Rule. Additionally, where the Departments refer to the “Proclamation Bar” or “TCT Bar” without including “IFR” or “Final Rule,” the Departments are referring to the bars as applied and not to the rulemaking documents that implemented them.

The rule applies to certain noncitizens who enter during the two-year period in any asylum application they submit, regardless of when the application is filed or if the noncitizen makes subsequent entries. *See* 8 CFR 208.13(f) (“For applications filed by aliens who entered the United States between May 11, 2023, and May 11, 2025, also refer to the provisions on asylum eligibility described in § 208.33.”); 8 CFR 1208.13(f) (same); 8 CFR 208.33(a)(1), 1208.33(a)(1) (providing that the rebuttable presumption applies to noncitizens who enter the United States from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission between the effective date and a date 24-months later and after the end of implementation of the Title 42 public health Order with certain exceptions). To remove any potential ambiguity regarding the ongoing applicability of the lawful pathways rebuttable presumption, the final rule makes the presumption’s ongoing applicability explicit in 8 CFR 208.33(c)(1) and 1208.33(d)(1) by stating that the lawful pathways condition on eligibility shall apply to “any asylum application” that is filed by a covered noncitizen “regardless of when the application is filed and adjudicated.”

The Departments have exempted from this ongoing application of the rebuttable presumption certain noncitizens who enter the United States during the two-year period while under the age of 18 and who later seek asylum as principal applicants after the two-year period. In the NPRM, the Departments requested comment on “[w]hether any further regulatory provisions should be added or amended to address the application of the rebuttable presumption in adjudications that take place after the rule’s sunset date.” 88 FR at 11708. After reviewing comments raising concerns about the impact of the rule on children who arrive as part of a family unit and who are thus subject to the decision-making of their parents, the Departments have decided to adopt a provision excepting such children from the rule in certain circumstances after the two-year period ends. *See* 8 CFR 208.33(c)(2), 1208.33(d)(2). The Departments recognize that children who enter with their families are generally traveling due to their parents’ decision-making. Exempting children from the rebuttable presumption entirely would mean,

under the rule, that all family units that include minor children would also be exempted, which could incentivize families who otherwise would not make the dangerous journey to do so. And if the rule were amended to only exempt the child, it could inadvertently lead to the separation of a family in many cases because every child would have to be treated separately from their family during the credible fear screening as they would not be subject to the rebuttable presumption but their parents could be.

Although accompanied children remain subject to the rebuttable presumption generally, the Departments have determined that the presumption should not apply to them in any application for asylum they file after the two-year period, but only if they apply as a principal (as opposed to a derivative) applicant. The Departments believe this exception to the general applicability provision balances the interest in ensuring the rebuttable presumption has an impact on behavior, while at the same time recognizing the special circumstance of children who enter in a manner that triggers the rebuttable presumption, likely without intending to do so or being able to form an understanding of the consequences. Specifically, if the Departments were to extend this exception to all children after the two-year period, even if they applied only as a derivative, the Departments would risk incentivizing families to seek to prolong their proceedings to file their asylum applications after the two-year period expires, undermining the Departments' interest in efficient adjudications. In addition, any family that did so would be able to avoid the applicability of the presumption entirely, by virtue of the rule's family unity provision. The Departments have decided not to include such a broad exemption, in light of the urgent need to disincentivize a further surge in irregular migration.

### 3. Expansion of Applicability to Adjacent Coastal Borders

As proposed in the NPRM, the rule would apply to certain noncitizens who enter the United States at the SWB—that is, “along the entirety of the U.S. land border with Mexico.” 88 FR at 11704 n.1. The Departments received comments that applying the rule only to those who enter the United States from Mexico across the U.S.-Mexico land border would inadvertently

incentivize noncitizens without documents sufficient for lawful admission to circumvent the land border by making a hazardous attempt to reach the United States by sea. In this final rule, the Departments have decided to modify 8 CFR 208.33(a)(1) and 8 CFR 1208.33(a)(1) to provide that the rule’s rebuttable presumption of ineligibility for asylum applies to noncitizens who enter the United States from Mexico at “adjacent coastal borders.” The term “adjacent coastal borders” refers to any coastal border at or near the U.S.-Mexico border. This modification therefore means that the rule’s rebuttable presumption of ineligibility for asylum applies to noncitizens who enter the United States at such a border after traveling from Mexico and who have circumvented the U.S.-Mexico land border.

This modification mirrors the geographic reach of the CDC’s Title 42 public health Order, which likewise applied—as relevant here—to certain covered noncitizens traveling from Mexico who would otherwise be introduced into a congregate setting “at or near the U.S. land and adjacent coastal borders.” *See* 86 FR at 42841. Because the Title 42 public health Order did not define the phrase “adjacent coastal borders,” its meaning was developed during the public health Order’s implementation. Specifically, as implemented by CBP, the term “adjacent coastal borders” was interpreted to apply to the same population as the Amended CDC Order issued in May 2020, which first introduced the concept of “coastal” application. The Amended Order applied to “persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land or coastal POE or Border Patrol station at or near the U.S. border with Canada or Mexico, subject to exceptions.”<sup>42</sup> With regard to persons traveling from Mexico, in line with the interpretation above, CBP implemented the Title 42 public health Order as covering any coastal border adjacent to the U.S.-Mexico border reached by an individual traveling from Mexico and landing within the United States

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<sup>42</sup> *See* Amendment and Extension of Order Under Sections 362 and 365 of the Public Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 FR 31503 (May 26, 2020); CBP, CBP COVID-19 Response: Suspension of Entries and Imports Concept of Operations 1–3 (May 20, 2020), <https://www.cbp.gov/document/foia-record/title-42>.

having circumvented the U.S.-Mexico land border. Applying the same geographic reach that has been applied by CBP for the past three years to this rule will avoid the risk that smugglers would exploit what could be perceived as a new “loophole” following the lifting of the Title 42 public health Order to persuade migrants to make a perilous crossing to the United States from Mexico by sea. In DHS’s experience, that risk may well materialize, as smugglers routinely prey on migrants using perceived changes in U.S. immigration law.<sup>43</sup> Any such campaign by smugglers to persuade more migrants to circumvent the land border would result in life-threatening risks for migrants and DHS personnel, given the elevated danger associated with maritime crossings. As just one example of how dangerous such attempts can be, the Departments note that in March 2023, two suspected human smuggling boats from Mexico capsized and eight people died off the coast near San Diego, California.<sup>44</sup> This incident, as well as the increases in maritime migration over the past few years, as discussed further in Section V of this preamble, and commenters’ concerns that the NPRM would have encouraged migration by sea, as discussed further in Section IV.B.8.i of this preamble, have led the Departments to extend the rebuttable presumption to the adjacent coastal borders. Specifically, in the interest of ensuring that this rule is not used to encourage intending migrants to undertake attempts that could end in similar tragedies, the Departments believe it is important that the text of 8 CFR 208.33(a)(1) and 8 CFR 1208.33(a)(1) make clear that the rule’s presumption applies equally to noncitizens who arrive from Mexico on coasts adjacent to the southwest land border.

#### 4. Clarification of Meaning of “Final Decision”

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<sup>43</sup> See Tech Transparency Project, *Inside the World of Misinformation Targeting Migrants on Social Media* (July 26, 2022), <https://www.techtransparencyproject.org/articles/inside-world-misinformation-targeting-migrants-social-media> (“A review of social media groups and pages identified by migrants showed . . . dubious offers of coyote or legal services, false claims about conditions along the route, misinformation about points of entry at which officials waive the rules, and baseless rumors about changes to immigration law.”).

<sup>44</sup> See Karen Kucher et al., *8 Reported Dead After 2 Suspected Smuggling Boats Crash at Black’s Beach in San Diego*, L.A. Times, Mar. 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>; Wendy Fry, *An Endless Fight: As Border Infrastructure on Land Improves, Smugglers Take to the Water*, San Diego Tribune, Nov. 6, 2019, <https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-11-06/an-endless-fight-as-border-infrastructure-on-land-improves-smugglers-take-to-the-water>.

As was proposed in the NPRM, the rule excepts from the rebuttable presumption noncitizens who sought asylum or other protection in another country through which they traveled and received a “final decision” denying that application. *See* 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C). The Departments have amended this paragraph to further define what constitutes a “final decision” for the purposes of this exception. With this change, the final rule specifies that a “final decision includes any denial by a foreign government of the applicant’s claim for asylum or other protection through one or more of that government’s pathways for that claim.” *Id.* The provision further states that a “final decision does not include a determination by a foreign government that the noncitizen abandoned the claim.” *Id.* The Departments have made this change in response to comments, as discussed below, and to provide clarity that a noncitizen must in fact pursue the claim since a denial based on abandonment would be insufficient.

#### 5. Exception for Unaccompanied Children

The NPRM provided that “[u]naccompanied alien children, as defined in 6 U.S.C. 279(g)(2), are not subject to paragraph (a)(1) of this section.” *See* 88 FR at 11750–51 (proposed 8 CFR 208.33(b), 1208.33(b)). The Departments have modified the proposed language to explicitly state that this exception applies to noncitizens who were UCs at the time of entry.<sup>45</sup> 8 CFR 208.33(a)(2)(i), 1208.33(a)(2)(i).

This added language makes clear that the UC exception aligns with other exceptions in this rule, which are based upon conditions at the time of a noncitizen’s presentation at a POE, *see* 8 CFR 208.33(a)(2), 1208.33(a)(2), and more closely aligns the regulatory text with the Departments’ stated purpose in the NPRM that “unaccompanied children would be categorically excepted from the rebuttable presumption,” 88 FR at 11724.

#### 6. Expansion of Family Unity Provision

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<sup>45</sup> Numerous commenters recognized that the NPRM proposed an exception for UCs, but did not indicate a clear understanding of whether this exception applied to those who were UCs at the time of entry or at the time of adjudication.

The NPRM provided that where a principal applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the presumption, and where an accompanying spouse or child does not independently qualify for asylum or other protection from removal, the presumption shall be deemed rebutted as an exceptionally compelling circumstance. *See* 88 FR at 11752 (proposed 8 CFR 1208.33(d)). Commenters raised concerns that excluding asylum applicants who travel without their families may inadvertently incentivize families to engage in irregular migration together so as not to risk that the principal applicant would be prevented from later applying for their family members to join them. This could involve making a dangerous journey with vulnerable family members, such as children. Accordingly, as discussed in Section IV.E.7.ii of this preamble, in response to these comments, the Departments have expanded the provision to also cover principal asylum applicants who have a spouse or child who would be eligible to follow to join that applicant as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A). *See* 8 CFR 1208.33(c).

## 7. Other Changes

In addition to the changes this final rule makes to the NPRM detailed above, this final rule also makes other changes to the regulatory text set out in the NPRM.

First, the Departments have reorganized and made other edits to proposed 8 CFR 208.33(a) and 1208.33(a) to improve clarity for noncitizens, counsel appearing before the Departments, other members of the public, and adjudicators. For example, the Departments added the exception for unaccompanied children to 8 CFR 208.33(a)(2)(i) and 1208.33(a)(2)(i) rather than maintaining it as a standalone paragraph at 8 CFR 208.33(b) and 1208.33(b). Similarly, the Departments added headings and additional guideposts within 8 CFR 208.33(a) and 1208.33(a). Second, the Departments revised 8 CFR 208.33 and 1208.33 to move instructions from 8 CFR 208.33 to 8 CFR 1208.33 regarding IJ review that are better placed in EOIR's regulations. For example, the Departments removed the sentence at proposed 8 CFR 208.33(c)(2)(ii) stating that noncitizens may apply for asylum, withholding of removal, and



protection under the CAT in removal proceedings and included that at new 8 CFR 1208.33(b)(4).

These revisions do not change the meaning of those provisions.

#### *D. Rule Provisions*

The rule contains the following key provisions:

- The rule imposes a rebuttable presumption of ineligibility for asylum upon certain noncitizens who enter the United States from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission as described in INA 212(a)(7), 8 U.S.C. 1182(a)(7). *See* 8 CFR 208.33(a)(1), 1208.33(a)(1). The rebuttable presumption applies to only those noncitizens whose entry was (1) between May 11, 2023 and May 11, 2025; (2) subsequent to the end of implementation of the Title 42 public health Order; and (3) after the noncitizen traveled through a country other than the noncitizen's country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 ("Refugee Convention") or 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 ("Refugee Protocol"). *See* 8 CFR 208.33(a)(1)(i) through (iii), 1208.33(a)(1)(i) through (iii).
- The rule excepts from the rebuttable presumption any noncitizen who is an unaccompanied child as defined in 6 U.S.C. 279(g)(2). *See* 8 CFR 208.33(a)(2)(i), 1208.33(a)(2)(i).
- The rule also excepts from the rebuttable presumption a noncitizen if the noncitizen or a member of the noncitizen's family with whom the noncitizen is traveling (1) was provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process; (2) presented at a POE, pursuant to a pre-scheduled time and place, or presented at a POE without a pre-scheduled time and place, if the noncitizen demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant

technical failure, or other ongoing and serious obstacle; or (3) sought asylum or other protection in a country through which the noncitizen traveled and received a final decision denying that application. *See id.* 208.33(a)(2)(ii), 1208.33(a)(2)(ii).

- The rule allows a noncitizen to rebut the presumption by demonstrating by a preponderance of the evidence that exceptionally compelling circumstances exist. A noncitizen necessarily rebuts the presumption if they demonstrate by a preponderance of the evidence that the noncitizen, or a member of the noncitizen's family with whom the noncitizen is traveling, (1) faced an acute medical emergency; (2) faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or (3) satisfied the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11(a). *See id.* 208.33(a)(3), 1208.33(a)(3). In addition, as a measure to ensure family unity, the rule provides that in removal proceedings pursuant to section 240 of the INA, 8 U.S.C. 1229a ("section 240 removal proceedings"), where a principal asylum applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the rebuttable presumption, and where an accompanying spouse or child does not independently qualify for asylum or other protection from removal or where the principal asylum applicant has a spouse or child who would be eligible to follow to join them if they are granted asylum, as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A), the presumption is deemed rebutted as an exceptionally compelling circumstance. *See* 8 CFR 1208.33(c).
- The rule establishes procedures, applicable in the expedited removal context, under which AOs will determine whether the noncitizen has made a sufficient showing that the rebuttable presumption does not apply or that they meet an exception to or can rebut the presumption. *See id.* 208.33(b). If the AO determines that the rebuttable presumption does not apply or the noncitizen falls within an exception or has rebutted the presumption, the general procedures in 8 CFR 208.30 apply. *See id.* 208.33(b)(1)(ii). On

the other hand, if the AO determines that the rebuttable presumption does apply and no exception or rebuttal ground applies, the AO will consider whether the noncitizen has established a reasonable possibility of persecution or torture with respect to the identified country or countries of removal. *See id.* 208.33(b)(1)(i), 208.33(b)(2).

- The rule provides that an AO's adverse determination as to the applicability of the rebuttable presumption, whether an exception applies or the presumption has been rebutted, and whether the noncitizen has established a reasonable possibility of persecution or torture, are all subject to de novo IJ review. *See id.* 208.33(b)(2)(iii) through (v), 1208.33(b). The noncitizen must request such review by so indicating on a Record of Negative Fear Finding and Request for Review by Immigration Judge. *See id.* 208.33(b)(2)(iv) and (v), 1208.33(b)(1).
- The rule establishes procedures for such IJ review. Specifically, if the IJ determines that the noncitizen has made a sufficient showing that the rebuttable presumption does not apply to them or that they meet an exception to or can rebut the presumption, and that the noncitizen has established a significant possibility of eligibility for asylum, statutory withholding of removal, or CAT withholding, the IJ issues a positive credible fear finding and the case proceeds under existing procedures at 8 CFR 1208.30(g)(2)(iv)(B). *See id.* 208.33(b)(2)(v)(A), 1208.33(b)(2)(i). If the IJ determines that the rebuttable presumption applies and has not been rebutted and no exception is applicable, but the noncitizen has established a reasonable possibility of persecution or torture with respect to the identified country or countries of removal, the IJ will issue a positive credible fear finding and DHS will issue a Form I-862, Notice to Appear, to commence section 240 removal proceedings. *See id.* 208.33(b)(2)(v)(B), 1208.33(b)(2)(ii). And finally, if the IJ issues a negative credible fear determination, the case is returned to DHS for removal of the noncitizen. *See id.* 208.33(b)(2)(v)(C), 1208.33(b)(2)(ii). In such a circumstance, the noncitizen may not appeal the IJ's decision or request that U.S. Citizenship and

Immigration Services (“USCIS”) reconsider the AO’s negative determination, although USCIS may, in its sole discretion, reconsider a negative determination. *See id.*

208.33(b)(2)(v)(C).

- The rule provides that a noncitizen who is found to be subject to the lawful pathways condition during expedited removal proceedings may, if placed in section 240 removal proceedings, apply for asylum, statutory withholding of removal, or CAT protection, or any other form of relief or protection for which the noncitizen is eligible during those removal proceedings. *See id.* 1208.33(b)(4).
- The rule declines to adopt the Proclamation Bar IFR on a permanent basis and removes the language effectuating the Proclamation Bar. Specifically, the rule removes and reserves paragraphs 8 CFR 208.13(c)(3) and 1208.13(c)(3), which previously included the requirements for the bar’s applicability.
- The rule removes regulatory provisions implementing the TCT Bar Final Rule. The rule removes and reserves paragraphs 8 CFR 208.13(c)(4) and 1208.13(c)(4), which previously included the requirements for the TCT Bar Final Rule’s applicability. The rule also removes and reserves paragraphs 8 CFR 208.13(c)(5) and 1208.13(c)(5), which provided that determinations made with regard to whether an applicant met one of the exceptions to the TCT Bar Final Rule would not bind Federal departments or agencies with respect to certain later adjudications. Given the removal of the TCT Bar Final Rule and its implementing provisions, these provisions are no longer necessary.
- The rule also amends the CFR to remove provisions implementing the Proclamation Bar IFR and TCT Bar Final Rule during the credible fear process. The rule removes 8 CFR 208.30(e)(5)(ii) and (iii), which implemented the Proclamation Bar IFR and TCT Bar Final Rule, respectively. The rule also removes reference to (ii) though (iv) from what was previously (i) and redesignates (i) as (e)(5). Similarly, the rule also amends provisions relating to IJ standard of review for Proclamation Bar and TCT Bar

determinations by removing 8 CFR 1003.42(d)(2) and (3), and redesignates 8 CFR 1003.42(d)(1) as paragraph (d). Finally, the rule removes and reserves 8 CFR 1208.30(g)(1), which provided instructions to IJs regarding the application of the Proclamation Bar and the TCT Bar during credible fear reviews.

- The rule contains a special provision providing that the rebuttable presumption does not apply to an asylum application filed after May 11, 2025, if the noncitizen was under the age of 18 at the time of entry, and the noncitizen is applying for asylum as a principal applicant. *See id.* 208.33(c)(2), 1208.33(d)(2).
- The rule contains a severability clause reflecting the Departments' intention that the rule's provisions be severable from each other in the event that any aspect of the new provisions governing the rebuttable presumption is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance. *See id.* 208.33(d), 1208.33(e).

### **III. Legal Authority**

The Secretary and the Attorney General jointly issue this rule pursuant to their shared and respective authorities concerning asylum, statutory withholding of removal, and CAT determinations. The Homeland Security Act of 2002 (“HSA”), Public Law 107–296, 116 Stat. 2135, as amended, created DHS and transferred to it many functions related to the administration and enforcement of Federal immigration law while maintaining many functions and authorities with the Attorney General, including concurrently with the Secretary.

The INA, as amended by the HSA, charges the Secretary “with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens,” except insofar as those laws assign functions to other agencies. INA 103(a)(1), 8 U.S.C. 1103(a)(1). The INA also grants the Secretary the authority to establish regulations and take other actions “necessary for carrying out” the Secretary’s authority under the immigration laws, INA 103(a)(1) and (3), 8 U.S.C. 1103(a)(1) and (3); *see also* 6 U.S.C. 202.

The HSA charges the Attorney General with “such authorities and functions under [the INA] and all other laws relating to the immigration and naturalization of aliens as were [previously] exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to [EOIR].” INA 103(g)(1), 8 U.S.C. 1103(g)(1); *see also* 6 U.S.C. 521. In addition, under the HSA, the Attorney General retains authority to “establish such regulations, . . . issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out” his authorities under the INA. INA 103(g)(2), 8 U.S.C. 1103(g)(2).

Under the HSA, the Attorney General retains authority over the conduct of section 240 removal proceedings. These adjudications are conducted by IJs within DOJ’s EOIR. *See* 6 U.S.C. 521; INA 103(g), 8 U.S.C. 1103(g). With limited exceptions, IJs within DOJ adjudicate asylum, statutory withholding of removal, and CAT protection applications filed by noncitizens during the pendency of section 240 removal proceedings, including asylum applications referred by USCIS to the immigration court. INA 101(b)(4), 8 U.S.C. 1101(b)(4); INA 240(a)(1), 8 U.S.C. 1229a(a)(1); INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 1208.2(b), 1240.1(a); *see also Dhakal v. Sessions*, 895 F.3d 532, 536–37 (7th Cir. 2018) (describing affirmative and defensive asylum processes). The Board of Immigration Appeals (“BIA”), also within DOJ, in turn hears appeals from IJ decisions. *See* 8 CFR 1003.1(a)(1) and (b)(3); *see also Garland v. Ming Dai*, 141 S. Ct. 1669, 1677–78 (2021) (describing appeals from IJ to BIA). In addition, the INA provides that the “determination and ruling by the Attorney General with respect to all questions of law shall be controlling.” INA 103(a)(1), 8 U.S.C. 1103(a)(1).

In addition to the separate authorities discussed above, the Attorney General and the Secretary share some authorities. Section 208 of the INA, 8 U.S.C. 1158, authorizes the “Secretary of Homeland Security or the Attorney General” to “grant asylum” to a noncitizen “who has applied for asylum in accordance with the requirements and procedures established by” the Secretary or the Attorney General under section 208 if the Secretary or the Attorney General

determines that the noncitizen is a refugee. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A). Section 208 thereby authorizes the Secretary and the Attorney General to “establish[]” “requirements and procedures” to govern asylum applications. *Id.* The statute further authorizes them to “establish,” “by regulation,” “additional limitations and conditions, consistent with” section 208, under which a noncitizen “shall be ineligible for asylum.” INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); *see also* INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B) (authorizing the Secretary and the Attorney General to “provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with [the INA]”).<sup>46</sup> The INA also provides the Secretary and Attorney General authority to publish regulatory amendments governing their respective roles regarding apprehension, inspection and admission, detention and removal, withholding of removal, deferral of removal, and release of noncitizens encountered in the interior of the United States or at or between POEs. *See* INA 235, 236, 241, 8 U.S.C. 1225, 1226, 1231.

The HSA granted DHS the authority to adjudicate asylum applications and to conduct credible fear interviews, make credible fear determinations in the context of expedited removal, and to establish procedures for further consideration of asylum applications after an individual is found to have a credible fear. INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* 6 U.S.C. 271(b) (providing for the transfer of adjudication of asylum and refugee applications from the Commissioner of Immigration and Naturalization to the Director of the Bureau of Citizenship and Immigration Services, now USCIS). Within DHS, the Secretary has delegated some of those authorities to the Director of USCIS, and USCIS AOs conduct credible fear interviews, make credible fear determinations, and determine whether a noncitizen’s asylum application should be granted. *See* DHS, Delegation to the Bureau of Citizenship and Immigration Services, No. 0150.1 (June 5, 2003); 8 CFR 208.2(a), 208.9, 208.30.

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<sup>46</sup> Under the HSA, the references to the “Attorney General” in the INA also encompass the Secretary, either solely or additionally, with respect to statutory authorities vested in the Secretary in the HSA or subsequent legislation, including in relation to immigration proceedings before DHS. 6 U.S.C. 557.

The United States is a party to the Refugee Protocol, which incorporates Articles 2 through 34 of the Refugee Convention. Article 33 of the Refugee Convention generally prohibits parties to the Convention from expelling or returning (“refouler”) “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” 120%

Congress codified these obligations in the Refugee Act of 1980, creating the precursor to what is now known as statutory withholding of removal.<sup>47</sup> The Supreme Court has long recognized that the United States implements its non-refoulement obligations under Article 33 of the Refugee Convention (via the Refugee Protocol) through the statutory withholding of removal provision in section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), which provides that a noncitizen may not be removed to a country where their life or freedom would be threatened on account of one of the protected grounds listed in Article 33 of the Refugee Convention.<sup>48</sup> *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3); *see also* 8 CFR 208.16, 1208.16. The INA also authorizes the Secretary and the Attorney General to implement statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3). *See* INA 103(a)(1) and (3), (g)(1) and (2), 8 U.S.C. 1103(a)(1) and (3), (g)(1) and (2).

The Departments also have authority to implement Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994). The Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”) provides the Departments with the authority to “prescribe regulations to implement the

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<sup>47</sup> Public Law 96–212, 94 Stat. 102 (“Refugee Act”).

<sup>48</sup> *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 426–27 (1999); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 440–41 (1987) (distinguishing between Article 33’s non-refoulement prohibition, which aligns with what was then called withholding of deportation and Article 34’s call to “facilitate the assimilation and naturalization of refugees,” which the Court found aligned with the discretionary provisions in section 208 of the INA, 8 U.S.C. 1158). The Refugee Convention and Protocol are not self-executing. *E.g., Al-Fara v. Gonzales*, 404 F.3d 733, 743 (3d Cir. 2005) (“The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.”).



obligations of the United States under Article 3 of the [CAT], subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.” Public Law 105–277, div. G, sec. 2242(b), 112 Stat. 2681, 2681–822 (8 U.S.C. 1231 note). DHS and DOJ have implemented the United States’ obligations under Article 3 of the CAT in the CFR, consistent with FARRA. *See, e.g.*, 8 CFR 208.16(c) through 208.18, 1208.16(c) through 1208.18; Regulations Concerning the Convention Against Torture, 64 FR 8478 (Feb. 19, 1999), as corrected by 64 FR 13881 (Mar. 23, 1999).

This rule does not change the eligibility requirements for statutory withholding of removal or CAT protection. As further discussed below, the rule applies a “reasonable possibility” standard in screenings for statutory withholding of removal and CAT protection in cases where the presumption of asylum ineligibility is applied and not rebutted. While the application of this standard is a change from the prior practice in the expedited removal context, it is the same standard used in protection screenings in other contexts and is consistent with both domestic and international law. *See* 8 CFR 208.31.

#### **IV. Public Comments and Responses**

The Departments received 51,952 comments on the proposed rule, the majority of which expressed opposition to the proposal. A range of governmental and non-governmental entities, public officials, and private persons submitted comments. The Departments summarize and respond to the public comments below.

##### *A. General Support*

###### 1. General support

*Comment:* Many commenters stated their support for the rule overall. Commenters emphasized the importance of border security, stating that the Government must do what is necessary to both manage workloads at the border and stop migrants from entering the United States without permission.

*Response:* Promulgation of this rule is needed because, once the Title 42 public health Order is lifted, the number of migrants traveling to the United States without authorization is expected to increase significantly, to a level that risks undermining the Departments' ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system. Such a surge would also place additional pressure on States, local communities, and non-governmental organization ("NGO") partners both along the border and in the interior of the United States.

To address these issues, the rule imposes a rebuttable presumption of asylum ineligibility for certain migrants who enter the United States outside of safe, orderly, and lawful pathways and without first seeking protection in a third country they have traveled through en route to the SWB, during a designated period of time. The rule (1) incentivizes the use of multiple existing lawful, safe, and orderly means for noncitizens to enter the United States to seek asylum and other forms of protection; (2) continues to provide core protections for noncitizens who would be threatened with persecution or torture in other countries; and (3) builds upon ongoing efforts to share the responsibility of providing asylum and other forms of protection to deserving migrants with the United States' regional partners.

The successful implementation of the CHNV parole processes has demonstrated that an increase in lawful pathways, when paired with consequences for migrants who do not avail themselves of such pathways, can incentivize the use of such pathways and undermine transnational criminal organizations, such as smuggling operations. The rule, which is fully consistent with domestic and international legal obligations, provides the necessary consequences to maintain this incentive under Title 8 authorities. In short, the Departments expect the rule, coupled with an expansion of lawful, safe, and orderly pathways, to reduce the number of noncitizens seeking to cross the SWB without authorization to enter the United States.

The benefits of reducing the number of encounters include protecting against overcrowding in border facilities; allowing for the continued effective, humane, and efficient

processing of noncitizens at and between ports of entry; and helping to reduce reliance on dangerous human smuggling networks that exploit migrants for financial gain. Even where the rule applies, the presumption against asylum eligibility may be rebutted in certain circumstances, such as where, at the time of the noncitizen's entry into the United States, they or a family member with whom they are traveling are experiencing an acute medical emergency or an extreme and imminent threat to life or safety, or are a victim of a severe form of trafficking. Moreover, DHS will still screen migrants who cannot overcome the rebuttable presumption to determine if the migrant has established a reasonable possibility of persecution for the purposes of statutory withholding of removal or a reasonable possibility of torture for the purposes of protection under the regulations implementing the CAT. *See* 8 CFR 208.33(b)(2)(i). Should a migrant receive a negative credible fear determination, they can also seek review of the determination by an IJ. *See* 8 CFR 208.33(b)(2)(iii) through (v). Those who are found to have credible fear due to a reasonable possibility of persecution or torture will then have the opportunity for further consideration of their protection claims via a section 240 removal proceeding. *See* 8 CFR 208.33(b)(2)(ii).

## 2. Need, Effectiveness, and Rationale for the Rule

*Comment:* Commenters described the rule as a common-sense approach to managing migration at the border and discouraging illegal migration, while others stated that the rule would contribute to the “rule of law” at the border. Other commenters noted that a change such as that made by this rule is necessary, as it is simply impossible to admit all migrants who want to enter the United States. Some commenters stated that the rule is a reasonable solution until Congress can take legislative action to address the issue. Other commenters supported the rule's encouragement for migrants to first seek protection in third countries they pass through before requesting asylum at the SWB and asserted that such a requirement is standard in international law; commenters further stated that the rule would discourage “asylum shoppers.” Commenters stated that allowing migrants to cross multiple countries en route to the United States before

claiming asylum defeats the true purpose of asylum. Some commenters stated that migrants know that claiming asylum allows them entry into the United States, and thus take advantage of the process.

*Response:* As noted above, the Departments have designed this rule in response to the number of migrants expected to travel without authorization to the United States after the lifting of the Title 42 public health Order, absent a policy change such as this one. In that case, the circumstances likely to occur include the following: an additional number of migrants anticipated to arrive at the border; the severe strain on resources that this influx of migrants would cause DHS; and a substantial resulting impact on U.S. Government operations, as well as local communities. DHS's successful Uniting for Ukraine ("U4U") and CHNV parole processes—under which DHS coupled a mechanism for noncitizens from these countries to seek entry to the United States in a lawful, safe, and orderly manner with the imposition of new consequences for those who cross the SWB without authorization—have demonstrated that an increase in the availability of lawful pathways paired with consequences for migrants who do not avail themselves of such pathways can incentivize the use of lawful pathways and undermine transnational criminal organizations, such as smuggling operations. The Departments expect similar benefits from this rule, especially a reduced number of encounters at the border, which will help to protect against overcrowding in border facilities; allow for the continued effective, humane, and efficient processing of noncitizens at and between ports of entry; and reduce reliance on dangerous human smuggling networks that exploit migrants for financial gain.

The Departments designed the rule to strike a balance that maintains safe and humane processing of migrants while also including safeguards to protect especially vulnerable individuals. The rule provides exceptions to the rebuttable presumption and allows migrants to rebut the presumption in exceptionally compelling circumstances. These exceptions and opportunities for rebuttal are meant to ensure that migrants who are particularly vulnerable, who are in imminent danger, or who could not access the lawful pathways provided are not made

ineligible for asylum by operation of the rebuttable presumption. Those who are not excepted from and are unable to rebut the presumption of ineligibility may still pursue statutory withholding of removal and protection under the CAT. In addition, to further aid migrants, the Departments plan to continue to work with foreign partners to expand lawful pathways for migration, as well as expand the Departments' mechanisms for lawful processing. Thus, the rule will disincentivize irregular migration and instead incentivize migrants—including those intending to seek asylum—to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel.

### 3. Mitigate Irregular Migration and the Associated Impacts

*Comment:* Many commenters expressed support for the rule for a variety of reasons. Commenters supported the change in policy, noting that this rule would result in a more efficient use of government resources at the border. Commenters also supported the proposed rule's use of a formal process for asylum applicants. Some commenters stated their support for the rule because the journey to the SWB is dangerous due to harsh conditions and smugglers, and this rule would weaken smugglers and transnational criminal enterprises and reduce their exploitation of migrants. Commenters also stated that incentivizing migrants to present themselves at POEs would reduce their risk of exploitation by human traffickers or other harm when attempting to cross between POEs. Commenters commended the Departments for prioritizing safe and orderly processing methods for those seeking refuge. Some commenters indicated that border security is critical and expressed concerns that malicious actors could enter the United States more easily during a surge in migration.

*Response:* The Departments recognize these commenters' support for the rule and agree that maintaining border security is critical. The Departments agree that irregular migration is dangerous and can lead to increased strain on SWB operations and resources, increased illegal smuggling activity, and increased pressure on communities along the SWB. The United States

has taken several measures to meet the influx of migrants crossing the SWB and is taking new steps to address increased flows throughout the Western Hemisphere.<sup>49</sup>

However, the anticipated increase in the number of migrants following the lifting of the Title 42 public health Order threatens to exceed the Departments' capacity to safely and humanely process migrants. By coupling the rule with additional lawful pathways and allowing migrants to schedule their arrival at a SWB POE, currently via the CBP One app, the rule will reduce the number of noncitizens seeking to cross the SWB without authorization to enter the United States. This reduction will protect against overcrowding in border facilities; allow for the continued effective, humane, and efficient processing of noncitizens at and between ports of entry; and help to reduce reliance on dangerous human smuggling networks that exploit migrants for financial gain. The Departments expect that this rule will result in decreased strain on border states, local communities, and NGOs and, accordingly, allow them to better absorb releases from CBP border facilities and provide support to the migrant community. Ultimately, this rule will disincentivize irregular migration and instead incentivize migrants to use safe, orderly, and lawful pathways to the United States or to seek protection in third countries.

#### 4. Positive Impacts on Operations and Resources

*Comment:* Commenters supported the rule, stating that allowing migrants to remain in the United States at the government's expense while waiting for their asylum claim to be adjudicated is a waste of government resources. Commenters said that the rule—specifically when coupled with the expanded use of the CBP One app and the ability for migrants to schedule appointments—would allow for more efficient processing at the SWB. Commenters stated that, by decreasing the number of migrants seeking asylum, the Departments would adjudicate asylum claims much faster and decrease the amount of time migrants must wait in the United States before receiving a final decision in their case.

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<sup>49</sup> See DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

*Response:* The Departments recognize these commenters' support and agree that the rule will have benefits for both those granted asylum and the U.S. immigration system. The rule encourages noncitizens to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel. The rule is designed to channel the high numbers of migrants expected to seek protection in the United States following the termination of the Title 42 public health Order into lawful, safe, and orderly pathways and ensure they can be processed in an effective, humane, and efficient manner. In addition, the Departments anticipate that the use of the CBP One app—the current scheduling mechanism that provides migrants with a means to schedule a time and place to present themselves at a SWB POE—will allow CBP to streamline the processing of noncitizens at POEs on the SWB and process significantly more individuals in a safe and orderly manner.

Adjudication on the merits of an asylum claim for those who establish credible fear and are placed into removal proceedings can be a long process. Thirty-eight percent of all noncitizens who entered along the SWB, received a positive credible fear determination, and were placed into proceedings before EOIR between FY 2014 and FY 2019 remained in EOIR proceedings as of December 31, 2022.<sup>50</sup> Further, almost half (47 percent) of those in EOIR cases who received positive credible fear determinations resulting from FY 2019 encounters (referrals to EOIR) remained in proceedings as of December 31, 2022.<sup>51</sup> Excluding *in absentia* orders, the mean completion time for EOIR cases in FY 2022 was 3.7 years.<sup>52</sup> Thus, those who have a valid claim to asylum in the United States often wait years for a final relief or protection decision; likewise, noncitizens who will ultimately be found ineligible for asylum or other protection—which occurs in the majority of cases—often have spent many years in the United States prior to being ordered removed.

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<sup>50</sup> See OIS analysis of OIS Enforcement Lifecycle data based on data through December 31, 2022.

<sup>51</sup> *Id.*

<sup>52</sup> See OIS analysis of DOJ EOIR data based on data through March 31, 2023.

This lengthy adjudications process means that migrants who can establish credible fear can expect to remain in the United States for an extended period regardless of whether they will ultimately obtain asylum status at an EOIR hearing on the merits. Allowing a migrant to remain in the United States for years before ultimately determining the migrant is ineligible for asylum or other protection is inefficient, risks creating a pull factor for other intending migrants, and runs counter to principles of judicial fairness, including the swift adjudication of claims. As discussed in the NPRM, *see* 88 FR at 11737, and below at Section IV.B.2 of this preamble, the Departments have determined that this rule will lead to increased efficiencies in the asylum adjudications process so that claims can be adjudicated without a lengthy delay.

## 5. Other Support

*Comment:* Commenters agreed that the Departments have the legal authority to restrict asylum eligibility based on a migrant's failure to seek protection in a third country that they have traveled through on route to the SWB and that such a policy is consistent with both domestic and international law. Commenters stated that the rule was necessary because most migrants do not have legitimate asylum claims, noting low grant rates by EOIR, and are instead seeking economic opportunities in the United States. Other commenters expressed general support for the rule and stated a belief that asylum seekers do not have legitimate claims because they may be coached by NGOs or other organizations. At least one commenter stated that if a migrant traveled through a third country with a legitimate asylum process on their way to the United States, DHS should assume that the migrant is not really in fear for their life; otherwise, the U.S. asylum system would be used for economic migration, the demand for which should be addressed by other means. Another commenter said that the proposed rule encourages asylum-seekers to use the "front door" by presenting at POEs and fulfills domestic and international legal obligations by removing eligibility for asylum for those who fail to do so while maintaining access to statutory withholding of removal and protection under the CAT. The commenter noted that countries are within their rights to limit access to asylum. The commenter also stated that



many individuals are barred from asylum eligibility for reasons such as fraud, criminal convictions, and illegal reentry, and that the proposed rule would add those who do not avail themselves of asylum in the nearest country and do not apply at a POE to this list, which should limit further unlawful entries and use of government resources. Some commenters supported the rule and suggested that the Government disseminate information about the rule in other countries to ensure migrants planning to seek asylum are aware of both the asylum process and the consequences of non-compliance.

*Response:* As discussed further below in Section IV.B.D, the Departments agree that the rule is consistent with U.S. obligations under both domestic and international law, including the INA; the Refugee Convention; the Refugee Protocol, which incorporates Articles 2 through 34 of the Refugee Convention; and the CAT. While the Departments appreciate these commenters' support for the rule, the Departments emphasize that this rule is necessary to prevent the expected increase in the number of migrants who would otherwise seek to travel without authorization to the United States after the termination of the Title 42 public health Order, which would risk undermining the Departments' ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system. In other words, the Departments do not rely on the alternative goals or bases of support for the rule expressed in the comments summarized above.

The Departments appreciate the importance of disseminating information about the rule to the public, including intending migrants, and are planning a robust communication effort in conjunction with and immediately following the publication of this rule.

## *B. General Opposition*

### 1. General Opposition

*Comment:* The Departments received many comments expressing general opposition to the rule. Some commenters expressed opposition to the rule and encouraged the Administration to withdraw it, without further explanation. Commenters also stated, without explanation, that

the rule would allow future administrations the ability to decide which nationalities are afforded protections, instead of making protections available for everyone in need. Other commenters stated the rule creates barriers, not pathways, for asylum seekers.

*Response:* The Departments take seriously the concerns expressed by commenters who generally oppose the rule. Because some of these comments failed to articulate specific reasoning underlying the general opposition, the Departments are unable to provide a more detailed response to those comments. In general, the Departments emphasize that this rule is necessary to ensure that, after the lifting of the Title 42 public health Order, protection claims made by noncitizens encountered at the SWB can be processed in a manner that is effective, humane, and efficient. The rule is also designed to reduce overcrowding at DHS facilities and reduce migrants' reliance on exploitive smuggling networks. The Departments intend this rule to work in conjunction with other initiatives that expand lawful pathways to enter the United States, and thereby incentivize safe, orderly, lawful migration over dangerous, irregular forms of migration. Although some lawful pathways, which exist separate from this rule, are available only to particular nationalities, this rule does not deny protection on the basis of nationality. A noncitizen of any nationality may avoid the rebuttable presumption by, for instance, presenting at a POE pursuant to a pre-scheduled time and place. As discussed in the NPRM and further below, the rule's presumption against asylum eligibility only applies to those who enter during a 2-year period, is rebuttable, and contains multiple exceptions to prevent undue harm to noncitizens with meritorious protection claims.

## 2. Need, Effectiveness, and Rationale for the Rule

*Comment:* Commenters asserted that the Departments' concerns about a future surge of migration after the end of the Title 42 public health Order are speculative and unsupported. One commenter said that the surge numbers were unreliable at best, that entries between POEs were higher two decades ago, and that the surge could in part be the result of attempted suppression of normal migration. Some commenters questioned the Departments' planning projection of the

number of border encounters it expects when the Title 42 public health Order is lifted as a valid justification of the NPRM. Another commenter stated that the numbers of unauthorized unique individuals detained at the border are far from an all-time high or a record, and that attempts to enter the country undetected have plummeted. One commenter stated that the Title 42 public health Order increased the percentage of individuals attempting repeated crossings at the border, which has artificially inflated CBP's border apprehension statistics, and thereby overstated the scale of the problem at the border. Some commenters stated that the public is unable to properly evaluate the Departments' data used to justify the rule because the "DHS SWB Encounter Planning Model generated January 6, 2023" cited in the NPRM, *e.g.*, 88 FR at 11705 n.11, does not have a link to the model and it does not provide information on methodology, data sources, and alternative figures.

*Response:* The Departments strongly disagree that the concerns stated in the NPRM regarding an ongoing and potential further surge of migration are speculative or unsupported. As noted in the NPRM, for the 30 days ending December 24, 2022, total daily encounters along the SWB consistently fluctuated between approximately 7,100 and 9,700 per day, averaging approximately 8,500 per day, with encounters exceeding 9,000 per day on 12 different occasions during this 30-day stretch.<sup>53</sup> 88 FR at 11704–05. While commenters are correct that the Title 42 public health Order has increased the percentage of repeat crossing attempts relative to the 2010s, since 2022 over 97 percent of extra-regional migrants (*i.e.*, migrants not from Mexico or Northern Central America<sup>54</sup>)—the people representing the greatest processing challenge—are unique encounters.<sup>55</sup> Encounter totals reached an all-time high in FY 2022, and they remain at historically high levels even as encounters of CHNV nationals have fallen in recent months.<sup>56</sup>

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<sup>53</sup> OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

<sup>54</sup> Northern Central America refers to El Salvador, Guatemala, and Honduras.

<sup>55</sup> OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

<sup>56</sup> Concrete data on unique versus repeat encounters are only available since 2010. During that period, for the years prior to the implementation of Title 42 expulsions, the percentage of encounters that were unique increased each year from 2010–2019. OIS analysis of OIS Persist Dataset based on data through March 31, 2023. While specific data on numbers of unique encounters are not available prior to 2010, it is widely accepted that the years before the

OIS leads an interagency working group that produces a roughly bi-weekly SWB encounter projection used for operational planning, policy development, and short-term budget planning. The model used to produce encounter projections every two to four weeks is a mixed-method approach that combines a statistical predictive model with subject matter expertise intended to provide informed estimates of future migration flow and trends. The mixed methods approach blends multiple types of models through an ensemble approach of model averaging.<sup>57</sup> The model includes encounter data disaggregated by country and demographic characteristics going back to FY 2013, data on apprehensions of third country nationals by Mexican enforcement agencies, and economic data. DHS uses the encounter projection to generate a range of planning models, including “moderately-high” planning models that are based on the 68 percent upper bound of the forecast interval and “high” planning models based on the 95 percent upper bound of the forecast interval.

Encounter projections are, of course, subject to some degree of uncertainty. International migration is an exceedingly complex process shaped by family and community networks, labor markets, environmental and security-related push factors, and rapidly evolving criminal smuggling networks, among other factors. Recent unprecedented changes in migration flows have further complicated the task of predicting future migration flows with precision. As recently as the 2000s, unauthorized migration to the SWB consisted almost entirely of single adults from Mexico.<sup>58</sup> Families and UCs accounted for increasing shares of unauthorized

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2010, and particularly the years before 2000, were characterized by much larger numbers of repeat encounters, as most encounters were of Mexican nationals who were permitted to return to Mexico without being subject to formal removal proceedings or other enforcement consequences. See also DHS, *FY 2021 Border Security Metrics Report* (Apr. 27, 2022), <https://www.dhs.gov/immigration-statistics/border-security/border-security-metrics-report>.

<sup>57</sup> Blending multiple models and basing predictions on prior data has been understood to improve modeling accuracy. See, e.g., Spyros Makridakis et al., *Forecasting in Social Settings: The State of the Art*, 36 *Int'l J. Forecasting* 15, 16 (2020) (noting that it has “stood the test of time [that] combining forecasts improves [forecast] accuracy”); The Forecasting Collaborative, *Insights into the Accuracy of Social Scientists' Forecasts of Societal Change*, *Nat. Hum. Behaviour*, Feb. 9, 2023, <https://doi.org/10.1038/s41562-022-01517-1> (comparing forecasting methods and suggesting that forecasting teams may materially improve accuracy by, for instance, basing predictions on prior data and including scientific experts and multidisciplinary team members).

<sup>58</sup> According to historic OIS Yearbooks of Immigration Statistics, Mexican nationals accounted for 97 percent of all administrative arrests by the legacy Immigration and Nationality Service from 1981–1999. According to OIS Production data, Mexican nationals also accounted for 97 percent of SWB encounters from 2000–2003. Mexico's

migrants in the 2010s, as did migrants from Northern Central America; and “extra-regional” migrants have driven increased flows in the 2020s, accounting for an absolute majority of encounters in FY 2023 YTD.<sup>59</sup> The OIS working group takes these recent changes in migration flows into account in preparing its roughly bi-weekly encounter projection models.

Demographic changes in migration flows have introduced new challenges in the field of border enforcement. For decades the challenge was to detect and interdict Mexican nationals seeking to evade detection and to return them to Mexico, which generally was cooperative in accepting back its nationals across the land border. Today’s set of challenges is broader; the United States Government must humanely process family units and UCs and consider tens of thousands of asylum claims, granting relief or protection where appropriate and imposing enforcement consequences (such as removal or return, and in some cases criminal charges), all with limited processing resources and challenges relating to barriers to repatriations for nationals from certain countries. These changes have significant implications, requiring substantial resources from CBP, ICE, USCIS, EOIR, and HHS.

An additional consideration in how the Departments utilize encounter projections for operational planning and budgeting is that it takes weeks or months to put new enforcement resources in place, while removing such resources takes much less time. For this reason, DHS generally must be conservative in its enforcement planning because the failure to have adequate resources in place at the start of a migration surge risks vicious cycles in which inadequate capacity to implement critically needed tools to disincentivize irregular migration, coupled with

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share of SWB border encounters fell to 94 percent in 2004, an all-time low, then averaged 91 percent for the remainder of the 2000s. OIS analysis of OIS Yearbook on Immigration Statistics, 1981–1999; OIS Production Data, 2000–2009.

<sup>59</sup> Families and unaccompanied children accounted for an estimated 11 percent of SWB encounters in 2013, rising to 62 percent in 2019, and have averaged 30 percent from 2020 through March 2023. Data on unaccompanied children were first collected in 2008 and data on other family statuses were first collected in 2013, but not universally collected until 2016. Mexican nationals accounted for an average of 57 percent of SWB encounters from 2013–2015, fell to an all-time low of 24 percent in 2019 (when Northern Central Americans accounted for 64 percent of the total), and have averaged 35 percent of encounters from 2021 through March 2023. Extra regional nationals accounted for an average of 9 percent of SWB encounters from 2013–2018, 12 percent from 2019–2020, and account for 52 percent in the first six months of FY 2023. OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

persistent and strong “push factors,” contribute to cascading adverse effects as the enforcement system becomes overwhelmed. Such effects include overcrowding in DHS facilities (which can endanger both migrants and DHS personnel), more noncitizens being released into the interior pending immigration proceedings, and additional flows of migrants. In the current context of added uncertainty in the encounter projection and evolving enforcement challenges, DHS focuses its operational planning efforts on the high and moderately-high planning models rather than planning for an optimistic scenario that could leave enforcement efforts badly under-resourced. As for this policymaking effort, the Departments believe the policies in this rule are justified “in light of the migration patterns witnessed in late November and December of 2022, and the concern about the possibility of a surge in irregular migration upon, or in anticipation of, the eventual lifting of the Title 42 public health Order.” 88 FR at 11708.

With respect to the suggestion that the Departments should have subjected the OIS planning model to more detailed review by commenters, the Departments respectfully disagree. In addition to the Departments’ description of the planning model in the NPRM, *see* 88 FR at 11705 n.11, the Departments presented a range of the underlying data clearly demonstrating the scope of the problem the Departments face. *See, e.g.*, 88 FR at 11704–05 (“For the 30 days ending December 24, 2022, total daily encounters along the SWB consistently fluctuated between approximately 7,100 and 9,700 per day, averaging approximately 8,500 per day, with encounters exceeding 9,000 per day on 12 different occasions during this 30-day stretch”); *id.* at 11708–14 (describing the historically unique nature of current migratory trends and the role of shifting demographics and other factors on these trends). Although the Departments did not describe the planning models in minute detail, the data make clear the basis for the proposed rule and no commenters submitted data suggesting that the Departments do not currently face, and will not imminently face, an urgent circumstance requiring a policy response.

*Comment:* One commenter stated that concerns that NGOs and shelter networks have or are close to reaching their “outer limit” of capacity are unfounded, because according to the

commenter, none of the \$800 million newly allocated for humanitarian reception had been distributed as of the NPRM's publication in late February of this year. The commenter wrote that there are numerous ways that the Administration can work with Congress and NGO partners to continue to build shelter capacity and effectively respond to the needs of arriving migrants and asylum seekers. Similarly, a commenter noted that the Government pays private, for-profit detention facilities \$320/day to detain noncitizens, but only pays shelters \$25 for a single bed. The commenter wrote that they had been asking the Government for more than two years to provide more funding to shelters and increase cooperation with NGOs, to no avail.

*Response:* The Departments acknowledge commenters' concerns about funds dedicated for NGOs and shelter networks as they work to respond to migratory flows and note that one expected effect of this rule is to disincentivize irregular migration, which may in turn result in reduced demand for certain NGO and shelter services. With respect to grant funding generally, as noted in the NPRM, the Federal Emergency Management Agency ("FEMA") spent \$260 million in FYs 2021 and 2022 on grants to non-governmental and state and local entities through the Emergency Food and Shelter Program—Humanitarian ("EFSP-H") to assist migrants arriving at the SWB with shelter and transportation. *See* 88 FR at 11714. In November 2022, FEMA released \$75 million through the program, consistent with the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023.<sup>60</sup> In addition, the Bipartisan Year-End Omnibus, which was enacted on December 29, 2022, directed CBP to transfer \$800 million in funding to FEMA to support sheltering and related activities for noncitizens encountered by DHS. The Omnibus authorized FEMA to utilize this funding to establish a new Shelter and Services Program and to use a portion of the funding for the existing EFSP-H, until the Shelter and Services Program is established.<sup>61</sup> On February 28, 2023, DHS announced a \$350 million

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<sup>60</sup> Pub. L. No. 117-180, Division A, Sec. 101(6), Continuing Appropriations Act, 2023.

<sup>61</sup> Pub. L. No. 117-328, Division F, Title II, Security Enforcement, and Investigations, U.S. Customs and Border Protection, Operations and Support.

funding opportunity for EFSP-H.<sup>62</sup> This is the first major portion of funding that is being allocated for humanitarian assistance under the Omnibus funding approved in December.<sup>63</sup> For the new Shelter and Services Program, FEMA and CBP have held several public listening sessions and are developing plans to release a Notice of Funding Opportunity prior to September 2023 for the second major portion of funding allocated by Omnibus to assist migrants encountered by DHS.

The Departments emphasize that the reference to an “outer limit” in the NPRM was a prediction that the expected increase in migration at the border following the end of the Title 42 public health Order, without any other policy changes, could exceed the capacity of the Department of State, local governments, and NGOs to provide assistance to migrants. 88 FR at 11715. While commenters are correct that the \$800 million in funding approved in the recent Omnibus is still being distributed and allocated, the Departments disagree that this ongoing funding conflicts with the statement in the NPRM. In other words, funding allocated to date, and funding slated for further allocation under the Omnibus funding approved in December, is insufficient to address the impending further surge of migration expected after the termination of the Title 42 public health Order.

*Comment:* Multiple commenters stated their opposition to “deterrence-oriented” rules. At least one commenter stated the NPRM makes clear the Administration wants to make the asylum system “cumbersome and difficult to navigate” to deter potential asylum seekers from coming to the United States, stating Vice President Harris’ comment of “do not come” in 2021 was a message that those fleeing danger should not seek protection in the United States. Another

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<sup>62</sup> See DHS, Press Release, *The Department of Homeland Security Awards \$350 Million for Humanitarian Assistance Through the Emergency Food and Shelter Program* (Feb. 28, 2023), <https://www.dhs.gov/news/2023/02/28/department-homeland-security-awards-350-million-humanitarian-assistance-through>; DHS Grant Opportunity DHS-23-DAD-024-00-03, Fiscal Year 2023 Emergency Food and Shelter National Board Program - Humanitarian (EFSP) (\$350M) (Feb. 28, 2023), <https://www.grants.gov/web/grants/view-opportunity.html?oppId=346460>.

<sup>63</sup> DHS, Press Release, *The Department of Homeland Security Awards \$350 Million for Humanitarian Assistance Through the Emergency Food and Shelter Program* (Feb. 28, 2023), <https://www.dhs.gov/news/2023/02/28/department-homeland-security-awards-350-million-humanitarian-assistance-through>.



commenter stated the proposed rule would not be an effective deterrent because of its similarity to the Migrant Protection Protocols (“MPP”) and the Title 42 public health Order in the past, which the commenter claimed “outsourced and exacerbated the situation” by leaving thousands of individuals in dangerous conditions in Mexican border cities waiting to see if, or when, they will get into the United States. Another commenter stated the rule does not serve as a deterrent, as evidenced by the growing numbers of asylum seekers at the border.

Some commenters disagreed that the rule would reduce arrivals at the SWB.

Commenters disagreed with the premise underlying the proposed rule—that the rebuttable presumption would disincentivize migrants from entering the United States except through a lawful and orderly pathway and lead to a reduction in encounters at the SWB. Another commenter argued that the rule is providing an opportunity to smuggling organizations and also providing an additional tool for extortion for noncitizens seeking to enter the United States. Another commenter stated that there is no evidence that the NPRM will deter asylum seekers from crossing the border and suggested that arrivals at the border would increase due to suppression of entries at POEs.

*Response:* The Departments disagree that the rule generally seeks to discourage asylum seekers from coming to the United States. Rather, the rule seeks to strike a balance: It is intended to reduce the level of irregular migration to the United States, but also to preserve sufficient avenues for migrants with valid claims to apply for asylum or other protection, either in the United States or in third countries through which they travel. This rule is also intended to disincentivize the use of smugglers. To those ends, the rule encourages those with meritorious claims to either apply for asylum or other protection in the first safe country they reach or pursue available lawful pathways to the United States as set forth in the rule.

The Departments also disagree with the comparison some commenters made between this rule and certain past policies, including MPP and application of the Title 42 public health Order. The rule’s operation as a rebuttable presumption, and the rule’s operation in conjunction with

multiple available lawful pathways, are two of the multiple ways in which this rule differs from certain past policies, including MPP or expulsions under the Title 42 public health Order. As it relates to MPP in particular, the purpose and effect of this rule is not to return noncitizens to Mexico pending their removal proceedings. *See* INA 235(b)(2)(C), 8 U.S.C. 1225(b)(2)(C). Instead, it is to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel. Although some migrants may wait for some period of time in Mexico before obtaining a CBP One app appointment and before attending that appointment, the purpose and duration of such a stay would be different than under MPP. Absent this rule, DHS anticipates that its ability to process noncitizens at POEs, as well as continue to facilitate regular travel and trade, would be adversely impacted by the shifting of resources and personnel from POEs to help process individuals encountered between POEs.

The Departments disagree with commenters' claim that this rule will not reduce entries and that it will incentivize irregular migration. The Departments have shown that an increase in the availability of lawful pathways, paired with immediate consequences for irregular migration, can incentivize the use of lawful pathways and thus reduce irregular migration. *See* 88 FR at 11705–06. Furthermore, the Departments disagree with commenters' assertion that the rule will push individuals away from POEs to cross between POEs. The rule incentivizes noncitizens who might otherwise attempt to enter without inspection between POEs to take advantage of expanded lawful pathways. The availability of lawful pathways, such as the ability to schedule an appointment through the CBP One app and the DHS-approved parole processes, and the rule's operation as a rebuttable presumption are two of the multiple ways in which this rule differs from certain efforts of the past Administration.

*Comment:* Commenters raised concerns with Departmental data cited in the NPRM. For example, commenters referred to two of the Departments' statements in the NPRM: (1) that 83 percent of the people who were subject to expedited removal and claimed to have a credible fear

of persecution or torture from 2014 to 2019 were referred to an IJ for section 240 proceedings, but only 15 percent of those cases that were completed were granted asylum or some other form of protection, *see* 88 FR at 11716; and (2) while only 15 percent of all case completions result in relief or protection, OIS estimates that 28 percent of cases decided on their merits are grants of relief, 88 FR at 11716 n.97. Commenters stated that the 15 percent figure is misleading, because it is based on the total percentage of completed removal cases, and not the total percentage of cases decided on the merits of the asylum claim. Commenters claim that this method artificially deflates the asylum grant rate and creates the false impression that many asylum seekers were ineligible for asylum even where there was no decision on their asylum claim. Commenters also stated that the 28 percent figure itself was too low because, as described by the Departments, this figure excludes withholding of removal, deferral of removal, cancellation of removal, and claimed status reviews.

Commenters also claimed that asylum policies of the previous Administration artificially deflated asylum grant rates. Other commenters stated that it is logical that the percentage of cases passing the credible fear interview stage is far higher than the cases that eventually qualify for asylum, given that the credible fear process is supposed to have a low bar for passage. Another commenter stated that, by the Departments' logic, no asylum applicant should be entitled to an initial credible fear determination and full asylum merits hearing because their claims will probably be denied given the low approval rating of asylum.

*Response:* The Departments cited relevant Departmental statistics—which date back to 2014, prior to the implementation of any policies of the prior Administration—to demonstrate the general point that there is a significant disparity between positive credible fear determinations and ultimate relief in section 240 removal proceedings. *See* 88 FR at 11716. Whether one uses the 15-percent figure or the 28-percent figure, ultimately, the number of individuals who are referred to an IJ at the beginning of the expedited removal process greatly exceeds the number who are granted asylum or some other form of relief or protection.

*Comment:* A commenter stated that numerous factors beyond merit impact whether an asylum seeker's case is ultimately granted (e.g., access to counsel, availability of experts, changing regulations and procedures, and backlogs that affect the availability of evidence). Another commenter noted that many who seek asylum in the United States ultimately lose their cases not due to a lack of merit but instead because of "our convoluted and dysfunctional" immigration system, which the commenter claimed is difficult for asylum seekers to navigate and results in denial of many asylum claims on bases unrelated to the merits of the claim. One commenter asserted that modifying the legal requirements for asylum will not stop migrants from fleeing armed conflict, poverty or other dangers, because many are unaware of their right to apply for asylum. Another commenter stated that the number of migrants arriving is irrelevant to the merits of their asylum claims; the commenter also argued that the rule would screen out asylum seekers regardless of the merit of their case.

*Response:* The Departments acknowledge commenters' concerns that factors unrelated to the merits of the claim, such as access to counsel and unfamiliarity with the asylum process, could affect the ultimate determination of an asylum claim, but disagree that these potential issues are exacerbated by the rule. As discussed in more detail later in Section IV.B.5 of this preamble, this rule does not deprive noncitizens of access to counsel during credible fear proceedings. Additionally, all AOs are trained to conduct interviews in a non-adversarial manner and elicit relevant testimony from noncitizens. Specific training for implementation of this rule will include training on eliciting testimony related to whether a noncitizen can establish an exception or rebut the presumption of asylum ineligibility; therefore, noncitizens are not required to be familiar with the rule to remain eligible for asylum. The Departments emphasize that in all credible fear determinations, a noncitizen's credible testimony may be sufficient to overcome or establish an exception to the presumption against asylum ineligibility in this rule. INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii). As discussed later in Section IV.D.1.iii of this preamble, the Departments note that the overall standard of proof for rebutting or establishing an

exception to the presumption of asylum ineligibility during credible fear proceedings remains the “significant possibility” standard; that standard must be applied in conjunction with the standard of proof required for the ultimate determination (i.e., preponderance of the evidence that an exception applies or that the presumption has been rebutted).

As discussed throughout the NPRM, the lawful pathways condition, and the related modification of the withholding and CAT screening standard applied to noncitizens subject to the condition, would improve overall asylum processing efficiency by increasing the speed with which asylum claims are considered. *See* 88 FR at 11737. By encouraging noncitizens seeking to travel to the United States, including those seeking asylum, to pursue lawful pathways and processes, the rule promotes orderly processing and reduces the number of individuals who would be placed in lengthy section 240 removal proceedings and released into the United States pending such proceedings. *Id.* at 11736. Moreover, by reducing the number of noncitizens permitted to remain in the United States despite failing to avail themselves of a safe and lawful pathway to seek protection, the rule reduces incentives for noncitizens to cross the SWB, thus reducing the anticipated further surge that is expected to strain DHS resources. The Departments reiterate that the rule is not being promulgated to generally prevent noncitizens from seeking asylum in the United States but to strike a balance—reducing the level of irregular migration to the United States while providing sufficient avenues for migrants with valid claims to apply for asylum or other protection. The rule is needed because, absent this rule, after the termination of the Title 42 public health Order, the number of migrants expected to travel without authorization to the United States is expected to increase significantly, to a level that risks undermining the Departments’ ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system.

*Comment:* One commenter asserted that the real purpose of the rule is to incentivize an increasing number of migrants to use the CBP One app to make fraudulent asylum claims. The same commenter also stated “that the proposed rule and the CBP One app will incentivize

increased rates of illegal immigration into the United States.” The commenter further stated that because there is insufficient capacity to process all of the asylum claims of those using the CBP One app, the rule will simply increase the number of individuals who are paroled into the United States, incentivizing further illegal immigration. Another commenter argued that current migration levels result from the current Administration’s actions to “weaken border security, promote the influx of illegal immigration, and to remove integrity from the administration of both the legal immigration process (including asylum and credible fear measures) and overall enforcement of the laws.” Similarly, another commenter stated that the root cause of this crisis was “the Administration’s reckless open borders policies.”

*Response:* While the Departments acknowledge the commenters’ concerns about increased rates of unauthorized immigration into the United States, the Departments disagree that the rule and use of the CBP One app will incentivize noncitizens to enter the United States to make fraudulent asylum claims. If anything, by adding a rebuttable presumption of ineligibility, this rule creates a strong disincentive for irregular migration relative to the status quo. The Departments note that no commenter submitted data suggesting that the rule will result in an increase in fraud or misrepresentation. As explained in Section IV.B.5.iii of this preamble, the Departments are confident that AOs have the training, skills, and experience needed to assess credibility and appropriately determine whether a noncitizen has met an exception to or rebutted the presumption of ineligibility for asylum codified in the rule. Regarding commenters’ concerns that use of the CBP One app will increase the number of individuals who are paroled into the United States and thus incentivize irregular migration, the Departments note that the rule does not provide for, prohibit, or otherwise set any policy regarding DHS’s discretionary authority to make parole determinations for those who use the CBP One app. Even so, as outlined in the NPRM and later in Section IV.E.3.ii of this preamble, the expanded use of the CBP One app is expected to create efficiencies that will enable CBP to safely and humanely expand its ability to process noncitizens at POEs, including those who may be seeking asylum.

*See* 88 FR at 11719. Notably, the rule, coupled with an expansion of lawful, safe, and orderly pathways, is expected to reduce the number of noncitizens seeking to cross the SWB without authorization to enter the United States. Additionally, the United States is undertaking a range of efforts to address irregular migration, including, for instance, working with partner countries to address the causes of migration, significantly increasing the availability of H-2 temporary worker visas and refugee processing in the Western Hemisphere, successfully implementing the CHNV parole processes, and addressing the pernicious role of human smugglers. *See* 88 FR at 11718–21.

The Departments strongly disagree with commenters who assert that the current migration levels are a result of any action by the Departments to “weaken” security at the border. Rather, as noted in the NPRM, economic and political instability around the world is fueling the highest levels of migration since World War II, including in the Western Hemisphere. *See* 88 FR 11704. Additionally, even while the Title 42 public health Order has been in place, the total number of encounters at the SWB reached an all-time high in FY 2022, and they remain at historically high levels even as encounters of CHNV nationals have fallen in recent months.<sup>64</sup> *See id.* at 11704–05. During this time, the United States has been working to build on a multi-pronged, long-term strategy with countries throughout the region to support conditions that would decrease irregular migration while continuing efforts to increase immigration enforcement capacity and streamline processing of asylum seekers and other migrants. *See* 88 FR at 11720–23. This rule ensures that the United States meets its obligations under both U.S. and international law while ensuring that vulnerable populations are able to seek asylum or other protection through lawful, safe, and orderly pathways.

*Comment:* Commenters stated that the rule is unnecessary because the goals of discouraging migrants from seeking asylum and swiftly removing migrants are invalid. These commenters further stated that immigration is good; there is no need to quickly remove asylum

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<sup>64</sup> OIS analysis of OIS Persist Dataset based on data through March 31, 2023; OIS analysis of historic USBP data.

seekers, regardless of backlogs; and that overwhelmed immigration facilities are problems created by the Government that would be solved by welcoming migrants rather than treating them as a problem or as dangerous. A few commenters critiqued the need for the rule, writing that the proposed rule is unnecessary and the Administration should take responsibility for actions that have created an overloaded immigration system. Other commenters questioned whether restrictive border measures and quickly removing individuals actually reduce migratory flows. At least one commenter did not understand how this rule was a “good thing” that would change immigration policy in the United States, which the commenter described as a “disaster.” A commenter stated that the proposed rule is not needed and instead recommended implementing practical and humane solutions, including funding and coordinating with civil society organizations on the border and throughout the country. Another commenter stated that she lives within 100 miles of the border and does not feel threatened by the influx of migrants to her community, and thus the rule is unnecessary.

One commenter stated that the U.S. immigration system is not broken but the current laws need to be strictly enforced, while another commenter stated that DHS should be strengthened so it can address each case instead of lumping people into categories. At least one commenter stated that there is no reason why DHS cannot process applicants more quickly, noting that the United States received a significant number of migrants in the early 1900s with far less technology, so the government should be able to do so much more efficiently now with the sophisticated technology, medical equipment, fingerprinting, and other means available now. Another commenter stated that the rule would not fix backlogs in immigration court, while a number of commenters suggested that it would actually increase the backlogs.

A commenter questioned the need for the rule because the Departments had not demonstrated that they had considered other options. Another commenter requested that the Departments expressly consider a range of factors, such as the U.S. economic outlook and the role of other external variables (such as climate change) in driving migration. The commenter



suggested that such factors may influence migration patterns to such a degree that the rule is unnecessary or likely to be ineffective.

*Response:* The Departments disagree that the rule is unnecessary. The Departments reiterate that the goal of the rule is not to generally discourage migrants with valid claims from applying for asylum or other protection, but rather to encourage the use of lawful, safe, and orderly pathways into the United States. The Departments agree that the United States' historical openness to immigration has enriched our culture, expanded economic opportunities, and enhanced our influence in the world. However, the U.S. immigration system has experienced extreme strain with a dramatic increase of noncitizens attempting to cross the SWB in between POEs without authorization, reaching an all-time high of 2.2 million encounters in FY 2022.<sup>65</sup> The Departments believe that without a meaningful policy change, border encounters could dramatically rise to as high as 11,000 per day after the Title 42 public health Order is lifted.<sup>66</sup> As described in the NPRM, DHS does not currently have the resources to manage and sustain the processing of migratory flows of this scale in a safe and orderly manner, even with the assistance of modern technology. *See* 88 FR at 11712–13. In response to this urgent situation, the rule will establish a rebuttable presumption of asylum ineligibility for certain noncitizens who fail to take advantage of the existing and expanded lawful pathways to enter the United States, including the opportunity to schedule a time and place to present at a SWB POE, where they may seek asylum or other forms of protection, in a lawful, safe, and orderly manner, or to seek asylum or other protection in one of the countries through which they travel on their way to the United States. *See id* at 11706. The Departments believe that this rule is necessary to address the anticipated surge in irregular migration.

The Departments also believe the rule is necessary to improve the overall functioning and efficiency of the immigration system. *See* INA 208(b)(2)(C) and (d)(5)(B),

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<sup>65</sup> OIS analysis of historic USBP data.

<sup>66</sup> OIS analysis of DHS SWB Encounter Planning Model generated April 18, 2023.

8 U.S.C. 1158(b)(2)(C) and (d)(5)(B). Specifically, the rule would efficiently and fairly provide relief to noncitizens who are in the United States and are eligible for relief, while also efficiently denying relief and ultimately removing those noncitizens who are determined to be ineligible for asylum and do not qualify for statutory withholding of removal or protection under the regulations implementing the CAT. The Departments acknowledge that despite the protections preserved by the rule and the availability of lawful pathways, the rebuttable presumption adopted in the rule will result in the denial of some asylum claims that otherwise may have been granted, but the Departments believe that the rule will generally offer opportunities for those with valid claims to seek protection. Moreover, the Departments have determined that the benefits to the overall functioning of the system, including deterrence of dangerous irregular migration and smuggling, justify the rule. In sum, the rule permissibly pursues efficient asylum processing while preserving core protections, which is within the Departments' authority conferred by section 208 of the INA, 8 U.S.C. 1158.

The Departments acknowledge commenters' support for enforcing existing immigration laws. However, the Departments do not believe that current laws and regulations are sufficient to address the current levels of migratory flows and the anticipated increase in the number of migrants who will attempt to enter the United States following the lifting of the Title 42 public health Order. Likewise, a policy is necessary to ensure lawful, safe, and orderly processing of those migrants. Absent further action, POEs will be congested, migrants will be forced to wait in long lines for unknown periods of time, and once processed they will be released into local communities that are already at or near their capacity to absorb them. *See* 88 FR at 11715. By incentivizing noncitizens to use lawful pathways, this rule aims to encourage migrants to either pursue options that would allow them to avoid making the journey to the SWB, or to schedule in advance a time for arrival at a POE, which will alleviate additional strain on DHS resources. The Departments believe it would be inappropriate to elect inaction on the basis of conjecture

regarding U.S. economic outlook and similar factors and the potential effects of such factors on the impending surge of irregular migration.

In response to comments asserting that the Departments did not consider other options before promulgating this final rule, the Departments note that alternative approaches for managing the expected surge in migration were discussed in the NPRM and the Departments ultimately assessed, and continue to assess, that the rule is the best option for responding to the current situation at the border and the expected surge in migration after the lifting of the Title 42 public health Order. *See* 88 FR at 11730–32. Concerns regarding backlogs, government resources and funding are addressed in Sections IV.B.5.iv and IV.C.2 of this preamble.

The Departments acknowledge commenters’ suggestion that DHS “strengthen” its resources to respond to the anticipated surge in migrants to the SWB. The Departments note that they have already deployed additional personnel, technology, infrastructure, and resources to the SWB and that continuing this “strengthening” of the SWB would require additional congressional actions, including significant additional appropriations, which are outside of the scope of this rulemaking.

i. Concerns Regarding the Sufficiency of the Lawful Pathways

*Comment:* Commenters stated that in general, the available lawful pathways are insufficient to meet the significant demand for migration to the United States. Commenters stated that increasing legal pathways for some should not come at the expense of restricting access for asylum seekers seeking protection. Commenters stated that the existing lawful pathways are “extremely narrow and unavailable to many people,” and that it is fundamentally unjust to fault individuals for seeking safety and stability in the only way possible. Commenters stated that migrants who seek asylum in the United States rather than another country are doing so rationally and intentionally and they would seek asylum in a closer country if it was truly safe.

Multiple commenters stated that H-2 temporary worker visas are insufficient substitutes for asylum. One commenter stated that the Administration is “misguided” in touting its efforts in

the proposed rule to expand two of the most “exploitative and troubled U.S. work visa programs—H-2A and H-2B” because these programs are “deeply flawed and in desperate need of reform.” The same commenter stated that expanding temporary work visa programs like H-2B and H-2A makes little sense for those seeking asylum because they do not provide a permanent pathway to remain in the United States and would put migrants in danger by returning them to dangerous situations after the visa certification expires. Similarly, other commenters stated that the H-2 programs do not provide or guarantee safety for migrants because they are not permanent or durable solutions and they do not allow for family unity in the United States.

*Response:* The United States is both a nation of immigrants and a nation of laws. The Departments are charged with enforcing those laws and endeavor to do so humanely. The rule is needed because, absent this rule, after the termination of the Title 42 public health Order, the number of migrants expected to travel without authorization to the United States is expected to increase significantly, to a level that risks undermining the Departments’ ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system. The rule, coupled with an expansion of lawful, safe, and orderly pathways, is expected to reduce the number of noncitizens seeking to cross the SWB without authorization to enter the United States.

Though the Departments acknowledge that existing lawful pathways may not be available to every migrant, the Departments disagree with comments stating that the existing lawful pathways are extremely narrow. The United States Government has been working to significantly expand access to lawful pathways and processes for migrants since January 2021. In addition to the new processes DHS has implemented for CHNV nationals, which are discussed at length in the NPRM, DHS has been working with other Federal departments and agencies to increase access to labor pathways; restart, streamline, and expand family

reunification parole programs; and significantly rebuild and expand refugee processing in the region. *See* 88 FR at 11718–23.<sup>67</sup>

For example, DHS has worked with the Department of State and the Department of Labor (“DOL”) to significantly expand access to the H-2A and H-2B temporary agricultural and nonagricultural worker visas in order to help address labor shortages and provide safe and orderly pathways for migrants seeking economic opportunity in the United States. On December 15, 2022, DHS and DOL jointly published a temporary final rule increasing the total number of noncitizens who may receive an H-2B nonimmigrant visa by up to 64,716 for the entirety of FY 2023. *See* Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers, 87 FR 76816 (Dec. 15, 2022). In particular, the number of H-2 visas issued to nationals of El Salvador, Honduras, and Guatemala has increased by 250 percent between FYs 2020 and 2022: in FY 2022, the Department of State issued 19,295 H-2 visas to those three countries, compared to just 5,439 in FY 2020.<sup>68</sup> The Departments disagree that expanding use of these programs is misguided; although improvements are possible, these programs are established features of the immigration system and an appropriate mechanism to support lawful, safe, and orderly travel to the United States. Moreover, these programs represent two of several available lawful pathways, some of which provide protection that is not temporary and does allow for derivative protection for family members. For example, the United States Government has restarted the Central American Minors Refugee and Parole Program, which provides certain qualified children who are nationals of El Salvador, Guatemala, and Honduras, as well as certain family members of those children, an opportunity to apply for refugee status and possible resettlement in the United States.<sup>69</sup>

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<sup>67</sup> *See also* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

<sup>68</sup> *See* Department of State, *H-2 Visa Data for El Salvador, Guatemala, and Honduras, FY 2015-FY2023 Mid-Year* (last reviewed Feb. 24, 2023).

<sup>69</sup> *See* USCIS, Central American Minors (CAM) Refugee and Parole Program, <https://www.uscis.gov/CAM> (last visited Apr. 5, 2023).

The United States Government also provides durable solutions for humanitarian protection through the U.S. Refugee Admissions Program for qualifying applicants. In 2022, concurrent with the announcement of the L.A. Declaration, the United States announced that it intends to refer for resettlement at least 20,000 refugees from Latin America and the Caribbean in FY 2023 and FY 2024, which would put the United States on pace to more than triple refugee admissions from the Western Hemisphere this fiscal year alone.<sup>70</sup> On April 27, 2023, DHS announced that it would commit to welcoming thousands of additional refugees per month from the Western Hemisphere—with the goal of doubling the number of refugees the United States committed to welcome as part of the L.A. Declaration.<sup>71</sup> The United States Government also continues to work with our partners to expand access to refugee resettlement more broadly throughout the Western Hemisphere. For instance, Canada recently announced that it will take significant steps to expand safe and orderly pathways for migrants from the Western Hemisphere to enter Canada lawfully. Building on prior commitments, Canada will provide an additional 15,000 migrants from Latin America and the Caribbean with access to legal pathways to Canada; and enter into arrangements with the United States and like-minded countries to promote lawful labor mobility pathways.<sup>72</sup>

Comments asserting insufficiencies associated with the CHNV parole processes and other lawful pathways identified in the rule are further addressed in Section IV.3 of this preamble.

The rule will not impact those who use these lawful pathways that the United States is offering for migrants to obtain entry into the United States. Additionally, the rule will not apply to noncitizens who enter the United States with documents sufficient for admission. Instead, the rule is meant to promote the use of these lawful pathways and disincentivize irregular migration.

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<sup>70</sup> See The White House, *Fact Sheet: The Los Angeles Declaration on Migration and Protection U.S. Government and Foreign Partner Deliverables* (June 10, 2022) (“L.A. Declaration Fact Sheet”), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/fact-sheet-the-los-angeles-declaration-on-migration-and-protection-u-s-government-and-foreign-partner-deliverables/>.

<sup>71</sup> See DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

<sup>72</sup> See DHS, Press Release, *United States and Canada Announce Efforts to Expand Lawful Migration Processes and Reduce Irregular Migration* (Mar. 24, 2023), <https://www.dhs.gov/news/2023/03/24/united-states-and-canada-announce-efforts-expand-lawful-migration-processes-and>.

ii. Similarity to Actions of Past Administration

*Comment:* Many commenters stated that the proposed rule is functionally indistinguishable from prior asylum-related rules that were issued by the prior Administration, particularly the TCT Bar IFR and Final Rule, which have been enjoined, or would cause similar harm to asylum seekers. At least one commenter criticized that the addition of the “rebuttable presumption” in this rule is not enough to distinguish it from previous rules. For example, commenters described the rule as “resurrect[ing] Trump-era categorical bans on groups of asylum seekers.” Similarly, some commenters stated that this rule is similar to the “asylum bans” the past Administration attempted to advance. Another commenter asserted that this rule operates similarly to rules from the prior Administration because it would operate as a ban for asylum seekers based on factors that do not relate to their fear of return and would result in asylum denials for all who are unable to establish that they qualify for exceptions the commenter characterized as extremely limited. A commenter claimed that while the Departments repeatedly assert throughout the NPRM that the rebuttable presumption is distinguishable from the TCT Bar, the opportunity to rebut the presumption would occur only under the most extreme scenarios and in excess of what would ordinarily be sufficient to claim asylum. Another commenter predicted that the proposed rule would revive attempts to “rig the credible fear process.” While comparing the rebuttable presumption standards to the non-refoulement screening standard used under MPP, the commenter argued that the proposed rule would impose a “more likely than not” screening standard that far exceeds the standard for an asylum grant. The commenter further stated that the “deficient” non-refoulement screenings carried out during MPP foreshadow the dangers asylum seekers would face under the proposed rule if finalized.

In comparing this rule to those issued by the prior Administration, commenters stated that the previous rules led to asylum denials, prolonged detention for many with bona fide claims, and family separations. At least one commenter stated that a recent congressional investigation found that not one person sent to Guatemala under the prior Administration’s

Asylum Cooperative Agreements received asylum; instead, migrants were forced to return to their originating country. A commenter also stated that the rule attempts to differentiate itself from prior policies via exceptions and alternative pathways to asylum but that the exceptions are insufficient because they would fail to protect the most vulnerable. Several commenters stated that asylum bans have been proven to be ineffective at deterring noncitizens from seeking safety. One commenter stated that calling the rule a “rebuttable presumption” was merely a semantic difference from prior asylum bans, which had narrow exceptions.

*Response:* The Departments acknowledge these commenters’ concerns but disagree that the final rule is indistinguishable from asylum-related rulemakings and policies issued by the prior Administration. The TCT Bar IFR and Final Rule and the Proclamation Bar IFR, for instance, categorically barred covered individuals from certain types of relief. While the TCT Bar Final Rule only allowed limited exceptions to its eligibility bar, including for trafficking victims and other grounds, this rule includes a number of broader exceptions and means for rebutting the presumption. A noncitizen can rebut the presumption by, for example, demonstrating exceptionally compelling circumstances by a preponderance of the evidence during a full merits hearing. *See* 8 CFR 208.33(a)(3); 8 CFR 1208.33(a)(3). A noncitizen can rebut the presumption if they establish that they or a member of their family with whom the noncitizen is traveling meet any of the three per se grounds for rebuttal, which provide that, at the time of entry: (1) they faced an acute medical emergency; (2) they faced an imminent and extreme threat to their life or safety; or (3) they were a “victim of a severe form of trafficking in persons” as defined in 8 CFR 214.11. In addition to the per se grounds for rebuttal, a noncitizen could also rebut the presumption in other exceptionally compelling circumstances. One exceptionally compelling circumstance recognized by the rule is included specifically to avoid family separations. *See* 8 CFR 1208.33(c). Protecting against family separation is one example of how this rule includes appropriate safeguards for vulnerable populations. Depending on



individual circumstances, AOs and IJs may find that certain especially vulnerable individuals meet the exceptionally compelling circumstances standard.

The Departments acknowledge concerns about opportunities to rebut the presumption but disagree that the rule would impose a higher standard for rebutting the presumption than the standard to establish asylum eligibility. The “significant possibility” standard is the overall assessment applied during credible fear screenings; that standard must be applied in conjunction with the standard of proof required for the ultimate determination (i.e., preponderance of the evidence that the presumption has been rebutted or an exception established). As discussed below in Section IV.E.1 of this preamble, a noncitizen can satisfy their burden of proof through credible testimony alone; the rule does not require any particular evidence to rebut or establish an exception to the presumption under 8 CFR 208.33(a)(3), 1208.33(a)(3). *See* INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii); INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Accordingly, the Departments believe that the means of rebutting or establishing an exception to the presumption are not unduly burdensome.

The Departments have considered the approaches taken in multiple rulemaking efforts of the last few years and now believe that the more tailored, time-limited approach in this final rule is better suited to address the increased migrant flows into the United States expected after the Title 42 public health Order terminates. *See* 88 FR at 11728. This rule encourages use of lawful, safe, and orderly pathways to enter the United States and, unlike those prior rulemakings, retains a noncitizen’s ability to be found eligible for asylum should they enter through an enumerated lawful pathway or otherwise overcome the condition imposed by this rule. The Departments believe that the rule’s more balanced approach renders the TCT Bar Final Rule and the Proclamation Bar IFR unnecessary, and that those rules conflict with the approach taken in this

rule.<sup>73</sup> As proposed in the NPRM and discussed at Sections IV.E.9 and IV.E.10 of this preamble, the Departments have decided to remove those prior rules from the CFR. *See* 88 FR at 11728.

The Departments disagree with some commenters that this final rule will cause harms similar to those attributed to the TCT Bar Final Rule and the Proclamation Bar IFR, which commenters allege include asylum denials, prolonged detention, and family separation. This rule's scope and effect are significantly different from the TCT Bar Final Rule. Unlike the TCT Bar Final Rule, the presumption would not completely bar asylum eligibility based on the availability of protection in a third country. First, while this rule takes into account whether individuals sought asylum or other forms of protection in third countries while traveling to the United States, the rule would not require that all noncitizens make such an application to be eligible for asylum, unlike the TCT Bar Final Rule. For example, if the noncitizen received authorization to travel to the United States to seek parole or scheduled an appointment through the CBP One app to present themselves at a POE, then the condition on asylum eligibility would not apply to that noncitizen regardless of whether the noncitizen sought protection in a third country. Second, while the TCT Bar Final Rule only allowed limited exceptions to its eligibility bar, including for trafficking victims and other grounds, this rule includes a number of exceptions and means for rebutting the presumption, including an exception for trafficking victims. This rule encourages noncitizens to use orderly, lawful pathways to enter the United States, and it will only become relevant whether the noncitizens applied for protection in a third country through which they traveled in cases in which noncitizens do not avail themselves of one of the pathways.

The Departments acknowledge commenters' concerns with the effectiveness of Safe Third Country Agreements ("STCA") or asylum cooperative agreements. The Departments acknowledge that negotiating such agreements is a lengthy and complicated process that depends

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<sup>73</sup> Both the TCT Bar Final Rule and the Proclamation Bar IFR are discussed further in Sections IV.E.9 and IV.E.10 of this preamble.

on the agreement of other nations. *See* 88 FR at 11732. The Departments note that the only such agreement in effect is the Canada-U.S. STCA. *See generally* Implementation of the 2022 Additional Protocol to the 2002 U.S.-Canada Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, 88 FR 18227 (Mar. 28, 2023). The rule does not implement or change the framework for negotiating STCAs, which involves extensive diplomatic negotiations. As discussed more in Section IV.E.3.iv of this preamble, the safe-third-country provision in section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), indicates that a noncitizen may be removed, pursuant to “a safe-third-country agreement,” and the noncitizen may not apply for asylum “unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.” This rule operates differently. Under this rule, noncitizens may apply for asylum and other protection in the United States. While the rule would create a rebuttable presumption, it specifies circumstances in which that presumption is necessarily rebutted as well as other exceptions. By encouraging noncitizens seeking to travel to the United States, including those intending to seek asylum, to use lawful pathways and processes, the Departments expect the rule to promote orderly processing, reduce the anticipated surge that is expected to strain DHS resources, reduce the number of individuals who would be placed in lengthy removal proceedings pursuant to section 240 of the INA and released into the United States pending such proceedings, allow for the expeditious removal of noncitizens who failed to avail themselves of a safe and lawful pathway to seek protection, and reduce incentives for noncitizens to cross the border using dangerous smuggling networks. *See* 88 FR at 11736. Regarding comments about the ineffectiveness of the rule to deter migrants from seeking safety, the rule does not discourage migrants with valid claims from applying for asylum or other protection. The rule encourages those with meritorious claims to either apply for asylum or other protection in the first safe country they find or pursue available lawful pathways, such as the U4U and CHNV parole processes—which early data indicate are deterring irregular

migration from those countries, *see* 88 FR at 11706—or presenting at a POE at a pre-scheduled time and place.

*Comment:* Some commenters noted the rise in recidivist encounters following the end of the prior Administration despite many efforts to restrict asylum access and stated that removals under this rule would increase rates of recidivism.

*Response:* The Departments disagree that removals under this rule will increase the rate of recidivism. The Departments note that a range of external considerations (such as the COVID-19 pandemic, litigation resulting in injunctions or vacatur of those rules prior to or during initial stages of their implementation,<sup>74</sup> and differences in the operation of the Title 42 public health Order and this rule) prevent the Departments from drawing any firm conclusions applicable to this rulemaking based solely on recidivism numbers following the end of the prior Administration. The application of the Title 42 public health Order at the border has had unpredictable impacts on migration. Because Title 42 expulsions have no consequence, aside from the expulsion itself, DHS has seen a substantial increase in recidivism for individuals processed under Title 42 as compared to those processed under Title 8 authorities. In March 2023, for example, 26 percent of encounters at the SWB involved individuals who had at least one prior encounter during the previous 12 months, compared to an average 1-year re-encounter rate of 14 percent for FYs 2014–2019.<sup>75</sup>

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<sup>74</sup> Federal courts have either vacated or enjoined the Departments from implementing the TCT Bar IFR and Final Rule, Procedures for Asylum and Bars to Asylum Eligibility, 85 FR 67202 (Oct. 21, 2020) (“Criminal Asylum Bars Rule”), and Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (December 11, 2020) (“Global Asylum Rule”). *See, e.g., Capital Area Immigrants’ Rights Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020) (vacating the TCT Bar IFR); *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2020) (“*East Bay I*”) (affirming injunction of the TCT Bar IFR); *E. Bay Sanctuary Covenant v. Barr*, 519 F. Supp. 3d 663 (N.D. Cal. 2021) (“*East Bay II*”) (enjoining the TCT Bar Final Rule); *Pangea Legal Servs. v. DHS*, 501 F. Supp. 3d 792 (N.D. Cal. 2020) (enjoining the Criminal Asylum Bars Rule) (“*Pangea I*”); *Pangea Legal Servs. v. U.S. Dep’t of Homeland Sec.*, 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021) (“*Pangea II*”) (preliminarily enjoined the Departments “from implementing, enforcing, or applying the [Global Asylum Rule] . . . or any related policies or procedures.”); *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 681 (9th Cir. 2021) (“*East Bay III*”); *see O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019) (recounting the history of the litigation over the Proclamation Bar IFR and vacating it).

<sup>75</sup> Including CBP enforcement encounters at or between ports of entry. OIS Persist based on data through March 31, 2023.

Overall, since the start of the pandemic and the initiation of Title 42 expulsions, 39 percent of all Title 42 expulsions have been followed by a re-encounter of the same individual within 30 days versus a 9 percent 30-day re-encounter rate for Title 8 repatriations.<sup>76</sup> Similarly, the 12-month re-encounter rates are 51 percent for Title 42 expulsions versus 20 percent for Title 8 repatriations.<sup>77</sup> While a portion of the overall gap between Title 42 and Title 8 re-encounter rates is likely explained by the fact that many Title 42 expulsions are to Mexico and almost all Title 8 repatriations are to individuals' countries of citizenship, it is notable that a large gap between Title 42 and Title 8 re-encounter rates is also observed in the case of Mexican nationals, all of whom are repatriated to Mexico.<sup>78</sup>

This gap is likely, in part, because a removal under Title 8 carries with it at least a five-year bar to admission, among other legal consequences. As a result, it is the Departments' assessment that a return to Title 8 processing of all noncitizens will likely reduce recidivism at the border. Moreover, the Departments believe it would be unwarranted to conclude that, based on recidivist apprehensions while the Title 42 public health Order has been in place, conditions on asylum eligibility do not discourage attempts to enter the United States unlawfully. This rule, which will take effect upon the lifting of the Title 42 public health Order, anticipates that those who receive negative credible fear determinations will be removed upon issuance of final orders of removal and be subject to at least a five-year bar on admission in addition to having the rebuttable presumption apply to any subsequent asylum application the noncitizen may file in the future.

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<sup>76</sup> Title 8 repatriation, as used here, refers to both removals (noncitizen required to depart based on a removal order) and returns (noncitizen required to depart leaves without a formal order of removal).

<sup>77</sup> OIS analysis of OIS Enforcement Lifecycle based on data through December 31, 2022.

<sup>78</sup> For Mexican nationals, since the start of the pandemic, the 30-day re-encounter rates are 44 percent for Title 42 expulsions versus 15 percent for Title 8 repatriations, and the 12-month re-encounter rates are 55 percent for Title 42 expulsions versus 26 percent for Title 8 repatriations. OIS analysis of OIS Enforcement Lifecycle based on data through December 31, 2022.

iii. Unnecessary Given the Asylum Processing IFR

*Comment:* Some commenters questioned why this proposed rule is necessary given that the Asylum Processing IFR was adopted less than one year ago. *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 FR 18078 (Mar. 29, 2022) (“Asylum Processing IFR”). In referencing the Asylum Processing IFR, one commenter noted that this rule is an “abrupt change in reasoning from less than a year ago,” which, according to the commenter, indicates that the rule is “political” rather than based on reasoned decision making. Some commenters noted that in the Asylum Processing IFR, the Departments explained that applying the TCT Bar Final Rule at the credible fear stage as proposed by the past Administration was inefficient and consumed considerable resources so there is “no basis to suddenly reverse course again.” A commenter argued that the proposal would depart from conclusions DHS reached within the last year in the Asylum Processing IFR recommitting agencies to the statutory “significant possibility” standard for asylum claims. One commenter asserted that while the proposed rule is premised on the idea that applying a higher “reasonable possibility” standard can weed out non-meritorious asylum cases, the Departments recently acknowledged in the Asylum Processing IFR that the higher standard is not effective at screening out such claims. The same commenter expressed concern that the Government’s “abrupt about-face” is not based on new data, but rather on the lack of evidence that the reasonable possibility standard is not effective in the context in which it is currently used. Another commenter similarly wrote that the application of the reasonable possibility standard at the credible fear screening stage represents a “stark reversal” from DHS’s position in the Asylum Processing IFR that asylum eligibility bars should not be applied at the initial screening stage and that the “significant possibility” standard should be applied when screening for all protection claims (i.e., asylum, withholding of removal, and CAT protection). A commenter stated that the proposed rule introduces conflict with the Asylum Processing IFR and expressed concern that implementation of the new rule would be difficult for AOs. One

commenter stated that the Departments should make greater use of the recent 2022 asylum merits interview process, which would provide a solution to the problems the Departments asserted in the NPRM.

*Response:* The Departments recognize that under the Asylum Processing IFR issued in March 2022, certain noncitizens determined to have a credible fear are referred to an AO, in the first instance, for further review of the noncitizen's asylum application. *See* 87 FR at 18078. For noncitizens subject to that IFR, following a positive credible fear determination, AOs conduct an initial asylum merits interview instead of referring the case directly for removal proceedings pursuant to section 240 of the INA. If USCIS does not grant asylum, the individual is referred to EOIR for streamlined removal proceedings pursuant to section 240. In issuing the Asylum Processing IFR, the Departments concluded that protection determinations during the expedited removal process could be made more efficient. *See* 87 FR at 18085. The purpose of the Asylum Processing IFR was to simultaneously increase the promptness, efficiency, and fairness of the process by which noncitizens who enter the United States without appropriate documentation are either removed or, if eligible, granted relief or protection. *Id.* at 18089. Additionally, the Asylum Processing IFR enables meritorious cases to be resolved more quickly, reducing the overall asylum system backlog, and using limited AO and IJ resources more efficiently. *Id.* at 18090. The entire process is designed to take substantially less time than the average of over four years it takes to adjudicate asylum claims otherwise. *See* 88 FR at 11716. This final rule builds upon this existing system while implementing changes, namely that AOs will apply the lawful pathways rebuttable presumption during credible fear screenings.

The Departments disagree with commenters' suggestion that the proposed rule was political and not based on reasoned decisions. Rather, the rule's primary purpose is to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel. The rule establishes procedures for AOs and IJs to follow when

determining whether the rebuttable presumption applies to a noncitizen and, if it does, whether the noncitizen has established any exceptions to or rebutted the presumption. *See* 8 CFR 208.33(b). In addition, for noncitizens found to be ineligible for asylum under 8 CFR 208.33, the rule establishes procedures for AOs to further consider a noncitizen’s eligibility for statutory withholding of removal or protection under the regulations implementing the CAT. *See* 8 CFR 208.33(c)(2). Individuals subject to the lawful pathways condition will still be placed into removal proceedings under section 240 if they meet the “reasonable possibility” of persecution or torture standard. One of the goals of the Asylum Processing IFR is to streamline the expedited removal process, and this rule is complementary to that goal, but is also necessary to incentivize lawful, safe, and orderly migratory flows. This rule does not foreclose processing noncitizens through the process established by the Asylum Processing IFR.

The Departments acknowledge that the approach in this rule is different in certain respects from that articulated in the Asylum Processing IFR issued in March 2022. However, the Departments believe the current and impending situation on the ground along the SWB warrants departing in some respects from the approach generally applied in credible fear screenings. *See* 88 FR at 11742. The Asylum Processing IFR was designed for non-exigent circumstances. However, as noted in the NPRM, encounters of non-Mexican nationals at the SWB between POEs have reached a 10-year high of 1.5 million in FY 2022,<sup>79</sup> driven by smuggling networks that enable and exploit this unprecedented movement of people. This heightened migratory flow has overburdened the current asylum system, resulting in a growing backlog of cases awaiting review by AOs and IJs. *See* 88 FR at 11705. The exigent circumstances giving rise to this rule arose after the Asylum Processing IFR was issued and require departing from the general approach in the Asylum Processing IFR in specific ways—i.e., applying the condition on eligibility during credible fear screenings, applying the “reasonable possibility” standards to individuals who cannot show a “significant possibility” of eligibility for asylum based on the

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<sup>79</sup> OIS analysis of OIS Persist Dataset based on data through March 31, 2023.



presumption established in the rule, requiring an affirmative request for IJ review of a negative credible fear determination, and limiting requests for reconsideration after IJ review and instead providing for reconsideration based only on USCIS's discretion.

The Departments believe that the condition on eligibility and this rule's departures from the Asylum Processing IFR are reasonable and necessary for the reasons discussed in the NPRM. *See* 88 FR at 11744–47. The rule will help achieve many of the goals outlined in the Asylum Processing IFR, including improving efficiency; streamlining the adjudication of asylum, statutory withholding of removal, and CAT protection claims; and reducing the strain on the immigration courts by screening out and removing those with non-meritorious claims more quickly. *See* 87 FR 18078.

The Departments note that the rule does not apply a higher “reasonable possibility” standard to asylum claims; rather, the rule applies the statutory “significant possibility” standard to asylum claims, as explained elsewhere in this preamble. The rule only applies the “reasonable possibility” standard to statutory withholding and CAT claims, and only if a noncitizen is subject to and has not established an exception to or rebutted the presumption at the credible fear screening. Additionally, the Asylum Processing IFR did not conclude that the higher standard was “not effective” at screening out non-meritorious statutory withholding and CAT claims, but rather made a policy determination that the higher standard was inefficient given the circumstances of that particular rule. *See* 87 FR at 18092. The Departments reached a different policy conclusion after the Asylum Processing IFR was issued and believe that this rule is necessary to address the current and exigent circumstances described throughout the NPRM. *See* 88 FR at 11744–47.

The Departments appreciate commenters' support for the asylum merits interview process, but the Departments reiterate the discussion from the NPRM that the asylum merits interview process should not be used for noncitizens subject to the presumption. *See* 88 FR at 11725–26. This is because each such proceeding, in which the noncitizen would only be eligible

for forms of protection that the AO cannot grant (withholding of removal or CAT protection), would have to ultimately be adjudicated by an IJ. Further, the Departments note that the processes relating to management of those who have already established a credible fear are different from the processes for migrants seeking entry into the United States who are making an initial claim of fear.

iv. Unnecessary Given Parole Processes

*Comment:* Some commenters objected that although the Departments stated that they anticipate a surge in CHNV individuals claiming fear at the SWB after the termination of the Title 42 public health Order, the proposed rule also claims that the parole processes for these populations are working to limit irregular migration from these countries.

*Response:* In an effort to address the significant increase in CHNV migrants at the SWB, the United States has taken significant steps to expand safe and orderly processes for migrants from these countries to lawfully come to the United States. Specifically, these processes provide a lawful and streamlined way for eligible CHNV nationals and their family members to apply to come to the United States without having to make the dangerous journey to the SWB.<sup>80</sup> Individuals can request an advance authorization to travel to the United States to be considered on a case-by-case basis for a grant of temporary parole by CBP. Noting the success of the CHNV parole processes coupled with enforcement measures in limiting irregular migration of CHNV nationals, the Departments also recognize that there are a number of factors that could prevent the same level of success after the lifting of the Title 42 public health Order absent additional policy changes. *See* 88 FR at 11706. These factors include the presence of large CHNV populations already in Mexico and elsewhere in the hemisphere as a result of past migratory flows and the already large number of migrants from these countries in the proximity of the SWB after they were expelled to Mexico under the Title 42 public health Order. *See id.*

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<sup>80</sup> *See* DHS, Press Release, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), <https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and>.

In addition, as the Departments noted in the NPRM, the incentive structure created by the CHNV parole processes relies on the availability of an immediate consequence, such as the application of expedited removal under this rule, for those who do not have a valid protection claim or lawful basis to stay in the United States. *See* 88 FR at 11731. The parole processes thus work with this rule in a complementary manner to address the expected surge in migration after the Title 42 public health Order is lifted.

v. Unnecessary Given Lack of Access to Asylum

*Comment:* Some commenters stated that the rule would not succeed at meeting its goal of deterring irregular immigration since migrants are already aware, even without the rule, that there is a low chance of actually receiving asylum in the United States.

*Response:* The Departments reiterate that the rule's primary goal is to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel. The rule is intended to reduce the level of irregular migration to the United States without discouraging migrants with valid claims from applying for asylum or other protection. Even assuming migrants are aware of the relative likelihood of success of their asylum claims, the Departments do not believe the low ultimate approval rate for asylum and other forms of protection, which has long been the status quo, has served as a strong disincentive against making protection claims given the comparatively high chance of receiving a positive credible fear determination (83 percent for FYs 2014–19, *see* 88 FR at 11716) after which migrants are able to wait in the United States to present their claims, the multi-year backlog of immigration court cases,<sup>81</sup> and the fact that many migrants who are denied asylum are not ultimately removed, *see id.* Additionally, many noncitizens who are encountered at the border and released pending their immigration proceedings will spend years in the United States, regardless of the

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<sup>81</sup> *See* TRAC, *Immigration Court Asylum Backlog through February 2023*, <https://trac.syr.edu/phptools/immigration/asylumbl/> (last visited Mar. 14, 2023) (average 1,535 days from I-589 filing to merits hearing).

outcome of their cases. *See id.* Indeed, most noncitizens who receive a positive credible fear determination will be able to live and work in the United States for the duration of their removal proceedings—which, on average, take almost 4 years.<sup>82</sup> This reality provides a powerful incentive for noncitizens to make protection claims. Therefore, a low approval rate for asylum applications does not necessarily offer much disincentive against making protection claims.

vi. Ineffective Without Changes to Withholding of Removal or CAT Adjudications

*Comment:* Some commenters stated that if the process for applying for statutory withholding of removal or CAT protection stays the same, the rule would not be an effective deterrent for people who do not have a meritorious claim for asylum who are seeking to delay their removal from the United States. One commenter suggested that because those subject to the rule can seek protection through statutory withholding of removal and CAT, even with this rule in place, they will likely continue to arrive without using a lawful pathway. The commenter further stated that people fleeing unlivable conditions at home, the overwhelmingly majority of whom have no real knowledge of U.S. immigration law, are unlikely to carefully dissect the rule’s subtle changes to eligibility standards. And as long as migrants know there is the possibility of protection in the United States—no matter whether through asylum or another form of relief—they will likely continue to make the dangerous trek to the border, where they will then cross.

*Response:* The Departments note that the rule would implement changes to the existing credible fear screening process. Specifically, if noncitizens cannot make a sufficient showing that the lawful pathways condition on eligibility for asylum is inapplicable or that they are subject to an exception or rebuttal ground, then the AO will screen the noncitizen for statutory withholding of removal and protection under the CAT using the higher “reasonable possibility” standard. *See* 8 CFR 208.33(b)(2)(i). This “reasonable possibility” standard is a change from the practice currently applied for statutory withholding of removal and CAT protection in the

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<sup>82</sup> OIS analysis of DOJ EOIR data based on data through March 31, 2023.

credible fear process. As explained in the NPRM, the Departments have long applied—and continue to apply—the higher “reasonable possibility” of persecution or torture standard in reasonable-fear screenings because this standard better predicts the likelihood of succeeding on the ultimate statutory withholding of removal or CAT protection application than does the “significant possibility” of establishing eligibility for the underlying protection standard, given the higher burden of proof for statutory withholding of removal and CAT protection. *See* 88 FR at 11746–47. The Departments also assess that applying the “reasonable possibility” of persecution or torture standard where the lawful pathways condition renders the noncitizen ineligible for asylum will result in fewer individuals with non-meritorious claims being placed into removal proceedings under section 240 of the INA, and more such individuals being quickly removed. The Departments believe that using the “reasonable possibility” standard to screen for statutory withholding and CAT protection in this context, and quickly removing individuals who do not have a legal basis to remain in the United States, may serve as a disincentive for migrants who would otherwise make the perilous journey to the United States without first attempting to use a lawful pathway or seeking protection in a country through which they travel.

vii. Ineffective Because Exceptions Will Swallow the Rule

*Comment:* Some commenters raised concerns that the rebuttable presumption of ineligibility could be too easily overcome or perceived as easy to overcome, due to the number of exceptions and means of rebuttal. One commenter referred to the proposed rule as “a facially stricter threshold” than under current practice and said that the rebuttable presumption was “a tougher standard in name only.” Another commenter opined that the proposed rule would be largely ineffective and urged the Departments to eliminate exceptions to the presumption against asylum eligibility, which they said are overbroad, easy to exploit, and threaten to swallow the rule. Similarly, other commenters stated that there should be no exceptions to the condition on asylum. Commenters stated that migrants would quickly learn the various exceptions to the presumption and how to fraudulently claim them to obtain asylum. One commenter alleged,

without evidence, that various NGOs and legal organizations coach people on which “magic words” they must utter to gain entry into the United States. One commenter stated that noncitizens may falsely claim to be Mexican nationals to circumvent the rule.

One commenter proposed that the rule’s exceptions be limited to (1) those who received a final judgment denying them protection in at least one country through which they transited; (2) victims of a severe form of trafficking; (3) those who have transited only through countries that are not parties to the Refugee Convention, the Refugee Protocol, or CAT; and (4) UCs. Another commenter proposed that the Departments should eliminate the CBP One app exception and should apply the presumption to UCs. One commenter stated that the rule should require, not encourage, migrants to use lawful, safe, and orderly pathways.

*Response:* The Departments acknowledge these concerns but believe it is necessary to maintain the exceptions to and means of rebutting the presumption of ineligibility for asylum to prevent undue hardship. The Departments have limited the means of rebutting the presumption to “exceptionally compelling circumstances,” where it would be unreasonable to require use of the DHS appointment scheduling system or pursuit of another lawful pathway. The rule lists three examples of exceptionally compelling circumstances that would be considered at both the credible fear and merits stages: acute medical emergencies, imminent and extreme threats to life or safety, and victims of severe forms of human trafficking. *See* 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i). AOs and IJs will assess the noncitizen’s testimony, along with any other evidence in the record, to determine whether the noncitizen meets an exception to or rebuts the presumption against asylum eligibility. INA 208(b)(1)(B), 8 U.S.C. 1158(b)(1)(B); INA 240(c)(4)(B), 8 U.S.C. 1229a(c)(4)(B); 8 CFR 208.30.

The Departments do not believe that the rule creates significant incentive for migrants to falsely pose as Mexican nationals. Even if successful, this would only be a plausible strategy for migrants who are hoping to voluntarily return to Mexico instead of being placed in expedited removal. Once in expedited removal, any incentive to pose as a Mexican national dissipates

quickly. It will likely be difficult for the noncitizen to establish a credible fear of persecution or torture in Mexico, a country with which they are less familiar than their actual country of nationality. The noncitizen will not be able to seek any assistance from their consulate without disclosing their true country of nationality. And it will become very difficult for the noncitizen to qualify for asylum or other protection before an IJ, where they will need to prove identity.<sup>83</sup> Noncitizens who falsify their nationality could face serious consequences, as any such false pretenses would be likely to have an adverse effect on their credibility and could result in a permanent bar from all future immigration benefits.<sup>84</sup>

### 3. Concerns Related to Impacts on Asylum Seekers or Conflicts with Humanitarian Values

#### i. Belief that the Rule is Motivated by Unlawful Intent and Inconsistent with U.S. Values

*Comment:* Some commenters generally asserted that the rule targets certain nationalities, groups, or types of claims and that it was motivated by racial animus; that it has discriminatory effects; and that it was intended to address political issues or to mollify those harboring racial animus. Commenters stated that issuing this rule would advance the agendas of anti-immigration groups. At least one commenter stated that the proposed rule could fuel existing anti-immigrant and anti-Latinx sentiments in the United States by sensationalizing immigration. Another commenter expressed opposition to the proposed rule stating that it would continue to uphold an “ableist, xenophobic, and white supremacist” notion of accessibility into the United States. One commenter urged DHS to consider the impact that previous white supremacist and race-based policies have had on the U.S. immigration system. Furthermore, a commenter opposed the rule concluding that it continues a “legacy of structural racism” in U.S. immigration policy.

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<sup>83</sup> See *Matter of O-D-*, 21 I&N Dec. 1079, 1081 (BIA 1998) (“A concomitant to such claim is the burden of establishing identity, nationality, and citizenship.”); INA 208(d)(5)(A)(i), 8 U.S.C. 208(d)(5)(A)(i) (“[A]sylum cannot be granted until the identity of the applicant has been checked.”); 8 CFR 1003.47 (Identity, law enforcement, or security investigations or examinations relating to applications for immigration relief, protection, or restriction on removal).

<sup>84</sup> See INA 208(b)(1)(B)(iii), 8 U.S.C. 1158(b)(1)(B)(iii) (credibility determinations in asylum proceedings); INA 208(d)(6), 8 U.S.C. 1158(d)(6) (frivolous asylum applications); 8 CFR 1003.47(g) (preventing IJs from granting asylum applications until they can consider complete and current identity, law enforcement, and security investigations).

Commenters compared the rule to race-based historical immigration laws in the United States, such as the Chinese Exclusion Act and other past immigration actions, including actions of the prior Administration. Another commenter compared the rule to nationality-based quotas instituted by the Immigration Act of 1924 and stated that the rule serves a similar purpose of excluding “undesirable” migrant populations, while others compared the rule to limits on migration before, during, and after World War II, including turning away Jewish refugees seeking protection on the ship the St. Louis. At least one commenter stated that asylum seekers from countries located geographically further away would have a higher burden for no reason beyond their national origin. Further, commenters stated that differentiating between the “types” of people admitted to the United States or detained at the border is akin to authoritarian regime policies that have prohibited entry to “undesirables” and “other inconvenient group[s].”

Some commenters stated that the proposed rule is inhumane, xenophobic, and against everything the current Administration is supposed to stand for. Other commenters noted that the rule would only affect migrants seeking to enter at the SWB, but that migrants crossing the northern border from Canada are excluded, which the commenter called “inequitable” and evidence of racism. Some commenters stated that limiting who to help in the time of a “global crisis” is “shameful” because the United States is one of the richest countries in the world. Some commenters stated that with all the terrible things happening in the world we should be making it easier and not harder to seek asylum. An advocacy group expressed further concern that the rule may instead reinforce a notion that immigrants are unwelcome or otherwise do not belong in the United States. Another advocacy group expressed disappointment that words like “surge” in the NPRM could frame asylum seekers as a problem that needs to be mitigated or reduced. Some commenters stated that the rule was only written in response to political pressure by political opponents to address the situation at the SWB, thus placing migrants in danger for the sake of a political agenda. One commenter stated that they expected the United States to “treat migrants as human beings rather than playing pieces that could affect political outcomes.”



*Response:* The Departments reject these commenters' claims concerning the Departments' basis for promulgating the rule. As explained in the NPRM, 88 FR at 11704, the Departments are promulgating the rule to address the following considerations. First, the reality of large numbers of migrants crossing the SWB has placed a substantial burden on the resources of Federal, State, and local governments. *See* 88 FR 11715. While the United States Government has taken extraordinary steps to address this burden, the current level of migratory movements and the anticipated increase in the numbers of individuals seeking entry into the United States following the lifting of the Title 42 public health Order, without policy changes, threaten to exceed the capacity to maintain the safe and humane processing of noncitizens who cross the SWB without authorization. *See id* at 11704. Second, this reality allows pernicious smuggling networks to exploit migrants—putting migrants' lives at risk for the smugglers' financial gain. Finally, the unprecedented migratory flow of non-Mexican migrants, who are far more likely to apply for protection,<sup>85</sup> has contributed to a growing backlog of cases awaiting review by AOs and IJs. As a result, those who have a valid claim to asylum may have to wait years for their claims to be granted, while individuals who will ultimately be found ineligible for protection may spend years in the United States before being ordered removed. None of these considerations are racially motivated, inhumane, or xenophobic.

The Departments reiterate that the United States Government has implemented, and will continue to implement, a number of measures designed to enhance and expand lawful pathways and processes for noncitizens who may wish to apply for asylum to come to the United States. DHS has recently created new processes for up to 30,000 CHNV nationals per month to apply for advance authorization to seek parole into the United States, enabling them to travel by air to

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<sup>85</sup> For noncitizens encountered at the SWB in FYs 2014–2019 who were placed in expedited removal, 6 percent of Mexican nationals made fear claims that were referred to USCIS for adjudication compared to 57 percent of people from Northern Central America and 90 percent of all other nationalities. OIS analysis of Enforcement Lifecycle data as of December 31, 2022.

the United States.<sup>86</sup> DHS and its interagency partners have also increased H-2B nonimmigrant visa availability and refugee processing for countries within the Western Hemisphere. *See* 88 FR at 11718. Noncitizens who are not eligible for these pathways can schedule an appointment to present at a southwest land border POE through the CBP One app and be exempted from the rule. Finally, the rule does not apply to migrants crossing into the United States from Canada because, as discussed in more detail below, the STCA between the United States and Canada, along with the Additional Protocol of 2022, announced March 24, 2023, already enable sufficient management of migration from Canada.<sup>87</sup> The Additional Protocol expands the STCA to apply to migrants who claim asylum or other protection after crossing the U.S.-Canada border between POEs, thus providing another disincentive for irregular migration.<sup>88</sup>

*Comment:* Other commenters stated that there is a disconnect between President Biden’s remarks in Poland in February 2023 regarding accepting and welcoming refugees and this rule. Some commenters stated that the proposed rule is not in line with the American value of welcoming refugees and asylum seekers. Many commenters referenced the Statue of Liberty and the American tradition of welcoming the poor and other vulnerable immigrants and quoted Emma Lazarus’ poem. Commenters stated that the ability to seek asylum is a legally recognized right and that the proposed rule would effectively deny that right to many asylum seekers, as well as that the United States should instead live up to its legal responsibilities and ideals. Commenters stated that the need to reduce strain at the border is an insufficient reason to support the reduction in asylum access that would result from the rule.

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<sup>86</sup> *See* 87 FR 63507 (Oct. 19, 2022); DHS, Implementation of a Parole Process for Haitians, 88 FR 1243 (Jan. 9, 2023); DHS, Implementation of a Parole Process for Nicaraguans, 88 FR 1255 (Jan. 9, 2023); DHS, Implementation of a Parole Process for Cubans, 88 FR 1266 (Jan. 9, 2023).

<sup>87</sup> *See* DHS, Press Release, *United States and Canada Announce Efforts to Expand Lawful Migration Processes and Reduce Irregular Migration* (Mar. 24, 2023), <https://www.dhs.gov/news/2023/03/24/united-states-and-canada-announce-efforts-expand-lawful-migration-processes-and>.

<sup>88</sup> *See* 8 CFR 208.30(e)(6); 8 CFR 1003.42(h); Implementation of the 2022 Additional Protocol to the 2002 U.S.-Canada Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, 88 FR 18227 (Mar. 25, 2023).

*Response:* The Departments acknowledge that the United States has a long tradition of accepting and welcoming refugees and note that in the past two years, the United States Government has taken steps to significantly expand refugee admissions from Latin America and the Caribbean. However, simply welcoming migrants into the United States without a policy in place to ensure lawful, safe, and orderly processing of those migrants would exceed DHS's already limited resources and facilities—especially given the anticipated increase in the numbers of migrants who will attempt to enter the United States following the lifting of the Title 42 public health Order.

The Departments underscore that the rebuttable presumption will not apply to noncitizens who availed themselves of safe, orderly, and lawful pathways to enter the United States or sought asylum or other protection in a third country and were denied. The rule lists three *per se* grounds for rebuttal: if a noncitizen demonstrates that, at the time of entry, they or a member of their family as described in 8 CFR 208.30(c) with whom the noncitizen is traveling faced an acute medical emergency; faced an imminent and extreme threat to their life or safety; or were a “victim of a severe form of trafficking in persons” as defined in 8 CFR 214.11. *See* 8 CFR 208.33(a)(3), 1208.33(a)(3). The rule also contains a specific exception to the rebuttable presumption for unaccompanied children. *See* 8 CFR 208.33(a)(2)(i), 1208.33(a)(2)(i). Noncitizens who are subject to the lawful pathways condition on eligibility for asylum and who do not qualify for an exception or rebut the presumption of the condition's applicability, remain eligible to apply for CAT protection or for statutory withholding of removal, which implements U.S. non-refoulement obligations under the 1967 Protocol. *See, e.g., Mejia v. Sessions*, 866 F.3d 573, 588 (4th Cir. 2017); *Cazun v. U.S. Att’y Gen.*, 856 F.3d 249, 257 n.16 (3d Cir. 2017).

Exceptionally compelling circumstances will also be found if, during section 240 removal proceedings, the noncitizen is found eligible for statutory withholding of removal or CAT withholding, they would be granted asylum but for the presumption against asylum, and their accompanying spouse or child does not independently qualify for asylum or other protection

against removal or the noncitizen has a spouse or child who would be eligible to follow to join them as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A), if they were granted asylum. *See* 8 CFR 1208.33(c). As discussed in the NPRM, the Departments have determined that applying the lawful pathways condition on eligibility for asylum is necessary to ensure the Departments' continued ability to safely, humanely, and effectively enforce and administer U.S. immigration laws and to reduce the role of exploitative and dangerous smuggling and human trafficking networks.

*Comment:* Many commenters stated that if the United States cannot be a safe place for people being persecuted, then it is not living up to constitutional and moral values. A commenter stated that anyone not of Native American ancestry is here because our relatives came here for a better life for themselves and their family. Some commenters stated that America is a nation of immigrants, while others stated that we should remember our ancestors, as many were immigrants too, and invoked their family's migration to the United States as examples. A commenter stated that it is inherently evil to ignore, mistreat, or in any way harm desperate people fleeing their homes because they would likely suffer or even die if they stay. Commenters described the rule as inhumane, not in alignment with Christian or Judeo-Christian morals, and immoral and contrary to American values. A commenter stated that the use of the term "humane" in connection with the proposed rule was cynical and cruel. Another commenter stated that the rule would inevitably lead to unnecessary harm and death. One commenter stated that the rule would cause survivors and victims of crime to distrust systems.

Many commenters cited the harms resulting from the United States' failure to provide protection for those fleeing Nazi persecution, which commenters said led to the development of the modern asylum system. Multiple commenters stated that, as a wealthy country that claims to be a leader in democracy, the United States has a special obligation to make it easy to seek asylum here, and that the proposed rule would put barriers in the way of desperate people. Commenters stated that the Departments should not forget the contributions of immigrants to the

United States' workforce and diversity and should not deny protection to people in need. Some commenters stated that the asylum seekers who would be denied under the rule would be contributing members of society that the country needs. One commenter stated the rule conflicts with the American tradition of "innocent until proven guilty," another protested "the presumption of guilt of undocumented immigrants which underlies this proposed rule," and others stated that refugees should not be treated as criminals. At least one commenter stated that the rule would amount to "cruel and unusual punishment" and other commenters described it as "cruel" or "wrong" and "un-American." One commenter stated that the rule imposes an arbitrary punishment on the very individuals whom the asylum laws were intended to protect. At least one commenter stated that the rule should have a presumption in favor of applicants. Another commenter said that one of America's principles is that "all men are created equal," noting that it says "men" and does not refer to U.S. citizens only.

*Response:* The Departments disagree that this rule is inhumane or contrary to morals and values. For decades, U.S. law has protected vulnerable populations from return to a country where they would be persecuted or tortured. The Departments note that the rule is designed to safely, effectively, and humanely process migrants seeking to enter the United States, and to reduce the influence and role of the lawless and pernicious human smuggling organizations that put migrants' lives in peril for profit. *See* 88 FR at 11713–14. The Departments considered the dangerous journeys made by migrants who put their lives at risk trying to enter the United States without authorization. The rule is designed to disempower criminal enterprises that seek to take advantage of desperate migrants, leading to untold human suffering and far too many tragedies. *See id.* The rule pursues this goal by encouraging migrants to seek protection in other countries in the region and to use lawful pathways and processes to access the U.S. asylum system, including pathways and processes that do not require them to take a dangerous journey. In order to ensure that particularly vulnerable migrants are not unduly affected by the rule, the Departments have included exceptions and multiple ways that migrants may rebut the

presumption and thereby remain eligible for asylum, as well as access to other protection. A noncitizen who seeks to apply for asylum can also schedule their arrival at a land border POE through the CBP One app and be exempted from the rule.

Regarding comments stating that the rule conflicts with “innocent until proven guilty,” or that the rule attaches a presumption of guilt to migrants, or that the rule amounts to “cruel and inhumane treatment,” the Departments note that this rule is not intended to ascribe guilt or innocence or punishment to anyone but rather to encourage the use of lawful, safe, and orderly pathways to enter the United States. The rule also does not subject anyone to “cruel and inhumane treatment,” and indeed ensures that individuals who fear torture or persecution can seek statutory withholding of removal or CAT protection. Similarly, the Departments disagree with comments recommending a presumption in the rule that favors eligibility for asylum. The Departments note that asylum eligibility requirements set forth in section 208(b)(1) of the INA place the burden on the noncitizen. Creating a presumption in the rule to favor eligibility for asylum would remove that burden from the noncitizen and would not achieve the Departments’ goals of disincentivizing migrants from crossing the SWB without authorization. Finally, as explained in Section IV.D.1.ii of this preamble, the rule is fully consistent with the Departments’ legal authority and obligations on asylum eligibility pursuant to section 208 of the INA, 8 U.S.C. 1158.

*Comment:* Commenters described this rule as a “broken promise” to fix the asylum system and stated that President Biden had criticized the Title 42 public health Order and indicated that he would pursue policies that reflect the United States’ commitment to asylum seekers and refugees. A commenter urged the Departments to withdraw the rule, reasoning that it would contravene the Biden Administration’s values by putting vulnerable migrants at greater risk for violence without shelter or protection. Another commenter expressed concern that the proposed rule would be antithetical to President Biden’s prior promises to reduce migrants’ reliance on smuggling networks, to reduce overcrowding in migrant detention facilities, and to

provide effective humane processing for migrants seeking protections in the United States. Other commenters stated that the rule would contravene President Biden’s promise to uphold U.S. laws humanely and to preserve the dignity of “immigrant families, refugees, and asylum seekers.” One commenter stated that during the presidential election, President Biden campaigned to “restore the soul of America” and cutting off asylum seekers is not part of that promise. Another commenter urged that President Biden be held accountable for the “promises he made before his election.” A commenter likewise stated that the proposed rule would fail to uphold the Biden Administration’s commitments to promote regional cooperation and shared migration management.

*Response:* Political and economic instability, coupled with the lingering adverse effects of the COVID-19 global pandemic, have fueled a substantial increase in migration throughout the world. This global increase is reflected in the trends on the SWB, where the United States has experienced a sharp increase in encounters of non-Mexican nationals over the past two years, and particularly in the final months of 2022. *See* 88 FR at 11708. DHS was encountering an average of approximately 8,800 noncitizens per day during the first ten days of December 2022—a new record—and expects that encounter numbers could increase to 11,000 per day following the termination of the Title 42 public health Order.<sup>89</sup> The rule is a response to the even more urgent situation that the Departments could face after the lifting of the Title 42 public health Order. The Departments believe that these circumstances warrant this policy, which will encourage those migrants who wish to seek asylum to avail themselves of lawful, safe, and orderly pathways into the United States.

Consistent with the principle of establishing a fair, orderly, and humane asylum system, the United States Government has implemented a multi-pronged approach to managing migration throughout North and Central America. The United States Government is working

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<sup>89</sup> *See* DHS Post-Title 42 Planning Model generated April 18, 2023; *see also* OIS analysis of CBP UIP data downloaded January 13, 2023.

closely with international organizations and the governments in the region to establish a comprehensive strategy for addressing the causes of migration in the region; build, strengthen, and expand Central and North American countries' asylum systems and resettlement capacity; and increase opportunities for vulnerable populations to apply for protection closer to home. *See* E.O. 14010, Creating a Comprehensive Regional Framework to Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 FR 8267, 8270 (Feb. 2, 2021). These commitments were further enshrined and expanded beyond Central and North America in the June 2022 L.A. Declaration endorsed by the United States and 19 nations in the Western Hemisphere.<sup>90</sup> Indeed, the L.A. Declaration specifically outlines “the need to promote the political, economic, security, social, and environmental conditions for people to lead peaceful, productive, and dignified lives in their countries of origin” and states that “addressing irregular international migration requires a regional approach.”<sup>91</sup> At the same time, the United States is expanding efforts to protect refugees by increasing refugee admissions and expanding refugee processing within the Western Hemisphere. In fact, on April 27, 2023, DHS announced that it would commit to welcoming thousands of additional refugees each month from the Western Hemisphere—with the goal of doubling the number of refugees the United States committed to welcome as part of the L.A. Declaration.<sup>92</sup> Therefore, the United States is enhancing lawful pathways for migration to this country while improving efficiencies within the U.S. asylum system.

*Comment:* Commenters stated that the United States should welcome and not punish asylum seekers because the United States is responsible for creating the conditions and other problems that have caused many of the migrants seeking asylum to leave their countries, such as

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<sup>90</sup> The White House, *Los Angeles Declaration on Migration and Protection* (June 10, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/>.

<sup>91</sup> *Id.*

<sup>92</sup> *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).



through American military, intelligence, political, or economic actions. Commenters also stated that the United States should not limit access to asylum for migrants coming from countries where the United States Government supported a regime change that created the circumstances that the migrants are fleeing. For example, one commenter referenced the United States' support in prior conflicts in Guatemala and El Salvador and the current support for the controversial leadership in El Salvador as reasons the commenter believed the United States was the cause of migration. One commenter stated that the United States has played a role in creating the political instability that cause many Central American refugees to flee and seek asylum in the United States. Other commenters expressed a belief that many migrants are fleeing because of climate change, to which the United States has greatly contributed, or because of challenging conditions in some countries, including Haiti. Another commenter argued that the U.S. war on drugs has contributed to the circumstances from which migrants are fleeing to seek asylum at the SWB.

*Response:* The Departments recognize commenters' concerns that numerous factors may have contributed to migrants seeking asylum. As noted in the preceding comment response, political and economic instability, coupled with the lingering adverse effects of the COVID-19 global pandemic, have fueled a substantial increase in migration throughout the world. This global increase is reflected in the trends on the SWB, where the United States has experienced a sharp increase in encounters of non-Mexican nationals over the past two years, and particularly in the final months of 2022. *See* 88 FR at 11708. This rule addresses the Departments' continued ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system, in anticipation of a potential further surge of migration at the SWB, regardless of any factors that may have contributed to migration flows. The Departments have sought to address this situation by increasing lawful pathways while also imposing consequences for not using those pathways. The Departments further note that the United States has worked closely with its regional partners to prioritize and implement a strategy that advances safe, orderly, legal, and humane migration, including taking measures to address the root causes

of migration, expand access to lawful pathways, improve the U.S. asylum system, and address the pernicious role of smugglers. For instance, the United States Government has implemented new parole processes for CHNV nationals that have created a strong incentive for these individuals to wait where they are to access an orderly process to come to the United States.<sup>93</sup> Additionally, the United States has expanded refugee processing in the region which provides another orderly option for refugees to lawfully enter the United States. *See* 88 FR at 11719. Consistent with these processes, this rule would further incentivize noncitizens to avail themselves of other lawful, safe, and orderly means for seeking protection in the United States or elsewhere.

*Comment:* Some commenters stated that the United States is applying inconsistent policy by ending expulsions of noncitizens under the Title 42 public health Order while simultaneously creating new restrictions on asylum. Commenters stated that the United States Government should not use the end of the Title 42 public health Order as an excuse to resurrect asylum restrictions. Commenters stated that the United States has expelled individuals from “Central America, Haiti, and . . . Venezuela,” nearly 2.5 million times while the Title 42 public health Order has been in place, which, according to commenters, has led to increasing numbers of deaths along the border. One commenter stated that it is “ludicrous” that the Government has acted as if the pandemic is over except in the context of welcoming asylum seekers. Conversely, some commenters stated that the ending of Title 42 is within the Administration’s control and is not a necessary justification for the rule, and further critiqued the recent actions of the Departments to prepare for the termination as causative of the recent border crisis.

*Response:* The Departments respectfully disagree that this action is inconsistent with the lifting of the Title 42 public health Order. It is important to note that the CDC’s April 2022 decision to terminate the Title 42 public health Order and HHS’s separate decision to not renew

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<sup>93</sup> *See* DHS, Press Release, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), <https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and>.

the public health emergency after May 11, 2023, resulting in the impending termination of the Title 42 public health Order, were based on considerations of public health, not immigration policy. HHS and CDC exercise authority under Title 42 of the U.S. Code to make public health determinations for a range of purposes. *See* 42 U.S.C. 265, 268; section 319 of the Public Health Service Act; 42 CFR 71.40. Throughout the COVID-19 pandemic, DHS and DOJ have relied and will continue to rely on the public health expertise of CDC and HHS, and DHS will implement relevant CDC orders to the extent that they remain in effect.

After the Title 42 public health Order is lifted, migrants will be subject to Title 8 processing. The Departments anticipate that in the absence of this rulemaking, a significant further surge in irregular migration would then occur. Such a surge would risk (1) overwhelming the Departments' ability to effectively process, detain, and remove, as appropriate, the migrants encountered; and (2) placing additional pressure on States, local communities, and NGO partners both along the border and in the interior of the United States. This rule will disincentivize irregular migration and instead incentivize migrants to take safe, orderly, and lawful pathways to the United States or to seek protection in a third country.

ii. Ports of Entry Should be Open to Anyone to Make an Asylum Claim

*Comment:* Commenters stated that everyone escaping persecution should be able to seek safety in the United States by presenting at a POE, and that migrants should not be required to make appointments to present themselves or to seek asylum in third countries where they may face harm. Another commenter stated that the rule would limit asylum to the "privileged and connected" despite longstanding legal precedent holding that individuals should be able to access asylum regardless of manner of entry. One commenter stated that even if migrants have a relatively low chance of approval, they have a right to enter the United States and apply for asylum, because some claims will be successful. Commenters stated that the United States denies visas to many people who face persecution, so those same people should not be denied asylum for failing to travel with a visa. For example, at least one commenter stated that an

average person from Central America would struggle to get a tourist, student, or other visa. Another commenter stated that everyone, regardless of manner of entry, manner of transit, nationality, or other arbitrary restriction, should have the right to seek asylum in the United States.

*Response:* As discussed in more detail in Section IV.D.1 of this preamble, this rule does not deny anyone the ability to apply for asylum or other protection in the United States; instead, the Departments have exercised their authority to adopt additional conditions for asylum eligibility by adopting a rebuttable presumption of ineligibility for asylum in certain circumstances. The Departments acknowledge and agree that any noncitizen who is physically present in the United States may apply for asylum, but note that there is no freestanding right to enter or to be processed in a particular manner. *See U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 357, 452 (1950) (“At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government”). Importantly, under this rule, any noncitizen will be able to present at a POE, and no individual—regardless of manner of entry into the United States—will be turned away or denied the opportunity to seek protection in the United States under this rule. Noncitizens who lack documents appropriate for admission to the United States are encouraged and incentivized, but not required, to make an appointment using the CBP One app to present themselves at a POE for inspection.

The use of the CBP One app will contribute to CBP’s efforts to expand its SWB POE migrant processing capacity well beyond the 2010–2016 daily POE average,<sup>94</sup> resulting in increased access for noncitizens to POEs. Those who arrive at a POE without an appointment via the CBP One app may be subject to longer wait times for processing at the POE depending on daily operational constraints and circumstances. And this rule does not preclude such

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<sup>94</sup> See CBP STAT Division, *U.S. Customs and Border Protection (CBP) Enforcement Encounters – Southwest Border (SBO), Office of Field Operations (OFO) Daily Average* (internal data report, retrieved Apr. 13, 2023).

noncitizens, or other noncitizens who cross the southwest land border or adjacent coastal borders, from filing an asylum application. Indeed, in all cases, any noncitizen who is being processed for expedited removal may express or indicate a fear of return during the expedited removal process, and will be referred to USCIS for a credible fear interview, as appropriate. *See* INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii). Also, noncitizens in section 240 removal proceedings have the opportunity to present information asserting fear or concern of potential removal. *See* INA 240(c)(4), 8 U.S.C. 1229a(c)(4). Although such individuals may be presumptively ineligible for asylum under this rule, they may seek to establish that they are subject to an exception or to rebut that presumption, and they may also still seek statutory withholding of removal and CAT protection in the United States, as outlined in Section IV.E.8 of this preamble. The Departments also note that a purpose of this rule is to facilitate safe and orderly travel to the United States. Individuals who lack a visa are generally inadmissible to the United States, *see* INA 212(a)(7), 8 U.S.C. 1182(a)(7), and will remain so under this rule.

iii. Belief that the Rule Will Result in Denial of Valid Asylum Claims

*Comment:* Commenters stated that the rule would result in the denial of valid asylum claims and described the right to seek asylum as a human right. One commenter emphasized that, when Congress created the credible screening process, the premise of the screening was for adjudicators to err on the side of protection. Multiple commenters expressed concern that implementing the proposed rule would increase the likelihood that asylum seekers would be refouled or migrants returned to harmful conditions. One commenter said that denying a bona fide asylum claim and putting a would-be applicant at risk of danger is a greater mistake than making a positive credible fear determination that does not result in asylum. At least one commenter disagreed with the proposed rule's assertion that noncitizens who forgo certain lawful or orderly procedures are less likely to have a well-founded fear than those who do and stated that this assertion is unsupported.

Commenters stated that the rule imposes conditions on noncitizens' access to asylum that have nothing to do with the merits of their asylum claims and merely puts up bureaucratic hurdles. One commenter stated that people often have no control or choice in how they get to the United States, which is a matter of survival. Another commenter stated that rushed procedure created by this rule would result in what the commenter describes as false negatives, as asylum seekers subjected to this process would be disoriented from their days in CBP's holding facilities, especially after undergoing a harrowing journey to the United States that likely included violence, persecution, and trauma. Commenters stated that instead of filtering out migrants with weak asylum claims, the rule would stop the most vulnerable from being able to apply for asylum. One commenter stated that it may be necessary for asylum seekers to cross the border by unscrupulous means to escape their persecutors and that this bolsters their case for asylum rather than detracts. Commenters stated that the exceptions to the proposed rule do little to provide meaningful safeguards for asylum seekers and would result in erroneous denials and forced return to countries where the noncitizen would face danger. Commenters stated that asylum seekers who are otherwise eligible for asylum but banned by the rule would likely be deported to danger. Other commenters stated that the framework of the rebuttable presumption would have negative effects and de facto be dispositive of asylum eligibility before noncitizens have a "fair shot at making their case." One commenter wrote that, concerning the one-year asylum filing deadline, numerous reports have shown the impact of such bars on returning individuals to harm.

*Response:* The Departments disagree that the rule creates an unwarranted risk of denial of valid asylum claims. The U.S. asylum system is governed by statute and implementing regulations. To receive asylum, noncitizens must establish that (1) they meet the definition of a "refugee," under section 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42), (2) they are not subject to a bar to applying for asylum or a bar to the granting of asylum, and (3) they merit a favorable exercise of discretion. *See* INA 208(a)(2), 8 U.S.C. 1158(a)(2); INA 208(b)(1), 8 U.S.C.

1158(b)(1); INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A); 8 CFR 1240.8(d); *see also Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013) (describing asylum as a form of “discretionary relief from removal”); *Delgado v. Mukasey*, 508 F.3d 702, 705 (2d Cir. 2007) (“Asylum is a discretionary form of relief . . . . Once an applicant has established eligibility . . . it remains within the Attorney General's discretion to deny asylum.”). Because asylum is a discretionary form of relief from removal, the assumption that this rule will result in the risk of denial of valid asylum claims is incorrect because the noncitizen bears the burden of showing both eligibility for asylum and why the Attorney General or Secretary should exercise the discretion to grant relief. *See* INA 208(b)(1), 8 U.S.C. 1158(b)(1); INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A)(ii); 8 CFR 1240.8(d); *Romilus v. Ashcroft*, 385 F.3d 1, 8 (1st Cir. 2004).

The Departments acknowledge that despite the protections preserved by the rule and the availability of lawful pathways, the rebuttable presumption adopted in the rule will result in the denial of some asylum claims that otherwise may have been granted, but the Departments believe that the rule will generally offer opportunities for those with valid claims to seek protection through asylum, statutory withholding of removal, or protection under the CAT. Moreover, the Departments have determined that the benefits to the overall functioning of the system, including deterrence of dangerous irregular migration and smuggling, justify the rule.

The rule encourages those with meritorious claims to either apply for asylum or other protection in the first safe country they reach or pursue available lawful pathways as set forth in the rule. Noncitizens who apply for and are denied protection in a third country are not barred from asylum eligibility under this rule. The rule will preserve core asylum protections by permitting noncitizens subject to the presumption of asylum ineligibility to rebut it by showing exceptionally compelling circumstances that excuse their failure to pursue lawful pathways or processes. Furthermore, under the rule, noncitizens who are ineligible for asylum due to the lawful pathways condition remain eligible for protections from persecution and torture. Indeed, noncitizens who establish a reasonable possibility of persecution or torture are placed in section

240 removal proceedings where they can apply for asylum, statutory withholding of removal, and protection under CAT. 8 CFR 1208.33(b)(2)(ii), (b)(4). Thus, the rule does not prevent noncitizens from pursuing asylum nor does the rule create an unwarranted risk of denial of valid asylum claims.

iv. Belief that the Rule Will Increase Smuggling or Trafficking

*Comment:* Commenters agreed that human trafficking is a serious concern, but asserted that this rule would make the problem worse. Commenters stated the proposed rule will not result in asylum seekers relying less on smuggling networks, but will actually increase their reliance on smugglers and increase their vulnerability to trafficking. One stated that desperate people turn to traffickers because they fear being turned away by authorities, and that the most effective way to remove traffickers' leverage is to open safe and legal pathways for immigration. Another commenter stated that the United States should make it easier to legally enter for work as a way to discourage trafficking by smugglers rather than implement the proposed rule. Some commenters stated human smuggling and trafficking were problems of the Government's own making, and by discouraging migrants from coming to the border in a legal manner, the rule would increase the interactions between migrants and smugglers, as well as increasing the number of noncitizens without lawful immigration status in the United States. Commenters also stated that closing off the SWB and trapping migrants in dangerous parts of Mexico for a prolonged time exposes them to greater violence, exploitation, and other dangers, and heightens their risk of being trafficked. One commenter stated that in the event that people are unable to get an appointment through the CBP One app and are blocked from access to asylum, smuggling operations and organized crime in Mexico will only gain more power, take individuals on more treacherous routes to evade detection, and cause USBP to invest more resources to detain individuals. Another commenter stated that the rule would further embolden organized crime, corrupt state actors, and criminals, making migrants even more of a target and placing them at greater risk of being trafficked. One commenter stated, without evidence, that the TCT Bar Final



Rule advantaged drug cartels and criminal organizations that target vulnerable populations, and asserted that this rule would have the same result.

Commenters said that technical difficulties associated with the CBP One app have opened new avenues for exploitation; for example, traffickers claiming an ability to obtain appointments, or scams charging fees for completing a CBP One app registration. Similarly, one commenter said that individuals who lack access to stable Wi-Fi may seek Wi-Fi in dangerous places, including cities controlled by cartels. Another commenter wrote that the need for migrants to borrow a smartphone from a third party could create an opportunity to take advantage of migrants trapped at the U.S.-Mexico border to target them for extortion, sexual violence, or other harm. In contrast, based on its field monitoring, a different commenter stated that the CBP One app has led to a reduction in instances of fraud and abuse of migrants who previously relied on local actors to get on lists to request an exception to the Title 42 public health Order.

Another commenter expressed concern that the proposed rule may discourage migrants from contacting U.S. law enforcement for fear of deportation, increasing the likelihood of trafficking and smuggling. One comment stated that the rule would continue the Administration's shameful legacy of facilitating mass trafficking and smuggling of vulnerable noncitizens because it is "all bark and no bite" due to its "numerous loopholes and exceptions," unlike the TCT Bar rulemaking, which the commenter described as part of a multi-pronged strategy to secure the border.

*Response:* The Departments acknowledge the commenters' concerns about smuggling and trafficking, but disagree with the either/or approach urged by some commenters. To prevent migrants from falling victim to smugglers and traffickers, the Departments believe it is necessary to both increase the availability of lawful pathways for migration and discourage attempts to enter the United States without inspection. The Departments anticipate that the newly expanded lawful pathways to enter the United States, in conjunction with the rule's condition on asylum

eligibility for those who fail to exercise those pathways, will ultimately decrease attempts to enter the United States without authorization, and thereby reduce reliance on smugglers and human traffickers.

DHS has recently created alternative means for migrants to travel to the United States via air through the CHNV parole processes, increased refugee processing in the Western hemisphere, and increased admissions of nonimmigrant H-2 workers from the region. 88 FR at 11718–20. DHS also recently announced that it plans to create new family reunification parole processes for nationals of El Salvador, Guatemala, Honduras, and Colombia, and to modernize the existing Haitian Family Reunification Parole process and the Cuban Family Reunification Parole process.<sup>95</sup> In addition, noncitizens' use of the CBP One app to schedule appointments to present at land border POEs is expected to enhance DHS's ability to process such individuals in a safe, orderly manner. As discussed later in Section IV.E.3.ii.a of this preamble, CBP anticipates processing several times more migrants each day at SWB POEs than the 2010–16 daily average,<sup>96</sup> including through the use of the CBP One app. While the CBP One app provides noncitizens access to schedule arrivals at a POE, no CBP officer will dissuade or prevent any noncitizen who lacks a scheduled appointment from applying for admission to the United States. *See* INA 235(a)(4), U.S.C. 1225(a)(4); 8 CFR 235.1, 235.4 (decision to withdraw application for admission must be made voluntarily).

The Departments disagree that the CBP One app or accessibility issues associated with the CBP One app will increase reliance on smugglers and traffickers. The CBP One app is a free, public-facing application that can be downloaded on a mobile phone. 88 FR at 11717. As noted in the received comments, the International Organization for Migration (“IOM”) has,

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<sup>95</sup> *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

<sup>96</sup> *See* CBP STAT Division, *U.S. Customs and Border Protection (CBP) Enforcement Encounters – Southwest Border (SBO), Office of Field Operations (OFO) Daily Average* (internal data report, retrieved Apr. 13, 2023); Memorandum for William A. Ferrara, Exec. Ass't Comm'r, Off. of Field Operations, from Troy A. Miller, Acting Comm'r, CBP, *Re: Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf>.

during its recent field monitoring, observed that the CBP One app has led to a reduction in instances of fraud and abuse of migrants who previously relied on local actors to get on lists to request an exception to the Title 42 public health Order, and recommended that CBP further develop the CBP One app to prevent glitches and incorporate improvements suggested by IOM and other stakeholders. CBP is continuing to improve the CBP One app and engage with stakeholders on potential improvements. The rule also contains an exception for situations where it was not possible to access or use the app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. 8 CFR 208.33(a)(2)(B), 1208.33(a)(2)(B).

The Departments also disagree with the assertion that, due to its exceptions and means of rebuttal, the rule will facilitate mass trafficking and smuggling of vulnerable noncitizens. The recently expanded lawful pathways are designed to allow migrants to travel directly to the United States without having to travel through Central America, where they might rely on smugglers or traffickers. In addition, some of the specific examples of exceptionally compelling circumstances are designed to protect victims or those at risk of trafficking. *See* 8 CFR 208.33(a)(3)(i)(B) and (C), 1208.33(a)(3)(i)(B) and (C).

Finally, the Departments do not believe that the rule will discourage migrants from contacting U.S. law enforcement due to fear of deportation, and thereby place them at further risk of trafficking and smuggling. Migrants who enter the United States without inspection or apprehension by CBP are already subject to removal, *see* INA 212(a)(6)(A), 8 U.S.C. 1182(a)(6)(A), and victims of severe forms of trafficking or other crimes may be eligible to apply for T or U nonimmigrant status, *see* INA 101(a)(15)(T) and (U), 8 U.S.C. 1101(a)(15)(T) and (U).

#### 4. Negative Impacts and Discrimination Against Particular Groups

i. General Comments on Discrimination

*Comment:* Commenters raised concerns that the proposed rule could have a disproportionate impact on certain populations that may be vulnerable, including those without legal representation, those with limited English proficiency (“LEP”), families and children, victims of domestic and gender-based violence, victims of human trafficking, women, the LGBT community, those with mental impairments and associated competency issues, elderly individuals, those with limited technological literacy, those with physical disabilities, those with health problems or who are otherwise in need of medical attention, people of color, indigenous groups, survivors of persecution or torture, and those with post-traumatic stress disorder (“PTSD”), among others.

For example, commenters stated that those without legal representation or with limited English proficiency may have difficulty understanding and complying with the process proposed by the rule, which commenters claimed requires access to technology, technological proficiency, and an understanding of the requirements prior to attempting entry at the SWB. Likewise, commenters suggested that groups including survivors of persecution or torture, the LGBT community, victims of domestic and gender-based violence, women, and noncitizens with mental impairments and associated competency issues may have difficulty applying for relief in a third country, as those countries may not have sufficiently robust humanitarian-relief systems to accommodate the particular issues faced by these and similar groups. For instance, many such individuals may have difficulty recounting the harms they suffered in their home countries without specialized procedures, and some third countries may not recognize their harms as qualifying for asylum in the same way that U.S. asylum law does. Similarly, commenters stated, some groups may also face particular discrimination or violence in third countries based on the same immutable characteristics for which they were persecuted in their home countries. Other commenters highlighted anecdotally that membership in one group has often intersected with membership in another, compounding the harm noncitizens have experienced in transit.

*Response:* The Departments are committed to the equal treatment of all persons. This rule is intended to promote lawful, safe, and orderly pathways to the United States and is intended to benefit particularly vulnerable groups by removing the incentive to make a dangerous irregular migration journey and reducing the role of exploitative transnational criminal organizations and smugglers. *See* 88 FR at 11707. As detailed in the NPRM, irregular migration journeys can be particularly fraught for vulnerable groups, including those discussed in the following sections. *See* 88 FR at 11713 (explaining that women and children are “particularly vulnerable to attack and injury” as well as illness along an important migratory route). The incentivizing of the lawful pathways described in the NPRM is intended in part to encourage vulnerable groups to avoid such journeys while simultaneously preserving their ability to apply for asylum consistent with existing law and regulations. *See, e.g.,* 88 FR at 11718 (explaining that the United States has taken “meaningful steps” to enhance lawful pathways for migrants to access protection). In addition, depending on individual circumstances, AOs and IJs may find that certain especially vulnerable individuals meet the exceptionally compelling circumstances standard.

ii. Children and Families

*Comment:* Commenters raised concerns about the proposed rule’s impact on children and families. In general, commenters stated that the United States has a legal and moral obligation to act in the best interest of children by preserving family unity and should be doing whatever it can to protect children seeking asylum, especially after prior family separation policies at the border. Commenters generally asserted that the proposed rule would expose children and families to continued violence and danger, limit their right to seek asylum, and deny children the opportunity to be safe and protected. Commenters provided anecdotal examples of migrant families and children who had been harmed or killed while waiting at the border to secure an appointment through the CBP One app or while attempting to travel to POEs with available appointments. Commenters asserted that the proposed rule would prevent accompanied children

from presenting their own asylum claims independent of a claim presented by their parent or guardian. Commenters were concerned that the asylum ineligibility presumption would encourage families to separate at the SWB and prevent noncitizens from petitioning for their eligible derivatives, which commenters claimed would be a form of family separation, and described potential attendant negative consequences for children and families, such as trauma, familial instability, developmental delays, vulnerability to harm and exploitation, detention, placement in orphanages, and detention in inhumane conditions.

Further, commenters asserted that all children, because of their unique needs and challenges, deserve additional procedural protections and child-sensitive considerations not included in the proposed rule. Commenters highlighted the vulnerability of children, the fact that children process trauma differently than adults do, and children's varied ability to understand complex immigration requirements, stating that the law recognizes the need for additional protections for children and to account for their best interests. Commenters also suggested that the proposed rule and any detention that it may require would re-traumatize children who have already experienced trauma, including trauma from their journey to the SWB. Other commenters suggested that any required detention may have serious ramifications on a child's well-being, mental health, and development.

Additionally, commenters posited that the proposed rule could incentivize entire families to make a potentially dangerous journey to the United States together. Commenters stated that prior to the proposed rule, one family member might have journeyed alone to the United States to seek asylum with the understanding that they would be able to petition for family members upon being granted asylum. But under the proposed rule, those commenters stated, many families may be incentivized by what commenters consider a lack of asylum availability to undertake an unsafe journey to the SWB together rather than risk permanent family separation. Relatedly, commenters indicated that children compelled to wait at the SWB with a member of their family, so as not to be subject to the NPRM's condition on eligibility, may be deprived of

access to other forms of status for which they may be eligible in the United States, such as Special Immigrant Juvenile classification. Commenters urged the Departments to prioritize processing family unit applications to keep families together and expressed that families deserve a chance to live together in the United States to escape violence in their home countries.

One commenter stated that children have little control over whether their parents can pre-schedule their arrival at a POE or choose to apply for protection in transit countries, but the proposed rule would condition asylum eligibility for the child on whether their parent did so. Similarly, other commenters stated that the proposed rule failed to consider or make an exception for the fact that children and young people generally have less control and choice with respect to their movement and may depend on the assistance of a parent, who may have been jailed or killed by persecutors, or who may themselves have harmed the child or young person, to apply and be approved for a visa.

*Response:* The Departments share commenters' concerns about the vulnerability of children and note that UCs are entitled to special protections under the law. *See* 88 FR at 11724 (citing INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E) (providing that safe-third-country bar does not apply to UCs); INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C) (stating that an AO has initial jurisdiction over the asylum claims of UCs); and 8 U.S.C. 1232(d)(8) ("Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.")). The Departments also recognize commenters' concerns that children may be at risk for exploitation by criminal actors at and around the SWB, and the Departments note that UCs are of particular concern.

Because of UCs' unique vulnerability and the special protections granted to them by law, the rule contains a provision categorically excepting UCs from the rebuttable presumption of ineligibility for asylum. 8 CFR 208.33(a)(2)(i), 1208.33(a)(2)(i). Accordingly, because UCs

will not be subject to the rebuttable presumption of ineligibility for asylum created by this rule, the Departments emphasize that UCs do not need to wait, potentially vulnerable, in Mexico before seeking entry to the United States or rely on smugglers to undertake a potentially dangerous journey across the SWB. Further, the Departments expect that the rule, by creating efficiencies and freeing up resources due to non-UC migrants pre-scheduling their arrival at SWB POEs, will allow for faster, smoother processing of UCs presenting at the SWB. *See* 88 FR at 11719–20 (describing anticipated efficiencies from implementation of pre-scheduling through the CBP One app). The Departments believe that the rule sufficiently recognizes the unique situation of UCs and provides appropriate safeguards. For discussion of the exception to the condition on asylum eligibility for UCs, and comments suggesting a similar exception for accompanied children, please see Section IV.E.3.v of this preamble.

The Departments acknowledge commenter concerns that children may not have the autonomy to make decisions about their transit or manner of entry into the United States. With those important realities in mind, the Departments have amended the language proposed in the NPRM to ensure that the presumption of asylum ineligibility will not apply to certain noncitizens who entered as children and who file asylum applications after the date range set forth in 8 CFR 208.33(a)(1)(i) and 1208.33(a)(1)(i)—specifically, those who are applying as principal applicants. *See* 8 CFR 1208.33(d)(2). Further, the Departments recognize that some children could be traveling with an adult but still meet the definition of UC at 6 U.S.C. 279(g)(2), for example, where the adult is not the child’s parent or legal guardian. Such children would also be excepted from the presumption against asylum eligibility as UCs. *See* 8 CFR 208.33(a)(2)(i), 1208.33(a)(2)(i). The Departments believe that the aforementioned provisions of the rule prevent those who entered as children from facing a continuing impact on asylum eligibility based upon decisions that others likely made for them.

As discussed in more detail in Section IV.E.3.ii.b of this preamble, the Departments emphasize that family units traveling together should schedule their appointments together



through the CBP One app. Families or groups traveling together who do not register together on one CBP One app account may not be accommodated at the same POE or date. Further, as stated in the NPRM, when family units are subject to a credible fear screening, USCIS will find that the entire family passes the screening if one family member establishes a credible fear. 88 FR at 11724; *see* 8 CFR 208.30(c). Likewise, when the reasonable possibility standard applies, USCIS will continue to process claims from family units in this way. 88 FR at 11724 (“USCIS will continue to process family claims in this manner even when applying the reasonable possibility standard.”).

The Departments also acknowledge commenter concerns related to the impact that any potential detention may have on children and families, as well as the effects of trauma on children. However, this rule neither addresses nor expands detention policies, and therefore specific concerns related to detention are outside the scope of this rule. Further, with respect to the effects of trauma on children and concerns about re-traumatization, the Departments are confident in the ability of AOs and IJs to follow appropriate safeguards available for children in processing with USCIS and the immigration courts and note that adjudicators receive training and guidance related to special considerations in cases involving children.<sup>97</sup>

However, the Departments disagree with commenters’ contention that children waiting for an appointment to present at a POE together with their family unit will be deprived of Special Immigrant Juvenile classification. Whether a noncitizen enters alone or with a family unit is not dispositive to the statutory definition of a “special immigrant.” *See* INA 101(a)(27)(J), 8 U.S.C. 1101(a)(27)(J) (defining “special immigrant,” in part, as an immigrant who is present in the United States “who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or

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<sup>97</sup> *See, e.g.*, Department of Justice, EOIR, *OPPM 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-03/download> (recognizing unique circumstances presented by immigration cases involving children and providing guidance for those cases); USCIS, RAIO Directorate – Officer Training: Children’s Claims (last revised Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Childrens\\_Claims\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf) [hereinafter USCIS, *Children’s Claims*] (providing guidelines for adjudicating children’s claims).

department of a State, or an individual or entity appointed by a State or juvenile court located in the United States,” and whose reunification with one or both of the immigrant’s parents “is not viable due to abuse, neglect, abandonment, or a similar basis found under State law”). Further, the Departments highlight that nothing in this rulemaking prevents a noncitizen child from obtaining Special Immigrant Juvenile classification after entering the United States, provided that they are otherwise eligible for such status.

Moreover, the Departments disagree with the characterization of this rule as contributing to family separation rather than focusing on family unity. The Departments drafted this rule with the goal of eliminating the risk of separating families. As explained above, the rule has several provisions to ensure that family units are processed together. For example, if any noncitizen in a family unit traveling together meets an exception to, or is able to rebut, the asylum ineligibility presumption, the presumption will not apply to anyone in the family unit traveling together. 8 CFR 1208.33(a). Similarly, the rule contains an explicit family unity provision applicable in removal proceedings. *Id.* 1208.33(c). The provision states that if a principal applicant for asylum is eligible for statutory withholding of removal or withholding of removal under the CAT and would be granted asylum but for the rebuttable presumption created by this rule, the presumption “shall be deemed rebutted as an exceptionally compelling circumstance” where an accompanying spouse or child does not independently qualify for asylum or other protection or the principal asylum applicant has a spouse or child who would be eligible to follow to join that applicant as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A), if the applicant were granted asylum. *Id.* This provision is intended to prevent the separation of families. Additionally, this provision is intended to avoid incentivizing families to engage in irregular migration together, so as not to risk that the principal applicant be prevented from later applying for their family members to join them. This may involve making a dangerous journey with vulnerable family members such as children.

Further, the rule incentivizes families, as well as individuals traveling without their families, to take advantage of the lawful pathways outlined in this rule, rather than rely on smugglers or criminal organizations to facilitate a potentially dangerous journey. The rebuttable presumption is intended to disincentivize making such irregular journeys. *See, e.g.*, 88 FR at 11730 (“The proposed rule aims to achieve that shift in incentives by imposing a rebuttable presumption of asylum ineligibility.”). The Departments believe that the meaningful pathways detailed in the rule, combined with the exceptions and rebuttals to the presumption, provide sufficient opportunities for individuals to meet an exception to or rebut the presumption, which could preclude asylee status and the ability to later petition for eligible derivatives. Finally, commenter concerns related to placing separated children in orphanages are outside the scope of this rulemaking, but the Departments emphasize that nothing in this rule would authorize such a process.

For additional discussion of concerns related to due process, see Section IV.B.5 of this preamble. For more discussion of the family unity provision applicable in removal proceedings, please see Section IV.E.7.ii of this preamble.

iii. Individuals with LEP

*Comment:* Commenters expressed the belief that the proposed rule would function as a complete ban on asylum for noncitizens who are not sufficiently proficient or literate in the languages they would need to use to successfully navigate available lawful pathway options. As a foundational issue, commenters voiced the opinion that due to language and literacy barriers, many noncitizens, particularly those who speak rare languages and those with limited literacy in their native languages, would not be able to understand what lawful pathways are available to them or the consequences that may result from not pursuing a lawful pathway under the proposed rule. For example, some commenters stated that many asylum seekers who are unfamiliar with U.S. immigration law may not know what steps to take to preserve their eligibility for asylum.

Commenters also indicated that many noncitizens would be unable to meaningfully access the CBP One app due to inadequate proficiency or literacy in the app's supported languages and therefore would be unable to pre-schedule their appearance at a POE, making them subject to the rule's presumption of asylum ineligibility. Commenters provided examples of individuals who they asserted would be disproportionately impacted by the rule and face particular challenges, including those who speak an Afghan dialect of the Persian language, monolingual speakers of indigenous languages, and members of the Asian-Pacific Islander community whose primary languages do not utilize the Latin script.

*Response:* Due to the safeguards crafted into the rule and the success of similar, recently implemented parole processes, the Departments disagree with commenters' contentions that language and literacy barriers will prevent many noncitizens from foundationally understanding what lawful pathway options are available to them.

The Departments acknowledge commenters' concerns that some noncitizens who wish to use the lawful pathway of pre-scheduling their arrival may have language and literacy-related difficulty with accessing and using the CBP One app. Accordingly, the rule provides an exception to application of the rebuttable presumption of asylum ineligibility for noncitizens who present at a POE without a pre-scheduled appointment who can demonstrate through a preponderance of the evidence that, because of a language barrier or illiteracy, it was not possible for them to access or use the DHS scheduling system to pre-schedule an appointment. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). AOs will follow established procedures for interviewing individuals to determine applicability of this exception. Similarly, IJs will follow established procedures for soliciting testimony and developing the record, as appropriate.

The Departments also believe the processes highlighted in this rulemaking will be navigable for noncitizens—regardless of language spoken—as evidenced by the success of the recent, similar U4U and CHNV parole processes, both of which are offered to noncitizens from countries where the primary language is one other than English. *See, e.g.*, 88 FR at 11706–07

(noting that the U4U and CHNV parole processes resulted in vastly fewer irregular border crossings, demonstrating that noncitizens from Ukraine, Cuba, Haiti, Nicaragua, and Venezuela were able to take advantage of the U4U and CHNV parole processes). The success of the U4U and CHNV parole processes suggests that these noncitizens are broadly aware of changes to U.S. immigration processes, that such information is being communicated to noncitizens outside the United States, and that noncitizens are changing migration behaviors in response. In addition, the Departments intend to engage in robust regional public awareness campaigns to promote understanding of the rule, building on ongoing efforts to encourage intending migrants to avail themselves of lawful pathways and publicize the perils of irregular migration. Therefore, the Departments believe that, irrespective of language spoken, noncitizens outside of the United States will become apprised of the lawful pathway options laid out in this rule.

#### iv. Individuals with Mental Impairments and Associated Mental Competency Issues

*Comment:* Commenters raised concerns about the proposed rule's effect on noncitizens who have mental impairments and associated mental competency issues. Commenters stated that some mental impairments result in symptoms that would impact an individual's ability to apply for asylum under any circumstances, especially if access to medical services is unavailable. Moreover, commenters stated that downloading, registering for, and using the CBP One app may be too difficult for some noncitizens with mental impairments and associated mental competency issues. Thus, commenters recommended exempting such persons from the rule.

*Response:* The Departments recognize the difficulties faced by noncitizens with mental impairments and associated competency issues. Under this rule, AOs and IJs may consider, on a case-by-case basis, whether a noncitizen's or accompanying family member's mental impairments or associated competency issues presented an "ongoing and serious obstacle" to accessing the DHS scheduling system. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). In addition, depending on the noncitizen's or accompanying family member's particular

circumstances, any serious mental impairments or associated competency issues may qualify as an “exceptionally compelling circumstance” sufficient to rebut the presumption of ineligibility for asylum. 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i). Notably, the “acute medical emergency” ground for rebutting the presumption of asylum ineligibility is not limited to physical medical ailments but could include mental health emergencies. 8 CFR 208.33(a)(3)(i)(A), 1208.33(a)(3)(i)(A).

Procedurally, DHS has discretion to place noncitizens in expedited removal proceedings or refer noncitizens to EOIR for section 240 removal proceedings. *Matter of E-R-M- & L-R-M*, 25 I&N Dec. 520 (BIA 2011). Therefore, DHS may choose to refer noncitizens who exhibit indicia of mental incompetency to EOIR for removal proceedings under section 240 of the INA, where an IJ may more fully consider whether the noncitizen shows indicia of incompetency and, if so, which safeguards are appropriate. *See, e.g., Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011).

#### v. Low-Income Individuals

*Comment:* Commenters asserted that the proposed rule discriminates against noncitizens who cannot afford to arrive in the United States by air or sea and favors individuals with more financial resources. In general, commenters stressed that a noncitizen’s method of arrival in the United States—whether by land, air, or sea—should not dictate their eligibility for asylum and stated that asylum laws should not have a “wealth test” for access to protection from persecution. Pointing to the fact that the proposed rule would only apply to noncitizens arriving by land at the SWB, commenters said that the proposed rule would have a disparate impact on individuals, particularly working-class, non-white migrants, who do not have the economic means to purchase a plane ticket or obtain a visitor visa or passport and may not have existing supportive relationships within the United States. Commenters stated that the lawful pathways identified in the proposed rule—including parole programs and use of DHS scheduling technology—prioritize individuals with financial means over those who are indigent.

At least one commenter stated that the proposed rule would cause migrants financial hardship, as not all migrants have the financial resources to travel to a third country to seek asylum before attempting to cross the SWB. Commenters also suggested that the proposed rule would privilege migrants with the economic means to maintain a working smartphone capable of operating the CBP One app and either pay for data roaming capability or remain in an area with internet access. Commenters also stated that the proposed rule unfairly benefits wealthier noncitizens who are more likely to be able to use an approved parole process because such noncitizens may be immediately eligible for employment authorization while low-income noncitizens who are not able to use such a parole process remain without immediate employment authorization. Commenters concluded that the proposed rule would amount to a de facto ban on asylum that targets economically disadvantaged noncitizens without options other than arriving at the SWB.

*Response:* As explained in the NPRM, the Departments are issuing this rule specifically to address an anticipated surge of migration at the SWB following the lifting of the CDC’s Title 42 public health Order. 88 FR at 11704. Through this rule, the Departments have decided to address such a surge one step at a time, beginning with the SWB, where the Departments expect a surge to focus most intensely and immediately. So, tailoring the rule to apply exclusively to migrants arriving from Mexico at the southwest land border or adjacent coastal borders<sup>98</sup> who meet certain conditions but not to migrants arriving via other means is appropriate based on existing and anticipated conditions at the SWB, many of which the Departments outlined in the NPRM. *See id.* at 11705–07. Where conditions necessitate, the Departments can reevaluate the scope of the rule. *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 522, 129 S. Ct. 1800, 1815 (2009) (stating that “[n]othing prohibits federal agencies from moving in an incremental manner”); *City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989) (explaining that

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<sup>98</sup> As explained in Section II.C.3 of this preamble, the Departments have decided to apply this rule to migrants arriving from Mexico not only at the southwest land border but also at “adjacent coastal borders,” which matches the geographic scope of the CDC’s Title 42 public health Order.

“agencies have great discretion to treat a problem partially” including through a “step toward a complete solution”). Indeed, as stated above, the Departments intend that the rule will be subject to review to determine whether the entry dates provided in 8 CFR 208.33(a)(1)(i) and 1208.33(a)(1)(i) should be extended, modified, or remain as provided in the rule.

Commenters who expressed concerns that this rule would cause financial hardship to migrants by requiring them to travel to a third country to seek asylum before arriving at the SWB misunderstand the terms of this rule. The rule does not require any migrant to travel to a third country to overcome the rebuttable presumption—indeed, the rebuttable presumption does not apply to those who did not travel through a third country—and seeking protection in a third country is merely one of several means to qualify for an exception to or rebut the presumption. Moreover, this rule is intended in part to address existing conditions impacting low-income individuals by reducing opportunities for smugglers to recruit migrants to participate in “expensive and dangerous human smuggling schemes.” 88 FR at 11705.

Further, except for those for whom Mexico is their country of nationality or last habitual residence, individuals arriving at the southwest land border or adjacent coastal borders, whether they have traveled by land, air, or sea, to arrive there, necessarily travel through another country—and, often, more than one other country—en route to the United States. Also, while individuals traveling from their country of nationality or last habitual residence to the United States may arrive directly in the United States without transiting another country, they generally are not permitted to board an aircraft or vessel to a U.S. location without first demonstrating that they have the travel documents required for entry into the United States. *See, e.g.*, INA 211, 8 U.S.C. 1181 (setting forth requirements for immigrant admission); *see also* INA 217, 8 U.S.C. 1187 (visa waiver requirements); INA 221 through 224, 8 U.S.C. 1201 through 1204 (visas); INA 231, 8 U.S.C. 1221 (establishing air and vessel manifest requirements including mandating the collection of passport numbers); *see also* 8 CFR 212.5(f) (providing that DHS may issue “an



appropriate document authorizing travel” for those seeking to travel to the United States without a visa).

This rule does not intend to penalize migrants based on economic status, a lack of travel documents, lack of phone or internet access, or exigent circumstances, nor does it do so in effect. Indeed, the Departments recognize that many individuals are only able to enter the United States via the SWB due to just such circumstances and, in recognition of this reality, have identified several pathways and processes through which such individuals may travel to the SWB in a safe and orderly fashion and, once present, seek asylum or other protection. One such pathway or process includes pre-scheduling their arrival, which at this time can be accomplished via the CBP One app. Without a pre-scheduling system, migrants seeking to travel to the SWB may have to wait for an indeterminate amount of time for CBP to have resources available to process them. *See* 88 FR at 11720. Pre-scheduling provides noncitizens seeking to present at a SWB POE with a clear understanding of when CBP expects to process them, which allows them to plan for safer transit and reduces opportunities for smugglers and criminal organizations. *See id.* at 11707. Moreover, the rule excepts from application of the condition on asylum eligibility those noncitizens who presented at a POE and can establish, based on the preponderance of the evidence, that it was not possible for them to access or use the DHS scheduling system, including because they had insufficient phone or internet access. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B) (providing the presumption does not apply “if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to . . . significant technical failure, or other ongoing and serious obstacle”).

In response to commenters’ concerns about differences in eligibility for employment authorization depending on whether a migrant entered the United States following use of the CBP One app, a DHS-approved parole process, or some other means, the Departments acknowledge that the employment authorization rules may vary depending on the pathway that a noncitizen uses to enter the United States and how the noncitizen is processed. This has always

been the case, and although this rule recognizes certain lawful pathways as a basis to avoid the rebuttable presumption, such pathways would exist irrespective of this rulemaking. The Departments also note that individuals in expedited removal proceedings, including those determined to have a credible fear who are then paroled from custody, remain ineligible to apply for employment authorization on the basis of this exercise of parole. 8 CFR 235.3(b)(2)(iii), (b)(4)(ii). The NPRM did not propose to revise any regulations governing employment authorization eligibility, and the final rule does not make any such changes either.

vi. Allegations of Discrimination on Race, Ethnicity, or Nationality Grounds

*Comment:* Commenters raised concerns that the proposed rule would have a discriminatory impact based on nationality and effectively deny protection to migrants from certain countries. For example, commenters alleged that the proposed rule would have a disproportionately negative impact on noncitizens from countries in Africa, the Caribbean, Central America, and Latin America who do not currently fall under any large-scale parole initiatives and are more likely to seek asylum via arrival at the SWB, with some commenters describing the rule as a de facto ban for these populations. Commenters also stated that noncitizens from China specifically, and Asia more generally, would be disproportionately impacted by the rule as a result of lasting effects from reduced refugee admissions under the prior Administration, which, commenters said, increased the number of individuals from these countries seeking entry to the United States at the SWB. Likewise, commenters noted that noncitizens from Afghanistan would be disproportionately impacted by the rule due to potential danger in third countries.

Further, commenters noted that the Administration has created special immigration programs for citizens of certain countries—including Cuba, Haiti, Nicaragua, Ukraine, and Venezuela—in response to various political and humanitarian conditions in those countries, but has not done so for citizens of certain other countries. Commenters questioned why citizens from these countries are offered special programs to enter the United States while citizens from

other countries do not have the same opportunities, which commenters claimed was discriminatory and raised equal protection concerns.

Commenters also raised equal protection concerns because noncitizens subject to the rule's rebuttable presumption would be treated differently from those not subject to the rule based on the date, location, and manner of their entry into the United States. As a result, commenters argued that the rule would have a disparate impact on asylum applicants from less affluent countries, who do not have easy access to air travel or nonimmigrant visas.

Additionally, commenters asserted that the rule discriminates based on race and ethnicity and would have a disproportionate impact on persons of certain races and ethnicities for equal protection purposes. Commenters pointed to the Government's response to Ukrainian refugees as evidence that the United States is capable of accepting asylum seekers and refugees and stated that the difference in treatment between Ukraine and other countries was racially motivated.

Lastly, commenters suggested that it was facially discriminatory to require migrants from countries other than Mexico to first apply for asylum in transit countries, as it would result in their quick removal and force them to wait for a number of years before they could reapply for asylum in the United States.

*Response:* The rule does not classify noncitizens based on race, ethnicity, nationality, or any other protected trait. Nor, as elaborated below, are the Departments issuing the rule with discriminatory intent or animus. As the Departments explained in the NPRM, the rule is intended to address an anticipated increase in migrants arriving at the SWB following the lifting of the Title 42 public health Order and the resultant strain the anticipated surge would put on DHS and DOJ resources. *See* 88 FR at 11728. As such, the rule's scope and applicability are intended to address this anticipated migration surge. *See generally id.*

Additionally, although the rule imposes a rebuttable presumption of ineligibility if noncitizens seek to enter the United States at the SWB outside of an established lawful pathway and do not seek protection in a third country through which they travel en route to the United

States, that presumption does not constitute a “de facto ban” on asylum for noncitizens of any race, ethnicity, or nationality, given the opportunities to avoid the presumption and, for those unable to do so, to establish an exception to or rebut it. Irrespective of race, ethnicity, or nationality, noncitizens will not be subject to the presumption if they apply for and are denied asylum or other protection in a third country they transit while en route to the United States, but no noncitizen is required to do so. *See* 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C).

Likewise, regardless of race, ethnicity, or nationality, noncitizens will not be subject to the presumption if they schedule an appointment to present at a POE using the CBP One app. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). In addition, irrespective of race, ethnicity, or nationality, noncitizens who are subject to the rule’s presumption will have the opportunity to rebut it in certain circumstances, including if at the time of their entry they or a family member with whom they traveled was experiencing an acute medical emergency, an imminent and extreme threat to life or safety, a severe form of trafficking, or another exceptionally compelling circumstance. 8 CFR 208.33(a)(3), 1208.33(a)(3). Further, noncitizens of every race, ethnicity, and nationality may apply for other relevant immigration processes that are applicable to them. The rule’s approach balances the needs to address current and expected circumstances at the SWB, to avoid unduly negative consequences for noncitizens, to avoid unduly negative consequences for the U.S. immigration system, and to provide ways for individuals to seek protection in the United States and other countries in the region. 88 FR at 11730.

The Departments disagree that the rule violates the Equal Protection Clause<sup>99</sup> to the extent that the rule applies to noncitizens who arrive in the United States at a particular location, by a particular method, or after a particular date. Noncitizens who utilize a lawful pathway, meet an exception to the rule’s presumption, or rebut the presumption will not be subject to the rule’s

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<sup>99</sup> Although the Equal Protection Clause of the Fourteenth Amendment does not apply to the United States Government, the Supreme Court in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), held that while “‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than ‘due process of law,’ . . . discrimination may be so unjustifiable as to be violative of due process.” The Court concluded that “[i]n view of [its] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.” *Id.* at 500.

condition on eligibility, irrespective of their country of origin or the method by which they arrive. The ability to afford a plane ticket or qualify for a visa is not a requirement to meet an exception to or rebut the presumption of ineligibility under the rule. And with respect to concerns about dates of entry, the Departments note that Federal immigration laws, including regulations that impose conditions on asylum, routinely apply to migrants who arrive or file their application for relief after, but not before, a particular effective date. *See, e.g.*, INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B); 8 CFR 208.4(a) (imposing filing deadline on asylum applications filed after April 1, 1997, and tying that deadline to the applicant’s date of arrival in the United States); 8 CFR 208.13(b)(3), 1208.13(b)(3) (2020) (imposing conditions related to internal relocation, applied per 8 CFR 208.1(a) to applications filed after the regulatory effective date of April 1, 1997).<sup>100</sup>

Further, as detailed in the NPRM, the United States previously has, and is still, committed to taking significant steps to expand pathways and processes for migrants to enter the country in a safe and lawful way. 88 FR at 11718–20. In addition to creating parole processes for citizens of certain countries, the United States has announced “significant increases to H-2 temporary worker visas and refugee processing in the Western Hemisphere” and worked closely with other countries in the region “to prioritize and implement a strategy that advances safe, orderly, legal, and humane migration, including access to international protection for those in need, throughout the Western Hemisphere.” *Id.* at 11718, 11720. Moreover, the Departments remain committed to continuing to work with foreign partners on expanding their legal options for migrants and expanding the Departments’ own mechanisms for processing migrants who lawfully arrive in the United States. *Id.* at 11720, 11722, 11729.

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<sup>100</sup> This provision was amended by a prior rulemaking, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274, 80281 (Dec. 11, 2020), which was preliminarily enjoined and its effectiveness stayed before it became effective. *See Pangea II*, 512 F. Supp. 3d at 969–70 (preliminarily enjoining the rule). The district court’s order remains in effect, and thus the 2020 version of this provision—the version immediately preceding the enjoined amendment—is currently effective.

As to certain commenters' concerns that the rule discriminates among noncitizens based on whether their country of nationality has a parole process, the Departments did not promulgate the rule, or design its applicability and scope, with a discriminatory purpose or intent. Instead, the rule is designed to "encourage migrants to avail themselves of lawful, safe, and orderly pathways into the United States, or otherwise to seek asylum or other protection in countries through which they travel, thereby reducing reliance on human smuggling networks that exploit migrants for financial gain." *Id.* at 11704. As elaborated on later in this preamble, lawful pathways are available to noncitizens from all countries, and country-specific processes are available without regard to race or ethnicity. *See, e.g., id.* at 11704, 11706 (listing and explaining processes and programs). Thus, the existence of special processes and programs for qualifying noncitizens from certain countries does not demonstrate that the rule was promulgated "for a discriminatory purpose or intent," as required to show a violation of the Equal Protection Clause. *United States v. Barcenas-Rumualdo*, 53 F.4th 859, 864 (5th Cir. 2022) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977)). Moreover, Congress regularly makes laws that distinguish among individuals on the basis of nationality; indeed, the "whole of Title 8 of the United States Code, regulating aliens and nationality, is founded on" such distinctions. *Mathews v. Diaz*, 426 U.S. 67, 78 n.12, 80 (1976). Yet, "such disparate treatment" is not by itself "invidious." *Id.* at 80.

#### vii. Other Underserved or Vulnerable Populations

##### a. Women, Domestic Violence Survivors, and LGBT Individuals

*Comment:* Commenters raised concerns that the rule would have a disproportionate impact on certain particularly vulnerable populations, such as women, including domestic violence and sexual assault survivors and younger, pregnant, and indigenous women, as well as the LGBT community, and those noncitizens who are disabled, elderly, or HIV positive, among others. Commenters stated that these populations would face discrimination, violence, extortion, and persecution in transit countries. Commenters also asserted that applying for a parole process

and waiting for approval in one's home country may not be a viable option for such groups who need to leave a dangerous situation immediately. As a result, commenters stated that such groups should be exempted from the rule.

Commenters asserted, for example, that women and girls would be at high risk for sexual and gender-based violence in transit countries or if forced to wait in Mexico for their scheduled SWB POE appointments. Similarly, commenters raised concerns that the LGBT community would face persecution, violence, and inadequate access to medical care, among other harms, in transit countries, particularly if required to wait to schedule an SWB POE appointment through the CBP One app or apply for asylum in those countries. Commenters also noted that it is unclear if claims related to persecution based on sexual orientation and gender identity would be recognized in many common transit countries. Additionally, commenters stated that the rule, particularly the family unity provision, would exclude LGBT families, as legal protections such as marriage or LGBT-inclusive family protections are unavailable or inaccessible to LGBT individuals and families in many countries.

Further, commenters noted that many of these groups, including domestic violence survivors, torture survivors, and those with PTSD, may, as a result of psychological trauma, have difficulty recounting traumatic events underlying their claims during credible fear screenings—a difficulty that commenters said would be exacerbated if members of such groups must also present evidence about the rebuttable presumption of asylum ineligibility. As a result, commenters stated that traumatized noncitizens would not have sufficient time to gather their thoughts or collect relevant evidence. Moreover, commenters stated that recounting such incidents may risk retraumatizing such individuals. Similarly, commenters asserted that such groups are often reluctant to speak about what happened to them and may not express their fear of return to someone in a third country who could inform them of their right to apply for asylum.

*Response:* The Departments recognize that certain populations may be particularly vulnerable during transit to the United States. Accordingly, the purpose of the rule is

to encourage migrants, including those who may be seeking asylum, to pursue safe, orderly, and lawful pathways to the United States rather than attempt irregular migration journeys, which often subject migrants to dangerous human smuggling networks. *See, e.g.*, 88 FR at 11713–14 (noting that women face particular vulnerabilities along certain portions of the irregular migration route to the SWB). The rule details multiple potential pathways and processes available to many migrants, including those who seek protection, that do not involve a dangerous journey to the United States. *See id.* at 11718–23. Notably, amongst those options, the rule does not require noncitizens to apply for asylum in third countries where they may also face persecution or other harm. Moreover, applying for asylum in a third country is only one of multiple options migrants may pursue. For a more in-depth examination of third-country safety for migrants, please see the further discussion of specific third countries later in this preamble in Section IV.E.3.iv (“Third Countries”). *See also* 88 FR at 11720–23 (NPRM discussing “Increased Access to Protection and Other Pathways in the Region”). Additionally, the Departments note that the rule provides that its presumption of asylum ineligibility can be rebutted by noncitizens, including those with particular vulnerabilities, who do not utilize a lawful pathway but who face imminent and extreme threats to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder, or who were victims of a severe form of trafficking in persons. *See* 8 CFR 208.33(a)(3)(i)(B) and (C), 1208.33(a)(3)(i)(B) and (C).

The Departments also recognize that migrants’ protection claims may be premised on past traumatic events in their home countries, which can be difficult to recount. However, the rule does not change the credible fear process that Congress has instituted, which involves detailing these events to a DHS officer so that the officer can make a credible fear determination. *See generally* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); 8 CFR 208.30(d) and (e). The rule merely adds a condition on asylum eligibility in the form of a rebuttable presumption. During the credible fear screening, noncitizens may demonstrate why they believe that the presumption is inapplicable or an exception or rebuttal ground exists. The rule does not impose an infeasible



requirement for noncitizens with meritorious claims to show that the presumption does not apply, or that they qualify for an exception or rebuttal to the presumption, during the credible fear screening process. *See* 8 CFR 208.30(d)(4). In addition, AOs and IJs have conducted credible fear assessments for many years and are well-trained in accounting for any potential trauma that may be relevant.

b. Unrepresented Individuals

*Comment:* Commenters raised concerns that unrepresented noncitizens would not understand the rule's requirements, particularly the need to take affirmative steps outside of the United States, such as through applying for protection in a third country or scheduling an SWB POE appointment through the CBP One app. Commenters also expressed that the proposed rule did not explain how information about the rule's requirements would be disseminated. Similarly, commenters stated that unrepresented noncitizens may have received little or no information during the screening process and may not understand their rights during the process or the consequences of failing to assert them. Commenters also asserted that unrepresented individuals may not understand the burdens of proof in the rule and may be unable to present a legal argument sufficient to overcome its presumption of ineligibility. Additionally, commenters were concerned that the rule would dramatically increase the likelihood of denials for relief for unrepresented noncitizens who are subject to the asylum ineligibility presumption and stated that individuals with meritorious claims are no less deserving of asylum because they do not have counsel. Further, commenters pointed to various statutory provisions that they claimed showed a recognition by Congress that unrepresented noncitizens need assistance to present their claims. As a result, commenters suggested that unrepresented noncitizens should be exempted from the rule or be provided more resources to navigate the immigration system.

*Response:* The Departments recognize that unrepresented noncitizens can have additional difficulties navigating the U.S. immigration system, as compared to those with counsel. This is to be expected with respect to any unrepresented individuals in a legal setting. As a general

matter, the Departments strongly support efforts for noncitizens to obtain or confer with counsel in immigration proceedings.<sup>101</sup>

However, for those noncitizens who do not retain counsel, the Departments do not believe that the rule presents an overly complicated process for migrants seeking protection, including asylum. The rule does not change the right to confer with a person or persons of the noncitizen's choosing in the existing expedited removal and credible fear screening processes. *See* 8 CFR 208.30(d)(4). Rather, the rule simply adds a determination about the asylum ineligibility presumption to the credible fear screening. As such, the Departments decline to create a wholesale exception from the rule for unrepresented noncitizens, which would significantly reduce the incentives for using the lawful pathways described in the rule, as well as disincentivize obtaining counsel as needed.

The rule is intended to provide clear options for migrants, including asylum seekers, to follow, such as applying for asylum in a third country or presenting at an SWB POE at a pre-scheduled time and place. *See generally* 8 CFR 208.33(a)(2), 1208.33(a)(2). Noncitizens may also be able to pursue other pathways to the United States that would not trigger the rule's presumption, such as an employment-based visa or refugee admission through the United States Refugee Admissions Program ("USRAP"). 88 FR at 11719 (describing expansions of labor pathways and increases in USRAP processing). If unrepresented noncitizens choose to forgo such options and instead unlawfully enter the United States, they will be subject to the rule's rebuttable presumption of asylum ineligibility, with an opportunity to establish an exception to or rebut the presumption, including for exceptionally compelling circumstances. *See* 8 CFR 208.33(a)(3), 1208.33(a)(3). For instance, such noncitizens who present at a POE without a pre-scheduled appointment may be excepted from the presumption if they can demonstrate that they were unable to access or use the DHS scheduling system due to ongoing and serious obstacles,

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<sup>101</sup> *See, e.g.*, EOIR Director's Memorandum ("DM") 22-01, *Encouraging and Facilitating Pro Bono Legal Services* (Nov. 5, 2021), <https://www.justice.gov/eoir/book/file/1446651/download>.

such as a language barrier, illiteracy, or a significant technical failure. *See* 8 CFR

208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B).

The Departments believe these processes will be navigable for unrepresented noncitizens based on the significant usage and success of other recent processes for Cuban, Haitian, Nicaraguan, Ukrainian, and Venezuelan nationals. *See, e.g.*, 88 FR at 11706, 11711–12 (explaining, for example, that the Venezuela process has had a “profound impact” and that, in one measured period, there was an over 95 percent decrease in SWB unlawful encounters with Venezuelan migrants). These statistics, along with the success of the U4U and CNHV parole processes, show that noncitizens outside the United States are broadly aware of information about changes to U.S. immigration processes and that noncitizens alter migration behaviors accordingly, regardless of their representation status. As for commenters’ desire for additional information about how the rule’s requirements will be communicated, the Departments note that they have numerous, non-regulatory tools at their disposal that they may use to disseminate information to the public, as appropriate, including press releases,<sup>102</sup> policy memoranda, web-based tools,<sup>103</sup> and other statements in public fora, among others. The Departments further describe their efforts to communicate the rule’s requirements to the public in Section IV.B.5.iv of this preamble.

### c. Climate Migration

*Comment:* Commenters noted that global migration is increasingly driven in part by the effects of climate change and that governments of many migrants’ home countries are unable to stop or redress such effects. As such, commenters expressed concerns that the proposed rule would unlawfully deny noncitizens from countries disproportionately affected by climate change the right to be meaningfully heard on their asylum claims. Commenters also asserted that

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<sup>102</sup> *See* EOIR, *Communications and Legislative Affairs Division*, <https://www.justice.gov/eoir/communications-and-legislative-affairs-division> (last visited Apr. 25, 2023) (“The Communications and Legislative Affairs Division (CLAD) serves as the Executive Office for Immigration Review’s liaison with Congress, the news media, and other interested parties by communicating accurate and timely information about the agency’s activities and programs.”).

<sup>103</sup> *See, e.g.*, EOIR, *Immigration Court Online Resource*, <https://icor.eoir.justice.gov/en/> (last visited Apr. 25, 2023) (providing information about immigration processes in Chinese, Haitian Creole, Portuguese, Punjabi, and Spanish).

ecological disasters resulting from climate change, such as famine and flooding, would prevent noncitizens from countries experiencing such disasters from being able to pursue a lawful pathway so as not to be subject to the rule’s rebuttable presumption. As a result, commenters recommended expanding asylum eligibility to account for displacement caused by climate change.

*Response:* Comments related to climate change are generally outside the scope of this rulemaking, which focuses on incentivizing migrants to use lawful pathways to pursue their claims. To the extent that commenters raised concerns about the effects of climate change—such as a severe environmental disaster—creating a necessity for noncitizens to enter the United States outside of the lawful pathways described in the rule, the Departments note that the rule includes an exception to its asylum ineligibility presumption for “exceptionally compelling circumstances.” *See* 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i). Evidence of exceptionally compelling circumstances will be considered on a case-by-case basis.<sup>104</sup>

To the extent that commenters argued that the rule’s application in the context of the alleged exigencies of climate change migration would violate the due process rights of noncitizens, the Supreme Court has held that the rights of noncitizens applying for admission at the U.S. border are limited to “only those rights regarding admission that Congress has provided by statute.” *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1983 (2020).

#### d. Indigenous People and People of Color

*Comment:* Commenters raised concerns that the rule would have a particularly detrimental impact on members of indigenous communities and people of color. As a result,

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<sup>104</sup> The Departments note that, to the extent commenters have substantive comments related to the interaction of climate change and immigration or asylum law, such as how adjudicators should consider the effects of climate change in making asylum determinations, commenters may raise those concerns as relevant in response to future potential Departmental rulemakings that address other substantive asylum provisions. *See, e.g.*, Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions—Fall 2022, 88 FR 10966, 11054, 11088–89 (Feb. 22, 2023) (including a future rulemaking addressing particular social groups and related definitions and interpretations for asylum and withholding of removal).

commenters recommended exempting these groups from the rule and for the Departments to articulate actions taken to mitigate any disparate impacts on such groups.

Commenters stated that such populations would face discrimination, racism, persecution, prolonged detention, medical neglect, homelessness, erasure of indigenous identity, and other harms in transit countries. Commenters also believed that these groups would face difficulty applying for asylum or related protection in a third country, due to discrimination and insufficiently robust asylum systems, among other reasons. Additionally, commenters asserted that persons from predominantly Black countries had higher rates of visa denials, which limit their lawful pathways when compared to other groups. In support of these contentions, commenters stated that immigration court asylum denial rates increased for these groups while the TCT Bar Final Rule was in effect.

Further, commenters maintained that the proposed rule would disproportionately impact indigenous migrants and people of color because such groups often lack the means or ability to enter the United States other than by land through the SWB and, therefore, would be more likely to be subject to the rule's rebuttable presumption of ineligibility. Relatedly, commenters maintained that these populations have disproportionately low access to the technology commenters stated is mandated by the rule, thereby precluding such groups from taking advantage of the available lawful pathways. Similarly, commenters raised a number of concerns with the CBP One app and its use by indigenous migrants and people of color, including language barriers and difficulties experienced by those with darker skin tones in taking valid pictures.

*Response:* As previously stated, the rule includes various exceptions to the rebuttable presumption—including for instances where noncitizens have been denied asylum or other protection in a third country or show, by a preponderance of the evidence, that it was not possible to access or use the CBP One app—and the rule allows noncitizens to rebut the presumption where they face certain safety issues. *See* 8 CFR 208.33(a)(2) and (3),

1208.33(a)(2) and (3). For additional material addressing commenter concerns about the CBP One app and indigenous migrants and people of color, please see Section IV.E.3.ii.a of this preamble.

Further, if any noncitizens, including members of indigenous communities and people of color, do not believe that they will be able to meaningfully access protection in a third country, then those noncitizens may be excepted from the presumption of ineligibility by availing themselves of other lawful pathways to enter the United States, such as by pre-scheduling an appointment to present themselves at a POE, or by obtaining appropriate authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process. *See* 8 CFR 208.33(a)(2)(ii), 1208.33(a)(2)(ii). Such noncitizens may also be able to pursue other pathways to entering the United States that would not trigger the rule's application, such as an employment-based visa or refugee admission through USRAP. 88 FR at 11719 (describing expansions of labor pathways and increases in USRAP processing). Accordingly, the Departments believe that the rule provides sufficient flexibility to account for issues identified by commenters as related to indigenous communities and people of color.

## 5. Due Process and Procedural Concerns

### i. General Due Process and Procedural Concerns

*Comment:* Commenters voiced general concerns that the rule violates due process and is thus unconstitutional or arbitrary. One commenter argued that due process standards for asylum cases should be consistent with criminal procedure in the United States. At least one commenter said that the proposed rule would violate due process in that it would separate families, restrict access to asylum, and prohibit the granting of asylum to those who travel by land through a safe third country. Specifically, one commenter argued that for family members whose asylum cases are connected, separation obstructs family members' opportunities to present necessary corroborating witness testimony or access critical evidence in presenting their claims for relief, which may violate their constitutional and statutory rights to present evidence and can result in

inconsistent case timelines and outcomes that permanently sever family relationships. Another commenter said that the rule would make it easier for the United States Government to simply deny entry to asylum seekers and deport migrants without due process. Other commenters stated that no asylum seekers should be prevented from presenting their case to a judge. Further, commenters said that the rule would violate due process by requiring asylum seekers to affirmatively request IJ review of negative credible fear findings and eliminating USCIS reconsideration of such findings. Commenters also stated that due process concerns would be magnified because of the plan to conduct credible fear interviews within days or hours of an asylum seeker's arrival in custody in what commenters characterized as notoriously difficult conditions, such as where they lack food, water, showers, sleep, and access to counsel. Another commenter echoed these concerns regarding conditions for individuals in CBP custody and stated that poor conditions were not conducive to asylum seekers being able to clearly articulate their claims. Commenters asserted that these obstacles are so high as to render success unachievable for most noncitizens, regardless of the merits of their claims. Finally, one commenter stated that the rule would raise the standard from "credible" to "reasonable" fear and would thereby give rise to a procedural due process violation, as it would alter the intended purpose of the screening interview.

*Response:* The Departments disagree that the rule would violate the Due Process Clause of the Fifth Amendment or impermissibly restrict access to asylum. With respect to application of the rule in the expedited removal process, the Departments note that the rule does not have any impact on where noncitizens may be detained pending credible fear interviews.

Additionally, noncitizens who are encountered in close vicinity to and immediately after crossing the border and are placed in expedited removal proceedings, including those in the credible fear screening process, have "only those rights regarding admission that Congress has provided by

statute.”<sup>105</sup> *Thuraissigiam*, 140 S. Ct. at 1983; *see also Mendoza-Linares v. Garland*, 51 F.4th 1146, 1148 (9th Cir. 2022) (concluding that “an arriving immigrant caught at the border . . . ‘has no constitutional rights regarding his application’ for asylum” (quoting *Thuraissigiam*, 140 S. Ct. at 1982)). Regarding arguments by commenters that the due process standards that apply in criminal proceedings should also apply in the context of asylum and credible fear interviews, the Departments first note that Congress has created, by statute, a process applicable to individuals in expedited removal that is significantly different from the process that applies in criminal cases. The Departments decline to use this rule to change the due process rights of noncitizens, and the rule ensures that noncitizens receive a fair process consistent with the law.

As to the allegation that the rule raises the standard in expedited removal proceedings from “credible” fear to “reasonable” fear, the Departments note that the rule does not change the standard except to the extent that a noncitizen cannot show a significant possibility of establishing eligibility for asylum due to operation of the rule’s condition on asylum eligibility. In that circumstance, the AO or IJ will determine whether the noncitizen has a reasonable fear of persecution or torture in the country or countries of removal, as has long been the process for other noncitizens who are screened for eligibility for statutory withholding of removal and CAT protection and who are not eligible for asylum, as discussed in more detail in Section IV.D.1.iii of this preamble.

Moreover, although the rule changes some procedures, as discussed throughout the rule, it leaves much of the process unaltered. Individuals in the credible fear process maintain the right to consult with an attorney or other person or persons of their choosing prior to their

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<sup>105</sup> Courts also have held that noncitizens do not have an independently cognizable substantive due process interest in the receipt of asylum because asylum is a discretionary form of relief. *See, e.g., Jin v. Mukasey*, 538 F.3d 143, 157 (2d Cir. 2008) (holding that “an alien who has already filed one asylum application, been adjudicated removable and ordered deported, and who has nevertheless remained in the country illegally for several years, does not have a liberty or property interest in a discretionary grant of asylum”); *Ticoalu v. Gonzales*, 472 F.3d 8, 11 (1st Cir. 2006) (“Due process rights do not accrue to discretionary forms of relief, . . . and asylum is a discretionary form of relief.”); *Mudric v. Att’y Gen.*, 469 F.3d 94, 99 (3d Cir. 2006) (holding that an eight-year delay in processing the petitioner’s asylum application was not a constitutional violation because the petitioner “had no due process entitlement to the wholly discretionary benefits of which he and his mother were allegedly deprived”); *cf. Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003) (“Since discretionary relief is a privilege created by Congress, denial of such relief cannot violate a substantive interest protected by the Due Process clause.”).



interview, and such persons may be present for the interview itself. 8 CFR 208.30(d)(4). Asylum seekers also may present evidence relevant to their claim during the interview. *Id.* Additionally, USCIS provides interpreter services to noncitizens who are unable to proceed effectively in English at the agency's expense. 8 CFR 208.30(d)(5). And noncitizens may request review of a negative fear determination before an IJ. *Compare* 8 CFR 208.30(g)(1) (providing the standard process for requesting IJ review in credible fear proceedings), *with* 8 CFR 208.33(b)(2)(iii) through (v) (explaining the process for requesting IJ review for those subject to and unable to rebut the rule's presumption). Although the rule amends the standard process so that noncitizens must affirmatively request such review when asked, rather than the review being granted upon a failure to respond, IJ review remains available in all cases with a negative credible fear determination. INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III); 8 CFR 208.30(g), 1208.30(g)(2). These procedural safeguards are therefore not undermined by the rule, which is fully consistent with the Departments' legal authority and obligations.

Furthermore, the rule does not violate any procedural due process rights noncitizens may have in section 240 removal proceedings. The rule's condition on eligibility will be litigated in those proceedings before an IJ with all the attendant procedural rights that apply in section 240 removal proceedings. In addition, the rule provides several procedural protections to ensure that asylum applicants receive a full and fair hearing before an IJ and that the condition on eligibility applies only to noncitizens properly within the scope of 8 CFR 208.33(a) and 1208.33(a). If an AO finds a noncitizen is subject to the rule's condition on eligibility, the noncitizen may request review of that determination, and an IJ will evaluate *de novo* whether the noncitizen is subject to the presumption and, if so, whether the noncitizen has established any exceptions to or rebutted the presumption. 8 CFR 208.33(b)(2)(iii) through (v), 1208.33(b). Furthermore, even where an IJ denies asylum because the presumption applies and has not been rebutted and no exception applies, if the noncitizen has demonstrated a reasonable possibility of persecution or torture in the country or countries of removal, they will have an opportunity to apply for statutory

withholding of removal, protection under the CAT regulations, or any other form of relief or protection for which the noncitizen is eligible in section 240 removal proceedings. 8 CFR 208.33(b)(2)(ii) and (v)(B), 1208.33(b)(4). These standards help to ensure—in contrast to commenters’ concerns—that the outcome of the process delineated in the rule is not predetermined and that noncitizens potentially subject to the condition on eligibility receive a full and fair hearing that satisfies any due process rights they may have.

To the extent commenters raised due process concerns related to arguments that the rule would result in separation of families, these arguments are addressed above in Section IV.B.4.ii of this preamble. As elaborated there, for example, the rule includes provisions designed to prevent the separation of families. Moreover, to the extent that commenters argued that the rule would separate families and thereby raise due process concerns by preventing individuals from presenting evidence, the Departments note that the rule does not change the provision on the treatment of family units with respect to credible fear screenings, found at 8 CFR 208.30(c), which provides that when family units are subject to a credible fear screening, USCIS will find that the entire family passes the screening if one family member establishes a credible fear. Further, the rule contains provisions to promote family unity both by making exceptions and providing rebuttal grounds applicable to family units traveling together, and by providing a family unity provision for those in removal proceedings. *See* 8 CFR 208.33(a)(2)(ii) and (3)(i), 1208.33(c).

To the extent commenters argued that these concerns implicate the constitutional rights of specific groups of noncitizens, the rule does not deprive any group of the rights that Congress provided by statute, and the rule is one of equal application that does not bar any particular classes of noncitizens from seeking asylum or other protection due to the nature of the harm the noncitizen has suffered or their race, religion, nationality, political opinion, or membership in a particular social group. *See* 8 CFR 208.33(a)(1) through (3), 1208.33(a)(1) through (3) (defining scope of rule’s application and creating condition on eligibility and a rebuttable presumption

rather than a bar). Additionally, to the extent that commenters claimed there would be due process implications because of the language and certain technical limitations of the CBP One app, the same commenters acknowledged that due process rights are limited to individuals located on U.S. soil. Because users of the CBP One app will, by definition, be located outside of the United States, the commenters' CBP-One-app-related due process concerns are misplaced. Moreover, these commenters provided no specific citations to show that the CBP One app's limited set of foreign languages or technical limitations violate any other Federal law. For instance, the Departments note that Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, 65 FR 50121 (Aug. 11, 2000), "does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person." *Id.* at 50121–22.

In addition, notwithstanding the above, the rule contains multiple means for particularly vulnerable noncitizens to potentially overcome the presumption against eligibility for asylum where applicable, depending on the individual's circumstances. To the extent that commenters are concerned about the ability of noncitizens who have a language barrier, disability, mental incompetence, or past trauma to pre-schedule a time and location to appear at a POE, these noncitizens may be able to establish an exception to the presumption if they present at a POE and establish that "it was not possible to access or use the DHS scheduling system due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle." *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). And among the "exceptionally compelling circumstances" that may rebut the presumption against eligibility, the rule includes acute medical emergencies and other situations where the noncitizen faces an imminent and extreme threat to life or safety at the time of entry. *See* 8 CFR 208.33(a)(3)(i)(A) and (B), 1208.33(a)(3)(i)(A) and (B). Furthermore, the Departments note that even if a noncitizen is found ineligible for asylum, if they fear persecution on account of a protected ground, or torture in another country that has

been designated as a country of removal, they may seek statutory withholding of removal or CAT protection to avoid being returned to that country.

Finally, to the extent that commenters expressed concerns about how the fact of noncitizens' detention, the conditions in DHS facilities, and the timing of credible fear screenings allegedly impact such screenings and the ability of noncitizens to meet their burden to show a credible fear, those concerns are predominantly addressed below in Section IV.D.1.iii of this preamble, where the Departments discuss the nature of the evidence that may be available to the AO during credible fear interviews. As to commenters' concerns about the timing of the credible fear process and where noncitizens are detained pending credible fear interviews, these concerns are misplaced, as the rule does not have any impact on the steps in the credible fear process or where noncitizens may be detained pending credible fear interviews. To the extent that commenters have concerns about detention and conditions in CBP custody, such concerns are beyond the scope of this rule, as discussed further in Section IV.B.5.v of this preamble.

*Comment:* Commenters expressed a range of other concerns that the rule does not establish sufficient procedural protections for noncitizens subject to the presumption against eligibility for asylum. Some commenters expressed concern that AOs are likely to make errors in assessing whether applicants are subject to the rule's condition on asylum eligibility. Commenters likewise asserted that credible fear interviews are quick screenings, during which individuals usually lack documentary evidence for their claims, and that migrants would not be able to present evidence of country conditions in connection with such interviews. Further, one commenter stated that expedited removal denies children the opportunity to make a claim for protection independent of their parent or legal guardian, and specifically raised concerns about CBP agents questioning children.

*Response:* The Departments acknowledge the commenters' concerns but disagree that there are insufficient procedural protections for individuals subject to the rule. All AOs are trained in non-adversarial interview techniques to elicit relevant and useful information. 8 CFR

208.1(b). A noncitizen's testimony and evidence available to the AO may be sufficient to establish an exception to or rebut the condition on asylum. AOs are trained to consult country conditions information. *Id.* All credible fear determinations are reviewed by a Supervisory AO. 8 CFR 208.30(e)(8). Those who receive negative determinations may request review from an IJ. *See* 8 CFR 208.33(b)(2)(iii) through (v). If the IJ affirms a negative credible fear determination, USCIS may also reconsider the determination at its own discretion. *See* 8 CFR 208.33(b)(2)(v)(C). For those who are initially found subject to the rule's condition on asylum eligibility but who establish a reasonable possibility of persecution or torture upon removal, the IJ will make a de novo determination of whether the noncitizen is subject to the condition on asylum eligibility during removal proceedings. *See* 8 CFR 208.33(b)(2)(v).

The Departments disagree that the rule denies children the opportunity to make a claim for protection independent of their parent or legal guardian. As explained above, the rule does not change the provision on treatment of family units with respect to credible fear evaluations, found at 8 CFR 208.30(c). The rule further provides at 8 CFR 208.33(c)(2) and 1208.33(d)(2) that its ineligibility presumption does not apply to an asylum application filed by a noncitizen after the two-year period in 8 CFR 208.33(a)(1)(i) and 1208.33(a)(1)(i), if the noncitizen was under the age of 18 at the time of the entry referenced in 8 CFR 208.33(a)(1) and 1208.33(a)(1), respectively, and the noncitizen is applying as a principal applicant.

ii. Concerns Regarding Access to Counsel, Unrepresented Applicants, and the Ability or Time to Obtain Evidence and Prepare

*Comment:* Some commenters stated that the rule raises serious questions about access to counsel during the credible fear process. In addition to the general comments regarding due process described and addressed above, commenters also expressed specific concerns that the rule violates the Fifth Amendment's Due Process Clause because it allegedly deprives noncitizens of access to counsel or decreases their already limited access to counsel. For instance, some commenters expressed concern that individuals in CBP detention facilities lack

meaningful access to counsel to prepare for their credible fear interviews because it takes time to find counsel and the rule will amplify the problems of a fast-tracked removal process, and because there is a lack of free or low-cost attorneys in border areas where credible fear interviews take place. Other commenters stated that individuals awaiting their CBP One app appointments abroad lack meaningful access to counsel to prepare for their credible fear interviews. These commenters stated that attorneys located in the United States face obstacles to representing individuals outside the United States due to ethics concerns and liability insurance coverage, while asylum seekers awaiting appointments would be unable to meet with counsel in person prior to their appointments, allegedly leading to representation deficiencies and difficulty obtaining assistance in navigating the CBP One app. For example, citing data from the Human Trafficking Institute, one commenter wrote that 80 percent of migrants awaiting their asylum hearings in the United States can find representation, compared to 7.6 percent of migrants waiting in Mexico.

Other commenters characterized the rule's provisions as complicated and punitive, making access to counsel even more important and exacerbating the access-to-counsel issues commenters identified above. Commenters who are legal services providers said that the rule would increase the time and resources needed to provide adequate legal advice and representation to asylum seekers, leading to diversion of limited resources and increased pressure on staff. Some commenters recommended that the United States Government increase funding for representation of asylum seekers or provide migrants with legal counsel and release them swiftly rather than detain them, stating that it would assist with backlogs and protect due process rights.

Multiple commenters remarked that a person who could retain an attorney is far more likely to succeed in immigration court. Commenters said concerns relating to fast-tracked immigration proceedings, known as the "Dedicated Docket," would be amplified by the addition of a new evaluation of a rebuttable presumption against asylum eligibility. Commenters claimed

that those individuals subject to the rebuttable presumption who pass the heightened “significant possibility” screening standard applied under the rule and are placed on the Dedicated Docket during the resulting section 240 removal proceeding would find it even more difficult to obtain counsel because of its accelerated timelines.

Finally, some commenters alleged that the United States Government currently restricts access to counsel for noncitizens in credible fear proceedings. Commenters similarly claimed that EOIR’s Immigration Court Practice Manual (“ICPM”) denies asylum seekers the right to counsel in credible fear review hearings before IJs.

*Response:* The rule does not deprive noncitizens of access to counsel in violation of the Fifth Amendment’s Due Process Clause. As explained above, the Supreme Court has held that the rights of individuals seeking asylum at the border are limited to “only those rights regarding admission that Congress has provided by statute.” *Thuraissigiam*, 140 S. Ct. at 1983. And the INA provides only that a noncitizen “may consult with a person or persons of the alien’s choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General,” and the statute specifies that “[s]uch consultation shall be at no expense to the Government and shall not unreasonably delay the process.” INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv). Thus, due process and the INA do not guarantee that every noncitizen in expedited removal proceedings will have counsel, for example, if a noncitizen involved in such proceedings cannot find an attorney who is willing and able to provide representation. The rule does not bar noncitizens in expedited removal proceedings from exercising their statutory rights under the INA, and therefore cannot violate such noncitizens’ rights to due process. *See Guerrier v. Garland*, 18 F.4th 304, 313 (9th Cir. 2021) (*Thuraissigiam* clarified that “the due process rights of noncitizens who have not ‘effected an entry’ into the [United States] are coextensive with the statutory rights Congress provides”).

Nor does the rule deprive noncitizens of access to counsel in violation of the Fifth Amendment’s Due Process Clause insofar as it allegedly creates additional matters for attorneys

and noncitizens to discuss prior to a noncitizen’s credible fear interview, including when the noncitizen is outside the United States. The statutory right to consult, described above, does not attach until a noncitizen becomes eligible for a credible fear interview. *See* INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv) (“An alien who is eligible for such interview may consult with a person or persons of the alien’s choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General.”). And the regulations that implement expedited removal elaborate that “[s]uch consultation shall be made available in accordance with the policies and procedures of the detention facility where the alien is detained[.]” 8 CFR 235.3(b)(4)(ii). “Read together, the text of these provisions provides noncitizens with a right to consultation while they are detained pending expedited removal, but also plainly establish that the consultation right is subordinate to the expedition that this removal process is designed to facilitate, and that the scope of the right to consult is determined by the facility in which these noncitizens are detained.” *Las Americas Immigrant Advoc. Ctr. v. Wolf*, 507 F. Supp. 3d 1, 25 (D.D.C. 2020) (Jackson, J.). Thus, the INA does not guarantee, and the Constitution does not require, that noncitizens who have not entered the United States must have an opportunity to consult with any other individual concerning an anticipated asylum application.

The Departments decline to amend existing practices with respect to credible fear proceedings around a noncitizen’s ability to obtain and consult with counsel, including with regard to the availability of counsel or time it takes to secure counsel in areas near the SWB. The Departments disagree with any implication by commenters that the Departments have control over where free or low-cost immigration attorneys choose to locate their practices within the United States. In any event, nothing in the rule alters a noncitizen’s existing ability to consult with persons of their choosing prior to the credible fear interview, *see* INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv), or prior to IJ review of a negative credible fear determination, *see* 8 CFR 1003.42(c). The Departments acknowledge commenters’ concerns but do not believe that the rule makes it more challenging for detained noncitizens to access legal



representation. To the extent that commenters seek improved access to counsel during the credible fear process in general, that issue lies outside the scope of this rulemaking.

Commenters' concerns regarding the Dedicated Docket similarly fall beyond the scope of the rulemaking. As discussed later in Section IV.B.5.iv of this preamble, the Departments do not believe that the rule greatly adds to the complexity of U.S. asylum law or that noncitizens in the credible fear process will require the assistance of an attorney to establish an exception to or rebut the rule's presumption against asylum eligibility. During the credible fear process, AOs will elicit relevant testimony in a non-adversarial manner to determine whether the rebuttable presumption against asylum eligibility applies and, if so, whether the presumption is rebutted or any exception exists.<sup>106</sup> Therefore, noncitizens will not need to be familiar with every aspect of the rule to overcome the presumption.

With regard to commenter claims that EOIR's ICPM restricts the right to counsel during credible fear review, the Departments first note that the contents of the ICPM are outside of the scope of this rulemaking. In any event, the ICPM is consistent with the INA and regulations, all of which make clear that noncitizens have the right to consult with a person or persons of their choosing prior to a credible fear interview and any subsequent review. *See* ICPM, Chapter 7.4(d)(4)(C) (Nov. 14, 2022); INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv); 8 CFR 1003.42(c). Beyond such consultation, any ability of such persons to attend or participate in a credible fear proceeding is fully within the discretion of the IJ. *See* 8 CFR 1003.10(b) (describing IJs' discretion to take any action consistent with their authorities under the INA and regulations that is appropriate and necessary for the disposition of a case).

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<sup>106</sup> *See, e.g.,* USCIS, *RAIO Directorate—Officer Training: Interviewing: Eliciting Testimony* 12 (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Interviewing\\_-\\_Eliciting\\_Testimony\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Eliciting_Testimony_LP_RAIO.pdf) [hereinafter USCIS, *Eliciting Testimony*] (“In cases requiring an interview, although the burden is on the applicant to establish eligibility, equally important is your obligation to elicit all pertinent information.”); USCIS, *RAIO Directorate—Officer Training: Interviewing: Introduction to the Non-Adversarial Interview* 13 (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Interviewing\\_-\\_Intro\\_to\\_the\\_NonAdversarial\\_Interview\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Intro_to_the_NonAdversarial_Interview_LP_RAIO.pdf) [hereinafter USCIS, *Non-Adversarial Interview*] (“You control the direction, pace, and tone of the interview and have a duty to elicit all relevant testimony.”); Comment Submitted by National Citizenship and Immigration Services Council 119 at 16 (Mar. 27, 2023), <https://www.regulations.gov/comment/USCIS-2022-0016-12267>.

*Comment:* Commenters said that represented individuals receive relief more frequently than non-represented individuals, and expressed concern that many asylum seekers who lack counsel would not be able to pass their credible fear screenings. One commenter claimed, without specific evidence, that AOs are less thorough when adjudicating credible fear cases of unrepresented noncitizens. Commenters argued that unrepresented individuals may not receive meaningful notice about the CBP One app, asylum procedures, or the exceptions to the rule's condition on eligibility that may apply in their cases. One commenter wrote that the rule's preponderance of the evidence standard for rebutting the presumption against asylum eligibility would create another hurdle for asylum seekers who lack counsel.

*Response:* To the extent that commenters expressed concern that unrepresented individuals might face difficulty understanding the credible fear process, the INA provides that “[t]he Attorney General shall provide information concerning the asylum interview . . . to aliens who may be eligible.” INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv); 8 CFR 235.3(b)(4)(i). The rule does not change that obligation. As for commenters' concerns that noncitizens may not receive adequate notice regarding the CBP One app or other aspects of the rule, “the general rules concerning adequacy of notice through publication in the Federal Register apply in the immigration context.” *Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir. 2008) (holding that publication of CAT regulations in the Federal Register provided notice that due process required).

As discussed earlier and in Section IV.B.5.iv of this preamble, the rule does not affect noncitizens' current access to counsel during credible fear proceedings or significantly increase the complexity of U.S. asylum law, and noncitizens should not require the assistance of an attorney to establish an exception to or rebut the presumption against asylum eligibility. Prior to conducting a credible fear interview, an AO must verify that the noncitizen “has received in writing the relevant information regarding the fear determination process” and “has an understanding of” that process. 8 CFR 208.30(d)(2); *see also* USCIS, Form M-444, *Information*

*About Credible Fear Interview* (May 31, 2022). AOs are trained to conduct interviews in a non-adversarial manner and elicit relevant testimony,<sup>107</sup> and they will ask relevant questions to determine whether the rebuttable presumption against asylum eligibility applies, so noncitizens need not be familiar with the rule to remain eligible for asylum. Regarding the standard of proof for rebutting the presumption against asylum eligibility during credible fear proceedings, as discussed later in Section IV.D.1.iii of this preamble, the overall standard remains the significant possibility standard, but that standard must be applied in conjunction with the standard of proof required for the ultimate determination on eligibility for asylum (i.e., preponderance of the evidence that an exception to the presumption applies or that the presumption has been rebutted). Other concerns about rebutting the rule's presumption of ineligibility are addressed in Section IV.E.1 of this preamble.

### iii. CBP Official, AO, and IJ Conduct and Training

#### a. CBP Official Conduct and Training

*Comment:* Some commenters expressed concerns about the actions of CBP officials, including with respect to the use of the CBP One app. Regarding the CBP One app generally, one commenter stated that migrants are often unable to seek asylum at a POE due to metering policies and that migrants have no other option to access safety than to cross the SWB without permission. Another commenter stated that the requirement to use the CBP One app would effectively cap the number of people who may seek asylum based on the number of appointments available. Commenters also stated that the CBP One app equates to another metering system imposed by CBP officials, including causing turnbacks of children, which Federal courts have found to be illegal. In particular, one commenter stated that, even with appointments, some families are not able to cross the border, or they receive appointments at a POE far from their current location, requiring them to travel long distances within Mexico.

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<sup>107</sup> See USCIS, *Non-Adversarial Interview*; USCIS, *Eliciting Testimony*; Comment Submitted by National Citizenship and Immigration Services Council 119 at 16 (Mar. 27, 2023), <https://www.regulations.gov/comment/USCIS-2022-0016-12267>.

Various commenters alleged that requiring use of the CBP One app raises concerns that access to the system will be based not on wait time but on luck, technological skills, or resources to secure an appointment. Other commenters similarly stated that the CBP One app has very limited appointment slots and turns asylum access into a lottery. And at least one commenter expressed concern that the CBP One app does not ask if a migrant is seeking asylum in the United States, nor are migrants interviewed by CBP officials upon arrival to determine if they have any vulnerabilities that may show eligibility for asylum.

As for alleged misconduct by CBP officials, one commenter expressed concern that CBP officials at POEs have turned away many asylum seekers without cause, been affirmatively hostile to claims of protection, or only allowed a handful of individuals per day to present themselves for processing. The commenter also suggested that there would not be a meaningful opportunity under the rule for asylum seekers to present themselves and demonstrate that they were unable to use the CBP One app to request an appointment. Similarly, another commenter stated that the rule would allow CBP officers to turn away individuals without a smartphone.

Additionally, commenters alleged that CBP officials regularly fail to protect the rights of individuals in expedited removal proceedings, including through failing to ask questions related to fear claims, failing to refer individuals for credible fear interviews, and subjecting individuals to harassment, directly or indirectly.

Other commenters raised concerns that there are inadequate protections against rogue CBP officer behavior more generally, noting that individuals with appointments in February 2023 were rejected at POEs, including those with Title 42 exception appointments being rejected even though they had valid appointments. One commenter asserted that when families expressed concern about the Title 42 exception process, CBP officials threatened to call Mexican police and urged people to depart. Another commenter noted that CBP officers use abuse, threats and intimidation, coercion, and misrepresentations, make unfounded claims about capacity restrictions, use waitlists, and illegally deny access to the asylum process. Some commenters

alleged that CBP officers harassed and physically and sexually abused noncitizens at POEs, stole their documents, and failed to record statements by noncitizens expressing a fear of return. Another commenter expressed concerns that Mexican officials, at the request of the United States Government, improperly intercepted individuals at its own southern border so that those individuals would not come to the United States.

*Response:* As an initial matter, the Departments note that migrants do not apply for asylum with CBP at a POE. At POEs, CBP is responsible for the inspection and processing of all applicants for admission, including individuals who may intend to seek asylum in the United States. 8 CFR 235.1(a) (concerning all applicants for admission at POEs), 235.3(b)(4) (concerning individuals processed for expedited removal and claiming fear of persecution or torture). CBP's ability to process undocumented noncitizens in a timely manner at land border POEs is dependent on CBP resources, including infrastructure and personnel; CBP is committed to continuing to increase its capacity to process undocumented noncitizens at SWB POEs.<sup>108</sup> The CBP One app is one key way that CBP is streamlining and increasing its capacity to process undocumented noncitizens.<sup>109</sup> Noncitizens are able to schedule appointments through the CBP One app at one of eight POEs along the SWB, providing noncitizens with options to choose the POE that works best for them geographically. The app is not a method of seeking asylum in the United States, and CBP officers do not determine the validity of any claims for protection. Noncitizens are not required to make an appointment in the CBP One app to present at a POE, and CBP policy provides that in no instance will an individual be turned away from a POE. All noncitizens who arrive at a POE will be inspected for admission into the United States. *See* 8 CFR 235.1(a). That said, those noncitizens who arrive at a POE without a pre-scheduled

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<sup>108</sup> Memorandum for William A. Ferrara, Exec. Ass't Comm'r, Off. of Field Operations, from Troy A. Miller, Acting Comm'r, CBP, *Re: Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf>.

<sup>109</sup> *See id.*

appointment will be subject to the rule’s presumption of asylum ineligibility unless they establish the applicability of an exception to or a ground for rebutting the presumption.

The Departments disagree that the CBP One app is a “metering system,” and CBP and DHS have rescinded all previous metering policies. Following the termination of the Title 42 public health Order, CBP will process noncitizens without documents sufficient for admission who present at an SWB land POE in accordance with its November 2021 memorandum “Guidance for Management and Processing of Undocumented Noncitizens.” Moreover, as noted, CBP remains committed to processing as many noncitizens at POEs as is operationally feasible.<sup>110</sup>

To the extent that commenters’ reference to metering policies relates to any allegation of misconduct by CBP officers, and with respect to any other commenter concerns about such alleged misconduct, the Departments note that CBP takes allegations of employee misconduct very seriously. Under a uniform system, allegations of misconduct are documented and referred to the DHS Office of Inspector General (“OIG”) for independent review and assessment.<sup>111</sup> Cases are either retained by the DHS OIG for investigation or referred to CBP’s Office of Professional Responsibility (“OPR”) for further handling. Allegations of misconduct by a CBP employee or contractor can be sent to CBP OPR’s Joint Intake Center via email at [JointIntake@cbp.dhs.gov](mailto:JointIntake@cbp.dhs.gov) or via phone at 1-877-2INTAKE (246-8253) Option 5.<sup>112</sup> Such allegations can also be sent to the DHS OIG Hotline via OIG’s website, <https://www.oig.dhs.gov/hotline>, or via phone at 1-800-323-8603. Upon completion of an investigation, CBP management reviews all evidence, the CBP Standards of Conduct, the CBP

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<sup>110</sup> *See id.*

<sup>111</sup> *See, e.g.,* DHS OIG, Hotline Poster, [https://www.oig.dhs.gov/sites/default/files/DHS\\_OIG\\_Hotline-optimized\\_without\\_fax.jpg](https://www.oig.dhs.gov/sites/default/files/DHS_OIG_Hotline-optimized_without_fax.jpg) (last visited Apr. 17, 2023); CBP, DHS/CBP/PIA-044, *Privacy Impact Assessment for the Joint Integrity Case Management System (JICMS)* at 1–2 (July 18, 2017), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp044-jicms-july2017.pdf>; CBP, CBP Pub. No. 1686-0322, *Report on Internal Investigations and Employee Accountability—Fiscal Year 2021* at 11–12 (Mar. 2022), [https://www.cbp.gov/sites/default/files/assets/documents/2022-May/fy21-cbp-opr-internal-investigation-accountability\\_1.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2022-May/fy21-cbp-opr-internal-investigation-accountability_1.pdf).

<sup>112</sup> CBP, *How to Make a Report*, <https://www.cbp.gov/about/care-and-custody/how-make-report> (last visited Apr. 17, 2023).

Table of Offenses and Penalties, and how the agency has handled similar misconduct in the past, in order to determine what, if any, disciplinary action is appropriate.<sup>113</sup>

Commenter concerns about the processing of individuals seeking exceptions to the Title 42 public health Order at POEs are misplaced. As an initial matter, the rule will take effect only once the Title 42 public health Order is lifted, at which time CBP will inspect and process all noncitizens who arrive at a POE under Title 8. Title 42 is a statutory scheme that operates separate from Title 8. Thus, concerns about the Title 42 exception process in and of itself are not relevant to this rulemaking. While noncitizens seeking to enter a POE under Title 8 may experience some wait times, those wait times are not equivalent to rejections; CBP policy provides that in no instance will an individual be turned away or “rejected” from a POE.

*Comment:* One commenter stated that the use of the CBP One app to schedule an appointment to present at a POE conflicts with the inspection requirement in 8 U.S.C. 1225(a)(3), requiring that all applicants for admission be inspected by CBP officers. The commenter specifically referred to the district court’s order in *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168 (S.D. Cal. 2019), holding that this provision applies to migrants who are approaching a POE but have not yet entered the United States. The commenter stated that, because the number of appointments provided does not approach the demand, the CBP One app is functionally a system of metering. Another commenter also asserted that it was not clear whether noncitizens without an appointment who approach a POE would, in fact, be inspected and processed, or whether they would be turned away in violation of CBP’s mandatory duty to inspect and process noncitizens at POEs.

*Response:* The Departments respectfully disagree that the use of the CBP One app to schedule an appointment to present at a POE conflicts with CBP’s duties under 8 U.S.C. 1225(a)(3), unlawfully withholds access to the asylum process, or operates as a form of metering

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<sup>113</sup> See CBP, CBP Pub. No. 1686-0322, *Report on Internal Investigations and Employee Accountability Fiscal Year 2021* at 17 (2022), [https://www.cbp.gov/sites/default/files/assets/documents/2022-May/fy21-cbp-opr-internal-investigation-accountability\\_1.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2022-May/fy21-cbp-opr-internal-investigation-accountability_1.pdf).

(though the Departments maintain that DHS’s prior metering policies are lawful). The Departments acknowledge the district court’s holding in *Al Otro Lado*—which the Government has appealed—but the use of CBP One app appointments as contemplated by this rule does not implicate that holding. CBP’s policy is to inspect and process all arriving noncitizens at POEs, regardless of whether they have used the CBP One app. In other words, the use of the CBP One app is not a prerequisite to approach a POE, nor is it a prerequisite to be inspected and processed under 8 U.S.C. 1225(a)(3). Individuals without appointments will not be turned away. CBP is committed to increasing the number of noncitizens processed at POEs and to processing noncitizens in an expeditious manner.<sup>114</sup>

In addition, any noncitizen who is inspected and processed for expedited removal upon arrival at a POE and who expresses a fear of return, whether or not they use the CBP One app, will be referred to USCIS for a credible fear interview with an AO. *See* INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii). The AO will determine whether the presumption applies or whether the individual can rebut or establish an exception to the presumption. CBP officers do not determine or evaluate the merits of any claim of fear, nor do they make determinations on whether the rule’s presumption applies. *See id.* (providing that credible fear interviews are conducted by AOs).

#### b. AO Conduct and Training

*Comment:* Several commenters expressed concern that the rule would lead to erroneous asylum decisions made by AOs, given alleged deficiencies in AO conduct and training.

Commenters asserted that the rule would lead to asylum decisions that are too swift. Multiple commenters also expressed concern that AOs have conducted inadequate credible fear screenings and made erroneous decisions in such screenings, resulting in errors in adjudicating

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<sup>114</sup> *See* Memorandum for William A. Ferrara, Exec. Ass’t Comm’r, Off. of Field Operations, from Troy A. Miller, Acting Comm’r, CBP, *Re: Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf>.



asylum claims. For instance, citing an investigation by the DHS Office for Civil Rights and Civil Liberties, one commenter alleged that AOs have misapplied or failed to apply existing asylum law, ignored relevant portions of asylum seekers' testimony, failed to perform pattern and practice analysis and consider country conditions, failed to ask relevant follow-up questions and develop the record, and failed to take accurate notes. In addition, the same commenter said some AOs can be hostile and belligerent, and even the best trained and most effective AOs have limited time for credible fear interviews. Another commenter stated that AOs are ill-equipped to conduct the additional analysis required by the rule, given alleged deficiencies in the credible fear lesson plan, failure of AOs to apply current legal standards, failure to provide appropriate language interpretation, failure to interview vulnerable populations within agency guidelines, and interference with access to counsel.

Some commenters also stated that AOs are not medical experts and lack the required expertise to evaluate whether something is or is not an acute medical emergency. Another commenter stated that DHS should train all staff who interact with LGBT asylum seekers. Some commenters likewise stated that the rule should explicitly instruct AOs to affirmatively elicit information about whether a person could qualify for an exception to the rule or rebut its ineligibility presumption, such as details about any family or personal medical emergencies, threats of violence, difficulties using the CBP One app, and other matters that bear on the exceptions and grounds for rebuttal.

One commenter expressed concerns that noncitizens who are subject to the rule's rebuttable presumption of asylum ineligibility would be deprived of the right to be meaningfully heard on their claims because adjudicators applying the presumption would understand the rule to favor overall deterrence of asylum seeking, such that decisionmakers would allegedly err on the side of denying asylum or making negative credible fear determinations. This commenter also argued that the expedited removal system leads to a systemic, unjustified skepticism amongst adjudicators toward meritorious claims.

*Response:* The Departments acknowledge these commenter concerns but disagree that AOs lack the competence, expertise, or training to make determinations on whether the presumption of ineligibility for asylum applies or an exception or rebuttal ground has been established. AOs frequently assess physical and psychological harm when adjudicating asylum applications and are trained to do so in a sensitive manner.<sup>115</sup> AOs already evaluate harm resulting from the unavailability of necessary medical care or specific medications when assessing “other serious harm” under 8 CFR 208.13(b)(1)(iii)(B).<sup>116</sup> Additionally, all AOs receive specific training on adjudicating asylum claims of LGBT individuals.<sup>117</sup> As for commenters’ requests that the rule explicitly instruct AOs to affirmatively elicit information about the presumption, such an instruction is unnecessary, as AOs conducting credible fear interviews are already required to specifically ask questions to elicit all relevant testimony in a non-adversarial manner.<sup>118</sup> This will necessarily include information related to whether the rule’s presumption applies or an exception or rebuttal ground has been established, regardless of whether the noncitizen affirmatively raises these issues.

USCIS takes any allegations of AO misconduct seriously and is aware of the ongoing investigation by the DHS Office of Civil Rights and Civil Liberties cited by commenters. However, the Departments strongly disagree with any claims that AOs systematically exhibit an unjustified skepticism or insensitivity toward asylum claims, that they routinely fail to follow law or procedure, or that they would do so when applying this rule. AOs are career government employees and are selected based on merit. They undergo special training on non-adversarial interview techniques, cross-cultural communication, interviewing children, and interviewing

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<sup>115</sup> For example, AOs adjudicate cases involving forms of persecution like female genital mutilation, forced abortion, or forced sterilization. See *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); INA 101(a)(42)(B), 8 U.S.C. 1101(a)(42)(B); see also USCIS, *RAIO Directorate—Officer Training, Gender-Related Claims* at 24–28 (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Gender\\_Related\\_Claims\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Gender_Related_Claims_LP_RAIO.pdf).

<sup>116</sup> See USCIS, *RAIO Directorate—Officer Training: Definition of Persecution and Eligibility Based on Past Persecution*, Supp. B at 60 (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Persecution\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAIO.pdf).

<sup>117</sup> See generally USCIS, *RAIO Directorate—Officer Training: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims* (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/LGBTI\\_Claims\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/LGBTI_Claims_LP_RAIO.pdf).

<sup>118</sup> See generally USCIS, *Non-Adversarial Interview*; USCIS, *Eliciting Testimony*.

survivors of torture and other severe trauma.<sup>119</sup> While the Departments disagree with the commenters' premise, the Departments also note that government officials are entitled to the presumption of official regularity in the way they conduct their duties. *See United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926). Commenters failed to provide persuasive evidence of systematic bias or misapplication of the law or procedure by AOs.

### c. IJ Conduct and Training

*Comment:* Several commenters expressed concern with IJ conduct and their training *vis-à-vis* application of the rule's condition on asylum eligibility. One commenter expressed concerns that noncitizens who are subject to the rule's rebuttable presumption of asylum ineligibility would be deprived of the right to be meaningfully heard on their claims because adjudicators applying the presumption would understand the proposed rule to favor overall deterrence, such that IJs would allegedly err on the side of denial or negative credible fear findings. The commenter argued that the expedited removal system and prior hiring practices within EOIR lead to a systemic inclination toward unjustified skepticism among IJs with respect to meritorious claims.

Commenters also averred that IJs are not medical experts with the required expertise to evaluate medical issues implicated by the rebuttable presumption. Commenters stated that a significant number of IJs hired in the past several years lacked prior immigration law experience, yet, as IJs, they make complex legal determinations in brief credible fear proceedings. Commenters also asserted that some IJs have engaged in unprofessional and hostile behavior toward asylum seekers and noted that some IJs have asylum denial rates of 90 percent or higher.

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<sup>119</sup> *See* 8 CFR 208.1(b); *see also* USCIS, *Non-Adversarial Interview*; USCIS, *Eliciting Testimony*; USCIS, *RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors that May Impede Communication at an Interview* (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/CrossCultural\\_Communication\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/CrossCultural_Communication_LP_RAIO.pdf); USCIS, *Children's Claims*; USCIS, *RAIO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma* (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Interviewing\\_-\\_Survivors\\_of\\_Torture\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Survivors_of_Torture_LP_RAIO.pdf) [hereinafter USCIS, *Interviewing Survivors of Torture*].

Additionally, commenters expressed concern about potential IJ bias or lack of sufficient training for IJs related to, in particular, asylum claims of LGBT individuals.

*Response:* The Departments respectfully disagree with commenters' concerns about IJs' conduct and training. IJs, like AOs, are career employees who are selected through a competitive process. Likewise, IJs receive "comprehensive, continuing training and support" directed at "promot[ing] the quality and consistency of adjudications." 8 CFR 1003.0(b)(1)(vii). Relatedly, the Chief Immigration Judge has the authority to "[p]rovide for appropriate training of the immigration judges and other OCIJ staff on the conduct of their powers and duties." 8 CFR 1003.9(b)(2). Regulations also require IJs to "resolve the questions before them in a timely and impartial manner consistent with the [INA] and regulations." 8 CFR 1003.10(b).

The Departments likewise do not share commenters' concerns regarding newly hired IJs' professional experience or ability to make appropriate legal determinations in the context of credible fear reviews or section 240 removal proceedings. The Departments believe that IJs' diverse professional backgrounds contribute to their ability to address complex legal issues in all cases arising before them. Notably, IJs are selected on merit with baseline qualifications, including possession of a J.D., LL.M., or LL.B. degree; active membership in a State bar; and seven years of experience as a licensed attorney working in litigation or administrative law. Upon entry on duty, new IJs receive extensive training, and throughout their tenure, all IJs receive both annual and periodic training on specialized topics as necessary. IJs are also expected to maintain professionalism and competence in the law.<sup>120</sup>

Moreover, the Departments disagree with commenter concerns about IJs' ability to assess medical records. Nothing in the rule requires adjudicators to make a formal medical diagnosis to determine whether a noncitizen is exempt from or has rebutted the rule's condition on eligibility. Rather, adjudicators will make a factual determination regarding whether certain exigencies,

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<sup>120</sup> See EOIR, *Ethics and Professionalism Guide for Immigration Judges 2* (Jan. 31, 2011), <https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf>.

such as an acute medical emergency, caused a noncitizen to enter the United States outside of an available lawful pathway. 8 CFR 208.33(a)(2), 1208.33(a)(2). Given the IJ's role as the finder of fact in proceedings before EOIR, IJs are well-equipped to make such fact-based determinations.

Further, to the extent that commenters' concerns amount to allegations that IJs are biased or fail to comport themselves in a manner consistent with their duties, the Departments note that IJs are attorneys, 8 CFR 1003.10(a), and must comply with all ethical conduct and training requirements for DOJ attorneys. *See, e.g.*, 5 CFR 2635.101.<sup>121</sup> Additionally, as evidenced by the existence and work of EOIR's Judicial Conduct and Professionalism Unit ("JCPU"), "[a]lleged misconduct by [IJs] is taken seriously by [DOJ] and [EOIR]."<sup>122</sup> EOIR strives to adjudicate every case in a fair manner and to treat all parties involved with respect. Individuals or groups who believe that an IJ or other EOIR adjudicator has engaged in misconduct may submit a complaint to EOIR's JCPU via mail at Executive Office for Immigration Review, attn.: Judicial Conduct and Professionalism Unit, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041 or via email at [judicial.conduct@usdoj.gov](mailto:judicial.conduct@usdoj.gov). Additionally, JCPU may launch its own investigation if information related to potential misconduct comes to JCPU's attention by other means, including through news reports, Federal court decisions, and routine reviews of agency proceedings.<sup>123</sup> JCPU will review all complaints, docket cases alleging judicial misconduct, gather relevant materials, and forward the complaint, relevant documents, and a summary of JCPU's preliminary fact-gathering to the IJ's supervisor for investigation and resolution.<sup>124</sup>

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<sup>121</sup> *See also* ICPM, Chapter 1.3(c) (Nov. 14, 2022) ("Immigration judges strive to act honorably, fairly, and in accordance with the highest ethical standards, thereby ensuring public confidence in the integrity and impartiality of immigration court proceedings.").

<sup>122</sup> *See id.*

<sup>123</sup> *See* EOIR, *Judicial Complaint Process* (Feb. 2023), <https://www.justice.gov/eoir/page/file/1100946/download> (explaining the steps of the judicial complaint process).

<sup>124</sup> *Id.*

Complaints can be resolved by dismissal, conclusion, corrective action, or disciplinary action, and JCPU will provide written notice to the complainant when the matter is closed.<sup>125</sup>

While the Departments disagree with the commenters' premise, moreover, the Departments also note that government officials are entitled to the presumption of official regularity in the way they conduct their duties, *Chem. Found.*, 272 U.S. at 14–15, and commenters failed to provide persuasive evidence of systematic bias amongst IJs.

#### iv. Concerns Regarding Confusion, Delays, Backlog, and Inefficiencies

*Comment:* Commenters described the rule as “convoluted,” “elaborate,” or “unclear,” and expressed concerns that it would be confusing to migrants and make it difficult for legal services organizations to advise clients, partner organizations, and the communities that they serve. Commenters said that the proposed rule would impose a two-tier approach and additional fact-intensive queries for credible fear interviews, thereby increasing interview times and complexity of credible fear cases and adding to the burden and confusion of AOs. Additionally, commenters stated that prior asylum policy changes have led to confusion amongst attorneys and migrants and resulted in erroneous deportations. Moreover, one commenter stated that a confusing legal framework does not prevent and sometimes promotes an increase of irregular migration. Another commenter recommended that the Government provide guidance or an FAQ document to accompany and explain the rule's exceptions and means of rebuttal.

In addition, commenters expressed concern that, by adding to the evidentiary requirements, complexity, and length of asylum adjudications, the rule would exacerbate delays and backlogs, inefficiently prolong the asylum process for legitimate asylum seekers, increase erroneous denials, decrease the number of attorneys available to help clear backlogs, and strain limited government resources. Commenters also pointed to previous instances where changes in procedure led to an increased backlog, citing the Citizenship and Immigrant Services

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<sup>125</sup> *Id.*; see also EOIR, *Statistics and Reports*, <https://www.justice.gov/eoir/statistics-and-reports> (last visited Apr. 19, 2023) (providing IJ complaint statistics).

Ombudsman 2022 annual report to highlight this dynamic. Another commenter stated that cases wrongly referred to the immigration court by the Asylum Office due to erroneous applications of the rule would unnecessarily add to immigration court backlogs. And commenters stated that the NPRM failed to provide any evidence or explanation that the proposed rule would mitigate backlogs. In response to these efficiency concerns, one commenter suggested that the Departments should pursue alternate solutions for addressing the USCIS and EOIR backlogs, such as more dedicated dockets, smarter prioritization of cases, expanded use of administrative closure or deferred action, or establishing an independent immigration court. One commenter likewise maintained that the Departments, in their efforts to help the immigration court system function more efficiently and effectively must still respect the due process rights of asylum seekers.

*Response:* The Departments do not believe that the rule's provisions are unduly confusing or complex. However, as described in Section II.C.7 of this preamble, the Departments have streamlined the regulatory text significantly to improve clarity, and the Departments believe this final rule publication should provide much of the guidance sought by commenters. Substantively, the rule simply outlines a circumstance in which a noncitizen will be presumed ineligible for asylum, and includes a list of exceptions to and means of rebutting the presumption. As explained in Section IV.B.5.iii.a of this preamble, AOs conducting credible fear interviews will specifically ask questions to elicit all relevant testimony in a non-adversarial manner, including with respect to whether the presumption applies or any exception or rebuttal ground is applicable in a given case, regardless of whether the noncitizen affirmatively raises these issues. Furthermore, noncitizens who are found by an AO to be subject to the condition on eligibility may request review of that determination, and an IJ will evaluate de novo whether the noncitizen is subject to the presumption, and if so, whether the noncitizen has established an exception to or rebutted the presumption. 8 CFR 208.33(b)(1), (2). And even where the presumption applies and no exception or rebuttal ground has been established at the credible fear

stage, if the noncitizen has demonstrated a reasonable possibility of persecution or torture, they will have an opportunity to apply for asylum, statutory withholding of removal, CAT protection, or any other form of relief or protection for which the noncitizen is eligible in removal proceedings under section 240 of the INA. *See* 8 CFR 208.33(b)(2)(ii), (b)(2)(v)(B); *id.* 1208.33(b)(4).

In relation to the concern that the rule's provisions are unclear or that additional public-facing materials may be necessary to clarify and raise awareness about provisions of the rule, the Departments intend to execute a robust communications plan to notify and inform the public of the rule's requirements. This plan entails engagement with stakeholders, including NGOs, international organizations, legal services organizations, and others. The Departments also plan to mount communications campaigns as appropriate throughout the Western Hemisphere in coordination with interagency partners and partner governments in order to educate potential migrants about the rule's requirements, including consequences of failing to use available lawful pathways.

These efforts are in addition to preexisting and ongoing communications efforts, including publicization of removal and enforcement statistics, English-, Spanish-, Portuguese-, and Haitian Creole-language interviews with media outlets in the region, and regularly updated Web resources on which the Departments can provide additional information in response to demand from the public.

The Departments acknowledge concerns regarding delays, backlogs, and limited government resources, but believe that these concerns are outweighed by the anticipated benefits of the rule. The rule is expected to ultimately reduce the number of cases pending before the immigration courts and reduce ancillary benefit requests to USCIS. *See* 8 CFR 208.7 (employment authorization for pending asylum applicants). This would also alleviate the burden on ICE of removing non-detained noncitizens who receive final orders of removal at the conclusion of removal proceedings under section 240 of the INA but who do not comply with



their orders. *See, e.g.*, 8 CFR 241.4(f)(7) (in considering whether to recommend further detention or release of a noncitizen, an adjudicator must consider “[t]he likelihood that the alien is a significant flight risk or may abscond to avoid removal”). The Departments also anticipate that the rule will redirect migratory flows towards lawful, safe, orderly pathways in ways that make it easier to process their requests for admission. 88 FR at 11729. The Departments believe that this will ultimately result in fewer credible fear cases than would otherwise be processed, and that these improvements in efficiency would outweigh a potential increase in credible fear interview times. The Departments do not anticipate that the rule will be applied frequently in affirmative asylum cases decided by the Asylum Office, since only a small percentage of these applicants enter the United States from Mexico across the southwest land border or adjacent coastal borders, apart from UCs who are not subject to the rule.<sup>126</sup> When all the effects are considered on balance, this rule will serve one of the key goals of the U.S. asylum system, which is to efficiently and fairly provide protection to noncitizens who are in the United States and have meritorious claims, while also efficiently denying and ultimately removing those who are not deemed eligible for discretionary forms of protection and do not qualify for statutory withholding of removal or protection under the CAT. *See* 88 FR at 11729.

Comments advocating for other immigration policy changes or statutory reforms that could potentially create efficiencies in immigration proceedings are outside the scope of this rulemaking. However, as stated in the NPRM, the Departments note that EOIR has created efficiencies by reducing barriers to access immigration courts. *See* 88 FR at 11717. In that regard, EOIR has expanded the Immigration Court Helpdesk program to several additional courts, issued guidance on using the Friend of the Court model to assist unrepresented respondents, and reconstituted its pro bono liaison program at each immigration court. The

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<sup>126</sup> The annual percentage of affirmative asylum applicants who entered between POEs and were not UCs has steadily declined over the past two decades. The percentages for 2020-22 have been 16.00 percent, 14.85 percent, and 13.92 percent, respectively. So far in fiscal year 2023, the percentage has been 9.06 percent. USCIS Data Collection, Apr. 13, 2023.

above measures promote efficiency as, where a noncitizen is represented, the IJ is less likely to have to engage in time-consuming discussions at hearings to ascertain whether the noncitizen is subject to removal and potentially eligible for any relief. In addition, a noncitizen's counsel can assist the noncitizen in gathering evidence, can prepare the noncitizen to testify, and can work with DHS counsel to narrow the issues the IJ must decide. While critically important, these process improvements are not, on their own, sufficient to respond to the significant resource needs associated with the increase in migrants anticipated following the lifting of the Title 42 public health Order.

To the extent commenters argued that adjudication timeline concerns implicate the due process rights of noncitizens, as explained above, the Supreme Court has held that the due process rights of noncitizens applying for admission at the border are limited to "only those rights regarding admission that Congress has provided by statute." *Thuraissigiam*, 140 S. Ct. at 1983. However, upon referral of a fear claim, USCIS seeks to issue credible fear determinations for detained noncitizens in a timely manner. Furthermore, the statute that governs expedited removal provides that upon a noncitizen's request for review of an AO's negative credible fear determination, an IJ will review the determination "in no case later than 7 days after the date of the determination." INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). In any event, because there is no statute guaranteeing any noncitizen that their expedited removal or credible fear process will be completed in a given amount of time, any failure to meet this obligation is not in the nature of a due process violation. *See Thuraissigiam*, 140 S. Ct. at 1983.

*Comment:* Commenters expressed concerns that a lack of notice about the rule for asylum seekers could lead to confusion and due process violations. Some expressed concern that noncitizens who are traveling to the United States when the rule becomes effective would not have sufficient notice about the CBP One app or the need to schedule an appointment in order to seek asylum without being subject to a rebuttable presumption of ineligibility. Commenters expressed concern that individuals who had contracted with smugglers in transit would receive

disinformation from the smugglers about lawful pathways, thereby preventing them from using a lawful pathway to enter the United States. Other commenters said that noncitizens should receive notice of the rebuttable presumption prior to their credible fear interviews.

*Response:* The Departments believe that comments about lack of notice are misguided for several reasons. First, as just discussed, the rule’s requirements are not unduly confusing or complex, and the Departments intend to implement a robust communications plan to notify and inform the public of requirements under the rule, minimizing any potential confusion. Second, the Departments provided advance notice of the potential issuance of this policy by issuing the NPRM on February 23 of this year, and by announcing the impending issuance of such proposed rule in January.<sup>127</sup> Third, any lack of notice would not constitute a violation of the Fifth Amendment’s Due Process Clause. As explained above, the Supreme Court has held that the rights of noncitizens applying for admission at the border are limited to “only those rights regarding admission that Congress has provided by statute.” *Thuraissigiam*, 140 S. Ct. at 1983. The Departments are aware of no statutory requirement that notice regarding any of the INA’s provisions be provided to individuals outside the United States, including those who may be subject to expedited removal provisions or conditions on asylum eligibility upon arrival. Finally, courts have long held that “ignorance of the legal requirements for filing an asylum application” is “no excuse” for failing to comply with such requirements, particularly where, as here, the enactment of such requirements is published in the Federal Register. *Alquijay v. Garland*, 40 F.4th 1099, 1103 (9th Cir. 2022) (quotation marks omitted) (citing, e.g., *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010)); see *Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir. 2008).

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<sup>127</sup> See DHS, Press Release, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), <https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and>.

## v. Other Procedural Concerns

*Comment:* Commenters stated that it would be extremely challenging or impossible for many asylum seekers to show that the rule does not apply to them or to establish an exception to or rebut the presumption of ineligibility, despite having bona fide claims. According to these commenters, the expedited removal process is extremely flawed and rife with erroneous removals due to a number of factors. Asylum seekers are detained in remote areas (in abusive and dangerous conditions of confinement), where attorney access is limited and they have no chance to gather evidence. Credible fear screenings typically occur over the phone (often with poor call quality and sporadic connection, with little or no privacy). The commenters also stated that the lack of privacy during these screenings makes it more difficult and potentially retraumatizing for applicants to share their stories and make their cases. One commenter stated that, although the noncitizen may be in a private room, there is often a lot of noise and commotion in the passageways that can be distracting. One commenter wrote that trauma severely impacts a survivor's ability to coherently and compellingly present an asylum claim by negatively affecting memory and emotional state and causing them to behave in ways that untrained people may read as indicating a lack of credibility. Another commenter stated that credible fear screenings can trigger increased traumatic response, rather than increased disclosure about the circumstances of persecution or torture. The presence of noncitizens' children during the interview can be distracting or deter the person from disclosing sensitive elements of their persecution story. Commenters also stated that language barriers, including English-only availability for written notices, make the process more difficult. One commenter also stated that translators may be unfamiliar with certain dialects and slang. Commenters stated that these alleged factors would worsen if the Administration were to pursue its reported plan to conduct credible fear interviews within days of asylum seekers' arrival in CBP custody, based on the conditions in CBP custody and lack of access to counsel, as shown by the increase in negative

credible fear determinations during the Prompt Asylum Case Review (“PACR”) program and the Humanitarian Asylum Review Program (“HARP”).

*Response:* To the extent commenters argued that conditions in which credible fear interviews take place, such as location, interview procedures, and surrounding circumstances, implicate the due process rights of noncitizens, as explained above, the Supreme Court has held that the due process rights of noncitizens applying for admission at the border are limited to “only those rights regarding admission that Congress has provided by statute.” *Thuraissigiam*, 140 S. Ct. at 1983. As further explained above, the statute that governs expedited removal provides only that the noncitizen may “consult with a person or persons of the alien’s choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.” INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv).

In any event, the Departments disagree with these characterizations of credible fear interviews. With regard to commenter concerns about lack of privacy during credible fear interviews, the Departments note that these interviews are conducted “separate and apart from the general public.” 8 CFR 208.30(d). The Departments are mindful of their duties under 8 CFR 208.6 and 1208.6 to prevent unauthorized disclosure of records pertaining to any credible fear determination, and AOs are required to explain these confidentiality requirements to noncitizens prior to credible fear interviews.<sup>128</sup> Noncitizens in credible fear proceedings are also informed that interpreters are sworn to keep their testimony confidential.<sup>129</sup> All AOs receive training on working with interpreters, which includes assessing competency and recognizing other factors that may affect the accuracy of interpretation.<sup>130</sup> Credible fear interviews are conducted “in a

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<sup>128</sup> See USCIS, *Non-Adversarial Interview*; see also Form M-444, Information About Credible Fear Interview 1 (May 31, 2022) (“U.S. law has strict rules to prevent the government from telling others about what you say in your credible fear interview.”).

<sup>129</sup> Form M-444, Information About Credible Fear Interview 2 (May 31, 2022) (“The interpreter will be sworn to keep the information you discuss confidential.”).

<sup>130</sup> USCIS, RAIO Directorate – *Officer Training, Interviewing – Working with an Interpreter* (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Interviewing\\_-\\_Working\\_with\\_an\\_Interpreter\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Working_with_an_Interpreter_LP_RAIO.pdf).

nonadversarial manner, separate and apart from the general public.” 8 CFR 208.30(d). AOs are trained to elicit all relevant testimony during credible fear interviews,<sup>131</sup> and will not preemptively issue negative credible fear determinations due to phone connectivity issues. All AOs receive training on interviewing survivors of torture and other severe trauma.<sup>132</sup>

Finally, commenters’ concerns related to the potential for conducting credible fear interviews while noncitizens are in CBP custody are outside the scope of this rule. This rule does not specify where noncitizens may be held in custody during credible fear proceedings. Any decision to conduct credible fear interviews while the noncitizen is in CBP custody will take into account a range of factors, including operational limitations associated with the facility, staffing, and throughput. Additionally, to the extent that commenters have concerns about conditions in CBP custody, such comments are outside the scope of this rule. DHS notes, however, that it is committed to providing safe, sanitary, and humane conditions to all individuals in custody, and that it is committed to transferring individuals out of CBP custody in an expeditious manner. The Departments further note that one anticipated effect of this rule is to alleviate overcrowding in DHS detention facilities. *See* 88 FR at 11704.

## 6. Recent Regional Migration Initiatives

*Comment:* Commenters stated that the rule conflicts with several migration declarations and other compacts into which the United States has recently entered. For example, at least one commenter stated that the rule conflicts with the L.A. Declaration, in which the United States committed “to promote access to protection and complementary pathways for asylum seekers, refugees, and stateless persons in accordance with national legislation and with respect for the

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<sup>131</sup> USCIS, *Eliciting Testimony* 12 (“In cases requiring an interview, although the burden is on the applicant to establish eligibility, equally important is your obligation to elicit all pertinent information.”); USCIS, *Non-Adversarial Interview* 13 (“You control the direction, pace, and tone of the interview and have a duty to elicit all relevant testimony.”).

<sup>132</sup> USCIS, *Interviewing Survivors of Torture*.

principle of non-refoulement.”<sup>133</sup> One commenter stated the former presidents of Colombia and Costa Rica object to the proposed rule on the basis that it is not in line with the L.A. Declaration.

*Response:* The Departments disagree that the rule conflicts with any recent regional migration initiatives. The Departments’ rule is fully consistent with the United States’ commitments under the L.A. Declaration, including our responsibility as a signatory country to “manage mixed movements across international borders in a secure, humane, orderly, and regular manner.”<sup>134</sup> As described in the NPRM, political and economic instability, coupled with the lingering adverse effects of the COVID-19 global pandemic, have fueled a substantial increase in migration throughout the world. *See, e.g.*, 88 FR at 11708–14.

Current DHS encounter projections and planning models suggest that encounters at the SWB could rise to 11,000 encounters per day after the lifting of the Title 42 public health Order.<sup>135</sup> Absent policy changes, most non-Mexicans processed for expedited removal under Title 8 would likely establish credible fear and remain in the United States for the foreseeable future despite the fact that many of them will not ultimately be granted asylum, a scenario that would likely incentivize an increasing number of migrants to the United States and further increase the likelihood of sustained high encounter rates.

The Departments’ promulgation of this rule is an attempt to avert this scenario in line with the United States and other signatory nations’ responsibility to manage migration responsibly and humanely as described in the L.A. Declaration. Contrary to commenters’ assertion, the rule is consistent with the Collaborative Migration Management Strategy (“CMMS”)<sup>136</sup> and the L.A. Declaration’s support for a collaborative and regional approach to migration and forced displacement, pursuant to which countries in the hemisphere commit to

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<sup>133</sup> The White House, *Los Angeles Declaration on Migration and Protection* (June 10, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/>.

<sup>134</sup> *Los Angeles Declaration*.

<sup>135</sup> OIS analysis of DHS SWB Encounter Planning Model generated April 18, 2023.

<sup>136</sup> *See* The White House, *Collaborative Migration Management Strategy* (July 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf>.

implementing programs to stabilize communities hosting migrants and asylum seekers, providing increased regular pathways and protections for migrants and asylum seekers who reside in or traveled through their countries, and humanely enforcing existing immigration laws.

The rule works in combination with several other policy actions to secure the SWB while upholding the principles enshrined in the L.A. Declaration. These policy actions include resumption of the Cuban and Haitian Family Reunification Parole Programs, the plans to streamline those programs and extend them to nationals of certain other countries, the establishment of regional processing centers, expansion of refugee resettlement commitments globally and in the region, expansion of labor pathways, including expanded access in the region to H-2B temporary nonagricultural worker visas, creation of the parole processes for CHNV nationals, the Asylum Processing IFR, and other processing improvements geared toward expanding access to lawful pathways. 88 FR at 11716–19.<sup>137</sup> These actions are consistent with the specific goal laid out in the L.A. Declaration to collectively “[e]xpand access to regular pathways for migrants and refugees.” Together with the rule, these policy actions will help address unprecedented migratory flows, the systemic costs those flows impose on the immigration system, and the ways in which a network of increasingly sophisticated human smuggling networks cruelly exploit the system for financial gain.

## 7. Negative Impacts on the Workforce and Economy

*Comment:* Some commenters stated that the Departments should not enact restrictions on immigration due to current labor shortages and the general benefits of immigration. Commenters stated that the rule will stifle the flow of immigration to American communities, which will suffer because immigrants are central to community development, economic prosperity, and maintaining a strong workforce. A commenter stated that U.S. history has shown that immigrants, even those who arrive here in the weakest of circumstances, strengthen our country in the long run. Commenters said that the U.S. population is stagnating or shrinking, so the

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<sup>137</sup> See also DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).



United States should welcome migrants—especially young migrants—who can support the economy, fill jobs, and contribute to Social Security. A commenter stated that beginning in 2019, levels of immigration to the United States dropped significantly, and that by the end of 2021 there were close to 2 million fewer working-age immigrants in the United States than there would have been if pre-pandemic immigration continued unchanged, according to researchers from the University of California, Davis.

Some commenters opposed the proposed rule on the ground that immigrants are willing to work difficult jobs that many already in the United States are not willing to take. Commenters stated that there is currently a severe shortage of certain workers in the United States, such as in the health care, agriculture, and service industries, and that migrants who undertake an arduous overland journey to the United States are likely to work hard and become productive members of U.S. society. One commenter noted that immigrant-owned businesses account for over 8 million jobs and 1.3 trillion dollars in the U.S. economy. Another commenter stated that individuals in the asylum process who are working with work authorization contribute about \$11 billion to the economy each year. Commenters also stated that migrants do not have a significant negative impact on the wages of local-born residents and that migrants contribute more to the U.S. economy than the cost of community and government services they use. One commenter stated that the proposed rule improperly restricts asylum seekers being integrated into the workforces of the States and that State-funded services for asylum seekers would be put under strain as a result.

*Response:* The Departments agree that immigrants make important contributions to the U.S. economy. However, the Departments disagree that the benefits of immigration render this rule unnecessary or invalid. The Departments emphasize that the U.S. immigration system has experienced extreme strain with a dramatic increase of noncitizens attempting to cross the SWB in between POEs without authorization, reaching an all-time high of 2.2 million encounters in FY 2022. Without a meaningful policy change, border encounters could dramatically rise to as

high as 11,000 per day after the Title 42 public health Order is lifted,<sup>138</sup> and DHS does not currently have the resources to manage and sustain the processing of migratory flows of this scale in a safe and orderly manner. *See* 88 FR at 11712–13. This rule is therefore designed to incentivize migrants to choose lawful, safe, and orderly pathways to entering the United States over dangerous, irregular pathways.

Over the last several months, DHS has endeavored to promote and expand lawful, safe, and orderly pathways. For instance, in January 2023, DHS implemented new parole processes for CHN nationals that built on the successful process for Venezuelans and created an accessible, streamlined way for eligible individuals to travel to and enter the United States via a lawful and safe pathway. Through a fully online process, individuals can seek advance authorization to travel to the United States and be considered, on a case-by-case basis, for a temporary grant of parole for up to two years. Individuals who are paroled through these processes can apply for employment authorization immediately following their arrival to the United States.<sup>139</sup>

Furthermore, the United States Government has significantly expanded access to the H-2 labor visa programs to address labor shortages and provide safe and orderly pathways for migrants seeking to work in the United States. For example, on December 15, 2022, DHS and the Department of Labor (“DOL”) jointly published a temporary final rule increasing the total number of noncitizens who may receive an H-2B nonimmigrant visa by up to 64,716 for the entirety of FY 2023. 87 FR 76816 (Dec. 15, 2022). In 2022, concurrent with the announcement of the L.A. Declaration, the United States announced that it intends to welcome at least 20,000 refugees from Latin America and the Caribbean in FY 2023 and FY 2024, which would put the United States on pace to more than triple the number of refugee admissions from the Western Hemisphere this fiscal year alone.<sup>140</sup> On April 27, 2023, DHS announced that it would commit

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<sup>138</sup> OIS analysis of DHS SWB Encounter Planning Model generated April 18, 2023.

<sup>139</sup> *See* USCIS, Frequently Asked Questions About the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans (Mar. 22, 2023), <https://www.uscis.gov/humanitarian/frequently-asked-questions-about-the-processes-for-cubans-haitians-nicaraguans-and-venezuelans>.

<sup>140</sup> *See* L.A. Declaration Fact Sheet.

to referring for resettlement thousands of additional refugees per month from the Western Hemisphere—with the goal of doubling the number of refugees the United States committed to welcome as part of the L.A. Declaration.<sup>141</sup> The Departments also note that the United States admitted significantly more noncitizens in nonimmigrant status in fiscal year 2022 (96,700,000) than in previous years.<sup>142</sup>

The Departments believe that these new or expanded lawful pathways, and particularly employment-based pathways, are effective ways to address labor shortages and encourage lawful migration. The Departments also believe that, by reducing migrants’ incentives to use human smugglers and traffickers to enter the United States, this final rule will reduce the likelihood that newly arrived migrants will be subjected to labor trafficking. The Departments further reiterate that noncitizens who avail themselves of any of the lawful, safe, and orderly pathways recognized in this rule will not be subject to the rebuttable presumption.

## 8. Other Opposition

### i. Encourages Migration by Sea or Other Dangerous Means

*Comment:* A commenter predicted that the proposed rule may increase the number of migrants seeking to travel to the United States by sea, which is dangerous and could lead to an increase in migrant deaths and drownings, and another suggested that attempted immigration directly by sea would pose a significant burden on Coast Guard and other resources. One commenter expressed concern that the rule would incentivize migrants to avoid detection by CBP, remarking that migrants may attempt to enter the United States by crossing the Rio Grande River or along the Pacific coast, where they face a high risk of drowning.

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<sup>141</sup> See DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

<sup>142</sup> Compare OIS, *Legal Immigration and Adjustment of Status Report Fiscal Year 2022, Quarter 4*, <https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration>, with OIS, *Annual Flow Report: U.S. Nonimmigrant Admissions: 2021 (July 2022)*, [https://www.dhs.gov/sites/default/files/2022-07/2022\\_0722\\_pley\\_nonimmigrant\\_fy2021.pdf](https://www.dhs.gov/sites/default/files/2022-07/2022_0722_pley_nonimmigrant_fy2021.pdf), and OIS, *Annual Flow Report: U.S. Nonimmigrant Admissions: 2018 (Oct. 2018)*, [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/nonimmigrant\\_admissions\\_2018.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/nonimmigrant_admissions_2018.pdf).

Commenters stated that the proposed rule would do nothing to stem the flow of migrants to the United States but would instead force people to seek out other means of coming to the United States and leave people with few choices, including the very choices the rule purports to wish to avoid. Some commenters stated that the rule will result in migrants, who are in a desperate humanitarian situations or fear for their lives, resorting to more dangerous routes between POEs to enter the United States. One commenter stated that these dangerous border crossings can result in severe injuries, dehydration, starvation, and drownings as well as kidnappings and other violent attacks by cartels and other organized criminal groups that exert influence at the U.S.-Mexico border. Another commenter claimed that data shows that CBP's "prior metering program" increased border apprehensions by 36 percent, which suggests that making the CBP One app mandatory may in fact increase border crossings and make them riskier.

*Response:* First, the Departments share commenters' concerns that noncitizens seeking to avoid the rebuttable presumption may take dangerous sea routes, leading to migrant deaths and drownings. Because applying the rule only to those who enter the United States from Mexico across the southwest land border would inadvertently incentivize noncitizens without documents sufficient for lawful admission to circumvent that land border by making a hazardous attempt to reach the United States from Mexico by sea, the Departments have determined that it is appropriate to apply the rebuttable presumption to those who enter the United States from Mexico at both the southwest land border and adjacent coastal borders. Similar considerations that led the Departments to pursue this rulemaking with respect to land arrivals at the SWB apply in this specific maritime context, as the anticipated increase in migration by land could lead migrants attempting to avoid the rebuttable presumption to make the final portion of their journey from Mexico by sea. In light of the inherent dangers such attempts could create for migrants and DHS personnel, and to avoid a significant further increase in maritime interdictions and landfall by noncitizens along the adjacent coastal borders as compared to the already

significant surge that the Departments have seen in recent years, the Departments have extended the rebuttable presumption to apply to noncitizens who enter the United States from Mexico at adjacent coastal borders. 8 CFR 208.33(a)(1), 1208.33(a)(1).

Extension of the rebuttable presumption to noncitizens who enter the United States from Mexico at adjacent coastal borders is supported by the growing number of migrants taking to sea under dangerous conditions, which puts lives at risk and stresses DHS's resources. The IOM Missing Migrants Project reported at least 321 documented deaths and disappearances of migrants throughout the Caribbean in 2022, signaling the highest recorded number since it began tracking such events in 2014 and a 78 percent overall increase over the 180 documented cases in 2021.<sup>143</sup> Total migrants interdicted at sea by the U.S. Coast Guard ("USCG") increased by 502 percent between FY 2020 (2,079) and FY 2022 (12,521).<sup>144</sup> Interdictions continued to rise in FY 2023 with 8,822 migrants interdicted at sea through March, almost 70 percent of the total in FY 2022 within six months.<sup>145</sup> Interdictions occurred primarily in the South Florida Straits and the Caribbean Sea.<sup>146</sup> The USCG views its migrant interdiction mission as a humanitarian effort to rescue those taking to the sea and to encourage noncitizens to pursue lawful pathways to enter the United States. By allocating additional assets to migrant interdiction operations and to prevent conditions that could lead to a maritime mass migration, the USCG assumes certain operational risk to other statutory missions. Recently, some USCG assets have been reallocated from other key mission areas, including counter-drug operations, protection of living marine resources, and support for shipping navigation. The Departments expect that the strategy of coupling expanded lawful, safe, and orderly pathways into the United States with this rule's application of the rebuttable presumption to noncitizens who make landfall at adjacent coastal borders after traveling through Mexico, would lead to a reduction in the numbers of migrants

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<sup>143</sup> Int'l Org. for Migration, *Missing Migrants in the Caribbean Reached a Record High in 2022* (Jan. 24, 2023), <https://www.iom.int/news/missing-migrants-caribbean-reached-record-high-2022>.

<sup>144</sup> OIS analysis of USCG data through March 31, 2023.

<sup>145</sup> *Id.*

<sup>146</sup> Testimony of Jonathan Miller, "Securing America's Maritime Border: Challenges and Solutions for U.S. National Security" at 4 (Mar. 23, 2023), <https://homeland.house.gov/media/2023/03/3.23.23-TMS-Testimony.pdf>.

who would otherwise undertake a dangerous journey to the United States by sea. By avoiding a further increase in maritime migration, USCG can in turn avoid incurring greater risk to its other statutory missions.

Second, the Departments disagree with commenters' concerns that this rule will incentivize more migrants to use other dangerous means of entering the United States, such as concealment in a vehicle crossing a SWB POE or crossing between POEs at remote locations. As noted in Section IV.B.3.iv of this preamble, the Departments anticipate that the newly expanded lawful pathways to enter to the United States, in conjunction with the rule's condition on asylum eligibility for those who fail to exercise those pathways, will ultimately decrease attempts to enter the United States without authorization, and thereby reduce reliance on smugglers and human traffickers.

The Departments further disagree with the commenter's claims that the use of the CBP One app to schedule an appointment to present at a POE is a "metering program" or that use of the CBP One app will increase irregular migration or incentivize riskier irregular migration routes. CBP will inspect and process all arriving noncitizens at POEs, regardless of whether they have used the CBP One app. In other words, the use of the CBP One app is not a prerequisite to approach a POE, nor is it a prerequisite to be inspected and processed under the INA. CBP will not turn away individuals without appointments. CBP is committed to increasing the number of noncitizens processed at POEs and is committed to processing noncitizens in an expeditious manner.<sup>147</sup>

Moreover, the Departments intend for this rule to work in conjunction with other initiatives that expand lawful pathways to enter the United States, and thereby incentivize safe, orderly, lawful migration over dangerous, irregular forms of migration. Noncitizens who enter

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<sup>147</sup> See Memorandum for William A. Ferrara, Exec. Ass't Comm'r, Off. of Field Operations, from Troy A. Miller, Acting Comm'r, CBP, *Re: Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf>.

the United States in vehicles without scheduling an appointment to present at a POE and who are inadmissible under section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), are subject to the rebuttable presumption. Similarly, noncitizens who attempt to cross the southwest land border between POEs are subject to the rebuttable presumption. Likewise, noncitizens who attempt to enter the United States from Mexico at adjacent coastal borders are subject to the rebuttable presumption. Additionally, DHS has changed the respective parole processes for Cubans and Haitians, such that Cubans and Haitians who are interdicted at sea after April 27, 2023, are ineligible for such parole processes. *See* Implementation of a Change to the Parole Process for Cubans, 88 FR 26329 (Apr. 28, 2023); Implementation of a Change to the Parole Process for Haitians, 88 FR 26327 (Apr. 28, 2023). The Departments anticipate that these disincentives, coupled with the newly expanded pathways for lawful migration and the rule's exceptions and means of rebuttal, will ultimately lead fewer noncitizens to attempt to enter the United States in an unsafe manner.

ii. Inconsistent with Actions of Other Countries and Harmful to Foreign Relations

*Comment:* Commenters stated that the proposed rule would almost completely abandon the United States' commitment to work with other countries to meet growing refugee and asylum seeker protection needs, instead placing the burden on transit countries. Commenters stated that many European countries have opened their borders to millions of immigrants, and that the United States should do the same to help people who are facing desperate situations at home. Commenters observed that other countries in Latin America or the Western hemisphere have taken in many more migrants and taken on a greater burden than the United States. One commenter expressed concern that other countries may seek to follow in the United States' footsteps and enact similar restrictive asylum measures. Another commenter stated the rule will not improve foreign relations with hemispheric partner nations.

*Response:* The Departments acknowledge the comments and reiterate that the purpose of this rule is to encourage migrants to choose safe, orderly, and lawful pathways of entering the

United States, while preserving the opportunity for individuals fleeing persecution to pursue protection-based claims consistent with the INA and international law. The rule is needed because, absent this rule, after the termination of the Title 42 public health Order, the number of migrants expected to travel without authorization to the United States is expected to increase significantly, to a level that risks undermining the Departments' ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system. This rule is one policy within a broad range of actions being implemented to ensure that there is a regional framework for addressing and responding to historic levels of migration within the hemisphere.<sup>148</sup>

The United States Government is expanding its efforts to protect refugees, those seeking asylum, and those fleeing civil conflict. Since FY 2020, the United States has increased its annual refugee admissions ceiling eightfold and expanded refugee processing within the Western hemisphere.<sup>149</sup> On April 27, 2023, DHS and the Department of State announced that they would commit to referring for resettlement thousands of additional refugees per month from the Western Hemisphere—with the goal of doubling the number of refugees the United States committed to welcome as part of the L.A. Declaration.<sup>150</sup> Similarly, DHS and the Department of State recently announced enhancements to the Central American Minors Refugee and Parole Program, which expands eligibility criteria for those who may request USRAP access for qualifying children.<sup>151</sup> DHS has also implemented comprehensive processes to facilitate the lawful, safe, and orderly migration of CHNV nationals by introducing the CHNV parole

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<sup>148</sup> See The White House, FACT SHEET: The Biden Administration Blueprint for a Fair, Orderly and Humane Immigration System (July 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/27/fact-sheet-the-biden-administration-blueprint-for-a-fair-orderly-and-humane-immigration-system/>; The White House, FACT SHEET: Update on the Collaborative Migration Management Strategy (Apr. 20, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/20/fact-sheet-update-on-the-collaborative-migration-management-strategy/>; L.A. Declaration Fact Sheet.

<sup>149</sup> Compare Presidential Determination on Refugee Admissions for Fiscal Year 2021, 85 FR 71219 (Nov. 6, 2020) (15,000), with White House, Memorandum on Presidential Determination on Refugee Admissions for Fiscal Year 2023 (Sept. 27, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/09/27/memorandum-on-presidential-determination-on-refugee-admissions-for-fiscal-year-2023/> (125,000).

<sup>150</sup> See DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

<sup>151</sup> Notice of Enhancements to the Central American Minors Program, 88 FR 21694 (Apr. 11, 2023).



processes.<sup>152</sup> Additionally, DHS has recently implemented special lawful processes for nationals of Ukraine.<sup>153</sup>

iii. Other

*Comment:* A commenter stated that the rule would allow noncitizens who entered the United States after lying on a visa petition to remain eligible for asylum while barring those who never submitted false information and objected to this outcome as “absurd.”

*Response:* The Departments acknowledge the commenter’s concern but reiterate that the purpose of this rulemaking is to address an anticipated further surge of migration at the SWB following the expiration of the CDC’s Title 42 public health Order, which may compromise the Departments’ ability to process claims for asylum and related forms of protection in a manner that is effective, humane, and efficient. The Departments do not anticipate that noncitizens who attempt to enter on nonimmigrant visas obtained through misrepresentation will contribute to this surge in any substantial way.

In addition, the Departments disagree with the premise of this comment. Willful misrepresentations in connection with a nonimmigrant visa application may affect an applicant’s eligibility for asylum or adjustment of status. Prior misrepresentations to immigration officials can affect credibility determinations, *see* INA 208(b)(1)(B)(iii), 8 U.S.C. 1158(b)(1)(B)(iii), and may be negative discretionary factors in asylum and adjustment of status determinations.<sup>154</sup> Applicants for adjustment of status under section 209(b) of the INA, 8 U.S.C. 1159(b), who have previously sought to obtain immigration benefits through fraud or willful misrepresentation of material fact are inadmissible under section 212(a)(6)(C)(i) of the INA, 8 U.S.C.

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<sup>152</sup> *See* USCIS, Frequently Asked Questions About the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans (Mar. 22, 2023), <https://www.uscis.gov/humanitarian/frequently-asked-questions-about-the-processes-for-cubans-haitians-nicaraguans-and-venezuelans>.

<sup>153</sup> *See* DHS, Uniting for Ukraine (Mar. 21, 2023), <https://www.dhs.gov/ukraine>; DHS, Operation Allies Welcome (Mar. 13, 2023), <https://www.dhs.gov/allieswelcomes>.

<sup>154</sup> *See Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987) (finding that the circumvention of immigration laws can be considered as a negative discretionary factor in asylum adjudications); USCIS Policy Manual, Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Use of Discretion [7 USCIS-PM A.10] (Apr. 21, 2023), <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10#footnote-31>.

1182(a)(6)(C)(i), unless they obtain a discretionary waiver of inadmissibility under section 209(c) of the INA, 8 U.S.C. 1159(c).

*Comment:* One commenter stated that the application of the presumption against asylum eligibility at the credible fear stage would lead to absurd and irrational results. As an example, the commenter stated a noncitizen may admit to terrorism in their home country and still receive a positive credible fear determination, whereas a noncitizen subject to the rule who fails to rebut the presumption would receive a negative determination.

*Response:* The Departments strongly dispute the commenter's suggestion that noncitizens who admit to terrorism would receive superior treatment than noncitizens who are subject to the rule. Noncitizens subject to the INA's terrorism-related inadmissibility grounds ("TRIG"), *see* INA 212(a)(3)(B), 8 U.S.C. 1182(a)(3)(B), may not be ordered released by an IJ during removal proceedings irrespective of any relief from removal for which they may be eligible. INA 236(c), 8 U.S.C. 1226(c); 8 CFR 1003.19(h)(2)(i)(C); INA 241(a)(2), 8 U.S.C. 1231(a)(2); INA 236A(a), 8 U.S.C. 1226a(a). Noncitizens subject to TRIG are ineligible for asylum, statutory withholding of removal, or withholding of removal under the CAT, absent a discretionary exemption from DHS, INA 208(b)(2)(v), 8 U.S.C. 1158(b)(2)(v); INA 241(b)(3)(B)(iv), 8 U.S.C. 1231(b)(3)(B)(iv); 8 CFR 208.16(d)(2); INA 212(d)(3)(B)(i), 8 U.S.C. 1182(d)(3)(B)(i), as are noncitizens for whom there are reasonable grounds to regard as dangers to the security of the United States, INA 208(b)(2)(iv), 8 U.S.C. 1158(b)(2)(iv); INA 241(b)(3)(B)(iv), 8 U.S.C. 1231(b)(3)(B)(iv); 8 CFR 208.16(d)(2).

*Comment:* A local government voiced concern that the five-year re-entry ban if the asylum seeker violates the rule creates additional roadblocks for the most vulnerable individuals.

*Response:* The five-year ground of inadmissibility for those ordered removed following expedited removal proceedings is based on statute, INA 212(a)(9)(A)(i), 8 U.S.C. 1182(a)(9)(A)(i), and cannot be changed through administrative rulemaking. This statute applies equally to noncitizens who are not subject to this rule. Despite prior removal, noncitizens can

still seek statutory withholding of removal or protection under the CAT within the five-year period. *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 208.16, 1208.16.

### *C. Alternatives and Other General or Mixed Feedback*

#### 1. Address Root Causes of Migration

*Comment:* A number of commenters requested additional information on the Administration's ongoing efforts to address the root causes of migration, and suggested that, instead of implementing this rule, the United States should focus on providing economic, social, and political support to the countries from which the migrants are fleeing. Another commenter stated that long-term solutions are needed, such as investing in regional stability and humanitarian aid that contribute to human security, addressing the precursors of forced migration, and diminishing the threats that put vulnerable communities at risk. Some commenters suggested that there should be a comprehensive plan to both improve the conditions in Latin American and Caribbean countries by eliminating U.S. sanctions, as well as "offering asylum to large groups of refugees" in the United States. Commenters also stated that we should devote more resources to helping people from countries such as Haiti, Venezuela, and other Central American countries. Similarly, commenters stated that the United States should provide additional aid to the region and promote democratic values and good governance with an eye towards creating meaningful reforms, particularly in areas that drive irregular migration such as corruption and lack of opportunity. Other commenters stated that in determining eligibility for asylum, the proposed rule would fail to consider significant dangers such as gang violence, starvation, and natural disasters. A commenter expressed further concern that the proposed rule attempts to control the border by reducing the number of USBP encounters with migrants, reasoning that this approach would not address the root cause of increased migration.

One commenter stated that, while deterrence programs may result in temporary dips in the number of people presenting or apprehended at the border, they have no long-term effect because they do not address the root causes forcing people from their homes. Another

commenter stated that for many individuals, fleeing their countries in haste and without resources is not optional and they will continue to do so unless the situation in their countries changes. Another commenter stated that the United States should support Latin and Central American governments' capacity to strengthen humanitarian protections and migration management systems by investing in technical assistance and institutional capacity and investing in sustainable infrastructural needs and social safety nets (including education, stable employment, public safety, and economic support) in Mexico and Central America.

*Response:* The Departments agree that the United States must consistently engage with partners throughout the Western Hemisphere to address the hardships that cause people to leave their homes and come to our border. The migratory trends at the SWB today will persist long into the future if the root causes of migration are not addressed. The United States has been engaging with regional partners to address the root causes of migration, but this rule is nonetheless necessary to address a potential surge of migrants at the SWB in the near term.

In June 2022, the United States partnered with 19 other countries in the Western Hemisphere in endorsing the L.A. Declaration, which asserts “the need to promote the political, economic, security, social, and environmental conditions for people to lead peaceful, productive, and dignified lives in their countries of origin. Migration should be a voluntary, informed choice and not a necessity.”<sup>155</sup> In addition, nations including the United States committed to implementing programs to stabilize communities hosting migrants and asylum seekers, providing increased lawful pathways and protections for migrants and asylum seekers residing in or traveling through their countries, and humanely enforcing existing immigration laws.<sup>156</sup>

Earlier, in July 2021, the United States began working closely with countries in Central America to prioritize and implement a strategy that addresses the root causes of irregular

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<sup>155</sup> The White House, Los Angeles Declaration on Migration and Protection (June 10, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/>.

<sup>156</sup> *Id.*

migration with the desired end-state being “a democratic, prosperous, and safe Central America, where people advance economically, live, work, and learn in safety and dignity, contribute to and benefit from the democratic process, have confidence in public institutions, and enjoy opportunities to create futures for themselves and their families at home.”<sup>157</sup> At the same time, the United States also presented the CMMS, which aims to advance safe, orderly, legal, and humane migration, including access to international protection for those in need throughout North and Central America.<sup>158</sup> On April 27, 2023, DHS and the Department of State announced plans to establish regional processing centers and expand refugee resettlement commitments in the region.<sup>159</sup> Existing high levels of irregular migration, however, make clear that such efforts are, on their own, insufficient in the near term to fundamentally influence migrants’ decision-making, to reduce the risks associated with current levels of irregular migration and the anticipated further surge of migrants to the border after the Title 42 public health Order is terminated, or to protect migrants from human smugglers that profit from their vulnerability. *See* 88 FR at 11716. The United States will continue to work with our regional partners to manage migration across the Hemisphere.

## 2. Prioritize Funding and Other Resources

*Comment:* Many commenters urged the Government to prioritize funding, other resources, or alternative policies, reasoning that these would make border processing and asylum adjudications more effective and efficient. Some commenters focused on funding, suggesting that the Government should request additional funding from Congress, that the Departments should be prioritizing funding and staffing for the HHS, Office of Refugee Resettlement, USCIS, and U.S. immigration courts, or that the Government should prioritize investing in community-

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<sup>157</sup> *See, e.g.*, National Security Council, U.S. Strategy for Addressing the Root Causes of Migration in Central America 5 (July 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf>.

<sup>158</sup> *See, e.g.*, The White House, Fact Sheet: The Collaborative Migration Management Strategy (July 29, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-the-collaborative-migration-management-strategy/>.

<sup>159</sup> *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

based alternatives, including robust funding and expansion of asylum processing at POEs and investment in NGOs and civil society organizations.

Other commenters suggested more generally that the Government devote other resources to immigrant arrivals. For example, one commenter said that DHS should focus on “increasing the number of resources at the SWB to safely and fairly process the influx of migration at the border itself,” including creating shelters near the southern border for noncitizens without family and friends to support them while they await processing of their claim. Another commenter, however, instead suggested that asylum seekers be transferred to communities throughout the United States, along with resources to ensure that asylum seekers and receiving communities are supported. One commenter stated that, instead of the proposed rule, DHS should train border officials to identify asylum claims or assess credible fear. Conversely, another commenter stated that more AOs, not CBP officers, are needed to interview asylum seekers. Commenters also stated the Departments should address significant failures in structure, functioning, and processing through staffing, budget review, training for AOs and judges to reduce appeals, training for DHS attorneys about docket management, and other means.

Another commenter requested that DHS consider “improving border infrastructure for high volume facilities,” and noted that DHS did not explain why it lacked the infrastructure, personnel, and funding to sustain processing levels of high numbers of migrants. One commenter expressed concern that CBP does not have sufficient resources in sectors along the SWB to patrol the border and detain migrants and expressed concern about the number of migrants who successfully evade USBP and enter the country.

Some commenters suggested alternative policy proposals to pursue instead of the proposed rule. For example, commenters recommended that DHS widely advertise the need for sponsors for asylum seekers and facilitate their applications for sponsorship. One commenter suggested providing additional resources to Mexico and other transit countries to improve their asylum-processing capacities.

*Response:* The Departments acknowledge commenters' suggestions for increasing resources, both financial and otherwise, to account for migrant arrivals at the SWB. The Departments first note that they have already deployed additional personnel, technology, infrastructure, and resources to the SWB and that additional financial support would require additional congressional actions, including significant additional appropriations, which are outside of the scope of this rulemaking. The Departments agree with commenters that additional resources would provide benefits for managing the border. The Departments have, for example, significantly increased hiring of AOs and IJs over the past decade.<sup>160</sup> AOs and IJs possess experience in handling asylum and related adjudications; receive regular trainings on asylum-related country conditions and legal issues, as well as non-adversarial interviewing techniques; and have ready access to country-conditions experts.<sup>161</sup> However, it is not feasible for the Departments to quickly hire sufficient qualified personnel or increase other resources to efficiently, effectively, and fairly handle the volume of encounters projected by May 2023, when a further surge of migrants to the SWB is expected following the lifting of the Title 42 public health Order.

Furthermore, the Departments note that they are leading ongoing Federal Government efforts to support NGOs and local and state governments as they work to respond to migratory flows impacting their communities. As noted in the NPRM, FEMA spent \$260 million in FYs 2021 and 2022 on grants to non-governmental and state and local entities through the EFSP-H to assist migrants arriving at the SWB with shelter and transportation. *See* 88 FR at 11714. In November 2022, FEMA released \$75 million through the program, consistent with the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023.<sup>162</sup> In addition, the Bipartisan Year-End Omnibus, which was enacted on December 29, 2022, directed CBP to

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<sup>160</sup> EOIR, Adjudication Statistics: Immigration Judge Hiring (Jan. 2023), <https://www.justice.gov/eoir/page/file/1242156/download>; Citizenship and Immigration Services Ombudsman, Annual Report 2020 at 45 (June 30, 2020), [https://www.dhs.gov/sites/default/files/publications/20\\_0630\\_cisomb-2020-annual-report-to-congress.pdf](https://www.dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf).

<sup>161</sup> *See* 8 CFR 208.1(b).

<sup>162</sup> Pub. L. No. 117–180, Division A, sec. 101(6), 131 Stat. 2114, 2115.

transfer \$800 million in funding to FEMA to support sheltering and related activities for noncitizens encountered by DHS. The Omnibus authorized FEMA to utilize this funding to establish a new Shelter and Services Program and to use a portion of the funding for the existing EFSP-H, until the Shelter and Services Program is established.<sup>163</sup> On February 28, 2023, DHS announced a \$350 million funding opportunity for EFSP-H.<sup>164</sup> This is the first major portion of funding that is being allocated for humanitarian assistance under the Omnibus funding approved in December.<sup>165</sup> For the new Shelter and Services Program, FEMA and CBP have held several public listening sessions and are developing plans to release a Notice of Funding Opportunity prior to September 2023 for the second major portion of funding allocated by Omnibus to assist migrants encountered by DHS.

Additionally, on April 27, 2023, DHS announced that it has awarded more than \$135 million to communities to date this fiscal year and will award an additional \$290 million in the coming weeks.<sup>166</sup> The Departments are also ramping up coordination between state and local officials and other Federal agencies to provide resources, technical assistance, and support, including through regular information sessions with stakeholders to ensure that the program is broadly understood and the funds are accessible.<sup>167</sup> The Departments will continue to mobilize faith-based and non-profit organizations supporting migrants, including those providing temporary shelter, food, transportation, and humanitarian assistance as individuals await the outcome of their immigration proceedings.<sup>168</sup>

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<sup>163</sup> Pub. L. No. 117–328, Division F, Title II, Security Enforcement, and Investigations, U.S. Customs and Border Protection, Operations and Support.

<sup>164</sup> See DHS, Press Release, *The Department of Homeland Security Awards \$350 Million for Humanitarian Assistance Through the Emergency Food and Shelter Program* (Feb. 28, 2023), <https://www.dhs.gov/news/2023/02/28/department-homeland-security-awards-350-million-humanitarian-assistance-through>; DHS Grant Opportunity DHS-23-DAD-024-00-03, Fiscal Year 2023 Emergency Food and Shelter National Board Program - Humanitarian (EFSP) (\$350M) (Feb. 28, 2023), <https://www.grants.gov/web/grants/view-opportunity.html?oppId=346460>.

<sup>165</sup> *Id.*

<sup>166</sup> See DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

<sup>167</sup> See *id.*

<sup>168</sup> See *id.*



With regard to CBP resources at the border, CBP continues to increase facility capacity and to look to new facilities to further expand capacity. *See* 88 FR at 11714. In addition, CBP continues to take steps to facilitate more efficient processing of encountered migrants so that agents are able to remain in the field and patrol the border. For example, USBP has deployed non-uniformed Border Patrol Processing Coordinators (“BPPCs”), who can provide crucial support to USBP facilities, including humanitarian care to individuals in custody, transportation, and processing assistance.<sup>169</sup> As of March 15, 2023, USBP had hired 961 BPPCs, with more individuals in the hiring process.<sup>170</sup> Additionally, CBP has invested in virtual and mobile processing technologies, which enables USBP agents and officers to assist SWB sectors without needing to be physically present in these locations.<sup>171</sup> All of these steps enable USBP agents to return to the field to conduct their law enforcement duties, while ensuring safe conditions for individuals in custody. However, as noted in the NPRM, the increased numbers of migrants entering the United States—and the anticipated surge following the lifting of the Title 42 public health Order—will continue to strain CBP resources. *See* 88 FR at 11706. Thus, the Departments believe that this rule is necessary to disincentivize migrants from attempting to enter the United States without authorization.

The Departments do not agree with commenters’ suggestions that alternative policies should be pursued in place of this rule. For example, advertising the need for asylum sponsors would not sufficiently address the anticipated influx of migration at the SWB. The Departments have created, and continue to expand, lawful pathways to enter the United States, which will be available alongside this rule to encourage the use of all lawful pathways and discourage irregular migration to the United States. In contrast, were the Departments to take a hiring-only approach that does not expand lawful pathways or consequences for unlawful entry, the Departments

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<sup>169</sup> Testimony of Raul Ortiz, “Failure by Design: Examining Sec’y Mayorkas’ Border Crisis” (Mar. 15, 2023), <https://www.cbp.gov/about/congressional-resources/testimony/Ortiz-CHS-15MAR23>.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

estimate that irregular arrivals would likely increase after the expiration of the Title 42 public health Order, adding to the current backlog of asylum cases. Such a policy would likely have no immediate effect on arrivals at the SWB, necessitating continued surges of DHS resources to POEs and the SWB to support processing.

The Departments note that the rule requires collaboration across the Departments. CBP, USCIS, and DOJ are all part of the whole-of-government approach necessary to address irregular migration and ensure that the U.S. asylum system is fair, orderly, and humane. The Departments acknowledge comments suggesting that CBP officials should be trained to conduct credible fear screenings. The Asylum Processing IFR clarified that a “USCIS asylum officer” will conduct the credible fear interview. 8 CFR 208.30(d). This is consistent with the INA, which specifies that only AOs (as opposed to immigration officers) conduct credible fear interviews, *see* INA 235(b)(1)(B)(i), 8 U.S.C. 1225(b)(1)(B)(i); 8 CFR 208.30(d), and make those determinations, *see* INA 236(b)(1)(B)(iii), 8 U.S.C. 1225(b)(1)(B)(iii); *see also* 8 CFR 208.30(c) through (e); 87 FR at 18136. AOs receive training and possess experience in handling asylum and related adjudications; receive regular trainings on asylum-related country conditions and legal issues, as well as non-adversarial interviewing techniques; and have ready access to country conditions experts. *See* 87 FR at 18136. As noted above, hiring of additional AOs is ongoing, and DHS recently announced that it is surging AOs to complete credible fear interviews at the SWB more quickly.<sup>172</sup>

*Comment:* Some commenters suggested that DHS should better utilize or increase its detention capacity to account for the anticipated migratory flow, as an alternative to the approach adopted in this rule. One commenter suggested that DHS increase its detention capacity to account for the mandatory detention requirements at section 235(b)(1)(B)(ii) of the INA, 8 U.S.C. 1225(b)(1)(B)(ii), and to better use the capacity it has, citing unused detention space in the summer of 2021. The same commenter noted that section 212(d)(5)(A) of the INA, 8 U.S.C.

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<sup>172</sup> *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

1182(d)(5)(A), allows DHS to parole noncitizens into the United States in limited circumstances, but claimed that the proposed rule makes parole the default and detention the exception, contrary to statute. The commenter argued that expanded use of detention would serve as a greater deterrent than this rule and objected to a reduction in detention capacity it identified in the Administration's FY 2024 budget. Similarly, another commenter stated that the Departments should request from Congress the resources necessary to expand detention centers' capacity to handle the current migratory flow.

*Response:* To the extent that the commenters are contending that DHS is capable of obtaining bedspace sufficient for detaining all inadmissible noncitizens predicted to enter the United States who could potentially be subject to detention pursuant to section 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), following the lifting of the Title 42 public health Order, the Departments strongly disagree. DHS's ability to detain an individual on any given day is determined by many different factors, including the availability of appropriated funds; the number and demographic characteristics of individuals in custody, as well as those encountered at or near the border or within the interior of the United States; and the types of facilities with available bedspace. In addition, there are capacity restrictions at individual facilities imposed for a variety of reasons ranging from public health requirements to court-ordered limitations that also constrain the availability of detention space.

The Departments also disagree with the commenter's assertion that this rule makes parole the default. This rule does not address parole or change DHS's detention practices. Rather, this rule creates a rebuttable presumption regarding eligibility for asylum.

### 3. Further Expand Refugee Processing or Other Lawful Pathways

*Comment:* Several commenters suggested increasing access to protection and improving processes to encourage noncitizens to seek asylum in lawful and orderly ways, but without imposing a condition on eligibility for asylum for noncitizens who fail to do so. Commenters suggested that the United States should expand regional refugee processing, increase asylum

processing and humanitarian programs, and expand and create new lawful pathways, in lieu of pursuing the proposed rule. One commenter said the Administration should use Temporary Protected Status broadly, including for the countries focused on in the proposed rule and other countries where safe return is impossible. Others recommended creating viable alternatives to asylum for lawful admission to the United States, including decreasing waits for family-based immigration or increasing and streamlining migration opportunities based on skilled labor, citing the Canadian Federal Skilled Worker Express Entry policy as a successful example. Another commenter stated that the Departments should consider policies facilitating fast-track arrival in the United States, including quickly approved in-country visas and widely available humanitarian parole, and streamlining asylum regulations to more broadly encompass the types of dangers and persecution migrants are fleeing today.

*Response:* The United States has made and will continue to make extensive efforts to expand refugee processing and lawful pathways generally. *See* Section IV.B.2.i of this preamble. For example, on April 27, 2023, DHS and the Department of State announced they will establish regional processing centers in several countries in the Western Hemisphere, including Guatemala and Colombia, “to reduce irregular migration and facilitate safe, orderly, humane, and lawful pathways from the Americas.”<sup>173</sup> Individuals from the region will be able to make an appointment to visit the nearest regional processing center before traveling, receive an interview with immigration specialists, and if eligible, be processed rapidly for lawful pathways to the United States, Canada, and Spain, including USRAP.<sup>174</sup> Existing levels of unlawful migration, however, make clear that such efforts are, on their own, insufficient in the near term to change the incentives of migrants, reduce the risks associated with current levels of irregular migration and the anticipated surge of migrants to the border, and protect migrants from human smugglers that profit from their vulnerability. *See* 88 FR at 11716. The Departments’ recent

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<sup>173</sup> DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

<sup>174</sup> *See id.*

experience has shown that an increase in lawful pathways coupled with consequences for not using such pathways can significantly—and positively—affect behavior and undermine smuggling networks, as described in Section II.A of this preamble. The Departments also note that while they will consider the commenters’ specific suggestions for other lawful pathways or alternatives for entry to the United States, this rule does not create, expand, or otherwise constitute the basis for any lawful pathways.

#### 4. Require Migrants to Wait in Mexico or Other Countries

*Comment:* Some commenters stated that the United States should reimplement the MPP, with one stating that MPP caused a drop in border crossings. A commenter argued that reinstating MPP would have all the benefits that the Departments are seeking to achieve via the proposed rule, but without the rule’s downsides, which the commenter argued include increasing incentives for irregular migration. The commenter also stated that the Departments’ justifications for ending MPP, including a lack of infrastructure and cooperation from Mexico, are insufficient, arguing that if attempted border crossings are deterred by MPP then many fewer resources will be required, and that the Administration has not sufficiently explained why Mexico would not be willing to cooperate with a reimposition of MPP when it agreed to do so in the recent past. Another commenter suggested that MPP should be restarted and the United States pay for safe housing and food for migrants who are waiting in Mexico during their legal proceedings.

*Response:* The Departments disagree with commenters’ contentions that the explanation given in the NPRM regarding why the Departments are not reinstating MPP is insufficient. *See* 88 FR at 11731. The Secretary of Homeland Security weighed the full range of MPP’s costs and benefits, explaining, among other things, that MPP is not the best tool for deterring unlawful migration; that MPP exposes migrants to unacceptable risks to their physical safety; and that MPP detracts from the Executive’s efforts to manage regional migration. Moreover, given the Departments’ knowledge and understanding of their own resources and infrastructure

constraints, as well as the Government of Mexico's statement on February 6, 2023, affirming its willingness to cooperate in international agreements relating to refugees (including the L.A. Declaration) and endorsing lawful pathways, including the CHNV processes,<sup>175</sup> the Departments continue to believe that promulgation of this rule is the appropriate response to manage and avoid a significant further surge in irregular migration after the Title 42 public health Order is lifted.

As explained in the NPRM, programmatic implementation of the contiguous-territory return authority requires Mexico's concurrence and ongoing support and collaboration. *See* 88 FR at 11731. When DHS was previously under an injunction requiring it to re-implement MPP, the Government of Mexico would only accept the return of MPP enrollees consistent with available shelter capacity in specific regions, and indeed had to pause the process at times due to shelter constraints. Notably, Mexico's shelter network is already strained from the high volume of northbound irregular migration happening today. In February 2023, the Government of Mexico publicly announced its independent decision that it would not accept the return of individuals pursuant to section 235(b)(2)(C) of the INA, 8 U.S.C. 1225(b)(2)(C).<sup>176</sup>

Additionally, the resources and infrastructure necessary to use contiguous-territory return authority at the scale that would be required given current and anticipated flows are not currently available. To employ the contiguous-territory return authority at a scale sufficient to meaningfully address the anticipated migrant flows, the United States would need to rebuild, redevelop, and significantly expand infrastructure for noncitizens to be processed in and out of the United States and attend immigration court hearings throughout the duration of their removal proceedings. This would require, among other things, the construction of substantial additional court capacity along the border. It would also require the reassignment of IJs and ICE attorneys

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<sup>175</sup> Government of Mexico, *SRE rechaza reimplementación de estancias migratorias en México bajo la sección 235(b)(2)(C) de la Ley de EE.UU.* (Feb. 6, 2023), <https://www.gob.mx/sre/prensa/sre-rechaza-reimplementacion-de-estancias-migratorias-en-mexico-bajo-la-seccion-235-b-2-c-de-la-ley-de-inmigracion-y-nacionalidad-de-eeuu>.

<sup>176</sup> *Id.*

to conduct the hearings and CBP personnel to receive and process those who are coming into and out of the country to attend hearings.

*Comment:* Other commenters suggested numerous ideas that would require migrants to wait for cases to be heard outside the United States or to create additional opportunities to apply for asylum from outside of the United States. One commenter suggested that the United States allow asylum seekers to present themselves at embassies, refugee camps, or U.S. military bases to make their claims without the need to undertake the dangerous journey to the U.S. border. A commenter suggested setting up a controlled process to allow a fixed number of migrants into the United States this year, managed through embassies abroad, and stated that it is inhumane to allow migrants to travel to the border only to turn them down. The same commenter also stated that such a controlled process would stop trafficking, drugs, and criminals from entering the country.

Commenters suggested implementing remote teleconferencing technology so that credible fear interviews could be conducted over Zoom or another platform from outside the United States in lieu of using the CBP One app to make appointments, with at least one suggesting that if the migrant's credible fear claim is accepted, they be sent an email stating that the migrant can be granted humanitarian parole into the United States for a final asylum hearing. Another commenter suggested that, instead of implementing this rule, DHS should create a virtual application and video hearing system that would allow migrants to apply and be processed for asylum while still abroad. At least one commenter suggested that migrants be given a temporary work card and ID and be required to pay a penalty tax and U.S. taxes to cover the expenses of managing immigration services. At least one commenter suggested creating a single border crossing dedicated to processing asylum claims, similar to the historical practice at Ellis Island.

*Response:* Pursuant to section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1), only noncitizens who are “physically present in the United States or who arrive[] in the United States”

can apply for asylum. Similarly, the expedited removal provisions in section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), apply only to noncitizens within the United States. Thus, while credible fear interviews may be conducted remotely (i.e., telephonically), such interviews cannot be conducted for those who are abroad and have not—as required for such interviews—entered the United States, been processed for expedited removal, and asserted a fear of persecution or torture or of return to their country or an intention to apply for asylum.<sup>177</sup> In any event, the intent of this rule is to address the expected surge of migration following the lifting of the Title 42 public health Order on May 11, 2023. Commenters’ suggestion that the Departments should create opportunities for noncitizens who have not entered the United States to apply for asylum at U.S. embassies, military bases, a virtual application abroad, or other locations, even if legally available, would not be available in the short-term or at the scale that would be required given current and anticipated flows. Similarly, creating a single border crossing dedicated to processing asylum claims, even if legally permissible, would not be operationally feasible, particularly in the short term.

However, as noted elsewhere in this document, USRAP is expanding its operations in the Western Hemisphere, which is the appropriate pathway for noncitizens outside the United States to seek admission as a refugee. *See* INA 207, 8 U.S.C. 1157. On April 27, 2023, DHS and the Department of State announced that the United States Government in cooperation with other countries of the L.A. Declaration will establish regional processing centers in several locations throughout the Western Hemisphere to reduce irregular migration.<sup>178</sup> The United States Government will commit to welcoming thousands of additional refugees per month from the Western Hemisphere—with the goal of doubling the number of refugees the United States as part of the L.A. Declaration.<sup>179</sup> The Departments also note that Congress has provided that asylum applicants may receive employment authorization no less than 180 days subsequent to the filing

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<sup>177</sup> *See* INA 235(b)(1), 8 U.S.C. 1225(b)(1).

<sup>178</sup> *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

<sup>179</sup> *See id.*



of their asylum application. *See* INA 208(d)(2), 8 U.S.C. 1158(d)(2). Additionally, it is not within the Departments' authority to impose taxes.

## 5. Additional Measures

*Comment:* Commenters suggested that the United States adopt more restrictive measures instead of this rule, such as requiring all SWB arrivals to seek asylum in Mexico first; requiring all migrants to be returned to their country of origin for two years to wait for their cases to be heard; or creating a bar to asylum for those who are denied asylum in other countries. Another commenter recommended that the rule require that a migrant must seek and be denied protection in each country through which they travel, rather than just one country.

One commenter suggested that the President should use the authority provided by section 212(f) of the INA, 8 U.S.C. 1182(f), to suspend the entry of migrants in order to address the border crisis. This commenter also suggested that DHS make efforts to enforce all deportation orders, expand the use of expedited removal to the fullest extent authorized by Congress, and post ICE agents in courtrooms to immediately enforce removal orders.

Another commenter suggested the rule should also apply to the Northern border and the maritime borders of the United States.

*Response:* The Departments acknowledge the commenters' suggestions but do not believe the alternatives proposed by the commenters are suitable to address operational concerns or meet the Departments' policy objectives.

As an initial matter, a categorical requirement that all individuals arriving at the SWB seek asylum in Mexico first would be inconsistent with the United States' ongoing efforts to share the responsibility of providing asylum and other forms of protection with the United States' regional partners. The United States Government remains committed to working with regional partners to jointly address historic levels of migration in the hemisphere and will continue to engage with the governments of Mexico and other regional partners to identify and

implement solutions. Furthermore, there may be individuals for whom Mexico is not a safe alternative.

The Departments disagree with the commenter's suggestion that noncitizens be required to seek and be denied protection in each country through which they travel. Mexico or other countries through which certain individuals travel en route to the United States may not be a safe alternative for particular individuals, as discussed elsewhere in this preamble, *see* Sections IV.B.4.vii and IV.E.3.iv.d–(e). The rule therefore strikes a balance: It provides an exception from its presumption of ineligibility for individuals who seek and are denied protection in a third country, but it recognizes that for some individuals, particular third countries—or even all third countries—may not be a viable option. The rule therefore provides additional exceptions and rebuttal grounds for the presumption of ineligibility it creates.

Additionally, U.S. obligations under international and domestic law prohibit returning noncitizens to a country where their life or freedom would be threatened because of a protected ground, or where they would be subject to torture.<sup>180</sup> DHS cannot remove a noncitizen without first obtaining a removal order and cannot remove a noncitizen to a country about which the noncitizen has expressed fear of return without first determining whether they are entitled to protection pursuant to the withholding of removal statute and the regulations implementing the CAT.

The Departments disagree with the recommendation to establish a bar to asylum for those who are denied asylum in other countries. Those denials may be due to a variety of factors unrelated to the applicant's underlying claim, such as the foreign country's unique restrictions on

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<sup>180</sup> INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 1208.16, 1208.17. The Departments note that 8 CFR 208.16(b)(3), 1208.16(b)(3) were amended by the by Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (December 11, 2020), which was preliminarily enjoined and its effectiveness stayed before it became effective. *See Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966, 969–70 (N.D. Cal. 2021) (“*Pangea IP*”) (preliminarily enjoining the rule). Similarly, 8 CFR 208.16(e), 1208.16(e) were removed by the Criminal Asylum Bars Rule, Procedures for Asylum and Bars to Asylum Eligibility, 85 FR 67202 (Oct. 21, 2020), which was also preliminarily enjoined. *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 501 F. Supp. 3d 792, 827 (N.D. Cal. 2020). These orders remain in effect, and thus the 2020 version of these provisions—the version immediately preceding the enjoined amendments—are currently effective. The current version of 8 CFR 208.16 is effective with regard to all other provisions of that section.

asylum. Furthermore, such a proposal could discourage asylum seekers from applying for asylum in other countries, since a denial from other countries would result in the harsher consequence of also being ineligible for asylum in the United States.

Regarding the suggestion to suspend entry pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), the Departments note that suspension of entry requires a presidential proclamation, which is beyond the Departments' authorities. With this rule, which is fully consistent with domestic and international legal obligations, the Departments are exercising their authorities to address current and expected circumstances at the SWB, to avoid unduly negative consequences for noncitizens, to avoid unduly negative consequences for the U.S. immigration system, and to provide ways for individuals to seek protection in the United States and other countries in the region. 88 FR at 11730.

Separate from this rulemaking, DHS has been increasing and enhancing the use of expedited removal for those noncitizens who cannot be processed under the Title 42 public health Order.<sup>181</sup> The Departments have been dedicating additional resources, optimizing processes, and working with the Department of State and countries in the region to increase repatriations.<sup>182</sup> On April 27, 2023, DHS announced that the United States, in coordination with regional partners, has dramatically scaled up the number of removal flights per week, which will double or triple for some countries.<sup>183</sup> With this increase in removal flights, migrants who cross the U.S. border without authorization and who fail to qualify for protection should expect to be swiftly removed and subject to at least a five-year bar to returning to the United States.<sup>184</sup> Regarding the suggestion to expand the use of expedited removal, the Departments note that this rule works in conjunction with expedited removal, as the rebuttable presumption will be applied during credible fear interviews for noncitizens placed in expedited removal after claiming a fear.

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<sup>181</sup> DHS, Press Release, *DHS Continue to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), <https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and>.

<sup>182</sup> *See id.*

<sup>183</sup> *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

<sup>184</sup> *See id.*

To the extent that the commenter is suggesting that the Secretary should exercise his “sole and unreviewable discretion” to extend expedited removal proceedings to certain other categories of noncitizens who have not shown that they have been physically present in the United States for two years, that suggestion lies outside the scope of this rulemaking. *See* INA 235(b)(1)(A)(iii), 8 U.S.C. 1225(b)(1)(A)(iii).<sup>185</sup> Finally, the Departments note the process for taking noncitizens into custody for the execution of removal orders also is beyond the scope of this rule.

With respect to a commenter’s suggestion that the rule apply to the Northern border, the Departments do not currently assess that application of the rebuttable presumption to such entries is necessary at the U.S.-Canada land border. With limited exceptions, these noncitizens are ineligible to apply for asylum in the United States due to the safe-third-country agreement with Canada, *see* INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A); 8 CFR 208.30(e)(6), and the United States is implementing other measures to address irregular migration at that border, such as the Additional Protocol of 2022 to the STCA between the United States and Canada. The Additional Protocol expands the STCA to apply to migrants who claim asylum or other protection after crossing the U.S.-Canada border between POEs. Under the STCA, migrants who cross from Canada to the United States, with limited exceptions, cannot pursue an asylum or other protection claim in the United States and are instead returned to Canada to pursue their claim.<sup>186</sup>

With respect to a commenter’s suggestion that the rule apply to maritime borders, the Departments have determined it is appropriate to extend the application of the rebuttable presumption not only to the U.S.-Mexico southwest land border, but also to adjacent coastal borders. The term “adjacent coastal borders” refers to any coastal border at or near the U.S.-

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<sup>185</sup> Section 235 of the INA continues to refer to the Attorney General, but the Homeland Security Act of 2002 (HSA), Pub. L. 107-296, 116 Stat. 2135, transferred immigration enforcement authorities to the Secretary of Homeland Security and provided that any reference to the Attorney General in a provision of the INA describing functions that were transferred from the Attorney General or other Department of Justice officials to DHS by the HSA “shall be deemed to refer to the Secretary” of Homeland Security. 6 U.S.C. 557 (codifying HSA sec. 1517); *see also* 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

<sup>186</sup> *See* 8 CFR 208.30(e)(6); 8 CFR 1003.42(h); 88 FR 18227; Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 FR 69480 (Dec. 29, 2004).

Mexico border. This modification therefore means that the rule's rebuttable presumption of ineligibility for asylum applies to noncitizens who enter the United States at such a border after traveling from Mexico and who have circumvented the U.S.-Mexico land border. Moreover, the Departments are also considering and requesting comment on whether to apply the rebuttable presumption to noncitizens who enter the United States at a maritime border without documents sufficient for lawful admission during the same temporary time period, whether or not they traveled through a third country, *see* Section V of this preamble.

*Comment:* A commenter also suggested pursuing STCAs with transit countries as an alternative to the rule, stating that the proposed rule's reasoning on that point was insufficient. The commenter noted that the proposed rule stated that STCAs require long negotiations, but that the proposed rule itself is time-limited to noncitizens who enter within a two-year period. The commenter also stated that the proposed rule's claim that STCAs would provide lesser protection to noncitizens failed to account for the costs to states of allowing such noncitizens to have their claims adjudicated in the United States.

*Response:* The Departments agree that STCAs can be an important tool for managing the border. For example, on March 28, 2023, the Departments announced an update to the preexisting STCA between the United States and Canada. *See* 88 FR at 18227. That rule implemented a supplement to the U.S.-Canada STCA to extend its application to individuals who cross between the POEs along the U.S.-Canada shared border, including certain bodies of water as determined by the United States and Canada, and make an asylum or other protection claim relating to fear of persecution or torture within 14 days after such crossing. *Id.*

However, as noted in the NPRM, development of an STCA is a lengthy process. 88 FR at 11731. The recent supplement to the U.S.-Canada STCA aptly demonstrates this point; the negotiations that led to the supplement began in early 2021, over two years prior to its eventual publication. *Id.* at 18232. For this reason, the Departments find that the enactment of this rule is preferable to pursuing additional STCAs at this time because the Departments need a solution in

the immediate short-term to manage the significant increase in the number of migrants expected to travel without authorization to the United States after the termination of the Title 42 public health Order.

Regarding commenters' belief that an STCA could be preferable to this rule because a STCA would prevent affected noncitizens from having their claims adjudicated in the United States, the Departments reiterate that the goal of this rule is to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel, and they expect it to reduce the number of noncitizens seeking to cross the SWB without authorization.

*Comment:* A commenter suggested amending the rule to prioritize the cases of noncitizens who follow the lawful pathways outlined in the NPRM, rather than implementing the rebuttable presumption against those who do not. This commenter argued that doing so would encourage use of lawful pathways but not risk returning noncitizens to countries where they may be persecuted or tortured.

*Response:* The Departments agree that prioritizing the cases of those noncitizens who follow lawful, safe, and orderly pathways to entering the United States may result in some noncitizens with valid claims to asylum more quickly being granted asylum. However, noncitizens who do not follow such lawful, safe, and orderly pathways, including those noncitizens ultimately found ineligible for asylum or other protection, would continue to wait years for a decision on their claim for asylum or other protection. As previously noted in this preamble, the expectation that noncitizens will remain in the United States for a lengthy period during the adjudication of their claims for asylum or other protection may drive even more migration to the United States. Under this rule, such noncitizens, however, will remain in the United States for less time before a final order is entered in their case. Furthermore, prioritization alone will not address the need for quick processing of those who arrive at the SWB and the lack of resources to do so safely and efficiently. Moreover, the success of the

CHNV parole processes demonstrates that the United States can effectively discourage irregular migration by coupling incentives for use of lawful pathways with disincentives to cross the SWB irregularly.

*Comment:* One commenter recommended the United States advance dissuasive messaging, including announcements of legal action, against relatives, friends, and criminal organizations that may promote and finance migration to the United States. Another commenter recommended that an education and awareness campaign across the Western Hemisphere and a clearer definition of the “significant possibility” standard could prove a potent combination of policies to restore the integrity and manageability of the U.S. asylum system at the SWB, while also preserving the country’s long-standing commitment to humanitarian values.

*Response:* The Departments understand and agree with the need for robust messaging relating to the dangers of irregularly migrating to the United States SWB. Strengthening regional public messaging on migration is one of the eight lines of effort outlined in the CMMS.<sup>187</sup> In addition, the Departments regularly publicize law enforcement action and efforts against human trafficking, smuggling, and transnational criminal organizations that profit from irregular migration, often in conjunction with partners in the region.<sup>188</sup> The Departments intend to continue these efforts once the rule is in place.

The Departments acknowledge the commenter’s concern regarding the “significant possibility” standard but disagree that there is a need for clarifying regulations on the statutory standard at section 235(b)(1)(B)(v) of the INA, 8 U.S.C. 1225(b)(1)(B)(v). In the context of the condition established by this rule, however, the Departments have provided additional clarification regarding the “significant possibility” standard in Section IV.D.1.iii of this preamble.

#### *D. Legal Authority and Background*

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<sup>187</sup> The White House, *FACT SHEET: The Collaborative Migration Management Strategy* (July 29, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-the-collaborative-migration-management-strategy/>.

<sup>188</sup> See, e.g., L.A. Declaration Fact Sheet (“The United States will announce a multilateral ‘Sting Operation’ to disrupt human smuggling networks across the Hemisphere.”).

## 1. Immigration and Nationality Act

### i. Section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1)

*Comment:* Commenters claim that the proposed rule would violate both the Refugee Act and the INA. Specifically, commenters cited the Refugee Act, which they say both contains principles of non-refoulement and bars any distinction, including based on nationality, for noncitizens who are “physically present in the United States or at a land border or port of entry.” Refugee Act of 1980, 94 Stat. at 105. Additionally, commenters stated this proposed rule goes further by adding additional requirements that did not exist in the Refugee Act and do not exist in the INA. While some commenters acknowledge and agree that the proposed rule is within the scope of the Departments’ authority and is consistent with the INA, other commenters expressed concern that the proposed rule would be contrary to the plain language of section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1), which states, “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 or, where applicable, section 1225(b) of this title.” Commenters asserted that the INA does not require those seeking protection to apply before entering or at a POE or to schedule an appointment through a website or app in order to make an application, but instead allows applications from anywhere along the border. Some commenters described a fundamental right to apply for asylum for anyone inside the United States. Commenters asserted that entering the United States either through a POE or across the SWB and asking for asylum constitutes a “lawful pathway.” Another asserted that the proposed rule effectively creates a new legal framework by which to evaluate asylum claims in conflict with the statutory process provided by Congress, while another commenter stated that the proposed rule will cause confusion among asylum seekers. Commenters stated that the proposed rule would result in migrants who seek refuge at the SWB being turned away. At least one commenter asserted that



the proposed rule violates the Refugee Act because it violates the right to uniform treatment. Another commenter described the proposed rule as disparate treatment based on manner of entry, with particular concern for those who entered between POEs. Commenters stated that Congress clearly intended to allow noncitizens to apply for asylum regardless of manner of entry without requiring that a noncitizen first apply for asylum elsewhere while in transit. Commenters further asserted that analyzing an asylum application should focus on the applicant's reasonable fear of persecution rather than their manner of entry. Commenters similarly stated that the Departments should not and cannot categorically deny asylum for reasons unrelated to the merits of the claim itself. Commenters also asserted that, under *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987), manner of entry may not be the dispositive factor in deciding whether a noncitizen is eligible for asylum. Similarly, commenters argued that *Matter of Pula* is binding precedent and precludes consideration of manner of entry over all other factors.

*Response:* This rule is consistent with U.S. law. As a threshold response, the rule does not require the Departments to turn away migrants at the SWB or to categorically deny all asylum applications filed by migrants who enter the United States from Mexico at the southwest land border or adjacent coastal borders. Nor does the rule prohibit any noncitizen from seeking protection solely because of the manner or location of entry into the United States. Rather, the rule is a lawful condition on eligibility for asylum, as authorized by section 208(b)(2)(C), (d)(5)(B) of the INA, 8 U.S.C. 1158(b)(2)(C), (d)(5)(B).

In response to comments that the rule violates the non-refoulement provision of the Refugee Act, as stated elsewhere in this preamble, the United States has implemented its non-refoulement obligations through section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), and the regulations implementing CAT protections at 8 CFR 208.16(c), 208.17, 208.18, 1208.16(c), 1208.17, 1208.18, and the conditions provided by this rule are not a penalty in violation of international law.

Regarding comments that the Refugee Act and subsequent amendments to the INA provide access to applying for asylum for any noncitizen “physically present in” or arriving in the United States, “whether or not at a designated port of arrival” and regardless of status, the Departments respond that this rule is not inconsistent. INA 208(a)(1), 8 U.S.C. 1158(a)(1); *see* Refugee Act of 1980, 94 Stat. at 105 (providing that the Attorney General establish “a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien’s status, to apply for asylum”); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. 104–208, 110 Stat. 3009, 3009–690 (amending INA 208(a)(1), 8 U.S.C. 1158(a)(1), to permit any noncitizen “who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .)” to apply for asylum “irrespective of” the noncitizen’s immigration status). Critically, the rule does not prevent anyone from applying for asylum. IIRIRA separated and distinguished the ability to apply for asylum from the conditions for granting asylum. *Compare* INA 208(a)(1), 8 U.S.C. 1158(a)(1), *with* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *see also* INA 208(d)(5)(A), 8 U.S.C. 1158(d)(5)(A) (establishing procedures for consideration of asylum applications). Section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1) retains the ability for most noncitizens who are physically present in the United States to apply for asylum irrespective of whether they arrived in the United States at a POE, except that Congress created three categories of noncitizens who are barred from making an application. INA 208(a)(2)(A) through (C), 8 U.S.C. 1158(a)(2)(A) through (C).<sup>189</sup> Separately, Congress provided “[c]onditions for granting asylum,” which include six statutory exceptions to demonstrating eligibility for asylum as well as authority for the Departments to promulgate additional conditions and limitations on eligibility for asylum. INA 208(b)(2)(A)(i) through (vi), (C), 8 U.S.C. 1158(b)(2)(A)(i) through (vi),

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<sup>189</sup> *See* INA 208(a)(2)(A) through (C), 8 U.S.C. 1158(a)(2)(A) through (C) (enumerating: (A) noncitizens who may be removed to a safe third country pursuant to a bilateral or multilateral agreement; (B) noncitizens who did not file for asylum within one year after arriving in the United States unless they demonstrate the existence of extraordinary or materially changed circumstances; and (C) noncitizens who previously applied for asylum and had that application denied unless they demonstrate the existence of extraordinary or materially changed circumstances).

(C).<sup>190</sup> As some commenters noted, by creating exceptions to who is eligible to receive asylum and by authorizing the Departments to create new exceptions to eligibility, Congress saw nothing inconsistent in barring some individuals who may apply for asylum from receiving that relief.<sup>191</sup> *See R-S-C v. Sessions*, 869 F.3d 1176, 1187 (10th Cir. 2017).

Additionally, under this rule and contrary to commenter assertions, manner of entry, standing alone, is never dispositive. *Cf. E. Bay Sanctuary Covenant v. Biden* (“*East Bay III*”), 993 F.3d 640, 669–70 (9th Cir. 2021) (enjoining the Proclamation Bar IFR as “effectively a categorical ban on migrants who use a method of entry explicitly authorized by Congress in section 1158(a)”). Rather, the rule provides that a subset of noncitizens seeking asylum—i.e., those who travel through a specified third country, enter the United States during a two-year period after the effective date of the rule, and are not subject to one of four enumerated categories of excepted individuals, including those who use an identified lawful pathway to enter the United States—are subject to a rebuttable presumption of ineligibility. 8 CFR 208.33(a)(1) through (3), 1208.33(a)(1) through (3); 88 FR at 11707. This presumption is not categorical, but rather involves a case-by-case consideration of facts and factors. Indeed, as discussed in Sections IV.B.2.ii and IV.D.2 of this preamble, the narrower application and numerous exceptions and methods of rebutting the presumption demonstrate the differences between the prior, categorical bars that are now enjoined, and one of which is vacated. *See also* Sections IV.E.9 and IV.E.10 of this preamble (removing the TCT Bar Final Rule and the Proclamation Bar IFR from the CFR).

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<sup>190</sup> *See* INA 208(b)(2)(A)(i) through (vi), 8 U.S.C. 1158(b)(2)(A)(i) through (vi) (barring asylum for individuals who: participate in the persecution of others, have been convicted of a particularly serious crime, have committed a serious nonpolitical crime outside the United States, are regarded as a danger to the security of the United States, have engaged in certain terrorism-related activities, or were firmly resettled in another country prior to arriving in the United States).

<sup>191</sup> One important distinction between the exceptions enumerated in subsection 208(a)(2) of the INA, 8 U.S.C. 1158(a)(2), and those enumerated in 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A), is that noncitizens who may apply for asylum but may be ineligible due to a (b)(2)(A) bar on eligibility may seek work authorization while their application is being adjudicated. 8 CFR 208.7(a)(1). A noncitizen who is barred from applying, i.e., someone subject to a subsection (a)(2) bar, cannot obtain work authorization during this time. Because this rule does not create a bar on applying for asylum under section 208(a)(2) of the INA, 8 U.S.C. 1158(a)(2), there is no inconsistency with the provision of immediate work authorization to noncitizens who use one of the provided lawful parole processes to enter the United States and apply for asylum. 88 FR at 11707 n.26.

Furthermore, the rule is within the scope of the Departments' authority because it adds a condition on eligibility for asylum permitted under section 208(b)(2)(C), (d)(5)(B) of the INA, 8 U.S.C. 1158(b)(2)(C), (d)(5)(B), not a sweeping categorical bar that would preclude a grant of asylum solely based on manner of entry, which some courts have found to conflict with section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1). 88 FR at 11735, 11740. *Cf. East Bay III*, 993 F.3d at 669–70 (concluding that the Proclamation Bar was “effectively a categorical ban” on migrants based on their method of entering the United States, and that such a categorical bar is in conflict with section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1)). Section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), provides that the Attorney General and Secretary “may by regulation establish additional limitations and conditions, consistent with [section 208], under which an alien shall be ineligible for asylum.” Similarly, section 208(d)(5)(B) of the INA, 8 U.S.C. 1158(d)(5)(B), specifies that the Attorney General and Secretary “may provide by regulation for any other conditions or limitations on the consideration of an application for asylum,” so long as those conditions or limitations are “not inconsistent with this chapter.” *See* INA 208(d)(5), 8 U.S.C. 1158(d)(5) (establishing certain procedures for consideration of asylum applications). As the Tenth Circuit explained, “carving out a subset of” noncitizens seeking asylum and placing a condition or limitation on their asylum applications falls within the limitations allowed by section 208(b)(2)(C), (d)(5)(B) of the INA, 8 U.S.C. 1158(b)(2)(C), (d)(5)(B), and is not inconsistent with section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1). *R-S-C*, 869 F.3d at 1187 n.9. Precluding such a regulation would “render 1158(b)(2)(C) [and (d)(5)(B)] meaningless, disabling the Attorney General from adopting further limitations while the statute clearly empowers him to do so.” *Id.*

Consistent with this authority, the Departments have promulgated other limitations or conditions on asylum eligibility, including some provisions that Congress later adopted and codified in the INA. *See* Aliens and Nationality; Refugee and Asylum Procedures, 45 FR 37392, 37392 (June 2, 1980) (imposing firm resettlement bar); Aliens and Nationality; Asylum and

Withholding of Deportation Procedures, 55 FR 30674, 30678, 30683 (July 27, 1990) (promulgating 8 CFR 208.14(c) (1990), which provided for mandatory regulatory bars to asylum for those who have been convicted in the United States of a particularly serious crime and who constitute a danger to the security of the United States while retaining a prior regulatory bar to asylum for noncitizens who have been firmly resettled); Asylum Procedures, 65 FR 76121, 76127 (Dec. 6, 2000) (including internal relocation); *see also, e.g., Afriyie v. Holder*, 613 F.3d 924, 934–36 (9th Cir. 2010) (discussing internal relocation). Restraining the Departments’ authority to promulgate additional limitations and conditions on the ability to establish eligibility for asylum would be contrary to congressional intent. *See Thuraissigiam*, 140 S. Ct. at 1966 (recognizing that the “theme” of IIRIRA “was to protect the Executive’s discretion from undue interference by the courts”) (alteration and quotation marks omitted); *R-S-C*, 869 F.3d at 1187 (reasoning that the “delegation of authority” in section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), “means that Congress was prepared to accept administrative dilution” of section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1)); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 444–45 (1987); 88 FR at 11740.

Regarding comments that the condition created by the rule is inconsistent with the statute because it does not relate to whether a noncitizen qualifies as a refugee, the Departments respond that bars, limitations, and conditions on asylum do not necessarily and need not directly relate to whether a noncitizen satisfies the definition of a “refugee” within the meaning of section 101(a)(42)(A) of the INA, 8 U.S.C. 1101(a)(42)(A), but instead can embrace policy considerations that justify a finding of ineligibility. *See, e.g., Zheng v. Mukasey*, 509 F.3d 869, 871 (7th Cir. 2007) (noting that IIRIRA enacted several provisions, including the one-year bar, “intended to reduce delays and curb perceived abuses in removal proceedings”); *Ali v. Reno*, 237 F.3d 591, 594 (6th Cir. 2001) (recognizing that asylum law “was never intended to open the United States to refugees who had found shelter in another nation and had begun to build new lives”) (internal marks and quotation omitted); *Matter of Negusie*, 28 I&N Dec. 120, 125 (A.G.

2020) (discussing the history of the persecutor bar, and noting that Congress intended to make “certain forms of immigration relief,” including asylum, “unavailable to persecutors”).

This rule also does not, contrary to commenter concerns, violate the Refugee Act by establishing a non-uniform procedure for applying for asylum. The rule, consistent with the Refugee Act’s objective to provide systematic and comprehensive procedures, establishes procedures and conditions to support the lawful, orderly processing of asylum applications. 88 FR at 11704, 11728; *see* Refugee Act, sec. 101(b), 94 Stat. at 102 (“The objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.”). To be sure, the rule will not lead to the same result for each noncitizen: For example, the rebuttable presumption will not apply to noncitizens who enter the United States using a lawful pathway but will apply to noncitizens who enter the United States from Mexico at the southwest land border or adjacent coastal borders and do not establish an exception to the presumption or otherwise rebut the presumption. But the rule will apply in a uniform way to all asylum applications filed by noncitizens who are subject to its terms during the applicable time period.

The rule is likewise within the Departments’ broad authority, within existing statutory bounds, to establish procedures that are tailored to different situations. INA 208(d)(1), 8 U.S.C. 1158(d)(1) (requiring the Attorney General to “establish a procedure for the consideration of asylum applications”). Notably, asylum applicants navigate several procedurally different paths depending on their arrival in the United States and timing of their applications; some noncitizens file affirmative applications with USCIS after arriving in the United States, and others file defensive applications after being placed in expedited removal proceedings and found to have a credible fear of persecution. Others submit defensive applications while in section 240 removal proceedings. Contrary to commenter concerns, the lawful pathways to enter the United States

outlined in this rule do not eliminate any of these existing procedures or categorically bar any of these applications for asylum.

Furthermore, it is not inconsistent with the INA to provide a lawful pathway that relies on use of the CBP One app. The Departments note that it is not uncommon to implement policies that encourage the use of new technologies as they become available to create efficiencies in processing, including with respect to asylum applications, such as new forms, e-filing, the use of video teleconference hearings, and digital audio recording of hearings.<sup>192</sup> *See, e.g.*, Executive Office for Immigration Review Electronic Case Access and Filing System, 86 FR 70708 (Dec. 13, 2021) (implementing EOIR’s electronic case management system); Immigration Court Practice Manual, Chapter 4.7 (Apr. 10, 2022) (providing guidance for video teleconference hearings); *id.* at Chapter 4.10(a) (providing for electronic recording of hearings). In this rule, the Departments are implementing a rebuttable presumption of ineligibility that will encourage the use of lawful pathways, including use of the CBP One app, which the Departments expect will enable POEs to manage migratory flows in a safe and efficient manner. Importantly, those who present at a POE without a CBP One appointment and demonstrate that it was not possible to access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle will not be subject to the presumption. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). Further, using the app is not required in order to qualify for an exception from or to rebut the presumption, such as where a noncitizen applied for asylum or other protection in a third country and received a final decision denying that application or where the noncitizen shows exceptionally compelling circumstances. Thus, although the rule encourages increased use of the CBP One app, which is expected to facilitate more efficient and streamlined processing along the SWB, use of the app is not required.

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<sup>192</sup> In 1998, Congress passed the Government Paperwork Elimination Act, which requires federal agencies to provide the public with the ability to conduct business electronically, when practicable, with the Federal government. *See* Public Law 105–277, § 1701–10, 112 Stat. 2681, 2681–749 to –751 (1998). Similarly, in 2002, Congress passed the E-Government Act of 2002, which promotes electronic government services and requires agencies to use internet-based technology to increase the public’s access to government information and services. *See* Public Law 107–347, 116 Stat. 2899 (2002).

In response to commenters' assertions that crossing the SWB and applying for asylum is in itself a "lawful pathway," the Departments reiterate that this rule does not bar a noncitizen from entering the United States from Mexico at the southwest land border or adjacent coastal borders and subsequently seeking asylum. 88 FR at 11707. However, crossing the southwest land border or adjacent coastal borders without authorization is not one of the lawful pathways provided to encourage and increase safe, orderly transit to the United States. Thus, noncitizens who choose to cross the southwest land border or adjacent coastal borders without making an appointment to present at a POE during the period covered by this rule, and who do not otherwise qualify for an exception enumerated in 8 CFR 208.33(a)(2), 1208.33(a)(2), will have to address the rebuttable presumption as part of establishing eligibility for relief, but they will nevertheless be able to apply for asylum.

As to commenters' statements that the Departments' reliance on *Matter of Pula* is misplaced, the Departments respond that the rule is consistent with historical consideration of manner of entry as a relevant factor in considering an asylum application. In *Matter of Pula*, the BIA identified—as relevant factors as to whether a noncitizen warrants the favorable exercise of discretion in granting asylum—the noncitizen's "circumvention of orderly refugee procedures," including their "manner of entry or attempted entry"; whether they "passed through any other countries or arrived in the United States directly"; "whether orderly refugee procedures were in fact available to help" in any transit countries; and whether they "made any attempts to seek asylum before coming to the United States." *Matter of Pula*, 19 I&N Dec. at 473–74. The BIA explained that section 208(a) of the INA, 8 U.S.C. 1158(a), required the Attorney General to establish procedures for adjudicating applications filed by any noncitizen, "irrespective of such alien's status," but the BIA did not preclude consideration of the manner of entry in assessing whether to grant asylum. *Id.* at 472. The BIA also stated that while the manner of entry could "be a serious adverse factor, it should not be considered in such a way that the practical effect is to deny relief in virtually all cases." *Id.* at 473. The BIA cautioned against placing "too much



emphasis on the circumvention of orderly refugee procedures” because “the danger of persecution should generally outweigh all but the most egregious of adverse factors.” *Id.* at 473–74.

The Departments acknowledge that this rule places more weight on manner of entry than the Board did in *Matter of Pula*. 88 FR at 11736. But in line with *Matter of Pula*, the rule also considers factors other than manner of entry, including providing a categorical rebuttal ground for noncitizens who faced an imminent and extreme threat to life or safety at the time of entry. *Id.*; 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B). And like *Matter of Pula*, this rule provides for consideration of manner of entry in assessing eligibility for some asylum seekers, but this factor is not considered in “a way that the practical effect is to deny relief in virtually all cases.” 19 I&N Dec. at 473. Rather, the manner of entry is only impactful for individuals who do not enter the United States using a lawful pathway, do not establish an exception to the rebuttable presumption, and do not rebut the presumption. 88 FR at 11707, 11735–36.

The Departments also recognize that the specific analysis discussed in *Matter of Pula* (considering manner of entry in the discretionary decision of whether to grant asylum) is distinct from how the rule considers manner of entry (as part of provisions governing eligibility for asylum). *See Matter of Pula*, 19 I&N Dec. at 472. Nevertheless, *Matter of Pula* supports the proposition that it is lawful to consider, and in some cases rely on, manner of entry for asylum applicants. Moreover, adjudicators are not precluded from considering the same facts when evaluating both eligibility and discretion. Indeed, it is possible for a single fact to be relevant to both determinations but dispositive as to only one. *See Kankamalage v. INS*, 335 F.3d 858, 864 (9th Cir. 2003) (concluding that a conviction did not render a noncitizen ineligible for asylum, but stating that the Board was “not prohibited from taking into account Kankamalage’s robbery conviction when it decides whether or not to grant asylum as a matter of discretion”); *Matter of Jean*, 23 I&N Dec. 373, 385 (A.G. 2002) (concluding that even a noncitizen who “qualifies as a

‘refugee’” and whose criminal conviction did “not preclude her eligibility” for asylum could nevertheless be “manifestly unfit for a *discretionary* grant of relief”).

Moreover, the Departments, in exercising their broad discretion to issue regulations adopting additional limitations and conditions on asylum eligibility, are not bound to consider manner of entry only as a factor contributing to whether a particular noncitizen warrants a favorable exercise of discretion. The Departments similarly disagree with the commenter who stated that the Departments are seeking to “excuse themselves from complying with long-established Board precedent simply because the ‘regulatory regime’ in place today is different than the regime at the time the Board decided *Matter of Pula*.” This rule is not in conflict with *Matter of Pula*, which remains the applicable standard for discretionary determinations. And the rule takes *Matter of Pula* as providing support for the proposition that it is lawful to consider, and in some cases rely on, manner of entry for asylum applicants. 88 FR at 11735–36.

In sum, as with other conditions and limitations imposed by section 208(b)(2) of the INA, 8 U.S.C. 1158(b)(2), this rule is grounded in important policy objectives, including providing those with valid asylum claims an opportunity to have their claims heard in a timely fashion, preventing an increased flow of migrants arriving at the SWB that will overwhelm DHS’s ability to provide safe and orderly processing, and reducing the role of exploitative transnational criminal organizations and smugglers. 88 FR at 11704. In seeking to enhance the overall functioning of the immigration system and to improve processing of asylum applications, the Departments are, in the exercise of the authority to promulgate conditions and limitations on eligibility for asylum, placing greater weight on manner of entry to encourage migrants to seek protection in other countries in the region and to use lawful pathways and processes to enter the United States and access the U.S. asylum system.

## ii. Statutory Bars to Asylum

*Comment:* Commenters stated that the proposed rule would be inconsistent with the statutory firm-resettlement and safe-third-country bars. *See* INA 208(b)(2)(A)(vi), 8 U.S.C.

1158(b)(2)(A)(vi); INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). Commenters argued that Congress intended for these two bars to be the sole means by which a noncitizen may be denied asylum based on a relationship with a third country. Commenters disagreed with the proposed rule, asserting it would bar asylum for anyone who travels through what the United States deems a “safe third country.” Similarly, another commenter stated that the proposed rule would penalize migrants who do not live adjacent to a safe third country to which they could travel directly in order to seek protection.

*Response:* This rule is within the Departments’ broad authority to create new conditions on eligibility for asylum, and the Departments disagree that the rule conflicts with any of the exceptions to a noncitizen’s ability to apply for asylum or a noncitizen’s eligibility for asylum under sections 208(a)(2) or (b)(2) of the INA, 8 U.S.C. 1158(a)(2) or (b)(2). The INA’s safe-third-country provision prohibits a noncitizen from applying for asylum if the noncitizen “may be removed, pursuant to a bilateral or multilateral agreement” to a safe third country in which the noncitizen would not be subject to persecution and “would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.” INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). The firm-resettlement provision precludes a noncitizen who “was firmly resettled in another country prior to arriving in the United States” from demonstrating eligibility for asylum. INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi); *see also* 8 CFR 208.15 (2020), 1208.15 (2020).<sup>193</sup> The two provisions provide categorical bars to asylum for noncitizens who have available, sustained protection in another country, and help protect against forum shopping. *Sall v. Gonzales*, 437 F.3d 229, 233 (2d Cir. 2006) (per curiam) (noting that the policy behind the safe-third-country statutory bar includes the principle that “[t]he United States offers asylum to refugees not to provide them with a broader choice of safe

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<sup>193</sup> These provisions were amended by Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (December 11, 2020), which was preliminarily enjoined and its effectiveness stayed before it became effective. *See Pangea Legal Services v. U.S. Dep’t of Homeland Security (Pangea II)*, 512 F. Supp. 3d 966, 969–70 (N.D. Cal. 2021). This order remains in effect, and thus the 2020 version of these provisions—the version immediately preceding the enjoined amendment—is currently effective.

homelands, but rather, to protect those arrivals with nowhere else to turn.”); *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 55, 56 (1971) (noting that the concept of firm resettlement is historically rooted in the notion of providing “a haven for the world’s homeless people” while encouraging “other nations to do likewise.”); *see also Maharaj v. Gonzales*, 450 F.3d 961, 988–89 (9th Cir. 2006) (en banc) (O’Scannlain, J., concurring, in part) (recognizing that the firm-resettlement bar protects against forum shopping, an issue “that our immigration laws have long sought to avoid.”); *United States v. Malenge*, 294 F. App’x 642, 645 (2d Cir. 2008) (noting that a purpose of the safe-third-country agreement with Canada was to prevent forum shopping).

The Departments disagree with commenters because the INA permits the Attorney General and Secretary to create new eligibility conditions and does not limit this authority based on the content of the existing statutory conditions. *See Trump*, 138 S. Ct. at 2411–12 (recognizing that the INA “did not implicitly foreclose the Executive from imposing tighter restrictions” in “similar” areas); *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 979 (9th Cir. 2020) (“*East Bay I*”) (acknowledging that the INA does not limit the Departments’ “authority to the literal terms of the two safe-place statutory bars”); *R-S-C*, 869 F.3d at 1187 (noting that Congress’s delegation of authority in section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C) “means that Congress was prepared to accept administrative dilution” of the right to seek asylum). Indeed, section 208(b)(2)(C), (d)(5)(B) of the INA, 8 U.S.C. 1158(b)(2)(C), (d)(5)(B), provides no subject-matter limit, other than requiring any regulation be “consistent with” section 208 of the INA, 8 U.S.C. 1158. *See R-S-C*, 869 F.3d at 1187 n.9. The condition created by this rule is consistent with section 208 of the INA, 8 U.S.C. 1158, as a whole, and it is consistent with the safe-third-country and firm-resettlement bars in particular. 88 FR at 11736.

Critically, unlike the safe-third-country bar, the rule does not consider whether the noncitizen could now safely relocate to a third country, and unlike the firm-resettlement bar, this rule does not categorically preclude a noncitizen from demonstrating eligibility for asylum because they are no longer in flight from persecution. *Cf. Ali*, 237 F.3d at 594 (noting that the

firm-resettlement bar does not conflict with Congress’s intent in providing for asylum relief “[b]ecause firmly resettled aliens are by definition no longer subject to persecution”) (marks and citation omitted). Rather, as discussed in the NPRM, the rule encourages use of lawful pathways for migrants seeking to come to the United States, including noncitizens wishing to seek asylum in the United States. 88 FR at 11707. The rule is designed to improve processing of such asylum applications. *Id.* at 11704, 11706–07. Noncitizens will not be subject to the rebuttable presumption if they travel through a third country and seek entry into the United States through a lawful, safe, and orderly pathway. *Id.* at 11707; 8 CFR 208.33(a)(2)(ii), 1208.33(a)(2)(ii). They also will not be subject to the rebuttable presumption if they seek and are denied asylum or other protection in a third country. 88 FR at 11707; 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C). And unaccompanied children are excepted from the presumption. 8 CFR 208.33(a)(2)(i), 1208.33(a)(2)(i). Moreover, even if a noncitizen is subject to the presumption of ineligibility under 8 CFR 208.33(a)(1), 1208.33(a)(1), the noncitizen may rebut that presumption in any of several ways that account for protecting the safety of those fleeing imminent harm. 88 FR at 11707; 8 CFR 208.33(a)(3), 1208.33(a)(3). Accordingly, the rule encourages noncitizens seeking to enter the United States, including those seeking asylum who have transited through a third country before arriving in the United States, to enter through lawful, safe, and orderly pathways by imposing an additional condition on the asylum eligibility of individuals who did not avail themselves of such pathways. 88 FR at 11706–07. The rule does not preclude noncitizens who have transited through third countries without applying for protection in those countries from obtaining asylum in the United States. *Id.* at 11706–07. In addition, the rule expressly accounts for migrants who have been denied a safe haven elsewhere; if an applicant seeks asylum in a third country and is denied, the rebuttable presumption does not apply. 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C).

*Comment:* Commenters stated that the proposed rule would conflict with the firm-resettlement bar to asylum eligibility or render the firm-resettlement bar superfluous because it

would negate the need to determine whether the noncitizen has firmly resettled or whether any potential or obtained status in a third country would not be reasonably available or reasonably retained due to issues such as processing backlogs in the third country. Commenters were also concerned that the proposed rule would not account for the risk of harm that the noncitizen might face in the third country. Commenters stated that the proposed rule would ignore congressional intent that the noncitizen have a more significant relationship with the third country—i.e., be firmly resettled in that country rather than be merely transiting through the country—to be effectively rendered ineligible for asylum. Commenters asserted that requiring individuals to apply for protection in a third transit country would create a new hurdle for them because it could subject them to the firm-resettlement bar.

*Response:* As discussed above, the INA does not limit the Departments’ authority regarding eligibility conditions relating to a noncitizen’s conduct in third countries to the boundaries of the firm-resettlement statutory bar. *Trump*, 138 S. Ct. at 2411–12 (recognizing that the INA “did not implicitly foreclose the Executive from imposing tighter restrictions” in “similar” areas); *see also East Bay I*, 994 F.3d at 979 (noting that the INA does not limit the Departments’ “authority to the literal terms of the two safe-place statutory bars”). The Departments disagree that the rule conflicts with the firm-resettlement bar, which focuses on protecting against forum shopping when a migrant has already found a safe refuge. INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi); *Bonilla v. Mukasey*, 539 F.3d 72, 80 (1st Cir. 2008); *Ali*, 237 F.3d at 594. This rule focuses on encouraging migrants to use safe, orderly, and lawful pathways to enter the United States. 88 FR at 11707, 11736. Accordingly, the relevant facts and analysis for considering firm resettlement and the application of the rebuttable presumption are materially different.

Additionally, the rule does not overlook commenter concerns about the accessibility to or processing times of applications in third countries. Even if noncitizens determine that protection in a third country is inaccessible or would take more time than the noncitizens believe they can

wait, the rule provides other ways that the noncitizen can seek protection. Seeking protection in a third country and receiving a denial excepts a noncitizen from the presumption but is not a requirement—the noncitizen may still either enter using a lawful pathway, pre-schedule an appointment to present themselves at a POE, or show one of several other circumstances that allow an individual to be excepted from the rule’s rebuttable presumption. 8 CFR 208.33(a)(2), 1208.33(a)(2). The rule also explicitly protects family unity by providing that if one member of a family traveling together is excepted from the presumption of asylum ineligibility or has rebutted the presumption then the other members of the family are similarly treated as excepted from the presumption or having rebutted the presumption. 8 CFR 208.33(a)(2)(ii), (3), 1208.33(a)(2)(ii), (3); 88 FR at 11730. And if during removal proceedings a principal applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the presumption and has either an accompanying spouse or child who would not qualify for asylum or protection from removal or a spouse or child who would be eligible to follow to join them as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A), if the principal applicant were granted asylum, the applicant will be deemed to have established an exceptional circumstance that rebuts the presumption. 8 CFR 1208.33(c). Additionally, any principal asylum applicants who enter the United States during the two-year period of the rebuttable presumption while under the age of eighteen and apply for asylum after the two-year period are not subject to the presumption. 8 CFR 208.33(c)(2), 1208.33(d)(2). Furthermore, the rule does not affect a noncitizen’s ability to apply for statutory withholding of removal and CAT protection. 88 FR at 11730.

The rule also does not render the firm-resettlement bar superfluous; instead, this rule and the firm-resettlement bar apply independently. The operative firm-resettlement regulations provide that a noncitizen is barred from receiving asylum in the United States if they have received an offer of safe, established permanent resettlement that is not substantially and consciously restricted. 8 CFR 208.15, 1208.15 (2020). The firm-resettlement bar is divorced

from any inquiry into how or when a noncitizen enters the United States. INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi); 8 CFR 208.15, 1208.15 (2020). Put differently, the firm-resettlement bar applies with equal force to noncitizens who enter the United States using an identified lawful pathway and those who do not. *Abdalla v. INS*, 43 F.3d 1397, 1400 (10th Cir. 1994) (“The pertinent regulations specifically focus on resettlement status prior to the alien’s entry into this country . . . .”). Conversely, this rule does not turn exclusively on whether the noncitizen received an offer of permanent resettlement in a third country. 88 FR at 11723. Under the rule, a migrant’s time in a third country is primarily relevant in two circumstances: (1) when a noncitizen travels through a third country and does not enter the United States through established lawful pathways, or (2) if the noncitizen applied for protection in the third country and was denied. 8 CFR 208.33(a)(1)(iii), (2)(ii)(C), 1208.33(a)(1)(iii), (2)(ii)(C). In the first circumstance, the noncitizen is subject to the rule’s condition on asylum eligibility unless they can demonstrate an applicable exception or successfully rebut the presumption. 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). In the second circumstance, the noncitizen is categorically not subject to the rebuttable presumption of asylum ineligibility regardless of whether they entered the United States through established lawful pathways. 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C). But neither circumstance involves determining whether the noncitizen was firmly resettled, as defined in 8 CFR 208.15, 1208.15 (2020), before traveling to the United States.<sup>194</sup> Thus, the firm-resettlement bar and this rule are simply different conditions with different scopes.

In addition, the rule properly accounts for the risk of harm a noncitizen might face in the third country. As at least one commenter in favor of the rule noted, not all migrants who travel through third countries are actively fleeing persecution and some choose to come to the United States for other reasons. But should the noncitizen be fleeing harm, one of the enumerated

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<sup>194</sup> Indeed, the firm-resettlement bar, if applicable to a particular noncitizen, would not be applied by an AO in credible fear proceedings and would be applied only if the noncitizen’s application is considered by an IJ in section 240 removal proceedings or an AO during an asylum merits interview. 8 CFR 208.30(e)(5)(i).



grounds that will necessarily rebut the presumption of asylum ineligibility is that the noncitizen faced an imminent and extreme threat to life or safety at the time of entry into the United States. 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B); 88 FR at 11704, 11707, 11736. In response to the comment that requiring a noncitizen to seek protection in a transit country would add a hurdle to obtaining asylum in the United States insofar as that noncitizen may need to address the firm-resettlement bar, the Departments note that noncitizens subject to the firm-resettlement bar are not in need of protection in the United States. *See Ali*, 237 F.3d at 594 (recognizing that asylum law “was never intended to open the United States to refugees who had found shelter in another nation and had begun to build new lives” (quoting *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 56 (1971))); *East Bay I*, 994 F.3d at 977 (recognizing “the ‘core regulatory purpose of asylum,’ which is ‘to protect [refugees] with nowhere else to turn,’ because ‘by definition’ an applicant barred by a safe-place provision has somewhere else to turn” (quoting *Matter of B-R-*, 26 I&N Dec. 119, 122 (BIA 2013), overruled on other grounds by *Zepeda-Lopez v. Garland*, 38 F.4th 315, 326 (2d Cir. 2022))); Constitution of the International Refugee Organization, ch. V, sec. (D)(c), Dec. 15, 1946, 18 U.N.T.S. 20 (determining that a refugee or displaced person “will cease to be the concern of the Organization . . . when they have . . . become otherwise firmly established”). Likewise, the rule does not deny asylum to a noncitizen who obtained asylum in a third country (and therefore presumably has a cognizable claim to refugee status) but thereafter comes to the United States and seeks asylum. That person may seek to enter through a lawful pathway and file an asylum application like any other migrant, at which point they would likely need to address the firm-resettlement bar. Should they enter the United States from Mexico at the southwest land border or adjacent coastal borders without authorization or at a POE without an appointment and not otherwise be covered by an exception, they, like any other noncitizen in that situation, will be able to address the rebuttable presumption.

Finally, the Departments disagree that the rule ignores congressional intent underlying the firm-resettlement bar. As explained above, this rule has the policy objective of encouraging

the use of safe, orderly, and lawful pathways by noncitizens, including those seeking asylum, to enter the United States to present their claims, 88 FR at 11704, 11707, and is distinct from the firm-resettlement bar, which is grounded in the policy objective of protecting against forum shopping by migrants who have already found a safe refuge, *East Bay I*, 994 F.3d at 977; *Bonilla*, 539 F.3d at 80; *Ali*, 237 F.3d at 595.

*Comment:* Commenters stated that the proposed rule would be inconsistent with or would circumvent the safe-third-country bar to applying for asylum because the safe-third-country bar was intended to ensure that any third country was safe and had a fair procedure for asylum or temporary protection before requiring that a noncitizen avail themselves of protection in that country. Commenters asserted that the proposed rule essentially or implicitly declares Mexico, Guatemala, or other transit countries to be safe third countries without obtaining the requisite bilateral or multilateral agreements. Commenters also claimed that this proposed rule, which would apply regardless of whether the United States has an agreement with the transit country, would not adequately consider or require an individualized determination as to whether a third country is “safe” for asylum seekers or has an adequate system for granting protection against persecution and torture. Instead, commenters explained that this proposed rule relies on a third country being a party to specified international accords, which commenters stated are not sufficient to ensure the noncitizen’s safety and, therefore, would result in refugees being returned to the countries where they will be persecuted—in conflict with the non-refoulement principles of the Refugee Act. One commenter specified that the asylum structures in Mexico, El Salvador, Honduras, and Guatemala do not meet the international standard for refugee protection and thus cannot constitute a safe third country.

*Response:* As a threshold matter, the Departments distinguish the categorical safe-third-country bar found in section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), from this rule because this rule, unlike the safe-third-country bar, is neither a categorical bar on the ability to apply for asylum nor does it hinge exclusively on the availability of protection in a third country.

88 FR at 11723, 11736. While the Departments believe that protection is available for many noncitizens in third countries through which they transit before arriving in the United States from Mexico at the southwest land borders or adjacent coastal borders, the Departments have carefully refrained from making asylum eligibility in the United States turn exclusively on whether the noncitizen could have sought protection in any third country. Nor does this rule act as or constitute a third-country agreement for purposes of section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A). 88 FR at 11732. Critically, the purpose behind this rule is to encourage noncitizens to take advantage of existing and expanded safe, orderly, and lawful pathways for noncitizens to enter the United States to present asylum claims. 88 FR at 11704, 11719. And the rule does not, contrary to commenters' suggestions, require a noncitizen to return to or go to a third country without evaluating the safety of that country simply because of their method of entering the United States. *Cf. East Bay I*, 994 F.3d at 977. Rather, the rule is more limited. The rule provides that noncitizens who have traveled through a third country and enter the United States through a provided lawful pathway may seek asylum through an orderly and directed process. 88 FR at 11707, 11723; *see* 8 CFR 208.33(a)(2)(ii), 1208.33(a)(2)(ii). Noncitizens who travel through a third country that is a party to the Refugee Convention or Protocol and do not enter the United States through a provided lawful pathway, and who do not first seek (and are denied) protection in that third country, may still present a claim for relief and protection based on fear of persecution—but, in order to be eligible for asylum, they must first establish an exception to or rebut a presumption of ineligibility for asylum. 88 FR at 11707, 11723; *see* 8 CFR 208.33(a)(3), 1208.33(a)(3). And even if the noncitizen is subject to the presumption of ineligibility for asylum, the noncitizen may still seek and be eligible for statutory withholding of removal or CAT protection. 88 FR at 11737; *see* 8 CFR 208.33(b)(2)(i) and (ii), 1208.33(b)(2)(i) and (ii). Simply put, the rule imposes a condition on asylum (and only asylum) eligibility relating to whether the noncitizen availed themselves of a lawful pathway, but the rule

does not direct an inquiry as to whether the noncitizen can or should return to a third country. 88 FR at 11737–38.

### iii. Expedited Removal

*Comment:* Some commenters stated that the proposed rule creates a higher standard of proof (preponderance of the evidence) for rebutting the presumption against asylum, as compared to the “significant possibility” standard for establishing a credible fear. Commenters expressed a belief that the rule requires noncitizens “to actually establish, at their credible fear interview, that they *are* eligible for asylum” (emphasis in original), not simply that they have a significant possibility of demonstrating eligibility. These commenters expressed concern that the rule could be read to require AOs to make a finding that a noncitizen is ineligible for asylum without assessing the presumption under the “significant possibility” standard. These commenters further argued that the touchstone of the “significant possibility” standard was whether a noncitizen “*could* show, after a full hearing with factual development,” that the presumption does not apply.

*Response:* The “significant possibility” standard is required by statute, and the rule does not impose a different standard during the credible fear process.<sup>195</sup> The INA mandates that, when determining whether a noncitizen has a “credible fear,” the AO must determine whether there is a “significant possibility . . . that the alien could establish eligibility for asylum.” INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). When it comes to the rebuttable presumption, the

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<sup>195</sup> Previous limitations on asylum eligibility have used similar regulatory language that does not explicitly include the phrase “significant possibility” while also stating in the rules’ preambles that the “significant possibility” standard applied to those limitations. *See, e.g.*, Security Bars and Processing, 85 FR 84160, 84175 (Dec. 23, 2020) (“Security Bars Rule”) (explaining that “[t]he rule does not, and could not, alter the standard for demonstrating a credible fear of persecution, which is set by statute”); Asylum Eligibility and Procedural Modifications, 84 FR 33829, 33837 (July 16, 2019) (“TCT Bar IFR”) (providing that “[t]he asylum officer will ask threshold questions to elicit whether an alien is ineligible for a grant of asylum pursuant to the third-country-transit bar. If there is a significant possibility that the alien is not subject to the eligibility bar (and the alien otherwise demonstrates that there is a significant possibility that he or she can establish eligibility for asylum), then the alien will have established a credible fear.”); Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934, 55943 (Nov. 9, 2018) (“Proclamation Bar”) (providing that “[t]he asylum officer will ask threshold questions to elicit whether an alien is ineligible for a grant of asylum pursuant to a proclamation entry bar. If there is a significant possibility that the alien is not subject to the eligibility bar (and the alien otherwise demonstrates sufficient facts pertaining to asylum eligibility), then the alien will have established a credible fear.”).

AO will determine whether there is a significant possibility that the noncitizen would be able to show at a full hearing by a preponderance of the evidence that the presumption does not apply or that they meet an exception to or can rebut the presumption. 8 CFR 208.33(a)(2), (3)(i), 1208.33(a)(2), (3)(i). In other words, the “significant possibility” standard is the overall assessment applied at the credible fear stage, but that standard must be applied in conjunction with the standard of proof required for the ultimate merits determination. Although the “significant possibility” standard applies when determining the presumption’s applicability and whether it has been rebutted, the Departments expect that noncitizens rarely would be found exempt from or to have rebutted the presumption for credible fear purposes and subsequently be found not to be exempt from or to have rebutted the presumption at the merits stage. The “significant possibility” standard asks a predictive question: whether there is a “significant possibility” that the noncitizen “could establish” asylum eligibility at a merits hearing. INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). And given the nature of the inquiry under this rule’s presumption, the Departments expect that AOs or IJs will almost always be able to determine based on the evidence before them at the credible fear stage whether a noncitizen would be unable to establish asylum eligibility at the merits stage.

First, the evidence necessary to determine whether a person is excepted from or can rebut the presumption should generally be available to the AO at the time of the credible fear interview, whether from the noncitizen or otherwise. Unlike some of the more complex factual inquiries required for other elements of asylum eligibility, such as nexus or particular social group, which often require evidence about country conditions or other evidence, and often regard events that did not happen recently, AOs will—except in exceptional circumstances—be able to assess eligibility for such exceptions or rebuttal circumstances at the credible fear interview through consideration of the noncitizen’s credible testimony and available evidence, including government records relating to their circumstances at the time of their entry into the United States.

For instance, a noncitizen should not generally need testimony from a witness in their home country or evidence of country conditions to show that they faced an acute medical emergency at the time of entry or that it was not possible to access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. *See* 8 CFR 208.33(a)(2)(ii)(B), (3)(i)(A), 1208.33(a)(2)(ii)(B), (3)(i)(A). In some cases, the absence of documentation and DHS records—such as a record that a noncitizen was provided appropriate authorization to travel to the United States to seek parole—may make it unlikely that the noncitizen could make the requisite showing at a full merits hearing. In other situations, the noncitizen’s credible testimony may be sufficient to prove the noncitizen’s claims, although AOs also may consider any evidence noncitizens have with them at the time they entered the United States from Mexico at the southwest land border or adjacent coastal borders, and evidence regarding the State in which they were encountered at or near the border. Thus, AOs should have all the necessary evidence before them during the credible fear interview to determine whether a noncitizen will be exempt from or able to rebut the presumption, and additional evidence is not likely to change whether an exception to or rebuttal of the presumption applies.

Second, as with factual determinations, the legal analysis for determining whether a person is exempt from or can rebut the presumption is straightforward because most of the enumerated grounds for those determinations are narrow and clearly defined. There is little gray area in determining whether a noncitizen transited through a third country, and the rule provides clear examples of the types of threats that constitute an imminent and extreme threat to life or safety—that is, an imminent threat of rape, kidnapping, torture, or murder. *See* 8 CFR 208.33(a)(1)(iii), (3)(i)(B), 1208.33(a)(1)(iii), (3)(i)(B). As a result, the question of whether a noncitizen has a “significant possibility” of meeting these standards should not require much legal analysis after the AO has considered the evidence before them. That again differs from other questions that may arise during a credible fear inquiry—such as whether the noncitizen is a member of a cognizable particular social group—which can be quite complex; AOs or IJs may

reasonably defer such difficult questions by finding credible fear. *See* 8 CFR 208.30(e)(4) (“In determining whether the alien has a credible fear of persecution . . . or a credible fear of torture, the asylum officer shall consider whether the alien’s case presents novel or unique issues that merit a positive credible fear finding . . . in order to receive further consideration of the application for asylum and withholding of removal.”). Hence, in this unique context, applying the “significant possibility” standard will almost always lead to a similar conclusion as applying the ultimate eligibility standard.

However, the Departments acknowledge that in some rare cases the outcome from applying the “significant possibility” standard may differ from application of the ultimate merits standard, such that a noncitizen who is found to have met the “significant possibility” standard may ultimately be found after a merits hearing to be subject to the presumption of ineligibility. It is the Departments’ expectation that such cases will be rare, and that applying the “significant possibility” standard will not differ meaningfully from application of the ultimate merits standard in this context.

*Comment:* Commenters stated that Congress intended to set a low screening standard for the credible fear process and alleged that the proposed rule raised the screening standard for statutory withholding of removal and CAT protection during this process without providing a justification for doing so. Commenters argued that Congress intended the plain language of the statute, which uses a “significant possibility” standard for asylum, to also apply to related fear claims, such as statutory withholding of removal and CAT protection.

*Response:* As a preliminary matter, this rule does not change the screening standard for asylum claims. Instead, it imposes an additional condition on asylum eligibility: a rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel. 88 FR at 11750; INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). AOs will continue to apply the statutory “significant possibility” standard to

determine credible fear. *Id.* In considering whether a noncitizen can establish a significant possibility of eligibility for asylum, the AO will be required to consider whether the noncitizen has shown a significant possibility that they could establish that the presumption does not apply or that they meet an exception to or can rebut the presumption. 88 FR at 11750. Only after determining that a noncitizen could not demonstrate a “significant possibility” of eligibility for asylum would the AO apply the long-established “reasonable possibility” standard to assess whether further proceedings on a possible statutory withholding or CAT protection claim are warranted. *Id.* at 11746, 11750.

In contrast to the establishment of a statutory “significant possibility” standard to screen for asylum, Congress did not specify a statutory standard for screening statutory withholding of removal or CAT protection claims in expedited removal proceedings. *See* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v) (referencing only “asylum”). Since 1999, AOs have applied the “reasonable possibility” standard to statutory withholding of removal and CAT protection claims in streamlined proceedings for reinstatement and administrative removal where noncitizens are statutorily ineligible for asylum. *See* 8 CFR 208.31, 1208.31 (2020)<sup>196</sup> (implementing the reasonable fear process for noncitizens subject to administrative removal orders); 8 CFR 241.8(e) (implementing the reasonable fear process for noncitizens subject to reinstatement of a prior order of removal). While the “reasonable possibility” standard is lower than the “clear probability” standard required to demonstrate eligibility for statutory withholding or CAT protection, it is a more demanding standard than the “significant possibility” standard used in credible fear proceedings to screen for asylum. Regulations Concerning the Convention Against Torture, 64 FR 8474, 8485 (Feb. 19, 1999). At the time the CAT regulations were implemented, the goal of the reasonable fear process was to ensure that the United States complied with its

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<sup>196</sup> These provisions were amended by the Global Asylum Rule, which was preliminarily enjoined and its effectiveness stayed before it became effective. *See Pangea II*, 512 F. Supp. 3d at 969–70. This order remains in effect, and thus the 2020 version of these provisions—the version immediately preceding the enjoined amendments is currently effective.



non-refoulement obligations under the CAT “without unduly disrupting the streamlined removal processes applicable.” *Id.* at 8479. The justification for using the reasonable possibility standard was also explained at the time the reasonable fear proceedings were created: “[b]ecause the standard for showing entitlement to these forms of protection (a probability of persecution or torture) is significantly higher than the standard for asylum (a well-founded fear of persecution), the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher.” *Id.* at 8485.

For the purpose of this rule, the Departments have judged that, in those cases where an applicant cannot establish a significant possibility of eligibility for asylum due to the lawful pathways condition, the use of the “reasonable possibility” standard to assess statutory withholding of removal and CAT claims better reflects the goals of the rule as a whole. As explained in the NPRM, while this is a different judgment than what was made by the Asylum Processing IFR, the application of the heightened standard is in line with the goal of identifying non-meritorious claims at the screening stage, allowing the heavily burdened immigration courts to focus on those claims most likely to warrant protection. 88 FR at 11742. The Departments believe that applying the “reasonable possibility” standard, which is tailored to statutory withholding of removal and CAT claims, “better predicts the likelihood of succeeding” on an application for statutory withholding of removal or CAT protection because it appropriately accounts for the higher burden of proof. 88 FR at 11746–47. The use of the standard specific to statutory withholding and CAT claims, since its inception, has allowed the United States to meet its obligations under international law while simultaneously balancing the need to expeditiously identify non-meritorious claims. Moreover, as stated in the NPRM, the Departments seek to protect those who have viable claims while also considering the “downstream effects” on immigration courts. 88 FR at 11746. The application of standards tailored to the type of relief for which the noncitizen is eligible is designed to accomplish that goal.

## 2. TCT Bar and Proclamation Bar Litigation

*Comment:* Several commenters argued that the proposed rule is no different than the TCT Bar Final Rule and the Proclamation Bar IFR. Many commenters submitted only a general reference to precedent issued in litigation regarding the Proclamation Bar IFR and the TCT Bar rules, without any discussion or consideration of the distinctions provided in the proposed rule. Some asserted that the proposed rule conflicts with or violates the injunctions issued regarding those rules, or that the existing injunction should apply to the proposed rule. Commenters also asserted that the proposed rule is similar to the TCT Bar rules and Proclamation Bar IFR and will cause confusion. An organization expressed concern that members of a certified class for purposes of injunctive relief, *see Al Otro Lado, Inc. v. McAleenan*, No. 17-CV-02366-BAS-KSC, 2022 WL 3142610 (S.D. Cal. Aug. 5, 2022), would be subject to the rebuttable presumption. The commenter stated that application of the rebuttable presumption to such class members would likely violate the injunction in that case because that injunction requires that the Departments apply “pre-Asylum Ban practices for processing the asylum applications” of class members. *See id.*

*Response:* The Departments reiterate that this rule is materially different from the TCT Bar IFR and Final Rule and Proclamation Bar IFR. 88 FR at 11738–39; *see also* Section IV.B.2.ii of this preamble. And contrary to commenter concerns, there is no risk of confusion because neither the TCT Bar nor the Proclamation Bar is in effect. *Capital Area Immigrants’ Rights Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020) (vacating the TCT Bar IFR); *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020) (enjoining the TCT Bar IFR); *E. Bay Sanctuary Covenant v. Barr* (“*East Bay II*”), 519 F. Supp. 3d 663, 668 (N.D. Cal. 2021) (enjoining the TCT Bar Final Rule); *East Bay III*, 993 F.3d at 681; *see O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019) (recounting the history of the litigation over the Proclamation Bar IFR and vacating it).<sup>197</sup> As discussed later in Sections IV.E.9 and IV.E.10 of this preamble,

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<sup>197</sup> The district court in *O.A.* vacated the Proclamation Bar IFR for similar substantive reasons to those articulated in *East Bay III*. *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019). *O.A. v. Trump* is subject to a pending appeal that

removal of provisions implementing the TCT Bar Final Rule and the Proclamation Bar IFR is warranted. But even separate from the removal of provisions implementing those rules, the Departments respond that the litigation surrounding those rules does not mean that this distinct rule is invalid, unenforceable, or arbitrary and capricious.

The Departments also disagree with the generalized comparisons between this rule and the Proclamation Bar IFR and the TCT Bar rules. 88 FR at 11736. As stated in the NPRM, this rule is substantively distinct from the eligibility bars in those rules. The TCT Bar rules focused exclusively on the noncitizen's travel prior to entering the United States, *see* 85 FR at 82261–62, and the Proclamation Bar IFR imposed a strict eligibility bar for anyone entering outside a POE, *see* 83 FR at 55935. In comparison, this rule is not a categorical bar on asylum eligibility, but instead is a rebuttable presumption, including several exceptions that are adjudicated on a case-by-case basis, for certain noncitizens who enter the United States without availing themselves of any of numerous lawful pathways during a temporary period of time. 88 FR at 11707, 11739–40; 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). Notably, and contrary to claims by some commenters, the rule does not block access to asylum for those who need it most. *Cf. East Bay I*, 994 F.3d at 980. The rule contains exceptions to and ways to rebut the presumption, including several ways to avoid the presumption that account for protecting the safety of those fleeing imminent harm. In addition, the rule is intended to better manage already-strained resources, thereby protecting against overcrowding in border facilities and helping to ensure that the processing of migrants seeking protection in the United States is done in an effective, humane, and efficient manner. 88 FR at 11704, 11713–16, 11730. In that vein, as discussed in Sections IV.E.9 and IV.E.10 of this rule, the TCT Bar IFR and Final Rule and Proclamation Bar IFR pursued approaches and policies that differ in important respects from this rule. *Compare* TCT

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is presently held in abeyance. *O.A. v. Biden*, No. 19-5272 (D.C. Cir. Oct. 11, 2019). Similarly, in *Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-2366, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022), a different district court issued an injunction relating to application of the TCT Bar rules that the Departments disagree with and have appealed. *Al Otro Lado, Inc. v. Mayorkas*, Nos. 22-55988, 22-56036 (9th Cir. Nov. 7, 2022).

Bar IFR, 84 FR at 33831, *and* Proclamation Bar IFR, 83 FR at 55935, *with* 88 FR at 11706–07. Moreover, this rule is designed to address a specific exigency that did not exist when the TCT Bar rules and Proclamation Bar IFR were promulgated. 88 FR at 11705–06.

Second, this rule is not in conflict with or precluded by existing injunctions and court precedent relating to litigation surrounding those rules. *See United States v. Cardales-Luna*, 632 F.3d 731, 735 (1st Cir. 2011) (recognizing that “a decision dependent upon its underlying facts is not necessarily controlling precedent as to a subsequent analysis of the same question on different facts and a different record”) (marks and citation omitted); *Overseas Shipholding Group, Inc. v. Skinner*, 767 F. Supp. 287, 296 (D.D.C. 1991) (noting that neither the law of the case nor stare decisis doctrines applied in “an entirely separate rulemaking process”); *cf. Associated Builders and Contractors, Inc. v. Brock*, 862 F.2d 63, 67 (3d Cir. 1988) (considering the adequacy of notice of proposed rulemaking and concluding that an argument was foreclosed because a prior panel “applied the law” to facts that had “not changed”). Procedurally, the injunctions issued against the TCT Bar rules and Proclamation Bar IFR were limited to the specific facts and specific rules at issue in those cases and do not bar the issuance of this materially distinct rule. *See E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019) (enjoining the Departments “from taking any action continuing to implement” the TCT Bar IFR), *affirmed by East Bay I*, 994 F.3d at 988; *East Bay II*, 519 F. Supp. 3d at 668 (enjoining the Departments “from taking any action continuing to implement the [TCT Bar] Final Rule”); *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 868 (N.D. Cal. 2018), *affirmed by East Bay III*, 993 F.3d at 680–81; *see also California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (noting that remedies “do not simply operate on legal rules in the abstract”) (quotation marks and citation omitted). Substantively, the opinions in those cases were limited to categorical eligibility bars premised on manner of entry or whether a noncitizen first sought asylum in another country, and this rule creates no such categorical bar. The more nuanced approach in this rule will have different effects and is premised on different factual

circumstances and new reasoning, including an increased focus on available lawful pathways.

88 FR at 11739.

Regarding the application of the proposed rule to *Al Otro Lado* injunction class members, as noted in the NPRM, the Departments do not view the permanent injunction in the *Al Otro Lado* litigation—see *Al Otro Lado, Inc. v. Mayorkas*, No. 17-CV-02366-BAS-KSC, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022)—which they have appealed to the Ninth Circuit,<sup>198</sup> as limiting the Departments’ discretionary authority to apply new asylum limitations conditions consistent with section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), to the injunction class. See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 281–82 (1977) (“The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the [alleged wrongful conduct] itself.”); *Meinhold v. U.S. Dep’t of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994); see also, e.g., *Thomas v. Cty. of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1992) (reversing injunction that “fail[ed] to specify the act or acts sought to be restrained as required by” Federal Rule of Civil Procedure 65(d)).<sup>199</sup> In any event, certain injunction class members whose cases are reopened or reconsidered under the *Al Otro Lado* injunction because they were removed following application of the TCT Bar may follow a DHS-established process to request “appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process,” as outlined in 8 CFR 208.33(a)(2)(ii)(A), 1208.33(a)(2)(ii)(A), to participate in renewed removal proceedings. Injunction class members who follow those procedures would thus not be subject to the rebuttable presumption.

*Comment:* Many commenters noted that the courts, in addressing the TCT Bar rules and the Proclamation Bar IFR, held that the Departments could not promulgate a regulation that

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<sup>198</sup> See *Al Otro Lado, Inc. v. Mayorkas*, Nos. 22-55988, 22-56036 (9th Cir. Oct. 25, 2022)

<sup>199</sup> Further, the commenter’s position that the *Al Otro Lado* injunction applies to this rule is inconsistent with *Al Otro Lado* Class Counsel’s website: “[T]he Biden Administration proposed a similar rule in February 2023, but the *Al Otro Lado v. Mayorkas* court order does not cover the new rule. The court order only applies to the rule implemented on July 16, 2019.” See American Immigration Council, *Your Rights Under Al Otro Lado v. Mayorkas*, <https://www.americanimmigrationcouncil.org/al-otro-lado-mayorkas> (last visited Apr. 21, 2023).

restricts access to asylum based on manner or location of entry into the United States or transit through a third country. Commenters similarly asserted, citing the Ninth Circuit’s decision in *East Bay III*, that the proposed rule is not “consistent with” section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1), and also violates international law.

*Response:* The holdings relating to the TCT Bar rules and the Proclamation Bar IFR do not undermine this rule. As discussed in Section IV.D.1.ii of this preamble, this rule does not conflict with the INA’s safe-third-country and firm-resettlement bars. 88 FR at 11736; *see R-S-C*, 869 F.3d at 1187 n.9. While the applicability of the rebuttable presumption of ineligibility turns in part on transit through a third country, 8 CFR 208.33(a)(1)(iii), 1208(a)(1)(iii), the ultimate eligibility decision requires case-by-case evaluation of whether an exception applies and whether the noncitizen rebutted the presumption. 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3); *cf. East Bay I*, 994 F.3d at 982–83 (indicating that the Departments cannot rely “solely” on a noncitizen’s decision not to seek asylum in a third country in denying their asylum application in the United States).

Regarding the Proclamation Bar, *East Bay III* enjoined a categorical entry bar as inconsistent with the statutory provision allowing “migrants arriving anywhere along the United States’s border” to apply for asylum. 993 F.3d at 669. Unlike the Proclamation Bar IFR, this rule involves a rebuttable presumption that includes consideration of numerous factors unrelated to the manner of entry, including transit through a third country. 88 FR at 11707; 8 CFR 208.33(a)(1)(iii), (2) and (3), 1208.33(a)(1)(iii), (2) and (3). And, as discussed in Section IV.D.1.i of this preamble, the rule is consistent with INA section 208, 8 U.S.C. 1158. *See* 88 FR at 11707, 11740; 8 CFR 208.33(a)(2), 1208.33(a)(2) (providing for exceptions to applicability of the rebuttable presumption); 8 CFR 208.33(a)(3), 1208.33(a)(3) (providing ways to rebut the presumption of ineligibility). The provided lawful pathways, third country transit components, exceptions to the presumption, and the fact-intensive, case-by-case analysis for rebutting the presumption demonstrate that the condition imposed by this rule is distinct from the “categorical

ban” enjoined in *East Bay III*, 993 F.3d at 669–70. Notwithstanding this distinction, the Departments reiterate that they disagree with the holding in *East Bay III* that the Proclamation Bar IFR was inconsistent with section 208(a) of the INA, 8 U.S.C. 1158(a). 88 FR at 11739; *see E. Bay III*, 993 F.3d at 670; *see also* Section IV.D.1.i of this preamble.

The rule also does not violate the United States’ obligations under international treaties. As discussed in Section IV.D.3 of this preamble, the rule is not a penalty based on manner of entry and does not violate treaty commitments regarding non-refoulement. The Departments also disagree with the decision in *East Bay III* on this point as applied to the Proclamation Bar IFR. 88 FR at 11739; *see East Bay III*, 993 F.3d at 672–75. In any event, *East Bay III* does not render this rule unlawful. In *East Bay III*, the Ninth Circuit determined that the Proclamation Bar IFR “ensure[d] neither” “the safety of those already in in the United States” nor “the safety of refugees,” which were the purposes behind the asylum bars in the INA and in the Refugee Convention. 993 F.3d at 673. Conversely, as explained in the NPRM, a purpose of this rule is to reduce reliance on dangerous routes to enter the United States used by criminal organizations and smugglers, thus protecting the safety of refugees. 88 FR at 11707. Furthermore, one of the enumerated categories for rebutting the presumption in the rule is demonstrating that the noncitizen faced an imminent and extreme threat to life or safety at the time of entry into the United States. 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B). The Ninth Circuit’s concerns are therefore not present in this rule.

*Comment:* Relying on cases enjoining the TCT Bar rules and the Proclamation Bar IFR, commenters asserted that the proposed rule is invalid because the condition in the proposed rule is unrelated to the merits of the asylum claim.

*Response:* The Departments disagree that the cases involving the TCT Bar rules demonstrate that this rule is invalid. As discussed in Section IV.D.1.i of this preamble, the INA provides the Departments with the authority to impose limitations or conditions on asylum eligibility. INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B). But the statute

neither qualifies what types of limitations or conditions may be imposed—except insofar as such limitations or conditions must be consistent with the INA—nor states that any such limitations or conditions must relate to whether the noncitizen has demonstrated or can demonstrate that they meet the definition of a refugee under section 101(a)(42)(A) of the INA, 8 U.S.C.

1101(a)(42)(A). Indeed, several of the statutory restrictions on asylum eligibility are unrelated to whether the noncitizen has established that they are a refugee within the meaning of section 101(a)(42)(A) of the INA, 8 U.S.C. 1101(a)(42)(A). *See, e.g.*, INA 208(b)(2)(A)(i), 8 U.S.C. 1158(b)(2)(A)(i) (participating in the persecution of others); INA 208(b)(2)(A)(iv), 8 U.S.C. 1158(b)(2)(A)(iv) (reasonable grounds for considering the noncitizen a danger to the security of the United States). And section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), provides for the promulgation of “*additional limitations and conditions.*” (emphasis added). The existence of exceptions and conditions that are unrelated to the refugee definition both demonstrates that it is lawful for the Departments to promulgate this condition on asylum eligibility and undermines the Ninth Circuit’s limitation on scope of any regulatory condition. *E. Bay I*, 994 F.3d at 979. There is no basis to assume that Congress intended to circumscribe the scope of limitations or conditions that the Departments can promulgate when the statute does not do so and Congress itself provided for exceptions unrelated to the meaning of “refugee” in section 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). *R-S-C*, 869 F.3d at 1187 n.9 (rejecting a statutory construction that would circumscribe the type of limitations or conditions promulgated under section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), because such restrictions “would render [section] 1158(b)(2)(C) meaningless, disabling the Attorney General from adopting further limitations while the statute clearly empowers him to do so.”).

In addition, the rule is not precluded by either *East Bay I* or *East Bay III*. Neither of these decisions require that a condition on asylum eligibility relate to the definition of refugee under section 101(a)(42)(A), 8 U.S.C. 1158(a)(42)(a). Accordingly, the injunctions and vacatur



decisions relating to the TCT Bar rules and the Proclamation Bar do not render this rule unlawful.

### 3. International Law

*Comment:* Commenters expressed concern that the NPRM, if finalized, would violate the United States' non-refoulement obligations under international law, including Article 33 of the Refugee Convention, which the commenters generally explained as prohibiting the return of asylum seekers to a country where their lives or freedom would be threatened on account of a protected ground. Specifically, commenters voiced apprehension that the NPRM would "bar" most protection-seeking noncitizens from being eligible for asylum, leaving them able to apply only for statutory withholding of removal or CAT protection. Commenters predicted that many noncitizens would not be able to satisfy the comparatively higher standards of proof for statutory withholding and CAT claims and that, in turn, would lead to the refoulement of persons who, if not for the NPRM's "bar" to asylum eligibility, would have been granted asylum.

Applying similar reasoning, some commenters raised that the proposed rule may violate Article 3 of the CAT, which prohibits state parties from returning people to a country where there is sufficient likelihood that they would be tortured. One commenter stated that conditioning asylum based on manner of entry would be in violation of the CAT.

Commenters also argued the rule conflicted with other provisions of the Refugee Convention and Protocol. Commenters noted that Article 31 of the Refugee Convention prohibits states from imposing improper penalties for irregular entry, which commenters argued included administrative penalties and limits on access to asylum. Commenters also stated the proposed rule would violate Article 3, which prohibits non-discrimination, and Article 16, which protects refugees' access to the courts. One commenter stated that the proposed rule is more expansive than the Refugee Convention's exclusion for migrants who secured residency or status in another country.

Relatedly, several commenters pointed to United Nations High Commissioner for Refugees (“UNHCR”) statements and guidance interpreting the Refugee Convention and the Refugee Protocol. Specifically, commenters pointed to UNHCR guidance interpreting those documents as providing that asylum seekers are not required to apply for protection in the first country where protection is available. Further, commenters noted that UNHCR interprets those documents as not requiring refugees to be returned to a country through which they transited. Commenters further noted UNHCR’s positions that asylum should not be refused only on the basis that it could have been sought in another country and that asylum seekers should not be required to seek protection in a country to which they have no established links. A commenter also noted that UNHCR has repeatedly denounced attempts to impose similar bans, and that such rules undermine international human rights and refugee law, because the right to seek asylum is a human right regardless of the person’s origin, immigration status, or manner of arrival at the border.

Several commenters also argued that the rule violated the United States’ obligations under other international documents. Some commenters simply made a general assertion that the rule would violate international treaties and degrade the United States’ international standing. Several commenters stated that the proposed rule is contrary to the Universal Declaration of Human Rights (“UDHR”). Commenters argued that the UDHR protects the right to seek asylum, and that any restriction or limitation to access asylum is a violation of the letter and spirit of the UDHR. Other commenters stated that the rule violated the United Nations Convention on the Rights of the Child (“CRC”) because it did not provide for a robust, individualized assessment of a child’s asylum claim. One commenter stated that the rule would place migrant children and their families at a higher risk of exploitation and trafficking, in contravention of obligations pursuant to the Optional Protocol on the Sale of Children and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (“The Palermo Protocol”). Another commenter contended the rule violates Article 7 of

the International Covenant on Civil and Political Rights (“ICCPR”), which forbids subjecting individuals to “torture or to cruel, inhuman or degrading treatment or punishment,” and violates Article 12, which confirms the rights of individuals to leave any country. Several commenters claimed that the rule would violate anti-discrimination principles in a variety of agreements and declarations including the ICCPR, International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), the American Declaration on the Rights and Duties of Man, Vienna Declaration, and San Jose Action Statement. Another commenter stated the proposed rule violates the right to life, human dignity, and equality before the law in the ICCPR because the proposed rule was “discriminatory” and establishes “great inequality.” Commenters also claimed conflicts with treaties including Article 6 of the Rome Statute of International Criminal Court, which prohibits genocide, and Article 32 of the Geneva Convention.

*Response:* This rule is consistent with the United States’ obligations under international law. Three primary documents govern the rights of refugees and corresponding obligations of states in international law: the Refugee Convention; the Refugee Protocol, which incorporates Articles 2 through 34 of the Refugee Convention; and the CAT. Together, these documents provide a framework for states to provide protection to migrants fleeing persecution or torture and establish the principle of non-refoulement, which prohibits states from returning refugees to territories in specific circumstances. While the United States is a party to the Refugee Protocol and the CAT, these treaties are not directly enforceable in U.S. law. *See INS v. Stevic*, 467 U.S. 407, 428 & n.22 (1984); *Al-Fara v. Gonzales*, 404 F.3d 733, 743 (3d Cir. 2005) (“The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.”). Instead, the United States has implemented its obligations through domestic legislation and implementing regulations, and the Protocol “serves only as a useful guide in determining congressional intent in enacting the Refugee Act.” *Barapind v. Reno*, 225 F.3d 1100, 1107 (9th Cir. 2000). The Refugee Convention’s non-refoulement obligation is contained in Article 33.1, which prohibits contracting states from returning a

refugee to a territory “where his life or freedom would be threatened” on account of an enumerated ground. The United States has implemented the non-refoulement provisions of Article 33.1 of the Refugee Convention through the withholding of removal provisions at section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), rather than through the asylum provisions at section 208 of the INA, 8 U.S.C. 1158. *See Cardoza-Fonseca*, 480 U.S. at 429, 440–41. The CAT’s non-refoulement provision is in Article 3, which prohibits the return of a person to a country where there are “substantial grounds for believing” the person will be tortured. The United States implemented its obligations under the CAT through regulations. *See Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”), Public Law 105–277, sec. 2242(b), 112 Stat. 2681, 2631–822 (8 U.S.C. 1231 note); 8 CFR 208.16(c), 208.17, 208.18, 1208.16(c), 1208.17, 1208.18.* The rule does not change or limit eligibility for statutory withholding of removal or CAT protection. Instead, applicants subject to the rule’s rebuttable presumption will be screened for eligibility for statutory withholding of removal and CAT protection under a reasonable possibility standard. As explained earlier in Section IV.D.1.iii of this preamble, the reasonable possibility standard is the same standard that has been used to ensure the United States complies with its non-refoulement obligations under international law in withholding-only proceedings for decades.

The rule’s rebuttable presumption will limit asylum eligibility for some noncitizens. But as the Supreme Court has explained, asylum “does not correspond to Article 33 of the Convention, but instead corresponds to Article 34,” which provides that contracting countries “shall as far as possible facilitate the assimilation and naturalization of refugees.” *Cardoza-Fonseca*, 480 U.S. at 441 (quotation marks omitted). Article 34 “is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible.” *Id.* Because application of the presumption does not affect eligibility for statutory withholding of removal or protection under the CAT regulations, the rule is consistent with U.S. non-refoulement obligations under the Refugee Protocol (incorporating, inter alia, Article 33 of the Refugee

Convention) and the CAT. *See R-S-C*, 869 F.3d at 1188 n.11 (explaining that “the Refugee Convention’s non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General’s withholding-only rule”); *Cazun v. U.S. Att’y Gen.*, 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia v. Lynch*, 813 F.3d 240, 241 (5th Cir. 2016).

The Departments agree that asylum is an important protection in international law and acknowledge that the right to seek asylum has been recognized under the UDHR, Art. 14, G.A. Res. 217A (III), U.N. Doc. A/810 (1948). The UDHR is a non-binding human rights resolution of the UN General Assembly, and thus it does not impose legal obligations on the United States. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–35 (2004) (“[T]he [UDHR] does not of its own force impose obligations as a matter of international law.”). Instead, the right enshrined in the UDHR—“to seek and to enjoy in other countries asylum from persecution,” UDHR, Art. 14, G.A. Res. 217A (III), U.N. Doc. A/810 (1948)—is also reflected in the non-refoulement provisions of the Refugee Protocol and the CAT. As previously explained, the rule does not impact eligibility for statutory withholding of removal or CAT protection, and accordingly does not implicate the United States’ non-refoulement obligations. Moreover, the rebuttable presumption in the rule does not prohibit any person from seeking asylum, statutory withholding of removal, or CAT protection. Instead, the rule creates a condition on eligibility for asylum by creating a rebuttable presumption of ineligibility for those who neither avail themselves of a lawful pathway to the United States nor apply for asylum or seek other protection, and await a decision thereon, in a country they travel through. The rule similarly does not bar those seeking asylum from procedures that protect them from refoulement. All noncitizens processed for expedited removal who express a fear of return are entitled to a credible fear interview. As with any eligibility criteria, the presumption will apply in some cases to limit eligibility for noncitizens based on the individual circumstances presented, including at the credible fear stage. Even in those cases where the AO determines that the noncitizen cannot demonstrate a

significant possibility of being granted asylum because the presumption has not been rebutted, the noncitizen may still demonstrate credible fear by showing a reasonable possibility of persecution or torture. Similarly, after applying for asylum before an IJ, if the presumption has not been rebutted, noncitizens may still demonstrate eligibility for statutory withholding of removal or CAT protection.

The rule is also consistent with the Refugee Convention and the corresponding obligations under international law, including specific provisions cited by commenters. The rule does not violate the non-discrimination requirement in Article 3 of the Refugee Convention. Article 3 prohibits discrimination on the basis of “race, religion or country of origin.” The rule does not discriminate on the basis of any of these protected characteristics. Instead, it is a rule of equal application based on the actions of the noncitizen. The application of the rule is limited to those circumstances where the noncitizen who is not excepted from its coverage has neither utilized an available lawful pathway nor sought protection and received a decision denying protection in a country traveled through, and cannot demonstrate that the failure to do was excusable under the rule or otherwise rebut the presumptive ineligibility. For the same reason, the rule does not violate other anti-discrimination requirements in international law, including the ICERD, Dec. 21, 1965, 660 U.N.T.S. 195, 212, and the ICCPR, Dec. 16, 1966, 999 U.N.T.S. 171.

Neither is the rule inconsistent with Article 16 of the Refugee Convention. Article 16 establishes that refugees should be given “free access to the courts,” and in the country of a refugee’s habitual residence, access should be equivalent to that of a national. This enshrines the right of the refugee to sue and be sued in practice—not merely in name—by removing barriers to participating in court such as access to government-provided counsel (where the government otherwise provides it), ensuring court fees are not higher for refugees than nationals, and prohibiting *cautio judicatum solvi*, the practice of requiring a bond for the costs of litigation as a

pre-requisite to filing a complaint. *See* Refugee Convention, Art. 16, Travaux Préparatoires & Commentaries. These rights are not implicated by the rule.

Similarly, the rule is not inconsistent with Article 31 of the Refugee Convention, which prohibits states from “impos[ing] penalties” on refugees based on “illegal entry or presence.” As the commentary to the Refugee Convention explains, the term “penalties” in Article 31 refers “to administrative or judicial convictions on account of illegal entry or presence, not to expulsion.” Refugee Convention Art. 31, commentary; *see Cazun v. Att’y Gen. U.S.*, 856 F.3d 249, 257 & n.16 (3d Cir. 2017) (rejecting argument that the reinstatement bar to asylum was a “penalty” within the meaning of Article 31). The rule does not change any rules or policies relating to detention or convictions for unlawful entry or presence. The Departments acknowledge that the Ninth Circuit concluded in *East Bay III*, 993 F.3d at 674, that the bar to asylum at issue in that case violated Article 31 of the Refugee Convention because it imposed a “penalty.” As described in the NPRM, the rule here does not create a categorical bar to asylum, but instead a rebuttable presumption, and *East Bay III* accordingly does not address the lawfulness of this rule. 88 FR at 11739. Moreover, the Ninth Circuit’s conclusion was erroneous because the denial of discretionary relief is not a penalty within the meaning of Article 31. *Id.*

Some commenters correctly observed that the Refugee Convention does not require refugees to apply for asylum in the first country they pass through. This rule, however, does not require noncitizens to apply for asylum in the first—or any—country through which they travel. Instead, the rule applies a rebuttable presumption to certain noncitizens who failed to avail themselves of a lawful pathway. One such pathway is to apply for asylum and receive a final denial in a transit country, but it is not the sole lawful pathway available. Noncitizens who fail to avail themselves of a lawful pathway may still rebut the presumption of ineligibility for asylum. Regardless, the Convention does not require the United States to grant asylum to every person who qualifies as a “refugee” under the INA; instead, the United States implements the Convention’s prohibitions on refoulement through statutory withholding of removal. UNHCR

has stated that “the primary responsibility to provide protection rests with the State where asylum is sought.”<sup>200</sup> But UNHCR also acknowledges that “refugees do not have an unfettered right to choose their ‘asylum country.’”<sup>201</sup>

In any event, UNHCR’s interpretations of or recommendations regarding the Refugee Convention and Refugee Protocol are “not binding on the Attorney General, the BIA, or United States courts.” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). “Indeed, [UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status] itself disclaims such force, explaining that ‘the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.’” *Id.* at 427–28 (quoting *Cardoza-Fonseca*, 480 U.S. at 439 n. 22). Such guidance “may be a useful interpretative aid,” *id.* at 427, but it does not create obligations for the United States.

The rule similarly does not violate the United States’ obligations under other international laws and treaties, including the Geneva Conventions, the Rome Statute, the ICCPR, the CRC, or customary international law. First, the Geneva Conventions, a series of treaties that regulate the conduct of armed conflict, have no bearing on the rule. Commenters pointed to Articles 32 and 33 of the Fourth Geneva Convention, which prohibit corporal punishment or mass punishment against protected persons. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“Fourth Geneva Convention”), 12 Aug. 1949, 75 UNTS 287. Under Article 4, “protected persons” are limited to those who, during a conflict or occupation, are “in the hands of a Party to the conflict or Occupying Power.” As the rule does not implicate a conflict or occupation, there is no conflict with the Geneva Conventions. While at least one commenter pointed to the definition of genocide in Article 6 of the Rome Statute, the United States is not a

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<sup>200</sup> UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, para. 3(i) (May 2013), <http://www.refworld.org/docid/51af82794.html>.

<sup>201</sup> UNHCR, Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries, at 1 (Apr. 2018), <https://www.refworld.org/pdfid/5acb33ad4.pdf>.



party to and has no obligations pursuant to the Rome Statute. In any event, the rule plainly does not constitute or involve genocide in any way. *See* Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998). Similarly, the United States has not ratified the CRC and thus has no obligations under that instrument, 1577 U.N.T.S. 3, reprinted in 28 I.L.M. 1448, 1456 (Nov. 20, 1989).<sup>202</sup> Again, even if considered customary international law—although the United States maintains that it is not—the CRC requires only that States take appropriate measures to protect children who are refugees. *See* CRC, Article 22. The rule accounts for the interests of children through creating robust screening procedures, exempting unaccompanied children from the application of the rule, having a family unity exception, and exempting certain noncitizens who enter as children from ongoing application of the presumption after the two-year period. Additionally, the adjudicator may consider on a case-by-case basis whether the child’s situation presents exceptionally compelling circumstances, including considering the circumstances surrounding the child’s manner of entry, thus rebutting the presumption.

#### 4. Recent Executive Orders

*Comment:* Some commenters stated without explanation that the rule is contrary to Executive Order 14012, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 FR 8277 (Feb. 2, 2021). Other commenters stated that to restore faith in the U.S. asylum system as the Executive Order aims to do, the “government” should take various steps, including “adequately fund[ing] a fair asylum system” rather than “wast[e] money on immigration enforcement that separates families, traumatizes children, and tears our communities apart.” Commenters further stated that the Administration should end the use of expedited removal, increase the scale and pace of refugee admissions, and expand lawful pathways for people “fleeing from countries with failed

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<sup>202</sup> *See* Status of Ratification, Office of the High Commissioner for Human Rights, <https://indicators.ohchr.org/>.

government and uncontrolled violence.” On the other hand, some commenters were critical of the rule because they believed it was not strict enough and, accordingly, averred that the rule is consistent with the Executive Order because it will “remov[e] barriers to immigration.”

*Response:* As a threshold matter, Executive Order 14012 does not require DOJ or DHS to adopt any specific policies but rather to (1) identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits and make recommendations on how to remove these barriers; (2) identify any agency actions that fail to promote access to the legal immigration system and recommend steps, as appropriate and consistent with applicable law, to revise or rescind those agency actions; (3) submit a plan describing the steps they will take to advance these policies; and (4) submit reports regarding implementation of those plans. 86 FR 8277. Because Executive Order 14012 does not require the adoption of specific policies, the actions taken here do not violate that Executive Order.

To the extent commenters believe that the rule is inconsistent with Executive Order 14012, the Departments disagree. Consistent with Executive Order 14012’s promotion of removing barriers to accessing immigration benefits and access to the legal immigration system, DHS has created multiple parole processes to provide certain migrants with pathways to temporarily enter and remain in the United States. During those periods of stay, those noncitizens may seek asylum and related protection or other benefits for which they may be eligible. The rule furthers the policy discussed in the Executive Order by encouraging noncitizens to use those parole processes, as well as the CBP One app to enter the United States through a safe, orderly process. This rule also discourages unlawful border crossings that overwhelm limited government resources along the SWB. The Departments believe that there will be efficiency gains from having noncitizens pre-register for appointments—saving considerable processing time—and from decreased encounters between POEs with persons who claim a fear of persecution or torture, the processing of whom requires more resources than processing noncitizens who pursue a lawful pathway. It is correct that implementing the rule

will increase the duration of some credible fear screenings. However, the Departments expect that fewer individuals with non-meritorious claims will receive positive screening determinations, which will result in a more efficient asylum system overall.

The Departments acknowledge commenters' recommendations to provide additional funding for the asylum system and end expedited removal. Both of those actions are outside the Departments' authority and would require congressional action. Ending the use of expedited removal in the absence of congressional action is outside the scope of this rulemaking. The Departments have considered commenters' recommendation of adding lawful pathways for people leaving countries with failed governments. This rule does not create any lawful pathways and thus the comment is outside the scope of this rulemaking.

*Comment:* Commenters expressed concern that the rule is inconsistent with Executive Order 14010, 86 FR 8267, because they believe it contradicts the instruction to develop policies and procedures for the safe and orderly processing of asylum claims at the U.S. land borders. Commenters stated that rather than developing policies for the safe and orderly processing of asylum claims, the rule instead would restrict the availability of asylum in a way that would make it impossible for most asylum seekers to access the asylum system. Commenters further asserted that rather than restoring faith in the U.S. asylum system, the rule attempts to "deport refugees to danger based on manner of entry and transit in circumvention of existing refugee law and treaty obligations." Commenters also suggested that the rule resurrects the PACR and HARP programs that the Executive Order ended.

Commenters also criticized the Departments for not following "the collaborative process called for in" the Executive Order. Specifically, commenters stated that Departments have failed to "follow Executive Order 14010's mandate to consult with affected organizations" as they are unaware of any "consultation or planning" that has occurred between when the Executive Order was issued and the publication of the NPRM.

*Response:* The Departments disagree with these commenters because the rule, as directed by Executive Order 14010, encourages use of lawful pathways to enter the United States, which will foster safe, orderly, and more efficient processing of asylum claims for those individuals seeking asylum, while discouraging unlawful border crossings that overwhelm limited resources and unfairly delay the adjudication of meritorious claims for asylum and other forms of protection. The rule is designed to incentivize noncitizens to avail themselves of a lawful pathway to enter the United States, which allows for more efficient use of DHS resources. By incentivizing the pursuit of lawful pathways, the Departments are promoting safe and orderly processing along the SWB as Executive Order 14010 instructs—processing that seeks to minimize the role of criminal organizations that prioritize profits over migrants’ lives.

The Departments disagree with commenters that the rule resurrects PACR and HARP. Those programs were developed by DHS to promptly address credible fear claims of single adults and family units while the noncitizens remained in CBP custody.<sup>203</sup> This rule, in contrast, does not change the timeline for credible fear screenings. Nor does it affect where noncitizens are located during such screenings. Thus, commenters’ comparisons to PACR and HARP are misplaced.

Commenters are similarly mistaken regarding DHS’s responsibilities under the Executive Order. Commenters are correct that the Executive Order instructed the Secretary and Director of the CDC, “in coordination with the Secretary of State, . . . [to] promptly begin consultation and planning with international and non-governmental organizations to develop policies and procedures for the safe and orderly processing of asylum claims at United States land borders, consistent with public health and safety and capacity constraints.” 86 FR at 8269. DHS has worked with NGOs to implement the exceptions to the Title 42 public health Order and continues to seek collaboration through seeking comment on this rule.

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<sup>203</sup> See Mem. of Law in Opp’n to Pls.’s Mot. for Summ. J. & in Supp. of Defs.’ Cross-Mot. for Summ. J. at 8–11, *Las Ams. Immigrant Advoc. Ctr. v. Wolf*, No. 19-cv-3640 (D.D.C. Feb. 6, 2020).

*Comment:* Some commenters stated that the rule violates Executive Order 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273 (Feb. 2, 2021), and amounts to the legalization of family separation, in contravention of that Executive Order.

*Response:* In Executive Order 14011, President Biden announced the creation of a task force to identify children who were separated from their families between January 20, 2017, and January 20, 2021, and, among other things, to the greatest extent possible, facilitate and enable the reunification of those children with their families. 86 FR at 8273. In doing so, President Biden stated that his Administration “will protect family unity and ensure that children entering the United States are not separated from their families, except in the most extreme circumstances where a separation is clearly necessary for the safety and well-being of the child or is required by law.” *Id.* The rule is consistent with this policy statement. The rule includes multiple provisions aimed at ensuring that families who enter the United States from Mexico at the SWB or adjacent coastal borders are not inadvertently separated. For example, where an exception or rebuttal circumstance applies to one member of a family, it is applied to all members of the family. *See* 8 CFR 208.33(a)(2)(ii), (3)(i), 1208.33(a)(2)(ii), (3)(i). And where asylum is denied to a noncitizen because of the presumption of ineligibility but one member of the noncitizen’s family who traveled with the noncitizen obtains protection from removal through statutory withholding of removal or CAT, the circumstance will be deemed exceptionally compelling for the noncitizen denied such relief, allowing the family to remain together. *See* 8 CFR 1208.33(c). Finally, as described in Section IV.E.7.ii of this preamble, the Departments have expanded the family unity provision to cover spouses and children who would be eligible to follow to join the applicant if that applicant were granted asylum, as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A). 8 CFR 1208.33(c). Such measures were adopted in accordance with Executive Order 14011 to ensure that family units will not be separated as a result of this rule.

*Comment:* Commenters stated that the Departments should take into account Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 FR 7009 (Jan. 20, 2021), and the more recent Executive Order 14091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 88 FR 10825 (Feb. 16, 2023), and stated that the agencies have not considered these underserved populations and that this rule is evidence that these Executive Orders were not considered in the rule-making process. Commenters more broadly criticized the rule as “betraying promises” made in the Executive Orders because they believe the rule will have a disproportionate effect on certain groups of noncitizens and argued that the rule is generally out of line with the Executive Orders. Commenters also suggested that “[o]verly relying on the [CBP One] app . . . will significantly thwart the Biden administration’s stated commitment to racial justice and equity.” Commenters further stated that the rule undermines the commitment in the Executive Orders and “will endanger Black, Brown, and Indigenous asylum seekers.” Commenters asserted that the rule “will perpetuate systemic and institutional racism and injustice,” noting concerns about the accessibility of the CBP One app for those who speak languages other than English, Spanish, and Haitian Creole; “the app’s widely reported misidentification of people of color”; the exacerbation of “existing discrepancies in outcome[s] for individuals without legal representation”; and the “further solidif[ication of] inequities and injustice in our immigration system.”

*Response:* On President Biden’s first day in office, January 20, 2021, he issued Executive Order 13985. On February 16, 2023, he issued Executive Order 14091, which reiterated the policy goals detailed in Executive Order 13985 and discussed the ways in which those policy goals had been furthered since that Executive Order. Both Executive Orders describe President Biden’s policy of “advancing equity for all, including communities that have long been underserved, and addressing systemic racism in our Nation’s policies and programs.” 88 FR at 10825. As discussed throughout this preamble, the Departments have designed the rule to

include a tailored rebuttable presumption in order to address a specific problem along the SWB. As discussed in Section IV.B.4.vi of this preamble, the Departments do not have any discriminatory purpose in adopting the rule. The Departments have addressed concerns about the disparate impact of the rule on various communities in Section IV.B.4 of this preamble, the concerns relating to the CBP One app's liveness software are addressed in Section IV.E.3.ii of this preamble, and concerns about pro se individuals are discussed in Section IV.B.5.ii of this preamble. Finally, as discussed in Section IV.E.3 of this preamble, the rule provides an exception to the application of the rebuttable presumption for those who appear at a POE without a pre-scheduled appointment and for whom scheduling an appointment was impossible due to a language barrier. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B).

#### 5. Other Comments on Legal Authority

*Comment:* One commenter noted that the proposed rule “is not a legislative act” and is instead subject to the Administrative Procedure Act, but “the persons to whom the rule applies are excluded from appearing within the USA to challenge the administrative requirement for exhaustion of remedies.”

*Response:* The Departments agree that this rule is not a legislative act but instead the promulgation of agency regulations pursuant to the APA. The Departments disagree that the rule implicates or changes the exhaustion requirements in administrative law. The Departments note that the rule does not apply to noncitizens in other countries; the rule only applies to noncitizens who enter the United States and thereafter file applications for asylum. Put differently, it will only apply to noncitizens within the United States, who are not precluded from filing an APA challenge by virtue of being outside of the United States, but who may be limited in the types of challenges they can bring to its application during the credible fear process under section 242(e) of the INA, 8 U.S.C. 1252(e). The Departments further note that noncitizens who avail themselves of a lawful pathway to enter the United States will not otherwise need to address the provisions of this rule, as any subsequently filed asylum application will not be subject to the

rebuttable presumption. Any noncitizen subject to the rebuttable presumption will be able to address its application to them and any applicable exceptions or rebuttal grounds before an AO or IJ, and in any available administrative appeal. Thus, the commenter's concern about being able to bring an APA challenge from a foreign jurisdiction are unfounded.

*Comment:* Commenters stated that litigation over and injunctions against the rule would only exacerbate the confusion at the SWB.

*Response:* As explained previously in Section IV.D of this preamble, the Departments believe this rule is lawful and that it should not be subject to an injunction or otherwise halted in litigation. To the extent it is possible that the rule will be halted or enjoined, the Departments believe the risks are outweighed by the need to ensure safe and orderly processing at the SWB.

*Comment:* Commenters stated that the proposed rule was silent as to retroactive applicability and urged the Departments to "make an affirmative pronouncement" that the rule will not apply retroactively. Commenters were specifically concerned about the rule applying to "anyone whose latest entry into the United States was prior to the effective date(s) of the rule," which commenters stated is required by section 551(4) of the APA, 5 U.S.C. 551(4). Commenters further raised concerns that application of the rule to those who enter before its effective date would "infringe upon due process rights."

*Response:* As written, the rule will not apply to anyone who enters the United States before the rule is effective. The Departments believe the NPRM's proposed language and the final language in this rule clearly provide that the rebuttable presumption may only be applied to those who enter the United States between the rule's effective date and a date 24 months later. See 8 CFR 208.13(f), 208.33(a)(1)(i), 1208.13(f), 1208.33(a)(1)(i). The Departments decline to address the applicability or requirements of due process or the APA in this regard because the rule is explicit that it is only potentially triggered by entries that take place after its effective date.

*Comment:* A commenter argued that the proposal fails to account for "refugees'" reliance interests. The commenter wrote that refugees have an interest and right against refoulement and



in the United States upholding domestic and international refugee law generally. The commenter argued that the Departments only have “circumscribed” discretion in administering asylum, citing INA 208, 8 U.S.C. 1158, and case law on establishing refugee status, and thus that refugees have a cognizable reliance interest in asylum.

*Response:* As described earlier in Section IV.D.3 of this preamble, the United States implements its non-refoulement obligations through statutory withholding of removal, not asylum. Thus, it is incorrect to suggest that the non-refoulement obligations can raise a reliance interest in asylum. Additionally, asylum is a discretionary form of relief to which no applicant is entitled. *See* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (“The Secretary of Homeland Security or the Attorney General may grant asylum . . . .”). Although “longstanding policies may have ‘engendered serious reliance interests that must be taken into account,’” *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (quoting *Fox Television*, 556 U.S. at 515), the commenter does not explain in what way noncitizens who are outside the United States have relied upon U.S. asylum law. To the extent noncitizens outside the United States have any cognizable reliance interests in the current rules governing asylum, the Departments believe those interests would be outweighed by the interest in incentivizing noncitizens to pursue safe, orderly, and lawful pathways to seek protection, and preventing a potential surge of migration at the southern border that threatens to overwhelm the Departments’ ability to process asylum claims in a safe and orderly manner.

*Comment:* Commenters stated that the rule would violate the *Pangea* injunction. *See Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966 (N.D. Cal. 2021).

*Response:* The court’s order preliminarily enjoining the implementation of Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (December 11, 2020) (“Global Asylum Rule”) and related policies in *Pangea II*, 512 F. Supp. 3d 966, does not prohibit the Departments from issuing this rule or otherwise limit the Departments’ discretionary authority to adopt new asylum limitations consistent with section 208(b)(2)(C) of

the INA, 8 U.S.C. 1158(b)(2)(C). *See, e.g., Milliken v. Bradley*, 433 U.S. 267, 281–82 (1974) (“The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the [alleged wrongful conduct] itself.”); *Meinhold v. U.S. Dep’t of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994); *see also Thomas v. Cty. of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1992) (reversing injunction that “fail[ed] to specify the act or acts sought to be restrained as required by” Federal Rule of Civil Procedure 65(d)).

#### *E. Comments on the Rule Provisions*

##### 1. General Feedback on the Rebuttable Presumption of Ineligibility

*Comment:* Commenters expressed concern that the requirements to overcome the presumption would deprive asylum seekers of a meaningful opportunity to seek protection, subject them to removal if they could not meet the elevated standard for statutory withholding of removal, and put them at risk of violence or other harmful conditions. Commenters said that the proposed rule would require noncitizens to gather evidence and present arguments to rebut the presumption against asylum eligibility, establish an exception, or prove that they are not subject to the rule. Some said it would be difficult or impossible for noncitizens arriving at the SWB to do so, given that most are detained during credible fear proceedings; that they may lack access to supporting documentation; that CBP officers may confiscate their property; and that the determination is made in a single interview. Therefore, commenters stated, the rule would categorically deny relief, bar asylum, or result in “automatic ineligibility” for most or all noncitizens who would be subject to it. Commenters stated that noncitizens would be at the mercy of the AOs’ credibility assessment and discretion. Some commenters said there was no indication that AOs would have to elicit relevant testimony and suggested this requirement should be included in the rule. One commenter wrote that individuals who have previously experienced any of the per se exemptions for rebuttal may still be experiencing long-lasting effects that limit their ability to rebut the presumption in the present. A commenter stated that

children and families would be unable to rebut the presumption due to limited language access, absence of legal counsel, and having their belongings confiscated.

Some commenters said that the grounds for rebutting the presumption against asylum eligibility were too narrow, limited, or extreme and did not relate to the merits of an asylum claim; they recommended that the grounds be expanded. One commenter stated that the current examples of exceptionally compelling circumstances would not protect the vast majority of refugees who would qualify for asylum under U.S. law, including many who enter the United States without an appointment due to safety risks, medical issues, and other protection needs. Some stated that narrow terms like “exceptionally compelling,” “imminent and extreme,” and “severe” made the presumption too difficult to rebut, while others expressed concern about the perceived vagueness of these terms and said the rule provided inadequate guidance on them. One commenter wrote that the nature of the grounds and exceptions make them inherently difficult to corroborate with physical evidence. One commenter expressed concerns that the proposed means of rebuttal do not reference a subjective component, such as where the asylum seeker believed they faced an acute medical emergency or imminent and extreme threat. A legal services provider compared the proposed rule to the one-year deadline to apply for asylum and stated that the one-year deadline allows for even greater opportunities for rebuttal by allowing an individual to show a number of exceptional circumstances beyond those in the NPRM. Some commenters expressed concern about possible lack of clarity in the evidentiary requirements to rebut the presumption against asylum eligibility. Some stated that the lack of definitions and documentary evidence requirements in the NPRM would leave the adjudicator with an inordinate amount of discretion to decide whether the presumption had been rebutted. Some commenters urged the Departments to reverse the presumption or apply a rebuttable presumption of eligibility for torture survivors.

*Response:* The Departments acknowledge these concerns but disagree with them. As discussed throughout Section IV.B.5 of this preamble, AOs conducting credible fear interviews

have an affirmative duty to elicit all testimony relevant to assessing eligibility for protection, which will necessarily include testimony relevant to the rebuttable presumption.<sup>204</sup> Similarly, credible fear review by an IJ “include[s] an opportunity for the alien to be heard and questioned by the [IJ].” INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). In section 240 proceedings, IJs have a duty to develop the record, which again will necessarily include facts and testimony relevant to the rebuttable presumption. 8 CFR 1003.10(b) (“[IJs] shall administer oaths, receive evidence, and interrogate, examine, and cross-examine aliens and any witnesses.”); *Quintero v. Garland*, 998 F.3d 612, 626 (4th Cir. 2021). A noncitizen may be able to satisfy their burden of proof through credible testimony alone, INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii), and the rule does not require any particular evidence, including documentary evidence, to rebut or establish an exception to the presumption under 8 CFR 208.33(a) and 1208.33(a).

The Departments believe that the exceptions to and means of rebutting the presumption are appropriate in scope and detail and that they need not be expanded by, for example, incorporating means of rebuttal similar to the exceptions to the one-year deadline for applying for asylum. To the extent that, at the time of entry, a noncitizen reasonably believed that they faced an acute medical emergency or imminent and extreme threat to life or safety, the rule permits adjudicators to consider whether this situation may constitute an “exceptionally compelling circumstance[.]” 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i). As to concerns about disparate application amongst AOs, all credible fear determinations undergo supervisory review to ensure consistency, 8 CFR 208.30(e)(8), and noncitizens can request IJ review of a negative determination, 8 CFR 208.33(b), 1208.33(b). Determinations made by IJs in section 240 proceedings, including determinations about the presumption, are subject to review by the BIA. *See* 8 CFR 1003.1(b). Comments regarding AO and IJ conduct and training are further

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<sup>204</sup> USCIS, *Eliciting Testimony*; USCIS, *Non-Adversarial Interview* 13 (“You control the direction, pace, and tone of the interview and have a duty to elicit all relevant testimony.”).

addressed in Section IV.B.5.iii of this preamble. The Departments decline to “reverse” the presumption of ineligibility for certain cases, which would function as an additional exception to the rule and undermine the rule’s goal of incentivizing migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States or seek asylum or other protection in another country through which they travel. However, even if ineligible for asylum due to the presumption against asylum eligibility, noncitizens who establish a reasonable possibility of persecution or torture, 8 CFR 208.33(b)(2)(i), 1208.33(b)(2)(ii), remain eligible to apply for statutory withholding of removal and protection under the CAT. 8 CFR 208.16.

*Comment:* Commenters expressed opposition to the proposed requirement that noncitizens satisfy the preponderance of the evidence standard to rebut the presumption of ineligibility. Commenters stated that using the preponderance of the evidence standard violates section 235(b)(1)(B)(v) of the INA, 8 U.S.C. 1225(b)(1)(B)(v), by imposing a different, higher standard than the “significant possibility” standard. Citing a 1996 statement from U.S. Senator Orrin Hatch, one commenter stated that the application of the “preponderance of the evidence” standard during the credible fear stage was considered and rejected by Congress and that the Departments lack the authority to resurrect and implement that standard through regulation. Some commenters emphasized that the “significant possibility” standard is an intentionally low screening standard for credible fear interviews established by Congress. Some commenters stated that the “preponderance of the evidence” standard is even higher than the “reasonable possibility” standard to show a well-founded fear, which in turn is higher than the “significant possibility” standard. Some commenters stated that the “preponderance of the evidence” standard imposes too high a burden on noncitizens in credible fear proceedings. Commenters said it would be particularly difficult for detained, unrepresented individuals to satisfy this burden or that the rule would be hardest on disadvantaged noncitizens. One commenter recommended that this heightened standard of proof not be implemented and that the existing

standard of proof be revised for consistency with international norms to exclude only cases that are “manifestly unfounded or clearly abusive.”

*Response:* Commenters’ concerns are based on an incorrect premise. At the credible fear stage, AOs will apply the “significant possibility” standard in assessing whether a noncitizen may ultimately rebut the presumption of asylum ineligibility by a preponderance of the evidence during a full merits adjudication. Because the “significant possibility” standard is set by statute, *see* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), the Departments lack the authority to alter it through rulemaking. For further discussion of this issue, see Section IV.D.1.iii of this preamble.

*Comment:* Commenters stated that applying the rule’s presumption of ineligibility at the credible fear stage is different from how other eligibility bars function in credible fear determinations. Some commenters stated that the complex means of rebuttal would require a lengthy, fact-based interview and “intensive factual analysis,” which they claimed are not appropriate for credible fear interviews because those interviews offer insufficient procedural protections. Another commenter stated that the Departments recently recognized due process problems with this approach when they rescinded the requirement that certain mandatory bars to asylum be considered at the credible fear screening stage.

One commenter expressed concern with the perceived discretion of border officials during the proposed rebuttable presumption process, asserting that the NPRM gave no clear indication of how, when, or in front of whom the asylum seeker will have to present their evidence. One commenter stated that DHS has a poor track record of making similar determinations in the past, citing instances where noncitizens were erroneously enrolled in the MPP, and stated that DHS has historically failed to effectively screen asylum seekers for certain characteristics and processes. One commenter stated that, under the NPRM, AOs would determine whether individuals presented at the SWB without documents sufficient for lawful

admission pursuant to section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), but that AOs do not receive the same training as CBP officers regarding that section.

*Response:* The Departments acknowledge that statutory bars to asylum eligibility have not historically applied at the credible fear stage. However, the Departments have authority to apply conditions on asylum eligibility at that stage. The INA authorizes AOs to assess whether there is a significant possibility that the noncitizen could establish eligibility for asylum, INA 235(b)(1)(v), 8 U.S.C. 1225(b)(1)(v), which may include additional eligibility conditions that the Departments establish by regulation, *see* 88 FR at 11742. Moreover, the Departments believe that the rebuttable presumption of ineligibility under this rule is less complex than the mandatory bars provided in section 208(b)(2)(A) of the INA, 8 U.S.C. 1158(b)(2)(A) (barring from asylum eligibility noncitizens (1) who have participated in persecution; (2) who have been convicted of a particularly serious crime; (3) for whom there are serious reasons to believe committed a serious nonpolitical crime; (4) for whom there are reasonable grounds to regard as a danger to the United States; (5) who are described under certain provisions relating to terrorist activity; or (6) who were firmly resettled before coming to the United States). Also, most of the facts relevant to the applicability of, exceptions to, and means of rebutting the presumption involve circumstances at or near the time of the noncitizen's entry. Because credible fear interviews occur near the time of entry when the events and circumstances giving rise to the presumption's exceptions and rebuttal grounds occur, the Departments believe noncitizens will have a sufficient opportunity to provide testimony regarding such events and circumstances while they are fresh in noncitizens' minds. Furthermore, delaying application of the presumption against asylum eligibility until the final merits stage would undermine the Departments' goals of incentivizing migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States or seek asylum or other protection in another country through which they travel.

This rule provides that AOs and IJs, not CBP officers, will assess whether noncitizens are subject to the rule's presumption of asylum ineligibility and can rebut the presumption. 8 CFR

208.33(b), 1208.33(b). Also, the Departments note that the “significant possibility” standard applied at the credible fear stage is lower than the “more likely than not” standard that was used by DHS to assess whether a noncitizen could be returned to Mexico pursuant to the MPP.<sup>205</sup> The Departments disagree that the rule requires AOs to assess whether noncitizens are inadmissible under section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), and subject to expedited removal. CBP officers will continue to determine whether a noncitizen is subject to, and will be placed in, expedited removal.

*Comment:* Commenters stated that the term “rebuttable presumption” as used in the rule is misleading and inaccurate and that the rule instead creates an outright bar with exceptions.

*Response:* The Departments believe that the description of the rule’s main provision as a rebuttable presumption accurately reflects the operation of that provision, including the availability of exceptions and bases to rebut the presumption. Unlike the TCT Bar Final Rule, which included only narrow, categorical exceptions to its application, under this rule, if the noncitizen is not exempted from this rule’s application, the lawful pathways condition may be rebutted where the noncitizen demonstrates to the adjudicator’s satisfaction that exceptionally compelling circumstances are present. *See* 8 CFR 208.33(a)(3), 1208.33(a)(3). Because a noncitizen to whom the condition applies and for whom an exception is not available under 8 CFR 208.33(a)(2), 1208.33(a)(2), may nevertheless avoid its effect in certain non-categorical circumstances, the Departments believe that referring to it as a “rebuttable presumption” is accurate.

## 2. Grounds for Rebutting the Presumption

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<sup>205</sup> USCIS, *PM 602-0169, Policy Memorandum: Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols* (Jan. 28, 2019), <https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf>.



i. Acute Medical Emergency

*Comment:* Commenters expressed concerns regarding the acute medical emergency means of rebuttal. One commenter asserted that this was a novel concept under immigration law and that the NPRM's description of this ground of rebuttal made clear that this standard is designed to be impossible to meet. Some commenters stated that the proposed rule failed to provide definitions or guidance to inform assessments of what constitutes an acute medical emergency. Some commenters wrote that this means of rebuttal should include non-life-threatening and other non-medical needs. One commenter, who is a doctor, stated that the definition of "medical emergency" should include curable conditions that would be fatal in the short term and conditions that could be commonly treated in the United States to restore health and function, assuming that sufficient care would not be available in the originating country. Commenters expressed concern regarding how people living with HIV will be assessed under this provision, given that their condition could lead to a life-threatening emergency without treatment. Commenters also expressed concern that the proposed rule gave inadequate consideration to the unique attributes of children's physical and mental health and noted that signs differentiating a child with illness from one with severe illness are quite subtle. Some commenters also expressed concern that the proposed rule would not require that children be assessed by trauma-informed physicians. Another commenter expressed concerns that the rule would not account for potential emergencies for pregnant women.

Some commenters stated that the "preponderance of the evidence" standard for establishing an acute medical emergency is too high. Commenters said that the rule did not explain how an individual would prove that their medical issue was "acute," and one stated that this determination is possible only after medical care is already being provided. Some commenters stated that noncitizens may lack medical documentation or knowledge of the severity of their condition and that AOs and IJs are not medical experts with the required expertise to evaluate these types of medical issues. Other commenters stated that the proposed

rule does not specify which officials will be making this determination or whether any medical training or expertise would be required. Commenters expressed concerns that asking immigration officials to make medical assessments would yield inconsistent application of the rebuttable presumption and undermine the welfare of asylum seekers. Commenters expressed concern that this means of rebutting the presumption would require noncitizens to share private details about their medical histories and bodies with a stranger on the phone. One commenter said that an individual may not know that they are suffering an acute medical emergency, while another stated that a noncitizen's medical condition could worsen by the time that the AO decides whether the presumption has been rebutted. Some commenters added that the rule should specify what would occur in scenarios where families rebut the presumption based on the acute medical emergency ground and the individual with the medical emergency subsequently dies or the individual lacks access to medical care to address their medical emergency.

Commenters said that CBP had denied Title 42 health exceptions to those with acute medical needs, despite extensive documentation of their conditions, which raised the concern that the term "acute medical emergency" would also be applied stringently under the rule. Another commenter stated that the rule would "restrict access to medical care and humanitarian aid if asylum seekers are denied by CBP," which would impede the gathering of evidence needed to rebut the presumption of asylum ineligibility.

Another commenter expressed concern that an acute medical emergency may also be easy to feign or fabricate, though the commenter did not provide any example of how that could be done.

*Response:* The Departments believe the acute medical emergency means of rebuttal at 8 CFR 208.33(a)(3)(i)(A) and 1208.33(a)(3)(i)(A), is drafted so that those noncitizens with acute medical emergencies can rebut the condition on asylum eligibility. In general, as stated in the NPRM, acute medical emergencies include situations in which someone faces a life-threatening medical emergency or faces acute and grave medical needs that they cannot adequately address

outside of the United States. *See* 88 FR at 11723. If a noncitizen rebuts the presumption based on the acute medical emergency of a family member with whom they were traveling, the noncitizen’s eligibility for asylum will not change if the family member who faced the medical emergency subsequently passes away; this is because the language of the rebuttal circumstance focuses on whether the family member faced an acute medical emergency “at the time of entry.” 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i).

The Departments believe that, in general, broadening this means of rebuttal would undermine the purpose of the rule, which is to incentivize noncitizens to utilize lawful, safe, and orderly pathways of migration. A medical condition that is not an acute emergency would not ordinarily or necessarily justify failing to pursue a lawful pathway. However, while an acute medical emergency is a *per se* example of an exceptionally compelling circumstance to rebut the presumption of ineligibility, AOs and IJs may determine, on a case-by-case basis, whether less severe health-related situations also qualify as “exceptionally compelling circumstances.” *See* 8 CFR 208.33(a)(3), 1208.33(a)(3).

The Departments also disagree with comments concerning the ability of AOs and IJs to properly assess this rebuttal ground and the ability of noncitizens to establish it. As discussed in Section IV.D.1.iii of this preamble, AOs will apply the “significant possibility” standard during credible fear interviews to determine whether a noncitizen would be able to rebut the presumption because they faced an acute medical emergency at the time of entry. Again, the Departments emphasize that noncitizens may be able to rebut the presumption of asylum ineligibility through testimony alone, and the rule does not require any particular evidence to rebut the presumption under 8 CFR 208.33(a)(3) and 1208.33(a)(3). AOs are trained to elicit all relevant testimony in a non-adversarial manner, which will necessarily include testimony related to this ground for rebuttal.<sup>206</sup> As discussed earlier in Section IV.B.5.iii.a of this preamble, AOs

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<sup>206</sup> USCIS, *Eliciting Testimony* 12 (“In cases requiring an interview, although the burden is on the applicant to establish eligibility, equally important is your obligation to elicit all pertinent information.”); USCIS, *Non-*

frequently assess physical and psychological harm when adjudicating asylum applications and are trained to do so in a sensitive manner. As discussed in Section IV.B.5.iii.c of this preamble, the rule does not require adjudicators to make a formal medical diagnosis or analyze whether a noncitizen meets specific medical criteria to determine whether a noncitizen has rebutted the rule's condition on eligibility. Instead, adjudicators will make a factual determination of whether an acute medical emergency existed at the time of entry. 8 CFR 208.33(a)(3)(i)(A), 1208.33(a)(3)(i)(A). To the extent that a noncitizen experienced such a medical emergency during their time in CBP custody, AOs may be able to consult CBP records. Specifically, if a noncitizen experiences a medical issue during their time in CBP custody, CBP medical staff will evaluate the noncitizen, and, if appropriate based on the severity of the issue, refer them to a local medical facility. This treatment would be documented.<sup>207</sup> Regarding the concerns raised about sharing private medical details, noncitizens in credible fear proceedings, as discussed in Section IV.B.5.v of this preamble, are advised of the confidential nature of the interview. As noted earlier in Sections IV.B.5.i and IV.E.1 of this preamble, credible fear determinations undergo multiple levels of review to ensure consistency, and decisions made in section 240 proceedings are subject to administrative appeal.

The Departments note that, like all exceptionally compelling circumstances, AOs in credible fear proceedings or IJs in immigration court, not CBP officers at POEs, will determine whether a noncitizen faced an acute medical emergency. Accordingly, to the extent commenters are concerned by how CBP officers have considered medical issues in the context of the application of the Title 42 public health Order, such concerns are inapplicable to this rule. Additionally, CBP will process all noncitizens who arrive and seek admission at a POE without regard to whether the presumption may ultimately be found to apply.

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*Adversarial Interview* 13 (“You control the direction, pace, and tone of the interview and have a duty to elicit all relevant testimony.”)

<sup>207</sup> CBP, *Directive 2210-004, Enhanced Medical Support Efforts* (Dec. 31, 2019), <https://www.cbp.gov/document/directives/directive-2210-004-cbp-enhanced-medical-efforts>.

Regarding concerns of fraud, the commenter did not provide any explanation or example of how an acute medical emergency would be easy to fabricate, and AOs and IJs will assess the credibility of any claims that the noncitizen faced an acute medical emergency. INA 208(b)(1)(B)(2), 8 U.S.C. 1158(b)(1)(B)(2); INA 240(c)(4)(B), 8 U.S.C. 1229a(c)(4)(B); 8 CFR 208.30(e)(2).

ii. Imminent and Extreme Threat to Life and Safety

*Comments:* Commenters expressed concern over the high level of risk required to rebut the presumption based on an imminent and extreme threat to life and safety. Some commenters stated this means of rebuttal requires a higher degree of risk than is required for eligibility for asylum or statutory withholding of removal. One commenter stated that it would require migrants to “predict the future” in deciding whether to wait for an appointment at the border, which can be dangerous because violence happens randomly and unexpectedly. Some said that, if an asylum seeker is forced to remain in Mexico until a threat is imminent, it may well be too late to avoid such harm, thus putting the person in a “catch-22.” A commenter stated that the rule appears to exclude anyone who has already been gravely harmed while in Mexico but who cannot prove that another harm is “imminent,” while others recommended that if an individual circumvents other pathways to cross the U.S.-Mexico border due to the severity of past threats or harms, the “imminent and extreme threat” ground should automatically apply. Another commenter stated that, due to the complicated and lengthy regulatory definition of torture, that term should be replaced with “severe pain or suffering.”

Commenters also expressed concern about the ability for specific populations to meet this rebuttal ground. Commenters stated that the rule forces LGBT and HIV-positive people, who already face significant hostility in Mexico, to put themselves in even worse danger to satisfy the imminence requirement of the “imminent and extreme” ground for rebuttal. Commenters wrote that this rebuttal ground should be broadened so that adjudicators may favorably consider circumstances involving threats to life or safety that might not necessarily be considered

imminent or extreme. For example, one commenter noted that there are many forms of gender-based harm that are unlikely to meet the requirement that the threat to life or safety is “imminent and extreme” because such forms of harm are not always highly violent acts. One commenter wrote that pervasive discrimination or physical abuse—as, for example, experienced by LGBT individuals in Mexico, where discrimination against such persons is still commonplace—would not meet the threshold of “imminent and extreme threat to life and safety” if experienced in either a transit country or their home country. The commenter also stated that individuals forced to hide their identity to avoid discrimination would be hindered in their ability to meet this ground for rebuttal.

Commenters expressed concern that noncitizens would not have sufficient evidence to show an “imminent and extreme” threat to rebut the presumption. Similar to their comment regarding the “acute medical emergency” means of rebuttal, one commenter asserted that the “imminent and extreme” threat means of rebuttal is a novel concept under immigration law and that the description of this ground of rebuttal in the NPRM made clear that this standard is designed to be impossible to meet. One commenter stated that proving a specific threat may be near impossible because individualized threats are frequently made orally and in person, not in writing, and hence are not amenable to proof in a formalized setting. The commenter also stated that such threats are usually directly followed by the harm itself. One commenter wrote that the most deserving individuals in the asylum process will be hard-pressed to produce evidence of an “imminent threat” because persecution frequently does not leave documentary evidence. A few commenters emphasized that survivors of sexual assault would face extreme difficulty in obtaining documentation to meet the evidentiary burden from another country unless they had others assisting them; some survivors, for example, may have only their own account of the assault. A legal services provider expressed concern that survivors of violence would not necessarily have the proof, language, or support needed to explain what imminent danger they

faced, leading to the denial of bona fide asylum claims and the refolement of individuals facing extreme persecution.

Commenters expressed concerns that the lack of definition of an “extreme and imminent threat to life or safety” left adjudicators with an inordinate amount of discretion. One commenter stated that asylum seekers in Mexican border regions so often face a serious risk to their safety that it is unclear what an asylum seeker would need to show to establish an “imminent and extreme” threat to life. Commenters expressed concern that this ground of rebuttal calls for a subjective assessment of the temporality and qualitative extremity of the threats faced by asylum seekers, which may exclude many genuine refugees.

Other commenters stated concerns that this means of rebuttal was overly broad or would lead to fraud. One commenter said that AOs and IJs would have difficulty determining whether someone has fabricated evidence to support a claim that they faced an imminent threat to life or safety, especially when strong evidence exists that migrants who travel to the U.S.-Mexico border by way of smuggling networks are frequently subject to such violence. Another commenter stated that the journey to the southwest border of the United States is inherently a journey where migrants will face extreme threats to life and safety from beginning to end; adding this means of rebuttal would thus exempt the entire population of migrants who have traveled with the assistance of smugglers and other criminal enterprises.

*Response:* The Departments acknowledge these concerns but believe that only imminent and extreme threats to life or safety should constitute a per se ground to rebut the presumption of asylum ineligibility. For threats that are less imminent or extreme, noncitizens may attempt to demonstrate on a case-by-case basis that they otherwise present “exceptionally compelling circumstances” that overcome the presumption of ineligibility. Including lesser threats in the per se grounds for rebuttal would undermine the Departments’ goal of incentivizing migrants to use lawful, safe, and orderly pathways to enter the United States or seek asylum or other protection in another country through which they travel.

As noted in the NPRM, threats cannot be speculative, based on generalized concerns about safety, or based on a prior threat that no longer posed an immediate threat at the time of entry. 88 FR at 11707 n.27. The term “extreme” refers to the seriousness of the threat; the threat needs to be sufficiently grave, such as a threat of rape, kidnapping, torture, or murder, to trigger this ground for rebuttal. *Id.* Where the noncitizen is a member of a particularly vulnerable group (e.g., LGBT or HIV-positive people), their membership in such a group may be a relevant factor in assessing the extremity and immediacy of the threats faced at the time of entry. In response to the recommendation that the word “torture” be replaced with “severe pain and suffering,” the Departments note that the imminent and extreme threats to life and safety listed in the rule are not exhaustive and that this means of rebuttal may in certain circumstances encompass imminent and extreme threats of severe pain and suffering.

The Departments disagree that noncitizens will have to “predict the future” to rebut the presumption against asylum in this manner. For this per se rebuttal ground to apply, the noncitizen must demonstrate there was an imminent and extreme threat to life or safety, not that the feared harm was actively taking place or certain to occur. *See* 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B). The Departments also note that “imminent” and “extreme” are standards that are commonly used in asylum adjudications. *See, e.g., Fon v. Garland*, 34 F.4th 810, 813 (9th Cir. 2022) (“[P]ersecution is an extreme concept” (quoting *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995))); *Li v. Att’y Gen. of U.S.*, 400 F.3d 157, 164 (3d Cir. 2005) (“[U]nfulfilled threats must be of a highly imminent and menacing nature in order to constitute persecution” (citing *Boykov v. INS*, 109 F.3d 413, 416–17 (7th Cir. 1997))). As already discussed in Section IV.E.1 of this preamble, noncitizens may be able to rebut the presumption against asylum eligibility through credible testimony alone. In response to commenter concerns about inconsistent application of the rule, the Departments note that an AO’s decision is subject to supervisory and potentially IJ review, and determinations made in section 240 proceedings may be administratively appealed.



The Departments acknowledge commenters' concern about fraud, but during credible fear screenings, AOs will assess the credibility of a noncitizen's testimony regarding dangers faced at the time of entry, which will necessarily include an evaluation of whether a claimed threat is fraudulent. As discussed earlier in Section IV.D.1.iii of this preamble, whether a noncitizen is able to establish an exception to the rule or rebut the presumption will generally involve a straightforward analysis, and the Departments expect that, except in rare cases, application of the "significant possibility" standard will not meaningfully differ from application of the ultimate merits standard. The Departments believe that this ground of rebuttal is sufficiently narrow to prevent broad application to all citizens who attempt to enter the United States from Mexico across the SWB or adjacent coastal borders.

### iii. Other Exceptionally Compelling Circumstances

*Comment:* Some commenters stated that the provision allowing a noncitizen to show "exceptionally compelling circumstances" to rebut the presumption was not sufficiently defined and hence that applying it would lead to disparate results amongst adjudicators. One commenter stated that the rule does not clarify whether the exceptionally compelling circumstance must be one that prevented the asylum seeker from scheduling an appointment or whether it may be an equitable factor that mitigates in favor of granting humanitarian protection. Another commenter expressed concerns that the adverb "exceptionally" is redundant or excessive and would result in different interpretations by adjudicators. The same commenter stated that applying the term "exceptionally compelling circumstances" would also be difficult because the term is rarely used in immigration law and is restrictively defined by the Departments.

While some commenters expressed concern that requiring noncitizens to show "exceptionally compelling circumstances" by a preponderance of the evidence would be too demanding of a standard, which they asserted renders the provision inaccessible to many asylum seekers and will result in unfair denials, other commenters claimed that the standard would, in practice, allow for any official to create an exemption for any reason.

*Response:* The Departments respectfully disagree with commenters' concerns about the "exceptionally compelling circumstances" standard being insufficiently defined or not amenable to consistent determinations. The rule provides that a noncitizen necessarily demonstrates exceptionally compelling circumstances if, at the time of entry, they or a family member with whom they were traveling (1) had an acute medical emergency; (2) faced an imminent and extreme threat to life or safety; or (3) satisfied the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11. *See* 8 CFR 208.33(a)(3), 1208.33(a)(3). The non-exhaustive nature of this list preserves flexibility and ensures that the rule does not foreclose adjudicators from considering facts giving rise to exceptionally compelling circumstances.

The Departments emphasize that exceptionally compelling circumstances are not limited to the examples enumerated in 8 CFR 208.33(a)(3)(i) and 1208.33(a)(3)(i). In fact, the rule recognizes additional *per se* exceptionally compelling circumstances in section 240 removal proceedings to, along with other provisions in the rule, eliminate the possibility that this rule will cause separation of family members who traveled together or long-term separation that would result by preventing family members from following to join principal applicants who would be granted asylum but for the presumption. 8 CFR 1208.33(c).

The Departments also note that AOs and IJs regularly apply various standards in the course of their adjudications, such as the "extraordinary circumstances" standard to determine whether an asylum applicant qualifies for an exception to the one-year filing deadline, *see* INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D), and the discretionary "compelling reasons" standard to determine whether an applicant who has suffered past persecution but lacks a well-founded fear of future persecution should be granted asylum in the exercise of discretion, *see* 8 CFR 208.13(b)(1)(iii)(A); 1208.13(b)(1)(iii)(A). Hence, although the Departments acknowledge the concerns of some commenters about noncitizens' ability to demonstrate "exceptionally compelling circumstances," the Departments believe that the best way to assess the variety of fact patterns presented by noncitizens is to use a fact-specific approach on a case-by-case basis.

Using this fact-specific approach on a case-by-case basis is consistent with other aspects of asylum adjudication, such as establishing an exception to the one-year filing deadline, *see* INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D), determining whether harm rises to the level of persecution, *see Stevic*, 467 U.S. at 423 n.18, or determining whether an individual was harmed on account of a protected ground, *see* 8 CFR 208.13(b)(1).

AOs receive extensive training that is designed to enable them to conduct non-adversarial interviews, assess testimony, and exercise their judgment in a fair and impartial manner.<sup>208</sup> Likewise, IJs have extensive experience and training in applying such concepts to individual cases.<sup>209</sup> Accordingly, the Departments strongly believe that IJs and AOs will fairly and competently examine the facts and circumstances of an individual’s case to determine whether they demonstrated exceptionally compelling circumstances to rebut the lawful pathways presumption of asylum ineligibility. In response to commenter concerns about consistency of determinations, credible fear determinations, as noted above, are subject to review by a Supervisory AO, and determinations made in section 240 proceedings are subject to administrative appeal.

#### iv. Victim of Severe Form of Trafficking in Persons

*Comment:* A number of commenters stated concern about noncitizens’ ability to rebut the presumption by satisfying the definition of a “victim of a severe form of trafficking in persons.” Some commenters stated that trafficking victims cannot be expected to have evidence prepared to demonstrate, by a preponderance of the evidence, that they were trafficked. A few

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<sup>208</sup> *See* USCIS, *Non-Adversarial Interview*.

<sup>209</sup> *See* 8 CFR 1003.0(b)(1)(vii) (EOIR Director’s authority to “[p]rovide for comprehensive, continuing training and support” for IJs); 8 CFR 1003.9(b)(1) and (2) (Chief Immigration Judge’s authority to issue “procedural instructions regarding the implementation of new statutory or regulatory authorities” and “[p]rovide for appropriate training of the [IJs] . . . on the conduct of their powers and duties”); DOJ EOIR, *Legal Education and Research Services Division* (Jan. 3, 2020), <https://www.justice.gov/eoir/legal-education-and-research-services-division> (“The Legal Education and Research Services Division (LERS) develops and coordinates headquarters and nationwide substantive legal training and professional development for new and experienced judges, attorneys, and others within EOIR who are directly involved in EOIR’s adjudicative functions. LERS regularly distributes new information within EOIR that includes relevant legal developments and policy changes from U.S. government entities and international organizations.”).

commenters expressed concern that it would be very difficult for the population that is vulnerable to trafficking to rebut the presumption due to lack of evidence and the exemption being narrowly applied. Others stated that the NPRM's reference to 8 CFR 214.11, which defines victims of severe forms of trafficking, was not sufficiently specific. Some commenters wrote that this ground of rebuttal should be broadened to apply to circumstances in which individuals may be at risk of trafficking and to apply regardless of severity. One commenter stated that the victims of trafficking rebuttal ground is very narrow and fails to take into account the many other forms of gender-based persecution, including domestic violence, sexual assault, stalking, female genital cutting, and forced marriage. A few other commenters expressed concerns that officials may retraumatize individuals in the process of validating a claim for rebutting the presumption and may end up returning them to their traffickers if they find that the noncitizen did not rebut the presumption of asylum ineligibility. One commenter wrote that, because the severity of human trafficking is hard to "grade," it is important to apply the broadest understanding of new trends and definitions provided under the universal human rights instruments to prevent underreporting and insufficient identification of victims of this human rights violation.

One commenter wrote that the definition of "victim of a severe form of trafficking" is highly technical and requires a thorough analysis of several components usually (in the T nonimmigrant status context, from which the definition derives) completed after review of a complete application package, including extensive supporting evidence and briefing prepared by legal counsel. The same commenter added that a survivor presenting at the border under the circumstances described above is unlikely to be able to meet this standard. Some commenters stated that the rule would force trafficking victims to rebut the presumption at a higher legal standard—preponderance of the evidence—rather than "any credible evidence" as would be required if they were already in the United States and applying for T nonimmigrant status.

One commenter stated that the Departments should remove the trafficking rebuttal ground because migrants who voluntarily utilized smugglers would falsely claim to have been trafficked to qualify for the exception.

*Response:* The Departments acknowledge commenters' concerns about victims of human trafficking but disagree that the existing rebuttal ground should be revised or expanded. As described in the NPRM, *see* 88 FR at 11730, the presumption in this rule is necessarily rebuttable in certain circumstances, including if, at the time of entering the United States, the noncitizen satisfied the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11. *See* 8 CFR 208.33(a)(3)(i)(C), 1208.33(a)(3)(i)(C). The Departments disagree with the premise that this rule's reference to the definition of "victim of a severe form of trafficking in persons" found in 8 CFR 214.11 is insufficiently specific. This final rule relies upon, and is consistent with, the definition used in the T nonimmigrant status context, which itself is consistent with the applicable statutory definition.<sup>210</sup>

The Departments also emphasize that they are not applying the "preponderance of the evidence" standard to trafficking victims who are initially seeking to rebut the lawful pathways presumption during credible fear screenings. The standard of proof applied in credible fear screening is a "significant possibility . . . that the alien could establish eligibility for asylum," INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), which also applies to "exceptionally compelling circumstances." During credible fear screenings, then, a noncitizen would have to show a significant possibility that they could satisfy the definition of victim of a severe form of trafficking by a preponderance of the evidence in a full hearing. The Departments recognize that many victims of trafficking are unlikely to possess written evidence of their trafficking; however, the credible fear screening process involves eliciting testimony from individuals seeking protection and does not require noncitizens to provide written statements or other documentation. *See* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); 8 CFR 208.30(d). Moreover, the Departments

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<sup>210</sup> *See* 8 CFR 214.11(b) (cross-referencing INA 101(a)(15)(T)(i), 8 U.S.C. 1101(a)(15)(T)(i)).

note that, in addition to receiving extensive training in substantive law and procedure, AOs are also trained to identify and interview vulnerable individuals, including victims of trafficking.<sup>211</sup> For merits adjudications, both AOs<sup>212</sup> and IJs<sup>213</sup> receive training and have experience assessing evidence and the credibility of noncitizens who appear before them for interviews or hearings, even in the absence of other documentation. Indeed, the INA explicitly provides that “testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration.” INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii).

With respect to the commenter’s suggestion that the Departments should remove the trafficking-victims ground for rebuttal because the commenter believed that noncitizens who are smuggled will falsely claim they are trafficked, the Departments strongly believe it is important to treat trafficking as an exceptionally compelling circumstance. The Departments included this provision to allow this vulnerable population to rebut the lawful pathways presumption and seek protection in the United States. The Departments note that the commenter did not include any reliable evidence or data to support their allegation that individuals who are smuggled will falsely claim to be trafficked. In addition, the TCT Bar IFR also included a limited exception for victims of severe forms of trafficking, and the Departments are unaware of evidence that it was abused while that IFR was in effect.

Commenters’ suggestions regarding broadening the grounds to rebut the presumption are addressed below in Section IV.E.3 of this preamble.

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<sup>211</sup> See USCIS, *RAIO Directorate – Detecting Possible Victims of Trafficking Lesson Plan* (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Trafficking\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Trafficking_LP_RAIO.pdf); see also USCIS, *Asylum Division Training Programs* (Dec. 19, 2016), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-division-training-programs>.

<sup>212</sup> USCIS, *RAIO Directorate—Officer Training: Decision Making* (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Decision\\_Making\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Decision_Making_LP_RAIO.pdf).

<sup>213</sup> See 8 CFR 1003.0(b)(1)(vii) (EOIR Director’s authority to “[p]rovide for comprehensive, continuing training and support” for IJs); 8 CFR 1003.9(b)(1) and (2) (Chief Immigration Judge’s authority to issue “procedural instructions regarding the implementation of new statutory or regulatory authorities” and “[p]rovide for appropriate training of the [IJs] . . . on the conduct of their powers and duties”); DOJ EOIR, *Legal Education and Research Services Division* (Jan. 3, 2020), <https://www.justice.gov/eoir/legal-education-and-research-services-division> (“[LERS] develops and coordinates headquarters and nationwide substantive legal training and professional development for new and experienced judges, attorneys, and others within EOIR who are directly involved in EOIR’s adjudicative functions. LERS regularly distributes new information within EOIR that includes relevant legal developments and policy changes from U.S. government entities and international organizations.”).

### 3. Exceptions to the Presumption

#### i. Proposed Exceptions for Migrants Facing Danger in Third Countries

*Comment:* Commenters expressed concern that the rule contains no exceptions for asylum seekers who would face danger in transit countries even though many asylum seekers are at serious risk in common transit countries. Multiple commenters suggested that the exemption for imminent threat of rape, kidnapping, torture, or murder should be expanded to include general threats of violence, as many individuals within the asylum process would be forced to stay in Mexico or other countries where general threats of violence are much more common and put their lives or safety at risk. Another commenter stated that, when asylum seekers are waiting in some of the most dangerous towns and cities in the world, they face real threats that the rule should recognize as an exception to the presumption.

Several commenters noted that the members of one family, when using the Title 42 exception process, tried to travel more than 1200 miles across Mexico and were kidnapped and taken hostage during that travel, only to be expelled from the United States when they sought help from the USBP. Another commenter noted that movement along the U.S.-Mexico border is notoriously difficult and unsafe. In contrast, one commenter stated that reports of localized violence in certain areas of Mexico are not indicative of the conditions in Mexico as a whole.

*Response:* The Departments acknowledge the concerns raised by commenters and reiterate that noncitizens who face an extreme and imminent threat to life or safety in Mexico at the time of entry can rebut the presumption of asylum ineligibility, *see* 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B), without needing to qualify for any additional exception. In addition, the rule provides that they may rebut the presumption by showing that, at the time of entry, they faced an acute medical emergency or were victims of a severe form of trafficking. *See* 8 CFR 208.33(a)(3)(i)(A) and (C), 1208.33(a)(3)(i)(A) and (C). However, the Departments decline to enumerate additional, broader ways to rebut the presumption, such as a ground based on general threats of violence; and the Departments likewise believe that they need not enumerate additional

exceptions to the presumption. In the absence of other exceptionally compelling circumstances, *see* 8 CFR 208.33(a)(3)(i), 1208(a)(3)(i), the Departments believe that danger in Mexico generally would justify failing to pre-schedule a time and place to appear at a POE and eschewing lawful and orderly pathways for entering the United States only when it amounts to an extreme and imminent threat to life or safety. For noncitizens who face dangers in other countries besides Mexico, or who face less imminent and extreme threats in Mexico, there ordinarily remain reasonable opportunities to take advantage of other lawful pathways contemplated by the rule. To the extent a noncitizen’s individual circumstances make lawful pathways unavailable, or otherwise warrant rebuttal of the presumption, noncitizens may attempt to demonstrate as much on a case-by-case basis under the “exceptionally compelling circumstances” means of rebuttal. Noncitizens may choose to apply for asylum or other protection in a different country where they do not face dangers or schedule appointments to appear at a SWB POE using the CBP One app. CHNV nationals may also apply for advanced authorization for parole while outside their country of nationality. With regard to concerns about traveling along the U.S.-Mexico border to access available CBP One app appointments, CBP intends to increase the number of available appointments when the Title 42 public health Order is lifted, as detailed in Section IV.E.3.ii.a of this preamble. As detailed in Section IV.E.3.ii.b of this preamble, CBP is implementing updates to the CBP One app process that will enable noncitizens to request a preferred POE to schedule an appointment, thus helping noncitizens avoid unpredictable travel along the U.S.-Mexico border.

ii. Concerns about the Exception for Scheduled Arrivals at Ports of Entry

a. General Comments Regarding the CBP One app

*Comment:* One commenter, a legal services provider, expressed concern about the future impact of the CBP One app based on their experiences with the use of the app in the context of seeking Title 42 exceptions. Specifically, the commenter stated that the use of the app had barred “thousands” from seeking exceptions to the Title 42 public health Order. This commenter



stated that, before January 2023, it was able to schedule appointments for its clients with POEs directly, without using the app. The organization said that this process was “orderly and calm” and that clients rarely waited more than four to six weeks for an appointment. The organization stated that, following the implementation of the scheduling capability, many of their clients had been unable to secure appointments, and the process takes longer. The organization stated that CBP did not provide notice that the CBP One app would be the sole way to seek exceptions to Title 42.

*Response:* To the extent that commenters have concerns about the processing of individuals seeking exceptions to the Title 42 public health Order at POEs, including concerns about the number of appointments available under the Title 42 exception process, these concerns are outside the scope of this rule. This rule is designed to manage the anticipated increase in the number of individuals expected to travel to the United States without documents sufficient for lawful admission following the termination of the Title 42 public health Order and will take effect once the Title 42 public health Order is lifted. At that time, CBP will inspect and process all noncitizens who arrive at a POE under Title 8 authorities, which include the INA, as required by statute. Title 42 is a separate statutory scheme that operates separately from Title 8.

Additionally, following the termination of the Title 42 public health Order, CBP intends to increase the number of available appointments in the CBP One app and is committed to processing as many noncitizens as is operationally feasible. Further, in no instance will CBP turn a noncitizen away from a POE, regardless of whether they utilize the CBP One app.

*Comment:* Commenters expressed concern about the security of the personally identifiable information (“PII”) that users submit through the CBP One app. A commenter asserted that the CBP One app poses serious privacy concerns regarding the collection, storage, and use of private personal information and alleged that requiring use of the CBP One app is “another means of enlarging what is an already expansive surveillance infrastructure that relentlessly targets immigrant communities.” A commenter also stated that, while the

Departments have previously indicated that use of the CBP One app is voluntary, the rule will significantly expand use of the app, with the result that it will be the only way for certain noncitizens to seek asylum in the United States and thus that “many people do not have a genuine choice in whether to consent.” Commenters questioned the wisdom of encouraging migrants to disclose personal details while in transit in temporary shelters and non-secure settings.

Particularly in light of a recent ICE data breach, commenters expressed concern about what measures CBP and DHS will take to secure the PII that applicants will have to provide in order to secure an appointment through the CBP One app. The commenters expressed concern that a similar breach regarding CBP One app data could place applicants waiting for appointments outside the United States at a greater risk than individuals affected by the recent breach, who were primarily in the United States. Commenters alleged that this risk could have a chilling effect on otherwise meritorious applications.

Commenters expressed a range of PII-related concerns regarding the use of the CBP One app in the context of asylum seekers and asylum applications. For example, a commenter expressed concern that use of the CBP One app and the need to rely on publicly accessible internet connections may violate 8 CFR 208.6, which establishes limits on the disclosure to third parties of information contained in or pertaining to records related to credible fear determinations, asylum applications, and similar records. Another commenter similarly noted that use of the app may be tracked by government officials or persecutors, placing migrants in further danger.

A commenter also expressed concern that the lack of privacy may be particularly harmful for those fleeing domestic violence and that use of a smart device to access the CBP One app may permit GPS tracking and put the noncitizen at heightened risk of being located by their abuser, as well as put them at risk of financial abuse. A commenter expressed concern that information provided by migrants through the CBP One app could be shared with law

enforcement agencies beyond CBP, which are not bound by CBP privacy and information-sharing policies. A few commenters expressed concern with requiring the use of a Login.gov account because the underlying provider for that site has a history of data breaches.

*Response:* The Departments disagree with the statement that migrants must use, or are unable to meaningfully consent to using, the CBP One app. While noncitizens who present at a POE without scheduling an appointment using the CBP One app will be subject to the rebuttable presumption unless otherwise excepted, noncitizens are not required to use the app in order to be processed at a POE.<sup>214</sup> The Departments note that the rebuttable presumption does not apply to noncitizens who either were provided authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process or who sought asylum or other protection in a country through which they traveled and received a final decision denying that application. 8 CFR 208.33(a)(2)(ii)(A) and (C), 1208.33(a)(2)(ii)(A) and (C). The presumption also does not apply to noncitizens who arrive at a port of entry without scheduling an appointment if the scheduling system was not possible to access or use due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B).

For those who choose to utilize the CBP One app to schedule an appointment, CBP has taken steps to protect users' information. First, in accordance with DHS policy, apps developed by DHS—including the CBP One app—must meet certain baseline privacy and security requirements.<sup>215</sup> These requirements include app-specific privacy and notice policies; limitations on the collection of sensitive content, including PII; and appropriate encryption for the transmission of data.<sup>216</sup> The app was reviewed for compliance prior to development and is

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<sup>214</sup> See, e.g., CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 18 (Jan. 19, 2023), [https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023\\_0.pdf](https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf).

<sup>215</sup> See DHS, *Instruction 047-01-003 (Rev. 00.1), Privacy Policy for DHS Mobile Applications* 7–10 (Dec. 14, 2018), <https://www.dhs.gov/publication/privacy-policy-dhs-mobile-applications>.

<sup>216</sup> *Id.*

reviewed again every time a change is made that impacts the collection and use of PII.<sup>217</sup> All CBP systems have undergone comprehensive testing and evaluation to assess the respective security features and have been granted an Authority to Operate (“ATO”).<sup>218</sup> In particular, the app serves only as a tool for the collection of information.<sup>219</sup> Once the information is received, CBP temporarily retains the submitted CBP One app photographs of undocumented individuals within the Automated Targeting System (“ATS”). Upon an individual’s arrival at a POE, the advance information is imported into a Unified Secondary (“USEC”) event.<sup>220</sup> The information is then verified by an officer and stored as part of standard CBP processes.<sup>221</sup> All data in ATS and USEC is treated and retained in accordance with the relevant retention schedules.<sup>222</sup> These systems are subject to continuous evaluation of security protocols so that CBP may quickly respond if there is a change in the risk posture in any of the systems. The information CBP collects via the CBP One app and transmits to downstream systems is the same information CBP already collects when a noncitizen encounters a CBP officer at a POE—it is simply collected earlier to make processing at the POE more orderly and efficient.<sup>223</sup> CBP has published a Privacy Impact Assessment (“PIA”) for the CBP One app generally and a standalone, function-specific PIA for the collection of advance information from certain undocumented noncitizens.<sup>224</sup>

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<sup>217</sup> See *id.* at 10.

<sup>218</sup> See DHS, *DHS 4300A Sensitive Systems Handbook* 47 (Nov. 15, 2015), <https://www.dhs.gov/publication/dhs-4300a-sensitive-systems-handbook>.

<sup>219</sup> See CBP, *DHS/CBP/PIA-068, Privacy Impact Assessment for CBP One™ Mobile Application* 4 (Feb. 19, 2021), <https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf>. CBP has updated this impact assessment multiple times since February 19, 2021.

<sup>220</sup> See *id.* at 15.

<sup>221</sup> See CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 11–12, 21 (Jan. 19, 2023), [https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023\\_0.pdf](https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf).

<sup>222</sup> See CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 10, 13 (Jan. 19, 2023), [https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023\\_0.pdf](https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf).

<sup>223</sup> See *id.* at 17–18.

<sup>224</sup> CBP, *DHS/CBP/PIA-068, Privacy Impact Assessment for CBP One™ Mobile Application* (Feb. 19, 2021), <https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf>; CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* (Jan. 19, 2023), [https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023\\_0.pdf](https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf).

With regard to the commenters' concerns regarding privacy notices related to biometrics and facial recognition technology, CBP takes such concerns seriously. In the referenced GAO audit, GAO-20-568, GAO made five recommendations to CBP, with which CBP concurred. Three of the recommendations were related to privacy considerations, including (1) ensuring privacy notices are complete and current, (2) ensuring notices are available at all locations using facial recognition technology, and (3) developing and implementing a plan to audit its program partners for privacy compliance.<sup>225</sup> At the time of the publication of the NPRM, all of these privacy-related recommendations had been implemented, and the recommendations were closed by GAO.<sup>226</sup> CBP has since created a new website that outlines the locations (air, land, and seaports) where CBP uses facial comparison technology, and CBP continues to take steps to ensure that appropriate notice is provided to travelers.<sup>227</sup>

With regard to commenters' concerns about Login.gov, the Departments note that Login.gov is owned and operated by the General Services Administration ("GSA"),<sup>228</sup> and thus the Departments have no control over the data privacy or data security considerations of that platform. However, the Departments note that GSA has a system security plan for Login.gov, and Login.gov has an ATO.<sup>229</sup>

*Comment:* At least one commenter raised a concern that the CBP One app is an untested pilot program.

*Response:* The Departments respectfully disagree. The CBP One app was initially launched in October 2020 to serve as a single portal to access CBP services.<sup>230</sup> In May 2021,

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<sup>225</sup> See GAO, *Facial Recognition: CBP and TSA are Taking Steps to Implement Programs, but CBP Should Address Privacy and System Performance Issues* 72–73 (Sept. 2020), <https://www.gao.gov/assets/gao-20-568.pdf>.

<sup>226</sup> GAO, *Facial Recognition: CBP and TSA are Taking Steps to Implement Programs, but CBP Should Address Privacy and System Performance Issues*, <https://www.gao.gov/products/gao-20-568> (reporting on the changes that CBP made that resulted in closure of the recommendations).

<sup>227</sup> CBP, *Say Hello to the New Face of Speed, Security and Safety: Introducing Biometric Facial Comparison*, <https://biometrics.cbp.gov/> (last visited May 1, 2023).

<sup>228</sup> See GSA, *Privacy Impact Assessment for Login.gov* 1, 5 (Mar. 17, 2023), [https://www.gsa.gov/cdnstatic/Logingov\\_PIA\\_March2023.pdf](https://www.gsa.gov/cdnstatic/Logingov_PIA_March2023.pdf).

<sup>229</sup> See *id.* at 27.

<sup>230</sup> CBP, *CBP One™ Mobile Application* (Apr. 10, 2023), <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

CBP updated the app to provide the ability for certain NGOs to submit information to CBP on behalf of an undocumented noncitizen and schedule a time for such undocumented noncitizens to present at a POE to be considered for an exception from the Title 42 public health Order.<sup>231</sup> This functionality included submitting individuals' information in advance, including a photo, and scheduling a date and time to present at a POE.<sup>232</sup> In April 2022, CBP expanded the ability for noncitizens to directly submit information and schedule appointments to present at a land border POE to noncitizens seeking to enter the United States under the U4U process.<sup>233</sup> To further expand the accessibility of the CBP One Title 42 exception process, in January 2023, the advance information submission and scheduling process was made publicly available to all undocumented noncitizens seeking to travel to a land POE to be considered for an exception to the Title 42 public health Order.<sup>234</sup> Significant enhancements and changes to the CBP One app have been and will continue to be made in response to user and stakeholder feedback.<sup>235</sup>

*Comment:* Commenters stated that the CBP One app is not workable. For example, commenters stated that there are more migrants seeking asylum than there are appointments available, that the number of appointments was entirely too limited, that the rule does not provide for a minimum number of appointments, and that after a final rule is issued, demand for appointments would only increase. Another commenter noted that the INA does not limit the number of people who may arrive at a POE, nor does the rule provide information about how the government will apportion daily appointments. This commenter also noted that the number of appointments at the border is currently “capped,” but that this limitation is not legally binding and could be increased. At least one commenter said it would be “inherently unjust to demand” that individuals use an information system that cannot handle the number of people expected to

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<sup>231</sup> CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 4 (Jan. 19, 2023), <https://www.dhs.gov/publication/dhscbppia-076-collection-advance-information-certain-undocumented-individuals-land>.

<sup>232</sup> *Id.*

<sup>233</sup> CBP, *DHS/CBP/PIA-068, Privacy Impact Assessment for CBP One™ Mobile Application* 16–17 (Feb. 19, 2021), <https://www.dhs.gov/publication/dhscbppia-068-cbp-one-mobile-application>.

<sup>234</sup> *Id.* at 17–18.

<sup>235</sup> CBP, *CBP One™ Mobile Application* (Apr. 10, 2023), <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

use it. Commenters argued that requiring use of this system will create a backlog and require people to wait for their appointments for a significant period of time in Mexico.

Other commenters raised concerns about flaws in the CBP One app and suggested it would empower smugglers. Commenters noted that the CBP One app was created for other purposes and not as an appointment system for asylum seekers. A commenter noted that some individuals have to create a new account every day because of flaws in the app. Another commenter asserted that there is a significant risk that appointments will be resold, pointing to a lack of security within the app that would permit such resale. Commenters also stated that CBP indicated that criminal groups were creating fraudulent appointments to obtain information and funds from asylum seekers seeking entry to the United States. A commenter stated that requiring use of the CBP One app has already led to increased exploitation by criminal groups and others who seek to take advantage of migrants and is likely to push individuals to travel by more dangerous routes. Another commenter noted that the availability of appointments only at certain POEs had led to migrants traversing dangerous parts of Mexico to travel to a POE for their appointment. The commenter stated that traversing Mexico was particularly difficult because transportation companies and Mexican authorities impede migrants' ability to travel through Mexico. Another commenter recommended the creation of a process parallel to the CBP One app process for highly vulnerable migrants to be considered for entry into the United States in an expedited manner. At least one commenter stated that the CBP One app should allow for prioritization based on vulnerability. Another commenter stated that smugglers will have more power because of the limited number of appointments, as people will pay smugglers to find alternate routes into the United States.

*Response:* The Departments acknowledge that there are currently many migrants waiting to present at a POE and that demand for CBP One app appointments may exceed the number of appointments that can reasonably be made available on a given day. However, CBP is committed to processing as many individuals at POEs as operationally feasible, based on

available resources and capacity, while executing CBP's mission to protect national security and facilitate lawful trade and travel.<sup>236</sup> While the Title 42 public health Order remains in effect, the CBP One app is being used to schedule appointments for individuals who are seeking to present at a land POE to be considered for an exception from the Title 42 public health Order. During this time, the number of appointments available has been limited. However, when the Title 42 public health Order is lifted, CBP intends to increase the number of available appointments and anticipates processing several times more migrants each day at SWB POEs than the 2010 through 2016 daily average, including through use of the CBP One app.<sup>237</sup> While CBP recognizes and acknowledges that demand for appointments may exceed the number of appointments that can reasonably be made available on a given date, there has been a large number of migrants waiting in Mexico to enter the United States since long before the introduction of the app, and CBP expects that use of the app will help facilitate the processing of such individuals. The CBP One app is a scheduling tool that provides efficiencies and streamlines processing at POEs. Additionally, while CBP acknowledges that some noncitizens who are unable to schedule an appointment might conceivably turn to smuggling or more dangerous routes, CBP is implementing changes to the CBP One app to permit noncitizens to select a preferred arrival POE in an effort to mitigate any perceived need to travel to another location. Additionally, CBP is transitioning scheduling in the CBP One app to a daily appointment allocation process to allow noncitizens additional time to complete the process. This process change will allow noncitizens to submit a request for an appointment, and available appointments will then be allocated to those who made such a request, and the app will now

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<sup>236</sup> Memorandum for William A. Ferrara, Exec. Ass't Comm'r, Off. of Field Operations, from Troy A. Miller, Acting Comm'r, CBP, *Re: Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf>.

<sup>237</sup> See CBP STAT Division, *U.S. Customs and Border Protection (CBP) Enforcement Encounters – Southwest Border (SBO), Office of Field Operations (OFO) Daily Average* (internal data report, retrieved Apr. 13, 2023); Memorandum for William A. Ferrara, Exec. Ass't Comm'r, Off. of Field Operations, from Troy A. Miller, Acting Comm'r, CBP, *Re: Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf>.



provide a 23-hour period for individuals allotted appointments to complete the scheduling process and confirm their appointments. In addition to the increased number of appointments made available after the end of the Title 42 public health Order, it is anticipated that these changes will reduce the likelihood of noncitizens seeking to travel by alternate routes.

The capacity to process migrants at POEs and the utilization of the CBP One app to secure appointments are separate and distinct issues. Officers will process all individuals who present at a POE regardless of a CBP One app appointment. Although a noncitizen who presents at a POE without an appointment may be subject to the rebuttable presumption under this rule, they will be able to present any protection claims, as well as any evidence to rebut the presumption or establish an exception to its application—including evidence related to their inability to access the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle—during either expedited removal or section 240 removal proceedings, with an AO or IJ, as applicable. Processing times will vary based on capacity and available resources, and those without a CBP One app appointment may be subject to longer wait times before being processed by a CBP officer.

With regard to commenters' suggestions regarding the prioritization of vulnerable individuals, the Departments decline to adopt such a process. As an initial matter, the Departments reiterate that the CBP One app is a method of facilitating entry into the United States. Once individuals are present in the United States at a POE, CBP must inspect and process all noncitizens, regardless of vulnerability. *See, e.g.,* INA 235(a)(3), 8 USC 1225(a)(3); 8 CFR 235.1(a). While in some cases an individual who is particularly vulnerable may warrant more expeditious processing, such prioritization and processing does not occur until the individual is physically present in the United States. In other words, while an individual's vulnerability may, in some cases, be a factor in the noncitizen's processing disposition at the time of processing, this vulnerability is not validated or taken into account prior to a migrant's arrival in the United States in the context of the CBP One app.

*Comment:* Commenters raised concerns about limitations on where and when an appointment can be made using the CBP One app. One commenter noted that the geofencing portion of the app does not perform accurately, as indicated by individuals who are present in Mexico receiving error messages saying they are not. Another commenter noted that, since the geofencing limits where people can be to make appointments, they have no option but to make a dangerous journey before they even begin a lawful process; the commenter urged instead that individuals be permitted to schedule appointments prior to embarking on their journey to ensure that appointments are provided in a fair manner. At least one commenter expressed concern that individuals would use Virtual Private Networks to do an end run around the geofencing. Another commenter stated that the app allows for scheduling appointments up to 13 days in advance, but that individuals accessing the app from their home countries may not be able to make it to the United States in 13 days. Similarly, a commenter stated that, although the rule contemplated expanding CBP One access to locations beyond the SWB, such an expansion would not alleviate the risk of harm that migrants face, as it would not be possible for the migrant to schedule a date and time to present at a POE before leaving their home country, and migrants seeking to access the app from their home countries would lack access to NGOs and other entities at the SWB that could provide assistance.

*Response:* At this time, the ability to schedule an appointment through the CBP One app is available only to migrants located in central and northern Mexico.<sup>238</sup> The geofenced area allows migrants to remain in shelters and other support networks instead of congregating at the border in unsafe conditions, facilitating a safe and orderly presentation at POEs. The app does not facilitate travel to Mexico in order to schedule an appointment to present at a POE. Individuals outside northern and central Mexico are encouraged to use various pathways

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<sup>238</sup> See CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 6 n.24 (Jan. 19, 2023), [https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023\\_0.pdf](https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf).

available to lawfully travel to the United States, and they will be able to use the app once they are in the geofenced area and thus closer to the United States.

CBP is aware of reports of users attempting to circumvent the geofenced area and has taken steps to prevent this from occurring. CBP has also received reports of users who were in Mexico in close proximity to the SWB, but whose phones were showing that they were within the United States, thus generating error messages. To address this issue, CBP adjusted the geofencing to accommodate individuals located in Mexico in close proximity to the SWB.

*Comment:* Some commenters stated that requiring people to wait in Mexico until their appointment date is dangerous, as indicated, for example, by the number of violent attacks on migrants who have been turned back under the Title 42 public health Order since President Biden took office and the dangers that individuals faced in Mexico during MPP. One commenter expressed concern that the rule included no exception to the rebuttable presumption for asylum seekers' inability to secure a timely opportunity to present themselves, even though CBP One appointments have been "extremely difficult to access" and have taken weeks or months to secure. Another commenter noted that the first-come, first-served scheduling design is haphazard, and that there is no priority for migrants who have been waiting for longer periods of time.

Another commenter cited a Human Rights First study that found that there were 1,544 reported cases of violence against asylum seekers—including two murders—during the first two years of MPP. One commenter stated that the delays caused by the CBP One app increase the dangers for those waiting for a POE appointment in Mexico. Commenters stated that asylum seekers who are unable to secure appointments through the CBP One app will be forced to remain indefinitely at the border in dangerous conditions, including conditions where they have no access to or must rely on third parties for safe housing, food, electricity, internet, or stable income, all while continuing to try to make an appointment. One commenter noted that this was particularly problematic for those with chronic or serious health problems because access to

health care in areas where individuals must wait is limited. Commenters expressed concern that criminal organizations, including cartels, could exploit individuals during the period that they must remain in northern Mexico waiting for an appointment. Another commenter expressed concern that those individuals in Mexico awaiting an appointment are at risk of deportation to their home countries, where they could experience persecution.

A commenter also stated that the United States Government should engage with the Government of Mexico to ensure that noncitizens waiting in Mexico for a CBP One app appointment have documents authorizing a temporary stay in Mexico for that purpose and that the lack of official documents regarding status in Mexico leaves noncitizens at risk of fraud and abuse. Another commenter recommended that CBP provide instruction on the use of the app to personnel in Mexico.

*Response:* The Departments acknowledge that individuals seeking to make an appointment to present at a POE will generally need to wait in Mexico prior to their appointment. The Departments also acknowledge that, in some cases, the conditions in which such individuals wait may be dangerous. However, noncitizens are currently waiting in northern Mexico, and, as addressed in the NPRM, the Departments anticipate that larger numbers of individuals will seek to enter the United States after the lifting of the Title 42 public health Order. *See* 88 FR at 11705. Therefore, as noted in the NPRM, the Departments have concluded that this anticipated influx warrants the implementation of a more transparent and efficient system for facilitating orderly processing into the United States. Although the use of the CBP One app may, as commenters noted, sometimes cause delays, the Departments believe that, on balance, the benefits of the more transparent and efficient system created by use of the app outweigh the drawbacks and that use of the app will ultimately inure to noncitizens' benefit by allowing the Departments to more expeditiously resolve their claims. CBP has conducted extensive outreach and communication with stakeholders who may be able to assist noncitizens

in accessing the CBP One app to register and schedule an appointment, including shelters and other entities in Mexico.

The Departments also note that migrants are not categorically required to preschedule an appointment to present at a POE, and all migrants who arrive at a POE, regardless of whether they have an appointment, will be inspected and processed. Migrants who present without an appointment may be subject to the presumption, but, among other exceptions, the presumption will not apply for those for whom it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). Additionally, migrants who demonstrate “exceptionally compelling circumstances,” such as an imminent and extreme threat to their life or safety, an acute medical emergency, or status as a victim of a severe form of trafficking, may rebut the presumption, in accordance with 8 CFR 208.33(a)(3)(i)(A) through (C), 1208.33(a)(3)(i)(A) through (C).

b. CBP One App Accessibility

*Comment:* Commenters expressed a range of concerns regarding the accessibility of the CBP One app for migrants seeking to enter the United States.

Many commenters stated the CBP One app is not available to all migrants, especially those who do not have smartphones, reliable internet access, or passports, and that all appointments are claimed almost immediately because the supply is insufficient. Multiple commenters suggested that many low-income individuals do not have access to a working phone or the internet in their home country, making use of the CBP One app infeasible. Commenters stated that many oppressive regimes limit access to the internet and asked how the Departments planned to provide access to the CBP One app to migrants in such countries. Relatedly, at least one commenter conveyed, anecdotally, that some migrants with limited economic means are forgoing food so that they can purchase enough data to attempt to make an appointment on the CBP One app to cross the SWB and seek asylum in the United States. Some commenters noted

that many migrants become victims of crime while traveling to the United States, and their phones may be stolen, lost, or broken. Another commenter pointed out that some individuals may have phones but cannot afford to pay for telephone services for the phone. A commenter stated that it was unreasonable to place the burden on migrants to obtain internet and broadband access, as some migrants must choose between “sustenance and digital access.” The commenter stated that this requirement perpetuated the crisis of unequal access to justice. At least one commenter noted that individuals may dispose of their cell phones out of concern that those they fear could track them using that phone and so no longer have a smartphone to use the CBP One app. One commenter suggested finding donors to provide phones for families to schedule appointments.

Others stated concerns with relying on a web and mobile application because technology can fail. At least one commenter stated that the Departments should not rely only on the CBP One app because cellular signals along the SWB are inconsistent and Wi-Fi options are limited, and some migrants, such as Afghans who travel through South and Central America, do not have local connectivity. At least one commenter asked how having a cell phone with good coverage so a migrant can obtain an appointment relates to the merits of their asylum claim, while another stated that migrants without internet access would effectively be held to a higher standard than those with internet access, which many would not be able to overcome due to the lack of legal representation in initial screenings.

Another commenter stated that the rule did not provide sufficient information on how the Government conducted a study of the number of migrants who may have smartphones. Another asserted that the study had a sampling bias since it only surveyed individuals seeking a Title 42 exception, which they claimed required the use of the CBP One app. A commenter provided data comparing the percentages of smartphone ownership in Mexico, Cuba, Haiti, Nicaragua, and Venezuela, which, they stated, showed that while Mexico and Haiti had a high percentage of users, Nicaragua and Venezuela did not. On the other hand, at least one commenter noted that

cell phones, including smartphones, are very common and that as a result people should be able to apply for CBP One app appointments.

Other commenters noted that people who cannot use the application would be at a serious risk of being turned away at the border and disagreed with the Departments' statements to the contrary.

A commenter claimed that CBP has yet to implement a desktop version of the app and has provided little clarity on whether and when such a version would be available. The commenter also stated that many migrants lack regular access to desktop computers.

*Response:* The Departments disagree that the CBP One app is a barrier to seeking asylum. The Departments also disagree with the contention that this rule sets up a linkage between access to an adequate cell phone or internet and the merits of an individual's asylum claim. Rather, the CBP One app is a tool that DHS has established to process the flow of noncitizens seeking to enter the United States in an orderly and efficient fashion. CBP intends to increase the number of available appointments when the Title 42 public health Order is lifted and anticipates processing several times more migrants each day at the SWB POEs than the 2010–2016 daily average, including through use of the CBP One app.<sup>239</sup> Further, noncitizens who present at a POE without using the CBP One app are not automatically barred from asylum.<sup>240</sup> The determination of whether the rebuttable presumption applies will be determined by an AO during the credible fear process or by an IJ in section 240 removal proceedings, at which time the noncitizen can demonstrate it was not possible to use the CBP One app due to language barrier,

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<sup>239</sup> See CBP, CBP STAT, *U.S. Customs and Border Protection (CBP) Enforcement Encounters – Southwest Border (SBO), Office of Field Operations (OFO) Daily Average* (internal data report, retrieved Apr. 13, 2023); Memorandum for William A. Ferrara, Exec. Ass't Comm'r, Off of Field Operations, CBP, from Troy A. Miller, Acting Comm'r, CBP, *Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf>.

<sup>240</sup> In addition, under this rule, any noncitizen will be able to present at a POE, and CBP will not turn away any individuals—regardless of manner of entry into the United States—or deny them the opportunity to seek admission to the United States. However, those who arrive at a POE without an appointment via the CBP One app may be subject to longer wait times for processing depending on daily operational constraints and circumstances.

illiteracy, significant technical failure, or other ongoing and serious obstacle. CBP officers will not be making determinations about whether the rebuttable presumption is applicable.

The CBP One app is free to use and publicly available. As noted in the NPRM, a limited study conducted at two POEs in December 2022 found that individuals had a smartphone in 93 out of 95 Title 42 exception cases. At the time of this survey, migrants were not required to utilize the CBP One app to schedule an appointment to be considered for a Title 42 exception; that requirement was implemented in January 2023.<sup>241</sup> Additionally, independent studies demonstrate that approximately two-thirds of individuals worldwide had smartphones by 2020.<sup>242</sup> The Departments acknowledge that other studies provided by commenters show varying rates of smartphone access among migrants, that not all migrants may have access to a smartphone or be able to easily use the CBP One app, and that lack of smartphone access may hinder a migrant's ability to use the CBP One app. However, individuals who do not have a smartphone or who have other phone-related problems can seek assistance from trusted partners, who may be able to share their phones or provide translation or technical assistance if needed to submit information in advance. In addition, CBP has conducted extensive engagement with NGOs and stakeholders and has received feedback and information about the challenges associated with the use of the CBP One app. Throughout these engagements, access to smartphones has been raised, although not as a significant concern for most individuals. CBP is aware that NGOs provide support and assistance with access to mobile devices and internet connectivity. CBP notes that from January 12, 2023, when appointment scheduling launched, through the end of March 2023, over 74,000 noncitizens have scheduled an appointment via the CBP One app.<sup>243</sup>

Nevertheless, CBP acknowledges there can be connectivity gaps and unreliable Wi-Fi in central and northern Mexico. CBP reiterates that the use of the app to schedule an appointment

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<sup>241</sup> See CBP, *CBP One™ Mobile Application* (Apr. 10, 2023), <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

<sup>242</sup> Allan Jay, *Number of Smartphone and Mobile Phone Users Worldwide in 2022/2023: Demographics, Statistics, Predictions* (Mar. 16, 2023), <https://financesonline.com/number-of-smartphone-users-worldwide/>.

<sup>243</sup> CBP, *CBP Releases March 2023 Monthly Operational Update* (Apr. 17, 2023), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-march-2023-monthly-operational-update>.



to present at a POE is geofenced to only those migrants who are present in central and northern Mexico, and so commenters' concerns regarding internet censorship in other countries are misplaced. However, in response to feedback about connectivity issues, on February 18 and 23, 2023, CBP released updates to the CBP One app to improve the submission and scheduling process for individuals with lower bandwidth. In addition, based on user and stakeholder feedback, CBP will transition CBP One scheduling to a daily appointment allocation process to allow noncitizens additional time to complete the process. This process change will allow noncitizens to submit a request for an appointment, and then available appointments will be allocated to those who made such a request. Individuals who are issued an appointment will have a 23-hour period to complete the scheduling process and confirm their appointment. Each day, unconfirmed appointments will be reallocated among the current pool of registrations. This change will reduce the burden on the noncitizen to have connectivity at the precise moment of the daily appointment release, as is currently the case. This process will also enable noncitizens to request a preferred POE at which to schedule an appointment. Future and ongoing enhancements to the app are expected based on user and stakeholder feedback to ensure equity in the scheduling process.

The Departments acknowledge concerns about the availability of a desktop app for scheduling appointments. There is currently a desktop version of the CBP One app,<sup>244</sup> but it is not currently available for noncitizens to submit advance information. CBP is updating the desktop capability to provide the ability for undocumented noncitizens to register via the desktop version. This update is expected to be available in summer 2023. However, CBP does not have plans to enable users to schedule an appointment using the desktop version of the CBP One app because the desktop version does not allow for specific requirements that CBP has determined

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<sup>244</sup> See CBP, *DHS/CBP/PIA-068, Privacy Impact Assessment for CBP One™ Mobile Application 15* (2023), <https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf>.

are needed such as geofencing and a live photo. This scheduling functionality will only be available via a mobile device.

CBP notes that commenters' concerns about access to the CBP One app are misplaced. Noncitizens seeking to schedule an appointment to present at a land POE are not required to have a passport.<sup>245</sup> Other functions of the CBP One app, including the Advance Travel Authorization ("ATA") functionality used as part of the CHNV parole processes, require an individual to provide their passport information.<sup>246</sup>

*Comment:* One commenter expressed concerns that the Departments relied on use of the CBP One app among the Venezuelan population as part of the CHNV parole processes to justify use of the CBP One exception in this rule. In particular, the commenter asserted that the use of the app among the Venezuelan population seeking to travel to the United States to seek parole was not a good indicator of the app's use among other populations of migrants, many of whom were less technically savvy and required more assistance with the app.

*Response:* This commenter's concern is misplaced because the Departments have not relied on any data regarding Venezuelan migrants' access to CBP One in this rule. The Departments acknowledge and agree that use of the CBP One app in the ATA context is not comparable to the use of the app to seek an appointment to present at a POE and note that the ATA process is separate and distinct from the use of the CBP One app to schedule an appointment to present at a POE.

*Comment:* Commenters also stated that use of the CBP One app is particularly difficult for families who may be unable to make appointments together. Another commenter stated that families may not have time to register together before all of the appointments are taken. Other commenters noted that family separation may occur because of both stress and confusion. Another commenter noted that CBP officers told individuals that they had the option of leaving

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<sup>245</sup> See *id.* at 15 n.18.

<sup>246</sup> See *id.* at 21–22.

children behind, trying to get another appointment, or sending children alone, underscoring that the CBP One app increases the likelihood that families will separate themselves in order to get appointments or to enter the United States. At least one commenter noted that there should be an adequate number of appointments set aside for families. Commenters also stated that the CBP One app is insufficient as a lawful pathway because it does not allow families to register together. One commenter, a legal services provider, stated that it had raised concerns to CBP about the length of time that families were waiting to seek an appointment. The commenter stated that CBP told the entity that the delay for families was likely a result of criminal groups making fraudulent appointments, which the commenter concluded was evidence that expansion of the CBP One app would increase exploitation of migrants. One legal services clinic stated that it had been informed by a CBP Field Office on the SWB in March 2023 that officers had not interviewed any families with more than six members, which was concerning given the number of larger families waiting to enter. A commenter stated that children should not be held responsible, through their eligibility for asylum, for whether their parents used the CBP One app to enter. One commenter noted that in February 2023 a family was not permitted to enter because the appointment did not list the children's names.

*Response:* CBP acknowledges the concerns regarding the ability of families to submit appointments together and has been working to address such concerns. Following the initial implementation, CBP received feedback that the app was timing out during the registration process of families with babies or young children and determined that this was caused by delays in the third-party liveness verification (that is, the process to verify that each person listed is, in fact, a live person). In February 2023, CBP updated the workflow in the app to address this issue by removing liveness detection as part of the registration process. Users are now only required to take a still photo of each traveler at the time of registration, the same action as if taking any photo from a mobile device, which only takes a few seconds. Following this update to remove

liveness detection from the registration process, CBP has received feedback from NGOs that there are fewer reported errors.

CBP has also consolidated appointment slots to increase the number of available appointments at the same time, where feasible, making it easier for family units to get an appointment together. For example, if a POE previously had two separate appointment times with 10 appointments each, they might have been combined to create one appointment time with 20 slots, making it easier to accommodate larger groups.

CBP continues to advise users and NGOs that one member of the family should create a registration on behalf of the entire family. While each member of a family must have a unique appointment, one member of a family can create the submission on behalf of the entire family group and complete the scheduling process, including the photo capture, to secure appointments for all registered family members. Functionally, this is similar to buying airline tickets. A designated person accesses the website, the website ensures there are seats for the indicated number of people, and the designated person provides the details for each individual to complete the purchase. At this stage, only the individual submitting the registration on the family's behalf is required to provide a live photograph.

Following the rollout of these enhancements, as of April 18, 2023, CBP data show that, for appointments scheduled from March 8, 2023, through May 1, 2023, groups make up an average of 83 percent of the CBP One scheduled appointments. Families or groups who do not register together on one CBP One account may not be accommodated at the same POE or on the same date. The Departments acknowledge that challenges remain for larger families, but the Departments believe that these changes have significantly ameliorated the concerns raised by commenters that family groups have been unable to obtain appointments.

CBP shares commenters' concerns about fraud and exploitation and has taken several steps to try to mitigate such issues. Specifically, the app uses 1-to-1 facial matching, meaning that it compares still photos submitted by users during the registration process to subsequent

photos submitted by the same users while scheduling an appointment. This photo matching helps to ensure that the individual making an appointment is the same person who registered for the appointment. Additionally, the app's liveness detection verifies that a person submitting an appointment is, in fact, a live person. Finally, users have a limited number of submissions per Login.gov authenticated identity, helping to prevent one individual from submitting bulk appointment requests.

With respect to the comment stating that children should not be held responsible for whether their parents used the CBP One app to enter, the Departments note that they have exempted from this ongoing application of the rebuttable presumption noncitizens who entered the United States during the two-year period while under the age of 18 and who later seek asylum as principal applicants after the two-year period. 8 CFR 208.33(c)(2), 1208.33(d)(2).

*Comment:* Commenters noted that the app is only available in English, Spanish, and Haitian Creole, which limits accessibility for many, such as speakers of indigenous languages or other languages outside this limited list. A commenter referred to a study that, in January 2021, identified more than forty different languages spoken by individuals with pending MPP proceedings, which, according to the commenter, rendered it “alarming” that the app was available in only three. One commenter stated that, as of January 2023, the app was not available in Creole. Other commenters expressed concern about those who may be illiterate who are still seeking to access the app, including those who may not be literate in one of the languages available on the app. At least one commenter noted that Login.gov is also only available in English, Spanish, and French, noting that based on at least one report these are not the most common languages and that third party assistance does not adequately address this concern. Another commenter stated that due to limited resources and high demand, it is not clear whether non-profit service providers will be able to help asylum seekers overcome the CBP One app's language barriers.

Commenters also expressed concern about specific portions of the CBP One app that they stated are only available in English. Specifically, commenters stated that the CBP One app's advisals regarding the terms and conditions of use and the repercussions of fraud or willful misrepresentation are presented exclusively in English. Other commenters said that all answers entered into the app must be in English, resulting in many individuals requiring assistance, including Spanish and Haitian Creole speakers, even though the CBP One app is available in their native language. Other commenters noted that the app's error messages are only in English, even if the user selects a different language, which makes using the app difficult for asylum seekers who cannot understand English. Commenters expressed that the limited availability of interpreters and the time required to enter information using interpreters added to difficulties in obtaining appointments through the CBP One app for non-English speakers. Commenters maintained that translating the CBP One app into additional languages would not resolve access issues for individuals with no or limited literacy.

Commenters also expressed concern about migrants' ability to meet the language barrier exception. One commenter stated that asylum seekers will struggle to meet the language barrier exception because the rule does not provide a clear process for how they can demonstrate that they were unable to use the CBP One app due to language issues. The commenter stated it is unclear whether the asylum seekers must show that they sought help from a third party before presenting themselves at a POE. One commenter stated that the rule does not explain how noncitizens with language, literacy, or technology issues can access this exception.

*Response:* As commenters noted, the CBP One app is currently available in English, Spanish, and Haitian Creole. The addition of Haitian Creole, on February 1, 2023, was based on stakeholder feedback. The translation of terms and conditions into all three languages was added on April 6, 2023. Initial analysis conducted in March 2023 indicated the current three languages account for 82 percent of the application users, with the next most common language being Russian, at 9 percent. Currently, CBP has not received any requests to make the app available in

Russian. However, CBP will continue to consider the inclusion of additional primary languages, which will be made available based on analysis of populations encountered at the border and user feedback. Additionally, outside entities, including NGOs, or other persons may provide assistance with the appointment scheduling process in the CBP One app.

CBP is also implementing the translation of all drop-down menus as well as allowing for special characters, which is expected to be complete by May 11, 2023. This update will also allow users to input answers in the three available languages. While most of the error messages are translated, CBP acknowledges that not all messages are translated, as a few system errors stem from different sources that do not have translation capabilities. However, CBP also has detailed user guides—which are available in English and Spanish (and Haitian Creole by the end of May 2023)—fact sheets—which are available in English, Spanish, Haitian Creole, Portuguese, and Russian—and video introductions available for free on the CBP.gov website, which provide visual overviews on how to submit information in advance.<sup>247</sup>

With regard to Login.gov, that website is an independent authentication service for government mobile applications, and therefore CBP has no authority to make changes to it. However, CBP has submitted a request to GSA to consider adding Haitian Creole as an additional language.

The Departments acknowledge commenters' concerns about application of the exception to the rebuttable presumption of asylum ineligibility for those who can demonstrate that it was not possible to access or use the CBP One app due to language barrier, illiteracy, or another serious and ongoing obstacle, 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B), and such concerns are discussed further in Section IV.E.3.ii.d of this preamble.

*Comment:* Commenters stated that the CBP One app is inaccessible for many migrants, particularly the most vulnerable. A commenter stated that they had done volunteer work with asylum seekers from a few African countries and from many Spanish-speaking countries, and

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<sup>247</sup> CBP, *CBP One™ Mobile Application*, <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

that reliance on the CBP One app is unfair because it assumes that migrants have a level of literacy, electricity, and time that are often unavailable to those desperately seeking safety. Another commenter noted that those with mental impairments or physical impairments, including arthritis, may not be able to use the CBP One app. One commenter stated that there is no rebuttal available for people with educational, mental, or psychological disabilities or who are unable to secure a timely appointment. One commenter stated that the proposed rule does not provide reasonable accommodations related to difficulties of using the CBP One app for people with disabilities, which the commenter asserted violated section 504 of the Rehabilitation Act, 29 U.S.C. 701 *et seq.*

*Response:* CBP acknowledges that certain individuals may have difficulty accessing the CBP One app. However, CBP has taken several steps to facilitate awareness of and access to the app. In particular, CBP has conducted extensive engagement with NGOs and stakeholders and has provided several opportunities to non-profit and advocacy organizations to provide feedback and receive information about the use of the CBP One app. Such entities may also serve as a resource for technological, humanitarian, and other assistance to migrants accessing the app. Management at POEs where the app is being utilized are also in regular contact with these support organizations to address any issues and concerns in real time.

Additionally, the CBP One app is undergoing a compliance review under section 508 of the Rehabilitation Act of 1973, which is expected to be completed by the end of May 2023. CBP expects a final certification by the end of August 2023. There are also several assistive technologies that can be utilized to translate the app independently, such as free apps that provide screen readers, magnification, and translation.

#### c. CBP One Technological Issues and Functionality

*Comment:* Commenters expressed concerns that the CBP One app has multiple glitches and problems, most notably that it allegedly does not capture or register darker skin tones and does not allow some individuals to upload their photos, instead displaying error messages. Some



commenters referred to studies that demonstrated racial bias in facial recognition technology. One commenter stated that certain disabilities or conditions, including blindness and autism, prevented users from effectively capturing a live photograph for the app. A commenter expressed concern that transgender individuals may present differently at the border than they did at the time their photograph was taken.

*Response:* The Departments are committed to equal access to the CBP One app for individuals of all races and ethnicities. At this time, CBP has not found any indication of meaningful discrepancies in app functionality based on skin tone. The predominant reason for error messages during the photo process was the volume of submissions at one time with low connectivity and bandwidth of other technological platforms that supported the app. To ensure equity for all nationalities in the photo process, CBP is continuing to assess and study the software's performance.

For additional context, there are two photo capture technologies utilized in the CBP One process: the Traveler Verification Service (“TVS”) and “liveness detection.” TVS is a facial recognition technology that allows a CBP One submitter's photo to be compared against subsequent submitted photos to ensure it is the same individual each time a photo is submitted.<sup>248</sup> This system is utilized at two different points in the process: (1) during the process of scheduling an appointment, to verify that the photo submitted matches the photo previously provided during registration; and (2) upon a noncitizen's arrival at a POE, where officers take another photo of the individual as part of the inspection process and verify that that photo matches the photograph submitted at the time of scheduling. However, there are alternative methods to verify that the individual presenting at the POE matches the individual who scheduled through CBP One if facial matching is not possible. For example, an officer can enter the unique confirmation

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<sup>248</sup> See CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 10 (2023), [https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023\\_0.pdf](https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf); CBP, *DHS/CBP/PIA-056, Privacy Impact Assessment for the Traveler Verification Service* (2018), <https://www.dhs.gov/publication/dhscbppia-056-traveler-verification-service>.

number provided by the CBP One application or biographic data.<sup>249</sup> Additionally, CBP has partnered with the National Institute of Standards and Technology, the DHS Science and Technology Directorate, and the DHS Office of Biometric Identity Management to assess and test facial recognition technology and algorithms as part of efforts to improve the effectiveness of the process.<sup>250</sup> Additional information is publicly available in the TVS Privacy Impact Assessment.<sup>251</sup>

CBP One also relies on “liveness detection.” The vast majority of feedback CBP has received regarding issues identifying people of color were identified as related to liveness detection during the registration process. As explained in more detail below, CBP One previously utilized liveness detection during both the registration and scheduling processes. For context, the CBP One app utilizes third-party software to verify “genuine presence” or “liveness” during registration and scheduling an appointment.<sup>252</sup> The liveness verification confirms the user is a live person and is not taking a photo of a photo or video.<sup>253</sup> Such verification ensures that appointments are given to bona fide individuals and family groups, rather than brokers or middlemen who might seek to book appointments in bulk and then sell them to migrants.

When the scheduling capability was initially implemented in January 2023, CBP originally required users to take a live photograph at the time they input their biographic information to register for the app, and, if they were unable to schedule an appointment at the same time, they were required to take a live photograph again at the time they scheduled an

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<sup>249</sup> See CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 10–11 (2023), [https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023\\_0.pdf](https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf).

<sup>250</sup> See CBP, *DHS/CBP/PIA-056, Privacy Impact Assessment for the Traveler Verification Service* 15–16 (2018), <https://www.dhs.gov/publication/dhscbppia-056-traveler-verification-service>.

<sup>251</sup> See generally *id.*

<sup>252</sup> See, e.g., CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 23 (2023), [https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023\\_0.pdf](https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf); see also DHS, *News Release: DHS S&T Awards IPROOV \$198K to Pilot Genuine Presence Detection and Anti-Spoofing Capability* (Nov. 6, 2020), <https://www.dhs.gov/science-and-technology/news/2020/11/06/news-release-st-award-genuine-presence-detection-and-anti-spoofing>.

<sup>253</sup> DHS, *News Release: DHS S&T Awards IPROOV \$198K to Pilot Genuine Presence Detection and Anti-Spoofing Capability* (Nov. 6, 2020), <https://www.dhs.gov/science-and-technology/news/2020/11/06/news-release-st-award-genuine-presence-detection-and-anti-spoofing>.

appointment. This requirement took significant bandwidth, which resulted in many users experiencing difficulty. However, based on feedback from users and stakeholders, and consistent with its security protocols, CBP has determined the liveness check is no longer required during the registration process and implemented this change in February 2023.

Therefore, while users are required to submit a photo at the time of registration, this photo does not need to be a live photo. Rather, the user is only required to submit a live photo at the time of scheduling an appointment, so that the liveness check and facial matching only occur during the scheduling of the appointment. When scheduling an appointment on behalf of a family or group, only one member of that family group is required to submit a live photograph. At that time, the CBP One app utilizes the live photo and facial matching technology to match the photo submitted during scheduling to the original photo submitted upon initial registration to verify that both photos are of the same person. Thus, an individual must only present similarly in photographs at the time of registration and the time of submission. Following this change, as well as others made during February 2023 to increase bandwidth, CBP has received feedback that there are fewer errors.

In addition, with regard to concerns about disparities based on skin tone, the third-party vendor has conducted their own equality study, which was provided to CBP, and concluded that across their global platform, differences in performance between ethnicities are on the order of tenths of a percent. As of the end of March 2023, Haitians are one of the top three nationalities using the CBP One app.<sup>254</sup> Regarding concerns about the ability of the app to capture a live photograph from individuals with certain disabilities or conditions, including blindness and autism, such individuals are not required to submit a live photograph if they are part of a family or group, as another member of that family or group can submit the live photograph on their behalf. In the event that an individual is unable to submit a live photograph as part of the

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<sup>254</sup> See CBP, *CBP Releases March 2023 Monthly Operational Update* (Apr. 17, 2023), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-march-2023-monthly-operational-update>.

submission process, they are encouraged to seek assistance from another person to take the photo for them. In addition, CBP consistently evaluates the registration and scheduling process, including the use of live photographs, and will continue to make enhancements and adjust the process based on feedback and operations.

*Comment:* Commenters noted a range of technology-related concerns with the CBP One app. Commenters described the CBP One app as very difficult to use, stating that it often crashes or is prone to glitches. Another commenter stated that there have been reports of the CBP One app freezing when noncitizens try to send confirmation of their interview dates. Some commenters noted that those seeking to enter the United States may not have the technical ability to navigate the app. A commenter noted that, although the Departments stated in the NPRM that CBP had conducted “extensive testing” of the app’s technical capabilities, such statement was not supported by any publicly available studies or information. Commenters also recommended that CBP develop timely and effective mechanisms to receive and address reports of errors in the CBP One app.

*Response:* The Departments recognize commenters’ frustration with the CBP One app. As noted above in Section IV.E.3.ii.a of this preamble, CBP systems undergo comprehensive testing and evaluation to assess the respective security features as part of the process of being granted an ATO.<sup>255</sup> The advanced information and scheduling capabilities addressed in this rule in particular have undergone various rounds of testing prior to and post deployment. CBP also conducted limited user testing both internally and in partnership with an NGO partner. The primary issues identified by users since the app’s implementation have been caused by issues that cannot be fully identified in a testing environment.

CBP continues to make improvements to the app based on stakeholder feedback, including updates to enhance usability in low bandwidth and connectivity scenarios, and to

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<sup>255</sup> See DHS, *DHS 4300A Sensitive Systems Handbook 47* (2015), <https://www.dhs.gov/publication/dhs-4300a-sensitive-systems-handbook>.

streamline the submission and scheduling process. CBP primarily receives reports of errors or other concerns through three mechanisms. The first and primary mechanism is the CBP One email inbox,<sup>256</sup> to which users may send an inquiry or concern about any capability within the CBP One app. Since CBP One has many capabilities and functionalities, and is available to a diverse audience, the inbox initially responds by asking the author to select the appropriate topic pertaining to their specific issue. Emails related to the ability to schedule appointments at POEs are addressed by one of three teams: CBP Customer Service, CBP's Office of Information Technology, or the CBP One team within CBP's Office of Field Operations. CBP also receives reports of errors or issues through recurrent briefings and sessions with NGOs. Third, CBP personnel both at local POEs and within CBP Headquarters receive direct email communications from NGOs.

The reported issues are a result of the volume of activity and the strain this may put on local bandwidth and connectivity. In an effort to improve app performance in low or limited bandwidth and connectivity situations, CBP determined the live photo could be removed as part of the registration process. This change was implemented in February 2023, and based on feedback from NGOs and stakeholders, it has reduced the number of reported errors users experienced. CBP is actively working to improve application hang-up-error logging and reporting to better inform on user complaints and application improvements.

d. Exception for Certain Failures to Pre-Schedule a Time and Place to Present at a POE<sup>257</sup>

*Comment:* Commenters provided comments on the proposed exception to the presumption for individuals who present at a POE and demonstrate that it was not possible to

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<sup>256</sup> See CBP, *CBP One™ Mobile Application* (Apr. 10, 2023), <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

<sup>257</sup> This section describes comments and responses related to the exception to the rebuttable presumption for noncitizens who present at a POE without having pre-scheduled a time and place for an appointment. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). Currently, as explained in the NPRM, the only available system for scheduling such an appointment is the CBP One app. 88 FR at 11723. Accordingly, this section's comments and responses are focused on the use of the CBP One app for this exception, although the exception would apply similarly to any other scheduling system developed for this purpose.

access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or another serious and ongoing obstacle.

Regarding the “illiteracy” and “language barrier” provisions, commenters questioned how noncitizens would prove that they cannot understand any of the languages offered by the CBP One app, and whether testimony about their language proficiency would suffice as evidence for an exemption. One commenter said the proposed rule does not provide a standard for how officials will determine asylum seekers’ language proficiency, which could lead to erroneous denials. Another commenter said it is unclear whether asylum seekers with language barriers must show that they sought help from a third party before presenting themselves at a POE. A commenter expressed concern that refugees who have basic communication skills in English or Spanish, but who cannot read or write proficiently in either of those languages, would wrongly be found to not have a language barrier that would exempt them from the requirement to use the app. Another commenter wrote that the exemptions based on illiteracy and language barriers are reasonably clear but the rule should clarify that literacy in the dominant language of a country should not be presumed for citizens of that country because, for example, many indigenous people in Guatemala do not speak Spanish. One commenter expressed concern that individuals with limited English proficiency would face difficulty establishing this exception due to the unavailability of qualified interpreters and recommended that if the Government cannot obtain interpreters for individuals, they should be placed directly in section 240 removal proceedings.

Multiple commenters said the proposed rule fails to clearly define what constitutes a “significant technical failure.” Several commenters said the proposed rule did not outline how individuals could document technical difficulties such as app malfunctions or inaccessibility. A commenter said it may not be possible to screenshot the app to document a glitch if the app is frozen and producing this evidence would be hard for migrants in detention where they may not have access to their phones. Another commenter asked if this exception would include inability to afford a smartphone, having a phone stolen or broken, or inability to access stable Wi-Fi.

Another commenter stated that additional usage of the CBP One app after the Title 42 public health Order is terminated would likely exacerbate technical problems, leading migrants to irregularly cross the border and claim that the rebuttable presumption does not apply due to technical difficulties.

One commenter stated that the Departments should update the regulatory text to specify that “significant technical failure” refers to an inability of the DHS scheduling system to provide, on the date that the noncitizen attempted to use it, an appointment for entry within the two weeks after such attempt, together with the failure of that system, when access to it is sought at the POE at which the noncitizen has presented, to provide an appointment at that POE within the following two weeks. A commenter similarly recommended that, for the first 12–18 months after the lifting of the Title 42 public health Order, the Departments should assess the application of the exception based on a “more liberal” standard than the preponderance of the evidence, based on an assumption that the CBP One app is likely to have numerous technical failures.

Commenters stated that the proposed rule failed to clearly define what constitutes an “ongoing and serious obstacle.” Commenters questioned whether a failed attempt to make an appointment using the CBP One app is likely to be considered sufficient. A commenter also stated that the Departments should specify certain foreseeable obstacles in the regulations as ongoing and serious obstacles, such as mental impairments or physical conditions that affect one’s ability to use a smartphone. One commenter questioned whether the dangers that marginalized asylum seekers face in parts of central and northern Mexico would be deemed an ongoing and serious obstacle. Another commenter said the Departments should provide a list of anticipated obstacles to prevent arbitrary and inconsistent determinations and recommended that the list “include, for example, mental impairments; physical impairments such as severe arthritis of the hands that prevent the use of a cell phone or other device to access the CBP One app; lack of access to such a device coupled with poverty such that the noncitizen could not reasonably

purchase such a device; and a continuing lack of appointments in the near future to enter at the POE at which the noncitizen has presented.”

One commenter recommended that if the app is crashing or the available appointments are so limited near where the asylum seeker is located that they cannot promptly obtain an appointment, then the affected asylum seeker should not have the burden of proving the impossibility of accessing the system. That commenter proposed that USCIS should assign an official to monitor the app and capacity of processing facilities and post on a public website whether the app was functioning and the availability of appointments. According to that commenter, this public information, showing that the app was functioning and that prompt entry appointments were available, would create a presumption that no significant failure had occurred. Similarly, another commenter suggested that the exception should also take into account the potential for human error, specifically referring to a situation in which a migrant believes they have an appointment, the app failed to register that appointment, and a CBP officer permits the individual to enter the POE. The commenter stated that, in such a case, the migrant “should not be punished when they are following the rules” and should not be required to show that there were significant technical failures. The commenter suggested amending the regulatory text so that the rebuttable presumption would not apply if the noncitizen shows “that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or human error.” The commenter also recommended amending the regulatory text to include a statement that “such evidence may include data on the performance of the CBP One app which DHS will make publicly available as well as records of problems reported by users.”

Commenters also noted potential procedural concerns with application of this exception. Some commenters stated that it will be difficult for noncitizens to meet the burden of demonstrating this exception, since the issue will arise in credible fear interviews when people are not likely to be represented. One commenter said it was impossible for asylum seekers to



show they meet this exception because it would require them to prove a negative. Another commenter stated that CBP often confiscates people's phones while they are in CBP custody or people may have borrowed phones to access the app, meaning that they would not have access to the evidence they need to prove they encountered obstacles using the CBP One app.

Commenters said it is unclear who will determine if this exception applies and expressed concern that some individuals would be turned away without the chance to seek asylum. One commenter wrote that it was unclear if the failure of an individual to indicate that they qualify for an exemption would be counted against them when an AO reviews their case. Another commenter recommended the creation of a standardized form of questions for officials to use when determining whether individuals should be exempted from the CBP One appointment requirement. One commenter wrote that the NPRM failed to consider the practicality of conducting the analysis for this exception at the credible fear interview stage.

Some commenters expressed concern that the exception is too broad or easy to exploit. One commenter stated that applying the significant possibility standard for this exception could result in "carte blanche" acceptance of testimony that such an obstacle was present and thereby undermine the intent of the rulemaking. Others said that this exception was broad and easy to exploit because it could encompass a wide variety of difficult-to-verify claims, such as losing one's mobile phone, losing access to cell service, and being unable to pay for a new mobile phone or data plan. One commenter also said that the CBP One app's publicized technical issues would make it easy to claim the exception. Another commenter stated that, based on the app's rating in the app store, the app almost appeared to be "designed to fail," to permit noncitizens to take advantage of the exception. Another commenter expressed general support for the inclusion of exceptions but predicted confusion and that migrants would prefer to present at a POE with an exception given the frequency of instances where it is not possible to access or use the DHS scheduling system. One commenter disagreed with the proposed exception relating to language barriers to accessing the CBP One app, asserting that migrants would take advantage of this

exception to appear at a POE without an appointment. Another commenter stated that the rule “impermissibly” shifts the burden onto DHS to refute a noncitizen’s assertion that it was not possible to use the app and therefore expressed concern about “exploitation” of the standard.

Some commenters recommended that the Departments should expand the exception for failure to use the CBP One app when it is not possible to do so to include noncitizens who enter the United States without inspection, rather than only applying to noncitizens who present at a POE.

*Response:* The rule provides the same exception set forth in the NPRM to the applicability of the rebuttable presumption if the noncitizen presented at a POE and demonstrates by a preponderance of the evidence that it was not possible to access or use the CBP One app due to language barriers, illiteracy, significant technical failure, or other ongoing and serious obstacle. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). This exception captures a narrow set of circumstances in which it was truly not possible for the noncitizen to access or use the CBP One app. *See* 88 FR at 11723 n.173.

The Departments appreciate the commenters’ suggestions about the scope of the exceptions in 8 CFR 208.33(a)(2)(ii)(B) and 1208.33(a)(2)(ii)(B). With regard to the “illiteracy” exception, the Departments acknowledge and agree that citizenship is not necessarily a proxy for literacy in a particular language, and there is no presumption in the CBP One app or in this rule regarding a particular migrant’s language. The Departments note, however, that individuals may seek assistance, including translation assistance, in using the app. And, to the extent that an individual is unable to access the app due to their language barriers, they may be excepted from the presumption, as discussed earlier in this preamble. The Departments decline to specify precise ways by which a noncitizen must prove, or particular language standards by which an AO or IJ must assess, that the noncitizen qualifies for a language barrier or illiteracy exception. This is to preserve flexibility and account for the unique circumstances of certain noncitizens

who are illiterate or who face language barriers. Exceptions under this part of the rule will be assessed on a case-by-case basis.

The Departments also acknowledge that the parameters of the exception do not include a specific definition of “significant technical failure” and thank the commenter for their suggested definition. However, the Departments decline to add this definition to the regulatory text, as the Departments believe that there may be any number of ways that an individual could show a “significant technical failure.” The Departments also note that this exception is intended to cover technical failures of the app itself—e.g., the app is not available due to a CBP network or server issue causing it to crash—rather than a situation in which a migrant is unable to schedule an appointment due to high demand or one where there is a fleeting, temporary technical error. In such a situation, the Departments encourage noncitizens to continue seeking to schedule an appointment, but, to the extent that they are prevented from doing so because of exigent circumstances, they may be able to show that they have experienced another “ongoing and serious obstacle,” such that they are excepted from the presumption. The Departments likewise decline to amend the regulatory text to take into account human error or specific data on the performance of the CBP One app. As noted above, there may be any of number of ways to show a significant technical issue, or, as described in more detail below, an “ongoing and serious obstacle,” which may be specific to the individual user. As noted below, the determination of whether the presumption applies will be made on a case-by-case basis.

The Departments appreciate commenters’ concerns about what constitutes an “ongoing and serious obstacle.” The Departments agree that an individual with a mental or physical impairment may have difficulty accessing the app but decline to add a new categorical exception to the regulatory text for individuals with mental or physical impairment. This is in part because the Departments do not intend to limit the exception to a specified category or group of conditions, and AOs and IJs will determine the application of the exception on an individualized basis. The Departments also decline to create further rules regarding which situations will

generally or categorically qualify for this exception, including on the basis of failed attempts to make an appointment through the CBP One app. This will preserve flexibility and account for the unique circumstances that noncitizens may face while attempting to schedule an appointment to appear at different POEs at different times. Exceptions under this part of the rule will be assessed on a case-by-case basis.

The Departments respectfully disagree with commenters' concerns as to noncitizens' ability to establish this exception. First, with regard to the commenters' concerns about access to counsel in credible fear interviews, that issue is discussed earlier in Section IV.B.5.ii of this preamble. The Departments decline to alter the burden of proof required for a migrant to show that it truly was not possible for them to access the CBP One app. As an initial matter, the Departments note that noncitizens outside of the United States have no freestanding right to enter, and no right to enter in a particular manner or at a particular time. *See, e.g., Shaughnessy*, 338 U.S. at 542. The CBP One app does not alter this longstanding principle, but rather is intended to incentivize and facilitate an orderly flow of travel into the United States. Thus, the Departments decline to change the burden of proof from the noncitizen to the Government or adopt a more liberal standard for noncitizens who enter the United States during the initial months after the rule takes effect.

Concerns about who will assess whether the exception applies are misguided. The rule tasks AOs and IJs, not CBP officers, with determining whether a noncitizen meets this exception to the rule. 8 CFR 208.33(b)(1) ("The asylum officer shall first determine whether the alien is covered by the presumption . . . ."); *id.* 208.33(b)(2) ("The immigration judge shall first determine whether the alien is covered by the presumption . . . ."). So too are concerns as to an inability to access physical evidence to prove the exception while in custody. Noncitizens may be able to establish that they meet the exception through testimony so long as it is credible, persuasive, and refers to specific facts to establish the exception. INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii). A noncitizen also does not need to affirmatively raise this issue to qualify for

the exception; adjudicators are trained to elicit testimony relevant to establishing a credible fear, as described in Section IV.B.5 of this preamble. However, if a noncitizen fails to disclose a technical failure or other obstacle when questioned about their failure to schedule an appointment using the CBP One app, this could potentially affect the credibility of their testimony if they later claim an exception in subsequent proceedings.

The Departments also disagree with commenters who claimed this exception is too broad or easy to exploit. The Departments disagree with the assertion that this exception will cause noncitizens to appear at a POE without an appointment. Noncitizens are not required to make an appointment in the CBP One app to present at a POE, and in no instance will an individual be turned away from a POE. All noncitizens who arrive at a POE will be inspected for admission into the United States. 8 CFR 235.1(a). Those, however, who present at a POE without making an appointment in the CBP One app, and do not meet another exception, will be subject to the presumption. For the exception to apply, the noncitizen must do more than merely assert that they could not access the scheduling system for one of the identified reasons, without further explanation. Rather, AOs and IJs will assess whether the noncitizen has demonstrated that they meet the exception on a case-by-case basis as part of the credible fear process or in section 240 removal proceedings. Additionally, the Departments note the app is not intended or designed to “fail,” and that AOs and IJs will evaluate on a case-by-case basis whether a noncitizen has shown that it was not possible to access the app due to language barriers, illiteracy, significant technical failure, or other ongoing serious obstacle.

Finally, the Departments decline to expand this exception to noncitizens to enter the United States without inspection instead of presenting at a POE. The Departments believe this would undermine the rule’s purpose of incentivizing migrants to use lawful, safe, and orderly pathways to enter the United States. In cases where it was truly not possible for a noncitizen to access or use the CBP One app due to one of the rule’s enumerated reasons, the Departments believe it would be preferable to incentivize that noncitizen to seek admission at a POE rather

than attempt a potentially dangerous entry between POEs. The latter could require the assistance of smugglers or traffickers and could place further strain on DHS resources in apprehending the noncitizen and commencing removal proceedings.

### iii. Adequacy of Parole

*Comment:* While many commenters expressed support for the parole processes referenced in the NPRM, many also expressed a range of concerns about the role of the parole processes in the rule's rebuttable presumption. A commenter stated that the parole processes only account for small numbers of potential asylum seekers. One commenter stated that the parole programs have little bearing on asylum access at the SWB or the Departments' stated goal to reduce border apprehensions. The commenter also stated that those who have the time and means to use these parole programs are not the same people who flee and approach the SWB. Another stated that the parole processes should not be the only way for migrants to come to the United States and petition for asylum. Another commenter stated that while Afghan migrants might be able to apply for humanitarian parole, the wait for the applications to be processed is too long for those who are living in danger in their country, and alleged that nearly 90 percent of humanitarian parole applications filed from outside the United States in the last year were denied.

Commenters stated that the CHNV parole processes are flawed because (1) they are limited to CHNV nationals; (2) they have a monthly cap, limiting the number of people who may enter the United States each month; (3) they require applicants to hold unexpired passports, which is uncommon for most citizens of Latin America and the Caribbean because of financial constraints; (4) they require a U.S.-based contact with the financial wherewithal to sponsor the applicant, which favors wealthy applicants and those with a broader network of support in the United States; (5) the applicant will need additional financial resources to afford a plane ticket and to meet vaccination and other requirements; and (6) humanitarian parole is not a substitute for asylum. Commenters stated that government officials may confiscate passports or target

passport applicants at government offices, and noncitizens may not be able to wait for a passport or for receipt of advanced authorization due to the risk of harm or death. One commenter stated that huge backlogs related to the parole program have overwhelmed Haiti's passport system.

One commenter stated that the rule's impact on those who have been pre-approved by CBP to present for parole at POEs under section 212(d)(5) of the INA, 8 U.S.C. 1182(d)(5), due to urgent humanitarian reasons or significant public benefit is unknown because the rule does not clarify whether those pre-approved to present for parole by port officials will face the presumption of asylum ineligibility.

Another commenter expressed concern that the CHNV parole processes would simply add to the population of migrants present in the United States without status, which according to the commenter would impose a burden on American taxpayers, and that the parole processes simply "kicks the can down the road."

*Response:* The parole processes established for CHNV nationals are available lawful pathways—though not the only available lawful pathways—for qualifying individuals seeking to come to the United States. Each month, DHS issues advance travel authorizations for up to 30,000 CHNV nationals to travel to the United States to be considered by CBP on a case-by-case basis for a temporary grant of parole for a period of up to two years. Once the individuals have arrived in the United States, they may apply for immigration benefits for which they may be eligible, including asylum and other humanitarian protections. The Departments recognize that the parole processes are not universally available, even to the covered populations; in addition, the parole processes established for CHNV nationals and Ukrainians are distinct from applying for asylum and are not a substitute for applying for asylum. Although noncitizens who are eligible for these processes may apply for asylum after being paroled into the United States, there is no requirement that they do so. These processes do, however, represent one lawful, safe, and orderly pathway available to certain CHNV nationals seeking to enter the United States.

Similarly, while DHS recognizes that several commenters have raised concerns about the adequacy of the parole processes, this rule’s reference to the parole processes is not intended to suggest that the parole processes are an alternative to or replacement for asylum. Rather, the parole processes are lawful, safe, and orderly pathways that the Departments wish to encourage in light of the urgent circumstances presented. Eligible noncitizens may use these processes to seek entry into the United States, and, thereafter, apply for asylum if desired. Moreover, with respect to the commenters’ concern about the ongoing status of CHNV parolees—including obstacles they face in seeking parole and the impact that allowing parolees into the country will have on taxpayers—such concerns are outside the scope of this rulemaking because the parole processes exist separate and apart from this rule. To the extent that this rulemaking encourages noncitizens to use those parole processes and thereafter apply for asylum, rather than migrating irregularly, parolees who do so may remain in the United States to await the adjudication of any pending asylum application, and during that time may be eligible for employment authorization. *See* 8 CFR 274a.12(c)(11) (employment authorization available for duration of parole); *id.* 274a.12(c)(8) (employment authorization available for asylum applicants).

With respect to the commenter’s suggestion that the CHNV parole processes have little bearing on the Departments’ goal of reducing irregular migration, the Departments note that these processes have substantially reduced the number of encounters between POEs. For instance, between the announcement of the CHN processes on January 5, 2023, and January 21, 2023, the number of daily encounters between POEs of CHN nationals dropped from 928 to 73, a 92 percent decline.<sup>258</sup> CHN encounters between POEs continued to decline to an average of fewer than 17 per day in March 2023.<sup>259</sup> The Departments offer further metrics in support of these processes’ efficacy in Section II of this preamble.

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<sup>258</sup> OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

<sup>259</sup> *Id.*



While CHNV and Ukrainian nationals who lack a supporter cannot take advantage of these parole processes, such individuals can present at a POE by using a DHS scheduling mechanism to schedule a time to arrive at POEs at the SWB and not be subject to the presumption of ineligibility. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). If the noncitizen can establish that the scheduling mechanism is not possible to access or use due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle, then the noncitizen can present at a POE to seek asylum without a pre-scheduled appointment, and not be subject to the presumption of ineligibility. *Id.* This process is available to all noncitizens seeking protection, regardless of their nationality.

With respect to the commenters' concern about individuals "pre-approved" by CBP to present at the SWB, the Departments note that the rebuttable presumption does not apply to any noncitizen who presents at a land POE, pursuant to a pre-scheduled time and place. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33 (a)(2)(ii)(B). This is not limited to those who schedule a time through the CBP One app. Therefore, in the rare circumstance that noncitizens have scheduled a time to present at such a POE through another means, they would not be subject to the rebuttable presumption. Additionally, the Departments reiterate that the presumption does not apply to a noncitizen who has been provided appropriate authorization to travel to seek parole pursuant to a DHS-approved parole process, including the CHNV processes. *See* 8 CFR 208.33(a)(2)(ii)(A), 1208.33 (a)(2)(ii)(A).

*Comment:* Commenters recognized that the parole processes had positive results in the decrease of CHNV nationals encountered at the SWB, but predicted that the deterrence would decrease as more applicants are denied.

Commenters also stated that the requirement to travel directly to the United States by air may for some noncitizens be more challenging than traveling to the SWB, and raised the concern that the rebuttable presumption would apply to individuals who have received advance travel authorization under the CHNV processes, if those individuals arrive at the SWB rather than

traveling directly by air. A commenter asserted that such a “disqualification” would be based on a “technicality,” not on any material facts.

Commenters cited statistics stating that since January 2023, Haitian nationals had 11,300 approved paroles, but only 5,100 of those traveled to the United States. Commenters noted that parolees would add to the backlog of asylum applicants.

*Response:* With respect to commenters’ caution that the magnitude of the CHNV processes’ impact on unauthorized arrivals at the SWB may change over time, as discussed in Section II of this preamble, the CHNV parole processes have remained effective since the rollout of the Venezuela process in October. The Departments disagree that this will necessarily change as more applicants are denied, because any intending migrant who cannot access the CHNV parole processes may still be dissuaded from migrating irregularly because even those applicants who are denied authorization to travel under those processes may respond to the disincentives to irregular migration made possible by those processes and this rule. The Departments acknowledge, however, that since mid-April, there has been an increase in Venezuelan migrants crossing between POEs at the SWB, while others continue making the treacherous journey through the Darién Gap to reach the United States—even as encounters of Cubans, Nicaraguans, and Haitians remain near their lowest levels this year.<sup>260</sup> The Departments believe that this increase in Venezuelan migration has been driven in part by the current limited availability of CBP One appointments and misinformation campaigns by smugglers, in the aftermath of the fire in a Mexican government facility that killed a number of Venezuelan migrants in March.<sup>261</sup> Although the number of CBP One app appointments available has been limited while the Title 42 public health Order has been in place, as detailed in Section IV.E.3.ii.a of this preamble, when

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<sup>260</sup> See Reyes Mata III & Nick Miroff, *Surge of Migrants Strains U.S. Capacity Ahead of May 11 Deadline*, Wash. Post. Apr. 28, 2023, <https://www.washingtonpost.com/nation/2023/04/28/border-migrants-biden-title-42/>.

<sup>261</sup> See, e.g., *id.*; Nicole Acevedo & Albinson Linares, *Misinformation Fuels False Hopes Among Migrants after Deadly Fire in Mexico*, NBC News, Mar. 30, 2023, <https://www.nbcnews.com/news/latino/misinformation-fuels-false-hopes-migrants-mexico-fire-rcna77398> (“Over 1,000 migrants lined up outside international bridges to El Paso, Texas, on Wednesday afternoon [March 29, 2023] after false information spread on social media and by word of mouth that the U.S. would allow them to enter the country.”).

the Title 42 public health Order is lifted, CBP intends to increase the number of available appointments. In addition, as discussed in more detail in Section II.A of this preamble, DHS and the Department of State announced new measures on April 27, 2023, that are expected to significantly expand lawful pathways, which, along with the expanded ability to present at a land POE pursuant to a pre-scheduled time and place, are expected to further reduce the overall volume of irregular migration. The Departments also note that there has not been a similar rise in encounters of CHN nationals, and believe that the rule's approach of incentivizing the use of safe, orderly, and lawful pathways while imposing a meaningful consequence for those who fail to do so and cannot otherwise rebut the presumption against asylum eligibility will reduce the number of noncitizens seeking to cross the SWB without authorization.

With respect to commenters' objection regarding the CHNV parole processes' stated requirements with respect to air travel to an interior POE, the Departments are aware that some noncitizens may have trouble securing air travel, but also note the potentially significant costs associated with irregular migration, including substantial fees that some migrants pay to smugglers and cartels to facilitate such travel.<sup>262</sup> The specific requirements for participation in the CHNV parole processes are outside the scope of this rulemaking, but DHS is actively monitoring the effects of the processes and may make adjustments as necessary.

The Departments also acknowledge that parolees who apply for asylum will add to the number of pending asylum applications; however, as discussed in Section II of this preamble, the net effect of the CHNV parole processes has been to significantly reduce rates of irregular migration and avoid a corresponding increase in the immigration court backlog.

*Comment:* A commenter stated that the Departments must consider how they would ensure that those migrants who use a parole program to enter the United States, such as Venezuelans or Nicaraguans, are not falling prey to scams. The commenter stated that there is

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<sup>262</sup> See, e.g., Ariel G. Ruiz Soto et al., *Charting a New Regional Course of Action: The Complex Motivations and Costs of Central American Migration* (Nov. 2021), [https://www.migrationpolicy.org/sites/default/files/publications/mpi-wfp-mit\\_migration-motivations-costs\\_final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/mpi-wfp-mit_migration-motivations-costs_final.pdf).

reporting that those who do not have friends or relatives in the United States are going online to try to find sponsors, and stated that “there are posts online demanding up to \$10,000.00 USD for financial sponsorship.” The commenter stated that if the Departments require use of the parole processes, the Departments should make efforts to “end the financial abuse of potential parolees,” similar to efforts to end human smuggling.

*Response:* As an initial matter, the specific requirements for participation in the CHNV parole processes are outside the scope of this rulemaking. In any event, the Departments recognize that immigration processes can be complex and that applicants, petitioners, and requestors are at risk of becoming victims of scams or fraud. The United States Government takes immigration scams and fraud seriously and is engaged in regular efforts to combat such behavior.<sup>263</sup> Additionally, the Departments conduct public-facing communications to advise all applicants to ensure that they only accept legal advice on immigration matters from an attorney or an accredited representative working for a DOJ-recognized organization.<sup>264</sup> The Departments also provide information to help applicants avoid immigration scams.<sup>265</sup>

DHS notes in public communications that access to the parole processes is free; neither the U.S.-based supporter nor the beneficiary is required to pay the United States Government a fee to file the Form I-134A or to be considered for travel authorization, or parole.<sup>266</sup> DHS also provides a list of resources for victims of abuse, violence, or exploitation, as well as advice for protecting against immigration scams.<sup>267</sup>

*Comment:* One commenter noted the pending litigation regarding the CHNV parole processes and stated that the proposed rule presumes that the processes will continue to exist. If

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<sup>263</sup> See, e.g., USCIS, *Fraud Detection and National Security Directorate* (last updated June 15, 2022), <https://www.uscis.gov/about-us/organization/directorates-and-program-offices/fraud-detection-and-national-security-directorate>.

<sup>264</sup> See, e.g., USCIS, *Find Legal Services* (last updated Mar. 27, 2023), <https://www.uscis.gov/scams-fraud-and-misconduct/avoid-scams/find-legal-services>.

<sup>265</sup> See, e.g., USCIS, *Avoid Scams* (last updated Feb. 17, 2023), <http://www.uscis.gov/scams-fraud-and-misconduct/avoid-scams>.

<sup>266</sup> See USCIS, *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans* (last updated Mar. 22, 2023), <https://www.uscis.gov/CHNV>.

<sup>267</sup> *Id.*

the parole processes are ultimately found to be unlawful, the commenter asserted that an injunction would nullify a central premise of the rule. The commenter also noted that the rule extends into the first several months of the next administration, which may end the parole processes. Another commenter argued that the parole processes are overbroad and contrary to statute, and that it is “improper” for the Departments to cite the parole processes as effective tools in support of the rule.

*Response:* The parole processes that DHS established in 2022 and 2023 for Ukrainian and CHNV nationals provide lawful pathways for individuals seeking to enter the United States. The Departments recognize that there is currently litigation over the CHNV parole processes. *See Texas v. DHS*, No. 6:23-cv-00007 (S.D. TX filed Jan. 24, 2023). The Departments are vigorously defending the processes as permitted under section 212(d)(5) of the INA, 8 U.S.C. 1182(d)(5), and believe that the CHNV parole processes are permitted under the statute, for the reasons described in the *Federal Register* notices announcing each process. Should this litigation result in an injunction or other hold on any parole process, the Departments do not believe that such an injunction or hold would affect the application of this rule.

The parole processes established for CHNV nationals do not represent the only available options for noncitizens seeking entry to the United States. If these parole processes are enjoined, Ukrainian and CHNV nationals would still be able to avoid the rebuttable presumption if they present at a POE pursuant to a pre-scheduled time and place. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). Moreover, if the noncitizen establishes that the mechanism for scheduling was not possible to access or use due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle, then the noncitizen can present at a POE without a pre-scheduled appointment and would not be subject to the presumption of ineligibility for asylum. *Id.* Similarly, these noncitizens would also be excepted from the presumption of ineligibility if they sought asylum or other protection in a country through which they traveled and received a final decision denying that application. 8 CFR 208.33(a)(2)(ii)(C),

1208.33(a)(2)(ii)(C). The Departments believe that these alternative pathways for a noncitizen to be excepted from or rebut the presumption against asylum eligibility are sufficient, such that the rule would be justified even if the CHNV parole processes were to end. The rule incentivizes migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways, not simply the CHNV parole processes, to enter the United States, or seek asylum or other protection in another country through which they travel and thus reduce the number of noncitizens seeking to cross the SWB without authorization to enter the United States.

As stated at 8 CFR 208.33(d) and 1208.33(e), the Departments intend for the provisions of this rule to be severable from each other such that if a court holds that any provision is invalid or unenforceable as to a particular person or circumstance, the presumption will remain in effect as to any other person or circumstance. *See also* 88 FR 11726–27. This intention for maximum severability extends to the parole processes themselves, which are authorized separate from this rulemaking and would exist even in the absence of 8 CFR 208.33(a)(2)(ii)(A), 1208.33(a)(2)(ii)(A).

#### iv. Third Countries

##### a. 1951 Convention and 1967 Protocol Signatories Alone Insufficient

*Comment:* A commenter stated that migrants may not be able to apply for protection in third countries if such countries do not have functioning asylum systems. A commenter suggested that the Departments revise the rule to except noncitizens who demonstrate that the country or countries through which the noncitizen traveled, that are party to the 1951 Convention or 1967 Protocol, did not provide a minimally safe, orderly, expeditious, and effective protection process in the noncitizen’s circumstances. Another noted that while many countries in South and Central America are taking on a significant portion of the burden of migration in the Western Hemisphere, many of these countries cannot be considered “safe” for asylum seekers. Numerous commenters expressed a belief that the conditions and options in most or all third countries are insufficient to provide true or reasonable alternatives to seeking protection in the United States.

Commenters stated that government records and NGO reports both make it clear that “these countries have not developed working asylum systems and that, for many migrants, it would be pointless and life-threatening to stay and apply.” Commenters noted that these conditions are the reason many migrants are fleeing and seeking to come to the United States in the first place. Further, some commenters noted that while Costa Rica has a successful asylum system, Costa Rica has significantly more asylum seekers per capita than the United States, and expressed a belief that Costa Rica is unlikely to be able to absorb more.

*Response:* The Departments do not agree with the commenter’s suggestion to add an exception for noncitizens who demonstrate that a country did not provide an adequate protection process in that noncitizen’s circumstances. First, the rule provides for several exceptions to, and means to rebut, the condition on asylum eligibility beyond having sought and been denied asylum or other protection in a third country. Second, the rule does not require that a noncitizen seek protection in any particular country. Finally, a noncitizen who seeks protection in a country through which they traveled, believes that the protection process was unfair in that country, and receives a final decision denying asylum or other protection from that country would still qualify for an exception to the presumption against asylum ineligibility.

The Departments do not agree with the generalizations that the nations through which a noncitizen might transit, including Mexico and countries in South and Central America, lack functioning asylum systems and invariably cannot be considered safe for those who apply for asylum in those countries. Many of these countries have taken substantial and meaningful steps in recent years that demonstrate their willingness to provide protection to those who need it, which is reflected in their international commitments and their efforts as described later in this response. To be relevant for the rebuttable presumption analysis, the country through which the noncitizen transited must be a party to the Refugee Convention or Protocol. Noncitizens traveling through the Western Hemisphere have many options in this regard; of the countries in

North, Central, and South America, only one is not party to the Convention or the Protocol.<sup>268</sup> Several countries through which noncitizens may transit have also joined the non-binding Cartagena Declaration on Refugees (“Cartagena Declaration”).<sup>269</sup> Delegations from Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Venezuela joined the Declaration on November 22, 1984.<sup>270</sup> Among other things, the Cartagena Declaration includes a pledge to promote the adoption of national laws and regulations facilitating the application of the 1951 Convention and the 1967 Protocol.<sup>271</sup> The Cartagena Declaration also expands the definition of “refugee” to include those fleeing “generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”<sup>272</sup> This “refugee” definition is more expansive than that in U.S. law, *see* 8 U.S.C. 1101(a)(42)(A), thus providing some who may apply for protection, such as asylum, with more grounds on which to make their claim than they would have in the United States.

Nations throughout the Hemisphere are continuously demonstrating their commitment to providing protection to refugees, migrants, and asylum seekers. Colombia, Belize, and Mexico have made significant strides in developing their asylum systems and expanding protections for migrants. In 2021, Colombia adopted legislation that allows Venezuelans to apply for temporary protection status, which grants Venezuelans 10-year residency and allows them to access public education, health care, and employment.<sup>273</sup> By February 2022, about 2.4 million Venezuelans had applied for that status, and Colombian migration authorities had approved nearly 1.4 million

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<sup>268</sup> *See* Maja Janmyr, *The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda*, 33 *Int’l J. Refugee L.* 188, 189 (2021); UNHCR, *States Parties, Including Reservations and Declarations, to the 1951 Refugee Convention*, <https://www.unhcr.org/us/media/38230> (last visited Apr. 25, 2023).

<sup>269</sup> *See* Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Nov. 19-22, 1984, [https://www.oas.org/dil/1984\\_cartagena\\_declaration\\_on\\_refugees.pdf](https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> Int’l Crisis Group, *Hard Times in a Safe Haven: Protecting Venezuelan Migrants in Colombia* (Aug. 2022), <https://www.crisisgroup.org/latin-america-caribbean/andes/colombia-venezuela/hard-times-safe-haven-protecting-venezuelan>.



by July 2022.<sup>274</sup> Belize offers an amnesty program for registered asylum seekers and certain irregular migrants that provides permanent residence and a path to citizenship.<sup>275</sup> The Government of Mexico has made exceptional strides to improve conditions for asylum seekers, migrants, and refugees within its borders. Mexico’s Federal Public Defender’s Office offers legal counseling and support to asylum seekers and migrants who have filed claims with Mexico’s Commission for Refugee Assistance (“COMAR”) and has increased both its specialized staff and visits to migration stations.<sup>276</sup> Mexico has also committed to integrating 20,000 refugees into the Mexican labor market over the next three years and is expanding labor opportunities for Central American workers.<sup>277</sup>

*Comment:* Commenters stated that it is inhumane to require asylum seekers to first seek protection in third countries because they are particularly vulnerable in those countries to harms like exploitation, kidnapping, assault, rape, robbery, or extortion. Commenters noted that many transit countries struggle with high levels of violence, corruption, and ineffective judicial or political systems, citing a range of facts to illustrate political and other concerns in many transit countries, including the trial of Mexican officials for conspiracy with cartels and the extradition of the former Honduran president to face charges in the United States. One commenter asserted that requiring victims of persecution to expose their personal information to possibly corrupt or hostile governments is “an extension of the persecution they fled in the first place,” while another stated that the act of applying for asylum in a third country would make migrants targets of the governments they are fleeing. Commenters also noted that most immigrants to the United States only travel through countries that also have a large number of emigrants seeking to enter the United States, which the commenter believes demonstrates that those countries are not safe.

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<sup>274</sup> *Id.*

<sup>275</sup> Government of Belize, *Amnesty Background Information* (Dec. 7, 2022), <https://immigration.gov.bz/amnesty-background-information>.

<sup>276</sup> Comprehensive Regional Protection and Solutions Framework, *MIRPS in Mexico* (Aug. 2022), <https://mirps-platform.org/en/mirps-by-country/mirps-in-mexico>.

<sup>277</sup> Government of Mexico, Secretary of External Relations, *Mexico to Expand Labor Mobility Programs and Integrate Refugees into its Labor Market* (June 10, 2022), <https://www.gob.mx/sre/prensa/mexico-to-expand-labor-mobility-programs-and-integrate-refugees-into-its-labor-market?idiom=en>.

*Response:* The Departments recognize that certain noncitizens may feel unsafe seeking protection in certain nations through which they might transit, including Mexico and countries in South and Central America, due to the concerns commenters describe. However, as discussed above, the Departments do not agree with generalizations that these countries are universally unsafe and cannot provide protection to asylum seekers. The Departments also note that the rule does not require any noncitizen to seek protection in a country where they do not feel safe. Applying for, and being denied, asylum or other protection in a third country is one exception to the rebuttable presumption, but noncitizens who choose not to pursue this path may instead seek authorization to travel to the United States to seek parole pursuant to a DHS-approved process, or present at a POE at a pre-scheduled time or place (or demonstrate that it was not possible to do so for a reason covered by the rule). *See* 8 CFR 208.33(a)(2)(ii), 1208.33(a)(2)(ii).

Noncitizens may also rebut the presumption by showing that exceptionally compelling circumstances exist, including an acute medical emergency or an imminent and extreme threat to life or safety at the time of entry. 8 CFR 208.33(a)(3), 1208.33(a)(3). Although the Departments expect that many migrants seeking protection will be able to access asylum or other protection in at least one transit country, they recognize that not every country will be safe for every migrant and have provided other exceptions and means for rebutting the presumption to account for those circumstances. Although noncitizens may prefer to apply for asylum in the United States, it is not unreasonable to expect that they would pursue other safe options.<sup>278</sup>

#### b. Concerns about Length of Process and Documentation Provided by Third Countries

*Comment:* Several commenters stated that third countries are not efficient in providing proper documentation for asylum seekers, thus increasing wait times and creating additional issues in overcoming the presumption at the SWB. Another raised concerns that requiring

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<sup>278</sup> *See* UNHCR, *Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries* 1 (Apr. 2018), <https://www.refworld.org/pdfid/5acb33ad4.pdf> (“[R]efugees do not have an unfettered right to choose their ‘asylum country.’”).

migrants to first apply and be rejected for asylum in a third country could force them to wait for that third country's asylum adjudication for months before they can continue their journey to the SWB. One commenter stated that the proposed regulations require a noncitizen to produce documentation (paper or electronic) to show denial of asylum in a third country, which the commenter stated is contrary to the INA's specification that noncitizens may establish asylum eligibility through testimony alone. One commenter expressed concern that the Departments have given no assurances that a denial of asylum in another country will not be used against an asylum applicant here in the United States, where our asylum eligibility guidelines are many times more stringent.

*Response:* To determine if an applicant has met their burden to demonstrate that they sought asylum or protection in a third country and were denied, adjudicators may weigh an applicant's credible testimony with other evidence. *See* INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii). Even when an applicant's testimony is credible, an adjudicator may, where appropriate, request evidence to corroborate this credible testimony, including documentation of the final denial. In that case, the applicant is not required to provide the evidence if they do not have the evidence and cannot reasonably obtain it. *Id.*

Regarding commenters' statements that requiring migrants to seek asylum in third countries will increase wait times, the Departments believe that wait times would likely be significantly longer in the absence of this rulemaking. For those who are unwilling or unable to seek asylum or other protection in a third country and wait for a final decision, the Departments note that there are multiple ways to avoid or rebut the rule's presumption of ineligibility, only one of which involves seeking asylum or other protection in a third country. *See* 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). Noncitizens who do not feel comfortable or safe applying for asylum outside the United States may avoid the rebuttable presumption by seeking parole under one of the authorized parole processes or using the CBP One app to present themselves at a pre-scheduled time at a POE. *See id.* 208.33(a)(2)(ii)(A) and (B),

1208.33(a)(2)(ii)(A) and (B). Additionally, noncitizens may rebut the presumption in exceptionally compelling circumstances, including where they faced an immediate and extreme threat to life and safety at the time of their entry into the United States. 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B). Those who are not excepted from and are unable to rebut the presumption of ineligibility may still pursue statutory withholding of removal and protection under the CAT.

With respect to the comment the Departments have given no assurances that a denial of asylum in another country will not be used against an asylum applicant here in the United States, the Departments note that AOs and IJs will consider the noncitizen's fear of returning to their country of origin on a case-by-case basis through the noncitizen's credible testimony and other relevant evidence demonstrating a fear of persecution.

c. Concerns About Differential Treatment of Migrants

*Comment:* Commenters raised concerns about unintended inequitable treatment of migrants under the rule. For example, commenters raised concerns that the rule arbitrarily disfavors migrants who live farther away, stating that it would be unfair to penalize those who do not have the good fortune of living in a nation close enough to the United States that they do not have to pass through a third country in their journey to the SWB. Another commenter noted that migrants who travel through third countries en route to the United States have necessarily traveled a lengthy distance, which may suggest that their claims are in fact more likely than others' to be meritorious. Similarly, commenters noted that a migrant who does not live close to a country that provides strong protections may not realize until after they passed through a third country that they should have applied for asylum in that country, and that many migrants cannot afford what may be a months-long process of applying for protection in a third country.

Some commenters stated that the United States should not summarily deny asylum claims based on whether migrants have passed through another "safe third country," as the third country may not have been safe for each individual migrant, especially for vulnerable populations. At

least one commenter stated that requiring migrants to seek asylum in third countries on their journey to the SWB is counterintuitive if the migrant has relatives or another support system in the United States. One commenter also noted that individuals with conditions that may cause cognitive difficulties or deficits, such as post-traumatic stress disorder, depression, or head trauma, may not be able to find the medical services that would allow them to participate in the asylum process of a country through which they transited, even if those countries had a functioning asylum system.

*Response:* The rule's primary purpose is to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel. Migrants who do not avail themselves of such a lawful pathway or seek protection in a country through which they travel will be subject to a rebuttable presumption of ineligibility for asylum. That said, the Departments recognize that many migrants face challenging circumstances in their home countries and en route to the United States, and appreciate that not every country will be viable for every migrant, including those who may apply for asylum or other protection, depending upon their individual circumstances. With regards to concerns that migrants may not receive sufficient notice of the exception to seek and be denied asylum or other protection in a transit country, the Departments note that this is only one of multiple exceptions and means of rebuttal that the rule allows. As discussed in Section IV.B.5.iv of this preamble, the rule does not deprive noncitizens of notice in violation of the Fifth Amendment Due Process Clause.

With respect to concerns about "requiring" migrants to seek protection in a third country when they have relatives already in the United States, the Departments reiterate that the rule does not require any migrant to seek protection elsewhere; there are multiple ways to avoid or rebut that presumption of ineligibility, only one of which involves seeking asylum or other protection in a third country. Eligible noncitizens who cannot safely apply for asylum outside the United States may (while residing in any country) seek parole under an authorized parole process.

Alternatively, they may use the CBP One app to present themselves at a pre-scheduled time at a POE. Additionally, the presumption may be rebutted in exceptionally compelling circumstances, such as by demonstrating that one faces an acute medical emergency or imminent and extreme threat to life or safety at the time of entry, or by satisfying the definition of a victim of a severe form of trafficking in persons under 8 CFR 214.11(a), 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i). Those who are not excepted from and are unable to rebut the presumption of ineligibility may still pursue statutory withholding of removal and protection under the CAT. The Departments are not aware, however, of any evidence establishing a direct link between distance traveled and validity of protection claims.

Finally, the Departments note that a location that may be unsafe for one person may not only be safe for, but may offer a much-needed refuge to, others. For example, some countries in the region may have a larger number of individuals who leave the country to seek protection elsewhere than who seek protection in the country, perhaps because those specific individuals experience a targeted threat of violence or fear of persecution in that country. At the same time, such a country may demonstrably provide protection for other individuals or groups of individuals, particularly those originating from third countries, who consider the country to be a safe option where they can be free from persecution or torture. To the extent commenters raise concerns about the ability of certain individuals to participate in the asylum processes of third countries, the Departments note that, as discussed above, many regional partners have protection frameworks that are in some respects more expansive than those of the United States. As detailed in the preamble to the NPRM, *see* 88 FR at 11720–23, many countries in the region have significantly increased protection options to address the unprecedented movement of migrants throughout the hemisphere. Finally, humanitarian protection is not the only available lawful pathway to intending migrants. In some instances, employment-based migration may be

the best option for migrants for whom economic issues are a key factor motivating them (which studies have shown are a high percentage of those moving through the region).<sup>279</sup>

Further discussion of the potential effects of this rule with respect to specific groups is contained in Section IV.B.4 of this preamble.

d. Concerns About Conditions and Asylum Process in Third Countries Generally

*Comment:* Commenters stated that lawful pathways in third countries do not necessarily promote family unity, and that opportunities for family unity depend on the specific pathway.

*Response:* The Departments acknowledge that countries in the region have differing asylum systems and requirements. However, this rule does not require that noncitizens apply for asylum or other protection in a specific third country in order to preserve family unity. Rather, such an application is one of multiple options for noncitizens under the rule. DHS-approved parole processes represent another set of options available to some noncitizens. Additionally, any noncitizen may present at a POE via an appointment that includes a pre-scheduled time and place or may present at a POE without a pre-scheduled time and place and be excepted from the presumption if the noncitizen demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. The Departments also note the discussion in Section IV.E.3.ii.b of this preamble of CBP's ongoing efforts to improve CBP One app functionality for families.

*Comment:* Numerous commenters stated that the third country exception would cause serious bodily harm to noncitizens, lengthening the amount of time noncitizens spend in unsafe transit countries, and exposing them to further risks of persecution, torture, and death in third countries. Multiple commenters expressed concern that the rule ignores the realities asylum

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<sup>279</sup> See, e.g., Ariel G. Ruiz Soto et al, *Charting a New Regional Course of Action: The Complex Motivations and Costs of Central American Migration*, 18 (Nov. 2021), [https://www.migrationpolicy.org/sites/default/files/publications/mpi-wfp-mit\\_migration-motivations-costs\\_final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/mpi-wfp-mit_migration-motivations-costs_final.pdf) (reporting that 92 percent of respondents to a UN World Food Programme household survey “cited economic reasons related to their livelihoods as being key motivating factors” for migration).

seekers face, including violence, persecution, and inadequacy of asylum systems in third countries, and reflects a misunderstanding of the conditions of noncitizens fleeing persecution. Multiple other commenters stated that applying for asylum and awaiting a subsequent denial in a third country is nearly impossible for noncitizens. Several commenters argued that requiring noncitizens to apply for asylum in third countries and wait for a decision would prolong their journey to safety. Another commenter stated that it was unreasonable to require noncitizens to wait for extended periods of time in third countries and suggested that the Departments revise the rule to except noncitizens who waited for six months or more without a decision. Similarly, a commenter stated that the third country exception was a way to delay the safety and stability of noncitizens. A commenter also stated that prior “safe third country” policies relating to Guatemala, among other places, forced asylum seekers into dangerous situations in third countries. A commenter said that although the NPRM states that preventing human trafficking is a consideration for the rule, the third country exception would drive people further into traffickers’ hands. Numerous commenters provided narrative examples of noncitizens who had successfully gained asylum in the United States, and added that it would not have been possible for them to gain asylum if the third country exception was enacted.

*Response:* Regarding comments stating that “safe third country” and similar policies force those who might otherwise apply for asylum in the United States into dangerous situations in third countries, the Departments recognize that not all third countries will be safe for all noncitizens seeking asylum and acknowledge that some migrants may feel that the dangers noted by commenters, or the risk that a particular country’s asylum system would be unduly delayed or leave them vulnerable to refoulement, make applying for protection in that country untenable. However, the rule does not require any noncitizen to seek protection in any particular country and therefore the Departments likewise decline to add an exception for noncitizens who waited for a certain period of time in a third country without a final decision.



The Departments also strongly disagree that the third country exception will heighten risks of human trafficking. Rather, the Departments expect that the rule will reduce reliance on dangerous human smuggling networks that exploit migrants for financial gain, including via human trafficking. If a noncitizen does not believe it would be safe to apply for asylum or related protection in any third country, they may avoid the presumption against asylum eligibility by availing themselves of any of the other available lawful pathways, or, if applicable, they may be able to rebut the presumption of ineligibility by demonstrating exceptionally compelling circumstances.

*Comment:* Some commenters oppose the rule because they believe it encourages individuals to remain in countries where they may not be safe and are closer to their feared persecutor(s) to avoid being disqualified from asylum should they try to enter at the SWB. For example, one commenter cited the experiences of individuals who are being imminently threatened by gangs and have to flee and therefore are unable to remain in their country to apply for a lawful pathway to the United States. Similarly, many commenters stated that it was unfair and unrealistic to expect noncitizens to seek asylum in areas that are unsafe and do not have meaningful protections for refugees.

*Response:* The Departments disagree that the rule encourages noncitizens to remain in dangerous conditions or remain close to their feared persecutors so as to preserve their chance to be eligible for asylum in the United States. The Departments understand that in some cases it would be dangerous for a noncitizen to remain in their home country while they seek a safe, orderly, and lawful pathway into the United States, but note that eligible migrants who have already left their country of origin may apply for the CHNV processes, and all migrants may, if within the appropriate area in Mexico, schedule an appointment to present at a POE. Moreover, the Departments note that lawful pathways such as applying for asylum in a country they transited through or scheduling an appointment through the CBP One app to present at a POE are recognized by the rule and are available to migrants who have already left their country of origin.

The Departments do not agree that this rule creates a strong incentive for those facing danger to remain in their home countries.

e. Concerns About Conditions and Asylum Process in Mexico Specifically

*Comment:* Several commenters expressed concerns about the adequacy of the asylum process in Mexico in particular. For example, one commenter stated that they had worked as a lawyer with migrants in Mexico for a year, and that COMAR is extremely overwhelmed and lacks the staff and funds to process the hundreds of thousands of asylum applications they have received from people in Mexico in the past few years. The commenter stated that they had personally witnessed the inability to receive a timely decision, or even to get access to COMAR in order to file an application in many parts of Mexico. The commenter also stated that Mexican civil society cannot meet the legal and social service needs of hundreds of thousands of asylum seekers, because such organizations are underfunded and under-resourced and cannot begin to meet the basic humanitarian and legal needs of the many people in need of protection who transit through Mexico. Other commenters stated that COMAR is underfunded and that immigration advocates have documented mismanagement and instances of denials of meritorious claims.

One commenter stated that Mexico's asylum system is not prepared to actually grant asylum to refugees from South and Central American countries, stating that conditions for refugees in Mexico are "harsh" and that Mexico does not provide refugees with "legal residence or adequate legal rights to keep them free of exploitation."

A commenter stated that unless an applicant is granted a transfer request by COMAR, they cannot leave the geographical area where they applied for asylum. The commenter added that many applicants move due to safety or economic concerns, and as a result, their cases are considered abandoned. The commenter stated that an abandoned case would not be considered a denial under Mexican law, and that a person who abandoned their application would not qualify under the NPRM. A commenter stated that they have not seen evidence that the Departments

have reviewed the ability of asylum seekers to obtain protection in Mexico and that failure to do so would lead to arbitrary and capricious rulemaking.

*Response:* The Departments recognize that managing migration is a collective responsibility and, as part of a whole-of-government approach, requires working closely with countries throughout the region to prioritize and implement a strategy that advances safe, orderly, legal, and humane migration throughout the Western Hemisphere. With regard to Mexico's ability to handle asylum claims, as stated in the NPRM, 88 FR at 11721, Mexico is the third highest recipient of asylum claims in the world; in 2022, COMAR reported receiving 118,478 applicants for refugee status.<sup>280</sup> Of applications completed in 2021, COMAR granted asylum in 72 percent of cases; an additional two percent of applicants were granted complementary protection (a form of protection available to those who are not eligible for refugee status).<sup>281</sup> Of applications completed in 2022, COMAR granted asylum in 61 percent of cases; an additional two percent of applicants were granted complementary protection.<sup>282</sup> The average case takes 8–12 months to adjudicate.<sup>283</sup> With United States Government funding and the support of international organizations, Mexico has also substantially increased its Local Integration Program, which relocates individuals granted asylum to safe areas of Mexico's industrial corridor and integrates them into such areas. These individuals are then matched with jobs and provided apartments, and their children are enrolled in local schools. In May 2022, the program reached the milestone of reintegrating 20,000 asylum seekers in Mexico.<sup>284</sup> And in June 2022, Mexico committed to support local labor integration for an additional 20,000 asylees over

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<sup>280</sup> Government of Mexico, La COMAR en Números, Diciembre 2022 (Jan. 16, 2023),

[https://www.gob.mx/cms/uploads/attachment/file/792337/Cierre\\_Diciembre-2022\\_\\_31-Dic\\_\\_1.pdf](https://www.gob.mx/cms/uploads/attachment/file/792337/Cierre_Diciembre-2022__31-Dic__1.pdf).

<sup>281</sup> See *id.*; UNHCR, *Asylum Capacity Support Group, Mexico: Granting Complementary Protection*, <https://acsg-portal.org/tools/mexico-granting-complementary-protection/> (last visited Apr. 26, 2023).

<sup>282</sup> Government of Mexico, La COMAR en Números, Diciembre 2022 (Jan. 16, 2023), [https://www.gob.mx/cms/uploads/attachment/file/792337/Cierre\\_Diciembre-2022\\_\\_31-Dic\\_\\_1.pdf](https://www.gob.mx/cms/uploads/attachment/file/792337/Cierre_Diciembre-2022__31-Dic__1.pdf).

<sup>283</sup> Refugees Int'l, *Mexico's Use of Differentiated Asylum Procedures: An Innovative Approach to Asylum Processing* (July 20, 2021), [https://www.refugeesinternational.org/reports/use-of-differentiated-asylum-procedures-an-innovative-approach-to-asylum-processing-#\\_ftn5](https://www.refugeesinternational.org/reports/use-of-differentiated-asylum-procedures-an-innovative-approach-to-asylum-processing-#_ftn5).

<sup>284</sup> UNHCR, *Más de 20.000 Reubicaciones como Parte de los Esfuerzos de Integración de Personas Refugiadas en México* (May 25, 2022), <https://www.acnur.org/noticias/press/2022/5/628e4b524/mas-de-20000-reubicaciones-como-parte-de-los-esfuerzos-de-integracion-de.html>.

the next three years.<sup>285</sup> The Government of Mexico has announced substantial increases to its labor visa programs over the past two years to help those seeking protection enter the labor market.<sup>286</sup> The Departments acknowledge that, like the United States, Mexico has a significant asylum backlog. Nonetheless, it remains a viable option for many seeking protection in Mexico.<sup>287</sup>

As it relates to the comment regarding abandoned claims, the Departments note that, as discussed in Section IV.E.3.iv.f of this preamble, under this rule, a final decision does not include a determination by a foreign government that the noncitizen abandoned the claim. *See* 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C). A noncitizen who has abandoned their asylum claim in Mexico would not qualify, on that basis, for an exception to the rebuttable presumption. Such noncitizens may nonetheless qualify for another exception to the rebuttable presumption or be able to rebut the presumption. For these reasons, the Departments have declined to revise the rule in response to this comment.

*Comment:* Other commenters stated that towns along Mexico's northern border are not equipped to provide food, shelter, health care, and sanitation services to migrants waiting for an asylum hearing. Commenters also stated that migrant camps in Mexico are dangerous, unsanitary, and negatively impact migrants' mental health. A commenter stated that organized crime operates across Central America and Mexico with impunity, and that a target of organized crime fleeing one location would likely be found and targeted in Mexico as well. Another commenter stated that persecutors have followed asylum seekers into Mexico and harmed them there.

Commenters also stated conditions in Mexico are unsafe, especially for asylum seekers. Specifically, commenters stated that the proposed rule would cause additional harm for migrants

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<sup>285</sup> *See* L.A. Declaration Fact Sheet..

<sup>286</sup> *See id.*

<sup>287</sup> *See* Global Compact on Refugees, *Mexico*, <https://globalcompactrefugees.org/gcr-action/countries/mexico> (last visited Mar. 9, 2023); Government of Mexico, Law on Refugees, Complementary Protection, and Political Asylum, Article 28, January 27, 2011, <https://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP.pdf>.

forced to wait in Mexico before applying for asylum in the United States due to the risk of rape, murder, kidnapping, extortion, robbery, and other violence; violent detention by Mexican government officials; denial of medical care for serious illnesses; displacement and homelessness; discrimination or harassment due to race, gender, and sexual orientation; abusive employment arrangements; and denial of access to basic services and protections due to language barriers. One commenter expressed concern that migrants in Mexico face discrimination from drug cartels and other criminals as well as from Mexican authorities, including police and immigration officials. Some commenters pointed to advisories issued by the U.S. Department of State warning U.S. citizens not to travel to areas in Mexico, and stated that there are many examples of migrants being seriously harmed while waiting for asylum in Mexico or for the chance to enter the United States.

Commenters also stated that these risks were further heightened for members of vulnerable groups, such as women and children, Black, brown, and indigenous persons, and LGBT persons.

*Response:* The Departments recognize commenters' concerns about potential harm to migrants in Mexico, particularly for members of vulnerable groups, but again note that more than 100,000 individuals felt safe enough to apply for asylum in Mexico in 2022. The Departments also emphasize that the rule does not require any noncitizen to apply for asylum or other protection in Mexico or any other country. Applying for and being denied protection in Mexico is only one of multiple ways to be excepted from or rebut the presumption of ineligibility for asylum. *See* 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). The rule also provides that the presumption of asylum ineligibility can be rebutted by noncitizens who do not utilize a lawful pathway but who face an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder or who were victims of a severe form of trafficking in persons. *See* 8 CFR 208.33(a)(3)(i)(A) through (C), 1208.33(a)(3)(i)(A) through (C).

For further discussion of this rule and vulnerable populations, please see Section IV.B.4 of this preamble.

*Comment:* A commenter expressed concern that Mexican asylum seekers would have to wait for an appointment with CBP in the same country where they are experiencing persecution.

*Response:* This concern is based on a misunderstanding of the rule. The rebuttable presumption only applies to noncitizens who travel through a country other than their country of citizenship, nationality, or, if stateless, last habitual residence, and that is a party to the Refugee Convention or Protocol, and thereafter enter the United States from Mexico at the SWB or adjacent coastal borders without documents sufficient for lawful admission. *See* 8 CFR 208.33(a)(1), 1208.33(a)(1). Mexican nationals would not have traveled through a country other than Mexico en route to the SWB, and therefore are not subject to the rebuttable presumption. *See* 8 CFR 208.33(a)(1)(iii), 1208.33(a)(1)(iii).

f. Final Decision of Foreign Government is Undefined

*Comment:* Commenters asked how U.S. officials would know the adjudication and appeal processes of third countries, such that they could confirm that a noncitizen's application for asylum or other protection in a third country had been denied in a final decision. Commenters stated that a requirement for a final decision could introduce years of uncertainty depending on the backlogs and resources of third countries. One commenter stated that proving the denial of protection in a third country may be entirely impossible in the context of a credible fear interview.

*Response:* The Departments agree that further clarity on the meaning of the term "final decision" will help noncitizens understand, and IJs and AOs apply, this provision. The Departments are therefore revising 8 CFR 208.33(a)(2)(ii)(C) and 1208.33(a)(2)(ii)(C) to except from the rebuttable presumption noncitizens who "[s]ought asylum or other protection in a country through which the noncitizen traveled and received a final decision denying that application. A final decision includes any denial by a foreign government of the applicant's

claim for asylum or other protection through one or more of that government's pathways for that claim. A final decision does not include a determination by a foreign government that the noncitizen abandoned the claim.”

The Departments also acknowledge that, like the United States, many countries have asylum backlogs that contribute to significant wait times for applicants. However, this rule does not require noncitizens to apply for asylum in a third country and wait for a final decision before applying for asylum in the United States; rather, that is simply one of the lawful pathways recognized by the rule. As an alternative to applying for asylum in a third country and seeking a final decision before migrating to the United States, noncitizens can utilize the CBP One app to pre-schedule an appointment to present at a POE or seek parole pursuant to a lawful parole process (such as the CHNV parole processes). *See* 8 CFR 208.33(a)(2)(ii)(A) and (B), 1208.33(a)(2)(ii)(A) and (B). The rule also allows noncitizens to whom the presumption applies to rebut it in exceptionally compelling circumstances. 8 CFR 208.33(a)(3), 1208.33(a)(3).

The Departments acknowledge that each of the lawful pathways outlined in the rule is subject to limitations, including, *e.g.*, capacity constraints, limitations on eligibility, and geographic availability. The Departments further acknowledge that the pathways' combined limitations could constrain some individuals' ability to access pathways at a given time or place, and that some of those individuals may also not be able to establish an exception to, or rebut, the presumption. However, the Departments have concluded that the interests of migrants and the immigration system as a whole, including the asylum system, are best promoted by incentivizing noncitizens to pursue safe, orderly, and lawful pathways to enter the United States rather than failing to take adequate actions to respond to a potential further surge of irregular migrations at the SWB that threatens to overwhelm the immigration system and prevent orderly processing of claims for protection.

*Comment:* Commenters stated that the proposed exception for those who sought and were denied asylum or “other protection” was unduly vague, because the term “other protection” is

undefined. Commenters stated that if a migrant applied for and was denied an immigration status other than asylum, they would not necessarily know such denial would qualify them for an exception to the rebuttable presumption. Commenters further stated that the absence of a definition would result in inconsistent application of the exception.

*Response:* The preamble of the NPRM described the United States' efforts throughout the region to prioritize and implement a strategy that advances safe, orderly, legal, and humane migration, including access to international protection. Such efforts are put forward in three policy-setting documents: the U.S. Strategy for Addressing the Root Causes of Migration in Central America<sup>288</sup>; the CMMS<sup>289</sup>; and the L.A. Declaration. The NPRM provided a detailed discussion of increased access to protection and other pathways in the region, specifically identifying available programs and processes in Mexico, Guatemala, Belize, Costa Rica, Colombia, Ecuador, and Canada. *See* 88 FR at 11720–23. While these countries provide an opportunity for individuals to apply for asylum or refugee status, they also offer other protection that is not dependent on the applicant meeting the definition of a refugee as provided by the Refugee Convention. For example, Mexico offers protection to individuals whose lives are in danger or where there are well-founded reasons to believe that they would be in danger of being subjected to torture or other cruel, inhuman, or degrading treatment or punishment.<sup>290</sup> Colombia, Costa Rica, and Ecuador have also offered other protection via regularization programs for individuals of specific nationalities.<sup>291</sup>

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<sup>288</sup> The White House, *U.S. Strategy for Addressing the Root Causes of Migration in Central America* (July 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf>.

<sup>289</sup> The White House, *Collaborative Migration Management Strategy* (July 2021), [https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf?utm\\_medium=email&utm\\_source=govdelivery](https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf?utm_medium=email&utm_source=govdelivery).

<sup>290</sup> Government of Mexico, *Law on Refugees, Complementary Protection, and Political Asylum*, Article 28, January 27, 2011, <https://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP.pdf>.

<sup>291</sup> UNHCR, *Temporary Protection Status in Colombia (November 2021)* (Dec. 3, 2021), <https://reliefweb.int/report/colombia/temporary-protection-status-colombia-november-2021-0>; Costa Rica, *Special Temporary Category for Nationals of Cuba, Costa Rica and Nicaragua with Pending or Denied Refugee Claims* (Apr. 17, 2023), [https://www.migracion.go.cr/Paginas/Categor%C3%ADa%20Migratorias%20\(Extranjer%C3%ADa\)/Categor%C3%ADa-Especial-Temporal.aspx](https://www.migracion.go.cr/Paginas/Categor%C3%ADa%20Migratorias%20(Extranjer%C3%ADa)/Categor%C3%ADa-Especial-Temporal.aspx); Reuters, *Ecuador Begins Regularization Process for Thousands of Venezuelan Migrants* Sept. 1, 2022, <https://www.reuters.com/world/americas/ecuador-begins-regularization-process-thousands-venezuelan-migrants-2022-09-01/>.



Because such protection and other pathways in the region are country-specific and, as exemplified by the increased access to protection in the region as a result of the CMMS and L.A. Declaration, are subject to change, the Departments have determined that appropriate pathways and other protections are best determined on a case-by-case basis, considering the evidence presented relating to the nature and basis of the noncitizen's application for protection in the third country. Nevertheless, the Departments note that the "final decision denying asylum or other protection" is intended to include denials of asylum and other forms of humanitarian protection related to fear of returning to one's home country as well as other temporary protections akin to that of temporary protected status under section 244 of the INA, 8 U.S.C. 1254a.

*Comment:* Commenters stated that the proposed rule gives preference to applicants who were denied asylum by another country over those who did not apply or who did apply and received asylum. Commenters stated that the proposed rule would not filter out people with weak asylum claims, as commenters believe the Departments intend, but would rather prevent the most vulnerable people from seeking asylum altogether.

*Response:* The Departments disagree with the assertions that this rule necessarily gives preference to applicants who were denied asylum by another country over those who do not apply and disagree that the rule would prevent the most vulnerable people from seeking asylum altogether. The rule imposes consequences on certain noncitizens who enter the United States without availing themselves of a lawful pathway for entering the United States. Seeking protection and receiving a final decision in a country through which a noncitizen traveled is one of the lawful pathways recognized by the rule, but it is not the only lawful pathway available. A noncitizen who does not seek protection in a third country may nonetheless establish an exception to the presumption—just as a noncitizen who has sought and been denied such protection would—by presenting at a POE at a pre-scheduled time, or by pursuing a DHS-approved parole process.

The rule incentivizes intending migrants to pursue lawful pathways as part of a regional approach to migration management, including by incentivizing migrants to seek protection in countries through which they travel. With respect to any concern that noncitizens denied protections in a third country are less deserving of protection here, the Departments do not agree that a denial in a third country necessarily means that the applying individual would not merit protection under U.S. law.

In addition, the Departments do not agree that the rule necessarily gives preference to applicants who have been denied asylum in another country. Rather, the rule incentivizes migrants to avail themselves of lawful alternatives to irregular migration and see them through to completion (*e.g.*, receiving a final decision in another country). Those noncitizens meeting that requirement who are ultimately granted asylum or other protections in other countries would have no need to continue on to the United States and may, in many cases, be subject to the firm resettlement bar to asylum, and thus, in the Departments' view, such noncitizens need not be excepted from the rebuttable presumption. However, those who have been denied may still have a need for protection in the United States. Therefore, the Departments believe that maintaining asylum eligibility in the United States for those who have been denied asylum in third countries is appropriate and supports the larger goal of incentivizing noncitizens to pursue available lawful pathways, as part of an effort to build a regional approach to migration management.

Moreover, as noted above, there are additional lawful pathways to which noncitizens could avail themselves to avoid application of the rebuttable presumption as well as multiple circumstances in which the presumption of asylum ineligibility could be rebutted. *See* 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). The Departments acknowledge that each of the lawful pathways outlined in the rule is subject to limitations and that the pathways' combined limitations could constrain any individual's ability to access them at a given time or place. However, the Departments have concluded as a matter of policy that the interests of migrants and the immigration system as a whole are best promoted by incentivizing noncitizens to pursue safe,

orderly, and lawful pathways to enter the United States rather than failing to take adequate actions to respond to a potential further surge of irregular migration at the SWB that threatens to overwhelm the immigration system and prevent orderly processing of claims for protection.

g. Pursuit of Lawful Pathways May be Improperly Used as Evidence

*Comment:* Some commenters expressed concern that taking time to pursue lawful pathways may be used as evidence that noncitizens who do not flee their country immediately do not have a legitimate well-founded fear of persecution.

*Response:* The Departments disagree that the rule will increase the likelihood of adverse determinations against those noncitizens who choose to remain in their home countries while seeking access to one of the enumerated lawful pathways. As noted elsewhere in this section, this rule does not discourage any person from fleeing a dangerous circumstance, and in fact highlights the options potentially available to persons who do so. Moreover, such migrants may still provide relevant evidence to support their eligibility for asylum, including a well-founded fear of future persecution, notwithstanding their decision to remain in their country to seek a lawful pathway to the United States. *See* 88 FR at 11737; *see also* 8 CFR 208.13. In short, despite assertions made by some commenters, this rule will not result in the elimination of claims for asylum based on a well-founded fear of future persecution, even for applicants who spend some amount of time in their country of origin attempting to access an orderly and lawful pathway to the United States. AOs and IJs will still consider the noncitizen's fear of returning to their country of origin on a case-by-case basis through the noncitizen's credible testimony and other relevant evidence demonstrating a fear of persecution.

v. Unaccompanied Children

*Comment:* Commenters disagreed with the exception for UCs, stating that children need their parents to keep them safe during their journey to the SWB and that the proposed rule would discourage whole families from seeking asylum together. Some commenters stated that the UC exception would encourage family separation, arguing that families often separate as a perceived

means to obtain protection for their children. Specifically, commenters stated that excepting UCs from the rebuttable presumption would incentivize families to send their children on a dangerous journey to the SWB unaccompanied, leading to a surge in the number of UCs arriving at the SWB. Similarly, commenters expressed that in lieu of waiting together in Mexico, many families may choose, or be “forced” by the lack of sufficient appointment slots for family members or concerns related to their children’s safety, to send their children unaccompanied to the SWB while waiting to schedule their own appointment through the CBP One app.

Commenters pointed to reports of such voluntary separations under MPP and the Title 42 public health Order and said that the proposed rule would lead to similar outcomes, and that implementing a policy that would foment such separations would be inhumane and unacceptable. Commenters stated that family separations can cause severe emotional trauma to children and may increase the risk that a child will be exploited or trafficked.

Some commenters suggest that the Departments should remove the UC exception and instead award a higher priority to family unit applications, as this would keep family units together, grant asylum to those that qualify, and disincentivize sending UCs to the SWB. Other commenters asserted that accompanied children should also qualify for an exception, since the exception for UCs creates a perverse incentive to send children alone to the border if families are not first successful together. Another noted that children arriving with their families do not choose where to cross the border or whether to first obtain an appointment, nor do they choose whether to first apply for asylum in another country, especially when fleeing danger.

*Response:* The Departments fully agree with commenters that keeping families unified and avoiding family separation and the associated trauma is an important goal, but disagree that the rule, including the exception for UCs, will increase separations of families and result in more UCs arriving in the United States. *See, e.g.,* E.O. 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273 (Feb. 5, 2021). As noted in the preamble of the NPRM, applicability of the rebuttable presumption will be considered during the credible

fear process for those noncitizens processed for expedited removal, as well as applied to merits adjudications. 88 FR at 11707. Pursuant to section 235 of the Trafficking Victims Protection Reauthorization Act of 2003 (“TVPRA”), UCs whom DHS seeks to remove cannot be processed for expedited removal and, thus, are never subject to the credible fear process. 8 U.S.C. 1232(a)(5)(D). As UCs are already excluded from expedited removal, the Departments do not expect—based on their experience implementing current law concerning expedited removal and asylum—that this exclusion of UCs from the rebuttable presumption would serve as a significant incentive for families to send their children unaccompanied to the United States.

In addition, under this rule, families may avail themselves of lawful pathways and processes to enter the United States to avoid application of the rebuttable presumption. The rule also states that if one member of a family travelling together, including both parents and children, is excepted from the presumption or has rebutted the presumption, all members of the family are treated as excepted from or as having rebutted the presumption. 8 CFR 208.33(a)(2)(ii) and (3)(i), 1208.33(a)(2)(ii) and (3)(i); 88 FR at 11730 (providing that “if one member of a family traveling together is excepted from the presumption that the condition applies or has rebutted the presumption, then the other members of the family as described in 8 CFR 208.30(c) are similarly treated as excepted from the presumption or as having rebutted the presumption”); *see* 8 CFR 208.30(c)(2) (“The asylum officer in the officer’s discretion may also include other accompanying family members who arrived in the United States concurrently with a principal [applicant] in that [applicant’s] positive fear evaluation and determination for purposes of family unity.”).

To the extent commenters suggest that all children, including those traveling with a parent or legal guardian, be excluded from applicability of the rule, the Departments agree that children may have limited agency in their manner of arrival in the United States. The Departments have therefore added a provision to the rule that allows principal asylum applicants who were under the age of 18 at the time of entry to avoid the condition on asylum eligibility for applications if they file as principal applicants after May 11, 2025, as discussed in more detail at Section II.C.2 of this preamble. 8 CFR 208.33(c)(2), 1208.33(d)(2). However, the Departments do not wish to create an incentive for adults to arrive at the border with children falsely claiming to be a family unit in order to be excepted from the rule or for parents or legal guardians to bring their children with them on the dangerous journey to the United States when they otherwise would not do so, and therefore decline to add an exception for all accompanied minors. The Departments seek to encourage families that may choose to travel to the United States together to travel via a lawful pathway rather than by entrusting smugglers or criminal organizations to facilitate a potentially dangerous journey.

vi. Other General Comments on Exceptions

*Comment:* Several commenters stated that the exceptions to the rebuttable presumption are too narrow and, therefore, would preclude many noncitizens from obtaining asylum. One commenter suggested creating a broad fourth exception that would exempt particularly vulnerable demographics from the rebuttable presumption, much like the proposed rule already exempts unaccompanied children. Another commenter suggested creating an exception for the elderly, who are significantly less likely to be repeat unauthorized crossers.

*Response:* The Departments believe that the rule will generally offer opportunities for those with valid claims to seek protection, and decline to add additional exceptions to the rule. The Departments believe that the existing exceptions to application of the rebuttable presumption against asylum eligibility at 8 CFR 208.33(a)(2) and 1208.33(a)(2) provide the desired incentive for noncitizens seeking to enter the United States do so via safe, orderly, and lawful pathways,

and that additional exceptions, particularly broad exceptions such as those suggested by commenters, would be contrary to the purpose of the rule. Regardless of whether certain populations may be more or less likely to be repeat, unauthorized border crossers, the Departments believe that all noncitizens seeking to enter the United States should do so via safe, orderly, and lawful pathways if possible.

The Departments also note that in addition to the enumerated exceptions, the rule includes means of rebutting the presumption against asylum eligibility at 8 CFR 208.33(a)(3) and 1208.33(a)(3) where exceptionally compelling circumstances exist, including where at the time of entry the noncitizen or a member of their family with whom they are traveling faced an acute medical emergency, faced an imminent and extreme threat to life or safety, or were a victim of a severe form of trafficking in persons. The Departments believe that together, the exceptions and grounds for rebuttal strike the correct balance between incentivizing use of safe, orderly, and lawful pathways for entry into the United States while also recognizing that in certain limited circumstances use of these pathways may not be feasible.

#### 4. Other General Comments on the Rebuttable Presumption

*Comment:* At least one commenter suggested that the Departments should permit an applicant to override the lawful pathways condition if they establish a reasonable possibility of persecution or torture.

*Response:* To best effectuate the policy aims underpinning this rulemaking, the Departments believe that even those noncitizens who establish a reasonable fear of persecution or torture generally should remain subject to this asylum eligibility condition. Such noncitizens remain eligible for statutory withholding of removal or for CAT protection, consistent with U.S. non-refoulement obligations under the Refugee Convention and Protocol and Article 3 of the CAT. See *Mejia v. Sessions*, 866 F.3d 573, 588 (4th Cir. 2017); *Cazun v. U.S. Att’y Gen.*, 856 F.3d 249, 257 n.16 (3d Cir. 2017). Additionally, as discussed in Section IV.E.7.ii of this preamble, the Departments have included protections for family members of principal asylum

applicants who are eligible for statutory withholding of removal or CAT protection and would be granted asylum but for the lawful pathways rebuttable presumption, where an accompanying spouse or child would not qualify for asylum or other protection from removal on their own or where the principal asylum applicant has a spouse or child who would be eligible to follow to join that applicant as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A), if the applicant were granted asylum. In that context, the Departments have determined that the possibility of separating the family would constitute an exceptionally compelling circumstance that rebuts the lawful pathways presumption of ineligibility for asylum. *See* 8 CFR 1208.33(c).

*Comment:* One commenter stated that the United States and Mexico should establish certain parameters for non-Mexicans waiting in Mexico for an appointment or for entry by other means, which must take into account safety, security, and humanitarian conditions in the locations where asylum seekers may be forced to wait. The commenter suggested that those parameters should include permission to remain lawfully in Mexico while awaiting appointments and ensuring relevant standards of protection and treatment under the Refugee Convention and international human rights standards.

*Response:* It would be the Government of Mexico's prerogative to establish any such parameters. The Departments remain committed to continuing to work with foreign partners on expanding their legal options for migrants and expanding the Departments' mechanisms for processing migrants who lawfully arrive in the United States. *See* 88 FR at 11720.

## 5. Screening Procedures and Review

### i. Requests for Reconsideration

*Comment:* Some commenters opposed eliminating noncitizens' ability to seek reconsideration of a negative fear determination by USCIS and contended that the proposed rule would eliminate AO reconsideration of negative credible fear determinations. Commenters stated that the use of reconsiderations is needed to safeguard the rights of and due process for asylum seekers where the AO in the first instance issues an erroneous decision. Commenters



stated that reconsideration has shielded asylum seekers from deportation to persecution and torture for decades, and observed that between FYs 2019–21 requests for reconsideration resulted in 569 reversals of negative credible fear determinations. One commenter stated that even one reversal in the request for reconsideration process is significant enough. One commenter wrote that, contrary to the proposed rule’s “theory that” requests for reconsideration “are a waste of resources because so few are granted,” their experience was that so few are granted because migrants cannot adequately state their fear in the initial interview nor access assistance with the process. Another commenter said the elimination of the possibility of reconsideration leaves an applicant’s fate entirely to the quality and circumstances of the initial interview. Another commenter stated that the Departments should not use USCIS’s “abysmal grant rate to justify eliminating this critical opportunity for justice and to right a wrong in an asylum seeker’s application for protection.” Another commenter expressed concern that this proposed rule would apply only to people who receive negative credible fear determinations due to this proposed rule, thereby creating different sets of procedural rules for asylum seekers denied under this proposed rule and those denied for other reasons.

*Response:* At the outset, the Departments note that contrary to some commenters’ assertions, the rule does not eliminate reconsideration of negative credible fear determinations. If the IJ upholds the AO’s negative determination, USCIS can still exercise its discretion to reconsider a negative determination. *See* 8 CFR 208.33(b)(2)(v)(C). The rule does eliminate the ability to request such reconsideration for noncitizens deemed ineligible for asylum by operation of the rebuttable presumption. While the Departments acknowledge concerns about eliminating a noncitizen’s ability to request reconsideration in this context, they believe it is important to efficiently resolve credible fear cases that are subject to the rebuttable presumption against asylum eligibility. The rule’s effectiveness in channeling migration into safe and orderly pathways depends in part on the efficient resolution of credible fear cases, and the inclusion of further review procedures in this context would unnecessarily prolong the credible fear process.

In response to concerns about fairness, the Departments note that there remain multiple safeguards to ensure that the process is fair and to guard against inadvertent error for those subject to the rule. All credible fear determinations undergo initial review by a Supervisory AO. 8 CFR 208.30(e)(8). If the supervisor concurs with the negative determination, the noncitizen can request review of that determination by an IJ. *See* 8 CFR 208.33(b)(2)(iii) through (v). Those who are found subject to the presumption against asylum eligibility but who are still placed in section 240 removal proceedings can seek a de novo decision regarding the presumption. *See* 8 CFR 1208.33(b)(4). Furthermore, the Departments note that few requests for review of negative credible fear determinations ultimately result in the reversal of those determinations. *See* 87 FR at 18132; 88 FR at 11747. The Departments assess that, in light of the safeguards in place and the low rate of reversal, efficiency interests outweigh the interest in providing further opportunity to request reconsideration; the Departments therefore respectfully disagree with the commenter stating that even one reversal would be significant enough to warrant the ability to request reconsideration. Regarding the claim that few requests for reconsideration are granted due to noncitizens' lack of opportunity to state their fear during the initial interview and lack of assistance with the process, the commenter offered only anecdotal evidence for this. Moreover, this assertion does not change the Departments' assessment that providing further opportunity to request reconsideration carries insufficient benefits to justify its costs. To the extent that commenters argued that these limits on reconsideration implicate the due process rights of noncitizens, as explained previously in Section IV.B.5.i of this preamble, the Supreme Court has held that the due process rights of noncitizens applying for admission at the border are limited to "only those rights regarding admission that Congress has provided by statute." *Thuraissigiam*, 140 S. Ct. at 1983 (citing INA 235(b)(1)(B)(ii) and (v), 8 U.S.C. 1225(b)(1)(B)(ii) and (v)). The INA provides no statutory right to reconsideration of an AO's negative credible fear determination. *See* INA 235(b)(1), 8 U.S.C. 1225(b)(1).

The Departments acknowledge that noncitizens who are not subject to the presumption are subject to different rules for reconsideration. *See* 8 CFR 208.30(g)(1)(i). However, the Departments note that the decision to reconsider a negative credible fear determination under that rule is still subject to USCIS discretion and is also time limited. *Id.* By contrast, there are no time limits for USCIS to reconsider negative determinations in cases subject to this rule. 8 CFR 208.33(b)(2)(v)(C). And due to the exigent circumstances discussed throughout this rule, including in Sections II.A and IV.B.2 of this preamble, the Departments believe it necessary to limit requests for reconsideration in cases subject to this rule.

ii. “Significant Possibility” Standard and Mechanisms for Evaluating Asylum and Withholding of Removal

*Comment:* Some commenters alleged that the rule would elevate the “significant possibility” standard established by Congress to the “reasonable possibility” standard, which is much harder for asylum seekers to meet. One commenter stated that the complexity of the presumption of ineligibility will require “intensive factual analysis” during credible fear interviews and stated that application of the reasonable possibility standard for screenings for withholding of removal or CAT protection violates the Global Asylum Rule injunction. Other commenters suggest that it will be “an extremely onerous undertaking” for the Departments to apply a “reasonable fear” standard in cases where the lawful pathways condition applies, which could lead to more complex and resource-intensive credible fear screening interviews with a “high risk of error that would send bona fide refugees back to danger.” Another commenter stated that, by applying the “reasonable possibility” standard to cases subject to the rule, the rule would essentially turn the credible fear interview, which is intended to be a low-bar screening, into an asylum merits hearing for these individuals. One commenter said that procedural and judicial errors are likely to increase as AOs are asked to apply the more onerous “reasonable possibility” standard.

A commenter stated that the rule may not be necessary as long as statutory withholding of removal and protection under CAT are available, as migrants would not distinguish between asylum, withholding, and CAT protection and instead would arrive at the SWB with the intention of seeking whatever relief is available to them. Other commenters expressed concern that those who cannot rebut the presumption would then be forced to meet a more difficult standard to be able to present a claim to lesser protections in the form of statutory withholding of removal or CAT protection. One commenter stated that the fact that the Departments have long applied the higher standard in reasonable fear screenings is “inapposite,” reasoning that the rule is not about reasonable fear screenings, which impact those who were previously ordered removed and then re-entered without inspection.

*Response:* To the extent commenters suggest that the “reasonable possibility” standard will apply at the credible fear stage to asylum claims under this rule, they are incorrect. The statutory “significant possibility” standard will continue to apply to such asylum claims. *See* Section IV.D.1.iii of this preamble. The rule would apply a “reasonable possibility” standard only to screen for claims of withholding of removal and CAT protection, and only where a noncitizen has failed to establish a significant possibility that they would be able to show at a full hearing by a preponderance of the evidence that the presumption does not apply or that they meet an exception to or can rebut the presumption of ineligibility. *See* 88 FR at 11724.

That said, the Departments acknowledge commenters’ concerns that certain noncitizens will be subject to a higher burden of proof for statutory withholding of removal and CAT protection. The Departments acknowledge that use of the “reasonable possibility” standard is a change from the practice currently applied in the expedited removal context as articulated in the Asylum Processing IFR; however, it is the same standard used in other protection screening contexts. *See* 8 CFR 208.31; *see also* 88 FR 11742–44. Notably, this higher screening standard accords with the higher standard a noncitizen must meet for statutory withholding of removal and protection under CAT in section 240 removal proceedings, 8 U.S.C. 1229a. *See INS. v.*

*Cardoza-Fonseca*, 480 U.S. 421 (1987). As explained in the NPRM, the Departments therefore believe that the “reasonable possibility” standard “better predicts the likelihood of succeeding on the ultimate statutory withholding or CAT protection application than the ‘significant possibility’ of establishing eligibility for the underlying protection standard, given the higher burden of proof.” 88 FR at 11746–47. The application of standards tailored to the type of relief or protection that the noncitizen is eligible for will not foreclose an opportunity for those with meritorious claims to seek protection.

While the INA specifies the “significant possibility” standard for the purpose of screening for potential asylum eligibility in credible fear proceedings, INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), the INA does not specify a standard to be used in screening for potential eligibility for statutory withholding of removal or CAT protection. Congress did not require the same eligibility standards for asylum, statutory withholding of removal, and protection under the CAT in the “credible fear” screening process. *See* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* The Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”), Pub. L. 105–277, 112 Stat. 2681–822. Thus, the Departments have determined that, where the rebuttable presumption of asylum ineligibility applies and has not been rebutted, applying the “reasonable possibility” of persecution or torture standard to screen claims for statutory withholding of removal and CAT protection would better advance the Departments’ systemic goal of processing protection claims in a manner that is efficient, orderly, and safe.

The Departments acknowledge that in multiple rulemaking efforts in recent years, the Departments promulgated divergent standards for screening for potential eligibility for asylum as compared with statutory withholding of removal and CAT protection, along with variable standards for individuals barred from certain types of protection, which are currently not in effect.<sup>292</sup> In June 2020, the Departments published the Global Asylum Rule, which amended

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<sup>292</sup> *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934, 55939, 55943 (Nov. 9, 2018) (“Proclamation Bar IFR”); Asylum Eligibility and Procedural

provisions relating to the expedited removal and credible fear screening process, including raising the standards of proof for screening all claims for statutory withholding of removal and CAT protection to a “reasonable possibility” of persecution or torture and applying all mandatory bars to asylum and statutory withholding of removal during the credible fear screening. *See* Global Asylum Rule, 85 FR at 80277–78. The Global Asylum Rule continues to be the subject of lawsuits challenging the rule on multiple grounds.<sup>293</sup> Most of the changes to the credible fear process in expedited removal made by the Global Asylum Rule were superseded by the Asylum Processing IFR. As explained in the NPRM, the considerations that led to those decisions do not apply here. *See* 88 FR at 11744. This rule implements the new condition on eligibility in credible fear screenings through a stand-alone provision rather than a catch-all as the Departments sought to do through the Global Asylum Rule. Moreover, the Departments have determined that it would be appropriate to apply the lawful pathways condition on asylum eligibility during the credible fear screening stage such that the “reasonable possibility” of persecution or torture standard would then be used to screen the remaining applications for statutory withholding of removal and CAT protection. *See id.*

The Departments disagree with commenters’ assertions that applying a higher burden of proof to screen for statutory withholding of removal and CAT protection where the presumption of asylum ineligibility applies and is not rebutted will result in errors. AOs and IJs have long applied, and continue to apply, the “reasonable possibility” of persecution or torture standard successfully to noncitizens who are subject to administrative removal orders under section 238(b) of the INA, 8 U.S.C. 1228(b), or reinstated orders under section 241(a)(5) of the INA, 8

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Modifications, 84 FR 33829 (July 16, 2019) (“Third Country Transit (TCT) Bar IFR”); Asylum Eligibility and Procedural Modifications, 85 FR 82260 (Dec. 17, 2020) (“TCT Bar Final Rule”); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020) (“Global Asylum NPRM”); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (Dec. 11, 2020) (“Global Asylum Rule”); Security Bars and Processing, 85 FR 84160 (Dec. 23, 2020) (“Security Bars Rule”).

<sup>293</sup> *See Pangea Legal Servs. v. U.S. Dep’t of Homeland Sec.*, 501 F. Supp. 3d 792 (N.D. Cal. 2020); *Immigration Equality v. U.S. Dep’t of Homeland Sec.*, No. 3:20-cv-09258 (N.D. Cal. filed Dec. 21, 2020); *Human Rights First v. Mayorkas*, No. 1:20-cv-3764 (D.D.C. filed Dec. 21, 2020); *Tahirih Justice Ctr. v. Mayorkas*, No. 1:21-cv-00124 (D.D.C. filed Jan. 14, 2021).

U.S.C. 1231(a)(5). *See generally* 8 CFR 208.31 and 1208.31. There is therefore no reason to conclude that AOs and IJs will not be able to appropriately apply that standard successfully in the context of this rule.

The Departments disagree with commenters' suggestion that the rule will increase irregular migration because noncitizens will still travel to the United States to pursue any avenue of relief available to them. The rule's primary purpose is to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel. The rule, coupled with an expansion of lawful, safe, and orderly pathways, is expected to reduce the number of noncitizens seeking to cross the SWB without authorization to enter the United States. The rule is intended to reduce the level of irregular migration to the United States without discouraging migrants with valid claims from applying for asylum or other protection. The Departments believe the rule will generally offer opportunities for those with valid claims to seek protection.

The Departments' application of a higher standard for statutory withholding and CAT protection in "reasonable fear" screenings, *see* 8 CFR 208.31 and 1208.31, is not inapposite in the context of this rule, where a noncitizen does not meet an exception to or rebut the presumption of asylum ineligibility. As in the "reasonable fear" context, this standard would be applied only where noncitizens are ineligible for asylum—and because the standard for showing entitlement to statutory withholding and CAT protection (a probability of persecution or torture) is significantly higher than the standard for asylum (well-founded fear of persecution), the Departments have determined that the screening standard adopted for initial consideration of withholding and deferral requests in these contexts should also be higher.

In promulgating this rule, the Departments considered and drew upon the established framework for considering the likelihood of a grant of statutory withholding of removal or CAT protection in the reasonable-fear context. *See* 88 FR at 11743. The Departments have authority to establish screening procedures and standards for statutory withholding of removal and CAT

protection. *See* INA 103(a)(1), 8 U.S.C. 1103(a)(1). The Departments have frequently invoked these authorities to establish or modify procedures in expedited removal proceedings. *See id.* Noncitizens who establish a reasonable fear of persecution or torture would still be able to seek protection in proceedings before IJs. *See* CFR 1208.33(b)(2)(ii).

*Comment:* One commenter supported the Departments' assessment that applying the higher standard would lead to fewer noncitizens with non-meritorious claims being placed in section 240 removal proceedings, and that using this standard would further systemic goals without violating statutory or international obligations. However, the commenter recommended that DHS raise the screening standard from "significant possibility" to "reasonable possibility" for statutory withholding of removal and CAT protection during all credible fear interviews. The commenter reasoned that such an approach would be consistent with the INA, the FARRA, and U.S. non-refoulement obligations, and would reduce "historic and unsustainable strains" on the U.S. asylum system by deterring unauthorized immigration into the United States.

*Response:* The Departments decline to apply the "reasonable possibility" standard to screen all withholding of removal and CAT claims. The Departments believe that continuing to use the "significant possibility" standard to screen for all three types of claims— asylum, statutory withholding of removal, and CAT protection—when the noncitizen is excepted from or has overcome the presumption would avoid AOs and IJs applying divergent standards to the same sets of facts in a credible fear interview, thus simplifying the screening process for those noncitizens.

The commenter did not provide any explanation or evidence regarding how applying a higher standard during the credible fear screening to all claims for protection will reduce fraudulent claims. While the Departments acknowledge the commenter's concern, the Departments emphasize that the rule's primary intent is not to identify fraudulent asylum claims, but rather to reduce the level of irregular migration to the United States without discouraging migrants with valid claims from applying for asylum or other protection.



## 6. Effective Date, Temporary Period, and Further Action

*Comments:* Commenters raised concerns regarding the effective date of the rule and the two-year temporary duration of the rule. Several commenters expressed a concern that the two-year period is unexplained. Some commenters argued that two years was too short of a time period to assess the effectiveness of the program. Another commenter stated that the two-year temporary duration of the rule allowed for sufficient time to assess the effects of the rule and to deter migrants. Some commenters questioned why the rule would expire after two years and requested further explanation, stating that if the Departments believe it is sound policy, it is not clear why the changes are not permanent. Others stated that the two-year period was too long for a “temporary” program designed to address “exigent circumstances,” and stated that the Departments should have considered a much shorter duration, such as 30 days or 90 days, reconsideration every 6 months, or a sunset before the end of 2025. Another commenter stated that the Departments should specify conditions that would trigger the expiration of the rule. Commenters also expressed concern that the rule does not sufficiently lay out the criteria for determining whether the rule should be extended at the end of the 24-month period, or that the criteria are highly subjective. Commenters also noted that previous immigration policies, including MPP and those stemming from the Title 42 public health Order, have been difficult to sunset.

*Response:* The Departments intend for the rule to address the surge in migration that is anticipated to follow the lifting of the Title 42 public health Order. For that reason, and consistent with the Departments’ initial assessment as stated in the NPRM, *see* 88 FR at 11727, the rule will only cover those who enter during a specific time period, applying to those who enter the United States at the SWB during the 24-month period following the rule’s effective date. The Departments believe that a 24-month period provides sufficient time to implement and assess the effects of the policy contained in this rule. In addition, the Departments believe that a 24-month period is sufficiently long to impact the decision-making process for noncitizens who

might otherwise pursue irregular migration and make the dangerous journey to the United States, while a shorter duration, or one based on specified conditions, would likely not have such an effect.

During this time, the United States will continue to build on the multi-pronged, long-term strategy with our foreign partners throughout the region to support conditions that would decrease irregular migration, work to improve refugee processing and other immigration pathways in the region, and implement other measures as appropriate, including continued efforts to increase immigration enforcement capacity and streamline processing of asylum seekers and other migrants. Recognizing, however, that there is not a specific event or demarcation that would occur at the 24-month mark, the Departments will closely monitor conditions during this period in order to review and make a decision, consistent with the requirements of the APA, whether additional rulemaking is appropriate to modify, terminate, or extend the rebuttable presumption and the other provisions of this rule. Such review and decision would consider all relevant factors, including the following: current and projected migration patterns, including the number of migrants seeking to enter the United States or being encountered at the SWB; resource limitations, including whether the number of noncitizens seeking or expected to seek to enter the United States at the SWB exceeds or is likely to exceed the Departments' capacity to safely, humanely, and efficiently administer the immigration system, including the asylum system; the availability of lawful, safe, and orderly pathways to seek protection in the United States and partner nations; and foreign policy considerations. The Departments expect to consider their experience under the rule to that point, including the effects of the rebuttable presumption on those pursuing asylum claims. In addition, the Departments expect to consider changes in policy views and imperatives, including foreign policy objectives, in making any decision regarding the future of the rule. The Departments do not believe that establishment of specific metrics for renewal ex ante would be appropriate, given the dynamic

nature of the circumstances at the SWB and the multifaceted domestic and foreign policy challenges facing the Departments.

*Comment:* Commenters expressed concern about the rationale for adopting the two-year duration and potential extensions of the rule in subsequent administrations. Some commenters stated that the Departments' rationale for the two-year temporary duration was pretextual, with the true motivations being political and partisan in nature. One commenter disagreed with allowing the rule to be effective after the end of the current presidential term because it could be indefinitely extended, and another similarly stated that the fact that the rule is "temporary" does not mean that a subsequent presidential administration could not renew it. Commenters stated that, by sunseting the rule after the end of the current presidential term, the Departments were inviting such a result.

*Response:* The Departments disagree that the rationale for the 24-month duration of the rule is political, partisan, or pretextual in nature. The rule's primary purpose is to incentivize migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways to enter the United States, or seek asylum or other protection in another country through which they travel. The rule is needed because, absent this rule, after the termination of the Title 42 public health Order, the number of migrants expected to travel without authorization to the United States is expected to increase significantly, to a level that risks undermining the Departments' ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system. The 24-month duration of the rule is discussed in more detail in Section IV.E.6 of this preamble.

*Comment:* Commenters questioned how the temporary nature of the rule would practically work, noting the range of new procedures, training, and other Notices required to start and stop such a large program. These commenters hypothesized that the time spent training and making other updates for implementation would directly cut into the limited time the rule would be in effect, reducing its effectiveness.

*Response:* The Departments agree that implementation of the rule requires training and guidance, and are taking steps to ensure that it can be implemented in a timely, fair, and efficient manner after it goes into effect. The Departments are confident that the new procedures required can be put into effect with minimal disruption or delay in both merits adjudications and credible fear screenings.

*Comment:* Commenters stated that although the rule proposed a two-year effective period, it would have a permanent impact. A few commenters expressed concern about the potential for two identical asylum seekers to be treated differently based on whether they seek asylum before or after the sunset date of the rule. One commenter urged the Departments to provide clarity regarding adjudications that take place after the rule's sunset date for individuals that entered prior to the sunset date.

*Response:* The Departments appreciate commenters' concerns that the rule, which would only apply to those entering during a specified, time-limited date range, could lead to confusion, and appreciate the opportunity to clarify how it will be implemented. The Departments also recognize that due to the nature of the rule, noncitizens who enter during the specified date range will be subject to its terms while those who enter before or after the period will not. However, the Departments disagree that the effects of the condition should be time-limited in duration. The rule was designed to apply to anyone who entered during the specified time period in order to avoid the possibility of individuals entering without documents sufficient for lawful admission during the time period covered by the rule, then waiting out the condition imposed by the rule before applying for asylum, thereby contributing to the existing immigration court backlog and rendering the rule ineffective in its aims of reducing unauthorized arrivals to the SWB and encouraging utilization of available lawful pathways. To clarify to noncitizens and adjudicators that the rebuttable presumption has continuing effect, the Departments added language to the regulations stating that the rebuttable presumption will continue to apply to all asylum applications filed by people who enter in the specified manner during the 24-month period

regardless of when the application is filed and adjudicated. *See* 8 CFR 208.33(c)(1), 1208.33(d)(1). To further clarify, and in response to commenters' concerns in relation to individuals who enter as minors in a family unit who may have entered during the rule's effective period through no fault or agency of their own, the Departments have added language to the rule to ensure children brought to the United States during the 24-month effective period are not subject to the lawful pathways rebuttable presumption of asylum ineligibility in the rule if they file an application for asylum as a principal applicant after expiration of the 24-month period. 8 CFR 208.33(c)(2), 1208.33(d)(2).

*Comment:* Several commenters stated that the rule is contrary to international law, and that its temporary nature, or the emergency rationale behind it, do not justify or excuse such a violation.

*Response:* For discussion of the rule's compliance with international law and U.S. treaty obligations, please see Section IV.D.3 of this preamble.

## 7. EOIR Proceedings

### i. EOIR IJ Credible Fear Review Procedures

*Comment:* Commenters objected to the provision in the proposed rule that would require noncitizens to affirmatively request IJ review of negative credible fear determinations, which differs from existing procedures where review is given to those who do not affirmatively decline review. Commenters stated that IJ review of negative credible fear determinations is an important safeguard that is guaranteed by statute, pointing to data detailing how many negative credible fear determinations were overturned by IJs. Commenters stated that this change favors expedience over access to protection in the United States and would inevitably result in an increase in deportations to countries where asylum seekers have a credible fear of return. Commenters stated that negative credible fear determinations should automatically receive IJ review unless the noncitizen affirmatively declines it, as expecting a noncitizen to know to affirmatively ask for an IJ's review is unrealistic and effectively denies the noncitizen the

opportunity for a judicial review. Commenters explained that many individuals may not request review, or know to request review, even if asked whether they wish to seek further review before an IJ, for a variety of reasons. The provided reasons included unfamiliarity with the immigration system; lack of counsel or education; inability to identify legal errors by the AO; language issues; time in custody; mental health conditions; confusion; trauma; and deference to authority; among others. Further, commenters also stated that changing the explanations of the right to IJ review would not serve as a sufficient safeguard.

Commenters also stated that the Departments did not give a reasoned justification for this policy change and that the rationale in the NPRM for requiring noncitizens to affirmatively request IJ review contradicts the Asylum Processing IFR, which, after the Global Asylum Final Rule implemented a requirement that noncitizens affirmatively request review, reinstated the default rule that negative determinations would be automatically referred for IJ review absent explicit declination by the noncitizen. Moreover, commenters asserted that this rule change would cause confusion as DHS officers would be required to apply the automatic credible fear review provision differently for asylum seekers with negative credible fear determinations based on the rebuttable presumption in this rule, as compared to determinations made on another basis. Commenters also expressed concern that the NPRM did not include statistics regarding automatic IJ credible fear review, including how many asylum seekers succeeded in their review without having articulated a desire for IJ review to the AO, or how many IJ credible fear reviews were expeditiously resolved after the IJ explained the asylum seeker's rights and the asylum seeker chose to not pursue further review.

Separately, regarding credible fear reviews more generally, commenters stated that it was unclear whether an IJ could review the asylum ineligibility presumption during a credible fear review. Commenters also stated that the proposed rule would cause a significant increase in negative credible fear reviews at EOIR, and that such reviews would require more adjudication time due to application of the rebuttable presumption. Moreover, commenters stated that the

proposed rule would allow IJs to engage in speculation by looking outside of the record of proceedings during the credible fear review.

Commenters also proposed an additional hearing, prior to or concurrent with the IJ review, assessing whether a noncitizen's documents were sufficient for lawful admission pursuant to section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7). In contrast, other commenters proposed generally eliminating IJ review of credible fear determinations, asserting this would reduce the backlog of cases within the immigration system and would reduce the pull factor created by lengthy adjudications. Similarly, other commenters stated that IJ review is not necessary if a noncitizen knowingly declines review, so long as the Departments provide expanded rights advisals and explain the consequences of declining such review.

*Response:* As stated in the NPRM, the Departments acknowledge that the procedure for IJ review of negative credible fear determinations established by this rule differs from the credible fear review procedures implemented by the Asylum Processing IFR. *See* 88 FR at 11744 (“[U]nlike the process adopted by the Asylum Processing IFR, noncitizens must affirmatively elect immigration judge review of a negative credible fear determination when that choice is presented to them; noncitizens who fail or refuse to indicate a request for immigration judge review will not be considered to have requested such review.”). While the Departments believe that “the need for expedition under the current and anticipated exigent circumstances” weighs in favor of requiring noncitizens to affirmatively request IJ review of a negative credible fear determination, they will also “seek to ensure noncitizens are aware of the right to review and the consequences of failure to affirmatively request such review.” *Id.* at 11747.<sup>294</sup>

In particular, if a noncitizen receives a negative credible fear determination after failing to rebut the presumption or to establish a “reasonable possibility” of persecution or torture, the rule requires AOs to provide noncitizens “with a written notice of decision and inquire whether

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<sup>294</sup> Regarding commenters' data requests, the Departments note that EOIR does not maintain data regarding how many IJ credible fear reviews were initiated after a noncitizen failed to request such review.

the alien wishes to have an immigration judge review the negative credible fear determinations.” 8 CFR 208.33(b)(2)(iii). The Departments believe that such notice sufficiently ensures that noncitizens who desire IJ review have the opportunity to elect it under this rule. Currently, USCIS explains to noncitizens that they may request review of a negative credible fear determination with an IJ, and that failure to do so may result in removal from the United States. USCIS also explains to noncitizens their right to consultation during the credible fear process, and provides noncitizens with a list of free or low-cost legal services providers whom they may wish to contact.<sup>295</sup> To ensure that noncitizens—including, among others, noncitizens who are unfamiliar with the immigration system, have suffered trauma, are without counsel, or are unable to read or speak English—understand what review is available to them, DHS “intends to change the explanations it provides to noncitizens subject to the . . . rule to make clear to noncitizens that the failure to affirmatively request review will be deemed a waiver of the right to seek such review.” 88 FR at 11747. These explanations will be provided by trained asylum office staff through an interpreter in a language understood by the noncitizen. *See* 8 CFR 208.30(d)(5). As a result, the Departments believe that it is reasonable to conclude that noncitizens who do not request IJ review after receiving sufficient notice, *see* 8 CFR 208.30(d)(5), and the enhanced explanations described above do not wish for additional review. *See* 88 FR at 11747. The Departments note that, at the time that the Asylum Processing IFR was being considered, the Departments were assessing procedures that would require affirmative requests for IJ review through the lens of the Global Asylum Final Rule, which did not include a planned rollout of enhanced explanations for noncitizens. Under this rule, DHS is now planning different protocols for implementing the requirement that noncitizens affirmatively request review by providing the above-described explanations coupled with enhanced notice procedures. The Departments also do not believe this change will cause unnecessary confusion for DHS officers and staff, as they

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<sup>295</sup> *See* USCIS Form M-444, Information About Credible Fear Interview.



are well trained in expedited removal and credible fear procedures. *See, e.g.*, 8 CFR 208.1(b) (“Training of asylum officers”).

Separately, in response to more general comments about the IJ credible fear review process, the Departments clarify that IJs apply a de novo standard during credible fear reviews, including on the question whether the asylum ineligibility presumption applies. *See* 8 CFR 1208.33(b)(1) (stating that “the immigration judge shall evaluate the case de novo”). More generally, the Departments do not believe that the application of the rebuttable presumption presents a risk of creating significant inefficiencies during the IJ credible fear review process that would warrant amending the rule, as IJs have significant experience conducting credible fear reviews and applying asylum-related standards. Additionally, IJs will be able to review relevant evidence provided at the initial credible fear interview before the AO in making any determinations regarding the rebuttable presumption. As discussed above, the Departments anticipate that any increases in the time that it takes to review a negative credible fear decision will be outweighed by other efficiencies created by this rule. The Departments disagree with commenters that the rule allows IJs to engage in “speculation” during credible fear reviews, as the relevant evidentiary standards in credible fear reviews predate this regulation. *See* 8 CFR 1003.42(d)(1) (explaining that the IJ may take into account “such other facts as are known to the immigration judge”).

In response to other commenters, the Departments also decline to completely eliminate IJ credible fear review, which is provided by statute and acts as an important safeguard during the expedited removal process. *See* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III) (“The Attorney General shall provide by regulation and upon the alien’s request for prompt review by an immigration judge of a determination . . . that the alien does not have a credible fear of persecution.”). Similarly, the Departments decline to add additional hearings regarding inadmissibility determinations, which are properly determined within existing procedures. *See*

INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i) (requiring DHS officer to determine document-related inadmissibility during the expedited removal process).

*Comment:* Commenters raised a number of concerns about IJ credible fear review proceedings generally, including the sufficiency and reliability of the evidentiary record before the AO, the abbreviated nature of IJ credible fear reviews in light of the complexity of the issues presented, the lack of counsel or limited participation of counsel in IJ credible fear reviews, the level of deference IJs demonstrate towards to the AO's determination, and the lack of appeal of an IJ negative credible fear determination, among others.

*Response:* As an initial matter, the Departments note that this rule does not alter the existing IJ credible fear review process, and comments regarding unaltered existing processes are outside the scope of this rule. Regardless, with respect to commenters who characterized the existing credible fear screening and review process as deficient or contrary to due process, the Departments note that Congress has established an expedited removal process that includes neither BIA review nor judicial review and requires any IJ review of credible fear determinations to be prompt. *See* INA 235(b)(1)(B)(iii)(III), (C), 8 U.S.C. 1225(b)(1)(B)(iii)(III), (C). Additionally, existing regulations outline a robust process for IJ review of credible fear determinations. *See* 8 CFR 1003.42, 1208.30 (describing IJ review of credible fear determinations). Please also see discussion in Section IV.B.5 of this preamble responding to comments on the effects of the rule on due process.

As to the sufficiency and reliability of the record of determination, the Departments disagree with commenter contentions that this document does not provide a sufficient record for IJ review. The INA sets forth that the record of determination "shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in light of such facts, the [noncitizen] has not established a credible fear of persecution." INA 235(b)(1)(B)(iii)(II), 8 U.S.C. 1225(b)(1)(B)(iii)(II). Further, as the record of determination is a government-created document, it is generally presumed to be

reliable in the absence of evidence to the contrary. *See Matter of J-C-H-F-*, 27 I&N Dec. 211, 212 (BIA 2018) (citing *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995)). Should the reliability of a record of determination be challenged before the IJ, the IJ will consider the arguments raised as to its reliability. *Cf. id.* at 215–16 (setting forth the framework for IJ review when the reliability of a border interview is challenged); *see also Ye v. Lynch*, 845 F.3d 38, 45 (1st Cir. 2017) (requiring a totality-of-the-circumstances-based inquiry as to reliability of a DHS document); *Zhang v. Holder*, 585 F.3d 715, 725–26 (2d Cir. 2009) (requiring a factor-based inquiry as to reliability of a DHS document).

Moreover, during review of a negative credible fear determination, IJs are authorized to “receive into evidence any oral or written statement which is material and relevant to any issue in the review.” 8 CFR 1003.42(c). Accordingly, noncitizens who believe that their credible fear interview is inaccurately described or who wish to provide additional testimony, context, or explanation have the opportunity to do so before an IJ. Furthermore, as an additional procedural precaution for noncitizens, the IJ review of a negative credible fear determination itself is subject to preservation-of-records requirements, as the IJ must create a Record of Proceeding in which to memorialize their review. *See* 8 CFR 1003.42(b).

As stated in the NPRM and consistent with existing practice, IJs will continue to evaluate such credible fear determinations using a de novo standard of review. *See* 8 CFR 1003.42(d)(1), 1208.33(b)(1) (“[T]he immigration judge shall evaluate the case de novo, as specified in paragraph (b)(2) of this section.”); 88 FR at 11726. This includes reviewing an AO’s determinations about the applicability of the presumption of asylum ineligibility and whether the presumption was rebutted. *See* 8 CFR 1208.33(b). Under 8 CFR 1208.33(b)(1), the IJ shall review de novo “[w]here an asylum officer has issued a negative credible fear determination pursuant to 8 CFR 208.33(b), and the alien has requested immigration judge review of that credible fear determination.” 8 CFR 208.33(b)(2)(v) (“Immigration judges will evaluate the case as provided in 8 CFR 1208.33(b).”). In such an instance, de novo review serves to protect

noncitizens from incorrect or unwarranted negative credible fear determinations that may have in part relied upon the rebuttable presumption.

Further, with respect to commenter concerns about timelines in credible fear review proceedings, the expedited removal statute requires “prompt review.” INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). Additionally, the statute states that “[r]eview shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the [negative credible fear] determination.” *Id.*

Moreover, the Departments will not depart from existing procedures regarding IJ review of credible fear determinations to allow appeals from the IJs’ review of such determinations. Prior to this rule, IJ decisions at the credible fear review stage were not reviewable, and this rule maintains that posture. *See* 8 CFR 1003.42(f) (2020)<sup>296</sup> (“No appeal shall lie from a review of an adverse credible fear determination made by an immigration judge.”); 208.33(b)(2)(v)(C) (“No appeal shall lie from the immigration judge’s decision and no request for reconsideration may be submitted to USCIS.”). Such processes are in accordance with the INA. *See* INA 235(b)(1)(C), 8 U.S.C. 1225(b)(1)(C) (providing that removal orders issued under this section are not subject to administrative appeal other than review by an IJ). However, the Departments note that per the rule, USCIS retains the discretion to reconsider negative determinations. *See* 8 CFR 208.33(b)(2)(v)(C) (“Nevertheless, USCIS may, in its sole discretion, reconsider a negative determination.”). Because noncitizens can request IJ review of a negative credible fear determination, and USCIS retains discretion to reconsider negative determinations, the Departments continue to believe, as explained in the NPRM, that the rule appropriately balances the availability of review and the efficient use of limited agency resources. *See* 88 FR at 11747.

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<sup>296</sup> This provision was amended by the Global Asylum Rule, which was preliminarily enjoined and its effectiveness stayed before it became effective. *See Pangea II*, 512 F. Supp. 3d at 969–70. This order remains in effect, and thus the 2020 version of this provision—the version immediately preceding the enjoined amendment—is currently effective.

In sum, the Departments believe that the established process for IJ review of credible fear determinations provides sufficient opportunity for noncitizens to present the necessary evidence, including testimony, relevant for evaluating the applicability of the presumption of asylum ineligibility created by this rule.

ii. Section 240 Removal Proceedings

*Comment:* Commenters stated that the rule would create confusion in section 240 removal proceedings, as the rule states that a noncitizen who is subject to the presumption but demonstrates a “reasonable possibility” of persecution or torture may apply for asylum during subsequent removal proceedings. Commenters also expressed concern that under the proposed rule, an IJ might re-adjudicate the condition on eligibility in section 240 removal proceedings despite an AO initial determination during the credible fear process that the presumption of ineligibility was not applicable or was rebutted. Commenters stated that it would be unfair to require asylum applicants to repeatedly demonstrate that they are able to rebut the presumption before different adjudicators, suggesting an AO’s determination that the presumption is inapplicable should be final for all future proceedings.

*Response:* The Departments reiterate that noncitizens who are subject to the presumption of asylum ineligibility during a credible fear determination, but who demonstrate a “reasonable possibility” of persecution or torture, can apply for asylum during any subsequent removal proceedings. *See* 8 CFR 1208.33(b)(4). However, the provisions of this rule governing the presumption of asylum ineligibility will still apply, and an IJ will apply the relevant provisions de novo during removal proceedings. *See generally* 8 CFR 1208.33.

The Departments do not believe that it is unfair for IJs to consider the presumption of asylum ineligibility de novo where the AO already determined that the presumption did not apply or was rebutted. The IJ’s determination would be based on all available evidence after the noncitizen is given the opportunity to present and examine such evidence. *See* INA 240(b)(4)(B), 8 U.S.C. 1229a(b)(4)(B) (explaining a noncitizen’s evidentiary rights in section

240 removal proceedings). The Departments thus decline to deviate from existing practice in section 240 removal proceedings requiring IJs to determine asylum eligibility *de novo* once a matter is referred to EOIR after a positive credible fear determination. *See, e.g.*, 8 CFR 1208.13(a) (“The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.”).

*Comment:* Commenters provided generally positive feedback on the inclusion of a family unity provision but raised concerns about the operation of the provision itself. Commenters were concerned that the family unity provision was insufficient because it would not apply to asylum applicants traveling without their families, including cases where family members are unable to travel together due to immediate danger, among other factors. Commenters stated that individual asylum applicants would be subject to the asylum ineligibility presumption and, as a result, would be unable to petition for eligible derivatives outside the United States if they are only able to receive statutory withholding of removal or CAT protection, providing anecdotal examples. In turn, commenters stated, this would result in family separation with spouses and children left in dangerous situations in their home country, unable to join their family members in the United States. Therefore, commenters suggested that the family unity provision should be expanded to individual asylum applicants who meet the provision’s requirements if they have eligible derivatives abroad. Commenters also proposed that the rule include “families” as a general exception to application of the rebuttable presumption of ineligibility for asylum.

Commenters explained that, for the provision as currently drafted to apply, the noncitizen would have to first qualify for statutory withholding of removal or CAT withholding, which have higher standards of proof than asylum. Commenters stated that this would result in families with legitimate asylum claims being denied relief because they may be unable to meet the higher standards required for statutory withholding of removal or CAT withholding. Additionally, commenters claimed that this provision would create an inefficient and costly process, where

noncitizens would be required to gather and present a significant amount of evidence on statutory withholding of removal and CAT withholding to meet their higher standards and IJs would have to adjudicate those forms of relief or protection separately before applying the exception, rather than potentially granting asylum in the first instance. Commenters noted that in removal proceedings, the family unity exception requires a determination that the noncitizen is eligible for withholding of removal or CAT withholding and that they would be granted asylum but for the presumption. Commenters also raised concerns that many applicants will face harm while those issues are adjudicated. Commenters raised further concerns that the family unity provision would only apply where no members of a family qualify for withholding of removal or CAT withholding, thus resulting in removal orders for entire families who qualified for those forms of protection. Lastly, commenters expressed concern that the provision does not address family unity concerns where family members traveling together may not qualify as derivatives due to their relationship status. Commenters explained that this would result in the rebuttable presumption of asylum ineligibility applying and, assuming certain non-derivative family members cannot meet the standards for statutory withholding of removal or CAT withholding, de facto separation.

Commenters also expressed confusion about whether the family unity provision could work retroactively to grant asylum to individuals with statutory withholding of removal if their spouse or child subsequently journeyed to the United States and underwent adjudication. Further, commenters stated that the proposed rule leaves outstanding questions about what independent relief would disqualify families from availing themselves of the family unity provision.

One commenter claimed that the family unity provision would incentivize the smuggling of children and suggested eliminating it entirely. Separately, some commenters claimed that the provision would increase the incentives for family migration.

*Response:* The Departments fully agree with commenters that keeping families unified and avoiding family separation is an important goal. *See, e.g.*, E.O. 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273 (Feb. 5, 2021). This rule has been designed to eliminate the possibility that the rule’s presumption will result in the separation of families.

With respect to family units traveling together, if any noncitizen in that family unit traveling together meets an exception to or is able to rebut the asylum ineligibility presumption, the presumption will not apply to anybody in the family traveling together. 8 CFR 208.33(a)(2)(ii), 208.33(a)(3)(i); *see also* 88 FR at 11749. Additionally, even where no family members that are traveling together meet an exception or are able to rebut the presumption, the rule includes a family unity provision that sets forth a unity-based “exceptionally compelling circumstance” to rebut the asylum ineligibility presumption for certain noncitizens in order to avoid separating asylum applicants from potential derivative beneficiaries. 8 CFR 1208.33(c). More specifically, under this family unity provision, where a principal asylum applicant is subject to the presumption but is eligible for statutory withholding of removal or CAT withholding,<sup>297</sup> and would be granted asylum but for the presumption, and where an accompanying spouse or child does not independently qualify for asylum or other protection from removal, the presumption shall be deemed rebutted as an exceptionally compelling circumstance. *See* 8 CFR 1208.33(c). Such principal applicants and their accompanying derivatives can then proceed with their asylum claims consistent with general asylum procedures. *See* INA 208(b)(3), 8 U.S.C. 1158(b)(3).

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<sup>297</sup> The family unity provision at 8 CFR 1208.33(c) is not triggered by eligibility for deferral of removal under the CAT because a noncitizen only eligible for that form of CAT must be subject to a bar to CAT withholding, which would also bar the noncitizen from asylum. *See* 8 CFR 1208.17(a) (providing that someone who is eligible for CAT withholding but who is subject to the mandatory bars to statutory withholding of removal at 8 CFR 1208.16(d)(2) and (3) shall be granted CAT deferral); 8 CFR 1208.16(d)(2) (providing that an application for CAT withholding will be denied if the noncitizen is subject to a bar to statutory withholding of removal under section 241(b)(3)(B) of the INA, 8 U.S.C. 1231(b)(3)(B)). Compare INA 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B) (providing mandatory bars to statutory withholding of removal), with INA 208(b)(2), 8 U.S.C. 1158(b)(2) (providing mandatory bars to asylum). Thus, such a noncitizen would never be ineligible for asylum solely due to the rebuttable presumption.



Additionally, in light of commenters' concerns, the Departments have expanded this provision to also cover principal applicants who have a spouse or children who would be eligible to follow to join that applicant as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A). 8 CFR 1208.33(c). As commenters noted, excluding asylum applicants who travel without their families may inadvertently incentivize families to engage in irregular migration together so as not to risk that the principal applicant would be prevented from later applying for their family members to join them. This may involve making a dangerous journey with vulnerable family members, such as children. The expansion to the provision would apply only to migrants who are subject to the presumption, who are ultimately found eligible for statutory withholding of removal or CAT withholding, and who have spouses or children who would be eligible to follow to join them in the United States.

However, the Departments decline to modify the rule to categorically exempt families from the rebuttable presumption of asylum eligibility. Given the existing and expanded protections in the rule, such a change is not necessary to ensure family unity. And the Departments have determined that making such a change would significantly diminish the effectiveness of the rule and incentivize families to migrate irregularly. *See* 88 FR at 11708–09 (describing the significant increase in families seeking asylum in the United States). Further, the Departments do not want to create an incentive for adults to present at the SWB with children fraudulently claiming to be a family unit.<sup>298</sup>

Overall, the Departments have designed the family unity provision at 8 CFR 1208.33(c) and the other protections against family separation to ensure that the rule does not cause the separation of families. With regard to the family unity provision, the Departments believe that

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<sup>298</sup> *See* Tech Transparency Project, Inside the World of Misinformation Targeting Migrants on Social Media (July 26, 2022), <https://www.techtransparencyproject.org/articles/inside-world-misinformation-targeting-migrants-social-media> (“A review of social media groups and pages identified by migrants showed . . . dubious offers of coyote or legal services, false claims about conditions along the route, misinformation about points of entry at which officials waive the rules, and baseless rumors about changes to immigration law.”); ICE, Press Release, *ICE HSI El Paso, USBP Identify More than 200 ‘Fraudulent Families’ in Last 6 Months* (Oct. 17, 2019), <https://www.ice.gov/news/releases/ice-hsi-el-paso-usbp-identify-more-200-fraudulent-families-last-6-months>.

requiring the lead asylum applicant to first establish eligibility for protection under the higher standards of proof for statutory withholding of removal or CAT withholding before qualifying for the family unity provision serves as an incentive to choose a lawful pathway. Choosing a lawful pathway would enable applicants to remain eligible for asylum, which requires a lower burden of proof and includes the ability to include derivatives on their application or utilize follow-to-join procedures set forth in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A).

To the extent that commenters claim that some family members who traveled together may have, but for the presumption, qualified for asylum but not statutory withholding of removal, and therefore would not qualify for the family unity exception if subject to the rebuttable presumption of asylum ineligibility, the Departments reiterate that the family unity provision in 8 CFR 1208.33(c) is but one protection for family units included in this rule. For example, the rule includes options for families to stay together if any member of a family traveling together: uses an available lawful pathway (8 CFR 208.33(a)(2)(ii), 1208.33(a)(2)(ii)); establishes an exception from or rebuts the presumption of ineligibility (8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3)); or, if they do not pursue a lawful pathway and are unable to establish an exception from or rebut the presumption, meets the higher standard required for statutory withholding of removal or CAT withholding. Notably, exceptions from and rebuttals to the presumption consider circumstances involving both the noncitizen and members of the noncitizen's family with whom they are traveling, for example, whether the noncitizen or a member of the noncitizen's family faced an acute medical emergency at the time of entry. *See* 8 CFR 1208.33(a)(2) and (3), 208.33(a)(2) and (3). To reiterate, the rule also includes options for family members who do not pursue a lawful pathway and are unable to rebut the presumption to stay together or reunite if a principal asylum applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the presumption, if either (1) an accompanying spouse or child does not also independently qualify for asylum or other protection from removal, or (2) if the principal asylum applicant has a spouse or child who

would be eligible to follow to join that applicant if granted asylum. These protections together ensure that the rule does not lead to the separation of families. The Departments strongly encourage noncitizens, including asylum-seeking families, to choose lawful pathways.

However, to the extent that some families may not use a lawful pathway, and are unable to rebut the presumption, the Departments believe that many noncitizens with approvable asylum claims would present claims for statutory withholding of removal or CAT protection on the same set of underlying facts, although the standards that apply to asylum, statutory withholding of removal, and CAT protection each differ from one another in some respects. *See* Regulations Concerning the Convention Against Torture, 64 FR 8478, 8485 (Feb. 19, 1999) (“Additionally, use of the Form I-589 will obviate the need for two separate forms that, in many cases, will elicit similar information. In many cases in which the alien applies both for asylum and withholding of removal under the Act and for withholding under the Convention Against Torture, the underlying facts supporting these claims will be the same.”); *Yousif v. Lynch*, 796 F.3d 622, 629 (6th Cir. 2015) (“An asylum claim and a withholding claim require consideration of ‘the same factors’ and proof of the same underlying facts about an applicant’s probable persecution.”).

Separately, the Departments disagree with commenters that the family unity provision would encourage family migration or child smuggling. The strong incentives of the lawful pathways described in the rule, coupled with the disincentive of the rebuttable presumption of asylum ineligibility, are designed to encourage noncitizens, including families, to pursue lawful pathways. For example, after implementation of the Venezuelan parole process for eligible Venezuelan nationals and their families, migratory flows with respect to this group fell dramatically. *See* 88 FR at 11712, 11718. Based on this trend and the implementation of other initial parole processes implementations discussed in the NPRM, the Departments believe that the rule will reduce irregular family migration as well as child smuggling as part of an overall reduction in irregular migration.

To the extent that commenters raised concerns that the family unity provision is inefficient in operation, the Departments believe that the benefits from inclusion of the provision outweigh any potential inefficiencies. The Departments also note that asylum, statutory withholding of removal, and CAT withholding are forms of relief and protection that generally rely on the same set of underlying facts. *See Yousif*, 796 F.3d at 629. Therefore, IJs who determine that a noncitizen is eligible for statutory withholding of removal or CAT withholding will be able to apply the family unity provision and efficiently consider whether to exercise their discretion to grant asylum on the same facts. Additionally, in response to commenter concerns about noncitizens facing harm while the family unity exception is being adjudicated, the Departments note that this rule does not amend existing follow-to-join procedures.

#### 8. Adequacy of Withholding of Removal and CAT

*Comment:* Commenters stated that statutory withholding of removal and CAT protection are insufficient alternative forms of protection for individuals who would be ineligible for asylum pursuant to the proposed rule, asserting that these forms of protection are more difficult to obtain and provide fewer benefits than asylum.

For example, commenters stated that such forms of protection are not sufficiently available to all those who require protection. Specifically, commenters stated that statutory withholding of removal and CAT protection require applicants to meet a higher burden of proof than asylum, as they would need to demonstrate that it is “more likely than not” that they would face persecution or torture. Commenters stated that, because of this higher burden of proof, an applicant may be otherwise eligible for asylum, but be removed because they are unable to meet the burden for statutory withholding of removal or CAT protection. As a result, commenters alleged that an individual may be returned to a country where they would face persecution or death.

Commenters also stated that, even if an applicant were able to meet the higher burden of proof for statutory withholding of removal or CAT protection, the individual would not then be

accorded the same benefits as asylees. For example, commenters expressed concern regarding the prohibition on international travel for recipients of statutory withholding of removal and CAT protection. Commenters noted that, unlike recipients of asylum, these individuals do not have access to travel documents and are unable to travel abroad.

Commenters also noted that recipients of statutory withholding of removal and CAT protection remain in a tenuous position because they are not granted lawful status, or any path to citizenship, to remain in the United States indefinitely. Commenters explained that recipients of statutory withholding of removal or CAT protection remain permanently subject to a removal order and may have their status terminated at any time. Commenters stated that the constant prospect of deportation or removal creates uncertainty for recipients of statutory withholding of removal or CAT protection, which can lead to community instability in the United States. Commenters stated that this uncertainty would prevent such noncitizens from processing the trauma that predicated their migration to the United States.

Similarly, commenters stated that recipients of statutory withholding of removal or CAT protection may be limited from fully participating in U.S. society. Commenters raised specific concerns about statutory withholding and CAT protection recipients' lack of access to public benefits, services, and healthcare. Commenters were also concerned about such individuals' need to apply annually and pay for work authorization and the impact that this requirement may have on related benefits, such as the ability to obtain a driver's license.

Commenters also claimed that granting statutory withholding of removal or CAT protection instead of asylum under the proposed rule would fail to ensure family unity. Commenters alleged that individuals who are granted statutory withholding of removal or CAT protection would be unable to reunite with family in the United States because these forms of relief do not allow the recipient to petition for derivative beneficiaries. Due to this, commenters stated that the proposed rule would institute another policy of family separation that permanently separates noncitizens from their family members. Commenters also stated that family members

applying for statutory withholding of removal are not able to request that their cases be consolidated and adjudicated together like asylum applicants can and stated that moving separately through the legal system makes them more likely to have uneven results for different family members, which may result in some members being ordered removed while others remain protected in the United States. Some commenters stated that they have experience with clients who have been permanently separated from family members, including young children, because they were granted statutory withholding of removal or CAT protection instead of asylum.

Commenters further raised concerns about the effect the proposed rule would have on availability of bond to those subject to the presumption of asylum ineligibility. Commenters asserted that adjudicators are less likely to grant bond to those who are eligible only for statutory withholding of removal or CAT protection as overly high flight risks due to the comparatively higher standards of proof. Commenters also expressed confusion over whether, under the proposed rule, individuals subject to the presumption of ineligibility will be treated as having entered without inspection, leaving them eligible for bond, or as arriving aliens, leaving them ineligible for bond.

*Response:* As described in the NPRM, the purpose of this rule is to discourage irregular migration by encouraging migrants, including those who may seek asylum, to use lawful, safe, and orderly pathways to the United States. *See generally* 88 FR at 11706–07. To do so, the rule includes a number of exceptions to the rebuttable presumption of ineligibility for asylum for prospective asylum applicants outside the United States, including whether they or a member of their family with whom they traveled (1) sought asylum or other protection in third countries through which they first transit, to avoid the need to continue an often-perilous journey to the United States in pursuit of protection unless absolutely necessary; (2) obtained appropriate authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process; or (3) presented at a POE pursuant to a pre-scheduled date and time or presented at the POE without an appointment but established that it was not possible to access or use the DHS

scheduling system for a specified reason. *See* 8 CFR 208.33(a)(2), 1208.33(a)(2). In other words, this rule provides numerous ways in which noncitizens covered by this rule may pursue asylum. And to the extent that a noncitizen may not be able to pursue a lawful pathway due to exceptionally compelling circumstances, they may be able to rebut the presumption. *See* 8 CFR 208.33(a)(3), 1208.33(a)(3).

With respect to noncitizens, or family members with whom they traveled, who do not avail themselves of a lawful pathway or otherwise rebut the presumption, the Departments recognize that the standards for eligibility for statutory withholding of removal and CAT protection are each higher than that for asylum, as they require demonstrating it is more likely than not that noncitizens will be persecuted or tortured in another country, whereas asylum requires a lesser well-founded fear.<sup>299</sup> *See* 64 FR at 8485. Indeed, that difference in standards aligns with several objectives of this rule: to encourage noncitizens to avail themselves of the lawful pathways described above, where possible, as well as to discourage irregular migration, promote orderly processing at POEs, and ensure that protection from removal is still available for those who satisfy the applicable standards for mandatory protection under statutory withholding of removal or the regulations implementing CAT. *See, e.g.*, 88 FR at 11729 (“The Departments assess that the Government can reduce and redirect such migratory flows by coupling an incentive for migrants to pursue lawful pathways with a substantial disincentive for migrants to cross the land border unlawfully.”). The higher ultimate standards of proof for statutory withholding of removal and CAT protection therefore serve as a disincentive for noncitizens to forgo the lawful pathways detailed in this rule, as noncitizens would risk having to satisfy those comparatively higher standards in the first instance if the presumption applied to their case and were un rebutted.<sup>300</sup>

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<sup>299</sup> As a general matter, the Departments note that this rule does not change any of the long-time standards relating to statutory withholding of removal and CAT protection outside of the initial credible fear screening stage.

<sup>300</sup> In response to commenters, the Departments note that they cannot quantify how many noncitizens subject to the asylum ineligibility presumption can qualify for statutory withholding of removal or CAT protection, as those are case-by-case, fact-specific determinations.

Similarly, the Departments recognize the comparatively fewer benefits of statutory withholding of removal and CAT protection as compared to asylum, including the following: (1) no permanent right to remain in the United States; (2) the inability to adjust status to become a lawful permanent resident and, relatedly, later naturalize as a U.S. citizen; (3) the inability to travel abroad; and (4) the need to affirmatively apply for, and annually renew, work authorization documents.<sup>301</sup> However, as explained above, the Departments promulgated this rule with the intention to encourage noncitizens to utilize a lawful pathway rather than a pathway that may limit them to statutory withholding of removal or CAT protection and their more limited benefits. The Departments also note the lack of derivative protection for statutory withholding of removal and CAT protection recipients.<sup>302</sup> Compare INA 208(b)(3)(A), 8 U.S.C. 1158(b)(3)(A) (providing for derivative asylum status for spouses and children), with INA 241(b)(3), 8 U.S.C. 1231(b)(3) (no derivative status for spouses and children under statutory withholding of removal), and 8 CFR 1208.16(c)(2) (no derivative status for spouses and children under the CAT).<sup>303</sup> The Departments are cognizant of these limitations and acknowledge the importance of family unity. See, e.g., E.O. 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273 (Feb. 5, 2021) (“It is the policy of my Administration to respect and value the integrity of families seeking to enter the United States.”). To that end, as discussed in further detail at Section IV.E.7.ii in this preamble, this rule contains numerous

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<sup>301</sup> See, e.g., American Immigration Council, The Difference Between Asylum and Withholding of Removal at 2 (Oct. 2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_difference\\_between\\_asylum\\_and\\_withholding\\_of\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf); 8 CFR 274a.12(a) (explaining need for withholding recipients to affirmatively apply for work authorization).

<sup>302</sup> The Departments note that, although there is no derivative protection under statutory withholding of removal or CAT, certain U.S.-based qualifying parents or legal guardians, including those granted withholding of removal, may petition for qualifying children and eligible family members to be considered for refugee status and possible resettlement in the United States. See USCIS, Central American Minors (CAM) Refugee and Parole Program, <https://www.uscis.gov/CAM> (last visited Apr. 5, 2023).

<sup>303</sup> The Departments note that applicants will not be prevented from petitioning for family members because of this rule. Under the expanded family unity provision at 8 CFR 1208.33(c), any applicant who is found eligible for statutory withholding of removal or CAT withholding and who would be granted asylum but for the presumption will be deemed to have rebutted the presumption if they have a spouse or child who would be eligible to follow to join them, as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A), and may pursue follow-to-join procedures if granted asylum.



measures to avoid the separation of family members, including applying any exceptions or rebuttals to the presumption to the entire family unit traveling together, as well as a “family unity” provision applicable in removal proceedings to ensure that the rule does not result in family separations when granting relief in the United States. *See* 8 CFR 1208.33(c) (“Family unity and removal proceedings.”).

Separately, because this rule does not impact procedures for bond eligibility or consideration, commenter concerns with respect to these issues are outside of the scope of this rulemaking. Nevertheless, the Departments note that bond determinations will continue to be made on a case-by-case basis in accordance with the governing statutes and regulations. Similarly, this rulemaking does not impact determinations of whether to consolidate cases, although the Departments note that consolidation of cases is not limited to those who are pursuing or are eligible for asylum, and that such determinations are made at the IJ’s discretion. *See* ICPM, Chapter 4.21(a) and (b) (Nov. 14, 2022) (“The immigration court may consolidate cases at its discretion or upon motion of one or both of the parties, where appropriate. For example, the immigration court may grant consolidation when spouses or siblings have separate but overlapping circumstances or claims for relief.”).

## 9. Removal of Provisions Implementing the TCT Bar Final Rule

### i. Support for Removal of Provisions Implementing the TCT Bar Final Rule

*Comment:* The Departments received several comments expressing opposition to the TCT Bar Final Rule and supporting removal of regulatory provisions implementing that rule. Some commenters expressed opposition to the TCT Bar Final Rule without explanation, while others asserted that the TCT Bar Final Rule conflicts with the INA and that the Departments lacked authority to promulgate the TCT Bar Final Rule. Commenters also objected to the TCT Bar as inconsistent with fundamental protections of refugee law, including the right to seek asylum, the principle of non-refoulement, and the prohibition against penalties for irregular entry. Commenters supporting the removal of provisions implementing that rule also faulted the

Departments for not including proposed regulatory text removing the TCT Bar from the CFR. Many commenters who urged the Departments to withdraw the proposed rule did so while requesting that the Departments rescind the TCT Bar Final Rule.

Commenters suggested that the TCT Bar Final Rule is inconsistent with the INA because it conflicts with the safe-third-country exception to applying for asylum under section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), and noted that courts have enjoined the rule, finding it inconsistent with the INA. Commenters further noted that the court in *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 945 (N.D. Cal. 2019), concluded that “Congress requires reasonable assurances that any so-called ‘safe’ third country is actually safe, in line with the long-held understanding that categorical bars on asylum must be limited to people who have somewhere else to turn.”

Commenters also objected to the TCT Bar as inconsistent with fundamental protections of refugee law, including the right to seek asylum, the principle of non-refoulement, and the prohibition against penalties for irregular entry. Commenters agreed with removal of provisions implementing that rule and expressed concern that the TCT Bar Final Rule imposes a sweeping, categorical ban on asylum. Commenters further raised concerns that, while in effect, the TCT Bar disproportionately impacted people of color and Black and brown migrants. At least one commenter claimed that the TCT Bar Final Rule discourages noncitizens from reporting crimes. Many commenters expressed concern over the TCT Bar Final Rule’s effect on children, both accompanied and unaccompanied, and some commenters stated that the TCT Bar Final Rule does not adequately explain why the Departments omitted an exemption for UCs.

*Response:* The Departments acknowledge these commenters’ support. Although the Departments did not include proposed regulatory text in the NPRM, the Departments have included amendatory text in this final rule, which will result in the TCT Bar’s removal from 8 CFR 208 and 1208.

Since the TCT Bar Final Rule was promulgated and then enjoined, the Departments have reconsidered its approach and have determined that they prefer the tailored approach of the rebuttable presumption enacted by this rule to the categorical bar that the TCT Bar IFR and Final Rule adopted. Even if the rebuttable presumption had not been adopted, the Departments would seek to remove provisions implementing the TCT Bar Final Rule as the Departments no longer agree with the approach taken in that rule. Additionally, in order to use the TCT Bar Final Rule, the Departments would have to continue litigating various appeals defending the policy, which the Departments now disagree with. Thus, the Departments consider the removal of provisions implementing that rule to be severable from the provisions of 8 CFR 208.13(f), 208.33, 1208.13(f), and 1208.33.

As discussed in Section IV.D.2 of this preamble, the TCT Bar IFR and Final Rule were enacted to address circumstances along the SWB. In the TCT Bar IFR, the Departments stated that increases in the number of noncitizens encountered along or near the SWB corresponds with an increase in the number of noncitizens claiming fear of persecution or torture, and that the processing of credible fear and asylum applications in turn “consumes an inordinate amount of the limited resources of the Departments.” 84 FR at 33831. The Departments also stated that the increase in credible fear claims has been complicated by a demographic shift in the noncitizen population crossing the southwest border from Mexican single adult males to predominantly Central American family units and UCs. *See id.* at 33838. The Departments explained that while Mexican single adults who are not eligible to remain in the United States can be immediately repatriated to Mexico, often without requiring detention or lengthy court proceedings, it is more difficult to expeditiously repatriate family units and UCs who are not from Mexico or Canada. *See id.* The Departments also explained that, over the past decade, the overall percentage of noncitizens subject to expedited removal who, as part of the initial screening process, were referred for a credible fear interview on claims of a fear of return has jumped from approximately 5 percent to more than 40 percent, and that the number of cases

referred to DOJ for proceedings before an IJ also rose sharply, more than tripling between 2013 and 2018. *See id.* at 33831. In the TCT Bar IFR, the Departments further stated that the growing number of noncitizens seeking protection in the United States and changing demographics created an untenable strain on agency resources. *See id.* at 33838–39. The TCT Bar IFR stated that in FY 2018, USCIS received 99,035 credible fear claims, a 175 percent increase from five years earlier and an 1,883 percent increase from ten years earlier. *See id.* at 33838. In an attempt to address these increases in fear claims, the TCT Bar IFR reduced the availability of asylum to non-Mexicans entering or attempting to enter at the SWB by requiring most asylum seekers who transited through a third country to first seek protection in that transit country, subject to limited exceptions, and without recognizing other avenues for allowing migrants to access the U.S. asylum system.

In response to the TCT Bar IFR, the Departments received 1,847 comments. The commenters who expressed support for that rule indicated that it was an appropriate tool for processing noncitizens arriving at the SWB and would help close “loopholes” they asserted exist in the asylum process. *See* TCT Bar Final Rule, 85 FR at 82262. Those who expressed opposition to that rule raised concerns that the rule (1) was in conflict with the INA and U.S. obligations under international law; (2) imposed a sweeping and categorical ban on asylum; and (3) effectively denied asylum seekers the right to be meaningfully heard with respect to their asylum claims. *See id.* at 82263, 82270, 82275.

The Departments subsequently issued the TCT Bar Final Rule to address the comments received on the TCT Bar IFR. *See id.* at 82260. In the TCT Bar Final Rule, the Departments affirmed that they promulgated the IFR based on several policy objectives, including the following: (1) directing prompt relief to noncitizens who are unable to obtain protection from persecution elsewhere and noncitizens who are victims of a severe form of trafficking in persons; (2) the need to reduce the incentive for noncitizens with “meritless or non-urgent asylum claims” to seek entry to the United States; (3) relieving stress on immigration enforcement and

adjudicatory authorities; (4) curtailing human smuggling; (5) strengthening the negotiating power of the United States regarding migration issues, including the flow of noncitizens into the United States; and (6) addressing humanitarian and security concerns along the SWB. *See id.* at 82285.

As also discussed in Section IV.D.2 of this preamble, a Federal district court vacated the TCT Bar IFR on June 30, 2020, in *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020). Additionally, in parallel litigation, on July 6, 2020, the Ninth Circuit Court of Appeals upheld an order enjoining the IFR. *See E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020). After the TCT Bar Final Rule was issued, in February 2021, the U.S. District Court for the Northern District of California also enjoined the Departments from implementing the TCT Bar Final Rule in its entirety. *See East Bay II*, 519 F. Supp. 3d at 668 (“Defendants are hereby ORDERED AND ENJOINED . . . from taking any action continuing to implement the Final Rule and ORDERED to return to the pre-Final Rule practices for processing asylum applications.”). Thus, the TCT Bar Final Rule is not in effect. As discussed in Section IV.D.2 of this preamble, the injunction rested on a finding that the final rule is inconsistent with both the safe-third-country and firm-resettlement provisions of section 208 of the INA. *See id.* at 667–68; INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A); INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). The court also stated that the TCT Bar Final Rule exacerbated the risk that asylum seekers and migrants would suffer violence and deprived asylum seekers of procedural safeguards meant to protect them from arbitrary denials of their asylum claims. *See East Bay II*, 519 F. Supp. 3d at 664.

The Departments have removed regulatory text implementing the TCT Bar Final Rule from the CFR because the Departments no longer support the TCT Bar Final Rule as a means of addressing capacity and other issues at the SWB. Throughout the NPRM and this rule, the Departments have explained that, absent this rule, the lifting of the Title 42 public health Order is expected to lead to a surge of migration at the SWB. At the same time, the Departments

recognize the opportunity afforded to migrants via the provided lawful pathways, as well as the unique vulnerabilities of asylum applicants, the high stakes involved in the adjudication of applications for asylum, and the fundamental importance of ensuring that noncitizens with a fear of return have access to the U.S. asylum system, subject to certain exceptions. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (explaining that removing a noncitizen to their home country “is all the more replete with danger when the [noncitizen] makes a claim that [the noncitizen] will be subject to death or persecution if forced to return . . . .”); *Quintero*, 998 F.3d at 632 (“[N]eedless to say, these cases per se implicate extremely weighty interests in life and liberty, as they involve [noncitizens] seeking protection from persecution, torture, or even death.”); *Matter of O-M-O-*, 28 I&N Dec. 191, 197 (BIA 2021) (“The immigration court system has no more solemn duty than to provide refuge to those facing persecution or torture in their home countries, consistent with the immigration laws.”). These concerns are echoed in E.O. 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*. *See, e.g., E.O. 14010*, 86 FR at 8267 (Feb. 5, 2021) (“Securing our borders does not require us to ignore the humanity of those who seek to cross them.”). Accordingly, the Departments believe that when evaluating changes to the asylum system, as well as processing at the POEs, the potential adverse impacts to legitimate asylum seekers should be carefully considered, as they have been in this rule. The Departments believe that this rule is better suited to address current circumstances than the TCT Bar Final Rule’s categorical ban on asylum for nearly anyone who traveled through a third country without applying for asylum in that third country.

The Departments recognize that the TCT Bar was in effect for nine months, and although multiple factors influence migration trends over time, the Departments’ review does not indicate that the bar had a dramatic effect on the number of noncitizens seeking to cross the SWB

between POEs.<sup>304</sup> Given the success of the CHNV parole processes, which paired lawful pathways with consequences for not pursuing such pathways, in decreasing encounters, the Departments believe that the TCT Bar’s lack of such alternative pathways may have contributed to its failure to dramatically decrease encounters between POEs. This informs the Departments’ reasoning for adopting the more tailored approach in this rule—that is, pairing safe, orderly, and lawful pathways for entering the United States with negative consequences for forgoing those pathways, along with exceptions and means of rebutting the presumption against asylum eligibility where certain circumstances are present. Additionally, the fact that the TCT Bar has not been in effect for approximately three years undermines any assertion of reliance interests on the bar.

ii. Opposition to Removal of Provisions Implementing the TCT Bar Final Rule

*Comment:* Some commenters expressed general opposition to the removal of provisions implementing the TCT Bar Final Rule. Commenters stated that “the concepts of limiting eligibility for asylum based on means of entry and criteria surrounding that entry are appropriate methods of controlling migrant flows at the southwest border” and that the TCT Bar achieved this without including “myriad of exceptions to effectively render it meaningless.” Some commenters maintained the TCT Bar Final Rule was legally permissible and politically warranted based on factual conditions at the SWB. Commenters similarly urged the Departments to adopt on a permanent basis an amended version of the rule that would mirror the

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<sup>304</sup> The Departments note that apprehensions along the SWB did not dramatically decrease while the TCT Bar IFR was in effect between September 11, 2019, and June 30, 2020. See CBP, *Southwest Border Migration FY 2019*, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019> (last visited Mar. 22, 2023); CBP, *Southwest Land Border Encounters*, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last visited Mar. 22, 2023). Encounters along the SWB increased dramatically starting in January 2019 until early May 2019, when they began to fall significantly. CBP, *Southwest Border Migration FY 2019*, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019> (last visited Mar. 22, 2023). The TCT Bar IFR, although issued on July 16, 2019, did not go into full effect until September 11, 2019, after encounters had already dropped from a high of 144,116 in May to 52,546 in September. *Id.* Encounters continued to trend downward more slowly from October 2019 to March 2020 when concerns over COVID-19 led to the suspension of MPP and the Title 42 public health Order and a steep decline of encounters to a low in April 2020. CBP, *Southwest Land Border Encounters*, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last visited Mar. 22, 2023). Thereafter, encounters increased steadily for the rest of the FY with no noticeable change after the TCT Bar IFR was enjoined and stopped being applied on June 30, 2020. Given this data, the Departments have no reason to believe that the TCT Bar IFR had any noticeable impact on encounters along the SWB while it was in effect.

TCT Bar Final Rule’s provisions, stating that this would better serve the NPRM’s stated goal of “distribut[ing] the asylum burden to countries that are able to provide protection against persecution within the Western Hemisphere.” Commenters averred that this would limit asylum eligibility to those with the greatest need for protection and that the “maintenance of effective deterrence policies is essential to stemming the flow of illegal immigration into the United States.”

*Response:* The Departments note these commenters’ general opposition to rescinding the TCT Bar and their support for enforcing the Nation’s immigration laws. The Departments believe that this rule results in the right incentives to avoid a significant further surge in irregular migration after the Title 42 public health Order is lifted, and that the approach taken in this rule is substantially more likely to succeed than the approach taken in the TCT Bar Final Rule. Specifically, the successful implementation of the CHNV parole processes has demonstrated that an increase in lawful pathways, when paired with consequences for migrants who do not avail themselves of such pathways, can positively affect migrant behavior and undermine transnational criminal organizations, such as smuggling operations. This rule, which is fully consistent with domestic and international legal obligations, provides the necessary consequences to maintain this incentive under Title 8 authorities. In short, the rule aims to disincentivize irregular migration and instead incentivize migrants to take safe, orderly, and lawful pathways to the United States or to seek protection in a third country.

As compared to the TCT Bar Final Rule, this rule has been more carefully tailored to mitigate the potential for negative impact of the rule on migrants to the extent feasible while also recognizing the reality of unprecedented migratory flows, the systemic costs that those flows impose on the immigration system, and the ways in which increasingly sophisticated smuggling networks cruelly exploit the system for financial gain. The Departments remain committed to ensuring that those who apply for asylum or seek protection who most urgently need protection from persecution are able to have their claims adjudicated in a fair, impartial, and timely manner



and believe that this rule, including the removal of provisions implementing the TCT Bar Final Rule, will be a more effective and efficient means of doing so.

*Comment:* Commenters averred that the rule would be too lenient in comparison to the TCT Bar Final Rule and would lead to “open borders.” They claimed that the presumption of asylum ineligibility is not sufficiently stringent and therefore would be far less effective at disincentivizing unlawful migration.

*Response:* The Departments believe that the rule strikes the right balance in terms of incentivizing the use of lawful, safe, and orderly pathways to enter the United States while imposing negative consequences on a failure to do so. As has been shown with the CHNV parole processes, pairing such policies together can lead to meaningful decreases in the flow of irregular migration to the SWB.

#### 10. Declining to Permanently Adopt the Proclamation Bar IFR

In addition to the 51,952 comments on this NPRM, the Departments received a total of 3,032 comments on the Proclamation Bar IFR and posted 3,000 of those comments. Of the 32 comments not posted, 30 were commenters’ duplicates, one was untimely and did not address substantive or novel issues not already covered by other timely comments, and one was an internal test comment. Most of the comments came from one of three mass-mail campaigns, containing the same or closely related variations of the same standard language. While 18 comments supported the IFR specifically or the prior Administration’s efforts generally, the vast majority of the comments opposed the IFR. Below, the Departments address these comments in addition to the comments relating to removal of provisions implementing the Proclamation Bar IFR received in response to the NPRM.

##### i. Support for not Permanently Adopting the Proclamation Bar

*Comment:* Many commenters expressed general opposition to the Proclamation Bar IFR or support for removing provisions implementing that rule without providing any reasoning. Some commenters simply stated that their comments “express [their] strong opposition to the

new Interim Final Rule.” Some commenters, in stating their general opposition to the Proclamation Bar IFR, also made unrelated, general criticisms regarding the prior administration’s immigration policies. Commenters supporting the removal of provisions implementing the Proclamation Bar IFR also faulted the Departments for not including proposed regulatory text removing that rule from the CFR. Many commenters who urged the Departments to withdraw the proposed rule did so while requesting that the Departments rescind the Proclamation Bar IFR.

Commenters expressed concern that the Proclamation Bar IFR violates multiple laws. Specifically, commenters stated that the Proclamation Bar IFR violates multiple sections of the Act: INA 208(a), 8 U.S.C. 1158(a) (eligibility to apply for asylum); INA 235(b)(1), 8 U.S.C. 1225(b)(1) (inspection of noncitizens arriving in the United States and certain other noncitizens who have not been admitted or paroled); INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C) (additional limitations on granting asylum); INA 208(a)(2)(C), 8 U.S.C. 1158(a)(2)(C) (previous asylum exception to authority to apply for asylum); INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C) (codifying the TVPRA). Some commenters asserted that only Congress may act to amend the law and that the prior administration circumvented the legislative process by issuing the Proclamation Bar IFR. Commenters also argued that the Proclamation Bar IFR violates 5 U.S.C. 706(2)(A) in that it was promulgated in a manner inconsistent with the APA, and that it violates multiple provisions of the U.S. Constitution. In particular, commenters argued that the Proclamation Bar IFR violates due process rights, equal protection, and separation of powers; exceeds Executive authority; was promulgated with discriminatory intent; is similar to deterrence-focused policies that have been held unconstitutional; and is unlawful on the basis that the appointment of the then-Acting Attorney General violated the Appointments Clause. Commenters contended that the Proclamation Bar IFR also violates the APA by being arbitrary and capricious, in that it conditions asylum on a factor unrelated to persecution. Numerous commenters claimed that the Proclamation Bar IFR violates the APA’s notice-and-comment

requirements and that the good cause and foreign affairs exceptions do not apply. One commenter claimed that the Proclamation Bar IFR would, in fact, have federalism impacts, contrary to the Departments' federalism impact assessment, and some commenters disagreed with the Departments' position that it is not subject to the Congressional Review Act because its effect is less than \$100 million. Commenters also expressed concern that the Proclamation Bar IFR violates international law, customary international law, and the Refugee Act.

Commenters noted that the court in *East Bay III* held that the Proclamation Bar directly conflicts with section 208(a) of the INA, 8 U.S.C. 1158(a), because “[i]t is effectively a categorical ban on migrants who use a method of entry explicitly authorized by Congress.” Commenters further noted the Ninth Circuit’s holding in *East Bay III* that the fact “[t]hat a refugee crosses a land border instead of a port-of-entry says little about the ultimate merits of her asylum application.” They further cited *East Bay I* as holding that there is “no basis to support ‘categorically disbelieving’ non-citizens, or declaring them ‘not credible,’ simply because of their manner of entry” when applying the “reasonable possibility” standard to those who are determined ineligible for asylum.

Commenters voiced numerous policy concerns about the Proclamation Bar IFR. Specifically, commenters criticized the Proclamation Bar IFR as they believe that it relies on insufficient data or improperly interpreted data; exacerbates trauma by forcing migrants to remain indefinitely outside of the U.S. border in inhumane conditions; punishes those who lack the means to access designated POEs and the luxury to choose how and when they enter the United States; potentially increases risk of harm to children by narrowing safe options; forecloses legitimate asylum claims by imposing an initial higher standard of proof on individuals who enter between POEs; fails to address the root causes of migration, for which some commenters believe the United States is at least in part responsible; violates religious and moral obligations; and is a “shameful abdication of the United States’ obligation to serve as a haven for those individuals who meet the internationally agreed upon definition of a refugee.”

Further, commenters stated that, contrary to its purpose, the Proclamation Bar IFR would not encourage admission at POEs due to safety and procedural concerns at the SWB and would impede state and local services and non-governmental organizations by undermining policies and programs, imposing substantial additional costs, and discouraging engagement. Commenters also voiced concern that the Proclamation Bar IFR would harm U.S. diplomatic efforts and undermine the United States' international credibility by inflaming tensions and hindering diplomatic relations with Mexico and other nations, as well as encouraging other nations to abandon their humanitarian protection practices. Commenters expressed their belief that the Proclamation Bar IFR is cruel, unnecessary, and overly harsh and was issued "under the guise of streamlining the asylum process" but was actually intended to intimidate asylum seekers from entering the United States "out of fear that their presence in the United States guarantees inadmissibility." Additionally, commenters indicated that statutory withholding of removal and CAT protection are insufficient forms of relief.

*Response:* The Departments appreciate the commenters' submissions and agree that removal of provisions implementing the Proclamation Bar IFR is sound policy and accords with this Administration's priorities. Although the Departments did not include proposed regulatory text in the NPRM, the Departments have included amendatory text in this final rule, which will result in the Proclamation Bar's removal from 8 CFR 208 and 1208.

Since the Proclamation Bar IFR was promulgated, the Departments have reconsidered their approach and have determined that they prefer the tailored approach of the rebuttable presumption enacted by this rule to the categorical bar that the Proclamation Bar IFR adopted. Even if the rebuttable presumption were not paired with the decision not to adopt the Proclamation Bar permanently, the Departments would decline to permanently adopt the Proclamation Bar IFR and would remove the bar's language from the regulatory text as the Departments no longer view it as their preferred policy choice and are not inclined to continue defending the Proclamation Bar IFR in court in order to be able to implement it at some

indeterminate point in the future. Thus, the Departments consider the decision not to adopt the Proclamation Bar on a permanent basis and to remove the bar's language from the CFR to be severable from the provisions of 8 CFR 208.13(f), 208.33, 1208.13(f), and 1208.33.

The Proclamation Bar IFR was promulgated to address circumstances along the SWB. In the Proclamation Bar IFR, the Departments stated that “[i]n recent weeks, United States officials have each day encountered an average of approximately 2,000 inadmissible aliens at the southern border.” 83 FR at 55935. They further noted “large caravans” of noncitizens, primarily from Central America, attempting to make their way to the United States, “with the apparent intent of seeking asylum after entering the United States unlawfully or without proper documentation.” *Id.* The Departments noted that nationals of Central American countries were more likely to enter between POEs rather than present at a POE. *Id.* The Departments enacted the Proclamation Bar IFR to “channel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner.” *Id.* The Departments also stated that the Proclamation Bar IFR would “facilitate the likelihood of success in future negotiations” with Mexico. *Id.* at 55951.

Rather than barring entry on its own, the Proclamation Bar IFR only barred entry between POEs when a presidential proclamation or other presidential order under section 212(f) or 215(a)(1) of the INA, 8 U.S.C. 1182(f) or 1185(a)(1), suspended entry along the SWB. 83 FR at 55952–53. Any exceptions to the operation of the bar would be set out in the presidential proclamation or order and were not within the Departments' control. *Id.* at 5934 (“It would not apply to a proclamation that specifically includes an exception for aliens applying for asylum, nor would it apply to aliens subject to a waiver or exception provided by the proclamation.”).

The Proclamation Bar IFR was preliminarily enjoined soon after it became effective and was eventually vacated. *See generally O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019) (recounting the history of the litigation over the Proclamation Bar IFR and vacating it). The Departments appealed the vacatur, and that case has been stayed since February 24, 2021, to

allow for rulemaking by the agencies. *O.A. v. Biden*, No. 19-5272 (D.C. Cir. filed Oct. 11, 2019).

As stated in the NPRM, the Departments have reconsidered the Proclamation Bar IFR and decline to adopt it permanently. *See* 88 FR at 11728. As an initial matter, the Proclamation Bar IFR conflicts with the tailored approach taken in this rule because, in combination with the proclamation the President issued, the Proclamation Bar IFR barred from asylum all individuals who entered the United States along the SWB unless they presented themselves at a POE. *See* 83 FR at 55935 (“The interim rule, if applied to a proclamation suspending the entry of aliens who cross the southern border unlawfully, would bar such aliens from eligibility for asylum and thereby channel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner.”). The Departments do not believe barring all noncitizens who enter between POEs along the SWB is the proper approach in the current circumstances and have instead decided to pair safe, orderly, and lawful pathways for entry into the United States with negative consequences for not taking those pathways, with exceptions and means of rebutting the presumption against asylum eligibility.

Even if the rule’s rebuttable presumption were not finalized and given effect, the Departments would nevertheless remove provisions implementing the Proclamation Bar IFR. The bar’s categorical nature did not allow for case-by-case judgments to determine whether it should apply, which the Departments consider important to ensure that such bars are applied fairly. The Departments believe that this consideration further supports removing the regulatory language implementing the Proclamation Bar IFR. Finally, U.S. negotiations with Mexico have changed, and the Departments no longer believe that the Proclamation Bar IFR is necessary for those negotiations.

ii. Opposition to not Adopting the Proclamation Bar IFR Permanently

*Comment:* Some commenters expressed general support for the Proclamation Bar IFR. Commenters stated that the prior Administration had not done enough to deter irregular

migration, resulting in the undermining of compliance with U.S. laws, the rule of law, and national security and safety.

*Response:* The Departments acknowledge commenters' concerns regarding national security and safety and note the commenters' support for the Proclamation bar IFR.

Nevertheless, the Departments, after due consideration, believe this rule to be more appropriate as a matter of policy and law. This rule serves to encourage the safe and orderly processing of migrants at the SWB and is consistent with the United States' legal obligations under the INA, international treaties, and all relevant legal sources. Because these particular comments failed to articulate specific reasoning underlying expressions of general support for the Proclamation Bar IFR, the Departments are unable to provide a more detailed response.

#### *F. Statutory and Regulatory Requirements*

##### 1. Administrative Procedure Act

###### i. Length of Comment Period

*Comment:* Commenters raised concerns that this rule violated the APA's requirements, as set forth in 5 U.S.C. 553(b) through (d). Commentors stated that the 30-day comment period was not sufficient, arguing that the Departments should extend the comment period to at least 60 days or should reissue the rule with a new 60-day comment period. Numerous commenters requested additional time to comment, citing the complex nature of the NPRM, its length, and the impact of the rule on asylum-seekers and commenters. Other commenters, such as legal services organizations, noted that they have a busy workload and that 30 days was not a sufficient period to prepare the fulsome comment they would have prepared had the comment period provided more time. For example, a legal services organization indicated that it would have provided additional information about asylum seekers the organization has assisted in the past and data about the population the organization serves but that it did not have time to do so. Other organizations stated they also would have included information on issues such as their clients' experiences with the CBP One app and experiences in third countries en route to the

United States and would have consulted with experts. Another organization stated that it had to choose between providing comments on the rule and helping migrants prepare for the rule's implementation, and another organization stated that it was unable to provide fulsome comments because the comment period coincided with the implementation of the CBP One app as a means by which its clients could seek exceptions to the Title 42 public health Order. Commenters argued that the Departments selected a 30-day comment period to reduce the volume of negative comments that will be filed in order to justify disregarding national sentiment against the rule.

Commenters asserted that the 30-day comment period is “risking that public comments will not be seriously considered before the rule is implemented,” and additional time is needed to meet APA requirements that agencies provide the public with a “meaningful opportunity” to comment. These comments referenced Executive Orders 12866, Regulatory Planning and Review, 58 FR 51735 (Sept. 30, 1993) and 13563, Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 18, 2011), which recommend a comment period of not less than 60 days “in most cases,” and case law, such as *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011), and *Centro Legal de la Raza v. EOIR*, 524 F. Supp. 3d 919 (N.D. Cal. 2021).

Commenters disagreed with the Departments' reliance on the impending termination of the Title 42 public health Order in May 2023 and the expected potential surge in migration that would result as justification for the 30-day comment period. These commenters emphasized that the Administration itself sought to formally end the Title 42 public health Order nearly a year ago and stated that the Departments have had sufficient time to prepare for the policy's end. For example, commenters cited to the December 13, 2022, statement issued by Secretary Mayorkas regarding the planning for the end of the Title 42 public health Order.<sup>305</sup>

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<sup>305</sup> DHS, *Statement by Secretary Mayorkas on Planning for End of Title 42* (Dec. 13, 2022), <https://www.dhs.gov/news/2022/12/13/statement-secretary-mayorkas-planning-end-title-42#:~:text=%E2%80%9CNonetheless%2C%20we%20know%20that%20smugglers,United%20States%20will%20be%20removed.>



Some commenters requested extension of the comment period due to reported technical difficulties with submitting comments and stated that technical problems had effectively shortened the comment period to less than 30 days or reduced the public’s ability to fully participate in the rulemaking process. For example, one commenter stated that they had learned that there was a technical outage or other error in the application programming interface (“API”) technology used to allow third-party organizations to submit comments through regulations.gov. This commenter expressed a belief that an unknown number of comments had been “discarded” without the commenters’ knowledge. Another commenter referenced an individual who had technical errors when trying to submit a comment online.<sup>306</sup> This commenter also noted that there was an alert banner on regulations.gov at 9:30 a.m. eastern time on March 27, 2023, that stated “Regulations.gov is experiencing delays in website loading. We apologize for the inconvenience. While we are working on a fix, please try to refresh when you encounter slow responses or error messages.” Overall, these commenters referenced possible technical errors with the submission of comments from as early as March 20, 2023, through the close of the comment period on March 27, 2023.

Finally, commenters further stated that the comment period for the USCIS fee schedule NPRM<sup>307</sup> (from January 4, 2023, through March 13, 2023) overlapped with the comment period for the NPRM in this rulemaking, which caused challenges for commenting on this rule in the 30-day comment period. In addition, commenters stated that the 30-day comment period did not provide commenters who do not regularly work in immigration law with sufficient time to fully analyze the effects of the rule, and that the Departments should extend the 30-day comment

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<sup>306</sup> This commenter also referenced a second individual who was able to eventually submit a timely comment but who posted a photo on twitter that the commenter described as a screenshot of an error screen from regulations.gov. <https://twitter.com/argrenier/status/1639989637413490689/photo/1>. The Departments note that this photo is actually a screenshot from a different website (federalregister.gov) and not regulations.gov, which is the website the instructions in the NPRM told the public to use to submit a comment. *Id.*

<sup>307</sup> See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 88 FR 402 (Jan. 4, 2023); U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements; Extension of Comment Period, 88 FR 11825 (Feb. 24, 2023) (extending the comment period until March 13, 2023).

period to provide sufficient time for respectful observance of Ramadan, which began during the comment period.<sup>308</sup>

*Response:* The Departments believe the comment period was sufficient to allow for meaningful public input, as evidenced by the almost 52,000 public comments received, including numerous detailed comments from interested organizations.

The comment period spanned 33 days, from February 23, 2023, through March 27, 2023. The January 5, 2023, announcement of the impending issuance of the proposed rule<sup>309</sup> also provided an opportunity for public discussion of the general contours of the policy.<sup>310</sup> In addition, commenters could begin to familiarize themselves with the rule before the rule was published during the period before the comment period opened when the rule was on public inspection.

The APA does not require a specific comment period length, *see* 5 U.S.C. 553(b), (c), and although Executive Orders 12866 and 13563 recommend a comment period of at least 60 days, a 60-day period is not required. Much of the litigation on this issue has focused on the reasonableness of comment periods shorter than 30 days, often in the face of exigent circumstances. *See, e.g., N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012) (analyzing the sufficiency of a 10-day comment period); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 629–30 (D.C. Cir. 1996) (concluding 15 days for comments was sufficient); *NW. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981) (finding 7-day comment period sufficient).

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<sup>308</sup> This commenter also stated the Departments should extend the comment period due to the holidays of Passover and Easter, but both Passover (April 5 through April 13, 2023) and Easter (April 9, 2023 or later) do not occur in whole or in part during the rule's comment period.

<sup>309</sup> DHS, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), <https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and>.

<sup>310</sup> *See, e.g., Al Jazeera, US Rights Groups Slam Bidens 'Unacceptable' Asylum Restrictions*, Jan. 6, 2023, <https://www.aljazeera.com/news/2023/1/6/us-rights-groups-slam-bidens-unacceptable-asylum-restrictions>; UN, *New US Border Measures 'Not in Line with International Standards', Warns UNHCR*, Jan. 6, 2023, <https://news.un.org/en/story/2023/01/1132247>.

The Departments are not aware of any case law holding that a 30-day comment period is categorically insufficient. Indeed, some courts have found 30 days to be a reasonable comment period length. For example, the D.C. Circuit has stated that, although a 30-day period is often the “shortest” period that will satisfy the APA, such a period is generally “sufficient for interested persons to meaningfully review a proposed rule and provide informed comment,” even when “substantial rule changes are proposed.” *Nat’l Lifeline Ass’n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984)). The Departments recognize, however, that some courts have held that a 30-day comment period was likely insufficient in certain circumstances. *See, e.g., Centro Legal de la Raza v. EOIR*, 524 F. Supp. 3d 919, 955 (N.D. Cal. 2021) (holding that DOJ’s 30-day notice-and-comment period was likely insufficient for a rule that implemented extensive changes to the immigration court system and noting, *inter alia*, the arguments by commenters that they could not fully respond during the comment period, the effect of the COVID-19 pandemic, and allegations of “staggered rulemaking”); *Pangea Legal Servs. v. DHS*, 501 F. Supp. 3d 792, 818–22 (N.D. Cal. 2020) (holding that the plaintiffs had at a minimum shown “serious questions going to the merits” of whether the 30-day comment period for a different asylum-related rulemaking was insufficient and noting, *inter alia*, the “magnitude” of the rule, that the comment period “spanned the year-end holidays,” the comment periods of other rules by DHS, the number of comments received, and allegations of “staggered rulemaking”).

Here, even assuming these cases were correctly decided, the Departments have concluded that the concerns raised in those circumstances are not borne out. First, the significant number of detailed and thorough public comments is evidence that the comment period here was sufficient for the public to meaningfully review and provide informed comment. *See, e.g., Little Sisters of the Poor Saints Peter & Paul Home v. Penn.*, 140 S. Ct. 2367, 2385 (2020) (“The object [of notice and comment], in short, is one of fair notice.” (citation and quotation marks omitted)). Second, the 30-day comment period did not span any Federal holidays, and while

commenters noted that the Muslim month of Ramadan began during the comment period, the Departments find that there is no evidence that the occurrence of the month of Ramadan during the comment period would substantively impact the ability of Ramadan observants to submit a timely comment. Third, because the Departments had not recently published other related rules on this topic or that affect the same portions of the CFR that would affect commenters' ability to comment, this rule does not present staggered rulemaking concerns. The last asylum-related rulemaking, the Asylum Processing IFR, was published on March 27, 2022, and was effective on May 31, 2022. 87 FR 18078.<sup>311</sup> Accordingly, commenters did not have to contend with the interplay of intersecting rules and related policy changes when drafting their comments. And though the Departments recognize that the USCIS fee rule's comment period partially overlapped with this rule's comment period, this overlap does not render this rule's comment period unreasonable. The comment period for that rule—which addresses different subjects and portions of the CFR than this rule—opened on January 4, 2023, 50 days before opening of this rule's comment period, and ended on March 13, 2023, 14 days prior to the close of this comment period.

Finally, the Departments also believe that the 30-day comment period was preferable to a longer comment period since this rule involves concerns about the Departments' ability to safely, effectively, and humanely enforce and administer the asylum system and immigration laws given the surge of migrants that is expected to occur upon the lifting of the Title 42 public health Order if this rule were not in place. *Cf., e.g., Haw. Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (noting that the agency had good cause to not engage in notice and comment rulemaking at all because the rule was needed to protect public safety as demonstrated by numerous then-recent helicopter crashes). By proceeding with a comment period shorter than 60 days, the Departments were able to receive comments, review comments, and prepare a final rule

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<sup>311</sup> In addition, the Departments published a final rule extending the U.S.-Canada STCA on March 28, 2023, but that rule did not have any impact on the subject of this rule as it applies to the U.S.-Canada land border. 88 FR 18227.

to be promulgated in time for the May 11, 2023, expiration of the public health emergency and the corresponding expiration of the Title 42 public health Order. A 60-day comment period, on the other hand, would have run until April 24, 2023, and a final rule would have been impossible to prepare in the 17 days from April 24 to May 11, 2023. Having this rule in place for the expiration of the Title 42 public health Order will disincentivize the expected surge of irregular migration and instead incentivize migrants to take safe, orderly, and lawful pathways to the United States or to seek protection in third countries in the region. The rule will thus prevent a severe strain on the immigration system, as well as protect migrants from the dangerous journey to the SWB and the human smugglers that profit on their vulnerability. Contrary to some commenters' allegations, the Departments did not select a 30-day comment period to limit public involvement on the rule.

The Departments disagree with commenters' statements that the Departments' reliance on the end of the Title 42 public health Order is inapt because ending Title 42 was a government choice, and the Departments should have had time to prepare without a 30-day comment period. First, the Departments note that the Title 42 public health Order is ending based on factual developments, and the Departments do not control either those factual developments or the decision to recognize those factual developments by terminating the public health Order. Second, litigation and the resulting injunctions over ending the Title 42 public health Order have made it difficult for the Departments to predict an exact end date. *See, e.g., Arizona v. Mayorkas*, 143 S. Ct. 478 (2022) (granting States' application for stay pending certiorari and preventing the District Court for the District of Columbia from giving effect to its order setting aside and vacating the Title 42 public health Order); *Louisiana v. CDC*, 603 F. Supp. 3d 406 (W.D. La. 2022) (granting States' motion for a preliminary injunction prohibiting enforcement of the CDC's order terminating Title 42). Accordingly, it was not until the Administration

announced<sup>312</sup> its plan to have the public health emergency that underpins the Title 42 public health Order extend until May 11, 2023, and then expire that the end of the Title 42 public health Order changed from speculative to more concrete. The Departments then published the NPRM in short order, 24 days after the Administration’s statement of intent. Finally, as discussed in the NPRM and elsewhere in this preamble, the CHNV parole processes that the Departments developed in October 2022 (Venezuela) and January 2023 (Cuba, Haiti, and Nicaragua) have shown significant success in reducing encounters and encouraging noncitizens to seek lawful pathways to enter the United States. This rule adopts a similar design as these programs—coupling the incentives of lawful pathways with disincentives for failing to pursue those pathways—based, in part, on the successes of those programs in decreasing irregular migration. Because those successes were not seen until as late as January 2023, commenters are incorrect that the Departments could have published it long before February 2023. Once the NPRM was published, it was reasonable to include a 30-day comment period in light of the impending end of Title 42 public health Order.

Finally, the Departments have investigated commenters’ allegations of technical errors that led to comments being “discarded” or not submitted with the eRulemaking Program at the GSA. A GSA representative explained the following:

- The API, which allows the electronic submission of comments to regulations.gov by third-party software, was operating normally from March 20, 2023, to March 28, 2023.
- Commenters are incorrect that any submitted comments were “discarded” as comments that are received are not discarded.
- While some users reported errors on the submission of API comments, all unsuccessful transactions were successfully resubmitted within a maximum of 30 minutes.
- In addition, the eRulemaking Program accommodated one commenting organization with a temporary increase to the API posting rate limit so that the organization could submit approximately 26,000 comments by the close of the comment period.

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<sup>312</sup> Office of Mgmt. & Budget, Exec. Office of the President, *Statement of Administration Policy* (Jan. 30, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf>.

- None of the help desk call logs reflect a call related to this rule nor a discussion indicating an unresolved error when posting comments.

Accordingly, the Departments do not believe that any technical errors prevented commenters from submitting comments within the 30-day comment period.

Overall, the Departments find that the time afforded by a 30-day comment period to prepare a final rule prior to the expiration of the Title 42 public health Order, which would not have been possible with a longer comment period, outweighs the arguments raised in support of a longer comment period by commenters. Commenters have provided numerous and detailed comments regarding the NPRM, and the Departments appreciate their effort to provide thorough commentary for the Departments' consideration during the preparation of this final rule.

#### ii. Insufficient Consideration of Public Comments

*Comments:* Commenters stated that the timeline for the rule risks that the Departments will not seriously consider public comments before implementing a final rule and gives the appearance that the Departments have predetermined the outcome of the NPRM. Many commenters stated that the short time span between the scheduled close of the comment period (at the end of March 27, 2023) and the anticipated issuance of the final rule (no later than May 12, 2023) suggested that the Departments would not meaningfully consider public comments. Commenters stated that the Departments should have issued a proposed rule earlier than February 2023 to give the Departments more time to carefully consider comments received and revise policy plans prior to the issuance of a final rule.

*Response:* The Departments have included an extensive discussion of comments received as part of this preamble. The Departments strongly disagree with the commenters' assertions that the Departments failed to meaningfully consider public comments in issuing this final rule. The Departments' receptivity to public comments is demonstrated by, for instance:

- The extensive and substantive discussion of public comments in this preamble;
- Multiple revisions made by the Departments to the policy contained in the NPRM, including clarifications of policy requested by commenters, a reorganization of the

regulatory text for clarity, and other policy changes that are responsive to public comments; and

- The Departments’ choice to seek public comment in the first instance, notwithstanding that this rulemaking involves a foreign affairs function of the United States and addresses an emergency situation for which the Departments would have good cause to bypass notice and comment.<sup>313</sup>

### iii. Delayed Effective Date

*Comments:* Commenters stated that they anticipated that the Departments would issue the final rule in violation of the APA’s requirement of a 30-day delayed effective date for substantive rules.<sup>314</sup> Commenters stated that by delaying so long in issuing the NPRM, the Departments had forfeited any argument for “good cause” to make the final rule effective immediately. Commenters noted that there has been litigation for years over the ongoing viability of Title 42 public health Order—itsself an inherently temporary measure—and the April 2022 Title 42 termination Order. Commenters stated that the Departments could have conducted a notice-and-comment rulemaking with a 30-day delayed effective date had they begun this rulemaking sooner.

*Response:* As discussed in Section V.A. of this preamble, the Departments are invoking the foreign affairs and good cause exceptions for bypassing a 30-day delayed effective date. *See* 5 U.S.C. 553(a)(1) and (d). The Departments have determined that immediate implementation of this rule is necessary to fortify bilateral relationships and avoid exacerbating a projected surge in migration across the region following the lifting of the Title 42 public health Order.

Case law suggesting that an agency’s delay can effectively forfeit the agency’s “good cause” relates primarily to the separate good cause exception applicable to notice-and-comment rulemaking requirements under 5 U.S.C. 553(b)(B).<sup>315</sup> Such case law has no bearing on the

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<sup>313</sup> *See* 5 U.S.C. 553(a)(1), (b)(B); *see also* Section VI.A. of this preamble.

<sup>314</sup> *See* 5 U.S.C. 553(d).

<sup>315</sup> *See, e.g., Env’tl. Def. Fund v. EPA*, 716 F.2d 915, 921–22 (D.C. Cir. 1983) (holding that because the agency “failed to demonstrate that outside time pressures forced the agency to dispense with APA notice and comment procedures . . . the agency’s action . . . [fell] outside the scope of the good cause exception”); *Nat’l Ass’n of Farmworkers Org. v. Marshall*, 628 F.2d 604, 622 (D.C. Cir. 1980) (rejecting a good cause argument for bypassing notice and comment because the time pressure cited by the agency “was due in large part to the [agency’s] own delays”).



foreign affairs exemption under 5 U.S.C. 553(a)(1). In addition, it is not dispositive as to the good cause exception at 5 U.S.C. 553(d), which serves “different policies” and “can be invoked for different reasons.”<sup>316</sup> Specifically, the 30-day delayed-effective-date requirement “is intended to give affected parties time to adjust their behavior before the final rule takes effect,”<sup>317</sup> but in this context, affected parties have been subject to the Title 42 public health Order for years, and cannot reasonably argue that they require an additional 30 days to adjust their behavior to the new approach taken in this rule.

Even if the forfeiture doctrine is applied in this context, however, the Departments have pursued this rulemaking without delay, and in fact have proceeded as rapidly as possible under the circumstances. As discussed at length in the NPRM, this rulemaking addresses a range of dynamic circumstances, including major recent shifts in migration patterns across the hemisphere, altered incentives at the SWB created by the application of the Title 42 public health Order (which has carried no immigration consequences and resulted in many migrants trying repeatedly to enter the United States), and ongoing litigation regarding the Title 42 public health Order.<sup>318</sup> The Departments have sought to address these circumstances in a variety of ways, including the six-pillar strategy outlined in the April 2022 DHS Plan for Southwest Border Security and Preparedness; the issuance of the Asylum Processing IFR, 87 FR 18078; the expansion of lawful pathways throughout the region and via the CHNV processes; and the introduction of the CBP One app, among other measures. The Departments’ issuance of the proposed rule while the litigation over the Title 42 public health Order was ongoing, and within weeks of the Administration’s announcement regarding the impending termination of that Order, reflects the high priority that the Departments have placed on issuing this rulemaking promptly via a notice and comment process.

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<sup>316</sup> *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992) (The “30-day waiting period in no way relates to the notice and comment requirement, but the federal courts have not always been careful to maintain the distinction” (internal citation and quotation omitted)).

<sup>317</sup> *Id.*

<sup>318</sup> *See* 88 FR at 11708–14.

## 2. Paperwork Reduction Act (“PRA”)

*Comment:* A commenter stated that the Departments had not posted to the public docket any proposed revisions to the collection of information under Office of Management and Budget (“OMB”) Control Number 1651-0140, *Collection of Advance Information from Certain Undocumented Individuals on the Land Border*. The commenter stated that such revision appeared particularly important given the NPRM’s proposed codification of the required use of the CBP One app to access regular Title 8 asylum processing. The commenter stated that, as a consequence of the failure to post the proposed revisions, they were unable to comment on the proposed changes to the collection of information. A commenter expressed concern that CBP sought emergency approval to collect advance information on undocumented noncitizens and bypassed the standard notice and comment process.

*Response:* With respect to commenters’ stated concerns about the public docket, the Departments note that like all proposed revisions to collections of information, the proposed revisions described in the NPRM were available for review throughout the comment period on OMB’s website at <https://www.reginfo.gov>, under the Information Collection Review tab.<sup>319</sup> The Departments did not also post these comments to the public docket, but are unaware of any attempt by the commenter to request a copy of the proposed changes by using the contact information listed in the NPRM.

The Departments maintain that the nature of the proposed change to the collection of information was clear to commenters, as the proposed change was described at length in the NPRM and was the subject of many comments. The Supporting Statement that was available on OMB’s website (and was the only document related to the information collection for which the Departments had proposed revisions) described an NPRM that, if finalized, “would change the consequences, for some noncitizens and for a temporary period of time, of not using CBP One to

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<sup>319</sup> See OMB, *ICR Documents: CLEAN Supporting Statement 1651-0140 Advance Information Collection NPRM Changes*, [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=202302-1651-001](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202302-1651-001) (last visited Mar. 29, 2023).

schedule an appointment to present themselves at a POE.”<sup>320</sup> The Supporting Statement explained that such noncitizens would “be subject to a rebuttable presumption of asylum ineligibility, unless the noncitizen demonstrates by a preponderance of the evidence that it was not possible to access or use CBP One due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or that the noncitizen is otherwise not subject to the rebuttable presumption.”<sup>321</sup> The Supporting Statement further clarified that “[t]here is no change to the information being collected under this collection or the use of the information by CBP, but this change would alter the consequences of not using the collection, and thus increases the estimated annual number of responses in the collection.”<sup>322</sup>

Regarding the concern with using the emergency PRA approval process for the collection of information via the CBP One app, CBP notes that, although the initial collection was approved on an emergency basis,<sup>323</sup> the relevant PRA approval for the collection that is being used for this rule (OMB Control Number 1651-0140) was subsequently done using the normal PRA process, which included two *Federal Register* notices and an opportunity for public comment.<sup>324</sup> Further, this collection is being revised again through this rule, and the public was given additional opportunity to comment on the information collection in this rulemaking. *See* 88 FR at 11749–50.

Members of the public are welcome to submit comments to OMB on the collection of information via <https://www.reginfo.gov> for a period of 30 days following issuance of this final rule.

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<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *See* OIRA, *OIRA Conclusion, OMB Control No. 1651-0140, Collection of Advance Information from Certain Undocumented Individuals on the Land Border* (May 3, 2021), [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=202104-1651-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202104-1651-001).

<sup>324</sup> *See* 86 FR 73304 (Dec. 27, 2021); 87 FR 53667 (Sept. 28, 2021). *See also* OIRA, *OIRA Conclusion, OMB Control No. 1651-0140, Collection of Advance Information from Certain Undocumented Individuals on the Land Border* (Dec. 18, 2022), [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=202112-1651-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202112-1651-001). The OIRA *Conclusion* includes citations and links to the notices published in the *Federal Register*, as well as the comments received in response.

*Comment:* A commenter expressed that the NPRM is not in compliance with the APA because the CBP One app has not gone through the normal notice-and-comment period required by the APA. The commenter stated that the Departments had not clearly described the app in a way that would provide the public with the necessary information to understand how the app works and that a noncitizen’s failure to use the app when presenting themselves at a port of entry has serious implications on immigration relief.

*Response:* The Departments disagree with the contention that the use of the CBP One app, whether separate from or as described in this rule, fails to comply with the APA. The CBP One app serves as a single portal to a variety of CBP services.<sup>325</sup> Because there is not an overarching CBP One information collection, CBP has sought OMB approval under the PRA of each information collection contained in the CBP One app, pursuant to standard procedures. Regarding the particular use of the CBP One app that is described in this rulemaking—i.e., the use of the app as the current “DHS scheduling system” described in 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B), to collect information from certain undocumented individuals on the land border—the PRA information referenced above, and available to the public, provided information sufficient to understand how the app works, and how it would work in connection with this rulemaking. Similarly, the Departments provided a description of the presumption and its application, including to those who do not utilize CBP One, in the NPRM and invited comment thereon.

### 3. Impacts, Costs, and Benefits (Executive Orders 12866 and 13563)

*Comment:* A few commenters expressed that the Departments have not met their obligations under Executive Order 12866 and Executive Order 13563. A commenter requested that the Departments investigate and develop quantitative estimates regarding a range of potential regulatory effects, such as estimates of the rule’s potential impact on family unity, the

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<sup>325</sup> See CBP, *CBP One™ Mobile Application*, <https://www.cbp.gov/about/mobile-apps-directory/cbpone> (last visited Apr. 26, 2023).

lifetime cost of work permit renewals for those who are granted withholding of removal instead of asylum under the rule; the impact of life-long inability to travel internationally for those granted withholding of removal rather than asylum; and the potential costs on States and localities of vastly increasing the class of individuals ineligible for public benefits, services, and healthcare. Another commenter requested that the Departments consider the downstream impacts of the rule on other noncitizens and their U.S. citizen family members who might be affected by additional backlogs in immigration court. A legal services provider expressed concern with the Departments' "evident implication" that the rebuttable presumption will not impact asylum seekers beyond their loss of a path to citizenship and inability to petition for family members to join them in the United States; the commenter cited challenges with retaining counsel and lost opportunities to collect evidence or consult family before an asylum decision is made. Some commenters stated that the rule's analysis of its costs and benefits is deficient because the rule lacked detailed estimates or further specifics with respect to costs for the Departments, the States, and other parties. Commenters stated that for this reason, the regulatory analysis in Section VI.A. of the NPRM's preamble failed to satisfy the requirements of Executive Order 12866.

*Response:* The Departments respectfully maintain that the regulatory analysis accompanying the NPRM adequately described the costs and benefits associated with this rulemaking. The concerns raised by the commenters have been addressed qualitatively in the preambles to the NPRM and this final rule. The Departments recognize that the rule will result in costs and benefits for the individual noncitizens who are subject to it, as well as a range of potential indirect effects on other persons and entities.<sup>326</sup> The Departments have further described these costs and benefits throughout this preamble. The Departments have also further revised the Executive Order 12866 discussion in Section VI.B. of this preamble to address some

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<sup>326</sup> See Section VI.B of this preamble for a further discussion of the rule's costs and benefits.

of the concerns described by the commenters, including concerns related to work permit renewal.<sup>327</sup>

Although the Departments have discussed the relevant policy considerations associated with this rulemaking at length, the Departments note that neither Executive Order 12866, nor any other executive order or law, requires more detailed quantitative analysis in these circumstances. The fact that preparation of a regulatory impact analysis under Executive Order 12866 is a matter of Executive Branch discretion is underscored by the terms of Executive Order 12866, section 10:

Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Courts have recognized the internal, managerial nature of this and other similarly worded executive orders, and have concluded that actions taken by an agency to comply with such executive orders are not subject to judicial review. *See Cal-Almond, Inc. v. USDA*, 14 F.3d 429, 445 (9th Cir. 1993) (citing *State of Mich. v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986)).

i. Quantitative Impacts on Federal and State Governments

*Comment:* A group of State Attorneys General stated that the proposed rule “completely ignores the increased costs to the States of higher levels of unlawful aliens precipitated by” the NPRM. Quoting the proposed rule, the commenters stated that the Departments “falsely claim[ed] that ‘[t]he costs of the proposed rule primarily are borne by migrants and the Departments.’” *See* 88 FR at 11748. Commenters further stated that States have significant reliance interests in the Federal Government’s enforcement of the immigration laws and that the Departments should withdraw the rule because the Departments did not consider this reliance in

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<sup>327</sup> The Departments note that some, but not all, of the commenters that pressed for additional quantitative analysis expressed strong support for the TCT Bar IFR and Final Rule, which did not contain an Executive Order 12866 analysis due to their nexus to a foreign affairs function of the United States. *See* 84 FR at 33843 (IFR); 85 FR at 82289 (final rule).

the proposed rule. Commenters stated that the rule would cause additional noncitizens to enter the United States where they would cause the States to expend additional funds on law enforcement, education, and healthcare than the States otherwise would have spent.

In support of this assertion, commenters stated that irregular migration imposes significant costs on States. Commenters cited a study that stated “the net cost of illegal immigration to U.S. taxpayers is now \$150.7 billion.” Commenters provided specific examples of costs that the State of Indiana has incurred or could incur to provide services to noncitizens, including costs to provide English Language Learner Services and other education services. Commenters stated that as many as 5,000 family units that had been encountered and granted parole pursuant to the parole + ATD policy settled in Indiana between July 2021 and February 2022. On the other hand, a state administrative agency wrote that immigrants and refugees are integral to that State’s economy and generate \$2.8 billion of business income and contribute over \$21.4 billion in Federal, State, and local taxes, annually. The commenter wrote that immigrants and refugees have successfully rebuilt their lives and made positive social and economic contributions to the State by revitalizing neighborhoods and adding to the cultural vitality of the State and its communities.

*Response:* The Departments respectfully disagree with the characterization of the rule as precipitating higher levels of irregular migration. As discussed in the preamble to the proposed rule, *see, e.g.*, 88 FR at 11705–06, and in Section I of this preamble, in the absence of this rule, the Departments would anticipate a significant further surge in irregular migration after the Title 42 public health Order is lifted. This rule is expected to reduce irregular migration, not increase it.

This rule imposes a rebuttable presumption of asylum ineligibility for certain migrants who enter the United States at the southwest land border or adjacent coastal borders after traveling through a third country during a designated period. This rule excepts from its rebuttable presumption noncitizens who enter the United States pursuant to a lawful pathway, but

the rule does not newly introduce or authorize any lawful pathways to enter the United States. While it is true that the rule excepts from the rebuttable presumption those who use some lawful pathways, such pathways would exist irrespective of this rule. Indeed, as stated in the NPRM, the term “lawful pathways” refers to the “range of pathways and processes by which migrants are able to enter the United States or other countries in a lawful, safe, and orderly manner and seek asylum and other forms of protection.” 88 FR at 11706 n.15. One such lawful pathway is entry pursuant to the CHNV parole processes; such processes were established prior to and separate from the publication of the NPRM. In other words, the commenters have conflated the lawful pathways accounted for in this rule with the rule itself.

The Departments further note the evidence that the introduction of lawful pathways, particularly when coupled with a consequence for failing to use such processes, has significantly reduced levels of irregular migration. For instance, as noted in the proposed rule, in the week prior to the announcement of the Venezuela parole process on October 12, 2022, encounters of Venezuelan nationals between POEs at the SWB averaged over 1,100 a day from October 5–11. About two weeks after the announcement, encounters of Venezuelan nationals averaged under 200 per day between October 18 and 24.<sup>328</sup> The low trend continued with a daily average of 106 in March 2023.<sup>329</sup> Similarly, the number of CHN nationals encountered dropped significantly in the wake of the January 2023 announcement of new processes for those countries. Between the announcement of the new processes on January 5, 2023, and January 21, the number of daily encounters between POEs of CHN nationals dropped from 928 to 73, a 92 percent decline.<sup>330</sup> Encounters between POEs of CHN nationals continued to decline to a daily average of fewer than 17 per day in March 2023.<sup>331</sup> These reductions in encounters have been sustained for months while the Title 42 public health Order has remained in effect.

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<sup>328</sup> USBP encountered an average of 225 Venezuelans per day in November 2022 and 199 per day in December 2022. OIS analysis of OIS Persist Dataset based on data through March 31, 2023. Data are limited to USBP encounters to exclude those being paroled in through POEs.

<sup>329</sup> OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*



With respect to commenters' statement that States have significant reliance interests in the Federal Government's enforcement of the immigration laws, this rule does not set any policy against enforcement of the immigrations laws. Commenters' objections to other enforcement policies, or any lack thereof, have little relationship to this rule, which, as previously stated, creates a rebuttable presumption of asylum ineligibility for certain migrants who enter the United States at the southwest land border or adjacent coastal borders after traveling through a third country during a designated period. The Departments are unaware of any existing policies altered by this rule in which States have a substantial reliance interest. For example, States cannot have substantial reliance interests in the Proclamation Bar IFR or TCT Bar Final Rule because neither rule is being enforced.

Ultimately, the commenters' objections are not to the proposed rule, but to the lawful pathways themselves, as well as to other aspects of the immigration system. The Departments believe that withdrawing the proposed rule would not achieve the Departments' or the commenters' goals.

*Comment:* Another group of State Attorneys General stated that if, as a consequence of the rule, noncitizens endure additional trauma seeking asylum in a third country or waiting at the SWB in potentially dangerous conditions for a CBP One appointment, such noncitizens will require more State-funded services, such as services related to healthcare, education, and legal assistance.

*Response:* The Departments acknowledge that various levels of government provide services to noncitizens for a range of purposes. The Departments have further revised the Executive Order 12866 discussion in Section VI.B of this preamble to note the potential effects on such entities.

*Comment:* Commenters stated that while the Departments acknowledge the cost and other impact that irregular migration has had on DHS operations, States and border communities, and NGOs, the Departments did not adequately consider the costs borne by other Federal

agencies not directly associated with immigration enforcement. For example, commenters stated that some health programs (Medicaid; the Children's Health Insurance Program; the Supplemental Nutrition Assistance Program; and the Women, Infants, and Children program) and tax credits are available to noncitizens without employment authorization. Commenters also stated that UCs are eligible for a large number of Federal benefits immediately upon their entry. Commenters also stated that the expanded usage of humanitarian parole results in costs associated with providing parolees Federal benefits.

*Response:* The Departments agree that a high volume of irregular migration can have significant implications for other Federal agencies that provide services or assistance to migrants. For the reasons stated in the first comment response in Section IV.F.3.i of this preamble, however, the Departments do not believe it is reasonable to expect that the rule would result in an increase in irregular migration. This rule is designed to reduce levels of irregular migration, and to channel migrants into lawful, safe, and orderly pathways. In the absence of this rule, the Departments would anticipate a significant further surge in irregular migration after the Title 42 public health Order is lifted. This rule will reduce irregular migration and any costs associated with such migration, rather than increasing such migration and costs.

*Comment:* Some commenters also stated that the rule fails to adequately consider and address the administrative costs that the Departments would incur in order to implement the rule. Regarding USCIS, these commenters stated that the Departments failed to consider, for instance, the following costs: new trainings, possible future hiring needs that could result from the rule, and possible collateral costs to petitioners before USCIS who could have adjudications delayed due to downstream delays. Some commenters expressed concern that USCIS, as a fee-funded agency, might have insufficient resources to implement the rule, and hypothesized that USCIS might seek to ask Congress for an appropriation to cover implementation costs, which would shift the burden of the cost to U.S. taxpayers. These commenters cited the requirements of the

Anti-Deficiency Act and past reductions in USCIS fee revenues in support of the commenters' prediction of an appropriations request.

Regarding CBP, commenters stated that the Departments failed to consider, for instance, costs for training staff on the CBP One app and for app maintenance and updates.

Regarding ICE, commenters stated that if, as a result of the rule, more noncitizens receive negative credible fear determinations and request IJ review, there is a risk of overcrowding and other operational complications as bed space runs out for new arrivals. The commenters stated that this could increase the money paid by the U.S. taxpayer unnecessarily.

Regarding EOIR, these commenters stated that the Departments failed to consider, for instance, the following costs: training of IJs and staff; form updates; and an increase to the court backlog if adjudications take longer.

*Response:* The Departments agree that various agencies will expend resources to implement this rule. The discussion in Section VI.B of this preamble explains that the rule will require additional time for AOs and IJs, during fear screenings and reviews, respectively, to inquire into the applicability of the presumption and whether the presumption has been rebutted. Similarly, the rule will require additional time for IJs during section 240 removal proceedings. However, as discussed in the proposed rule and elsewhere in this preamble, in the absence of this rule, the Departments would anticipate a significant further surge in irregular migration after the Title 42 public health Order is lifted, which would require the expenditure of significant resources. This rule is therefore anticipated to substantially reduce net burdens on the Departments, including at the agencies referenced by the commenters.

#### 4. Regulatory Flexibility Act (“RFA”)

*Comment:* At least one commenter disagreed with the certification in the NPRM that the proposed rule would not have a significant economic impact on a substantial number of small entities. *See* 88 FR at 11748. Some legal services providers gave examples of how the rule would impact their organization and workloads, without objecting to the RFA certification. But

at least one commenter disputed the certification and wrote that as a nonprofit organization that helps asylum seekers prepare for credible fear interviews, IJ reviews, and merits hearings, the commenter would experience a significant time and cost burden associated with the new rule, such as the additional time spent gathering evidence from foreign countries, appearing at interviews and hearings, and explaining the law and outcome to clients and pro se respondents. The commenter stated that, as a consequence of the rule, the commenter would therefore be forced to serve fewer individuals, significantly reducing the number of people who would have access to legal services. The commenter further stated that due to the increased time burden, individuals would have to pay the commenter increased fees or donors would have to chip in more for each person.

*Response:* Consistent with longstanding case law, a regulatory flexibility analysis is not required when a rule has only indirect effects on small entities, rather than directly regulating those entities. *See, e.g., Mid-Tex Elec. Co-op., Inc. v. FERC*, 773 F.2d 327, 342–43 (D.C. Cir. 1985) (“[A]n agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule. . . . Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.”).<sup>332</sup> This rule does not directly regulate any organizations; the rule imposes a rebuttable presumption of asylum ineligibility for certain migrants who enter the United States at the southwest land border or adjacent coastal borders after traveling through a third country during a designated period. The RFA does not

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<sup>332</sup> *See also Cement Kiln Recycling Coal v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (“The statute requires that the agency conduct the relevant analysis or certify ‘no impact’ for those small businesses that are ‘subject to’ the regulation, that is, those to which the regulation ‘will apply’. . . . The rule will doubtless have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation’s small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.” (citing *Mid-Tex*, 773 F.2d at 343)); *White Eagle Co-op. Ass’n v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009) (“[S]mall entities directly regulated by the proposed [rulemaking]—whose conduct is circumscribed or mandated—may bring a challenge to the RFA analysis or certification of an agency. . . . However, when the regulation reaches small entities only indirectly, they do not have standing to bring an RFA challenge.”).

require the Departments to estimate the rule's potential indirect effects on legal service organizations, law firms, and other service providers whose clients may be subject to the rule. Because this rule does not regulate small entities themselves, the Departments reaffirm their conclusion that no regulatory flexibility analysis is necessary.

## 5. Other Regulatory Requirements

*Comment:* A group of State Attorneys General disputed the statement in the proposed rule, made pursuant to Executive Order 13132, Federalism, 64 FR 43255 (Aug. 4, 1999), that the proposed rule would not have a substantial direct effect on the States, the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. *See* 88 FR at 11749.

*Response:* The Departments maintain that this rule will not have a substantial direct effect on the States, the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule's only direct effects relate to asylum applicants and those being processed at the SWB. For the same reason, this final rule will not impose substantial direct compliance costs (indeed, any direct compliance costs) on State and local governments, or preempt State law. Accordingly, in accordance with section 6 of Executive Order 13132, this rule requires no further agency action or analysis.

*Comment:* A group of State Attorneys General stated that the Departments should withdraw the rule because it would impose significant unfunded mandates on the States but the Departments did not assess the impact on the States or their constituent local governments under the Unfunded Mandates Reform Act of 1995 ("UMRA"). Commenters disagreed with the Department's statement in the proposed rule that the rule would not impose an unfunded mandate because "[a]ny downstream effects on such entities would arise solely due to their voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed" by the rule. 88 FR 11748. Commenters cited cases regarding

standing to sue in Federal court, such as *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019) and *City & County of San Francisco v. USCIS*, 944 F.3d 773, 787 (9th Cir. 2019), arguing that if the fact patterns in those cases were sufficient to establish standing, they are sufficient to trigger the UMRA's requirements. Quoting 2 U.S.C. 1534(a), commenters stated that UMRA also requires that "[e]ach agency . . . develop an effective process to permit elected officers of State, local, and tribal governments . . . to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates." The comments stated that the Departments never allowed elected leaders in their States to provide any such input.

*Response:* Case law on standing does not dictate UMRA's scope. The Departments maintain that the NPRM preamble's discussion of UMRA was correct. This rule does not contain a Federal mandate, or a significant Federal intergovernmental mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed by the rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate contained in this rule, as that term is defined under UMRA.

#### *G. Out of Scope*

*Comment:* Commenters submitted a number of comments that were outside the scope of the rulemaking. For instance, some commenters stated that the United States should create a path to citizenship for undocumented immigrants; that the Government should otherwise engage in legislative immigration reform; that all noncitizens with disabilities should be eligible for asylum; that minors should not be released to individuals without lawful status; that the Government should focus on disparities among IJs in asylum grant rates; that the United States should expand resources focused on the development of civil society and governments in the Northern Triangle; that countries from which asylum applicants flee should help fund

humanitarian aid for their citizens who resettle in the United States; that POEs are already overwhelmed so asylum-seekers should be allowed to enter in other places; that the Government needs to focus on granting “Dreamers” citizenship; that the Government should call on the military to forcibly repel migrants from the border; that the United States should end birthright citizenship; that the American workforce is becoming automated, putting American citizens out of work; that the United States should subsidize the implementation of machinery that would fill the jobs that normally “attract” migrants (e.g., agricultural work); that migrant children are being forced into child labor; that the U.S. birthrate is low and we need more workers to maintain Social Security and Medicare; that the United States is selling land to China, and India is buying oil from Russia; that the United States should systematically fund research that evaluates the racial disparities that exist in the efficiency with which Ukrainian humanitarian parole applications have been reviewed and evaluated versus those of Afghan applicants; that American taxpayers are suffering the effects of the border crisis, particularly in schools; that the United States should expand legal immigration; that asylum seekers will receive in absentia removal orders due to difficulties in contacting asylum seekers for court hearings; that they objected to the number of noncitizens present in the United States without lawful status.

*Response:* Such comments address matters well beyond the scope of the proposed rule and do not require further response.

*Comment:* Several commenters made statements related to CBP custody conditions, noting for instance that they are overcrowded, lack adequate access to hygiene, lack adequate space so that families are separated by gender, are cold, lack adequate bedding, have lights on at night, and do not have adequate showers. At least one commentor noted that CBP facilities should have more child friendly reception areas.

*Response:* The Department acknowledges the commenters’ concerns. However, this rule does not have any impact on whether or how individuals are in custody or detained, and these comments are outside the scope of the rulemaking.

## **V. Request for Comments on Proposed Extension of Applicability to All Maritime Arrivals**

In addition to the changes made in this final rule described in Section IV.B.8.i of this preamble, the Departments are considering and request comment on whether to apply the rebuttable presumption to noncitizens who enter the United States without documents sufficient for lawful admission during the same temporary time period at a maritime border,<sup>333</sup> whether or not they traveled through a third country. Such a modification would expand the scope of the rule's rebuttable presumption in two ways: both geographically (covering all entries by sea, not just those entering the United States from Mexico at coastal borders adjacent to the SWB) and with regard to the class of persons potentially subject to the rebuttable presumption (by covering persons who enter the United States by sea even if they did not travel through a country other than their country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees). In addition, the Departments are also considering and request comment on whether to expand the scope of the rule's rebuttable presumption geographically to noncitizens who enter the United States without documents sufficient for lawful admission during the same temporary time period at any maritime border, while continuing to limit the presumption's applicability to those who traveled through another country before reaching the United States. Finally, the Departments are considering and request comment on whether to expand the scope of the presumption to noncitizens who enter the United States by sea, but to limit the scope of that expansion to noncitizens who departed from the Caribbean or other regions that present a heightened risk of maritime crossings.

The Departments are considering extending the rule's rebuttable presumption to maritime arrivals to encourage any migrants intending to reach the United States by sea to instead avail

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<sup>333</sup> The STCA and Additional Protocol controls and applies as to individuals who cross the U.S.-Canada land border between POEs, including certain bodies of water along or across the U.S.-Canada land border, as described in 88 FR 18227, 18234. The Departments' use of "at a maritime border" includes individuals who enter the United States by sea, as in the Atlantic and Pacific coasts of the United States.



themselves of lawful, safe, and orderly pathways into the United States, or otherwise to seek asylum or other protection in another country. As discussed in more detail below, DHS has recently experienced high levels of maritime interdictions, primarily of Cuban and Haitian nationals in the Caribbean, and is concerned that rates of attempted entries to the United States by sea may soon increase to levels that would greatly stress DHS's available resources and may lead to devastating loss of life and other consequences. The Departments expect that extending the strategy of coupling an expansion of lawful, safe, and orderly pathways into the United States with this rule's consequence for noncitizens who do not avail themselves of one of those options would lead to a reduction in the numbers of migrants who would otherwise undertake a dangerous sea journey to the United States.

*A. Maritime Migration Continues to Increase, With Devastating Consequences for Migrants*

Total migrants interdicted at sea by the U.S. Coast Guard ("USCG") increased by 502 percent between FY 2020 (2,079) and FY 2022 (12,521).<sup>334</sup> Interdictions continued to rise in FY 2023 with 8,822 migrants interdicted at sea through March, almost 70 percent of the total in FY 2022 within six months.<sup>335</sup> Interdictions occurred primarily in the South Florida Straits and the Caribbean Sea.<sup>336</sup>

Individuals departing from Cuba and Haiti make up the vast majority of maritime interdictions. Maritime migration from Cuba increased by nearly 600 percent in FY 2022, with 5,740 Cuban nationals interdicted at sea, compared to 827 in FY 2021.<sup>337</sup> Similarly, maritime migration from Haiti more than tripled in FY 2022, with 4,025 Haitian nationals interdicted at sea, compared to 1,205 in FY 2021 and 398 in FY 2020.<sup>338</sup> In the first six months of FY 2023, Cuban interdictions were nearly equal to the Cuban FY 2022 total, comprising 62 percent of all

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<sup>334</sup> OIS analysis of USCG data through March 31, 2023.

<sup>335</sup> *Id.*

<sup>336</sup> Testimony of Jonathan Miller, "Securing America's Maritime Border: Challenges and Solutions for U.S. National Security" at 4 (Mar. 23, 2023), <https://homeland.house.gov/media/2023/03/3.23.23-TMS-Testimony.pdf>.

<sup>337</sup> OIS analysis of USCG data through March 31, 2023.

<sup>338</sup> *Id.*

FY 2023 interdictions at sea; Haitian interdictions were over 60 percent of the Haitian FY 2022 total, comprising around 30 percent of all FY 2023 interdictions at sea.<sup>339</sup>

Meanwhile, USBP apprehensions of noncitizens who made landfall in southeast coastal sectors have also been increasing rapidly.<sup>340</sup> There were 5,978 such apprehensions in FY 2022, nearly triple the number of apprehensions in FY 2021 (2,045). And in FY 2023 to date, there have already been 6,364 USBP apprehensions of noncitizens who made landfall in southeast coastal sectors, more than the total for all of FY 2022.<sup>341</sup> Cuban and Haitian nationals made up 76 percent of these apprehensions in FY 2022 and 84 percent of apprehensions so far in FY 2023.

Several large group interdictions of Cubans and Haitians have caused challenges for the USCG in recent months. On January 22, 2023, the USCG interdicted a sail freighter suspected of illegally transporting migrants with nearly 400 Haitians aboard, necessitating repatriations of eligible individuals back to the Bahamas.<sup>342</sup> Days later, on January 25, the USCG interdicted and repatriated another 309 Haitians to Haiti.<sup>343</sup> USCG interdicted yet another large group of Haitians on February 15, resulting in the repatriation of all 311 Haitian migrants in that group,<sup>344</sup> and another group of 206 Haitians were repatriated on March 2 following two successive, separate interdictions on February 22 and 28.<sup>345</sup> On January 12, 2023, USCG repatriated 177

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<sup>339</sup> *Id.*

<sup>340</sup> Includes Miami, Florida; New Orleans, Louisiana; and Ramey, Puerto Rico sectors.

<sup>341</sup> OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

<sup>342</sup> David Goodhue and Jacqueline Charles, *Coast Guard stops boat with 400 Haitians off the Bahamas and likely headed to Florida*, Miami Herald, Jan. 23, 2023, <https://www.miamiherald.com/news/nation-world/world/americas/haiti/article271514157.html>.

<sup>343</sup> USCG, *Coast Guard Repatriates 309 People to Haiti* (Jan. 31, 2023), <https://www.news.uscg.mil/Press-Releases/Article/3281802/coast-guard-repatriates-309-people-to-haiti>.

<sup>344</sup> USCG, *Coast Guard Repatriates 311 People to Haiti* (February 20, 2023), <https://www.news.uscg.mil/Press-Releases/Article/3302743/coast-guard-repatriates-311-people-to-haiti/>.

<sup>345</sup> USCG, *Coast Guard Repatriates 206 People to Haiti* (March 2, 2023), <https://www.news.uscg.mil/Press-Releases/Article/3314530/coast-guard-repatriates-206-people-to-haiti/>.

Cubans from 7 separate interdictions.<sup>346</sup> USCG repatriated an additional 67 Cubans between February 23–24 following prior interdictions.<sup>347</sup>

Interdictions in the maritime environment can pose unique hazards to life and safety. On March 23, 2023, Rear Admiral Jo-Ann Burdian, Assistant Commandant for Response Policy, testified before a Congressional panel, stating: “Over the last year and a half, the Coast Guard observed an increase in irregular maritime migration, above historical norms, across our southern maritime border. This is a difficult mission for our crews.... For example, patrolling the waters of the South Florida Straits can be compared to patrolling a land area the size of Maryland with seven police cars limited to traveling at 15 miles per hour. It requires exceptional tactical coordination between aircraft, ships, boats, and supporting partners ashore.”<sup>348</sup> Rear Admiral Burdian further stated that it is not uncommon for migrants encountered at sea to be non-compliant, threatening their own lives and those of other migrants on board to deter a Coast Guard rescue.<sup>349</sup> Additional challenges of maritime migration operations include ensuring adequate sanitation, security, and providing for food, medical, and shelter needs of migrants.<sup>350</sup>

Interdicting Haitian sail freighters poses unique challenges to DHS crews and migrants. *See* 88 FR at 26328. These types of vessels are often overloaded with more than 150 migrants onboard, including small children. *Id.* Because these vessels do not have sufficient safety equipment, including life jackets, emergency locator beacons, or life rafts in the event of an emergency, there is a great risk to human life if these vessels overturn or sink because such an overturning or sinking would create a situation where there could be hundreds of noncitizens in

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<sup>346</sup> USCG, *Coast Guard Repatriates 177 People to Cuba* (Jan. 12, 2023), <https://www.news.uscg.mil/Press-Releases/Article/3265898/coast-guard-repatriates-177-people-to-cuba/>.

<sup>347</sup> USCG, *Coast Guard Repatriates 29 People to Cuba* (Feb. 23, 2023), <https://www.news.uscg.mil/Press-Releases/Article/3306722/coast-guard-repatriates-29-people-to-cuba/>; USCG, *Coast Guard Repatriates 38 People to Cuba* (Feb. 24, 2023), <https://www.news.uscg.mil/Press-Releases/Article/3306850/coast-guard-repatriates-38-people-to-cuba/>.

<sup>348</sup> Testimony of Rear Admiral Jo-Ann F. Burdian, Assistant Commandant for Response Policy, “Securing America’s Maritime Border: Challenges and Solutions for U.S. National Security” (Mar. 23, 2023), <https://homeland.house.gov/media/2023/03/2023-03-23-TMS-Testimony.pdf>.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

the water, many of whom may not know how to swim. *Id.* Often, noncitizens interdicted on these vessels have been at sea for several days, are dehydrated, need medical attention, or are otherwise experiencing elevated levels of stress. *Id.* These factors increase the risk to DHS personnel who rescue these migrants from these vessels because the number of migrants outnumber DHS crews. *Id.* DHS encounters with sail freighters are not uncommon, and because of sail freighter capacity to carry several hundred migrants, they can exceed the holding capacity of USCG cutters patrolling southeastern maritime smuggling vectors, increasing the risk not only to the migrants, but to cutter crews as well. *Id.* While maritime interdictions declined somewhat in February 2023, DHS assesses that the weather played a significant role in this reduced maritime movement in the Caribbean. *Id.* Through much of February, weather conditions were unfavorable for maritime ventures, particularly on smaller vessels. *Id.* However, DHS assesses that this was only temporary. Increasing levels of maritime interdictions put lives at risk and stress DHS's resources, and the increase in migrants taking to sea, under dangerous conditions, has led to devastating consequences.

Human smugglers and irregular migrant populations continue to use unseaworthy, overly crowded vessels, piloted by inexperienced mariners, without any safety equipment—including, but not limited to, personal flotation devices, radios, maritime global positioning systems, or vessel locator beacons. In FY 2022, the USCG recorded 107 noncitizen deaths, including those presumed dead, as a result of irregular maritime migration. In January 2022, the USCG located a capsized vessel with a survivor clinging to the hull.<sup>351</sup> USCG crews interviewed the survivor, who indicated there were 34 others on the vessel who were not in the vicinity of the capsized vessel and the survivor.<sup>352</sup> The USCG conducted a multi-day air and surface search for the missing migrants, eventually recovering five deceased migrants, while the others were presumed

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<sup>351</sup> Adriana Gomez Licon, Situation 'dire' as Coast Guard seeks 38 missing off Florida, Associated Press, Jan. 26, 2022, <https://apnews.com/article/florida-capsized-boat-live-updates-f251d7d279b6c1fe064304740c3a3019>.

<sup>352</sup> *Id.*

lost at sea.<sup>353</sup> In November 2022, USCG and CBP rescued over 180 people from an overloaded boat that became disabled off of the Florida Keys.<sup>354</sup> They pulled 18 Haitian migrants out of the sea after they became trapped in ocean currents while trying to swim to shore.<sup>355</sup>

IOM's Missing Migrants Project reported at least 321 documented deaths and disappearances of migrants throughout the Caribbean in 2022, signaling the highest recorded number since they began tracking such events in 2014.<sup>356</sup> Most of those who perished or went missing in the Caribbean were from Haiti and Cuba.<sup>357</sup> This data represents a tragic 78 percent overall increase over the 180 deaths in the Caribbean documented in 2021, underscoring the perils of the journey.<sup>358</sup>

#### *B. A Further Increase in Maritime Migration is Reasonably Foreseeable*

The Departments assess that maritime migration is likely to increase absent policy changes such as those being considered. For instance, Haiti continues to experience security and humanitarian crises caused by rampant gang violence, food and fuel shortages, a resurgence of cholera, and an August 2021 earthquake that killed 2,000 people.<sup>359</sup> And Cuba is undergoing its worst economic crisis since the 1990s<sup>360</sup> due to the lingering impact of the COVID-19 pandemic, reduced foreign aid from Venezuela because of that country's own economic crisis, high food prices, and U.S. economic sanctions.<sup>361</sup> These crises will likely continue to fuel irregular maritime migration.

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<sup>353</sup> Adriana Gomez Licon, Coast Guard suspends search for migrants off Florida, Associated Press, Jan. 27, 2022, <https://apnews.com/article/florida-lost-at-sea-79253e1c65cf5708f19a97b6875ae239>.

<sup>354</sup> Ashley Cox, More than 180 people rescued from overloaded vessel in Florida Keys, CBS News CW44 Tampa, Nov. 22, 2022, <https://www.cbsnews.com/tampa/news/more-than-180-people-rescued-from-overloaded-vessel-in-florida-keys/>.

<sup>355</sup> *Id.*

<sup>356</sup> IOM, Missing Migrants in the Caribbean Reached a Record High in 2022 (Jan. 24, 2023), <https://www.iom.int/news/missing-migrants-caribbean-reached-record-high-2022>.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> See, e.g., CRS, Haiti: Recent Developments and U.S. Policy, R47394 (Jan. 23, 2023), <https://crsreports.congress.gov/product/pdf/R/R47394>.

<sup>360</sup> The Economist, Cuba is Facing Its Worst Shortage of Food Since 1990s (July 1, 2021), <https://www.economist.com/the-americas/2021/07/01/cuba-is-facing-its-worst-shortage-of-food-since-the-1990s>.

<sup>361</sup> CRS, Cuba: U.S. Policy in the 117th Congress (Sept. 22, 2022), <https://crsreports.congress.gov/product/pdf/R/R47246>.

Although the establishment of the CHNV parole processes has significantly reduced SWB encounters with Cuban and Haitian nationals as described above in Section II.A, maritime interdictions of Cuban and Haitian nationals in the Caribbean have increased in recent years and persist at high levels, as just described. Unlike noncitizens encountered at the SWB, noncitizens who reach the United States directly by sea without traveling from Mexico or Canada have not been subject to the CDC's Title 42 public health Order.<sup>362</sup> Instead, they are (and will continue to be) processed under Title 8, which as described above may entail years spent in the United States before a final order of removal is issued. DHS recently announced that in response to the increase in maritime migration and interdictions, and to disincentivize migrants from attempting the dangerous journey to the United States by sea, individuals who have been interdicted at sea after April 27, 2023, are ineligible for the parole processes for Cubans and Haitians. 88 FR 26327; 88 FR 26329. The Departments expect that this step will help but that, in light of the complicated mix of factors driving maritime migration, more is needed to discourage maritime migration and encourage the use of safe, lawful, orderly processes.

### *C. Effects on Resources and Operations*

USCG and its partners have surged assets to address the recent increase in maritime migration, but the increased flow of migrants overall led to a lower interdiction effectiveness rate (that is, the percentage of detected undocumented migrants of all nationalities who were interdicted by USCG and partners via maritime routes).<sup>363</sup> Between FY 2018 and FY 2020, USCG approached or exceeded its 75 percent effectiveness target.<sup>364</sup> In FY 2021 and FY 2022, effectiveness dropped to 47.2 percent and 56.6 percent, respectively, despite a surge response that resulted in 17 percent more interdictions in FY 2022 than in FY 2021.<sup>365</sup> That is, even though the USCG interdicted more migrants overall, those interdictions were a smaller

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<sup>362</sup> See 86 FR at 42841 (Order applies only to certain persons “traveling from Canada or Mexico”).

<sup>363</sup> DHS, U.S. Coast Guard Budget Overview, Fiscal Year 2024 Congressional Justification, at USCG-3.

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

percentage of total detected migrants on maritime routes than the USCG had interdicted between FY 2018 and 2019. A further surge in maritime migration risks further decreasing effectiveness (and thereby reducing deterrence of dangerous journeys by sea) and, as described below, would exacerbate USCG's overall capacity challenges and increase the risk to other key mission areas, such as counter-drug operations.

The United States Government's response to maritime migration in the Caribbean region is governed by executive orders, presidential directives, and resulting framework and plans that outline interagency roles and responsibilities. Homeland Security Task Force-Southeast ("HSTF-SE") is primarily responsible for DHS's response to maritime migration in the Caribbean Sea and the Straits of Florida. Operation Vigilant Sentry is the DHS interagency operational plan for responding to maritime migration in the Caribbean Sea and the Straits of Florida.<sup>366</sup> The primary objectives of HSTF-SE are to protect the safety and security of the United States, deter and dissuade noncitizens from attempting the dangerous journey to the United States by sea, achieve U.S. humanitarian objectives, maintain the integrity of the U.S. immigration system, and prevent loss of life at sea through mobilizing DHS resources, reinforced by other Federal, State, and local assets and capabilities.

The USCG supports HSTF-SE and views its migrant interdiction mission as a humanitarian effort to rescue those taking to the sea and to encourage noncitizens to pursue lawful pathways to enter the United States. By allocating additional assets to migrant interdiction operations and to prevent conditions that could lead to maritime mass migration, the USCG assumes certain operational risk to other statutory missions. Some USCG assets were diverted from other key mission areas, including counter-drug operations, protection of living

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<sup>366</sup> Homeland Security Task Force–Southeast, published through the U.S. Embassy in Cuba, *Homeland Security Task Force Southeast partners increase illegal migration enforcement patrols in Florida Straits, Caribbean* (Sept. 6, 2022), <https://cu.usembassy.gov/homeland-security-task-force-southeast-partners-increase-illegal-migration-enforcement-patrols-in-florida-straits-caribbean/>.

marine resources, and support for shipping navigation. *See* 88 FR at 26329. A reduction in maritime migration would reduce the operational risk to USCG's other statutory missions.

Maritime encounters also strain other DHS resources. For instance, during times of increased encounters in the maritime environment, the U.S. Border Patrol executes lateral decompression flights for processing. Once the Title 42 public health Order is lifted, based on DHS encounter projections and throughput models, southwest border sectors will likely lose the ability to accept decompression flights from coastal border sectors. This in turn would result in overcrowding in coastal border sectors' short-term holding facilities and impact local communities not prepared to receive migrants.

#### *D. Lawful, Safe, and Orderly Pathways*

As discussed in detail earlier in this preamble, the United States has taken significant steps to expand safe and orderly options for migrants, including migrants from the Caribbean region, to lawfully enter the United States. The United States has, for example, increased and will continue to increase refugee processing in the Western Hemisphere; country-specific and other available processes for individuals seeking parole for urgent humanitarian reasons or significant public benefit, including the Cuba, Haiti, Nicaragua, and Venezuela parole processes; and opportunities to lawfully enter the United States for the purpose of seasonal employment. In addition, the United States has resumed the Cuban Family Reunification Program and resumed and increased participation in the Haitian Family Reunification Program.

The Departments are also aware that many individuals migrating out of island nations, such as Cuba and Haiti, do so via air travel.<sup>367</sup> For many individuals, travel by air to a third

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<sup>367</sup> *See, e.g.,* Reuters, *Nicaragua eliminates visa requirement for Cubans*, Nov. 23, 2021, <https://www.reuters.com/world/americas/nicaragua-eliminates-visa-requirement-cubans-2021-11-23/>; Ed Augustin, *Stars align for Cuban migrants as record numbers seek better life in US*, Guardian, June 12, 2022, <https://www.theguardian.com/world/2022/jun/12/cuban-migrants-us-record-numbers-migration> (“The US Coast Guard has intercepted nearly 2,000 Cubans since October [2021]. But far more are flying to the Latin American mainland before journeying up to the US-Mexico border: 114,000 have crossed into the US since October [2021], according to US Customs and Border Protection – 1% of the island’s entire population.”); Julie Watson et al., *Charter business thrives as US-expelled Haitians flee Haiti*, AP, June 14, 2022, <https://apnews.com/article/covid-health-travel-caribbean-2e5f32f8781a06e74ef7ea7ec639785f>; Julie Watson et al., *Haitian trip to Texas border often*



country may be an additional option for obtaining asylum or other protection. The Departments acknowledge, however, that there may be individuals for whom air travel is not an option. The Departments welcome data, other information, or comments on access to air travel and whether any aspect of this rule's presumption should be adjusted to account for differences among individuals in access to air travel.

#### *E. Alternatives Under Consideration*

The Departments are considering whether the rebuttable presumption should apply to noncitizens who enter the United States without documents sufficient for lawful admission during the same temporary time period at any maritime border, whether or not they traveled through a third country. Under this approach, the presumption would apply to any covered noncitizen who reached the United States by sea, including Cuban or Haitian nationals traveling directly to the United States from Cuba or Haiti. The Departments acknowledge, however, that eliminating the third-country travel component for those arriving by sea would be a departure from the rest of the rule. The Departments are therefore considering whether this departure may be independently justified. The Departments believe that this additional measure could be warranted in light of the extreme hazard to both migrants and DHS personnel associated with maritime migration; the deterrence it would afford migrants who might undertake this dangerous journey to enter the United States irregularly and thus supplement interdiction efforts; the availability of lawful, safe, and orderly pathways for the primary populations at issue; and the safeguards incorporated into the rule. Applying the rule's rebuttable presumption of asylum ineligibility to persons who reach the United States by sea would not impose a categorical bar to asylum. To the contrary, the rule would still exempt noncitizens from the presumption if, instead of making a dangerous journey by sea, they arrived at the United States through a lawful pathway. It would also exempt certain noncitizens who arrive by sea, including unaccompanied

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*starts in South America*, AP, Sept. 21, 2021, <https://apnews.com/article/technology-mexico-texas-caribbean-united-states-ac7f598bafd44b3f95b786d2d800f3ce> (“Nearly all Haitians reach the U.S. on a well-worn route: Fly to Brazil, Chile or elsewhere in South America [then] move through Central America and Mexico.”).

children, and provide multiple ways for noncitizens to rebut the presumption, including in circumstances where—at the time the noncitizen entered the United States—the noncitizen or a member of their family with whom they were traveling faced an imminent and extreme threat to life or safety. The Departments request comment on how the various means of rebutting the presumption—including facing an “acute medical emergency,” “imminent and extreme threat to life and safety,” and “especially compelling circumstances”—should apply to noncitizens who reach the United States by sea. *See* 8 CFR 208.33(a)(3)(i); 8 CFR 1208.33(a)(3)(i).

The Departments are also considering whether to extend the geographic scope of the rule to certain noncitizens who enter the United States by sea, without regard to whether they departed from Mexico, while retaining the requirement that a noncitizen have traveled through another country on their way to the United States. This narrower application of the rule would limit covered noncitizens to those who, by and large, could have sought asylum or other protection in that other country. However, this alternative would mean that Cuban and Haitian nationals who reach the United States by sea directly from their country of origin would not fall within the rule’s compass.

As another alternative, the Departments are considering whether to extend the scope of the presumption to certain noncitizens who enter the United States by sea, but only if they departed from the Caribbean or another region that presents a heightened risk of maritime crossings. This alternative may be more tailored to the specific geographic regions that have caused the increase in maritime interdictions in recent months, but it would not expand the rule to other regions that could be a source of maritime crossings in the future.

Finally, if rates of maritime migration rise substantially prior to the end of this comment period or prior to the issuance of a final rule that responds to these comments, the Departments intend to take appropriate action, consistent with the APA, which may include issuance of a temporary or interim final rule that implements one of the proposed modifications.

## **VI. Regulatory Requirements**

## A. Administrative Procedure Act

This final rule is consistent with the notice-and-comment rulemaking requirements described at 5 U.S.C. 553(b) and (c). For the reasons explained below, the Departments have determined that this rule is exempt from the 30-day delayed-effective-date requirement at 5 U.S.C. 553(d).

### 1. Foreign Affairs Exemption

This rule is exempt from the APA's delayed-effective-date requirement because it involves a "foreign affairs function of the United States."<sup>368</sup> 5 U.S.C. 553(a)(1). Courts have held that this exemption applies when the rule in question "is clearly and directly involved in a foreign affairs function."<sup>369</sup> In addition, although the text of the APA does not require an agency invoking this exemption to show that such procedures may result in "definitely undesirable international consequences," some courts have required such a showing.<sup>370</sup> This rule satisfies both standards.

The United States must work with foreign partners to address migration in the Western Hemisphere region, and this rule is clearly and directly related to, and responsive to, ongoing discussions with and requests by key foreign partners in the Western Hemisphere region in two ways. First, such partners have encouraged the United States to take action to address unlawful migration to the SWB, which is particularly necessary now in light of the anticipated lifting of the Title 42 public health Order.<sup>371</sup> And by responding to these requests, the rule facilitates a key foreign policy goal—fostering a hemisphere-wide approach of addressing migration on a regionwide basis. Though the specific details of these discussions are not appropriate for extensive elaboration here due to the sensitive nature of government-to-government discussions,

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<sup>368</sup> Although the Departments have voluntarily complied with the APA's notice and comment requirements, this rule is exempt from such requirements pursuant to the foreign affairs exception as well, for the same reasons that are described in this section.

<sup>369</sup> See, e.g., *Mast Indus. v. Regan*, 596 F. Supp. 1567, 1582 (C.I.T. 1984) (cleaned up).

<sup>370</sup> See, e.g., *Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008).

<sup>371</sup> See, e.g., *Am. Ass'n of Exps. & Imps. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (exemption applies where a rule is "linked intimately with the Government's overall political agenda concerning relations with another country").

such partners have expressed concern that the lifting of the Title 42 public health Order—which provided an immediate consequence for many of those attempting to cross the SWB irregularly—may be misperceived by migrants as an indication that the U.S. border is open, which, in turn, could spur a surge of irregular migrant flows through their countries as migrants seek to enter the United States. One foreign partner opined that the formation of caravans in the spring of 2022 were spurred by rumors of the United States Government terminating the Title 42 public health Order and then the officially announced plans to do so. Such increases in irregular migration would further strain limited governmental and nongovernmental resources in partner nations. Already, partner nations have expressed significant concerns about the ways in which recent flows are challenging their own local communities and immigration infrastructure; they have expressed serious concerns that a dramatic increase in migrant flows could be overwhelming.

Some partner countries also have emphasized the possibility that criminal human smuggling organizations may seek to intentionally misrepresent the end of the Title 42 public health Order as leading to the opening of the U.S.-Mexico border in order to persuade would-be migrants to participate in expensive and dangerous human smuggling schemes. Such activity would put migrants' lives in danger and also contribute to the above-referenced adverse consequences associated with increased irregular migratory flows.

In connection with such discussions, a number of countries have lauded the sharp reductions in irregular migration associated with the aforementioned CHNV processes—which, like this rule, imposed consequences for irregular migration alongside the availability of a lawful, safe, and orderly process for migrants to travel directly to the United States. Following the implementation of the Venezuela process in October 2022, some countries requested that the United States implement similar policies for other nationalities, which DHS did in January 2023. At the same time, however, partner nations have raised concerns that any changes to these processes or the circumstances in which they operate—including the perception that there will be

no consequences for irregular entry once the Title 42 public health Order is no longer in place—will undermine their success.<sup>372</sup>

Implementation of this rule will therefore advance top foreign policy priorities of the United States, by responding to the aforementioned discussions with and feedback from foreign partners and demonstrating U.S. partnership and commitment to the shared goals of stabilizing migratory populations and addressing migration collectively as a region, both of which are essential to maintaining strong bilateral and multilateral relationships.<sup>373</sup> As noted earlier in this preamble and in the proposed rule, recent surges in irregular migration, including overland migration through the Darién Gap, have affected a range of regional neighbors, including Mexico, Colombia, Costa Rica, Peru, Ecuador, and Panama. *See, e.g.*, 88 FR 11710–11. A further spike in migration following the lifting of the Title 42 public health Order risks severely straining relations with the countries in the region, as each would be compelled to turn away from more sustainable policy goals, and employ its limited resources to address the humanitarian needs of a significant influx of irregular migrants.

Further, as described above, the United States faces constraints in removing nationals of certain countries—including Venezuela, Nicaragua, Cuba, and Haiti—to their home countries. With limited exceptions, such nationals can only be removed to a third country as a result. International partners have conveyed that their willingness to receive increased returns of migrants was contingent on expanding the model provided by the Venezuela process, which decreased irregular migration throughout the hemisphere by increasing options for lawful pathways and adding consequences for noncitizens who bypass those opportunities to travel irregularly to the United States.<sup>374</sup>

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<sup>372</sup> *See, e.g.*, Alfredo Corchado, *Ahead of Title 42's end, U.S.-Mexico Negotiations called 'intense,' 'round-the-clock,'* Dallas Morning News, Dec. 13, 2022, <https://www.dallasnews.com/news/2022/12/13/ahead-of-title-42s-end-us-mexico-negotiations-called-intense-round-the-clock/>.

<sup>373</sup> *See* L.A. Declaration Fact Sheet.

<sup>374</sup> *See* The White House, *Mexico and United States Strengthen Joint Humanitarian Plan on Migration* (May 2, 2023) (committing to increase joint actions to counter human smugglers and traffickers, address root causes of migration, and continue to combine expanded lawful pathways with consequences for irregular migration).

In short, delaying issuance and implementation of this rule, including for purposes of incorporating a 30-day delayed effective date, would be inconsistent with the foreign policy imperative to act now. Such delay would not only forfeit an opportunity to fortify bilateral relationships, but would fail to address, and potentially exacerbate, DHS's projections of a surge in migration across the region following the lifting of the Title 42 public health Order. From a U.S. foreign policy perspective, such outcomes would have undesirable international consequences.

The Departments' invocation of the foreign affairs exemption here is consistent with recent precedent. For example, in 2017, DHS published a notice eliminating an exception to expedited removal for certain Cuban nationals, which explained that the change in policy was consistent with the foreign affairs exemption because the change was central to ongoing negotiations between the two countries.<sup>375</sup> DHS similarly invoked the foreign affairs exemption more recently, in connection with the CHNV parole processes.<sup>376</sup>

## 2. Good Cause

This rule is also exempt from the APA's delayed-effective-date requirement because the Departments have for good cause found that a delay associated with that requirement would be impracticable and contrary to the public interest.<sup>377</sup> The Title 42 public health Order is ending due to developments over which the Departments do not exercise any direct control. It would be impossible to incorporate a 30-day delayed effective date and issue a rule prior to the expiration of the Title 42 public health Order in that abbreviated time frame. As described above, such a delay would greatly exacerbate an urgent border and national security challenge that DHS has already taken multiple additional measures to address, and would miss a critical opportunity to

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<sup>375</sup> See DHS, Eliminating Exception To Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 FR 4902 (Jan. 17, 2017).

<sup>376</sup> See 88 FR 1266 (Jan. 9, 2023); 88 FR 1243 (Jan. 9, 2023); 88 FR 1255 (Jan. 9, 2023); DHS, Implementation of Changes to the Parole Process for Venezuelans, 188 FR 1282 (Jan. 9, 2023); 87 FR 63507 (Oct. 19, 2022).

<sup>377</sup> 5 U.S.C. 553(d)(3). Although the Departments have voluntarily complied with the APA's notice and comment requirements, this rule is exempt from such requirements pursuant to the good cause exception at 5 U.S.C. 553(b)(B) as well, for reasons that are described in this section.

reduce and divert the additional flow of irregular migration that is expected following lifting of the Title 42 public health Order.<sup>378</sup>

First, a 30-day delay of the effective date would be impracticable and contrary to the public interest because it would likely result in a significant further increase in irregular migration. As noted above, in recent years, the Departments, in coordination with other Executive Branch agencies and regional neighbors, have undertaken numerous measures to address such increases, which have been implemented via rulemakings,<sup>379</sup> voluntary processes paired with incentives against irregular migration,<sup>380</sup> and a wide range of significant resource surges and operational changes. A significant further increase in irregular migration, exacerbated by an influx of migrants from countries such as Venezuela, Nicaragua, and Cuba, with limited removal options, and coupled with DHS's limited options for processing, detaining, or quickly removing such migrants, would unduly impede DHS's ability to fulfill its critical and varied missions.

Such challenges were evident in the days following the November 15, 2022, court decision vacating the Title 42 public health Order.<sup>381</sup> Within two days of the court's decision, total encounters at the SWB reached 9,583 in a single day on November 17, 2022, a 17 percent

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<sup>378</sup> The good cause exception to the 30-day effective date requirement is easier to meet than the good cause exception for forgoing notice and comment rulemaking. *See Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992) (noting “good cause [is] more easily found as to [the] 30–day waiting period” than the exception to notice and comment procedures); *Am. Fed’n of Gov’t Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289-90 (7th Cir. 1979). An agency can show good cause for eliminating the 30-day delayed effective date when it demonstrates either urgent conditions the rule seeks to correct or unavoidable time limitations. *U.S. Steel Corp.*, 605 F.2d at 290; *United States v. Gavrilovic*, 511 F.2d 1099, 1104 (8th Cir. 1977).

<sup>379</sup> *See, e.g.*, 87 FR 18078 (Mar. 29, 2022) (amending regulations to allow U.S. immigration officials to more promptly consider the asylum claims of individuals encountered at or near the SWB while ensuring the fundamental fairness of the asylum process); 87 FR 30334 (May 18, 2022) (authorizing an additional 35,000 supplemental H-2B visas for the second half of FY 2022, of which 11,500 were reserved for nationals of Central American countries and Haiti); 87 FR 4722 (Jan. 28, 2022) (authorizing an additional 20,000 H-2B visas for FY 2022, of which 6,500 were reserved for nationals of Central American countries, with the addition of Haiti); 87 FR 76818 (Dec. 15, 2022) (authorizing nearly 65,000 additional visas, of which 20,000 are reserved for nationals of Central American countries and Haiti).

<sup>380</sup> *See, e.g.*, DHS, Implementation of a Parole Process for Venezuelans, 87 FR 63507 (Oct. 19, 2022) (parole process for certain Venezuelan nationals and their immediate family members); DHS, Implementation of the Uniting for Ukraine Parole Process, 87 FR 25040 (Apr. 27, 2022) (parole process for certain Ukrainian nationals and their immediate family members).

<sup>381</sup> *See Huisha-Huisha v. Mayorkas*, --- F. Supp. 3d ---, 2022 WL 16948610 (D.D.C. Nov. 15, 2022).

increase from the day before.<sup>382</sup> The baseline number of encounters decreased in March 2023, from April 2022, and also consisted of a much lower share of nationals from countries that have stopped or limited returns of their own nationals.<sup>383</sup> A delayed effective date could result in a substantial increase in irregular migration across multiple national borders, including our own.<sup>384</sup> As detailed above, these levels of irregular migration risk overwhelming DHS’s ability to effectively process, detain, and remove, as appropriate, the migrants encountered. This, in turn, would result in potentially dangerous overcrowding at CBP facilities. The attendant risks to public safety, health, and welfare provide good cause to issue this rule without delay.<sup>385</sup>

The Departments expect that this effect would be particularly pronounced if noncitizens know that there is a specific 30-day period between the termination of the Title 42 public health Order and the effective date of this rule. That gap would incentivize even more irregular migration by those seeking to enter the United States before the process would take effect. It has long been recognized that agencies may use the good cause exception where significant public harm would result from using standard APA procedures.<sup>386</sup> If, for example, advance notice of a coming price increase would immediately produce market dislocations and lead to serious

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<sup>382</sup> OIS analysis of Persist Dataset based on data through March 31, 2023.

<sup>383</sup> *Id.*

<sup>384</sup> DHS SWB Encounter Planning Model generated April 18, 2023.

<sup>385</sup> *See, e.g., Hawaii Helicopter Operators Ass’n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (concluding agency’s “concern about the threat to public safety” justified notice and comment waiver).

<sup>386</sup> *See, e.g., Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94–95 (D.C. Cir. 2012) (noting that the “good cause” exception “is appropriately invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose of the proposal—if, for example, announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent [or] in order to prevent the amended rule from being evaded” (cleaned up)); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1975) (“[W]e are satisfied that there was in fact ‘good cause’ to find that advance notice of the freeze was ‘impracticable, unnecessary, or contrary to the public interest’ within the meaning of § 553(b)(B). . . . Had advance notice issued, it is apparent that there would have ensued a massive rush to raise prices and conduct ‘actual transactions’—or avoid them—before the freeze deadline.” (cleaned up)).



shortages, advance notice (and comment) need not be given.<sup>387</sup> A number of cases follow this logic in the context of economic regulation.<sup>388</sup>

The same logic applies here, where the Departments are responding to exceedingly serious challenges at the border, and a gap between the termination of the Title 42 public health Order and the implementation of this rule would significantly increase the incentive, on the part of migrants and others (such as smugglers), to engage in actions that would compound those very challenges. The Departments' experience has been that in some circumstances when public announcements have been made regarding changes in our immigration laws and procedures that would restrict access to immigration benefits to those attempting to enter the United States along the U.S.-Mexico land border, there have been dramatic increases in the numbers of noncitizens who enter or attempt to enter the United States. Smugglers routinely prey on migrants using perceived changes in domestic immigration law.<sup>389</sup> And those sudden influxes overload scarce government resources dedicated to border security.<sup>390</sup>

For instance, on February 28, 2020, the Ninth Circuit lifted a stay of a nationwide injunction of MPP, a program implementing the Secretary's contiguous return authority under 8 U.S.C. 1225(b)(2)(C).<sup>391</sup> Almost immediately, hundreds of migrants began massing at POEs

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<sup>387</sup> See, e.g., *Nader v. Sawhill*, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975) (“[W]e think good cause was present in this case based upon [the agency’s] concern that the announcement of a price increase at a future date could have resulted in producers withholding crude oil from the market until such time as they could take advantage of the price increase.”).

<sup>388</sup> See, e.g., *Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 908 (D.C. Cir. 2006) (“The [‘good cause’] exception excuses notice and comment in emergency situations, where delay could result in serious harm, or when the very announcement of a proposed rule itself could be expected to precipitate activity by affected parties that would harm the public welfare.” (citations omitted)); *Mobil Oil Corp. v. Dep’t of Energy*, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983) (“On a number of occasions . . . this court has held that, in special circumstances, good cause can exist when the very announcement of a proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare.”).

<sup>389</sup> See Nick Miroff and Carolyn Van Houten, *The Border is Tougher to Cross Than Ever. But There’s Still One Way into America*, Wash. Post (Oct. 24, 2018); See Tech Transparency Project, *Inside the World of Misinformation Targeting Migrants on Social Media* (July 26, 2022), <https://www.techtransparencyproject.org/articles/inside-world-misinformation-targeting-migrants-social-media> (“A review of social media groups and pages identified by migrants showed . . . dubious offers of coyote or legal services, false claims about conditions along the route, misinformation about points of entry at which officials waive the rules, and baseless rumors about changes to immigration law.”).

<sup>390</sup> Declaration of Enrique Lucero ¶¶ 6–8, Dkt. 95-3, *Innovation Law Lab v. Wolf*, No. 19-15716 (9th Cir. Mar. 3, 2020); Declaration of Robert E. Perez, ¶ 15, Dkt. 95-2, *Innovation Law Lab*, No. 19-15716.

<sup>391</sup> See *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1095 (9th Cir. 2020), *vacated as moot sub nom. Innovation Law Lab v. Mayorkas*, 5 F.4th 1099 (9th Cir. 2021).

across the SWB attempting to immediately enter the United States, creating a severe safety hazard that forced CBP to temporarily close POEs in whole or in part.<sup>392</sup> Many others requested immediate entry into the country through their counsel, while others overwhelmed Border Patrol agents by attempting to illegally cross the SWB, with only some being apprehended successfully.<sup>393</sup> Absent the immediate and resource-intensive action taken by CBP, the number of migrants gathered at the border, whether at or between the POEs, could have increased dramatically, especially considering there were approximately 25,000 noncitizens who were in removal proceedings pursuant to MPP without scheduled court appearances, as well as others in Mexico that could have become aware of CBP's operational limitations and sought to exploit them.<sup>394</sup> And while CBP officers took action to resolve the sudden influx of migrants at multiple ports and prevent further deterioration of the situation at the border, they were diverted away from other critical missions, including detecting and confiscating illicit materials, and guarding efficient trade and travel.<sup>395</sup>

By contrast, as detailed above, immediate implementation of the parole process for Venezuelans was associated with a drastic reduction in irregular migration by Venezuelans. Had the parole process, and the consequence that accompanied it (*i.e.*, the return to Mexico of Venezuelan nationals encountered irregularly entering the United States without authorization between POEs) been announced weeks prior to its implementation, it likely would have had the opposite effect, resulting in many hundreds and thousands of Venezuelan nationals attempting to cross the border between the POEs before the process went into effect. *See* 87 FR at 63516.

The Departments' determination here is consistent with past practice. For example, in addition to the parole process for Venezuelans described above, DHS concluded in January 2017 that it was imperative to give immediate effect to a rule designating Cuban nationals arriving by

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<sup>392</sup> *See* Declaration of Robert E. Perez, ¶¶ 4–15, Dkt. 95-2, *Innovation Law Lab*, No. 19-15716.

<sup>393</sup> *Id.* ¶¶ 4, 8.

<sup>394</sup> *Id.* ¶ 14.

<sup>395</sup> *Id.* ¶ 15.

air as eligible for expedited removal because “[p]re-promulgation notice and comment would . . . endanger[ ] human life and hav[e] a potential destabilizing effect in the region.”<sup>396</sup> DHS cited the prospect that “publication of the rule as a proposed rule, which would signal a significant change in policy while permitting continuation of the exception for Cuban nationals, could lead to a surge in migration of Cuban nationals seeking to travel to and enter the United States during the period between the publication of a proposed and a final rule.”<sup>397</sup> DHS found that “[s]uch a surge would threaten national security and public safety by diverting valuable Government resources from counterterrorism and homeland security responsibilities. A surge could also have a destabilizing effect on the region, thus weakening the security of the United States and threatening its international relations.”<sup>398</sup> DHS concluded that “a surge could result in significant loss of human life.”<sup>399</sup> Here, the Departments announced the proposed rule while a prior restrictive policy remained in place, but given the impending termination of the Title 42 public health Order, there is insufficient time for a delayed effective date.

Second, a delayed effective date is contrary to the public interest given that the anticipated termination of the Title 42 public health Order has drastically altered the framework governing processing of migrants. Courts find good cause satisfied where the immediate issuance of a rule is necessary to prevent public harm where a previously existing regulatory structure has been set aside by the courts.<sup>400</sup> A similar circumstance exists here: the Title 42 public health Order is ending based on factual developments, and the Departments do not control either those factual developments or the decision to recognize those factual developments by

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<sup>396</sup> DHS, Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 FR 4769, 4770 (Jan. 17, 2017).

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*; accord, e.g., Department of State, Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 81 FR 5906, 5907 (Feb. 4, 2016) (finding the good cause exception applicable because of similar short-run incentive concerns).

<sup>400</sup> See, e.g., *United States v. Dean*, 604 F.3d 1275, 1277–80 (11th Cir. 2010); *Mid-Tex Elec. Coop., Inc. v. FERC*, 822 F.2d 1123, 1124 (D.C. Cir. 1987), *Nat’l Fed’n of Fed. Emps. v. Devine*, 671 F.2d 607, 608 (D.C. Cir. 1982), *Block*, 655 F.2d at 1154; *Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1284 (N.D. Fla. 2016) (collecting cases).

terminating the public health Order. Until May 11, 2023, the Title 42 public health Order requires DHS to expel hundreds of thousands of migrants without processing them under Title 8. Once the Title 42 public health Order is lifted, however, the Government must pivot, quickly, to process all migrants under its Title 8 authorities, at a time when the number of migrants seeking to cross the SWB without lawful authorization to do so is expected to surge significantly. The Departments therefore find good cause to forgo a delayed effective date in order to prevent the adverse consequences resulting from the termination of the Title 42 public health Order.

The Departments reiterate that they have only invoked the foreign affairs and good cause exceptions for the delayed-effective-date requirement. The Departments have solicited public comments and have given careful attention to comments that were received during the comment period, as reflected in Section III of this preamble.

*B. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 14094 (Modernizing Regulatory Review)*

Executive Order 12866, Executive Order 13563, and Executive Order 14094, Modernizing Regulatory Review, 88 FR 21879 (Apr. 6, 2023) direct agencies to assess the costs, benefits, and transfers of available alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The Office of Information and Regulatory Affairs of OMB reviewed the rule as a significant regulatory action under section 3(f)(4) of Executive Order 12866, as amended.

The expected effects of this rule are discussed above. The rule is expected to result in significantly reduced incentives for irregular migration and illegal smuggling activity, and will help avert a significant further surge in irregular migration after the Title 42 public health Order

is lifted. The rule will likely decrease the number of asylum grants and likely reduce the amount of time that noncitizens who are ineligible for asylum and who lack a reasonable fear of persecution or torture would be present in the United States. Noncitizens who establish a reasonable fear of persecution or torture would still be able to seek protection in proceedings before IJs.

The benefits of the rule are expected to include large-scale reductions in strains on limited national resources; preservation of the Departments' continued ability to safely, humanely, and effectively enforce and administer the immigration laws; a reduction in the role of exploitative transnational criminal organizations and smugglers; and improved relationships with, and enhanced opportunities to coordinate with and benefit from the migration policies of, regional neighbors. Some of these benefits accrue to migrants who wish to pursue safe, orderly, lawful pathways and processes, such as the ability to schedule a time to apply for admission at a POE. These migrants' ability to present their claims might otherwise be hampered by the severe strain that a further surge in irregular migration would impose on the Departments.

The direct costs of the rule are borne by migrants and the Departments. To the extent that any migrants are made ineligible for asylum under the presumptive condition established by the rule but would have received asylum in the absence of this rule, such an outcome would entail the denial of asylum and its attendant benefits, although such persons may continue to be eligible for statutory withholding of removal and withholding under the CAT. Unlike asylees, noncitizens granted these more limited forms of protection do not have a path to citizenship and cannot petition for certain family members to join them in the United States.<sup>401</sup> Such migrants may also be required to apply for work authorization more frequently than an asylee would. Migrants who choose to wait in Mexico for a CBP One appointment, rather than migrating

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<sup>401</sup> As discussed previously in Section IV.E.7.ii of this preamble, the rule includes a specific provision to ensure that applicants who in section 240 removal proceedings who have a spouse or child who would be eligible to follow to join them under section 208(b)(3)(A), 8 U.S.C. 1158(b)(3)(A), will be able to rebut the presumption if the presumption is the only reason for denying their asylum application.

irregularly across the southwest land border or adjacent coastal borders, also may incur some costs that are discussed earlier in this preamble, including potential safety risks for some migrants. The Departments note, in this regard, that noncitizens who establish “exceptionally compelling circumstances,” including an imminent and extreme threat to life or safety or an acute medical emergency, can rebut the presumption against asylum eligibility.

8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B). The Departments further note that there are also potential benefits for migrants who choose to wait in Mexico for a CBP One appointment (for instance, avoiding a dangerous cross-border journey and interactions with smugglers).

The rule will also require additional time for AOs and IJs, during fear screenings and reviews, respectively, to inquire into the applicability of the presumption and whether the presumption has been rebutted. Similarly, the rule will require additional time for IJs during section 240 removal proceedings. However, as discussed throughout this preamble, the rule is expected to result in significantly reduced irregular migration. Accordingly, the Departments expect the additional time spent by AOs and IJs on the rebuttable presumption to be mitigated by a comparatively smaller number of credible fear cases than AOs and IJs would otherwise have been required to handle in the absence of the rule.

Other entities, such as legal service organizations and private attorneys, will also incur some indirect costs as a result of the rule, such as familiarization costs and costs associated with assisting noncitizens who may be subject to the rule. There are other potential downstream effects of the rule, including effects on NGOs and state and local entities that interact with noncitizens, such as by providing services to such persons or receiving tax revenues from them. The nature and scale of such effects will vary by entity and should be considered relative to the baseline condition that would exist in the absence of this rule. As compared to the baseline condition, this rule is expected to reduce irregular migration.

The lawful, safe, and orderly pathways described earlier in this preamble are authorized separately from this rule but are expected to yield significant benefits for noncitizens who might

otherwise seek to migrate irregularly to the United States. For instance, the ability to schedule a time to arrive to apply for admission at POEs is expected to significantly improve CBP's ability to process noncitizens at POEs, and available parole processes allow prospective irregular migrants to avoid a dangerous and expensive overland journey in favor of an arrival by air to the United States. To the extent that such pathways and this rule result in a substantial reduction in irregular migration, the benefits of such pathways may also accrue to the various entities that incur costs as a consequence of irregular migration.

### *C. Regulatory Flexibility Act*

The RFA requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. *See* 5 U.S.C. 601 et seq. "Small entities" are small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. *Id.* 601(6). This rule does not directly regulate small entities and is not expected to have a direct effect on small entities. Rather, the rule regulates individuals, and individuals are not defined as "small entities" by the RFA. *Id.* While some employers could experience costs or transfer effects, these impacts would be indirect. In the proposed rule, the Departments certified that the proposed rule would not have a significant economic impact on a substantial number of small entities. The Departments nonetheless welcomed comments regarding potential impacts on small entities. The Departments discuss comments from small entities earlier in the preamble, including in connection with the RFA. No such comments identified small entities that are subject to the rule within the meaning of the RFA. Accordingly, and for the same reasons stated in the proposed rule, the Departments certify that this rule will not have a significant economic impact on a substantial number of small entities.

### *D. Unfunded Mandates Reform Act of 1995*

UMRA is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each

Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may directly result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. 2 U.S.C. 1532(a). The inflation-adjusted value of \$100 million in 1995 was approximately \$177.8 million in 2021 based on the Consumer Price Index for All Urban Consumers (CPI-U).<sup>402</sup>

The term “Federal mandate” means a Federal intergovernmental mandate or a Federal private sector mandate. *See* 2 U.S.C. 1502(1), 658(6). A “Federal intergovernmental mandate” in turn is a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program). *See id.* 658(5). And the term “Federal private sector mandate” refers to a provision that would impose an enforceable duty upon the private sector (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program). *See id.* 658(7).

This rule does not contain a Federal mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to the entity’s voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed by this proposed rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA. The requirements of title II of UMRA, therefore, do not apply, and the Departments have not prepared a statement under UMRA.

#### *E. Congressional Review Act*

OMB has determined that this rule is not a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804. This rule will not result in an annual effect on the

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<sup>402</sup> *See* BLS, *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items by Month* (Dec. 2021), <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202112.pdf>.



economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The rule will be submitted to Congress and GAO consistent with the Congressional Review Act's requirements no later than its effective date.

*F. Executive Order 13132 (Federalism)*

This proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Departments believe that this proposed rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*G. Executive Order 12988 (Civil Justice Reform)*

This rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, 61 FR 4729 (Feb. 5, 1996).

*H. Family Assessment*

The Departments have reviewed this rule in line with the requirements of section 654 of the Treasury and General Government Appropriations Act, 1999, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999. The Departments have reviewed the criteria specified in section 654(c)(1), by evaluating whether this regulatory action (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) only financially impacts families, if at all, to the extent such impacts are justified; (6) may be carried out by State or local governments or by the family; or (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the

norms of society. If the agency determines a regulation may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation.

The Departments have determined that the implementation of this rule will not impose a negative impact on family well-being or the autonomy or integrity of the family as an institution. Under the rule, adjudicators would consider the circumstances of family members traveling together when determining whether noncitizens are not subject to the presumption in §§ 208.33(a)(1) and 1208.33(a). The presumption will not apply to a noncitizen if the noncitizen or a member of the noncitizen's family who is traveling with the noncitizen establishes one of the conditions in § 208.33(a)(1)(i) through (iii). Similarly, the presumption in paragraph (a)(1) of those sections would be rebutted if the noncitizen demonstrates that, at the time of entry, the noncitizen or a member of the noncitizen's family who is traveling with the noncitizen was subject to one of the circumstances enumerated in paragraph (a)(3).

Additionally, to protect against family separation, the Departments have determined that a principal applicant establishes an exceptionally compelling circumstance that rebuts the presumption of ineligibility for asylum where the principal asylum applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the lawful pathways rebuttable presumption, and where denial of asylum on that ground alone would lead to the applicant's family being or remaining separated because an accompanying spouse or child would not qualify for asylum or other protection from removal on their own, or the principal asylum applicant has a spouse or child who would be eligible to follow to join that applicant if the applicant were not subject to the presumption. *See* E.O. 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273, 8273 (Feb. 5, 2021) ("It is the policy of my Administration to respect and value the integrity of families seeking to enter the United States.").

*I. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)*

This rule does not have “tribal implications” because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. E.O. 13175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249 (Nov. 6, 2000). Accordingly, Executive Order 13175 requires no further agency action or analysis.

*J. Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq. the Departments must submit to OMB, for review and approval, any collection of information contained in a rule, unless otherwise exempt. *See* Pub. L. 104–13, 109 Stat. 163 (May 22, 1995). The proposed rule proposed a revision to a collection of information under OMB Control Number 1651–0140, *Collection of Advance Information from Certain Undocumented Individuals on the Land Border*. Comments pertinent to the collection of information are discussed earlier in this preamble.

As discussed in Section IV.E.3.ii.b of this preamble, CBP will transition CBP One scheduling to a daily appointment allocation process to allow noncitizens additional time to complete the process. CBP has revised the burden estimate for this collection consistent with this change. CBP continues to make improvements to the app based on stakeholder feedback.

*Overview of information collection:*

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Collection of Advance Information from Certain Undocumented Individuals on the Land Border.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* CBP.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

*Primary:* Individual undocumented noncitizens. Under this collection, CBP collects certain biographic and biometric information from undocumented noncitizens prior to their arrival at a

POE, to streamline their processing at the POE. The requested information is that which CBP would otherwise collect from these individuals during primary and/or secondary processing. This information is provided by undocumented noncitizens, directly or through NGOs and International Organizations. Providing this information reduces the amount of data entered by CBP officers and the corresponding time required to process an undocumented noncitizen.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* This information collection is divided into three parts. The estimated annual number of respondents for the registration in the CBP One app is 500,000 and the estimated time burden per response is 12 minutes. The estimated annual number of respondents for the daily opt-in for appointments is 500,000 and the estimated time burden per response is 1 minutes. The estimated annual number of respondents for the confirmation of appointment in the app is 456,250 and the estimated time burden per response is 3 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 372,813 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is \$7,605,385.

### **List of Subjects**

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Regulatory Amendments

**DEPARTMENT OF HOMELAND SECURITY**

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security amends 8 CFR part 208 as follows:

**PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL**

1. The authority citation for part 208 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110-229; 8 CFR part 2; Pub. L. 115-218.

2. Amend § 208.13 by removing and reserving paragraphs (c)(3), (4), and (5); adding and reserving paragraph (e); and adding paragraph (f), to read as follows:

**§ 208.13 Establishing asylum eligibility.**

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(c) \* \* \*

(3) – (5) [Reserved]

\* \* \* \* \*

(e) [Reserved]

(f) *Lawful pathways condition.* For applications filed by aliens who entered the United States between May 11, 2023, and May 11, 2025, also refer to the provisions on asylum eligibility described in § 208.33.

**§ 208.30 [Amended]**

3. Amend § 208.30(e)(5) by:

a. Amending paragraph (e)(5)(i) by removing the phrase “paragraphs (e)(5)(ii) through (iv), or” from the first sentence;

b. Removing paragraphs (e)(5)(ii) and (iii); and

c. Redesignating paragraph (e)(5)(i) as (e)(5).

4. Add subpart C, consisting of § 208.33, to read as follows:

**Subpart C – Lawful Pathways and Asylum Eligibility for Certain Aliens Who Entered Between May 11, 2023, and May 11, 2025**

**§ 208.33 Lawful pathways condition on asylum eligibility.**

Notwithstanding any contrary section of this part, including §§ 208.2, 208.13, and 208.30—

(a) *Condition on eligibility.* (1) *Applicability.* A rebuttable presumption of ineligibility for asylum applies to an alien who enters the United States from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission as described in section 212(a)(7) of the Act and whose entry was:

(i) Between May 11, 2023, and May 11, 2025,

(ii) Subsequent to the end of implementation of the Title 42 public health Order issued on August 2, 2021, and related prior orders issued pursuant to the authorities in sections 362 and 365 of the Public Health Service Act (42 U.S.C. 265, 268) and the implementing regulation at 42 CFR 71.40, and

(iii) After the alien traveled through a country other than the alien's country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees.

(2) *Exceptions to applicability of the rebuttable presumption.* The rebuttable presumption described in paragraph (a)(1) of this section does not apply if:

(i) The alien was, at the time of entry, an unaccompanied alien child as defined in 6 U.S.C. 279(g)(2); or

(ii) The alien, or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(A) Was provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process;

(B) Presented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry without a pre-scheduled time and place, if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or

(C) Sought asylum or other protection in a country through which the alien traveled and received a final decision denying that application. A final decision includes any denial by a foreign government of the applicant's claim for asylum or other protection through one or more of that government's pathways for that claim. A final decision does not include a determination by a foreign government that the alien abandoned the claim.

(3) *Rebuttal of the presumption.* (i) An alien subject to the presumption described in paragraph (a)(1) of this section can rebut the presumption by demonstrating by a preponderance of the evidence that exceptionally compelling circumstances exist, including if the alien demonstrates that, at the time of entry, the alien or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(A) Faced an acute medical emergency;

(B) Faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or

(C) Satisfied the definition of "victim of a severe form of trafficking in persons" provided in § 214.11(a) of this chapter.

(ii) An alien who demonstrates by a preponderance of the evidence any of the circumstances in paragraph (a)(3)(i) of this section shall necessarily rebut the presumption in paragraph (a)(1) of this section.

(b) *Application in credible fear determinations—(1) Initial determination.* The asylum officer shall first determine whether the alien is covered by the presumption in paragraph (a)(1) of this section and, if so, whether the alien has rebutted the presumption in accordance with paragraph (a)(3) of this section.

(i) If the alien is covered by the presumption in paragraph (a)(1) of this section and fails to rebut the presumption in accordance with paragraph (a)(3) of this section, then the asylum officer shall enter a negative credible fear determination with respect to the alien's asylum claim and continue to consider the alien's claim under paragraph (b)(2) of this section.

(ii) If the alien is not covered by the presumption in paragraph (a)(1) of this section or has rebutted the presumption in accordance with paragraph (a)(3) of this section, the asylum officer shall follow the procedures in § 208.30.

(2) *Additional procedures.* (i) In cases in which the asylum officer enters a negative credible fear determination under paragraph (b)(1)(i) of this section, the asylum officer will assess whether the alien has established a reasonable possibility of persecution (meaning a reasonable possibility of being persecuted because of their race, religion, nationality, membership in a particular social group, or political opinion) or torture, with respect to the identified country or countries of removal identified pursuant to section 241(b) of the Act.

(ii) In cases described in paragraph (b)(2)(i) of this section, if the alien establishes a reasonable possibility of persecution or torture with respect to the identified country or countries of removal, the Department will issue a Form I-862, Notice to Appear.

(iii) In cases described in paragraph (b)(2)(i) of this section, if an alien fails to establish a reasonable possibility of persecution or torture with respect to the identified country or countries of removal, the asylum officer will provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative credible fear determinations.

(iv) The alien must indicate whether he or she desires such review on a Record of Negative Fear Finding and Request for Review by Immigration Judge.

(v) Only if the alien requests such review by so indicating on the Record of Negative Fear shall the asylum officer serve the alien with a Notice of Referral to Immigration Judge. The record of determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. Immigration judges will evaluate the case as provided in 8 CFR 1208.33(b). The case shall then proceed as set forth in paragraphs (b)(2)(v)(A) through (C) of this section.



(A) Where the immigration judge issues a positive credible fear determination under 8 CFR 1208.33(b)(2)(i), the case shall proceed under 8 CFR 1208.30(g)(2)(iv)(B).

(B) Where the immigration judge issues a positive credible fear determination under 8 CFR 1208.33(b)(2)(ii), DHS shall issue a Form I-862, Notice to Appear, to commence removal proceedings under section 240 of the Act.

(C) Where the immigration judge issues a negative credible fear determination, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision and no request for reconsideration may be submitted to USCIS. Nevertheless, USCIS may, in its sole discretion, reconsider a negative determination.

(c) *Continuing applicability of condition on eligibility.* (1) Subject to paragraph (c)(2) of this section, the condition on asylum eligibility in paragraph (a)(1) of this section shall apply to any asylum application filed by an alien who entered the United States during the time and in the manner specified in paragraph (a)(1) of this section and who is not covered by an exception in paragraph (a)(2) of this section, regardless of when the application is filed and adjudicated.

(2) The conditions on asylum eligibility in paragraph (a)(1) of this section shall not apply to an asylum application filed by an alien described in paragraph (c)(1) of this section if the asylum application is filed after May 11, 2025, the alien was under the age of 18 at the time of the entry referenced in paragraph (c)(1) of this section, and the alien is applying for asylum as a principal applicant.

(d) *Severability.* The Department intends that any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, should be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is that the provision is wholly invalid and unenforceable, in which event the provision should be severed from the remainder of this section and the holding should not affect the remainder of this section or the application of the provision to persons not similarly situated or to dissimilar circumstances.

**DEPARTMENT OF JUSTICE**

Accordingly, for the reasons set forth in the preamble, the Attorney General amends 8 CFR parts 1003 and 1208 as follows:

**PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

5. The authority citation for part 1003 continues to read as follows:

**Authority:** 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

**§ 1003.42 [Amended]**

6. Amend § 1003.42 by removing paragraphs (d)(2) and (3) and redesignating paragraph (d)(1) as paragraph (d).

**PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL**

7. The authority citation for part 1208 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110-229; Pub. L. 115-218.

8. Amend § 1208.13 by removing and reserving paragraphs (c)(3), (4), and (5), and by adding paragraph (f), to read as follows:

**§ 1208.13 Establishing asylum eligibility.**

\* \* \* \* \*

(c) \* \* \*

(3) – (5) [Reserved]

\* \* \* \* \*

(f) *Lawful pathways condition.* For applications filed by aliens who entered the United States between May 11, 2023, and May 11, 2025, also refer to the provisions on asylum eligibility described in § 1208.33.

**§ 1208.30 [Amended]**

9. Amend § 1208.30 by removing and reserving paragraph (g)(1).

10. Add subpart C, consisting of § 1208.33, to read as follows:

**Subpart C – Lawful Pathways and Asylum Eligibility for Certain Aliens Who Entered Between May 11, 2023, and May 11, 2025**

**§ 1208.33 Lawful pathways condition on asylum eligibility.**

Notwithstanding any contrary section of this part, including §§ 1208.2, 1208.13, and 1208.30—

(a) *Condition on eligibility.* (1) *Applicability.* A rebuttable presumption of ineligibility for asylum applies to an alien who enters the United States from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission as described in section 212(a)(7) of the Act and whose entry was:

(i) Between May 11, 2023, and May 11, 2025,

(ii) Subsequent to the end of implementation of the Title 42 public health Order issued on August 2, 2021, and related prior orders issued pursuant to the authorities in sections 362 and 365 of the Public Health Service Act (42 U.S.C. 265, 268) and the implementing regulation at 42 CFR 71.40, and

(iii) After the alien traveled through a country other than the alien's country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees.

(2) *Exceptions to applicability of the rebuttable presumption.* The rebuttable presumption described in paragraph (a)(1) of this section does not apply if:

(i) The alien was, at the time of entry, an unaccompanied alien child as defined in 6 U.S.C. 279(g)(2); or

(ii) The alien, or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(A) Was provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process;

(B) Presented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry without a pre-scheduled time and place, if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or

(C) Sought asylum or other protection in a country through which the alien traveled and received a final decision denying that application. A final decision includes any denial by a foreign government of the applicant's claim for asylum or other protection through one or more of that government's pathways for that claim. A final decision does not include a determination by a foreign government that the alien abandoned the claim.

(3) *Rebuttal of the presumption.* (i) The presumption in paragraph (a)(1) of this section can be rebutted if an alien demonstrates by a preponderance of the evidence that exceptionally compelling circumstances exist, including if the alien demonstrates that, at the time of entry, the alien or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(A) Faced an acute medical emergency;

(B) Faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or

(C) Satisfied the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11(a).

(ii) An alien who demonstrates by a preponderance of the evidence any of the circumstances in paragraph (a)(3)(i) of this section shall necessarily rebut the presumption in paragraph (a)(1) of this section.

(b) *Application in credible fear determinations.* (1) Where an asylum officer has issued a negative credible fear determination pursuant to 8 CFR 208.33(b), and the alien has requested immigration judge review of that credible fear determination, the immigration judge shall evaluate the case de novo, as specified in paragraph (b)(2) of this section. In doing so, the

immigration judge shall take into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge.

(2) The immigration judge shall first determine whether the alien is covered by the presumption at 8 CFR 208.33(a)(1) and 1208.33(a)(1) and, if so, whether the alien has rebutted the presumption in accordance with 8 CFR 208.33(a)(3) and 1208.33(a)(3).

(i) Where the immigration judge determines that the alien is not covered by the presumption, or that the presumption has been rebutted, the immigration judge shall further determine, consistent with § 1208.30, whether the alien has established a significant possibility of eligibility for asylum under section 208 of the Act, withholding of removal under section 241(b)(3) of the Act, or withholding of removal under the Convention Against Torture. Where the immigration judge determines that the alien has established a significant possibility of eligibility for one of those forms of relief or protection, the immigration judge shall issue a positive credible fear finding. Where the immigration judge determines that the alien has not established a significant possibility of eligibility for any of those forms of relief or protection, the immigration judge shall issue a negative credible fear finding.

(ii) Where the immigration judge determines that the alien is covered by the presumption and that the presumption has not been rebutted, the immigration judge shall further determine whether the alien has established a reasonable possibility of persecution (meaning a reasonable possibility of being persecuted because of their race, religion, nationality, political opinion, or membership in a particular social group) or torture. Where the immigration judge determines that the alien has established a reasonable possibility of persecution or torture, the immigration judge shall issue a positive credible fear finding. Where the immigration judge determines that the alien has not established a reasonable possibility of persecution or torture, the immigration judge shall issue a negative credible fear finding.

(3) Following the immigration judge's determination, the case will proceed as indicated in 8 CFR 208.33(b)(2)(v)(A) through (C).

(4) If, under 8 CFR 208.33(b)(2), DHS issues a Form I-862, Notice to Appear, to commence removal proceedings under section 240 of the Act, the alien may apply for asylum, withholding of removal under section 241(b)(3) of the Act, withholding of removal under the Convention Against Torture, or any other form of relief or protection for which the alien is eligible during those removal proceedings.

(c) *Family unity and removal proceedings.* In removal proceedings under section 240 of the Act, where a principal asylum applicant is eligible for withholding of removal under section 241(b)(3) of the Act or withholding of removal under § 1208.16(c)(2) and would be granted asylum but for the presumption in paragraph (a)(1) of this section, and where an accompanying spouse or child as defined in section 208(b)(3)(A) of the Act does not independently qualify for asylum or other protection from removal or the principal asylum applicant has a spouse or child who would be eligible to follow to join that applicant as described in section 208(b)(3)(A) of the Act, the presumption shall be deemed rebutted as an exceptionally compelling circumstance in accordance with paragraph (a)(3) of this section.

(d) *Continuing applicability of condition on eligibility.* (1) Subject to paragraph (d)(2) of this section, the condition on asylum eligibility in paragraph (a)(1) of this section shall apply to any asylum application filed by an alien who entered the United States during the time and in the manner specified in paragraph (a)(1) of this section and who is not covered by an exception in paragraph (a)(2) of this section, regardless of when the application is filed and adjudicated.

(2) The conditions on asylum eligibility in paragraph (a)(1) of this section shall not apply to an asylum application filed by an alien described in paragraph (d)(1) of this section if the asylum application is filed after May 11, 2025, the alien was under the age of 18 at the time of the entry referenced in paragraph (d)(1) of this section, and the alien is applying for asylum as a principal applicant.

(e) *Severability.* The Department intends that any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, should be construed so

as to continue to give the maximum effect to the provision permitted by law, unless such holding is that the provision is wholly invalid and unenforceable, in which event the provision should be severed from the remainder of this section and the holding should not affect the remainder of this section or the application of the provision to persons not similarly situated or to dissimilar circumstances.

Alejandro N. Mayorkas,

Secretary,

U.S. Department of Homeland Security

**Dated:** May 8, 2023.

Merrick B. Garland,  
Attorney General,  
U.S. Department of Justice.

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