

March 27, 2023

**Department of Homeland Security
20 Massachusetts Ave. NW
Washington, DC 20529-2140**

Submitted via www.regulations.gov

Re: DHS CIS No. 2736-22 DHS Docket No: USCIS 2022-0016; Comments on the proposed rulemaking on the “Circumvention of Lawful Pathways.”

We respectfully submit the comment letter below in response to the Department of Homeland Security’s (DHS) Notice of Proposed Rulemaking (NPRM), “Circumvention of Lawful Pathways,” published on February 23, 2023:

UnidosUS, previously known as the National Council of La Raza, is the nation’s largest Hispanic civil rights and advocacy organization. Through its unique combination of expert research, advocacy, programs, and an Affiliate Network of nearly 300 community-based organizations across the United States and Puerto Rico, UnidosUS simultaneously challenges the social, economic, and political barriers to the success and well-being of Latinos at the national and local levels. For more than 50 years, UnidosUS has united communities and different groups seeking common ground through collaboration, and that share a desire to make our country stronger. Our approach to immigration policy is no different and has guided our advocacy efforts on every significant immigration conversation our country has had since 1968.

The Biden administration’s draft rule aims to incentivize migrants to seek safety by others means than the lawful access to asylum at our southern border. This proposal would apply only to asylum seekers who, after Title 42 ends and in the two-year-period after the rule goes into effect, enter at the southwest border without proper documentation and traveled through a country where they could have sought asylum but did not. It creates a “rebuttable presumption” that a person is ineligible for asylum in the United States unless the individual sought asylum in a country through which they traveled and were denied or presented themselves at a port of entry with an asylum appointment that they scheduled on their smartphone using the CBP One app.

UnidosUS supports the development and implementation of incentives that encourage asylum seekers to seek safety closer to their home countries, reduce the need for asylum seekers to undergo a long and dangerous journey to the United States, and establish a more orderly and manageable process for our government and those who seek asylum at our southern border. However, we strongly oppose the administration using the incentives as a pretense to significantly limit access to asylum only for those who seek it on our southern border and believe that this will result in the denial of access to asylum to

legitimate asylum seekers and increased hardship for the most vulnerable migrants, including vulnerable families with children and unaccompanied minors. Therefore, we oppose this rule.

The Well-Being and Safety of Children and Families Must be Prioritized in the Asylum Process

UnidosUS has historically supported the well-being and safety of children as a central focus of our advocacy agenda. This includes, in the case of the Trump administration, working to prevent the separation of children and families at the southern border.¹ The rule states that as a goal. However, the rule, which imposes adverse asylum consequences on those who do not pursue its incentives, applies to children who arrive at the southern border with their families but does not apply to unaccompanied minors.

The imposition of this rule on families with children has two deleterious effects. First, it will likely incentivize some parents to send their children alone to the southern border to evade the consequences of the rule and to ensure their safety in the U.S., since the risk is higher that the family unit will be denied access to asylum under the rule. We assert that a humane and effective asylum policy would enable families suffering persecution to arrive at the border, claim asylum, and remain together through the adjudication process.

Second, this provision makes it more difficult for children accompanied by parents to make a separate, individual asylum claim. Often it is the children themselves who are targeted for persecution, with dangerous consequences for the whole family.² The rule fails to acknowledge the lack of autonomy held by children who travel to the border with their families and condemns children who may have had little to no say in availing themselves of the proposal's incentives. Oftentimes, these children are not in control of whether their parents cross into the U.S. at or in between ports of entry, apply to asylum in a transit country, or make an appointment using the CBP One app. Considering this, a child can be punished with presumed ineligibility for asylum for decisions or actions that are largely out of their control.

Lastly, the proposed rule fast-tracks asylum seekers who cannot or do not comply with the rule's incentives through expedited removal procedures. This disproportionately harms children and increases the difficulty they face in building asylum claims for themselves and their families. Children's developmental stage hinders their ability to make and detail independent claims for protection in the condensed timeframe laid out in the regulation. This is only made worse by the trauma many of these children carry, and their early developmental stage makes them even less equipped to cope with this trauma and effectively navigate the asylum system.³ The expedited removal timeline can deprive these children and their families from accessing proper language services and legal counsel, as well, making effective case-building around asylum claims more improbable.⁴

An Improperly Executed Regulation will only Further Exacerbate the Exploitation of Child Migrant Workers

The Biden administration ought to recognize the way this rule would aggravate the ongoing crisis of child migrant labor exploitation that was brought to the public's eye only recently through a New York Times investigative report.⁵

This crisis pointed out the gaps in the sponsor vetting process conducted by the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services (HHS). A surge in unaccompanied minors at the southern border, caused by this proposed rule, would only further overwhelm ORR, especially at a time when it is still undergoing an audit of the sponsor vetting system following the aforementioned news outbreak. This rule will incentivize parents to send their children to the border unaccompanied—not knowing that the U.S. government has repeatedly failed to identify and respond to signs of potential trafficking and labor exploitation of children. The Administration has taken some steps, but more will be necessary and more resources and supports will be needed for families and migrant children awaiting.

Flexibility in the Scheduling and Allocation of Asylum Appointments Is Needed and Should Not Be a Pretext for the Denial of Asylum

The rule requires migrants at the southern border to schedule appointments through the CBP One app. This would generally deny asylum to migrants who arrive at a border port of entry without a previously scheduled appointment and/or those who were not denied protection in a transit country. Advanced technology is certainly a sensible component in modernization efforts. However, the CBP One app is a flawed government tool that is inaccessible to many asylum seekers due to financial, language, and technological, and other barriers.⁶ By designating the app as an integral part of the asylum process, the Biden administration makes the false assumption that most migrants arriving to the southern border have the financial means to procure a smart phone that can run the app, are in a geographical region with stable access to Wi-Fi (and can pay for such a service), and have the cognitive and linguistic capacity to navigate the app in either English, Spanish, or Haitian Creole. Although the app requirement can be waived, migrants must be made aware of this and have the opportunity to take this step. Moreover, the CBP One app has also been thoroughly documented to discriminate against darker-skinned Black and Indigenous migrants due to a racial bias in its facial recognition technology.⁷

The greatest flaw in the app is that migrants who are able to overcome all of these barriers in accessibility are still often unable to schedule appointments due to extremely limited slots. One source notes that with fewer than a thousand slots offered each day for the more than 100,000 migrants at the border seeking entry, the app's appointments are filled within five minutes of opening up at 6 a.m. PST.⁸ This inefficient system turns asylum access into a lottery that keeps people waiting indefinitely in danger along the border. There is not an inherent problem with deploying a digital tool such as the CBP One app to make the asylum appointment process more orderly. The issue lies in the fact that, through this rule,

DHS seeks to condition access to asylum on the southern border on the use of a flawed app to book asylum appointments.

The Proposed Rule is Misguided and Lacks Workable Incentives for Asylum Seekers

We acknowledge that the Biden administration must make an effort to modernize and update our asylum system. However, the proposed rule will result in denying access to asylum on the border rather than ensuring that an orderly system is in place.

For decades, extremists in Congress have played politics with the immigration issue and refused to update, modernize, and invest resources into effective border management and our immigration system. This has led to challenges on our southern border where those coming to work or to join family have limited legal paths to enter the U.S., and those seeking safety face barriers and long waits to have their claims for asylum processed.

As a result of congressional inaction, President Biden and Secretary Mayorkas have inherited an issue that has persisted across administrations. Moreover, given obstruction in Congress, the Biden administration has been left to address the crisis at the border alone, with a constrained set of tools and with insufficient resources. The President's goal to incentivize people to seek safety before making the dangerous trek north to the U.S. is a laudable one. If effective, it has the potential to save lives and make the enforcement between ports of entry manageable—a mutually beneficial outcome for the federal government and migrants alike.

Nonetheless, these prospects rely on the idealized assumption of migrants' clear understanding of the policies proposed in this draft regulation and the full-fledged ability to act on them. In its current form, this regulation discounts various troublesome factors, including: (1) safety and economic barriers that prevent migrants from following the asylum process as outlined in the regulation, (2) questionable access to asylum in transit countries, and (3) systemic and technical issues with tools that the Biden administration has deployed to assist with this process, such as the CBP One app.

Our immigration system—and specifically the mechanisms for legal immigration into the United States—is outdated and in need of reform. However, this proposed rule, as it currently stands, severely restricts meaningful access to asylum seekers with legitimate claims and creates particularly harsh and unjustifiable barriers to families with children. UnidosUS urges DHS to propose workable incentives that enable meaningful access to asylum.

Looking Beyond Border Security—and at Congressional Action—to Ensure Health of the National Immigration System

The Biden administration should continue to pursue modernization of our immigration system. This is important to the nation and many Americans, including Latinos, who want an orderly and humane asylum system as well as a safe southern border. While we oppose the rule in its current form, we

recognize that something must be done to reduce the challenges on our southern border and to improve the functioning of our asylum system.

We recommend the Biden administration take other steps to effectively manage the southern border. These include increasing capacity at the ports of entry to process more migrants, investing more in immigration courts and access to legal representation to ensure the fair and timely screening and adjudication of asylum cases, so that families are not stressfully waiting in limbo at processing centers or in the interior.

The federal government should further address threats and migration throughout the hemisphere and to the Global South. Migration doesn't start at our southern border. It starts in nations throughout the Americas and beyond where authoritarian regimes, rampant corruption, widespread human rights violations, and pervasive poverty drain hope and spur migration. Fortunately, this administration has worked to restore partnerships with private and public actors to stimulate investments, job growth, and community stability in communities in Central America, and through the designation of Temporary Protective Status (TPS) for nationals in the U.S. who are unable to safely return to their home countries. These development initiatives need to be supported and expanded so that, over time, migration becomes a choice rather than a necessity.

Congress has a crucial role to play, and the Administration should call them to task. Lawmakers must fulfill their constitutional obligation to set divisive politics aside and work in a bipartisan way to comprehensively update our immigration laws. Reforms should enable us to: more effectively manage our southern border; allow the legal and orderly entrance of migrants to seek asylum, fill gaps in our workforce, and join U.S. families; and resolve the precarious status of Dreamers and the undocumented with deep roots and many years living in the U.S.

Should you have any questions regarding these comments, please contact Susan Collins at scollins@unidosus.org and Nicole Chavez at nchavez@unidosus.org.

Sincerely,

UnidosUS

¹ Guevara, Carlos. "Beyond the Border: Family Separation in the Trump Era." *UnidosUS*. March 2019. <https://unidosus.org/publications/1915-beyond-the-border-family-separation-in-the-trump-era/>.

² Carlson, Elizabeth; Gallagher, Anna Marie. "Humanitarian Protection for Children Fleeing Gang-Based Violence in the Americas." *Center for Migration Studies*. 2015. <https://cmsny.org/publications/jmhs-humanitarian-protection-for-children/>.

³ Linton, Julie M, et al. "Detention of Immigrant Children." *The Academy of Pediatrics*. 1 May 2017. <https://publications.aap.org/pediatrics/article/139/5/e20170483/38727/Detention-of-Immigrant-Children?autologincheck=redirected>.

⁴ Abaya, Miriam. "5 ways the Biden asylum ban punishes children." *First Focus*. 24 February 2023. <https://firstfocus.org/blog/5-ways-the-biden-asylum-ban-punishes-children>.

⁵ Dreier, Hannah. "Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S." *The New York Times*. 28 February 2023. <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html>.

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- ⁷ Del Bosque, Melissa. "Facial recognition bias frustrates Biden asylum applicants to US, advocates say." *The Guardian*. 8 February 2023. https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias?CMP=share_btn_tw. Morrissey, Kate. "Asylum seekers in Tijuana are scrambling through mobile app error messages for few appointments into the U.S." *The San Diego Union-Tribune*. 22 January 2023. <https://www.sandiegouniontribune.com/news/immigration/story/2023-01-22/cbp-one-app-asylum-tijuana>.
- ⁸ Hernández, Arelis R. "Desperate migrants seeking asylum face a new hurdle: Technology." *The Washington Post*. 11 March 2023. <https://www.washingtonpost.com/nation/2023/03/11/asylum-seekers-mexico-border-app/>.