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Michael Sheetz, President

**March 27, 2023**

Submitted via: <https://www.regulations.gov>

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**Re: Comment on the Proposed Rule by the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) on Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023**

Dear Acting Director Daniel Delgado and Assistant Director Lauren Alder Reid,

The Anti-Defamation League (ADL) submits this comment in response to the Department of Homeland Security (DHS) and Department of Justice (DOJ)'s proposed rule published in the Federal Register on February 23, 2023, that would ban many refugees from asylum protection in the United States and deprive refugees of the ability to reunite with their families and pursue a path to citizenship.

ADL is a leading anti-hate organization founded in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment to all. We are rooted in a community that has experienced the plight of living as refugees throughout its history. ADL has advocated for fair and humane immigration policy since our founding and has been a leader in exposing anti-immigrant and anti-refugee hate that has poisoned our nation's debate. As a leader in the fight against hate, we have seen the consequences of leaving it unchecked: from Charleston to Charlottesville to Pittsburgh, from El Paso to Buffalo, we know how antisemitism, racism, anti-LGBTQ+ hate, anti-immigrant hate, and other forms of bias can intertwine to result in bias incidents and even deadly violence against vulnerable communities.

ADL's recently published Audit of Antisemitic Incidents for 2022 documented the highest number of such incidents in the more than four decades that ADL has been tracking them.<sup>1</sup> This increase has been accompanied by a general mainstreaming of extremism, the spread of conspiracy theories, disinformation, and ugly propaganda, and surveys showing a greater prevalence of antisemitic attitudes.<sup>2</sup> Once largely relegated to white supremacist rhetoric, the racist, anti-immigrant, and often antisemitic "great replacement" theory has made its way into mainstream consciousness in the past several years.<sup>3</sup>

Against this backdrop, DHS and DOJ's proposed rule is particularly alarming. It is a new version of similar asylum bans promulgated by the Trump administration that were repeatedly struck down by federal courts as unlawful. The asylum ban attempts to cut off access to asylum for many refugees at the southern border, discriminates against Black, Brown, and Indigenous asylum seekers, and seeks to circumvent U.S. law and treaty obligations to refugees. In light of our mission, ADL strongly urges the agencies to withdraw the proposed rule in its entirety and stop pursuing asylum bans that have been welcomed by anti-immigrant hate groups.<sup>4</sup> The administration should instead uphold long-standing U.S. and international refugee law, restore full access to asylum at ports of entry, ensure fair and humane asylum adjudications, and rescind the Trump administration entry and transit bans in their entirety.

### **The 30-Day Comment Period Provides Insufficient Time to Comment on the Rule**

Per the Administrative Procedure Act (APA), typically, the public is given 30-60 days to review and provide comments for proposed rules. For particularly complex rules, such as the one that is the subject of our comment, agencies can allow for 180 days, or more, for comment.<sup>5</sup> Under Executive Orders 12866 and 13563, agencies should generally provide at least 60 days for the public to comment on proposed regulations. However, this time the public was only given 30 days to submit comments. A minimum of 60 days is especially critical given that this is a sweeping, complex, 153-page proposed Rule that attempts to ban asylum for many refugees in violation of U.S. law and international commitments, returning many to death, torture, and violence. While the agencies cite the termination of the Title 42 policy in May 2023 as a justification to curtail the public's right to comment on the proposed Rule, this reasoning is questionable – particularly so given that the administration itself sought to formally end Title 42 nearly a year ago and has had ample time to prepare for the end of the policy.

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<sup>1</sup> ADL. "Antisemitic Incidents Surge in 2022." Retrieved March 2023, from <https://www.adl.org/audit-antisemitic-incidents>

<sup>2</sup> ADL. "Antisemitic Attitudes in America: Topline Findings." Retrieved March 2023, from <https://www.adl.org/resources/report/antisemitic-attitudes-america-topline-findings>

<sup>3</sup> ADL. "'The Great Replacement': An Explainer." Retrieved March 2023, from <https://www.adl.org/resources/background/great-replacement-explainer>

<sup>4</sup> Capuano, M. (2022, December 5). Embattled Biden Administration Finally Figures Out Asylum Can't Be a Free-for-All. Retrieved March 2023, from <https://www.fairus.org/blog/2022/12/05/embattled-biden-administration-finally-figures-out-asylum-cant-be-free-all>

<sup>5</sup> The Office of the Federal Register. (n.d.) "A Guide to the Rulemaking Process." Retrieved March 2023, from [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf)

Due to the gravity of the Rule, and the lack of adherence to the APA, we ask the Departments to rescind it. If that does not happen, at a minimum, we ask that the Departments extend the comment period for an additional 30 days. If that also does not happen, ADL emphasizes that our comment does not represent the extent of our analysis, and it should not be construed as being supportive of any part of the Rule.

## Overview of Proposed Rule

The proposed Rule bans refugees from seeking asylum protection based on their manner of entry into the United States and transit through other countries, factors that are irrelevant to their fear of return and have no basis in U.S. or international law.

The Rule would create a presumption of asylum ineligibility for individuals who 1) did not apply for and receive a formal denial of protection in a transit country; and 2) entered between ports of entry at the southern border or entered at a port of entry without a previously scheduled appointment through the CBP One mobile application, subject to extremely limited exceptions.

CBP One is an extremely flawed government tool to request an appointment at a port of entry that is inaccessible to many asylum seekers due to financial, language, technological, and other barriers, discriminates against Black and Indigenous asylum seekers, and has very limited appointment slots such that requiring asylum seekers to use the application essentially turns asylum access into a lottery. The proposed Rule attempts to establish CBP One as the only mechanism to request asylum at the southern border and seeks to punish those who cannot wait indefinitely in danger while they attempt to schedule an appointment.

The asylum ban violates U.S. law, which ensures access to asylum regardless of manner of entry or transit and prohibits restrictions on asylum that are inconsistent with provisions in the U.S. asylum statute. Members of Congress,<sup>6</sup> human rights advocates,<sup>7</sup> faith-based organizations (including ADL),<sup>8</sup> and many others urged the administration not to issue the proposed Rule and voiced strong opposition to it when the administration announced its intention to publish it.

The asylum ban would apply in the fundamentally flawed expedited removal process as well as in full asylum adjudications before USCIS and the immigration court. Expedited removal is the process that allows the U.S. government to deport people arriving at the border without ever seeing an immigration judge if they do not express fear or do not pass a “credible fear” screening

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<sup>6</sup> Congressional Letter to President Biden on the Administration’s Border Policies (2023, January 25). Retrieved March 2023 from <https://www.menendez.senate.gov/imo/media/doc/letter-to-president-biden-on-the-administrations-border-policies.pdf>

<sup>7</sup> Human Rights Organizational Letter Objecting to Announced Plan to Resurrect Trump-era Asylum Bans (2023, January 19). Retrieved March 2023 from <https://humanrightsfirst.org/wp-content/uploads/2023/01/Letter-to-President-Biden-re-asylum-ban-NPRM-1.pdf>

<sup>8</sup> Faith Organizations Letter Opposing Proposed Asylum Ban (2023, January 23). Retrieved March 2023 from <https://www.interfaithimmigration.org/wp-content/uploads/2023/01/Final-Faith-Letter-Opposing-Proposed-Asylum-Ban-Jan2023.pdf>

interview where they must show a significant possibility that they could establish asylum eligibility in a full hearing. In expedited removal, asylum seekers covered by the proposed Rule would be required to gather the evidence and arguments necessary to “rebut the presumption of ineligibility” (i.e. prove they fall within one of the few exceptions to the Rule). Those who fail to do so would be automatically subject to a higher screening standard (in violation of U.S. law governing credible fear interviews<sup>9</sup>) and would face deportation to danger if they cannot pass the screening. Even those who do pass would be subject to the presumption of ineligibility in an immigration hearing and if barred from asylum would only be eligible for lesser forms of protection known as Withholding of Removal or Convention Against Torture (CAT) protection. These protections do not provide a pathway to citizenship, are subject to revocation at any time, and do not allow people to petition for their spouses and children.

The Rule will also apply to immigrants in full asylum hearings before USCIS and the immigration court. In these proceedings, asylum seekers would be denied asylum if they cannot rebut the presumption of ineligibility, resulting in the deportation of many refugees and leaving others with only lesser forms of protection available to them.

### **The Asylum Ban Continues an Alarming Trend of United States Asylum Law Straying Far from Our Obligations Under International Treaties, Returning to This Country’s Shameful History of Turning Away Displaced People**

The proposed Rule contravenes U.S. and international law governing asylum access, expedited removal procedures, and prohibitions on the return of refugees to persecution and torture.

ADL is mindful that Jews have a long history of displacement throughout the world. Many Jewish American families first came to this country as refugees and asylum seekers. We are also acutely aware of what happens when the United States flatly denies asylum to displaced persons without consideration for the harm they may face once turned away from this country’s protection, for the incident of the *St. Louis* is burned into our collective memory.

In 1939, the German ship *St. Louis* sailed for Cuba carrying 937 passengers. Almost all of them were Jews fleeing Nazi Germany. Most of the Jewish passengers had applied for U.S. visas and were planning to stay in Cuba only until they could enter the United States. However, political conditions in Cuba changed abruptly just before the ship sailed and only 28 passengers were actually admitted by the Cuban government. The remaining 908 passengers (one died in transit) were left in limbo – unable to disembark and be admitted to Cuba and terrified of turning back. The *St. Louis* was ordered out of Cuban waters on June 2, 1939 and sailed so close to Miami that passengers could see its lights. Some of them cabled President Franklin D. Roosevelt asking for refuge. He never responded. Instead, the State Department sent a passenger a telegram stating that passengers must “await their turns on the [visa] waiting list and qualify for and obtain immigration visas before they may be admissible into the United States.”<sup>10</sup>

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<sup>9</sup> 8 U.S. Code § 1225

<sup>10</sup> United States Holocaust Memorial Museum, Holocaust Encyclopedia. (n.d.). “Voyage of the *St. Louis*,” Retrieved March 2023 from, <https://encyclopedia.ushmm.org/content/en/article/voyage-of-the-st-louis>.

The asylum seekers aboard the *St. Louis* had no choice but to return to Europe. Notably, they did not return to Germany. Jewish organizations were able to negotiate with four European governments to secure entry visas for the passengers. Germany invaded Western Europe in May 1940, trapping 532 former *St. Louis* passengers. About half – 254 people – were murdered in the Holocaust.<sup>11</sup>

Since that fateful decision, the United States joined countries around the world in affirming that the global community could not allow forced displacement crises like that precipitated by World War II to happen again, and committed to respecting the rights of those seeking safety. Part of this process included agreement upon the recognized definition of who a refugee is and what nations' obligations to refugees are. The United States played a lead role in drafting the United Nations *Convention Relating to the Status of Refugees* ("Refugee Convention") in the wake of World War II. The United States later became a signatory to the 1967 *Protocol Relating to the Status of Refugees*,<sup>12</sup> which binds parties to the Refugee Convention.<sup>13</sup> This obligates the U.S. to comply with the principle of *non-refoulement* – that an asylum seeker cannot be sent to another territory or state where they fear threats to their life or freedom on protected grounds. Although the Refugee Convention allows signatory states to exclude and/or expel asylum seekers, this is only permitted in limited circumstances.

It was not until 1980 that the United States asylum system was codified in statute through the Refugee Act.<sup>14</sup> Along with other measures designed to bring the U.S. domestic legal code into compliance with the Refugee Convention, the Refugee Act adopts the internationally accepted definition of "refugee" and the five recognized grounds upon which refugee claims are based. 8 U.S.C. 1158 provides that people may apply for asylum regardless of manner of entry into the United States. It also delineates limited exceptions where an asylum seeker may be denied asylum based on travel through another country, but these restrictions only apply where an individual was "firmly resettled" in another country (defined to mean the person was eligible for or received permanent legal status in that country) or if the U.S. has a formal "safe third country" agreement with a country where refugees would be safe from persecution and have access to fair asylum procedures. The statute prohibits the administration from issuing restrictions on asylum that are inconsistent with these provisions. 8 U.S.C. 1231 codified the prohibition against returning refugees to countries where they face persecution. ADL fears that the proposed Rule, which conditions access to asylum on manner of entry and transit, would force individuals who meet the historically and globally accepted refugee definition to return to the countries from which they fled. This would be in direct contravention of U.S. law and the United States' obligation to comply with the principle of *non-refoulement*.

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<sup>11</sup> *Id.*

<sup>12</sup> United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

<sup>13</sup> Convention Relating to the Statute of Refugees, July 28, 1951, 140 U.N.T.S. 1954.

<sup>14</sup> National Archives Foundation. (n.d.). "Refugee Act of 1980." Retrieved March 2023, from <https://www.archivesfoundation.org/documents/refugee-act-1980/>

In 1996, Congress created the expedited removal process through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Under this process, asylum seekers placed in expedited removal who establish a credible fear of persecution must be referred for full asylum adjudications.<sup>15</sup> The proposed rule attempts to unlawfully circumvent the credible fear screening standard established by Congress, which was intended to be a low screening threshold.<sup>16</sup> The government is required to refer asylum seekers in expedited removal for full asylum adjudications if they can show a “significant possibility” that they could establish asylum eligibility in a full hearing. The proposed Rule attempts to eviscerate this standard by first requiring asylum seekers to prove to an asylum officer by a preponderance of evidence that they can rebut the presumption of asylum ineligibility, and then requiring those who cannot overcome the presumption to meet a higher fear standard before being permitted to seek protection. This provision is inconsistent with U.S. law.

The proposed Rule also violates the Refugee Convention’s prohibition against imposing improper penalties on asylum seekers based on their irregular entry into the country of refuge. The agencies explicitly note that the asylum ban would inflict “consequences” on people seeking asylum – a blatant attempt to punish people based on their manner of entry into the United States. These consequences could include the denial of access to asylum, deportation to harm, family separation, and deprivation of a path to naturalization.

## **Conclusion**

Much like asylum bans attempted by the previous administration, the proposed Rule would similarly operate as an asylum ban for refugees 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 the extremely limited exceptions. Its use in expedited removal will require asylum seekers – many of whom have suffered persecution and violence and underwent a harrowing journey to reach safety – to prove that the Rule does not apply to them in a credible fear interview shortly after arrival in the United States, while detained and with little to no access to counsel, likely without knowledge of how the Rule works or what they need to prove.

Moreover, the Rule discriminates against asylum seekers based on manner of entry and transit and will have a racially disparate impact on asylum seekers from Africa, the Caribbean, and Latin America. The proposed ban, which applies only to people who seek protection at the southern border, will disproportionately harm people of color who do not have the resources or ability to arrive in the United States by plane.

ADL calls on the administration to withdraw this Rule in its entirety, stop punishing migrants arriving at the U.S. southern border, and instead allocate resources toward humane asylum processing and fair adjudications.

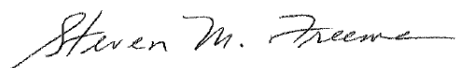
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<sup>15</sup> 8 U.S. Code § 1225

<sup>16</sup> Congressional Record Volume 142, Number 136 (1996, September 27). Retrieved March 2023 from <https://www.govinfo.gov/content/pkg/CREC-1996-09-27/html/CREC-1996-09-27-pt1-PgS11491-2.htm>

Please do not hesitate to contact us with questions or for further information.

Sincerely,



Steven M. Freeman  
Vice President  
Civil Rights



Max Sevilla  
Vice President  
Government Relations,  
Advocacy, and  
Community Engagement



Karen Levit  
National Civil Rights Counsel