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Submitted via https://www.regulations.gov

RE: RIN 1125-AB32/1615-AC92AC; DHS Docket No. USCIS-2024-0006; A.G. Order 5943-2024 Comment in Opposition to Final Rule Entitled Securing the Border

Dear Assistant Director Reid and Assistant Secretary Delgado,

The Immigrant Legal Resource Center (ILRC) submits the following comment opposing the final rule issued by the Department of Justice and the Department of Homeland Security (the Departments) on October 7, 2024, entitled "Securing the Border."

The ILRC is a national non-profit organization that works to advance immigrant rights through advocacy, educational materials, and legal trainings. Since 1979, the ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. We serve the individuals and community of organizations that are most impacted by this rule. The ILRC builds the capacity of immigration advocates to assist immigrants in their removal defense cases to provide more immigrants with a meaningful chance at justice.

We support immigration legal service providers nationwide, serving hundreds of organizations and practitioners that work with immigrants, including immigrants who are seeking asylum, withholding of removal, and protection under the Convention Against Torture. The ILRC provides support on these forms of relief through our in-person trainings, webinars, and case strategy calls with various non-profit and regional collaboratives. We also provide technical assistance through our Attorney of the Day service, in which we work with advocates on their specific cases and questions. As experts in the field, the ILRC publishes Removal Defense: Defending Immigrants in

Immigration Court, a manual which provides a thorough guide to the immigration court process with practice tips. The ILRC also publishes Essentials of Asylum Law, a manual that provides an overview of asylum law for practitioners. It is our work and resulting expertise in this area that informs our comment opposing this final rule in its entirety. We ask that the Departments rescind it in full.

I. The ILRC opposes the final rule's entrenchment of harmful provisions set forth in the Securing the Border interim final rule

The ILRC provided comment[1] on the Securing the Border interim final rule (IFR) published June 7, 2024.[2] We reiterate our objections to the IFR here and raise them as objections to the final rule. Overall, the ILRC objects to the systematic erosion – and eventual eradication - of asylum protections through first the IFR and now the final rule, under the guise of the Biden administration's efforts to make the asylum screening system more efficient and "orderly." Specifically, the objections raised in our IFR comment are as follows:

- Publishing the June 7, 2024 rule as an IFR violated the Administrative Procedures Act (APA), as the basis for the IFR was not sufficient to warrant an exception to regular notice and comment procedures, either under the foreign affairs or good cause exception.
- The final rule violates the Immigration and Nationality Act (INA) and various court rulings regarding the treatment of asylum seekers at the border. Specifically, the IFR violates the plain text of INA § 208 by banning asylum seekers based on their manner of entry as well as violating § 235 of the INA by imposing a new standard for credible fear screenings.
- The creation of a "shout test" combined with further restrictions on access to legal counsel impose an unacceptable burden on asylum seekers in violation of principles of non-*refoulement*.
- By conditioning access to the asylum process on the CBP One app – a system that is, at best, faulty – the final rule bars anyone without an appointment from access to asylum. The enumerated exceptions are illusory and insufficient to ensure that asylum seekers will not be returned to countries where they will experience persecution.

We urge the Biden Administration to rescind this rule in full and promulgate regulations that honor the United States' international obligation to protect asylum seekers.

II. Raised numerical thresholds and inclusion of UCs in border encounter numbers ensures that the restrictions cannot be lifted.

The ILRC objects to the final rule's inclusion of Unaccompanied Children (UCs) when calculating the threshold for border encounters and the accompanying restrictions. Both changes are transparent steps to transform the final rule into a functionally permanent border closure for bona fide asylum seekers.

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[1] ILRC, *Comment in Opposition to Interim Final Rule Entitled Securing the Border*, July 8, 2024, available at https://www.ilrc.org/resources/community/ilrc-comment-securing-the-border-IFR.

[2] Securing the Border, 89 Fed.Reg. 48710, June 7, 2024.

From the beginning, the Departments have claimed that the rule is justified in large part by its deterrent value.[3] The Departments argue that by imposing harsh border restrictions when border encounters are high a message is sent that entry is not possible, thereby discouraging potential migrants and smugglers from making the journey.[4] This deterrence-based justification has long been misguided: many administrations have tried to use deterrence to slow migration at the southern border, and none of these efforts has resulted in a sustained decrease in people fleeing their home countries.[5] Deterrence does not work; people flee their homes, families, and communities because they are in desperate circumstances and have no other choice, not because they pay close attention to U.S. immigration policy.[6]

The Departments also argue that the restrictions are serving a deterrent purpose, as demonstrated by Customs and Border Protection (CBP) statistics from the past five months.[7] This conclusion is shaky at best; Southern border encounters have historically dipped every year during the hot summer months. But to the extent the current restrictions are having a deterrent effect, the inclusion of UCs in calculating the threshold is completely illogical. UCs are explicitly exempted from the border restrictions and therefore have no stake in whether the restrictions are lifted or remain in place. Triggering a deterrent policy based on the actions of a group that will suffer no consequences as a result of that policy fails to follow the most basic principles of deterrence theory. The inclusion of UCs thus underscores the true purpose of the final rule: to impose permanent, unliftable restrictions at the border. And although the Departments assert that UC encounters have also trended downward since imposition of the IFR, that assertion is not borne out in statistics.[8]

The ILRC also objects to the drastic expansion of the required period that border encounters must remain down before the restrictions can be lifted, a change that the Departments characterize as a "modest adjustment" but which in fact quadruples the necessary reduction period.[9] First, the Departments do not explain why this expansion is necessary given that encounter numbers have remained high enough during the past five months to maintain the border restrictions since the IFR's implantation on June 5, 2024. Thus, this threshold expansion is even more transparent in its true purpose: by requiring such a long period of sustained reduction in border encounters, the Departments render the restrictions functionally permanent. The Departments falsely claim that consistency is a key piece of the final rule's deterrent value, ignoring the fact that it all but abandons the deterrence justification by including UCs in its

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[3] 89 Fed. Reg. at 48748-49 (discussing the "deterrent value" of imposing higher screening standards and imposing swifter removal at the southern border).
[4] *Id.*
[5] Jerusalem Demsas, The Atlantic Monthly, *How Deterrence Policies Create Border Chaos* (Jun. 21, 2023), https://www.theatlantic.com/ideas/archive/2023/06/deterrence-immigration-us-border-policy/674457/.
[6] Adam Isacson, Advocacy for Human Rights in the Americas, *Fewer Migrants, Greater Danger: The Impact of 2024's Crackdowns* (Aug. 29, 2024), https://www.wola.org/analysis/fewer-migrants-greater-effect-2024s-migration-crackdowns/.
[7] 89 Fed. Reg. at 81159.
[8] CBP, *U.S. Border Patrol and Office of Field Operations Encounters by Area of Responsibility and Component* (Oct. 22, 2024), https://www.cbp.gov/newsroom/stats/nationwide-encounters.
[9] *Id.*

calculations. The expansion to 28 days renders the border restrictions the new status quo, rather than special measures imposed only during emergency circumstances.

The final rule's transparent shift to permanent restrictions is even more problematic in light of its procedural background. The Departments issued this rule as an IFR, without going through the usual notice and comment procedure typically required for changes that will permanently alter agency procedure. With this final rule, the Departments' original intentions are now on stark display: the agency has made a permanent change to the implementation of critical sections of the INA and has done so by intentionally circumventing the procedures explicitly required under the APA.

III. The Departments Should Not Expand the Entry Period of the Circumvention of Lawful Pathways Rule Beyond May 11, 2025

The ILRC provided comment on the Circumvention of Lawful Pathways Final Rule (CLP) which was finalized on May 11, 2023.[10] We reiterate our objections to the CLP rule here. Overall, the ILRC objects to the systematic erosion – and eventual eradication - of asylum protections through first the CLP rule and now the Securing the Border IFR and final rule. These changes have been made under the guise of the Biden administration's efforts to make the asylum screening system more efficient and "orderly."

Thus, the ILRC objects to any expansion of the CLP Rule. In the final rule, the Departments are specifically seeking comments on the extension of the applicable entry period beyond the May 11, 2025 sunset date. Such an extension would expand the CLP rule to bar people who enter the United States indefinitely.

The Departments promulgated the CLP rule as a temporary, emergency measure to manage what was expected to be an "anticipated surge in migration upon the termination of the Title 42." The Departments now claim that the CLP rule should be extended beyond the two-year period for very different reasons than were previously given and that largely mirror the justifications provided for the final rule. Such rationale is not sufficient to support the expansion of an unlawful and unnecessary law.

The Departments' primary reason for the indefinite extension of the CLP rule is to "ensure that DHS can continue to deliver timely consequences," to asylum-seeking noncitizens who are encountered at the southern border. As the Departments explain, the CLP rule will be necessary only during those very limited periods of time when the number of noncitizens encountered is sufficiently low as to not trigger the Securing the Borders final rule. The Departments do not adequately explain why an emergency measure such as the CLP rule is necessary in times of low encounters and why the existing expedited removal and fear screening mechanisms are not sufficient.

The Departments' insistence on expanding an unlawful and inhumane law is a prime example of doubling down on a bad decision. The Departments speculate that there might be periods of time in which the CLP

[10] ILRC, *Comment in Opposition to Joint Notice of Proposed Rulemaking Entitled Circumvention of Lawful Pathways,* March 27, 2023, available at https://www.ilrc.org/resources/community/public-comment-asylum-ban.

rule might be needed to limit numbers of asylum seekers and in the event it is not necessary they could "revise policy as needed." This justification is both illogical and unnecessarily punitive to those who would be subject to the expanded CLP rule. The inverse approach would be more appropriate – allow the CLP entry period to expire in May 2025 as planned and revise the policy as needed in the future.

The Departments also point to the need for the United States to institute asylum restrictions that both serve as a model of deterrence for other countries within the Western Hemisphere and that create an actual deterrence for future migrants fleeing persecution. Much like the rationale above, this deterrent factor would only exist in times when the Securing the Borders final rule is not in effect and the numbers of encounters at the southern border are low. In fact, extending the CLP rule would be counterproductive to the Departments' stated aims of effective migration policy. Rather than serving as a deterrent, the CLP rule spurs irregular crossings by at-risk people who cannot safely wait in Mexico. The Departments would be more likely to achieve the goal of fewer irregular crossings by focusing resources and efforts on expanding and improving existing lawful pathways, such as the refugee resettlement process, various parole programs, and more.

IV. The Departments Should Not Extend the Geographic Reach of the CLP Rule to Include Southern Coastal Borders

The Departments cite three reasons why they believe that the CLP rule should follow the present rule and apply to all southern coastal borders. First, it claims this is necessary to make clear that "timely consequences will result if they cross irregularly, no matter where along the southern border they cross." Second, they seek to deter noncitizens from using maritime routes to avoid the CLP rule's presumption of ineligibility. Third, they believe it will result in "consistency in implementation."
None of these reasons offer an adequate justification for extending an already unlawful policy. First, the conditions along maritime routes highlighted by the Departments are the result of their previous unlawful asylum restrictions, including the CLP rule and the interim final version of the present Securing the Borders rule. Second, their desire for "consistency in implementation," especially at a time when crossings would be below this rule's very low threshold, do not justify disregarding statutory law. Finally, the extension's removal of the third-country transit provision would destroy the already flimsy rationale that the CLP rule is consistent with the asylum statute.

A. The increased use of dangerous maritime routes is the result of the Department's unlawful policies and their failure to create adequate "lawful pathways"

In its justification for the rule, the Departments cite the increase in maritime interdictions along U.S. coastal waters in the wake of the Title 42 border closure and subsequent CLP rule. This is a hallmark of the failure of these asylum bans to actually "discourage individuals from resorting to irregular migration" along dangerous routes.[11] The rule's closure of ports of entry to most asylum seekers has had devastating

[11] 89 Fed. Reg. 81,274

consequences, including the increased use of maritime routes by asylum seekers who have been deprived of their statutory and treaty rights to access asylum processes.

The "lawful pathways" promised by the Departments remain inadequate. The ILRC commends the administration for expanding refugee resettlement, yet refugee admissions are inadequate substitutes for access to the asylum system. This is especially true for those who are actively fleeing persecution and are unable to access ordinary refugee procedures. In most cases, the only means of applying for asylum under the Departments' new framework is trying to obtain one of a tiny number of CBP One appointments. Otherwise, the remaining "lawful pathways" are largely limited to parole programs available only to nationals of certain countries who have a U.S.-based sponsor or are beneficiaries of a family-based petition. These programs have different eligibility criteria than asylum or refugee status and many of those eligible for asylum and most in need of its protections may not qualify for a special parole program. Yet the Departments continue to treat these programs as an adequate substitute for access to asylum procedures.

The predictable failure of the CLP rule and related asylum bans has led to an increased use of dangerous migratory routes. These are precisely the results that the Refugee Convention and asylum statute sought to avoid. Yet the Department is using their failure to create adequate safe pathways to asylum to justify further unlawful restrictions.

B. Agency expediency does not justify violating statutory law, and the extension would only apply at a time when agency resources are not strained

Additionally, the Departments hope that the alignment of geographic scope of both rules will result in consistent implementation. The hope articulated is that DHS personnel will not have to make an "operational switch" when conditions exist that would result in the lifting of the Securing the Border final rule. Otherwise, during periods of extended low apprehension numbers, asylum seekers interdicted in coastal waters not adjacent to the U.S.-Mexico border would be subject to the statutory expedited removal framework and could receive a credible fear interview if they indicate fear of persecution.[12] In other words, DHS personnel would be placed in the inconvenient position of having to follow the laws passed by Congress and U.S. treaty obligations with respect to noncitizens fleeing persecution. Agency expediency concerns, however, do not justify violating statutory law.

Moreover, the Departments have failed to adequately explain why such an extension would be necessary if it would apply only at times when border encounters would be low enough to warrant lifting the present rule's suspension. The justification of the CLP rule rested on the "enormous strain on already strained resources" and "overcrowding in already crowded USBP stations" caused by "unprecedented migratory flows."[13] Yet the entire reason for the maritime extension of the CLP rule would be for it to apply during times when crossings are low, and agency resources are facing much less strain. The

[12] *See* INA § 235(b)(1)(B).

[13] Circumvention of Lawful Pathways, 88 Fed. Reg. 31,314, 31,316 (May 16, 2023).

Departments offer no justification as to why extending such a rule to U.S. maritime borders would be necessary at such a time.

C. The removal of the third-country transit provision from the CLP rule's proposed extension destroys the already flimsy rationale that it does not violate the asylum statute

INA § 208(a)(1) expressly states that noncitizens interdicted in international or U.S. waters may apply for asylum irrespective of their status. Yet, the Departments are seeking to expand the CLP rule to maritime borders even if the noncitizen did not travel through a country other than their country of nationality. This expansion plainly contradicts the asylum statute and is not a permissible limitation under INA § 208(b)(2)(C).

Much of the justification for the original CLP rule rested on the dubious justification that the "rebuttable presumption" would apply only to migrants who had transited through Mexico, a party to the Refugee Convention and Protocol, and possibly through additional member states.[14] The rationale being that the CLP rule would thus be compatible with the firm resettlement and safe third country bars to asylum, declining to offer protection in cases where people already had access to it. This provision was already a fig leaf, meant to respond to critics of the CLP rule who correctly pointed out that the rule clearly violated the letter and spirit of the asylum statute.

Now the Departments are proposing to dispense with even the flimsy rationale offered by the third country transit provision. This expansion of the CLP rule goes even further than its original version in contradicting the plain language of the asylum statute.

V. Conclusion

We continue to object to the Biden administration's systematic dismantling of the U.S. asylum system through regulatory action. The actions that the administration has taken over the course of President Biden's time in office have gone beyond discouraging migrants to seek asylum at the border and instead insurmountable barriers have been erected to deter those seeking safety at our doors. The policies lack justification and indeed, have done more harm than good to asylum-seekers looking to exercise their legal right to claim asylum in the United States. By finalizing this rule, the Biden administration has all but ensured that the restrictions put in place by the CLP rule and the IFR cannot be lifted. Rather than consider an approach that honors the non-*refoulement* obligations under which the United States has operated for decades, the Administration has doubled-down on a failed deterrence and enforcement-only approach. We remain steadfast in our opposition to these measures.

Sincerely,

[14] 88 Fed. Reg. 31,410-31,411.

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