grounds that will necessarily rebut the presumption of asylum ineligibility is that the noncitizen faced an imminent and extreme threat to life or safety at the time of entry into the United States. 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B); 88 FR at 11704, 11707, 11736. In response to the comment that requiring a noncitizen to seek protection in a transit country would add a hurdle to obtaining asylum in the United States insofar as that noncitizen may need to address the firm-resettlement bar, the Departments note that noncitizens subject to the firm-resettlement bar are not in need of protection in the United States. *See Ali*, 237 F.3d at 594 (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" (quoting *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 56 (1971)); *East Bay I*, 994 F.3d at 977 (recognizing "the 'core regulatory purpose of asylum,' which is 'to protect [refugees] with nowhere else to turn,' because 'by definition' an applicant barred by a safe-place provision has somewhere else to turn" (quoting *Matter of B-R-*, 26 I&N Dec. 119, 122 (BIA 2013), overruled on other grounds by *Zepeda-Lopez v. Garland*, 38 F.4th 315, 326 (2d Cir. 2022)); Constitution of the International Refugee Organization, ch. V, sec. (D)(c), Dec. 15, 1946, 18 U.N.T.S. 20 (determining that a refugee or displaced person "will cease to be the concern of the Organization . . . when they have . . . become otherwise firmly established"). Likewise, the rule does not deny asylum to a noncitizen who obtained asylum in a third country (and therefore presumably has a cognizable claim to refugee status) but thereafter comes to the United States and seeks asylum. That person may seek to enter through a lawful pathway and file an asylum application like any other migrant, at which point they would likely need to address the firm-resettlement bar. Should they enter the United States from Mexico at the southwest land border or adjacent coastal borders without authorization or at a POE without an appointment and not otherwise be covered by an exception, they, like any other noncitizen in that situation, will be able to address the rebuttable presumption.

Finally, the Departments disagree that the rule ignores congressional intent underlying the firm-resettlement bar. As explained above, this rule has the policy objective of encouraging

the use of safe, orderly, and lawful pathways by noncitizens, including those seeking asylum, to enter the United States to present their claims, 88 FR at 11704, 11707, and is distinct from the firm-resettlement bar, which is grounded in the policy objective of protecting against forum shopping by migrants who have already found a safe refuge, *East Bay I*, 994 F.3d at 977; *Bonilla*, 539 F.3d at 80; *Ali*, 237 F.3d at 595.

Comment: Commenters stated that the proposed rule would be inconsistent with or would circumvent the safe-third-country bar to applying for asylum because the safe-third-country bar was intended to ensure that any third country was safe and had a fair procedure for asylum or temporary protection before requiring that a noncitizen avail themselves of protection in that country. Commenters asserted that the proposed rule essentially or implicitly declares Mexico, Guatemala, or other transit countries to be safe third countries without obtaining the requisite bilateral or multilateral agreements. Commenters also claimed that this proposed rule, which would apply regardless of whether the United States has an agreement with the transit country, would not adequately consider or require an individualized determination as to whether a third country is "safe" for asylum seekers or has an adequate system for granting protection against persecution and torture. Instead, commenters explained that this proposed rule relies on a third country being a party to specified international accords, which commenters stated are not sufficient to ensure the noncitizen's safety and, therefore, would result in refugees being returned to the countries where they will be persecuted—in conflict with the non-refoulement principles of the Refugee Act. One commenter specified that the asylum structures in Mexico, El Salvador, Honduras, and Guatemala do not meet the international standard for refugee protection and thus cannot constitute a safe third country.

Response: As a threshold matter, the Departments distinguish the categorical safe-third-country bar found in section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), from this rule because this rule, unlike the safe-third-country bar, is neither a categorical bar on the ability to apply for asylum nor does it hinge exclusively on the availability of protection in a third country.

88 FR at 11723, 11736. While the Departments believe that protection is available for many noncitizens in third countries through which they transit before arriving in the United States from Mexico at the southwest land borders or adjacent coastal borders, the Departments have carefully refrained from making asylum eligibility in the United States turn exclusively on whether the noncitizen could have sought protection in any third country. Nor does this rule act as or constitute a third-country agreement for purposes of section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A). 88 FR at 11732. Critically, the purpose behind this rule is to encourage noncitizens to take advantage of existing and expanded safe, orderly, and lawful pathways for noncitizens to enter the United States to present asylum claims. 88 FR at 11704, 11719. And the rule does not, contrary to commenters' suggestions, require a noncitizen to return to or go to a third country without evaluating the safety of that country simply because of their method of entering the United States. *Cf. East Bay I*, 994 F.3d at 977. Rather, the rule is more limited. The rule provides that noncitizens who have traveled through a third country and enter the United States through a provided lawful pathway may seek asylum through an orderly and directed process. 88 FR at 11707, 11723; *see* 8 CFR 208.33(a)(2)(ii), 1208.33(a)(2)(ii). Noncitizens who travel through a third country that is a party to the Refugee Convention or Protocol and do not enter the United States through a provided lawful pathway, and who do not first seek (and are denied) protection in that third country, may still present a claim for relief and protection based on fear of persecution—but, in order to be eligible for asylum, they must first establish an exception to or rebut a presumption of ineligibility for asylum. 88 FR at 11707, 11723; *see* 8 CFR 208.33(a)(3), 1208.33(a)(3). And even if the noncitizen is subject to the presumption of ineligibility for asylum, the noncitizen may still seek and be eligible for statutory withholding of removal or CAT protection. 88 FR at 11737; *see* 8 CFR 208.33(b)(2)(i) and (ii), 1208.33(b)(2)(i) and (ii). Simply put, the rule imposes a condition on asylum (and only asylum) eligibility relating to whether the noncitizen availed themselves of a lawful pathway, but the rule

does not direct an inquiry as to whether the noncitizen can or should return to a third country. 88 FR at 11737–38.

iii. Expedited Removal

Comment: Some commenters stated that the proposed rule creates a higher standard of proof (preponderance of the evidence) for rebutting the presumption against asylum, as compared to the "significant possibility" standard for establishing a credible fear. Commenters expressed a belief that the rule requires noncitizens "to actually establish, at their credible fear interview, that they *are* eligible for asylum" (emphasis in original), not simply that they have a significant possibility of demonstrating eligibility. These commenters expressed concern that the rule could be read to require AOs to make a finding that a noncitizen is ineligible for asylum without assessing the presumption under the "significant possibility" standard. These commenters further argued that the touchstone of the "significant possibility" standard was whether a noncitizen "*could* show, after a full hearing with factual development," that the presumption does not apply.

Response: The "significant possibility" standard is required by statute, and the rule does not impose a different standard during the credible fear process.[195] The INA mandates that, when determining whether a noncitizen has a "credible fear," the AO must determine whether there is a "significant possibility . . . that the alien could establish eligibility for asylum." INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). When it comes to the rebuttable presumption, the

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[195] Previous limitations on asylum eligibility have used similar regulatory language that does not explicitly include the phrase "significant possibility" while also stating in the rules' preambles that the "significant possibility" standard applied to those limitations. *See, e.g.*, Security Bars and Processing, 85 FR 84160, 84175 (Dec. 23, 2020) ("Security Bars Rule") (explaining that "[t]he rule does not, and could not, alter the standard for demonstrating a credible fear of persecution, which is set by statute"); Asylum Eligibility and Procedural Modifications, 84 FR 33829, 33837 (July 16, 2019) ("TCT Bar IFR") (providing that "[t]he asylum officer will ask threshold questions to elicit whether an alien is ineligible for a grant of asylum pursuant to the third-country-transit bar. If there is a significant possibility that the alien is not subject to the eligibility bar (and the alien otherwise demonstrates that there is a significant possibility that he or she can establish eligibility for asylum), then the alien will have established a credible fear."); Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934, 55943 (Nov. 9, 2018) ("Proclamation Bar") (providing that "[t]he asylum officer will ask threshold questions to elicit whether an alien is ineligible for a grant of asylum pursuant to a proclamation entry bar. If there is a significant possibility that the alien is not subject to the eligibility bar (and the alien otherwise demonstrates sufficient facts pertaining to asylum eligibility), then the alien will have established a credible fear.").

AO will determine whether there is a significant possibility that the noncitizen would be able to show at a full hearing by a preponderance of the evidence that the presumption does not apply or that they meet an exception to or can rebut the presumption. 8 CFR 208.33(a)(2), (3)(i), 1208.33(a)(2), (3)(i). In other words, the "significant possibility" standard is the overall assessment applied at the credible fear stage, but that standard must be applied in conjunction with the standard of proof required for the ultimate merits determination. Although the "significant possibility" standard applies when determining the presumption's applicability and whether it has been rebutted, the Departments expect that noncitizens rarely would be found exempt from or to have rebutted the presumption for credible fear purposes and subsequently be found not to be exempt from or to have rebutted the presumption at the merits stage. The "significant possibility" standard asks a predictive question: whether there is a "significant possibility" that the noncitizen "could establish" asylum eligibility at a merits hearing. INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). And given the nature of the inquiry under this rule's presumption, the Departments expect that AOs or IJs will almost always be able to determine based on the evidence before them at the credible fear stage whether a noncitizen would be unable to establish asylum eligibility at the merits stage.

First, the evidence necessary to determine whether a person is excepted from or can rebut the presumption should generally be available to the AO at the time of the credible fear interview, whether from the noncitizen or otherwise. Unlike some of the more complex factual inquiries required for other elements of asylum eligibility, such as nexus or particular social group, which often require evidence about country conditions or other evidence, and often regard events that did not happen recently, AOs will—except in exceptional circumstances—be able to assess eligibility for such exceptions or rebuttal circumstances at the credible fear interview through consideration of the noncitizen's credible testimony and available evidence, including government records relating to their circumstances at the time of their entry into the United States.

For instance, a noncitizen should not generally need testimony from a witness in their home country or evidence of country conditions to show that they faced an acute medical emergency at the time of entry or 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. *See* 8 CFR 208.33(a)(2)(ii)(B), (3)(i)(A), 1208.33(a)(2)(ii)(B), (3)(i)(A). In some cases, the absence of documentation and DHS records—such as a record that a noncitizen was provided appropriate authorization to travel to the United States to seek parole—may make it unlikely that the noncitizen could make the requisite showing at a full merits hearing. In other situations, the noncitizen's credible testimony may be sufficient to prove the noncitizen's claims, although AOs also may consider any evidence noncitizens have with them at the time they entered the United States from Mexico at the southwest land border or adjacent coastal borders, and evidence regarding the State in which they were encountered at or near the border. Thus, AOs should have all the necessary evidence before them during the credible fear interview to determine whether a noncitizen will be exempt from or able to rebut the presumption, and additional evidence is not likely to change whether an exception to or rebuttal of the presumption applies.

Second, as with factual determinations, the legal analysis for determining whether a person is exempt from or can rebut the presumption is straightforward because most of the enumerated grounds for those determinations are narrow and clearly defined. There is little gray area in determining whether a noncitizen transited through a third country, and the rule provides clear examples of the types of threats that constitute an imminent and extreme threat to life or safety—that is, an imminent threat of rape, kidnapping, torture, or murder. *See* 8 CFR 208.33(a)(1)(iii), (3)(i)(B), 1208.33(a)(1)(iii), (3)(i)(B). As a result, the question of whether a noncitizen has a "significant possibility" of meeting these standards should not require much legal analysis after the AO has considered the evidence before them. That again differs from other questions that may arise during a credible fear inquiry—such as whether the noncitizen is a member of a cognizable particular social group—which can be quite complex; AOs or IJs may

reasonably defer such difficult questions by finding credible fear. *See* 8 CFR 208.30(e)(4) ("In determining whether the alien has a credible fear of persecution . . . or a credible fear of torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit a positive credible fear finding . . . in order to receive further consideration of the application for asylum and withholding of removal."). Hence, in this unique context, applying the "significant possibility" standard will almost always lead to a similar conclusion as applying the ultimate eligibility standard.

However, the Departments acknowledge that in some rare cases the outcome from applying the "significant possibility" standard may differ from application of the ultimate merits standard, such that a noncitizen who is found to have met the "significant possibility" standard may ultimately be found after a merits hearing to be subject to the presumption of ineligibility. It is the Departments' expectation that such cases will be rare, and that applying the "significant possibility" standard will not differ meaningfully from application of the ultimate merits standard in this context.

Comment: Commenters stated that Congress intended to set a low screening standard for the credible fear process and alleged that the proposed rule raised the screening standard for statutory withholding of removal and CAT protection during this process without providing a justification for doing so. Commenters argued that Congress intended the plain language of the statute, which uses a "significant possibility" standard for asylum, to also apply to related fear claims, such as statutory withholding of removal and CAT protection.

Response: As a preliminary matter, this rule does not change the screening standard for asylum claims. Instead, it imposes an additional condition on asylum eligibility: a rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel. 88 FR at 11750; INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). AOs will continue to apply the statutory "significant possibility" standard to

determine credible fear. *Id.* In considering whether a noncitizen can establish a significant possibility of eligibility for asylum, the AO will be required to consider whether the noncitizen has shown a significant possibility that they could establish that the presumption does not apply or that they meet an exception to or can rebut the presumption. 88 FR at 11750. Only after determining that a noncitizen could not demonstrate a "significant possibility" of eligibility for asylum would the AO apply the long-established "reasonable possibility" standard to assess whether further proceedings on a possible statutory withholding or CAT protection claim are warranted. *Id.* at 11746, 11750.

In contrast to the establishment of a statutory "significant possibility" standard to screen for asylum, Congress did not specify a statutory standard for screening statutory withholding of removal or CAT protection claims in expedited removal proceedings. *See* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v) (referencing only "asylum"). Since 1999, AOs have applied the "reasonable possibility" standard to statutory withholding of removal and CAT protection claims in streamlined proceedings for reinstatement and administrative removal where noncitizens are statutorily ineligible for asylum. *See* 8 CFR 208.31, 1208.31 (2020)[196] (implementing the reasonable fear process for noncitizens subject to administrative removal orders); 8 CFR 241.8(e) (implementing the reasonable fear process for noncitizens subject to reinstatement of a prior order of removal). While the "reasonable possibility" standard is lower than the "clear probability" standard required to demonstrate eligibility for statutory withholding or CAT protection, it is a more demanding standard than the "significant possibility" standard used in credible fear proceedings to screen for asylum. Regulations Concerning the Convention Against Torture, 64 FR 8474, 8485 (Feb. 19, 1999). At the time the CAT regulations were implemented, the goal of the reasonable fear process was to ensure that the United States complied with its

[196] These provisions were amended by the Global Asylum Rule, which was preliminarily enjoined and its effectiveness stayed before it became effective. *See Pangea II*, 512 F. Supp. 3d at 969–70. This order remains in effect, and thus the 2020 version of these provisions—the version immediately preceding the enjoined amendments is currently effective.

non-refoulement obligations under the CAT "without unduly disrupting the streamlined removal processes applicable." *Id.* at 8479. The justification for using the reasonable possibility standard was also explained at the time the reasonable fear proceedings were created: "[b]ecause the standard for showing entitlement to these forms of protection (a probability of persecution or torture) is significantly higher than the standard for asylum (a well-founded fear of persecution), the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher." *Id.* at 8485.

For the purpose of this rule, the Departments have judged that, in those cases where an applicant cannot establish a significant possibility of eligibility for asylum due to the lawful pathways condition, the use of the "reasonable possibility" standard to assess statutory withholding of removal and CAT claims better reflects the goals of the rule as a whole. As explained in the NPRM, while this is a different judgment than what was made by the Asylum Processing IFR, the application of the heightened standard is in line with the goal of identifying non-meritorious claims at the screening stage, allowing the heavily burdened immigration courts to focus on those claims most likely to warrant protection. 88 FR at 11742. The Departments believe that applying the "reasonable possibility" standard, which is tailored to statutory withholding of removal and CAT claims, "better predicts the likelihood of succeeding" on an application for statutory withholding of removal or CAT protection because it appropriately accounts for the higher burden of proof. 88 FR at 11746–47. The use of the standard specific to statutory withholding and CAT claims, since its inception, has allowed the United States to meet its obligations under international law while simultaneously balancing the need to expeditiously identify non-meritorious claims. Moreover, as stated in the NPRM, the Departments seek to protect those who have viable claims while also considering the "downstream effects" on immigration courts. 88 FR at 11746. The application of standards tailored to the type of relief for which the noncitizen is eligible is designed to accomplish that goal.

2. TCT Bar and Proclamation Bar Litigation

Comment: Several commenters argued that the proposed rule is no different than the TCT Bar Final Rule and the Proclamation Bar IFR. Many commenters submitted only a general reference to precedent issued in litigation regarding the Proclamation Bar IFR and the TCT Bar rules, without any discussion or consideration of the distinctions provided in the proposed rule. Some asserted that the proposed rule conflicts with or violates the injunctions issued regarding those rules, or that the existing injunction should apply to the proposed rule. Commenters also asserted that the proposed rule is similar to the TCT Bar rules and Proclamation Bar IFR and will cause confusion. An organization expressed concern that members of a certified class for purposes of injunctive relief, *see Al Otro Lado, Inc. v. McAleenan*, No. 17-CV-02366-BAS-KSC, 2022 WL 3142610 (S.D. Cal. Aug. 5, 2022), would be subject to the rebuttable presumption. The commenter stated that application of the rebuttable presumption to such class members would likely violate the injunction in that case because that injunction requires that the Departments apply "pre-Asylum Ban practices for processing the asylum applications" of class members. *See id.*

Response: The Departments reiterate that this rule is materially different from the TCT Bar IFR and Final Rule and Proclamation Bar IFR. 88 FR at 11738–39; *see also* Section IV.B.2.ii of this preamble. And contrary to commenter concerns, there is no risk of confusion because neither the TCT Bar nor the Proclamation Bar is in effect. *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020) (vacating the TCT Bar IFR); *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020) (enjoining the TCT Bar IFR); *E. Bay Sanctuary Covenant v. Barr* ("*East Bay II*"), 519 F. Supp. 3d 663, 668 (N.D. Cal. 2021) (enjoining the TCT Bar Final Rule); *East Bay III*, 993 F.3d at 681; *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).[197] As discussed later in Sections IV.E.9 and IV.E.10 of this preamble,

[197] The district court in *O.A.* vacated the Proclamation Bar IFR for similar substantive reasons to those articulated in *East Bay III*. *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019). *O.A. v. Trump* is subject to a pending appeal that

removal of provisions implementing the TCT Bar Final Rule and the Proclamation Bar IFR is warranted. But even separate from the removal of provisions implementing those rules, the Departments respond that the litigation surrounding those rules does not mean that this distinct rule is invalid, unenforceable, or arbitrary and capricious.

The Departments also disagree with the generalized comparisons between this rule and the Proclamation Bar IFR and the TCT Bar rules. 88 FR at 11736. As stated in the NPRM, this rule is substantively distinct from the eligibility bars in those rules. The TCT Bar rules focused exclusively on the noncitizen's travel prior to entering the United States, *see* 85 FR at 82261–62, and the Proclamation Bar IFR imposed a strict eligibility bar for anyone entering outside a POE, *see* 83 FR at 55935. In comparison, this rule is not a categorical bar on asylum eligibility, but instead is a rebuttable presumption, including several exceptions that are adjudicated on a case-by-case basis, for certain noncitizens who enter the United States without availing themselves of any of numerous lawful pathways during a temporary period of time. 88 FR at 11707, 11739–40; 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). Notably, and contrary to claims by some commenters, the rule does not block access to asylum for those who need it most. *Cf. East Bay I*, 994 F.3d at 980. The rule contains exceptions to and ways to rebut the presumption, including several ways to avoid the presumption that account for protecting the safety of those fleeing imminent harm. In addition, the rule is intended to better manage already-strained resources, thereby protecting against overcrowding in border facilities and helping to ensure that the processing of migrants seeking protection in the United States is done in an effective, humane, and efficient manner. 88 FR at 11704, 11713–16, 11730. In that vein, as discussed in Sections IV.E.9 and IV.E.10 of this rule, the TCT Bar IFR and Final Rule and Proclamation Bar IFR pursued approaches and policies that differ in important respects from this rule. *Compare* TCT

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is presently held in abeyance. *O.A. v. Biden*, No. 19-5272 (D.C. Cir. Oct. 11, 2019). Similarly, in *Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-2366, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022), a different district court issued an injunction relating to application of the TCT Bar rules that the Departments disagree with and have appealed. *Al Otro Lado, Inc. v. Mayorkas*, Nos. 22-55988, 22-56036 (9th Cir. Nov. 7, 2022).

Bar IFR, 84 FR at 33831, *and* Proclamation Bar IFR, 83 FR at 55935, *with* 88 FR at 11706–07. Moreover, this rule is designed to address a specific exigency that did not exist when the TCT Bar rules and Proclamation Bar IFR were promulgated. 88 FR at 11705–06.

Second, this rule is not in conflict with or precluded by existing injunctions and court precedent relating to litigation surrounding those rules. *See United States v. Cardales-Luna*, 632 F.3d 731, 735 (1st Cir. 2011) (recognizing that "a decision dependent upon its underlying facts is not necessarily controlling precedent as to a subsequent analysis of the same question on different facts and a different record") (marks and citation omitted); *Overseas Shipholding Group, Inc. v. Skinner*, 767 F. Supp. 287, 296 (D.D.C. 1991) (noting that neither the law of the case nor stare decisis doctrines applied in "an entirely separate rulemaking process"); *cf. Associated Builders and Contractors, Inc. v. Brock*, 862 F.2d 63, 67 (3d Cir. 1988) (considering the adequacy of notice of proposed rulemaking and concluding that an argument was foreclosed because a prior panel "applied the law" to facts that had "not changed"). Procedurally, the injunctions issued against the TCT Bar rules and Proclamation Bar IFR were limited to the specific facts and specific rules at issue in those cases and do not bar the issuance of this materially distinct rule. *See E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019) (enjoining the Departments "from taking any action continuing to implement" the TCT Bar IFR), *affirmed by East Bay I*, 994 F.3d at 988; *East Bay II*, 519 F. Supp. 3d at 668 (enjoining the Departments "from taking any action continuing to implement the [TCT Bar] Final Rule"); *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 868 (N.D. Cal. 2018), *affirmed by East Bay III*, 993 F.3d at 680–81; *see also California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (noting that remedies "do not simply operate on legal rules in the abstract") (quotation marks and citation omitted). Substantively, the opinions in those cases were limited to categorical eligibility bars premised on manner of entry or whether a noncitizen first sought asylum in another country, and this rule creates no such categorical bar. The more nuanced approach in this rule will have different effects and is premised on different factual

circumstances and new reasoning, including an increased focus on available lawful pathways. 88 FR at 11739.

Regarding the application of the proposed rule to *Al Otro Lado* injunction class members, as noted in the NPRM, the Departments do not view the permanent injunction in the *Al Otro Lado* litigation—*see Al Otro Lado, Inc. v. Mayorka*s, No. 17-CV-02366-BAS-KSC, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022)—which they have appealed to the Ninth Circuit,[198] as limiting the Departments' discretionary authority to apply new asylum limitations conditions consistent with section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), to the injunction class. *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 281–82 (1977) ("The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the [alleged wrongful conduct] itself."); *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994); *see also, e.g.*, *Thomas v. Cty. of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1992) (reversing injunction that "fail[ed] to specify the act or acts sought to be restrained as required by" Federal Rule of Civil Procedure 65(d)).[199] In any event, certain injunction class members whose cases are reopened or reconsidered under the *Al Otro Lado* injunction because they were removed following application of the TCT Bar may follow a DHS-established process to request "appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process," as outlined in 8 CFR 208.33(a)(2)(ii)(A), 1208.33(a)(2)(ii)(A), to participate in renewed removal proceedings. Injunction class members who follow those procedures would thus not be subject to the rebuttable presumption.

Comment: Many commenters noted that the courts, in addressing the TCT Bar rules and the Proclamation Bar IFR, held that the Departments could not promulgate a regulation that

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[198] *See Al Otro Lado, Inc. v. Mayorka*s, Nos. 22-55988, 22-56036 (9th Cir. Oct. 25, 2022)

[199] Further, the commenter's position that the *Al Otro Lado* injunction applies to this rule is inconsistent with *Al Otro Lado* Class Counsel's website: "[T]he Biden Administration proposed a similar rule in February 2023, but the Al Otro Lado v. Mayorkas court order does not cover the new rule. The court order only applies to the rule implemented on July 16, 2019." *See* American Immigration Council, *Your Rights Under Al Otro Lado v. Mayorkas*, *https://www.americanimmigrationcouncil.org/al-otro-lado-mayorkas* (last visited Apr. 21, 2023).

restricts access to asylum based on manner or location of entry into the United States or transit through a third country. Commenters similarly asserted, citing the Ninth Circuit's decision in *East Bay III*, that the proposed rule is not "consistent with" section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1), and also violates international law.

Response: The holdings relating to the TCT Bar rules and the Proclamation Bar IFR do not undermine this rule. As discussed in Section IV.D.1.ii of this preamble, this rule does not conflict with the INA's safe-third-country and firm-resettlement bars. 88 FR at 11736; *see R-S-C*, 869 F.3d at 1187 n.9. While the applicability of the rebuttable presumption of ineligibility turns in part on transit through a third country, 8 CFR 208.33(a)(1)(iii), 1208(a)(1)(iii), the ultimate eligibility decision requires case-by-case evaluation of whether an exception applies and whether the noncitizen rebutted the presumption. 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3); *cf. East Bay I*, 994 F.3d at 982–83 (indicating that the Departments cannot rely "solely" on a noncitizen's decision not to seek asylum in a third country in denying their asylum application in the United States).

Regarding the Proclamation Bar, *East Bay III* enjoined a categorical entry bar as inconsistent with the statutory provision allowing "migrants arriving anywhere along the United States's border" to apply for asylum. 993 F.3d at 669. Unlike the Proclamation Bar IFR, this rule involves a rebuttable presumption that includes consideration of numerous factors unrelated to the manner of entry, including transit through a third country. 88 FR at 11707; 8 CFR 208.33(a)(1)(iii), (2) and (3), 1208.33(a)(1)(iii), (2) and (3). And, as discussed in Section IV.D.1.i of this preamble, the rule is consistent with INA section 208, 8 U.S.C. 1158. *See* 88 FR at 11707, 11740; 8 CFR 208.33(a)(2), 1208.33(a)(2) (providing for exceptions to applicability of the rebuttable presumption); 8 CFR 208.33(a)(3), 1208.33(a)(3) (providing ways to rebut the presumption of ineligibility). The provided lawful pathways, third country transit components, exceptions to the presumption, and the fact-intensive, case-by-case analysis for rebutting the presumption demonstrate that the condition imposed by this rule is distinct from the "categorical

ban" enjoined in *East Bay III*, 993 F.3d at 669–70. Notwithstanding this distinction, the Departments reiterate that they disagree with the holding in *East Bay III* that the Proclamation Bar IFR was inconsistent with section 208(a) of the INA, 8 U.S.C. 1158(a). 88 FR at 11739; *see E. Bay III*, 993 F.3d at 670; *see also* Section IV.D.1.i of this preamble.

The rule also does not violate the United States' obligations under international treaties. As discussed in Section IV.D.3 of this preamble, the rule is not a penalty based on manner of entry and does not violate treaty commitments regarding non-refoulement. The Departments also disagree with the decision in *East Bay III* on this point as applied to the Proclamation Bar IFR. 88 FR at 11739; *see East Bay III*, 993 F.3d at 672–75. In any event, *East Bay III* does not render this rule unlawful. In *East Bay III*, the Ninth Circuit determined that the Proclamation Bar IFR "ensure[d] neither" "the safety of those already in in the United States" nor "the safety of refugees," which were the purposes behind the asylum bars in the INA and in the Refugee Convention. 993 F.3d at 673. Conversely, as explained in the NPRM, a purpose of this rule is to reduce reliance on dangerous routes to enter the United States used by criminal organizations and smugglers, thus protecting the safety of refugees. 88 FR at 11707. Furthermore, one of the enumerated categories for rebutting the presumption in the rule is demonstrating that the noncitizen faced an imminent and extreme threat to life or safety at the time of entry into the United States. 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B). The Ninth Circuit's concerns are therefore not present in this rule.

Comment: Relying on cases enjoining the TCT Bar rules and the Proclamation Bar IFR, commenters asserted that the proposed rule is invalid because the condition in the proposed rule is unrelated to the merits of the asylum claim.

Response: The Departments disagree that the cases involving the TCT Bar rules demonstrate that this rule is invalid. As discussed in Section IV.D.1.i of this preamble, the INA provides the Departments with the authority to impose limitations or conditions on asylum eligibility. INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B). But the statute

neither qualifies what types of limitations or conditions may be imposed—except insofar as such limitations or conditions must be consistent with the INA—nor states that any such limitations or conditions must relate to whether the noncitizen has demonstrated or can demonstrate that they meet the definition of a refugee under section 101(a)(42)(A) of the INA, 8 U.S.C. 1101(a)(42)(A). Indeed, several of the statutory restrictions on asylum eligibility are unrelated to whether the noncitizen has established that they are a refugee within the meaning of section 101(a)(42)(A) of the INA, 8 U.S.C. 1101(a)(42)(A). *See, e.g.*, INA 208(b)(2)(A)(i), 8 U.S.C. 1158(b)(2)(A)(i) (participating in the persecution of others); INA 208(b)(2)(A)(iv), 8 U.S.C. 1158(b)(2)(A)(iv) (reasonable grounds for considering the noncitizen a danger to the security of the United States). And section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), provides for the promulgation of "*additional limitations and conditions*." (emphasis added). The existence of exceptions and conditions that are unrelated to the refugee definition both demonstrates that it is lawful for the Departments to promulgate this condition on asylum eligibility and undermines the Ninth Circuit's limitation on scope of any regulatory condition. *E. Bay I*, 994 F.3d at 979. There is no basis to assume that Congress intended to circumscribe the scope of limitations or conditions that the Departments can promulgate when the statute does not do so and Congress itself provided for exceptions unrelated to the meaning of "refugee" in section 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). *R-S-C*, 869 F.3d at 1187 n.9 (rejecting a statutory construction that would circumscribe the type of limitations or conditions promulgated under section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), because such restrictions "would render [section] 1158(b)(2)(C) meaningless, disabling the Attorney General from adopting further limitations while the statute clearly empowers him to do so.").

In addition, the rule is not precluded by either *East Bay I* or *East Bay III*. Neither of these decisions require that a condition on asylum eligibility relate to the definition of refugee under section 101(a)(42)(A), 8 U.S.C. 1158(a)(42)(a). Accordingly, the injunctions and vacatur

decisions relating to the TCT Bar rules and the Proclamation Bar do not render this rule unlawful.

3. International Law

Comment: Commenters expressed concern that the NPRM, if finalized, would violate the United States' non-refoulement obligations under international law, including Article 33 of the Refugee Convention, which the commenters generally explained as prohibiting the return of asylum seekers to a country where their lives or freedom would be threatened on account of a protected ground. Specifically, commenters voiced apprehension that the NPRM would "bar" most protection-seeking noncitizens from being eligible for asylum, leaving them able to apply only for statutory withholding of removal or CAT protection. Commenters predicted that many noncitizens would not be able to satisfy the comparatively higher standards of proof for statutory withholding and CAT claims and that, in turn, would lead to the refoulement of persons who, if not for the NPRM's "bar" to asylum eligibility, would have been granted asylum.

Applying similar reasoning, some commenters raised that the proposed rule may violate Article 3 of the CAT, which prohibits state parties from returning people to a country where there is sufficient likelihood that they would be tortured. One commenter stated that conditioning asylum based on manner of entry would be in violation of the CAT.

Commenters also argued the rule conflicted with other provisions of the Refugee Convention and Protocol. Commenters noted that Article 31 of the Refugee Convention prohibits states from imposing improper penalties for irregular entry, which commenters argued included administrative penalties and limits on access to asylum. Commenters also stated the proposed rule would violate Article 3, which prohibits non-discrimination, and Article 16, which protects refugees' access to the courts. One commenter stated that the proposed rule is more expansive than the Refugee Convention's exclusion for migrants who secured residency or status in another country.

Relatedly, several commenters pointed to United Nations High Commissioner for Refugees ("UNHCR") statements and guidance interpreting the Refugee Convention and the Refugee Protocol. Specifically, commenters pointed to UNHCR guidance interpreting those documents as providing that asylum seekers are not required to apply for protection in the first country where protection is available. Further, commenters noted that UNHCR interprets those documents as not requiring refugees to be returned to a country through which they transited. Commenters further noted UNHCR's positions that asylum should not be refused only on the basis that it could have been sought in another country and that asylum seekers should not be required to seek protection in a country to which they have no established links. A commenter also noted that UNHCR has repeatedly denounced attempts to impose similar bans, and that such rules undermine international human rights and refugee law, because the right to seek asylum is a human right regardless of the person's origin, immigration status, or manner of arrival at the border.

Several commenters also argued that the rule violated the United States' obligations under other international documents. Some commenters simply made a general assertion that the rule would violate international treaties and degrade the United States' international standing. Several commenters stated that the proposed rule is contrary to the Universal Declaration of Human Rights ("UDHR"). Commenters argued that the UDHR protects the right to seek asylum, and that any restriction or limitation to access asylum is a violation of the letter and spirit of the UDHR. Other commenters stated that the rule violated the United Nations Convention on the Rights of the Child ("CRC") because it did not provide for a robust, individualized assessment of a child's asylum claim. One commenter stated that the rule would place migrant children and their families at a higher risk of exploitation and trafficking, in contravention of obligations pursuant to the Optional Protocol on the Sale of Children and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("The Palermo Protocol"). Another commenter contended the rule violates Article 7 of

the International Covenant on Civil and Political Rights ("ICCPR"), which forbids subjecting individuals to "torture or to cruel, inhuman or degrading treatment or punishment," and violates Article 12, which confirms the rights of individuals to leave any country. Several commenters claimed that the rule would violate anti-discrimination principles in a variety of agreements and declarations including the ICCPR, International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), the American Declaration on the Rights and Duties of Man, Vienna Declaration, and San Jose Action Statement. Another commenter stated the proposed rule violates the right to life, human dignity, and equality before the law in the ICCPR because the proposed rule was "discriminatory" and establishes "great inequality." Commenters also claimed conflicts with treaties including Article 6 of the Rome Statute of International Criminal Court, which prohibits genocide, and Article 32 of the Geneva Convention.

Response: This rule is consistent with the United States' obligations under international law. Three primary documents govern the rights of refugees and corresponding obligations of states in international law: the Refugee Convention; the Refugee Protocol, which incorporates Articles 2 through 34 of the Refugee Convention; and the CAT. Together, these documents provide a framework for states to provide protection to migrants fleeing persecution or torture and establish the principle of non-refoulement, which prohibits states from returning refugees to territories in specific circumstances. While the United States is a party to the Refugee Protocol and the CAT, these treaties are not directly enforceable in U.S. law. *See INS v. Stevic*, 467 U.S. 407, 428 & n.22 (1984); *Al-Fara v. Gonzales*, 404 F.3d 733, 743 (3d Cir. 2005) ("The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation."). Instead, the United States has implemented its obligations through domestic legislation and implementing regulations, and the Protocol "serves only as a useful guide in determining congressional intent in enacting the Refugee Act." *Barapind v. Reno*, 225 F.3d 1100, 1107 (9th Cir. 2000). The Refugee Convention's non-refoulement obligation is contained in Article 33.1, which prohibits contracting states from returning a

refugee to a territory "where his life or freedom would be threatened" on account of an enumerated ground. The United States has implemented the non-refoulement provisions of Article 33.1 of the Refugee Convention through the withholding of removal provisions at section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), rather than through the asylum provisions at section 208 of the INA, 8 U.S.C. 1158. *See Cardoza-Fonseca*, 480 U.S. at 429, 440–41. The CAT's non-refoulement provision is in Article 3, which prohibits the return of a person to a country where there are "substantial grounds for believing" the person will be tortured. The United States implemented its obligations under the CAT through regulations. *See* Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Public Law 105–277, sec. 2242(b), 112 Stat. 2681, 2631–822 (8 U.S.C. 1231 note); 8 CFR 208.16(c), 208.17, 208.18, 1208.16(c), 1208.17, 1208.18. The rule does not change or limit eligibility for statutory withholding of removal or CAT protection. Instead, applicants subject to the rule's rebuttable presumption will be screened for eligibility for statutory withholding of removal and CAT protection under a reasonable possibility standard. As explained earlier in Section IV.D.1.iii of this preamble, the reasonable possibility standard is the same standard that has been used to ensure the United States complies with its non-refoulement obligations under international law in withholding-only proceedings for decades.

The rule's rebuttable presumption will limit asylum eligibility for some noncitizens. But as the Supreme Court has explained, asylum "does not correspond to Article 33 of the Convention, but instead corresponds to Article 34," which provides that contracting countries "shall as far as possible facilitate the assimilation and naturalization of refugees." *Cardoza-Fonseca*, 480 U.S. at 441 (quotation marks omitted). Article 34 "is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible." *Id.* Because application of the presumption does not affect eligibility for statutory withholding of removal or protection under the CAT regulations, the rule is consistent with U.S. non-refoulement obligations under the Refugee Protocol (incorporating, inter alia, Article 33 of the Refugee

Convention) and the CAT. *See R-S-C*, 869 F.3d at 1188 n.11 (explaining that "the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule"); *Cazun v. U.S. Att'y Gen.*, 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia v. Lynch*, 813 F.3d 240, 241 (5th Cir. 2016).

The Departments agree that asylum is an important protection in international law and acknowledge that the right to seek asylum has been recognized under the UDHR, Art. 14, G.A. Res. 217A (III), U.N. Doc. A/810 (1948). The UDHR is a non-binding human rights resolution of the UN General Assembly, and thus it does not impose legal obligations on the United States. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–35 (2004) ("[T]he [UDHR] does not of its own force impose obligations as a matter of international law."). Instead, the right enshrined in the UDHR—"to seek and to enjoy in other countries asylum from persecution," UDHR, Art. 14, G.A. Res. 217A (III), U.N. Doc. A/810 (1948)—is also reflected in the non-refoulement provisions of the Refugee Protocol and the CAT. As previously explained, the rule does not impact eligibility for statutory withholding of removal or CAT protection, and accordingly does not implicate the United States' non-refoulement obligations. Moreover, the rebuttable presumption in the rule does not prohibit any person from seeking asylum, statutory withholding of removal, or CAT protection. Instead, the rule creates a condition on eligibility for asylum by creating a rebuttable presumption of ineligibility for those who neither avail themselves of a lawful pathway to the United States nor apply for asylum or seek other protection, and await a decision thereon, in a country they travel through. The rule similarly does not bar those seeking asylum from procedures that protect them from refoulement. All noncitizens processed for expedited removal who express a fear of return are entitled to a credible fear interview. As with any eligibility criteria, the presumption will apply in some cases to limit eligibility for noncitizens based on the individual circumstances presented, including at the credible fear stage. Even in those cases where the AO determines that the noncitizen cannot demonstrate a

significant possibility of being granted asylum because the presumption has not been rebutted, the noncitizen may still demonstrate credible fear by showing a reasonable possibility of persecution or torture. Similarly, after applying for asylum before an IJ, if the presumption has not been rebutted, noncitizens may still demonstrate eligibility for statutory withholding of removal or CAT protection.

The rule is also consistent with the Refugee Convention and the corresponding obligations under international law, including specific provisions cited by commenters. The rule does not violate the non-discrimination requirement in Article 3 of the Refugee Convention. Article 3 prohibits discrimination on the basis of "race, religion or country of origin." The rule does not discriminate on the basis of any of these protected characteristics. Instead, it is a rule of equal application based on the actions of the noncitizen. The application of the rule is limited to those circumstances where the noncitizen who is not excepted from its coverage has neither utilized an available lawful pathway nor sought protection and received a decision denying protection in a country traveled through, and cannot demonstrate that the failure to do was excusable under the rule or otherwise rebut the presumptive ineligibility. For the same reason, the rule does not violate other anti-discrimination requirements in international law, including the ICERD, Dec. 21, 1965, 660 U.N.T.S. 195, 212, and the ICCPR, Dec. 16, 1966, 999 U.N.T.S. 171.

Neither is the rule inconsistent with Article 16 of the Refugee Convention. Article 16 establishes that refugees should be given "free access to the courts," and in the country of a refugee's habitual residence, access should be equivalent to that of a national. This enshrines the right of the refugee to sue and be sued in practice—not merely in name—by removing barriers to participating in court such as access to government-provided counsel (where the government otherwise provides it), ensuring court fees are not higher for refugees than nationals, and prohibiting *cautio judicatum solvi*, the practice of requiring a bond for the costs of litigation as a

pre-requisite to filing a complaint. *See* Refugee Convention, Art. 16, Travaux Préparatoires & Commentaries. These rights are not implicated by the rule.

Similarly, the rule is not inconsistent with Article 31 of the Refugee Convention, which prohibits states from "impos[ing] penalties" on refugees based on "illegal entry or presence." As the commentary to the Refugee Convention explains, the term "penalties" in Article 31 refers "to administrative or judicial convictions on account of illegal entry or presence, not to expulsion." Refugee Convention Art. 31, commentary; *see Cazun v. Att'y Gen. U.S.*, 856 F.3d 249, 257 & n.16 (3d Cir. 2017) (rejecting argument that the reinstatement bar to asylum was a "penalty" within the meaning of Article 31). The rule does not change any rules or policies relating to detention or convictions for unlawful entry or presence. The Departments acknowledge that the Ninth Circuit concluded in *East Bay III*, 993 F.3d at 674, that the bar to asylum at issue in that case violated Article 31 of the Refugee Convention because it imposed a "penalty." As described in the NPRM, the rule here does not create a categorical bar to asylum, but instead a rebuttable presumption, and *East Bay III* accordingly does not address the lawfulness of this rule. 88 FR at 11739. Moreover, the Ninth Circuit's conclusion was erroneous because the denial of discretionary relief is not a penalty within the meaning of Article 31. *Id.*

Some commenters correctly observed that the Refugee Convention does not require refugees to apply for asylum in the first country they pass through. This rule, however, does not require noncitizens to apply for asylum in the first—or any—country through which they travel. Instead, the rule applies a rebuttable presumption to certain noncitizens who failed to avail themselves of a lawful pathway. One such pathway is to apply for asylum and receive a final denial in a transit country, but it is not the sole lawful pathway available. Noncitizens who fail to avail themselves of a lawful pathway may still rebut the presumption of ineligibility for asylum. Regardless, the Convention does not require the United States to grant asylum to every person who qualifies as a "refugee" under the INA; instead, the United States implements the Convention's prohibitions on refoulement through statutory withholding of removal. UNHCR

has stated that "the primary responsibility to provide protection rests with the State where asylum is sought."[200] But UNHCR also acknowledges that "refugees do not have an unfettered right to choose their 'asylum country.'"[201]

In any event, UNHCR's interpretations of or recommendations regarding the Refugee Convention and Refugee Protocol are "not binding on the Attorney General, the BIA, or United States courts." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). "Indeed, [UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status] itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.'" *Id.* at 427–28 (quoting *Cardoza-Fonseca*, 480 U.S. at 439 n. 22). Such guidance "may be a useful interpretative aid," *id.* at 427, but it does not create obligations for the United States.

The rule similarly does not violate the United States' obligations under other international laws and treaties, including the Geneva Conventions, the Rome Statute, the ICCPR, the CRC, or customary international law. First, the Geneva Conventions, a series of treaties that regulate the conduct of armed conflict, have no bearing on the rule. Commenters pointed to Articles 32 and 33 of the Fourth Geneva Convention, which prohibit corporal punishment or mass punishment against protected persons. Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention"), 12 Aug. 1949, 75 UNTS 287. Under Article 4, "protected persons" are limited to those who, during a conflict or occupation, are "in the hands of a Party to the conflict or Occupying Power." As the rule does not implicate a conflict or occupation, there is no conflict with the Geneva Conventions. While at least one commenter pointed to the definition of genocide in Article 6 of the Rome Statute, the United States is not a

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[200] UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, para. 3(i) (May 2013), *http://www.refworld.org/docid/51af82794.html*.

[201] UNHCR, Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries, at 1 (Apr. 2018), *https://www.refworld.org/pdfid/5acb33ad4.pdf*.

party to and has no obligations pursuant to the Rome Statute. In any event, the rule plainly does not constitute or involve genocide in any way. *See* Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998). Similarly, the United States has not ratified the CRC and thus has no obligations under that instrument, 1577 U.N.T.S. 3, reprinted in 28 I.L.M. 1448, 1456 (Nov. 20, 1989).[202] Again, even if considered customary international law—although the United States maintains that it is not—the CRC requires only that States take appropriate measures to protect children who are refugees. *See* CRC, Article 22. The rule accounts for the interests of children through creating robust screening procedures, exempting unaccompanied children from the application of the rule, having a family unity exception, and exempting certain noncitizens who enter as children from ongoing application of the presumption after the two-year period. Additionally, the adjudicator may consider on a case-by-case basis whether the child's situation presents exceptionally compelling circumstances, including considering the circumstances surrounding the child's manner of entry, thus rebutting the presumption.

4. Recent Executive Orders

Comment: Some commenters stated without explanation that the rule is contrary to Executive Order 14012, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 FR 8277 (Feb. 2, 2021). Other commenters stated that to restore faith in the U.S. asylum system as the Executive Order aims to do, the "government" should take various steps, including "adequately fund[ing] a fair asylum system" rather than "wast[e] money on immigration enforcement that separates families, traumatizes children, and tears our communities apart." Commenters further stated that the Administration should end the use of expedited removal, increase the scale and pace of refugee admissions, and expand lawful pathways for people "fleeing from countries with failed

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[202] *See* Status of Ratification, Office of the High Commissioner for Human Rights, *https://indicators.ohchr.org/.*

government and uncontrolled violence." On the other hand, some commenters were critical of the rule because they believed it was not strict enough and, accordingly, averred that the rule is consistent with the Executive Order because it will "remov[e] barriers to immigration."

Response: As a threshold matter, Executive Order 14012 does not require DOJ or DHS to adopt any specific policies but rather to (1) identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits and make recommendations on how to remove these barriers; (2) identify any agency actions that fail to promote access to the legal immigration system and recommend steps, as appropriate and consistent with applicable law, to revise or rescind those agency actions; (3) submit a plan describing the steps they will take to advance these policies; and (4) submit reports regarding implementation of those plans. 86 FR 8277. Because Executive Order 14012 does not require the adoption of specific policies, the actions taken here do not violate that Executive Order.

To the extent commenters believe that the rule is inconsistent with Executive Order 14012, the Departments disagree. Consistent with Executive Order 14012's promotion of removing barriers to accessing immigration benefits and access to the legal immigration system, DHS has created multiple parole processes to provide certain migrants with pathways to temporarily enter and remain in the United States. During those periods of stay, those noncitizens may seek asylum and related protection or other benefits for which they may be eligible. The rule furthers the policy discussed in the Executive Order by encouraging noncitizens to use those parole processes, as well as the CBP One app to enter the United States through a safe, orderly process. This rule also discourages unlawful border crossings that overwhelm limited government resources along the SWB. The Departments believe that there will be efficiency gains from having noncitizens pre-register for appointments—saving considerable processing time—and from decreased encounters between POEs with persons who claim a fear of persecution or torture, the processing of whom requires more resources than processing noncitizens who pursue a lawful pathway. It is correct that implementing the rule

will increase the duration of some credible fear screenings. However, the Departments expect that fewer individuals with non-meritorious claims will receive positive screening determinations, which will result in a more efficient asylum system overall.

The Departments acknowledge commenters' recommendations to provide additional funding for the asylum system and end expedited removal. Both of those actions are outside the Departments' authority and would require congressional action. Ending the use of expedited removal in the absence of congressional action is outside the scope of this rulemaking. The Departments have considered commenters' recommendation of adding lawful pathways for people leaving countries with failed governments. This rule does not create any lawful pathways and thus the comment is outside the scope of this rulemaking.

Comment: Commenters expressed concern that the rule is inconsistent with Executive Order 14010, 86 FR 8267, because they believe it contradicts the instruction to develop policies and procedures for the safe and orderly processing of asylum claims at the U.S. land borders. Commenters stated that rather than developing policies for the safe and orderly processing of asylum claims, the rule instead would restrict the availability of asylum in a way that would make it impossible for most asylum seekers to access the asylum system. Commenters further asserted that rather than restoring faith in the U.S. asylum system, the rule attempts to "deport refugees to danger based on manner of entry and transit in circumvention of existing refugee law and treaty obligations." Commenters also suggested that the rule resurrects the PACR and HARP programs that the Executive Order ended.

Commenters also criticized the Departments for not following "the collaborative process called for in" the Executive Order. Specifically, commenters stated that Departments have failed to "follow Executive Order 14010's mandate to consult with affected organizations" as they are unaware of any "consultation or planning" that has occurred between when the Executive Order was issued and the publication of the NPRM.

Response: The Departments disagree with these commenters because the rule, as directed by Executive Order 14010, encourages use of lawful pathways to enter the United States, which will foster safe, orderly, and more efficient processing of asylum claims for those individuals seeking asylum, while discouraging unlawful border crossings that overwhelm limited resources and unfairly delay the adjudication of meritorious claims for asylum and other forms of protection. The rule is designed to incentivize noncitizens to avail themselves of a lawful pathway to enter the United States, which allows for more efficient use of DHS resources. By incentivizing the pursuit of lawful pathways, the Departments are promoting safe and orderly processing along the SWB as Executive Order 14010 instructs—processing that seeks to minimize the role of criminal organizations that prioritize profits over migrants' lives.

The Departments disagree with commenters that the rule resurrects PACR and HARP. Those programs were developed by DHS to promptly address credible fear claims of single adults and family units while the noncitizens remained in CBP custody.[203] This rule, in contrast, does not change the timeline for credible fear screenings. Nor does it affect where noncitizens are located during such screenings. Thus, commenters' comparisons to PACR and HARP are misplaced.

Commenters are similarly mistaken regarding DHS's responsibilities under the Executive Order. Commenters are correct that the Executive Order instructed the Secretary and Director of the CDC, "in coordination with the Secretary of State, . . . [to] promptly begin consultation and planning with international and non-governmental organizations to develop policies and procedures for the safe and orderly processing of asylum claims at United States land borders, consistent with public health and safety and capacity constraints." 86 FR at 8269. DHS has worked with NGOs to implement the exceptions to the Title 42 public health Order and continues to seek collaboration through seeking comment on this rule.

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[203] *See* Mem. of Law in Opp'n to Pls.'s Mot. for Summ. J. & in Supp. of Defs.' Cross-Mot. for Summ. J. at 8–11, *Las Ams. Immigrant Advoc. Ctr. v. Wolf*, No. 19-cv-3640 (D.D.C. Feb. 6, 2020).

Comment: Some commenters stated that the rule violates Executive Order 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273 (Feb. 2, 2021), and amounts to the legalization of family separation, in contravention of that Executive Order.

Response: In Executive Order 14011, President Biden announced the creation of a task force to identify children who were separated from their families between January 20, 2017, and January 20, 2021, and, among other things, to the greatest extent possible, facilitate and enable the reunification of those children with their families. 86 FR at 8273. In doing so, President Biden stated that his Administration "will protect family unity and ensure that children entering the United States are not separated from their families, except in the most extreme circumstances where a separation is clearly necessary for the safety and well-being of the child or is required by law." *Id.* The rule is consistent with this policy statement. The rule includes multiple provisions aimed at ensuring that families who enter the United States from Mexico at the SWB or adjacent coastal borders are not inadvertently separated. For example, where an exception or rebuttal circumstance applies to one member of a family, it is applied to all members of the family. *See* 8 CFR 208.33(a)(2)(ii), (3)(i), 1208.33(a)(2)(ii), (3)(i). And where asylum is denied to a noncitizen because of the presumption of ineligibility but one member of the noncitizen's family who traveled with the noncitizen obtains protection from removal through statutory withholding of removal or CAT, the circumstance will be deemed exceptionally compelling for the noncitizen denied such relief, allowing the family to remain together. *See* 8 CFR 1208.33(c). Finally, as described in Section IV.E.7.ii of this preamble, the Departments have expanded the family unity provision to cover spouses and children who would be eligible to follow to join the applicant if that applicant were granted asylum, as described in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A). 8 CFR 1208.33(c). Such measures were adopted in accordance with Executive Order 14011 to ensure that family units will not be separated as a result of this rule.

Comment: Commenters stated that the Departments should take into account Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 FR 7009 (Jan. 20, 2021), and the more recent Executive Order 14091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 88 FR 10825 (Feb. 16, 2023), and stated that the agencies have not considered these underserved populations and that this rule is evidence that these Executive Orders were not considered in the rule-making process. Commenters more broadly criticized the rule as "betraying promises" made in the Executive Orders because they believe the rule will have a disproportionate effect on certain groups of noncitizens and argued that the rule is generally out of line with the Executive Orders. Commenters also suggested that "[o]verly relying on the [CBP One] app . . . will significantly thwart the Biden administration's stated commitment to racial justice and equity." Commenters further stated that the rule undermines the commitment in the Executive Orders and "will endanger Black, Brown, and Indigenous asylum seekers." Commenters asserted that the rule "will perpetuate systemic and institutional racism and injustice," noting concerns about the accessibility of the CBP One app for those who speak languages other than English, Spanish, and Haitian Creole; "the app's widely reported misidentification of people of color"; the exacerbation of "existing discrepancies in outcome[s] for individuals without legal representation"; and the "further solidif[ication of] inequities and injustice in our immigration system."

Response: On President Biden's first day in office, January 20, 2021, he issued Executive Order 13985. On February 16, 2023, he issued Executive Order 14091, which reiterated the policy goals detailed in Executive Order 13985 and discussed the ways in which those policy goals had been furthered since that Executive Order. Both Executive Orders describe President Biden's policy of "advancing equity for all, including communities that have long been underserved, and addressing systemic racism in our Nation's policies and programs." 88 FR at 10825. As discussed throughout this preamble, the Departments have designed the rule to

include a tailored rebuttable presumption in order to address a specific problem along the SWB. As discussed in Section IV.B.4.vi of this preamble, the Departments do not have any discriminatory purpose in adopting the rule. The Departments have addressed concerns about the disparate impact of the rule on various communities in Section IV.B.4 of this preamble, the concerns relating to the CBP One app's liveness software are addressed in Section IV.E.3.ii of this preamble, and concerns about pro se individuals are discussed in Section IV.B.5.ii of this preamble. Finally, as discussed in Section IV.E.3 of this preamble, the rule provides an exception to the application of the rebuttable presumption for those who appear at a POE without a pre-scheduled appointment and for whom scheduling an appointment was impossible due to a language barrier. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B).

5. Other Comments on Legal Authority

Comment: One commenter noted that the proposed rule "is not a legislative act" and is instead subject to the Administrative Procedure Act, but "the persons to whom the rule applies are excluded from appearing within the USA to challenge the administrative requirement for exhaustion of remedies."

Response: The Departments agree that this rule is not a legislative act but instead the promulgation of agency regulations pursuant to the APA. The Departments disagree that the rule implicates or changes the exhaustion requirements in administrative law. The Departments note that the rule does not apply to noncitizens in other countries; the rule only applies to noncitizens who enter the United States and thereafter file applications for asylum. Put differently, it will only apply to noncitizens within the United States, who are not precluded from filing an APA challenge by virtue of being outside of the United States, but who may be limited in the types of challenges they can bring to its application during the credible fear process under section 242(e) of the INA, 8 U.S.C. 1252(e). The Departments further note that noncitizens who avail themselves of a lawful pathway to enter the United States will not otherwise need to address the provisions of this rule, as any subsequently filed asylum application will not be subject to the

rebuttable presumption. Any noncitizen subject to the rebuttable presumption will be able to address its application to them and any applicable exceptions or rebuttal grounds before an AO or IJ, and in any available administrative appeal. Thus, the commenter's concern about being able to bring an APA challenge from a foreign jurisdiction are unfounded.

Comment: Commenters stated that litigation over and injunctions against the rule would only exacerbate the confusion at the SWB.

Response: As explained previously in Section IV.D of this preamble, the Departments believe this rule is lawful and that it should not be subject to an injunction or otherwise halted in litigation. To the extent it is possible that the rule will be halted or enjoined, the Departments believe the risks are outweighed by the need to ensure safe and orderly processing at the SWB.

Comment: Commenters stated that the proposed rule was silent as to retroactive applicability and urged the Departments to "make an affirmative pronouncement" that the rule will not apply retroactively. Commenters were specifically concerned about the rule applying to "anyone whose latest entry into the United States was prior to the effective date(s) of the rule," which commenters stated is required by section 551(4) of the APA, 5 U.S.C. 551(4). Commenters further raised concerns that application of the rule to those who enter before its effective date would "infringe upon due process rights."

Response: As written, the rule will not apply to anyone who enters the United States before the rule is effective. The Departments believe the NPRM's proposed language and the final language in this rule clearly provide that the rebuttable presumption may only be applied to those who enter the United States between the rule's effective date and a date 24 months later. *See* 8 CFR 208.13(f), 208.33(a)(1)(i), 1208.13(f), 1208.33(a)(1)(i). The Departments decline to address the applicability or requirements of due process or the APA in this regard because the rule is explicit that it is only potentially triggered by entries that take place after its effective date.

Comment: A commenter argued that the proposal fails to account for "refugees'" reliance interests. The commenter wrote that refugees have an interest and right against refoulement and

in the United States upholding domestic and international refugee law generally. The commenter argued that the Departments only have "circumscribed" discretion in administering asylum, citing INA 208, 8 U.S.C. 1158, and case law on establishing refugee status, and thus that refugees have a cognizable reliance interest in asylum.

Response: As described earlier in Section IV.D.3 of this preamble, the United States implements its non-refoulement obligations through statutory withholding of removal, not asylum. Thus, it is incorrect to suggest that the non-refoulement obligations can raise a reliance interest in asylum. Additionally, asylum is a discretionary form of relief to which no applicant is entitled. *See* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) ("The Secretary of Homeland Security or the Attorney General may grant asylum . . . ."). Although "longstanding policies may have 'engendered serious reliance interests that must be taken into account,'" *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (quoting *Fox Television*, 556 U.S. at 515), the commenter does not explain in what way noncitizens who are outside the United States have relied upon U.S. asylum law. To the extent noncitizens outside the United States have any cognizable reliance interests in the current rules governing asylum, the Departments believe those interests would be outweighed by the interest in incentivizing noncitizens to pursue safe, orderly, and lawful pathways to seek protection, and preventing a potential surge of migration at the southern border that threatens to overwhelm the Departments' ability to process asylum claims in a safe and orderly manner.

Comment: Commenters stated that the rule would violate the *Pangea* injunction. *See Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966 (N.D. Cal. 2021).

Response: The court's order preliminarily enjoining the implementation of Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (December 11, 2020) ("Global Asylum Rule") and related policies in *Pangea II*, 512 F. Supp. 3d 966, does not prohibit the Departments from issuing this rule or otherwise limit the Departments' discretionary authority to adopt new asylum limitations consistent with section 208(b)(2)(C) of

the INA, 8 U.S.C. 1158(b)(2)(C). *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 281–82 (1974) ("The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the [alleged wrongful conduct] itself."); *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994); *see also Thomas v. Cty. of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1992) (reversing injunction that "fail[ed] to specify the act or acts sought to be restrained as required by" Federal Rule of Civil Procedure 65(d)).

E. Comments on the Rule Provisions

1. General Feedback on the Rebuttable Presumption of Ineligibility

Comment: Commenters expressed concern that the requirements to overcome the presumption would deprive asylum seekers of a meaningful opportunity to seek protection, subject them to removal if they could not meet the elevated standard for statutory withholding of removal, and put them at risk of violence or other harmful conditions. Commenters said that the proposed rule would require noncitizens to gather evidence and present arguments to rebut the presumption against asylum eligibility, establish an exception, or prove that they are not subject to the rule. Some said it would be difficult or impossible for noncitizens arriving at the SWB to do so, given that most are detained during credible fear proceedings; that they may lack access to supporting documentation; that CBP officers may confiscate their property; and that the determination is made in a single interview. Therefore, commenters stated, the rule would categorically deny relief, bar asylum, or result in "automatic ineligibility" for most or all noncitizens who would be subject to it. Commenters stated that noncitizens would be at the mercy of the AOs' credibility assessment and discretion. Some commenters said there was no indication that AOs would have to elicit relevant testimony and suggested this requirement should be included in the rule. One commenter wrote that individuals who have previously experienced any of the per se exemptions for rebuttal may still be experiencing long-lasting effects that limit their ability to rebut the presumption in the present. A commenter stated that

children and families would be unable to rebut the presumption due to limited language access, absence of legal counsel, and having their belongings confiscated.

Some commenters said that the grounds for rebutting the presumption against asylum eligibility were too narrow, limited, or extreme and did not relate to the merits of an asylum claim; they recommended that the grounds be expanded. One commenter stated that the current examples of exceptionally compelling circumstances would not protect the vast majority of refugees who would qualify for asylum under U.S. law, including many who enter the United States without an appointment due to safety risks, medical issues, and other protection needs. Some stated that narrow terms like "exceptionally compelling," "imminent and extreme," and "severe" made the presumption too difficult to rebut, while others expressed concern about the perceived vagueness of these terms and said the rule provided inadequate guidance on them. One commenter wrote that the nature of the grounds and exceptions make them inherently difficult to corroborate with physical evidence. One commenter expressed concerns that the proposed means of rebuttal do not reference a subjective component, such as where the asylum seeker believed they faced an acute medical emergency or imminent and extreme threat. A legal services provider compared the proposed rule to the one-year deadline to apply for asylum and stated that the one-year deadline allows for even greater opportunities for rebuttal by allowing an individual to show a number of exceptional circumstances beyond those in the NPRM. Some commenters expressed concern about possible lack of clarity in the evidentiary requirements to rebut the presumption against asylum eligibility. Some stated that the lack of definitions and documentary evidence requirements in the NPRM would leave the adjudicator with an inordinate amount of discretion to decide whether the presumption had been rebutted. Some commenters urged the Departments to reverse the presumption or apply a rebuttable presumption of eligibility for torture survivors.

Response: The Departments acknowledge these concerns but disagree with them. As discussed throughout Section IV.B.5 of this preamble, AOs conducting credible fear interviews

have an affirmative duty to elicit all testimony relevant to assessing eligibility for protection, which will necessarily include testimony relevant to the rebuttable presumption.[204] Similarly, credible fear review by an IJ "include[s] an opportunity for the alien to be heard and questioned by the [IJ]." INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). In section 240 proceedings, IJs have a duty to develop the record, which again will necessarily include facts and testimony relevant to the rebuttable presumption. 8 CFR 1003.10(b) ("[IJs] shall administer oaths, receive evidence, and interrogate, examine, and cross-examine aliens and any witnesses."); *Quintero v. Garland*, 998 F.3d 612, 626 (4th Cir. 2021). A noncitizen may be able to satisfy their burden of proof through credible testimony alone, INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii), and the rule does not require any particular evidence, including documentary evidence, to rebut or establish an exception to the presumption under 8 CFR 208.33(a) and 1208.33(a).

The Departments believe that the exceptions to and means of rebutting the presumption are appropriate in scope and detail and that they need not be expanded by, for example, incorporating means of rebuttal similar to the exceptions to the one-year deadline for applying for asylum. To the extent that, at the time of entry, a noncitizen reasonably believed that they faced an acute medical emergency or imminent and extreme threat to life or safety, the rule permits adjudicators to consider whether this situation may constitute an "exceptionally compelling circumstance[.]" 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i). As to concerns about disparate application amongst AOs, all credible fear determinations undergo supervisory review to ensure consistency, 8 CFR 208.30(e)(8), and noncitizens can request IJ review of a negative determination, 8 CFR 208.33(b), 1208.33(b). Determinations made by IJs in section 240 proceedings, including determinations about the presumption, are subject to review by the BIA. *See* 8 CFR 1003.1(b). Comments regarding AO and IJ conduct and training are further

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[204] USCIS, *Eliciting Testimony*; USCIS, *Non-Adversarial Interview* 13 ("You control the direction, pace, and tone of the interview and have a duty to elicit all relevant testimony.").

addressed in Section IV.B.5.iii of this preamble. The Departments decline to "reverse" the presumption of ineligibility for certain cases, which would function as an additional exception to the rule and undermine the rule's goal of incentivizing 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. However, even if ineligible for asylum due to the presumption against asylum eligibility, noncitizens who establish a reasonable possibility of persecution or torture, 8 CFR 208.33(b)(2)(i), 1208.33(b)(2)(ii), remain eligible to apply for statutory withholding of removal and protection under the CAT. 8 CFR 208.16.

Comment: Commenters expressed opposition to the proposed requirement that noncitizens satisfy the preponderance of the evidence standard to rebut the presumption of ineligibility. Commenters stated that using the preponderance of the evidence standard violates section 235(b)(1)(B)(v) of the INA, 8 U.S.C. 1225(b)(1)(B)(v), by imposing a different, higher standard than the "significant possibility" standard. Citing a 1996 statement from U.S. Senator Orrin Hatch, one commenter stated that the application of the "preponderance of the evidence" standard during the credible fear stage was considered and rejected by Congress and that the Departments lack the authority to resurrect and implement that standard through regulation. Some commenters emphasized that the "significant possibility" standard is an intentionally low screening standard for credible fear interviews established by Congress. Some commenters stated that the "preponderance of the evidence" standard is even higher than the "reasonable possibility" standard to show a well-founded fear, which in turn is higher than the "significant possibility" standard. Some commenters stated that the "preponderance of the evidence" standard imposes too high a burden on noncitizens in credible fear proceedings. Commenters said it would be particularly difficult for detained, unrepresented individuals to satisfy this burden or that the rule would be hardest on disadvantaged noncitizens. One commenter recommended that this heightened standard of proof not be implemented and that the existing

standard of proof be revised for consistency with international norms to exclude only cases that are "manifestly unfounded or clearly abusive."

Response: Commenters' concerns are based on an incorrect premise. At the credible fear stage, AOs will apply the "significant possibility" standard in assessing whether a noncitizen may ultimately rebut the presumption of asylum ineligibility by a preponderance of the evidence during a full merits adjudication. Because the "significant possibility" standard is set by statute, *see* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), the Departments lack the authority to alter it through rulemaking. For further discussion of this issue, see Section IV.D.1.iii of this preamble.

Comment: Commenters stated that applying the rule's presumption of ineligibility at the credible fear stage is different from how other eligibility bars function in credible fear determinations. Some commenters stated that the complex means of rebuttal would require a lengthy, fact-based interview and "intensive factual analysis," which they claimed are not appropriate for credible fear interviews because those interviews offer insufficient procedural protections. Another commenter stated that the Departments recently recognized due process problems with this approach when they rescinded the requirement that certain mandatory bars to asylum be considered at the credible fear screening stage.

One commenter expressed concern with the perceived discretion of border officials during the proposed rebuttable presumption process, asserting that the NPRM gave no clear indication of how, when, or in front of whom the asylum seeker will have to present their evidence. One commenter stated that DHS has a poor track record of making similar determinations in the past, citing instances where noncitizens were erroneously enrolled in the MPP, and stated that DHS has historically failed to effectively screen asylum seekers for certain characteristics and processes. One commenter stated that, under the NPRM, AOs would determine whether individuals presented at the SWB without documents sufficient for lawful

admission pursuant to section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), but that AOs do not receive the same training as CBP officers regarding that section.

Response: The Departments acknowledge that statutory bars to asylum eligibility have not historically applied at the credible fear stage. However, the Departments have authority to apply conditions on asylum eligibility at that stage. The INA authorizes AOs to assess whether there is a significant possibility that the noncitizen could establish eligibility for asylum, INA 235(b)(1)(v), 8 U.S.C. 1225(b)(1)(v), which may include additional eligibility conditions that the Departments establish by regulation, *see* 88 FR at 11742. Moreover, the Departments believe that the rebuttable presumption of ineligibility under this rule is less complex than the mandatory bars provided in section 208(b)(2)(A) of the INA, 8 U.S.C. 1158(b)(2)(A) (barring from asylum eligibility noncitizens (1) who have participated in persecution; (2) who have been convicted of a particularly serious crime; (3) for whom there are serious reasons to believe committed a serious nonpolitical crime; (4) for whom there are reasonable grounds to regard as a danger to the United States; (5) who are described under certain provisions relating to terrorist activity; or (6) who were firmly resettled before coming to the United States). Also, most of the facts relevant to the applicability of, exceptions to, and means of rebutting the presumption involve circumstances at or near the time of the noncitizen's entry. Because credible fear interviews occur near the time of entry when the events and circumstances giving rise to the presumption's exceptions and rebuttal grounds occur, the Departments believe noncitizens will have a sufficient opportunity to provide testimony regarding such events and circumstances while they are fresh in noncitizens' minds. Furthermore, delaying application of the presumption against asylum eligibility until the final merits stage would undermine the Departments' goals of incentivizing 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.

This rule provides that AOs and IJs, not CBP officers, will assess whether noncitizens are subject to the rule's presumption of asylum ineligibility and can rebut the presumption. 8 CFR

208.33(b), 1208.33(b). Also, the Departments note that the "significant possibility" standard applied at the credible fear stage is lower than the "more likely than not" standard that was used by DHS to assess whether a noncitizen could be returned to Mexico pursuant to the MPP.[205] The Departments disagree that the rule requires AOs to assess whether noncitizens are inadmissible under section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), and subject to expedited removal. CBP officers will continue to determine whether a noncitizen is subject to, and will be placed in, expedited removal.

Comment: Commenters stated that the term "rebuttable presumption" as used in the rule is misleading and inaccurate and that the rule instead creates an outright bar with exceptions.

Response: The Departments believe that the description of the rule's main provision as a rebuttable presumption accurately reflects the operation of that provision, including the availability of exceptions and bases to rebut the presumption. Unlike the TCT Bar Final Rule, which included only narrow, categorical exceptions to its application, under this rule, if the noncitizen is not exempted from this rule's application, the lawful pathways condition may be rebutted where the noncitizen demonstrates to the adjudicator's satisfaction that exceptionally compelling circumstances are present. *See* 8 CFR 208.33(a)(3), 1208.33(a)(3). Because a noncitizen to whom the condition applies and for whom an exception is not available under 8 CFR 208.33(a)(2), 1208.33(a)(2), may nevertheless avoid its effect in certain non-categorical circumstances, the Departments believe that referring to it as a "rebuttable presumption" is accurate.

2. Grounds for Rebutting the Presumption

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[205] USCIS, *PM 602-0169, Policy Memorandum: Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols* (Jan. 28, 2019), *https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf.*

i. Acute Medical Emergency

Comment: Commenters expressed concerns regarding the acute medical emergency means of rebuttal. One commenter asserted that this was a novel concept under immigration law and that the NPRM's description of this ground of rebuttal made clear that this standard is designed to be impossible to meet. Some commenters stated that the proposed rule failed to provide definitions or guidance to inform assessments of what constitutes an acute medical emergency. Some commenters wrote that this means of rebuttal should include non-life-threatening and other non-medical needs. One commenter, who is a doctor, stated that the definition of "medical emergency" should include curable conditions that would be fatal in the short term and conditions that could be commonly treated in the United States to restore health and function, assuming that sufficient care would not be available in the originating country. Commenters expressed concern regarding how people living with HIV will be assessed under this provision, given that their condition could lead to a life-threatening emergency without treatment. Commenters also expressed concern that the proposed rule gave inadequate consideration to the unique attributes of children's physical and mental health and noted that signs differentiating a child with illness from one with severe illness are quite subtle. Some commenters also expressed concern that the proposed rule would not require that children be assessed by trauma-informed physicians. Another commenter expressed concerns that the rule would not account for potential emergencies for pregnant women.

Some commenters stated that the "preponderance of the evidence" standard for establishing an acute medical emergency is too high. Commenters said that the rule did not explain how an individual would prove that their medical issue was "acute," and one stated that this determination is possible only after medical care is already being provided. Some commenters stated that noncitizens may lack medical documentation or knowledge of the severity of their condition and that AOs and IJs are not medical experts with the required expertise to evaluate these types of medical issues. Other commenters stated that the proposed

rule does not specify which officials will be making this determination or whether any medical training or expertise would be required. Commenters expressed concerns that asking immigration officials to make medical assessments would yield inconsistent application of the rebuttable presumption and undermine the welfare of asylum seekers. Commenters expressed concern that this means of rebutting the presumption would require noncitizens to share private details about their medical histories and bodies with a stranger on the phone. One commenter said that an individual may not know that they are suffering an acute medical emergency, while another stated that a noncitizen's medical condition could worsen by the time that the AO decides whether the presumption has been rebutted. Some commenters added that the rule should specify what would occur in scenarios where families rebut the presumption based on the acute medical emergency ground and the individual with the medical emergency subsequently dies or the individual lacks access to medical care to address their medical emergency.

Commenters said that CBP had denied Title 42 health exceptions to those with acute medical needs, despite extensive documentation of their conditions, which raised the concern that the term "acute medical emergency" would also be applied stringently under the rule. Another commenter stated that the rule would "restrict access to medical care and humanitarian aid if asylum seekers are denied by CBP," which would impede the gathering of evidence needed to rebut the presumption of asylum ineligibility.

Another commenter expressed concern that an acute medical emergency may also be easy to feign or fabricate, though the commenter did not provide any example of how that could be done.

Response: The Departments believe the acute medical emergency means of rebuttal at 8 CFR 208.33(a)(3)(i)(A) and 1208.33(a)(3)(i)(A), is drafted so that those noncitizens with acute medical emergencies can rebut the condition on asylum eligibility. In general, as stated in the NPRM, acute medical emergencies include situations in which someone faces a life-threatening medical emergency or faces acute and grave medical needs that they cannot adequately address

outside of the United States. *See* 88 FR at 11723. If a noncitizen rebuts the presumption based on the acute medical emergency of a family member with whom they were traveling, the noncitizen's eligibility for asylum will not change if the family member who faced the medical emergency subsequently passes away; this is because the language of the rebuttal circumstance focuses on whether the family member faced an acute medical emergency "at the time of entry." 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i).

The Departments believe that, in general, broadening this means of rebuttal would undermine the purpose of the rule, which is to incentivize noncitizens to utilize lawful, safe, and orderly pathways of migration. A medical condition that is not an acute emergency would not ordinarily or necessarily justify failing to pursue a lawful pathway. However, while an acute medical emergency is a per se example of an exceptionally compelling circumstance to rebut the presumption of ineligibility, AOs and IJs may determine, on a case-by-case basis, whether less severe health-related situations also qualify as "exceptionally compelling circumstances." *See* 8 CFR 208.33(a)(3), 1208.33(a)(3).

The Departments also disagree with comments concerning the ability of AOs and IJs to properly assess this rebuttal ground and the ability of noncitizens to establish it. As discussed in Section IV.D.1.iii of this preamble, AOs will apply the "significant possibility" standard during credible fear interviews to determine whether a noncitizen would be able to rebut the presumption because they faced an acute medical emergency at the time of entry. Again, the Departments emphasize that noncitizens may be able to rebut the presumption of asylum ineligibility through testimony alone, and the rule does not require any particular evidence to rebut the presumption under 8 CFR 208.33(a)(3) and 1208.33(a)(3). AOs are trained to elicit all relevant testimony in a non-adversarial manner, which will necessarily include testimony related to this ground for rebuttal.[206] As discussed earlier in Section IV.B.5.iii.a of this preamble, AOs

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[206] 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-*

frequently assess physical and psychological harm when adjudicating asylum applications and are trained to do so in a sensitive manner. As discussed in Section IV.B.5.iii.c of this preamble, the rule does not require adjudicators to make a formal medical diagnosis or analyze whether a noncitizen meets specific medical criteria to determine whether a noncitizen has rebutted the rule's condition on eligibility. Instead, adjudicators will make a factual determination of whether an acute medical emergency existed at the time of entry. 8 CFR 208.33(a)(3)(i)(A), 1208.33(a)(3)(i)(A). To the extent that a noncitizen experienced such a medical emergency during their time in CBP custody, AOs may be able to consult CBP records. Specifically, if a noncitizen experiences a medical issue during their time in CBP custody, CBP medical staff will evaluate the noncitizen, and, if appropriate based on the severity of the issue, refer them to a local medical facility. This treatment would be documented.[207] Regarding the concerns raised about sharing private medical details, noncitizens in credible fear proceedings, as discussed in Section IV.B.5.v of this preamble, are advised of the confidential nature of the interview. As noted earlier in Sections IV.B.5.i and IV.E.1 of this preamble, credible fear determinations undergo multiple levels of review to ensure consistency, and decisions made in section 240 proceedings are subject to administrative appeal.

The Departments note that, like all exceptionally compelling circumstances, AOs in credible fear proceedings or IJs in immigration court, not CBP officers at POEs, will determine whether a noncitizen faced an acute medical emergency. Accordingly, to the extent commenters are concerned by how CBP officers have considered medical issues in the context of the application of the Title 42 public health Order, such concerns are inapplicable to this rule. Additionally, CBP will process all noncitizens who arrive and seek admission at a POE without regard to whether the presumption may ultimately be found to apply.

Adversarial Interview 13 ("You control the direction, pace, and tone of the interview and have a duty to elicit all relevant testimony.")

[207] CBP, *Directive 2210-004, Enhanced Medical Support Efforts* (Dec. 31, 2019), *https://www.cbp.gov/document/directives/directive-2210-004-cbp-enhanced-medical-efforts*.

Regarding concerns of fraud, the commenter did not provide any explanation or example of how an acute medical emergency would be easy to fabricate, and AOs and IJs will assess the credibility of any claims that the noncitizen faced an acute medical emergency. INA 208(b)(1)(B)(2), 8 U.S.C. 1158(b)(1)(B)(2); INA 240(c)(4)(B), 8 U.S.C. 1229a(c)(4)(B); 8 CFR 208.30(e)(2).

ii. Imminent and Extreme Threat to Life and Safety

Comments: Commenters expressed concern over the high level of risk required to rebut the presumption based on an imminent and extreme threat to life and safety. Some commenters stated this means of rebuttal requires a higher degree of risk than is required for eligibility for asylum or statutory withholding of removal. One commenter stated that it would require migrants to "predict the future" in deciding whether to wait for an appointment at the border, which can be dangerous because violence happens randomly and unexpectedly. Some said that, if an asylum seeker is forced to remain in Mexico until a threat is imminent, it may well be too late to avoid such harm, thus putting the person in a "catch-22." A commenter stated that the rule appears to exclude anyone who has already been gravely harmed while in Mexico but who cannot prove that another harm is "imminent," while others recommended that if an individual circumvents other pathways to cross the U.S.-Mexico border due to the severity of past threats or harms, the "imminent and extreme threat" ground should automatically apply. Another commenter stated that, due to the complicated and lengthy regulatory definition of torture, that term should be replaced with "severe pain or suffering."

Commenters also expressed concern about the ability for specific populations to meet this rebuttal ground. Commenters stated that the rule forces LGBT and HIV-positive people, who already face significant hostility in Mexico, to put themselves in even worse danger to satisfy the imminence requirement of the "imminent and extreme" ground for rebuttal. Commenters wrote that this rebuttal ground should be broadened so that adjudicators may favorably consider circumstances involving threats to life or safety that might not necessarily be considered

imminent or extreme. For example, one commenter noted that there are many forms of gender-based harm that are unlikely to meet the requirement that the threat to life or safety is "imminent and extreme" because such forms of harm are not always highly violent acts. One commenter wrote that pervasive discrimination or physical abuse—as, for example, experienced by LGBT individuals in Mexico, where discrimination against such persons is still commonplace—would not meet the threshold of "imminent and extreme threat to life and safety" if experienced in either a transit country or their home country. The commenter also stated that individuals forced to hide their identity to avoid discrimination would be hindered in their ability to meet this ground for rebuttal.

Commenters expressed concern that noncitizens would not have sufficient evidence to show an "imminent and extreme" threat to rebut the presumption. Similar to their comment regarding the "acute medical emergency" means of rebuttal, one commenter asserted that the "imminent and extreme" threat means of rebuttal is a novel concept under immigration law and that the description of this ground of rebuttal in the NPRM made clear that this standard is designed to be impossible to meet. One commenter stated that proving a specific threat may be near impossible because individualized threats are frequently made orally and in person, not in writing, and hence are not amenable to proof in a formalized setting. The commenter also stated that such threats are usually directly followed by the harm itself. One commenter wrote that the most deserving individuals in the asylum process will be hard-pressed to produce evidence of an "imminent threat" because persecution frequently does not leave documentary evidence. A few commenters emphasized that survivors of sexual assault would face extreme difficulty in obtaining documentation to meet the evidentiary burden from another country unless they had others assisting them; some survivors, for example, may have only their own account of the assault. A legal services provider expressed concern that survivors of violence would not necessarily have the proof, language, or support needed to explain what imminent danger they

faced, leading to the denial of bona fide asylum claims and the refoulment of individuals facing extreme persecution.

Commenters expressed concerns that the lack of definition of an "extreme and imminent threat to life or safety" left adjudicators with an inordinate amount of discretion. One commenter stated that asylum seekers in Mexican border regions so often face a serious risk to their safety that it is unclear what an asylum seeker would need to show to establish an "imminent and extreme" threat to life. Commenters expressed concern that this ground of rebuttal calls for a subjective assessment of the temporality and qualitative extremity of the threats faced by asylum seekers, which may exclude many genuine refugees.

Other commenters stated concerns that this means of rebuttal was overly broad or would lead to fraud. One commenter said that AOs and IJs would have difficulty determining whether someone has fabricated evidence to support a claim that they faced an imminent threat to life or safety, especially when strong evidence exists that migrants who travel to the U.S.-Mexico border by way of smuggling networks are frequently subject to such violence. Another commenter stated that the journey to the southwest border of the United States is inherently a journey where migrants will face extreme threats to life and safety from beginning to end; adding this means of rebuttal would thus exempt the entire population of migrants who have traveled with the assistance of smugglers and other criminal enterprises.

Response: The Departments acknowledge these concerns but believe that only imminent and extreme threats to life or safety should constitute a per se ground to rebut the presumption of asylum ineligibility. For threats that are less imminent or extreme, noncitizens may attempt to demonstrate on a case-by-case basis that they otherwise present "exceptionally compelling circumstances" that overcome the presumption of ineligibility. Including lesser threats in the per se grounds for rebuttal would undermine the Departments' goal of incentivizing migrants 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.

As noted in the NPRM, threats cannot be speculative, based on generalized concerns about safety, or based on a prior threat that no longer posed an immediate threat at the time of entry. 88 FR at 11707 n.27. The term "extreme" refers to the seriousness of the threat; the threat needs to be sufficiently grave, such as a threat of rape, kidnapping, torture, or murder, to trigger this ground for rebuttal. *Id.* Where the noncitizen is a member of a particularly vulnerable group (e.g., LGBT or HIV-positive people), their membership in such a group may be a relevant factor in assessing the extremity and immediacy of the threats faced at the time of entry. In response to the recommendation that the word "torture" be replaced with "severe pain and suffering," the Departments note that the imminent and extreme threats to life and safety listed in the rule are not exhaustive and that this means of rebuttal may in certain circumstances encompass imminent and extreme threats of severe pain and suffering.

The Departments disagree that noncitizens will have to "predict the future" to rebut the presumption against asylum in this manner. For this per se rebuttal ground to apply, the noncitizen must demonstrate there was an imminent and extreme threat to life or safety, not that the feared harm was actively taking place or certain to occur. *See* 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B). The Departments also note that "imminent" and "extreme" are standards that are commonly used in asylum adjudications. *See, e.g.*, *Fon v. Garland*, 34 F.4th 810, 813 (9th Cir. 2022) ("[P]ersecution is an extreme concept" (quoting *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995))); *Li v. Att'y Gen. of U.S.*, 400 F.3d 157, 164 (3d Cir. 2005) ("[U]nfulfilled threats must be of a highly imminent and menacing nature in order to constitute persecution" (citing *Boykov v. INS*, 109 F.3d 413, 416–17 (7th Cir. 1997))). As already discussed in Section IV.E.1 of this preamble, noncitizens may be able to rebut the presumption against asylum eligibility through credible testimony alone. In response to commenter concerns about inconsistent application of the rule, the Departments note that an AO's decision is subject to supervisory and potentially IJ review, and determinations made in section 240 proceedings may be administratively appealed.

The Departments acknowledge commenters' concern about fraud, but during credible fear screenings, AOs will assess the credibility of a noncitizen's testimony regarding dangers faced at the time of entry, which will necessarily include an evaluation of the whether a claimed threat is fraudulent. As discussed earlier in Section IV.D.1.iii of this preamble, whether a noncitizen is able to establish an exception to the rule or rebut the presumption will generally involve a straightforward analysis, and the Departments expect that, except in rare cases, application of the "significant possibility" standard will not meaningfully differ from application of the ultimate merits standard. The Departments believe that this ground of rebuttal is sufficiently narrow to prevent broad application to all citizens who attempt to enter the United States from Mexico across the SWB or adjacent coastal borders.

iii. Other Exceptionally Compelling Circumstances

Comment: Some commenters stated that the provision allowing a noncitizen to show "exceptionally compelling circumstances" to rebut the presumption was not sufficiently defined and hence that applying it would lead to disparate results amongst adjudicators. One commenter stated that the rule does not clarify whether the exceptionally compelling circumstance must be one that prevented the asylum seeker from scheduling an appointment or whether it may be an equitable factor that mitigates in favor of granting humanitarian protection. Another commenter expressed concerns that the adverb "exceptionally" is redundant or excessive and would result in different interpretations by adjudicators. The same commenter stated that applying the term "exceptionally compelling circumstances" would also be difficult because the term is rarely used in immigration law and is restrictively defined by the Departments.

While some commenters expressed concern that requiring noncitizens to show "exceptionally compelling circumstances" by a preponderance of the evidence would be too demanding of a standard, which they asserted renders the provision inaccessible to many asylum seekers and will result in unfair denials, other commenters claimed that the standard would, in practice, allow for any official to create an exemption for any reason.

Response: The Departments respectfully disagree with commenters' concerns about the "exceptionally compelling circumstances" standard being insufficiently defined or not amenable to consistent determinations. The rule provides that a noncitizen necessarily demonstrates exceptionally compelling circumstances if, at the time of entry, they or a family member with whom they were traveling (1) had an acute medical emergency; (2) faced an imminent and extreme threat to life or safety; or (3) satisfied the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11. *See* 8 CFR 208.33(a)(3), 1208.33(a)(3). The non-exhaustive nature of this list preserves flexibility and ensures that the rule does not foreclose adjudicators from considering facts giving rise to exceptionally compelling circumstances.

The Departments emphasize that exceptionally compelling circumstances are not limited to the examples enumerated in 8 CFR 208.33(a)(3)(i) and 1208.33(a)(3)(i). In fact, the rule recognizes additional per se exceptionally compelling circumstances in section 240 removal proceedings to, along with other provisions in the rule, eliminate the possibility that this rule will cause separation of family members who traveled together or long-term separation that would result by preventing family members from following to join principal applicants who would be granted asylum but for the presumption. 8 CFR 1208.33(c).

The Departments also note that AOs and IJs regularly apply various standards in the course of their adjudications, such as the "extraordinary circumstances" standard to determine whether an asylum applicant qualifies for an exception to the one-year filing deadline, *see* INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D), and the discretionary "compelling reasons" standard to determine whether an applicant who has suffered past persecution but lacks a well-founded fear of future persecution should be granted asylum in the exercise of discretion, *see* 8 CFR 208.13(b)(1)(iii)(A); 1208.13(b)(1)(iii)(A). Hence, although the Departments acknowledge the concerns of some commenters about noncitizens' ability to demonstrate "exceptionally compelling circumstances," the Departments believe that the best way to assess the variety of fact patterns presented by noncitizens is to use a fact-specific approach on a case-by-case basis.

Using this fact-specific approach on a case-by-case basis is consistent with other aspects of asylum adjudication, such as establishing an exception to the one-year filing deadline, *see* INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D), determining whether harm rises to the level of persecution, *see Stevic*, 467 U.S. at 423 n.18, or determining whether an individual was harmed on account of a protected ground, *see* 8 CFR 208.13(b)(1).

AOs receive extensive training that is designed to enable them to conduct non-adversarial interviews, assess testimony, and exercise their judgment in a fair and impartial manner.[208] Likewise, IJs have extensive experience and training in applying such concepts to individual cases.[209] Accordingly, the Departments strongly believe that IJs and AOs will fairly and competently examine the facts and circumstances of an individual's case to determine whether they demonstrated exceptionally compelling circumstances to rebut the lawful pathways presumption of asylum ineligibility. In response to commenter concerns about consistency of determinations, credible fear determinations, as noted above, are subject to review by a Supervisory AO, and determinations made in section 240 proceedings are subject to administrative appeal.

iv. Victim of Severe Form of Trafficking in Persons

Comment: A number of commenters stated concern about noncitizens' ability to rebut the presumption by satisfying the definition of a "victim of a severe form of trafficking in persons." Some commenters stated that trafficking victims cannot be expected to have evidence prepared to demonstrate, by a preponderance of the evidence, that they were trafficked. A few

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[208] *See* USCIS, *Non-Adversarial Interview*.

[209] *See* 8 CFR 1003.0(b)(1)(vii) (EOIR Director's authority to "[p]rovide for comprehensive, continuing training and support" for IJs); 8 CFR 1003.9(b)(1) and (2) (Chief Immigration Judge's authority to issue "procedural instructions regarding the implementation of new statutory or regulatory authorities" and "[p]rovide for appropriate training of the [IJs] . . . on the conduct of their powers and duties"); DOJ EOIR, *Legal Education and Research Services Division* (Jan. 3, 2020), *https://www.justice.gov/eoir/legal-education-and-research-services-division* ("The Legal Education and Research Services Division (LERS) develops and coordinates headquarters and nationwide substantive legal training and professional development for new and experienced judges, attorneys, and others within EOIR who are directly involved in EOIR's adjudicative functions. LERS regularly distributes new information within EOIR that includes relevant legal developments and policy changes from U.S. government entities and international organizations.").

commenters expressed concern that it would be very difficult for the population that is vulnerable to trafficking to rebut the presumption due to lack of evidence and the exemption being narrowly applied. Others stated that the NPRM's reference to 8 CFR 214.11, which defines victims of severe forms of trafficking, was not sufficiently specific. Some commenters wrote that this ground of rebuttal should be broadened to apply to circumstances in which individuals may be at risk of trafficking and to apply regardless of severity. One commenter stated that the victims of trafficking rebuttal ground is very narrow and fails to take into account the many other forms of gender-based persecution, including domestic violence, sexual assault, stalking, female genital cutting, and forced marriage. A few other commenters expressed concerns that officials may retraumatize individuals in the process of validating a claim for rebutting the presumption and may end up returning them to their traffickers if they find that the noncitizen did not rebut the presumption of asylum ineligibility. One commenter wrote that, because the severity of human trafficking is hard to "grade," it is important to apply the broadest understanding of new trends and definitions provided under the universal human rights instruments to prevent underreporting and insufficient identification of victims of this human rights violation.

One commenter wrote that the definition of "victim of a severe form of trafficking" is highly technical and requires a thorough analysis of several components usually (in the T nonimmigrant status context, from which the definition derives) completed after review of a complete application package, including extensive supporting evidence and briefing prepared by legal counsel. The same commenter added that a survivor presenting at the border under the circumstances described above is unlikely to be able to meet this standard. Some commenters stated that the rule would force trafficking victims to rebut the presumption at a higher legal standard—preponderance of the evidence—rather than "any credible evidence" as would be required if they were already in the United States and applying for T nonimmigrant status.

One commenter stated that the Departments should remove the trafficking rebuttal ground because migrants who voluntarily utilized smugglers would falsely claim to have been trafficked to qualify for the exception.

Response: The Departments acknowledge commenters' concerns about victims of human trafficking but disagree that the existing rebuttal ground should be revised or expanded. As described in the NPRM, *see* 88 FR at 11730, the presumption in this rule is necessarily rebuttable in certain circumstances, including if, at the time of entering the United States, the noncitizen satisfied the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11. *See* 8 CFR 208.33(a)(3)(i)(C), 1208.33(a)(3)(i)(C). The Departments disagree with the premise that this rule's reference to the definition of "victim of a severe form of trafficking in persons" found in 8 CFR 214.11 is insufficiently specific. This final rule relies upon, and is consistent with, the definition used in the T nonimmigrant status context, which itself is consistent with the applicable statutory definition.[210]

The Departments also emphasize that they are not applying the "preponderance of the evidence" standard to trafficking victims who are initially seeking to rebut the lawful pathways presumption during credible fear screenings. The standard of proof applied in credible fear screening is a "significant possibility . . . that the alien could establish eligibility for asylum," INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), which also applies to "exceptionally compelling circumstances." During credible fear screenings, then, a noncitizen would have to show a significant possibility that they could satisfy the definition of victim of a severe form of trafficking by a preponderance of the evidence in a full hearing. The Departments recognize that many victims of trafficking are unlikely to possess written evidence of their trafficking; however, the credible fear screening process involves eliciting testimony from individuals seeking protection and does not require noncitizens to provide written statements or other documentation. *See* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); 8 CFR 208.30(d). Moreover, the Departments

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[210] *See* 8 CFR 214.11(b) (cross-referencing INA 101(a)(15)(T)(i), 8 U.S.C. 1101(a)(15)(T)(i)).

note that, in addition to receiving extensive training in substantive law and procedure, AOs are also trained to identify and interview vulnerable individuals, including victims of trafficking.[211] For merits adjudications, both AOs[212] and IJs[213] receive training and have experience assessing evidence and the credibility of noncitizens who appear before them for interviews or hearings, even in the absence of other documentation. Indeed, the INA explicitly provides that "testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration." INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii).

With respect to the commenter's suggestion that the Departments should remove the trafficking-victims ground for rebuttal because the commenter believed that noncitizens who are smuggled will falsely claim they are trafficked, the Departments strongly believe it is important to treat trafficking as an exceptionally compelling circumstance. The Departments included this provision to allow this vulnerable population to rebut the lawful pathways presumption and seek protection in the United States. The Departments note that the commenter did not include any reliable evidence or data to support their allegation that individuals who are smuggled will falsely claim to be trafficked. In addition, the TCT Bar IFR also included a limited exception for victims of severe forms of trafficking, and the Departments are unaware of evidence that it was abused while that IFR was in effect.

Commenters' suggestions regarding broadening the grounds to rebut the presumption are addressed below in Section IV.E.3 of this preamble.

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[211] *See* USCIS, *RAIO Directorate – Detecting Possible Victims of Trafficking Lesson Plan* (Dec. 20, 2019), *https://www.uscis.gov/sites/default/files/document/foia/Trafficking_LP_RAIO.pdf*; *see also* USCIS, *Asylum Division Training Programs* (Dec. 19, 2016), *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-division-training-programs*.

[212] USCIS, *RAIO Directorate—Officer Training: Decision Making* (Dec. 20, 2019), *https://www.uscis.gov/sites/default/files/document/foia/Decision_Making_LP_RAIO.pdf*.

[213] *See* 8 CFR 1003.0(b)(1)(vii) (EOIR Director's authority to "[p]rovide for comprehensive, continuing training and support" for IJs); 8 CFR 1003.9(b)(1) and (2) (Chief Immigration Judge's authority to issue "procedural instructions regarding the implementation of new statutory or regulatory authorities" and "[p]rovide for appropriate training of the [IJs] . . . on the conduct of their powers and duties"); DOJ EOIR, *Legal Education and Research Services Division* (Jan. 3, 2020), *https://www.justice.gov/eoir/legal-education-and-research-services-division* ("[LERS] develops and coordinates headquarters and nationwide substantive legal training and professional development for new and experienced judges, attorneys, and others within EOIR who are directly involved in EOIR's adjudicative functions. LERS regularly distributes new information within EOIR that includes relevant legal developments and policy changes from U.S. government entities and international organizations.").

3. Exceptions to the Presumption

i. Proposed Exceptions for Migrants Facing Danger in Third Countries

Comment: Commenters expressed concern that the rule contains no exceptions for asylum seekers who would face danger in transit countries even though many asylum seekers are at serious risk in common transit countries. Multiple commenters suggested that the exemption for imminent threat of rape, kidnapping, torture, or murder should be expanded to include general threats of violence, as many individuals within the asylum process would be forced to stay in Mexico or other countries where general threats of violence are much more common and put their lives or safety at risk. Another commenter stated that, when asylum seekers are waiting in some of the most dangerous towns and cities in the world, they face real threats that the rule should recognize as an exception to the presumption.

Several commenters noted that the members of one family, when using the Title 42 exception process, tried to travel more than 1200 miles across Mexico and were kidnapped and taken hostage during that travel, only to be expelled from the United States when they sought help from the USBP. Another commenter noted that movement along the U.S.-Mexico border is notoriously difficult and unsafe. In contrast, one commenter stated that reports of localized violence in certain areas of Mexico are not indicative of the conditions in Mexico as a whole.

Response: The Departments acknowledge the concerns raised by commenters and reiterate that noncitizens who face an extreme and imminent threat to life or safety in Mexico at the time of entry can rebut the presumption of asylum ineligibility, *see* 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B), without needing to qualify for any additional exception. In addition, the rule provides that they may rebut the presumption by showing that, at the time of entry, they faced an acute medical emergency or were victims of a severe form of trafficking. *See* 8 CFR 208.33(a)(3)(i)(A) and (C), 1208.33(a)(3)(i)(A) and (C). However, the Departments decline to enumerate additional, broader ways to rebut the presumption, such as a ground based on general threats of violence; and the Departments likewise believe that they need not enumerate additional

exceptions to the presumption. In the absence of other exceptionally compelling circumstances, *see* 8 CFR 208.33(a)(3)(i), 1208(a)(3)(i), the Departments believe that danger in Mexico generally would justify failing to pre-schedule a time and place to appear at a POE and eschewing lawful and orderly pathways for entering the United States only when it amounts to an extreme and imminent threat to life or safety. For noncitizens who face dangers in other countries besides Mexico, or who face less imminent and extreme threats in Mexico, there ordinarily remain reasonable opportunities to take advantage of other lawful pathways contemplated by the rule. To the extent a noncitizen's individual circumstances make lawful pathways unavailable, or otherwise warrant rebuttal of the presumption, noncitizens may attempt to demonstrate as much on a case-by-case basis under the "exceptionally compelling circumstances" means of rebuttal. Noncitizens may choose to apply for asylum or other protection in a different country where they do not face dangers or schedule appointments to appear at a SWB POE using the CBP One app. CHNV nationals may also apply for advanced authorization for parole while outside their country of nationality. With regard to concerns about traveling along the U.S.-Mexico border to access available CBP One app appointments, CBP intends to increase the number of available appointments when the Title 42 public health Order is lifted, as detailed in Section IV.E.3.ii.a of this preamble. As detailed in Section IV.E.3.ii.b of this preamble, CBP is implementing updates to the CBP One app process that will enable noncitizens to request a preferred POE to schedule an appointment, thus helping noncitizens avoid unpredictable travel along the U.S.-Mexico border.

ii. Concerns about the Exception for Scheduled Arrivals at Ports of Entry

a. General Comments Regarding the CBP One app

Comment: One commenter, a legal services provider, expressed concern about the future impact of the CBP One app based on their experiences with the use of the app in the context of seeking Title 42 exceptions. Specifically, the commenter stated that the use of the app had barred "thousands" from seeking exceptions to the Title 42 public health Order. This commenter

stated that, before January 2023, it was able to schedule appointments for its clients with POEs directly, without using the app. The organization said that this process was "orderly and calm" and that clients rarely waited more than four to six weeks for an appointment. The organization stated that, following the implementation of the scheduling capability, many of their clients had been unable to secure appointments, and the process takes longer. The organization stated that CBP did not provide notice that the CBP One app would be the sole way to seek exceptions to Title 42.

Response: To the extent that commenters have concerns about the processing of individuals seeking exceptions to the Title 42 public health Order at POEs, including concerns about the number of appointments available under the Title 42 exception process, these concerns are outside the scope of this rule. This rule is designed to manage the anticipated increase in the number of individuals expected to travel to the United States without documents sufficient for lawful admission following the termination of the Title 42 public health Order and will take effect once the Title 42 public health Order is lifted. At that time, CBP will inspect and process all noncitizens who arrive at a POE under Title 8 authorities, which include the INA, as required by statute. Title 42 is a separate statutory scheme that operates separately from Title 8.

Additionally, following the termination of the Title 42 public health Order, CBP intends to increase the number of available appointments in the CBP One app and is committed to processing as many noncitizens as is operationally feasible. Further, in no instance will CBP turn a noncitizen away from a POE, regardless of whether they utilize the CBP One app.

Comment: Commenters expressed concern about the security of the personally identifiable information ("PII") that users submit through the CBP One app. A commenter asserted that the CBP One app poses serious privacy concerns regarding the collection, storage, and use of private personal information and alleged that requiring use of the CBP One app is "another means of enlarging what is an already expansive surveillance infrastructure that relentlessly targets immigrant communities." A commenter also stated that, while the

Departments have previously indicated that use of the CBP One app is voluntary, the rule will significantly expand use of the app, with the result that it will be the only way for certain noncitizens to seek asylum in the United States and thus that "many people do not have a genuine choice in whether to consent." Commenters questioned the wisdom of encouraging migrants to disclose personal details while in transit in temporary shelters and non-secure settings.

Particularly in light of a recent ICE data breach, commenters expressed concern about what measures CBP and DHS will take to secure the PII that applicants will have to provide in order to secure an appointment through the CBP One app. The commenters expressed concern that a similar breach regarding CBP One app data could place applicants waiting for appointments outside the United States at a greater risk than individuals affected by the recent breach, who were primarily in the United States. Commenters alleged that this risk could have a chilling effect on otherwise meritorious applications.

Commenters expressed a range of PII-related concerns regarding the use of the CBP One app in the context of asylum seekers and asylum applications. For example, a commenter expressed concern that use of the CBP One app and the need to rely on publicly accessible internet connections may violate 8 CFR 208.6, which establishes limits on the disclosure to third parties of information contained in or pertaining to records related to credible fear determinations, asylum applications, and similar records. Another commenter similarly noted that use of the app may be tracked by government officials or persecutors, placing migrants in further danger.

A commenter also expressed concern that the lack of privacy may be particularly harmful for those fleeing domestic violence and that use of a smart device to access the CBP One app may permit GPS tracking and put the noncitizen at heightened risk of being located by their abuser, as well as put them at risk of financial abuse. A commenter expressed concern that information provided by migrants through the CBP One app could be shared with law

enforcement agencies beyond CBP, which are not bound by CBP privacy and information-sharing policies. A few commenters expressed concern with requiring the use of a Login.gov account because the underlying provider for that site has a history of data breaches.

Response: The Departments disagree with the statement that migrants must use, or are unable to meaningfully consent to using, the CBP One app. While noncitizens who present at a POE without scheduling an appointment using the CBP One app will be subject to the rebuttable presumption unless otherwise excepted, noncitizens are not required to use the app in order to be processed at a POE.[214] The Departments note that the rebuttable presumption does not apply to noncitizens who either were provided authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process or who sought asylum or other protection in a country through which they traveled and received a final decision denying that application. 8 CFR 208.33(a)(2)(ii)(A) and (C), 1208.33(a)(2)(ii)(A) and (C). The presumption also does not apply to noncitizens who arrive at a port of entry without scheduling an appointment if the scheduling system was not possible to access or use due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B).

For those who choose to utilize the CBP One app to schedule an appointment, CBP has taken steps to protect users' information. First, in accordance with DHS policy, apps developed by DHS—including the CBP One app—must meet certain baseline privacy and security requirements.[215] These requirements include app-specific privacy and notice policies; limitations on the collection of sensitive content, including PII; and appropriate encryption for the transmission of data.[216] The app was reviewed for compliance prior to development and is

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[214] *See, e.g.*, CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 18 (Jan. 19, 2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf.*

[215] *See* DHS, *Instruction 047-01-003 (Rev. 00.1), Privacy Policy for DHS Mobile Applications* 7–10 (Dec. 14, 2018), *https://www.dhs.gov/publication/privacy-policy-dhs-mobile-applications.*

[216] *Id.*

reviewed again every time a change is made that impacts the collection and use of PII.[217] All CBP systems have undergone comprehensive testing and evaluation to assess the respective security features and have been granted an Authority to Operate ("ATO").[218] In particular, the app serves only as a tool for the collection of information.[219] Once the information is received, CBP temporarily retains the submitted CBP One app photographs of undocumented individuals within the Automated Targeting System ("ATS"). Upon an individual's arrival at a POE, the advance information is imported into a Unified Secondary ("USEC") event.[220] The information is then verified by an officer and stored as part of standard CBP processes.[221] All data in ATS and USEC is treated and retained in accordance with the relevant retention schedules.[222] These systems are subject to continuous evaluation of security protocols so that CBP may quickly respond if there is a change in the risk posture in any of the systems. The information CBP collects via the CBP One app and transmits to downstream systems is the same information CBP already collects when a noncitizen encounters a CBP officer at a POE—it is simply collected earlier to make processing at the POE more orderly and efficient.[223] CBP has published a Privacy Impact Assessment ("PIA") for the CBP One app generally and a standalone, function-specific PIA for the collection of advance information from certain undocumented noncitizens.[224]

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[217] *See id.* at 10.

[218] *See* DHS, *DHS 4300A Sensitive Systems Handbook* 47 (Nov. 15, 2015), *https://www.dhs.gov/publication/dhs-4300a-sensitive-systems-handbook*.

[219] *See* CBP, *DHS/CBP/PIA-068, Privacy Impact Assessment for CBP One™ Mobile Application* 4 (Feb. 19, 2021), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf*. CBP has updated this impact assessment multiple times since February 19, 2021.

[220] *See id.* at 15.

[221] *See* CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 11–12, 21 (Jan. 19, 2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf*.

[222] *See* CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 10, 13 (Jan. 19, 2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf*.

[223] *See id.* at 17–18.

[224] CBP, *DHS/CBP/PIA-068, Privacy Impact Assessment for CBP One™ Mobile Application* (Feb. 19, 2021), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf*; CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* (Jan. 19, 2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf*.

With regard to the commenters' concerns regarding privacy notices related to biometrics and facial recognition technology, CBP takes such concerns seriously. In the referenced GAO audit, GAO-20-568, GAO made five recommendations to CBP, with which CBP concurred. Three of the recommendations were related to privacy considerations, including (1) ensuring privacy notices are complete and current, (2) ensuring notices are available at all locations using facial recognition technology, and (3) developing and implementing a plan to audit its program partners for privacy compliance.[225] At the time of the publication of the NPRM, all of these privacy-related recommendations had been implemented, and the recommendations were closed by GAO.[226] CBP has since created a new website that outlines the locations (air, land, and seaports) where CBP uses facial comparison technology, and CBP continues to take steps to ensure that appropriate notice is provided to travelers.[227]

With regard to commenters' concerns about Login.gov, the Departments note that Login.gov is owned and operated by the General Services Administration ("GSA"),[228] and thus the Departments have no control over the data privacy or data security considerations of that platform. However, the Departments note that GSA has a system security plan for Login.gov, and Login.gov has an ATO.[229]

Comment: At least one commenter raised a concern that the CBP One app is an untested pilot program.

Response: The Departments respectfully disagree. The CBP One app was initially launched in October 2020 to serve as a single portal to access CBP services.[230] In May 2021,

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[225] *See* GAO, *Facial Recognition: CBP and TSA are Taking Steps to Implement Programs, but CBP Should Address Privacy and System Performance Issues* 72–73 (Sept. 2020), *https://www.gao.gov/assets/gao-20-568.pdf.*
[226] GAO, *Facial Recognition: CBP and TSA are Taking Steps to Implement Programs, but CBP Should Address Privacy and System Performance Issues*, *https://www.gao.gov/products/gao-20-568* (reporting on the changes that CBP made that resulted in closure of the recommendations).
[227] CBP, *Say Hello to the New Face of Speed, Security and Safety: Introducing Biometric Facial Comparison*, *https://biometrics.cbp.gov/* (last visited May 1, 2023).
[228] *See* GSA, *Privacy Impact Assessment for Login.gov* 1, 5 (Mar. 17, 2023), *https://www.gsa.gov/cdnstatic/Logingov_PIA_March2023.pdf.*
[229] *See id.* at 27.
[230] CBP, *CBP One™ Mobile Application* (Apr. 10, 2023), *https://www.cbp.gov/about/mobile-apps-directory/cbpone.*

CBP updated the app to provide the ability for certain NGOs to submit information to CBP on behalf of an undocumented noncitizen and schedule a time for such undocumented noncitizens to present at a POE to be considered for an exception from the Title 42 public health Order.[231] This functionality included submitting individuals' information in advance, including a photo, and scheduling a date and time to present at a POE.[232] In April 2022, CBP expanded the ability for noncitizens to directly submit information and schedule appointments to present at a land border POE to noncitizens seeking to enter the United States under the U4U process.[233] To further expand the accessibility of the CBP One Title 42 exception process, in January 2023, the advance information submission and scheduling process was made publicly available to all undocumented noncitizens seeking to travel to a land POE to be considered for an exception to the Title 42 public health Order.[234] Significant enhancements and changes to the CBP One app have been and will continue to be made in response to user and stakeholder feedback.[235]

Comment: Commenters stated that the CBP One app is not workable. For example, commenters stated that there are more migrants seeking asylum than there are appointments available, that the number of appointments was entirely too limited, that the rule does not provide for a minimum number of appointments, and that after a final rule is issued, demand for appointments would only increase. Another commenter noted that the INA does not limit the number of people who may arrive at a POE, nor does the rule provide information about how the government will apportion daily appointments. This commenter also noted that the number of appointments at the border is currently "capped," but that this limitation is not legally binding and could be increased. At least one commenter said it would be "inherently unjust to demand" that individuals use an information system that cannot handle the number of people expected to

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[231] CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 4 (Jan. 19, 2023), *https://www.dhs.gov/publication/dhscbppia-076-collection-advance-information-certain-undocumented-individuals-land.*

[232] *Id.*

[233] CBP, *DHS/CBP/PIA-068, Privacy Impact Assessment for CBP One™ Mobile Application* 16–17 (Feb. 19, 2021), *https://www.dhs.gov/publication/dhscbppia-068-cbp-one-mobile-application.*

[234] *Id.* at 17–18.

[235] CBP, *CBP One™ Mobile Application* (Apr. 10, 2023), *https://www.cbp.gov/about/mobile-apps-directory/cbpone.*

use it. Commenters argued that requiring use of this system will create a backlog and require people to wait for their appointments for a significant period of time in Mexico.

Other commenters raised concerns about flaws in the CBP One app and suggested it would empower smugglers. Commenters noted that the CBP One app was created for other purposes and not as an appointment system for asylum seekers. A commenter noted that some individuals have to create a new account every day because of flaws in the app. Another commenter asserted that there is a significant risk that appointments will be resold, pointing to a lack of security within the app that would permit such resale. Commenters also stated that CBP indicated that criminal groups were creating fraudulent appointments to obtain information and funds from asylum seekers seeking entry to the United States. A commenter stated that requiring use of the CBP One app has already led to increased exploitation by criminal groups and others who seek to take advantage of migrants and is likely to push individuals to travel by more dangerous routes. Another commenter noted that the availability of appointments only at certain POEs had led to migrants traversing dangerous parts of Mexico to travel to a POE for their appointment. The commenter stated that traversing Mexico was particularly difficult because transportation companies and Mexican authorities impede migrants' ability to travel through Mexico. Another commenter recommended the creation of a process parallel to the CBP One app process for highly vulnerable migrants to be considered for entry into the United States in an expedited manner. At least one commenter stated that the CBP One app should allow for prioritization based on vulnerability. Another commenter stated that smugglers will have more power because of the limited number of appointments, as people will pay smugglers to find alternate routes into the United States.

Response: The Departments acknowledge that there are currently many migrants waiting to present at a POE and that demand for CBP One app appointments may exceed the number of appointments that can reasonably be made available on a given day. However, CBP is committed to processing as many individuals at POEs as operationally feasible, based on

available resources and capacity, while executing CBP's mission to protect national security and facilitate lawful trade and travel.[236] While the Title 42 public health Order remains in effect, the CBP One app is being used to schedule appointments for individuals who are seeking to present at a land POE to be considered for an exception from the Title 42 public health Order. During this time, the number of appointments available has been limited. However, when the Title 42 public health Order is lifted, CBP intends to increase the number of available appointments and anticipates processing several times more migrants each day at SWB POEs than the 2010 through 2016 daily average, including through use of the CBP One app.[237] While CBP recognizes and acknowledges that demand for appointments may exceed the number of appointments that can reasonably be made available on a given date, there has been a large number of migrants waiting in Mexico to enter the United States since long before the introduction of the app, and CBP expects that use of the app will help facilitate the processing of such individuals. The CBP One app is a scheduling tool that provides efficiencies and streamlines processing at POEs. Additionally, while CBP acknowledges that some noncitizens who are unable to schedule an appointment might conceivably turn to smuggling or more dangerous routes, CBP is implementing changes to the CBP One app to permit noncitizens to select a preferred arrival POE in an effort to mitigate any perceived need to travel to another location. Additionally, CBP is transitioning scheduling in the CBP One app to a daily appointment allocation process to allow noncitizens additional time to complete the process. This process change will allow noncitizens to submit a request for an appointment, and available appointments will then be allocated to those who made such a request, and the app will now

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[236] 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*.

[237] *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*.

provide a 23-hour period for individuals allotted appointments to complete the scheduling process and confirm their appointments. In addition to the increased number of appointments made available after the end of the Title 42 public health Order, it is anticipated that these changes will reduce the likelihood of noncitizens seeking to travel by alternate routes.

The capacity to process migrants at POEs and the utilization of the CBP One app to secure appointments are separate and distinct issues. Officers will process all individuals who present at a POE regardless of a CBP One app appointment. Although a noncitizen who presents at a POE without an appointment may be subject to the rebuttable presumption under this rule, they will be able to present any protection claims, as well as any evidence to rebut the presumption or establish an exception to its application—including evidence related to their inability to access the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle—during either expedited removal or section 240 removal proceedings, with an AO or IJ, as applicable. Processing times will vary based on capacity and available resources, and those without a CBP One app appointment may be subject to longer wait times before being processed by a CBP officer.

With regard to commenters' suggestions regarding the prioritization of vulnerable individuals, the Departments decline to adopt such a process. As an initial matter, the Departments reiterate that the CBP One app is a method of facilitating entry into the United States. Once individuals are present in the United States at a POE, CBP must inspect and process all noncitizens, regardless of vulnerability. *See, e.g.*, INA 235(a)(3), 8 USC 1225(a)(3); 8 CFR 235.1(a). While in some cases an individual who is particularly vulnerable may warrant more expeditious processing, such prioritization and processing does not occur until the individual is physically present in the United States. In other words, while an individual's vulnerability may, in some cases, be a factor in the noncitizen's processing disposition at the time of processing, this vulnerability is not validated or taken into account prior to a migrant's arrival in the United States in the context of the CBP One app.

Comment: Commenters raised concerns about limitations on where and when an appointment can be made using the CBP One app. One commenter noted that the geofencing portion of the app does not perform accurately, as indicated by individuals who are present in Mexico receiving error messages saying they are not. Another commenter noted that, since the geofencing limits where people can be to make appointments, they have no option but to make a dangerous journey before they even begin a lawful process; the commenter urged instead that individuals be permitted to schedule appointments prior to embarking on their journey to ensure that appointments are provided in a fair manner. At least one commenter expressed concern that individuals would use Virtual Private Networks to do an end run around the geofencing. Another commenter stated that the app allows for scheduling appointments up to 13 days in advance, but that individuals accessing the app from their home countries may not be able to make it to the United States in 13 days. Similarly, a commenter stated that, although the rule contemplated expanding CBP One access to locations beyond the SWB, such an expansion would not alleviate the risk of harm that migrants face, as it would not be possible for the migrant to schedule a date and time to present at a POE before leaving their home country, and migrants seeking to access the app from their home countries would lack access to NGOs and other entities at the SWB that could provide assistance.

Response: At this time, the ability to schedule an appointment through the CBP One app is available only to migrants located in central and northern Mexico.[238] The geofenced area allows migrants to remain in shelters and other support networks instead of congregating at the border in unsafe conditions, facilitating a safe and orderly presentation at POEs. The app does not facilitate travel to Mexico in order to schedule an appointment to present at a POE. Individuals outside northern and central Mexico are encouraged to use various pathways

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[238] *See* CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 6 n.24 (Jan. 19, 2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf.*

available to lawfully travel to the United States, and they will be able to use the app once they are in the geofenced area and thus closer to the United States.

CBP is aware of reports of users attempting to circumvent the geofenced area and has taken steps to prevent this from occurring. CBP has also received reports of users who were in Mexico in close proximity to the SWB, but whose phones were showing that they were within the United States, thus generating error messages. To address this issue, CBP adjusted the geofencing to accommodate individuals located in Mexico in close proximity to the SWB.

Comment: Some commenters stated that requiring people to wait in Mexico until their appointment date is dangerous, as indicated, for example, by the number of violent attacks on migrants who have been turned back under the Title 42 public health Order since President Biden took office and the dangers that individuals faced in Mexico during MPP. One commenter expressed concern that the rule included no exception to the rebuttable presumption for asylum seekers' inability to secure a timely opportunity to present themselves, even though CBP One appointments have been "extremely difficult to access" and have taken weeks or months to secure. Another commenter noted that the first-come, first-served scheduling design is haphazard, and that there is no priority for migrants who have been waiting for longer periods of time.

Another commenter cited a Human Rights First study that found that there were 1,544 reported cases of violence against asylum seekers—including two murders—during the first two years of MPP. One commenter stated that the delays caused by the CBP One app increase the dangers for those waiting for a POE appointment in Mexico. Commenters stated that asylum seekers who are unable to secure appointments through the CBP One app will be forced to remain indefinitely at the border in dangerous conditions, including conditions where they have no access to or must rely on third parties for safe housing, food, electricity, internet, or stable income, all while continuing to try to make an appointment. One commenter noted that this was particularly problematic for those with chronic or serious health problems because access to

health care in areas where individuals must wait is limited. Commenters expressed concern that criminal organizations, including cartels, could exploit individuals during the period that they must remain in northern Mexico waiting for an appointment. Another commenter expressed concern that those individuals in Mexico awaiting an appointment are at risk of deportation to their home countries, where they could experience persecution.

A commenter also stated that the United States Government should engage with the Government of Mexico to ensure that noncitizens waiting in Mexico for a CBP One app appointment have documents authorizing a temporary stay in Mexico for that purpose and that the lack of official documents regarding status in Mexico leaves noncitizens at risk of fraud and abuse. Another commenter recommended that CBP provide instruction on the use of the app to personnel in Mexico.

Response: The Departments acknowledge that individuals seeking to make an appointment to present at a POE will generally need to wait in Mexico prior to their appointment. The Departments also acknowledge that, in some cases, the conditions in which such individuals wait may be dangerous. However, noncitizens are currently waiting in northern Mexico, and, as addressed in the NPRM, the Departments anticipate that larger numbers of individuals will seek to enter the United States after the lifting of the Title 42 public health Order. *See* 88 FR at 11705. Therefore, as noted in the NPRM, the Departments have concluded that this anticipated influx warrants the implementation of a more transparent and efficient system for facilitating orderly processing into the United States. Although the use of the CBP One app may, as commenters noted, sometimes cause delays, the Departments believe that, on balance, the benefits of the more transparent and efficient system created by use of the app outweigh the drawbacks and that use of the app will ultimately inure to noncitizens' benefit by allowing the Departments to more expeditiously resolve their claims. CBP has conducted extensive outreach and communication with stakeholders who may be able to assist noncitizens

in accessing the CBP One app to register and schedule an appointment, including shelters and other entities in Mexico.

The Departments also note that migrants are not categorically required to preschedule an appointment to present at a POE, and all migrants who arrive at a POE, regardless of whether they have an appointment, will be inspected and processed. Migrants who present without an appointment may be subject to the presumption, but, among other exceptions, the presumption will not apply for those for whom it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). Additionally, migrants who demonstrate "exceptionally compelling circumstances," such as an imminent and extreme threat to their life or safety, an acute medical emergency, or status as a victim of a severe form of trafficking, may rebut the presumption, in accordance with 8 CFR 208.33(a)(3)(i)(A) through (C), 1208.33(a)(3)(i)(A) through (C).

b. CBP One App Accessibility

Comment: Commenters expressed a range of concerns regarding the accessibility of the CBP One app for migrants seeking to enter the United States.

Many commenters stated the CBP One app is not available to all migrants, especially those who do not have smartphones, reliable internet access, or passports, and that all appointments are claimed almost immediately because the supply is insufficient. Multiple commenters suggested that many low-income individuals do not have access to a working phone or the internet in their home country, making use of the CBP One app infeasible. Commenters stated that many oppressive regimes limit access to the internet and asked how the Departments planned to provide access to the CBP One app to migrants in such countries. Relatedly, at least one commenter conveyed, anecdotally, that some migrants with limited economic means are forgoing food so that they can purchase enough data to attempt to make an appointment on the CBP One app to cross the SWB and seek asylum in the United States. Some commenters noted

that many migrants become victims of crime while traveling to the United States, and their phones may be stolen, lost, or broken. Another commenter pointed out that some individuals may have phones but cannot afford to pay for telephone services for the phone. A commenter stated that it was unreasonable to place the burden on migrants to obtain internet and broadband access, as some migrants must choose between "sustenance and digital access." The commenter stated that this requirement perpetuated the crisis of unequal access to justice. At least one commenter noted that individuals may dispose of their cell phones out of concern that those they fear could track them using that phone and so no longer have a smartphone to use the CBP One app. One commenter suggested finding donors to provide phones for families to schedule appointments.

Others stated concerns with relying on a web and mobile application because technology can fail. At least one commenter stated that the Departments should not rely only on the CBP One app because cellular signals along the SWB are inconsistent and Wi-Fi options are limited, and some migrants, such as Afghans who travel through South and Central America, do not have local connectivity. At least one commenter asked how having a cell phone with good coverage so a migrant can obtain an appointment relates to the merits of their asylum claim, while another stated that migrants without internet access would effectively be held to a higher standard than those with internet access, which many would not be able to overcome due to the lack of legal representation in initial screenings.

Another commenter stated that the rule did not provide sufficient information on how the Government conducted a study of the number of migrants who may have smartphones. Another asserted that the study had a sampling bias since it only surveyed individuals seeking a Title 42 exception, which they claimed required the use of the CBP One app. A commenter provided data comparing the percentages of smartphone ownership in Mexico, Cuba, Haiti, Nicaragua, and Venezuela, which, they stated, showed that while Mexico and Haiti had a high percentage of users, Nicaragua and Venezuela did not. On the other hand, at least one commenter noted that

cell phones, including smartphones, are very common and that as a result people should be able to apply for CBP One app appointments.

Other commenters noted that people who cannot use the application would be at a serious risk of being turned away at the border and disagreed with the Departments' statements to the contrary.

A commenter claimed that CBP has yet to implement a desktop version of the app and has provided little clarity on whether and when such a version would be available. The commenter also stated that many migrants lack regular access to desktop computers.

Response: The Departments disagree that the CBP One app is a barrier to seeking asylum. The Departments also disagree with the contention that this rule sets up a linkage between access to an adequate cell phone or internet and the merits of an individual's asylum claim. Rather, the CBP One app is a tool that DHS has established to process the flow of noncitizens seeking to enter the United States in an orderly and efficient fashion. CBP intends to increase the number of available appointments when the Title 42 public health Order is lifted and anticipates processing several times more migrants each day at the SWB POEs than the 2010–2016 daily average, including through use of the CBP One app.[239] Further, noncitizens who present at a POE without using the CBP One app are not automatically barred from asylum.[240] The determination of whether the rebuttable presumption applies will be determined by an AO during the credible fear process or by an IJ in section 240 removal proceedings, at which time the noncitizen can demonstrate it was not possible to use the CBP One app due to language barrier,

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[239] *See* CBP, CBP STAT, *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, CBP, from Troy A. Miller, Acting Comm'r, CBP, *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.

[240] In addition, under this rule, any noncitizen will be able to present at a POE, and CBP will not turn away any individuals—regardless of manner of entry into the United States—or deny them the opportunity to seek admission to the United States. However, those who arrive at a POE without an appointment via the CBP One app may be subject to longer wait times for processing depending on daily operational constraints and circumstances.

illiteracy, significant technical failure, or other ongoing and serious obstacle. CBP officers will not be making determinations about whether the rebuttable presumption is applicable.

The CBP One app is free to use and publicly available. As noted in the NPRM, a limited study conducted at two POEs in December 2022 found that individuals had a smartphone in 93 out of 95 Title 42 exception cases. At the time of this survey, migrants were not required to utilize the CBP One app to schedule an appointment to be considered for a Title 42 exception; that requirement was implemented in January 2023.[241] Additionally, independent studies demonstrate that approximately two-thirds of individuals worldwide had smartphones by 2020.[242] The Departments acknowledge that other studies provided by commenters show varying rates of smartphone access among migrants, that not all migrants may have access to a smartphone or be able to easily use the CBP One app, and that lack of smartphone access may hinder a migrant's ability to use the CBP One app. However, individuals who do not have a smartphone or who have other phone-related problems can seek assistance from trusted partners, who may be able to share their phones or provide translation or technical assistance if needed to submit information in advance. In addition, CBP has conducted extensive engagement with NGOs and stakeholders and has received feedback and information about the challenges associated with the use of the CBP One app. Throughout these engagements, access to smartphones has been raised, although not as a significant concern for most individuals. CBP is aware that NGOs provide support and assistance with access to mobile devices and internet connectivity. CBP notes that from January 12, 2023, when appointment scheduling launched, through the end of March 2023, over 74,000 noncitizens have scheduled an appointment via the CBP One app.[243]

Nevertheless, CBP acknowledges there can be connectivity gaps and unreliable Wi-Fi in central and northern Mexico. CBP reiterates that the use of the app to schedule an appointment

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[241] *See* CBP, *CBP One™ Mobile Application* (Apr. 10, 2023), *https://www.cbp.gov/about/mobile-apps-directory/cbpone.*
[242] Allan Jay, *Number of Smartphone and Mobile Phone Users Worldwide in 2022/2023: Demographics, Statistics, Predictions* (Mar. 16, 2023), *https://financesonline.com/number-of-smartphone-users-worldwide/.*
[243] CBP, *CBP Releases March 2023 Monthly Operational Update* (Apr. 17, 2023), *https://www.cbp.gov/newsroom/national-media-release/cbp-releases-march-2023-monthly-operational-update.*

to present at a POE is geofenced to only those migrants who are present in central and northern Mexico, and so commenters' concerns regarding internet censorship in other countries are misplaced. However, in response to feedback about connectivity issues, on February 18 and 23, 2023, CBP released updates to the CBP One app to improve the submission and scheduling process for individuals with lower bandwidth. In addition, based on user and stakeholder feedback, CBP will transition CBP One scheduling to a daily appointment allocation process to allow noncitizens additional time to complete the process. This process change will allow noncitizens to submit a request for an appointment, and then available appointments will be allocated to those who made such a request. Individuals who are issued an appointment will have a 23-hour period to complete the scheduling process and confirm their appointment. Each day, unconfirmed appointments will be reallocated among the current pool of registrations. This change will reduce the burden on the noncitizen to have connectivity at the precise moment of the daily appointment release, as is currently the case. This process will also enable noncitizens to request a preferred POE at which to schedule an appointment. Future and ongoing enhancements to the app are expected based on user and stakeholder feedback to ensure equity in the scheduling process.

The Departments acknowledge concerns about the availability of a desktop app for scheduling appointments. There is currently a desktop version of the CBP One app,[244] but it is not currently available for noncitizens to submit advance information. CBP is updating the desktop capability to provide the ability for undocumented noncitizens to register via the desktop version. This update is expected to be available in summer 2023. However, CBP does not have plans to enable users to schedule an appointment using the desktop version of the CBP One app because the desktop version does not allow for specific requirements that CBP has determined

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[244] *See* CBP, *DHS/CBP/PIA-068, Privacy Impact Assessment for CBP One™ Mobile Application* 15 (2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp068-cbpmobileapplication-jan2023.pdf*.

are needed such as geofencing and a live photo. This scheduling functionality will only be available via a mobile device.

CBP notes that commenters' concerns about access to the CBP One app are misplaced. Noncitizens seeking to schedule an appointment to present at a land POE are not required to have a passport.[245] Other functions of the CBP One app, including the Advance Travel Authorization ("ATA") functionality used as part of the CHNV parole processes, require an individual to provide their passport information.[246]

Comment: One commenter expressed concerns that the Departments relied on use of the CBP One app among the Venezuelan population as part of the CHNV parole processes to justify use of the CBP One exception in this rule. In particular, the commenter asserted that the use of the app among the Venezuelan population seeking to travel to the United States to seek parole was not a good indicator of the app's use among other populations of migrants, many of whom were less technically savvy and required more assistance with the app.

Response: This commenter's concern is misplaced because the Departments have not relied on any data regarding Venezuelan migrants' access to CBP One in this rule. The Departments acknowledge and agree that use of the CBP One app in the ATA context is not comparable to the use of the app to seek an appointment to present at a POE and note that the ATA process is separate and distinct from the use of the CBP One app to schedule an appointment to present at a POE.

Comment: Commenters also stated that use of the CBP One app is particularly difficult for families who may be unable to make appointments together. Another commenter stated that families may not have time to register together before all of the appointments are taken. Other commenters noted that family separation may occur because of both stress and confusion. Another commenter noted that CBP officers told individuals that they had the option of leaving

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[245] *See id.* at 15 n.18.
[246] *See id.* at 21–22.

children behind, trying to get another appointment, or sending children alone, underscoring that the CBP One app increases the likelihood that families will separate themselves in order to get appointments or to enter the United States. At least one commenter noted that there should be an adequate number of appointments set aside for families. Commenters also stated that the CBP One app is insufficient as a lawful pathway because it does not allow families to register together. One commenter, a legal services provider, stated that it had raised concerns to CBP about the length of time that families were waiting to seek an appointment. The commenter stated that CBP told the entity that the delay for families was likely a result of criminal groups making fraudulent appointments, which the commenter concluded was evidence that expansion of the CBP One app would increase exploitation of migrants. One legal services clinic stated that it had been informed by a CBP Field Office on the SWB in March 2023 that officers had not interviewed any families with more than six members, which was concerning given the number of larger families waiting to enter. A commenter stated that children should not be held responsible, through their eligibility for asylum, for whether their parents used the CBP One app to enter. One commenter noted that in February 2023 a family was not permitted to enter because the appointment did not list the children's names.

Response: CBP acknowledges the concerns regarding the ability of families to submit appointments together and has been working to address such concerns. Following the initial implementation, CBP received feedback that the app was timing out during the registration process of families with babies or young children and determined that this was caused by delays in the third-party liveness verification (that is, the process to verify that each person listed is, in fact, a live person). In February 2023, CBP updated the workflow in the app to address this issue by removing liveness detection as part of the registration process. Users are now only required to take a still photo of each traveler at the time of registration, the same action as if taking any photo from a mobile device, which only takes a few seconds. Following this update to remove

liveness detection from the registration process, CBP has received feedback from NGOs that there are fewer reported errors.

CBP has also consolidated appointment slots to increase the number of available appointments at the same time, where feasible, making it easier for family units to get an appointment together. For example, if a POE previously had two separate appointment times with 10 appointments each, they might have been combined to create one appointment time with 20 slots, making it easier to accommodate larger groups.

CBP continues to advise users and NGOs that one member of the family should create a registration on behalf of the entire family. While each member of a family must have a unique appointment, one member of a family can create the submission on behalf of the entire family group and complete the scheduling process, including the photo capture, to secure appointments for all registered family members. Functionally, this is similar to buying airline tickets. A designated person accesses the website, the website ensures there are seats for the indicated number of people, and the designated person provides the details for each individual to complete the purchase. At this stage, only the individual submitting the registration on the family's behalf is required to provide a live photograph.

Following the rollout of these enhancements, as of April 18, 2023, CBP data show that, for appointments scheduled from March 8, 2023, through May 1, 2023, groups make up an average of 83 percent of the CBP One scheduled appointments. Families or groups who do not register together on one CBP One account may not be accommodated at the same POE or on the same date. The Departments acknowledge that challenges remain for larger families, but the Departments believe that these changes have significantly ameliorated the concerns raised by commenters that family groups have been unable to obtain appointments.

CBP shares commenters' concerns about fraud and exploitation and has taken several steps to try to mitigate such issues. Specifically, the app uses 1-to-1 facial matching, meaning that it compares still photos submitted by users during the registration process to subsequent

photos submitted by the same users while scheduling an appointment. This photo matching helps to ensure that the individual making an appointment is the same person who registered for the appointment. Additionally, the app's liveness detection verifies that a person submitting an appointment is, in fact, a live person. Finally, users have a limited number of submissions per Login.gov authenticated identity, helping to prevent one individual from submitting bulk appointment requests.

With respect to the comment stating that children should not be held responsible for whether their parents used the CBP One app to enter, the Departments note that they have exempted from this ongoing application of the rebuttable presumption noncitizens who entered the United States during the two-year period while under the age of 18 and who later seek asylum as principal applicants after the two-year period. 8 CFR 208.33(c)(2), 1208.33(d)(2).

Comment: Commenters noted that the app is only available in English, Spanish, and Haitian Creole, which limits accessibility for many, such as speakers of indigenous languages or other languages outside this limited list. A commenter referred to a study that, in January 2021, identified more than forty different languages spoken by individuals with pending MPP proceedings, which, according to the commenter, rendered it "alarming" that the app was available in only three. One commenter stated that, as of January 2023, the app was not available in Creole. Other commenters expressed concern about those who may be illiterate who are still seeking to access the app, including those who may not be literate in one of the languages available on the app. At least one commenter noted that Login.gov is also only available in English, Spanish, and French, noting that based on at least one report these are not the most common languages and that third party assistance does not adequately address this concern. Another commenter stated that due to limited resources and high demand, it is not clear whether non-profit service providers will be able to help asylum seekers overcome the CBP One app's language barriers.

Commenters also expressed concern about specific portions of the CBP One app that they stated are only available in English. Specifically, commenters stated that the CBP One app's advisals regarding the terms and conditions of use and the repercussions of fraud or willful misrepresentation are presented exclusively in English. Other commenters said that all answers entered into the app must be in English, resulting in many individuals requiring assistance, including Spanish and Haitian Creole speakers, even though the CBP One app is available in their native language. Other commenters noted that the app's error messages are only in English, even if the user selects a different language, which makes using the app difficult for asylum seekers who cannot understand English. Commenters expressed that the limited availability of interpreters and the time required to enter information using interpreters added to difficulties in obtaining appointments through the CBP One app for non-English speakers. Commenters maintained that translating the CBP One app into additional languages would not resolve access issues for individuals with no or limited literacy.

Commenters also expressed concern about migrants' ability to meet the language barrier exception. One commenter stated that asylum seekers will struggle to meet the language barrier exception because the rule does not provide a clear process for how they can demonstrate that they were unable to use the CBP One app due to language issues. The commenter stated it is unclear whether the asylum seekers must show that they sought help from a third party before presenting themselves at a POE. One commenter stated that the rule does not explain how noncitizens with language, literacy, or technology issues can access this exception.

Response: As commenters noted, the CBP One app is currently available in English, Spanish, and Haitian Creole. The addition of Haitian Creole, on February 1, 2023, was based on stakeholder feedback. The translation of terms and conditions into all three languages was added on April 6, 2023. Initial analysis conducted in March 2023 indicated the current three languages account for 82 percent of the application users, with the next most common language being Russian, at 9 percent. Currently, CBP has not received any requests to make the app available in

Russian. However, CBP will continue to consider the inclusion of additional primary languages, which will be made available based on analysis of populations encountered at the border and user feedback. Additionally, outside entities, including NGOs, or other persons may provide assistance with the appointment scheduling process in the CBP One app.

CBP is also implementing the translation of all drop-down menus as well as allowing for special characters, which is expected to be complete by May 11, 2023. This update will also allow users to input answers in the three available languages. While most of the error messages are translated, CBP acknowledges that not all messages are translated, as a few system errors stem from different sources that do not have translation capabilities. However, CBP also has detailed user guides—which are available in English and Spanish (and Haitian Creole by the end of May 2023)—fact sheets—which are available in English, Spanish, Haitian Creole, Portuguese, and Russian—and video introductions available for free on the CBP.gov website, which provide visual overviews on how to submit information in advance.[247]

With regard to Login.gov, that website is an independent authentication service for government mobile applications, and therefore CBP has no authority to make changes to it. However, CBP has submitted a request to GSA to consider adding Haitian Creole as an additional language.

The Departments acknowledge commenters' concerns about application of the exception to the rebuttable presumption of asylum ineligibility for those who can demonstrate that it was not possible to access or use the CBP One app due to language barrier, illiteracy, or another serious and ongoing obstacle, 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B), and such concerns are discussed further in Section IV.E.3.ii.d of this preamble.

Comment: Commenters stated that the CBP One app is inaccessible for many migrants, particularly the most vulnerable. A commenter stated that they had done volunteer work with asylum seekers from a few African countries and from many Spanish-speaking countries, and

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[247] CBP, *CBP One™ Mobile Application*, *https://www.cbp.gov/about/mobile-apps-directory/cbpone*.

that reliance on the CBP One app is unfair because it assumes that migrants have a level of literacy, electricity, and time that are often unavailable to those desperately seeking safety. Another commenter noted that those with mental impairments or physical impairments, including arthritis, may not be able to use the CBP One app. One commenter stated that there is no rebuttal available for people with educational, mental, or psychological disabilities or who are unable to secure a timely appointment. One commenter stated that the proposed rule does not provide reasonable accommodations related to difficulties of using the CBP One app for people with disabilities, which the commenter asserted violated section 504 of the Rehabilitation Act, 29 U.S.C. 701 *et seq.*

Response: CBP acknowledges that certain individuals may have difficulty accessing the CBP One app. However, CBP has taken several steps to facilitate awareness of and access to the app. In particular, CBP has conducted extensive engagement with NGOs and stakeholders and has provided several opportunities to non-profit and advocacy organizations to provide feedback and receive information about the use of the CBP One app. Such entities may also serve as a resource for technological, humanitarian, and other assistance to migrants accessing the app. Management at POEs where the app is being utilized are also in regular contact with these support organizations to address any issues and concerns in real time.

Additionally, the CBP One app is undergoing a compliance review under section 508 of the Rehabilitation Act of 1973, which is expected to be completed by the end of May 2023. CBP expects a final certification by the end of August 2023. There are also several assistive technologies that can be utilized to translate the app independently, such as free apps that provide screen readers, magnification, and translation.

c. CBP One Technological Issues and Functionality

Comment: Commenters expressed concerns that the CBP One app has multiple glitches and problems, most notably that it allegedly does not capture or register darker skin tones and does not allow some individuals to upload their photos, instead displaying error messages. Some

commenters referred to studies that demonstrated racial bias in facial recognition technology. One commenter stated that certain disabilities or conditions, including blindness and autism, prevented users from effectively capturing a live photograph for the app. A commenter expressed concern that transgender individuals may present differently at the border than they did at the time their photograph was taken.

Response: The Departments are committed to equal access to the CBP One app for individuals of all races and ethnicities. At this time, CBP has not found any indication of meaningful discrepancies in app functionality based on skin tone. The predominant reason for error messages during the photo process was the volume of submissions at one time with low connectivity and bandwidth of other technological platforms that supported the app. To ensure equity for all nationalities in the photo process, CBP is continuing to assess and study the software's performance.

For additional context, there are two photo capture technologies utilized in the CBP One process: the Traveler Verification Service ("TVS") and "liveness detection." TVS is a facial recognition technology that allows a CBP One submitter's photo to be compared against subsequent submitted photos to ensure it is the same individual each time a photo is submitted.[248] This system is utilized at two different points in the process: (1) during the process of scheduling an appointment, to verify that the photo submitted matches the photo previously provided during registration; and (2) upon a noncitizen's arrival at a POE, where officers take another photo of the individual as part of the inspection process and verify that that photo matches the photograph submitted at the time of scheduling. However, there are alternative methods to verify that the individual presenting at the POE matches the individual who scheduled through CBP One if facial matching is not possible. For example, an officer can enter the unique confirmation

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[248] *See* CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 10 (2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf*; CBP, *DHS/CBP/PIA-056, Privacy Impact Assessment for the Traveler Verification Service* (2018), *https://www.dhs.gov/publication/dhscbppia-056-traveler-verification-service*.

number provided by the CBP One application or biographic data.[249] Additionally, CBP has partnered with the National Institute of Standards and Technology, the DHS Science and Technology Directorate, and the DHS Office of Biometric Identity Management to assess and test facial recognition technology and algorithms as part of efforts to improve the effectiveness of the process.[250] Additional information is publicly available in the TVS Privacy Impact Assessment.[251]

CBP One also relies on "liveness detection." The vast majority of feedback CBP has received regarding issues identifying people of color were identified as related to liveness detection during the registration process. As explained in more detail below, CBP One previously utilized liveness detection during both the registration and scheduling processes. For context, the CBP One app utilizes third-party software to verify "genuine presence" or "liveness" during registration and scheduling an appointment.[252] The liveness verification confirms the user is a live person and is not taking a photo of a photo or video.[253] Such verification ensures that appointments are given to bona fide individuals and family groups, rather than brokers or middlemen who might seek to book appointments in bulk and then sell them to migrants.

When the scheduling capability was initially implemented in January 2023, CBP originally required users to take a live photograph at the time they input their biographic information to register for the app, and, if they were unable to schedule an appointment at the same time, they were required to take a live photograph again at the time they scheduled an

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[249] See CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 10–11 (2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf.*

[250] *See* CBP, *DHS/CBP/PIA-056, Privacy Impact Assessment for the Traveler Verification Service* 15–16 (2018), *https://www.dhs.gov/publication/dhscbppia-056-traveler-verification-service.*

[251] *See generally id.*

[252] *See, e.g.*, CBP, *DHS/CBP/PIA-076, Privacy Impact Assessment for the Collection of Advance Information from Certain Undocumented Individuals on the Land Border* 23 (2023), *https://www.dhs.gov/sites/default/files/2023-01/privacy-pia-cbp076-advance-collection-for-undocumented-individuals-jan2023_0.pdf*; *see also* DHS, *News Release: DHS S&T Awards IPROOV $198K to Pilot Genuine Presence Detection and Anti-Spoofing Capability* (Nov. 6, 2020), *https://www.dhs.gov/science-and-technology/news/2020/11/06/news-release-st-award-genuine-presence-detection-and-anti-spoofing.*

[253] DHS, *News Release: DHS S&T Awards IPROOV $198K to Pilot Genuine Presence Detection and Anti-Spoofing Capability* (Nov. 6, 2020), *https://www.dhs.gov/science-and-technology/news/2020/11/06/news-release-st-award-genuine-presence-detection-and-anti-spoofing.*

appointment. This requirement took significant bandwidth, which resulted in many users experiencing difficulty. However, based on feedback from users and stakeholders, and consistent with its security protocols, CBP has determined the liveness check is no longer required during the registration process and implemented this change in February 2023. Therefore, while users are required to submit a photo at the time of registration, this photo does not need to be a live photo. Rather, the user is only required to submit a live photo at the time of scheduling an appointment, so that the liveness check and facial matching only occur during the scheduling of the appointment. When scheduling an appointment on behalf of a family or group, only one member of that family group is required to submit a live photograph. At that time, the CBP One app utilizes the live photo and facial matching technology to match the photo submitted during scheduling to the original photo submitted upon initial registration to verify that both photos are of the same person. Thus, an individual must only present similarly in photographs at the time of registration and the time of submission. Following this change, as well as others made during February 2023 to increase bandwidth, CBP has received feedback that there are fewer errors.

In addition, with regard to concerns about disparities based on skin tone, the third-party vendor has conducted their own equality study, which was provided to CBP, and concluded that across their global platform, differences in performance between ethnicities are on the order of tenths of a percent. As of the end of March 2023, Haitians are one of the top three nationalities using the CBP One app.[254] Regarding concerns about the ability of the app to capture a live photograph from individuals with certain disabilities or conditions, including blindness and autism, such individuals are not required to submit a live photograph if they are part of a family or group, as another member of that family or group can submit the live photograph on their behalf. In the event that an individual is unable to submit a live photograph as part of the

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[254] *See* CBP, *CBP Releases March 2023 Monthly Operational Update* (Apr. 17, 2023), *https://www.cbp.gov/newsroom/national-media-release/cbp-releases-march-2023-monthly-operational-update.*

submission process, they are encouraged to seek assistance from another person to take the photo for them. In addition, CBP consistently evaluates the registration and scheduling process, including the use of live photographs, and will continue to make enhancements and adjust the process based on feedback and operations.

Comment: Commenters noted a range of technology-related concerns with the CBP One app. Commenters described the CBP One app as very difficult to use, stating that it often crashes or is prone to glitches. Another commenter stated that there have been reports of the CBP One app freezing when noncitizens try to send confirmation of their interview dates. Some commenters noted that those seeking to enter the United States may not have the technical ability to navigate the app. A commenter noted that, although the Departments stated in the NPRM that CBP had conducted "extensive testing" of the app's technical capabilities, such statement was not supported by any publicly available studies or information. Commenters also recommended that CBP develop timely and effective mechanisms to receive and address reports of errors in the CBP One app.

Response: The Departments recognize commenters' frustration with the CBP One app. As noted above in Section IV.E.3.ii.a of this preamble, CBP systems undergo comprehensive testing and evaluation to assess the respective security features as part of the process of being granted an ATO.[255] The advanced information and scheduling capabilities addressed in this rule in particular have undergone various rounds of testing prior to and post deployment. CBP also conducted limited user testing both internally and in partnership with an NGO partner. The primary issues identified by users since the app's implementation have been caused by issues that cannot be fully identified in a testing environment.

CBP continues to make improvements to the app based on stakeholder feedback, including updates to enhance usability in low bandwidth and connectivity scenarios, and to

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[255] *See* DHS, *DHS 4300A Sensitive Systems Handbook* 47 (2015), *https://www.dhs.gov/publication/dhs-4300a-sensitive-systems-handbook.*

streamline the submission and scheduling process. CBP primarily receives reports of errors or other concerns through three mechanisms. The first and primary mechanism is the CBP One email inbox,[256] to which users may send an inquiry or concern about any capability within the CBP One app. Since CBP One has many capabilities and functionalities, and is available to a diverse audience, the inbox initially responds by asking the author to select the appropriate topic pertaining to their specific issue. Emails related to the ability to schedule appointments at POEs are addressed by one of three teams: CBP Customer Service, CBP's Office of Information Technology, or the CBP One team within CBP's Office of Field Operations. CBP also receives reports of errors or issues through recurrent briefings and sessions with NGOs. Third, CBP personnel both at local POEs and within CBP Headquarters receive direct email communications from NGOs.

The reported issues are a result of the volume of activity and the strain this may put on local bandwidth and connectivity. In an effort to improve app performance in low or limited bandwidth and connectivity situations, CBP determined the live photo could be removed as part of the registration process. This change was implemented in February 2023, and based on feedback from NGOs and stakeholders, it has reduced the number of reported errors users experienced. CBP is actively working to improve application hang-up-error logging and reporting to better inform on user complaints and application improvements.

d. Exception for Certain Failures to Pre-Schedule a Time and Place to Present at a POE[257]

Comment: Commenters provided comments on the proposed exception to the presumption for individuals who present at a POE and demonstrate that it was not possible to

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[256] *See* CBP, *CBP One™ Mobile Application* (Apr. 10, 2023), https://www.cbp.gov/about/mobile-apps-directory/cbpone.

[257] This section describes comments and responses related to the exception to the rebuttable presumption for noncitizens who present at a POE without having pre-scheduled a time and place for an appointment. 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). Currently, as explained in the NPRM, the only available system for scheduling such an appointment is the CBP One app. 88 FR at 11723. Accordingly, this section's comments and responses are focused on the use of the CBP One app for this exception, although the exception would apply similarly to any other scheduling system developed for this purpose.

access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or another serious and ongoing obstacle.

Regarding the "illiteracy" and "language barrier" provisions, commenters questioned how noncitizens would prove that they cannot understand any of the languages offered by the CBP One app, and whether testimony about their language proficiency would suffice as evidence for an exemption. One commenter said the proposed rule does not provide a standard for how officials will determine asylum seekers' language proficiency, which could lead to erroneous denials. Another commenter said it is unclear whether asylum seekers with language barriers must show that they sought help from a third party before presenting themselves at a POE. A commenter expressed concern that refugees who have basic communication skills in English or Spanish, but who cannot read or write proficiently in either of those languages, would wrongly be found to not have a language barrier that would exempt them from the requirement to use the app. Another commenter wrote that the exemptions based on illiteracy and language barriers are reasonably clear but the rule should clarify that literacy in the dominant language of a country should not be presumed for citizens of that country because, for example, many indigenous people in Guatemala do not speak Spanish. One commenter expressed concern that individuals with limited English proficiency would face difficulty establishing this exception due to the unavailability of qualified interpreters and recommended that if the Government cannot obtain interpreters for individuals, they should be placed directly in section 240 removal proceedings.

Multiple commenters said the proposed rule fails to clearly define what constitutes a "significant technical failure." Several commenters said the proposed rule did not outline how individuals could document technical difficulties such as app malfunctions or inaccessibility. A commenter said it may not be possible to screenshot the app to document a glitch if the app is frozen and producing this evidence would be hard for migrants in detention where they may not have access to their phones. Another commenter asked if this exception would include inability to afford a smartphone, having a phone stolen or broken, or inability to access stable Wi-Fi.

Another commenter stated that additional usage of the CBP One app after the Title 42 public health Order is terminated would likely exacerbate technical problems, leading migrants to irregularly cross the border and claim that the rebuttable presumption does not apply due to technical difficulties.

One commenter stated that the Departments should update the regulatory text to specify that "significant technical failure" refers to an inability of the DHS scheduling system to provide, on the date that the noncitizen attempted to use it, an appointment for entry within the two weeks after such attempt, together with the failure of that system, when access to it is sought at the POE at which the noncitizen has presented, to provide an appointment at that POE within the following two weeks. A commenter similarly recommended that, for the first 12–18 months after the lifting of the Title 42 public health Order, the Departments should assess the application of the exception based on a "more liberal" standard than the preponderance of the evidence, based on an assumption that the CBP One app is likely to have numerous technical failures.

Commenters stated that the proposed rule failed to clearly define what constitutes an "ongoing and serious obstacle." Commenters questioned whether a failed attempt to make an appointment using the CBP One app is likely to be considered sufficient. A commenter also stated that the Departments should specify certain foreseeable obstacles in the regulations as ongoing and serious obstacles, such as mental impairments or physical conditions that affect one's ability to use a smartphone. One commenter questioned whether the dangers that marginalized asylum seekers face in parts of central and northern Mexico would be deemed an ongoing and serious obstacle. Another commenter said the Departments should provide a list of anticipated obstacles to prevent arbitrary and inconsistent determinations and recommended that the list "include, for example, mental impairments; physical impairments such as severe arthritis of the hands that prevent the use of a cell phone or other device to access the CBP One app; lack of access to such a device coupled with poverty such that the noncitizen could not reasonably

purchase such a device; and a continuing lack of appointments in the near future to enter at the POE at which the noncitizen has presented."

One commenter recommended that if the app is crashing or the available appointments are so limited near where the asylum seeker is located that they cannot promptly obtain an appointment, then the affected asylum seeker should not have the burden of proving the impossibility of accessing the system. That commenter proposed that USCIS should assign an official to monitor the app and capacity of processing facilities and post on a public website whether the app was functioning and the availability of appointments. According to that commenter, this public information, showing that the app was functioning and that prompt entry appointments were available, would create a presumption that no significant failure had occurred. Similarly, another commenter suggested that the exception should also take into account the potential for human error, specifically referring to a situation in which a migrant believes they have an appointment, the app failed to register that appointment, and a CBP officer permits the individual to enter the POE. The commenter stated that, in such a case, the migrant "should not be punished when they are following the rules" and should not be required to show that there were significant technical failures. The commenter suggested amending the regulatory text so that the rebuttable presumption would not apply if the noncitizen shows "that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or human error." The commenter also recommended amending the regulatory text to include a statement that "such evidence may include data on the performance of the CBP One app which DHS will make publicly available as well as records of problems reported by users."

Commenters also noted potential procedural concerns with application of this exception. Some commenters stated that it will be difficult for noncitizens to meet the burden of demonstrating this exception, since the issue will arise in credible fear interviews when people are not likely to be represented. One commenter said it was impossible for asylum seekers to

show they meet this exception because it would require them to prove a negative. Another commenter stated that CBP often confiscates people's phones while they are in CBP custody or people may have borrowed phones to access the app, meaning that they would not have access to the evidence they need to prove they encountered obstacles using the CBP One app.

Commenters said it is unclear who will determine if this exception applies and expressed concern that some individuals would be turned away without the chance to seek asylum. One commenter wrote that it was unclear if the failure of an individual to indicate that they qualify for an exemption would be counted against them when an AO reviews their case. Another commenter recommended the creation of a standardized form of questions for officials to use when determining whether individuals should be exempted from the CBP One appointment requirement. One commenter wrote that the NPRM failed to consider the practicality of conducting the analysis for this exception at the credible fear interview stage.

Some commenters expressed concern that the exception is too broad or easy to exploit. One commenter stated that applying the significant possibility standard for this exception could result in "carte blanche" acceptance of testimony that such an obstacle was present and thereby undermine the intent of the rulemaking. Others said that this exception was broad and easy to exploit because it could encompass a wide variety of difficult-to-verify claims, such as losing one's mobile phone, losing access to cell service, and being unable to pay for a new mobile phone or data plan. One commenter also said that the CBP One app's publicized technical issues would make it easy to claim the exception. Another commenter stated that, based on the app's rating in the app store, the app almost appeared to be "designed to fail," to permit noncitizens to take advantage of the exception. Another commenter expressed general support for the inclusion of exceptions but predicted confusion and that migrants would prefer to present at a POE with an exception given the frequency of instances where it is not possible to access or use the DHS scheduling system. One commenter disagreed with the proposed exception relating to language barriers to accessing the CBP One app, asserting that migrants would take advantage of this

exception to appear at a POE without an appointment. Another commenter stated that the rule "impermissibly" shifts the burden onto DHS to refute a noncitizen's assertion that it was not possible to use the app and therefore expressed concern about "exploitation" of the standard.

Some commenters recommended that the Departments should expand the exception for failure to use the CBP One app when it is not possible to do so to include noncitizens who enter the United States without inspection, rather than only applying to noncitizens who present at a POE.

Response: The rule provides the same exception set forth in the NPRM to the applicability of the rebuttable presumption if the noncitizen presented at a POE and demonstrates by a preponderance of the evidence that it was not possible to access or use the CBP One app due to language barriers, 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). This exception captures a narrow set of circumstances in which it was truly not possible for the noncitizen to access or use the CBP One app. *See* 88 FR at 11723 n.173.

The Departments appreciate the commenters' suggestions about the scope of the exceptions in 8 CFR 208.33(a)(2)(ii)(B) and 1208.33(a)(2)(ii)(B). With regard to the "illiteracy" exception, the Departments acknowledge and agree that citizenship is not necessarily a proxy for literacy in a particular language, and there is no presumption in the CBP One app or in this rule regarding a particular migrant's language. The Departments note, however, that individuals may seek assistance, including translation assistance, in using the app. And, to the extent that an individual is unable to access the app due to their language barriers, they may be excepted from the presumption, as discussed earlier in this preamble. The Departments decline to specify precise ways by which a noncitizen must prove, or particular language standards by which an AO or IJ must assess, that the noncitizen qualifies for a language barrier or illiteracy exception. This is to preserve flexibility and account for the unique circumstances of certain noncitizens

who are illiterate or who face language barriers. Exceptions under this part of the rule will be assessed on a case-by-case basis.

The Departments also acknowledge that the parameters of the exception do not include a specific definition of "significant technical failure" and thank the commenter for their suggested definition. However, the Departments decline to add this definition to the regulatory text, as the Departments believe that there may be any number of ways that an individual could show a "significant technical failure." The Departments also note that this exception is intended to cover technical failures of the app itself—e.g., the app is not available due to a CBP network or server issue causing it to crash—rather than a situation in which a migrant is unable to schedule an appointment due to high demand or one where there is a fleeting, temporary technical error. In such a situation, the Departments encourage noncitizens to continue seeking to schedule an appointment, but, to the extent that they are prevented from doing so because of exigent circumstances, they may be able to show that they have experienced another "ongoing and serious obstacle," such that they are excepted from the presumption. The Departments likewise decline to amend the regulatory text to take into account human error or specific data on the performance of the CBP One app. As noted above, there may be any of number of ways to show a significant technical issue, or, as described in more detail below, an "ongoing and serious obstacle," which may be specific to the individual user. As noted below, the determination of whether the presumption applies will be made on a case-by-case basis.

The Departments appreciate commenters' concerns about what constitutes an "ongoing and serious obstacle." The Departments agree that an individual with a mental or physical impairment may have difficulty accessing the app but decline to add a new categorical exception to the regulatory text for individuals with mental or physical impairment. This is in part because the Departments do not intend to limit the exception to a specified category or group of conditions, and AOs and IJs will determine the application of the exception on an individualized basis. The Departments also decline to create further rules regarding which situations will

generally or categorically qualify for this exception, including on the basis of failed attempts to make an appointment through the CBP One app. This will preserve flexibility and account for the unique circumstances that noncitizens may face while attempting to schedule an appointment to appear at different POEs at different times. Exceptions under this part of the rule will be assessed on a case-by-case basis.

The Departments respectfully disagree with commenters' concerns as to noncitizens' ability to establish this exception. First, with regard to the commenters' concerns about access to counsel in credible fear interviews, that issue is discussed earlier in Section IV.B.5.ii of this preamble. The Departments decline to alter the burden of proof required for a migrant to show that it truly was not possible for them to access the CBP One app. As an initial matter, the Departments note that noncitizens outside of the United States have no freestanding right to enter, and no right to enter in a particular manner or at a particular time. *See, e.g.*, *Shaughnessy*, 338 U.S. at 542. The CBP One app does not alter this longstanding principle, but rather is intended to incentivize and facilitate an orderly flow of travel into the United States. Thus, the Departments decline to change the burden of proof from the noncitizen to the Government or adopt a more liberal standard for noncitizens who enter the United States during the initial months after the rule takes effect.

Concerns about who will assess whether the exception applies are misguided. The rule tasks AOs and IJs, not CBP officers, with determining whether a noncitizen meets this exception to the rule. 8 CFR 208.33(b)(1) ("The asylum officer shall first determine whether the alien is covered by the presumption . . . ."); *id.* 1208.33(b)(2) ("The immigration judge shall first determine whether the alien is covered by the presumption . . . ."). So too are concerns as to an inability to access physical evidence to prove the exception while in custody. Noncitizens may be able to establish that they meet the exception through testimony so long as it is credible, persuasive, and refers to specific facts to establish the exception. INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii). A noncitizen also does not need to affirmatively raise this issue to qualify for

the exception; adjudicators are trained to elicit testimony relevant to establishing a credible fear, as described in Section IV.B.5 of this preamble. However, if a noncitizen fails to disclose a technical failure or other obstacle when questioned about their failure to schedule an appointment using the CBP One app, this could potentially affect the credibility of their testimony if they later claim an exception in subsequent proceedings.

The Departments also disagree with commenters who claimed this exception is too broad or easy to exploit. The Departments disagree with the assertion that this exception will cause noncitizens to appear at a POE without an appointment. Noncitizens are not required to make an appointment in the CBP One app to present at a POE, and 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. 8 CFR 235.1(a). Those, however, who present at a POE without making an appointment in the CBP One app, and do not meet another exception, will be subject to the presumption. For the exception to apply, the noncitizen must do more than merely assert that they could not access the scheduling system for one of the identified reasons, without further explanation. Rather, AOs and IJs will assess whether the noncitizen has demonstrated that they meet the exception on a case-by-case basis as part of the credible fear process or in section 240 removal proceedings. Additionally, the Departments note the app is not intended or designed to "fail," and that AOs and IJs will evaluate on a case-by-case basis whether a noncitizen has shown that it was not possible to access the app due to language barriers, illiteracy, significant technical failure, or other ongoing serious obstacle.

Finally, the Departments decline to expand this exception to noncitizens to enter the United States without inspection instead of presenting at a POE. The Departments believe this would undermine the rule's purpose of incentivizing migrants to use lawful, safe, and orderly pathways to enter the United States. In cases where it was truly not possible for a noncitizen to access or use the CBP One app due to one of the rule's enumerated reasons, the Departments believe it would be preferrable to incentivize that noncitizen to seek admission at a POE rather

than attempt a potentially dangerous entry between POEs. The latter could require the assistance of smugglers or traffickers and could place further strain on DHS resources in apprehending the noncitizen and commencing removal proceedings.

iii. Adequacy of Parole

Comment: While many commenters expressed support for the parole processes referenced in the NPRM, many also expressed a range of concerns about the role of the parole processes in the rule's rebuttable presumption. A commenter stated that the parole processes only account for small numbers of potential asylum seekers. One commenter stated that the parole programs have little bearing on asylum access at the SWB or the Departments' stated goal to reduce border apprehensions. The commenter also stated that those who have the time and means to use these parole programs are not the same people who flee and approach the SWB. Another stated that the parole processes should not be the only way for migrants to come to the United States and petition for asylum. Another commenter stated that while Afghan migrants might be able to apply for humanitarian parole, the wait for the applications to be processed is too long for those who are living in danger in their country, and alleged that nearly 90 percent of humanitarian parole applications filed from outside the United States in the last year were denied.

Commenters stated that the CHNV parole processes are flawed because (1) they are limited to CHNV nationals; (2) they have a monthly cap, limiting the number of people who may enter the United States each month; (3) they require applicants to hold unexpired passports, which is uncommon for most citizens of Latin America and the Caribbean because of financial constraints; (4) they require a U.S.-based contact with the financial wherewithal to sponsor the applicant, which favors wealthy applicants and those with a broader network of support in the United States; (5) the applicant will need additional financial resources to afford a plane ticket and to meet vaccination and other requirements; and (6) humanitarian parole is not a substitute for asylum. Commenters stated that government officials may confiscate passports or target

passport applicants at government offices, and noncitizens may not be able to wait for a passport or for receipt of advanced authorization due to the risk of harm or death. One commenter stated that huge backlogs related to the parole program have overwhelmed Haiti's passport system.

One commenter stated that the rule's impact on those who have been pre-approved by CBP to present for parole at POEs under section 212(d)(5) of the INA, 8 U.S.C. 1182(d)(5), due to urgent humanitarian reasons or significant public benefit is unknown because the rule does not clarify whether those pre-approved to present for parole by port officials will face the presumption of asylum ineligibility.

Another commenter expressed concern that the CHNV parole processes would simply add to the population of migrants present in the United States without status, which according to the commenter would impose a burden on American taxpayers, and that the parole processes simply "kicks the can down the road."

Response: The parole processes established for CHNV nationals are available lawful pathways—though not the only available lawful pathways—for qualifying individuals seeking to come to the United States. Each month, DHS issues advance travel authorizations for up to 30,000 CHNV nationals to travel to the United States to be considered by CBP on a case-by-case basis for a temporary grant of parole for a period of up to two years. Once the individuals have arrived in the United States, they may apply for immigration benefits for which they may be eligible, including asylum and other humanitarian protections. The Departments recognize that the parole processes are not universally available, even to the covered populations; in addition, the parole processes established for CHNV nationals and Ukrainians are distinct from applying for asylum and are not a substitute for applying for asylum. Although noncitizens who are eligible for these processes may apply for asylum after being paroled into the United States, there is no requirement that they do so. These processes do, however, represent one lawful, safe, and orderly pathway available to certain CHNV nationals seeking to enter the United States.

Similarly, while DHS recognizes that several commenters have raised concerns about the adequacy of the parole processes, this rule's reference to the parole processes is not intended to suggest that the parole processes are an alternative to or replacement for asylum. Rather, the parole processes are lawful, safe, and orderly pathways that the Departments wish to encourage in light of the urgent circumstances presented. Eligible noncitizens may use these processes to seek entry into the United States, and, thereafter, apply for asylum if desired. Moreover, with respect to the commenters' concern about the ongoing status of CHNV parolees—including obstacles they face in seeking parole and the impact that allowing parolees into the country will have on taxpayers—such concerns are outside the scope of this rulemaking because the parole processes exist separate and apart from this rule. To the extent that this rulemaking encourages noncitizens to use those parole processes and thereafter apply for asylum, rather than migrating irregularly, parolees who do so may remain in the United States to await the adjudication of any pending asylum application, and during that time may be eligible for employment authorization. *See* 8 CFR 274a.12(c)(11) (employment authorization available for duration of parole); *id.* 274a.12(c)(8) (employment authorization available for asylum applicants).

With respect to the commenter's suggestion that the CHNV parole processes have little bearing on the Departments' goal of reducing irregular migration, the Departments note that these processes have substantially reduced the number of encounters between POEs. For instance, between the announcement of the CHN processes on January 5, 2023, and January 21, 2023, the number of daily encounters between POEs of CHN nationals dropped from 928 to 73, a 92 percent decline.[258] CHN encounters between POEs continued to decline to an average of fewer than 17 per day in March 2023.[259] The Departments offer further metrics in support of these processes' efficacy in Section II of this preamble.

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[258] OIS analysis of OIS Persist Dataset based on data through March 31, 2023.
[259] *Id.*

While CHNV and Ukrainian nationals who lack a supporter cannot take advantage of these parole processes, such individuals can present at a POE by using a DHS scheduling mechanism to schedule a time to arrive at POEs at the SWB and not be subject to the presumption of ineligibility. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). If the noncitizen can establish that the scheduling mechanism is not possible to access or use due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle, then the noncitizen can present at a POE to seek asylum without a pre-scheduled appointment, and not be subject to the presumption of ineligibility. *Id.* This process is available to all noncitizens seeking protection, regardless of their nationality.

With respect to the commenters' concern about individuals "pre-approved" by CBP to present at the SWB, the Departments note that the rebuttable presumption does not apply to any noncitizen who presents at a land POE, pursuant to a pre-scheduled time and place. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33 (a)(2)(ii)(B). This is not limited to those who schedule a time through the CBP One app. Therefore, in the rare circumstance that noncitizens have scheduled a time to present at such a POE through another means, they would not be subject to the rebuttable presumption. Additionally, the Departments reiterate that the presumption does not apply to a noncitizen who has been provided appropriate authorization to travel to seek parole pursuant to a DHS-approved parole process, including the CHNV processes. *See* 8 CFR 208.33(a)(2)(ii)(A), 1208.33 (a)(2)(ii)(A).

Comment: Commenters recognized that the parole processes had positive results in the decrease of CHNV nationals encountered at the SWB, but predicted that the deterrence would decrease as more applicants are denied.

Commenters also stated that the requirement to travel directly to the United States by air may for some noncitizens be more challenging than traveling to the SWB, and raised the concern that the rebuttable presumption would apply to individuals who have received advance travel authorization under the CHNV processes, if those individuals arrive at the SWB rather than

traveling directly by air. A commenter asserted that such a "disqualification" would be based on a "technicality," not on any material facts.

Commenters cited statistics stating that since January 2023, Haitian nationals had 11,300 approved paroles, but only 5,100 of those traveled to the United States. Commenters noted that parolees would add to the backlog of asylum applicants.

Response: With respect to commenters' caution that the magnitude of the CHNV processes' impact on unauthorized arrivals at the SWB may change over time, as discussed in Section II of this preamble, the CHNV parole processes have remained effective since the rollout of the Venezuela process in October. The Departments disagree that this will necessarily change as more applicants are denied, because any intending migrant who cannot access the CHNV parole processes may still be dissuaded from migrating irregularly because even those applicants who are denied authorization to travel under those processes may respond to the disincentives to irregular migration made possible by those processes and this rule. The Departments acknowledge, however, that since mid-April, there has been an increase in Venezuelan migrants crossing between POEs at the SWB, while others continue making the treacherous journey through the Darién Gap to reach the United States—even as encounters of Cubans, Nicaraguans, and Haitians remain near their lowest levels this year.[260] The Departments believe that this increase in Venezuelan migration has been driven in part by the current limited availability of CBP One appointments and misinformation campaigns by smugglers, in the aftermath of the fire in a Mexican government facility that killed a number of Venezuelan migrants in March.[261] Although the number of CBP One app appointments available has been limited while the Title 42 public health Order has been in place, as detailed in Section IV.E.3.ii.a of this preamble, when

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[260] *See* Reyes Mata III & Nick Miroff, *Surge of Migrants Strains U.S. Capacity Ahead of May 11 Deadline*, Wash. Post. Apr. 28, 2023, *https://www.washingtonpost.com/nation/2023/04/28/border-migrants-biden-title-42/*.

[261] *See, e.g.*, *id.*; Nicole Acevedo & Albinson Linares, *Misinformation Fuels False Hopes Among Migrants after Deadly Fire in Mexico*, NBC News, Mar. 30, 2023, *https://www.nbcnews.com/news/latino/misinformation-fuels-false-hopes-migrants-mexico-fire-rcna77398* ("Over 1,000 migrants lined up outside international bridges to El Paso, Texas, on Wednesday afternoon [March 29, 2023] after false information spread on social media and by word of mouth that the U.S. would allow them to enter the country.").

the Title 42 public health Order is lifted, CBP intends to increase the number of available appointments. In addition, as discussed in more detail in Section II.A of this preamble, DHS and the Department of State announced new measures on April 27, 2023, that are expected to significantly expand lawful pathways, which, along with the expanded ability to present at a land POE pursuant to a pre-scheduled time and place, are expected to further reduce the overall volume of irregular migration. The Departments also note that there has not been a similar rise in encounters of CHN nationals, and believe that the rule's approach of incentivizing the use of safe, orderly, and lawful pathways while imposing a meaningful consequence for those who fail to do so and cannot otherwise rebut the presumption against asylum eligibility will reduce the number of noncitizens seeking to cross the SWB without authorization.

With respect to commenters' objection regarding the CHNV parole processes' stated requirements with respect to air travel to an interior POE, the Departments are aware that some noncitizens may have trouble securing air travel, but also note the potentially significant costs associated with irregular migration, including substantial fees that some migrants pay to smugglers and cartels to facilitate such travel.[262] The specific requirements for participation in the CHNV parole processes are outside the scope of this rulemaking, but DHS is actively monitoring the effects of the processes and may make adjustments as necessary.

The Departments also acknowledge that parolees who apply for asylum will add to the number of pending asylum applications; however, as discussed in Section II of this preamble, the net effect of the CHNV parole processes has been to significantly reduce rates of irregular migration and avoid a corresponding increase in the immigration court backlog.

Comment: A commenter stated that the Departments must consider how they would ensure that those migrants who use a parole program to enter the United States, such as Venezuelans or Nicaraguans, are not falling prey to scams. The commenter stated that there is

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[262] *See, e.g.*, Ariel G. Ruiz Soto et al., *Charting a New Regional Course of Action: The Complex Motivations and Costs of Central American Migration* (Nov. 2021), *https://www.migrationpolicy.org/sites/default/files/publications/mpi-wfp-mit_migration-motivations-costs_final.pdf.*

reporting that those who do not have friends or relatives in the United States are going online to try to find sponsors, and stated that "there are posts online demanding up to $10,000.00 USD for financial sponsorship." The commenter stated that if the Departments require use of the parole processes, the Departments should make efforts to "end the financial abuse of potential parolees," similar to efforts to end human smuggling.

Response: As an initial matter, the specific requirements for participation in the CHNV parole processes are outside the scope of this rulemaking. In any event, the Departments recognize that immigration processes can be complex and that applicants, petitioners, and requestors are at risk of becoming victims of scams or fraud. The United States Government takes immigration scams and fraud seriously and is engaged in regular efforts to combat such behavior.[263] Additionally, the Departments conduct public-facing communications to advise all applicants to ensure that they only accept legal advice on immigration matters from an attorney or an accredited representative working for a DOJ-recognized organization.[264] The Departments also provide information to help applicants avoid immigration scams.[265]

DHS notes in public communications that access to the parole processes is free; neither the U.S.-based supporter nor the beneficiary is required to pay the United States Government a fee to file the Form I-134A or to be considered for travel authorization, or parole.[266] DHS also provides a list of resources for victims of abuse, violence, or exploitation, as well as advice for protecting against immigration scams.[267]

Comment: One commenter noted the pending litigation regarding the CHNV parole processes and stated that the proposed rule presumes that the processes will continue to exist. If

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[263] *See, e.g.*, USCIS, *Fraud Detection and National Security Directorate* (last updated June 15, 2022), *https://www.uscis.gov/about-us/organization/directorates-and-program-offices/fraud-detection-and-national-security-directorate.*

[264] *See, e.g.*, USCIS, *Find Legal Services* (last updated Mar. 27, 2023), *https://www.uscis.gov/scams-fraud-and-misconduct/avoid-scams/find-legal-services.*

[265] *See, e.g.*, USCIS, *Avoid Scams* (last updated Feb. 17, 2023), *http://www.uscis.gov/scams-fraud-and-misconduct/avoid-scams.*

[266] *See* USCIS, *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans* (last updated Mar. 22, 2023), *https://www.uscis.gov/CHNV.*

[267] *Id.*

the parole processes are ultimately found to be unlawful, the commenter asserted that an injunction would nullify a central premise of the rule. The commenter also noted that the rule extends into the first several months of the next administration, which may end the parole processes. Another commenter argued that the parole processes are overbroad and contrary to statute, and that it is "improper" for the Departments to cite the parole processes as effective tools in support of the rule.

Response: The parole processes that DHS established in 2022 and 2023 for Ukrainian and CHNV nationals provide lawful pathways for individuals seeking to enter the United States. The Departments recognize that there is currently litigation over the CHNV parole processes. *See Texas v. DHS*, No. 6:23-cv-00007 (S.D. TX filed Jan. 24, 2023). The Departments are vigorously defending the processes as permitted under section 212(d)(5) of the INA, 8 U.S.C. 1182(d)(5), and believe that the CHNV parole processes are permitted under the statute, for the reasons described in the *Federal Register* notices announcing each process. Should this litigation result in an injunction or other hold on any parole process, the Departments do not believe that such an injunction or hold would affect the application of this rule.

The parole processes established for CHNV nationals do not represent the only available options for noncitizens seeking entry to the United States. If these parole processes are enjoined, Ukrainian and CHNV nationals would still be able to avoid the rebuttable presumption if they present at a POE pursuant to a pre-scheduled time and place. *See* 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). Moreover, if the noncitizen establishes that the mechanism for scheduling was not possible to access or use due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle, then the noncitizen can present at a POE without a pre-scheduled appointment and would not be subject to the presumption of ineligibility for asylum. *Id.* Similarly, these noncitizens would also be excepted from the presumption of ineligibility if they sought asylum or other protection in a country through which they traveled and received a final decision denying that application. 8 CFR 208.33(a)(2)(ii)(C),

1208.33(a)(2)(ii)(C). The Departments believe that these alternative pathways for a noncitizen to be excepted from or rebut the presumption against asylum eligibility are sufficient, such that the rule would be justified even if the CHNV parole processes were to end. The rule incentivizes migrants, including those intending to seek asylum, to use lawful, safe, and orderly pathways, not simply the CHNV parole processes, to enter the United States, or seek asylum or other protection in another country through which they travel and thus reduce the number of noncitizens seeking to cross the SWB without authorization to enter the United States.

As stated at 8 CFR 208.33(d) and 1208.33(e), the Departments intend for the provisions of this rule to be severable from each other such that if a court holds that any provision is invalid or unenforceable as to a particular person or circumstance, the presumption will remain in effect as to any other person or circumstance. *See also* 88 FR 11726–27. This intention for maximum severability extends to the parole processes themselves, which are authorized separate from this rulemaking and would exist even in the absence of 8 CFR 208.33(a)(2)(ii)(A), 1208.33(a)(2)(ii)(A).

iv. Third Countries

a. 1951 Convention and 1967 Protocol Signatories Alone Insufficient

Comment: A commenter stated that migrants may not be able to apply for protection in third countries if such countries do not have functioning asylum systems. A commenter suggested that the Departments revise the rule to except noncitizens who demonstrate that the country or countries through which the noncitizen traveled, that are party to the 1951 Convention or 1967 Protocol, did not provide a minimally safe, orderly, expeditious, and effective protection process in the noncitizen's circumstances. Another noted that while many countries in South and Central America are taking on a significant portion of the burden of migration in the Western Hemisphere, many of these countries cannot be considered "safe" for asylum seekers. Numerous commenters expressed a belief that the conditions and options in most or all third countries are insufficient to provide true or reasonable alternatives to seeking protection in the United States.

Commenters stated that government records and NGO reports both make it clear that "these countries have not developed working asylum systems and that, for many migrants, it would be pointless and life-threatening to stay and apply." Commenters noted that these conditions are the reason many migrants are fleeing and seeking to come to the United States in the first place. Further, some commenters noted that while Costa Rica has a successful asylum system, Costa Rica has significantly more asylum seekers per capita than the United States, and expressed a belief that Costa Rica is unlikely to be able to absorb more.

Response: The Departments do not agree with the commenter's suggestion to add an exception for noncitizens who demonstrate that a country did not provide an adequate protection process in that noncitizen's circumstances. First, the rule provides for several exceptions to, and means to rebut, the condition on asylum eligibility beyond having sought and been denied asylum or other protection in a third country. Second, the rule does not require that a noncitizen seek protection in any particular country. Finally, a noncitizen who seeks protection in a country through which they traveled, believes that the protection process was unfair in that country, and receives a final decision denying asylum or other protection from that country would still qualify for an exception to the presumption against asylum ineligibility.

The Departments do not agree with the generalizations that the nations through which a noncitizen might transit, including Mexico and countries in South and Central America, lack functioning asylum systems and invariably cannot be considered safe for those who apply for asylum in those countries. Many of these countries have taken substantial and meaningful steps in recent years that demonstrate their willingness to provide protection to those who need it, which is reflected in their international commitments and their efforts as described later in this response. To be relevant for the rebuttable presumption analysis, the country through which the noncitizen transited must be a party to the Refugee Convention or Protocol. Noncitizens traveling through the Western Hemisphere have many options in this regard; of the countries in

North, Central, and South America, only one is not party to the Convention or the Protocol.[268] Several countries through which noncitizens may transit have also joined the non-binding Cartagena Declaration on Refugees ("Cartagena Declaration").[269] Delegations from Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Venezuela joined the Declaration on November 22, 1984.[270] Among other things, the Cartagena Declaration includes a pledge to promote the adoption of national laws and regulations facilitating the application of the 1951 Convention and the 1967 Protocol.[271] The Cartagena Declaration also expands the definition of "refugee" to include those fleeing "generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."[272] This "refugee" definition is more expansive than that in U.S. law, *see* 8 U.S.C. 1101(a)(42)(A), thus providing some who may apply for protection, such as asylum, with more grounds on which to make their claim than they would have in the United States.

Nations throughout the Hemisphere are continuously demonstrating their commitment to providing protection to refugees, migrants, and asylum seekers. Colombia, Belize, and Mexico have made significant strides in developing their asylum systems and expanding protections for migrants. In 2021, Colombia adopted legislation that allows Venezuelans to apply for temporary protection status, which grants Venezuelans 10-year residency and allows them to access public education, health care, and employment.[273] By February 2022, about 2.4 million Venezuelans had applied for that status, and Colombian migration authorities had approved nearly 1.4 million

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[268] *See* Maja Janmyr, *The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda*, 33 Int'l J. Refugee L. 188, 189 (2021); UNHCR, *States Parties, Including Reservations and Declarations, to the 1951 Refugee Convention*, *https://www.unhcr.org/us/media/38230* (last visited Apr. 25, 2023).
[269] *See* Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Nov. 19-22, 1984, *https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf*.
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] Int'l Crisis Group, *Hard Times in a Safe Haven: Protecting Venezuelan Migrants in Colombia* (Aug. 2022), *https://www.crisisgroup.org/latin-america-caribbean/andes/colombia-venezuela/hard-times-safe-haven-protecting-venezuelan*.

by July 2022.[274] Belize offers an amnesty program for registered asylum seekers and certain irregular migrants that provides permanent residence and a path to citizenship.[275] The Government of Mexico has made exceptional strides to improve conditions for asylum seekers, migrants, and refugees within its borders. Mexico's Federal Public Defender's Office offers legal counseling and support to asylum seekers and migrants who have filed claims with Mexico's Commission for Refugee Assistance ("COMAR") and has increased both its specialized staff and visits to migration stations.[276] Mexico has also committed to integrating 20,000 refugees into the Mexican labor market over the next three years and is expanding labor opportunities for Central American workers.[277]

Comment: Commenters stated that it is inhumane to require asylum seekers to first seek protection in third countries because they are particularly vulnerable in those countries to harms like exploitation, kidnapping, assault, rape, robbery, or extortion. Commenters noted that many transit countries struggle with high levels of violence, corruption, and ineffective judicial or political systems, citing a range of facts to illustrate political and other concerns in many transit countries, including the trial of Mexican officials for conspiracy with cartels and the extradition of the former Honduran president to face charges in the United States. One commenter asserted that requiring victims of persecution to expose their personal information to possibly corrupt or hostile governments is "an extension of the persecution they fled in the first place," while another stated that the act of applying for asylum in a third country would make migrants targets of the governments they are fleeing. Commenters also noted that most immigrants to the United States only travel through countries that also have a large number of emigrants seeking to enter the United States, which the commenter believes demonstrates that those countries are not safe.

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[274] *Id.*

[275] Government of Belize, *Amnesty Background Information* (Dec. 7, 2022), *https://immigration.gov.bz/amnesty-background-information*.

[276] Comprehensive Regional Protection and Solutions Framework, *MIRPS in Mexico* (Aug. 2022), *https://mirps-platform.org/en/mirps-by-country/mirps-in-mexico*.

[277] Government of Mexico, Secretary of External Relations, *Mexico to Expand Labor Mobility Programs and Integrate Refugees into its Labor Market* (June 10, 2022), *https://www.gob.mx/sre/prensa/mexico-to-expand-labor-mobility-programs-and-integrate-refugees-into-its-labor-market?idiom=en*.

Response: The Departments recognize that certain noncitizens may feel unsafe seeking protection in certain nations through which they might transit, including Mexico and countries in South and Central America, due to the concerns commenters describe. However, as discussed above, the Departments do not agree with generalizations that these countries are universally unsafe and cannot provide protection to asylum seekers. The Departments also note that the rule does not require any noncitizen to seek protection in a country where they do not feel safe. Applying for, and being denied, asylum or other protection in a third country is one exception to the rebuttable presumption, but noncitizens who choose not to pursue this path may instead seek authorization to travel to the United States to seek parole pursuant to a DHS-approved process, or present at a POE at a pre-scheduled time or place (or demonstrate that it was not possible to do so for a reason covered by the rule). *See* 8 CFR 208.33(a)(2)(ii), 1208.33(a)(2)(ii).

Noncitizens may also rebut the presumption by showing that exceptionally compelling circumstances exist, including an acute medical emergency or an imminent and extreme threat to life or safety at the time of entry. 8 CFR 208.33(a)(3), 1208.33(a)(3). Although the Departments expect that many migrants seeking protection will be able to access asylum or other protection in at least one transit country, they recognize that not every country will be safe for every migrant and have provided other exceptions and means for rebutting the presumption to account for those circumstances. Although noncitizens may prefer to apply for asylum in the United States, it is not unreasonable to expect that they would pursue other safe options.[278]

b. Concerns about Length of Process and Documentation Provided by Third Countries

Comment: Several commenters stated that third countries are not efficient in providing proper documentation for asylum seekers, thus increasing wait times and creating additional issues in overcoming the presumption at the SWB. Another raised concerns that requiring

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[278] *See* UNHCR, *Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries* 1 (Apr. 2018), *https://www.refworld.org/pdfid/5acb33ad4.pdf* ("[R]efugees do not have an unfettered right to choose their 'asylum country.'").

migrants to first apply and be rejected for asylum in a third country could force them to wait for that third country's asylum adjudication for months before they can continue their journey to the SWB. One commenter stated that the proposed regulations require a noncitizen to produce documentation (paper or electronic) to show denial of asylum in a third country, which the commenter stated is contrary to the INA's specification that noncitizens may establish asylum eligibility though testimony alone. One commenter expressed concern that the Departments have given no assurances that a denial of asylum in another country will not be used against an asylum applicant here in the United States, where our asylum eligibility guidelines are many times more stringent.

Response: To determine if an applicant has met their burden to demonstrate that they sought asylum or protection in a third county and were denied, adjudicators may weigh an applicant's credible testimony with other evidence. *See* INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii). Even when an applicant's testimony is credible, an adjudicator may, where appropriate, request evidence to corroborate this credible testimony, including documentation of the final denial. In that case, the applicant is not required to provide the evidence if they do not have the evidence and cannot reasonably obtain it. *Id.*

Regarding commenters' statements that requiring migrants to seek asylum in third countries will increase wait times, the Departments believe that wait times would likely be significantly longer in the absence of this rulemaking. For those who are unwilling or unable to seek asylum or other protection in a third country and wait for a final decision, the Departments note that there are multiple ways to avoid or rebut the rule's presumption of ineligibility, only one of which involves seeking asylum or other protection in a third country. *See* 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). Noncitizens who do not feel comfortable or safe applying for asylum outside the United States may avoid the rebuttable presumption by seeking parole under one of the authorized parole processes or using the CBP One app to present themselves at a pre-scheduled time at a POE. *See id.* 208.33(a)(2)(ii)(A) and (B),

1208.33(a)(2)(ii)(A) and (B). Additionally, noncitizens may rebut the presumption in exceptionally compelling circumstances, including where they faced an immediate and extreme threat to life and safety at the time of their entry into the United States. 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B). Those who are not excepted from and are unable to rebut the presumption of ineligibility may still pursue statutory withholding of removal and protection under the CAT.

With respect to the comment the Departments have given no assurances that a denial of asylum in another country will not be used against an asylum applicant here in the United States, the Departments note that AOs and IJs will consider the noncitizen's fear of returning to their country of origin on a case-by-case basis through the noncitizen's credible testimony and other relevant evidence demonstrating a fear of persecution.

c. Concerns About Differential Treatment of Migrants

Comment: Commenters raised concerns about unintended inequitable treatment of migrants under the rule. For example, commenters raised concerns that the rule arbitrarily disfavors migrants who live farther away, stating that it would be unfair to penalize those who do not have the good fortune of living in a nation close enough to the United States that they do not have to pass through a third country in their journey to the SWB. Another commenter noted that migrants who travel through third countries en route to the United States have necessarily traveled a lengthy distance, which may suggest that their claims are in fact more likely than others' to be meritorious. Similarly, commenters noted that a migrant who does not live close to a country that provides strong protections may not realize until after they passed through a third country that they should have applied for asylum in that country, and that many migrants cannot afford what may be a months-long process of applying for protection in a third country.

Some commenters stated that the United States should not summarily deny asylum claims based on whether migrants have passed through another "safe third country," as the third country may not have been safe for each individual migrant, especially for vulnerable populations. At

least one commenter stated that requiring migrants to seek asylum in third countries on their journey to the SWB is counterintuitive if the migrant has relatives or another support system in the United States. One commenter also noted that individuals with conditions that may cause cognitive difficulties or deficits, such as post-traumatic stress disorder, depression, or head trauma, may not be able to find the medical services that would allow them to participate in the asylum process of a country through which they transited, even if those countries had a functioning asylum system.

Response: 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. Migrants who do not avail themselves of such a lawful pathway or seek protection in a country through which they travel will be subject to a rebuttable presumption of ineligibility for asylum. That said, the Departments recognize that many migrants face challenging circumstances in their home countries and en route to the United States, and appreciate that not every country will be viable for every migrant, including those who may apply for asylum or other protection, depending upon their individual circumstances. With regards to concerns that migrants may not receive sufficient notice of the exception to seek and be denied asylum or other protection in a transit country, the Departments note that this is only one of multiple exceptions and means of rebuttal that the rule allows. As discussed in Section IV.B.5.iv of this preamble, the rule does not deprive noncitizens of notice in violation of the Fifth Amendment Due Process Clause.

With respect to concerns about "requiring" migrants to seek protection in a third country when they have relatives already in the United States, the Departments reiterate that the rule does not require any migrant to seek protection elsewhere; there are multiple ways to avoid or rebut that presumption of ineligibility, only one of which involves seeking asylum or other protection in a third country. Eligible noncitizens who cannot safely apply for asylum outside the United States may (while residing in any country) seek parole under an authorized parole process.

Alternatively, they may use the CBP One app to present themselves at a pre-scheduled time at a POE. Additionally, the presumption may be rebutted in exceptionally compelling circumstances, such as by demonstrating that one faces an acute medical emergency or imminent and extreme threat to life or safety at the time of entry, or by satisfying the definition of a victim of a severe form of trafficking in persons under 8 CFR 214.11(a). 8 CFR 208.33(a)(3)(i), 1208.33(a)(3)(i). Those who are not excepted from and are unable to rebut the presumption of ineligibility may still pursue statutory withholding of removal and protection under the CAT. The Departments are not aware, however, of any evidence establishing a direct link between distance traveled and validity of protection claims.

Finally, the Departments note that a location that may be unsafe for one person may not only be safe for, but may offer a much-needed refuge to, others. For example, some countries in the region may have a larger number of individuals who leave the country to seek protection elsewhere than who seek protection in the country, perhaps because those specific individuals experience a targeted threat of violence or fear of persecution in that country. At the same time, such a country may demonstrably provide protection for other individuals or groups of individuals, particularly those originating from third countries, who consider the country to be a safe option where they can be free from persecution or torture. To the extent commenters raise concerns about the ability of certain individuals to participate in the asylum processes of third countries, the Departments note that, as discussed above, many regional partners have protection frameworks that are in some respects more expansive than those of the United States. As detailed in the preamble to the NPRM, *see* 88 FR at 11720–23, many countries in the region have significantly increased protection options to address the unprecedented movement of migrants throughout the hemisphere. Finally, humanitarian protection is not the only available lawful pathway to intending migrants. In some instances, employment-based migration may be

the best option for migrants for whom economic issues are a key factor motivating them (which studies have shown are a high percentage of those moving through the region).[279]

Further discussion of the potential effects of this rule with respect to specific groups is contained in Section IV.B.4 of this preamble.

d. Concerns About Conditions and Asylum Process in Third Countries Generally

Comment: Commenters stated that lawful pathways in third countries do not necessarily promote family unity, and that opportunities for family unity depend on the specific pathway.

Response: The Departments acknowledge that countries in the region have differing asylum systems and requirements. However, this rule does not require that noncitizens apply for asylum or other protection in a specific third country in order to preserve family unity. Rather, such an application is one of multiple options for noncitizens under the rule. DHS-approved parole processes represent another set of options available to some noncitizens. Additionally, any noncitizen may present at a POE via an appointment that includes a pre-scheduled time and place or may present at a POE without a pre-scheduled time and place and be excepted from the presumption if the noncitizen demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle. The Departments also note the discussion in Section IV.E.3.ii.b of this preamble of CBP's ongoing efforts to improve CBP One app functionality for families.

Comment: Numerous commenters stated that the third country exception would cause serious bodily harm to noncitizens, lengthening the amount of time noncitizens spend in unsafe transit countries, and exposing them to further risks of persecution, torture, and death in third countries. Multiple commenters expressed concern that the rule ignores the realities asylum

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[279] *See, e.g.*, Ariel G. Ruiz Soto et al, *Charting a New Regional Course of Action: The Complex Motivations and Costs of Central American Migration,* 18 (Nov. 2021), *https://www.migrationpolicy.org/sites/default/files/publications/mpi-wfp-mit_migration-motivations-costs_final.pdf* (reporting that 92 percent of respondents to a UN World Food Programme household survey "cited economic reasons related to their livelihoods as being key motivating factors" for migration).

seekers face, including violence, persecution, and inadequacy of asylum systems in third countries, and reflects a misunderstanding of the conditions of noncitizens fleeing persecution. Multiple other commenters stated that applying for asylum and awaiting a subsequent denial in a third country is nearly impossible for noncitizens. Several commenters argued that requiring noncitizens to apply for asylum in third countries and wait for a decision would prolong their journey to safety. Another commenter stated that it was unreasonable to require noncitizens to wait for extended periods of time in third countries and suggested that the Departments revise the rule to except noncitizens who waited for six months or more without a decision. Similarly, a commenter stated that the third country exception was a way to delay the safety and stability of noncitizens. A commenter also stated that prior "safe third country" policies relating to Guatemala, among other places, forced asylum seekers into dangerous situations in third countries. A commenter said that although the NPRM states that preventing human trafficking is a consideration for the rule, the third country exception would drive people further into traffickers' hands. Numerous commenters provided narrative examples of noncitizens who had successfully gained asylum in the United States, and added that it would not have been possible for them to gain asylum if the third country exception was enacted.

Response: Regarding comments stating that "safe third country" and similar policies force those who might otherwise apply for asylum in the United States into dangerous situations in third countries, the Departments recognize that not all third countries will be safe for all noncitizens seeking asylum and acknowledge that some migrants may feel that the dangers noted by commenters, or the risk that a particular country's asylum system would be unduly delayed or leave them vulnerable to refoulement, make applying for protection in that country untenable. However, the rule does not require any noncitizen to seek protection in any particular country and therefore the Departments likewise decline to add an exception for noncitizens who waited for a certain period of time in a third country without a final decision.

The Departments also strongly disagree that the third country exception will heighten risks of human trafficking. Rather, the Departments expect that the rule will reduce reliance on dangerous human smuggling networks that exploit migrants for financial gain, including via human trafficking. If a noncitizen does not believe it would be safe to apply for asylum or related protection in any third country, they may avoid the presumption against asylum eligibility by availing themselves of any of the other available lawful pathways, or, if applicable, they may be able to rebut the presumption of ineligibility by demonstrating exceptionally compelling circumstances.

Comment: Some commenters oppose the rule because they believe it encourages individuals to remain in countries where they may not be safe and are closer to their feared persecutor(s) to avoid being disqualified from asylum should they try to enter at the SWB. For example, one commenter cited the experiences of individuals who are being imminently threatened by gangs and have to flee and therefore are unable to remain in their country to apply for a lawful pathway to the United States. Similarly, many commenters stated that it was unfair and unrealistic to expect noncitizens to seek asylum in areas that are unsafe and do not have meaningful protections for refugees.

Response: The Departments disagree that the rule encourages noncitizens to remain in dangerous conditions or remain close to their feared persecutors so as to preserve their chance to be eligible for asylum in the United States. The Departments understand that in some cases it would be dangerous for a noncitizen to remain in their home country while they seek a safe, orderly, and lawful pathway into the United States, but note that eligible migrants who have already left their country of origin may apply for the CHNV processes, and all migrants may, if within the appropriate area in Mexico, schedule an appointment to present at a POE. Moreover, the Departments note that lawful pathways such as applying for asylum in a country they transited through or scheduling an appointment through the CBP One app to present at a POE are recognized by the rule and are available to migrants who have already left their country of origin.

The Departments do not agree that this rule creates a strong incentive for those facing danger to remain in their home countries.

e. Concerns About Conditions and Asylum Process in Mexico Specifically

Comment: Several commenters expressed concerns about the adequacy of the asylum process in Mexico in particular. For example, one commenter stated that they had worked as a lawyer with migrants in Mexico for a year, and that COMAR is extremely overwhelmed and lacks the staff and funds to process the hundreds of thousands of asylum applications they have received from people in Mexico in the past few years. The commenter stated that they had personally witnessed the inability to receive a timely decision, or even to get access to COMAR in order to file an application in many parts of Mexico. The commenter also stated that Mexican civil society cannot meet the legal and social service needs of hundreds of thousands of asylum seekers, because such organizations are underfunded and under-resourced and cannot begin to meet the basic humanitarian and legal needs of the many people in need of protection who transit through Mexico. Other commenters stated that COMAR is underfunded and that immigration advocates have documented mismanagement and instances of denials of meritorious claims.

One commenter stated that Mexico's asylum system is not prepared to actually grant asylum to refugees from South and Central American countries, stating that conditions for refugees in Mexico are "harsh" and that Mexico does not provide refugees with "legal residence or adequate legal rights to keep them free of exploitation."

A commenter stated that unless an applicant is granted a transfer request by COMAR, they cannot leave the geographical area where they applied for asylum. The commenter added that many applicants move due to safety or economic concerns, and as a result, their cases are considered abandoned. The commenter stated that an abandoned case would not be considered a denial under Mexican law, and that a person who abandoned their application would not qualify under the NPRM. A commenter stated that they have not seen evidence that the Departments

have reviewed the ability of asylum seekers to obtain protection in Mexico and that failure to do so would lead to arbitrary and capricious rulemaking.

Response: The Departments recognize that managing migration is a collective responsibility and, as part of a whole-of-government approach, requires working closely with countries throughout the region to prioritize and implement a strategy that advances safe, orderly, legal, and humane migration throughout the Western Hemisphere. With regard to Mexico's ability to handle asylum claims, as stated in the NPRM, 88 FR at 11721, Mexico is the third highest recipient of asylum claims in the world; in 2022, COMAR reported receiving 118,478 applicants for refugee status.[280] Of applications completed in 2021, COMAR granted asylum in 72 percent of cases; an additional two percent of applicants were granted complementary protection (a form of protection available to those who are not eligible for refugee status).[281] Of applications completed in 2022, COMAR granted asylum in 61 percent of cases; an additional two percent of applicants were granted complementary protection.[282] The average case takes 8–12 months to adjudicate.[283] With United States Government funding and the support of international organizations, Mexico has also substantially increased its Local Integration Program, which relocates individuals granted asylum to safe areas of Mexico's industrial corridor and integrates them into such areas. These individuals are then matched with jobs and provided apartments, and their children are enrolled in local schools. In May 2022, the program reached the milestone of reintegrating 20,000 asylum seekers in Mexico.[284] And in June 2022, Mexico committed to support local labor integration for an additional 20,000 asylees over

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[280] Government of Mexico, La COMAR en Números, Diciembre 2022 (Jan. 16, 2023), *https://www.gob.mx/cms/uploads/attachment/file/792337/Cierre_Diciembre-2022__31-Dic.__1.pdf.*
[281] *See id.*; UNHCR, *Asylum Capacity Support Group, Mexico: Granting Complementary Protection*, *https://acsg-portal.org/tools/mexico-granting-complementary-protection/* (last visited Apr. 26, 2023).
[282] Government of Mexico, La COMAR en Números, Diciembre 2022 (Jan. 16, 2023), *https://www.gob.mx/cms/uploads/attachment/file/792337/Cierre_Diciembre-2022__31-Dic.__1.pdf.*
[283] Refugees Int'l, *Mexico's Use of Differentiated Asylum Procedures: An Innovative Approach to Asylum Processing* (July 20, 2021), *https://www.refugeesinternational.org/reports/use-of-differentiated-asylum-procedures-an-innovative-approach-to-asylum-processing-#_ftn5.*
[284] UNHCR, *Más de 20.000 Reubicaciones como Parte de los Esfuerzos de Integración de Personas Refugiadas en México* (May 25, 2022), *https://www.acnur.org/noticias/press/2022/5/628e4b524/mas-de-20000-reubicaciones-como-parte-de-los-esfuerzos-de-integracion-de.html.*

the next three years.[285] The Government of Mexico has announced substantial increases to its labor visa programs over the past two years to help those seeking protection enter the labor market.[286] The Departments acknowledge that, like the United States, Mexico has a significant asylum backlog. Nonetheless, it remains a viable option for many seeking protection in Mexico.[287]

As it relates to the comment regarding abandoned claims, the Departments note that, as discussed in Section IV.E.3.iv.f of this preamble, under this rule, a final decision does not include a determination by a foreign government that the noncitizen abandoned the claim. *See* 8 CFR 208.33(a)(2)(ii)(C), 1208.33(a)(2)(ii)(C). A noncitizen who has abandoned their asylum claim in Mexico would not qualify, on that basis, for an exception to the rebuttable presumption. Such noncitizens may nonetheless qualify for another exception to the rebuttable presumption or be able to rebut the presumption. For these reasons, the Departments have declined to revise the rule in response to this comment.

Comment: Other commenters stated that towns along Mexico's northern border are not equipped to provide food, shelter, health care, and sanitation services to migrants waiting for an asylum hearing. Commenters also stated that migrant camps in Mexico are dangerous, unsanitary, and negatively impact migrants' mental health. A commenter stated that organized crime operates across Central America and Mexico with impunity, and that a target of organized crime fleeing one location would likely be found and targeted in Mexico as well. Another commenter stated that persecutors have followed asylum seekers into Mexico and harmed them there.

Commenters also stated conditions in Mexico are unsafe, especially for asylum seekers. Specifically, commenters stated that the proposed rule would cause additional harm for migrants

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[285] *See* L.A. Declaration Fact Sheet..
[286] *See id.*
[287] *See* Global Compact on Refugees, *Mexico, https://globalcompactrefugees.org/gcr-action/countries/mexico* (last visited Mar. 9, 2023); Government of Mexico, Law on Refugees, Complementary Protection, and Political Asylum, Article 28, January 27, 2011, *https://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP.pdf*.

forced to wait in Mexico before applying for asylum in the United States due to the risk of rape, murder, kidnapping, extortion, robbery, and other violence; violent detention by Mexican government officials; denial of medical care for serious illnesses; displacement and homelessness; discrimination or harassment due to race, gender, and sexual orientation; abusive employment arrangements; and denial of access to basic services and protections due to language barriers. One commenter expressed concern that migrants in Mexico face discrimination from drug cartels and other criminals as well as from Mexican authorities, including police and immigration officials. Some commenters pointed to advisories issued by the U.S. Department of State warning U.S. citizens not to travel to areas in Mexico, and stated that there are many examples of migrants being seriously harmed while waiting for asylum in Mexico or for the chance to enter the United States.

Commenters also stated that these risks were further heightened for members of vulnerable groups, such as women and children, Black, brown, and indigenous persons, and LGBT persons.

Response: The Departments recognize commenters' concerns about potential harm to migrants in Mexico, particularly for members of vulnerable groups, but again note that more than 100,000 individuals felt safe enough to apply for asylum in Mexico in 2022. The Departments also emphasize that the rule does not require any noncitizen to apply for asylum or other protection in Mexico or any other country. Applying for and being denied protection in Mexico is only one of multiple ways to be excepted from or rebut the presumption of ineligibility for asylum. *See* 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). The rule also provides that the presumption of asylum ineligibility can be rebutted by noncitizens who do not utilize a lawful pathway but who face an imminent and extreme threat 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)(A) through (C), 1208.33(a)(3)(i)(A) through (C).

For further discussion of this rule and vulnerable populations, please see Section IV.B.4 of this preamble.

Comment: A commenter expressed concern that Mexican asylum seekers would have to wait for an appointment with CBP in the same country where they are experiencing persecution.

Response: This concern is based on a misunderstanding of the rule. The rebuttable presumption only applies to noncitizens who travel through a country other than their country of citizenship, nationality, or, if stateless, last habitual residence, and that is a party to the Refugee Convention or Protocol, and thereafter enter the United States from Mexico at the SWB or adjacent coastal borders without documents sufficient for lawful admission. *See* 8 CFR 208.33(a)(1), 1208.33(a)(1). Mexican nationals would not have traveled through a country other than Mexico en route to the SWB, and therefore are not subject to the rebuttable presumption. *See* 8 CFR 208.33(a)(1)(iii), 1208.33(a)(1)(iii).

f. Final Decision of Foreign Government is Undefined

Comment: Commenters asked how U.S. officials would know the adjudication and appeal processes of third countries, such that they could confirm that a noncitizen's application for asylum or other protection in a third country had been denied in a final decision. Commenters stated that a requirement for a final decision could introduce years of uncertainty depending on the backlogs and resources of third countries. One commenter stated that proving the denial of protection in a third country may be entirely impossible in the context of a credible fear interview.

Response: The Departments agree that further clarity on the meaning of the term "final decision" will help noncitizens understand, and IJs and AOs apply, this provision. The Departments are therefore revising 8 CFR 208.33(a)(2)(ii)(C) and 1208.33(a)(2)(ii)(C) to except from the rebuttable presumption noncitizens who "[s]ought asylum or other protection in a country through which the noncitizen traveled and received a final decision denying that application. A final decision includes any denial by a foreign government of the applicant's

claim for asylum or other protection through one or more of that government's pathways for that claim. A final decision does not include a determination by a foreign government that the noncitizen abandoned the claim."

The Departments also acknowledge that, like the United States, many countries have asylum backlogs that contribute to significant wait times for applicants. However, this rule does not require noncitizens to apply for asylum in a third country and wait for a final decision before applying for asylum in the United States; rather, that is simply one of the lawful pathways recognized by the rule. As an alternative to applying for asylum in a third country and seeking a final decision before migrating to the United States, noncitizens can utilize the CBP One app to pre-schedule an appointment to present at a POE or seek parole pursuant to a lawful parole process (such as the CHNV parole processes). *See* 8 CFR 208.33(a)(2)(ii)(A) and (B), 1208.33(a)(2)(ii)(A) and (B). The rule also allows noncitizens to whom the presumption applies to rebut it in exceptionally compelling circumstances. 8 CFR 208.33(a)(3), 1208.33(a)(3).

The Departments acknowledge that each of the lawful pathways outlined in the rule is subject to limitations, including, *e.g.*, capacity constraints, limitations on eligibility, and geographic availability. The Departments further acknowledge that the pathways' combined limitations could constrain some individuals' ability to access pathways at a given time or place, and that some of those individuals may also not be able to establish an exception to, or rebut, the presumption. However, the Departments have concluded that the interests of migrants and the immigration system as a whole, including the asylum system, are best promoted by incentivizing noncitizens to pursue safe, orderly, and lawful pathways to enter the United States rather than failing to take adequate actions to respond to a potential further surge of irregular migrations at the SWB that threatens to overwhelm the immigration system and prevent orderly processing of claims for protection.

Comment: Commenters stated that the proposed exception for those who sought and were denied asylum or "other protection" was unduly vague, because the term "other protection" is

undefined. Commenters stated that if a migrant applied for and was denied an immigration status other than asylum, they would not necessarily know such denial would qualify them for an exception to the rebuttable presumption. Commenters further stated that the absence of a definition would result in inconsistent application of the exception.

Response: The preamble of the NPRM described the United States' efforts throughout the region to prioritize and implement a strategy that advances safe, orderly, legal, and humane migration, including access to international protection. Such efforts are put forward in three policy-setting documents: the U.S. Strategy for Addressing the Root Causes of Migration in Central America[288]; the CMMS[289]; and the L.A. Declaration. The NPRM provided a detailed discussion of increased access to protection and other pathways in the region, specifically identifying available programs and processes in Mexico, Guatemala, Belize, Costa Rica, Colombia, Ecuador, and Canada. *See* 88 FR at 11720–23. While these countries provide an opportunity for individuals to apply for asylum or refugee status, they also offer other protection that is not dependent on the applicant meeting the definition of a refugee as provided by the Refugee Convention. For example, Mexico offers protection to individuals whose lives are in danger or where there are well-founded reasons to believe that they would be in danger of being subjected to torture or other cruel, inhuman, or degrading treatment or punishment.[290] Colombia, Costa Rica, and Ecuador have also offered other protection via regularization programs for individuals of specific nationalities.[291]

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[288] The White House, *U.S. Strategy for Addressing the Root Causes of Migration in Central America* (July 2021), *https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf.*

[289] The White House, *Collaborative Migration Management Strategy* (July 2021), *https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf?utm_medium=email&utm_source=govdelivery.*

[290] Government of Mexico, Law on Refugees, Complementary Protection, and Political Asylum, Article 28, January 27, 2011, *https://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP.pdf.*

[291] UNHCR, *Temporary Protection Status in Colombia (November 2021)* (Dec. 3, 2021), *https://reliefweb.int/report/colombia/temporary-protection-status-colombia-november-2021-0*; Costa Rica, *Special Temporary Category for Nationals of Cuba, Costa Rica and Nicaragua with Pending or Denied Refugee Claims* (Apr. 17, 2023), *https://www.migracion.go.cr/Paginas/Categor%C3%ADa%20Migratorias%20(Extranjer%C3%ADa)/Categor%C3%ADa-Especial-Temporal.aspx*; Reuters, *Ecuador Begins Regularization Process for Thousands of Venezuelan Migrants* Sept. 1, 2022, *https://www.reuters.com/world/americas/ecuador-begins-regularization-process-thousands-venezuelan-migrants-2022-09-01/.*

Because such protection and other pathways in the region are country-specific and, as exemplified by the increased access to protection in the region as a result of the CMMS and L.A. Declaration, are subject to change, the Departments have determined that appropriate pathways and other protections are best determined on a case-by-case basis, considering the evidence presented relating to the nature and basis of the noncitizen's application for protection in the third country. Nevertheless, the Departments note that the "final decision denying asylum or other protection" is intended to include denials of asylum and other forms of humanitarian protection related to fear of returning to one's home country as well as other temporary protections akin to that of temporary protected status under section 244 of the INA, 8 U.S.C. 1254a.

Comment: Commenters stated that the proposed rule gives preference to applicants who were denied asylum by another country over those who did not apply or who did apply and received asylum. Commenters stated that the proposed rule would not filter out people with weak asylum claims, as commenters believe the Departments intend, but would rather prevent the most vulnerable people from seeking asylum altogether.

Response: The Departments disagree with the assertions that this rule necessarily gives preference to applicants who were denied asylum by another country over those who do not apply and disagree that the rule would prevent the most vulnerable people from seeking asylum altogether. The rule imposes consequences on certain noncitizens who enter the United States without availing themselves of a lawful pathway for entering the United States. Seeking protection and receiving a final decision in a country through which a noncitizen traveled is one of the lawful pathways recognized by the rule, but it is not the only lawful pathway available. A noncitizen who does not seek protection in a third country may nonetheless establish an exception to the presumption—just as a noncitizen who has sought and been denied such protection would—by presenting at a POE at a pre-scheduled time, or by pursuing a DHS-approved parole process.

The rule incentivizes intending migrants to pursue lawful pathways as part of a regional approach to migration management, including by incentivizing migrants to seek protection in countries through which they travel. With respect to any concern that noncitizens denied protections in a third country are less deserving of protection here, the Departments do not agree that a denial in a third country necessarily means that the applying individual would not merit protection under U.S. law.

In addition, the Departments do not agree that the rule necessarily gives preference to applicants who have been denied asylum in another country. Rather, the rule incentivizes migrants to avail themselves of lawful alternatives to irregular migration and see them through to completion (*e.g.*, receiving a final decision in another country). Those noncitizens meeting that requirement who are ultimately granted asylum or other protections in other countries would have no need to continue on to the United States and may, in many cases, be subject to the firm resettlement bar to asylum, and thus, in the Departments' view, such noncitizens need not be excepted from the rebuttable presumption. However, those who have been denied may still have a need for protection in the United States. Therefore, the Departments believe that maintaining asylum eligibility in the United States for those who have been denied asylum in third countries is appropriate and supports the larger goal of incentivizing noncitizens to pursue available lawful pathways, as part of an effort to build a regional approach to migration management.

Moreover, as noted above, there are additional lawful pathways to which noncitizens could avail themselves to avoid application of the rebuttable presumption as well as multiple circumstances in which the presumption of asylum ineligibility could be rebutted. *See* 8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3). The Departments acknowledge that each of the lawful pathways outlined in the rule is subject to limitations and that the pathways' combined limitations could constrain any individual's ability to access them at a given time or place. However, the Departments have concluded as a matter of policy that the interests of migrants and the immigration system as a whole are best promoted by incentivizing noncitizens to pursue safe,

orderly, and lawful pathways to enter the United States rather than failing to take adequate actions to respond to a potential further surge of irregular migration at the SWB that threatens to overwhelm the immigration system and prevent orderly processing of claims for protection.

g. Pursuit of Lawful Pathways May be Improperly Used as Evidence

Comment: Some commenters expressed concern that taking time to pursue lawful pathways may be used as evidence that noncitizens who do not flee their country immediately do not have a legitimate well-founded fear of persecution.

Response: The Departments disagree that the rule will increase the likelihood of adverse determinations against those noncitizens who choose to remain in their home countries while seeking access to one of the enumerated lawful pathways. As noted elsewhere in this section, this rule does not discourage any person from fleeing a dangerous circumstance, and in fact highlights the options potentially available to persons who do so. Moreover, such migrants may still provide relevant evidence to support their eligibility for asylum, including a well-founded fear of future persecution, notwithstanding their decision to remain in their country to seek a lawful pathway to the United States. *See* 88 FR at 11737; *see also* 8 CFR 208.13. In short, despite assertions made by some commenters, this rule will not result in the elimination of claims for asylum based on a well-founded fear of future persecution, even for applicants who spend some amount of time in their country of origin attempting to access an orderly and lawful pathway to the United States. AOs and IJs will still consider the noncitizen's fear of returning to their country of origin on a case-by-case basis through the noncitizen's credible testimony and other relevant evidence demonstrating a fear of persecution.

v. Unaccompanied Children

Comment: Commenters disagreed with the exception for UCs, stating that children need their parents to keep them safe during their journey to the SWB and that the proposed rule would discourage whole families from seeking asylum together. Some commenters stated that the UC exception would encourage family separation, arguing that families often separate as a perceived

means to obtain protection for their children. Specifically, commenters stated that excepting UCs from the rebuttable presumption would incentivize families to send their children on a dangerous journey to the SWB unaccompanied, leading to a surge in the number of UCs arriving at the SWB. Similarly, commenters expressed that in lieu of waiting together in Mexico, many families may choose, or be "forced" by the lack of sufficient appointment slots for family members or concerns related to their children's safety, to send their children unaccompanied to the SWB while waiting to schedule their own appointment through the CBP One app. Commenters pointed to reports of such voluntary separations under MPP and the Title 42 public health Order and said that the proposed rule would lead to similar outcomes, and that implementing a policy that would foment such separations would be inhumane and unacceptable. Commenters stated that family separations can cause severe emotional trauma to children and may increase the risk that a child will be exploited or trafficked.

Some commenters suggest that the Departments should remove the UC exception and instead award a higher priority to family unit applications, as this would keep family units together, grant asylum to those that qualify, and disincentivize sending UCs to the SWB. Other commenters asserted that accompanied children should also qualify for an exception, since the exception for UCs creates a perverse incentive to send children alone to the border if families are not first successful together. Another noted that children arriving with their families do not choose where to cross the border or whether to first obtain an appointment, nor do they choose whether to first apply for asylum in another country, especially when fleeing danger.

Response: The Departments fully agree with commenters that keeping families unified and avoiding family separation and the associated trauma is an important goal, but disagree that the rule, including the exception for UCs, will increase separations of families and result in more UCs arriving in the United States. *See, e.g.*, E.O. 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273 (Feb. 5, 2021). As noted in the preamble of the NPRM, applicability of the rebuttable presumption will be considered during the credible

fear process for those noncitizens processed for expedited removal, as well as applied to merits adjudications. 88 FR at 11707. Pursuant to section 235 of the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA"), UCs whom DHS seeks to remove cannot be processed for expedited removal and, thus, are never subject to the credible fear process. 8 U.S.C. 1232(a)(5)(D). As UCs are already excluded from expedited removal, the Departments do not expect—based on their experience implementing current law concerning expedited removal and asylum—that this exclusion of UCs from the rebuttable presumption would serve as a significant incentive for families to send their children unaccompanied to the United States.

In addition, under this rule, families may avail themselves of lawful pathways and processes to enter the United States to avoid application of the rebuttable presumption. The rule also states that if one member of a family travelling together, including both parents and children, is excepted from the presumption or has rebutted the presumption, all members of the family are treated as excepted from or as having rebutted the presumption. 8 CFR 208.33(a)(2)(ii) and (3)(i), 1208.33(a)(2)(ii) and (3)(i); 88 FR at 11730 (providing that "if one member of a family traveling together is excepted from the presumption that the condition applies or has rebutted the presumption, then the other members of the family as described in 8 CFR 208.30(c) are similarly treated as excepted from the presumption or as having rebutted the presumption"); *see* 8 CFR 208.30(c)(2) ("The asylum officer in the officer's discretion may also include other accompanying family members who arrived in the United States concurrently with a principal [applicant] in that [applicant's] positive fear evaluation and determination for purposes of family unity.").

To the extent commenters suggest that all children, including those traveling with a parent or legal guardian, be excluded from applicability of the rule, the Departments agree that children may have limited agency in their manner of arrival in the United States. The Departments have therefore added a provision to the rule that allows principal asylum applicants who were under the age of 18 at the time of entry to avoid the condition on asylum eligibility for applications if they file as principal applicants after May 11, 2025, as discussed in more detail at Section II.C.2 of this preamble. 8 CFR 208.33(c)(2), 1208.33(d)(2). However, the Departments do not wish to create an incentive for adults to arrive at the border with children falsely claiming to be a family unit in order to be excepted from the rule or for parents or legal guardians to bring their children with them on the dangerous journey to the United States when they otherwise would not do so, and therefore decline to add an exception for all accompanied minors. The Departments seek to encourage families that may choose to travel to the United States together to travel via a lawful pathway rather than by entrusting smugglers or criminal organizations to facilitate a potentially dangerous journey.

vi. Other General Comments on Exceptions

Comment: Several commenters stated that the exceptions to the rebuttable presumption are too narrow and, therefore, would preclude many noncitizens from obtaining asylum. One commenter suggested creating a broad fourth exception that would exempt particularly vulnerable demographics from the rebuttable presumption, much like the proposed rule already exempts unaccompanied children. Another commenter suggested creating an exception for the elderly, who are significantly less likely to be repeat unauthorized crossers.

Response: The Departments believe that the rule will generally offer opportunities for those with valid claims to seek protection, and decline to add additional exceptions to the rule. The Departments believe that the existing exceptions to application of the rebuttable presumption against asylum eligibility at 8 CFR 208.33(a)(2) and 1208.33(a)(2) provide the desired incentive for noncitizens seeking to enter the United States do so via safe, orderly, and lawful pathways,

and that additional exceptions, particularly broad exceptions such as those suggested by commenters, would be contrary to the purpose of the rule. Regardless of whether certain populations may be more or less likely to be repeat, unauthorized border crossers, the Departments believe that all noncitizens seeking to enter the United States should do so via safe, orderly, and lawful pathways if possible.

The Departments also note that in addition to the enumerated exceptions, the rule includes means of rebutting the presumption against asylum eligibility at 8 CFR 208.33(a)(3) and 1208.33(a)(3) where exceptionally compelling circumstances exist, including where at the time of entry the noncitizen or a member of their family with whom they are traveling faced an acute medical emergency, faced an imminent and extreme threat to life or safety, or were a victim of a severe form of trafficking in persons. The Departments believe that together, the exceptions and grounds for rebuttal strike the correct balance between incentivizing use of safe, orderly, and lawful pathways for entry into the United States while also recognizing that in certain limited circumstances use of these pathways may not be feasible.

4. Other General Comments on the Rebuttable Presumption

Comment: At least one commenter suggested that the Departments should permit an applicant to override the lawful pathways condition if they establish a reasonable possibility of persecution or torture.

Response: To best effectuate the policy aims underpinning this rulemaking, the Departments believe that even those noncitizens who establish a reasonable fear of persecution or torture generally should remain subject to this asylum eligibility condition. Such noncitizens remain eligible for statutory withholding of removal or for CAT protection, consistent with U.S. non-refoulement obligations under the Refugee Convention and Protocol and Article 3 of the CAT. *See Mejia v. Sessions*, 866 F.3d 573, 588 (4th Cir. 2017); *Cazun v. U.S. Att'y Gen.*, 856 F.3d 249, 257 n.16 (3d Cir. 2017). Additionally, as discussed in Section IV.E.7.ii of this preamble, the Departments have included protections for family members of principal asylum

applicants who are eligible for statutory withholding of removal or CAT protection and would be granted asylum but for the lawful pathways rebuttable presumption, where an accompanying spouse or child would not qualify for asylum or other protection from removal on their own or where 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. In that context, the Departments have determined that the possibility of separating the family would constitute an exceptionally compelling circumstance that rebuts the lawful pathways presumption of ineligibility for asylum. *See* 8 CFR 1208.33(c).

Comment: One commenter stated that the United States and Mexico should establish certain parameters for non-Mexicans waiting in Mexico for an appointment or for entry by other means, which must take into account safety, security, and humanitarian conditions in the locations where asylum seekers may be forced to wait. The commenter suggested that those parameters should include permission to remain lawfully in Mexico while awaiting appointments and ensuring relevant standards of protection and treatment under the Refugee Convention and international human rights standards.

Response: It would be the Government of Mexico's prerogative to establish any such parameters. The Departments remain committed to continuing to work with foreign partners on expanding their legal options for migrants and expanding the Departments' mechanisms for processing migrants who lawfully arrive in the United States. *See* 88 FR at 11720.

5. Screening Procedures and Review

i. Requests for Reconsideration

Comment: Some commenters opposed eliminating noncitizens' ability to seek reconsideration of a negative fear determination by USCIS and contended that the proposed rule would eliminate AO reconsideration of negative credible fear determinations. Commenters stated that the use of reconsiderations is needed to safeguard the rights of and due process for asylum seekers where the AO in the first instance issues an erroneous decision. Commenters

stated that reconsideration has shielded asylum seekers from deportation to persecution and torture for decades, and observed that between FYs 2019–21 requests for reconsideration resulted in 569 reversals of negative credible fear determinations. One commenter stated that even one reversal in the request for reconsideration process is significant enough. One commenter wrote that, contrary to the proposed rule's "theory that" requests for reconsideration "are a waste of resources because so few are granted," their experience was that so few are granted because migrants cannot adequately state their fear in the initial interview nor access assistance with the process. Another commenter said the elimination of the possibility of reconsideration leaves an applicant's fate entirely to the quality and circumstances of the initial interview. Another commenter stated that the Departments should not use USCIS's "abysmal grant rate to justify eliminating this critical opportunity for justice and to right a wrong in an asylum seeker's application for protection." Another commenter expressed concern that this proposed rule would apply only to people who receive negative credible fear determinations due to this proposed rule, thereby creating different sets of procedural rules for asylum seekers denied under this proposed rule and those denied for other reasons.

Response: At the outset, the Departments note that contrary to some commenters' assertions, the rule does not eliminate reconsideration of negative credible fear determinations. If the IJ upholds the AO's negative determination, USCIS can still exercise its discretion to reconsider a negative determination. *See* 8 CFR 208.33(b)(2)(v)(C). The rule does eliminate the ability to request such reconsideration for noncitizens deemed ineligible for asylum by operation of the rebuttable presumption. While the Departments acknowledge concerns about eliminating a noncitizen's ability to request reconsideration in this context, they believe it is important to efficiently resolve credible fear cases that are subject to the rebuttable presumption against asylum eligibility. The rule's effectiveness in channeling migration into safe and orderly pathways depends in part on the efficient resolution of credible fear cases, and the inclusion of further review procedures in this context would unnecessarily prolong the credible fear process.

In response to concerns about fairness, the Departments note that there remain multiple safeguards to ensure that the process is fair and to guard against inadvertent error for those subject to the rule. All credible fear determinations undergo initial review by a Supervisory AO. 8 CFR 208.30(e)(8). If the supervisor concurs with the negative determination, the noncitizen can request review of that determination by an IJ. *See* 8 CFR 208.33(b)(2)(iii) through (v). Those who are found subject to the presumption against asylum eligibility but who are still placed in section 240 removal proceedings can seek a de novo decision regarding the presumption. *See* 8 CFR 1208.33(b)(4). Furthermore, the Departments note that few requests for review of negative credible fear determinations ultimately result in the reversal of those determinations. *See* 87 FR at 18132; 88 FR at 11747. The Departments assess that, in light of the safeguards in place and the low rate of reversal, efficiency interests outweigh the interest in providing further opportunity to request reconsideration; the Departments therefore respectfully disagree with the commenter stating that even one reversal would be significant enough to warrant the ability to request reconsideration. Regarding the claim that few requests for reconsideration are granted due to noncitizens' lack of opportunity to state their fear during the initial interview and lack of assistance with the process, the commenter offered only anecdotal evidence for this. Moreover, this assertion does not change the Departments' assessment that providing further opportunity to request reconsideration carries insufficient benefits to justify its costs. To the extent that commenters argued that these limits on reconsideration implicate the due process rights of noncitizens, as explained previously in Section IV.B.5.i of this preamble, 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 (citing INA 235(b)(1)(B)(ii) and (v), 8 U.S.C. 1225(b)(1)(B)(ii) and (v)). The INA provides no statutory right to reconsideration of an AO's negative credible fear determination. *See* INA 235(b)(1), 8 U.S.C. 1225(b)(1).

The Departments acknowledge that noncitizens who are not subject to the presumption are subject to different rules for reconsideration. *See* 8 CFR 208.30(g)(1)(i). However, the Departments note that the decision to reconsider a negative credible fear determination under that rule is still subject to USCIS discretion and is also time limited. *Id.* By contrast, there are no time limits for USCIS to reconsider negative determinations in cases subject to this rule. 8 CFR 208.33(b)(2)(v)(C). And due to the exigent circumstances discussed throughout this rule, including in Sections II.A and IV.B.2 of this preamble, the Departments believe it necessary to limit requests for reconsideration in cases subject to this rule.

ii. "Significant Possibility" Standard and Mechanisms for Evaluating Asylum and Withholding of Removal

Comment: Some commenters alleged that the rule would elevate the "significant possibility" standard established by Congress to the "reasonable possibility" standard, which is much harder for asylum seekers to meet. One commenter stated that the complexity of the presumption of ineligibility will require "intensive factual analysis" during credible fear interviews and stated that application of the reasonable possibility standard for screenings for withholding of removal or CAT protection violates the Global Asylum Rule injunction. Other commenters suggest that it will be "an extremely onerous undertaking" for the Departments to apply a "reasonable fear" standard in cases where the lawful pathways condition applies, which could lead to more complex and resource-intensive credible fear screening interviews with a "high risk of error that would send bona fide refugees back to danger." Another commenter stated that, by applying the "reasonable possibility" standard to cases subject to the rule, the rule would essentially turn the credible fear interview, which is intended to be a low-bar screening, into an asylum merits hearing for these individuals. One commenter said that procedural and judicial errors are likely to increase as AOs are asked to apply the more onerous "reasonable possibility" standard.

A commenter stated that the rule may not be necessary as long as statutory withholding of removal and protection under CAT are available, as migrants would not distinguish between asylum, withholding, and CAT protection and instead would arrive at the SWB with the intention of seeking whatever relief is available to them. Other commenters expressed concern that those who cannot rebut the presumption would then be forced to meet a more difficult standard to be able to present a claim to lesser protections in the form of statutory withholding of removal or CAT protection. One commenter stated that the fact that the Departments have long applied the higher standard in reasonable fear screenings is "inapposite," reasoning that the rule is not about reasonable fear screenings, which impact those who were previously ordered removed and then re-entered without inspection.

Response: To the extent commenters suggest that the "reasonable possibility" standard will apply at the credible fear stage to asylum claims under this rule, they are incorrect. The statutory "significant possibility" standard will continue to apply to such asylum claims. *See* Section IV.D.1.iii of this preamble. The rule would apply a "reasonable possibility" standard only to screen for claims of withholding of removal and CAT protection, and only where a noncitizen has failed to establish a significant possibility that they would be able to show at a full hearing by a preponderance of the evidence that the presumption does not apply or that they meet an exception to or can rebut the presumption of ineligibility. *See* 88 FR at 11724.

That said, the Departments acknowledge commenters' concerns that certain noncitizens will be subject to a higher burden of proof for statutory withholding of removal and CAT protection. The Departments acknowledge that use of the "reasonable possibility" standard is a change from the practice currently applied in the expedited removal context as articulated in the Asylum Processing IFR; however, it is the same standard used in other protection screening contexts. *See* 8 CFR 208.31; *see also* 88 FR 11742–44. Notably, this higher screening standard accords with the higher standard a noncitizen must meet for statutory withholding of removal and protection under CAT in section 240 removal proceedings, 8 U.S.C. 1229a. *See INS. v.*

Cardoza-Fonseca, 480 U.S. 421 (1987). As explained in the NPRM, the Departments therefore believe that the "reasonable possibility" standard "better predicts the likelihood of succeeding on the ultimate statutory withholding or CAT protection application than the 'significant possibility' of establishing eligibility for the underlying protection standard, given the higher burden of proof." 88 FR at 11746–47. The application of standards tailored to the type of relief or protection that the noncitizen is eligible for will not foreclose an opportunity for those with meritorious claims to seek protection.

While the INA specifies the "significant possibility" standard for the purpose of screening for potential asylum eligibility in credible fear proceedings, INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), the INA does not specify a standard to be used in screening for potential eligibility for statutory withholding of removal or CAT protection. Congress did not require the same eligibility standards for asylum, statutory withholding of removal, and protection under the CAT in the "credible fear" screening process. *See* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* The Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. 105–277, 112 Stat. 2681–822. Thus, the Departments have determined that, where the rebuttable presumption of asylum ineligibility applies and has not been rebutted, applying the "reasonable possibility" of persecution or torture standard to screen claims for statutory withholding of removal and CAT protection would better advance the Departments' systemic goal of processing protection claims in a manner that is efficient, orderly, and safe.

The Departments acknowledge that in multiple rulemaking efforts in recent years, the Departments promulgated divergent standards for screening for potential eligibility for asylum as compared with statutory withholding of removal and CAT protection, along with variable standards for individuals barred from certain types of protection, which are currently not in effect.[292] In June 2020, the Departments published the Global Asylum Rule, which amended

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[292] *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934, 55939, 55943 (Nov. 9, 2018) ("Proclamation Bar IFR"); Asylum Eligibility and Procedural

provisions relating to the expedited removal and credible fear screening process, including raising the standards of proof for screening all claims for statutory withholding of removal and CAT protection to a "reasonable possibility" of persecution or torture and applying all mandatory bars to asylum and statutory withholding of removal during the credible fear screening. *See* Global Asylum Rule, 85 FR at 80277–78. The Global Asylum Rule continues to be the subject of lawsuits challenging the rule on multiple grounds.[293] Most of the changes to the credible fear process in expedited removal made by the Global Asylum Rule were superseded by the Asylum Processing IFR. As explained in the NPRM, the considerations that led to those decisions do not apply here. *See* 88 FR at 11744. This rule implements the new condition on eligibility in credible fear screenings through a stand-alone provision rather than a catch-all as the Departments sought to do through the Global Asylum Rule. Moreover, the Departments have determined that it would be appropriate to apply the lawful pathways condition on asylum eligibility during the credible fear screening stage such that the "reasonable possibility" of persecution or torture standard would then be used to screen the remaining applications for statutory withholding of removal and CAT protection. *See id.*

The Departments disagree with commenters' assertions that applying a higher burden of proof to screen for statutory withholding of removal and CAT protection where the presumption of asylum ineligibility applies and is not rebutted will result in errors. AOs and IJs have long applied, and continue to apply, the "reasonable possibility" of persecution or torture standard successfully to noncitizens who are subject to administrative removal orders under section 238(b) of the INA, 8 U.S.C. 1228(b), or reinstated orders under section 241(a)(5) of the INA, 8

Modifications, 84 FR 33829 (July 16, 2019) ("Third Country Transit (TCT) Bar IFR"); Asylum Eligibility and Procedural Modifications, 85 FR 82260 (Dec. 17, 2020) ("TCT Bar Final Rule"); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020) ("Global Asylum NPRM"); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (Dec. 11, 2020) ("Global Asylum Rule"); Security Bars and Processing, 85 FR 84160 (Dec. 23, 2020) ("Security Bars Rule").

[293] *See Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 501 F. Supp. 3d 792 (N.D. Cal. 2020); *Immigration Equality v. U.S. Dep't of Homeland Sec.*, No. 3:20-cv-09258 (N.D. Cal. filed Dec. 21, 2020); *Human Rights First v. Mayorkas*, No. 1:20-cv-3764 (D.D.C. filed Dec. 21, 2020); *Tahirih Justice Ctr. v. Mayorkas*, No. 1:21-cv-00124 (D.D.C. filed Jan. 14, 2021).

U.S.C. 1231(a)(5). *See generally* 8 CFR 208.31 and 1208.31. There is therefore no reason to conclude that AOs and IJs will not be able to appropriately apply that standard successfully in the context of this rule.

The Departments disagree with commenters' suggestion that the rule will increase irregular migration because noncitizens will still travel to the United States to pursue any avenue of relief available to them. 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, coupled with an expansion of lawful, safe, and orderly pathways, is expected to reduce the number of noncitizens seeking to cross the SWB without authorization to enter the United States. 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. The Departments believe the rule will generally offer opportunities for those with valid claims to seek protection.

The Departments' application of a higher standard for statutory withholding and CAT protection in "reasonable fear" screenings, *see* 8 CFR 208.31 and 1208.31, is not inapposite in the context of this rule, where a noncitizen does not meet an exception to or rebut the presumption of asylum ineligibility. As in the "reasonable fear" context, this standard would be applied only where noncitizens are ineligible for asylum—and because the standard for showing entitlement to statutory withholding and CAT protection (a probability of persecution or torture) is significantly higher than the standard for asylum (well-founded fear of persecution), the Departments have determined that the screening standard adopted for initial consideration of withholding and deferral requests in these contexts should also be higher.

In promulgating this rule, the Departments considered and drew upon the established framework for considering the likelihood of a grant of statutory withholding of removal or CAT protection in the reasonable-fear context. *See* 88 FR at 11743. The Departments have authority to establish screening procedures and standards for statutory withholding of removal and CAT

protection. *See* INA 103(a)(1), 8 U.S.C. 1103(a)(1). The Departments have frequently invoked these authorities to establish or modify procedures in expedited removal proceedings. *See id.* Noncitizens who establish a reasonable fear of persecution or torture would still be able to seek protection in proceedings before IJs. *See* CFR 1208.33(b)(2)(ii).

Comment: One commenter supported the Departments' assessment that applying the higher standard would lead to fewer noncitizens with non-meritorious claims being placed in section 240 removal proceedings, and that using this standard would further systemic goals without violating statutory or international obligations. However, the commenter recommended that DHS raise the screening standard from "significant possibility" to "reasonable possibility" for statutory withholding of removal and CAT protection during all credible fear interviews. The commenter reasoned that such an approach would be consistent with the INA, the FARRA, and U.S. non-refoulement obligations, and would reduce "historic and unsustainable strains" on the U.S. asylum system by deterring unauthorized immigration into the United States.

Response: The Departments decline to apply the "reasonable possibility" standard to screen all withholding of removal and CAT claims. The Departments believe that continuing to use the "significant possibility" standard to screen for all three types of claims—asylum, statutory withholding of removal, and CAT protection—when the noncitizen is excepted from or has overcome the presumption would avoid AOs and IJs applying divergent standards to the same sets of facts in a credible fear interview, thus simplifying the screening process for those noncitizens.

The commenter did not provide any explanation or evidence regarding how applying a higher standard during the credible fear screening to all claims for protection will reduce fraudulent claims. While the Departments acknowledge the commenter's concern, the Departments emphasize that the rule's primary intent is not to identify fraudulent asylum claims, but rather to reduce the level of irregular migration to the United States without discouraging migrants with valid claims from applying for asylum or other protection.

6. Effective Date, Temporary Period, and Further Action

Comments: Commenters raised concerns regarding the effective date of the rule and the two-year temporary duration of the rule. Several commenters expressed a concern that the two-year period is unexplained. Some commenters argued that two years was too short of a time period to assess the effectiveness of the program. Another commenter stated that the two-year temporary duration of the rule allowed for sufficient time to assess the effects of the rule and to deter migrants. Some commenters questioned why the rule would expire after two years and requested further explanation, stating that if the Departments believe it is sound policy, it is not clear why the changes are not permanent. Others stated that the two-year period was too long for a "temporary" program designed to address "exigent circumstances," and stated that the Departments should have considered a much shorter duration, such as 30 days or 90 days, reconsideration every 6 months, or a sunset before the end of 2025. Another commenter stated that the Departments should specify conditions that would trigger the expiration of the rule. Commenters also expressed concern that the rule does not sufficiently lay out the criteria for determining whether the rule should be extended at the end of the 24-month period, or that the criteria are highly subjective. Commenters also noted that previous immigration policies, including MPP and those stemming from the Title 42 public health Order, have been difficult to sunset.

Response: The Departments intend for the rule to address the surge in migration that is anticipated to follow the lifting of the Title 42 public health Order. For that reason, and consistent with the Departments' initial assessment as stated in the NPRM, *see* 88 FR at 11727, the rule will only cover those who enter during a specific time period, applying to those who enter the United States at the SWB during the 24-month period following the rule's effective date. The Departments believe that a 24-month period provides sufficient time to implement and assess the effects of the policy contained in this rule. In addition, the Departments believe that a 24-month period is sufficiently long to impact the decision-making process for noncitizens who

might otherwise pursue irregular migration and make the dangerous journey to the United States, while a shorter duration, or one based on specified conditions, would likely not have such an effect.

During this time, the United States will continue to build on the multi-pronged, long-term strategy with our foreign partners throughout the region to support conditions that would decrease irregular migration, work to improve refugee processing and other immigration pathways in the region, and implement other measures as appropriate, including continued efforts to increase immigration enforcement capacity and streamline processing of asylum seekers and other migrants. Recognizing, however, that there is not a specific event or demarcation that would occur at the 24-month mark, the Departments will closely monitor conditions during this period in order to review and make a decision, consistent with the requirements of the APA, whether additional rulemaking is appropriate to modify, terminate, or extend the rebuttable presumption and the other provisions of this rule. Such review and decision would consider all relevant factors, including the following: current and projected migration patterns, including the number of migrants seeking to enter the United States or being encountered at the SWB; resource limitations, including whether the number of noncitizens seeking or expected to seek to enter the United States at the SWB exceeds or is likely to exceed the Departments' capacity to safely, humanely, and efficiently administer the immigration system, including the asylum system; the availability of lawful, safe, and orderly pathways to seek protection in the United States and partner nations; and foreign policy considerations. The Departments expect to consider their experience under the rule to that point, including the effects of the rebuttable presumption on those pursuing asylum claims. In addition, the Departments expect to consider changes in policy views and imperatives, including foreign policy objectives, in making any decision regarding the future of the rule. The Departments do not believe that establishment of specific metrics for renewal ex ante would be appropriate, given the dynamic

nature of the circumstances at the SWB and the multifaceted domestic and foreign policy challenges facing the Departments.

Comment: Commenters expressed concern about the rationale for adopting the two-year duration and potential extensions of the rule in subsequent administrations. Some commenters stated that the Departments' rationale for the two-year temporary duration was pretextual, with the true motivations being political and partisan in nature. One commenter disagreed with allowing the rule to be effective after the end of the current presidential term because it could be indefinitely extended, and another similarly stated that the fact that the rule is "temporary" does not mean that a subsequent presidential administration could not renew it. Commenters stated that, by sunsetting the rule after the end of the current presidential term, the Departments were inviting such a result.

Response: The Departments disagree that the rationale for the 24-month duration of the rule is political, partisan, or pretextual in nature. 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 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. The 24-month duration of the rule is discussed in more detail in Section IV.E.6 of this preamble.

Comment: Commenters questioned how the temporary nature of the rule would practically work, noting the range of new procedures, training, and other Notices required to start and stop such a large program. These commenters hypothesized that the time spent training and making other updates for implementation would directly cut into the limited time the rule would be in effect, reducing its effectiveness.

Response: The Departments agree that implementation of the rule requires training and guidance, and are taking steps to ensure that it can be implemented in a timely, fair, and efficient manner after it goes into effect. The Departments are confident that the new procedures required can be put into effect with minimal disruption or delay in both merits adjudications and credible fear screenings.

Comment: Commenters stated that although the rule proposed a two-year effective period, it would have a permanent impact. A few commenters expressed concern about the potential for two identical asylum seekers to be treated differently based on whether they seek asylum before or after the sunset date of the rule. One commenter urged the Departments to provide clarity regarding adjudications that take place after the rule's sunset date for individuals that entered prior to the sunset date.

Response: The Departments appreciate commenters' concerns that the rule, which would only apply to those entering during a specified, time-limited date range, could lead to confusion, and appreciate the opportunity to clarify how it will be implemented. The Departments also recognize that due to the nature of the rule, noncitizens who enter during the specified date range will be subject to its terms while those who enter before or after the period will not. However, the Departments disagree that the effects of the condition should be time-limited in duration. The rule was designed to apply to anyone who entered during the specified time period in order to avoid the possibility of individuals entering without documents sufficient for lawful admission during the time period covered by the rule, then waiting out the condition imposed by the rule before applying for asylum, thereby contributing to the existing immigration court backlog and rendering the rule ineffective in its aims of reducing unauthorized arrivals to the SWB and encouraging utilization of available lawful pathways. To clarify to noncitizens and adjudicators that the rebuttable presumption has continuing effect, the Departments added language to the regulations stating that the rebuttable presumption will continue to apply to all asylum applications filed by people who enter in the specified manner during the 24-month period

regardless of when the application is filed and adjudicated. *See* 8 CFR 208.33(c)(1), 1208.33(d)(1). To further clarify, and in response to commenters' concerns in relation to individuals who enter as minors in a family unit who may have entered during the rule's effective period through no fault or agency of their own, the Departments have added language to the rule to ensure children brought to the United States during the 24-month effective period are not subject to the lawful pathways rebuttable presumption of asylum ineligibility in the rule if they file an application for asylum as a principal applicant after expiration of the 24-month period. 8 CFR 208.33(c)(2), 1208.33(d)(2).

Comment: Several commenters stated that the rule is contrary to international law, and that its temporary nature, or the emergency rationale behind it, do not justify or excuse such a violation.

Response: For discussion of the rule's compliance with international law and U.S. treaty obligations, please see Section IV.D.3 of this preamble.

7. EOIR Proceedings

i. EOIR IJ Credible Fear Review Procedures

Comment: Commenters objected to the provision in the proposed rule that would require noncitizens to affirmatively request IJ review of negative credible fear determinations, which differs from existing procedures where review is given to those who do not affirmatively decline review. Commenters stated that IJ review of negative credible fear determinations is an important safeguard that is guaranteed by statute, pointing to data detailing how many negative credible fear determinations were overturned by IJs. Commenters stated that this change favors expedience over access to protection in the United States and would inevitably result in an increase in deportations to countries where asylum seekers have a credible fear of return. Commenters stated that negative credible fear determinations should automatically receive IJ review unless the noncitizen affirmatively declines it, as expecting a noncitizen to know to affirmatively ask for an IJ's review is unrealistic and effectively denies the noncitizen the

opportunity for a judicial review. Commenters explained that many individuals may not request review, or know to request review, even if asked whether they wish to seek further review before an IJ, for a variety of reasons. The provided reasons included unfamiliarity with the immigration system; lack of counsel or education; inability to identify legal errors by the AO; language issues; time in custody; mental health conditions; confusion; trauma; and deference to authority; among others. Further, commenters also stated that changing the explanations of the right to IJ review would not serve as a sufficient safeguard.

Commenters also stated that the Departments did not give a reasoned justification for this policy change and that the rationale in the NPRM for requiring noncitizens to affirmatively request IJ review contradicts the Asylum Processing IFR, which, after the Global Asylum Final Rule implemented a requirement that noncitizens affirmatively request review, reinstated the default rule that negative determinations would be automatically referred for IJ review absent explicit declination by the noncitizen. Moreover, commenters asserted that this rule change would cause confusion as DHS officers would be required to apply the automatic credible fear review provision differently for asylum seekers with negative credible fear determinations based on the rebuttable presumption in this rule, as compared to determinations made on another basis. Commenters also expressed concern that the NPRM did not include statistics regarding automatic IJ credible fear review, including how many asylum seekers succeeded in their review without having articulated a desire for IJ review to the AO, or how many IJ credible fear reviews were expeditiously resolved after the IJ explained the asylum seeker's rights and the asylum seeker chose to not pursue further review.

Separately, regarding credible fear reviews more generally, commenters stated that it was unclear whether an IJ could review the asylum ineligibility presumption during a credible fear review. Commenters also stated that the proposed rule would cause a significant increase in negative credible fear reviews at EOIR, and that such reviews would require more adjudication time due to application of the rebuttable presumption. Moreover, commenters stated that the

proposed rule would allow IJs to engage in speculation by looking outside of the record of proceedings during the credible fear review.

Commenters also proposed an additional hearing, prior to or concurrent with the IJ review, assessing whether a noncitizen's documents were sufficient for lawful admission pursuant to section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7). In contrast, other commenters proposed generally eliminating IJ review of credible fear determinations, asserting this would reduce the backlog of cases within the immigration system and would reduce the pull factor created by lengthy adjudications. Similarly, other commenters stated that IJ review is not necessary if a noncitizen knowingly declines review, so long as the Departments provide expanded rights advisals and explain the consequences of declining such review.

Response: As stated in the NPRM, the Departments acknowledge that the procedure for IJ review of negative credible fear determinations established by this rule differs from the credible fear review procedures implemented by the Asylum Processing IFR. *See* 88 FR at 11744 ("[U]nlike the process adopted by the Asylum Processing IFR, noncitizens must affirmatively elect immigration judge review of a negative credible fear determination when that choice is presented to them; noncitizens who fail or refuse to indicate a request for immigration judge review will not be considered to have requested such review."). While the Departments believe that "the need for expedition under the current and anticipated exigent circumstances" weighs in favor of requiring noncitizens to affirmatively request IJ review of a negative credible fear determination, they will also "seek to ensure noncitizens are aware of the right to review and the consequences of failure to affirmatively request such review." *Id.* at 11747.[294]

In particular, if a noncitizen receives a negative credible fear determination after failing to rebut the presumption or to establish a "reasonable possibility" of persecution or torture, the rule requires AOs to provide noncitizens "with a written notice of decision and inquire whether

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[294] Regarding commenters' data requests, the Departments note that EOIR does not maintain data regarding how many IJ credible fear reviews were initiated after a noncitizen failed to request such review.

the alien wishes to have an immigration judge review the negative credible fear determinations." 8 CFR 208.33(b)(2)(iii). The Departments believe that such notice sufficiently ensures that noncitizens who desire IJ review have the opportunity to elect it under this rule. Currently, USCIS explains to noncitizens that they may request review of a negative credible fear determination with an IJ, and that failure to do so may result in removal from the United States. USCIS also explains to noncitizens their right to consultation during the credible fear process, and provides noncitizens with a list of free or low-cost legal services providers whom they may wish to contact.[295] To ensure that noncitizens—including, among others, noncitizens who are unfamiliar with the immigration system, have suffered trauma, are without counsel, or are unable to read or speak English—understand what review is available to them, DHS "intends to change the explanations it provides to noncitizens subject to the . . . rule to make clear to noncitizens that the failure to affirmatively request review will be deemed a waiver of the right to seek such review." 88 FR at 11747. These explanations will be provided by trained asylum office staff through an interpreter in a language understood by the noncitizen. *See* 8 CFR 208.30(d)(5). As a result, the Departments believe that it is reasonable to conclude that noncitizens who do not request IJ review after receiving sufficient notice, *see* 8 CFR 208.30(d)(5), and the enhanced explanations described above do not wish for additional review. *See* 88 FR at 11747. The Departments note that, at the time that the Asylum Processing IFR was being considered, the Departments were assessing procedures that would require affirmative requests for IJ review through the lens of the Global Asylum Final Rule, which did not include a planned rollout of enhanced explanations for noncitizens. Under this rule, DHS is now planning different protocols for implementing the requirement that noncitizens affirmatively request review by providing the above-described explanations coupled with enhanced notice procedures. The Departments also do not believe this change will cause unnecessary confusion for DHS officers and staff, as they

[295] *See* USCIS Form M-444, Information About Credible Fear Interview.

are well trained in expedited removal and credible fear procedures. *See, e.g.*, 8 CFR 208.1(b) ("Training of asylum officers").

Separately, in response to more general comments about the IJ credible fear review process, the Departments clarify that IJs apply a de novo standard during credible fear reviews, including on the question whether the asylum ineligibility presumption applies. *See* 8 CFR 1208.33(b)(1) (stating that "the immigration judge shall evaluate the case de novo"). More generally, the Departments do not believe that the application of the rebuttable presumption presents a risk of creating significant inefficiencies during the IJ credible fear review process that would warrant amending the rule, as IJs have significant experience conducting credible fear reviews and applying asylum-related standards. Additionally, IJs will be able to review relevant evidence provided at the initial credible fear interview before the AO in making any determinations regarding the rebuttable presumption. As discussed above, the Departments anticipate that any increases in the time that it takes to review a negative credible fear decision will be outweighed by other efficiencies created by this rule. The Departments disagree with commenters that the rule allows IJs to engage in "speculation" during credible fear reviews, as the relevant evidentiary standards in credible fear reviews predate this regulation. *See* 8 CFR 1003.42(d)(1) (explaining that the IJ may take into account "such other facts as are known to the immigration judge").

In response to other commenters, the Departments also decline to completely eliminate IJ credible fear review, which is provided by statute and acts as an important safeguard during the expedited removal process. *See* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III) ("The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination . . . that the alien does not have a credible fear of persecution."). Similarly, the Departments decline to add additional hearings regarding inadmissibility determinations, which are properly determined within existing procedures. *See*

INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i) (requiring DHS officer to determine document-related inadmissibility during the expedited removal process).

Comment: Commenters raised a number of concerns about IJ credible fear review proceedings generally, including the sufficiency and reliability of the evidentiary record before the AO, the abbreviated nature of IJ credible fear reviews in light of the complexity of the issues presented, the lack of counsel or limited participation of counsel in IJ credible fear reviews, the level of deference IJs demonstrate towards to the AO's determination, and the lack of appeal of an IJ negative credible fear determination, among others.

Response: As an initial matter, the Departments note that this rule does not alter the existing IJ credible fear review process, and comments regarding unaltered existing processes are outside the scope of this rule. Regardless, with respect to commenters who characterized the existing credible fear screening and review process as deficient or contrary to due process, the Departments note that Congress has established an expedited removal process that includes neither BIA review nor judicial review and requires any IJ review of credible fear determinations to be prompt. *See* INA 235(b)(1)(B)(iii)(III), (C), 8 U.S.C. 1225(b)(1)(B)(iii)(III), (C). Additionally, existing regulations outline a robust process for IJ review of credible fear determinations. *See* 8 CFR 1003.42, 1208.30 (describing IJ review of credible fear determinations). Please also see discussion in Section IV.B.5 of this preamble responding to comments on the effects of the rule on due process.

As to the sufficiency and reliability of the record of determination, the Departments disagree with commenter contentions that this document does not provide a sufficient record for IJ review. The INA sets forth that the record of determination "shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in light of such facts, the [noncitizen] has not established a credible fear of persecution." INA 235(b)(1)(B)(iii)(II), 8 U.S.C. 1225(b)(1)(B)(iii)(II). Further, as the record of determination is a government-created document, it is generally presumed to be

reliable in the absence of evidence to the contrary. *See Matter of J-C-H-F-*, 27 I&N Dec. 211, 212 (BIA 2018) (citing *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995)). Should the reliability of a record of determination be challenged before the IJ, the IJ will consider the arguments raised as to its reliability. *Cf. id.* at 215–16 (setting forth the framework for IJ review when the reliability of a border interview is challenged); *see also Ye v. Lynch*, 845 F.3d 38, 45 (1st Cir. 2017) (requiring a totality-of-the-circumstances-based inquiry as to reliability of a DHS document); *Zhang v. Holder*, 585 F.3d 715, 725–26 (2d Cir. 2009) (requiring a factor-based inquiry as to reliability of a DHS document).

Moreover, during review of a negative credible fear determination, IJs are authorized to "receive into evidence any oral or written statement which is material and relevant to any issue in the review." 8 CFR 1003.42(c). Accordingly, noncitizens who believe that their credible fear interview is inaccurately described or who wish to provide additional testimony, context, or explanation have the opportunity to do so before an IJ. Furthermore, as an additional procedural precaution for noncitizens, the IJ review of a negative credible fear determination itself is subject to preservation-of-records requirements, as the IJ must create a Record of Proceeding in which to memorialize their review. *See* 8 CFR 1003.42(b).

As stated in the NPRM and consistent with existing practice, IJs will continue to evaluate such credible fear determinations using a de novo standard of review. *See* 8 CFR 1003.42(d)(1), 1208.33(b)(1) ("[T]he immigration judge shall evaluate the case de novo, as specified in paragraph (b)(2) of this section."); 88 FR at 11726. This includes reviewing an AO's determinations about the applicability of the presumption of asylum ineligibility and whether the presumption was rebutted. *See* 8 CFR 1208.33(b). Under 8 CFR 1208.33(b)(1), the IJ shall review de novo "[w]here an asylum officer has issued a negative credible fear determination pursuant to 8 CFR 208.33(b), and the alien has requested immigration judge review of that credible fear determination." 8 CFR 208.33(b)(2)(v) ("Immigration judges will evaluate the case as provided in 8 CFR 1208.33(b)."). In such an instance, de novo review serves to protect

noncitizens from incorrect or unwarranted negative credible fear determinations that may have in part relied upon the rebuttable presumption.

Further, with respect to commenter concerns about timelines in credible fear review proceedings, the expedited removal statute requires "prompt review." INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). Additionally, the statute states that "[r]eview shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the [negative credible fear] determination." *Id.*

Moreover, the Departments will not depart from existing procedures regarding IJ review of credible fear determinations to allow appeals from the IJs' review of such determinations. Prior to this rule, IJ decisions at the credible fear review stage were not reviewable, and this rule maintains that posture. *See* 8 CFR 1003.42(f) (2020)[296] ("No appeal shall lie from a review of an adverse credible fear determination made by an immigration judge."); 208.33(b)(2)(v)(C) ("No appeal shall lie from the immigration judge's decision and no request for reconsideration may be submitted to USCIS."). Such processes are in accordance with the INA. *See* INA 235(b)(1)(C), 8 U.S.C. 1225(b)(1)(C) (providing that removal orders issued under this section are not subject to administrative appeal other than review by an IJ). However, the Departments note that per the rule, USCIS retains the discretion to reconsider negative determinations. *See* 8 CFR 208.33(b)(2)(v)(C) ("Nevertheless, USCIS may, in its sole discretion, reconsider a negative determination."). Because noncitizens can request IJ review of a negative credible fear determination, and USCIS retains discretion to reconsider negative determinations, the Departments continue to believe, as explained in the NPRM, that the rule appropriately balances the availability of review and the efficient use of limited agency resources. *See* 88 FR at 11747.

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[296] This provision was amended by the Global Asylum Rule, which was preliminarily enjoined and its effectiveness stayed before it became effective. *See Pangea II*, 512 F. Supp. 3d at 969–70. This order remains in effect, and thus the 2020 version of this provision—the version immediately preceding the enjoined amendment—is currently effective.

In sum, the Departments believe that the established process for IJ review of credible fear determinations provides sufficient opportunity for noncitizens to present the necessary evidence, including testimony, relevant for evaluating the applicability of the presumption of asylum ineligibility created by this rule.

ii. Section 240 Removal Proceedings

Comment: Commenters stated that the rule would create confusion in section 240 removal proceedings, as the rule states that a noncitizen who is subject to the presumption but demonstrates a "reasonable possibility" of persecution or torture may apply for asylum during subsequent removal proceedings. Commenters also expressed concern that under the proposed rule, an IJ might re-adjudicate the condition on eligibility in section 240 removal proceedings despite an AO initial determination during the credible fear process that the presumption of ineligibility was not applicable or was rebutted. Commenters stated that it would be unfair to require asylum applicants to repeatedly demonstrate that they are able to rebut the presumption before different adjudicators, suggesting an AO's determination that the presumption is inapplicable should be final for all future proceedings.

Response: The Departments reiterate that noncitizens who are subject to the presumption of asylum ineligibility during a credible fear determination, but who demonstrate a "reasonable possibility" of persecution or torture, can apply for asylum during any subsequent removal proceedings. *See* 8 CFR 1208.33(b)(4). However, the provisions of this rule governing the presumption of asylum ineligibility will still apply, and an IJ will apply the relevant provisions de novo during removal proceedings. *See generally* 8 CFR 1208.33.

The Departments do not believe that it is unfair for IJs to consider the presumption of asylum ineligibility de novo where the AO already determined that the presumption did not apply or was rebutted. The IJ's determination would be based on all available evidence after the noncitizen is given the opportunity to present and examine such evidence. *See* INA 240(b)(4)(B), 8 U.S.C. 1229a(b)(4)(B) (explaining a noncitizen's evidentiary rights in section

240 removal proceedings). The Departments thus decline to deviate from existing practice in section 240 removal proceedings requiring IJs to determine asylum eligibility de novo once a matter is referred to EOIR after a positive credible fear determination. *See, e.g.*, 8 CFR 1208.13(a) ("The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.").

Comment: Commenters provided generally positive feedback on the inclusion of a family unity provision but raised concerns about the operation of the provision itself. Commenters were concerned that the family unity provision was insufficient because it would not apply to asylum applicants traveling without their families, including cases where family members are unable to travel together due to immediate danger, among other factors. Commenters stated that individual asylum applicants would be subject to the asylum ineligibility presumption and, as a result, would be unable to petition for eligible derivatives outside the United States if they are only able to receive statutory withholding of removal or CAT protection, providing anecdotal examples. In turn, commenters stated, this would result in family separation with spouses and children left in dangerous situations in their home country, unable to join their family members in the United States. Therefore, commenters suggested that the family unity provision should be expanded to individual asylum applicants who meet the provision's requirements if they have eligible derivatives abroad. Commenters also proposed that the rule include "families" as a general exception to application of the rebuttable presumption of ineligibility for asylum.

Commenters explained that, for the provision as currently drafted to apply, the noncitizen would have to first qualify for statutory withholding of removal or CAT withholding, which have higher standards of proof than asylum. Commenters stated that this would result in families with legitimate asylum claims being denied relief because they may be unable to meet the higher standards required for statutory withholding of removal or CAT withholding. Additionally, commenters claimed that this provision would create an inefficient and costly process, where

noncitizens would be required to gather and present a significant amount of evidence on statutory withholding of removal and CAT withholding to meet their higher standards and IJs would have to adjudicate those forms of relief or protection separately before applying the exception, rather than potentially granting asylum in the first instance. Commenters noted that in removal proceedings, the family unity exception requires a determination that the noncitizen is eligible for withholding of removal or CAT withholding and that they would be granted asylum but for the presumption. Commenters also raised concerns that many applicants will face harm while those issues are adjudicated. Commenters raised further concerns that the family unity provision would only apply where no members of a family qualify for withholding of removal or CAT withholding, thus resulting in removal orders for entire families who qualified for those forms of protection. Lastly, commenters expressed concern that the provision does not address family unity concerns where family members traveling together may not qualify as derivatives due to their relationship status. Commenters explained that this would result in the rebuttable presumption of asylum ineligibility applying and, assuming certain non-derivative family members cannot meet the standards for statutory withholding of removal or CAT withholding, de facto separation.

Commenters also expressed confusion about whether the family unity provision could work retroactively to grant asylum to individuals with statutory withholding of removal if their spouse or child subsequently journeyed to the United States and underwent adjudication. Further, commenters stated that the proposed rule leaves outstanding questions about what independent relief would disqualify families from availing themselves of the family unity provision.

One commenter claimed that the family unity provision would incentivize the smuggling of children and suggested eliminating it entirely. Separately, some commenters claimed that the provision would increase the incentives for family migration.

Response: The Departments fully agree with commenters that keeping families unified and avoiding family separation is an important goal. *See, e.g.*, E.O. 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273 (Feb. 5, 2021). This rule has been designed to eliminate the possibility that the rule's presumption will result in the separation of families.

With respect to family units traveling together, if any noncitizen in that family unit traveling together meets an exception to or is able to rebut the asylum ineligibility presumption, the presumption will not apply to anybody in the family traveling together. 8 CFR 208.33(a)(2)(ii), 208.33(a)(3)(i); *see also* 88 FR at 11749. Additionally, even where no family members that are traveling together meet an exception or are able to rebut the presumption, the rule includes a family unity provision that sets forth a unity-based "exceptionally compelling circumstance" to rebut the asylum ineligibility presumption for certain noncitizens in order to avoid separating asylum applicants from potential derivative beneficiaries. 8 CFR 1208.33(c). More specifically, under this family unity provision, where a principal asylum applicant is subject to the presumption but is eligible for statutory withholding of removal or CAT withholding,[297] and would be granted asylum but for the presumption, and where an accompanying spouse or child does not independently qualify for asylum or other protection from removal, the presumption shall be deemed rebutted as an exceptionally compelling circumstance. *See* 8 CFR 1208.33(c). Such principal applicants and their accompanying derivatives can then proceed with their asylum claims consistent with general asylum procedures. *See* INA 208(b)(3), 8 U.S.C. 1158(b)(3).

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[297] The family unity provision at 8 CFR 1208.33(c) is not triggered by eligibility for deferral of removal under the CAT because a noncitizen only eligible for that form of CAT must be subject to a bar to CAT withholding, which would also bar the noncitizen from asylum. *See* 8 CFR 1208.17(a) (providing that someone who is eligible for CAT withholding but who is subject to the mandatory bars to statutory withholding of removal at 8 CFR 1208.16(d)(2) and (3) shall be granted CAT deferral); 8 CFR 1208.16(d)(2) (providing that an application for CAT withholding will be denied if the noncitizen is subject to a bar to statutory withholding of removal under section 241(b)(3)(B) of the INA, 8 U.S.C. 1231(b)(3)(B)). Compare INA 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B) (providing mandatory bars to statutory withholding of removal), with INA 208(b)(2), 8 U.S.C. 1158(b)(2) (providing mandatory bars to asylum). Thus, such a noncitizen would never be ineligible for asylum solely due to the rebuttable presumption.

Additionally, in light of commenters' concerns, the Departments have expanded this provision to also cover principal applicants who have a spouse or children 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). 8 CFR 1208.33(c). As commenters noted, excluding asylum applicants who travel without their families may inadvertently incentivize families to engage in irregular migration together so as not to risk that the principal applicant would 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. The expansion to the provision would apply only to migrants who are subject to the presumption, who are ultimately found eligible for statutory withholding of removal or CAT withholding, and who have spouses or children who would be eligible to follow to join them in the United States.

However, the Departments decline to modify the rule to categorically exempt families from the rebuttable presumption of asylum eligibility. Given the existing and expanded protections in the rule, such a change is not necessary to ensure family unity. And the Departments have determined that making such a change would significantly diminish the effectiveness of the rule and incentivize families to migrate irregularly. *See* 88 FR at 11708–09 (describing the significant increase in families seeking asylum in the United States). Further, the Departments do not want to create an incentive for adults to present at the SWB with children fraudulently claiming to be a family unit.[298]

Overall, the Departments have designed the family unity provision at 8 CFR 1208.33(c) and the other protections against family separation to ensure that the rule does not cause the separation of families. With regard to the family unity provision, the Departments believe that

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[298] *See* Tech Transparency Project, Inside the World of Misinformation Targeting Migrants on Social Media (July 26, 2022), *https://www.techtransparencyproject.org/articles/inside-world-misinformation-targeting-migrants-social-media* ("A review of social media groups and pages identified by migrants showed . . . dubious offers of coyote or legal services, false claims about conditions along the route, misinformation about points of entry at which officials waive the rules, and baseless rumors about changes to immigration law."); ICE, Press Release, *ICE HSI El Paso, USBP Identify More than 200 'Fraudulent Families' in Last 6 Months* (Oct. 17, 2019), *https://www.ice.gov/news/releases/ice-hsi-el-paso-usbp-identify-more-200-fraudulent-families-last-6-months*.

requiring the lead asylum applicant to first establish eligibility for protection under the higher standards of proof for statutory withholding of removal or CAT withholding before qualifying for the family unity provision serves as an incentive to choose a lawful pathway. Choosing a lawful pathway would enable applicants to remain eligible for asylum, which requires a lower burden of proof and includes the ability to include derivatives on their application or utilize follow-to-join procedures set forth in section 208(b)(3)(A) of the INA, 8 U.S.C. 1158(b)(3)(A).

To the extent that commenters claim that some family members who traveled together may have, but for the presumption, qualified for asylum but not statutory withholding of removal, and therefore would not qualify for the family unity exception if subject to the rebuttable presumption of asylum ineligibility, the Departments reiterate that the family unity provision in 8 CFR 1208.33(c) is but one protection for family units included in this rule. For example, the rule includes options for families to stay together if any member of a family traveling together: uses an available lawful pathway (8 CFR 208.33(a)(2)(ii), 1208.33(a)(2)(ii)); establishes an exception from or rebuts the presumption of ineligibility (8 CFR 208.33(a)(2) and (3), 1208.33(a)(2) and (3)); or, if they do not pursue a lawful pathway and are unable to establish an exception from or rebut the presumption, meets the higher standard required for statutory withholding of removal or CAT withholding. Notably, exceptions from and rebuttals to the presumption consider circumstances involving both the noncitizen and members of the noncitizen's family with whom they are traveling, for example, whether the noncitizen or a member of the noncitizen's family faced an acute medical emergency at the time of entry. *See* 8 CFR 1208.33(a)(2) and (3), 208.33(a)(2) and (3). To reiterate, the rule also includes options for family members who do not pursue a lawful pathway and are unable to rebut the presumption to stay together or reunite if a principal asylum applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the presumption, if either (1) an accompanying spouse or child does not also independently qualify for asylum or other protection from removal, or (2) if the principal asylum applicant has a spouse or child who

would be eligible to follow to join that applicant if granted asylum. These protections together ensure that the rule does not lead to the separation of families. The Departments strongly encourage noncitizens, including asylum-seeking families, to choose lawful pathways.

However, to the extent that some families may not use a lawful pathway, and are unable to rebut the presumption, the Departments believe that many noncitizens with approvable asylum claims would present claims for statutory withholding of removal or CAT protection on the same set of underlying facts, although the standards that apply to asylum, statutory withholding of removal, and CAT protection each differ from one another in some respects. *See* Regulations Concerning the Convention Against Torture, 64 FR 8478, 8485 (Feb. 19, 1999) ("Additionally, use of the Form I-589 will obviate the need for two separate forms that, in many cases, will elicit similar information. In many cases in which the alien applies both for asylum and withholding of removal under the Act and for withholding under the Convention Against Torture, the underlying facts supporting these claims will be the same."); *Yousif v. Lynch*, 796 F.3d 622, 629 (6th Cir. 2015) ("An asylum claim and a withholding claim require consideration of 'the same factors' and proof of the same underlying facts about an applicant's probable persecution.").

Separately, the Departments disagree with commenters that the family unity provision would encourage family migration or child smuggling. The strong incentives of the lawful pathways described in the rule, coupled with the disincentive of the rebuttable presumption of asylum ineligibility, are designed to encourage noncitizens, including families, to pursue lawful pathways. For example, after implementation of the Venezuelan parole process for eligible Venezuelan nationals and their families, migratory flows with respect to this group fell dramatically. *See* 88 FR at 11712, 11718. Based on this trend and the implementation of other initial parole processes implementations discussed in the NPRM, the Departments believe that the rule will reduce irregular family migration as well as child smuggling as part of an overall reduction in irregular migration.

To the extent that commenters raised concerns that the family unity provision is inefficient in operation, the Departments believe that the benefits from inclusion of the provision outweigh any potential inefficiencies. The Departments also note that asylum, statutory withholding of removal, and CAT withholding are forms of relief and protection that generally rely on the same set of underlying facts. *See Yousif*, 796 F.3d at 629. Therefore, IJs who determine that a noncitizen is eligible for statutory withholding of removal or CAT withholding will be able to apply the family unity provision and efficiently consider whether to exercise their discretion to grant asylum on the same facts. Additionally, in response to commenter concerns about noncitizens facing harm while the family unity exception is being adjudicated, the Departments note that this rule does not amend existing follow-to-join procedures.

8. Adequacy of Withholding of Removal and CAT

Comment: Commenters stated that statutory withholding of removal and CAT protection are insufficient alternative forms of protection for individuals who would be ineligible for asylum pursuant to the proposed rule, asserting that these forms of protection are more difficult to obtain and provide fewer benefits than asylum.

For example, commenters stated that such forms of protection are not sufficiently available to all those who require protection. Specifically, commenters stated that statutory withholding of removal and CAT protection require applicants to meet a higher burden of proof than asylum, as they would need to demonstrate that it is "more likely than not" that they would face persecution or torture. Commenters stated that, because of this higher burden of proof, an applicant may be otherwise eligible for asylum, but be removed because they are unable to meet the burden for statutory withholding of removal or CAT protection. As a result, commenters alleged that an individual may be returned to a country where they would face persecution or death.

Commenters also stated that, even if an applicant were able to meet the higher burden of proof for statutory withholding of removal or CAT protection, the individual would not then be

accorded the same benefits as asylees. For example, commenters expressed concern regarding the prohibition on international travel for recipients of statutory withholding of removal and CAT protection. Commenters noted that, unlike recipients of asylum, these individuals do not have access to travel documents and are unable to travel abroad.

Commenters also noted that recipients of statutory withholding of removal and CAT protection remain in a tenuous position because they are not granted lawful status, or any path to citizenship, to remain in the United States indefinitely. Commenters explained that recipients of statutory withholding of removal or CAT protection remain permanently subject to a removal order and may have their status terminated at any time. Commenters stated that the constant prospect of deportation or removal creates uncertainty for recipients of statutory withholding of removal or CAT protection, which can lead to community instability in the United States. Commenters stated that this uncertainty would prevent such noncitizens from processing the trauma that predicated their migration to the United States.

Similarly, commenters stated that recipients of statutory withholding of removal or CAT protection may be limited from fully participating in U.S. society. Commenters raised specific concerns about statutory withholding and CAT protection recipients' lack of access to public benefits, services, and healthcare. Commenters were also concerned about such individuals' need to apply annually and pay for work authorization and the impact that this requirement may have on related benefits, such as the ability to obtain a driver's license.

Commenters also claimed that granting statutory withholding of removal or CAT protection instead of asylum under the proposed rule would fail to ensure family unity. Commenters alleged that individuals who are granted statutory withholding of removal or CAT protection would be unable to reunite with family in the United States because these forms of relief do not allow the recipient to petition for derivative beneficiaries. Due to this, commenters stated that the proposed rule would institute another policy of family separation that permanently separates noncitizens from their family members. Commenters also stated that family members

applying for statutory withholding of removal are not able to request that their cases be consolidated and adjudicated together like asylum applicants can and stated that moving separately through the legal system makes them more likely to have uneven results for different family members, which may result in some members being ordered removed while others remain protected in the United States. Some commenters stated that they have experience with clients who have been permanently separated from family members, including young children, because they were granted statutory withholding of removal or CAT protection instead of asylum.

Commenters further raised concerns about the effect the proposed rule would have on availability of bond to those subject to the presumption of asylum ineligibility. Commenters asserted that adjudicators are less likely to grant bond to those who are eligible only for statutory withholding of removal or CAT protection as overly high flight risks due to the comparatively higher standards of proof. Commenters also expressed confusion over whether, under the proposed rule, individuals subject to the presumption of ineligibility will be treated as having entered without inspection, leaving them eligible for bond, or as arriving aliens, leaving them ineligible for bond.

Response: As described in the NPRM, the purpose of this rule is to discourage irregular migration by encouraging migrants, including those who may seek asylum, to use lawful, safe, and orderly pathways to the United States. *See generally* 88 FR at 11706–07. To do so, the rule includes a number of exceptions to the rebuttable presumption of ineligibility for asylum for prospective asylum applicants outside the United States, including whether they or a member of their family with whom they traveled (1) sought asylum or other protection in third countries through which they first transit, to avoid the need to continue an often-perilous journey to the United States in pursuit of protection unless absolutely necessary; (2) obtained appropriate authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process; or (3) presented at a POE pursuant to a pre-scheduled date and time or presented at the POE without an appointment but established that it was not possible to access or use the DHS

scheduling system for a specified reason. *See* 8 CFR 208.33(a)(2), 1208.33(a)(2). In other words, this rule provides numerous ways in which noncitizens covered by this rule may pursue asylum. And to the extent that a noncitizen may not be able to pursue a lawful pathway due to exceptionally compelling circumstances, they may be able to rebut the presumption. *See* 8 CFR 208.33(a)(3), 1208.33(a)(3).

With respect to noncitizens, or family members with whom they traveled, who do not avail themselves of a lawful pathway or otherwise rebut the presumption, the Departments recognize that the standards for eligibility for statutory withholding of removal and CAT protection are each higher than that for asylum, as they require demonstrating it is more likely than not that noncitizens will be persecuted or tortured in another country, whereas asylum requires a lesser well-founded fear.[299] *See* 64 FR at 8485. Indeed, that difference in standards aligns with several objectives of this rule: to encourage noncitizens to avail themselves of the lawful pathways described above, where possible, as well as to discourage irregular migration, promote orderly processing at POEs, and ensure that protection from removal is still available for those who satisfy the applicable standards for mandatory protection under statutory withholding of removal or the regulations implementing CAT. *See, e.g.*, 88 FR at 11729 ("The Departments assess that the Government can reduce and redirect such migratory flows by coupling an incentive for migrants to pursue lawful pathways with a substantial disincentive for migrants to cross the land border unlawfully."). The higher ultimate standards of proof for statutory withholding of removal and CAT protection therefore serve as a disincentive for noncitizens to forgo the lawful pathways detailed in this rule, as noncitizens would risk having to satisfy those comparatively higher standards in the first instance if the presumption applied to their case and were unrebutted.[300]

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[299] As a general matter, the Departments note that this rule does not change any of the long-time standards relating to statutory withholding of removal and CAT protection outside of the initial credible fear screening stage.

[300] In response to commenters, the Departments note that they cannot quantify how many noncitizens subject to the asylum ineligibility presumption can qualify for statutory withholding of removal or CAT protection, as those are case-by-case, fact-specific determinations.

Similarly, the Departments recognize the comparatively fewer benefits of statutory withholding of removal and CAT protection as compared to asylum, including the following: (1) no permanent right to remain in the United States; (2) the inability to adjust status to become a lawful permanent resident and, relatedly, later naturalize as a U.S. citizen; (3) the inability to travel abroad; and (4) the need to affirmatively apply for, and annually renew, work authorization documents.[301] However, as explained above, the Departments promulgated this rule with the intention to encourage noncitizens to utilize a lawful pathway rather than a pathway that may limit them to statutory withholding of removal or CAT protection and their more limited benefits. The Departments also note the lack of derivative protection for statutory withholding of removal and CAT protection recipients.[302] *Compare* INA 208(b)(3)(A), 8 U.S.C. 1158(b)(3)(A) (providing for derivative asylum status for spouses and children), *with* INA 241(b)(3), 8 U.S.C. 1231(b)(3) (no derivative status for spouses and children under statutory withholding of removal), *and* 8 CFR 1208.16(c)(2) (no derivative status for spouses and children under the CAT).[303] The Departments are cognizant of these limitations and acknowledge the importance of family unity. *See, e.g.*, E.O. 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273 (Feb. 5, 2021) ("It is the policy of my Administration to respect and value the integrity of families seeking to enter the United States."). To that end, as discussed in further detail at Section IV.E.7.ii in this preamble, this rule contains numerous

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[301] *See, e.g.*, American Immigration Council, The Difference Between Asylum and Withholding of Removal at 2 (Oct. 2020), *https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf*; 8 CFR 274a.12(a) (explaining need for withholding recipients to affirmatively apply for work authorization).

[302] The Departments note that, although there is no derivative protection under statutory withholding of removal or CAT, certain U.S.-based qualifying parents or legal guardians, including those granted withholding of removal, may petition for qualifying children and eligible family members to be considered for refugee status and possible resettlement in the United States. *See* USCIS, Central American Minors (CAM) Refugee and Parole Program, *https://www.uscis.gov/CAM* (last visited Apr. 5, 2023).

[303] The Departments note that applicants will not be prevented from petitioning for family members because of this rule. Under the expanded family unity provision at 8 CFR 1208.33(c), any applicant who is found eligible for statutory withholding of removal or CAT withholding and who would be granted asylum but for the presumption will be deemed to have rebutted the presumption if they have 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), and may pursue follow-to-join procedures if granted asylum.

measures to avoid the separation of family members, including applying any exceptions or rebuttals to the presumption to the entire family unit traveling together, as well as a "family unity" provision applicable in removal proceedings to ensure that the rule does not result in family separations when granting relief in the United States. *See* 8 CFR 1208.33(c) ("Family unity and removal proceedings.").

Separately, because this rule does not impact procedures for bond eligibility or consideration, commenter concerns with respect to these issues are outside of the scope of this rulemaking. Nevertheless, the Departments note that bond determinations will continue to be made on a case-by-case basis in accordance with the governing statutes and regulations. Similarly, this rulemaking does not impact determinations of whether to consolidate cases, although the Departments note that consolidation of cases is not limited to those who are pursuing or are eligible for asylum, and that such determinations are made at the IJ's discretion. *See* ICPM, Chapter 4.21(a) and (b) (Nov. 14, 2022) ("The immigration court may consolidate cases at its discretion or upon motion of one or both of the parties, where appropriate. For example, the immigration court may grant consolidation when spouses or siblings have separate but overlapping circumstances or claims for relief.").

9. Removal of Provisions Implementing the TCT Bar Final Rule

i. Support for Removal of Provisions Implementing the TCT Bar Final Rule

Comment: The Departments received several comments expressing opposition to the TCT Bar Final Rule and supporting removal of regulatory provisions implementing that rule. Some commenters expressed opposition to the TCT Bar Final Rule without explanation, while others asserted that the TCT Bar Final Rule conflicts with the INA and that the Departments lacked authority to promulgate the TCT Bar Final Rule. Commenters also objected to the TCT Bar as inconsistent with fundamental protections of refugee law, including the right to seek asylum, the principle of non-refoulement, and the prohibition against penalties for irregular entry. Commenters supporting the removal of provisions implementing that rule also faulted the

Departments for not including proposed regulatory text removing the TCT Bar from the CFR. Many commenters who urged the Departments to withdraw the proposed rule did so while requesting that the Departments rescind the TCT Bar Final Rule.

Commenters suggested that the TCT Bar Final Rule is inconsistent with the INA because it conflicts with the safe-third-country exception to applying for asylum under section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), and noted that courts have enjoined the rule, finding it inconsistent with the INA. Commenters further noted that the court in *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 945 (N.D. Cal. 2019), concluded that "Congress requires reasonable assurances that any so-called 'safe' third country is actually safe, in line with the long-held understanding that categorical bars on asylum must be limited to people who have somewhere else to turn."

Commenters also objected to the TCT Bar as inconsistent with fundamental protections of refugee law, including the right to seek asylum, the principle of non-refoulement, and the prohibition against penalties for irregular entry. Commenters agreed with removal of provisions implementing that rule and expressed concern that the TCT Bar Final Rule imposes a sweeping, categorical ban on asylum. Commenters further raised concerns that, while in effect, the TCT Bar disproportionately impacted people of color and Black and brown migrants. At least one commenter claimed that the TCT Bar Final Rule discourages noncitizens from reporting crimes. Many commenters expressed concern over the TCT Bar Final Rule's effect on children, both accompanied and unaccompanied, and some commenters stated that the TCT Bar Final Rule does not adequately explain why the Departments omitted an exemption for UCs.

Response: The Departments acknowledge these commenters' support. Although the Departments did not include proposed regulatory text in the NPRM, the Departments have included amendatory text in this final rule, which will result in the TCT Bar's removal from 8 CFR 208 and 1208.

Since the TCT Bar Final Rule was promulgated and then enjoined, the Departments have reconsidered its approach and have determined that they prefer the tailored approach of the rebuttable presumption enacted by this rule to the categorical bar that the TCT Bar IFR and Final Rule adopted. Even if the rebuttable presumption had not been adopted, the Departments would seek to remove provisions implementing the TCT Bar Final Rule as the Departments no longer agree with the approach taken in that rule. Additionally, in order to use the TCT Bar Final Rule, the Departments would have to continue litigating various appeals defending the policy, which the Departments now disagree with. Thus, the Departments consider the removal of provisions implementing that rule to be severable from the provisions of 8 CFR 208.13(f), 208.33, 1208.13(f), and 1208.33.

As discussed in Section IV.D.2 of this preamble, the TCT Bar IFR and Final Rule were enacted to address circumstances along the SWB. In the TCT Bar IFR, the Departments stated that increases in the number of noncitizens encountered along or near the SWB corresponds with an increase in the number of noncitizens claiming fear of persecution or torture, and that the processing of credible fear and asylum applications in turn "consumes an inordinate amount of the limited resources of the Departments." 84 FR at 33831. The Departments also stated that the increase in credible fear claims has been complicated by a demographic shift in the noncitizen population crossing the southwest border from Mexican single adult males to predominantly Central American family units and UCs. *See id.* at 33838. The Departments explained that while Mexican single adults who are not eligible to remain in the United States can be immediately repatriated to Mexico, often without requiring detention or lengthy court proceedings, it is more difficult to expeditiously repatriate family units and UCs who are not from Mexico or Canada. *See id.* The Departments also explained that, over the past decade, the overall percentage of noncitizens subject to expedited removal who, as part of the initial screening process, were referred for a credible fear interview on claims of a fear of return has jumped from approximately 5 percent to more than 40 percent, and that the number of cases

referred to DOJ for proceedings before an IJ also rose sharply, more than tripling between 2013 and 2018. *See id.* at 33831. In the TCT Bar IFR, the Departments further stated that the growing number of noncitizens seeking protection in the United States and changing demographics created an untenable strain on agency resources. *See id.* at 33838–39. The TCT Bar IFR stated that in FY 2018, USCIS received 99,035 credible fear claims, a 175 percent increase from five years earlier and an 1,883 percent increase from ten years earlier. *See id.* at 33838. In an attempt to address these increases in fear claims, the TCT Bar IFR reduced the availability of asylum to non-Mexicans entering or attempting to enter at the SWB by requiring most asylum seekers who transited through a third country to first seek protection in that transit country, subject to limited exceptions, and without recognizing other avenues for allowing migrants to access the U.S. asylum system.

In response to the TCT Bar IFR, the Departments received 1,847 comments. The commenters who expressed support for that rule indicated that it was an appropriate tool for processing noncitizens arriving at the SWB and would help close "loopholes" they asserted exist in the asylum process. *See* TCT Bar Final Rule, 85 FR at 82262. Those who expressed opposition to that rule raised concerns that the rule (1) was in conflict with the INA and U.S. obligations under international law; (2) imposed a sweeping and categorical ban on asylum; and (3) effectively denied asylum seekers the right to be meaningfully heard with respect to their asylum claims. *See id.* at 82263, 82270, 82275.

The Departments subsequently issued the TCT Bar Final Rule to address the comments received on the TCT Bar IFR. *See id.* at 82260. In the TCT Bar Final Rule, the Departments affirmed that they promulgated the IFR based on several policy objectives, including the following: (1) directing prompt relief to noncitizens who are unable to obtain protection from persecution elsewhere and noncitizens who are victims of a severe form of trafficking in persons; (2) the need to reduce the incentive for noncitizens with "meritless or non-urgent asylum claims" to seek entry to the United States; (3) relieving stress on immigration enforcement and

adjudicatory authorities; (4) curtailing human smuggling; (5) strengthening the negotiating power of the United States regarding migration issues, including the flow of noncitizens into the United States; and (6) addressing humanitarian and security concerns along the SWB. *See id.* at 82285.

As also discussed in Section IV.D.2 of this preamble, a Federal district court vacated the TCT Bar IFR on June 30, 2020, in *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020). Additionally, in parallel litigation, on July 6, 2020, the Ninth Circuit Court of Appeals upheld an order enjoining the IFR. *See E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020). After the TCT Bar Final Rule was issued, in February 2021, the U.S. District Court for the Northern District of California also enjoined the Departments from implementing the TCT Bar Final Rule in its entirety. *See East Bay II*, 519 F. Supp. 3d at 668 ("Defendants are hereby ORDERED AND ENJOINED . . . from taking any action continuing to implement the Final Rule and ORDERED to return to the pre-Final Rule practices for processing asylum applications."). Thus, the TCT Bar Final Rule is not in effect. As discussed in Section IV.D.2 of this preamble, the injunction rested on a finding that the final rule is inconsistent with both the safe-third-country and firm-resettlement provisions of section 208 of the INA. *See id.* at 667–68; INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A); INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). The court also stated that the TCT Bar Final Rule exacerbated the risk that asylum seekers and migrants would suffer violence and deprived asylum seekers of procedural safeguards meant to protect them from arbitrary denials of their asylum claims. *See East Bay II*, 519 F. Supp. 3d at 664.

The Departments have removed regulatory text implementing the TCT Bar Final Rule from the CFR because the Departments no longer support the TCT Bar Final Rule as a means of addressing capacity and other issues at the SWB. Throughout the NPRM and this rule, the Departments have explained that, absent this rule, the lifting of the Title 42 public health Order is expected to lead to a surge of migration at the SWB. At the same time, the Departments