NATIONAL IMMIGRATION PROJECT

Lawyers for the Movement

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RE: Comment in Opposition to the Question Posed in the *Securing the Border* Final Rule Regarding the Extended and Expanded Applicability of the Circumvention of Lawful Pathways Rule; DHS Docket Number USCIS–2024–0006; RIN 1615–AC92; [A.G. Order No. 6053–2024; RIN 1125–AB32

Dear Director Delgado and Assistant Director Alder Reid:

The National Immigration Project[1] submits the following comment in response to the Department of Homeland Security's (DHS) and the Executive Office for Immigration Review's (EOIR) request for comments on two proposed changes to the Circumvention of Lawful Pathways Rule (CLP) and a proposed change to the Securing the Border Rule (STB), which will expand the reach of the unlawful restrictions on asylum that these rules impose. For the reasons stated below, the National Immigration Project strongly opposes the proposed expansion of these rules and calls on the agencies to rescind the CLP and STB rules in their entirety. If the agencies do not rescind the rules completely, they should not make the amendments proposed in this Notice of Proposed Rulemaking (NPRM), expanding these unjust rules potentially in perpetuity.

The National Immigration Project is a national nonprofit membership organization that provides support, referrals, and legal and technical assistance to attorneys, community organizations,

[1] The primary author of this comment is National Immigration Project supervising attorney, Victoria Neilson, with thanks to Director of Legal Resources and Training, Michelle N. Méndez for her review.

families, and advocates seeking to advance the rights of noncitizens. The National Immigration Project focuses especially on the immigration consequences of criminal convictions, and its mission is to fight for justice and fairness for noncitizens who have contact with the criminal legal system. Additionally, we fight for fairness and transparency in immigration adjudication systems and believe that all noncitizens should be afforded the right to fair adjudications of their claims to remain in the United States.

The National Immigration Project opposes both the substance of the proposed CLP expansion and the procedure used to implement it and the expansion of the STB. We submitted a comment in opposition to the CLP on March 23, 2023,[2] and incorporate that comment herein. We further submitted a comment in response to the STB Interim Final Rule on July 3, 2024,[3] and incorporate that comment herein.

I. The National Immigration Project Strongly Opposes the Process Through Which DHS and EOIR Are Seeking Comments on the Expansion of the CLP and the STB Rules

The National Immigration Project strongly opposes the process the agencies have used in issuing this request for comments. Seeking comments on the CLP in a final rulemaking on the STB, is confusing and will likely deter commenters from responding to the changes to the CLP. Further, the National Immigration Project strongly opposes the short, 30-day period for submitting comments. Both rules are already in effect and there is no urgent reason to justify this very short comment period.

a. The National Immigration Project Strongly Opposes the Agencies' Solicitation of Comments on CLP, a Rule Which Was Published in 2023 Through the Issuance of a Different 2024 Final Rule

The agencies sought comments on the CLP on February 27, 2023. The National Immigration Project submitted comments to that rule and on May 16, 2023, the agencies issued the final CLP rule.[4] At the time the CLP final rule was published, the agencies solicited further comments on the question of whether the CLP prohibitions on granting asylum should be expanded to the "maritime context." The National Immigration Project joined 68 other civil, human rights, faith-based, and immigration groups in a comment strongly opposing the expansion of the CLP bans on asylum to maritime interdictions.[5]

Thereafter, on June 3, 2024, the agencies published a different border-based asylum ban titled Securing the Border. While some provisions of the STB overlap with the CLP, the rulemaking

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[2] USCIS-2022-0016-12200, https://www.regulations.gov/comment/USCIS-2022-0016-12200.
[3] USCIS-2024-0006-0768, https://www.regulations.gov/comment/USCIS-2024-0006-0768.
[4] 88 Federal Register (Fed. Reg.) 31314 (May 16, 2023), https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways.
[5] *See* Comment Submitted by Americans for Immigrant Justice, National Immigrant Justice Project, Haitian Bridge Alliance, and 66 Additional Organizations. Document (USCIS-2022-0016-51954), https://www.regulations.gov/comment/USCIS-2022-0016-51969.

for each was separate and each rule amends or creates a different section of the Code of Federal Regulations.[6] The purpose of seeking comments on proposed rules is to allow the public to weigh in and express their opinions and share their expertise. Soliciting comments on a rule which was finalized more than a year ago through the mechanism of publishing a different final rule, with a different title, which covers a different section of the Code of Federal Regulations cannot be said to provide reasonable notice to the public about the proposed change to the earlier, final rule.[7] While the National Immigration Project opposes the expansion of CLP for substantive reasons,[8] we also urge the agencies to provide proper notice to the public. The agencies should rescind this request for comments and, if it deems further amendments to the CLP necessary, reissue a Notice of Proposed Rulemaking that clearly bears the Circumvention of Lawful Pathways title and gives adequate time for commenters to respond.

b. The National Immigration Project Opposes the Agencies' Providing Only a 30 Day Period to Submit Comments on the Proposed Changes to the CLP and STB

As discussed in our previous comments on the CLP and STB, and as has been borne out by practice at the border and in adjudications since the implementation of these draconian restrictions on asylum,[9] both rules gut longstanding asylum protections and directly contradict established statutory rights. The current proposed revisions—to extend the CLP indefinitely and to greatly reduce the number of border encounters needed to keep the STB restrictions in place—will have the effect of foreclosing most asylum seekers from accessing the U.S. asylum system in perpetuity.

The Administrative Procedures Act (APA) § 553 requires that the public as "interested persons" have "an opportunity to participate in the rule making." In general, the agencies must afford "interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."[10] Courts have found that to comply with this participation requirement, the agencies must offer a comment period that is "adequate" to provide a "meaningful opportunity."[11] Given the importance of the public's participation in the rulemaking process, Executive Order 12866 specifies that rulemaking "in most cases should include a comment period of not less than 60 days."[12] Likewise, Executive Order 13563 explicitly states, "To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60

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[6] *See* 8 CFR § 208.33 (CLP) and 8 CFR § 208.35 (STB).

[7] 5 U.S.C. § 553(c) states, "the agency shall give interested persons an opportunity to participate in the rule making. . ."

[8] National Immigration Project is again joining a joint comment on the substance of the proposed rule on maritime interdictions which will be submitted by Americans for Immigrant Justice. We address the substance of the proposed permanent extension of the CLP below.

[9] Human Rights First, et al., *"Don't Tell Me About Your Fear" Elimination of Longstanding Safeguard Leads to Systematic Violations of Refugee Law* (Aug. 2024) https://humanrightsfirst.org/wp-content/uploads/2024/08/IFR-report_formatted.pdf.

[10] *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977).

[11] *N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012).

[12] *See* Exec. Order No. 12866, § 6(a), 58 Fed. Reg. 51735 (October 4, 1993).

days."[13] The purpose of notice and comment is to allow the public a meaningful opportunity to comment. Offering this limited opportunity to respond to the proposed changes contradicts these Executive Orders and makes it less likely that the agencies will receive informed feedback on the proposed change.

At a minimum, the agencies should have given a 60-day comment period rather than a 30-day comment period to allow interested parties to fully develop their comments. Both the CLP and the STB rule are already in effect. The CLP currently has a scheduled end-date of May 11, 2025; there is no reason the agencies need comments within 30 days of this proposed change when the rule will already remain in effect for seven months anyway. Likewise, there is no reason to require comments within 30 days of the proposed changes to the STB border calculation matrix when there is no indication that the number of encounters will drop below the current STB threshold in the next 60 days. Forcing stakeholders to comment on an accelerated timeline on changes that will not take effect for months, serves no purpose for the agencies and is arbitrary, capricious, and unreasonable.

II. The National Immigration Project Strongly Opposes the Substance of the Proposed Changes Which Would Likely Restrict Asylum at the Border Permanently

In addition to the National Immigration Project's objections to the process through which the agencies seek to expand these harmful rules, the National Immigration Project strongly opposes their substance. The change to the rule will implement the CLP's restrictions on asylum permanently, violating U.S. and international law. The changes to the STB will also result in those changes remaining in place, potentially permanently. At a time when there are record numbers of displaced people throughout the world, the United States should be increasing its capacity to provide refuge to those in need, not implementing permanent changes that gut our asylum system.

A. The National Immigration Project Strongly Opposes the Proposed Change to CLP Which Would Remove Its May 11, 2025 End Date, Permanently Restricting Asylum in Violation of U.S. and International Law

Section 208 of the INA unequivocally grants anyone present on U.S. soil the right to seek asylum. "Any [noncitizen] who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such [noncitizen's] status, may apply for asylum in accordance with this section. . ." INA § 208(a)(1).

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[13] Exec. Order No. 13563, 76 Fed. Reg. 3821 Improving Regulation and Regulatory Review (Jan. 18, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulationand-regulatory-review.

When the agencies promulgated the CLP, they justified doing so because they anticipated a surge at the border following the end of Title 42 expulsions.[14] The stated purpose of the CLP was to impose "consequences" on those who enter the United States between ports of entry rather than entering through lawful pathways, including parole and CBP One appointments.[15] The fundamental flaw with the concept of "consequences"—also frequently called deterrence—is that they do not work. At the time the CLP was published, the agencies stated 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."[16] In other words, the agencies believed at the time they promulgated the CLP that once noncitizens fleeing their countries understood the harsh consequences the U.S. government imposed on those who sought entry at the U.S.-Mexico border without prior authorized parole or CBP One use, noncitizens would stop seeking asylum at the border.

Clearly, this deterrence policy has not worked. If the premise of the CLP's "consequences" was correct, then the agencies would not have needed to expand the CLP's reach through the confusingly overlapping, but different restrictions imposed by the STB. Although the agencies essentially admit that the "consequences" imposed for those who cannot wait months in Mexico for a CBP One appointment are not preventing noncitizens from crossing the border irregularly, it now seeks to make these punitive measures permanent, still in the hope that doing so will deter asylum seekers from leaving dangerous homelands. In 1991, when the U.S. government denied virtually all Salvadoran and Guatemalan asylum claims, following litigation, the government agreed in a settlement agreement, "foreign policy and *border enforcement considerations* are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution." [Emphasis added.] *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991). Despite the U.S. government's acknowledgement of this basic concept thirty years ago, it continues to make policy decisions that are destined to fail, and that instead punish noncitizens who are seeking safety.

Rather than prevent asylum seekers from "mak[ing] the dangerous journey to the United States,"[17] the CLP has forced those who had no choice but to make that dangerous journey, to wait in unsafe conditions in Mexico, and in many instances, to cross the border irregularly.[18] The CLP then raises the screening standard at the border to a level where many genuine asylum seekers never receive a day in court, and imposes increased evidentiary burdens on those who are placed into removal proceedings, to a point where they are likely to be ordered removed. The CLP may give the appearance of being tough on the border, but it has neither prevented asylum

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[14] DHS, *Fact Sheet: Circumvention of Lawful Pathways Final Rule* (May 11, 2023) https://www.dhs.gov/news/2023/05/11/fact-sheet-circumvention-lawful-pathways-final-rule.
[15] *Id.*
[16] Cited at current request for comments 89 Fed. Reg. 81274-75.
[17] 89 Fed. Reg. 81274-77.
[18] Human Rights First, *Inhumane and Counterproductive Asylum Ban Inflicts Mounting Harm* (Oct. 2023) https://humanrightsfirst.org/wp-content/uploads/2023/10/Inhumane-and-Counterproductive-final-report.pdf.

seekers from coming to the U.S. border, nor provided the protections under U.S. and international law[19] to which asylum seekers are entitled.

In addition to the draconian effects the CLP has had at the border, the rule's ongoing application to adjudications in the interior, has caused confusion among adjudicators and practitioners, and led to genuine asylum seekers having their applications for protection denied.[20] At a moment where both the Asylum Offices and EOIR have record backlogs of asylum seekers, the complex CLP exceptions require every asylum seeker to undergo two hearings—one on whether they meet a CLP exception or rebut a CLP presumption—and a second on the merits of their protection claim. Additionally, for those who entered the United States after June 5, 2024, further STB restrictions on asylum are layered on top of the CLP restrictions.[21]

As a member organization, the National Immigration Project provides training and technical assistance to our members and other immigration legal service providers. Although the CLP has been in effect for over a year, counsel continues to be confused by its complicated patchwork of exceptions and rebuttable presumptions. Practitioners report that adjudicators at the border and in merits hearings apply impossibly high standards to the "exceptionally compelling circumstances" exceptions based on threats at the border or medical conditions.

The National Immigration Project previously commented on the ethical quagmire created by the Family Unity exceptionally compelling circumstance at 8 CFR § 1208.33(c)[22] and 8 CFR § 1208.35(c)[23], and in the preamble to this final rule, the agencies essentially dismiss those ethical concerns.[24] Nonetheless, practitioners must determine whether it is ethically possible to represent more than one family member in removal proceedings, when the entire family could be eligible for asylum if one family member has no viable claim, but the family would have to make due with withholding of removal if they can all prevail on withholding claims. While the agencies

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[19] UNHCR, *Convention and Protocol Relating to the Status of Refugees*, https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees; UNHCR, *News Comment: UNHCR Reiterates Concern About US Asylum Regulations* (Sep. 30, 2024) https://www.unhcr.org/us/news/press-releases/news-comment-unhcr-reiterates-concern-about-us-asylum-regulations.

[20] As a member organization, the National Immigration Project regularly responds to members' questions about immigration matters, including the CLP and STB. Additionally, National Immigration Project staff monitor listservs and social media for trends in adjudications. The author of this comment regularly speaks with attorneys who are seeking to navigate the complexities of the CLP and STB.

[21] *See* National Immigration Project, *Asylum Restrictions Comparison Chart* (Oct. 1, 2024) https://nipnlg.org/work/resources/asylum-restrictions-comparison-chart.

[22] USCIS-2022-0016-12200, https://www.regulations.gov/comment/USCIS-2022-0016-12200.

[23] USCIS-2024-0006-0768, https://www.regulations.gov/comment/USCIS-2024-0006-0768.

[24] 89 Fed. Reg. 81231. (The "Departments do not share commenters' concerns about potential ethical dilemmas faced by representatives related to pursuing independent relief for family members due to the family unity provisions. Representatives must be truthful to the court in presenting the record facts and will either be able to zealously advocate on behalf of all of their clients where the family members' interests present no conflict, or counsel can withdraw from such representation if they believe they cannot advocate for each client's interests equally.")

responded to this concern that the provision cannot be expanded, lest it reduce the "consequences" intended by the rule, one unintended result is that counsel may choose not to provide representation at all in cases where the family unity provision is at play for fear of running afoul of ethical rules.[25] Further, while the agencies explain that withholding of removal is sufficient protection to meet international obligations, the agencies do not consider the possibility that a different presidential administration could try to remove those who have been granted withholding of removal to third countries. The National Immigration Project strongly opposes the indefinite extension of the CLP.

B. The National Immigration Project Strongly Opposes the Changes to the Final STB Rule Which Greatly Reduce the Border-Encounter Threshold to Lift the Ban and Have the Effect of Permanently Restricting Asylum in Violation of U.S. and International Law.

The National Immigration Project likewise strongly opposes the new border calculations the rule proposes which will likely have the effect of permanently keeping the STB in place. The STB has already severely curtailed the rights of asylum seekers at the border.[26] The "manifestation" requirement for asylum seekers has led to countless noncitizens being returned to their home countries without ever having their fear of return assessed by a U.S. official.[27]

Under the STB as it currently exists the "suspension and limitation on entry and associated measures will apply until 14 calendar days after there has been 28-consecutive-calendar-days of a 7-consecutive-calender-day average of less than 1,500 encounters. The suspension and limitation on entry will continue to, or again, apply if there has been a 7-consecutive-calendar-day average of 2,500 encounters or more."[28]

The final rule as published, increases the period of time that the number of border crossings must remain reduced from 7 days under the IFR, to 28 days under the October final rule.[29] The

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[25] *Id.*

[26] The preamble to the rule claims that "noncitizens screened under the higher 'reasonable probability' standard that receive positive findings are more likely to have meritorious claims in ultimate adjudications." 89 Fed. Reg. 81161. Yet it does not include any data to support this claim. Given backlogs in immigration court, it is unlikely that many asylum seekers who have been processed under the STB rule have had merits hearings. Based on reports of the chaotic and arbitrary application of these new and complex rules, it is equally likely that whether or not an asylum seeker is able to meet the newly-created, and ultra vires "reasonable probability" standard is being arbitrarily administered and may not be a predictor of whether the individual is likely to prevail at their merits hearing.

[27] Human Rights First, et al., *"Don't Tell Me About Your Fear" Elimination of Longstanding Safeguard Leads to Systematic Violations of Refugee Law* (Aug. 2024) https://humanrightsfirst.org/wp-content/uploads/2024/08/IFR-report_formatted.pdf.

[28] DHS, Securing the Border, Presidential Proclamation and Rule (Last Updated: Oct. 21, 2024) https://www.dhs.gov/immigrationlaws.

[29] 89 Fed. Reg. 81164. ("Following the issuance of the IFR, the Departments have closely monitored its implementation and results across the southern border. The Departments recommended to the President adjustments to the Proclamation based on their experiences

preamble to the proposed changes state that the STB is "working as intended" in reducing border crossings, yet the agencies still propose quadrupling the amount of time crossings must remain below their threshold in order to lift the STB.[30] While the agencies describe this change as "modest" quadrupling the length of time crossings must remain reduced, make it far less likely that the STB ban will ever be lifted. According to the preamble, border crossings have fallen by 59 percent since the start of the STB.[31] If the actual goal of the STB was to reduce border crossings to the point that the restrictions on asylum could be lifted, and asylum seekers could be processed in accordance with the INA, then it would not make sense to increase the threshold numbers for the STB to be lifted. Instead, clearly, when the agencies state that the ban is "working as intended," they mean that the intention of the rule is to prevent asylum seekers from entering the United States and having a day in court.

When the STB was issued as an interim final rule, fewer than six months ago, it determined that seven consecutive days of decreased border crossings was the appropriate threshold at which level the STB ban would be lifted, after 14 calendar days to prepare to implement the change.[32] Even under the June IFR, if the levels of crossings increased during the 14-day implementation period, the ban would remain in place, meaning that the prior reduced border crossing threshold was really 21 days.[33] Now, with the required 28 days of reduced crossings, combined with the 14-day implementation period, the border crossing numbers must remain below 1500 per day for a full 44 days before the STB ceases to be in effect.

In addition to making longer the period of time during which border numbers must remain lowered, the proposed changes also sweep into their calculation of 1500 encounters many more noncitizens who present themselves at the border. Under the proposed changes, unaccompanied children from noncontiguous would be counted towards the threshold numbers, though the unaccompanied children themselves would remain exempt from the asylum bans. The purpose of both changes implemented in October appear designed to keep the STB in effect indefinitely. The National Immigration Project urges the agencies to withdraw these proposed changes and rescind the CLP and STB.

III. Conclusion

At a moment in our history where immigrants have increasingly been vilified to serve political purposes, the expansion of these dual asylum bans seems calculated to make a political statement rather than ensuring asylum seekers their rights under U.S. and international law. At a time of increased displacement throughout the world, the United States has ceased to be a leader in the

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implementing the Proclamation and IFR. Following those recommendations, the President issued the September 27 Proclamation, which amended section 2 of the June 3 Proclamation in two ways. First, section 2(a) of the June 3 Proclamation provided that the suspension and limitation on entry would be discontinued at 12:01 a.m. eastern time on the date that is 14- calendar-days after the Secretary makes a factual determination that there has been a 7-consecutive-calendar-day average of fewer than 1,500 encounters between POEs.").

[30] 89 Fed. Reg. 81159.

[31] *Id.*

[32] 89 Fed. Reg. 48715.

[33] *Id.*

just application of refugee principles and instead is slamming the door on asylum seekers, forcing thousands of people fleeing dangerous conditions to return to their country of feared harm, without ever getting a full day in court. The changes implemented to the STB in the final rule, and the proposed changes to the CLP, both of which are likely to shut out bona fide asylum seekers indefinitely, are a further betrayal of the United States commitment to comply with its own laws and international norms. The National Immigration Project urges the agencies to rescind both the STB and CLP in their entirety. If the agencies will not fully rescind these rules, they should, at a minimum not expand the damage wrought by these rules by extending their geographic and temporal reach.

Please do not hesitate to contact Victoria Neilson, victoria@nipnlg.org, if you have any questions or need any further information. Thank you for your consideration.

Respectfully,

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