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

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

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

---

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

[75] Including CBP enforcement encounters at or between ports of entry. OIS Persist based on data through March 31, 2023.

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

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

---

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

[77] OIS analysis of OIS Enforcement Lifecycle based on data through December 31, 2022.

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

iii. Unnecessary Given the Asylum Processing IFR

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

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

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

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

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

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

[79] OIS analysis of OIS Persist Dataset based on data through March 31, 2023.

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

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

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

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

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

iv. Unnecessary Given Parole Processes

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

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

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

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

v. Unnecessary Given Lack of Access to Asylum

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

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

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

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

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

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

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

[82] OIS analysis of DOJ EOIR data based on data through March 31, 2023.

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

vii. Ineffective Because Exceptions Will Swallow the Rule

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[90] The White House, *Los Angeles Declaration on Migration and Protection* (June 10, 2022), *https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/*.
[91] *Id.*
[92] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

iv. Belief that the Rule Will Increase Smuggling or Trafficking

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

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

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

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

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

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

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

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

---

[95] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

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

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

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

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

4. Negative Impacts and Discrimination Against Particular Groups

i. General Comments on Discrimination

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

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

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

ii. Children and Families

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

iii. Individuals with LEP

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

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

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

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

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

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

iv. Individuals with Mental Impairments and Associated Mental Competency Issues

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

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

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

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

v. Low-Income Individuals

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

States, that presumption does not constitute a "de facto ban" on asylum for noncitizens of any race, ethnicity, or nationality, given the opportunities to avoid the presumption and, for those unable to do so, to establish an exception to or rebut it. Irrespective of race, ethnicity, or nationality, noncitizens will not be subject to the presumption if they apply for and are denied asylum or other protection in a third country they transit while en route to the United States, but no noncitizen is required to do so. *See* 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C). Likewise, regardless of race, ethnicity, or nationality, noncitizens will not be subject to the presumption if they schedule an appointment to present at a POE using the CBP One app. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). In addition, irrespective of race, ethnicity, or nationality, noncitizens who are subject to the rule's presumption will have the opportunity to rebut it in certain circumstances, including if at the time of their entry they or a family member with whom they traveled was experiencing an acute medical emergency, an imminent and extreme threat to life or safety, a severe form of trafficking, or another exceptionally compelling circumstance. 8 CFR 208.33(a)(3), 1208.33(a)(3). Further, noncitizens of every race, ethnicity, and nationality may apply for other relevant immigration processes that are applicable to them. The rule's approach balances the needs to address current and expected circumstances at the SWB, to avoid unduly negative consequences for noncitizens, to avoid unduly negative consequences for the U.S. immigration system, and to provide ways for individuals to seek protection in the United States and other countries in the region. 88 FR at 11730.

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

---

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

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

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

---

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

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

vii. Other Underserved or Vulnerable Populations

a. Women, Domestic Violence Survivors, and LGBT Individuals

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

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

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

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

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

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

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

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

b. Unrepresented Individuals

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

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

matter, the Departments strongly support efforts for noncitizens to obtain or confer with counsel in immigration proceedings.[101]

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

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

---

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

such as a language barrier, illiteracy, or a significant technical failure. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B).

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

c. Climate Migration

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

---

[102] *See* EOIR, *Communications and Legislative Affairs Division, https://www.justice.gov/eoir/communications-and-legislative-affairs-division* (last visited Apr. 25, 2023) ("The Communications and Legislative Affairs Division (CLAD) serves as the Executive Office for Immigration Review's liaison with Congress, the news media, and other interested parties by communicating accurate and timely information about the agency's activities and programs.").
[103] *See, e.g.*, EOIR, *Immigration Court Online Resource, https://icor.eoir.justice.gov/en/* (last visited Apr. 25, 2023) (providing information about immigration processes in Chinese, Haitian Creole, Portuguese, Punjabi, and Spanish).

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

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

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

d. Indigenous People and People of Color

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

---

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

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

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

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

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

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

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

5. Due Process and Procedural Concerns

i. General Due Process and Procedural Concerns

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

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

Response: The Departments disagree that the rule would violate the Due Process Clause of the Fifth Amendment or impermissibly restrict access to asylum. With respect to application of the rule in the expedited removal process, the Departments note that the rule does not have any impact on where noncitizens may be detained pending credible fear interviews. Additionally, noncitizens who are encountered in close vicinity to and immediately after crossing the border and are placed in expedited removal proceedings, including those in the credible fear screening process, have "only those rights regarding admission that Congress has provided by

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

a. CBP Official Conduct and Training

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

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

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

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

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

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

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

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

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

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

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

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

---

[110] *See id.*

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

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

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

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

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

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

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

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

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

b. AO Conduct and Training

Comment: Several commenters expressed concern that the rule would lead to erroneous asylum decisions made by AOs, given alleged deficiencies in AO conduct and training. Commenters asserted that the rule would lead to asylum decisions that are too swift. Multiple commenters also expressed concern that AOs have conducted inadequate credible fear screenings and made erroneous decisions in such screenings, resulting in errors in adjudicating

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

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

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

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

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

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

---

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

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

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

[118] *See generally* USCIS, *Non-Adversarial Interview*; USCIS, *Eliciting Testimony*.

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

c. IJ Conduct and Training

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

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

---

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

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

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

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

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

---

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

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

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

[121] *See also* ICPM, Chapter 1.3(c) (Nov. 14, 2022) ("Immigration judges strive to act honorably, fairly, and in accordance with the highest ethical standards, thereby ensuring public confidence in the integrity and impartiality of immigration court proceedings.").
[122] *See id.*
[123] *See* EOIR, *Judicial Complaint Process* (Feb. 2023), *https://www.justice.gov/eoir/page/file/1100946/download* (explaining the steps of the judicial complaint process).
[124] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

v. Other Procedural Concerns

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

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

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

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

---

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

[129] Form M-444, Information About Credible Fear Interview 2 (May 31, 2022) ("The interpreter will be sworn to keep the information you discuss confidential.").

[130] USCIS, RAIO Directorate – *Officer Training, Interviewing – Working with an Interpreter* (Dec. 20, 2019), *https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Working_with_an_Interpreter_LP_RAIO.pdf*.

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

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

6. Recent Regional Migration Initiatives

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

[131] USCIS, *Eliciting Testimony* 12 ("In cases requiring an interview, although the burden is on the applicant to establish eligibility, equally important is your obligation to elicit all pertinent information."); USCIS, *Non-Adversarial Interview* 13 ("You control the direction, pace, and tone of the interview and have a duty to elicit all relevant testimony.").
[132] USCIS, *Interviewing Survivors of Torture*.

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

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

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

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

---

[133] The White House, *Los Angeles Declaration on Migration and Protection* (June 10, 2022), *https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/.*
[134] *Los Angeles Declaration.*
[135] OIS analysis of DHS SWB Encounter Planning Model generated April 18, 2023.
[136] *See* The White House, *Collaborative Migration Management Strategy* (July 2021), *https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf.*

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

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

7. Negative Impacts on the Workforce and Economy

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

[137] *See also* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

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

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

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

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

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

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

---

[138] OIS analysis of DHS SWB Encounter Planning Model generated April 18, 2023.
[139] *See* USCIS, Frequently Asked Questions About the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans (Mar. 22, 2023), *https://www.uscis.gov/humanitarian/frequently-asked-questions-about-the-processes-for-cubans-haitians-nicaraguans-and-venezuelans*.
[140] *See* L.A. Declaration Fact Sheet.

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

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

8. Other Opposition

i. Encourages Migration by Sea or Other Dangerous Means

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

---

[141] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

[142] *Compare* OIS, Legal Immigration and Adjustment of Status Report Fiscal Year 2022, Quarter 4, *https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration*, *with* OIS, Annual Flow Report: U.S. Nonimmigrant Admissions: 2021 (July 2022), *https://www.dhs.gov/sites/default/files/2022-07/2022_0722_plcy_nonimmigrant_fy2021.pdf*, *and* OIS, Annual Flow Report: U.S. Nonimmigrant Admissions: 2018 (Oct. 2018), *https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/nonimmigrant_admissions_2018.pdf*.

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

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

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

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

---

[143] Int'l Org. for Migration, *Missing Migrants in the Caribbean Reached a Record High in 2022* (Jan. 24, 2023), *https://www.iom.int/news/missing-migrants-caribbean-reached-record-high-2022*.
[144] OIS analysis of USCG data through March 31, 2023.
[145] *Id.*
[146] Testimony of Jonathan Miller, "Securing America's Maritime Border: Challenges and Solutions for U.S. National Security" at 4 (Mar. 23, 2023), *https://homeland.house.gov/media/2023/03/3.23.23-TMS-Testimony.pdf*.

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

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

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

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

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

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

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

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

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

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

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

---

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

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

[150] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

[151] Notice of Enhancements to the Central American Minors Program, 88 FR 21694 (Apr. 11, 2023).

processes.[152] Additionally, DHS has recently implemented special lawful processes for nationals of Ukraine.[153]

iii. Other

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

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

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

---

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

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

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

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

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

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

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

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

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

C. Alternatives and Other General or Mixed Feedback

1. Address Root Causes of Migration

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

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

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

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

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

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

---

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

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

2. Prioritize Funding and Other Resources

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

---

[157] *See, e.g.*, National Security Council, U.S. Strategy for Addressing the Root Causes of Migration in Central America 5 (July 2021), *https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf*.
[158] *See, e.g.*, The White House, Fact Sheet: The Collaborative Migration Management Strategy (July 29, 2021), *https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-the-collaborative-migration-management-strategy/*.
[159] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

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

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

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

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

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

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

---

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

[161] *See* 8 CFR 208.1(b).

[162] Pub. L. No. 117–180, Division A, sec. 101(6), 131 Stat. 2114, 2115.

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

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

---

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

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

[165] *Id.*

[166] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

[167] *See id.*

[168] *See id.*

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

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

---

[169] Testimony of Raul Ortiz, "Failure by Design: Examining Sec'y Mayorkas' Border Crisis" (Mar. 15, 2023), *https://www.cbp.gov/about/congressional-resources/testimony/Ortiz-CHS-15MAR23*.
[170] *Id.*
[171] *Id.*

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

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

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

[172] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).

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

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

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

3. Further Expand Refugee Processing or Other Lawful Pathways

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

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

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

[173] DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).
[174] *See id.*

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

4. Require Migrants to Wait in Mexico or Other Countries

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

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

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

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

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

---

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

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

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

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

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

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

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

---

[177] *See* INA 235(b)(1), 8 U.S.C. 1225(b)(1).
[178] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).
[179] *See id.*

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

5. Additional Measures

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

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

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

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

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

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

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

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

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

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

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

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

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

---

[181] DHS, Press Release, *DHS Continue to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), *https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.*
[182] *See id.*
[183] *See* DHS, *New Actions to Manage Regional Migration* (Apr. 27, 2023).
[184] *See id.*

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Legal Authority and Background

---

[187] 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/*.

[188] *See, e.g.*, L.A. Declaration Fact Sheet ("The United States will announce a multilateral 'Sting Operation' to disrupt human smuggling networks across the Hemisphere.").

1. Immigration and Nationality Act

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

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

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

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

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

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

---

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Moreover, the Departments, in exercising their broad discretion to issue regulations adopting additional limitations and conditions on asylum eligibility, are not bound to consider manner of entry only as a factor contributing to whether a particular noncitizen warrants a favorable exercise of discretion. The Departments similarly disagree with the commenter who stated that the Departments are seeking to "excuse themselves from complying with long-established Board precedent simply because the 'regulatory regime' in place today is different than the regime at the time the Board decided *Matter of Pula*." This rule is not in conflict with *Matter of Pula*, which remains the applicable standard for discretionary determinations. And the rule takes *Matter of Pula* as providing support for the proposition that it is lawful to consider, and in some cases rely on, manner of entry for asylum applicants. 88 FR at 11735–36.

In sum, as with other conditions and limitations imposed by section 208(b)(2) of the INA, 8 U.S.C. 1158(b)(2), this rule is grounded in important policy objectives, including providing those with valid asylum claims an opportunity to have their claims heard in a timely fashion, preventing an increased flow of migrants arriving at the SWB that will overwhelm DHS's ability to provide safe and orderly processing, and reducing the role of exploitative transnational criminal organizations and smugglers. 88 FR at 11704. In seeking to enhance the overall functioning of the immigration system and to improve processing of asylum applications, the Departments are, in the exercise of the authority to promulgate conditions and limitations on eligibility for asylum, placing greater weight on manner of entry to encourage migrants to seek protection in other countries in the region and to use lawful pathways and processes to enter the United States and access the U.S. asylum system.

ii. Statutory Bars to Asylum

Comment: Commenters stated that the proposed rule would be inconsistent with the statutory firm-resettlement and safe-third-country bars. *See* INA 208(b)(2)(A)(vi), 8 U.S.C.

1158(b)(2)(A)(vi); INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). Commenters argued that Congress intended for these two bars to be the sole means by which a noncitizen may be denied asylum based on a relationship with a third country. Commenters disagreed with the proposed rule, asserting it would bar asylum for anyone who travels through what the United States deems a "safe third country." Similarly, another commenter stated that the proposed rule would penalize migrants who do not live adjacent to a safe third country to which they could travel directly in order to seek protection.

Response: This rule is within the Departments' broad authority to create new conditions on eligibility for asylum, and the Departments disagree that the rule conflicts with any of the exceptions to a noncitizen's ability to apply for asylum or a noncitizen's eligibility for asylum under sections 208(a)(2) or (b)(2) of the INA, 8 U.S.C. 1158(a)(2) or (b)(2). The INA's safe-third-country provision prohibits a noncitizen from applying for asylum if the noncitizen "may be removed, pursuant to a bilateral or multilateral agreement" to a safe third country in which the noncitizen would not be subject to persecution and "would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection." INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). The firm-resettlement provision precludes a noncitizen who "was firmly resettled in another country prior to arriving in the United States" from demonstrating eligibility for asylum. INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi); *see also* 8 CFR 208.15 (2020), 1208.15 (2020).[193] The two provisions provide categorical bars to asylum for noncitizens who have available, sustained protection in another country, and help protect against forum shopping. *Sall v. Gonzales*, 437 F.3d 229, 233 (2d Cir. 2006) (per curiam) (noting that the policy behind the safe-third-country statutory bar includes the principle that "[t]he United States offers asylum to refugees not to provide them with a broader choice of safe

[193] These provisions were amended by Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (December 11, 2020), which was preliminarily enjoined and its effectiveness stayed before it became effective. *See Pangea Legal Services v. U.S. Dep't of Homeland Security* (*Pangea II*), 512 F. Supp. 3d 966, 969–70 (N.D. Cal. 2021). This order remains in effect, and thus the 2020 version of these provisions—the version immediately preceding the enjoined amendment—is currently effective.

homelands, but rather, to protect those arrivals with nowhere else to turn."); *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 55, 56 (1971) (noting that the concept of firm resettlement is historically rooted in the notion of providing "a haven for the world's homeless people" while encouraging "other nations to do likewise."); *see also Maharaj v. Gonzales*, 450 F.3d 961, 988–89 (9th Cir. 2006) (en banc) (O'Scannlain, J., concurring, in part) (recognizing that the firm-resettlement bar protects against forum shopping, an issue "that our immigration laws have long sought to avoid."); *United States v. Malenge*, 294 F. App'x 642, 645 (2d Cir. 2008) (noting that a purpose of the safe-third-country agreement with Canada was to prevent forum shopping).

The Departments disagree with commenters because the INA permits the Attorney General and Secretary to create new eligibility conditions and does not limit this authority based on the content of the existing statutory conditions. *See Trump*, 138 S. Ct. at 2411–12 (recognizing that the INA "did not implicitly foreclose the Executive from imposing tighter restrictions" in "similar" areas); *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 979 (9th Cir. 2020) ("*East Bay I*") (acknowledging that the INA does not limit the Departments' "authority to the literal terms of the two safe-place statutory bars"); *R-S-C*, 869 F.3d at 1187 (noting that Congress's delegation of authority in section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C) "means that Congress was prepared to accept administrative dilution" of the right to seek asylum). Indeed, section 208(b)(2)(C), (d)(5)(B) of the INA, 8 U.S.C. 1158(b)(2)(C), (d)(5)(B), provides no subject-matter limit, other than requiring any regulation be "consistent with" section 208 of the INA, 8 U.S.C. 1158. *See R-S-C*, 869 F.3d at 1187 n.9. The condition created by this rule is consistent with section 208 of the INA, 8 U.S.C. 1158, as a whole, and it is consistent with the safe-third-country and firm-resettlement bars in particular. 88 FR at 11736.

Critically, unlike the safe-third-country bar, the rule does not consider whether the noncitizen could now safely relocate to a third country, and unlike the firm-resettlement bar, this rule does not categorically preclude a noncitizen from demonstrating eligibility for asylum because they are no longer in flight from persecution. *Cf. Ali*, 237 F.3d at 594 (noting that the

firm-resettlement bar does not conflict with Congress's intent in providing for asylum relief "[b]ecause firmly resettled aliens are by definition no longer subject to persecution") (marks and citation omitted). Rather, as discussed in the NPRM, the rule encourages use of lawful pathways for migrants seeking to come to the United States, including noncitizens wishing to seek asylum in the United States. 88 FR at 11707. The rule is designed to improve processing of such asylum applications. *Id.* at 11704, 11706–07. Noncitizens will not be subject to the rebuttable presumption if they travel through a third country and seek entry into the United States through a lawful, safe, and orderly pathway. *Id.* at 11707; 8 CFR 208.33(a)(2)(ii), 1208.33(a)(2)(ii). They also will not be subject to the rebuttable presumption if they seek and are denied asylum or other protection in a third country. 88 FR at 11707; 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C). And unaccompanied children are excepted from the presumption. 8 CFR 208.33(a)(2)(i), 1208.33(a)(2)(i). Moreover, even if a noncitizen is subject to the presumption of ineligibility under 8 CFR 208.33(a)(1), 1208.33(a)(1), the noncitizen may rebut that presumption in any of several ways that account for protecting the safety of those fleeing imminent harm. 88 FR at 11707; 8 CFR 208.33(a)(3), 1208.33(a)(3). Accordingly, the rule encourages noncitizens seeking to enter the United States, including those seeking asylum who have transited through a third country before arriving in the United States, to enter through lawful, safe, and orderly pathways by imposing an additional condition on the asylum eligibility of individuals who did not avail themselves of such pathways. 88 FR at 11706–07. The rule does not preclude noncitizens who have transited through third countries without applying for protection in those countries from obtaining asylum in the United States. *Id.* at 11706–07. In addition, the rule expressly accounts for migrants who have been denied a safe haven elsewhere; if an applicant seeks asylum in a third country and is denied, the rebuttable presumption does not apply. 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C).

Comment: Commenters stated that the proposed rule would conflict with the firm-resettlement bar to asylum eligibility or render the firm-resettlement bar superfluous because it

would negate the need to determine whether the noncitizen has firmly resettled or whether any potential or obtained status in a third country would not be reasonably available or reasonably retained due to issues such as processing backlogs in the third country. Commenters were also concerned that the proposed rule would not account for the risk of harm that the noncitizen might face in the third country. Commenters stated that the proposed rule would ignore congressional intent that the noncitizen have a more significant relationship with the third country—i.e., be firmly resettled in that country rather than be merely transiting through the country—to be effectively rendered ineligible for asylum. Commenters asserted that requiring individuals to apply for protection in a third transit country would create a new hurdle for them because it could subject them to the firm-resettlement bar.

Response: As discussed above, the INA does not limit the Departments' authority regarding eligibility conditions relating to a noncitizen's conduct in third countries to the boundaries of the firm-resettlement statutory bar. *Trump*, 138 S. Ct. at 2411–12 (recognizing that the INA "did not implicitly foreclose the Executive from imposing tighter restrictions" in "similar" areas); *see also East Bay I*, 994 F.3d at 979 (noting that the INA does not limit the Departments' "authority to the literal terms of the two safe-place statutory bars"). The Departments disagree that the rule conflicts with the firm-resettlement bar, which focuses on protecting against forum shopping when a migrant has already found a safe refuge. INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi); *Bonilla v. Mukasey*, 539 F.3d 72, 80 (1st Cir. 2008); *Ali*, 237 F.3d at 594. This rule focuses on encouraging migrants to use safe, orderly, and lawful pathways to enter the United States. 88 FR at 11707, 11736. Accordingly, the relevant facts and analysis for considering firm resettlement and the application of the rebuttable presumption are materially different.

Additionally, the rule does not overlook commenter concerns about the accessibility to or processing times of applications in third countries. Even if noncitizens determine that protection in a third country is inaccessible or would take more time than the noncitizens believe they can

wait, the rule provides other ways that the noncitizen can seek protection. Seeking protection in a third country and receiving a denial excepts a noncitizen from the presumption but is not a requirement—the noncitizen may still either enter using a lawful pathway, pre-schedule an appointment to present themselves at a POE, or show one of several other circumstances that allow an individual to be excepted from the rule's rebuttable presumption. 8 CFR 208.33(a)(2), 1208.33(a)(2). The rule also explicitly protects family unity by providing that if one member of a family traveling together is excepted from the presumption of asylum ineligibility or has rebutted the presumption then the other members of the family are similarly treated as excepted from the presumption or having rebutted the presumption. 8 CFR 208.33(a)(2)(ii), (3), 1208.33(a)(2)(ii), (3); 88 FR at 11730. And if during removal proceedings a principal applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the presumption and has either an accompanying spouse or child who would not qualify for asylum or protection from removal or a spouse or child who would be eligible to follow to join them as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A), if the principal applicant were granted asylum, the applicant will be deemed to have established an exceptional circumstance that rebuts the presumption. 8 CFR 1208.33(c). Additionally, any principal asylum applicants who enter the United States during the two-year period of the rebuttable presumption while under the age of eighteen and apply for asylum after the two-year period are not subject to the presumption. 8 CFR 208.33(c)(2), 1208.33(d)(2). Furthermore, the rule does not affect a noncitizen's ability to apply for statutory withholding of removal and CAT protection. 88 FR at 11730.

The rule also does not render the firm-resettlement bar superfluous; instead, this rule and the firm-resettlement bar apply independently. The operative firm-resettlement regulations provide that a noncitizen is barred from receiving asylum in the United States if they have received an offer of safe, established permanent resettlement that is not substantially and consciously restricted. 8 CFR 208.15, 1208.15 (2020). The firm-resettlement bar is divorced

from any inquiry into how or when a noncitizen enters the United States. INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi); 8 CFR 208.15, 1208.15 (2020). Put differently, the firm-resettlement bar applies with equal force to noncitizens who enter the United States using an identified lawful pathway and those who do not. *Abdalla v. INS*, 43 F.3d 1397, 1400 (10th Cir. 1994) ("The pertinent regulations specifically focus on resettlement status prior to the alien's entry into this country . . . ."). Conversely, this rule does not turn exclusively on whether the noncitizen received an offer of permanent resettlement in a third country. 88 FR at 11723. Under the rule, a migrant's time in a third country is primarily relevant in two circumstances: (1) when a noncitizen travels through a third country and does not enter the United States through established lawful pathways, or (2) if the noncitizen applied for protection in the third country and was denied. 8 CFR 208.33(a)(1)(iii), (2)(ii)(C), 1208.33(a)(1)(iii), (2)(ii)(C). In the first circumstance, the noncitizen is subject to the rule's condition on asylum eligibility unless they can demonstrate an applicable exception or successfully rebut the presumption. 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). In the second circumstance, the noncitizen is categorically not subject to the rebuttable presumption of asylum ineligibility regardless of whether they entered the United States through established lawful pathways. 8 CFR 208.33(a)(2)(ii)(C),1208.33(a)(2)(ii)(C). But neither circumstance involves determining whether the noncitizen was firmly resettled, as defined in 8 CFR 208.15, 1208.15 (2020), before traveling to the United States.[194] Thus, the firm-resettlement bar and this rule are simply different conditions with different scopes.

In addition, the rule properly accounts for the risk of harm a noncitizen might face in the third country. As at least one commenter in favor of the rule noted, not all migrants who travel through third countries are actively fleeing persecution and some choose to come to the United States for other reasons. But should the noncitizen be fleeing harm, one of the enumerated

[194] Indeed, the firm-resettlement bar, if applicable to a particular noncitizen, would not be applied by an AO in credible fear proceedings and would be applied only if the noncitizen's application is considered by an IJ in section 240 removal proceedings or an AO during an asylum merits interview. 8 CFR 208.30(e)(5)(i).