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**Re: Comment Opposing the Proposed Rule: “Circumvention of Lawful Pathways”
— DHS, Docket No: USCIS 2022-0016; EOIR, A.G. Order No. 5605–2023¹**

Dear Acting Director Daniel Delgado and Assistant Director Lauren Alder Reid;

African Communities Together (“ACT”) submits the following comment in response to the proposed rule “Circumvention of Legal Pathways”² published by the Department of Homeland Security (“DHS”) and the Department of Justice (“DOJ”) on February 23, 2023. The proposed rule was released in anticipation of the termination of the Centers for Disease Control and Prevention’s (“CDC”) Title 42 public health order on May 11, 2023.

ACT is an organization of African immigrants fighting for civil rights, opportunity, and a better life for over 2 million African immigrants living in the U.S. One in five Black people in the United States are immigrants or children of Black immigrants.³ Pathways to enter are essential as Africans continue to pursue family reunification, opportunities for a better life, and safety. However, under the Biden administration, African immigrants are disproportionately impacted, with the steepest decline in the recovery of immigrant visa issuances compared to any other region.⁴ This has directly impacted the flow of African immigrants to the United States, hindering legal pathways to enter.

Migration Policy Institute estimated that 12 percent of all Black immigrants, comprising a diverse diaspora including African immigrants, entered the country as refugees or through other

¹ “Circumvention of Lawful Pathways.” 88 FR 11704, 23 Feb. 2023, <https://www.federalregister.gov/documents/2023/02/23/2023-03718/circumvention-of-lawful-pathway> S.

² Id.

³ Tamir, Christine. “Key Findings about Black Immigrants in the U.S.” *Pew Research Center*, 1 Feb. 2022, <https://www.pewresearch.org/fact-tank/2022/01/27/key-findings-about-black-immigrants-in-the-u-s/>.

⁴ “Table IV Summary of Visas Issued by Issuing Office Fiscal Year 2022.” *U.S. Department of State*, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2022AnnualReport/FY22_TableIV.pdf; Bier, David J. “Africans Face Steepest Decline in Immigrant Visas under Biden.” *Cato Institute*, 5 Apr. 2022, <https://www.cato.org/blog/africans-face-steepest-decline-immigrant-visas-under-biden>.

humanitarian pathways such as asylum.⁵ Under the proposed rule introduced by the Biden administration, only migrants who enter the country through legal channels (*see* 2. a.) or migrants who request asylum in a transiting country and receive a denial, are eligible to seek asylum. The rule introduces a *rebuttable presumption of asylum ineligibility* for all those who do not meet the above criteria, thereby essentially imposing a ban on asylum and introducing a transit ban.

1. **Seeking Asylum is Legal**

The 1951 Refugee Convention outlined the definition of a refugee and established the international customary law of non-refoulement, which was later adopted into U.S. domestic immigration laws.⁶ Both legal principles were abused under the Trump administration, and through these measures, the Biden administration fails to fulfill its promise to uphold the legal right to asylum, and to protect people from persecution, violation of due process, and family separation.⁷ The proposed rule is in violation of 8 U.S.C. 1158 under the Immigration and Nationality Act and violates the Refugee Convention by failing to provide fair and accurate adjudication and by prioritizing expedited removal.⁸

2. **Implications of the proposed rule**

Under our immigration laws, migrants can seek asylum regardless of the manner of entry. The proposed rule, however, deems migrants ineligible for asylum if they do not avail *lawful, safe, and orderly pathways* to enter the United States. This includes a grant of parole prior to arrival, an appointment at a port of entry through the CBP One app, or an application and denial of asylum or other protection in a country through which they traveled.

a. **Pathways to enter under the proposed rule**

The notice outlines some of the legal pathways that DHS cites as alternatives to unauthorized entry.

i. **Parole Program**

The Biden administration announced the United for Ukraine program in light of Russia's war on Ukraine and the Afghan Parole Program following the withdrawal of U.S. troops from Afghanistan. More recently, the administration announced new parole programs for nationals of Cuba, Haiti, Nicaragua, and Venezuela. Currently, **no African countries have received benefits under a humanitarian parole pathway.** The

⁵ Lacarte, Valerie. "Black Immigrants in the United States Face Hurdles, but Outcomes Vary by City." *Migration Policy Institute*, 10 Feb. 2022,

<https://www.migrationpolicy.org/article/black-immigrants-united-states-hurdles-outcomes-top-cities>.

⁶ "Refugee Act of 1979." Public Law 96-212. United States Statutes at Large, vol. 94, 1980, pp. 102-18. U.S. Government Publishing Office,

<https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf>; "8 CFR § 208.16 - Withholding of Removal under Section 241(b)(3)(b) of the Act and Withholding of Removal under the Convention Against Torture." *Legal Information Institute*, Cornell Law School,

<https://www.law.cornell.edu/cfr/text/8/208.16>; Buatte, Trent. "The Convention Against Torture and Non-Refoulement in U.S. Courts." *Georgetown Law Immigration Law Journal*, vol. 35, pp. 701-747.

<https://www.law.georgetown.edu/immigration-law-journal/wp-content/uploads/sites/19/2021/07/01-Buatte-GT-GILJ210041.pdf>.

⁷ "The Biden Plan for Securing Our Values as a Nation of Immigrants." *Joe Biden for President: Official Campaign Website*, 5 Aug. 2020, <https://joebiden.com/immigration>.

⁸ "8 U.S. Code § 1158 - Asylum." *Legal Information Institute*, Cornell Law School, <https://www.law.cornell.edu/uscode/text/8/1158>.

administration must extend similar protections to migrants fleeing violence in African nations such as the Democratic Republic of Congo (DRC) and Mali. Parole allows individuals with urgent humanitarian or significant public benefit reasons to come to the United States for a temporary period. However, *it does not offer a path to citizenship or any other form of legal status* as in the case of asylum. The administration must ensure asylum continues to remain accessible while expanding other legal pathways for migration such as parole.

ii. **CBP One App**

The proposed rule requires migrants to have an appointment scheduled through the CBP One app before they present themselves at a land border port of entry. There are extensive reports on the obstacles migrants face including lack of access to mobile devices and internet, poor connectivity and consistent technical difficulties in uploading data requested, glitches such as frozen screens, and geo-location failure.⁹ “Migrants awake before sunrise to search for a WiFi signal and try to get one of the 700 to 800 appointments available at eight entry points. The appointments fill up within five minutes.”¹⁰

Resources are specifically inaccessible to African migrants, who travel longer distances than most migrants, with little or no money, and through treacherous terrains losing all their belongings.¹¹ They further suffer as they cannot communicate in any language currently available on the app, or any languages of the transiting countries or at the border settlements, increasing their inability to request assistance.¹² It is widely reported that the app’s facial recognition features omit the identification of dark-skinned migrants, significantly impacting African immigrants.¹³ **African migrants are overshadowed in the system, and their troubles are undermined by the administration in the implementation of its policies.**¹⁴

⁹ Debusmann, Bernd. “At US Border, Tech Issues Plague New Migrant Applications.” *BBC News*, 8 Mar. 2023, <https://www.bbc.com/news/world-us-canada-64814095>; 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 Jan. 2023, <https://www.sandiegouniontribune.com/news/immigration/story/2023-01-22/cbp-one-app-asylum-tijuana>.

¹⁰ Hernández, Arelis R. “Desperate Migrants Seeking Asylum Face A New Hurdle: Technology.” *The Washington Post*, 13 Mar. 2023, <https://www.washingtonpost.com/nation/2023/03/11/asylum-seekers-mexico-border-app/>.

¹¹ Bonello, Deborah. “From Africa to Mexico: How Far Would You Go for the American Dream?” *The Telegraph*, 28 July 2019, <https://www.telegraph.co.uk/news/african-migrants-in-america/>.

¹² Sheridan, Rachel. “CBP One App May Do More Harm than Good for Survivors of Gender-Based Violence.” *Tahirih Justice Center*, 15 Mar. 2023, <https://www.tahirih.org/news/cbp-one-app-may-do-more-harm-than-good-for-survivors-of-gender-based-violence/>.

¹³ del Bosque, Melissa. “Facial Recognition Bias Frustrates Black Asylum Applicants to Us, Advocates Say.” *The Guardian*, 8 Feb. 2023, <https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias>.

¹⁴ Id.

CBP's privacy policy states that information collected through the app can be disclosed for enforcement purposes.¹⁵ According to Black Alliance for Just Immigration, Black immigrants are stopped, searched, and arrested at higher rates than non-Black immigrants. They are over-represented in sentencing, prison, immigrant detention, and removal proceedings, with 76 percent of Black immigrants who are deported having prior contact with the police and the criminal legal system compared to 45 percent of all immigrants.¹⁶ As a result, they face prolonged and arbitrary periods in detention and are forced to pay higher bail amounts, as high as \$35,000, compared to their non-Black counterparts, to be released.¹⁷

The systemic racism faced by black migrants in the immigration system will be exacerbated by racial profiling and surveillance enabled by the CBP One app.

As an exception, the proposed rule lays the burden on migrants to demonstrate that it was not possible to access or use the DHS scheduling system due to language barriers, illiteracy, significant technical failure, or other ongoing and serious obstacles. Migrants are expected to meet the standard of proof - "preponderance of the evidence," with lack of access to legal counsel, the underlined language barriers and illiteracy faced by the African diaspora and enumerated in the exception itself, and while experiencing psychological, mental, economic, and physical challenges of navigating the asylum system in the United States.

The right to asylum is not limited by time or manner of entry. We urge the administration to reverse the requirement of pre-scheduled appointments to seek asylum at the border.

iii. **Asylum in transit countries**

The proposed rule allows individuals to apply for asylum in the U.S. if they applied for and were denied asylum in a country through which they traveled. The proposed rule, which resembles the transit ban imposed by the Trump administration, **would by default deem all African migrants entering through the border ineligible to seek asylum.** The measure is justified by the administration as an attempt to deter migration at the border, curb human smuggling networks, and the exploitation of migrants for financial gain. However, in effect, it is forcing African migrants to apply for asylum in countries equally dangerous to the conditions they are fleeing, where they will face violent forms of racism, exploitation, and abuse.

¹⁵ Id.

¹⁶ Goff, Timantha, et al. "Uncovering the Truth." *Freedom for Immigrants*, Oct. 2022, <https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/6358c4c94b39565ec808f049/1666761932698/Uncovering+the+Truth.pdf>; Neal, Joan F. "Being Black and Immigrant in America." *The Center for Migration Studies of New York*, 3 Aug. 2020, <https://cmsny.org/being-black-and-immigrant-in-america>.

¹⁷ "CERD: Anti-Black Discrimination within US Immigration, Detention, and Enforcement Systems." *Human Rights First*, 8 Nov. 2022, <https://humanrightsfirst.org/library/cerd-anti-black-discrimination-within-us-immigration-detention-and-enforcement-systems>; de Freytas-tamura, Kimiko. "African and Invisible: The Other New York Migrant Crisis." *The New York Times*, 13 Jan. 2023, <https://www.nytimes.com/2023/01/13/nyregion/west-african-immigrants-nyc.html>.

According to the U.S. State Department human rights reports, criminal groups, police, immigration officers, and customs officials extort, threaten, or kidnap migrants and asylum seekers, and human smuggling organizations are reported to collaborate with local authorities.¹⁸ Transiting migrants, forcibly displaced populations, and asylum seekers with pending cases were especially vulnerable to abuse and sexual exploitation by criminal organizations, with women, children, and LGBTQI+ individuals specifically targeted.¹⁹ Governments do not cooperate with UNHCR in providing protection to refugees, asylum seekers, or other persons of concern.²⁰ **African immigrants face structural racism in countries of transit** – including harassment, police and gang violence, worse detention conditions, and exclusion from populations due to differences in language, culture, and religious practices – which **make transit and settling in the Americas particularly difficult for African migrants.**²¹ At the US-Mexico border, “**Anti-Blackness is endemic,**” as videos emerge of the kidnapping of four Black travelers, two of whom were killed, near a migrant encampment in Matamoros.²² Other countries such as Costa Rica and Panama are severely overburdened by migration from the countries of transit.²³

The proposed rule will place **African migrants who are waiting in dangerous encampments to seek asylum in the U.S. at peril, exposed to violence, and even death.**

The administration should immediately withdraw the proposal which establishes a higher standard for asylum eligibility – an asylum application or denial in a third country – that is inconsistent with domestic and international law. The administration is in violation of the principle of non-refoulement, by turning migrants away to countries where they would face torture, cruel, inhuman, or degrading treatment or punishment, and other irreparable harm.

b. Exception to the proposed rule

¹⁸ “2022 Country Reports on Human Rights Practices: Mexico.” *U.S. Department of State*, 20 Mar. 2023, <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/mexico>.

¹⁹ “2022 Country Reports on Human Rights Practices: Honduras.” *U.S. Department of State*, 20 Mar. 2023, <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/honduras>.; “2022 Country Reports on Human Rights Practices: Nicaragua.” *U.S. Department of State*, 20 Mar. 2023, <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/nicaragua>.

²⁰ “2022 Country Reports on Human Rights Practices: Nicaragua.” *U.S. Department of State*, 20 Mar. 2023, <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/nicaragua>.

²¹ Yates, Caitlyn, and Jessica Bolter. “African Migration through the Americas: Drivers, Routes, and Policy Responses.” *Migration Policy Institute*, 12 May 2022, <https://www.migrationpolicy.org/research/african-migration-through-americas>.

²² “Haitian Bridge Alliance Denounces Horrific Violence and Kidnapping in Matamoros; Warns the Migrant Population in the Area to be Extremely Cautious.” *Haitian Bridge Alliance*, 6 Mar. 2023, https://haitianbridgealliance.org/?page_id=989962.; Kitroeff, Natalie, et al. “A Trip to Mexico Ends in a Kidnapping and the Deaths of 2 Americans.” *The New York Times*, 7 Mar. 2023, <https://www.nytimes.com/2023/03/07/world/americas/americans-kidnapped-mexico.html>.

²³ Chaves-González, Diego, and María Jesús Mora. “The State of Costa Rican Migration and Immigrant Integration Policy.” *Migration Policy Institute*, Nov. 2021, <https://www.migrationpolicy.org/research/costa-rican-migration-immigrant-integration-policy>.

As an exception, the proposed rule would permit adjudicators to determine if there were exceptionally compelling circumstances to rebut the presumption of ineligibility. It is deplorable that the administration decided to impede the right to asylum until a migrant is in a situation of extreme vulnerability such as an acute medical emergency, an extreme and imminent threat to life or safety, or severe form of trafficking. **In effect, the asylum ban will lead to more migrant abuse, deaths, displacement, and trafficking**, undermining the alleged intent and purpose behind the proposed rule. Migrants experiencing traumatic and life-threatening conditions who enter the U.S. under the presumption of ineligibility can face detention and expedited removal to Mexico or their country of origin – a suffering and risk entirely unnecessary and an illegal imposition by the Biden administration.

3. Legal pathways made difficult for Black migrants

A majority of African immigrants face visa appointment backlogs and experience high visa denial rates.²⁴ They are forced to pay exorbitant visa fees equivalent to the U.S. dollar value, and if approved, struggle to secure funding for international travel. There is a significant disparity among regions from the recovery of immigrant visa issuances since the Covid-19 pandemic, and Africa saw the largest decline of 33 percent compared to FY 2019.²⁵ The decline is attributed to the administration's deprioritization of the diversity visa lottery program, causing Africans to lose out on more visas than immigrants from other regions.²⁶ These conditions limit the ability of African immigrants to travel to the U.S. directly, forcing them to transit through a third country and resort to an unauthorized manner of entry. African scholars have termed the inequity “**visa apartheid**,” calling for an end to the humiliation.²⁷ Marie-Claire Wangari, a young Kenyan physician stated – “**The sad reality regarding visa applications for people from the Global South is that any negative visa outcome is always deemed the visa applicant's fault.**”²⁸

Despite the reversal of the racist Muslim and Africa travel bans, opportunities for legal immigration to the U.S. are hindered and significantly slower, with severely impacted Nigerian, Cameroonian, Sudanese, and other diaspora communities unable to make their way to the United States.²⁹

Under the proposed rule, migrants who enter the United States outside of a lawful pathway and without first seeking protection in a third country can undergo an “appropriate standard for screening” for withholding of removal or protection under the Convention Against Torture, a higher threshold to meet in comparison to asylum.

²⁴ Manning, Maureen. “US Visa Denials in Sub-Saharan Region Concern Stakeholders.” *The Pie News*, 18 Jan. 2023, <https://thepienews.com/news/us-visa-denials-in-sub-saharan-region-concern-stakeholders/>.

²⁵ Bier, David J. “Africans Face Steepest Decline in Immigrant Visas under Biden.” Cato Institute, 5 Apr. 2022, <https://www.cato.org/blog/africans-face-steepest-decline-immigrant-visas-under-biden>.

²⁶ Id; “Table IV Summary of Visas Issued by Issuing Office Fiscal Year 2022.” U.S. Department of State, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2022AnnualReport/FY22_TableIV.pdf.

²⁷ Kyobutungi, Catherine et al. “From vaccine to visa apartheid, how anti-Blackness persists in global health.” *PLOS Global Public Health*, 27 Feb. 2023, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10021597>.

²⁸ Pai, Madhukar. “Passport and Visa Privileges in Global Health.” *Forbes*, 12 Oct. 2022, <https://www.forbes.com/sites/madhukarpai/2022/06/06/passport-and-visa-privileges-in-global-health>.

²⁹ Batalova, Jeanne, and Jane Lorenzi. “Sub-Saharan African Immigrants in the United States.” *Migration Policy Institute*, 11 May 2022, <https://www.migrationpolicy.org/article/sub-saharan-african-immigrants-united-states>.

However, trends in the adjudication of African humanitarian claims reiterate advocates' assertions and the truth of Anti-blackness and structural racism in the decision-making process that African migrants experience. Government data from 2020 reveals that migrants from Sub-Saharan Africa Black-majority countries were deemed not credible **37 percent more often than on average for all nationalities**.³⁰ Asylum seekers from countries including Burkina Faso, Cameroon, Ghana, Mauritania, and Senegal had some of the highest negative credibility finding rates.³¹ Without transparency and accountability for unbiased, informed, and inclusive screening processes, African migrants will continue to be on the receiving end of disproportionate outcomes in the humanitarian adjudication process.

4. Comment period

ACT joined 172 organizations in calling the administration to provide at least a 60-day comment period to respond to the proposed rule.³² The 30-day comment period provided until March 27 is insufficient for organizations to provide nuanced and constructive feedback, and share relevant data and views informed by the community of African immigrants that we serve. The departments must provide a reasonable comment period of at least 60 days in light of Executive Order 12866, Executive Order 13563, and in consideration of the serious implications facing the migrant community.³³

5. Conclusion

We implore the administration to prioritize the expansion of legal and humanitarian pathways for African migrants and other migrant communities while maintaining asylum obligations under the law. We urge you to take our insights seriously, consider our recommendations, and provide sufficient time for advocates serving the impacted African migrant community to address the proposed changes and their serious implications. The administration has the opportunity to avert the devastating outcomes of this asylum ban and prioritize the care and safety of migrants in need of humanitarian relief. For all the reasons stated above, ACT opposes the Rule and recommends that it be withdrawn immediately.

Sincerely,

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African Communities Together

³⁰ "CERD: Anti-Black Discrimination within US Immigration, Detention, and Enforcement Systems." Human Rights First, 8 Nov. 2022, <https://humanrightsfirst.org/library/cerd-anti-black-discrimination-within-us-immigration-detention-and-enforcement-systems>.

³¹ Id.

³² Erfani, Azadeh. "172 Organizations Call For Extension On Public Comment Period For Proposed Asylum Ban." National Immigrant Justice Center, 1 Mar. 2023, <https://immigrantjustice.org/staff/blog/172-organizations-call-extension-public-comment-period-proposed-asylum-ban>.

³³ United States, Executive Office of the President William Clinton. Executive Order 12866: Regulatory Planning and Review. 30 Sep. 1993. Federal Register, vol. 58, no. 190, <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>; United States, Executive Office of the President Barack Obama. Executive Order 13563: Improving Regulation and Regulatory Review. 18 Jan. 2011. Federal Register, vol. 76, no. 14, pp. 3821-3823, https://www.reginfo.gov/public/jsp/Utilities/EO_13563.pdf.