



Comment of Black Immigrant Bail Fund, Cameroon Advocacy Network, Haitian Bridge Alliance, and Robert F. Kennedy Human Rights on Proposed Rule, “Circumvention of Lawful Pathways,” 88 FR 11704

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The Black Immigrant Bail Fund, Cameroon Advocacy Network, Haitian Bridge Alliance, and Robert F. Kennedy Human Rights jointly submit the below comment in response to the notice of proposed rulemaking titled “Circumvention of Lawful Pathways,” published in the Federal Register on February 23, 2023. The proposed rule would disproportionately deny Black people a meaningful opportunity to apply for humanitarian protection from persecution by imposing new presumptions against asylum eligibility and heightened standards for asylum pre-application screenings. In doing so, the proposed rule subjects Black people to race-based discrimination, in violation of federal and international law. The below signed organizations therefore recommend that the proposed rule be withdrawn in its entirety.

I. Introduction

Black people seeking humanitarian protection at the United States border face significant negative disparities in treatment and approval rates in comparison to all noncitizens. The proposed rule would worsen race-based differential treatment by disqualifying Black people from asylum, subjecting them to even higher rates of detention, deportation, and *refoulement* (forcible return of refugees) to persecution, torture, and other serious harm.

This comment proceeds in four parts. First, it briefly describes proposed changes to current asylum-screening procedures that would significantly restrict the ability of Black immigrants to apply for asylum. Second, it describes how increased restrictions on humanitarian protection recently adopted have had the purpose and effect of denying Black people the human right to apply for asylum. Third, it explains how the proposed rule would have a disparate impact on Black asylum seekers, subjecting them to serious harm, including *refoulement* to persecution, torture, and death. Finally, it describes how the commenting organizations will be negatively affected by the proposed rule.

II. The Proposed Rule Significantly Restricts Access to Asylum.

The proposed rule seeks to disqualify from asylum the majority of individuals who request protection from the United States, including individuals from majority-Black countries who travel through Mexico to the U.S. border. It would “establish a rebuttable presumption that certain noncitizens . . . are ineligible for asylum, if they traveled through a country other than their country of citizenship, nationality, or, if stateless, last habitual residence. . . .”¹ The proposed rule therefore presumptively disqualifies from asylum all noncitizens requesting protection at the southern border other than Mexican nationals, and it creates a disparate system that favors those arriving directly to the United States by commercial air, a route not available to most Black individuals who intend to seek asylum.. The presumption against asylum eligibility applies whether a noncitizen is in removal proceedings and applies for asylum defensively or whether she affirmatively applies for asylum before the United States Citizenship and Immigration Services (USCIS).²

In three circumstances, the presumption would not apply. Noncitizens retain their statutory right to apply for asylum if they

- (1) receive pre-authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process;
- (2) present at a port of entry at a pre-scheduled time through the use of the web-based application CBP [Customs and Border Protection] One or if they demonstrate that the application for scheduling was not possible to access or use; or

¹ Circumvention of Lawful Pathways, 88 Fed. Reg. 11,704, 11,707 (Feb. 23, 2023) (revising 8 C.F.R. § 1208).

² *Id.*

- (3) apply for, and are denied in a final decision, asylum or other protection in a country through which they traveled.³

The high bar to demonstrate that CBP One inaccessible or unusable is met only in “a narrow set of cases in which it was truly not possible for the noncitizen to access or use the DHS system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.”⁴

The presumption can only be rebutted if a noncitizen, immediately upon entry at the border, shows “exceptionally compelling circumstances by a preponderance of the evidence.”⁵ Only three scenarios explicitly meet the “exceptionally compelling” bar. A noncitizen rebuts the presumption when she

- (1) has an acute medical emergency;
- (2) faces an imminent and extreme threat to life or safety, including rape, kidnapping, torture, or murder; or
- (3) is a “victim of a severe form of trafficking in persons” as defined elsewhere in U.S. law.⁶

The presumption may also be rebutted by “other exceptionally compelling circumstances,” in the discretion of the screening officer.⁷ The proposed rule provides no standards to prevent an officer’s arbitrary decision making or the abuse of discretion, including due to race-based bias, explicit or implicit.

As a practical matter, the proposed rule also elevates the pre-application standard for humanitarian protection. Under current law, an individual arriving at the border is not automatically granted the right to apply for asylum. Instead, she must first pass a credible fear interview, where she bears the burden of showing a “significant possibility of establishing eligibility for asylum.”⁸ If she does not meet this burden, she is immediately deported.⁹ The rule is clear that where a noncitizen is subject to the asylum ban presumption, she must meet a higher pre-application burden to show “a reasonable possibility of persecution or torture.”¹⁰ If she does not, she will be immediately deported, even where there is evidence of a significant possibility of race-based or other persecution.

³ *Id.*

⁴ *Id.* at 11,723 n.173.

⁵ *Id.* at 11,723.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 11,725 (referencing 8 U.S.C. § 1225(b)(1)(B)(v)).

⁹ *Id.*

¹⁰ *Id.*

III. DHS Disproportionately Prevents Black People from Accessing Humanitarian Protection.

The proposed rule will exacerbate the already-existing disproportionate disqualification of Black people from humanitarian protection at the U.S.-Mexico border. This section describes recent and longstanding asylum restriction policies that either explicitly target or disproportionately harm Black people.

Black immigrants have long suffered the brunt of harsh immigration policies designed to deter Black people from accessing their human right to apply for asylum.¹¹ Explicit anti-Haitian immigration policies adopted by the United States include mass denial of asylum applications without individualized consideration,¹² offshore detention at Guantánamo Bay,¹³ and creation of the world's first HIV-positive internment camp.¹⁴

Federal courts have also recognized the explicit anti-Black and anti-Haitian roots of metering, a recent restriction on humanitarian protection that, while formally disavowed, continues in practice. Metering denies the right to apply for asylum by “limit[ing] the number of asylum seekers who [are] processed each day at designated ports of entry along the U.S. southern border.”¹⁵ The United States first adopted the policy “[i]n response to the increase in Haitian migration in 2016,”¹⁶ directing border agents to turn back Haitians who had crossed the border and to stop those who had not with orders to return at a later, often unspecified time.¹⁷ Black asylum seekers who were turned back to Mexico report facing targeted violence from police and gangs, including kidnapping, rape, robbery, beatings, extortion, and threats.¹⁸ In September 2021, a federal court enjoined metering for violating the due process right to apply for asylum.¹⁹ But metering continues in the form of “exception waitlists” to Title 42, the 2020 policy of immediate expulsion of asylum seekers “without allowing them to apply for asylum or seek relief from

¹¹ See HAITIAN BRIDGE ALLIANCE & ROBERT F. KENNEDY HUMAN RIGHTS, BEYOND THE BRIDGE: DOCUMENTED HUMAN RIGHTS ABUSES AND CIVIL RIGHTS VIOLATIONS AGAINST HAITIAN MIGRANTS IN THE DEL RIO, TEXAS ENCAMPMENT (2022), <https://rfkhr.imgix.net/asset/Del-Rio-Report.pdf> [hereinafter *Beyond the Bridge*] (describing history of explicit anti-Haitian immigration policies adopted from the 1970s onward, including denial of asylum applications without individualized consideration, offshore detention at Guantánamo Bay, and creation of the world's first HIV-internment camp).

¹² *Id.* at 48-49 & n.270.

¹³ *Id.* at 16.

¹⁴ *Id.*

¹⁵ HILLEL R. SMITH, CONG. RESEARCH SERV., LSB10295, THE DEPARTMENT OF HOMELAND SECURITY'S "METERING" POLICY: LEGAL ISSUES 1 (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10295>.

¹⁶ *Al Otro Lado, Inc. v. Mayorkas*, No. 17-CV-02366-BAS-KSC, 2021 WL 3931890, at *2 (S.D. Cal. Sept. 2, 2021).

¹⁷ *Id.*

¹⁸ HUMAN RIGHTS FIRST & HAITIAN BRIDGE ALLIANCE, BIDEN ADMINISTRATION'S DANGEROUS HAITIAN EXPULSION STRATEGY ESCALATES THE U.S. HISTORY OF ILLEGAL AND DISCRIMINATORY MISTREATMENT OF HAITIANS SEEKING SAFETY IN THE UNITED STATES 3 (2021). <https://humanrightsfirst.org/wp-content/uploads/2022/09/BidenAdministrationDangerousHaitianExpulsionStrategy.pdf>

¹⁹ *Al Otro Lado*, 2021 WL 3931890, at *20.

removal to a place where they will face persecution.”²⁰ In mid-2022, the United States began to process exceptions to Title 42 expulsion at the southern border. As the number of individuals seeking exceptions increased, waitlists proliferated.²¹ Black asylum seekers reported being blocked from waitlists due to anti-Black discrimination and lack of interpretation services.²²

Metering is not the only policy to be recognized by a federal court as motivated by anti-Black bias. When the United States terminated Temporary Protected Status for Haitians in 2017, a federal court enjoined the rescission after finding it was likely “based on race and/or national origin/ethnicity against non-white immigrants in general and Haitians in particular.”²³ Pending federal lawsuits examine evidence of race-based asylum deterrence policies practiced against Haitian and Black asylum seekers, who in the fall of 2021 were penned into open-air encampments, cut off from legal and humanitarian aid, and pushed across the border by U.S. agents on horseback at Del Rio, Texas.²⁴

DHS also uses longstanding asylum screening procedures to disproportionately reject asylum claims of Black immigrants. Under current credible fear interview procedures, asylum seekers from Black-majority countries including Burkina Faso, Cameroon, the Dominican Republic, Ghana, Mauritania, and Senegal receive negative credibility findings in their initial credible fear interview at rates double to quadruple times the global average.²⁵ Positive credible fear interview determinations for Haitians are persistently lower than average over multi-year periods, in some years by almost half.²⁶

Black immigrants permitted to apply for asylum report discriminatory treatment in immigration court removal proceedings, including denials of adequate interpretation, lack of access to counsel, intentionally rushed proceedings, and adjudicator bias.²⁷ Over a 20-year period ending in FY2021, DHS denied 82 percent of asylum applications from Haitians, the second highest rate of denials of any nationality.²⁸ Adjudicator bias occurs across nationalities for

²⁰ *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 726 (D.C. Cir. 2022).

²¹ STEPHANIE LEUTERT & CAITLYN YEATS, UNIV. OF TEX. AT AUSTIN STRAUSS CTR. FOR INT’L SEC. & LAW, ASYLUM PROCESSING AT THE U.S.-MEXICO BORDER: FEBRUARY 2023, https://www.strausscenter.org/wp-content/uploads/Feb_2023_Asylum_Processing.pdf.

²² Black Alliance for Just Immigration et al., *Shadow Report to the Committee on the Elimination of Racial Discrimination (CERD): Anti-Black Discrimination Against Non-citizens and Ongoing Violations of International Protections for Migrants, Refugees, and Asylum Seekers of African Descent* 10 (Aug. 2022) [hereinafter *Shadow Report*], https://humanrightsfirst.org/wp-content/uploads/2022/09/US-Coalition_anti-Black-Discrimination-in-Immigration__CERD-Report_072222.pdf (citing statistics from FY2020).

²³ *Saget v. Trump*, 375 F. Supp. 3d 280, 374 (E.D.N.Y. 2019) (finding “both direct and circumstantial evidence a discriminatory purpose of removing non-white immigrants from the United States was a motivating factor behind the decision to terminate TPS for Haiti”).

²⁴ See Compl. ¶¶ 66-78, *Haitian Bridge All. v. Biden*, No. 1:21-cv-03317 (D.D.C. Dec. 20, 2021).

²⁵ *Shadow Report*, *supra* note 22, at 10.

²⁶ *Id.* at 11.

²⁷ *Id.* at 1.

²⁸ Syracuse University, Transactional Records Access Clearinghouse (TRAC), *The Impact of Nationality, Language, Gender and Age on Asylum Success* (Dec. 7, 2021), <https://trac.syr.edu/immigration/reports/668/>.

majority-Black countries, leading to legal errors in screening interviews, failures to grant opportunity to respond, mishandling of evidence, and errors of fact finding.²⁹ Immigration judges have ordered detained Black asylum seekers removed due to their inability to fill the forms in English or minor inconsistencies due to poor translation.³⁰

Black asylum seekers are also more likely to face abusive immigration detention, including solitary confinement at a rate six times higher than non-Black people,³¹ and overrepresentation in family detention,³² a policy currently being reconsidered by the Biden administration.³³ Black people represented more than half of all detained individuals in family detention in 2020.³⁴ More than 3 out of 4 immigrants in detention are not represented by counsel.³⁵ And people in detention prevail without representation in only 3 percent of cases.³⁶

Collectively, current asylum restrictions and longstanding policies disproportionately harm Black people, denying them meaningful access to humanitarian protection owed under international and domestic law. The proposed rule will only exacerbate this grave injustice.

²⁹ Human Rights Watch, ‘How Can You Throw Us Back?’ *Asylum Seekers Abused in the US and Deported to Harm in Cameroon* (Feb. 2022), https://www.hrw.org/sites/default/files/media_2022/03/us_cameroon0222_web.pdf, 114 - 43 [hereinafter “How Can You Throw Us Back?”] (describing the due process issues black immigrants face in the U.S. Immigration Court system including issues of dismissed errors in screening interviews, failure to grant opportunity to respond, mishandling evidence, and error of fact finding).

³⁰ *See id.* at 103-07 (identifying lack of interpretation as contributing to erroneous negative fear determinations and deportations of Cameroonian asylum seekers); *see also Grievance Letter to USCIS, ICE, EOIR Re: “Detained Asylum Seekers Deprived of Due Process in Expedited Removal Process”* (June 30, 2021), https://www.splcenter.org/sites/default/files/detained_asylum_seeker_grievance_letter_30_june_2021.pdf;

Human Rights First, ‘I’m a Prisoner Here’: *Biden Administration Policies Lock Up Asylum Seekers* 35, 37-38 (Apr. 2022), <https://www.humanrightsfirst.org/sites/default/files/I%27maPrisonerHere.pdf>

(documenting flawed credible fear interviews with inadequate interpretation as contributing to negative fear determinations and deportations of Cameroonian asylum seekers).

³¹ Konrad Franco, Caitlin Patler, & Keramet Reiter, *Punishing Status and the Punishment Status Quo: Solitary Confinement in US Immigration Prisons, 2013-2017* (Apr. 2020), <https://osf.io/preprints/socarxiv/zdy7f/>.

³² RAICES, *Black, Pregnant, Detained* (Mar. 4, 2021), https://www.youtube.com/watch?v=2NDto_YV01Y (noting that in 2020 Black people were more than half of all detained at Karnes County Family Residential Center in Texas and all of those detained at Berks Family Residential Center in Pennsylvania).

³³ Eileen Sullivan & Zolan Kanno-Youngs, *U.S. Is Said to Consider Reinstating Detention of Migrant Families*, N.Y. TIMES (Mar. 6, 2023), <https://tinyurl.com/974txkdm>.

³⁴ Compl. ¶ 49, *Haitian Bridge All. v. Biden*, No. 1:21-cv-03317 (D.D.C Dec. 20, 2021).

³⁵ TRAC, *Details on Deportation Proceedings in Immigration Court (through February 2019)*, <https://trac.syr.edu/phptools/immigration/ntahist/> (field selections: Immigration Court State: All; Custody: Detained; Represented: Not Represented).

³⁶ Robert A. Katzman, *Study Group on Immigrant Representation: The First Decade*, 87 FORDHAM L. REV. 485, 486 (2018), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5549&context=flr>.

IV. The Proposed Rule Violates the Human Rights of Black People to Seek Protection from Persecution and Torture.

Though facially race-neutral, the proposed rule would have a particularly harsh effect on Black asylum seekers. This section explains how the proposed rule would deepen existing race-based disparities in asylum screening procedures, depriving Black people in particular of meaningful access to asylum. It draws from secondary sources and in-person interviews with Black asylum seekers conducted in March 2023 by a team of researchers and lawyers, including individuals from the Haitian Bridge Alliance.³⁷ These accounts highlight elements of the proposed rule—including some already in practice—that work to deny Black people meaningful access to asylum, including mandatory electronic scheduling for border appointments to seek asylum, transit country asylum application requirements, and a humanitarian parole program that is an inadequate substitute for humanitarian protection.

A. The CBP One Appointment Scheduling Application Denies Black People Equal Access to Humanitarian Protection.

The proposed rule creates a presumption against asylum eligibility unless an individual uses the smartphone application CBP One to pre-schedule an appointment at a U.S. port of entry to request asylum.³⁸ Numerous reports from asylum seekers at the border describe serious flaws with CBP One, including unreliable software, connectivity issues, and failure to register darker skin tones.

Asylum seekers report that the CBP One application repeatedly crashes or freezes. Common issues with application crashing included freezing just before an individual could take their photo, freezing on the calendar slot page, and the application shutting down before individuals could add family member information.³⁹ Some of these issues might be remedied given sufficient access to broadband capacity and a newer smartphone.

But the reality on the ground is that Black migrants have very little resources to purchase or access a newer smartphone or a broadband internet connection. Many have undertaken significant risks and long journeys through South and Central America to reach the U.S.-Mexico border, including traveling the notorious Darien Gap, a remote and dangerous jungle region

³⁷ See Center for Gender & Refugee Studies, Haitian Bridge Alliance & Hastings to Haiti Partnership, *Making a Mockery of Asylum: The Proposed Asylum Ban, Relying on the CBP One App for Access to Ports of Entry, Will Separate Families and Deny Protection* (Mar. 27, 2023) (report compiling information from interview with 194 individuals and family units living in shelters or other informal housing arrangements in Tijuana regarding their experiences using the CBP One app as well as protections unavailable to them in Mexico and other transit countries en route to the United States).

³⁸ 88 Fed. Reg. at 11719.

³⁹ See Center for Gender & Refugee Studies et al., *supra* n. 37 at 6-8.

between Colombia and Panama.⁴⁰ During this journey, Black migrants are often subject to robbery, rape, and physical assault, resulting not only in trauma, but in loss or destruction of personal possessions like smartphones.⁴¹ Those arriving in Mexico also report robbery and assault while waiting to apply for asylum at the U.S. border, resulting in stolen or destroyed smartphones.⁴² Moreover, because CBP One requires a newer smartphone with up-to-date software in order to function properly (indeed the application itself requires frequent updates to be used), Black migrants who cannot afford the latest phones or technology face de facto exclusion from the asylum application process.

CBP One also uses facial recognition software that excludes black skin tones.⁴³ Research on skin-type bias in commercial artificial intelligence systems shows that facial recognition software exhibits significant racial biases. One study found that facial analysis software has an error rate of 0.8 percent for light-skinned men compared to 34.7 percent for dark-skinned women.⁴⁴ Individuals interviewed at the border affirm difficulties with photo uploads. Several people interviewed reported an inability to move past the photo confirmation page because CBP One refused to recognize their face.⁴⁵ Others reported that the short confirmation window at the calendar stage for taking photos made it impossible to capture entire families, especially those with small children, before all calendar spots had disappeared.⁴⁶

B. Transit Countries Deny Black People Meaningful Access to Humanitarian Protection.

The proposed rule creates a presumption against asylum eligibility unless an individual first applies for and receives a final denial of an application for asylum in a country through which she traveled before reaching the United States.⁴⁷ But countries in the Americas deny Black people meaningful access to humanitarian protection due to anti-Black racism and underdeveloped humanitarian protection systems.

⁴⁰ Laurence Blair, *Risking it all: migrants brave Darien Gap in pursuit of the American dream*, THE GUARDIAN (Apr. 28, 2022), <https://www.theguardian.com/global-development/2022/apr/28/risking-it-all-migrants-brave-darien-gap-in-pursuit-of-the-american-dream>

⁴¹ *Id.*

⁴² Human Rights Watch, *Mexico: Rampant Abuses Against Asylum Seekers* (2021), <https://www.hrw.org/news/2021/09/21/mexico-rampant-abuses-against-asylum-seekers>.

⁴³ Melissa del Bosque, *Facial Recognition Bias Frustrates Black Asylum Applicants to US, Advocates Say*, THE GUARDIAN (Feb. 8, 2023) <https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias>.

⁴⁴ See JOY BUOLAMWINI & TIMNIT GEBRU, *GENDER SHADES: INTERSECTIONAL ACCURACY DISPARITIES IN COMMERCIAL GENDER CLASSIFICATION*, 81 PROC. IN MACHINE LEARNING RES. 1 (2018), <http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf>

⁴⁵ See Center for Gender & Refugee Studies et al., *supra* n. 37 at 7.

⁴⁶ *Id.*

⁴⁷ 88 Fed. Reg. at 11,740.

Anti-Black racism is a significant problem in countries throughout the Americas, where Black asylum seekers face violence and discrimination from criminal organizations and local authorities. Black migrants and other individuals who have fled their home countries due to persecution are subjected to similar abuses in transit countries.⁴⁸ As simply put by a recent World Bank report, “Latin America is, in fact, the most violent region in the world, and Afrodescendants are the main victims.”⁴⁹ Costa Rican First Vice President Espy Campbell Barr acknowledges the “context of systemic racism against Afro-descendants . . . enclosed within the political, economic, social, and cultural system” across Central and South America.⁵⁰ In this context, police violence against Black people is common in states throughout the region.⁵¹ In Brazil, 75% of people killed by police are Black.⁵² Surveillance, hostile treatment in public spaces, and abuse from security forces are commonly reported by Black people throughout Latin American states.⁵³ The Inter-American Commission on Human Rights describes Afro-descendants in Latin America as vulnerable to “double victimization,” both excluded from police protection from crime and more likely to be victimized by institutionalized violence, including unfair judicial treatment.⁵⁴ And in Mexico, a state that all Black people must pass through to request asylum at the U.S. border, asylum seekers of African descent have reported targeted violence and racial discrimination after being turned away from the U.S. border when requesting protection.⁵⁵

Violence is not the only factor impeding Black people’s meaningful access to humanitarian protection in Latin America. The region’s overtaxed, underdeveloped asylum systems also make it infeasible for Black asylum seekers to apply for asylum and receive protection in these countries. From 2017 to 2022, there were nearly 1.7 million pending asylum applications to states in all nations of the Americas, excluding the United States and Canada.⁵⁶ Of that number, only 24,503

⁴⁸ See, e.g., Human Rights Watch, *Mexico: Abuses against asylum seekers at US border* (2021), <https://www.hrw.org/news/2021/03/05/mexico-abuses-against-asylum-seekers-us-border>.

⁴⁹ WORLD BANK GROUP, AFRO-DESCENDANTS IN LATIN AMERICA 67 <https://openknowledge.worldbank.org/entities/publication/a3b5c6a3-6b2d-52ad-a560-7f4817b235ca> (citing Laura Chioda, *Stop the Violence in Latin America: A Look at Prevention from Cradle to Adulthood*, *Latin American Development Forum* (2017)).

⁵⁰ PAN AM. HEALTH ORG., AFRO-DESCENDANTS IN LATIN AMERICAN COUNTRIES LIVE IN STARKLY UNEQUAL CONDITIONS THAT IMPACT HEALTH AND WELL-BEING, PAHO STUDY SHOWS (2021), <https://www.paho.org/en/news/3-12-2021-afro-descendants-latin-american-countries-live-starkly-unequal-conditions-impact>.

⁵¹ BRUNO CARVALHO, *LATIN AMERICA IS READY FOR A BLACK LIVES MATTER RECKONING*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2020/06/29/opinion/latin-america-racism-police.html>.

⁵² *Id.*

⁵³ WORLD BANK GROUP, AFRO-DESCENDANTS IN LATIN AMERICA, *supra* note 49, at 68 (citing Inter-American Commission on Human Rights, *The Situation of People of African Descent in the Americas* (2011)).

⁵⁴ *Id.*

⁵⁵ Human Rights Watch, *US: Asylum Seekers Returned to Uncertainty, Danger in Mexico* (July 2, 2019), <https://www.hrw.org/news/2019/07/02/us-asylum-seekers-returned-uncertainty-danger-mexico>.

⁵⁶ United Nations High Commissioner on Refugees (UNHCR), *Refugee Data Finder*, <https://www.unhcr.org/refugee-statistics/download/?url=Jz2Flp>.

received a final decision to grant or deny protection: a 1.4% decision rate.⁵⁷ In the face of such abysmal processing rates, United Nations officials acknowledge that “[n]ational asylum systems [in Latin America have] collapsed due to an exponential increase in the number of asylum applications . . . and a lack of human and financial resources.⁵⁸ Researchers describe a Latin American asylum system that is plagued by a “sense of arbitrary application.”⁵⁹ These asylum systems are also “largely symbolic, [given that] states across the region are reluctant to invest in [them], leading to low state capacity that hinders the application of the law.”⁶⁰

To give just two examples, Costa Rica, one of the countries in the region touted by the proposed rule for offering better refugee protections for people fleeing persecution, is tightening its asylum policies in the face of an overwhelmed system.⁶¹ As it stands, more than nine out of ten refugees in Costa Rica are from Nicaragua, leaving little capacity for migrants from majority-Black countries to seek protection.⁶² And Mexico, the one country that all migrants must pass through, now receives the world’s third highest number of asylum applications.⁶³ Since 2014 the overwhelmed Mexican asylum system has experienced a 5325% increase in asylum applications,⁶⁴ vastly outpacing the country’s ability to adjudicate applications in a fair and timely manner.

C. Expanded Pathways for Parole do not Adequately Replace Access to Asylum for Black Immigrants.

⁵⁷ *Id.* (returning results of 76,894 decisions issued; 52,481 listed as “otherwise closed”).

⁵⁸ Juan Ignacio Mondelli, *Reshaping Asylum in Latin America as a Response to Large-Scale Mixed Movements: A Decade of Progress and Challenges (2009-2019)*, at 4 (Dec. 1, 2020) https://www.unhcr.org/people-forced-to-flee-book/wp-content/uploads/sites/137/2021/10/Juan-Mondelli_Reshaping-Asylum-in-Latin-America-as-a-Response-to-Large-Scale-Mixed-Movements.pdf.

⁵⁹ Omar Hammoud Gallego, *Here to stay: Latin America must face up to the reality of long-term Venezuelan migration*, LONDON SCHOOL ECON. & POLITICAL SCIENCE BLOGS (Apr. 13, 2021), <https://blogs.lse.ac.uk/latamcaribbean/2021/04/13/here-to-stay-latin-america-must-face-up-to-the-reality-of-long-term-venezuelan-migration/>.

⁶⁰ Luisa Feline Freier & Omar Hammoud Gallego, *Symbolic refugee protection: why Latin America passed progressive refugee laws never meant to use*, LONDON SCHOOL ECON. & POLITICAL SCIENCE BLOGS (Oct. 6, 2022) <https://blogs.lse.ac.uk/latamcaribbean/2022/10/06/refugee-protection-latin-america-refugee-laws-never-used/>.

⁶¹ Javier Cordoba, *Costa Rica tightens overwhelmed asylum system*, ASSOC. PRESS (Dec. 14, 2022), <https://apnews.com/article/latin-america-mexico-caribbean-germany-costa-rica-0e2db787358228fe308023ba259d1d3f> (“Despite having only 5 million citizens, the Central American country [Costa Rica] trailed only the United States, Germany and Mexico in the number of asylum applications it received last year, according to the United Nations High Commissioner for Refugees.”).

⁶² Moises Castillo & Christopher Sherman, *Fleeing Nicaraguans Strain Costa Rica’s Asylum System*, ASSOC. PRESS (Sept. 2, 2022), <https://apnews.com/article/covid-health-elections-presidential-caribbean-52044748d15dbbb6ca706c66cc7459a5>.

⁶³ Daina Beth Solomon & Lizbeth Diaz, *Mexico seeks to curb ‘abuse’ of asylum system by migrants who do not plan to stay*, REUTERS (Feb. 13, 2023), <https://www.reuters.com/world/americas/mexico-seeks-curb-abuse-asylum-system-by-migrants-who-do-not-plan-stay-2023-02-13/>.

⁶⁴ Diego Badillo, *Exodo a Estados Unidos, sin precedentes, convierte a Mexico en sala de espera de migrantes*, EL ECONOMISTA (Jan. 15, 2023), <https://www.economista.com.mx/politica/Exodo-a-Estados-Unidos-sin-precedentes-convierte-a-Mexico-en-sala-de-espera-de-migrantes-20230113-0069.html>.

The proposed rule posits the recent expansion of parole programs for certain nationalities as an alternative to seeking asylum.⁶⁵ But parole is a poor substitute for meaningful access to humanitarian protection for Black immigrants. The parole requirements filter immigrants based on wealth, social connections, and ability to wait safely for approval while in the country of origin—not humanitarian need for protection from persecution. Moreover, the circumstances surrounding the creation of the new parole programs evince the government’s intention to discriminate against Black asylum seekers.

Given key differences in the populations between asylum seekers and those most likely to benefit from the parole program for Cubans, Haitians, Nicaraguans, and Venezuelans, expanded pathways for parole must supplement, not replace, access to asylum. These parole programs require an applicant to secure a financial sponsor in the United States, transmit biographic and application information to the Department of Homeland Security both through an online application and the CBP One application, and secure travel to a United States port of entry, presumably with a valid foreign passport.⁶⁶ But individuals who merit asylum, by definition, are fleeing dangerous conditions in their home countries, and often are doing so urgently, due to actual harm or the imminent threat of persecution. With safety and lives at immediate risk, they do not have the luxury of remaining in their home countries for processing of a parole application. On the run from persecution, they are unable to reliably communicate with a U.S.-based sponsor. They also risk serious harm if contacting their government, the persecuting agent, for necessary travel documents like a passport.

The parole programs also favor persons with the financial means to wait safely in their home countries, purchase flights to the United States, and leverage social connections to a U.S.-based financial sponsor. Those most in need of humanitarian protection are most likely to be disqualified for parole because they have already left their countries due to risk of persecution or torture. On the move in search of safety, they are also less likely to have either the discretionary funds needed for travel or a reliable communication with a U.S. financial sponsor.

Even if granted, the temporary nature of parole leaves Black immigrants in a state of instability. Parole is valid only for a limited period of time, with renewal availability uncertain.⁶⁷ It is also subject to revocation depending on the political winds, lacking the regulatory protections that asylum has against sudden rescission.⁶⁸ Individuals granted parole still face uncertainty about their safety, due to risk of deportation back to a home country where they would again face persecution once the parole period expires.

⁶⁵ 88 Fed. Reg. 11,704, 11,711-12.

⁶⁶ USCIS, *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*, <https://www.uscis.gov/CHNV>.

⁶⁷ 88 Fed. Reg. 11,704, 11,718 (specifying that parole is valid for an initial 2-year period).

⁶⁸ 8 CFR § 208.24 (mandating procedural protections against sudden asylum revocation).

Finally, there is strong evidence of government intent to discriminate against Black asylum seekers given the contrast in features between newly created parole programs for Cubans, Haitians, Nicaraguans, and Venezuelans and the distinct program created for Ukrainians. As an initial matter, the commenters support expanded immigration pathways such as parole. But when responding to a significant humanitarian crisis, it is possible to successfully pair expanded parole with access to asylum. The government knows this, because it has already done so for immigrants from the majority-white country of Ukraine. Between March and May 2022, the United States paroled nearly all of the more than 23,000 Ukrainians who arrived at the southern border at ports of entry, granting them full access to asylum procedures.⁶⁹ Only 0.6% of Ukrainians were immediately expelled.⁷⁰ In contrast, when describing the new parole programs created for immigrants from countries with a majority or significant Black population,⁷¹ the Notice of Proposed Rulemaking emphasizes “that the incentive structure created by [parole] processes relies on the availability of an immediate consequence”: the refusal of access to asylum to those who present at the U.S. border in the manner utilized by most Ukrainians and the expansion of expedited removal.⁷²

The proposed rule comes within a recent historical context of explicitly anti-Haitian immigration policies. It would expand to other countries features of the newly created parole programs for Cubans, Haitians, Nicaraguans, and Venezuelans that have a disparate impact on Black asylum seekers—a fact the government knows, given several months of observation since those programs were initiated. And it would expand and codify a difference in treatment of people seeking humanitarian protection under the parole programs for Ukrainians versus other nationalities with majority or significant Black populations. Under the circumstances of the proposed rule’s creation, a strong inference of intent to discriminate against Black asylum seekers arises.

⁶⁹ TRAC, *Ukrainians at the US-Mexico Border: Seeking Admission at US Ports of Entry by Nationality* (May 17, 2022), <https://trac.syr.edu/immigration/reports/683/>.

⁷⁰ US Customs and Border Protection, *Nationwide Encounters*, <https://www.cbp.gov/newsroom/stats/nationwide-encounters> (expulsion statistics).

⁷¹ Given the socially constructed nature of race and differences between nations in how racial categories are constructed, exact demographic figures of national racial makeup are elusive. Sources estimate that 95% of Haitians are Black; between 35 to 62 percent of Cubans are Afro-descendant; 55% of Venezuelans are of African or mixed-African descent; and at least 9% of Nicaraguans are Black, concentrated mainly on the Caribbean coast, though “many if not most western Nicaraguans had African ancestry” (Victoria Gonzalez Rivera, *Why My Nicaraguan Father Did Not “See” His Blackness*, HAVANA TIMES (June 16, 2020), <https://havanatimes.org/opinion/why-my-nicaraguan-father-did-not-see-his-blackness/>). See Embassy of the Republic of Haiti, Washington D.C., *Haiti at a Glance*, <https://www.haiti.org/haiti-at-a-glance/>; Maria Luisa Paul, “A powder keg about to explode”: Long marginalized Afro Cubans at forefront of island’s unrest, WASH. POST (July 19, 2021), <https://www.washingtonpost.com/world/2021/07/19/cuba-protests-afro-cubans/>; Instituto Nacional de Estadística, *XIV Censo Nacional de Población y Vivienda* 29 (May 2014), <http://www.ine.gov.ve/documentos/Demografia/CensodePoblacionyVivienda/pdf/nacional.pdf>; CIA, *The World Factbook: Nicaragua* (Mar. 22, 2023), <https://www.cia.gov/the-world-factbook/countries/nicaragua/>.

⁷² 88 Fed. Reg. 11,704, 11,731.

D. The Proposed Rule Violates Domestic and International Law Prohibiting Racial Discrimination.

The proposed rule's harmful and disparate impact on Black people violates human rights law prohibiting racial discrimination in treaties that the United States has ratified. Both the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) and the International Convention on Civil and Political Rights (ICCPR) prohibit racial discrimination of the type the proposed rule would institutionalize.

Under CERD, the United States pledges to eliminate

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁷³

This pledge carries affirmative duties to “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”⁷⁴ It also obligates the United States to rescind facially neutral policies that have a disparate impact on racial minorities.⁷⁵ In this sense, the United States' CERD obligations accord with U.S. constitutional law. At a minimum, both prohibit intentional racial discrimination, which may be inferred where a facially neutral law creates otherwise inexplicable racial disparities.⁷⁶

Similarly, ICCPR guarantees the right to protection against racial discrimination in law.⁷⁷ It also protects against racial discrimination with regards to other rights contained in the

⁷³ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, art. 1 [hereinafter CERD].

⁷⁴ CERD art. 2.

⁷⁵ See generally Audrey Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet Its International Obligations in Racial Discrimination Jurisprudence* at 270-71 (discussing evidence of CERD framers' intent to prohibit disparate impact) (citing NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 1 (Sijthoff & Noordhoff 1980), <https://core.ac.uk/download/pdf/232972364.pdf>).

⁷⁶ See *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) (“Determining whether invidious discriminatory purpose exists demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”); *Casteneda v. Partida*, 430 U.S. 482 n.13 (1977) (“If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process); see also *International Convention on the Elimination of All Forms of Racial Discrimination: Hearing Before the Comm. on Foreign Rel., 103d Cong., 2d Sess.* (1994) (discussion of the Acting Secretary of the Department of State in support of CERD ratification, stating that actions having an “unjustifiable disparate impact” included unnecessary actions that caused significant statistical disparities).

⁷⁷ International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, art. 21 [hereinafter ICCPR].

Convention.⁷⁸ Those rights implicated by the proposed rule include the right to life and its protection against non-refoulement⁷⁹ and the right to a fair procedure in assessing protection against non-refoulement.⁸⁰

As discussed above, the proposed rule imposes significant burdens on Black asylum seekers that, collectively, deprive them of a meaningful opportunity to seek protection against refoulement. The proposed rule's disparate impact on Black asylum seekers violates international human rights treaties to which the United States is bound, as well as domestic constitutional and statutory obligations.⁸¹ It should therefore be withdrawn in its entirety.

V. The Proposed Rule and Comment Timeline Adversely Impact Signatory Organizations.

The Rule's proposed changes are all but certain to adversely impact the undersigned organizations. First, the undersigned organizations object to the limited 30-day comment period imposed by this Rule. In this timeline we have not been able to provide complete details about the ways in which Black migrants face discrimination and abuse in the countries singled out as purported safe-havens by the proposed rule. We have also been unable to provide significant details about how we expect this proposed rule will function in real-life credible fear interviews, information that we believe would be relevant to demonstrating the absence of fairness in the rule's proposal.

More importantly, the proposed rule would harm the asylum seekers that the undersigned organizations seek to serve. Many Black asylum seekers will not be able to access the United States at all because they will not pass a credible fear interview under the heightened standard imposed by the proposed rule. This fact will make it harder—if not impossible—for the undersigned organizations to provide legal and social services to this community. In addition, the undersigned organizations will have to significantly increase or modify their services on the Mexico side of the U.S.-Mexico Border. The proposed rule also frustrates another key component of the undersigned organizations' respective missions. As organizations we collectively seek to empower Black

⁷⁸ ICCPR art. 2(1).

⁷⁹ Santhosh Persaud, *Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights* (Nov. 2006), at 7 <https://www.unhcr.org/en-us/research/working/4552f0d82/protecting-refugees-asylum-seekers-under-international-covenant-civil-political.html> (“It suffices here to state that the right to life under Article 6 (1) enjoys protection under a duty of non-refoulement.”).

⁸⁰ *Id.* at 10 (“All asylum-seekers, whose claim is assessed by states’ authorities, therefore enjoy guarantees under Article 13.”).

⁸¹ Given the limited 30-day comment period, a full legal analysis of the international and domestic legal norms that the proposed rule violates is outside the scope of this comment. However, commenters note that the proposed rule would also violate, at a minimum, provisions of the Immigration and Nationality Act, Administrative Procedures Act, and U.S. constitutional law guaranteeing individuals the right to apply for asylum; provisions of domestic civil rights and constitutional law guaranteeing access to due process; and provisions of domestic civil rights and constitutional law guaranteeing equal protection of the law and protection against racial discrimination.

immigrants to vindicate their human rights under U.S. and international law, including the right to seek asylum. Below is a discussion of the impact of the rule on each signatory organization.

A. Haitian Bridge Alliance

The Haitian Bridge Alliance (HBA), also known as “The BRIDGE,” is a 501(c)(3) grassroots nonprofit community organization that advocates for fair and humane immigration policies and provides migrants and immigrants with humanitarian, legal, and social services, with a particular focus on Black people, the Haitian community, women and girls, LGBTQIA+ individuals, and survivors of torture and other human rights abuses. HBA’s main office is in San Diego, California, and it has office presences in Tijuana and Tapachula, Mexico.

To fulfill its mission, HBA staff regularly visits border areas in Tijuana, Mexico/San Diego, California; Reynosa, Mexico/McAllen, Texas; and Matamoros, Mexico/Brownsville, Texas. HBA works regularly with civil society partners in those locations to serve Haitian and other Black people in mobility who are trying to access legal protection from the United States and/or enter the United States. HBA regularly brings delegations of lawyers, doctors, and other volunteers to the border. The delegations provide Know Your Rights trainings and conduct interviews with individuals and family units to identify systemic issues uniquely affecting Black migrants to advocate locally, nationally, and internationally for fair and just immigration policies.

For example, in March 2023, HBA and the Center for Gender & Refugee Studies visited Tijuana, Mexico where they conducted Know Your Rights trainings and interviewed 181 individuals and family units. The interviews focused on how the Biden administration policy and proposed rule would affect the ability to seek asylum in the United States.

Since 2019, HBA has operated a legal department with a small staff of attorneys who provide direct representation to people on U.S. immigration matters, including representation for people in DHS ICE detention, people facing removal proceedings before the Executive Office of Immigration Review, and people filing applications for immigration benefits to USCIS. HBA receives funding for its direct representation of people in California on immigration matters and provides limited pro bono representation before EOIR for people in jurisdictions other than California.

In 2022, HBA’s legal department and humanitarian department partnered with civil society coalitions to work with migrant communities on the U.S.-Mexico border and DHS to facilitate advocacy for and application of humanitarian exceptions to the U.S. Title 42 Policy. Through that work, HBA developed close relationships with Black migrant communities on the border and their service providers and continues to work with those groups on facilitating access to legal protections, working to troubleshoot and advocate around issues people are facing using DHS’s CBP One App, and the Biden Humanitarian Parole Program. HBA is currently working with

Welcome.US to facilitate sponsorship connections between Haitians and sponsors in the U.S. under the Biden Parole Program.

HBA regularly works with individuals and family units who have transited through ten or more States in the Americas in order to seek relief in the United States. In October 2022, HBA led a delegation of lawyers, academics, and humanitarian workers to visit Panama to investigate the human rights situation of people while transiting through the Americas.

1. The proposed rule's impact on Haitian Bridge Alliance

If this rule is implemented, HBA anticipates having to shift operations, create new programs, secure new funding, and hire additional staff in order to fulfill our mission of serving migrant communities at the border. HBA anticipates having to dramatically expand its deportation defense and detention work, devise new Know Your Rights programs so that people attempting to enter the United States understand the new law and also receive adequate preparation for Credible Fear Interviews, and expand its humanitarian department to assist people's use of CBP One, and applications for the Biden Parole Program, and accessing medical exceptions. HBA also anticipates needing to expand its work providing language access and translation services for people on the border and in the United States.

HBA anticipates that DHS will continue to disparately deny protection and relief to Black applicants under U.S. and international law during its credible fear interview processes, expelling, removing, and/or deporting people we serve into danger, or barring people from seeking relief they are entitled to seek under international refugee law, international human rights law, and jus-cogens norms of international law.

B. Cameroon Advocacy Network

The Cameroon Advocacy Network is a coalition of organizations and activists across the United States and Cameroon, advocating for the freedom and dignity of Cameroonians seeking asylum in the United States. We stand in solidarity with all Black immigrants fighting for liberation. Founded and led by Cameroonians in the diaspora in coalition with immigration and human rights activists and advocacy organizations, we are uniquely situated to champion the freedom and dignity of Cameroonians, center the issues of black migrants, and build our communities to thrive.

C. Black Immigration Bail Fund

The Black Immigrant Bail Fund (BIBF) is a national collaborative project of the Haitian Bridge Alliance (HBA) and the African Bureau for Immigration and Social Affairs (ABISA). BIBF was founded on June 19, 2020, to combat the racism and unusual and cruel punishments faced by black migrants seeking asylum in the United States. This project provides free assistance

and relief to black immigrants pursuing liberation and justice. Since its founding, BIBF has received over 350 applications from detained migrants and bond requests reaching over \$2.5 million in need.

D. Robert F. Kennedy Human Rights

[Robert F. Kennedy Human Rights](#) (RFK Human Rights) is a nonpartisan, not-for-profit organization that has worked to realize Robert F. Kennedy's dream of a more just and peaceful world since 1968. The U.S. Advocacy and Litigation Program at RFK Human Rights partners with grassroots organizations to seek accountability for human rights abuses in the U.S. criminal legal and immigration systems and to promote fairness, equity, and dignity for all people whose lives are touched by those systems.

RFK Human Rights also works to protect the human right to apply for protection from persecution and torture by empowering asylum seekers arriving to the United States with the knowledge and resources needed to vindicate their rights under domestic and international law. The U.S. Advocacy and Litigation Program sends monthly delegations to U.S. immigration detention centers, providing Know Your Rights presentations on how to access federal courts to asylum seekers and others. It also represents detained asylum seekers seeking relief from medical neglect, prolonged detention, and denials of due process in asylum screening procedures.

VI. Conclusion

The proposed rule is the latest in a long line of asylum and immigration restrictions that inflict particular harm on Black people. Its implementation will deny Black asylum seekers protection from persecution and torture. It should be withdrawn in its entirety.

Respectfully,

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