

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Part 208

[CIS No. 2736–22; Docket No: USCIS 2022–0016]

RIN 1615–AC83

## DEPARTMENT OF JUSTICE

### Executive Office for Immigration Review

### 8 CFR Part 1208

[A.G. Order No. 5605–2023]

RIN 1125–AB26

### Circumvention of Lawful Pathways

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (“DHS”) and the Department of Justice (“DOJ”) are issuing a notice of proposed rulemaking (“NPRM” or “proposed rule”) in anticipation of a potential surge of migration at the southwest border (“SWB”) of the United States following the eventual termination of the Centers for Disease Control and Prevention’s (“CDC”) public health Order. The proposed rule would encourage migrants to avail themselves of lawful, safe, and orderly pathways into the United States, or otherwise to seek asylum or other protection in countries through which they travel, thereby reducing reliance on human smuggling networks that exploit migrants for financial gain. It would do so by introducing a rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel. In the absence of such a measure, which would be implemented on a temporary basis, the number of migrants expected to travel without authorization to the United States is expected to increase significantly, to a level that risks undermining the Departments’ continued ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system, in the face of exceptionally challenging circumstances. Coupled with an expansion of lawful, safe, and orderly pathways into the United States, the

Departments expect the proposed rule to lead to a reduction in the numbers of migrants who seek to cross the SWB without authorization to enter, thereby reducing the reliance by migrants on dangerous human smuggling networks, protecting against extreme overcrowding in border facilities, and helping to ensure that the processing of migrants seeking protection in the United States is done in an effective, humane, and efficient manner.

**DATES:** Comments must be submitted on or before March 27, 2023. The electronic Federal Docket Management System will accept comments before midnight eastern time at the end of that day.

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

#### FOR FURTHER INFORMATION CONTACT:

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

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

#### SUPPLEMENTARY INFORMATION:

##### I. Public Participation

Interested persons are invited to submit comments on this action by submitting relevant written data, views, or arguments. To provide the most assistance to the Departments,

comments should reference a specific portion of the proposed rule; explain the reason for any recommendation; and include data, information, or authority that supports the recommended course of action. Comments must be submitted in English, or an English translation must be provided. Comments submitted in a manner other than those listed above, including emails or letters sent to the Departments’ officials, will not be considered comments on the proposed rule and may not receive a response from the Departments.

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

*Docket:* For access to the docket and to read background documents or comments received, go to <https://www.regulations.gov>, referencing the docket number listed above. You may also sign up for email alerts on the online docket to be notified when comments are posted or another **Federal Register** document is published.

##### II. Executive Summary

Economic and political instability around the world is fueling the highest levels of migration since World War II, including in the Western Hemisphere. Even while CDC’s Title 42 public health Order has been in place, encounters at our SWB<sup>1</sup>—referring to the number of

<sup>1</sup> United States Government sources refer to the U.S. border with Mexico by various terms, including “SWB,” “the southern border,” “U.S.-Mexico border,” or “the land border with Mexico.” In some instances, these differences can be substantive, referring only to portions of the border, while in others they simply reflect different word choices. The “southern border” is both a land and maritime border extending from beyond California to the west to beyond Florida to the east. This proposed rule would apply along the entirety of the U.S. land border with Mexico, referred to in the regulatory text as the “southwest land border,” but the Departments use different terms in the preamble to describe the border. This is in large part to reflect the source material supporting the proposed rule, but the Departments believe that the factual

times U.S. officials encounter noncitizens<sup>2</sup> attempting to cross the SWB of the United States without authorization to do so—have reached an all-time high, driven in large part by an unprecedented exodus of migrants from countries such as Colombia, Cuba, Ecuador, Nicaragua, Peru, and Venezuela. For the 30 days ending December 24, 2022, total daily encounters along the SWB consistently fluctuated between approximately 7,100 and 9,700 per day, averaging approximately 8,500 per day, with encounters exceeding 9,000 per day on 12 different occasions during this 30-day stretch.<sup>3</sup> Smuggling networks enable and exploit this unprecedented movement of people, putting migrants' lives at risk for their own financial gain.<sup>4</sup> Meanwhile, the current asylum system—in which most migrants who are initially deemed eligible to pursue their claims ultimately are not granted asylum in the subsequent EOIR removal proceedings<sup>5</sup>—has contributed to a growing backlog of cases awaiting review by asylum officers and immigration judges. The practical result of this growing backlog is that those deserving of protection may have to wait years for their claims to be granted, while individuals who are ultimately found not to merit protection may spend years in the United States before being issued a final order of removal. As the demographics of border encounters have shifted in recent years to include larger numbers of non-Mexicans—who are far more likely to make asylum claims—and as the time required to process and remove noncitizens ineligible for protection has grown (during which

circumstances described in the preamble call for applying the proposed rule across the entirety of the U.S. land border with Mexico.

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

<sup>3</sup>DHS Office of Immigration Statistics (“OIS”) analysis of data downloaded from the U.S. Customs and Border Protection (“CBP”) Unified Immigration Portal (“UIP”) on January 4, 2023.

<sup>4</sup>Miriam Jordan, *Smuggling Migrants at the Border Now a Billion-Dollar Business*, New York Times, July 26, 2022, <https://www.nytimes.com/2022/07/25/us/migrant-smuggling-evolution.html> (last visited Dec. 13, 2022).

<sup>5</sup>See EOIR, Executive Office for Immigration Review Adjudication Statistics: Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim (Oct. 13, 2022), <https://www.justice.gov/eoir/page/file/1062976/download> (last visited Jan. 27, 2023). The EOIR adjudication outcome statistics report on the total number of cases originating with credible fear claims resolved on any ground in a fiscal year, without regard to whether an asylum claim was adjudicated. The asylum grant rate is a percentage of that total number of cases.

time individuals become eligible to apply for employment authorization), the apprehension of border crossers has had limited deterrent effect.<sup>6</sup>

While the CDC's Title 42 public health Order<sup>7</sup> has been in effect, migrants who do not have proper travel documents have generally not been processed into the United States; they have instead been expelled to Mexico or to their home countries under the Order's authority without being processed under the authorities set forth in Title 8 of the United States Code, which includes the Immigration and Nationality Act (“INA” or “the Act”). When the Order is eventually lifted, however, the United States Government will process all such migrants who cross the border under Title 8 authorities, as statutorily required. At that time, the number of migrants seeking to cross the SWB without lawful authorization to do so is expected to increase significantly, unless other policy changes are made. Such challenges were evident in the days following the November 15, 2022, court decision that, had it not been stayed on December 19, 2022, would have resulted in vacatur of the Title 42 public health Order effective December 21, 2022.<sup>8</sup> Leading up to the expected termination date, migrants gathered in various parts of Mexico, including along the SWB, waiting to cross the border once the Title 42 public health Order was lifted.<sup>9</sup> According to internal

<sup>6</sup>For noncitizens encountered at the SWB in FY 2014–FY 2019 who were placed in expedited removal, 6 percent of Mexican nationals made fear claims that were referred to USCIS for adjudication, compared to 57 percent of people from Northern Central America, and 90 percent of all other nationalities. OIS analysis of Enforcement Lifecycle data as of September 30, 2022. Of note, according to OIS analysis of historic EOIR and CBP data, there is a clear correlation since FY 2000 between the increasing time it takes to complete immigration proceedings and the lower share of noncitizens being removed, and the growth in non-Mexican encounters at the SWB. Both trends accelerated in the 2010s, as non-Mexicans became the majority of border encounters, and they have accelerated further since FY 2021, as people from countries other than Mexico and Northern Central America now account for the largest numbers of border encounters.

<sup>7</sup>See CDC, Public Health Determination and Order Regarding Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 87 FR 19941, 19941–42 (Apr. 6, 2022) (describing the CDC's recent Title 42 orders, which “suspend[] the right to introduce certain persons into the United States from countries or places where the quarantinable communicable disease exists in order to protect the public health from an increased risk of the introduction of COVID–19”).

<sup>8</sup>See *Huisha-Huisha v. Mayorkas*, No. 21–100, 2022 WL 16948610 (D.D.C. Nov. 15, 2022), *cert. and stay granted*, *Arizona v. Mayorkas*, No. 22A544, 2022 WL 17957850 (S. Ct. Dec. 27, 2022).

<sup>9</sup>See, e.g., Leila Miller, *Asylum Seekers Are Gathering at the U.S.-Mexico Border. This Is Why*, L.A. Times (Dec. 23, 2022), <https://>

Government sources, smugglers were also expanding their messaging and recruitment efforts, using the expected lifting of the Title 42 public health Order to claim that the border was open, thereby seeking to persuade would-be migrants to participate in expensive and dangerous human smuggling schemes. In the weeks between the November announcement that the Title 42 public health Order would be lifted and the December 19 stay order that kept the Title 42 public health Order in place, encounter rates jumped from an average of 7,700 per week (early November) to 8,600 per week (mid-December).<sup>10</sup>

While a number of factors make it particularly difficult to precisely project the numbers of migrants who would seek to cross the border, without authorization, after the lifting of the Title 42 public health Order, DHS encounter projections and planning models suggest that encounters could rise to 11,000–13,000 encounters per day, absent policy changes and absent a viable mechanism for removing Cuban, Haitian, Nicaraguan, and Venezuelan (“CHNV”) nationals who do not have a valid protection claim.<sup>11</sup> Early data indicate that the recently announced enforcement processes, as applied to Cuban, Haitian, and Nicaraguan nationals,<sup>12</sup> which couple new parole

[www.latimes.com/world-nation/story/2022-12-23/la-fg-mexico-title-42-confusion](http://www.latimes.com/world-nation/story/2022-12-23/la-fg-mexico-title-42-confusion) (last visited Jan. 27, 2023).

<sup>10</sup>OIS analysis of CBP UIP data downloaded January 13, 2023.

<sup>11</sup>DHS SWB Encounter Planning Model generated January 6, 2023. The complexity of international migration limits the Department's ability to precisely project border encounters under the best of circumstances. The current period is characterized by greater than usual uncertainty due to ongoing changes in the major migration source countries (*i.e.*, the shift from Mexico and Northern Central America to new countries of origin, discussed further below), the growing impact of climate change on migration, political instability in several source countries, the evolving recovery from the COVID pandemic, and uncertainty generated by border-related litigation, among other factors.

The DHS Office of Immigration Statistics (OIS) leads an interagency SWB Encounter Projections Working Group that generates encounter projections every 2–4 weeks, using the best data and modeling available. The enterprise encounter projection utilizes a mixed method blended model that combines a longstanding subject matter expert model produced by the CBP STAT Division with a Bayesian structural time series statistical model produced by OIS. The blended model is run through a standard statistical process (Monte Carlo simulations) to generate 68 percent and 95 percent confidence intervals for each of 33 separate demographic groupings. In light of the greater-than-usual uncertainty at the current time, the Department's planning models are designed to prepare the Department for all reasonably likely eventualities, and thereby focus on the upper bounds of the blended model's 68 and 95 percent confidence intervals.

<sup>12</sup>See Part III.E of this preamble.

processes with prompt returns of those who cross the SWB without utilizing these processes, are deterring irregular migration from those countries,<sup>13</sup> thus yielding a decrease in encounter numbers. However, there are a number of factors that could contribute to these gains being erased after the lifting of the Title 42 public health Order, including the presence of several large diaspora populations in Mexico and elsewhere in the hemisphere, the unprecedented recent growth in migration from countries of origin not previously typical, the already large number of migrants in proximity to the SWB, and the general uncertainty surrounding the expected impact of the termination of the Title 42 public health Order on the movement of migrants. Thus, the high end of the estimated encounter rate remains a possibility for which the Departments need to prepare. In the absence of the policy changes included in the proposed rule, most people processed for expedited removal under Title 8 will likely establish credible fear and remain in the United States for the foreseeable future despite the fact that many of them will not ultimately be granted asylum,<sup>14</sup> a scenario that would likely incentivize an increasing number of migrants to the United States and further increase the likelihood of sustained, high encounter rates.

Such a high rate of migration risks overwhelming the Departments' ability to effectively process, detain, and remove, as appropriate, the migrants encountered. This would put an enormous strain on already strained resources; risk overcrowding in already crowded U.S. Border Patrol ("USBP") stations and border ports of entry in ways that pose significant health and safety concerns; and create a situation in which large numbers of migrants—only a small proportion of whom are likely to be granted asylum—are subject to extreme exploitation by the networks that support their movements north.

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

- account for the lawful, safe, and orderly means for noncitizens to enter the United States to seek asylum and other forms of protection,
- provide core protections for noncitizens who would be threatened

<sup>13</sup> Encounters of Cubans, Haitians, and Nicaraguans between ports of entry at the southwest border declined from 928 on January 5 (the day of the announcement) to just 92 on January 22—a decline of 92 percent. Encounters of other noncitizens began to rebound from their typical seasonal drop, increasing by 40 percent during the same period. OIS analysis of CBP UIP data downloaded January 23, 2023.

<sup>14</sup> See *infra* Section III.C.

with persecution or torture in other countries, and

- build upon ongoing efforts to share the responsibility of providing asylum and other forms of protection to deserving migrants with the United States' regional partners.

At the same time, the NPRM would address the reality of unprecedented migratory flows, the systemic costs those flows impose on the immigration system, and the ways in which a network of increasingly sophisticated smuggling networks cruelly exploit the system for financial gain. Specifically, this rule would establish a presumptive condition on asylum eligibility for certain noncitizens who fail to take advantage of the existing and expanded lawful pathways<sup>15</sup> to enter the United States, including the opportunity to schedule a time and place to present at a port of entry and thus seek asylum or other forms of protection in a lawful, safe, and orderly manner, or to seek asylum or other protection in one of the countries through which they travel on their way to the United States.

This effort draws, in part, on lessons learned from the successful Uniting for Ukraine ("U4U")<sup>16</sup> and Venezuela parole processes,<sup>17</sup> as well as the recently implemented processes for Cubans, Haitians, and Nicaraguans,<sup>18</sup> under which DHS coupled a mechanism for noncitizens from these countries to seek entry into the United States in a lawful, safe, and orderly manner, with the imposition of new consequences for those who cross the border without authorization to do so—namely returns to Mexico.<sup>19</sup> Prior to the implementation of these processes, the Government of Mexico had not been willing to accept the return of such nationals; the Government of Mexico's decision to do so was predicated, in

<sup>15</sup> The term "lawful pathways," as used in this preamble, refers to the range of pathways and processes by which migrants are able to enter the United States or other countries in a lawful, safe, and orderly manner and seek asylum and other forms of protection.

<sup>16</sup> See DHS, *Uniting for Ukraine* (Sept. 16, 2022), <https://www.dhs.gov/ukraine> (last visited Dec. 13, 2022); DHS, *Implementation of the Uniting for Ukraine Parole Process*, 87 FR 25040 (Apr. 27, 2022).

<sup>17</sup> See DHS, *DHS Announces New Migration Enforcement Process for Venezuelans* (Oct. 12, 2022), <https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans> (last visited Dec. 13, 2022); see also DHS, *Implementation of a Parole Process for Venezuelans*, 87 FR 63507 (Oct. 19, 2022).

<sup>18</sup> These processes are further discussed in Part III.E of this preamble.

<sup>19</sup> While the Title 42 public health Order has been in place, those returns have been made under Title 42. When the Title 42 public health Order is lifted, the affected noncitizens will instead be subject to removal to Mexico under Title 8.

primary part, on the implementation of these processes.

Prior to the announcement of U4U, for example, thousands of Ukrainian migrants, fleeing their country in the wake of Russia's unprovoked war of aggression, arrived at ports of entry along the SWB seeking entry into the United States. A large informal encampment formed in Tijuana, Mexico, and Ukrainian encounters averaged just under 940 per day in the two weeks prior to the announcement of U4U.<sup>20</sup> After U4U launched and Ukrainian citizens with approved applications were provided the option to fly directly into the United States—coupled with the return to Mexico pursuant to the Title 42 public health Order of Ukrainians who sought to cross irregularly at the land border—daily SWB encounters of Ukrainians dropped to an average of just over 12 per day in the two weeks ending May 10, 2022.<sup>21</sup>

Similarly, within a week of the announcement of the Venezuela parole process on October 12, 2022, the number of Venezuelans encountered at the SWB fell drastically, from an average of over 1,100 a day from October 5–11 to under 200 per day from October 18–24, and further declined to 67 per day as of the week ending November 29, 2022, and 28 per day the week ending January 22.<sup>22</sup> Similarly, the number of Cuban, Haitian, and Nicaraguan nationals encountered dropped significantly in the wake of the new processes being introduced, which coupled a lawful, safe, and orderly way for such nationals to seek parole in the United States with consequences (in the form of prompt returns to Mexico) for those who nonetheless crossed the SWB without authorization. Between the announcement of these processes on January 5, 2023, and January 21, the number of daily encounters between ports of entry of Cuban, Haitian, and Nicaraguan nationals dropped from 928 to 92, a 92 percent decline.<sup>23</sup>

This NPRM, which draws on these successful processes, would position the Departments to implement a temporary measure that would discourage irregular migration<sup>24</sup> by encouraging migrants to

<sup>20</sup> OIS analysis of data pulled from CBP UIP on December 9, 2022.

<sup>21</sup> *Id.*

<sup>22</sup> USBP encountered an average of 225 Venezuelans per day in November 2022 and 199 per day in December 2022. OIS analysis of data pulled from CBP UIP on January 23, 2023. Data are limited to USBP encounters to exclude those being paroled in through ports of entry.

<sup>23</sup> OIS analysis of data pulled from CBP UIP on January 23, 2023.

<sup>24</sup> In this NPRM, "irregular migration" refers to the movement of people into another country without authorization.

use lawful, safe, and orderly pathways and allowing for swift returns of migrants who bypass lawful pathways, even after the termination of the Title 42 public health Order. It would respond to the expected increase of migrants seeking to cross the SWB following the termination of the Title 42 public health Order that would occur in the absence of a policy shift, by encouraging reliance on lawful, safe, and orderly pathways, thereby shifting the relevant incentives that otherwise encourage migrants to make a dangerous journey to the border. It would also be responsive to the requests of foreign partners that have lauded the sharp reductions in irregular migration associated with the aforementioned process for Venezuelans and have urged that the United States continue and build on this kind of approach, which couples processes for individuals to travel directly to the United States with consequences at the land border for those who do not avail themselves of these processes. The United States has, as noted above, already extended this model to Cuba, Haiti, and Nicaragua. The Departments assess that continuing to build on this approach is critical to our ongoing engagements with regional partners, in particular the Government of Mexico, regarding migration management in the region.

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

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

In addition, once the Title 42 public health Order is terminated, the United States will expand implementation of the CBP One application (“CBP One app”), an innovative mechanism for noncitizens to schedule a time to arrive at ports of entry at the SWB, to allow an increasing number of migrants who may wish to claim asylum to request an available time and location to present and be inspected and processed at certain ports of entry, in accordance with operational limitations at each port of entry.<sup>25</sup> Use of this app protects

<sup>25</sup> As of January 12, 2023, this mechanism is currently available for noncitizens seeking to cross SWB land ports of entry to request a humanitarian

migrants from having to wait in long lines of unknown duration at the ports of entry, and enables the ports of entry to manage the flows in a safe and efficient manner, consistent with their footprint and operational capacity, which vary substantially across the SWB. Once present in the United States, those who enter through this mechanism would be able to make claims for asylum and other forms of protection and would be exempted from this proposed rule’s rebuttable presumption on asylum eligibility. They would be vetted and screened, and assuming no public safety or national security concerns, would be eligible to apply for employment authorization after crossing the border as they await resolution of their cases.<sup>26</sup>

These and other available pathways increase the accessibility of humanitarian protection and other immigration benefits in ways that provide a lawful, safe, and orderly mechanism for migrants to make their protection claims. Consistent with U4U and the CHNV processes, this proposed rule would also position the Departments to impose consequences on certain noncitizens who fail to avail themselves of the range of lawful, safe, and orderly means for seeking protection in the United States or elsewhere. Specifically, this proposed rule would establish a rebuttable presumption that certain noncitizens who enter the United States without documents sufficient for lawful admission are ineligible for asylum, if they traveled through a country other than their country of citizenship, nationality, or, if stateless, last habitual residence, unless they were provided appropriate authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process; presented at a port of entry at a pre-scheduled time or demonstrate that the mechanism for scheduling was not possible to access or use; or sought asylum or other protection in a country through which they traveled and received a final decision denying that

exception from the Title 42 public health Order. See CBP, Fact Sheet: Using CBP One™ to Schedule an Appointment (last modified Jan. 12, 2023), <https://www.cbp.gov/document/fact-sheets/cbp-one-fact-sheet-english> (last visited Jan. 13, 2023). Once the Title 42 public health Order is terminated, and the ports of entry open to all migrants who wish to seek entry into the United States, this mechanism will be broadly available to migrants in central and northern Mexico, allowing them to request an available time and location to present and be inspected and processed at certain ports of entry.

<sup>26</sup> Under current employment authorization regulations, there is no waiting period before a noncitizen parolee in this circumstance may apply for employment authorization. See 8 CFR 274a.12(c)(11).

application. This presumption could be rebutted, and would necessarily be rebutted if, at the time of entry, the noncitizen or a member of the noncitizen’s family had an acute medical emergency; faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder;<sup>27</sup> or satisfied the definition of “victim of a severe form of trafficking in persons” provided in 8 CFR 214.11. The presumption also would be rebutted in other exceptionally compelling circumstances, as the adjudicators may determine in the sound exercise of the judgment permitted to them under the proposed rule. Unaccompanied children would be excepted from this presumption.

The rebuttable presumption would be a “condition[ ]” on asylum eligibility, INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B), that would apply in affirmative and defensive asylum application merits adjudications, as well as during credible fear screenings. Individuals subject to the rebuttable presumption would remain eligible for statutory withholding of removal and protection under the regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).<sup>28</sup>

With the availability to schedule a time and place to arrive at U.S. ports of entry and other lawful pathways, this proposed system is designed to protect against an unmanageable flow of migrants arriving at the SWB; ensure that those with valid asylum claims have an opportunity to have their claims heard, whether in the United States or elsewhere; enable the Departments to continue administering the immigration laws fairly and effectively; and reduce the role of exploitative transnational criminal organizations and smugglers.

The Departments propose that the rule would apply to noncitizens who enter the United States without authorization at the southwest land border on or after the date of termination of the Title 42 public health Order and before a specified sunset date, 24 months from the rule’s effective

<sup>27</sup> The term “imminent” refers to the immediacy of the threat; it makes clear that the threat cannot be speculative, based on generalized concerns about safety, or based on a prior threat that no longer poses an immediate threat. The term “extreme” refers to the seriousness of the threat; the threat needs to be sufficiently grave, such as a threat of rape, kidnapping, torture, or murder, to trigger this ground for rebuttal.

<sup>28</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 114.

date. After the sunset date, the rule would continue to apply to such noncitizens during their Title 8 proceedings. The Departments intend that the rule would be subject to a review prior to its scheduled termination date, to determine whether the rebuttable presumption should be extended, modified, or sunset as provided in the rule.

Issuance of this rule is justified in light of the migration patterns witnessed in late November and December of 2022, and the concern about the possibility of a surge in irregular migration upon, or in anticipation of, the eventual lifting of the Title 42 public health Order. The Departments seek to obtain public comment on the proposal and to avoid any misimpression that migrants will be able to cross the border without authorization, and without consequence, upon the eventual lifting of the Order. Under this proposed rule the Departments would use their Title 8 authorities to process, detain, and remove, as appropriate, those who cross the SWB without authorization and do not have a valid protection claim.

The Departments are issuing this proposed rule with a 30-day comment period because they seek to be in a position to finalize the proposed rule, as appropriate, before the Title 42 public health Order is lifted. The lifting of the Order could occur as a result of several different litigation and policy developments, including the vacatur of the preliminary injunction entered in *Louisiana v. CDC*, No. 22-cv-885, 2022 WL 1604901 (W.D. La. May 20, 2022), *appeal pending*, No. 22-30303 (5th Cir.); the lifting of the stay entered by the Supreme Court in *Arizona v. Mayorkas*, No. 22A544, 2022 WL 17957850 (U.S. Dec. 27, 2022); or “the expiration of the Secretary of HHS’ declaration that COVID-19 constitutes a public health emergency,” 86 FR at 42829. The termination of the Secretary of HHS’ declaration that COVID-19 constitutes a public health emergency is expected to occur on May 11, 2023 in light of the recent announcement that “[a]t present, the Administration’s plan is to extend” the public health emergency to May 11 and then end it on that date, Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administration Policy (Jan. 30, 2023), available at <https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf>. The Departments are thus seeking to move as expeditiously as possible, while also allowing sufficient time for public comment. For similar reasons, the Departments may conclude that it is necessary to shorten or forgo

the standard 30-day delay in the final rule’s effective date. In addition, if, prior to the issuance of the final rule, the Title 42 public health Order is lifted or encounter rates rise significantly (even without the lifting of the Title 42 public health Order), the Departments intend to take appropriate action, consistent with the Administrative Procedure Act (“APA”), which may include issuance of a temporary or interim final rule similar to this NPRM while the Departments complete the notice-and-comment rulemaking process.

The Departments are requesting comments on all aspects of the NPRM and particularly welcome comments addressing the following issues:

- Whether the proposed duration of the rule should be modified, including whether it should be shorter, longer, or of indefinite duration;
- Whether the Departments should modify, eliminate, or add to the proposed grounds for necessarily rebutting the rebuttable presumption;
- Whether the Departments should modify, eliminate, or add to the proposed exceptions to the rebuttable presumption;
- Whether the proposed mechanisms for evaluating asylum, statutory withholding, and CAT claims should be retained or modified;
- Whether any further regulatory provisions should be added or amended to address the application of the rebuttable presumption in adjudications that take place after the rule’s sunset date; and
- Whether the proposed rule appropriately provides migrants a meaningful and realistic opportunity to seek protection.

In addition, although the Departments have not identified any persons or entities with justifiable reliance interests in the status quo concerning eligibility for asylum—which is an entirely discretionary benefit—the Departments welcome comments on the existence of reliance interests and the best ways to address them.

### III. Background

#### A. Migratory Trends

Political and economic instability, coupled with the lingering adverse effects of the COVID-19 global pandemic, have fueled a substantial increase in migration throughout the world. This global increase is reflected in the trends on our border, where we have experienced a sharp increase in encounters of non-Mexican nationals over the past two years, and particularly in the final months of 2022. Throughout the 1980s and into the first decade of

the 2000s, encounters along the SWB routinely numbered in excess of one million per year, with USBP averaging 1.2 million encounters per year from Fiscal Year (“FY”) 1983 through FY 2006.<sup>29</sup> By the early 2010s, three decades of investments in border security and strategy contributed to reduced border flows, with USBP averaging fewer than 400,000 encounters per year from 2011–2018.<sup>30</sup> These gains were subsequently reversed, however, as USBP SWB encounters more than doubled between 2017 and 2019 to reach a 12-year high.<sup>31</sup> Following a steep drop in the first months of the COVID-19 pandemic, encounters almost doubled again in 2021 as compared to 2019, increased by an additional one-third between 2021 and 2022, and reached an all-time high of 2.2 million USBP SWB encounters in FY 2022.<sup>32</sup> Encounters in the first quarter of FY 2023 (October–December 2022) exceeded the same period in FY 2022 by more than a third, and non-Mexican encounters in this same period were up 61 percent over the previous year.<sup>33</sup> (See Figure 1, below.)

#### 1. Changing Demographics

Shifts in migrants’ demographics have accelerated the increase in flows. Border encounters in the 1980s and 1990s consisted overwhelmingly of single adults from Mexico, most of whom were migrating for economic reasons.<sup>34</sup> Beginning in the 2010s, a growing share of migrants have been from Northern Central America (“NCA”) <sup>35</sup> and, since the late 2010s, from countries throughout the Americas.<sup>36</sup> As the

<sup>29</sup> OIS analysis of historic USBP data. Encounter data prior to 2005 are only available for U.S. Border Patrol. All numbers in this paragraph are likewise therefore limited to USBP encounters.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* As discussed in the following section, encounter data from March 2020 through the current data somewhat overstate flows to the border since repeat encounters have been markedly higher during the period that Title 42 expulsions have been completed.

<sup>33</sup> OIS Persist data through December 31, 2022.

<sup>34</sup> According to historic OIS Yearbooks of Immigration Statistics, Mexican nationals accounted for 96 to over 99 percent of apprehensions of persons entering without inspection between 1980 and 2000. On Mexican migrants from this era’s demographics and economic motivations, see Jorge Durand et al., “The New Era of Mexican Migration to the United States,” 86 *The Journal of American History*, no. 2, 518 (1999) (addressing the demographics and economic motivations of Mexican migrants from this era).

<sup>35</sup> Northern Central America refers to El Salvador, Guatemala, and Honduras.

<sup>36</sup> According to OIS Production data, Mexican nationals continued to account for 89 percent of total SWB encounters in FY 2010, with Northern Central Americans accounting for 8 percent and all

make-up of border crossers has expanded from Mexican single adults to single adults and families from throughout the hemisphere (and beyond), the number of encounters has increased; those encountered also have been more likely to seek asylum and other forms of relief.<sup>37</sup>

The application of Title 42 authorities at the land border also has altered migratory patterns, in part by incentivizing individuals who are expelled—without being issued a removal order, which, unlike a Title 42 expulsion order, carries immigration consequences<sup>38</sup>—to try to re-enter, often multiple times.<sup>39</sup> For this reason, the growth in encounters since 2021 is best assessed by comparing unique encounters—defined as the number of individuals who are encountered in a

other nationalities for 3 percent. Northern Central Americans' share of total encounters increased to 21 percent by FY 2012 and averaged 46 percent in FY 2014–FY 2019, the last full year before the start of the COVID-19 pandemic. All other countries accounted for an average of 5 percent of total SWB encounters in FY 2010–FY 2013, and for 10 percent of total encounters in FY 2014–FY 2019.

<sup>37</sup> For noncitizens encountered at the SWB in FY 2014–FY 2019 who were placed in expedited removal, 6 percent of Mexican nationals made fear claims that were referred to USCIS for adjudication compared to 57 percent of people from Northern Central America and 90 percent of all other nationalities. OIS analysis of Enforcement Lifecycle data as of September 30, 2022.

<sup>38</sup> For example, subject to certain exceptions, noncitizens ordered removed pursuant to expedited removal (INA section 235(b)(1), 8 U.S.C. 1225(b)(1)) or section 240 (8 U.S.C. 1229a) removal proceedings initiated at the time of arrival in the United States are inadmissible for five years after the date of removal. INA 212(a)(9)(A)(i), 8 U.S.C. 1182(a)(9)(A)(i). Noncitizens previously removed pursuant to expedited removal orders or section 240 removal orders who enter or attempt to re-enter the United States without being admitted are also inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the INA, 8 U.S.C. 1182(a)(9)(C)(i)(II). Such noncitizens may be subject to reinstatement of such a prior order of removal upon subsequent illegal re-entry. INA 241(a)(5), 8 U.S.C. 1231(a)(5).

<sup>39</sup> According to OIS analysis of OIS Persist Data through June 30, 2022, a total of 39 percent of noncitizens expelled under the Title 42 authority between March 2020 and May 2022 were re-encountered within one month, compared to 5 percent of those repatriated after issuance of a removal order issued pursuant to Title 8 authorities; and 12-month re-encounter rates were 47 percent for Title 42 expulsions compared to 14 percent for Title 8 repatriations. Persons expelled under the Title 42 authority were more likely to be re-encountered than those repatriated after issuance of a removal order issued pursuant to Title 8 authorities, regardless of citizenship or family status.

given year, instead of the total number of encounters, which can include a single migrant who sought to enter multiple times and is counted as an encounter each time—in recent months to those in the pre-pandemic period of FY 2014–FY 2019.<sup>40</sup>

The number of unique encounters increased sharply in FY 2021 to 1,126,888 (and 1,734,683 total encounters) from an average of 471,216 unique encounters (and 581,045 total encounters) per year in FY 2014–FY 2019.<sup>41</sup> Notably, both the number and percentage of unique encounters from countries other than Mexico and NCA contributed to a big share of this increase, rising sharply in FY 2021 to 322,123 (representing 29 percent of unique encounters), from an average of 40,549 per year (8 percent of unique encounters) in FY 2014–FY 2019.<sup>42</sup> This trend continued in FY 2022, with unique encounters reaching 1,741,506 (2,378,945 total encounters). This increase was largely driven by nationals of countries other than Mexico and NCA, accounting for 972,191 unique encounters (1,028,987 total encounters) in FY 2022 (56 percent of unique encounters; 43 percent of total encounters) and 424,530 unique encounters (442,932 total encounters) in the first three months of FY 2023 (71 percent of unique encounters; 62 percent of total encounters).<sup>43</sup> Migrant populations from these newer source countries have included large numbers of families and children.<sup>44</sup>

<sup>40</sup> The period FY 2014–FY 2019 is chosen as the comparison period because these were the first years in which non-Mexicans consistently accounted for a large and growing share of SWB encounters. The period since FY 2021 focuses on *unique* encounters, defined as persons not previously encountered in the 12 months prior to the referenced encounter date, because Title 42 has contributed to much higher repeat encounter rates, as 28 percent of SWB encounters since April 2020 have been repeat encounters, where repeat encounters are defined as encounters of individuals previously encountered in the preceding 12 months, compared to 15 percent of SWB encounters in FY 2013 through February 2020. OIS Persist Dataset based on data through December 31, 2022. (Detailed data on repeat versus unique encounters are not available before FY 2013.)

<sup>41</sup> OIS Persist Dataset based on data through December 31, 2022.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> A total of 65 percent of unique NCA encounters and 40 percent of all other unique non-Mexican encounters were unaccompanied children or family

Much of this shift is driven by a significant increase in unique encounters of CHNV nationals, which jumped more than ten-fold from an average of 15,557 in FY 2014–FY 2019 to 169,436 in FY 2021, with total CHNV encounters increasing from an average of 33,095 to 184,716.<sup>45</sup> CHNV unique encounters increased sharply again in FY 2022 to 605,690 (626,410 total encounters), constituting 35 percent of all unique encounters in FY 2022 and 26 percent of total encounters that year.<sup>46</sup> Overall, unique encounters of CHNV nationals rose 257 percent between FY 2021 and FY 2022 (with total CHNV encounters rising 239 percent), unique encounters of Brazilians, Colombians, Ecuadorans, and Peruvians increased 100 percent (with total encounters increasing 56 percent), and unique encounters of Mexican and NCA nationals fell 4 percent (with total encounters falling 0.5 percent).<sup>47</sup> These trends continued in the first 3 months of FY 2023, with CHNV countries accounting for 40 percent of unique encounters October–December 2022 and Brazilians, Colombians, Ecuadorans, and Peruvians climbing to 19 percent.<sup>48</sup> (See Figure 2, below.)

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### Figure 1: SWB U.S. Border Patrol Encounters, FY 1960–FY 2022

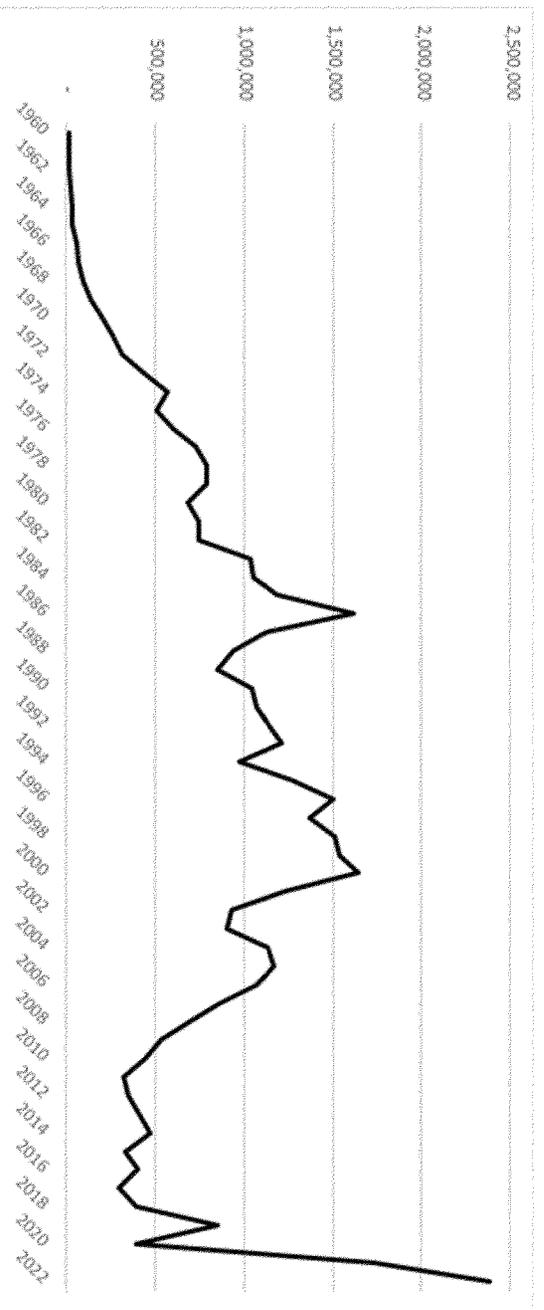
unit individuals in FY 2021–FY 2023Q1, compared to 13 percent of unique Mexican encounters. OIS Persist Dataset based on data through December 31, 2022.

<sup>45</sup> OIS Persist Dataset based on data through December 31, 2022.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* Of note, OIS utilizes a rigorous record matching methodology to generate unique encounter data, and the program is only run monthly upon receipt of CBP's official monthly encounter data. (The official encounter data are also only produced monthly after the real-time data go through extensive quality control.) OIS has only extended its person-level record matching back to 2013. For these reasons, unique encounter records are only available for encounters occurring between 2013 and December 2022. Most references in this preamble report on total encounter data, instead of unique encounter data, since it allows analysis of more recent numbers as well as longer historic comparisons. To the extent we are relying on unique encounters, the text will explicitly say so.

<sup>48</sup> *Id.*

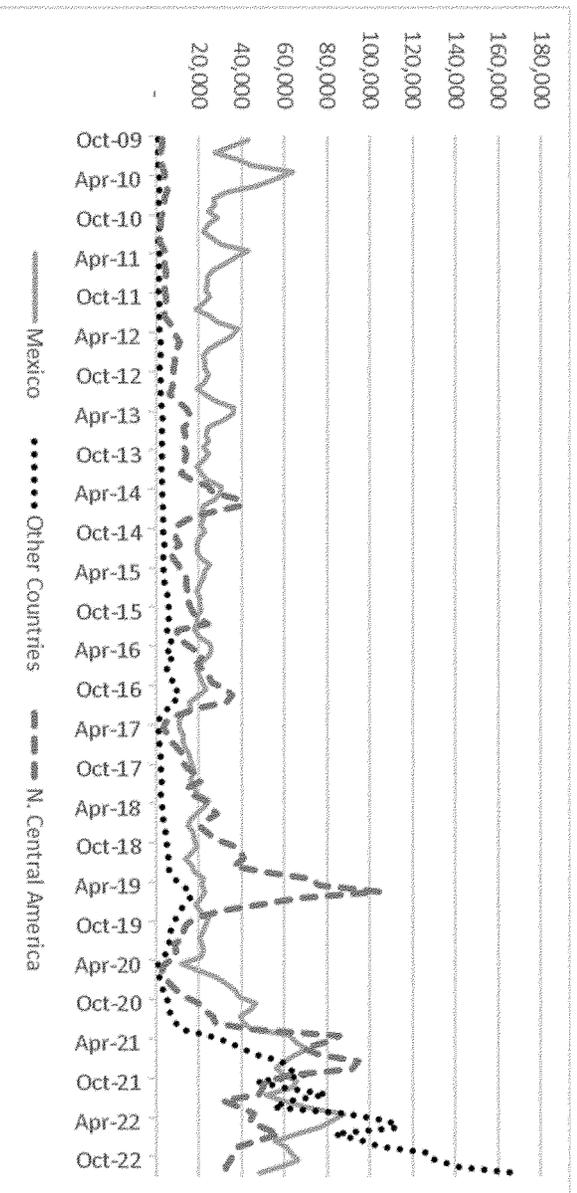


**Note:** Figure is limited to U.S. Border Patrol encounters because Office of Field Operations data are unavailable prior to

2005. Border Patrol encounters account for 87 percent of SWB encounters since FY 2009.

Source: OIS analysis of CBP data and OIS Production data through December 31, 2022.

**Figure 2: Total SWB Encounters by Selected Citizenships, FY 2010–December 2022**



Source: OIS Production data through December 31, 2022.

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## 2. Impact on Regional Partners

These migratory flows have affected every country throughout the Western Hemisphere. In the first nine months of 2022 alone, the Government of Colombia encountered over 170,000 Venezuelan migrants; as of September 2022, there were nearly 2.5 million Venezuelans living in Colombia, compared to 1.7 million in September 2021, representing an increase of approximately 800,000 in just one

year.<sup>49</sup> From January through October 2022, the Government of Panama encountered approximately 210,000 irregular migrants having crossed through the Darién Gap—a dangerous 100-kilometer stretch of dense jungle between Colombia and Panama, which is particularly notorious for the violence of the human smugglers operating in

<sup>49</sup> R4V, Regional Refugee and Migrant Response Plan 2023–2024 (Nov. 30, 2022), <https://www.r4v.info/en/rmp/2023-2024> (last visited Dec. 15, 2022); R4V, Refugees and Migrants from Venezuela (Dec. 12, 2022), <https://www.r4v.info/en/refugeeandmigrants> (last visited Dec. 15, 2022).

lawless stretches of jungle<sup>50</sup>—with nearly 60,000 migrants crossing into Panama irregularly via the Darién Gap in October 2022 alone, a sharp increase compared to the almost 5,000 migrants encountered in January 2022.<sup>51</sup> The

<sup>50</sup> Refugees International, *Life on the Edge of the Darién Gap* (June 16, 2022) <https://www.refugeesinternational.org/reports/2022/6/16/life-on-the-edge-of-the-darien-gap> (last visited Dec. 15, 2022); United Nations Office on Drugs and Crime, *Abused and Neglected: A Gender Perspective on Aggravated Migrant Smuggling Offences and Response*, [https://www.unodc.org/documents/human-trafficking/2021/Aggravated\\_SOM\\_and\\_Gender.pdf](https://www.unodc.org/documents/human-trafficking/2021/Aggravated_SOM_and_Gender.pdf) (last visited Dec. 11, 2022).

<sup>51</sup> Government of Panama, *Irregulares en Tránsito Frontera Panamá-Colombia 2022*, <https://>

Costa Rican migration agency similarly reports that 3,700 migrants were arriving every single day at Costa Rica's border with Panama in October 2022.<sup>52</sup> Meanwhile, the number of displaced Nicaraguans in Costa Rica doubled in an eight-month period, reaching more than 150,000 in February 2022, before the same figure increased to approximately 200,000 by June 2022.<sup>53</sup> Nicaraguans also claimed asylum in Mexico at three times the rate in 2022 as compared to 2021<sup>54</sup> and, as discussed above, are being encountered on our border at an unprecedented rate.

Mexico has similarly experienced a sharp increase in irregular migration in recent months. In October 2022, the Government of Mexico encountered more than 50,000 irregular migrants, almost doubling the numbers encountered only a few months earlier.<sup>55</sup> This increase was driven largely by a dramatic rise in Venezuelan encounters, which rose from about 1,200 in February 2022 to more than 20,000 in October 2022.<sup>56</sup> In addition to Venezuela and the NCA countries, Mexico also saw consistently high volumes from a wide range of countries in the Western Hemisphere, including Brazil, Colombia, Cuba, Ecuador, Nicaragua, and Peru.<sup>57</sup> From January to October 2022, some 350,000 irregular migrants have been encountered in Mexico, which is already more than it encountered in all of calendar year 2021.<sup>58</sup>

[www.migracion.gob.pa/images/img2022/PDF/IRREGULARES\\_%20POR\\_%20DARI%C3%89N\\_NOVIEMBRE\\_2022.pdf](http://www.migracion.gob.pa/images/img2022/PDF/IRREGULARES_%20POR_%20DARI%C3%89N_NOVIEMBRE_2022.pdf) (last visited Dec. 11, 2022).

<sup>52</sup> Michael D. McDonald, *The American Dream Is Over for Venezuelans Stranded in Costa Rica*, Bloomberg, Oct. 27, 2022, <https://www.bloomberg.com/news/articles/2022-10-27/american-dream-is-over-for-venezuelans-stranded-in-costa-rica> (last visited Dec. 13, 2022).

<sup>53</sup> Boris Cheshirkov, *Number of Displaced Nicaraguans in Costa Rica Doubles in Less than a Year*, UNHCR, Mar. 25, 2022, <https://www.unhcr.org/news/briefing/2022/3/623d894c4/number-displaced-nicaraguans-costa-rica-doubles-year.html> (last visited Dec. 13, 2022); UNHCR, *Costa Rica Fact Sheet September 2022* (Oct. 30, 2022), <https://reliefweb.int/report/costa-rica/costa-rica-fact-sheet-september-2022> (last visited Dec. 13, 2022) (“As of June 30, 2022, Costa Rica was hosting 215,933 people of concern: of these, 11,205 are refugees and 204,728 asylum seekers, the majority Nicaraguans (89%).”).

<sup>54</sup> See Government of Mexico, *La COMAR en Números* (Dec. 2022), [https://www.gob.mx/cms/uploads/attachment/file/792337/Cierre\\_Diciembre-2022\\_31-Dic.\\_1.pdf](https://www.gob.mx/cms/uploads/attachment/file/792337/Cierre_Diciembre-2022_31-Dic._1.pdf) (last visited Feb. 1, 2023).

<sup>55</sup> Government of Mexico, *Events of People in an Irregular Migratory Situation in Mexico by Continent and Country of Nationality, 2022* (Cuadro 3.1.1), <http://www.politicamigratoria.gob.mx/es/PoliticaMigratoria/CuadrosBOLETIN?Anual=2022&Secc=3> (last visited Dec. 11, 2022).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

The increased flow of Venezuelans and Nicaraguans has posed a particular concern for the region, as neither government accepts the repatriation of their nationals at anywhere near the scale at which they are currently migrating. Colombia is hosting more than 2 million Venezuelans and has granted temporary protection to 1.5 million; Peru is hosting 1.5 million Venezuelans, including over 500,000 asylum seekers; Brazil and Chile are hosting 380,000 Haitians; and Costa Rica is hosting more than 200,000 Nicaraguans and recently announced its intention to grant Nicaraguans and Venezuelans temporary protection.<sup>59</sup>

### 3. Venezuela Process

As described above, on October 12, 2022, in an effort to address the significant increase in Venezuelan migrants, the United States and Mexico jointly announced a new process that was modeled on the successful U4U process, seeking to incentivize Venezuelans to use a new lawful process to come to the United States and disincentivize them from traveling to the U.S.-Mexico land border. Specifically, the Venezuela process allows eligible Venezuelan nationals, and their family members, to request an advance authorization to travel to the United States, which, if issued, allows them to travel to the United States to be considered for a case-by-case determination of parole by U.S. Customs and Border Protection (“CBP”) officers. The initiation of this process was paired with a decision by the Mexican Government to accept the return (under the Title 42 public health Order currently in place) of Venezuelans who sought to cross the U.S.-Mexico border irregularly. The United States Government is currently in close

<sup>59</sup> UNHCR, *Colombia Operational Update: January-February 2022* (Mar. 19, 2022), <https://reliefweb.int/report/colombia/colombia-operational-update-january-february-2022> (last visited Dec. 4, 2022); The White House, *Fact Sheet: The Los Angeles Declaration on Migration and Protection U.S. Government and Foreign Partner Deliverables* (June 10, 2022) (“L.A. Declaration Fact Sheet”), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/fact-sheet-the-los-angeles-declaration-on-migration-and-protection-u-s-government-and-foreign-partner-deliverables/> (last visited Dec. 13, 2022); UNHCR, *Peru*, <https://reporting.unhcr.org/peru> (last visited Dec. 11, 2022); Migration Policy Institute, *Haitian Migration through the Americas: A Decade in the Making* (Sept. 30, 2021), <https://www.migrationpolicy.org/article/haitian-migration-through-americas> (last visited Dec. 13, 2022); Alvaro Murillo et al., *Costa Rica Prepares Plan to Regularize Status of 200,000 Mostly Nicaraguan Migrants*, Reuters, Aug. 10, 2022, <https://www.reuters.com/world/americas/costa-rica-prepares-plan-regularize-status-200000-mostly-nicaraguan-migrants-2022-08-10/> (last visited Dec. 13, 2022).

consultation with the Government of Mexico, as well as other foreign partners, to accept the return of third-country nationals under Title 8 authorities, including Venezuelan nationals, subsequent to the lifting of the Title 42 public health Order.

The Venezuela process has had a profound impact on the movement of Venezuelan migrants throughout the region. In the week leading up to the October 12, 2022, announcement, the United States was encountering approximately 1,100 Venezuelans between ports of entry at its SWB every day; numbers fell sharply within weeks and averaged 67 Venezuelans per day the week ending November 29, 2022, and 28 per day the week ending January 22, 2023.<sup>60</sup> Panama's daily encounters of Venezuelans also declined significantly in the wake of the parole process, falling some 88 percent, from 4,339 on October 16, 2022, to 532 by the end of that month. In October 2022, there were a total of 59,773 migrants who irregularly entered Panama; as a result of the sharp decline in Venezuelan migration, Panama encountered 16,632 migrants in November.<sup>61</sup>

The success of the Venezuela process provided a model for the subsequently announced Cuban, Haitian, and Nicaragua processes and supports this proposed rule. These processes demonstrate that the availability of processes to enter the United States in an orderly manner, coupled with consequences imposed on those who bypass lawful pathways, can significantly change migratory patterns in ways that protect migrants from a dangerous journey, reduce the role of pernicious smuggling networks, and respond to the urgency of the moment, given the current and anticipated flows and capacity limitations at the SWB.

### 4. Processes for Cubans, Haitians, and Nicaraguans

On January 5, 2023, as part of the United States' continued efforts to decrease migration flows at the SWB and building upon the successes of the Venezuela process, DHS announced similar border enforcement measures to address the significant increase in encounters of Cuban, Haitian, and Nicaraguan nationals attempting to enter the United States without

<sup>60</sup> OIS analysis of data pulled from CBP UIP on January 23, 2023.

<sup>61</sup> Government of Panama, *Irregulares en Tránsito Frontera Panamá-Colombia 2022*, [https://www.migracion.gob.pa/images/img2022/PDF/IRREGULARES\\_%20POR\\_%20DARI%C3%89N\\_NOVIEMBRE\\_2022.pdf](https://www.migracion.gob.pa/images/img2022/PDF/IRREGULARES_%20POR_%20DARI%C3%89N_NOVIEMBRE_2022.pdf) (last visited Dec. 11, 2022).

authorization.<sup>62</sup> Further, DHS lifted the initial cap of 24,000 on the number of parolees eligible for the previously implemented Venezuela process and replaced it with a monthly cap of 30,000 travel authorizations spread across the four separate parole processes.<sup>63</sup> Although it has only recently been implemented, initial results indicate that the parole processes for Cuban, Haitian, and Nicaraguan nationals—which coupled the implementation of new pathways for nationals from these countries to enter the United States with the prompt return to Mexico of those who arrived at the SWB without advance authorization—have had a similar effect as the Venezuela process in disincentivizing migrants from these countries from making the dangerous irregular journey to United States. In the first weeks after the announcement, encounters of Cubans, Haitians, and Nicaraguans (“CHNs”) between ports of entry on the SWB declined from 928 on the day of the announcement (January 5, 2023) to just 92 on January 22—a decline of 92 percent. The decline in encounters of nationals of these countries occurred even as encounters of other noncitizens began to rebound from their typical seasonal drop.<sup>64</sup>

#### 5. Border Encounters Remain High, and Are Likely To Increase Further Absent Additional Policy Changes

Despite the sharp decrease in Venezuelan migration encountered at the U.S. border in the wake of implementation of the Venezuela process, the baseline number of total SWB encounters remained high throughout the end of 2022—and significantly higher than the historical

average of less than 1,600 encounters per day from 2014–2019.<sup>65</sup> For the 30 days ending December 24, 2022, total daily encounters along the SWB consistently fluctuated between approximately 7,100 and 9,700, averaging approximately 8,500 per day, with encounters exceeding 9,000 per day on twelve different occasions during this 30-day period.<sup>66</sup>

The number of migrants crossing the Darién Gap and heading north also remained high by historical standards, even after the number of Venezuelan migrants began to decline.<sup>67</sup> Almost 110,000 migrants traveled through the Darién Gap between 2010 and 2019.<sup>68</sup> The majority of these encounters occurred in 2015, 2016, and 2019, which saw 29,289, 30,055, and 22,102 encounters per year, respectively;<sup>69</sup> encounters were fewer than 10,000 all other years.<sup>70</sup> This is compared to over 16,000 in the month of November alone in 2022.<sup>71</sup> As of the end of November 2022, approximately 4,000 migrants crossed the Darién Gap per week on average from a wide range of countries, including most prominently Ecuador and Haiti,<sup>72</sup> and NGOs operating in Mexico reported that there were at least 125,000 migrants moving northward through Mexico that month as well, many of whom may seek to make their way to the SWB.<sup>73</sup>

Meanwhile, the refusal of certain countries to accept the removal of their own nationals poses particular challenges. There was a significant increase in the number of encounters of Cuban and Nicaraguan nationals at the SWB in the fall of 2022—in part driven by the fact that, generally, neither country accepts removals of their

nationals at the rate the United States seeks to remove them. Nationals from these two countries accounted for over 83,000 SWB encounters in the 30 days ending December 24, 2022—an average of approximately 2,770 a day, as compared to an average of approximately 1,570 a day in the 30 days preceding the April 1, 2022, CDC termination order.<sup>74</sup> Cubans and Nicaraguans together accounted for just over 32 percent of total encounters during the more recent time period.<sup>75</sup> These challenges prompted the January 5, 2023, adoption of new parole processes for Cuban, Haitian, and Nicaraguan nationals that combine the implementation of lawful, safe, and orderly pathways for nationals from those countries to seek to come to the United States, coupled with the prompt return of those who fail to use these lawful processes. This was made possible by the Government of Mexico’s independent decision to start accepting returns of nationals of these countries—a decision that was in part contingent on the implementation of these new lawful processes for migrants from these countries to enter the United States without making the dangerous journey to the SWB. Within the first weeks of implementation, the numbers of Cuban, Haitian, and Nicaraguan nationals encountered at the SWB without authorization decreased significantly, and while these processes are in place, DHS anticipates that encounters of Cuban, Haitian, and Nicaraguan nationals will remain low, as compared to the numbers encountered at the end of 2022, akin to the results that were observed following the implementation of the Venezuela process. However, DHS anticipates that flows from all four countries would increase—perhaps significantly—in the absence of (1) a policy change to allow for swift removal of inadmissible noncitizens; and (2) the Government of Mexico’s continued willingness to accept the returns of CHNV nationals, once the Title 42 public health Order is lifted.

Specifically, the DHS Office of Immigration Statistics planning model assumes that, without a meaningful policy change, border encounters could rise, and potentially rise dramatically—up to as high as 13,000 a day—subsequent to the lifting of the Title 42 public health Order.<sup>76</sup> As described below, DHS does not currently have the

<sup>62</sup> See, DHS, DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes (Jan. 5, 2023), <https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and> (last visited Jan. 30, 2023).

<sup>63</sup> See 88 FR 1279, 1280 (Jan. 9, 2023).

<sup>64</sup> OIS analysis of CBP UIP data downloaded January 23, 2023. SWB encounters typically fall in the weeks between Christmas and mid-January, a pattern also observed in the 2022–2023 cycle. Total SWB encounters between ports of entry averaged 7,728 per day for December 1–24, 2022, and then dropped to an average of almost 4,900 per day between December 25, 2022 and January 1, 2023, including a low of 2,750 on the first. Similarly, encounters of Cubans, Haitians, and Nicaraguans between ports of entry averaged 2,828 per day December 1–24 and dropped to an average of just over 1,300 per day December 25–January 1, including a low of 467 on January 1. Yet while encounters of all groups rebounded after New Year’s, CHN and non-CHN nationals have diverged since the announcement of the new processes, with encounters of non-CHN nationals increasing 67 percent January 1–22 and encounters of CHN nationals falling back below their New Year’s day level. *Id.*

<sup>65</sup> OIS Persist Dataset based on data through December 2022.

<sup>66</sup> OIS analysis of data pulled from CBP UIP on January 4, 2023.

<sup>67</sup> Government of Panama, *Baja Ingreso de Migrantes Irregulares a Panamá* (Oct. 28, 2022), <https://www.migracion.gob.pa/inicio/noticias/878-baja-ingreso-de-migrantes-irregulares-a-panama> (last visited Dec. 13, 2022).

<sup>68</sup> Government of Panama, *Irregulares en Tránsito Frontera Panamá—Colombia 2010–2019*, <https://www.migracion.gob.pa/images/img2021/pdf/IRREGULARES%202010-2019%20actualizado.pdf> (last visited Dec. 8, 2022).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Government of Panama, *Irregulares en Tránsito Frontera Panamá-Colombia 2022*, [https://www.migracion.gob.pa/images/img2022/PDF/IRREGULARES\\_%20POR\\_%20DARI%3%89N\\_NOVIEMBRE\\_2022.pdf](https://www.migracion.gob.pa/images/img2022/PDF/IRREGULARES_%20POR_%20DARI%3%89N_NOVIEMBRE_2022.pdf) (last visited Dec. 11, 2022).

<sup>72</sup> *Id.*

<sup>73</sup> La Prensa Latina Bilingual Media, *NGOs Estimate 125K Migrants Moving North Through Southern Mexico* (Nov. 7, 2022), <https://www.laprensalatina.com/ngos-estimate-125k-migrants-moving-north-through-southern-mexico/> (last visited Dec. 13, 2022).

<sup>74</sup> OIS Persist Dataset based on data through October 2022, and OIS analysis of data pulled from CBP UIP on January 4, 2023.

<sup>75</sup> OIS analysis of data pulled from CBP UIP on January 4, 2023.

<sup>76</sup> DHS SWB Encounter Planning Model generated January 6, 2023.

infrastructure, personnel, or funding to sustain the processing of migratory flows of this magnitude in a safe and orderly manner over time.

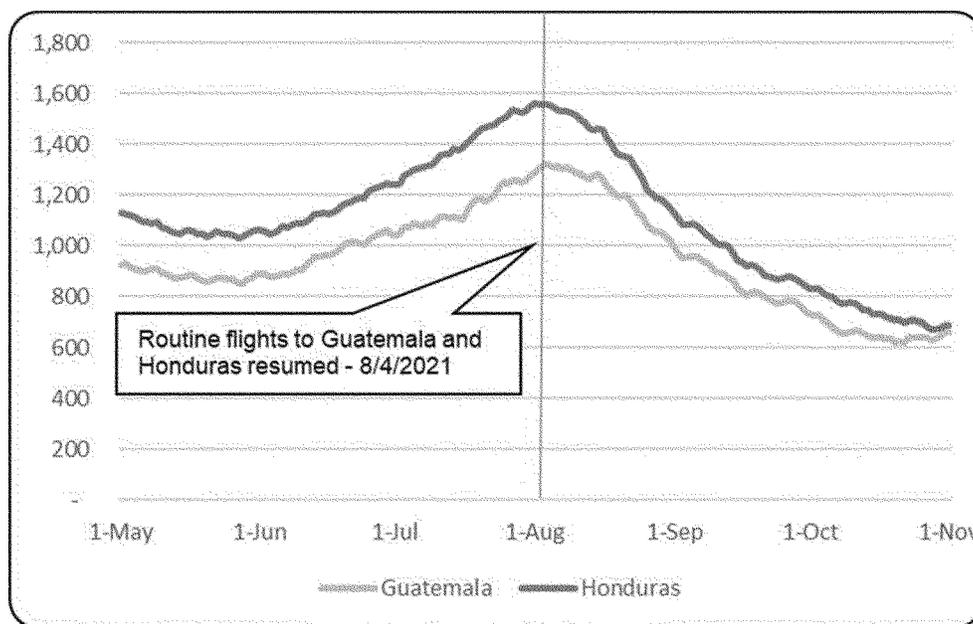
#### 6. The Importance of Quickly Returning Migrants Without a Legal Basis To Stay

DHS data shows that the ability to quickly remove individuals who do not have a legal basis to remain in the United States can reduce migratory flows—whereas, conversely, the inability or failure to do so risks yielding increased flows. CBP, for

example, saw rapidly increasing numbers of encounters of Guatemalan and Honduran nationals from January 2021 until August 2021, when these countries began accepting the direct return of their nationals via Title 42. In January 2021, CBP encountered an average of 424 Guatemalan nationals and 362 Honduran nationals a day. By August 4, 2021, the 30-day average daily encounter rates had climbed to 1,249 Guatemalan nationals and 1,502 Honduran nationals—an increase of 195 percent and 315 percent, respectively.

In the 60 days immediately following the resumption of return flights, average daily encounters fell by 38 percent for Guatemala and 42 percent for Honduras, as shown in Figure 3 below.<sup>77</sup> Since then, encounters for both countries have fluctuated but remain well below the pre-August 4, 2021, numbers; in November 2022, encounters averaged 481 per day for Guatemala and 433 per day for Honduras.<sup>78</sup>

**Figure 3: Daily Encounters of Guatemalan and Honduran Nationals, May 1–November 1, 2021**



**Note:** Figure depicts 30-day average of daily encounters.

Source: OIS Persist Data as of September 30, 2022.

Returns have proven to be effective, but the Departments do not believe that they are sufficient. For instance, while the numbers of encounters of Guatemalan and Honduran nationals have fallen, in the 30 days ending December 24, 2022, CBP encountered an average of around 970 nationals from these two countries each day.<sup>79</sup> The provision of lawful processes for individuals who intend to migrate is also a critical component to reducing migratory flows, particularly when paired with a consequence for bypassing

such lawful pathways—a model that has been proven to work by U4U and the Venezuela process in recent months, as detailed above.

#### 7. The Pernicious Role of Smuggling Networks

As described above, migratory movements to the SWB are in many cases facilitated by, and actively encouraged by, human smuggling organizations that exploit migrants for profit. These smuggling networks have become more and more sophisticated over time, increasingly using social media to deceive migrants and lure them into initiating a dangerous journey during which they may be robbed and

otherwise harmed, often with false promises about what will happen to them when they reach the United States.<sup>80</sup> Migrants often pay large sums to be brought through jungles, mountains, and rivers, frequently with small children in tow.

The Darién Gap is particularly notorious for the violence of the human smugglers operating in lawless stretches of the jungle.<sup>81</sup> As of October 2022, over 210,000 migrants have travelled to the SWB from South America through the Darién Gap in 2022 alone.<sup>82</sup> The International Organization for Migration (“IOM”) reports that as of October 2022, 30 individuals had died crossing the Darién Gap in 2022, including nine

<sup>77</sup> OIS analysis of OIS Persist Dataset based on data through August 31, 2022.

<sup>78</sup> OIS Persist Dataset based on data through November 2022.

<sup>79</sup> OIS analysis of data pulled from CBP UIP on January 3, 2023.

<sup>80</sup> Tech Transparency Project, *Inside the World of Misinformation Targeting Migrants on Social Media*

(July 26, 2022), <https://www.techtransparencyproject.org/articles/inside-world-misinformation-targeting-migrants-social-media> (last visited Dec. 6, 2022).

<sup>81</sup> United Nations Office on Drugs and Crime, *Abused and Neglected: A Gender Perspective on Aggravated Migrant Smuggling Offences and Response*, <https://www.unodc.org/documents/>

*human-trafficking/2021/Aggravated\_SOM\_and\_Gender.pdf* (last visited Dec. 11, 2022).

<sup>82</sup> Government of Panama, *Irregular Migrants Transiting through Darién by Country*, <https://www.datosabiertos.gob.pa/dataset/ebb56d40-112f-455e-9418-ccd73560021d/resource/3fae4878-5068-4b80-b250-ee9e52b16510/download/irregulares-entranzito-por-Darién-por-pais-octubre-2022.pdf> (last visited Dec. 11, 2022).

children.<sup>83</sup> Women and children are particularly vulnerable to attack and injury; children are also at risk for diarrhea, respiratory diseases, dehydration, and other ailments that require immediate attention. The Panamanian Red Cross reports that 10 to 15 percent of migrants are sexually assaulted crossing the Darién Gap.<sup>84</sup> Upon reaching the border area, noncitizens seeking to cross into the United States usually pay transnational criminal organizations—including, increasingly, the Mexican drug cartels—to coordinate and guide them along the final miles of their journey.<sup>85</sup> This cartel-controlled movement of people across the border is a billion-dollar criminal enterprise, in which the migrants pay thousands of dollars to be smuggled in inhumane conditions.<sup>86</sup>

Tragically, a significant number of individuals lose their lives along the way. In FY 2022, more than 890 migrants died attempting to enter the United States between ports of entry across the SWB, an estimated 58 percent increase from FY 2021 (565 deaths) and a 252 percent increase from FY 2020 (254 deaths). First responders in Eagle Pass, Texas, estimate that about 30 bodies have been taken out of the Rio Grande River each month since March 2022. The number of migrants rescued by CBP has almost quadrupled over the past two years—from approximately 5,330 in FY 2020, to approximately 12,900 in FY 2021, to over 22,000 in FY 2022. CBP attributes these rising trends to the historic increases in overall USBP encounters between ports of entry over this time period, and the fact that these encounters are increasingly taking place in remote and rugged locations where the perils of trying to enter the United States are particularly acute. Meanwhile, these numbers do not account for the countless incidents of death, illness, assault, and exploitation that migrants experience well before

they arrive at our border during the perilous journey north.

This proposed rule seeks to mitigate the role of would-be smugglers by incentivizing intending asylum seekers to utilize lawful, safe, and orderly pathways for seeking protection in the United States or elsewhere. For example, incentivizing migrants to schedule their arrival at land ports of entry minimizes the role of smugglers who seek to bring migrants through often dangerously hot and inhospitable locations between ports of entry. Collectively, the incentives and disincentives seek to minimize the irregular migratory flow to the border, and thus minimize the role—and profit—of the pernicious smuggling networks as a result.

### B. Effects on Resources and Operations

The large numbers of migrants crossing the border has placed a significant toll on the United States Government, as well as the States and local communities where migrants are provisionally released. While the United States Government has taken extraordinary steps to meet the need, the current level of migratory movements and the anticipated increase in the numbers of migrants following the lifting of the Title 42 public health Order threaten to exceed the capacity to maintain the safe and humane processing of migrants who have crossed the border without authorization to do so. By channeling noncitizens to lawful pathways available away from the SWB, this proposed rule aims to discourage migrants from making the journey to the border in the first instance.

#### 1. Capacity Constraints

The United States' border processing and immigration systems were not built to manage the nature and scale of the current irregular migration flows at the border and are operating under increasing strain. To respond to the accelerated increase in encounters along the SWB since January 2021, DHS has taken a series of extraordinary steps. CBP obligated more than \$669 million to build and operate 10 soft-sided processing facilities along the SWB in FY 2022. Since 2021, DHS has deployed more than 10,000 additional Federal personnel from across the Department on temporary rotations to the SWB, to include CBP agents and officers, law enforcement personnel from other DHS components, and the DHS Volunteer Force. In addition, CBP has hired or contracted over 1,000 civilian USBP Processing Coordinators, who, among other roles, supplement processing

operations. Yet, even with this increase in facilities and personnel, there are risks of overcrowding—challenges that will be exacerbated as encounters increase.

In addition, the Federal Emergency Management Agency (“FEMA”) has spent \$260 million in FYs 2021 and 2022 on grants to non-governmental and state and local entities through the Emergency Food and Shelter Program—Humanitarian (“EFSP-H”) to assist with the reception and onward travel of migrants arriving at the SWB.<sup>87</sup> This spending is on top of \$1.4 billion in FY 2022 appropriations that were earmarked for SWB contingency operations in response to the ongoing surge in migration.<sup>88</sup> Further, through FY 2023 appropriations, Congress made available up to \$785 million “for the purposes of providing shelter and other services to families and individuals encountered by the Department of Homeland Security.”<sup>89</sup>

Despite these efforts, DHS operations are subject to significant resource and capacity constraints. Of the nine SWB USBP sectors, four were over capacity, at 100 to 128 percent, with three more at capacity levels between 68 and 99 percent as of December 24, 2022, prior to the implementation of the parole processes for Cubans, Haitians, and Nicaraguans.<sup>90</sup> The impact has been particularly acute in certain border sectors. Increased flows are disproportionately occurring within the remote Del Rio, El Paso, and Yuma sectors. In FY 2022, the Del Rio, El Paso, and Yuma sectors encountered almost double (94 percent increase) the number of migrants as compared to FY 2021 and an eleven-fold increase over the average for FY 2014–FY 2019, primarily as a result of increases from CHNV countries.<sup>91</sup> As of December 24, 2022, these three sectors were each operating at the limits of, or over, their safe operating capacity, given space limitations, at 100 to 128 percent.<sup>92</sup>

The focused increase in encounters in those three sectors has been particularly

<sup>83</sup> Catalina Oquendo, *El Darién, la Trampa Mortal para los Migrantes Venezolanos*, El País, Oct. 11, 2022, <https://elpais.com/america-colombia/2022-10-11/el-darien-la-trampa-mortal-para-los-migrantes-venezolanos.html> (last visited Dec. 13, 2022).

<sup>84</sup> Voz de América, *Los 10 Peligros de Cruzar el Darién, el “Infierno Verde” de las Américas* (Aug. 19, 2022), <https://www.vozdeamerica.com/a/los-10-peligros-de-cruzar-el-darien-el-infierno-verde-de-las-americas/6705004.html> (last visited Dec. 13, 2022).

<sup>85</sup> Interpol, *People Smuggling*, <https://www.interpol.int/en/Crimes/People-smuggling> (last visited Dec. 11, 2022).

<sup>86</sup> José de Córdoba et al., *Smuggling Migrants to the U.S. is Big Business*, The Wall Street Journal, July 1, 2022, <https://www.wsj.com/articles/smuggling-migrants-to-the-u-s-is-big-business-11656680400> (last visited Dec. 13, 2022).

<sup>87</sup> EFSP Humanitarian Relief Table, created by DHS (Aug. 5, 2022).

<sup>88</sup> Memorandum for Interested Parties, from Alejandro N. Mayorkas, Secretary of Homeland Security, *Re: DHS Plan for Southwest Border Security and Preparedness* at 19 (Apr. 26, 2022), [https://www.dhs.gov/sites/default/files/2022-04/22\\_0426\\_dhs-plan-southwest-border-security-preparedness.pdf](https://www.dhs.gov/sites/default/files/2022-04/22_0426_dhs-plan-southwest-border-security-preparedness.pdf) (last visited Jan. 30, 2023).

<sup>89</sup> See Public Law 117–328, div. F, tit. II, sec. 211, 136 Stat. 4459, 4736 (2022).

<sup>90</sup> OIS analysis of data pulled from CBP UIP on December 24, 2022.

<sup>91</sup> OIS Persist Dataset based on data through October 2022.

<sup>92</sup> OIS analysis of data pulled from CBP UIP on December 24, 2022.

challenging. The Yuma and Del Rio sectors are geographically remote, and because of that—until the past two years—have never been a focal point for large numbers of individuals entering without authorization between ports of entry. As a result, these sectors have limited infrastructure to process the elevated encounters that they are experiencing in a safe and orderly manner. The El Paso sector has relatively modern infrastructure for processing noncitizens encountered at the border, but is far away from other CBP sectors, which makes it challenging to move individuals elsewhere for processing during surges—a key component of CBP’s ability to effectively manage migratory surges.

Meanwhile, many of the land ports of entry have limited space and capacity to process an influx of migrants, including those who may seek protection from removal, and are expected to quickly reach their safe operating capacity limits given the increase in migrants they are expected to encounter following the lifting of the Title 42 public health Order. Absent a lawful, safe, and orderly means for managing the flows, the ports of entry risk massive congestion: migrants would be forced to wait in long lines for unknown periods of time while exposed to the elements in order to be processed, in conditions that could also put the migrants at risk. This is of great concern to the Government of Mexico, because these lines would extend into Mexico and could adversely impact legitimate travel and trade, or lead to individuals camping out overnight or forming makeshift encampments on Mexican territory.

The capacity constraints are felt by DOJ as well. As the number of migrants arriving at the SWB has increased, so too have the number of Notices to Appear filed in EOIR’s immigration courts and the number of pending cases.<sup>93</sup> In FY 2022, EOIR hired 104 immigration judges for a total of 634 and completed a record 312,486 cases. Yet the number of cases pending before the immigration courts has risen to nearly 1.8 million, as the courts were unable to keep pace with the incoming volume.

## 2. Decompression Efforts

In an effort to reduce overcrowding in sectors that are experiencing surges, DHS deploys lateral transportation, using buses and flights to move noncitizens to other sectors with capacity to process. In October 2022,

USBP sectors along the SWB operated a combined 120 decompression buses containing almost 25,000 noncitizens along 480 routes to neighboring sectors. The majority of these buses are staffed by CBP personnel, which often requires pulling them off other key missions. In October 2022, USBP sectors also operated 113 lateral decompression flights, redistributing approximately 14,500 noncitizens to other sectors with additional capacity.

These assets are finite. Already in FY 2022, U.S. Immigration and Customs Enforcement (“ICE”) modified its ICE Air Operations’ air charter contract to increase the number of daily-use aircraft from 10 to 12 to meet the increasing air transportation demands, and CBP has executed a new contract that will provide for flight hours equivalent to approximately four to eight additional decompression flights per day. And while DHS is actively working to obtain additional contracted transportation support, such contract support takes time to put in place, and is also costly and resource intensive.

As a result, use of DHS air resources to operate lateral flights limits DHS’s capacity to operate international repatriation flights to receiving countries, leaving noncitizens who have been ordered removed in custody for longer, which presents challenges in light of DHS’s limited detention space. This in turn reduces the numbers of noncitizens who can be referred for detention each day and, as appropriate, removed efficiently after receiving final orders of removal, including pursuant to expedited removal (“ER”), at any given point in time. Further increases would exacerbate the need for decompression flights and further reduce the amount of resources available to conduct removal flights, which in turn would further decrease the number of noncitizens who can be referred to ICE detention centers. This would occur at precisely the point in time at which an increase in removal flights and faster movement of migrants into expedited removal, out of detention, and onto removal flights, as appropriate, is needed in order to disincentivize a further increase in encounters, and to effectively, humanely, and efficiently remove those who do not claim a fear of persecution or torture or are otherwise found not to have a credible fear.

## 3. State, Local Government, and Non-Governmental Limits

Increased encounters of noncitizens at the SWB not only strain DHS resources, but also place additional pressure on States, local communities, and NGO partners both along the border and in

the interior of the United States. These are key partners, providing shelter and other key social services to migrants and facilitating the onward movement of those conditionally released from DHS custody. In FY 2021 and FY 2022, Congress made approximately \$260 million available through FEMA’s EFSP–H in an order to help sustain these efforts.<sup>94</sup> As noted above, through FY 2023 appropriations, Congress made available up to \$785 million “for the purposes of providing shelter and other services to families and individuals encountered by the Department of Homeland Security.”<sup>95</sup> However, State, local government, and NGO capacity to provide these critical supports is limited, and may reach its outer limit once the Title 42 public health Order is lifted in the absence of additional policy changes.

## C. Systemic Issues

The U.S. asylum system was designed decades ago—when migratory flows were dramatically different than they are today—to serve the key goals of efficiently and fairly providing protection to noncitizens who are in the United States and are deserving of protection, while also efficiently denying and ultimately removing those who do are not deemed eligible for discretionary forms of protection and do not qualify for the mandatory relief of statutory withholding of removal or protection under the CAT. However, a systemic lack of resources and the changing nature, scope, and demographics of the migratory flows that the United States is encountering has made it difficult to achieve these key, twin goals.

By statute, certain inadmissible noncitizens may be placed in ER pursuant to section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1). Those who are in ER and who indicate an intent to apply for asylum or a fear of persecution or torture in their country of removal are subject to what are referred to as “credible fear” interviews, pursuant to which an asylum officer assesses whether there is a “significant possibility . . . that the [noncitizen] could establish eligibility for asylum.” INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v); *see also* 8 CFR 235.3(b)(4)(i), 1235.3(b)(4)(i). Those found not to have a credible fear, including following immigration judge (“IJ”) review of a negative determination when requested, are subject to removal

<sup>93</sup> See EOIR, Executive Office of Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions (Oct. 13, 2022), <https://www.justice.gov/eoir/page/file/1242166/download> (last visited Feb. 1, 2023).

<sup>94</sup> EFSP Humanitarian Relief Table, created by DHS (Aug. 5, 2022).

<sup>95</sup> See Public Law 117–328, div. F, tit. II, sec 211, 136 Stat. at 4736.

without the full removal proceedings provided for by section 240 of the INA, 8 U.S.C. 1229a. Those who are found to have a credible fear are generally placed in removal proceedings under section 240 during which they can apply for asylum and other forms of relief and protection from removal.<sup>96</sup>

There is, however, a significant disparity between the number of noncitizens who are found to have a credible fear and the number of noncitizens whom an IJ ultimately determines should not be removed at the end of the section 240 process because, for example, the noncitizen is found eligible for asylum or some other form of protection (such as withholding of removal or CAT). A full 83 percent of the people who were subject to ER and claimed fear from 2014 to 2019 were referred to an IJ for section 240 proceedings, but only 15 percent of those cases that were completed were granted asylum or some other form of protection.<sup>97</sup> Similarly, among cases referred and completed since 2013, significantly fewer than 20 percent of people found to have a credible fear were ultimately granted asylum from EOIR.<sup>98</sup> Ultimately, the number of

<sup>96</sup> Under an interim final rule issued in March 2022, and discussed below, some noncitizens found to have a credible fear are referred to an asylum officer for further review of the noncitizen's claims for asylum and other forms of protection, followed by IJ review if the noncitizen's asylum claim is denied. See Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 FR 18078 (Mar. 29, 2022) ("Asylum Processing IFR").

<sup>97</sup> OIS Enforcement Lifecycle data through September 30, 2022. Referrals to an IJ include positive credible fear findings by U.S. Citizenship and Immigration Services ("USCIS") asylum officers, negative fear findings that are vacated by an IJ, and USCIS case closures that are placed in section 240 proceedings. Grants of relief or protection include grants of asylum, statutory withholding of removal, withholding or deferral of removal under the CAT regulations, cancellation of removal, and adjustment of status under various statutory provisions. While only 15 percent of all case completions result in relief or protection, OIS estimates that 28 percent of cases decided on their merits are grants of relief. Cases of relief decided on their merits include grants of asylum and other grants of status under statutory provisions (*i.e.*, excluding withholding of removal, deferral of removal, cancellation of removal, and claimed status reviews); and the percentage of cases decided on their merits is calculated by dividing relief on merits by the sum of relief on merits and removal orders on merits (*i.e.*, excluding removal orders issued *in absentia*). All data on EOIR outcomes for credible fear cases in this discussion are based on case outcomes for all noncitizens encountered on the SWB in FY 2014–FY 2019, with data reflecting final or most current outcomes as of September 30, 2022. In general, relatively few Mexican nationals claim credible fear when placed in expedited removal, so EOIR outcomes cited here would be similar if the records were limited to non-Mexican encounters.

<sup>98</sup> See EOIR, EOIR Adjudication Statistics: Asylum Decision and Filing Rates in Cases

individuals who are referred to an IJ at the beginning of the ER process greatly exceeds the number who are actually granted asylum or some other form of relief or protection.

Meanwhile, the process for those who establish a credible fear is quite lengthy, with half of all cases taking more than four years to complete, and in many cases much longer. Indeed, 39 percent of all SWB credible fear referrals to EOIR from FY 2014 to FY 2019 remain in EOIR proceedings today.<sup>99</sup> As of FY 2022 year-end, more than a quarter (26 percent) of EOIR cases resulting from SWB encounters making credible fear claims from as long ago as FY 2014 remained in proceedings, one-third (33 percent) of EOIR cases resulting from FY 2016 encounters remained in proceedings, and almost half (48 percent) of EOIR cases resulting from FY 2019 encounters remained in proceedings.<sup>100</sup> Excluding *in absentia* orders, the mean completion time for EOIR cases completed in FY 2022 was 4.2 years.<sup>101</sup>

As a result, a large number of cases linger in a variety of incompletely resolved statuses for extended periods. For all SWB encounters from FY 2014 to FY 2019 that claimed fear and were referred to EOIR, only 9 percent had been granted relief by the end of FY 2022, and only 11 percent had an executed removal order—leaving 80 percent in some degree of limbo.<sup>102</sup>

As a result, those who have a valid claim to asylum in the United States often have to wait years for a final protection decision. Conversely, noncitizens ultimately found ineligible for asylum or another form of protection are likely to spend many years in the United States prior to being ordered removed.

In addition, the proportion and the absolute numbers of people claiming fear of persecution or torture in their home countries has increased dramatically in recent years. Prior to 2011, the overall share of total SWB

Originating with a Credible Fear Claim (Oct. 13, 2022), <https://www.justice.gov/eoir/page/file/1062976/download> (last visited Jan. 27, 2023). The EOIR adjudication outcome statistics report on the total number of cases originating with credible fear claims resolved on any ground in a fiscal year, without regard to whether an asylum claim was adjudicated. The asylum grant rate is a percentage of that total number of cases.

<sup>99</sup> OIS Enforcement Lifecycle data through September 30, 2022.

<sup>100</sup> *Id.*

<sup>101</sup> OIS analysis of DOJ EOIR data.

<sup>102</sup> OIS Enforcement Lifecycle data through September 30, 2022. Here and throughout this discussion, references to removal orders and removal orders with or without confirmed removals include IJ grants of voluntary departures with or without confirmed departures.

encounters who were processed for expedited removal and claimed fear never exceeded 2 percent.<sup>103</sup> By 2013, with increasing numbers of non-Mexican encounters, the rate had climbed to 15 percent of people placed in ER making fear claims that were referred to USCIS asylum officers (36,025 referrals).<sup>104</sup> By comparison, in 2019—prior to the implementation of the Title 42 public health Order—further growth in non-Mexican encounters meant that 44 percent of people placed in ER claimed fear, resulting in 98,266 credible fear adjudications.<sup>105</sup> Despite this dramatic increase in the number of people claiming fear since 2013, the percent who are ultimately granted asylum or other forms of protection has remained static or even fallen over this period, with IJ asylum grant rates in FY 2013–FY 2017 consistently falling between 12 and 17 percent, down from 24–38 percent in FY 2008–FY 2012.<sup>106</sup>

The fact that large numbers of migrants pass the credible fear screening, only to be denied relief or protection on the merits after a lengthy adjudicatory process, has high costs to the system in terms of resources and time.

Meanwhile, the fact that migrants can wait in the United States for years before being issued a final order denying relief, and that many such individuals are never actually removed, likely incentivizes migrants to make the journey north.

#### D. U.S. Efforts in Response

The United States has taken a number of measures in an attempt to offer alternative pathways to address the root causes of migration, improve the asylum system, and address the pernicious role of smugglers. These are important improvements, yet alone are insufficient in the near term to change the incentives of migrants, reduce the risks associated with current levels of irregular migration and the anticipated surge of migrants to the border, and protect migrants from human smugglers that profit from their vulnerability, necessitating this NPRM.

#### 1. Asylum Processing IFR and Other Process Improvements

In March 2022, the Departments adopted an interim final rule ("IFR") to shorten the time frame for adjudicating

<sup>103</sup> OIS analysis of historic CBP and USCIS data.

<sup>104</sup> OIS analysis of Enforcement Lifecycle data through September 30, 2022.

<sup>105</sup> *Id.*

<sup>106</sup> OIS analysis of DOJ EOIR Review of Asylum Adjudication Statistics as of October 2022.

asylum claims.<sup>107</sup> For noncitizens subject to that IFR, following a positive credible fear determination, asylum officers conduct an initial asylum merits interview instead of referring the case directly for removal proceedings before an IJ under section 240 of the INA, 8 U.S.C. 1229a. This creates multiple efficiencies, including using the information presented to the asylum officer in the credible fear interview as the asylum application, which eliminates the need for duplicative paperwork and processing time. If USCIS does not grant asylum, the individual is referred to EOIR for streamlined section 240 removal proceedings. The entire process—from credible fear claim to a final immigration court decision—is designed to take substantially less time than the average four years it takes to adjudicate asylum claims otherwise.

That rule, however, is being phased in gradually, and the Departments do not yet have the capacity, and do not expect to have the capacity in the near term, to process the large number of migrants expected to cross the border through the system that rule establishes.

## 2. Process Improvements

The Departments are making a number of other process improvements as well. DHS is digitalizing many of the processes that make up the U.S. immigration system, thus enabling agencies to process migrants more rapidly, securely store documentation, and share information to inform real-time decision-making with significant time savings. Meanwhile, USCIS also has made significant strides in protecting against what would be even greater backlog growth by hiring new officers and establishing an agency-wide focus on operational efficiency. The Asylum Division has grown from 273 authorized asylum officer positions in 2013 to 1,024 authorized asylum officer positions in 2022. USCIS has also put in place a number of initiatives to increase the efficiency of its processes, including the November 2022 launch of online filing for the Form I-589 for affirmative asylum applicants, working with other DHS components to digitize the A-File (the file containing immigration-related records relating to a noncitizen), and conducting more than 34,211 video-assisted interviews. EOIR has made similar strides in addressing its pending caseload, through judicial and staff hiring, modernization of courtroom

technology, and the ongoing digitalization of court files.<sup>108</sup>

In addition, EOIR has created efficiencies by reducing barriers to immigration court. In that regard, EOIR has expanded the Immigration Court Helpdesk program to several additional courts, issued guidance on using the Friend of the Court model to assist pro se respondents, and reconstituted its pro bono liaison program at each immigration court.<sup>109</sup> The above measures promote efficiency as, where a noncitizen is represented, the IJ does not have to engage in time-consuming discussions at hearings to ascertain whether the noncitizen is subject to removal and potentially eligible for any relief. In addition, a noncitizen's counsel can assist the noncitizen in gathering evidence, can prepare the noncitizen to testify, and can work with DHS counsel to narrow the issues the IJ must decide.

While critically important, these process improvements are not, on their own, sufficient to respond to the significant resource needs associated with the increase in migrants anticipated following the lifting of the Title 42 public health Order.

## 3. Taking on the Smugglers

In June of 2021, DOJ established a law enforcement task force, Joint Task Force Alpha (“JTFA”), to marshal investigative and prosecutorial resources in partnership with DHS to enhance U.S. enforcement efforts against human smuggling and trafficking groups operating in Mexico and the NCA countries of Guatemala, El Salvador, and Honduras. Since then, the task force has made significant strides in its efforts to disrupt and dismantle dangerous human smuggling organizations.<sup>110</sup> JTFA's impact and results include contributing to 165 domestic and international arrests, 69

convictions, 45 defendants sentenced including significant jail time imposed for human smuggling-related crimes; substantial asset forfeiture including hundreds of thousands of dollars in cash, real property, vehicles, firearms, and ammunition; dozens of defendants indicted under seal pending arrest; and numerous pending extradition requests against foreign leadership targets located in NCA and Mexico.<sup>111</sup>

<sup>111</sup> DOJ, Office of Public Affairs (“OPA”), *Eight Indicted in Joint Task Force Alpha Investigation and Arrested as Part of Takedown of Prolific Human Smuggling Network*, Department of Justice (Sept. 13, 2022), <https://www.justice.gov/opa/pr/eight-indicted-joint-task-force-alpha-investigation-and-arrested-part-takedown-prolific-human> (last visited Dec. 15, 2022); DOJ, OPA, *Two Guatemalan Nationals Plead Guilty to Human Smuggling Conspiracy Resulting in 2021 Death of Migrant in Odessa, Texas*, Department of Justice (Sept. 30, 2022), <https://www.justice.gov/opa/pr/two-guatemalan-nationals-plead-guilty-human-smuggling-conspiracy-resulting-2021-death-migrant> (last visited Dec. 15, 2022); U.S. Attorney for the District of Arizona, *Human Smuggling Coordinators Sentenced to 45 Months in Prison* (Aug. 31, 2022), <https://www.justice.gov/usao-az/pr/human-smuggling-coordinators-sentenced-45-months-prison> (last visited Dec. 15, 2022); U.S. Attorney for the Western District of Texas, *Defendants Indicted in Tractor Trailer Smuggling Incident That Resulted in 53 Deaths* (July 20, 2022), <https://www.justice.gov/usao-wdtx/pr/defendants-indicted-tractor-trailer-smuggling-incident-resulted-53-deaths> (last visited Dec. 15, 2022); DOJ, OPA, *Readout of Latest Justice Department Leadership Meeting on Joint Task Force Alpha's Anti-Human Smuggling and Trafficking Efforts* (June 13, 2022), <https://www.justice.gov/opa/pr/readout-latest-justice-department-leadership-meeting-joint-task-force-alpha-s-anti-human> (last visited Dec. 15, 2022); U.S. Attorney for the District of Arizona, *Three Individuals Arrested for Conspiracy to Transport and Harbor 86 Illegal Aliens from Mexico, Guatemala, and Honduras* (July 6, 2022), <https://www.justice.gov/usao-az/pr/three-individuals-arrested-conspiracy-transport-and-harbor-86-illegal-aliens-mexico> (last visited Dec. 15, 2022); DOJ, OPA, *Eight Defendants Indicted for Human Smuggling and Drug Conspiracy Offenses* (May 10, 2022), <https://www.justice.gov/opa/pr/eight-defendants-indicted-human-smuggling-and-drug-conspiracy-offenses> (last visited Dec. 15, 2022); DOJ, OPA, *DOJ-DHS-INL in Mexico Host Foreign Law Enforcement Partners at Regional Human Smuggling Roundtable Event* (April 6, 2022), <https://www.justice.gov/opa/pr/doj-dhs-inl-mexico-host-foreign-law-enforcement-partners-regional-human-smuggling-roundtable> (last visited Dec. 15, 2022); DOJ, OPA, *Man Sentenced for Role in International Human Smuggling Conspiracy* (Sept. 28, 2021), <https://www.justice.gov/opa/pr/man-sentenced-role-international-human-smuggling-conspiracy> (last visited Dec. 15, 2022); DOJ, OPA, *Law Enforcement Cooperation Between United States and Mexico Leads to Mexican Takedown of Significant Human Smugglers* (Mar. 10, 2022), <https://www.justice.gov/opa/pr/law-enforcement-cooperation-between-united-states-and-mexico-leads-mexican-takedown> (last visited Dec. 15, 2022); U.S. Attorney for the Western District of Texas, *Cuban National Sentenced to Over 38 Years in Prison for Drug Trafficking and Other Crimes after Using His Border Ranch as a Criminal Corridor* (Mar. 9, 2022), <https://www.justice.gov/usao-wdtx/pr/cuban-national-sentenced-over-38-years-prison-drug-trafficking-and-other-crimes-after> (last visited Dec. 15, 2022); U.S. Attorney for the District of Arizona, *Human*

<sup>108</sup> See, e.g., Executive Office for Immigration Review Electronic Case Access and Filing, 86 FR 70708 (Dec. 13, 2021) (EOIR final rule implementing electronic filing and records applications for all cases before the immigration courts and the Board of Immigration Appeals); EOIR Director's Memorandum 22-07, Internet-Based Hearings (Aug. 12, 2022), <https://www.justice.gov/eoir/page/file/1525691/download>.

<sup>109</sup> See, e.g., EOIR Director's Memorandum 22-06, Friend of the Court (May 5, 2022), <https://www.justice.gov/eoir/page/file/1503696/download>; EOIR Director's Memorandum 22-01, Encouraging and Facilitating Pro Bono Legal Services (Nov. 5, 2021), <https://www.justice.gov/eoir/book/file/1446651/download>.

<sup>110</sup> DOJ Office of Public Affairs, *Attorney General Announces Initiatives to Combat Human Smuggling and Trafficking and to Fight Corruption in Central America* (June 7, 2021), <https://www.justice.gov/opa/pr/attorney-general-announces-initiatives-combat-human-smuggling-and-trafficking-and-fight> (last visited Dec. 8, 2022).

<sup>107</sup> See Asylum Processing IFR, 87 FR 18078.

In April 2022, DHS launched an unprecedented “Counter Human Smuggler” campaign designed to disrupt and dismantle human smuggling networks, which included an increase in resources for JTFA and other interagency law enforcement efforts. The Counter Human Smuggler campaign focuses on disrupting key aspects of these criminal operations, including financial assets, and ability to travel and conduct commerce. DHS has committed over \$60 million to the effort and surged more than 1,300 personnel in Latin America and along the SWB.<sup>112</sup> Working closely with our foreign partners, DHS has achieved unprecedented results. The results so far have included a 500 percent increase in disruption activities in the first six months, including over 5,000 arrests and 5,500 disruptions of smuggling infrastructure (e.g., raiding smuggler stash houses, impounding tractor trailers that are used to smuggle migrants, and confiscating smugglers’ information technology).<sup>113</sup> Despite this monumental effort to counter human smuggling, it alone will not decrease the daily number of encounters at the SWB to a manageable level—these efforts must be combined with other efforts, including an increase in available lawful pathways throughout the region and consequences for migrants who bypass them.

#### *E. Lawful Processes for Individuals To Access the United States*

The United States Government has committed to enhancing legal pathways and processes for migrants in the region to access protection and opportunity in the United States. The United States has taken meaningful steps to realize this

*Smuggling Coordinator Pleads Guilty* (Feb. 3, 2022), <https://www.justice.gov/usao-az/pr/human-smuggling-coordinator-pleads-guilty> (last visited Dec. 15, 2022); U.S. Attorney for the District of Arizona, *Human Smugglers Plead Guilty to Transporting and Harboring Over 100 Illegal Aliens* (Nov. 18, 2021), <https://www.justice.gov/usao-az/pr/human-smugglers-plead-guilty-transporting-and-harboring-over-100-illegal-aliens> (last visited Dec. 15, 2022); DOJ, OPA, *Attorney General Merrick B. Garland Delivers Remarks at the Meeting of the President’s Interagency Task Force to Monitor and Combat Trafficking in Persons* (Jan. 25, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-meeting-president-s-interagency-task> (last visited Dec. 15, 2022); DOJ, OPA, *Readout of Justice Department Leadership Meeting on Human Smuggling and Trafficking Networks* (Nov. 5, 2021), <https://www.justice.gov/opa/pr/readout-justice-department-leadership-meeting-human-smuggling-and-trafficking-networks> (last visited Dec. 15, 2022).

<sup>112</sup> DHS, *FACT SHEET: Counter Human Smuggler Campaign Update* (Oct. 6, 2022), <https://www.dhs.gov/news/2022/10/06/fact-sheet-counter-human-smuggler-campaign-update-dhs-led-effort-makes-5000th> (last visited Dec. 13, 2022).

<sup>113</sup> *Id.*

commitment, including by announcing significant increases to H–2 temporary worker visas and refugee processing in the Western Hemisphere, and by introducing innovative parole processes for nationals of certain countries in the region. By expanding these pathways and processes, the United States has provided migrants an alternative to paying smuggling organizations that profit from taking migrants on a dangerous journey to the SWB, and has provided incentives for migrants to seek an alternative and safer pathway to the United States.

#### 1. Process for Venezuelan Nationals

As described above, on October 12, 2022, the United States Government announced a new process for Venezuelans that created a strong incentive for Venezuelans to wait in safe places to access an orderly process to come to the United States. The process is initiated by a U.S.-based supporter, who agrees to provide financial support to a Venezuelan beneficiary located outside the United States—including those still in Venezuela—thus providing a mechanism for such individuals to enter the United States without having to resort to a dangerous trek north. In order to be eligible, Venezuelan beneficiaries could not have entered the United States, Mexico, or Panama unlawfully following the date of announcement of the process. If they pass the requisite screening and vetting, they are provided advance authorization to travel by air to the United States and, if authorized to travel, are subject to a case-by-case parole determination once they arrive. Beneficiaries of this process can apply for asylum and other applicable immigration benefits and are eligible to immediately apply for employment authorization through an electronic process created by USCIS.<sup>114</sup> The Venezuela process has dramatically impacted migratory flows throughout the region, and as of January 22, 2023, more than 14,300 Venezuelans have come to the United States lawfully pursuant to this process.<sup>115</sup>

By coupling the provision of a safe and orderly lawful process that allows Venezuelan nationals and their immediate family members to come to the United States for a period of up to two years and receive work authorization with a consequence for those who enter unlawfully between the ports of entry, the process has provided critical protections while also yielding a

<sup>114</sup> *DHS Announces New Migration Enforcement Process for Venezuelans*, *supra*.

<sup>115</sup> OIS analysis of CBP data provided January 23, 2023.

reduction in migratory flows.<sup>116</sup> DHS recently announced changes to the process.<sup>117</sup> Specifically, DHS:

- Lifted the limit of 24,000 total travel authorizations and replaced it with a monthly limit of 30,000 travel authorizations spread across this process and the separate and independent parole processes for Cubans, Haitians, and Nicaraguans; and
- Added an exception that will enable Venezuelans who cross without authorization into the United States at the SWB and are subsequently permitted a one-time option to voluntarily depart or voluntarily withdraw their application for admission to maintain eligibility to participate in the parole process.<sup>118</sup>

#### 2. Processes for Nationals of Cuba, Haiti, and Nicaragua

As noted above, the United States Government recently initiated similar processes for nationals of Cuba, Haiti, and Nicaragua.<sup>119</sup> Like the process for Venezuelans, the processes for Cubans, Haitians, and Nicaraguans allows U.S.-based supporters to apply on behalf of an individual or family to be considered, on a case-by-case basis, for advanced authorization to travel and a temporary period of parole for up to two years for urgent humanitarian reasons or significant public benefit.<sup>120</sup> The parole is for an initial period of two years and parolees may apply for work authorization immediately after entering the country. Like the Venezuela process, implementation of the processes for Cubans, Haitians, and Nicaraguans was and remains contingent on the Government of Mexico’s decision to accept the return (under Title 42) or removal (under Title 8) of such migrants who enter irregularly at the SWB.

#### 3. Additional Processes for Haitian Nationals

The United States is working to increase number of Haitians granted immigrant visas and parole in support of family reunification. The Department of State has resumed adjudicating immigrant visas (“IVs”) on December 12 and has committed to surge consular officers to eliminate the IV case backlog in early 2023.

#### 4. Additional Processes for Cuban Nationals

In September 2022, the United States Government announced the resumption

<sup>116</sup> See *supra* Part III.A.3 of this preamble.

<sup>117</sup> See 88 FR 1279 (Jan. 9, 2023).

<sup>118</sup> *Id.* at 1280.

<sup>119</sup> See 88 FR 1255 (Jan. 9, 2023).

<sup>120</sup> *Id.* at 1256.

of the Cuban Family Reunification Parole (“CFRP”) program, which allows approved Cubans to enter the United States as parolees,<sup>121</sup> thereby allowing USCIS to work through the backlog of over 12,500 CFRP applications. This program has been paused since 2017, but over 125,000 Cubans were authorized to travel for the purpose of parole from 2004 to 2017. Beneficiaries must be currently living in Cuba and be petitioned by a U.S. citizen or LPR family member who was invited to participate. Potential beneficiaries cannot apply for themselves.<sup>122</sup>

By statute, Cuban parolees may apply for LPR status after a year of residence in the United States. Cuban Adjustment Act, Public Law 89–732, 80 Stat. 1161 (1966) (8 U.S.C. 1255 note). In addition, beginning in early 2023, the U.S. Embassy in Havana will resume full immigrant visa processing for the first time since 2017, which will increase the pool of noncitizens eligible for CFRP.<sup>123</sup>

#### 5. Labor Pathways

The United States Government recognizes that many migrants encountered at the SWB are seeking employment opportunities and often hoping to provide for their families via remittances sent home. The United States welcomes, through lawful pathways, noncitizen workers who play a vital role in the economy, particularly in the light of concentrated labor shortages. DHS and its interagency partners have been working diligently over the past few years to expand recruitment of workers for H–2 visas from the Western hemisphere and facilitate their entry into the United States. In FY 2022, for example, the United States Government issued more than 19,000 H–2 visas to Guatemalans, Hondurans, and Salvadorans—a 94 percent increase over the 9,796 H–2 visas in FY 2021.<sup>124</sup> In addition, on

December 15, 2022, DHS and the Department of Labor (“DOL”) issued a temporary final rule that made an additional 64,716 H–2B temporary nonagricultural worker visas available to employers in FY 2023, in addition to the 66,000 H–2B visas that are normally available each fiscal year. The H–2B supplemental includes an allocation of 20,000 visas to workers from Haiti and the Central American countries of Honduras, Guatemala, and El Salvador.<sup>125</sup>

In addition, the United States Agency for International Development (“USAID”) has worked directly with labor ministries in Central America to dramatically decrease the time it takes to match H–2 workers to employers’ requests—from 55 days to 16 days in Guatemala, from 24 days to nine days in Honduras, and from 42 days to 30 days in El Salvador.<sup>126</sup> Certain U.S. embassies and consulates prioritize H–2 visa applications, to the point at which these consular sections can process them in two business days.<sup>127</sup> While not a substitute for asylum, these available processes respond to the needs of many of those encountered at the border who are in fact seeking economic opportunity, not asylum.

#### 6. Expanded Refugee Processing in the Region

In the past two years, the United States Government has taken steps to significantly expand refugee admissions from Latin America and the Caribbean through the U.S. Refugee Admissions Program (“USRAP”). In FY 2022, the United States Government resettled 2,485 refugees from the Western Hemisphere, a 521 percent increase over FY 2021.<sup>128</sup> In June 2022, the United States made a commitment under the Los Angeles Declaration on Migration and Protection to resettle 20,000 refugees from the Americas during Fiscal Years 2023 and 2024.<sup>129</sup> In fulfillment of this commitment, significant resources are being put in place to expand regional refugee processing, which, coupled with the process improvements, are expected to result in thousands more individuals

applying for, and being granted, refugee status.

Globally, the United States Government has dedicated significant efforts to rebuilding, strengthening, and modernizing USRAP, including by implementing actions stemming from a major review of USRAP processing across the United States Government. In FY 2022, the United States significantly improved the efficiency and responsiveness of refugee applicant screening and vetting through coordination with the National Vetting Center (“NVC”). Increased efficiency and vetting through the NVC, combined with new technologies and innovation, will allow the United States Government to further improve efficiencies in screening and vetting.<sup>130</sup>

#### 7. Scheduling Arrivals at Ports of Entry

The United States is also expanding the implementation of an innovative new process that uses technology—the CBP One app, a free, public-facing application that can be downloaded on a mobile phone—to significantly increase the number of individuals, including those who may be seeking asylum, that CBP can process at land border ports of entry.

Upon the lifting of the Title 42 public health Order, individuals will be able to use the CBP One app to schedule a time to arrive at a port of entry in order to be processed into the United States in a safe and orderly manner, and once in the United States, able to make claims for protection. CBP has conducted extensive testing of the application to ensure it can receive a high volume of requests at one time, works on both iOS and Android, is user-friendly, and employs clear and accessible language.

The use of CBP One is expected to create efficiencies that will enable CBP to safely and humanely expand its ability to process noncitizens at land border ports of entry, including those who may be seeking asylum. First, the provision of advance biographical and biometric information by the noncitizen, as required by the application (in the form of basic applicant information and provision of a live photograph)—all information that would otherwise be collected upon arrival at the port of entry—is expected to save processing time, thereby allowing CBP officers to process more individuals than would otherwise be possible. CBP anticipates that use of the CBP One app will enable CBP to schedule appointments for—and

<sup>121</sup> USCIS, *USCIS Resumes Cuban Family Reunification Parole Program Operations* (Sept. 9, 2022), <https://www.uscis.gov/newsroom/alerts/uscis-resumes-cuban-family-reunification-parole-program-operations> (last visited Nov. 30, 2022).

<sup>122</sup> USCIS, *The Cuban Family Reunification Parole Program* (last updated Sept. 1, 2022) <https://www.uscis.gov/humanitarian/humanitarian-parole/the-cuban-family-reunification-parole-program> (last visited Dec. 13, 2022).

<sup>123</sup> Department of State, *Los Angeles Declaration on Migration and Protection Lima Ministerial Meeting: Fact Sheet (“Lima Ministerial Fact Sheet”)* (last updated Oct. 6, 2022), <https://www.state.gov/los-angeles-declaration-on-migration-and-protection-lima-ministerial-meeting/> (last visited Dec. 14, 2022); USCIS, *USCIS Resumes Cuban Family Reunification Parole Program Operations* (Sept. 1, 2022), <https://www.uscis.gov/newsroom/alerts/uscis-resumes-cuban-family-reunification-parole-program-operations> (last visited Dec. 13, 2022).

<sup>124</sup> Lima Ministerial Fact Sheet.

<sup>125</sup> See 87 FR 76816, 76817, 76819 (Dec. 15, 2022).

<sup>126</sup> USAID, *Remarks of Administrator Power at the Discussion On Opportunities and Incentives For Expanded H–2A Visa Recruitment with USDA Secretary Vilsack* (Sept. 30, 2022), <https://www.usaid.gov/news-information/speeches/sep-30-2022-remarks-administrator-power-discussion-opportunities-and-incentives> (last visited Jan. 31, 2023).

<sup>127</sup> *Id.*

<sup>128</sup> Lima Ministerial Fact Sheet.

<sup>129</sup> L.A. Declaration Fact Sheet.

<sup>130</sup> Department of State, *Report to Congress on Proposed Refugee Admissions for Fiscal Year 2023* (Sept. 8, 2022), <https://www.state.gov/report-to-congress-on-proposed-refugee-admissions-for-fiscal-year-2023/> (last visited Dec. 13, 2022).

process—multiple times more noncitizens at the border than the pre-pandemic (2014–2019) daily number of inadmissible noncitizens seeking to enter the United States at land border ports of entry. Second, these time savings are expected to reduce the time undocumented individuals spend in CBP custody, which further facilitates a safe and orderly process, reduces the risks associated with overcrowding, and promotes the health and safety of the DHS workforce and noncitizens alike.

Individuals who schedule a time to arrive at a port of entry using CBP One, present themselves at that time, and are processed into the United States, would not be subject to the rebuttable presumption on asylum eligibility created by this proposed rule, whether in an application for asylum or during a credible fear screening.

While the Departments are aware of concerns regarding the accessibility of the CBP One app, both the app and the proposed rule are designed to take account of such accessibility concerns. CBP has observed that the overwhelming majority of noncitizens processed at ports of entry have smartphones. A CBP survey of migrants at the Hidalgo and Brownsville Ports of Entry on December 11, 2022, substantiates that observation—finding that 93 of 95 migrants of all ages had smartphones. In addition, third parties may assist noncitizens to navigate the app and input the required information to schedule a time and place to arrive at a port of entry. The Departments also have proposed to address those who nonetheless continue to have access concerns, by excepting from the rebuttable presumption individuals who arrive at ports of entry without a pre-scheduled time and place if the noncitizen demonstrates by a

preponderance of the evidence that it was not possible to access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.

In sum, by enabling migrants to schedule a time to arrive at a port of entry, DHS anticipates being able to minimize wait times, ultimately process more migrants, and channel arrivals to ports according to their capacity and ability to safely operate. This will help protect CBP officers' ability to effectively carry out their other critical missions of facilitating trade and travel at the ports of entry.

#### *F. Increased Access to Protection and Other Pathways in the Region*

Recognizing that managing migration is a collective responsibility, the United States has been working closely with

countries throughout the region to prioritize and implement a strategy that advances safe, orderly, legal, and humane migration, including access to international protection for those in need, throughout the Western Hemisphere. This focus is exemplified in three policy-setting documents: the U.S. Strategy for Addressing the Root Causes of Migration in Central America;<sup>131</sup> the Collaborative Migration Management Strategy (“CMMS”);<sup>132</sup> and the Los Angeles Declaration on Migration and Protection (“L.A. Declaration”), which was endorsed in June 2022 by 21 countries.<sup>133</sup> The CMMS and the L.A. Declaration support a collaborative and regional approach to migration and forced displacement, pursuant to which countries in the hemisphere commit to implementing programs to stabilize communities hosting migrants and asylum seekers, providing increased regular pathways and protections for migrants and asylum seekers residing in or traveled through their countries, and humanely enforcing existing immigration laws. The L.A. Declaration specifically lays out the goal of collectively “expand[ing] access to regular pathways for migrants and refugees.”<sup>134</sup>

To further L.A. Declaration commitments, the Department of State's Bureau of Population, Refugees, and Migration (“PRM”) and USAID announced \$314 million in new funding for humanitarian and development assistance for refugees and vulnerable migrants across the hemisphere, including support for socio-economic integration and humanitarian aid for Venezuelans in 17 countries of the region.<sup>135</sup> And on September 22, 2022, PRM and USAID announced nearly \$376 million in additional humanitarian

<sup>131</sup> The White House, *FACT SHEET: Strategy to Address the Root Causes of Migration in Central America* (July 29, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-strategy-to-address-the-root-causes-of-migration-in-central-america/> (last visited Dec. 13, 2022).

<sup>132</sup> The White House, *FACT SHEET: The Collaborative Migration Management Strategy* (July 29, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-the-collaborative-migration-management-strategy/> (last visited Dec. 13, 2022).

<sup>133</sup> Department of Homeland Security, Los Angeles Declaration on Migration and Protection (June 10, 2022), <https://www.dhs.gov/news/2022/10/12/dhs-supplement-h-2b-cap-nearly-65000-additional-visas-fiscal-year-2023>, (last visited Nov. 30, 2022).

<sup>134</sup> *Id.*

<sup>135</sup> Department of State, *Additional \$314 Million for U.S. Humanitarian Response to the Venezuela Regional Crisis* (June 10, 2022), <https://www.state.gov/additional-314-million-for-u-s-humanitarian-response-to-the-venezuela-regional-crisis/> (last visited Dec. 13, 2022).

assistance, which will provide essential support for vulnerable Venezuelans within Venezuela, as well as urgently needed assistance for migrants, refugees, and host communities across the region, further contributing to stabilization to address humanitarian crises in the region.<sup>136</sup>

Already there have been dividends from these efforts, as countries throughout the region have made substantial improvements to their protection systems, offering migrants meaningful new avenues to access temporary protection, domestic job markets, and public benefits such as health care and education. For example, as of 2021, Mexico is the third highest recipient of asylum claims in the world and the Government of Mexico has announced substantial increases to its labor visa programs over the past two years to help those seeking protection enter the labor market.<sup>137</sup> Costa Rica announced its intention to provide protected status to more than 200,000 displaced Nicaraguans.<sup>138</sup> And Colombia is working to provide temporary protected status to more than 2 million displaced Venezuelans.<sup>139</sup>

The following descriptions are illustrative of the efforts being taken by countries in the region, all of which are parties to the 1951 United Nations Convention relating to the Status of Refugees (“Refugee Convention”) or the 1967 Protocol relating to the Status of Refugees (“Refugee Protocol” or “Protocol”)<sup>140</sup> and the Convention Against Torture.<sup>141</sup> The Departments recognize that not all the options below

<sup>136</sup> USAID, *The United States Announces Nearly \$376 Million in Additional Humanitarian Assistance for People Affected by the Ongoing Crisis in Venezuela and the Region* (Sept. 22, 2022), <https://www.usaid.gov/news-information/press-releases/sep-22-2022-the-us-announces-nearly-376-million-additional-humanitarian-assistance-for-people-affected-by-ongoing-crisis-in-venezuela> (last visited Dec. 13, 2022).

<sup>137</sup> L.A. Declaration Fact Sheet; International Rescue Committee, *Asylum Seekers in Mexico Need Support to Join the Labor Market and Rebuild Their Lives*, IRC and Citi Foundation Respond with a Project (Dec. 7, 2022), <https://www.rescue.org/press-release/asylum-seekers-mexico-need-support-join-labor-market-and-rebuild-their-lives-irc-and> (last visited Dec. 13, 2022).

<sup>138</sup> <https://reliefweb.int/report/colombia/colombia-operational-update-january-february-2022> Alvaro Murillo et al., *Costa Rica Prepares Plan to Regularize Status of 200,000 Mostly Nicaraguan Migrants*, Reuters, Aug. 10, 2022, <https://www.reuters.com/world/americas/costa-rica-prepares-plan-regularize-status-200000-mostly-nicaraguan-migrants-2022-08-10/> (last visited Dec. 13, 2022).

<sup>139</sup> L.A. Declaration Fact Sheet.

<sup>140</sup> 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268.

<sup>141</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 114.

are viable for each migrant or asylum seeker, depending upon their individual circumstances. However, a location that may be unsafe for one person may not only be safe for, but offer a much-needed refuge to, others. While some of the countries below are the origin for sizable numbers of asylum seekers in the region, they also demonstrably provide protection for others who do consider those countries to be safe options where they are free from persecution or torture. Many such countries have stepped up in significant ways to address the unprecedented movement of migrants throughout the hemisphere—which has created a humanitarian challenge for almost every country in the region—by providing increased access to protection.

*Mexico:* The Government of Mexico has made notable strides in strengthening access to international protection through its Mexican Refugee Assistance Commission (“COMAR”), and as a result has now emerged as one of the top countries receiving asylum applications in the world.

COMAR now has staffing and field presence in seven COMAR offices and representation at three additional National Migration Institute offices.<sup>142</sup> According to the United Nations High Commissioner for Refugees (“UNHCR”), nearly 60,000 asylum seekers were assisted by a legal network comprising more than 100 lawyers and paralegals in 2021, and the Federal Public Defender’s Office provides additional support to people with asylum claims before COMAR.<sup>143</sup> Applicants who do not qualify for asylum in Mexico are automatically considered for complementary protection if they possess a fear of harm in their country of origin, or if there is reason to believe that they will be subjected to torture or to cruel, inhuman, or degrading treatment, but do not meet the refugee definition. Complementary protection

<sup>142</sup> COMAR witnessed a historically high level of asylum applications in 2021 with 129,791 cases—a level that was maintained through 2022, with 118,478 applications. Government of Mexico, *La COMAR en Números* (Dec. 2022), [https://www.gob.mx/cms/uploads/attachment/file/792337/Cierre\\_Diciembre-2022\\_\\_31-Dic\\_\\_1.pdf](https://www.gob.mx/cms/uploads/attachment/file/792337/Cierre_Diciembre-2022__31-Dic__1.pdf) (last visited Feb. 1, 2023). Of the 419,337 individuals who have applied for asylum from COMAR from 2013 through the end of 2022, COMAR has granted asylum to 92,030 of these individuals. *Id.*

<sup>143</sup> United Nations High Commissioner for Refugees, *Protection and Solutions in the Pandemic* at 33 (2022), <https://www.acnur.org/6261d3ab4.pdf> (last visited Dec. 17, 2022); MIRPS, *MIRPS in Mexico*, <https://mirps-platform.org/en/mirps-by-country/mirps-in-mexico/> (last visited Dec. 17, 2022).

allows these beneficiaries to regularize their status.<sup>144</sup>

In 2021, COMAR received nearly 130,000 asylum applications—almost double the number of applications it processed in 2019, and the third most of any country in the world, after the United States and Germany.<sup>145</sup> Of those applications in 2021, COMAR granted asylum in 72 percent of cases; an additional two percent of applicants were granted complementary protection.<sup>146</sup> The average case takes 8–12 months to adjudicate.<sup>147</sup> With United States Government funding and the support of international organizations, Mexico also has substantially increased its Local Integration Program, which relocates and integrates individuals granted asylum in safe areas of Mexico’s industrial corridor. These individuals are then matched with jobs and provided apartments, and their children are enrolled in local schools. In May 2022, the program reached the milestone of reintegrating its 20,000th asylum seeker in Mexico.<sup>148</sup> And in June 2022, Mexico committed to support local labor integration for an additional 20,000 asylees over the next three years.<sup>149</sup>

It is also notable that that the Government of Mexico has become a regional leader in providing labor pathways for individuals who are seeking economic opportunity. Mexico has committed to growing the Border

<sup>144</sup> Government of Mexico, *Ley sobre Refugiados, Protección Complementaria y Asilo Político* (Jan. 27, 2011), [https://www.gob.mx/cms/uploads/attachment/file/211049/08\\_Ley\\_sobre\\_Refugiados\\_Protecci\\_n\\_Complementaria\\_y\\_Asilo\\_Pol\\_tico.pdf](https://www.gob.mx/cms/uploads/attachment/file/211049/08_Ley_sobre_Refugiados_Protecci_n_Complementaria_y_Asilo_Pol_tico.pdf) (last visited Dec. 17, 2022).

<sup>145</sup> Lizbeth Diaz, *Mexico Asylum Applications Surge in 2021, Haitians Top List*, Reuters, Jan. 3, 2022, <https://www.reuters.com/world/americas/mexico-asylum-applications-nearly-double-2021-haitians-top-list-2022-01-03/> (last visited Dec. 13, 2022); TeleSUR English, *Mexico was the Third Country with the Highest Number of Asylum Applications in 2021*, YouTube (Apr. 22, 2022), <https://www.youtube.com/watch?v=zD1jVg8CJ9s> (last visited Dec. 13, 2022).

<sup>146</sup> Lizbeth Diaz, *Mexico Asylum Applications Surge in 2021, Haitians Top List*, Reuters, Jan. 3, 2022, <https://www.reuters.com/world/americas/mexico-asylum-applications-nearly-double-2021-haitians-top-list-2022-01-03/> (last visited Dec. 13, 2022).

<sup>147</sup> Refugees International, *Mexico’s Use of Differentiated Asylum Procedures: An Innovative Approach to Asylum Processing* (July 20, 2021), [https://www.refugeesinternational.org/reports/use-of-differentiated-asylum-procedures-an-innovative-approach-to-asylum-processing-#\\_ftn5](https://www.refugeesinternational.org/reports/use-of-differentiated-asylum-procedures-an-innovative-approach-to-asylum-processing-#_ftn5) (last visited Dec. 13, 2022).

<sup>148</sup> UNHCR, *Más de 20.000 Reubicaciones como Parte de los Esfuerzos de Integración de Personas Refugiadas en México* (May 25, 2022), <https://www.acnur.org/noticias/press/2022/5/628e4b524/mas-de-20000-reubicaciones-como-parte-de-los-esfuerzos-de-integracion-de.html> (last visited Dec. 13, 2022).

<sup>149</sup> L.A. Declaration Fact Sheet.

Visitor Work Card program—which allows unlimited entry and exit for Guatemalans and Belizeans to cross Mexico’s southern border and work in Southern Mexican states—from approximately 3,500 beneficiaries a year to 10,000–20,000 beneficiaries per year.<sup>150</sup> Mexico also announced the launch of a new temporary labor program for 15,000–20,000 Guatemalan workers. This will be expanded to Honduran and Salvadoran workers in the medium term and highlights the priority that the Government of Mexico is placing on providing lawful mechanisms for migrants to access opportunity, thus reducing the incentive to resort to irregular migration.<sup>151</sup>

*Guatemala:* Over the past two years, the Government of Guatemala has taken key steps to continue to develop its asylum system. In 2021, the Guatemalan Migration Institute (“IGM”) announced that it established the Refugee Status Recognition Department (“DRER”) to better receive and process asylum applications, in line with the concept of regional responsibility sharing to manage migration.<sup>152</sup> DRER is a specialized branch of IGM that has been created solely to receive asylum claims—a key improvement from its prior practice, where intake was not specialized for asylum seekers. The Government of Guatemala also partnered with the United States Government and international organizations, including UNHCR, IOM, and the United Nations International Children’s Emergency Fund to establish a series of Attention Centers for Migrants and Refugees in Guatemala City, Tecun Uman, and Quetzaltenango.<sup>153</sup> These centers, located in key locations across Guatemala, provide individuals an

<sup>150</sup> Government of Mexico, Press Release, *Mexico to Expand Labor Mobility Programs and Integrate Refugees into its Labor Market* (June 10, 2022), <https://www.gob.mx/sre/prensa/mexico-to-expand-labor-mobility-programs-and-integrate-refugees-into-its-labor-market?idiom=en> (last visited Dec. 16, 2022); L.A. Declaration Fact Sheet.

<sup>151</sup> Unidad de Política Migratoria, *Boleti0301.n Mensual de Estadísticas Emigratorias* (Oct. 2022), [http://www.politicamigratoria.gob.mx/es/PoliticaMigratoria/Boletines\\_Estadisticos](http://www.politicamigratoria.gob.mx/es/PoliticaMigratoria/Boletines_Estadisticos) (last visited Dec. 14, 2022); L.A. Declaration Fact Sheet.

<sup>152</sup> Government of Guatemala Ministry of Foreign Affairs, Comunicado, *Guatemala Fortalece Acción Institucional en Esfuerzo Regional por Atención y Dignificación de Refugiados con Apoyo de ACNU Guatemala* (Feb. 9, 2021), <https://prensa.gob.gt/guatemala-fortalece-accion-institucional-en-esfuerzo-regional-por-atencion-y-dignificacion-de-0> (last visited Dec. 13, 2022).

<sup>153</sup> The White House, *FACT SHEET: Update on the Collaborative Migration Management Strategy* (April 20, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/20/fact-sheet-update-on-the-collaborative-migration-management-strategy/> (last visited Dec. 15, 2022).

opportunity to have their protection, humanitarian, and economic needs evaluated in order to provide appropriate services and referrals. Since their inception, more than 32,000 individuals have accessed these centers.<sup>154</sup>

In 2019 and 2020, IGM received just under 500 asylum applications per year; however, that number doubled to 1,054 in 2021. As of March 2022, IGM had already received nearly 300 applications in 2022 and granted asylum to 590 individuals.<sup>155</sup> In addition, with support from the United States Government, UNHCR has helped Guatemala streamline the issuance of work permits for refugee and asylum seekers from 15 to 4 business days.<sup>156</sup>

**Belize:** Belize also has taken meaningful steps to expand protection for migrants. In December 2021, the Government of Belize announced an amnesty program for asylum seekers who registered before March 31, 2020 (but whose cases have not been adjudicated), and irregular migrants who have lived in the country before December 31, 2016.<sup>157</sup> Additionally, migrants can qualify for other reasons tied to their societal connections to Belize, such as having a Belizean child, marrying a Belizean, or completing school in Belize and continuing to reside in Belize. Recipients are immediately granted permanent residence with a path to citizenship.<sup>158</sup> UNHCR reports that, as of October 2022, a total of 4,130 individuals (primarily Guatemalans, Hondurans and Salvadorans) have been granted asylum in Belize.<sup>159</sup>

**Costa Rica:** Costa Rica has demonstrated its commitment to providing humanitarian and other protections to asylum seekers and displaced migrants over the past two years. It is currently hosting roughly 300,000 Nicaraguan nationals who have fled deteriorating economic and security

conditions in that country—a number that constitutes about 75 percent of Costa Rica's migrant population.<sup>160</sup> As recently as September 2022, Costa Rican officials reported more than 200,000 pending applications and another 50,000 people waiting for their appointment to make a formal application. Nicaraguans account for nearly 9 out of 10 applicants.<sup>161</sup>

The Government of Costa Rica recently announced its intention to regularize the status of more than 200,000 mostly Nicaraguan migrants, providing them with access to jobs and healthcare as part of the process.<sup>162</sup> In addition, the Government of Costa Rica committed in its National Action Plan for the Comprehensive Regional Protection and Solutions Framework to “establish complementary protection or other mechanisms to guarantee the non-refoulement principle for people who do not meet the requirements to be recognized as refugees but should not be returned to their country of origin, because of reasonable risk of suffering harm.”<sup>163</sup>

On March 15, 2022, following extensive diplomatic engagement, the United States and the Government of Costa Rica signed a migration arrangement, the first such agreement in the region. This agreement outlines both countries' mutual commitment to work collaboratively to manage migration and expand legal pathways and access to protection.<sup>164</sup> Furthermore, through the L.A. Declaration, Costa Rica committed to renewing the temporary complementary protection category scheme for migrants of Cuba, Nicaragua,

and Venezuela.<sup>165</sup> Making true on its commitment in the L.A. Declaration, Costa Rica has established a Temporary Complementary Protection Program, also known as a Special Temporary Category (“STC”), for Cuban, Nicaraguan, and Venezuelan migrants who applied for asylum between January 1, 2010, and September 30, 2022, and desire to withdraw their applications in lieu of permission to remain lawfully in Costa Rica, work, and receive other social services in the country. STC holders will be permitted to apply for residency after five years.

**Colombia:** Colombia has emerged as one of the leaders in the Western Hemisphere—and the world—in its response to the unprecedented surge in irregular migration from Venezuela. On February 8, 2021, the Government of Colombia announced an innovative program to provide temporary protected status for 10 years to Venezuelans residing in Colombia as of that date, as well those who enter the country and register through official ports of entry over the next two years. This form of complementary protection provides Venezuelan migrants with government identity documents, allowing them to work legally, access public and private services, and integrate and contribute to Colombia's economy and society.<sup>166</sup>

More than 2.3 million Venezuelans have registered for this complementary protection, and as of December 2022, the Government of Colombia had approved documents to provide temporary legal status to over 1.6 million Venezuelans and delivered them to nearly 1.5 million Venezuelans.<sup>167</sup> The new Petro Administration in Colombia has affirmed its commitment to continuing these efforts, and Colombia is working to expand measures that promote integration of these migrants in Colombian society.

**Ecuador:** The Government of Ecuador is hosting more than 500,000 displaced Venezuelans and has worked to meaningfully expand protection for migrants in recent months.<sup>168</sup> Ecuador has received nearly 12,000 asylum applications containing over 60,000 applicants since 2017 and granted

<sup>154</sup> *Id.*

<sup>155</sup> Instituto Guatemalteco de Migración, *Información Sobre Personas Solicitantes y Refugiadas en Guatemala: Enero 2002–Marzo 2022* (Mar. 2022), <https://igm.gob.gt/wp-content/uploads/2022/04/Informe-con-Graficos-Marzo-2022.pdf> (last visited Dec. 13, 2022).

<sup>156</sup> Government of Guatemala, *Extranjeros Podrán Solicitar Permiso de Trabajo En Línea* (Feb. 28, 2022), <https://www.mintrabajo.gob.gt/index.php/noticias/356-extranjeros-podran-solicitar-permiso-de-trabajo-en-linea> (last visited Dec. 15, 2022).

<sup>157</sup> Government of Belize, *Announcement of Amnesty 2022* (Dec. 7, 2022), <https://www.pressoffice.gov.bz/announcement-of-amnesty-2022/> (last visited Dec. 8, 2022).

<sup>158</sup> *Id.*

<sup>159</sup> UNHCR, *Fact Sheet: Belize September–October 2022* (Nov. 28, 2022), <https://data.unhcr.org/en/documents/details/97161> (last visited Dec. 13, 2022).

<sup>160</sup> Nicaragua, *CIA World Factbook* (Dec. 2, 2022), <https://www.cia.gov/the-world-factbook/countries/nicaragua/#:~:text=Today%20roughly%20300%20000%20Nicaraguans%20are,seasonally%20for%20work%2C%20many%20illegally> (last visited Dec. 15, 2022).

<sup>161</sup> Moises Castillo, *Fleeing Nicaraguans strain Costa Rica's asylum system*, Associated Press, Sept. 2, 2022, <https://apnews.com/article/covid-health-elections-presidential-caribbean-52044748d15dbb6ca706c66c7459a5> (last visited Dec. 15, 2022).

<sup>162</sup> Alvaro Murillo et al., *Costa Rica Prepares Plan to Regularize Status of 200,000 Mostly Nicaraguan Migrants*, Reuters, Aug. 10, 2022, <https://www.reuters.com/world/americas/costa-rica-prepares-plan-regularize-status-200000-mostly-nicaraguan-migrants-2022-08-10/> (last visited Dec. 13, 2022).

<sup>163</sup> *MIRPS National Action Plan: Belize, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Panama 7*, <https://globalcompactrefugees.org/sites/default/files/2021-04/MIRPS%20National%20commitments.pdf> (last visited Dec. 16, 2022).

<sup>164</sup> DHS, *Readout of Secretary Mayorkas's Visit to Mexico and Costa Rica* (Mar. 15, 2022), <https://www.dhs.gov/news/2022/03/16/readout-secretary-mayorkas-visit-mexico-and-costa-rica> (last visited Dec. 13, 2022); U.S. Embassy in Costa Rica, *United States and Costa Rica Sign Migration Arrangement* (Mar. 17, 2022), <https://cr.usembassy.gov/united-states-and-costa-rica-sign-migration-arrangement/> (last visited Dec. 13, 2022).

<sup>165</sup> L.A. Declaration Fact Sheet.

<sup>166</sup> UNHCR, *Temporary Protection Status in Colombia (November 2021)* (Dec. 3, 2021), <https://reliefweb.int/report/colombia/temporary-protection-status-colombia-november-2021-0> (last visited Dec. 13, 2022).

<sup>167</sup> Government of Colombia, *Visibles: Estado Temporal de Protección*, <https://www.migracioncolombia.gov.co/visibles> (last visited Dec. 15, 2022).

<sup>168</sup> UNHCR, *Ecuador: Monthly Update October 2022* (Nov. 10, 2022), <https://reporting.unhcr.org/document/3742> (last visited Dec. 13, 2022).

asylum to 12,643 individuals and complementary protection to another 195 individuals through mid-2022.<sup>169</sup> On September 1, 2022, it launched the first phase of its registration process, which will enable irregular migrants to gain a temporary resident permit—opening online registration to an estimated 120,000 Venezuelans who hold or previously held a regular migration status and all unaccompanied minors. More than 68,500 individuals registered within the first week. The second phase opened on November 16, 2022, to approximately 100,000 non-Venezuelan migrants (the majority of whom are Colombian) who entered regularly. As of November 25, 2022, more than 89,000 individuals had registered and over 22,000 have already received their temporary residency visa. The third phase will open February 17, 2023, to an estimated 350,000 Venezuelans who entered irregularly.

**Canada:** Canada operates a well-known Temporary Foreign Worker Program and expected to welcome 50,000 agricultural workers from Mexico, Guatemala, and the Caribbean in 2022.<sup>170</sup> In 2021, Canada admitted 61,735 workers specifically in the agricultural sector, 44 percent of whom were from Mexico and 23 percent from Guatemala.<sup>171</sup> This is in addition to its refugee resettlement program, which has received 17,687 referrals from the Western Hemisphere in 2022, of which 5,020 have been granted refugee status in Canada so far.<sup>172</sup>

#### IV. Description of the Proposed Rule

##### A. Rebuttable Presumption of Ineligibility for Asylum and Exceptions

Pursuant to section 208(b)(1)(A), (b)(2)(C), (d)(5)(B) of the INA, 8 U.S.C. 1158(b)(1)(A), (b)(2)(C), (d)(5)(B), the Departments are proposing a condition on asylum eligibility, in the form of a new rebuttable presumption of ineligibility for asylum in proposed 8

CFR 208.33 and 8 CFR 1208.33 for certain noncitizens who enter the United States at the southwest land border. Under this NPRM, this rebuttable presumption would apply to certain noncitizens entering the United States at the southwest land border without documents sufficient for lawful admission as described in section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), on or after the date of termination of the Title 42 public health Order, after traveling through a country that is party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees. For purposes of proposed 8 CFR 208.33(a)(1) and 1208.33(a)(1), the phrase “enters the United States at the southwest land border” would mean any crossing into the territorial limits of the United States, *i.e.*, physical presence, whether presenting at a U.S. port of entry or crossing into U.S. territory between ports of entry, without regard to whether the noncitizen has been inspected by an immigration officer, evaded inspection by an immigration officer, or was free from official restraint or surveillance. In other words, the term “enters” would not be intended to import the definitions of “entry” that have been used in certain other, unique immigration law contexts. *Cf., e.g., Matter of Martinez-Serrano*, 25 I&N Dec. 151, 153 (BIA 2009).

This rebuttable presumption would not apply to noncitizens who availed themselves of certain established processes to enter the United States or sought asylum in a third country and were denied. Proposed 8 CFR 208.33(a)(1), 8 CFR 1208.33(a)(1). Specifically, the rebuttable presumption would not be applicable to noncitizens who are provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process; presented at a port of entry at a pre-scheduled time and place, or presented at a port of entry, without a pre-scheduled time and place, if the noncitizen demonstrates that the DHS scheduling system (currently the CBP One app) was not possible for the noncitizen to access or use; or sought asylum or other protection in a country through which the noncitizen traveled and received a final decision denying that application. Proposed 8 CFR 208.33(a)(1)(i) through (iii), 1208.33(a)(1)(i) through (iii).<sup>173</sup>

<sup>173</sup> The exemption for circumstances in which the DHS scheduling system was inaccessible or unusable is designed to capture 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.

A noncitizen could rebut this presumption by demonstrating exceptionally compelling circumstances by a preponderance of the evidence. The proposed rule lists three *per se* grounds for rebuttal: if a noncitizen demonstrates that, at the time of entry, they or a member of their family as described in 8 CFR 208.30(c) with whom the noncitizen is traveling faced an acute medical emergency; faced an imminent and extreme threat to their life or safety; or were a “victim of a severe form of trafficking in persons” as defined in 8 CFR 214.11. Proposed 8 CFR 208.33(a)(2)(i) through (iii), 1208.33(a)(2)(i) through (iii). Acute medical emergencies would include situations in which someone faces a life-threatening medical emergency or faces acute and grave medical needs that cannot be adequately addressed outside of the United States. Examples of imminent and extreme threats would include imminent threats of rape, kidnapping, torture, or murder that the noncitizen faced at the time the noncitizen crossed the SWB, such that they cannot wait for an opportunity to present at a port of entry in accordance with the processes outlined in this proposed rule without putting their life or well-being at extreme risk; it would not include generalized threats of violence. In addition to the *per se* grounds for rebuttal, the presumption also could be rebutted in other exceptionally compelling circumstances, as the adjudicators in the sound exercise of their judgment may determine.

One such additional exceptionally compelling circumstance that the proposed rule would recognize avoids a circumstance that may lead to the separation of a family. *See* proposed 8 CFR 1208.33(d). Those subject to the lawful pathways condition on asylum eligibility who do not rebut the presumption would be able to continue to apply for statutory withholding of removal and protection under the CAT. Unlike in asylum, spouses and minor children are not eligible for derivative grants of withholding of removal or CAT protection. *Compare* INA 208(b)(3)(A), 8 U.S.C. 1158(b)(3)(A) (“[a] spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien”), *with* INA 241(b)(3), 8 U.S.C. 1231(b)(3) (not providing for derivative statutory withholding of removal), *and* 8 CFR 1208.16(c)(2) (not providing for derivative CAT protection); *see also*

<sup>169</sup> UNHCR, *Ecuador: Monthly Update October 2022* (Nov. 10, 2022), <https://reporting.unhcr.org/document/3742> (last visited Dec. 13, 2022); UNHCR, *Refugee Data Finder: Asylum Applications*, <https://www.unhcr.org/refugee-statistics/download/?url=Lzen78> (last visited Dec. 13, 2022); UNHCR, *Refugee Data Finder: Asylum Decisions*, <https://www.unhcr.org/refugee-statistics/download/?url=U7qmaT> (last visited Dec. 13, 2022).

<sup>170</sup> L.A. Declaration Fact Sheet.  
<sup>171</sup> Statistics Canada, *Countries of Citizenship for Temporary Foreign Workers in the Agricultural Sector* (June 13, 2022), <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210022101> (last visited Dec. 13, 2022).

<sup>172</sup> Immigration and Refugee Board of Canada, *Claims by Country of Alleged Persecution 2022 (January to September)* (Nov. 22, 2022), <https://www.irb-cisr.gc.ca/en/statistics/protection/Pages/RPStat2022.aspx> (last visited Dec. 13, 2022).

*Sumolang v. Holder*, 723 F.3d 1080, 1083 (9th Cir. 2013) (recognizing that the asylum statute allows for derivative beneficiaries of the principal applicant for asylum, but that the withholding of removal statute makes no such allowance). Where a principal asylum applicant is eligible for statutory withholding of removal or CAT protection and would be granted asylum but for the lawful pathways rebuttable presumption, and where the denial of asylum on that ground alone would lead to the applicant's family being separated because at least one other family member would not qualify for asylum or other protection from removal on their own—meaning the entire family may not be able to remain together—the Departments have determined that the possibility of separating the family would constitute an exceptionally compelling circumstance that rebuts the lawful pathways presumption of ineligibility for asylum. *See* Executive Order 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273, 8273 (Feb. 5, 2021) (“It is the policy of my Administration to respect and value the integrity of families seeking to enter the United States.”).

This family unity provision would appear in EOIR's regulations and not DHS's regulations. That is because only EOIR adjudicators are able to issue removal orders to noncitizens found to have a credible fear and thus, functionally, are the only adjudicators able to withhold or defer those orders under the statute or the regulations implementing the CAT. Hence, a key inquiry for this rebuttal circumstance—whether the principal applicant is eligible for statutory withholding of removal or CAT protection—would be one reserved for EOIR and made during removal proceedings even for those who are first processed through the asylum merits process. Thus, inquiry into this rebuttal circumstance is properly reserved for proceedings before EOIR. Importantly, the absence of this provision from the DHS regulations would not lead to the separation of families. When USCIS conducts a credible fear screening of a family unit, it will find that the entire family unit passes the screening if one member of the family is found to have a credible fear. *See* 8 CFR 208.30(c). USCIS will continue to process family claims in this manner even when applying the reasonable possibility standard.

The proposed rule also contains a specific exception to the rebuttable presumption for unaccompanied children. Recognizing Congress's attention to the particular vulnerability

of unaccompanied children, *see* INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E) (exempting unaccompanied children from the safe-third-country bar); INA 208(b)(3)(C), 8 U.S.C. 1158(a)(2)(E) (permitting unaccompanied children to present their asylum claims in the first instance to an asylum officer in a non-adversarial interview),<sup>174</sup> unaccompanied children would be categorically excepted from the rebuttable presumption. *See* proposed 8 CFR 208.33(b)(1), 1208.33(b)(1). Moreover, applicability of the rebuttable presumption would be adjudicated during the credible fear process for noncitizens processed for expedited removal, as well as applied to merits adjudications, as discussed below. Pursuant to the Trafficking Victims Protection Reauthorization Act of 2008, unaccompanied children whom DHS seeks to remove cannot be processed for expedited removal and, thus, are never subject to the credible fear process. 8 U.S.C. 1232(a)(5)(D). As unaccompanied children are already precluded from expedited removal, which may already be an incentive for children to arrive unaccompanied at our border, the Departments do not expect—based on their experience implementing current law concerning expedited removal and asylum—that this exclusion of unaccompanied children from the rebuttable presumption would serve as a significant incentive for families to send their children unaccompanied to the United States. Moreover, under this NPRM, families would be able to avail themselves of lawful pathways and processes to enter the United States and not be subject to the rebuttable presumption.

#### B. Screening Procedures

Although the rebuttable presumption would apply to any noncitizen who is described in proposed 8 CFR 208.33(a)(1), it would most frequently be relevant for noncitizens who are subject to expedited removal under section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1).<sup>175</sup> As described above, such noncitizens are subject to removal “without further hearing or review” unless they indicate an intention to apply for asylum or fear of persecution. INA 235(b)(1)(A)(i), 8 U.S.C.

<sup>174</sup> *See also* 8 U.S.C. 1232(d)(8) (“Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.”).

<sup>175</sup> For a more complete description of the expedited removal process, *see* the Legal Authority section below.

1225(b)(1)(A)(i). Noncitizens in expedited removal who indicate an intention to apply for asylum or fear of persecution are referred to an asylum officer for an interview to determine if they have a credible fear of persecution and should accordingly remain in proceedings for further consideration of the application. INA 235(b)(1)(A)(ii), (b)(1)(B)(i)–(ii), 8 U.S.C. 1225(b)(1)(A)(ii), (b)(1)(B)(i)–(ii). In addition, asylum officers consider whether a noncitizen in expedited removal may be eligible for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or for protection under the regulations implementing U.S. non-refoulement obligations under the CAT. *See* 8 CFR 208.30(e)(2) and (3).

Accordingly, the proposed rule would implement changes to and build on this existing system and would instruct asylum officers to apply the lawful pathways rebuttable presumption during credible fear screenings. The proposed rule would establish procedures for asylum officers to follow when determining whether the rebuttable presumption applies to a noncitizen, *see* proposed 8 CFR 208.33(a)(1), and, if it does, whether the noncitizen has rebutted the presumption, *see* proposed 8 CFR 208.33(a)(2). In addition, for noncitizens found to be ineligible for asylum under the proposed rule, the proposed rule would establish procedures for asylum officers to further consider a noncitizen's fear of removal in the context of the noncitizen's eligibility for withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or for protection under the regulations implementing the CAT.

For each noncitizen referred to an asylum officer for a credible fear interview, the asylum officer would first determine if the noncitizen is covered by and fails to rebut the presumption of ineligibility at proposed 8 CFR 208.33(a)(1). If the asylum officer determines that the answer to both questions is “yes,” then the noncitizen would be ineligible for asylum under the lawful pathways condition, and the asylum officer would proceed to determine whether the noncitizen has established a reasonable possibility of persecution or torture<sup>176</sup> in order to

<sup>176</sup> The Departments acknowledge that, in the Asylum Processing IFR, they recently rescinded changes made by the Global Asylum Rule that applied mandatory bars during credible fear screenings and subjected noncitizens' remaining claims for statutory withholding and CAT protection to the “reasonable possibility” of persecution or torture standard. As discussed in Part V.C.6.ii of this preamble, the Departments have

screen for withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or for withholding of removal under the regulations implementing the CAT as to the identified country of removal.<sup>177</sup>

However, if the asylum officer determines that the answer to either question is “no”—meaning the asylum officer has determined that the noncitizen is not covered by the lawful pathways condition (for example, because the noncitizen pursued a lawful pathway set forth in proposed 8 CFR 208.33(a)(1) or is excepted pursuant to proposed 8 CFR 208.33(b)(2))<sup>178</sup> or the asylum officer determined that the noncitizen met the burden to rebut the presumption under proposed 8 CFR 208.33(a)(2)—then the asylum officer would follow the procedures in 8 CFR 208.30, which provide for a positive credible fear determination if the noncitizen establishes a significant possibility of establishing eligibility for asylum under section 208 of the INA, statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or withholding of removal under the regulations implementing the CAT.

In other words, if the asylum officer determines that the noncitizen is not subject to or has overcome the presumption described in this proposed rule and thus is otherwise potentially eligible for asylum, the asylum officer’s credible fear determination would follow the procedures already in place, including the use of the “significant possibility” standard to screen for eligibility for asylum, statutory withholding of removal, and CAT protection. *See* 8 CFR 208.30(e)(2) and (3); *see also* 86 FR at 46914–15 (describing the history of the credible fear screening process and “significant possibility” standard). If, however, the asylum officer determines that the noncitizen is ineligible for asylum due to the lawful pathways condition, the

determined that in the unique circumstances discussed in this proposed rule, it would be appropriate to apply the lawful pathways additional limitation on asylum eligibility during the credible fear screening stage and to then apply the “reasonable possibility” of persecution or torture standard to screen the remaining applications for statutory withholding of removal and CAT protection, and that doing so in the way the Departments intend would lead to better allocation of resources overall.

<sup>177</sup> In most cases, the country of removal is the noncitizen’s country of citizenship or nationality. However, DHS may identify one or more alternative countries of removal. *See* INA 241(b)(2), 8 U.S.C. 1231(b)(2) (designating countries of removal).

<sup>178</sup> For example, as discussed above, the proposed rule excepts unaccompanied children, but such exception is not relevant to the discussion here as unaccompanied children are ineligible for expedited removal. *See* 8 U.S.C. 1252(a)(5)(D).

asylum officer’s review would be limited to whether the noncitizen has demonstrated a reasonable possibility of persecution or torture, in order to screen for statutory withholding of removal and CAT protection.

If the asylum officer finds that a noncitizen who is ineligible for asylum due to the lawful pathways condition establishes a reasonable possibility of persecution or torture, as with other credible fear interviews, DHS would issue the noncitizen a Form I–862, Notice to Appear, and thereby place the noncitizen in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a. During the course of removal proceedings, the noncitizen would be able to apply for asylum, statutory withholding of removal, and protection under the CAT by filing a Form I–589 in accordance with the form’s and the court’s instructions, and the noncitizen could also seek any other claims for relief they wish to pursue.<sup>179</sup> In adjudicating the noncitizen’s application for asylum in section 240 proceedings, the IJ would use a *de novo* standard of review (meaning the judge considers the asylum officer’s record, but rules without deferring to the asylum officer’s factual findings or legal conclusions) in determining the applicability of the lawful pathways condition on eligibility for asylum.

If the asylum officer were to find that a noncitizen is ineligible for asylum due to the lawful pathways condition and fails to demonstrate a reasonable possibility of persecution or torture, the asylum officer would enter a negative credible fear determination, provide the noncitizen with a written notice of the decision, and inquire if the noncitizen wishes to seek further review of the asylum officer’s determination before an IJ. The noncitizen would indicate whether or not he or she desires such review on a Record of Negative Fear Finding and Request for Review by Immigration Judge. If the noncitizen requests an IJ’s review, the asylum officer would serve the noncitizen with a Form I–863, Notice of Referral, and provide the IJ with the record of the asylum officer’s determination. A complete description of the proposed IJ review proceedings is set out in the next section. As relevant for the DHS

<sup>179</sup> Specifically, the asylum officer’s determination regarding the noncitizen’s ineligibility for asylum due to the lawful pathways condition would not be controlling in section 240 removal proceedings, and the IJ would be able to consider the noncitizen’s asylum eligibility using a *de novo* standard of review. In addition, the noncitizen could seek any other form of relief or protection available in section 240 proceedings, subject to the eligibility requirements for such relief or protection.

procedures, however, the proposed rule provides that the case would be returned to DHS for removal of the noncitizen if the IJ affirms the asylum officer and issues a negative credible fear determination, either because (1) the IJ determined that the noncitizen is covered by the lawful pathways condition and did not rebut the presumption and that the noncitizen did not establish a reasonable possibility of persecution or torture, or (2) the IJ determined that the noncitizen was not covered by the lawful pathways condition or rebutted the presumption and that the noncitizen did not establish a significant possibility of qualifying for asylum, withholding of removal, or protection under the CAT. On the other hand, if the IJ issues a positive credible fear finding, DHS would initiate further proceedings that would allow the noncitizen the opportunity to pursue a claim for asylum, statutory withholding of removal, and CAT protection. Specifically, if the IJ finds that the noncitizen is not covered by the lawful pathways condition or successfully rebutted the condition’s presumption of ineligibility for asylum and established a significant possibility of eligibility for asylum, withholding of removal, or CAT protection, DHS would have the discretion either to issue the noncitizen a Form I–862, Notice to Appear, and thereby place the noncitizen in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a, or to refer the noncitizen for a merits interview before an asylum officer under newly established procedures. *See* 8 CFR 1208.30(g)(2)(iv)(B); Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 FR 18078 (Mar. 29, 2022) (“Asylum Processing IFR”). Alternatively, if the IJ finds that the noncitizen is subject to the lawful pathways condition and did not rebut the presumption of ineligibility but determines that the noncitizen established a reasonable possibility of persecution or torture, DHS would file a Form I–862, Notice to Appear, and place the noncitizen in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a.<sup>180</sup>

<sup>180</sup> The Departments note that this proposed rule would provide that DHS will refer all noncitizens subject to the lawful pathways limitation who establish a reasonable possibility of persecution or torture to removal proceedings under section 240 of the INA, 8 U.S.C. 1229a, even though the Credible Fear and Asylum Processing IFR provides that DHS has discretion to place other categories of screened-in noncitizens either in section 240 removal proceedings or in an asylum merits hearing before a USCIS asylum officer under newly established

Continued

### C. IJ Review Procedure

Under longstanding regulations, IJs have had the authority to review, upon the request of a noncitizen, an asylum officer's negative credible fear determination. *See generally* 8 CFR 1003.42, 1208.30. Consistent with this practice, this proposed rule would provide for IJ review of asylum officers' negative credible fear determinations in cases governed by proposed 8 CFR 208.33. A negative credible fear determination encompasses findings that noncitizens have not established a significant possibility of eligibility for asylum or a reasonable fear of persecution or torture for purposes of statutory withholding under the INA or the regulations implementing CAT.

Thus, where an asylum officer issues a negative credible fear determination pursuant to this proposed rule, the asylum officer would inquire whether the noncitizen wishes for an IJ to review that determination. *See* proposed 8 CFR 208.33(c)(2)(iii). Where the noncitizen requests such review, the record would be referred to an IJ. *See* proposed 8 CFR 208.33(c)(2)(v). As required by the INA, IJ review will be held in-person, by video, or by telephone, and the noncitizen will have "an opportunity . . . to be heard and questioned by the immigration judge."<sup>181</sup>

Consistent with established practice, the IJ would evaluate the case under a de novo standard of review. *See* 8 CFR 1003.42(d)(1), proposed 8 CFR 1208.33(c)(1). The IJ would first assess whether the rebuttable presumption of asylum ineligibility at proposed 8 CFR 208.33(a)(1) and 1208.33(a)(1) applies and, if so, whether it was rebutted by the noncitizen. Where the IJ determines that the presumption applies and is not rebutted, the IJ would assess whether the noncitizen has established a reasonable possibility of persecution or torture in the country of removal. Where the IJ concludes that the noncitizen has established such a reasonable possibility, the IJ would issue a positive credible fear determination. *See* proposed 8 CFR 1208.33(c)(2)(ii). Where the IJ concludes that the noncitizen has

not established such a reasonable possibility, the IJ would issue a negative credible fear determination. *See id.*

If the IJ determines that the presumption does not apply or that the noncitizen rebutted the presumption, the IJ would continue to determine whether the noncitizen has established a significant possibility of eligibility for asylum, withholding of removal under section 241(b)(3) of the Act, or withholding of removal under the CAT. Where the IJ determines that the noncitizen has established a significant possibility of eligibility, the IJ would issue a positive credible fear determination. *See* proposed 8 CFR 1208.33(c)(2)(i). Where the IJ determines that the noncitizen has not established a significant possibility of eligibility for asylum, withholding of removal under section 241(b)(3) of the Act, or withholding of removal under the CAT, the IJ would issue a negative credible fear determination. *See id.*

Where the IJ issues a positive credible fear determination based on the "significant possibility" standard, DHS would have the discretion either to refer the noncitizen for an asylum merits interview before an asylum officer, or to place the noncitizen in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a. *See* proposed 8 CFR 208.33(c)(2)(v)(A); Asylum Processing IFR. Where the IJ issues a positive credible fear determination based on the "reasonable possibility" standard, DHS would issue a Form I-862 and place the noncitizen in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a. *See* proposed 8 CFR 208.33(c)(2)(v)(B). In all cases, the noncitizen would have the ability to pursue their claims for asylum, withholding of removal under the Act, and protection under the CAT. Where the IJ issues a negative credible fear determination, the noncitizen would be removed by DHS, although USCIS has the discretion to reconsider its negative credible fear determination. *See* proposed 8 CFR 208.33(c)(2)(v)(C).

Consistent with longstanding practice, the IJ would be able to consider, in making the above determinations, the asylum officer's notes and summary of the material facts, and all other materials upon which the asylum officer's determination was based. *See* proposed 8 CFR 208.33(c)(2)(v). The IJ would also be able to consider any testimony from the noncitizen elicited at their hearing. *See* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III) (stating that credible fear review "shall include an opportunity for the alien to be heard and questioned by the IJ, either in

person or by telephonic or video connection"). Where an adjudicator finds in credible fear proceedings that a noncitizen is ineligible for asylum under the rebuttable presumption at proposed 8 CFR 208.33(a)(1) and 1208.33(a)(1), or that the noncitizen lacks a significant possibility of establishing eligibility for asylum, and the noncitizen is subsequently placed in removal proceedings, nothing in the INA or regulations would preclude the noncitizen from applying for asylum in those proceedings. In addition, nothing in the INA or regulations states that an IJ owes any deference in removal proceedings to determinations made by an adjudicator in credible fear proceedings, including as to whether the rebuttable presumption in proposed 8 CFR 208.33(a)(1) and 1208.33(a)(1) applies, and as to the likelihood the noncitizen will be persecuted on account of a protected ground or tortured in the country at issue. Accordingly, a noncitizen in removal proceedings would not be precluded from receiving asylum simply because it was previously determined in credible fear proceedings that the rebuttable presumption in proposed 8 CFR 208.33(a)(1) and 1208.33(a)(1) applied and was not rebutted, or that the noncitizen did not meet the burden of showing a significant possibility of eligibility for asylum.

Finally, the Departments emphasize that the proposed rule, if finalized, would not be applied indefinitely. The proposed rule would apply only to those who enter at the southwest land border during the 24-month period. After the sunset date, the proposed rule would continue to apply to those noncitizens. The Departments, however, will review the rule prior to the sunset date and will, at that point, decide whether to modify, extend, or maintain the sunset, consistent with the requirements of the APA, and in accordance with considerations discussed in Section E below.

### D. Severability

The Departments intend for the provisions of this proposed rule to be severable from each other. Proposed 8 CFR 208.33 and 8 CFR 1208.33 each include a paragraph describing the Departments' intent. In short, if a court holds that any provision in a final 8 CFR 208.33 or 8 CFR 1208.33 is invalid or unenforceable, the Departments intend that the remaining provisions of a final 8 CFR 208.33 or 1208.33, as relevant, would continue in effect to the greatest extent possible. In addition, if a court holds that any such provision is invalid or unenforceable as to a particular

procedures. *See generally* 87 FR 18078. The Departments believe this approach is the best use of resources because asylum officers could not grant the ultimate relief—withholding of removal under the Act or the Convention Against Torture—that noncitizens who have a reasonable fear of persecution but who are ineligible for asylum may be eligible for. In other words, because each such proceeding would have to go to an immigration judge, there would not be the same efficiency gained by allowing those cases to possibly proceed to an asylum merits interview before an asylum officer.

<sup>181</sup> INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III); 8 CFR 1003.42(c).

person or circumstance, the Departments intend that the provision would remain in effect as to any other person or circumstance. Remaining provisions of a final rule could continue to function sensibly independent of any held invalid or unenforceable. For example, the lawful pathways condition could be applied by asylum officers or IJs even if a court finds that the amended credible fear interview or review procedures, or a particular portion of those procedures, are facially invalid. Similarly, the proposed rule could be applied using the credible fear standard at 8 CFR 208.30(e)(2), (3), even if a court finds the “reasonable possibility” standard invalid.

#### *E. Effective Date, Temporary Period, and Further Action*

The Departments propose that, beginning on the rule’s effective date, the rebuttable presumption of asylum ineligibility would apply to noncitizens who enter the United States after the end of implementation of the Title 42 public health Order. The Departments propose this approach because of—

- the high volume of encounters projected upon the lifting of the Title 42 public health Order absent a policy change;
- the need to process all migrants encountered without authorization at the SWB under Title 8 upon the lifting of the Title 42 public health Order; and
- the fact that the lifting of the Title 42 public health Order will result in ports of entry once again being open to all migrants, which enables the expansion of the CBP One app to provide for lawful, safe, and orderly processes for migrants in northern and central Mexico to schedule appointments to arrive at ports of entry and, where applicable, make asylum claims—a critically important lawful process that would support the implementation of the proposed rule.

Because the Departments intend for the rule to address the surge in migration that, in the absence of this rule, is anticipated to follow the lifting of the Title 42 public health Order, the Departments propose for the rule to be temporary in duration, applying to those who enter the United States at the SWB during the 24-month period following the rule’s effective date.<sup>182</sup> During this

<sup>182</sup> The Departments note that, because the rebuttable presumption only applies subsequent to the end of the implementation of the Title 42 public health Order, the rebuttable presumption may only cover noncitizens who enter the United States for less than a 24-month period. For example, if the Title 42 public health Order is extended beyond its expected termination date such that it remains in effect for six months following the effective date of

time, the United States will continue to build on the multi-pronged, long-term strategy with our foreign partners throughout the region to support conditions that would decrease irregular migration, work to improve refugee processing and other immigration pathways in the region, and implement other measures as appropriate, including continued efforts to increase immigration enforcement capacity and streamline processing of asylum-seekers and other migrants. Although the Departments believe that aspects of the present situation at the border are likely to continue for some time and are unlikely to be significantly changed in a short period, the Departments believe that a 24-month period provides sufficient time to implement and assess the effects of the policy contained in this proposed rule. In addition, the Departments believe that a 24-month period is sufficiently long that it would be an effective deterrent to irregular migrants who might otherwise make the dangerous journey to the United States. Recognizing, however, that there is not a specific event or demarcation that would occur at the 24-month mark, the Departments specifically request comments on the proposal to have the rule apply for a 24-month period, including whether that period should be longer or shorter.

The Departments also will closely monitor conditions during this period. Before the period concludes, the Departments will conduct a review and make a decision, consistent with the requirements of the APA, whether additional rulemaking is appropriate to modify, terminate, or extend the rebuttable presumption and the other provisions of this rule.<sup>183</sup> Such review and decision would consider all relevant factors, which the Departments expect would include the following factors:<sup>184</sup>

- Current and projected migration patterns, including the number of migrants seeking to enter the United States or being encountered at the SWB. Shifts in the current or projected migration patterns could indicate that the rebuttable presumption is no longer required because a significant decrease in actual and expected migrants. Alternatively, if migration remains or is

the final rule, noncitizens could be subject to the rebuttable presumption for 18 months, absent an extension by the Departments as discussed below.

<sup>183</sup> See 5 U.S.C. 551 *et seq.*

<sup>184</sup> In general, these factors represent the same considerations made by the Departments before preparing this proposed rule, and the Departments believe they represent relevant and important considerations that would relate to a future determination of whether to modify, terminate, or extend the lawful pathways limitation.

expected to remain at a sustained or heightened level, despite the Departments’ actions, that could support a determination that the sunset provision should be lifted or extended.

- Resource limitations, including whether, absent the rebuttable presumption, the number of noncitizens seeking or expected to seek to enter the United States at the SWB exceeds or is likely to exceed the Departments’ capacity to safely, humanely, and efficiently administer the immigration system, including the asylum system.

- The availability of lawful, safe, and orderly pathways to seek protection in the United States and partner nations, including meaningful pathways to seek asylum and other forms of protection in the United States, such as that provided by use of the CBP One app to schedule a time and place to present at the port of entry.

- Foreign policy considerations, including whether modifying, terminating, or extending the rule would further or hamper any United States foreign policy goals, as determined by ongoing engagement with key foreign partners.

In addition, the Departments would expect to consider their experience under the rule to that point, including the effects of the rebuttable presumption on those pursuing asylum claims.

Meanwhile, the Departments will continue to monitor all relevant circumstances during the period prior to the issuance of the rule. If the Title 42 public health Order is lifted prior to the issuance of the rule, or should conditions at the border otherwise necessitate immediate action and support the issuance of a rule under an exception to notice-and-comment and delayed effective date requirements,<sup>185</sup> the Departments could issue a temporary or interim final rule to deal with the immediate and urgent situation that they and their regional partners are facing.

#### *F. Proposed Rescission of TCT Bar Final Rule and Proclamation Bar IFR*

The Departments propose rescinding prior rules establishing bars to asylum that are currently subject to court orders rendering them ineffective. In *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 FR 55934 (Nov. 9, 2018) (“Proclamation Bar IFR”), the Departments adopted a bar to asylum for noncitizens who enter the United States in contravention of certain

<sup>185</sup> See 5 U.S.C. 553(a), (b), (d).

presidential proclamations.<sup>186</sup> And in Asylum Eligibility and Procedural Modifications, 85 FR 82260 (Dec. 17, 2020) (“TCT Bar final rule”),<sup>187</sup> the Departments adopted a bar to asylum for those noncitizens who failed to apply for protection while in a third country through which they transited en route to the United States, with certain exceptions. As discussed in more detail in Part V.C.5 of this preamble, the Proclamation Bar IFR was vacated by *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019)<sup>188</sup> and is also subject to a preliminary injunction, *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1121 (N.D. Cal. 2018). The TCT Bar final rule is preliminarily enjoined, *E. Bay Sanctuary Covenant v. Barr*, 519 F. Supp. 3d 663 (N.D. Cal. Feb. 16, 2021).

The Departments have reconsidered the approaches taken in those rules and now believe that the tailored, time-limited approach proposed here—which couples mechanisms for individuals to enter lawfully (and as appropriate make protection claims) with new conditions on asylum eligibility for those who enter without taking advantage of these and other lawful processes—is better suited to address increased flows across the SWB.

As an initial matter, the TCT Bar final rule would conflict with the carefully crafted provisions of the proposed rule. The proposed rule takes into account whether individuals sought asylum or other forms of protection in third countries en route to the United States but unlike the TCT Bar final rule, the proposed rule would not require that all noncitizens make such an application, as long as they pursue a lawful pathway or rebut the presumption. If the TCT Bar final rule were to become effective, it would interfere with this scheme by barring those who take advantage of a lawful pathway to enter along the SWB or who otherwise rebut the presumption. Although the TCT Bar

final rule is preliminarily enjoined and thus not operative, proposing to rescind it alongside proposing this rule will eliminate confusion and the risk of the TCT Bar final rule becoming effective and interfering with the proposed rule.

Additionally, the Departments do not see the TCT Bar final rule as necessary for negotiations with other nations. A stated goal of the TCT Bar final rule was to “facilitate ongoing diplomatic negotiations with Mexico and the Northern Triangle countries regarding general migration issues, related measures employed to control the flow of aliens (such as the Migrant Protection Protocols), and the humanitarian and security crisis along the southern land border between the United States and Mexico.” 84 FR at 33840; see 85 FR at 82278. Since the TCT Bar IFR and final rule were published in 2019 and 2020, the nature of these negotiations has changed. And since the TCT Bar final rule has been enjoined, the Departments have not needed it to bolster such negotiations. Thus, the Departments do not view the TCT Bar final rule as a necessary component of negotiations with other nations.

Second, the Departments do not intend to adopt the Proclamation Bar IFR permanently, and therefore propose to rescind it, because the Departments believe the tailored approach proposed here is better suited to address current circumstances. The Proclamation Bar IFR conflicts with the tailored approach in this proposed rule because it sought to bar from asylum all individuals who did not cross at a port of entry. See 83 FR at 55935 (“The interim rule, if applied to a proclamation suspending the entry of aliens who cross the southern border unlawfully, would bar such aliens from eligibility for asylum and thereby channel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner”).

For the above reasons, the Departments believe the TCT Bar final rule and the Proclamation Bar IFR would conflict with the approach taken in the proposed rule and would be unnecessary. And particularly given the injunctions against those rules, the Departments are not aware of any serious reliance interests in them. Thus, the Departments propose rescinding the amendments made by both the Proclamation Bar and the TCT Bar rulemaking to 8 CFR 208.13, 208.30, 1003.42, 1208.13, and 1208.30, as well as amendments made to those sections by Proclamations for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR

80274 (Dec. 11, 2020) (“Global Asylum Rule”) relating to the Proclamation Bar IFR and TCT Bar final rule. With respect to the proposed rescission of the Proclamation Bar IFR, the Departments will consider comments received in response to this NPRM alongside the comments already received in response to the Proclamation Bar IFR, and may issue a final rule as part of this rulemaking or as part of the original Proclamation Bar rulemaking.

## V. Justification and Legal Authority

### A. Justification

This proposed rule temporarily imposes a rebuttable presumption of asylum ineligibility for certain noncitizens who enter the United States outside of a lawful pathway or without first seeking protection in a third country in the region that they have traveled through. This condition is appropriately tailored to circumstances expected upon the lifting of the Title 42 public health Order, absent a policy change, including most notably (1) the additional number of migrants anticipated to arrive at the border following the eventual lifting of the Title 42 public health Order; (2) the severe strain this anticipated influx of migrants would place on DHS resources; (3) the availability of lawful options for some migrants seeking protection, in the United States and elsewhere in the region; and (4) the Departments’ recent experience showing that an increase in lawful pathways coupled with consequences for evading them can significantly—and positively—affect behavior and undermine smuggling networks. The circumstances detailed above demand a shift in incentives and processes, coupled with meaningful opportunities for individuals to seek protection. The proposed rule strikes this balance, while also including appropriate safeguards for especially vulnerable individuals.

As discussed above, the United States was already experiencing high levels of migration throughout the end of 2022, and, absent further action akin to that proposed here, anticipates a surge in migration following the eventual lifting of the Title 42 public health Order. DHS was encountering an average of approximately 8,500 individuals per day at the beginning of December 2022, and while the implementation of the CHNV parole processes has supported a drop in encounter numbers, current DHS planning assumptions suggest that encounter numbers may increase to 11,000–13,000 per day following the termination of the Title 42 public health

<sup>186</sup> See also Executive Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, 86 FR 8267, 8270 (Feb. 2, 2021) (rescinding Proclamation 9880 of May 8, 2019 (Addressing Mass Migration Through the Southern Border of the United States), the last proclamation related to the Proclamation Bar IFR).

<sup>187</sup> The TCT Bar final rule amended an earlier IFR on the same topic. See Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019). As explained in more detail in Part V.C.5 of this preamble, the IFR was vacated prior to the issuance of the TCT Bar final rule.

<sup>188</sup> That ruling is subject to a pending appeal that is presently held in abeyance. See *O.A. v. Biden*, No. 19–5272 (D.C. Cir.).

Order absent a policy change.<sup>189</sup> As detailed above, such a sustained surge in migration would exceed DHS's current capacity to maintain the safe and humane processing of migrants at the border. Spurred by smugglers through social media, an increasing number of migrants are likely to put their lives at risk—and enrich smuggling networks as they do so—in attempts to unlawfully enter the United States.<sup>190</sup> The influx of migrants would likely also place additional strains on local communities that are already at or near their capacity to absorb releases from CBP border facilities.

This proposed rule seeks to disincentivize this expected surge of irregular migration and instead incentivize migrants to take safe, orderly, and lawful pathways to the United States or to seek protection in third countries in the region. The proposed rule aims to achieve that shift in incentives by imposing a rebuttable presumption of asylum ineligibility, as well as an appropriate standard for screening for statutory withholding of removal or protection under the CAT, for noncitizens who enter the United States outside of a lawful pathway and without first seeking protection in a third country in the region. To respond to the expected increase in the numbers of migrants seeking to cross the border without authorization following the lifting of the Title 42 public health Order, this shift would be needed to prevent a severe strain on the immigration system and ensure that the Departments can continue to safely, humanely, and efficiently administer the immigration system, including the asylum system. Notably, as also detailed above, a substantial proportion of migrants who cross the SWB ultimately are not found to have a valid asylum claim. Yet absent this NPRM, the vast majority of the migrants expected to surge to the border and make a fear claim following the lifting of the Title 42 public health Order would be screened in and permitted to wait in the United States for years before their asylum or other protection claim could be adjudicated. In the Departments' judgment, this circumstance would impose severe costs on the asylum system and the immigration system as a whole, and would also likely be self-reinforcing: the expectation of a lengthy

stay in the United States, regardless of the merit of an individual's case, risks driving even more migration.<sup>191</sup>

The Departments assess that the Government can reduce and redirect such migratory flows by coupling an incentive for migrants to pursue lawful pathways with a substantial disincentive for migrants to cross the land border unlawfully. The Venezuela process, for example, has sharply reduced Venezuelan migratory flows throughout the region and channeled these flows into a lawful process to come to the United States.<sup>192</sup> The U4U process also sharply reduced irregular flows of Ukrainian citizens to Mexico and to the SWB, and channeled them instead into a lawful process.<sup>193</sup> Likewise, though early in implementation, the processes established for nationals of Cuba, Haiti, and Nicaragua have signaled similar results in reducing encounters of such nationals. The Departments anticipate that the rebuttable presumption proposed by this rule, particularly in light of the innovative steps the United States Government and other governments are taking to provide other safe, lawful, and orderly pathways, would—as evidenced by the success of the Venezuela process and U4U—

incentivize migrants to seek protection through such lawful pathways. In conjunction with the proposed rule, the Departments will continue to work with foreign partners to expand their legal pathways and expand the Departments' own mechanisms for lawful processing.

As discussed in Part III.E.7 of this preamble, CBP will, upon the lifting of the Title 42 public health Order, expand access to the CBP One app, an innovative scheduling mechanism that will provide migrants a means to schedule a time and place to present themselves at a land border port of entry. CBP anticipates that using CBP One to permit noncitizens who lack documents sufficient for admission, including those who potentially wish to

claim asylum, to schedule a time to arrive at a port of entry would allow CBP to process significantly more such individuals than it has been able to before. For comparison, from 2014 to 2019—before travel was curtailed by the COVID-19 pandemic and the application of the Title 42 public health Order at the border—CBP, on average, processed 326 inadmissible individuals each day at ports of entry along the entire SWB.<sup>194</sup> CBP expects to process multiple times more individuals on average per day using CBP One. This significant expansion of processing noncitizens at land border ports of entry, including those who may be seeking asylum, would ensure that a safe and orderly process exists for such noncitizens.

Notably, however, the level of resources required to expand port of entry processing in this way would only be feasible if, as DHS projects, encounters at the border are driven down by the application of a consequence for not taking advantage of the expanded range of procedures in partner countries or the United States. For instance, CBP has previously had to shift staffing and resources at the SWB away from ports of entry to help process the increased number of individuals seeking to cross between ports of entry, which directly impacts other CBP operations. In the fall of 2022, for example, CBP officers were shifted from duties at ports of entry to assist USBP in processing increased numbers of migrants crossing between ports of entry in El Paso and Del Rio, Texas. Shifting CBP's finite staff in this manner diminishes its ability to simultaneously execute its many critical mission sets at the ports of entry—and thus highlights the need to couple the increased processing at ports of entry with a disincentive for those who might otherwise cross without authorization between ports of entry. Absent this proposed rule, DHS anticipates that its ability to process noncitizens at ports of entry, as well as continue to facilitate lawful trade and travel and maintain border security, would be adversely impacted by the requirement to detail personnel from the ports of entry to help process individuals encountered between ports of entry.

The proposed rule's anticipated effect on migration flows would also be integrated into and advance key foreign policy goals relating to migration in the Western Hemisphere—including our efforts to encourage other countries to provide protection to migrants who

<sup>191</sup> While not conclusive, the longer wait times and lower share of encounters being removed is correlated with an increase in flows. See Part III.A.6 of this preamble.

<sup>192</sup> Encounters of Venezuelan nationals between ports of entry fell from an average of 1,100 per day the week before the announcement of the Venezuela parole process on October 12, 2022, to an average of 67 per day the week ending November 29, 2022 and 28 per day the week ending January 22, 2023. OIS analysis of UIP data downloaded on January 23, 2023.

<sup>193</sup> Encounters of Ukrainian nationals fell from an average of 875 per day the week before the announcement of U4U on April 21, 2022, to an average of 10 per day the week ending May 2. OIS analysis of UIP data downloaded on December 9, 2022.

<sup>194</sup> OIS Persist Dataset based on data through November 2022.

<sup>189</sup> DHS Post-Title 42 Planning Model generated January 6, 2023.

<sup>190</sup> Tech Transparency Project, *Inside the World of Misinformation Targeting Migrants on Social Media* (July 26, 2022), <https://www.techtransparencyproject.org/articles/inside-world-misinformation-targeting-migrants-social-media> (last visited Dec. 6, 2022).

need it. As described above, governments across the region have put in place new mechanisms to provide protection for millions of displaced migrants—often with support from U.S.-funded international organizations. These efforts include grants of temporary protection for millions of migrants in Colombia, Costa Rica, Ecuador, and Peru. They also include Mexico's commitment to strengthening its asylum system—which now processes the third most applications in the world, behind just the United States and Germany—and to providing labor pathways for migrants from Central America.<sup>195</sup> In issuing this proposed rule, the Departments have carefully considered the international efforts discussed above. In ways that have not been true even in the recent past, regional partners have taken meaningful steps over the last two years to increase the availability of and access to protection options. Indeed, access to protection is more available now throughout the region than at any time in the recent past. This proposed rule takes account of these regional efforts and is designed to promote their further development by demonstrating to partner countries and migrants that there are conditions on the United States' ability to accept and immediately process individuals seeking protection, and that partner countries should continue to enhance their efforts to share the burden of providing protection for those who qualify.

This proposed rule also would provide important built-in safeguards. First, this proposed rule would be temporary in nature, as is appropriate to respond to the predicted increase that would otherwise follow the lifting of the Title 42 public health Order. During the 24-month period in which the rule would be applied to noncitizens who enter the United States, the Departments will continue to work with foreign partners to expand their legal pathways, expand the Departments' own mechanisms for lawful processing, take account of the processes' successes and failures, and monitor both the numbers of expected and encountered migrants and the state of the Departments' resources, as the Departments decide whether to extend the rule's coverage, modify it, or allow it to sunset.

<sup>195</sup> L.A. Declaration Fact Sheet; International Rescue Committee, *Asylum Seekers in Mexico Need Support to Join the Labor Market and Rebuild Their Lives, IRC and Citi Foundation Respond with a Project* (Dec. 7, 2022), <https://www.rescue.org/press-release/asylum-seekers-mexico-need-support-join-labor-market-and-rebuild-their-lives-irc-and> (last visited Dec. 13, 2022).

Second, as described above, the presumption proposed by this rule would be rebuttable in certain circumstances. In particular, the presumption would necessarily be rebutted in circumstances in which it would not be reasonable for a noncitizen to avail themselves of other options—including if, at the time of entering the United States, the noncitizen faced an acute medical emergency or an extreme and imminent threat to life or safety, or if the noncitizen was a victim of a severe form of trafficking. The proposed rule would also permit adjudicators to find the presumption rebutted in other exceptionally compelling circumstances, based on the sound exercise of their judgment.

Third, noncitizens to whom the proposed rule's presumption applies and is not rebutted would still be screened for eligibility for statutory withholding of removal and protections under the regulations implementing the CAT, which bar removal to a country where the noncitizen would be subject to persecution on protected grounds or to torture. Furthermore, if they receive a negative credible fear determination, they would be able to elect to have that determination swiftly reviewed by an IJ. Those whose negative determinations are upheld would be expeditiously removed from the United States. Those who receive a positive determination, however, would have the opportunity for further consideration of their protection claims in the course of a section 240 removal proceeding or asylum merits interview.

Fourth, the proposed rule includes an exception to ensure that the condition does not apply to unaccompanied children. The proposed rule would also protect family unity by providing that if one member of a family traveling together is excepted from the presumption that the condition applies or has rebutted the presumption, then the other members of the family as described in 8 CFR 208.30(c) are similarly treated as excepted from the presumption or as having rebutted the presumption.

Fifth, while the proposed rule is designed to encourage those who arrive at the ports of entry to use a DHS scheduling system (specifically, the CBP One app) to schedule an appointment to present themselves at a port of entry for processing, it also recognizes that there are certain circumstances in which use of that system is not possible, including for reasons of illiteracy or a language barrier. The proposed rule would except from the presumption those who presented at a port of entry without a

scheduled appointment and established by a preponderance of the evidence that it was not possible to use the scheduling system for these and other compelling reasons.

In sum, the Departments have proposed an approach that strikes an appropriate balance between the compelling need to address current and impending exigent circumstances in a manner that prevents adverse consequences for the immigration system and migrants, on the one hand, and furnishing avenues for individual migrants to seek protection in the United States and other countries in the region.

### *B. Consideration of Alternatives*

The Departments have considered several alternative approaches to managing the current and expected surge in migration, including those from CHNV countries. The Departments have assessed these alternative approaches with respect to the key goals of (1) providing that migrants, to the extent achievable, have meaningful opportunity to seek protection; (2) disincentivizing the expected surge in migration and preventing severe adverse consequences for the immigration system; (3) achieving core foreign policy goals in the region; and (4) providing individuals the opportunity to schedule a time to arrive at a port of entry to apply for admission and, once present in the United States, to apply for all available forms of relief and protection.

#### 1. Maintaining the Status Quo

First, the Departments considered maintaining the status quo, consistent with the plan in place when CDC issued its now-enjoined Title 42 termination Order in April 2022. In preparation for the expected May 2022 termination, DHS published a DHS Plan for Southwest Border Security and Preparedness that set forth how the Department planned to manage an anticipated increase in migration.<sup>196</sup> That plan, which has been continually refined since it was introduced and continues to be in place, is predicated on 6 pillars: (1) surging resources to the border; (2) more efficiently processing

<sup>196</sup> Memorandum for Interested Parties, from Alejandro N. Mayorkas, Secretary of Homeland Security, *Re: DHS Plan for Southwest Border Security and Preparedness* at 19 (Apr. 26, 2022), [https://www.dhs.gov/sites/default/files/2022-04/22\\_0426\\_dhs-plan-southwest-border-security-preparedness.pdf](https://www.dhs.gov/sites/default/files/2022-04/22_0426_dhs-plan-southwest-border-security-preparedness.pdf) (last visited Dec. 13, 2022); Department of Homeland Security, *Update on Southwest Border Security and Preparedness Ahead of Court-Ordered Lifting of Title 42* (Dec. 13, 2022), <https://www.dhs.gov/publication/update-southwest-border-security-and-preparedness-ahead-court-ordered-lifting-title-42> (last visited Jan. 5, 2023).

individuals encountered at the SWB; (3) administering consequences, including ER and focused prosecutions; (4) bolstering NGO capacity to receive noncitizens released by DHS; (5) targeting and disrupting transnational organized crime; and (6) working with foreign partners to address migratory flows.

That plan remains an important part of DHS's response to the expected surge in migration following the lifting of the Title 42 public health Order. However, the numbers of migrants have increased, and demographics of encounters have shifted over the past nine months, as discussed above. As a result, the Departments have concluded that this plan alone would not be sufficient to shift incentives, and thus migratory flows, in a way that would ensure the safe, humane, and orderly processing of migrants.

As described above, DHS Office of Immigration Statistics projects that encounters could average 11,000–13,000 per day after the lifting of the Title 42 public health Order, absent additional policy changes.<sup>197</sup> These encounters, which are expected to be composed in significant part of Venezuelan, Nicaraguan, and Cuban nationals, are best addressed through the application of immediate consequences for unlawful entry, alongside the provision of lawful pathways, such as the CBP One app and the recently announced parole processes. The Departments emphasize, however, that the incentive structure created by such processes relies on the availability of an immediate consequence, such as the application of expedited removal under this NPRM, for those who do not have a valid protection claim or lawful basis to stay in the United States.

In addition, as described in greater detail above, nationals of these countries are more difficult to remove and as such put additional strain on DHS processes and resources, absent the willingness of the Government of Mexico or another third country to accept the return of these nationals. Such a sustained surge in encounters would strain the Departments' available resources and lead to increased numbers of noncitizens being released into the United States, in ways that strain the resources of States, local communities, and NGOs.<sup>198</sup> Absent material changes in policy, the United States would likely

<sup>197</sup> DHS Post-Title 42 Planning Model generated January 6, 2023.

<sup>198</sup> Andy Newman and Raúl Vilchis, *A Migrant Wave Tests New York City's Identity as the World's Sanctuary*, New York Times, Aug. 24, 2022, <https://www.nytimes.com/2022/08/20/nyregion/nyc-migrants-texas.html> (last visited Dec. 16, 2022).

see a significant and challenging increase in migrants taking a dangerous journey towards the border.

Importantly, DHS has, through the success of the Venezuela process, and the initial success of the Cuban, Haitian, and Nicaraguan processes, demonstrated that the application of a significant consequence for bypassing lawful pathways, combined with the availability of lawful pathways, can fundamentally change migratory flows. Given the limitations on removing these nationals to their countries of origin, these processes have depended, in significant part, on the Government of Mexico's willingness to accept the returns of such nationals.

The Government of Mexico, for its part, has made clear that its willingness to accept the return of these nationals depends on the United States' willingness to continue the model that has proven successful—that is, to couple new pathways with meaningful, expeditious, and fairly-imposed consequences for bypassing lawful pathways.

For these reasons, DHS has concluded that maintaining the status quo is not a reasonable option and that a policy shift consistent with what is provided for in the proposed rule is needed to serve key foreign policy goals and address the expected flows.

## 2. Utilizing Contiguous-Territory Return Authority

The Departments considered whether returning noncitizens to Mexico under section 235(b)(2)(C) of the INA, 8 U.S.C. 1225(b)(2)(C), either through the Migrant Protection Protocols ("MPP") or via another programmatic use of the contiguous-territory return authority, would have a similar effect to the proposed approach. In December 2022, a district court stayed Secretary Mayorkas's October 29, 2021, memorandum terminating MPP. See Dkt. 178, *Texas v. Biden*, No. 21–cv–67 (N.D. Tex. Dec. 15, 2022). For two reasons, DHS is responding to the current exigency with the approach reflected in this proposed rule rather than attempting to manage the current surge in migration by relying solely on the programmatic use of its contiguous-territory return authority.

First, the resources and infrastructure necessary to use contiguous-territory return authority at scale are not currently available. To employ the contiguous-territory return authority at a scale sufficient to meaningfully address the anticipated migrant flows, the United States would need to redevelop and significantly expand infrastructure for noncitizens to be processed in and

out of the United States to attend immigration court hearings throughout the duration of their removal proceedings. This would require, among other things, the construction of substantial additional court capacity along the border. It would also require the reassignment of IJs and ICE attorneys to conduct the hearings and CBP personnel to receive and process those who are coming into and out of the country to attend hearings.

Second, programmatic implementation of contiguous-territory return authority requires Mexico's concurrence and support. When DHS was previously under an injunction requiring it to re-implement MPP, the Government of Mexico would only accept the return of MPP enrollees consistent with available shelter capacity in specific regions, and indeed had to pause the process at times due to shelter constraints. Notably, Mexico's shelter network is already strained from the high volume of northbound irregular migration we are seeing today.<sup>199</sup> The Government of Mexico announced the end of the court-ordered reimplementation of MPP on October 25, 2022.<sup>200</sup> Any potential re-starting of returns under MPP or another programmatic use of the contiguous-territory return authority would require the Government of Mexico to make an independent decision to accept noncitizens who would be returned under this authority and to date the Government of Mexico has made clear that it will not accept such returns.<sup>201</sup>

## 3. Employing Safe-Third-Country Authority

The Departments considered whether to use section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), by negotiating safe-third-country agreements or asylum cooperative agreements. Negotiating such agreements, however, is a lengthy

<sup>199</sup> Giovanna Dell'otro, *U.S. court rejects maintaining COVID-19 asylum restrictions*, WTOL11, Dec. 16, 2022, <https://www.wtol.com/article/news/nation-world/migrants-mexico-us-border-asylum-limits-end/507-02a353b7-d61f-4536-b3c9-bb45c3fbb388> (last visited Dec. 17, 2022).

<sup>200</sup> Government of Mexico, *Finaliza el programa de estancias migratorias en México bajo la Sección 235 (b)(2)(C) de la Ley de Inmigración y Nacionalidad de EE. UU.*, Oct. 25, 2022, <https://www.gob.mx/sre/prensa/finaliza-el-programa-de-estancias-migratorias-en-mexico-bajo-la-seccion-235-b-2-c-de-la-ley-de-inmigracion-y-nacionalidad-de-ee-uu> (last visited Dec. 19, 2022).

<sup>201</sup> See Government of Mexico, Press Release, *Foreign Ministry rejects having migrants stay in Mexico under reimplementation of U.S. Immigration and Nationality Act Section 235 (b)(2)(C)* (Feb. 6, 2023), <https://www.gob.mx/sre/prensa/foreign-ministry-rejects-having-migrants-stay-in-mexico-under-reimplementation-of-us-immigration-and-nationality-act-section-235-b-2-c> (last visited Feb. 11, 2023).

and complicated process that depends on the agreement of other nations. Although the time between publication of an NPRM and promulgation of a final rule can be substantial, the time it takes to negotiate and finalize safe-third-country agreements remains even more protracted since they involve not only diplomatic and operational negotiations, but also, in many countries, approval of any such agreement by their respective legislatures.

Moreover, it would be particularly difficult (if possible at all) to negotiate a safe-third-country agreement that would provide the humanitarian protections, among other things, provided for by this proposed rule. The safe-third-country provision provides that “if the Attorney General determines that [an] alien may be removed, pursuant to” a safe-third-country agreement, “to a country in which the alien’s life or freedom would not be threatened” based on a protected characteristic and “where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection,” then the noncitizen may not even apply for asylum “unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.” INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). This proposed rule, however, would continue to allow noncitizens to pursue asylum and other protection in the United States, and, while it would create a rebuttable presumption, it specifies circumstances in which that presumption is necessarily rebutted and other exceptions. Even if the safe-third-country provision could be used to achieve similar results, it could not do so without protracted bilateral or multilateral negotiations with foreign counterparts. Such agreements therefore would likely have limited short-term operational benefit as compared to this proposed rule and are not something that can be achieved within the time frame needed without significant bilateral efforts, particularly given partner countries’ resistance to entering into such agreements.

#### 4. Reducing Use of Credible Fear Interviews

The Departments considered whether to place individuals who claim fear directly into section 240 removal proceedings instead of the increased reliance on expedited removal as a processing pathway. This would free up USCIS adjudicators, who would otherwise be performing credible fear interviews, to work on reducing the affirmative asylum backlog.

This approach, however, would come with significant costs. It would put an increased strain on already stretched State and local governments, as well as supporting NGOs. And it would risk exacerbating the already anticipated surge in migratory flows. As described above, those placed in removal proceedings wait an average of 4 years before their proceedings are concluded. Given limited ICE detention capacity, individuals who are not determined to pose a national-security or public-safety threat generally are released during the course of these proceedings,<sup>202</sup> thus increasing pressures on States and local communities, as well as supporting NGOs. This framework, pursuant to which migrants know that they will likely be in the United States for years before any order of removal, also risks providing an increased incentive for individuals to come to the United States, thus leading to an increase in migratory flows at precisely the moment at which they need to be discouraged. For these reasons, this option is not a viable one.

For all the reasons above, the Departments have concluded that this proposed rule is the best option for responding to the current and impending exigent circumstances. The Departments invite comment on any other alternatives and their benefits and drawbacks.

#### C. Legal Authority

##### 1. General Authorities

The Attorney General and the Secretary jointly issue this proposed rule pursuant to their shared and respective authorities concerning asylum, statutory withholding of removal, and CAT determinations. The Homeland Security Act of 2002 (“HSA”), Public Law 107–296, 116 Stat. 2135, as amended, created DHS and transferred to it many functions related to the administration and enforcement of Federal immigration law while maintaining many functions and authorities with the Attorney General, including concurrently with the Secretary. The HSA charges the Attorney General with “such authorities and functions under [the INA] and all other laws relating to the immigration and naturalization of aliens as were [previously] exercised by the Executive Office for Immigration Review [(EOIR)],

<sup>202</sup> OIS estimates that 88 percent of noncitizens encountered at the SWB in FY 2014–FY 2019 who were placed in expedited removal and made fear claims resulting in their referral to section 240 proceedings were released from detention prior to the completion of their removal proceedings. OIS analysis of Enforcement Lifecycle data as of September 30, 2022.

or by the Attorney General with respect to [EOIR].” INA 103(g)(1), 8 U.S.C. 1103(g)(1); *see also* 6 U.S.C. 521; HSA 1102, 116 Stat. at 2274. In addition, under the HSA, the Attorney General retains authority to “establish such regulations . . . , issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out” his authorities under the INA. HSA 1102; INA 103(g)(2), 8 U.S.C. 1103(g)(2).

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

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

Section 208 of the INA authorizes the “Secretary of Homeland Security or the Attorney General” to “grant asylum” to a noncitizen “who has applied for asylum in accordance with the

requirements and procedures established by” the Secretary or the Attorney General under section 208 if the Secretary or the Attorney General determines that the noncitizen is a refugee. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A). As detailed below, section 208 thereby authorizes the Secretary and the Attorney General to “establish” “requirements and procedures” to govern asylum applications. *Id.* The statute further authorizes them to “establish,” “by regulation,” “additional limitations and conditions, consistent with” section 208, under which a noncitizen “shall be ineligible for asylum.” INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); *see also* INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B) (authorizing the Secretary and the Attorney General to “provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with [the INA]”).<sup>203</sup> The INA also provides authority to publish regulatory amendments governing the apprehension, inspection and admission, detention and removal, withholding of removal, deferral of removal, and release of noncitizens encountered in the interior of the United States or at or between the U.S. ports of entry. *See* INA 235, 236, 241, 8 U.S.C. 1225, 1226, 1231.

The HSA granted to DHS concurrent authority to adjudicate affirmative asylum applications—applications for asylum made outside the removal context—and authority to conduct credible fear interviews, make credible fear determinations in the context of expedited removal, and to establish procedures for further consideration of asylum applications after an individual is found to have a credible fear. INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* HSA 451(b), 6 U.S.C. 271(b) (providing for the transfer of adjudication of asylum and refugee applications from the Commissioner of Immigration and Naturalization to the Director of the Bureau of Citizenship and Immigration Services, now USCIS). Some of those authorities have been delegated within DHS to the Director of USCIS, and USCIS asylum officers conduct credible fear interviews, make credible fear determinations, and determine whether a noncitizen’s asylum application should be granted. *See* DHS, Delegation to the Bureau of

Citizenship and Immigration Services, No. 0150.1 (June 5, 2003); 8 CFR 208.2(a), 208.9, 208.30.

Section 235(b)(1)(B)(ii) of the INA, 8 U.S.C. 1225(b)(1)(B)(ii), provides that if an asylum officer determines that a noncitizen subject to expedited removal has a credible fear of persecution, the noncitizen shall receive “further consideration of the application for asylum.” Section 208(d)(1) of the INA, 8 U.S.C. 1158(d)(1), provides the Departments with the authority to establish by regulation additional conditions or limitations on the consideration of asylum applications, including those filed in accordance with section 235(b) of the INA, 8 U.S.C. 1225(b). *See* INA 208(a), 8 U.S.C. 1158(a); INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C).

The INA also authorizes the Secretary and the Attorney General to implement statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3). INA 103(a)(1), (3), (g)(1)–(2), 8 U.S.C. 1103(a)(1), (3), (g)(1)–(2). The United States is a party to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 (“Refugee Protocol”), which incorporates Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (“Refugee Convention”). Article 33 of the Refugee Convention generally prohibits parties to the Convention from expelling or returning (“refouler”) “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Congress codified these obligations in the Refugee Act of 1980, creating the precursor to what is now known as statutory withholding of removal.<sup>204</sup> The Supreme Court has long recognized that the United States implements its non-refoulement obligations under Article 33 of the Refugee Convention (via the Refugee Protocol) through the statutory withholding of removal provision in section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), which provides that a noncitizen may not be removed to a country where their life or freedom would be threatened on account of one of the protected grounds listed in Article 33 of the Refugee Convention.<sup>205</sup>

*See* INA 241(b)(3), 8 U.S.C. 1231(b)(3); *see also* 8 CFR 208.16, 1208.16.

The Departments also have authority to implement Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994). The Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”) provides the Departments with the authority to “prescribe regulations to implement the obligations of the United States under Article 3 of the [CAT], subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.” Public Law 105–277, div. G, sec. 2242(b), 112 Stat. 2681, 2681–822 (8 U.S.C. 1231 note). DHS and DOJ have promulgated various regulatory provisions implementing U.S. obligations under Article 3 of the CAT, consistent with FARRA. *See, e.g.*, 8 CFR 208.16(c) through 208.18, and 1208.16(c) through 1208.18; Regulations Concerning the Convention Against Torture, 64 FR 8478 (Feb. 19, 1999), as corrected by 64 FR 13881 (Mar. 23, 1999).

This proposed rule would not amend, or propose to amend, eligibility for statutory withholding of removal or CAT protection. As further discussed below, the proposed rule would apply a “reasonable possibility” standard in screenings for statutory withholding of removal and CAT protection in cases where the presumption of asylum ineligibility is applied and not rebutted. While this standard would be a change from the practice currently applied in the expedited removal context, it is the same standard used in protection screenings in other contexts and is consistent with both domestic and international law.<sup>206</sup>

## 2. Authority To Impose Additional Conditions on Asylum Eligibility

Asylum is a form of discretionary relief under section 208 of the INA, 8 U.S.C. 1158, that, when granted, protects a noncitizen from removal, creates a path to lawful permanent residence and U.S. citizenship, enables

deportation and Article 34’s call to “facilitate the assimilation and naturalization of refugees,” which the Court found aligned with the discretionary provisions in section 208 of the INA, 8 U.S.C. 1158). It is well-settled that the Refugee Convention and Protocol are not self-executing. *E.g., Al-Fara v. Gonzales*, 404 F.3d 733, 743 (3d Cir. 2005) (“The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.”).

<sup>206</sup> *See* 8 CFR 208.31.

<sup>203</sup> Under the HSA, the references to the “Attorney General” in the INA are understood also to encompass the Secretary, either solely or additionally, with respect to statutory authorities vested in the Secretary in the HSA or subsequent legislation, including in relation to immigration proceedings before DHS. HSA 1517, 6 U.S.C. 557.

<sup>204</sup> Public Law 96–212; 94 Stat. 102 (“Refugee Act”).

<sup>205</sup> *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 426–27 (1999); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 440–41 (1987) (distinguishing between Article 33’s non-refoulement prohibition, which aligns with what was then called withholding of

the noncitizen to receive authorization to work, and enables the noncitizen's eligible family members to seek lawful immigration status as derivatives. See INA 208–209, 8 U.S.C. 1158–1159. Any noncitizen “who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .)” may apply for asylum unless the noncitizen is subject to a statutory exception. INA 208(a)(1), 8 U.S.C. 1158(a)(1). A noncitizen applying for asylum must establish that he or she is a “refugee” who is not subject to a bar to asylum eligibility and who merits a favorable exercise of discretion. INA 208(b)(1), 8 U.S.C. 1158(b)(1); INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A); see *Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013) (describing asylum as a form of “discretionary relief from removal”); *Delgado v. Mukasey*, 508 F.3d 702, 705 (2d Cir. 2007) (“Asylum is a discretionary form of relief . . . . Once an applicant has established eligibility . . . it remains within the Attorney General’s discretion to deny asylum.”). For a noncitizen to establish that he or she is a “refugee,” the noncitizen generally must be someone who is outside of his or her country of nationality and “is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A).

Reflecting that asylum is a discretionary form of relief from removal, the INA provides that the noncitizen bears the burden of showing both eligibility for asylum and why the Attorney General or Secretary should exercise the discretion in favor of granting relief. See INA 208(b)(1), 240(c)(4)(A)(ii), 8 U.S.C. 1158(b)(1), 1229a(c)(4)(A)(ii); 8 CFR 1240.8(d); see *Romilus v. Ashcroft*, 385 F.3d 1, 8 (1st Cir. 2004). If evidence indicates that one or more of the grounds for mandatory denial may apply, see INA 208(b)(2)(A)(i)–(vi), 8 U.S.C. 1158(b)(2)(A)(i)–(vi), the asylum applicant also bears the burden of establishing that the bar at issue does not apply. 8 CFR 1240.8(d); see also, e.g., *Rendon v. Mukasey*, 520 F.3d 967, 973 (9th Cir. 2008) (applying 8 CFR 1240.8(d) in the context of the aggravated felony bar to asylum); *Chen v. U.S. Att’y Gen.*, 513 F.3d 1255, 1257 (11th Cir. 2008) (applying 8 CFR 1240.8(d) in the context of the persecutor bar); *Xu Sheng Gao v. U.S. Att’y Gen.*, 500 F.3d 93, 98 (2d Cir. 2007) (same).

The Attorney General and the Secretary have long exercised discretion, now expressly authorized by Congress, to create new rules governing the granting of asylum. When section 208 was first enacted as part of the Refugee Act of 1980, it simply provided that the Attorney General “shall establish a procedure” for a noncitizen “to apply for asylum,” and that the noncitizen “may be granted asylum in the discretion of the Attorney General if the Attorney General determined that the noncitizen was a refugee.” 8 U.S.C. 1158(a) (1982 ed.). In 1980, the Attorney General, in the exercise of that broad statutory discretion, established several mandatory bars to the granting of asylum. See 8 CFR 208.8(f) (1980); Aliens and Nationality; Refugee and Asylum Procedures, 45 FR 37392, 37392 (June 2, 1980). In 1990, the Attorney General substantially amended the asylum regulations, but exercised his discretion to retain the mandatory bars to asylum eligibility related to persecution of others on account of a protected ground, conviction of a particularly serious crime in the United States, firm resettlement in another country, and the existence of reasonable grounds to regard the noncitizen as a danger to the security of the United States. See Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 FR 30674–01, 30678, 30683 (July 27, 1990); see also *Yang v. INS*, 79 F.3d 932, 936–39 (9th Cir. 1996) (upholding firm resettlement bar); *Komarenko v. INS*, 35 F.3d 432, 436 (9th Cir. 1994) (upholding particularly serious crime bar), *abrogated on other grounds by Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc).

In that 1990 rule, the Attorney General also codified another limitation that was first discussed in a published decision in *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989). 55 FR at 30678. Specifically, although the statute defines as a “refugee,” and thus allows for asylum for, a noncitizen based on a showing of past “persecution or a well-founded fear of persecution,” INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A), by regulation, a showing of past persecution only gives rise to a presumption of a well-founded fear of future persecution, which DHS can rebut by showing that circumstances have changed such that the noncitizen no longer has a well-founded fear of future persecution or that the noncitizen can relocate to avoid persecution and under all the circumstances it is reasonable to expect the noncitizen to

do so.<sup>207</sup> 8 CFR 208.13(b)(1), 1208.13(b)(1). Where the presumption is rebutted, the adjudicator, “in the exercise of his or her discretion, shall deny the asylum application.”<sup>208</sup> 8 CFR 208.13(b)(1)(i), 1208.13(b)(1)(i). In 1990, Congress added a mandatory statutory bar for those with aggravated felony convictions. Immigration Act of 1990, Public Law 101–649, sec. 515, 104 Stat. 5053.

With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Congress added three categorical statutory bars on the ability even to apply for asylum, for (1) noncitizens who can be removed, pursuant to a bilateral or multilateral agreement, to a third country where they would not be persecuted on account of a specified ground; (2) noncitizens who failed to apply for asylum within one year of arriving in the United States; and (3) noncitizens who have previously applied for asylum and had the application denied. Public Law 104–208, div. C, sec. 604. Congress also adopted six mandatory bars to asylum eligibility that largely reflected the pre-existing, discretionary bars that had been set forth in the Attorney General’s asylum regulations. These bars cover (1) noncitizens who “ordered, incited, assisted, or otherwise participated” in the persecution of others; (2) noncitizens convicted of a “particularly serious crime” in the United States; (3) noncitizens who committed a “serious nonpolitical crime outside the United States” before arriving in the United States; (4) noncitizens who are a “danger to the security of the United States;” (5) noncitizens who are removable under a set of specified grounds relating to terrorist activity; and (6) noncitizens who were “firmly resettled” in another country prior to arriving in the United States. *Id.* (codified at INA 208(b)(2), 8 U.S.C. 1158(b)(2) (1997)). Congress further added that aggravated felonies, defined in section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43), would be considered “particularly serious crime[s].” *Id.* (codified at INA 208(b)(2)(B)(i), 8 U.S.C. 1158(b)(2)(B)(i) (1997)).

<sup>207</sup> As noted below, the internal relocation provision was added in 2000 by Asylum Procedures, 65 FR 76121, 76126 (Dec. 6, 2000).

<sup>208</sup> There is a narrow exception to this mandatory discretionary ground for denial, called “humanitarian asylum,” where the noncitizen establishes “compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution” or “that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.” 8 CFR 208.13(b)(1)(iii), 1208.13(b)(1)(iii).

In IIRIRA, Congress also made clear that the Executive Branch may continue to exercise its broad discretion in determining whether to grant asylum by creating additional limitations and conditions on the granting of asylum. The INA provides that the Attorney General and Secretary “may by regulation establish additional limitations and conditions, consistent with [section 208], under which an alien shall be ineligible for asylum.” INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); see 6 U.S.C. 552(d); INA 103(a)(1), 8 U.S.C. 1103(a)(1). In addition, while section 208(d)(5) of the INA, 8 U.S.C. 1158(d)(5), establishes certain procedures for consideration of asylum applications, Congress specified that the Attorney General and Secretary “may provide by regulation for any other conditions or limitations on the consideration of an application for asylum,” so long as those conditions or limitations are “not inconsistent with this chapter,” INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). In sum, the current statutory framework retains the broad discretion of the Attorney General (and, after the HSA, also the Secretary) to adopt additional conditions on the granting of asylum and procedures for implementing those conditions.

Previous Attorneys General and Secretaries have since invoked their authorities under section 208 of the INA to establish bars beyond those required by the statute itself. See, e.g., Asylum Procedures, 65 FR 76121, 76126 (Dec. 6, 2000) (requiring consideration of the applicant’s ability to relocate safely in his or her home country in assessing asylum eligibility); Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018) (limit on eligibility for applicants subject to certain presidential proclamations); Asylum Eligibility and Procedural Modifications, 85 FR 82260 (Dec. 17, 2020) (limit on eligibility for certain noncitizens who failed to apply for protection while in a third country through which they transited en route to the United States); Procedures for Asylum and Bars to Asylum Eligibility, 85 FR 67202 (Oct. 21, 2020) (limits on eligibility for noncitizens convicted of certain criminal offenses); see also Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312, 10342 (Mar. 6, 1997) (IFR codifying mandatory bars and adding provision allowing for discretionary denials of asylum where “the alien can be removed to a third country which has

offered resettlement and in which the alien would not face harm or persecution”). Establishing additional conditions is also consistent with historical practice, as discussed above. See, e.g., Aliens and Nationality; Refugee and Asylum Procedures, 45 FR 37392, 37392 (June 2, 1980); Asylum and Withholding of Deportation Procedures, 55 FR 30674, 30683 (July 27, 1990); see also *Yang*, 79 F.3d at 936–39 (upholding firm-resettlement bar); *Komarenko*, 35 F.3d at 436 (upholding particularly-serious-crime bar).

### 3. The Lawful Pathways Rebuttable Presumption

The rebuttable presumption set forth in this proposed rule is within the broad discretionary authority granted by section 208 of the INA. See INA 208(b)(1)(A), (b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(1)(A), (b)(2)(C), (d)(5)(B). The proposed rule serves to prioritize asylum for noncitizens who pursue lawful pathways. It is therefore consistent with the need for partner countries in the region to share in the undertaking to afford migrants lawful protection and the need to further the Departments’ continued ability to enforce and administer U.S. immigration law, including provisions concerning asylum and removal, in a safe, orderly, expeditious, and effective manner in the face of exceptionally challenging circumstances. The presumption is also “consistent with” section 208 and with the INA. INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B). “Consistent with” means “compatible” with. *Env’t Def. Fund, Inc. v. E.P.A.*, 82 F.3d 451, 457 (D.C. Cir. 1996) (quoting 3 *Oxford English Dictionary* 773 (2d ed. 1989)). Particularly given the history detailed above, the INA generally and section 208 specifically afford the Attorney General and Secretary broad discretion to adopt new rules governing the consideration of claims for and granting of asylum—which is in all events a discretionary form of relief—so long as those rules do not conflict with the statute.

The presumption is also consistent with section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1), which permits noncitizens in the United States to apply for asylum “whether or not at a designated port of arrival,” for several reasons. First, the presumption would not prohibit noncitizens from applying for asylum. Section 208 draws a distinction between those permitted to apply for asylum and those eligible to receive a grant of asylum. While the Refugee Act dealt with these two issues in a single subsection, IIRIRA broke the

two into separate subsections. Section 208(a) (titled “Authority to apply for asylum”) governs who may apply for asylum and includes several categorical bars on applications (e.g., a noncitizen present in the country for more than one year may not apply). INA 208(a)(1) and (2)(B), 8 U.S.C. 1158(a)(1) and (2)(B); see INA 241(a)(5), 8 U.S.C. 1231(a)(5). Section 208(b) (titled “Conditions for granting asylum”), in turn, governs who is eligible to be granted asylum. Specifically, section 208(b)(1)(A) provides that the Attorney General or the Secretary “may grant asylum to an alien who has applied.” Section 208(b)(2) then specifies six categories of noncitizens to whom “[p]aragraph (1)” of section 208(b) (i.e., the discretionary authority to grant asylum to an applicant) “shall not apply.” Any noncitizen falling within one of those categories may apply for asylum under section 208(a)(1) but is categorically ineligible to receive a grant of asylum under section 208(b). The text and structure of the statute thus show that there is nothing inconsistent in allowing an application for asylum to be made while also precluding a grant of asylum on the basis of that application. See also *R–S–C v. Sessions*, 869 F.3d 1176, 1187 & n.9 (10th Cir. 2017).

Second, the presumption would not exclude all noncitizens who arrive outside ports of entry; it would be limited to noncitizens who have traveled through a third country without seeking asylum or other protection or those who failed to avail themselves of lawful, safe, and orderly pathways into the United States. It would also apply to those who present at a port of entry without scheduling a time to do so, unless the noncitizen demonstrates that the DHS scheduling mechanism was inaccessible or unusable.

Third, the proposed rule would establish only a rebuttable presumption of asylum ineligibility, not a categorical bar. Nothing in section 208 precludes the Departments from exercising their broad authority to “establish additional limitations and conditions” on asylum eligibility, INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), or to establish “any other conditions or limitations on the consideration of an application for asylum,” INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B), that include rebuttable presumptions. Longstanding BIA precedent has treated manner of entry as a relevant discretionary factor in considering an asylum application. Specifically, in adopting the lawful pathways condition on asylum eligibility, the Departments have considered the BIA’s decision in *Matter*

of *Pula*.<sup>209</sup> In *Matter of Pula*, the BIA held that a noncitizen's "circumvention of orderly refugee procedures"—including their "manner of entry or attempted entry," "whether the alien passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States"—are relevant factors with respect to whether an individual warrants the favorable exercise of discretion in granting asylum. 19 I&N Dec. 467, 473–74 (BIA 1987). Like *Matter of Pula*, the lawful pathways condition on asylum eligibility would consider manner of entry (as well as the other lawful pathways noncitizens may have availed themselves of) but would not treat it as dispositive of their asylum claims. The proposed rule here places more weight on manner of entry than the BIA did for the discretion analysis in *Matter of Pula*. See 19 I&N Dec. at 474 (holding that "the danger of persecution should generally outweigh all but the most egregious of adverse factors"). But the Attorney General and Secretary, in exercising their broad discretion to issue regulations adopting additional limitations and conditions on asylum eligibility, are not bound by the approach in the BIA's decision in *Matter of Pula* under the regulatory regime then applicable. And under the proposed rule, noncitizens subject to the condition may overcome the presumption in exceptionally compelling circumstances. Additionally, in this specific context, and for the reasons provided throughout this preamble, the Departments have determined that placing greater weight on manner of entry is warranted in the interest of encouraging migrants to seek protection in other countries in the region and to use lawful pathways and processes to access the U.S. asylum system with an ultimate goal of promoting overall system efficiency so that the Departments can manage the

anticipated surge of migrants in as fair and orderly a manner as possible.

Furthermore, the lawful pathways condition would not displace *Matter of Pula*'s general application when considering whether an individual grant of asylum is warranted as a matter of discretion. *Matter of Pula* articulates principles to govern the exercise of discretion in individual cases in the absence of other measures instituted by the Attorney General or the Secretary guiding the exercise of discretion. Here, through the lawful pathways condition, the Attorney General and Secretary would exercise their general discretionary authority to issue additional conditions on asylum eligibility under section 208(b)(1)(A), (b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(1)(A), (b)(2)(C), (d)(5)(B). Moreover, the lawful pathways condition on eligibility would not displace *Matter of Pula*'s application in an asylum adjudication where the condition is not implicated or its presumptive application is rebutted.

This proposed rule is also consistent with the safe-third-country and firm-resettlement bars at sections 208(a)(2)(A) and (b)(2)(A)(iv) of the INA, 8 U.S.C. 1158(a)(2)(A), (b)(2)(A)(iv). The proposed rule's scope and effect are significantly different than those bars. Unlike those bars, the presumption would not make asylum eligibility hinge exclusively on the availability of protection in a third country; whether an applicant applied for protection in a third country through which they traveled would only be relevant if the noncitizen did not avail themselves of one of the specified pathways or processes to enter the United States—e.g., if the noncitizen entered the United States through a parole process or scheduled a time through the CBP One app to present themselves at a port of entry, then the condition does not apply to that noncitizen. Further, unlike those bars, the presumption would not operate as a categorical bar on asylum eligibility, but would merely operate as a rebuttable presumption that could be overcome in appropriate circumstances. Indeed, one of the grounds on which the presumption would necessarily be rebutted is that the noncitizen faced an imminent and extreme threat to life or safety at the time of entry into the United States—thereby advancing the purposes of the INA's protections against persecution. See, e.g., *Sall v. Gonzales*, 437 F.3d 229, 233 (2d Cir. 2006) (noting that the "United States offers asylum to refugees not to provide them with a broader choice of safe homelands, but rather, to protect those arrivals with nowhere else to turn");

*Matter of A–G–G–*, 25 I&N Dec. 486, 503 (BIA 2011); see also INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). Section 208 establishes the minimum statutory requirements for the discretionary grant of asylum, and permits the Departments to impose additional requirements for that discretionary benefit. See INA 208(b)(1)(A), (b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(1)(A), (b)(2)(C), (d)(5)(B); see also *Nijjar v. Holder*, 689 F.3d 1077, 1082 (9th Cir. 2012) (noting that fraud can be "one of the 'additional limitations . . . under which an alien shall be ineligible for asylum' that the Attorney General is authorized to establish by regulation"). Thus, the proposed rule is within the broad discretionary authority of the Attorney General and Secretary retained by section 208.

The lawful pathways condition proposed here would be a permissible exercise of the Departments' authority to impose a new condition on asylum that is designed to improve the overall functioning of the immigration system and to improve processing of asylum applications. Both of these purposes are consistent with the INA.

By channeling noncitizens seeking to travel to the United States, including to seek asylum, into lawful pathways and processes, the proposed rule would promote orderly processing and minimize the number of individuals who would be placed in lengthy section 240 removal proceedings and released into the United States pending such proceedings. And by reducing the number of noncitizens permitted to remain in the United States despite having non-meritorious asylum and protection claims, the proposed rule would reduce incentives for similarly situated noncitizens to seek to cross the border, thus reducing the anticipated surge that is expected to strain DHS resources.

The relevant provisions of the INA authorizing new asylum conditions permit the Departments to adopt conditions in order to improve the overall operation of the immigration system. Section 208(b)(2)(C) and (d)(5)(B) of the INA, 8 U.S.C. 1158(b)(2)(C) and (d)(5)(B), broadly allow the Attorney General and Secretary to establish by regulation other "limitations and conditions" on asylum, as long as they are consistent with section 208 and the INA, respectively.

Neither provision imposes restrictions on the types of conditions the Departments may adopt, other than specifying that the conditions must be consistent with the statute. Nothing in the text or purpose of the provisions

<sup>209</sup> The Global Asylum Rule explicitly departed from *Matter of Pula* when it established regulatory factors to be considered in various ways that did not align with *Pula*'s holdings. See 85 FR at 80342 ("Accordingly, the Departments properly and permissibly changed their policy from *Matter of Pula*."); 85 FR at 80387–88 (adding 8 CFR 208.13(d)); 85 FR at 80396–97 (adding 8 CFR 1208.13(d)). However, those regulatory amendments have never taken effect because the Global Asylum Rule was enjoined before its effective date. *Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021). Accordingly, the Departments continue to follow *Matter of Pula*.

indicates that conditions may not be designed to improve the overall effectiveness of the immigration system, to encourage other countries in the region to share in the protection of migrants, and to encourage migrants to seek protection in those countries. That is, nothing in the INA requires asylum eligibility criteria to focus only on individual-specific considerations to the exclusion of other factors, such as the overall efficiency of the asylum system or the broader public interest.

Congress has put into place generally applicable filing requirements aimed at management of the asylum system, such as in IIRIRA when it amended section 208 to add a provision prohibiting an application for asylum more than one year after a noncitizen entered the United States as a measure responding in part to a ballooning asylum docket. INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B). Although Congress included an exception to the bar where the applicant establishes “the existence of changed circumstances which materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within” the one-year period, INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D), it did not provide any exception based on the strength of the applicant’s asylum claim alone. In other words, Congress concluded that the interest in ensuring overall system efficiency outweighed the fact that there would be applicants who would have received asylum but for the one-year deadline.<sup>210</sup> The Departments have made a similar calculation in the interest of system efficiency. Similar to the one-year filing deadline, the proposed lawful pathways condition on asylum eligibility is aimed at ensuring that those who follow the procedures set forth to allow for an orderly application process are able to access the full panoply of benefits available to asylees within the United States.

The lawful pathways condition, and the related modification of the withholding and CAT screening standard applied to noncitizens subject to the condition, would also improve overall asylum processing efficiency. As noted, the Departments recognize that operationalizing the lawful pathways condition would require more resources

to implement because the credible fear interviews for those subject to the condition will take some additional time. Specifically, asylum officers would have to inquire into the applicability of any exceptions or rebuttal circumstances for the condition and then apply the higher “reasonable possibility” standard to determine the likelihood of persecution or torture for those whose asylum claims are precluded by the lawful pathways condition. At the end of this process, however, the Departments expect that fewer noncitizens would ultimately be placed in section 240 proceedings as fewer will pass the screening process. By applying more resources on the front end at the screening stage, the proposed rule would reduce the number of resource-intensive asylum applications that will need to be adjudicated by EOIR. And ICE would expend fewer resources litigating cases in immigration court and then locating, apprehending, and removing those with unsuccessful claims. Moreover, seeking to channel meritorious asylum claims for faster resolution is consistent with the purpose of the asylum provision as a whole.<sup>211</sup> And improving system efficiency is consistent with the longstanding and overarching principle articulated by the Board that “[t]he ultimate consideration when balancing factors in the exercise of discretion is to determine whether a grant of relief” like asylum “appears to be in the best interest of the United States.” *Matter of D–A–C–*, 27 I. & N. Dec. 575, 578 (BIA 2019).

Additionally, the proposed lawful pathways condition is expected to increase asylum processing efficiency by increasing to some degree the percentage of meritorious asylum claims that are considered. It rests in part on the understanding that many individuals who avail themselves of the credible fear process do not have meritorious claims, and that those who would circumvent orderly procedures and forgo readily available options may be less likely to have a well-founded fear of persecution than those individuals who do avail themselves of

an available lawful opportunity. Moreover, it is permissible for the Attorney General and the Secretary to adopt a presumption, applicable only in emergent circumstances, under which those truly requiring protection from persecution or torture may properly be expected to either apply for asylum or other protection in the first safe harbor they find, *see Kalubi v. Ashcroft*, 364 F.3d 1134, 1140 (9th Cir. 2004) (noting that forum-shopping might be “part of the totality of circumstances that sheds light on a request for asylum in this country”), or follow the procedures set forth for making an application rather than waiting until they are apprehended to do so. Of course, the Departments recognize it will not be the case for all noncitizens who do not avail themselves of alternative options in other countries or lawful pathways to enter the United States that they would not be found to have meritorious asylum claims. But the Attorney General and the Secretary believe, in light of the circumstances that the Departments faced in late November and December of 2022 and will likely face upon the lifting of the Title 42 public health Order, that it would be an appropriate exercise of their discretion to prioritize for consideration of a request for asylum those noncitizens who do pursue lawful pathways or processes in the United States or in other countries. In addition, the proposed rule would permit noncitizens to rebut the presumption of ineligibility by showing that they are deserving of being excused from the bar in exceptionally compelling circumstances despite their failure to pursue lawful pathways or processes. And, of course, the condition would not bar statutory withholding of removal or protection under the CAT, and thus those subject to the condition would remain eligible for protections from persecution and torture, consistent with the United States’ statutory and international obligations.<sup>212</sup> Pursuing

<sup>212</sup> Under both the INA and international law, providing asylum to individuals who do not meet the standards for withholding or CAT is discretionary rather than mandatory. *See* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (“The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.”); *Cardoza-Fonseca*, 480 U.S. at 441 (noting that the asylum provision of the INA corresponds to Article 34 of the Refugee Convention, which is “precatory” and “does not require the implementing authority actually to grant asylum to all those who are eligible”). Withholding and CAT protection are mandatory only for those

<sup>210</sup> Indeed, despite coming after *Matter of Pula*, when Congress enacted the one-year bar in IIRIRA in 1996, it did not include any exception for those who meet the eligibility requirements for asylum but cannot meet the higher standard for future persecution for withholding and thus will be returned to a country where there they have a well-founded fear of future persecution solely because they filed their application more than one year after their last entry into the United States.

<sup>211</sup> Section 208 includes multiple provisions aimed at providing an orderly and expeditious process for asylum applications. *See, e.g.*, INA 208(d)(5)(A)(ii), 8 U.S.C. 1158(d)(5)(A)(ii) (“in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed”); INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii) (“in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed”).

these improvements in the asylum processing system and the administration of the immigration laws more broadly is consistent with the INA.

In sum, the proposed rule permissibly pursues goals relating to both the functioning of the entire immigration system and the efficiency of asylum processing. In the current circumstances, while preserving core protections, the Departments believe either goal by itself would be sufficient to support the proposed rule. Thus, the proposal is within the authority conferred by section 208 of the INA.

#### 4. Expedited Removal and Screenings in the Credible Fear Process

In IIRIRA, Congress established the expedited removal process. Public Law 104–208, div. C, 110 Stat. 3009, 3009–546. The process is applicable to noncitizens arriving in the United States (and, in the discretion of the Secretary, certain other designated classes of noncitizens) who are found to be inadmissible under either section 212(a)(6)(C) of the INA, 8 U.S.C. 1182(a)(6)(C), regarding material misrepresentations, or section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), regarding documentation requirements for admission. Under expedited removal, such noncitizens may be “removed from the United States without further hearing or review unless the [noncitizen] indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.” INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i).

The former INS and, later, DHS implemented the expedited removal statute by establishing a screening process, known as the “credible fear” screening, to identify potentially valid requests for asylum and claims for statutory withholding of removal and CAT protection. Currently, any noncitizen who expresses a fear of persecution or torture, a fear of return,

who meet the higher standards applicable to that relief. See INA 241(b)(3), 8 U.S.C. 1231(b)(3) (“the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of” a protected ground”); *Cardoza-Fonseca*, 480 U.S. at 429 (explaining that withholding of removal corresponds to Article 33.1 of the Refugee Convention, which “imposed a mandatory duty on contracting States not to return an alien to a country where his ‘life or freedom would be threatened’ on account of one of the enumerated reasons”); FARRA § 2242(a), 112 Stat. at 2681–822 (“It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”); 8 U.S.C. 1231 note; 8 CFR 1208.16(d)(1).

or an intention to apply for asylum during the course of the expedited removal process is referred to a USCIS asylum officer for an interview to determine whether the noncitizen has a credible fear of persecution or torture. INA 235(b)(1)(A)(ii), (B), 8 U.S.C. 1225(b)(1)(A)(ii), (B); see also 8 CFR 235.3(b)(4), 1235.3(b)(4)(i). If the asylum officer determines that the noncitizen does not have a credible fear of persecution or torture, the noncitizen may request that an IJ review that determination. See INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III); 8 CFR 208.30(g), 1208.30(g).

If the asylum officer determines that a noncitizen subject to expedited removal has a credible fear of persecution or torture, DHS has discretion to issue a Notice to Appear to refer the noncitizen to the immigration court for full consideration of the asylum or statutory withholding claim in proceedings under section 240 of the INA, 8 U.S.C. 1229a, or to retain jurisdiction over the application for asylum pursuant to 8 CFR 208.2(a)(1)(ii) for consideration in a hearing pursuant to 8 CFR 208.9. See 8 CFR 208.30(f). If an IJ, upon review of the asylum officer’s negative credible fear determination, finds that the noncitizen possesses a credible fear of persecution or torture, the IJ vacates the expedited removal order and refers the case back to DHS for further proceedings consistent with 8 CFR 1208.2(a)(1)(ii) or for commencement of removal proceedings under section 240 of the INA, 8 U.S.C. 1229a. See 8 CFR 1208.30(g)(2)(iv)(B). As explained below, application of the proposed rule in the expedited removal process is consistent with these provisions.

#### 5. Litigation History

##### i. Litigation Related to the Entry and Transit Rules

The Departments acknowledge prior precedent concerning the scope of the Departments’ statutory rulemaking authority under section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021) (“*East Bay III*”); *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2020) (“*East Bay I*”), and an injunction in *E. Bay Sanctuary Covenant v. Barr*, 519 F. Supp. 3d 663 (N.D. Cal. 2021) (“*East Bay II*”).

In *East Bay I*, 994 F.3d 962, the U.S. Court of Appeals for the Ninth Circuit affirmed a preliminary injunction and held that an IFR that categorically denied asylum to most persons entering the United States at the SWB if they had

not first applied for asylum in Mexico or another third country through which they passed, known as the third-country-transit bar (the “TCT Bar”), was inconsistent with section 208 of the INA, 8 U.S.C. 1158, because it was inconsistent with both the safe-third-country and the firm-resettlement provisions of section 208. *Id.* at 977.<sup>213</sup> That court concluded that “[a] critical component of both [the safe-third-country and firm-resettlement] bars is the requirement that the alien’s ‘safe option’ be genuinely safe,” and that the transit rule did “virtually nothing to ensure that a third country is a ‘safe option.’” *Id.*

And in *East Bay II*, 519 F. Supp. 3d 663, the district court preliminarily enjoined the TCT Bar final rule, concluding that although the rule “avers to ‘have addressed the Ninth Circuit’s concerns by further explaining . . . how the transit bar is consistent’ with § 1158, 85 FR 82267 n.18, . . . the Final Rule remains inconsistent with § 1158.” *Id.* at 666. The court reasoned that “[o]nce again, ‘[t]he sole protection provided by the [Final] Rule is its requirement that the country through which the barred alien has traveled be a ‘signatory’ to the 1951 Convention and the 1967 Protocol,’” a requirement which the Ninth Circuit had already held “‘does not remotely resemble the assurances of safety built into the two safe-place bars of § 1158,’ and in fact is inconsistent with those provisions.” *Id.* (quoting and citing *E. Bay*, 964 F.3d at 845–49). That court’s injunction provides that “Defendants are hereby ORDERED AND ENJOINED, pending final judgment herein or further order of the Court, from taking any action continuing to implement the Final Rule and ORDERED to return to the pre-Final Rule practices for processing asylum applications.” *Id.* at 668.

Separately, in *East Bay III*, 993 F.3d 640, the Ninth Circuit affirmed a preliminary injunction against the Proclamation Bar IFR, which categorically rendered certain noncitizens ineligible for asylum if they

<sup>213</sup> The district court in that case enjoined the interim final transit rule for similar reasons, directing that “Defendants are hereby ORDERED AND ENJOINED, pending final judgment herein or further order of the Court, from taking any action continuing to implement the Rule and ORDERED to return to the pre-Rule practices for processing asylum applications.” *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019). Another district court issued a final judgment vacating the interim final transit rule, concluding that the rule did not comply with the APA’s notice-and-comment requirements. *Capital Area Immigrants’ Rights Coal. v. Trump*, 471 F. Supp. 3d 25, 45–57 (D.D.C. 2020). That court did not address the substantive validity of the interim final transit rule. *Id.* at 32.

entered the United States in violation of a presidential proclamation or other presidential order suspending or limiting the entry of noncitizens along the SWB. The court held that the Proclamation Bar IFR was inconsistent with section 208(a), which provides that any migrant “who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum.” *Id.* at 670.<sup>214</sup> As explained above, that holding is incorrect.

The court also suggested that the rule is inconsistent with the United States’ commitments under the 1967 Refugee Protocol, in which the United States adhered to specified provisions of the Refugee Convention. 993 F.3d at 972–75. That is incorrect. The United States’ non-refoulement obligation under Article 33 of the Convention is implemented by statute through the provision in section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3)(A), for mandatory withholding of removal. The proposed rule would specifically preserve the availability of that relief from removal. As discussed in Part V.C.3 of this preamble, the INA’s provision in section 208 of the INA, 8 U.S.C. 1158, for the discretionary granting of asylum instead aligns with Article 34 of the Convention, which is precatory and does not require a party actually to grant asylum to all those who are eligible. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 440–441 (1987). The court also misread Article 31(1) of the Refugee Convention, which pertains only to “penalties” imposed “on account of . . . illegal entry or presence” on refugees who, among other criteria, are “coming directly from a territory where” they face persecution. *See, e.g., Singh v. Nelson*, 623 F. Supp. 545, 560–561 (S.D.N.Y. 1985). And a bar to the granting of the discretionary relief of asylum is not a penalty under Article 31(1), especially given that the noncitizen remains eligible to apply for withholding of removal under section 241(b)(3) of the INA, which implements U.S. nonrefoulement obligations under the Protocol. *See Mejia v. Sessions*, 866 F.3d 573, 588 (4th Cir. 2017); *Cazun v. U.S. Att’y Gen.*, 856 F.3d 249, 257 n.16 (3d Cir. 2017).

<sup>214</sup> The court also held that the Proclamation Bar IFR likely did not properly fall under the good cause or foreign affairs exceptions to notice-and-comment rulemaking under 5 U.S.C. 553(a)(1) and (b)(B). *See East Bay II*, 993 F.3d at 676–77.

Regardless, even accepting *East Bay III*’s reasoning on this point, that reasoning is limited to a categorical eligibility bar premised on manner of entry. The proposed rule does not implicate the same concerns as the prior categorical bar on “manner of entry” because it would operate only when noncitizens traveled through at least one third country without seeking relief there and would not treat the manner of entry as dispositive in determining eligibility, but instead as the basis for a rebuttable presumption. The circumvention of orderly refugee processing would only be relevant where the applicant cannot demonstrate compelling reason why they did not avail themselves of a growing number of lawful pathways to the United States, including by scheduling an appointment to present at a port of entry in the United States in an orderly fashion, or showing that the individual could not access or use the government scheduling system. That is entirely consistent with longstanding Board precedent discussed above, as recognized by the Ninth Circuit itself. *See E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 773 (9th Cir. 2018) (recognizing “manner of entry” “may be considered”); *Matter of Pula*, 19 I. & N. Dec. at 473 (“circumvention can be a serious adverse factor” so long as it “is not [] considered in such a way that the practical effect is to deny relief in virtually all cases”).

The district court in that case enjoined the Proclamation Bar IFR for similar reasons, *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018), and issued an injunction directing that “Defendants are hereby ORDERED AND ENJOINED, pending final judgment herein or other order, from taking any action continuing to implement the Rule and ORDERED to return to the pre-Rule practices for processing asylum applications.” *Id.* at 1121.<sup>215</sup>

The preliminary injunctions in the *East Bay* cases dealt with different limitations on asylum and involved different factual circumstances, and

<sup>215</sup> Subsequently, another district court vacated the Proclamation Bar IFR for similar substantive reasons as the Ninth Circuit, concluding that a rule “which renders all aliens who enter the United States across the southern border . . . except at a designated port of entry, ineligible for asylum” is inconsistent “with 8 U.S.C. 1158(a)(1), which provides that “[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien’s status, may apply for asylum.” *O.A. v. Trump*, 404 F. Supp. 3d 109, 147 (D.D.C. 2019) (alterations in original). That ruling is subject to a pending appeal that is presently held in abeyance. *See O.A. v. Biden*, No. 19–5272 (D.C. Cir.).

hence do not preclude the issuance of this proposed rule. The injunctions bar the Departments from “implement[ing]” the specific rules enjoined in those cases. *East Bay II*, 519 F. Supp. 3d at 668; *East Bay*, 354 F. Supp. 3d at 1121. They do not preclude the Departments from issuing new rules with different substance and different effects and premised on different factual circumstances and on new reasoning. The APA authorizes judicial review of specific agency action, not abstract policies, 5 U.S.C. 702, and as the Supreme Court has explained, remedies do not operate “‘on legal rules in the abstract.’”<sup>216</sup>

The Departments respectfully disagree with some of the substantive holdings of the Ninth Circuit and the district court as described above. At the same time, the Departments view this proposed rule as fully consistent with those decisions, given the significant differences between the rebuttable presumption proposed here and the categorical bars at issue in those cases, particularly given the new and increased focus on available pathways and the ability to schedule a time to present at ports of entry.

To the extent the Ninth Circuit’s conclusion in *East Bay III* was premised on a view that any limits on asylum based on a failure to seek protection in a third country needed to be derivative of section 208’s safe-third-country provision and firm-resettlement bar, that

<sup>216</sup> *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (citation omitted). For the same reason, the Departments do not view the permanent injunction in *Al Otro Lado, Inc. v. Mayorkas*, No. 17–CV–02366–BAS–KSC, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022), as prohibiting the Departments from issuing this NPRM or otherwise limiting the Departments’ discretionary authority to apply new asylum limitations consistent with section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), to the injunction class. *See, e.g., Milliken v. Bradley*, 433 U.S. 267, 281–82 (1974) (“The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the [alleged wrongful conduct] itself.”); *Meinhold v. U.S. Dep’t of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994); *see also, e.g., Thomas v. County of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1992) (reversing injunction that “fail[ed] to specify the act or acts sought to be restrained as required by” Federal Rule of Civil Procedure 65(d)). The Departments also disagree with the district court’s rationale for the injunction and have appealed the order to the Ninth Circuit. *See Al Otro Lado, Inc. v. Mayorkas*, Case Nos. 22–55988, 22–56036 (9th Cir. 2022). Section 208 of the INA, 8 U.S.C. 1158, and section 235 of the INA, 8 U.S.C. 1225, do not require the Government to inspect and refer potential asylum-seekers who have not yet entered the territorial United States. These statutes, by their terms, apply only to individuals “in the United States,” so the Government does not withhold mandatory statutory processing by preventing someone outside the territorial United States from immediately crossing the border for inspection and referral for a fear screening.

view is incorrect. Nothing about the text or history of these provisions suggests that they were intended to set out the exclusive conditions relating to an individual seeking protection's ability to obtain relief in a third country, and therefore they do not prevent the Executive Branch from imposing additional requirements addressing that subject. To the contrary, those and other statutory bars establish minimum requirements for asylum eligibility that the Attorney General and Secretary may not disregard. They do not prevent the Attorney General and the Secretary from exercising their discretionary authority to adopt limitations and conditions on eligibility over and above the statutory minimum. Indeed, at the same time Congress codified those rules, it expressly preserved the Executive Branch's authority to "establish additional limitations and conditions" "by regulation." INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). Thus, the enumerated statutory bars plainly do not occupy the field of bars related to applications or presence in a third country. The Executive Branch enjoys broad discretion to supplement those bars with additional conditions. Put simply, the INA's enumerated asylum bars do not foreclose the Executive Branch from imposing alternative conditions, even if those alternative conditions address subjects that are in some respects similar to those that Congress addressed in the asylum statute.

In any event, unlike the rules at issue in the *East Bay* cases (which, as noted above, the Departments propose to rescind), this proposed rule would not operate as a categorical bar on asylum for all covered noncitizens based either on manner of entry or whether the noncitizen sought asylum in at least one country through which they traveled en route to the United States. The proposed rule would not implicate the same concerns as the prior categorical bar based on "manner of entry" because it would operate only when noncitizens traveled through at least one third country without seeking protection there and would not treat the manner of entry as dispositive in determining eligibility, but instead as one part of the basis for a rebuttable presumption. And more clearly than the prior transit bar, the proposed rule addresses very different issues from those applicable to the safe-third-country or firm-resettlement bars. Again, it would yield only a presumption (which, unlike those bars, may be rebutted) and would apply only when noncitizens travel through a third country and also fail to

pursue other lawful pathways, such as options for orderly processing at the port of entry.

In short, the proposed rule is more limited and less categorical than the prior bars, establishing only a rebuttable condition applicable to an individual noncitizen who, after traveling through a third country, fails to avail themselves of other options to request entry to the United States or to seek asylum or other protection in this country or elsewhere. Such a rebuttable presumption is supported by the longstanding view of the BIA that a noncitizen's "circumvention of orderly refugee procedures," including their "manner of entry or attempted entry," "whether the alien passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States" are relevant factors that can be considered as part of the totality of circumstances with respect to whether an individual warrants the favorable exercise of discretion in granting asylum. *Matter of Pula*, 19 I&N Dec. at 473–74;<sup>217</sup> see also, e.g., *Haloci v. U.S. Att'y Gen.*, 266 F. App'x 145, 147 (3d Cir. 2008) ("In addition, the IJ found that Haloci's failure to seek asylum in Turkey or Holland, along with his admission that he had never considered any final destination other than the United States, further undercut his alleged fear. The record supports the IJ's findings."); *Farbakhsh v. INS*, 20 F.3d 877, 882 (8th Cir. 1994) ("We also hold that the Board did not abuse its discretion in denying petitioner's application for asylum. Petitioner passed through several countries (Turkey, Italy, Spain, Portugal, Canada) en route to the United States; in Spain and Canada orderly refugee procedures were in fact available to

<sup>217</sup> As the Board further explained with respect to the asylum statute as it existed at the time, "[a] careful reading of the language of [section 208(a)(1)] reveals that the phrase 'irrespective of such alien's status' modifies only the word 'alien.'" *Pula*, 19 I&N Dec. at 473. "The function of that phrase is to ensure that the procedure established by the Attorney General for asylum applications includes provisions for adjudicating applications from any alien present in the United States or at a land or port of entry, 'irrespective of such alien's status.'" *Id.* (collecting cases). Thus, Congress made clear that noncitizens like stowaways, who, at the time the Refugee Act was passed, could not avail themselves of our immigration laws, would be eligible at least to apply for asylum "irrespective of [their] status." *Id.* "Thus, while section 208(a) provides that an asylum application be accepted from an alien 'irrespective of such alien's status,' no language in that section precludes the consideration of the alien's status in granting or denying the application in the exercise of discretion." *Id.*

him. He had applied for refugee status in Spain, and Canada had granted him temporary resident status and one year to apply for asylum.").

Given that the Departments may take account of these factors in individual cases, see INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), they may do so across a category of similarly situated cases as well, and give them the weight they deem appropriate. See, e.g., *Lopez v. Davis*, 531 U.S. 230, 244 (2001); *Reno v. Flores*, 507 U.S. 292, 313–14 (1993); *Yang*, 79 F.3d at 936–37. As noted, Congress clearly contemplated that the Attorney General and the Secretary would adopt generally applicable conditions on asylum eligibility by expressly authorizing the Executive Branch to establish further "limitations and conditions" on asylum eligibility "by regulation," INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), so long as those limitations and conditions are "consistent with" the asylum statute. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); see *R–S–C*, 869 F.3d at 1187 & n.9 ("the statute clearly empowers" the Attorney General and the Secretary to "adopt[ ] further limitations" on asylum eligibility); see also INA 208(d)(5)(A), 8 U.S.C. 1158(d)(5)(A). Reading that provision to bar any condition on asylum eligibility not already established by section 208—particularly a mere rebuttable presumption—"would mean that the Attorney General could not impose any limitations on asylum eligibility because any regulation that 'limits' eligibility necessarily undermines the statutory guarantee that 'any alien . . . irrespective of such alien's status' may apply for asylum." *R–S–C*, 869 F.3d at 1187 (third emphasis added).

Regardless, by taking account of various pathways for noncitizens fleeing persecution to obtain protection in the United States or other countries, including the avenues provided to gain entry to the United States, where they may thereafter seek asylum, the proposed rule in the current and impending exigent circumstances is consistent with what the Ninth Circuit viewed as the two categories of individuals whom section 208 excludes from asylum eligibility: those "considered not to be deserving of international protection" based on their actions, and those persons "not considered to be in need of international protection" because "there is a 'safe option' in another country." *East Bay I*, 994 F.3d at 976, 979 (emphasis omitted). The presumption would apply only to noncitizens who have neither availed themselves of alternative options, including seeking asylum or protection

elsewhere, nor availed themselves of safe and orderly processing, including mechanisms for seeking a lawful, safe, and orderly way to enter at a port of entry and any available parole processes. The presumption, moreover, could be rebutted, including on three per se grounds: if, at the time of entry, the noncitizen faced an acute medical emergency, faced an imminent and extreme threat to life or safety, or was a victim of a severe form of trafficking in persons.

Longstanding precedent recognizes that the “ultimate consideration” for whether someone is deserving of a discretionary asylum grant is whether granting relief “appears to be in the best interest of the United States.” *Matter of D–A–C–*, 27 I&N Dec. at 578. Here, the Departments propose that granting asylum to certain categories of noncitizens who have failed to avail themselves of lawful pathways or processes to enter the United States or seek asylum or other protection in other countries is not in the “best interest of the United States.” The Secretary and the Attorney General, in exercising their discretion, may consider, among other considerations, the current circumstances confronting the United States on the SWB, and their effect on the orderly and expeditious resolution of asylum claims.

The Secretary and the Attorney General may thus permissibly determine that, for a 24-month period as proposed by this rule, it is in the “best interest of the United States” to prioritize noncitizens who pursue lawful paths. Nothing in section 208 forecloses that view, and securing the best interests of the country is a reasonable policy goal under section 208 and thus “consistent with” section 208. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); see *Yang*, 79 F.3d at 939 (observing that “it is precisely to cope with the unexpected that Congress deferred to the experience and expertise of the Attorney General in fashioning section 208”); see also *id.* at 935 (“We must reject the argument that [the] regulation [establishing a categorical discretionary bar to asylum eligibility] exceeds the authority of the Attorney General if we find that the regulation has a ‘reasonable foundation . . . that is, if it rationally pursues a purpose that it is lawful for the [immigration agencies] to seek.” (quoting *Reno v. Flores*, 507 U.S. at 309)).

Beyond the clear statutory text, settled principles of administrative law dictate that the Departments may adopt generally applicable eligibility requirements. Those principles establish that it is permissible for agencies to establish general rules, reasonable

presumptions, or guidelines in lieu of case-by-case assessments, so long as those rules or guidelines are not inconsistent with statute. See *Lopez v. Davis*, 531 U.S. 230, 243–44 (2001) (rejecting the argument that the Bureau of Prisons was required to make “case-by-case assessments” of eligibility for sentence reductions and explaining that an agency “is not required continually to revisit ‘issues that may be established fairly and efficiently in a single rulemaking’”) (quoting *Heckler v. Campbell*, 461 U.S. 458, 467 (1983)); *Reno v. Flores*, 507 U.S. at 313–14 (holding that a statute requiring “individualized determination[s]” does not prevent immigration authorities from using “reasonable presumptions and generic rules”); *Fook Hong Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970) (upholding INS’s authority to “determine[] certain conduct to be so inimical to the statutory scheme that all persons who have engaged in it shall be ineligible for favorable consideration” and observing that there is no legal principle forbidding an agency that is “vested with discretionary power” from determining that it will not use that power “in favor of a particular class on a case-by-case basis”); see also *Singh v. Nelson*, 623 F. Supp. 545, 556 (S.D.N.Y. 1985) (“attempting to discourage people from entering the United States without permission . . . provides a rational basis for distinguishing among categories of illegal aliens”); *Matter of Salim*, 18 I&N Dec. 311, 315–16 (BIA 1982) (before *Pula*, according manner of entry dispositive weight); cf. *Peulic v. Garland*, 22 F.4th 340, 346–48 (1st Cir. 2022) (rejecting challenge to *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), which established strong presumption against a favorable exercise of discretion for certain categories of applicants for asylee and refugee adjustment of status under section 209(c) of the INA, 8 U.S.C. 1159(c) (citing cases)); *Cisneros v. Lynch*, 834 F.3d 857, 863–64 (7th Cir. 2016) (rejecting challenge to 8 CFR 1212.7(d), which established strong presumption against a favorable exercise of discretion for INA 212(h) waivers (8 U.S.C. 1182(h)) for certain classes of noncitizens, even if a few could meet the heightened discretionary standard (citing cases)). The authority to make discretionary denials of asylum, see INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), thus further supports the condition proposed here.

Finally, to the extent *East Bay II* indicated that any limitation or condition on asylum eligibility premised on manner of entry is inconsistent with section 208(a)’s

provision allowing for noncitizens to apply for asylum irrespective of their manner of entry, 993 F.3d at 670, the Departments disagree. As explained above, section 208(a)(1) by its plain terms requires only that a noncitizen be permitted to “apply” for asylum, regardless of the noncitizen’s manner of entry. It does not require that a noncitizen be eligible to be granted asylum, regardless of their manner of entry.

#### ii. Litigation Related to the “Global Asylum” Rule

The Departments are also aware of the litigation related to the Global Asylum Rule and do not view this litigation as an impediment to the Executive’s legal authority to issue this proposed rule. In June 2020, the Departments published an NPRM titled Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020) (“Global Asylum NPRM”), in which they proposed changes to, *inter alia*, the credible fear and expedited removal process.

The Global Asylum NPRM proposed four changes to the credible fear and expedited removal processes. First, the NPRM proposed to apply the statutory bars to applying for asylum and the statutory and regulatory bars to eligibility for asylum during credible fear screenings. *Id.* at 36296 (proposing amendment to 8 CFR 208.30(e)(5)(i)). Second, where a noncitizen was found to be subject to such a bar, the NPRM proposed that a negative credible fear determination would be entered and that the noncitizen would be screened only for a “reasonable possibility” of persecution or torture. *Id.* Third, all claims for statutory withholding and CAT relief would be screened using a “reasonable possibility” of persecution or torture standard, rather than a “significant possibility” of establishing eligibility for the underlying protection as provided for previously. *Id.* Fourth, if a noncitizen was found to have a credible fear of persecution or a reasonable fear of persecution or torture, they would be referred for asylum-and-withholding-only proceedings, rather than section 240 proceedings, during which they could apply only for asylum, statutory withholding of removal, or protection under the CAT, and not any other forms of relief available under Title 8 of the United States Code. *Id.* at 36297. In December 2020, after considering public comments, the Departments published the Global Asylum Rule, in which they adopted the changes proposed in the Global Asylum NPRM.

The Global Asylum Rule was, and continues to be, the subject of multiple suits challenging the rule on multiple procedural and substantive grounds. *See Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, No. 3:20-cv-09253 (N.D. Cal. filed Dec. 21, 2020); *Immigration Equality v. U.S. Dep't of Homeland Sec.*, No. 3:20-cv-09258 (N.D. Cal. filed Dec. 21, 2020); *Human Rights First v. Mayorkas*, No. 1:20-cv-3764 (D.D.C. filed Dec. 21, 2020); *Tahirih Justice Ctr. v. Mayorkas*, No. 1:21-cv-00124 (D.D.C. filed Jan. 14, 2021). In *Pangea Legal Servs. and Immigration Equality*, the U.S. District Court for the Northern District of California preliminarily enjoined the Departments from implementing the Global Asylum Rule in its entirety nationwide before it became effective. *Pangea Legal Servs.*, 512 F. Supp. 3d at 977. The court concluded that the plaintiffs were likely to succeed on the merits of their claim that the Global Asylum Rule “was done without authority of law” because the DHS official who approved it, then-Acting Secretary Chad Wolf, was not properly designated as Acting Secretary. *Id.* at 975. The court did not address any challenges to the rule’s substance. Since the Global Asylum Rule was preliminarily enjoined, all four challenges to the rule have been stayed or held in abeyance.

In enjoining the Global Asylum Rule, the court ordered that the Departments and their employees “are preliminarily enjoined from implementing, enforcing, or applying” the Global Asylum Rule “or any related policies or procedures.” *Pangea Legal Servs.*, 512 F. Supp. 3d at 977. The Departments have construed this injunction as potentially interfering with the implementation of another rule that was also published in December 2020 and which, unlike this proposed rule, relied on specific text in the Global Asylum Rule allowing for the consideration of specific bars to asylum eligibility during credible fear. *See Security Bars and Processing*, 85 FR 84160 *et seq.* (Dec. 23, 2020) (“Security Bars Rule”); *see also, e.g., Security Bars and Processing; Delay of Effective Date*, 86 FR 73615, 73617 (Dec. 28, 2021).

Most of the changes that the Global Asylum Rule made to the credible fear and expedited removal process were replaced by the Asylum Processing IFR. Regardless, the litigation over the Global Asylum Rule does not overlap or create a tension with the provisions in this NPRM. The Global Asylum Rule did not add any additional limitations on asylum eligibility. Moreover, this proposed rule would implement the new condition to credible fear

screenings through a stand-alone provision rather than a catch-all as the Departments sought to do through the Global Asylum Rule (and which the Departments sought to use to operationalize the Security Bars Rule). Accordingly, although both the proposed rule and the Global Asylum Rule involve asylum, credible fear, and expedited removal, their provisions are distinct.

#### 6. Consideration of Lawful Pathways Condition During Credible Fear Screening

Under the amendments proposed here, the lawful pathways condition on eligibility for asylum would be applied to noncitizens during credible fear screenings. Where a noncitizen is found subject to the lawful pathways condition on eligibility for asylum and where no exception applies and the noncitizen has not rebutted the presumption of the condition’s application, the asylum officer would enter a negative credible fear determination. *See* proposed 8 CFR 208.33(c)(1). The asylum officer would then screen the noncitizen for statutory withholding of removal and protection under the CAT using the “reasonable possibility” standard. To do so, the officer would question the noncitizen to elicit facts regarding their past experiences and future fear of persecution and torture and then determine whether, based on those facts, the noncitizen has a “reasonable possibility” of persecution or torture in the country of removal. *See* proposed 8 CFR 208.33(c)(2).

As discussed in Part V.A. of this preamble, the Departments have determined that applying the lawful pathways condition on eligibility for asylum during credible fear screenings is necessary to ensure the Departments’ continued ability to safely, humanely, and effectively enforce and administer U.S. immigration law, including provisions concerning asylum and removal, and to promote shared responsibility with our partner countries to address migration issues. Such application would be consistent with the statutory definition of “credible fear,” which asks whether there is “a significant possibility . . . that the alien could establish *eligibility* for asylum under section 208.” INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v) (emphasis added). If a noncitizen is subject to the lawful pathways condition on eligibility for asylum and not excepted and cannot rebut the presumption of the condition’s applicability, there would not be a significant possibility that the

noncitizen could establish eligibility for asylum.

The Departments have further determined that, where the proposed lawful pathways condition would apply, applying the “reasonable possibility” of persecution or torture standard to the remaining claims for statutory withholding of removal and CAT protection would better further the Departments’ systemic goals of border security and lessening the impact on the immigration adjudication system overall. First, as to individuals subject to the lawful pathways condition, fewer with non-meritorious claims would be placed into section 240 proceedings if the “reasonable possibility” of persecution or torture standard is applied than if the lower “significant possibility” of establishing eligibility for the underlying protection standard is applied. The Departments acknowledge that this approach would differ from that articulated in the Asylum Processing IFR issued in March 2022, but as further discussed below assess that, to respond to the current and impending exigent circumstances, the interests balance differently and warrant a different approach from the one generally applied in credible fear screenings.

Second, the Departments believe that using the “reasonable possibility” standard to screen for statutory withholding and CAT protection in this context would further these systemic goals while remaining consistent with the INA, Congress’s intent, the United States’ treaty obligations, and decades of agency practice. When Congress established the expedited removal system in IIRIRA, it allowed those claiming a fear of persecution to seek asylum through the credible fear process. INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii). If a noncitizen has a “credible fear of persecution,” the noncitizen is then “detained for further consideration of the application for asylum.” INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii). The statute provides that “‘credible fear of persecution’ means that there is a significant possibility . . . that the alien could establish eligibility for asylum.” INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). In none of those provisions did Congress refer to statutory withholding of removal or CAT protection. Thus, Congress clearly expressed its intent that the “significant possibility” standard be used to screen for asylum eligibility but did not express any clear intent as to which standard should apply to other applications—and indeed, as noted below, the Departments apply the

“reasonable possibility” of persecution or torture standard to screen for statutory withholding of removal and CAT protection in reasonable-fear screenings, where applicants (who are in the reasonable-fear screening process after either having a prior removal order reinstated or being subject to a final administrative removal order) would not be eligible for asylum but nonetheless could be eligible for withholding or deferral of removal. Similarly, the legislative history regarding the credible fear screening process references only asylum.<sup>218</sup> The proposed rule would retain the “significant possibility” standard for asylum, as Congress mandated in section 235(b)(1)(B)(v) of the INA, 8 U.S.C. 1225(b)(1)(B)(v). But the Departments do not read the statute or legislative history as requiring that claims for statutory withholding of removal or CAT protection be screened under that same standard. As discussed in more detail below, the Departments have concluded that applying the reasonable possibility of persecution or torture standard in this context would better align the screening process for statutory withholding of removal and CAT protection for those who are subject to expedited removal but are presumptively ineligible for asylum with their implementation of such screenings in other contexts where noncitizens would also be ineligible for asylum.

Furthermore, a “reasonable possibility” standard would be consistent with the INA, the FARRA, and U.S. non-refoulement obligations under the CAT. Those sources do not dictate any particular screening standard or procedure, and the Departments believe that a “reasonable possibility” of persecution or torture standard is sufficient to identify individuals who will ultimately be able to satisfy the “more likely than not” burden applicable to claims for statutory

withholding or CAT protection. A “reasonable possibility” of persecution or torture standard has been used in certain situations dating back to at least 1999. *See* Regulations Concerning the Convention Against Torture, 64 FR 8478–01, 8485, 8493 (Feb. 19, 1999); *see also id.* at 8479 (explaining that the screening process for noncitizens who were eligible only for statutory withholding or CAT protection is designed to “allow for the fair and expeditious resolution” of those claims “without unduly disrupting the streamlined removal processes applicable to” such individuals). Since 1999, regulations have provided for a “reasonable fear” screening process for certain noncitizens who are categorically ineligible for asylum and can thus make claims only for statutory withholding or CAT protection. *See* 8 CFR 208.31, 1208.31. Specifically, if a noncitizen is subject to having a previous order of removal reinstated or is a non-lawful permanent resident subject to an administrative order of removal resulting from an aggravated felony conviction, then they are categorically ineligible for asylum. *See id.* 208.31(a), (e). Such a noncitizen can be placed in withholding-only proceedings to adjudicate their statutory withholding or CAT claims, but only if they first establish a “reasonable fear” of persecution or torture through a screening process that tracks the credible fear process. *See id.* 208.31(c), (e).

To establish a reasonable fear of persecution or torture, a noncitizen must establish a “reasonable possibility that [the noncitizen] would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal.” *Id.* 208.31(c). “This . . . screening process is modeled on the credible-fear screening process, but requires the alien to meet a higher screening standard.” 64 FR at 8485; *see also Garcia v. Johnson*, No. 14–CV–01775, 2014 WL 6657591, at \*2 (N.D. Cal. Nov. 21, 2014) (describing the aim of the regulations as providing “fair and efficient procedures” in reasonable-fear screening that would comport with U.S. international obligations).

Significantly, when establishing the reasonable-fear screening process, DOJ explained that the two affected categories of noncitizens should be screened based on the higher reasonable-fear standard because, “[u]nlike the broad class of arriving aliens who are subject to expedited removal, these two classes of aliens are

ineligible for asylum,” and may be entitled only to statutory withholding of removal or CAT protection. 64 FR at 8485. “Because the standard for showing entitlement to these forms of protection (a probability of persecution or torture) is significantly higher than the standard for asylum (well-founded fear of persecution), the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher.” *Id.*

Drawing on the established framework for considering the likelihood of a grant of statutory withholding of removal or CAT protection in the reasonable-fear context, the proposed rule would adopt the “reasonable possibility” of persecution or torture standard for screening the claims of those noncitizens who are subject to the lawful pathways condition on eligibility for asylum and who do not qualify for an exception or rebut the presumption of the condition’s applicability. The Attorney General and Secretary have broad authority to implement the immigration laws, *see* INA 103, 8 U.S.C. 1103, including by establishing regulations, *see* INA 103(a)(3), 8 U.S.C. 1103(a)(3), and to regulate “conditions or limitations on the consideration of an application for asylum,” INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). Furthermore, the Secretary has the authority—in his “sole and unreviewable discretion,” the exercise of which may be “modified at any time”—to designate additional categories of noncitizens who will be subject to expedited-removal procedures, so long as the designated noncitizens inadmissible on certain grounds who have not been admitted or paroled nor continuously present in the United States for two years. INA 235(b)(1)(A)(iii), 8 U.S.C. 1225(b)(1)(A)(iii). The Departments have frequently invoked these authorities to establish or modify procedures affecting noncitizens in expedited removal proceedings, as well as to adjust the categories of noncitizens subject to particular procedures within the expedited-removal framework.

This proposed rule would not change the standard for withholding or CAT screening for those who are not subject to the lawful pathways condition on eligibility for asylum. Those noncitizens who follow the pathways that have been prepared for those seeking to enter the United States at the U.S.-Mexico land border—or have sought but been denied asylum or other protection in a country through which they traveled—will continue to have their claims for

<sup>218</sup> For example, the Asylum Processing NPRM provided: “The 104th Congress chose a screening standard ‘intended to be a low screening standard for admission into the usual full asylum process.’” 86 FR at 46914 (quoting 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Senate Judiciary Committee Chairman Orrin Hatch)). The NPRM provides additional discussion from various members of Congress about the compromise struck over the standard to apply during credible fear screenings, all of which refer to asylum. *See* 86 FR at 46914. When discussing the definition of “refugee” at section 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42), the legislative history does include the statement that “[a]n asylum claim also is considered a claim for withholding of deportation under section 243(h) of the INA.” H.R. Rep. No. 104–469, at 121 n.20. The Departments have found no similar discussion in the context of the nature of or procedure for the credible fear screening process.

statutory withholding of removal and CAT protection, as well as their claims for asylum, screened under the “significant possibility” of establishing eligibility for the underlying protection standard, in order to avoid requiring adjudicators to apply different standards to the same facts in the same screening. Furthermore, the proposed rule is not intended to change the entire credible fear process but rather would alter the manner of processing only for those subject to the lawful pathways condition.

The Departments acknowledge that, in the Asylum Processing IFR, they recently rescinded changes made by the Global Asylum Rule that subjected noncitizens’ claims for statutory withholding and CAT protection to the “reasonable possibility” of persecution or torture standard and that altered the post-negative credible fear process. As discussed in the three subsections below, the considerations that led to those choices do not apply in the same way in this unique context or are outweighed here by other considerations. Considering the differences between the lawful pathways condition on asylum eligibility and the nature of the changes at issue in the Asylum Processing IFR, as well as the changed circumstances since March 2022, the Departments have determined that it would be appropriate to apply the lawful pathways additional condition on asylum eligibility during the credible fear screening stage and to then apply the “reasonable possibility” of persecution or torture standard to screen the remaining applications for statutory withholding of removal and CAT protection, and that doing so in the way the Departments intend would lead to better allocation of resources overall.

In addition, the Departments propose two changes to the post-credible fear determination process for those found subject to the lawful pathways limitation and who receive a negative credible fear determination from an asylum officer. First, unlike the process adopted by the Asylum Processing IFR, noncitizens must affirmatively elect immigration judge review of a negative credible fear determination when that choice is presented to them; noncitizens who fail or refuse to indicate a request for immigration judge review will not be considered to have requested such review. Second, noncitizens would not be permitted to submit a request to reconsider a negative credible fear determination with USCIS, although USCIS will still retain discretion to reconsider negative determinations sua sponte. As further explained below, the Departments have determined that the

need for an expedited process under the current and anticipated exigent circumstances weighs against providing for immigration judge review where noncitizens do not request it and against allowing for requests to reconsider negative credible fear determinations after immigration judge review.

#### i. Application of Lawful Pathways Condition During Credible Fear Screening

When returning to the “historical practice of not applying mandatory bars at the credible fear screening stage” in the Asylum Processing IFR, 87 FR at 18135, the Departments explained that the bars the Global Asylum Rule would have applied during credible fear were generally legally and factually complicated and that screening for the bars would have required significant additional time in each screening interview for little operational benefit, 87 FR at 18093, 18094, 18134–35. The Departments further explained that they had come to believe that it was speculative that generally applying mandatory bars during the credible fear screening stage would ensure that noncitizens subject to those bars would be removed more quickly. 87 FR at 18094. These criticisms of the Global Asylum Rule’s provision applying multiple mandatory bars during the credible fear screening process do not apply equally to the lawful pathways condition on asylum eligibility given the condition’s stand-alone nature and its narrowly tailored applicability to the present and impending circumstances.

The lawful pathways condition on eligibility for asylum would be far simpler than the multiple, complex mandatory bars the Global Asylum Rule applied during the credible fear screening process. Specifically, the Global Asylum Rule would have applied multiple legally and factually complicated bars listed in section 208(b)(2)(A) of the INA, 8 U.S.C. 1158(b)(2)(A), including bars that render ineligible for asylum a noncitizen (1) who “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion”; (2) who, “having been convicted by a final judgment of a particularly serious crime, constitute[] a danger to the community of the United States”; (3) for whom “there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States”; (4) where “there are reasonable grounds for regarding the alien as a danger to the

security of the United States”; (5) who is described in specific portions of the provisions relating to terrorist activity in section 212(a)(3)(B)(i) of the INA, 8 U.S.C. 1182(a)(3)(B)(i); or (6) who “was firmly resettled in another country prior to arriving in the United States.” If required to screen for all of these bars in every credible fear interview, asylum officers would have to ask numerous additional questions aimed at eliciting information on a number of topics. Not only are each of these bars individually legally and factually complicated, but screening for all of them would indeed add significant time to each and every credible fear screening.

At bottom, as the Departments determined in the Asylum Processing IFR, screening for those bars is not currently a preferable use of the Departments’ resources. The Departments continue to believe that it is inadvisable to apply these complex mandatory bars during the credible fear screening process.

In contrast, the lawful pathways condition on eligibility for asylum would be simpler to apply than multiple, legally complicated bars. Not only would it be a single, stand-alone condition, but at the outset of a credible fear interview, the asylum officer would know whether to inquire into the condition or not. Specifically, the officer would know whether the applicant entered the United States without documents sufficient for lawful admission as described in INA 212(a)(7), 8 U.S.C. 1182(a)(7), across the U.S.-Mexico land border. *See* proposed 8 CFR 208.33(a)(1). Only for such individuals would the asylum officer have to ask additional questions to determine whether the presumption applies and, if so, whether the noncitizen can rebut the presumption. Thus, the additional time commitment for applying the lawful pathways condition would not be universal, as it was for the multiple bars to eligibility under the Global Asylum Rule. That said, the Departments recognize that, where a noncitizen may be subject to the lawful pathways condition on asylum eligibility, asylum officers would be required to inquire into whether the enumerated exceptions or any basis for rebutting the presumption applies. At times, this questioning may require significant additional time during the credible fear interview. Regardless, as discussed throughout this preamble, the Departments assess that under the circumstances, the interests in ensuring orderly processing, expedited rejection of unmeritorious claims at the outset in the emergent circumstance addressed by this proposed rule and

overall system efficiencies would outweigh any costs resulting from increasing the length of some credible fear screening interviews.

The Departments expect that application of the lawful pathways condition on asylum eligibility for asylum would also differ materially from the Departments' experience applying the TCT Bar IFR, which the Departments discussed in the Asylum Processing IFR. The TCT bar applied to "any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States" unless certain exceptions applied. 8 CFR 208.13(c)(4), 1208.13(c)(4). By its terms, the bar applied to every noncitizen who presented at a port of entry or between ports of entry along the U.S.-Mexico land and maritime border and presumably, only Mexican nationals would be categorically exempt. Thus, asylum officers had to screen every applicant for application of the bar—specifically, to determine whether they transited through a third country and then whether one of several exceptions applied. As the Departments explained in the Asylum Processing IFR, applying that bar required additional time in each credible fear interview and led to operational inefficiencies. 87 FR at 18093, 18131, 18135. The Departments, however, have learned from that experience, and will do additional triaging on the front end, so that those who use the CBP One app or otherwise avail themselves of a safe, orderly process—which will be readily apparent upon encounter—will not be subject to the rebuttable presumption described by this proposed rule. This feature of the proposed rule would limit the operational inefficiencies identified in the Asylum Processing IFR.

In the specific circumstances here, moreover, the Departments have concluded that the approach taken in this proposed rule is the superior policy—all things considered—even in circumstances where applying the lawful pathways condition requires more resources than the TCT bar. In particular, the lawful pathways condition would function as a rebuttable presumption for which there are enumerated exceptions and circumstances that may rebut the presumption. Inquiry into those exceptions and rebuttal circumstances would require additional factual development that may significantly increase interview times for some

noncitizens subject to the condition. However, as discussed throughout this preamble, the Departments believe that under the circumstances, the interests in ensuring lawful, safe, and orderly processing and overall system efficiencies—including screening out and removing those with non-meritorious claims more quickly—outweigh any costs resulting from increasing the length of some credible fear screening interviews, and expanding the operation of the credible fear screening program, if necessary.

Despite the difference in applicability, the Departments recognize the toll it took on their resources to apply the TCT bar. As the Departments explained in the Asylum Processing IFR, applying the TCT bar required additional time from their employees at various levels: asylum officers spent additional time "conducting these screening interviews, making determinations, and recording their assessments"; "supervisory asylum officers reviewing these cases spent additional time assessing whether the varying standards of proof were properly applied to the forms of relief for which asylum officers screened"; there was an "additional investment of time and resources from Asylum Division headquarters, including training and quality assurance staff who had to develop and deliver guidance and trainings on the new process, monitor the work being conducted in the field to ensure compliance with regulations and administrative processes, and provide guidance to asylum officers and supervisory asylum officers on individual cases"; "Attorneys from the USCIS Office of Chief Counsel had to spend time and resources reviewing and advising on training materials and guidance issued by the Asylum Division, as well as on individual cases on which legal advice was sought to ensure proper application of the divergent screening standards on various forms of relief"; and "IJs reviewing negative determinations by asylum officers were also compelled to spend additional time ensuring the proper application of these screening standards." 87 FR at 18092.

The Departments recognize that procedural changes may require significant resources to implement. Indeed, the Departments continue to experience this as they work to operationalize the significant procedural changes made by the Asylum Processing IFR. Notably, however, the Departments implemented the TCT Bar IFR for less than a year—from July 16, 2019, until June 30, 2020—and it was the first time the Departments implemented such a bar during credible fear. *See Capital*

*Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020) (vacating the TCT Bar IFR on June 30, 2020). Additionally, during that time there were disruptions to the bar's implementation due to fast-moving litigation that included an injunction that changed over time.<sup>219</sup> Thus, the Departments' experience of implementing the TCT bar was disrupted and marked by uncertainty and changing circumstances. Having had this experience along with implementing the Asylum Processing IFR, the Departments are equipped to operationalize a new condition on asylum eligibility during credible fear. Despite the additional time it will require to train officers and ensure proper application of the new procedure, the Departments believe the benefits of applying the lawful pathways condition on eligibility for asylum during the credible fear process outweigh the costs. Specifically, the Departments believe that in the current and impending circumstances, the interest in overall system efficiency outweighs the interest in minimizing the length of any given credible fear screening.

#### ii. Application of "Reasonable Possibility" Standard

In explaining the changes adopted in the Asylum Processing IFR, the Departments stated that using the "significant possibility" standard to screen for all three types of claims— asylum, statutory withholding of removal, and CAT protection—was preferable for multiple reasons, including because it aligned with Congress's intent that a low screening standard apply during the credible fear

<sup>219</sup> The TCT Bar IFR was published on July 16, 2019, and went into effect immediately. Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019). Eight days later, on July 24, the IFR was preliminarily enjoined nationwide. *E. Bay*, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019). The government appealed and sought an emergency stay pending appeal, and the Ninth Circuit upheld the preliminary injunction but limited its geographical scope to just the Ninth Circuit on August 16. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 (9th Cir. 2019). On September 9, 2019, the district court reinstated its previously entered preliminary injunction, again applying it nationwide. *E. Bay Sanctuary Covenant v. Barr*, 391 F. Supp. 3d 974, 985 (N.D. Cal. 2019). The government again appealed, but before the Ninth Circuit entered a decision, the Supreme Court on September 11, 2019, issued an order staying the district court's order "in full pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is sought." *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019). The TCT Bar IFR then remained in effect until it was vacated on June 30, 2020. *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020).

process. *See, e.g.*, 87 FR at 18091–93; 86 FR at 46914. Although the Departments continue to believe that the credible fear screening process is by its nature a screening procedure, they also balance the nature of that screening procedure against the need to create efficiencies in the system overall. Specifically, screening out more non-meritorious claims means fewer additional cases that would result in a denial years down the road—and which, in the meantime, would add to the immigration court backlog. In other words, the Departments’ goal for the process is not to conduct interviews as quickly as possible regardless of the downstream effects. A marginal increase in interview duration for some noncitizens that saves a significant amount of time later in the process is desirable as long as the screening is calibrated to protect individuals with viable statutory withholding or CAT claims. Although applying the “reasonable possibility” of persecution or torture standard may also take some additional time for those subject to the lawful pathways condition on eligibility for asylum and would make it more difficult for those with non-meritorious claims to pass the screening process, asylum officers and immigration judges have long applied the reasonable fear of persecution or torture standard successfully to noncitizens who are subject to administrative removal orders under section 238(b) of the INA, 8 U.S.C. 1228(b), or reinstated orders under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5).

The Asylum Processing NPRM and IFR included discussions regarding Congress’s intent that the “significant possibility” standard be a “low screening standard for admission into the usual full asylum process,” 86 FR at 46914, and that it be employed so that the expedited removal process is efficient and expeditious, *see generally* 87 FR at 18091–94, 18135. The Departments believe that screening noncitizens’ claims of fear of persecution and torture under the “reasonable possibility” standard where they are not eligible for asylum due to application of the lawful pathways condition on eligibility continues to align with the INA and Congress’s general intent to create an asylum and protection system that adjudicates claims both expeditiously and fairly. *See* INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii) (“[I]n the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be

completed within 180 days after the date an application is filed.”). In their discussion in the Asylum Processing NPRM and IFR, the Departments did not intend to foreclose ever applying the “reasonable possibility” standard. Indeed, the Departments at no time indicated an intent to change the standard applied in reasonable-fear screenings.

In the Asylum Processing IFR, the Departments also included discussions regarding their experiences applying the TCT Bar IFR and the inefficiencies that resulted from applying the “reasonable possibility” standard in that context. 87 FR at 18131; *see also id.* at 18091. Specifically, the discussion of the burdens of applying divergent standards in the Asylum Procedures IFR stated that “adjudicators were required to evaluate the same evidence twice for the same factual scenario.” *Id.* at 18131; *cf. id.* at 18091 (“[T]he Departments believe that the efficiency gained in screening the same or a closely related set of facts using the same legal standard at the same time is substantial and should not be overlooked.”). By contrast, the Departments do not intend to implement the lawful pathways condition in this inefficient manner. Under the proposed rule, after a noncitizen is found subject to the lawful pathways condition on eligibility for asylum, a negative credible fear determination would be entered as to asylum, and the noncitizen’s claims relating to persecution or torture would be considered only under the “reasonable possibility” of persecution or torture standard in order to screen for statutory withholding and CAT protection. And where the lawful pathways condition does not apply at all or the asylum officer determines that the noncitizen qualifies for an exception or has rebutted the presumption of its application, the asylum officer would apply the “significant possibility” standard to the screening for all three types of claims— asylum, statutory withholding of removal, and CAT protection. Thus, any inefficiencies that would have arisen from the manner in which the TCT Bar applied the “significant possibility” and “reasonable possibility” standards would not arise with respect to the application of the lawful pathways condition on eligibility for asylum.

The Asylum Processing IFR further described the burden on the Departments of implementing the “reasonable possibility” standard during credible fear screenings where the TCT bar applied. *See id.* at 18092 (“Having asylum officers apply varied legal standards would generally lead to

the need to elicit additional testimony from noncitizens at the time of the credible fear screening interview, which lengthens credible fear interviews and increases adjudication times.”). The Departments continue to acknowledge that the “reasonable possibility” of persecution or torture standard is more time consuming to implement than the lower standard of “significant possibility” of establishing eligibility for the underlying protection. But the Departments believe that in the unique context of this proposed rule, the additional time it would require to train officers and ensure proper application of the standard would be outweighed by the systemic benefits of applying the “reasonable possibility” of persecution or torture standard to the screening for statutory withholding of removal and CAT protection for those ineligible for asylum due to operation of the lawful pathways condition. Specifically, the Departments believe that in the current circumstances, where immediately after the lifting of the Title 42 public health Order DHS may encounter 11,000–13,000 migrants per day,<sup>220</sup> many of whom will express fear of returning to their home countries and seek to apply for asylum in the United States, the interest in overall system efficiency for processing the claims of those who either are not subject to the condition or are screened-in despite its applicability outweighs the interest in minimizing the length of any given credible fear screening. This includes, to the extent possible and consistent with statutory and international obligations, minimizing the number of cases added to a system that is already overwhelmed.

Finally, the Asylum Processing IFR noted that “while the TCT Bar IFR was in effect, no evidence [was] identified” that applying the “reasonable possibility” standard for statutory withholding of removal and CAT protection claims “resulted in more successful screening out of non-meritorious claims while ensuring the United States complied with its non-refoulement obligations.” *Id.* at 18092. Because of the short and tumultuous life of the TCT Bar IFR, it was difficult for the Departments to gather reliable data on the efficacy of the particular processes adopted under that rule. Moreover, the Departments have long applied—and continue to apply—the higher “reasonable possibility” of persecution or torture standard in reasonable-fear screenings on the ground that this standard better predicts

<sup>220</sup>DHS SWB Encounter Planning Model generated January 6, 2023.

the likelihood of succeeding on the ultimate statutory withholding or CAT protection application than the “significant possibility” of establishing eligibility for the underlying protection standard, given the higher burden of proof. As noted above, there is no evidence that this standard is insufficient to identify individuals who will ultimately be able to show that they are more likely than not to be persecuted or tortured. Consistent with that settled judgment, which the Asylum Processing IFR did not question or disturb, the Departments believe that the “reasonable possibility” standard remains an appropriate standard in proceedings where the applicant is determined to be ineligible for asylum and the only potentially viable claims are for statutory withholding or CAT relief.

### iii. Review After Asylum Officer’s Negative Credible Fear Determination

In the Asylum Processing IFR, the Departments reversed a change made by the Global Asylum Rule that required an affirmative request for immigration judge review after a negative credible fear determination. *See* 87 FR at 18219 (amending 8 CFR 208.30(g)(1)). The Departments also adopted a provision limiting USCIS, in its discretion, to only considering a single request for reconsideration from a noncitizen after immigration judge review. *See id.* (amending 8 CFR 208.30(g)(1)(i)). For those subject to the lawful pathways limitation on asylum eligibility, as discussed below, the Departments believe that the need for expedition under the current and anticipated exigent circumstances weighs against granting IJ review where a noncitizen, having been told in a language they understand of their right for review and invited to choose whether or not to request review, has refused or failed to request it, and weighs in favor of imposing further limits on reconsideration than the Asylum Processing IFR imposed.

First, the Departments propose to ensure that noncitizens are given a written notice of the requirement to either request or decline immigration judge review, and are advised that failure or refusal to indicate a choice will be considered as declining such review, and provide for immigration judge review of a negative credible fear determination only where the noncitizen requests such review. *See* proposed 8 CFR 208.33(c)(2)(v), 1208.33(c)(1). In the Asylum Processing IFR, the Departments amended 8 CFR 208.30(g)(1) to provide that “[a] refusal or failure by the alien to make such

indication shall be considered a request for review.” 87 FR at 18219. The Departments continue to recognize that there may be multiple explanations for a noncitizen’s failure to indicate whether they would like to seek IJ review, *see id.* at 18094, and seek to ensure noncitizens are aware of the right to review and the consequences of failure to affirmatively request such review. Specifically, DHS intends to change the explanations it provides to noncitizens subject to the proposed rule to make clear to noncitizens that the failure to affirmatively request review will be deemed a waiver of the right to seek such review. Conversely, the Departments are facing an exigent circumstance, in which there is a critical need for proceedings to be expeditious, while also fair, and for those without meritorious claims to be removed quickly. Under the current and anticipated exigent circumstances described in the rule, the Departments have determined that the balance of interests should yield a different result here than in the Asylum Processing IFR, and that, taking into account considerations of both fairness and efficiency, immigration judge review should be provided only where a noncitizen affirmatively indicates a request for such review when invited to do so.

Second, the Departments propose to allow for reconsideration of a negative credible fear finding after immigration judge review in the sole discretion of USCIS. *See* proposed 8 CFR 208.33(c)(2)(v)(C). In the Asylum Processing IFR, the Departments amended 8 CFR 208.30(g)(1)(i) to provide that “USCIS may, in its discretion, reconsider a negative credible fear finding that has been concurred upon by an immigration judge provided such reconsideration is requested by the alien or initiated by USCIS no more than 7 calendar days after the concurrence by the immigration judge, or prior to the alien’s removal, whichever date comes first, and further provided that no previous request for reconsideration of that negative finding has already been made.” 87 FR at 18219; *see* 8 CFR 1208.30(g)(2)(iv)(A) (“USCIS may nevertheless reconsider a negative credible fear finding as provided at 8 CFR 208.30(g)(1)(i).”). This was a change from prior practice, pursuant to which there was no limit on the number of requests for reconsideration that a noncitizen could submit; it was also a change from the NPRM, where the Departments proposed eliminating reconsideration entirely. *See* 86 FR at

46945 (proposing to amend 8 CFR 208.30(g)(1)(i) to add that “[o]nce the asylum officer has served the alien with Form I–863, the immigration judge shall have sole jurisdiction to review whether the alien has established a credible fear of persecution or torture, and an asylum officer may not reconsider or reopen the determination”). The Departments’ adoption of a provision allowing for one request for reconsideration within a short time frame was premised on the conclusion that allowing unlimited requests for reconsideration was inefficient but that, even after immigration judge review, “in some rare instances USCIS may still want to reconsider the determination as a matter of discretion.” 87 FR at 18132. Like the Asylum Processing IFR, the proposed rule would maintain USCIS’ ability to reconsider negative determinations. *See* proposed 8 CFR 208.33(c)(2)(v)(C). However, due to the exigent circumstances discussed throughout this NPRM, the Departments believe it is necessary to bar noncitizens subject to the proposed rule from submitting requests for reconsideration; as noted in the Asylum Processing IFR, such requests require USCIS to “devote time and resources that could more efficiently be used on initial credible fear and reasonable fear determinations,” 87 FR at 18095, and very few such requests lead to a reversal of the negative determination, *see id.* at 18132 (providing the numbers of such requests received and the number that result in a changed result for the asylum offices that track such information). The Departments note that from October 1, 2022 through February 8, 2023, approximately 288 requests for reconsideration were received by USCIS and of those, 13 were changed to a positive credible fear determination and 4 were pending further information gathering as of February 8, 2023.<sup>221</sup> In addition, the provision proposed here would not eliminate reconsideration entirely but rather would provide that reconsideration remains available at USCIS’ sole discretion.

## VI. Regulatory Requirements

### A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs, benefits, and transfers of available

<sup>221</sup> USCIS Global Case Management System (data downloaded Feb. 8, 2023).

alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs of the Office of Management and Budget (“OMB”) reviewed the proposed rule as a significant regulatory action under section 3(f)(4) of the Executive Order.

The expected effects of this proposed rule are discussed above. The new condition described above would likely decrease the number of asylum grants and likely reduce the amount of time that noncitizens who are ineligible for asylum and who lack a reasonable fear of persecution or torture would be present in the United States. Noncitizens who establish a reasonable fear of persecution or torture would still be able to seek protection in proceedings before IJs. In addition, the proposed rule may result in significantly reduced incentives for irregular migration and illegal smuggling activity.

The benefits of the proposed rule are expected to include improved relationships with, and enhanced opportunities to coordinate with and benefit from the migration policies of, regional neighbors; large-scale reductions in strains on limited national resources; preservation of the Departments’ continued ability to safely, humanely, and effectively enforce and administer the immigration laws; and a reduction in the role of exploitative transnational criminal organizations and smugglers. Some of these benefits would accrue to migrants who wish to pursue safe, orderly, lawful pathways and processes, such as the ability to schedule a time to apply for admission at a port of entry, whose ability to present their claim might otherwise be hampered by the severe strain that a further surge in irregular migration would impose on the Departments.

The costs of the proposed rule primarily are borne by migrants and the Departments. For migrants who would be made ineligible for asylum under the presumptive condition established by the rule, such an outcome would entail a loss of the benefits of asylum, although they would continue to be eligible for statutory withholding of removal and withholding under the CAT. Unlike asylees, noncitizens granted these more limited forms of protection do not have a path to

citizenship and cannot petition for certain family members to join them in the United States. In addition, the proposed rule would require additional time for asylum officers, during fear screenings, to inquire into the applicability of the presumption and whether the presumption has been rebutted.

The lawful, safe, and orderly pathways described earlier in this preamble would be authorized separate from this proposed rule but are expected to yield significant benefits for noncitizens who might otherwise seek to migrate irregularly to the United States. For instance, the ability to schedule a time to arrive to apply for admission at ports of entry is expected to significantly improve CBP’s ability to process noncitizens at ports of entry, and available parole processes allow prospective irregular migrants to avoid a dangerous and expensive overland journey in favor of an arrival by air to the United States.

#### B. Regulatory Flexibility Act

The Regulatory Flexibility Act requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. *See* 5 U.S.C. 601 *et seq.* “Small entities” are small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This NPRM would not directly regulate small entities and would not be expected to have a direct effect on small entities. Rather, the NPRM would regulate individuals, and individuals are not defined as “small entities” by the RFA.<sup>222</sup> While some employers could experience costs or transfer effects, these impacts would be indirect. Based on the evidence presented in this analysis and throughout this preamble, the Departments certify that this proposed rule would not have a significant economic impact on a substantial number of small entities. The Departments nonetheless welcomes comments regarding potential impacts on small entities, which the Departments may consider as appropriate in a final rule.

#### C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (“UMRA”) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal

agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may directly result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector.<sup>223</sup> The inflation-adjusted value of \$100 million in 1995 was approximately \$177.8 million in 2021 based on the Consumer Price Index for All Urban Consumers (CPI-U).<sup>224</sup>

The term “Federal mandate” means a Federal intergovernmental mandate or a Federal private sector mandate.<sup>225</sup> The term “Federal intergovernmental mandate” means, in relevant part, a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).<sup>226</sup> The term “Federal private sector mandate” means, in relevant part, a provision that would impose an enforceable duty upon the private sector (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).<sup>227</sup>

This proposed rule does not contain such a mandate, because it would not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed by this proposed rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA. The requirements of title II of UMRA, therefore, do not apply, and the Departments have not prepared a statement under UMRA.

<sup>223</sup> 2 U.S.C. 1532(a).

<sup>224</sup> *See* BLS, “Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items by Month” (Dec. 2021), <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202112.pdf>. Steps in calculation of inflation: (1) Calculate the average monthly CPI-U for the reference year (1995) and the most recent current year available (2021); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100. Calculation of inflation: [(Average monthly CPI-U for 2021 – Average monthly CPI-U for 1995)/(Average monthly CPI-U for 1995)] \* 100 = [(270.970 – 152.383)/152.383] \* 100 = (118.587/152.383) \* 100 = 0.7782 \* 100 = 77.82 percent = 77.8 percent (rounded). Calculation of inflation-adjusted value: \$100 million in 1995 dollars \* 1.778 = \$177.8 million in 2021 dollars.

<sup>225</sup> 2 U.S.C. 1502(1), 658(6).

<sup>226</sup> 2 U.S.C. 658(5).

<sup>227</sup> 2 U.S.C. 658(7).

<sup>222</sup> *See* 5 U.S.C. 601(6).

*D. Executive Order 13132 (Federalism)*

This proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Departments believe that this proposed rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*E. Executive Order 12988 (Civil Justice Reform)*

This proposed rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988.

*F. Family Assessment*

The Departments have reviewed this proposed rule in line with the requirements of section 654 of the Treasury and General Government Appropriations Act, 1999,<sup>228</sup> enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.<sup>229</sup> The Departments have reviewed the criteria specified in section 654(c)(1), by evaluating whether this regulatory action (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) only financially impacts families, if at all, to the extent such impacts are justified; (6) may be carried out by State or local government or by the family; or (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If the agency determines a regulation may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation.

The Departments have determined that the implementation of this proposed rule would not impose a negative impact on family well-being or the autonomy or integrity of the family as an institution. Under the proposed rule, adjudicators would consider the circumstances of family members traveling together when determining whether noncitizens are not subject to the presumption in proposed section 208.33(a)(1) and 1208.33(a). The

presumption would not apply to a noncitizen if the noncitizen or a member of the noncitizen's family establishes one of the conditions in proposed § 208.33(a)(1)(i) through (iii). Similarly, the presumption in paragraph (a)(1) of those sections would be rebutted if the noncitizen demonstrates that, at the time of entry, the noncitizen or a member of the noncitizen's family was subject to one of the circumstances enumerated in paragraph (a)(2).

Additionally, to protect against family separation, where a principal asylum applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the lawful pathways rebuttable presumption, and where denial of asylum on that ground alone would lead to the applicant's family being separated because at least one other family member would not qualify for asylum or other protection from removal on their own—meaning the entire family may not be able to remain together—the Departments have determined that the possibility of separating the family would constitute an exceptionally compelling circumstance that rebuts the lawful pathways presumption of ineligibility for asylum. See Executive Order 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273, 8273 (Feb. 5, 2021) (“It is the policy of my Administration to respect and value the integrity of families seeking to enter the United States.”).

*G. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)*

This proposed rule would not have “tribal implications” because it would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) requires no further agency action or analysis.

*H. Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–12, the Departments must submit to OMB, for review and approval, any collection of information contained in a rule, unless otherwise exempt. See Public Law 104–13, 109 Stat. 163 (May 22, 1995). This proposed rule proposes a revision to a collection of information OMB Control Number 1651–0140 *Collection of Advance Information from Certain*

*Undocumented Individuals on the Land Border.*

Comments on the revision are encouraged and will be accepted for 30 days from the publication date of the proposed rule. All submissions on the information collection specifically must include the words “OMB Control Number 1651–0140” in the body of the submission. Use only the method under the **ADDRESSES** and Public Participation sections of this proposed rule to submit comments. Comments on this information collection should address one or more of the following four points:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

**Overview of Information Collection**

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Collection of Advance Information from Certain Undocumented Individuals on the Land Border.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* CBP.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

*Primary:* Individual undocumented noncitizens. Under this collection, CBP collects certain biographic and biometric information from undocumented noncitizens prior to their arrival at a port of entry, to streamline their processing at the port of entry. The requested information is that which CBP would otherwise collect from these individuals during primary and/or secondary processing. This information is provided by undocumented noncitizens, directly or through NGOs and International Organizations. Providing this information reduces the amount of data entered by CBP Officers (CBPOs) and

<sup>228</sup> See 5 U.S.C. 601 note.

<sup>229</sup> Public Law 105–277, 112 Stat. 2681 (1998).

the corresponding time required to process an undocumented noncitizen.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection is 365,000 and the estimated time burden per response is 16 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 97,333 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is \$1,985,593.

#### List of Subjects

##### 8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

##### 8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

#### DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security proposes to amend 8 CFR part 208 as follows:

#### PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 1. The authority citation for part 208 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229; 8 CFR part 2; Pub. L. 115–218.

■ 2. Amend § 208.13 by adding and reserving paragraph (e) and adding paragraph (f), to read as follows:

##### § 208.13 Establishing asylum eligibility.

\* \* \* \* \*

(e) [Reserved]

(f) *Lawful pathways condition.* For applications filed by aliens who entered the United States between [EFFECTIVE DATE OF FINAL RULE] and [24 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], also refer to the provisions on asylum eligibility described in § 208.33.

■ 3. Add subpart C, consisting of § 208.33, to read as follows:

#### Subpart C—Lawful Pathways and Asylum Eligibility for Certain Aliens Who Entered Between [EFFECTIVE DATE OF FINAL RULE] and [24 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE]

##### § 208.33 Lawful pathways condition on asylum eligibility.

Notwithstanding any contrary section of this part, including §§ 208.2, 208.13, and 208.30—

(a) *Condition on eligibility.* (1) An alien who, between [EFFECTIVE DATE OF FINAL RULE] and [24 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], enters the United States at the southwest land border without documents sufficient for lawful admission as described in section 212(a)(7) of the Act subsequent to the end of implementation of the Centers for Disease Control and Prevention’s Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, issued on August 2, 2021, and related prior orders issued pursuant to the authorities in sections 362 and 365 of the Public Health Service Act (42 U.S.C. 265, 268) and the implementing regulation at 42 CFR 71.40, after traveling through a country other than the alien’s country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees is subject to a rebuttable presumption of ineligibility for asylum unless the alien, or a member of the alien’s family as described in § 208.30(c) with whom the alien is traveling:

(i) Was provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process;

(ii) Presented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry without a pre-scheduled time and place, if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or

(iii) Sought asylum or other protection in a country through which the noncitizen traveled and received a final decision denying that application.

(2) The presumption in paragraph (a)(1) of this section can be rebutted if an alien demonstrates by a preponderance of the evidence that exceptionally compelling circumstances exist, including if the alien

demonstrates that, at the time of entry, the alien or a member of the alien’s family as described in § 208.30(c) with whom the alien is traveling:

(i) Faced an acute medical emergency;

(ii) Faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or

(iii) Satisfied the definition of “victim of a severe form of trafficking in persons” provided in § 214.11 of this chapter.

(3) The presumption in paragraph (a)(1) of this section shall necessarily be rebutted if an alien demonstrates by a preponderance of the evidence any of the circumstances in paragraphs (a)(2)(i) through (iii) of this section.

(b) *Exception.* Unaccompanied alien children, as defined in 6 U.S.C. 279(g)(2), are not subject to paragraph (a)(1) of this section.

(c) *Application in credible fear determinations.* (1) The asylum officer shall first determine whether the alien is covered by the presumption in paragraph (a)(1) of this section and, if so, whether the alien has rebutted the presumption in accordance with paragraph (a)(2) of this section.

(i) If the alien is covered by the presumption in paragraph (a)(1) of this section and fails to rebut the presumption in accordance with paragraph (a)(2) of this section, then the asylum officer shall enter a negative credible fear determination with respect to the alien’s asylum claim and continue to consider the alien’s claim under paragraph (c)(2) of this section.

(ii) If the alien is not covered by the presumption in paragraph (a)(1) of this section or has rebutted the presumption in accordance with paragraph (a)(2) of this section, the asylum officer shall follow the procedures in § 208.30.

(2)(i) In cases in which the asylum officer enters a negative credible fear determination under paragraph (c)(1)(i) of this section, the asylum officer will assess whether the alien has established a reasonable possibility of persecution (meaning a reasonable possibility of being persecuted because of their race, religion, nationality, political opinion, or membership in a particular social group) or torture, with respect to the prospective country or countries of removal identified pursuant to section 241(b) of the Act.

(ii) In cases described in paragraph (c)(2)(i) of this section, if the alien establishes a reasonable possibility of persecution or torture with respect to the identified country of removal, the Department will issue a Form I–862, Notice to Appear. In removal proceedings, the alien may apply for

asylum, withholding of removal under section 241(b)(3) of the Act, withholding of removal under the Convention Against Torture, or any other form of relief or protection for which they are eligible.

(iii) In cases described in paragraph (c)(2)(i) of this section, if an alien fails to establish a reasonable possibility of persecution or torture with respect to the identified country of removal, the asylum officer will provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative credible fear determinations.

(iv) The alien must indicate whether he or she desires such review on a Record of Negative Fear Finding and Request for Review by Immigration Judge.

(v) Only if the alien requests such review by so indicating on the Record of Negative Fear shall the asylum officer serve the alien with a Notice of Referral to Immigration Judge. The record of determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. Immigration judges will evaluate the case as provided in 8 CFR 1208.33(c). The case shall then proceed as set forth in paragraphs (c)(2)(v)(A) through (C) of this section.

(A) Where the immigration judge issues a positive credible fear determination under 8 CFR 1208.33(c)(2)(i), the case shall proceed under 8 CFR 1208.30(g)(2)(iv)(B).

(B) Where the immigration judge issues a positive credible fear determination under 8 CFR 1208.33(c)(2)(ii), DHS shall issue a Form I-862, Notice to Appear, to commence removal proceedings under section 240 of the Act. In removal proceedings, the alien may apply for asylum, withholding of removal under section 241(b)(3) of the Act, withholding of removal under the Convention Against Torture, or any other form of relief or protection for which the alien is eligible.

(C) Where the immigration judge issues a negative credible fear determination, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision and no request for reconsideration may be submitted to USCIS. Nevertheless, USCIS may, in its sole discretion, reconsider a negative determination.

(d) *Severability.* The Department intends that any provision of this

section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, should be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is that the provision is wholly invalid and unenforceable, in which event the provision should be severed from the remainder of this section and the holding should not affect the remainder of this section or the application of the provision to persons not similarly situated or to dissimilar circumstances.

#### DEPARTMENT OF JUSTICE

Accordingly, for the reasons set forth in the preamble, the Attorney General proposes to amend 8 CFR part 1208 as follows:

#### PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 4. The authority citation for part 1208 is revised to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229; Pub. L. 115–218.

■ 5. Amend § 1208.13 by adding paragraph (f) to read as follows:

#### § 1208.13 Establishing asylum eligibility.

\* \* \* \* \*

(f) *Lawful pathways condition.* For applications filed by aliens who entered the United States between [EFFECTIVE DATE OF FINAL RULE] and [24 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], also refer to the provisions on asylum eligibility described in § 1208.33.

■ 6. Add subpart C, consisting of § 1208.33, to read as follows:

#### Subpart C—Lawful Pathways and Asylum Eligibility for Certain Aliens Who Entered Between [EFFECTIVE DATE OF FINAL RULE] and [24 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE]

#### § 1208.33 Lawful pathways condition on asylum eligibility.

Notwithstanding any contrary section of this part, including §§ 1208.2, 1208.13, and 1208.30—

(a) *Condition on eligibility.* (1) An alien who, between [EFFECTIVE DATE OF FINAL RULE] and [24 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], enters the United States at the southwest land border without documents sufficient for lawful admission as described in section 212(a)(7) of the Act subsequent to the end of implementation of the Centers for Disease Control and Prevention's Order Suspending the Right to Introduce

Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, issued on August 2, 2021, and related prior orders issued pursuant to the authorities in sections 362 and 365 of the Public Health Service Act (42 U.S.C. 265, 268) and the implementing regulation at 42 CFR 71.40, after traveling through a country other than the alien's country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees is subject to a rebuttable presumption of ineligibility for asylum unless the alien, or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(i) Was provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process;

(ii) Presented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry, without a pre-scheduled time and place, if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or

(iii) Sought asylum or other protection in a country through which the noncitizen traveled and received a final decision denying that application.

(2) The presumption in paragraph (a)(1) of this section can be rebutted if an alien demonstrates by a preponderance of the evidence that exceptionally compelling circumstances exist, including if the alien demonstrates that, at the time of entry, the alien or a member of the alien's family as described in 8 CFR 208.30(c) with whom the alien is traveling:

(i) Faced an acute medical emergency;

(ii) Faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or

(iii) Satisfied the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11.

(3) The presumption in paragraph (a)(1) of this section shall necessarily be rebutted if an alien demonstrates by a preponderance of the evidence any of the circumstances in paragraphs (a)(2)(i) through (iii) of this section.

(b) *Exception.* Unaccompanied alien children, as defined in 6 U.S.C. 279(g)(2), are not subject to paragraph (a)(1) of this section.

(c) *Application in credible fear determinations.* (1) Where an asylum

officer has issued a negative credible fear determination pursuant to 8 CFR 208.33(c), and the alien has requested immigration judge review of that credible fear determination, the immigration judge shall evaluate the case de novo, as specified in paragraph (c)(2) of this section. In doing so, the immigration judge shall take into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge.

(2) The immigration judge shall first determine whether the alien is covered by the presumption at 8 CFR 208.33(a)(1) and 1208.33(a)(1) and, if so, whether the alien has rebutted the presumption in accordance with 8 CFR 208.33(a)(2) and 1208.33(a)(2).

(i) Where the immigration judge determines that the alien is not covered by the presumption, or that the presumption has been rebutted, the immigration judge shall further determine, consistent with § 1208.30, whether the alien has established a significant possibility of eligibility for asylum under section 208 of the Act, withholding of removal under section 241(b)(3) of the Act, or withholding of removal under the Convention Against Torture. Where the immigration judge determines that the alien has established a significant possibility of eligibility for one of those forms of relief or protection, the immigration judge shall issue a positive credible fear

finding. Where the immigration judge determines that the alien has not established a significant possibility of eligibility for any of those forms of relief or protection, the immigration judge shall issue a negative credible fear finding.

(ii) Where the immigration judge determines that the alien is covered by the presumption and that the presumption has not been rebutted, the immigration judge shall further determine whether the alien has established a reasonable possibility of persecution (meaning a reasonable possibility of being persecuted because of their race, religion, nationality, political opinion, or membership in a particular social group) or torture. Where the immigration judge determines that the alien has established a reasonable possibility of persecution or torture, the immigration judge shall issue a positive credible fear finding. Where the immigration judge determines that the alien has not established a reasonable possibility of persecution or torture, the immigration judge shall issue a negative credible fear finding.

(3) Following the immigration judge's determination, the case will proceed as indicated in 8 CFR 208.33(c)(2)(v)(A) through (C).

(d) *Family unity and removal proceedings*. Where a principal asylum applicant is eligible for withholding of removal under section 241(b)(3) of the

Act or withholding of removal under § 1208.16(c)(2) and would be granted asylum but for the presumption in paragraph (a)(1) of this section, and where an accompanying spouse or child as defined in 208(b)(3)(A) of the Act does not independently qualify for asylum or other protection from removal, the presumption shall be deemed rebutted as an exceptionally compelling circumstance in accordance with 8 CFR 208.33(a)(2) and 1208.33(a)(2).

(e) *Severability*. The Department intends that any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, should be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is that the provision is wholly invalid and unenforceable, in which event the provision should be severed from the remainder of this section and the holding should not affect the remainder of this section or the application of the provision to persons not similarly situated or to dissimilar circumstances.

**Alejandro N. Mayorkas,**  
*Secretary, U.S. Department of Homeland Security.*

Dated: February 16, 2023.

**Merrick B. Garland,**  
*Attorney General, U.S. Department of Justice.*

[FR Doc. 2023-03718 Filed 2-21-23; 2:00 pm]

**BILLING CODE 4410-30-P; 9111-97-P**