

**March 27, 2023**

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

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Acting Director  
Border and Immigration Policy  
Office of Strategy, Policy, and Plans  
U.S. Department of Homeland Security

Lauren Alder Reid  
Assistant Director  
Office of Policy, EOIR  
U.S. Department of Justice

**Re: Joint 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 undersigned organizations—a coalition of Asian American organizations and community groups—submit this comment to the Department of Homeland Security (DHS) and the Department of Justice (DOJ) in response to the proposed rule on the Circumvention of Lawful Pathways, published on February 23, 2023.

Asian American communities are extremely diverse and hold a significant role in the history and future of the United States. Having long come to the U.S. in search of safety and the “American Dream,” Asian Americans currently make up the fastest growing racial group in the country.<sup>1</sup> Two thirds of our community members are immigrants while many others are the children of immigrants.<sup>2</sup> As a majority immigrant community with deep roots to U.S. systems of humanitarian protection, we write to express our opposition to the proposed rule and to encourage the Biden Administration to implement border policies that underscore welcome and restore full, robust, and meaningful access to asylum.

### **I. Resurrecting an Asylum Ban is Contrary to U.S. Law and Values**

The proposed rule effectively amounts to an asylum ban. 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, or 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, with some extremely limited exceptions. These factors have no basis in international and 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.

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<sup>1</sup> ASIAN AMERICANS ADVANCING JUSTICE – AAJC AND ASIAN AMERICANS ADVANCING JUSTICE – LOS ANGELES, INSIDE THE NUMBERS: HOW IMMIGRATION SHAPES ASIAN AMERICAN AND PACIFIC ISLANDER COMMUNITIES (June 2019), 20 [hereinafter INSIDE THE NUMBERS], available at [https://www.advancingjustice-aaajc.org/sites/default/files/2019-07/1153\\_AAJC\\_Immigration\\_Final\\_0.pdf](https://www.advancingjustice-aaajc.org/sites/default/files/2019-07/1153_AAJC_Immigration_Final_0.pdf).

<sup>2</sup> *Id.* at 6.

Similar bans implemented by the Trump Administration to bar immigrants from asylum protection were found unlawful and inflicted enormous and irreparable harm on immigrant communities. Repeatedly struck down by federal courts,<sup>3</sup> these previous bans sent asylum seekers back to danger, separated families, and prolonged the unnecessary and unjust jailing of immigrants.<sup>4</sup> While the Biden Administration asserts the proposed rule differentiates from the previous Administration's policies, the rule would similarly operate as a ban on asylum for immigrants based on factors that do not relate to one's fear of return and result in asylum denials for all who are unable to establish that they qualify for the extremely limited exceptions. Black, Brown and Indigenous people in search of safety at the southern border will be particularly harmed by such a ban, contradicting the Biden Administration's prior commitments to racial justice and equity.

Furthermore, the Biden Administration has only provided 30 days for the public to comment on the proposed rule, effectively denying the public the opportunity and right to meaningfully comment under the notice and comment rulemaking procedures required by the Administrative Procedure Act. On March 1, 2023, 172 organizations wrote to the agencies urging them to provide at least 60 days to comment on the complex 153-page rule that would have enormous implications for asylum access at the border and in U.S. Citizenship and Immigration Services (USCIS) and immigration court asylum proceedings.<sup>5</sup> On March 14, 2023, the Executive Office for Immigration Review (EOIR) responded to this letter and denied these organizations' request for an extension to the comment period. Allowing only 30 days for public comments on the proposed rule is reminiscent of Trump Administration practices, when agencies routinely provided 30-day comment periods on sweeping asylum rules and left the public little time to meaningfully assess and respond to its proposed rules.

## **II. Historical Significance of Refugee Resettlement and Humanitarian Relief for Asian Americans**

The search for safety and a place to call home is central to the story of many Asian Americans. While the refugee resettlement system and asylum system are legally distinct, both are motivated by a moral impulse to help those fleeing violence, danger, and death.

For decades, U.S. refugee resettlement provided a pathway of protection for refugees displaced by war, strife and volatility in Asian countries—conditions created, in part, by U.S. foreign intervention. Following American military missions that exacerbated political push factors in Vietnam, Laos, and Cambodia in the 1970s, large waves of Southeast Asian refugees were displaced from their homes and began resettling to the United States, increasing exponentially after the Refugee Act of 1980. By the end of that decade, Southeast Asians comprised more than

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<sup>3</sup> *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019); *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020); *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (N.D. Cal 2020).

<sup>4</sup> HUMAN RIGHTS FIRST, ASYLUM DENIED, FAMILIES DIVIDED: TRUMP ADMINISTRATION'S ILLEGAL THIRD-COUNTRY TRANSIT BAN 3–15 (2020), <https://humanrightsfirst.org/wp-content/uploads/2022/10/AsylumDeniedFamiliesDivided.pdf>.

<sup>5</sup> Heartland Alliance et al., *Re: Request to Provide a Minimum of 60 Days for Public Comment in Response to the Departments Joint Notice of Proposed Rulemaking (NPRM): Circumvention of Lawful Pathways* (March 1, 2023), available at <https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2023-03/Biden%20Asylum%20Ban%20-%20Extension%20letter%20to%2030-days%20comment%20period%20FINAL.pdf>.

half of all refugees in the country.<sup>6</sup> Brown University's Costs of War project also estimates that conflicts stemming from the United States' post-9/11 "War on Terror" has further resulted in the displacement of at least 37 million people,<sup>7</sup> including from countries in South Asia, the Middle East, and Africa. Between fiscal years 1975 and 2022, as U.S. intervention and proliferation of conflict in these regions continued, approximately 1,500,000 refugees from East Asia and over 470,000 refugees from the Near East and South Asia were resettled to the United States.<sup>8</sup>

The U.S. similarly intervened militarily and economically in countries throughout the Americas in the 20<sup>th</sup> century. However, refugee admissions from Latin America and the Caribbean have been significantly lower in comparison to other regions. Many people fleeing violence, conflict, and persecution in the Americas, particularly the Northern Triangle countries of El Salvador, Honduras, and Guatemala, have sought safety by requesting asylum at the U.S.–Mexico border.

While many Asian refugees were able to establish new roots in the U.S., their journeys through refugee camps before eventual resettlement were rife with danger, precarious living conditions, and uncertainty:

*"In 1981, [Sunny] fled Laos and went to Thailand with his sister, younger brother, and niece... After a few months, they were reunited with their parents and lived in Napho Refugee Camp for the next few years. As a teenager, Sunny remembers the crowded conditions, poor quality and sparse food rations, and grueling labor to run the camp... Women were at high risk of sexual assault from guards, so many young women, including Sunny's sister, got married in the camps in an attempt to avoid the guards."*<sup>9</sup>

If there had been a ban on resettling refugees who had passed through a third country like the asylum ban considered in this proposed rule, many Asian American families would have continued to languish in poor conditions at overcrowded refugee camps and would never been able to resettle in the United States. Under the proposed rule, many people would be forced to seek asylum and wait in transit countries where they would not be safe or have access to meaningful asylum procedures—similar to the dangers many of our own community members faced in refugee camps.

In Mexico, which would be a transit country for non-Mexican asylum seekers at the U.S. southern border, immigrants face life-threatening harms. There have been over 13,000 reported attacks against asylum seekers and immigrants stranded in Mexico under the Title 42 policy, and

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<sup>6</sup> SOUTHEAST ASIA RESOURCE ACTION CENTER AND ASIAN AMERICANS ADVANCING JUSTICE – LOS ANGELES, SOUTHEAST ASIAN AMERICAN JOURNEYS: A NATIONAL SNAPSHOT OF OUR COMMUNITIES 15 (2020), [https://www.searac.org/wp-content/uploads/2020/02/SEARAC\\_NationalSnapshot\\_PrinterFriendly.pdf](https://www.searac.org/wp-content/uploads/2020/02/SEARAC_NationalSnapshot_PrinterFriendly.pdf) [hereinafter NATIONAL SNAPSHOT].

<sup>7</sup> DAVID VINE ET AL., CREATING REFUGEES: DISPLACEMENT CAUSED BY THE UNITED STATES' POST-9/11 WARS 17 (2020), [https://watson.brown.edu/costsofwar/files/cow/imce/papers/2020/Displacement\\_Vine%20et%20al\\_Costs%20of%20War%202020%2009%2008.pdf](https://watson.brown.edu/costsofwar/files/cow/imce/papers/2020/Displacement_Vine%20et%20al_Costs%20of%20War%202020%2009%2008.pdf).

<sup>8</sup> WORLDWIDE REFUGEE ADMISSIONS PROCESSING SYSTEM, REFUGEE ADMISSIONS REPORT (February 28, 2023), <https://www.wrapsnet.org/admissions-and-arrivals/> [hereinafter WRAPS REFUGEE ADMISSIONS REPORT]; BUREAU OF POPULATION, REFUGEES, AND MIGRATION, FACT SHEET: U.S. REFUGEE ADMISSIONS AND RESETTLEMENT PROGRAM (2001), <https://2001-2009.state.gov/g/prm/rls/fs/2001/5412.htm>.

<sup>9</sup> NATIONAL SNAPSHOT at 17.

many of those waiting do not have access to fair asylum procedures in Mexico and are at risk of deportation to persecution in their home countries.<sup>10</sup> Black asylum seekers and immigrants face pervasive anti-Black violence, harassment, and discrimination in Mexico, including widespread abuse by Mexican authorities.<sup>11</sup>

Asylum seekers in El Salvador,<sup>12</sup> Honduras,<sup>13</sup> and Guatemala<sup>14</sup> would also face perilous conditions and barriers to accessing safety.<sup>15</sup> These countries do not have functional asylum systems that can protect large numbers of refugees, and many people transiting through these countries would be at risk of gender-based violence, anti-LGBTQI+ attacks, race-based violence, and other forms of persecution.<sup>16</sup> Forcing an asylum seeker to apply and wait for review of their asylum claim in many countries of transit, including Mexico and Central American countries, prolongs a survivor's perilous journey to finding safe haven and puts them at risk of persecution, including on the basis of the same immutable characteristics that led them to flee their home countries in the first place.

In addition to Black, Latine and Indigenous people seeking asylum at the U.S.–Mexico border, an increasing number of South Asians and Chinese immigrants have also been arriving at U.S. borders. While people fleeing persecution and violence in Asia and around the world have historically come to the U.S. through refugee resettlement, the refugee admissions program was decimated under the Trump Administration. As it rebuilds, there continue to be massive delays and only a fraction of the total number of refugees who could have resettled to the U.S. in recent years have been admitted. Many others around the world hoping to reunify with family and find stability in the U.S. had arrived through family-based immigration, a now broken system with exorbitant backlogs that have kept millions of aspiring Americans apart from their loved ones and unable to contribute to our economy and workforce.

Left with little recourse, more asylum seekers and migrants have presented themselves at U.S. borders, including people from South Asia and from China. In fiscal years 2021 and 2022, U.S. Customs and Border Protection (CBP) apprehended 17,424 Indians; 2,771 Bangladeshis; 1,383

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<sup>10</sup> HUMAN RIGHTS FIRST, HUMAN RIGHTS STAIN, PUBLIC HEALTH FARCE: EVASION OF ASYLUM LAW AND TITLE 42 ABUSE MUST END—AND NEVER BE REVIVED 2 (2022), <https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf>.

<sup>11</sup> BLACK ALLIANCE FOR JUST IMMIGRATION AND INSTITUTO PARA LAS MUJERES EN LA MIGRACIÓN, “THERE IS A TARGET ON US” – THE IMPACT OF ANTI-BLACK RACISM ON AFRICAN MIGRANTS AT MEXICO’S SOUTHERN BORDER 15-18 (2021), <https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf>.

<sup>12</sup> U.S. DEPARTMENT OF STATE, 2021 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EL SALVADOR (April 12, 2022), <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/el-salvador/>.

<sup>13</sup> U.S. DEPARTMENT OF STATE, 2021 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: HONDURAS (April 12, 2022), <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/honduras/>.

<sup>14</sup> U.S. DEPARTMENT OF STATE, 2021 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: GUATEMALA (April 12, 2022), <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/guatemala/>.

<sup>15</sup> See generally, HUMAN RIGHTS WATCH, DEPORTATION WITH A LAYOVER: FAILURE OF PROTECTION UNDER THE U.S.-GUATEMALA ASYLUM COOPERATIVE AGREEMENT (2020), <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative>.

<sup>16</sup> See OXFAM AMERICA AND TAHIRIH JUSTICE CENTER, SURVIVING DETERRENCE: HOW U.S. ASYLUM DETERRENCE POLICIES NORMALIZE GENDER-BASED VIOLENCE 14-15 (2022) (noting that there is a high risk of exposure to gender-based violence at the U.S.-Mexico border and that risks are higher for LGBTQI+ and Black immigrants), [https://www.tahirih.org/wp-content/uploads/2022/10/Oxfam\\_Tahirih\\_Surviving-Deterrence\\_English\\_2022.pdf](https://www.tahirih.org/wp-content/uploads/2022/10/Oxfam_Tahirih_Surviving-Deterrence_English_2022.pdf).

Nepalis; and 1,586 Chinese individuals at the U.S. border.<sup>17</sup> In that last fiscal year alone, CBP arrested a record high of 14,826 Indians. Despite there being an increase in Asians in search of safety, family, and opportunity in the United States, refugee resettlement rates have been quite low—with only 4 Indian, 5 Bangladeshi, 29 Nepali, and 8 Chinese refugees resettled in FY 2021 and 2022<sup>18</sup>—while immigration courts have denied asylum for about 23 percent of cases from those countries in that same period of time.<sup>19</sup>

If implemented, the proposed rule would represent a paradigm shift from the decades of welcome that have enabled many Asian American families and other refugee communities to find safety and a home in the U.S. Wealthy countries like the United States, who have had a hand in global conflicts that bear an enduring toll on the instability and insecurity of affected regions, are not offering their fair share of support to the tens of millions of displaced people, despite having the resources and infrastructure to do so. Further blocking channels to safety such as through the proposed asylum ban will bear an especially great harm on people of color fleeing from all corners of the world and seeking refuge at our border.

### **III. Expulsions Under the Proposed Asylum Ban Will Fuel Family Separation and Uncertainty**

Under the proposed asylum ban, immigrants who do not qualify for its extremely limited exceptions face being expelled and/or deported to countries they fled from, stuck in permanent limbo, and torn apart from their loved ones. The rule largely bans asylum for immigrants based on their manner of entry into the United States and travel through other countries. Under the proposed rule, an asylum ban would apply in the fundamentally flawed expedited removal process as well as in full asylum adjudications before USCIS and the immigration court, similar to the processes proposed under the Trump Administration bans.

Immigrants who are otherwise eligible for asylum but barred under the proposed rule because of their manner of entry or transit will similarly be deported to danger or—if granted the lesser forms of protection through Withholding of Removal or the Convention Against Torture (CAT)—left in permanent limbo and kept apart from their loved ones. Unlike asylum, withholding of removal and CAT protection do not allow people to petition for their spouses and children or to travel abroad, and leave them with a permanent order of removal. As a result, many immigrants who should be granted asylum under U.S. law will languish in legal limbo in the United States, indefinitely separated from spouses and/or children who remain abroad in danger.

We know from experience that forced removals in any shape or form hurt and weaken communities. While the proposed rule will carry distinct consequences for asylum seekers arriving at the border, the harm and trauma they will suffer as a result of being separated from their family members and living in a state of limbo resonate with many Asian Americans who face deportation from a country they have long called home. Today, over 15,000 Southeast Asian

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<sup>17</sup> Transactional Records Access Clearinghouse, *Border Patrol Arrest: CBP Data Through July 2022* (2022), available at <https://trac.syr.edu/phptools/immigration/cbparrest/>.

<sup>18</sup> WRAPS REFUGEE ADMISSIONS REPORT.

<sup>19</sup> Transactional Records Access Clearinghouse, *Speeding up the Asylum Process Leads to Mixed Results* (2022), available at <https://trac.syr.edu/reports/703/>.

community members have received final orders of deportation from the United States, more than 13,000 of which are based on old criminal records.<sup>20</sup> Many of these individuals have already completed their sentences and rebuilt their lives.

One of our affected community members is Ge Vang, a Hmong refugee who resettled in the U.S. in 1978 when he was eight months old. Ever since he was arrested and served time for an incident in 1996, the threat of deportation has caused fear in his daily life and could tear apart three generations of family:

*“Ge is a father of four to Damu, 19, Malaiya, 14, Jalina, 9, and Gisella, 7. He has been married to his wife for 25 years. His elderly parents live with him. Ge lives in constant fear of one day being deported to a country to which he has no ties. He doesn’t speak the language, and he has no family there. He knows there would be no job prospects other than ones that are too labor-intensive for someone his age. His kids would grow up without a father, and he would need to start a life he doesn’t want, all over again. This fear of sudden deportation permeates his family’s daily lives.”<sup>21</sup>*

Refugees living in the United States with pending deportation orders and asylum seekers at the border in expedited removal come from different circumstances but face the same threats to their wellbeing and safety. They live with anxiety and in distress over the looming threat of being forcibly sent back to danger or to the unknown, as well as the prospect of being indefinitely or forever separated from their family members and loved ones. The proposed asylum ban will only further fuel such harms and trauma for people in search of safety.

#### **IV. Our Communities Need Fair, Compassionate, and Meaningful Solutions**

The proposed rule will not address the humanitarian need of people seeking safety at the border. Rather than implement the proposed asylum ban, the Biden Administration should instead uphold refugee law, restore full access to asylum at ports of entry, ensure fair and humane asylum adjudications, and rescind the Trump Administration entry and transit bans in their entirety. Alternative solutions grounded in community-based care offer a future in which refugees and immigrants are treated with dignity and compassion, and history has shown us that Americans from all walks of life can and have successfully come together to welcome and support refugees. The story of Silong Chhun underscores the impact and success of such models of community sponsorship and care:

*“Silong’s parents struggled a lot with navigating resettlement and learning English, but thankfully, they had a strong support system in Tacoma. Their family was sponsored by a church, and other aunts and uncles who have previously been resettled in Tacoma supported them. These family members were instrumental because they had laid the groundwork for how to navigate resettlement. They learned how to apply for housing assistance and other*

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<sup>20</sup> SOUTHEAST ASIA RESOURCE ACTION CENTER, FACT SHEET: THE DEVASTATING IMPACT OF DEPORTATION ON SOUTHEAST ASIAN AMERICANS I (2018), <https://www.searac.org/wp-content/uploads/2018/04/The-Devastating-Impact-of-Deportation-on-Southeast-Asian-Americans-I.pdf>.

<sup>21</sup> Southeast Asia Resource Action Center, *Ge’s Story: Deportation Threatens to Tear Apart Three Generations of Family* (2021), available at <https://www.searac.org/our-voices/community-stories/ges-story-deportation-threatens-to-tear-apart-three-generations-of-family/>.

*programs, and passed on the knowledge to Silong’s parents. He and his family attended English classes at Tacoma Community House—the first organization in Tacoma to provide and help the refugee community—and obtained their citizenship there too. And today he works at Tacoma Community House.”<sup>22</sup>*

In addition to sponsorship partnering everyday people with resettlement agencies to support the needs of refugees resettled to the U.S., similar models of community-based care have sprung up across the country for immigrants who have recently arrived in the country in search of safety. These networks—comprised of nonprofit organizations, social and legal service providers, and local community members—exist across the country.

To address the humanitarian need of people seeking safety at the border, the Biden Administration need not and should not resort to policies that send individuals back to danger and restrict their right to seek safety here, or policies that rely on arbitrary, mass immigration detention. Instead, the United States should invest in an immigration system defined by the success and compassion of community-based care, so that people seeking safety can pursue their immigration cases and asylum claims in freedom and with loved ones. Such community-based models of support for refugees, migrants and asylum seekers have existed prior to Title 42. Solutions to concerns regarding government and community capacity can and would be better addressed through robust communication and planning between federal, state, and local governments and civil society as well as greater funding for civil society networks.<sup>23</sup>

## **V. Our Immigration System Must Be Defined by Welcome**

The undersigned organizations call on the Biden Administration to withdraw the proposed rule in its entirety. The proposed asylum ban stands contrary to U.S. law and values as well as our country’s history of welcome for people fleeing violence and persecution, and will cause untold harm and trauma as we have seen from previous iterations of this policy. Just as our community members looked to this country for safety from conflict and the opportunity to rebuild their lives in a new home, the United States must once again embrace its moral responsibility and values and welcome refugees and immigrants with dignity and compassion.

For further information, please contact Martin Kim, Associate Director of Immigration Advocacy at Asian Americans Advancing Justice | AAJC at [mkim@advancingjustice-aaajc.org](mailto:mkim@advancingjustice-aaajc.org); Lakshmi Sridaran, Executive Director of South Asian Americans Leading Together (SAALT) at [lakshmi@saalt.org](mailto:lakshmi@saalt.org); or Anna Byon, Director of National Policy at Southeast Asia Resource Action Center (SEARAC) at [anna@searac.org](mailto:anna@searac.org).

Sincerely,

South Asian Americans Leading Together (SAALT)  
Southeast Asia Resource Action Center (SEARAC)  
Asian Americans Advancing Justice | AAJC

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<sup>22</sup> NATIONAL SNAPSHOT at 79.

<sup>23</sup> See generally, NATIONAL IMMIGRANT JUSTICE CENTER, SOLUTIONS FOR A HUMANE BORDER POLICY (2023) (offering various recommendations), <https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2023-01/NIJC-Humane-Border-Solutions-January-2023.pdf>.

Asian Americans Advancing Justice – Asian Law Caucus  
Asian Americans Advancing Justice – Atlanta  
Asian Americans Advancing Justice | Chicago  
18 Million Rising  
Daya Inc.  
DRUM – Desis Rising Up & Moving  
Hindus for Human Rights  
Maitri Bay Area  
North American South Asian Law Students Association (NASALSA)  
Sadhana: Coalition of Progressive Hindus  
Sakhi for South Asian Women  
Sapna NYC  
South Asian SOAR