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**Re: Comment on the NPRM by the Department of Homeland Security and the Executive Office for Immigration Review, Department of Justice on Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023**

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

The undersigned are non-profit organizations that advocate for and/or directly represent non-citizens who are lesbian, gay, bisexual, transgender, queer, intersex, gender non-binary, gender non-conforming (“LGBTQ”)<sup>1</sup> or are living with HIV. We write in strong opposition to the Department of Homeland Security (“DHS”) and the Department of Justice’s (“DOJ,” collectively with DHS, the “Departments”) Notice of Proposed Rulemaking (“rule,” “proposed rule” or “NPRM”) on the Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023, published in the Federal Register on February 23, 2023.<sup>2</sup>

**I. Introduction**

The proposed rule guts the U.S. asylum system by establishing a new, discriminatory process that applies a heightened asylum standard to refugees at the southern border. Essentially, bona fide refugees who are unable (1) to seek and be denied protection in a third country, (2) to obtain an appointment through the CBP One mobile application, or (3) to access one of the very limited parole programs, will be presumed ineligible for asylum regardless of the merits of their claim.

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<sup>1</sup> There are many terms for the great diversity of people who fear harm based on their actual or perceived sexual orientation or gender identity, including people who identify as gay, lesbian, bisexual, transgender, queer, intersex, asexual, non-binary, and gender non-conforming, and people perceived by others as not sufficiently heterosexual, cisgender, and gender conforming. For space, here, we refer to all of these various terms together as “LGBTQ” or “queer and trans.” We refer collectively to LGBTQ people and people living with HIV as “LGBTQ/H.”

<sup>2</sup> Where this comment includes linked material in footnotes, we request that the Departments review the linked material in its entirety and consider it part of the record.

The proposed rule will subject LGBTQ/H refugees to grave harm, either because it will result in the wrongful denial of meritorious queer and trans asylum claims (something that the Departments acknowledge in the NPRM),<sup>3</sup> or because LGBTQ refugees will put their lives in danger trying to comply with the proposed rule’s requirements. As set forth in greater detail below, common transit countries (including those discussed in detail in the NPRM) are fundamentally unsafe for LGBTQ/H refugees. Requiring queer and trans people to out themselves and apply for asylum in such countries is non-sensical, impractical, and illegal. Moreover, LGBTQ asylum seekers are routinely raped, beaten, and kidnapped in Mexico, especially along the southern border. As such, the requirement that they wait patiently for a CBP One appointment is both ludicrous and illegal. Furthermore, the exception to the presumption for refugees who can prove “an extreme and imminent threat to life or safety” is insufficient. First, it creates an illegal additional evidentiary burden higher than asylum requires. Second, it ignores the reality that violence faced by LGBTQ people in Mexico is probable, but unpredictable.

Despite 153 pages explaining and attempting to justify the merits of the rule, the Departments overlook the most salient fact. Refugees (and the non-governmental organizations that serve them) *want* a more orderly process. Asylum seekers *do not want* to undertake the arduous, dangerous, and even deadly trek across hundreds or thousands of miles in search of safety. Asylum seekers *do not want* to cross the border with traffickers, or through deadly corridors. But they *have no other choice* in order to save their lives. This reality is why the Immigration and Nationality Act (“INA”) preserves the right to seek asylum regardless of manner of entry.

The carrot that this proposed rule presents is a compelling incentive that would motivate those asylum seekers who have the financial resources to take advantage of the parole processes. It would motivate individuals who can make and wait for a CBP One appointment to do so. This is clear from the success of the Uniting for Ukraine program, which offers similar incentives without similar penalties. However, punishing the most vulnerable refugees – LGBTQ, Black and Indigenous people, people with disabilities or limited literacy, poor people without access to smart phones and high-speed internet, people who speak languages not available on the app – undermines the fundamental right to asylum, violating the letter and spirit of the law.

The proposed rule also violates the promises made by President Biden to “Protect[] Vulnerable LGBTQI+ Refugees and Asylum Seekers”<sup>4</sup> and “restore and strengthen our own asylum system.”<sup>5</sup> As a candidate, he pledged that his administration would not “deny[] asylum to people fleeing persecution and violence” and would end restrictions on asylum for those who transit through other countries to reach safety.<sup>6</sup> The proposed rule blatantly contravenes these promises and condemns LGBTQ/H asylum seekers, like Brayan to further harm.<sup>7</sup>

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<sup>3</sup> NPRM at 11748.

<sup>4</sup> [Memorandum on Advancing the Human Rights of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Persons Around the World | The White House](#), (Feb. 4, 2021), § 2.

<sup>5</sup> [Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border | The White House](#) (February 2, 2021), § 1.

<sup>6</sup> [The Biden Plan for Securing Our Values as a Nation of Immigrants - Joe Biden for President: Official Campaign Website](#) (last visited Mar. 24, 2023).

<sup>7</sup> All client names have been replaced by initials or pseudonyms and certain minor details of accounts may have been modified in order to preserve confidentiality. Details of each case are on file with the commenting organizations.

Brayan, an Oasis client, fled Nicaragua after a lifetime of abuse for being gay. His father beat and insulted him from a young age for not being masculine enough. Brayan's cousin sexually abused him when he was a teenager. He was beaten up by classmates who also threatened to rape him. A teacher interrupted the beating and reported them all to the police. The police refused to get involved and said it was something the boys should work out by themselves. As an adult Brayan was harassed and insulted at work for being gay. Brayan fled Nicaragua after protesting against the current government and being threatened by a government security guard who discovered his involvement with opposition parties. Brayan first went to Guatemala and applied for asylum there. At the refugee house where he was offered shelter, one of the male housekeepers raped him. He was insulted on the streets and at every single job he was able to find for being gay. In Guatemala, Brayan heard stories on the news about gay people being beaten and killed. He followed a Guatemalan LGBTQ news page on social media where he saw a video posted that showed the police beating up a gay couple in their house. Brayan fled Guatemala before receiving a decision on his asylum case because of the abuse and never feeling safe. After reaching Mexico, Brayan was kidnapped while riding on a bus and held hostage for over three months by an armed group. He was raped several times by one of the men who was guarding him who insulted him for being gay. Brayan's friend in Guatemala paid a ransom for him to be released. He could not wait to be further abused in Mexico so he crossed into the U.S., where he has now applied for asylum.

If the NPRM is finalized, LGBTQ refugees in Brayan's position could be presumed ineligible for asylum and subjected to mortal danger. For this reason, and those discussed below, we urge the Departments to withdraw the NPRM in its entirety.

## **II. Commenting Organizations**

### *Immigration Equality*

Immigration Equality is a national organization that advocates for LGBTQ/H immigrants. For over 28 years, we have worked to secure safe haven and equality for immigrants facing persecution based on their sexual orientation, gender identity, or HIV status. To this end, we provide free legal services and advocacy through our in-house attorneys and nationwide network of pro bono partners. Through this program, we represent nearly 900 LGBTQ/H individuals annually, mostly in affirmative and defensive proceedings for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"), as well as regularly appearing in federal circuit courts as counsel or *amicus curiae*. Immigration Equality's asylum program maintains a remarkable 99% success rate. In addition, Immigration Equality helps thousands of LGBTQ/H asylum seekers every year through the provision of free legal advice, self-help guides and other materials, and via our online inquiry system and telephone hotline. Immigration Equality also offers assistance, support, and training to other attorneys on LGBTQ/H immigration issues, publishes a comprehensive manual on the preparation of asylum claims related to sexual orientation or gender identity, and has provided training on the adjudication of LGBTQ asylum cases to asylum officers within the Department of Homeland Security and to immigration judges ("IJ's) in New York.

### *Oasis Legal Services*

Oasis Legal Services is a leading nonprofit legal service provider to the LGBTQ+ immigrant community living on the West Coast, serving over 700 LGBTQ+ immigrants each year and representing over 1,400 LGBTQ+ asylum seekers since its founding in 2017. Given California's proximity to Mexico and Central America, over 90 percent of Oasis's clients are Latinx. All of Oasis's

clients have endured horrific violence in their countries of origin because of their sexual orientation, gender identity, gender expression, or HIV-positive status. In addition to direct legal services, Oasis also provides case management and wrap-around services to meet the needs of its clients holistically and provides training, sample documentation and briefs, and direct mentorship to lawyers locally and nationally who represent LGBTQ+ asylum seekers.

#### *Lawyers for Good Government*

Lawyers for Good Government (“L4GG”) is a national organization whose Project Corazon delivers direct services to LGBTQ/H and other of the most vulnerable asylum-seekers seeking safety at the ports of entry in Brownsville, Hidalgo and McCallen, Texas. L4GG coordinates large-scale pro bono programs and issue advocacy efforts to protect human rights, defend the environment, and ensure equal justice under the law, tapping its network of 125,000 lawyers and dozens of pro bono firm partners to assist in its efforts. L4GG is among a handful of legal organizations representing asylum seekers from various countries who are awaiting entry in Reynosa and Matamoros, Mexico, and continuing to serve our clients when they enter the country to await asylum proceedings, throughout the asylum-seeking process, and then through our work permit program. L4GG first developed a hybrid on-site and remote legal program to defend the rights of the families forced to wait in danger in Matamoros during the MPP crisis in 2019. Today, we focus our efforts on the RGV more broadly as the geographic needs of asylum seekers fluctuate depending on the travel of migrants and the status of different U.S. immigration policies.

#### *Transgender Law Center*

Transgender Law Center (“TLC”) is the largest national trans-led organization advocating for a world in which all people are free to define themselves and their futures. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming people alive, thriving, and fighting for liberation. TLC provides services through the Border Butterflies project (“BBP”). BBP was piloted in 2019 as a coordinated response to the crisis for LGBTQ+ migrants at the U.S. Southern border, and has become a stable, strategic, life-saving resource with unparalleled expertise about the actual experiences of LGBTQ+ migrants waiting in Mexico, entering the U.S., and navigating the asylum process within the U.S. This project draws on the complementary knowledge and experience of an array of collaborating partners (funded at various levels) to provide legal and humanitarian services through legal and material support and resources alongside an organizing team that builds the political power of directly impacted LGBTQ+ folks to advocate for themselves. Our legal team is based in both the United States and Mexico to provide legal support and advocacy in Mexico and then asylum support in the United States. We work with our community partners to provide holistic and supportive support to our participants. BBP is comprised of the following core organizations: Black LGBTQIA+ Migrant Project (BLMP), Transgender Law Center, Familia: Trans Queer Liberation Movement, Casa Arcoiris, and Jardin de las Mariposa, and Refugee Health Alliance/Clinica de salud y justicia alongside many other partner organizations in the U.S. and Mexico.

#### *Black LGBTQIA+ Migrant Project*

Black LGBTQIA+ Migrant Project (“BLMP”) envisions a world where no one is forced to give up their homeland, where all Black LGBTQIA+ people are free and liberated. We build and center the power of Black LGBTQIA+ migrants to ensure the liberation of all Black people through community-building, political education, creating access to direct services, and organizing across borders. Led by

a directly impacted steering committee, we build power, community, and knowledge in the U.S., while challenging the role the U.S. plays globally in creating the conditions that force us to leave our homes.

- National Organizing: BLMP shapes and informs national efforts to resist enforcement, detention and deportations through work within criminal justice/immigrant rights movements.
- Local Networks: BLMP engages hundreds of community members across the U.S., and has developed active local/regional networks—centered in Oakland, CA; New York City; the Upper Midwest (Twin Cities, Chicago, Detroit); Washington DC/DMV, and the South.
- Deportation Defense: We directly engage with and support detained community members, organizing campaigns for their release and helping to connect them with local support when they are released.
- Research: BLMP is transforming narratives through the inaugural Queer Black Migrant Survey, which is collecting qualitative and quantitative data on our community’s experiences.

### *The Council for Global Equality*

The Council for Global Equality is a Washington, D.C.-based coalition of 35 human rights and LGBTQI+ organizations that promotes LGBTQI+ inclusion in U.S. foreign policy. Together, Council members seek to ensure that those who represent the United States—including those in Congress, in the White House, in U.S. embassies, and in U.S. corporations—use the diplomatic, political, and economic leverage available to them to oppose human rights abuses that are too often directed at individuals because of their sexual orientation, gender identity/expression, or sex characteristics. The Council also seeks to increase support for foreign LGBTQI+ organizations as vital contributors to free and vibrant civil societies abroad. The Council’s highest priorities include ensuring that U.S. immigration, refugee, and asylum mechanisms are broadly robust, welcoming, and humane, and in particular, are fully LGBTQI+-inclusive and accessible.

### *Familia: Trans Queer Liberation Movement*

Familia: Trans Queer Liberation Movement (“Familia:TQLM”) works at the local and national levels to achieve the collective liberation of trans, queer, and gender nonconforming Latinxs through building community, organizing, advocacy, and education and we seek to abolish the systems that marginalize, criminalize, imprison, and kill our people. We are building on the legacy of racial justice and liberation movements.

### *The Human Rights Campaign*

The Human Rights Campaign (HRC) is America’s largest civil rights organization working to achieve lesbian, gay, bisexual, transgender, and queer (LGBTQ) equality. By inspiring and engaging all Americans, HRC strives to end discrimination against LGBTQ+ citizens and realize a nation that achieves fundamental fairness and equality for all. As an advocate for LGBTQ+ individuals, HRC believes that all people—including LGBTQ+ people and people living with HIV—deserve access to asylum and other protections for refugees.

### *Lambda Legal Defense and Education Fund, Inc.*

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is the nation’s oldest and largest legal organization whose mission is to achieve full recognition of the civil rights of lesbian, gay,

bisexual, transgender, and queer (“LGBTQ+”) people and everyone living with HIV through impact litigation, education, and public policy work. Since its founding in 1973, Lambda Legal has been counsel of record or amicus curiae in some of the most important cases addressing the rights of LGBTQ+ people. *See, e.g., Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731 (2020) (amicus); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (counsel); *United States v. Windsor*, 570 U.S. 744 (2013) (amicus); *Lawrence v. Texas*, 539 U.S. 558 (2003) (counsel); *Romer v. Evans*, 517 U.S. 620 (1996) (counsel). Lambda Legal has also striven to ensure fairness for LGBT immigrants by serving as counsel of record or amicus curiae in litigation involving the rights of LGBT immigrants and asylum seekers, and its work has helped establish important immigration jurisprudence. *See, e.g., Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (en banc) (amicus); *Velasquez-Banegas v. Lynch*, 846 F.3d 258 (7th Cir. 2017) (amicus); *Pitcherskaia v. I.N.S.*, 118 F.3d 641 (9th Cir. 1997) (counsel); *Immigration Equality v. U.S. Dep’t of Homeland Sec.*, No. 20-CV-09258-JD, --- F. Supp. 3d ----, 2021 WL 75756 (N.D. Cal. Jan. 8, 2021) (counsel). Lambda Legal also maintains a Legal Help Desk, which provides information and resources to help LGBTQ+ immigrants and refugees navigate the legal system and achieve safety and security in the United States.

### *Mijente*

Mijente is a political, digital, and grassroots organization that seeks to promote the interests of Latinx communities and other marginalized groups. Its members include people from all immigration backgrounds, including LGBTQ asylum seekers.

### *Santa Fe Dreamers Project*

Santa Fe Dreamers Project (“SFDP”) is a 501c3 organization which provides free and low-cost immigration legal services to immigrants and refugees in New Mexico and along the El Paso/Ciudad Juárez borderlands. Included within that work is our advocacy with the LGBTQ+ community. Since 2017 we’ve represented hundreds of LGBTQ+ clients in various capacities, including liberation from detention and Title 42 exception requests.

### *The TransLatin@ Coalition*

The TransLatin@ Coalition was founded in 2009 by a group of Transgender and Gender nonconforming and Intersex (TGI) immigrant women in Los Angeles, California, as a grassroots response to address the specific needs of TGI Latin@ immigrants who live in the United States.

### *Whitman-Walker Health*

Whitman-Walker Health (“Whitman-Walker” or “WWH”) is a community-based, Federally Qualified Health Center offering primary medical care and HIV specialty care, community health services and legal services to residents of the greater Washington, DC metropolitan area. WWH has a special mission to the LGBTQ members of our community, as well as to all Washington-area residents of every gender and sexual orientation who are living with or otherwise affected by HIV. Since the mid-1980s, Whitman-Walker has had an in-house Legal Services Program. Our attorneys and legal assistants provide information, counseling, and representation to Whitman-Walker patients, and to others in the community who are LGBTQ or living with or affected by HIV, on a wide range of civil legal matters that relate directly or indirectly to health and wellness – including immigration and asylum cases. Our Legal Services Program, with the assistance of hundreds of volunteer attorneys throughout the area, has provided a wide range of immigration-related services to foreign-born LGBTQ individuals and families. Many come to the U.S. fleeing persecution in their countries of birth because of their sexual orientation or gender identity.

### *The Young Center for Immigrant Children's Rights*

The Young Center for Immigrant Children's Rights is a federally appointed independent Child Advocate for unaccompanied and separated immigrant children and advocates with federal agencies to consider children's best interests in every decision. The Young Center has been appointed to thousands of vulnerable children, including LGBTQIA+ children who flee to the U.S. to escape violence and persecution based on their sexual orientation or gender identity.

### **III. The 30-day Comment Period Is Insufficient for the Undersigned to Comment Fully on the NPRM**

The Departments have provided a wholly insufficient 30-day timeframe to respond to an NPRM that will make dramatic changes to the asylum system, denying access to protection for many of the most vulnerable LGBTQ/H refugees the commenting organizations serve. Given the scope of the proposed rule, this truncated comment period fails to serve its intended purpose, thus, violates the Administrative Procedure Act. On March 1, 2023, 172 organizations, including several of the undersigned, wrote<sup>8</sup> to the Departments urging them to provide at least 60 days to comment on the complex 153-page rule, but to no avail.

Upending the asylum system without an adequate notice and comment period, where the consequences are literally life and death for vulnerable refugees, is patently unfair and at the very least will result in an incomplete record. More likely, it will result in the imposition of unlawful regulations that have a detrimental effect on the asylum system and lead to due process violations and the refoolment of vulnerable refugees.

Signatory organizations are non-profits that serve LGBTQ/H immigrants (either through direct services, advocacy, or both). Our organizations are stretched thinly and have little capacity to redirect resources, especially when that means taking valuable resources away from clients with pending applications or impending deadlines. If provided adequate time, we would have been able to gather relevant and comprehensive information from LGBTQ/H refugees on: 1) their experiences with the CBP One application, 2) their experiences in third countries en route to the U.S., including attempts to access the asylum system in such countries as an LGBTQ/H asylum seeker, and 3) information on experiences obtaining HIV care in third countries, including in Mexico, while awaiting entry into the U.S. to apply for asylum. In addition, we would have been able to conduct research on comparative law regarding LGBTQ asylum claims in common transit countries, as well as consult with the medical community and HIV-specialists who serve asylum seekers and refugees en route to the U.S. This information is critically important for the Departments to consider in determining the impact, legality, and feasibility of the proposed rule for LGBTQ/H asylum seekers.

The public should be given at least 60 days to provide comprehensive comments on such a sweeping rule. Because of the prejudicial 30-day public comment period, the below comments cannot address every problematic provision. But silence is not consent: the fact that we do not discuss a particular issue does not mean we agree with it.

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<sup>8</sup> Ltr. to Attorney Gen. Garland, et al. (Mar. 1, 2023), <https://immigrantjustice.org/staff/blog/172-organizations-call-extension-public-comment-period-proposed-asylum-ban>.

#### **IV. The NPRM Is Unlawful and Will Result in LGBTQ and HIV-Positive People Being Seriously Harmed and Returned to Countries of Persecution**

Under the proposed rule: noncitizens who cross the southwest land border without authorization, and without having (1) availed themselves of existing lawful processes, (2) presented at a port of entry in compliance with the rule's requirements, or (3) been denied asylum in a third country through which they traveled, would be presumed ineligible for asylum unless they meet certain limited exceptions. Noncitizens could rebut this presumption based on exceptionally compelling circumstances detailed below. Noncitizens who do not rebut the presumption would only be eligible for protection if there is a *reasonable possibility* they will face persecution or torture, a heightened standard. The rebuttable presumption may apply to migrants of any nationality who enter the United States at the southwest land border without authorization after traveling through at least one other country, but would not apply to unaccompanied minors.

##### **a. The Proposed Rule Violates, and Is Inconsistent with, U.S. Law**

The proposed rule violates U.S. law, which ensures access to asylum regardless of manner of entry or transit and prohibits restrictions on asylum that are inconsistent with provisions in the U.S. asylum statute. Indeed, the standard for asylum is well-established under U.S. and international law, and does not discriminate based on manner of entry or immigration status.

The Refugee Act of 1980 incorporated these principles into U.S. law. 8 U.S.C. § 1158 provides that people may apply for asylum regardless of manner of entry into the United States. It also delineates limited exceptions where an asylum seeker may be denied asylum based on travel through another country. However, these restrictions only apply where an individual was “firmly resettled” in another country (defined to mean the person was eligible for or received permanent legal status in that country) or if the U.S. has a formal “safe third country” agreement with a country where refugees would be safe from persecution and have access to fair asylum procedures. The statute prohibits the administration from issuing restrictions on asylum that are inconsistent with these provisions. 8 U.S.C. § 1231 codified the prohibition against returning refugees to countries where they face persecution. The proposed rule, which conditions access to asylum on manner of entry and transit, would result in the return of refugees to danger and unequivocally contravenes these provisions of U.S. law.

In 1996, Congress created the expedited removal process through the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”). Under this process, asylum seekers placed in expedited removal who establish a credible fear of persecution must be referred for full asylum adjudications.<sup>9</sup> The proposed rule attempts to unlawfully circumvent the credible fear screening standard established by Congress, which was intended to be a low screening threshold.<sup>10</sup> The government is required to refer asylum seekers in expedited removal for full asylum adjudications if they can show a “significant possibility” that they could establish asylum eligibility in a full hearing. The proposed rule attempts to eviscerate this standard by first requiring asylum seekers to prove to an asylum officer by a preponderance of evidence that they can rebut the presumption of asylum ineligibility, and then requiring those who cannot overcome the presumption to meet a higher fear standard before being permitted to seek protection. This provision is inconsistent with U.S. law.

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<sup>9</sup> 8 U.S.C. § 1225.

<sup>10</sup> 142 Cong. Rec. (1996), <https://www.govinfo.gov/content/pkg/CREC-1996-09-27/html/CREC-1996-09-27-pt1-PgS11491-2.htm>.



The proposed rule also violates the Refugee Convention’s prohibition against imposing improper penalties on asylum seekers based on their irregular entry into the country of refuge. The agencies explicitly note that the asylum ban would inflict “consequences” on people seeking asylum – a blatant attempt to punish people based on their manner of entry into the United States. These consequences could include the denial of access to asylum, deportation to harm, family separation, and deprivation of a path to naturalization. With respect to the Trump administration’s entry ban, the United Nations High Commissioner for Refugees (“UNHCR”) has stated that “[n]either the 1951 Convention nor the 1967 Protocol permits parties to condition access to asylum procedures on regular entry.”<sup>11</sup>

The proposed asylum ban violates these key provisions of U.S. law and treaty commitments. Indeed, similar Trump administration asylum bans targeting refugees at the border based on manner of entry and transit were vacated and enjoined by federal courts for violating these provisions of U.S. law. In 2021, when the Biden administration first considered adopting an asylum ban, legal counsel for the White House warned that it could be struck down as illegal for the same reason that federal courts struck down the Trump administration bans.<sup>12</sup> Nonetheless, the agencies have decided to proceed with this patently illegal policy.

**b. Exceptions to the Presumption Do Not Cure the Problems with the Proposed Rule and, Instead, Expose LGBTQ/H Asylum Seekers to Greater Risk**

Under the proposed rule, noncitizens who cross the southwest land border of the United States without authorization after traveling through a third country would be presumed ineligible for asylum unless they, or a member of their family with whom they are traveling, meet at least one of three exceptions:

- They were provided authorization to travel to the United States pursuant to a DHS-approved parole process;
- They used the CBP One app to schedule a time and place to present at a port of entry, or they presented at a port of entry without using the CBP One app and established that it was not possible to access or use the CBP One app due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or
- They applied for and were denied asylum in a third country en route to the United States.

Unaccompanied children would also be excepted from the rebuttable presumption.

Not only are these exceptions to the presumption inadequate to protect LGBTQ/H asylum seekers, they actually expose them to greater harm.

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<sup>11</sup> UNHCR, Brief of the Office of the United Nations High Commissioner for Refugees before the United States Court of Appeals for the District of Columbia Circuit in the case *O.A., et al., Plaintiffs-Appellees, v. DONALD J. TRUMP, AS PRESIDENT OF THE UNITED STATES, et al., Defendants-Appellants.*, Aug. 13 2020, No. 19-5272, <https://www.refworld.org/docid/5f3f90ea4.html>.

<sup>12</sup> Camilo Montoya-Galvez, U.S. Officials Clashed Over Asylum Restriction, and Its Legality, Before Biden Proposed It, CBS NEWS, Mar. 1, 2023, <https://www.cbsnews.com/news/immigration-biden-asylum-restrictions-legality/>.

**i. Forcing LGBTQ/H Asylum Seekers to Use the CBP One App Is Inequitable, Unfair, and Inhumane**

By managing asylum processing at the southern border nearly exclusively through the CBP One application, the Departments are penalizing and punishing the most vulnerable refugees – like those who are unable to access or use the technology (and prove it), those who have serious health issues that may not be considered “acute,” or those who are in danger in Mexico based on their LGBTQ/H status. As noted in Section IV.a above, penalizing refugees for their manner of entry and placing restrictive burdens on them is illegal.

In general, CBP One – as it is currently being used for processing Title 42 exemption requests – is impossible for many asylum seekers to access or use because of technological requirements. This impedes fair and equitable access to the U.S. asylum system. For example, CBP One: 1) requires smartphones, and excludes certain models 2) is not available in most languages, 3) requires high speed internet that is often unavailable, and 4) has frequent error messages (in English). It also penalizes people with limited literacy or other disabilities, or who simply cannot navigate the app. In addition, it disparately harms transgender and Black asylum seekers due to issues with facial recognition technology, which has prevented many from obtaining an appointment.

CBP One is also problematic because it does not provide any mechanism to identify or prioritize the most vulnerable applicants for appointment dates. Moreover, CBP One provides a limited number of spaces per day per port of entry. Those spaces are available on a first come/first served basis. Therefore, it is merely luck that determines who gets a date, and when that date will be. The absence of another, accessible means to seek safety leaves LGBTQ/H asylum seekers in violent and unsafe conditions, as described in more detail in Section IV.b.ii, below.

As reports confirm, CBP One is currently unable to handle the volume of applicants and frequently does not work.<sup>13</sup> As one user described the experience: “[I] would create an account, go through several more steps and the app would then restart to step one, [in] a seemingly endless cycle.”<sup>14</sup> This example illustrates the experiences and frustrations of many users, including clients of commenting organizations. For example, according to staff at BBP:

“Certain types of phones do not work with CBP One, *e.g.*, Huawei phones, or older iPhone operating systems. Many people cannot access the high-speed internet required to use CBP One. Every morning in Tijuana, entire shelters wake up and get on the internet. This causes the internet to go slower and cut out. Residents and shelter staff report that often people will be in the middle of inserting their information only to have the internet cut out and everyone loses their spot and must start all over. There are numerous error messages. The most common error messages occur when the applicant picks a date but has less than 30 seconds to successfully take a photo to confirm the date. Often either the photo will result in an error message or by the time the person takes the photo the date is lost to someone else. CBP One language availability is limited. There is a Mosquito speaking client at one shelter who reported to BBP staff that they move just a little slower because their Spanish is not as strong as other people. They have

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<sup>13</sup> Regina Yurrita, Asylum Seekers Met with Issues from New CBP One App, CBS8, Feb. 1, 2023, <https://www.cbs8.com/article/news/local/asylum-seekers-met-with-issues-from-cbp-one-app/509-5f69579c-05e1-4999-a7a9-720eab0cc680>.

<sup>14</sup> *Id.*

watched other residents secure dates but they are still waiting. They believe it is because of their language limitations.”

Applicants have also faced difficulty supplying required photographs through the app. CBP One requires submission of two different photos, which was advertised as a “fix” to the previous method of uploading a photo to a third-party photo comparison tool.<sup>15</sup> However, both of these processes routinely misidentify people of color and the new method is excessively burdensome. It requires applicants to stand in front of the same background with the same clothes, in order to be recognized. As commenter organizations have witnessed, CBP One has also repeatedly rejected photos from some dark skinned or transgender asylum seekers, delaying or rejecting their applications and requiring them to start the arduous process all over again.<sup>16</sup> Finally, while the application enables individuals to solicit dates at various ports of entry (“POEs”), it does not address economic inequity in access to travel, nor the profoundly limited right to travel for asylum seekers in northern Mexico. Furthermore, travel for LGBTQ/H people in northern Mexico is extremely dangerous. Nevertheless, LGBTQ/H clients of LFGG in Reynoso and Matamoros, Mexico, have been given appointments for asylum interviews hundreds of miles away.

BBP and L4GG have documented stories of LGBTQ/H people who have diligently sought to secure an appointment through the app since its launch but remain unable to even present their claim to this day, after months of trying. Here are some of their experiences:

Waleska is a trans woman from Honduras<sup>17</sup> who has been in Matamoros since November 2022. Upon arriving at the border, she spoke with an NGO whose representatives told her they would send a request to the government for a Title 42 exemption. A few days later, the organization reached back out to inform her that she needed to make an appointment through the CBP One application. While traveling to the border, she had all of her belongings stolen, leaving her with only enough money to buy a basic telephone without Internet access. Eventually, she secured access to a smartphone, but it slows down right as appointments become available each morning. When she finally manages to access the app, there are no more appointments available.

Mario is a gender-non-conforming Guatemalan asylum seeker who belongs to the Maya Q’eqchi’ community.<sup>18</sup> After experiencing persecution in Guatemala, they fled to the U.S.

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<sup>15</sup> Raul Pinto, DHS Fails to Address Concerns about CBP One as the Agency Expands the App’s Use, Immigration Impact (Jan. 13, 2023), [https://immigrationimpact.com/2023/01/13/concerns-cbp-one-app-dhs-expands/#:~:text=CBP%20One%20uses%20facial%20recognition,buried%20in%20dense%20government%20documents;CBP,FactSheet:UsingCBPOne%20toScheduleanAppointment,LastAccessedMar.23,2023,https://www.cbp.gov/sites/default/files/assets/documents/2023-Jan/CBP%20One%20Fact%20Sheet\\_English\\_3.pdf](https://immigrationimpact.com/2023/01/13/concerns-cbp-one-app-dhs-expands/#:~:text=CBP%20One%20uses%20facial%20recognition,buried%20in%20dense%20government%20documents;CBP,FactSheet:UsingCBPOne%20toScheduleanAppointment,LastAccessedMar.23,2023,https://www.cbp.gov/sites/default/files/assets/documents/2023-Jan/CBP%20One%20Fact%20Sheet_English_3.pdf).

<sup>16</sup> Suzanne Monyak, Migrants Grapple with Government App to Make Asylum Appointments, ROLL CALL, Jan. 31, 2023, <https://rollcall.com/2023/01/31/migrants-grapple-with-government-app-to-make-asylum-appointments/>.

<sup>17</sup> After Waleska was attacked by her own father in Honduras, she reported the abuse to the police. Instead of taking her report, they parroted it to her father, given their friendly relationship with him. After this, her father physically and psychologically assaulted her again, forcing her to flee the country in search of safety.

<sup>18</sup> Mario’s father was an expert on traditional herbal medicine and defender of human and land rights. Mario continued with their father’s profession and was well-respected in their community, until in March 2022 they decided to self-identify as a gender non-resident and together with other people organized peaceful demonstrations against a new bill, known as the “Protection Initiative of Life and Family” that was approved by the Guatemalan Congress on March 8, 2022. After the government identified them as one of the organizers of this peaceful protest, they were persecuted and tortured by community leaders affiliated with the official government, accusing them of witchcraft. Under indigenous “laws,” they were released and expelled from the community. After this, they sought refuge in other parts of the country, but the persecution did not stop. They survived two assassination attempts with a firearm, forcing them to leave the country and seek asylum in the United States.

Mario reached the International Bridge between Matamoros and Brownsville, walked to the middle of the bridge and spoke to an officer, and explained their intentions to request asylum. The officer's response was that they should download the CBP One app and make an appointment. Mario found other asylum seekers who helped them get into a shelter. One night, a woman brought food from a church, and Mario was able to tell her their situation. In that conversation, she discovered that Mario had never used a smartphone, had never gone to formal school, and is a Q'eqchi' speaker who has learned a little Spanish by interacting with other people, but never learned to read and write. Mario received help to buy a smartphone, download the app and create a user profile, but each day they try to book an appointment and cannot, as the app rarely recognizes their face. Mario thinks it's because of the color of their skin, having watched darker-skinned migrants around them face the same problem to an even worse extent. On the days that Mario manages to get the app to recognize their face after several attempts, they get in too late and there are no more appointments. But even then, Mario does not give up. Every day, they try to get an appointment through a process that they do not understand and that not one person can properly explain to them. They are afraid that they will never be able to exercise their right to request asylum.

Sophia, a transgender woman of Mexican nationality<sup>19</sup> who lives in Guadalajara Mexico, has been threatened and persecuted by local criminal groups and authorities for a long time. Before the launch of the CBP One app, she was meticulously documenting the harms she had experienced to prepare her claim for asylum. In January, she heard President Biden say that those who want to apply for asylum had to do so using the CBP One app, and that they should not travel to the border without having scheduled an appointment. While she has spent the last two months seeking an appointment, every day she gets a different error message. Simultaneously, persecution against her has increased. A few weeks ago, while she was shopping in a grocery store near her house, she was brutally attacked, leaving her with injuries that placed her in the hospital where she remained unconscious for two days. When she woke up, she had several sutures on her face and had been disfigured. Now, the app does not recognize her face. Sophia does not have a support system, and she cannot find a safer place for herself in Mexico. Every day she tries to get an appointment through the CBP One app. On days when the app does not present errors, she still cannot make the appointment since the app does not recognize her face.<sup>20</sup>

Blanca, a transgender woman from Honduras, came to Tijuana and found temporary refuge in an LGBT shelter. When she arrived, she informed staff that fluid was leaking from her breast and hip implants. The leaking fluid was escaping into her body and causing health problems, such as lumps in other parts of her body, excruciating pain, blood pressure issues, and concern over blood clots and heart problems. Despite her desperate need for a date to cross to the United States to receive life-affirming care, Blanca wakes up every morning at 4 a.m. with around 40 other individuals at the shelter to get ready for the CBP One lottery. Blanca says that often the internet gets very slow because many people need to use it at the same time and that everyone

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<sup>19</sup> Although claims from Mexican nationals should not be subject to the proposed rule, we include them herein to illustrate various points.

<sup>20</sup> Theoretically, Sophia seems like someone who could come to the port of entry and show by a preponderance of the evidence that she is unable to use the app. However, the practical reality is that the DHS personnel might struggle to implement the NPRM consistently and fairly. Due to the additional burdens the NPRM imposes, Sophia could still be denied asylum access.

gets an error message at the same time, and no one gets a date. Blanca has seen many able-bodied people cross the border before her because they were able to obtain a date. Blanca wakes up every day fearing for her life, hoping she can get a date.

Maria is the head of household for a family of four, including one transgender daughter, and a 71-year-old mother. Maria's mother is suffering from diabetes, high blood pressure, and an infection that has resulted in incontinence. There is no available diabetes medication in Reynosa, where they wait. Maria's daughter is scared as a transgender child waiting in dangerous Reynosa. Every day, Maria wakes up fearing that something will happen to her child or mother. They are in unstable housing and unsafe. Luckily, they were able to get a referral to BBP. BBP advised them to seek a date on CBP One and begin a parole request. Every morning they attempt to get a date. Because of the time it takes to schedule a date for four people, as opposed to one person, and their slow internet speed, they have been unable to get a date. Eventually, Maria scheduled an appointment, but only for herself. The family's attorney solicited additional spaces for Maria's family, but never received a response. Maria made the heartbreaking choice to cancel her date as she could not leave her mother and children. Since mid-February, Maria's attorney has had a pending parole request for this family. After nearly six weeks, the attorney was informed "Unfortunately, the Port of Hidalgo is unable to facilitate this request without a CBP One appointment."

Veronica and Laura are a lesbian couple from Venezuela who have been in a relationship for over eight years.<sup>21</sup> When they were scheduling their appointment in the CBP One application, it indicated the term "spouse." Because they were not legally married, they thought that meant they would not be considered a family unit, and therefore should complete the application process separately. Laura was able to get an appointment and enter the United States, while Veronica continues trying to schedule an appointment. Each morning that she tries to enter the app, it fails, and by the time she is able to get it to open in the afternoon, there are no more appointments available.

Our organizations have witnessed the impact of systemic equity, usability, and accessibility failures that have emerged through the introduction of CBP One. Even if the Biden administration addressed the glitches in the CBP One system, relying primarily on a smartphone app to manage mandatory POE interviews will invariably leave out the most marginalized minority communities. Institutionalizing its use for asylum processing will put LGBTQ/H asylum seekers in harm's way.

**ii. LGBTQ/H People Should Not Be Forced to Wait in Danger in Mexico Before Applying for Asylum in the U.S.**

Forcing LGBTQ/H refugees to wait in Mexico for an appointment to seek asylum in the U.S. is a form of "metering" and is illegal.<sup>22</sup> Moreover, Country conditions and the firsthand experiences of commenter's clients show that Mexico is an extremely dangerous place for LGBTQ and HIV-positive people. In fact, commenters represent asylum seekers *from Mexico* who are routinely granted asylum based on persecution on account of gender identity and sexual orientation. This is because, despite some progressive laws in Mexico, LGBTQ people routinely face persecution and the government is

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<sup>21</sup> In Venezuela, both women were students at university, where they began to receive threats at their home after attending a demonstration against the government. They did not pay too much attention to the threats until one day they returned home to be met by several men dressed as policemen who began to shoot at their vehicle.

<sup>22</sup> See Order, *Al Otro Lado, Inc. v. Mayorkas*, 2021 U.S. Dist. LEXIS 167128, 2021 WL 3931890.

unable or unwilling to protect them. For example, Oasis has represented 426 LGBTQ/H clients from Mexico in the past 6 years and Immigration Equality has represented over 140 LGBTQ/H Mexican asylum seekers. Both organizations have maintained between a 99-100% success rate with adjudicated cases.<sup>23</sup> This incredibly high success rate demonstrates the strength of these claims and level of persecution faced by the LGBTQ community in the country. Conditions for vulnerable LGBTQ/H refugees are often even worse. L4GG and the BBP have collectively helped hundreds of LGBTQ/H asylum seekers apply for a Title 42 exemption, based on the high risk of violence and other harm in Mexico. Many of their clients have experienced horrific harm while waiting in Mexico to enter the U.S. and request asylum.

It is cruel and illegal for Departments to force LGBTQ/H asylum seekers to either apply for asylum in Mexico, or wait for a CBP One appointment in Mexico where their lives are in danger. As discussed below, the exemption from the requirement if an applicant faces an extreme and imminent threat to life or safety is too narrow to cure this defect in the rule, and queer and trans asylum seekers may be chilled from even pursuing the exemption given the negative presumption.

### **1. Conditions for LGBTQ/H People in Mexico**

Homophobia and transphobia are prevalent across the country, including in major urban areas such as Mexico City and Guadalajara.<sup>24</sup> LGBTQ+ community members are 9 times more likely to suffer violence in Mexico than non-LGBTQ people<sup>25</sup> and Mexico ranks second globally behind Brazil for the number of hate crimes committed against the LGBTQ community.<sup>26</sup>

Human rights organizations, governments, and international bodies have recognized the violently dangerous conditions that LGBTQ and HIV positive people face in Mexico.<sup>27</sup> In the first eight months of 2022, there were eight hate-crime homicides and six forced disappearances committed against the LGBTQ community, according to the National Observatory of Crimes Against LGBTQ persons.<sup>28</sup> According to Letra S, a non-profit civil organization dedicated to the dissemination of information and the defense of human rights in Mexico, more than 647 LGBTQ people have been murdered in Mexico between the years 2014 and 2021 and the predominant feature the homicides of LGBTQ people in Mexico have in common is the “cruelty with which they are committed.”<sup>29</sup>

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<sup>23</sup> Note that this number may include some asylum seekers who do not identify as LGBTQ, but were persecuted on account of their imputed LGBTQ status.

<sup>24</sup> Research Directorate, Immigration and Refugee Board of Canada, Mexico: Societal Norms on Gender Identity Expressions, Including in Indigenous Communities (May 25, 2018), at 2, <https://www.refworld.org/docid/5b9bdb404.html>.

<sup>25</sup> LGBT Community, Nine Times More Exposed to Violence, LA JORNADA, Dec. 8 2019, <https://www.jornada.com.mx/2019/12/08/politica/013n2pol>.

<sup>26</sup> Lily Wakefield, Mexico Is Now the World’s Second-Deadliest Country for Trans People, THE PINK NEWS, Sep. 11, 2019, <https://www.thepinknews.com/2019/09/11/mexico-trans-people-second-deadliest-country-brazil-letra-ese-study-lgbt/>

<sup>27</sup> E.g., LETRA, Violent Deaths of LGBTI People in Mexico, 2021, (updated May 2022), 2022 Mexico Country Report at 33.

<sup>28</sup> Bureau of Democracy, Hum. Rts., & Lab., U.S. Dep’t of State, 2022 Country Reports on Human Rights Practices: Mexico (March 20, 2023), at 34, (hereinafter citation to the U.S. Dep’t of State Country Reports on Human Rights Practices will follow this format: [Year] [Country] Country Report (Date))2022 Mexico Country Report.

<sup>29</sup> Letra S, *supra*.

Many of the victims of these homophobic and transphobic murders suffered sexual violence before or after being assassinated, and the bodies of many of the victims were left with signs of torture.<sup>30</sup> The U.N. Human Rights Council's Special Rapporteur to Mexico has noted the alarming pattern of grotesque homicides of lesbian, gay, bisexual and transgender individuals in the country.<sup>31</sup> Daily reports in Mexican newspapers of the murder of LGBTQ community members show how common violence is against LGBTQ people and how the violence is carried out with relative impunity.<sup>32</sup> These include stories of transgender women being shot and murdered in the street<sup>33</sup> in full view of passersby, the bodies of transgender women<sup>34</sup> and gay men<sup>35</sup> being dumped in public places with signs of torture and sexual abuse, and the significant numbers of LGBTQ people who are attacked and murdered in their own homes.<sup>36</sup> Specific examples of assassinations of LGBTQ people include the following:

- In 2018, at least 53 transgender women were killed in Mexico. They included: a woman found in a trash bin with her face pummeled beyond recognition by a rock; a woman who was tortured to death by captors while her family heard her last moments over the phone; a woman who was found naked and strangled in her bedroom; a woman who was stabbed to death. No suspects have been publicly identified in those cases.<sup>37</sup>
- In 2018, Charly, a 25-year-old transgender woman, was murdered at her job. The woman suffered violence and torture before being stabbed 15 times. According to local media reports, her body was mutilated.<sup>38</sup>
- In just one month in 2016, 10 trans women were murdered in 9 different states across Mexico. Two of the women were found with signs of torture, five were killed with a

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<sup>30</sup> *Id.*

<sup>31</sup> U.N. Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in Follow-Up to His Mission to Mexico, (May 6, 2016), <https://www.refworld.org/docid/57616b6e4.html>.

<sup>32</sup> See Oasis Legal Services' Country Conditions Index for Mexico and cited articles: <https://drive.google.com/drive/folders/1KPiZFifP-DyWwCgiP5yu85pJ9JvAQ5Uk?usp=sharing>.

<sup>33</sup> Impunity in Hate Crimes in The Country, EL UNIVERSAL, Feb. 2, 2018, <http://www.eluniversal.com.mx/nacion/sociedad/impunidad-en-crimenes-de-odio-en-el-pais>.

<sup>34</sup> Immigration Equality, Mexico Trans Index and Exhibits, at 690, [https://immigrationequality.sharepoint.com/sites/Legal-CountryConditions/Shared%20Documents/Forms/AllItems.aspx?ga=1&id=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FMexico](https://immigrationequality.sharepoint.com/sites/Legal-CountryConditions/Shared%20Documents/Forms/AllItems.aspx?ga=1&id=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FMexico%2FMexico%202020%20Transgender%20Index%20and%20Exhibits%2Epdf&parent=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FMexico); see also Immigration Equality, LGB Index and Exhibits, [https://immigrationequality.sharepoint.com/sites/Legal-CountryConditions/Shared%20Documents/Forms/AllItems.aspx?ga=1&id=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FMexico](https://immigrationequality.sharepoint.com/sites/Legal-CountryConditions/Shared%20Documents/Forms/AllItems.aspx?ga=1&id=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FMexico%2FMexico%202020%20LGB%20Index%20and%20Exhibits%2Epdf&parent=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FMexico).

<sup>35</sup> They Kill a University Student; "Hate Crime;" UACM, ARISTEGUI NOTICIAS, Feb. 24, 2018, <https://aristeginoticias.com/2402/mexico/asesinan-a-universitario-crimen-de-odio-uacm/>.

<sup>36</sup> More Than 200 Members of LGBT Community Killed in Mexico Over Three Year Period, AL DIA NEWS, May 18, 2017, <http://aldianews.com/articles/politics/more-200-members-lgbt-community-killed-mexico-over-three-year-period/48171>; Zapotec Advocate for Muxe and LGBTQ Rights Murdered in Mexico, Mar. 1 2019, (Zapotec Advocate Murdered) <https://www.culturalsurvival.org/news/zapotec-advocate-muxe-and-lgbtq-rights-murdered-mexico>.

<sup>37</sup> Trans Women in Mexico Fight for Justice as Murders Go Unpunished, NBC NEWS, Sept. 10, 2019, <https://www.nbcnews.com/feature/nbc-out/trans-women-mexico-fight-justice-murders-go-unpunished-n1051886>.

<sup>38</sup> They Torture, Mutilate and Murder a Transgender Woman in Puebla, QUINTANA ROO HOY, Mar. 23, 2018, <https://quintanaroooy.com/mexico/torturan-mutilan-asesinan-a-mujer-transgenero-en-puebla/>.

firearm, one was strangled, one was killed with a knife, and one was hit in the head with a rock.<sup>39</sup>

- Gay activist Julio César Zúñiga Palacios was murdered when two assailants entered his beauty salon and shot him eight times, murdering him in front of his clients.<sup>40</sup>
- In 2019, a gay man was beaten to death while participating in a carnival in the state of Veracruz in front of local authorities who did not even arrest the perpetrator.<sup>41</sup>

Mexican LGBTQ human rights defenders also face increased levels of violence and mistreatment. In 2021, 8 LGBTQ human rights defenders were murdered in Mexico.<sup>42</sup> According to the U.N. Human Rights Council, “Defenders of the rights of lesbian, gay, bisexual, transgender, and intersex persons have ... been targeted by campaigns designed to stigmatize them, heightening the climate of fear in which many of them live” and the “attacks against lesbian, gay, bisexual, transgender, and intersex rights activists are usually related to efforts to promote recognition of their rights.”<sup>43</sup> In February 2019, indigenous LGBTQ activist Oscar Cazorla was found murdered in his home. According to news reports, “Cazorla was an Indigenous Zapotec activist and an advocate for Muxe and LGBTQ rights [who] self-identified as Muxe, a non-binary third gender originating within Zapotec culture.”<sup>44</sup>

The U.N. Human Rights Council, in their 2018 report on human rights defenders in Mexico, noted that prejudices based on sexual orientation and gender identity held by police officers and prosecutors reduce the effectiveness of investigations into attacks on LGBTQ activists. The assassinations of such activists are not investigated as hate crimes; neither is the LGBTQ rights activism of the victims usually taken into account. Moreover, the authorities often denigrate victims in an attempt to trivialize attacks.<sup>45</sup>

The Mexican police not only fail to investigate crimes committed against LGBTQ people<sup>46</sup> but are frequently the perpetrators of the violence.<sup>47</sup> As noted by the U.S. government in recent Mexico Country Reports, “The government [does] not always investigate and punish those complicit in abuses against LGBTQI+ persons, especially outside Mexico City.” The country reports also note that “civil society groups claimed police routinely subjected LGBTQI+ persons to mistreatment while in

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<sup>39</sup> Hate Crimes: Transsexuals of Mexico, TLEVISA NDEWS, Jun. 22 2017,

<https://noticieros.televisa.com/especiales/crimenes-odio-transexuales-mexico/>.

<sup>40</sup> Melissa Amazcua, This Gay Mexican Activist with Worldwide Renown Was Killed, BUZZ FEED NEWS, Nov. 23, 2017, [https://www.buzzfeed.com/mx/melissaamezcua/este-activista-gay-mexicano-reconocido-a-nivel-mundial-fue?utm\\_term=.qvoQN6XE4A#.my6qABG9LP](https://www.buzzfeed.com/mx/melissaamezcua/este-activista-gay-mexicano-reconocido-a-nivel-mundial-fue?utm_term=.qvoQN6XE4A#.my6qABG9LP).

<sup>41</sup> In Plain Sight of the Carnival of Veracruz, Man Beats ‘Youtuber’ From The LGBT+ Community, CULTURA COLECTIVA, Feb. 26 2019, <https://news.culturacolectiva.com/mexico/en-pleno-carnaval-de-veracruz-hombre-golpea-a-youtuber-de-comunidad-lgbt/>.

<sup>42</sup> Televisa News, *Hate Crimes: transsexuals of Mexico*, *supra*.

<sup>43</sup> U.N. Human Rights Council, Report of The Special Rapporteur on the Situation of Human Rights Defenders on His Mission to Mexico, (Feb. 12, 2018) (U.N. Rapporteur, Human Rights Defenders), at 10, <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/CountryVisits.aspx>.

<sup>44</sup> Zapotec Advocate Murdered.

<sup>45</sup> U.N. Rapporteur, Human Rights Defenders at 10.

<sup>46</sup> Mexico and the Growing Hate Crimes Against LGBT+ Community, PLUMAS ATOMICAS, May 2019, <https://plumasatomicas.com/lgbt/crimenes-de-odio-por-homofobia-contra-comunidad-lgbt-en-mexico/>.

<sup>47</sup> Austrian Red Cross, Austrian Ctr. for Country of Origin & Asylum Res. and Documentation, Mexico Sexual Orientation and Gender Identity (SOGI), COI Compilation, (May 31, 2017) (Red Cross, Mexico SOGI Conditions) at 21, 26, <http://www.refworld.org/pdfid/5937f12d4.pdf>.



custody.”<sup>48</sup> Between the years 2006 and 2016, there were over 1,370 registered hate crimes against the LGBTQ community but only about 10% of those crimes have been resolved according to Mexican researchers.<sup>49</sup> According to a report by the Mexican Comisión Ejecutiva de Atención a Víctimas (CEAV) and Fundación Arcoiris, a Mexican organization that advocates for the rights of LGBTQ people, 31 percent of transgender women and 15 percent of gay men said they had been detained by the police due to their LGBTQ status.

Examples of violence and discrimination from Mexican police and authorities towards LGBTQ people are plentiful:

- 25-year-old Korina de Jesús Utrera Domínguez and her girlfriend, Denise Francisca Blanco Lovato, were at Korina’s home in Tabasco, southern Mexico, when armed marines in camouflage uniforms stormed into the house and started to beat and yell at them. Both women were blindfolded and taken away without any arrest warrant to a Navy base. There, they were both raped and subjected to near asphyxiation and electric shocks. Denise told Amnesty International that marines screamed at them, “You fucking lesbians.”<sup>50</sup>
- A gay lawyer and his partner were arrested by police in a restaurant without any explanation. The police ripped the lawyer’s shirt, pulled down his pants, and after arriving at the police station, began to beat him with his hands and legs tied together around a pole. During the arrest and beating, the police insulted the lawyer and his partner for being gay and spit on them. When he was released the next day, the lawyer’s wallet, cell phone, and watch were missing.<sup>51</sup>
- In early 2021, Mexican police in Tijuana raped a Guatemalan Indigenous transgender woman who had been trafficked for sexual exploitation in Guatemala. At the time, she had already been waiting nearly a year to request U.S. asylum due to Title 42 restrictions at the border.<sup>52</sup>
- In the state of Nuevo Leon, police officers illegally entered the house of a lesbian couple and beat both women, calling them slurs related to their sexual orientation and threatening to decapitate and cut off their breasts for being lesbians. One of the women was arrested and held in jail for 12 hours before being released without any charges

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<sup>48</sup> 2022 Mexico Country Report at 34.

<sup>49</sup> Only 10% of Hate Crimes in Mexico Are Resolved, MEGAPOLIS, Aug. 20, 2017,

<https://megalopolismx.com/noticia/25795/apenas-10--de-crimenes-de-odio-en-mexico-se-esclarecen>.

<sup>50</sup> Amnesty International, Torture Against Women in Mexico: The Facts, Denis Blanco and Korina Utrera, Humiliated for Being Lesbians and Raped by the Navy, (June 28, 2016) (Amnesty International, Torture of Women),

<https://www.amnesty.org/en/latest/news/2016/06/Torture-against-women-in-Mexico-The-Facts/> . .

<sup>51</sup> See Immigration Equality Mexico LGB Index at 726, <https://immigrationequality.sharepoint.com/sites/Legal-CountryConditions/Shared%20Documents/Forms/AllItems.aspx?ga=1&id=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FMexico%2FMexico%202020%20LGB%20Index%20and%20Exhibits%2Epdf&parent=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FMexico> .

<sup>52</sup> Human Rights First, To Protect the Lives of LGBTQ Asylum Seekers, the Biden Administration Must Fully End Title 42, (Jul. 21, 2021), <https://humanrightsfirst.org/library/to-protect-the-lives-of-lgbtq-asylum-seekers-the-biden-administration-must-fully-end-title-42/> <https://humanrightsfirst.org/library/to-protect-the-lives-of-lgbtq-asylum-seekers-the-biden-administration-must-fully-end-title-42/> .

filed. Although both women filed a complaint with the mayor and the police chief, no investigation was performed, and the accused police officers remain in their jobs.<sup>53</sup>

- In the northern Mexican city of Torreon, the local mayor ordered the arrest of 10 transgender people for causing “moral damage” and forced all transgender people in the city to carry special “health ID cards” under the penalty of arrest.<sup>54</sup>

In addition to murder and violence from the police and governmental authorities, LGBTQ people in Mexico experience high levels of other types of violence, including rape and sexual assault, as well as kidnapping, extortion, and death threats. Lesbian women are subjected to so-called corrective rape and other forms of sexual abuse by men, and gay men are physically abused and beaten in order to make them more masculine.<sup>55</sup> A 2019 poll found that more than 50% of the LGBTQ community members surveyed reported having been targeted with hate speech and physical aggression within the past 12 months.<sup>56</sup> A 2016 study carried out by Fundación Arcoiris, surveyed members of the LGBTQ community in Mexico and found that sixty-two percent of trans women, 51% of trans men, 35% of [gay] men, 23% of [lesbian] women and more than 28% of the intersex persons were victims of physical aggression due to their gender identity or sexual orientation. The perpetrators were identified as unknown (32%), police (14%), relatives (11%) and friends and partners (12%).<sup>57</sup>

## **2. Client Accounts of Harm Suffered in Mexico, Including by LGBTQ Refugees Waiting to Enter the U.S. and Request Asylum**

Stories from our clients only emphasize the horrific violence that the LGBTQ community is subjected to in Mexico:

Alexandra, an Immigration Equality client, is a transgender woman from Mexico who is now seeking asylum in the United States. In Mexico, Alexandra was kidnapped and held captive for several months by gang members because of her gender identity after they spotted her wearing women’s clothing at a fundraiser she was organizing for children with leukemia. She was repeatedly raped and tortured by her persecutors. They hung her from the ceiling while they tormented her, slicing her with a knife and cutting her earlobes with metal scissors for wearing earrings. She was able to escape and make her way to the U.S. to seek asylum. Her injuries were so severe from the rapes that she had to undergo multiple rectal surgeries in an effort to repair the damage. Her case is currently pending.

Mirna, an Oasis client, is a lesbian woman from Mexico whose lifelong dream was to be a police officer. After joining the force, she was raped by her commanding officer in the police station where she worked as he told her that he was going to rape the lesbian out of her. When she reported the attack to her town’s police commissioner, nothing was done; the commanding officer continued to be Mira’s supervising officer and taunted her daily about the rape. Mirna’s

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<sup>53</sup> See Immigration Equality Mexico LGB Index at 732, <https://immigrationequality.sharepoint.com/sites/Legal-CountryConditions/Shared%20Documents/Forms/AllItems.aspx?ga=1&id=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FMexico%2FMexico%202020%20LGB%20Index%20and%20Exhibits%2Epdf&parent=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FMexico>.

<sup>54</sup> Mexican Mayor Jorge Zermeño Prosecuting Trans People for Causing ‘Moral Damages’, TELESUR, Mar. 15 2018, <https://www.telesurenglish.net/news/A-Mayor-in-Mexico-is-Forcing-Trans-People-to-Carry-Health-IDs-20180315-0003.html>.

<sup>55</sup> Amnesty International, Torture of Women; Red Cross, Mexico SOGI Conditions at 31-35.

<sup>56</sup> 2022 Mexico Country Report at 34.

<sup>57</sup> Red Cross, Mexico SOGI Conditions at 16.

fellow officers beat her on several occasions while calling her lesbian slurs. Mirna fled from Mexico after her ex-partner's family attacked her with a knife because they blamed her for turning their daughter into a lesbian and almost cut off one of her fingers. Because of the attack, Mirna is unlikely to ever regain use of that finger.

Kendra, another Oasis client, is a transgender woman from Mexico who was granted asylum in the United States. She owned a small hair salon in Mexico City but had to close it after receiving threats from a neighborhood gang who said that as a transgender woman, Kendra was not allowed to live or work in the neighborhood. The threats continued and Kimberly fled to another state to hide after trying to make a police report which resulted in the police laughing at and insulting her. The gang found Kendra in her hometown after learning from the police that Kendra had reported them and where she was living. Gang members beat Kendra unconscious at a gas station while onlookers watched and she was hospitalized with a broken eye socket and jaw. The police never made any attempt to investigate the beating or make any arrests.

Miguel, an Oasis client from Mexico suffered violence both in his home state of Oaxaca and while living in Tijuana. While attending university, Miguel was cornered after class by 5 classmates who pushed him to the ground, yelled gay slurs at him, and said they didn't understand why he was allowed to be there because "faggots" should not be able to go to college. One of Miguel's classmates hit him on the head with a piece of rebar. Miguel moved to Tijuana and found a job as a waiter. After work one evening, a customer who had insulted him earlier for being gay, followed him home and raped him at gun point.

LGBTQ migrants passing through Mexico on their way to the United States are equally, if not more vulnerable.<sup>58</sup> According to a 2017 study by the United Nations High Commissioner for Refugees, two thirds of the LGBTQ refugees from Central America who were surveyed had suffered sexual and gender-based violence in Mexico.<sup>59</sup> Carlos, a young gay man who fled extreme violence in Honduras, reported being terrified to leave the migrant shelter he was staying at in the south of Mexico because of the same type of violence he suffered in Honduras for being gay.<sup>60</sup> Carlos was brutally attacked and raped by other migrants outside of the shelter but could not report the attack to Mexican authorities for fear of being deported or bringing more abuse upon himself.<sup>61</sup> The fear of deportation among LGBTQ asylum seekers is well founded, since Mexican immigration authorities do, in fact, routinely deport refugees. For example, commenter, SFDP, reported working with a lesbian couple from Venezuela. The couple was picked up by Mexican immigration a few days before their Title 42 exception request appointment and deported back to their country of persecution.

The experiences of commenters' clients, like the examples provided below (and included in Section IV.b.i above), further illustrate the harm the LGBTQ refugee community faces in Mexico:

SFDP documented multiple abuses perpetrated against LGBTQ asylum seekers in Mexico as they waited on the outcomes of their Title 42 exception requests. For example, between July

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<sup>58</sup> Mexico/Central America: Authorities Turning Their Backs on LGBTI Refugees, AMNESTY INTERNATIONAL, Nov. 27, 2017, <https://www.amnesty.org/en/latest/news/2017/11/mexico-central-america-authorities-turning-their-backs-on-lgbti-refugees/>.

<sup>59</sup> *Id.*

<sup>60</sup> Amnesty International, 'No Safe Place': Salvadorans, Guatemalans and Hondurans Seeking Asylum in Mexico Based on Their Sexual Orientation and/or Gender Identity, (Nov. 27, 2017) at 20, <https://www.refworld.org/docid/5a1c28f54.html>.

<sup>61</sup> *Id.* at 21.

30, 2022, and January 11, 2022, SFDP documented 20 cases of physical assault against LGBTQ people by private actors and another eight instances by state actors; 12 instances of sexual assault by private actors and three instances by state actors; 4 kidnappings perpetrated by private actors; and 33 incidents of robbery and extortion by state and private actors (among other abuses).

Stephany, an Oasis client, fled Honduras with her partner because of the constant attacks and threats they received from gang members who controlled their community. The gang members insulted them for being lesbians and threatened to kill them if they did not leave. Stephany and her partner fled to Mexico after the police in Honduras said they could not protect them. In Mexico, they had difficulty finding a place to live because multiple landlords said they would not rent an apartment to a lesbian couple. Stephany and her partner applied for and received asylum in Mexico but continued to receive threats from the gang members in Honduras who said they knew Stephany and her partner were in Mexico and they were going to send someone to kill them because they had gone to the police. After moving to Guadalajara for their safety, Stephany and her partner were stalked by a man who said he had been sent from Honduras to keep an eye on them. The police in Mexico would not help them because they said the alleged perpetrator was not Mexican. On the streets of Guadalajara Stephany and her partner were insulted and called names for being a lesbian couple. They fled to the United States for their safety and are applying for asylum. Consistent with Stephany and her partner's experiences, SFDP recorded 40 instances of threats, including death and rape threats, and slurs against LGBTQ asylum seekers.

Jerome is a 23-year-old gay man from Uganda, where same sex relationships are criminalized and LGBTQ people face extreme levels of violence and persecution. When Jerome was 19, he and his boyfriend were discovered being intimate. They dragged outside their house naked and publicly beaten. When police arrived, they also participated in the beating and subsequently arrested and imprisoned the couple. J.K. spent 4 months in jail during which time he was subjected to regular beatings by police. J.K. was separated from his boyfriend and never saw him again. He believes his boyfriend may have been killed. J.K. tried to move to a different part of the country in the hopes he would be safe. Instead, he was arrested and imprisoned again, where he was tortured and beaten for 8 months. After his release he was forced to get married and was drugged and forced to undergo surgery intended to "fix" his sexuality. He still suffers pain in his groin from the procedure. After more attacks and threats, J.K. fled Uganda and made his way to the U.S. through several homophobic and dangerous countries. When he landed in Mexico, he was immediately arrested at the airport. Since he could not speak Spanish he could not understand why he was being arrested. He asked to speak to an immigration officer. Immigration officers came and took him to a detention center in Mexico where he spent approximately 45 days. Upon release, he was given a document saying he had to leave country within 25 days. He had nowhere to go and was arrested again once his document had expired. He was once again imprisoned. While in Mexico, he suffered racism, and was also rejected by the African migrant community because he is gay. He was released and crossed into the U.S. His asylum case is pending.

Immigration Equality client, Carlos, is a gay, HIV-positive man from Nicaragua. After fleeing persecution for his political opinion and LGBTQ identity, Carlos was forced to wait in Mexico because he was not allowed to enter the U.S. to pursue his asylum claim under Title 42. In order to make ends meet, Carlos began working in a bar. The owners of the bar confiscated

his identity documents and held him captive. Police officers would visit the bar at night where they would sexually assault Carlos. He was eventually able to get free and cross the border without inspection. He turned himself into authorities in the U.S., and is currently pursuing his asylum claim.

Mia is an Immigration Equality client from Jamaica. Mia arrived at the southern border after an arduous journey. At the border, Mia was given a number and forced to wait in Mexico for over three months to request asylum. In Mexico, Mia was homeless. She faced discrimination because of her race, transgender identity, and because she couldn't speak Spanish. Because of this she was not able to secure any work. She had no money, so was living on the street with a friend. But after they were robbed and attacked, they moved to a shelter in the hopes it would be safer. At the shelter, her friend was stabbed in the groin and she was targeted for abuse because of her race and transgender identity, so they moved back onto the streets. Mia eventually made it to the U.S. where her asylum claim is pending.

In sum, LGBTQ/H asylum seekers are at great risk in Mexico. Forcing them to remain there is inhumane, immoral, and goes against the Administration's promises to protect LGBTQ people and refugees.

**iii. Common Transit Countries Are Fundamentally Unsafe for LGBTQ/H Asylum Seekers, and Requiring LGBTQ People to Apply for Asylum in Such Countries Exposes them to Grave Harm**

Under the proposed rule, refugees can rebut the ineligibility presumption by applying for asylum in a transit country and receiving a denial before entering the U.S. This requirement circumvents U.S. law regarding safe third countries and forces asylum seekers to apply for protection in countries where they will not have access to meaningful asylum procedures. The requirement that these transit countries be signatories to the Refugee Convention does little to ensure the safety of LGBTQ/H asylum seekers since many egregious abusers of LGBTQ/H rights are signatories.

The Departments tout the expansion of access to refugee protection in the Western Hemisphere as a rationale for requiring applicants to first file in a third country. However, the NPRM does so without seriously addressing the lack of capacity these asylum systems have to process and manage asylum seekers in any significant number. Critically, the vast majority of these countries are fundamentally unsafe for LGBTQ/H refugees.

It is both illegal and immoral to force LGBTQ/H refugees to out themselves to government officials, apply for asylum, and wait for adjudication of their claim in countries where they risk severe harm, often the same types of harm from which they fled in their country of origin. In reality, applying for asylum in common transit countries is simply not an option. Many of commenters' clients report that they could not request asylum in a transit country because they were unsafe. Indeed, most such countries – including, Mexico, Honduras, El Salvador, and Guatemala – have long, documented histories of severe violence and torture of LGBTQ/H people. The governments of these countries fail to protect queer and trans people from egregious abuse and frequently engage in it. In fact, commenting organizations have successfully represented queer and trans asylum clients from nearly all central American and the majority of South American countries (e.g., Immigration Equality has successfully represented clients in their asylum claims from Belize, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Venezuela, Guyana, as well as Mexico).

Harmful conditions are exacerbated for LGBTQ *refugees* in these countries, given the lack of formal status, economic instability, lack of access to healthcare, and other resources.<sup>62</sup> The situation is worse still for Black, Indigenous and HIV-positive LGBTQ refugees, who face additional barriers. On a practical level, it is unclear whether an asylum claim based on sexual orientation or gender identity is even cognizable in transit countries. In short, the rule forces queer and trans people to seek protection in places that cannot provide it, endangering LGBTQ lives in the process. But the NPRM completely ignores these issues and the impact that this requirement will have on LGBTQ asylum seekers.

Below are country conditions and examples of the persecution faced by LGBTQ and HIV-positive people in Guatemala, Honduras, and El Salvador, including refugees. The grave conditions for queer, trans and HIV-positive in Mexico were outlined in Section IV.b.ii above. These are the primary transit countries that the Departments point to in the NPRM.

The Departments also discuss Belize as an option (although it is a less common and less accessible transit country given its geography). While conditions in Belize are somewhat better than in Mexico and the Northern Triangle, LGBTQ/H individuals still face high levels of discrimination and violence.<sup>63</sup> Moreover, immigration law in Belize prohibits “homosexuals” from entering the country.<sup>64</sup> Immigration Equality pro bono program clients have experienced persecution on account of their LGBTQ identity<sup>65</sup> in Belize and have been granted asylum in the U.S. because of it.

### **Guatemala**

Human rights organizations, governments, and international bodies have recognized the brutal and dangerous conditions that LGBTQ/H people face in Guatemala.<sup>66</sup> As noted by the U.S. government

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<sup>62</sup> See, e.g., 2021 Honduras Country Report at 12 (“Abuse of Migrants and Refugees: Transiting migrants and asylum seekers with pending cases were vulnerable to abuse and sexual exploitation by criminal organizations. Women, children, and LGBTQI+ migrants and asylum seekers with pending cases were especially vulnerable to abuse. Asylum seekers and refugees continued to face acute protection risks in border zones.”).

<sup>63</sup> 2019 Belize Country Report at 1.

<sup>64</sup> 2021 Belize Country Report at 24. The U.S. State department claims that Belize does not enforce this law. However, the Departments did not consider whether LGBTQ people would be able to bring sexual orientation and gender-identity based asylum claims given this law and the impact having such a law on the books has on LGBTQ refugees, even if not enforced.)

<sup>65</sup> For example, Immigration Equality client, M.H., is a gay man living with HIV. Growing up in Belize, he was forced to hide his sexual orientation because of anti-LGBTQ laws and fears of being outed. Even though he tried to hide his identity, he was sexually assaulted as a child on multiple occasions and was the target of harassment and violence because people perceived him as gay. He fled Belize after being held at gunpoint and threatened because of his sexuality.

<sup>66</sup> See generally, e.g., Immigration Equality, Guatemala 2022 LGBTQ Index and Exhibits, [https://immigrationequality.sharepoint.com/sites/Legal-CountryConditions/Shared%20Documents/Forms/AllItems.aspx?ga=1&id=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FGuatemala](https://immigrationequality.sharepoint.com/sites/Legal-CountryConditions/Shared%20Documents/Forms/AllItems.aspx?ga=1&id=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FGuatemala%2FGuatemala%202022%20LGBTQ%20Index%20and%20Exhibits%2Epdf&parent=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FGuatemala), (collecting sources and citations); Immigration Equality, Guatemala 2022 HIV Index and Exhibits, [https://immigrationequality.sharepoint.com/sites/Legal-CountryConditions/Shared%20Documents/Forms/AllItems.aspx?ga=1&id=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FGuatemala](https://immigrationequality.sharepoint.com/sites/Legal-CountryConditions/Shared%20Documents/Forms/AllItems.aspx?ga=1&id=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FGuatemala%2FGuatemala%202022%20HIV%20Index%20and%20Exhibits%2Epdf&parent=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FGuatemala) (collecting sources and citations); 2021 Guatemala Country Report (April 12, 2022), at 1, 35-36, [https://www.state.gov/wp-content/uploads/2022/02/313615\\_GUATEMALA-2021-HUMAN-RIGHTS-REPORT.pdf](https://www.state.gov/wp-content/uploads/2022/02/313615_GUATEMALA-2021-HUMAN-RIGHTS-REPORT.pdf); 2020 Guatemala Country Report (March 30, 2021), at 1, 13, 25-26, <https://www.state.gov/wp-content/uploads/2021/03/GUATEMALA-2020->

in recent Guatemala Country Reports, “[e]xtreme violence against LGBTQI+ persons remained a persistent issue and escalated during the year.”<sup>67</sup> For example, the U.S. reported “17 killings of LGBTQI+ persons from January to July [2021] in which the violence could plausibly be linked to the victims’ sexual orientation or gender identity;”<sup>68</sup> in 2020, “16 LGBTI persons had been killed as of October;”<sup>69</sup> and in 2019, “20 LGBTI persons had been killed [as of October]...[several] in their homes or at LGBTI spaces in Guatemala City.”<sup>70</sup> Human rights groups put the figures even higher. Amnesty International reported “[a]t least 32 LGBTIQ+ people were murdered in Guatemala [in 2021] as a result of their sexual orientation or gender identity...with another nine killings reported [as of March] 2022.”<sup>71</sup> However, underreporting is a persistent problem due to failure of the government to monitor and track hate crimes against the community, and fear within the community of reporting to the police.<sup>72</sup>

The murders of queer and trans people in Guatemala are often characterized by “disturbing levels of brutality and extreme cruelty.”<sup>73</sup> For example:

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[HUMAN-RIGHTS-REPORT.pdf](#); Inter-American Commission on Human Rights, Organization of American States (IACHR), Annual Report (2021), Chapter IV.B, Guatemala, at 767, <https://www.oas.org/en/iachr/docs/annual/2021/Chapters/IA2021cap4B.Guatemala-en.pdf>.

<sup>67</sup> 2021 Guatemala Country Report at 34-35; *see also* 2020 Guatemala Country Report at 25; 2019 Guatemala Country Report, at 22, <https://www.state.gov/wp-content/uploads/2020/02/GUATEMALA-2019-HUMAN-RIGHTS-REPORT.pdf>.

<sup>68</sup> 2021 Guatemala Country Report at 34-35.

<sup>69</sup> 2020 Guatemala Country Report at 25.

<sup>70</sup> 2019 Guatemala Country Report at 22.

<sup>71</sup> Amnesty International, Guatemala: Discriminatory Law Fosters Hate and Puts Lives, Rights and Families at Risk (Mar. 9, 2022), <https://www.amnesty.org/en/latest/news/2022/03/guatemala-discriminatory-law-lives-rights-families-risk/>; *see also* Human Rights Watch, World Report 2022: Events of 2021; Guatemala (Dec. 16, 2021), at 291, [https://www.hrw.org/sites/default/files/media\\_2022/01/World%20Report%202022%20web%20pdf\\_0.pdf](https://www.hrw.org/sites/default/files/media_2022/01/World%20Report%202022%20web%20pdf_0.pdf) (reporting murders); 2021 Guatemala Country Report at 35 (reporting murders).

<sup>72</sup> Sarah Barrett, *For people like you, there is no law*, (July 2, 2018), *The World*, at 4, <https://www.pri.org/stories/2018-07-02/people-you-there-no-law> (“Much of the violence against the LGBTQ community “goes unreported because people often feel stigmatized at police stations and in government offices.”); Human Rights Watch, Submission to United Nations Committee on the Elimination of Discrimination Against Women, Review of Guatemala, 85th Pre-Session, (Oct. 2022) (“HRW 2022 UN Submission”), at 5, 7, [https://www.hrw.org/sites/default/files/media\\_2022/10/HRW%20Submission%20to%20the%20Committee%20on%20the%20Elimination%20of%20Discrimination%20Against%20Women%20Review%20of%20Guatemala.pdf](https://www.hrw.org/sites/default/files/media_2022/10/HRW%20Submission%20to%20the%20Committee%20on%20the%20Elimination%20of%20Discrimination%20Against%20Women%20Review%20of%20Guatemala.pdf) (“The Attorney General’s office does attempt to track anti-LGBT hate crimes,” “LGBT people typically do not file reports against police for violence or harassment because they fear being victimized as a result. ‘If you file a report against a police officer, he will know that same day who filed a report against him. That makes you afraid that they’ll kill you.’”).

<sup>73</sup> Inter-American Commission On Human Rights, IACHR Repudiates Murder of Defender of Trans Rights In Guatemala, (Dec. 2, 2016) (“2016 IACHR Report”), [http://www.oas.org/en/iachr/media\\_center/PReleases/2016/181.asp](http://www.oas.org/en/iachr/media_center/PReleases/2016/181.asp); *see also* 2017 IACHR Report at 192 (“IACHR received reports of three other murders of trans women in Guatemala, which were characterized by alarming degrees of cruelty; a view shared by the Human Rights Ombudsman of Guatemala and the Office of the United Nations High Commissioner for Human Rights.”); Human Rights Watch, “It’s What Happens When You Look Like This” Violence and Discrimination Against LGBT People in Guatemala” (Mar. 2021) (“2021 HRW Report”), at 22, [https://www.hrw.org/sites/default/files/media\\_2021/03/%E2%80%9CIt%E2%80%99s%20What%20Happens%20When%20You%20Look%20Like%20This%E2%80%9D\\_0.pdf](https://www.hrw.org/sites/default/files/media_2021/03/%E2%80%9CIt%E2%80%99s%20What%20Happens%20When%20You%20Look%20Like%20This%E2%80%9D_0.pdf) (activists “recited stories of trans women they had known who had been killed over the years; some shot, some strangled” and “Human Rights Watch interviewed several LGBT people in Jalapa and Guastatoya who described instances of violence against other LGBT people they knew that appeared to be hate crimes.”).

- “In March, José Roberto Díaz, an 18-year-old volunteer with an LGBTIQ+ rights group ... was murdered in Huehuetenango.... Betzi Esmeralda Có Sagastume (also 18) and Kelli Maritza Villagrán (26), a lesbian couple, were found murdered in El Progreso.... In each case, their bodies were found with homophobic slurs cut into their skin.”<sup>74</sup>
- “According to information received by the IACHR, the body of Evelyn Zulma Alegría Robles was found in her home ...with bruises on her arms and around her jaw, her teeth missing, and her hair pulled out ... [her] throat had been cut and [] the toxicology report showed traces of high toxicity apparently consistent with the administration of poison.”<sup>75</sup>
- A “grainy surveillance video [] shows two men sitting in a bar in Guatemala holding hands. A man walks in, pulls out a gun and shoots them both point blank.”<sup>76</sup>
- “2020 commenced with the murder of a transgender woman. On New Year’s Day, Jennifer Ávila, from the small Western Guatemala town of Mazatenango, was found seriously injured, bearing signs of torture and sexual assault. She died in the hospital.”<sup>77</sup>

In addition to murder, LGBTQ people experience high levels other types of violence, including rape, sexual assault, domestic abuse, torture, as well as kidnapping, extortion, and death threats.<sup>78</sup> Such persecution and abuse is perpetrated by state actors, primarily the police, as well as gangs, criminal organizations and society at large.<sup>79</sup> Many queer and trans people also experience brutal violence, neglect, and mistreatment by their own family members and intimate partners.<sup>80</sup>

As reported by the U.S. government, “[l]esbian, bisexual, and queer women experienced specific forms of discrimination, such as forced marriages and ‘corrective’ rape intended to cause pregnancy, although these incidents were rarely, if ever, reported to authorities.”<sup>81</sup> Sexual assault and rape of LGBTQ people is pervasive in Guatemala, and impacts children as well as adults. “According to UNHCR, 88 percent of LGBTI asylum seekers and refugees from the Northern Triangle interviewed

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<sup>74</sup> Aisling Walsh, After a surge in hate speech, and police raids, Guatemala’s LGBTIQ+ community fears the worst is yet to come, *Open Democracy*, (Aug. 8, 2019), at 5, <https://www.opendemocracy.net/en/5050/after-a-surge-in-hate-speech-and-police-raids-guatemalas-lgbtiq-community-fears-the-worst-is-yet-to-come/>

<sup>75</sup> 2016 IACHR Report at 1.

<sup>76</sup> Barrett at 4.

<sup>77</sup> 2021 HRW Report at 22.

<sup>78</sup> *E.g.*, 2021 Guatemala Country Report at 35 (“Openly gay and HIV-positive congressman Aldo Davila reported death threats because of his public denunciations of corrupt officials. The threats often included harassing mentions of his sexual orientation.”); Report of The United Nations Office of The High Commissioner for Human Rights, A/HRC/WG.6/42/GTM/3: Summary of Stakeholders’ Submissions on Guatemala, Human Rights Council, Working Group on the Universal Periodic Review, 42nd Session, January 23-February 3, 2023 (“UNHCR Report”), at 9, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/535/98/PDF/G2253598.pdf?OpenElement> (“domestic violence acutely affected LGBTI persons”); Barrett, *supra* at 2 (“as many as 70 percent [of transgender women in Guatemala] report being victim to rape, kidnapping, torture, sexual violence and other crimes.”); 2022 HRW UN Submission at 9-10.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> 2021 Country Report at 35.



in the context of a study reported having suffered sexual and gender-based violence in their countries of origin.”<sup>82</sup> For example:

- “K.W., a trans woman from the department of Izabal, told Human Rights Watch that when she was 16 years old, she was raped by seven men whom she identified as gang members, resulting in injuries so severe she had to be hospitalized for 18 days.”<sup>83</sup>
- E.P., a 24-year-old trans woman ... said that when she was 15, her mother told her to stop being a “faggot” and threw an iron at her, hitting her in the side of the head and causing bleeding that required hospital treatment. Guatemala’s Human Rights Ombudsperson’s Office has also reported on intimate partner violence against LGBT people, specifically violence against lesbian and bisexual women from former male partners.<sup>84</sup>
- K.W. said that from the age of nine she had faced attempted sexual assault and school bullying as a result of her gender expression. She left school at age 10, having only completed third grade: ‘A primary school teacher tried to touch me when I was very little. I told my mother. Nobody listened to me, even my mother, she beat me for lying.’<sup>85</sup>

Many queer and trans people are forced to flee Guatemala because of the rampant abuse, but are met with more of the same in other neighboring countries.<sup>86</sup> For instance:

- Kataleya says that when a group of men found out she is a transgender woman, they beat her and sexually assaulted her. She woke up in a ditch. “I got up and went to see my mom...all beaten up,” she says. Kataleya and her mom left the city and headed to a northern region of Guatemala, close to the border with Mexico. “I escaped to another part of Guatemala, and they did the same things to me. I escaped to Mexico, and they did the same things to me.”<sup>87</sup>

LGBTQ human rights defenders also face increased levels of violence and mistreatment. As reported by IACHR (the Inter-American Commission on Human Rights), LGBTQ activists “are targets of violence, threats, attacks on their premises, and harassment because of their work as activists.”<sup>88</sup>

The situation is even worse for refugees. As an initial matter, Guatemala’s system is completely inadequate to handle the flow of asylum seekers. As noted by the U.S. government in its 2021 Country Report, “identification and referral mechanisms for potential asylum seekers were inadequate” and “there were gaps and lack of clarity in the procedures for implementing the legal framework.”<sup>89</sup>

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<sup>82</sup> AMNESTY INTERNATIONAL, NO SAFE PLACE: LGBTI SALVADORANS, GUATEMALANS AND HONDURANS SEEKING ASYLUM IN MEXICO, (Nov. 27, 2017) (“No Safe Place”), at 7, <https://www.amnestyusa.org/wp-content/uploads/2017/11/No-Safe-Place-Briefing-ENG-1.pdf>

<sup>83</sup> 2022 HRW UN Submission at 6.

<sup>84</sup> 2022 HRW UN Submission at 6.

<sup>85</sup> *Id.* at 8.

<sup>86</sup> REDLAC, Snapshot #6, Violence and Protection in the North of Central America: The Impact of Violence on LGBTI People in The North of Central America, (September 2019) (“REDLAC”), at 3, <https://reliefweb.int/sites/reliefweb.int/files/resources/Protection%20Snapshot%206%20-%20English%20-%20September%202019.pdf> (“Civil society organizations in Guatemala, El Salvador, and Honduras report that LGBTI people are at high risk for violence and extortion by gangs and organized criminal groups, hate crimes, and abuse by authorities, leading many LGBTI individuals to migrate in search of safety.”).

<sup>87</sup> REDLAC, *supra* at 10.

<sup>88</sup> 2016 IACHR Report at 1.

<sup>89</sup> 2021 Guatemala Country Report at 18.

According to the report, only “some” individuals in need of protection were able to access the asylum process, and “only 29 of the 486 cases filed in 2020 were adjudicated as of October.”<sup>90</sup> Moreover, given the danger for LGBTQ people generally – including from government agents – asylum clients have told commenting organizations that they are afraid to apply and out themselves to authorities. Their fears are well founded. “A 29 year-old transgender woman from El Salvador who fled to Guatemala was murdered.”<sup>91</sup> “The woman...had sought refugee status because of violence and persecution from gangs that she suffered because of her gender identity.”<sup>92</sup>

HIV positive people also experience severe stigma, discrimination, and lack of access to medical care, in particular if they are also LGBTQ.<sup>93</sup> Even access to HIV prevention programs is a challenge. “Discrimination against LGBTQI+ persons with HIV or AIDS was particularly common and affected access to HIV-prevention programs, especially for transgender individuals.”<sup>94</sup> The IACHR also reported a “lack of medicine in hospitals for the treatment of HIV for [people] who require it.”<sup>95</sup> The IACHR also observed that the Guatemalan Ministry of Health only purchases “medications once inventories are completely exhausted. This situation reportedly causes breaks in treatment for persons with HIV, particularly affecting trans women, who make up nearly 22% of the HIV positive population of the country.”<sup>96</sup>

Despite rampant abuse, the law provides few protections for LGBTQ Guatemalans and impunity is a problem.<sup>97</sup> Not only do Guatemalan authorities fail to prevent or stop these abuses, they actively perpetrate them.<sup>98</sup> According to IACHR, authorities subject LGBTQ people to “torture, demeaning or inhumane treatment, excessive use of force, and illegal detentions.”<sup>99</sup> The U.S. government reports “that police regularly engaged in extortion and harassed male and transgender individuals whom they alleged to be sex workers.”<sup>100</sup>

Moreover, LGBTQ victims often do not report crimes “because they fear discrimination and abuse by authorities.”<sup>101</sup> As one activist put it: “If you file a report against a police officer, he will know that same day who filed a report against him. That makes you afraid that they’ll kill you,”<sup>102</sup> Even when abuse is reported, Guatemalan authorities routinely refuse or fail to fully investigate crimes and

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Transgender Salvadoran woman who fled to Guatemala murdered, Washington Blade, Aug. 17, 2020, at 1,

<https://www.washingtonblade.com/2020/08/17/transgender-salvadoran-woman-who-fled-to-guatemala-murdered/>

<sup>93</sup> See, e.g., Immigration Equality, Guatemala 2022 HIV Index and Exhibits.

<sup>94</sup> 2021 Guatemala Country Report at 34.

<sup>95</sup> IACHR 2017 Report at 191.

<sup>96</sup> *Id.* at 192.

<sup>97</sup> E.g., 2022 HRW UN Submission at 5; REDLAC at 1.

<sup>98</sup> HRW UN Submission at 7 (reporting instances of police abuse; “A police officer hit me on my jaw and for the next two weeks, I could only drink liquids through a straw. He threatened to kill me.”); SUPPORT KIND, LATIN AMERICA WORKING GROUP EDUCATION FUND AND WOMEN’S REFUGEE COMMISSION, SEXUAL AND GENDER-BASED VIOLENCE (SGBV) & MIGRATION FACT SHEET (December 2018), at 1, 3-4, [SGBV-Fact-Sheet.-December-2018-new-1.pdf \(supportkind.org\)](#) (“violence by police and other authorities is also widespread” and “[in Northern Triangle countries] LGBTI victims do not report violent crimes because they fear discrimination and abuse by authorities, and the vast majority of reported crimes against LGBTI people are not investigated”).

<sup>99</sup> REDAC, *supra* at 8.

<sup>100</sup> 2021 Guatemala Country Report at 36; 2020 Guatemala Country Report at 25.

<sup>101</sup> REDLAC at 4.

<sup>102</sup> UN Submission at 7.

violence against LGBTQ people.<sup>103</sup> There is a “lack of will on the part of police to investigate fully hate crimes and violence against LGBTQI+ persons.”<sup>104</sup>

Notably, “the law does not extend specific antidiscrimination protections to LGBTQI+ individuals based on their sexual orientation, gender identity or expression, or sex characteristics” and there is “general societal discrimination against LGBTQI+ persons in access to education, health care, employment, and housing.”<sup>105</sup> Recently, Guatemala’s Congress passed a “Protection of Life and Family” law that “explicitly prohibited same-sex marriage – which was already in effect illegal – and banned schools from teaching anything that could ‘deviate [a child’s] identity according to their birth gender.’”<sup>106</sup>

The complex web of violence and high levels of discrimination and stigmatization, as well as the lack of protection experienced by the LGBTQ community in Guatemala, threatens their physical safety, limits their life choices, and leads many to flee the country.<sup>107</sup> “Although no comprehensive statistics are available on LGBT people’s economic situation in Guatemala, family rejection and discrimination in access to employment and education lead to a higher likelihood of economic marginalization,” particularly for trans women, who often cannot secure work outside of the sex trade.<sup>108</sup> Poverty in turn places LGBTQ people at high risk of violence from gang members, members of the public, and government actors like the police and security forces.<sup>109</sup> In sum, it’s a vicious cycle: “while victims of violence in Guatemala generally face monumental challenges obtaining redress in the face of fragile institutions, corruption and gang influence, LGBT victims often face an additional barrier in the form of stigma and discrimination from the very law enforcement agents charged with keeping them safe.”<sup>110</sup> These conditions “lead to forced displacement and migration of this population.”<sup>111</sup>

This reality is borne out by clients of commenter organizations. For example, Immigration Equality has represented over 40 LGBTQ/H Guatemalans who fled their country to seek asylum within

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<sup>103</sup> 2020 Guatemala Country Report at 25; Inter-American Commission on Human Rights, Organization of American States (IACHR), Country Report Guatemala: Situation of Human Rights in Guatemala (2017) (“IACHR 2017 Report”), at 66, <https://www.oas.org/en/iachr/reports/pdfs/Guatemala2017-en.pdf>.

<sup>104</sup> 2021 Guatemala Country Report at 36.

<sup>105</sup> *Id.* at 35-36.

<sup>106</sup> Guatemala increases punishment for abortions and bans same-sex marriage, *The Guardian*, Mar. 9, 2022, <https://www.theguardian.com/world/2022/mar/09/guatemala-abortion-punishment-bans-same-sex-marriage>

<sup>107</sup> Report of the United Nations High Commissioner for Human Rights, A/HRC/49/20: Situation of Human Rights in Guatemala, United Nations Human Rights Council, 49th Session, February 28-April 1, 2022, at 8, [G2228875.pdf \(un.org\)](https://www.un.org/ruhrdocdefault.aspx?DocumentID=2228875) (“Stigmatization, harassment, discrimination and rates of violence against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons are issues of concern and require urgent preventive and protective measures.”); Barrett, *supra* at 2 (“According to a study by the Ministry of Public Health 71 percent of transgender women in Guatemala report being victim to discrimination, 60 percent have reported physical abuse and 61 percent earn less than minimum wage.”); 2021 HRW Report at 1; REDLAC, *supra* at 3-7.

<sup>108</sup> 2021 HRW Report at 1; Human Rights Watch, Submission to United Nations Committee on the Elimination of Discrimination Against Women, Review of Guatemala, 85th Pre-Session, (October 2022) (“2022 HRW UN Submission”), at 1, [https://www.hrw.org/sites/default/files/media\\_2022/10/HRW%20Submission%20to%20the%20Committee%20on%20the%20Elimination%20of%20Discrimination%20Against%20Women%20Review%20of%20Guatemala.pdf](https://www.hrw.org/sites/default/files/media_2022/10/HRW%20Submission%20to%20the%20Committee%20on%20the%20Elimination%20of%20Discrimination%20Against%20Women%20Review%20of%20Guatemala.pdf).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> UNHCR Report at 9 (“the increase in the number of aggressions and killings of trans women in recent years due to the lack of legislation and other inclusive policies on gender identity ... forced trans persons to migrate away from the northern triangle.”).

the U.S., and has maintained a 99% success rate in obtaining relief for these individuals in adjudicated cases. That is because the situation for LGBTQ/H Guatemalans is dire, and they easily meet the definition of refugee. For example:

B.M., suffered horrific, repeated acts of violence and abuse on account of her perceived and actual sexual orientation and gender identity in her native Guatemala. Owing to her feminine appearance and mannerisms, B.M. was repeatedly raped as a child and a teen (beginning with rapes when she was seven, and again when she was nine) by gang members and others in her community. She was also violently beaten, and subject to near constant verbal and physical abuse. In one incident, when a neighbor attacked B.M., her brother was shot trying to protect her. Later, she saw her brother murdered because of his sexual orientation and refusal to work for a gang. She fled to the U.S. B.M. was granted asylum and is now living safely in the U.S. with her wife and their child.

G.A. is a gender fluid Guatemalan who identifies as a gay man, but does not view himself as strictly male or strictly female and sometimes presents as a woman. G.A. suffered severe physical and psychological abuse throughout his childhood because of his perceived sexual orientation. At six, he was kidnapped by a group of men, held captive for three days, and sexually assaulted. He was afraid to tell anyone but an aunt about what had actually happened to him out of fear and shame. Later, when he came out to his family at 12, he was beaten by his brother and cast out of the family home. While trying to support himself, he was attacked twice by members of the Barrio 18 gang who targeted him because of his sexual orientation. In the first incident, gang members took turns sexually assaulting him while calling him homophobic slurs and an “abomination of God.” In the second, G.A. and his boyfriend were attacked by gang members with a bat. G.A. fled to the U.S. where he was granted asylum.

From an early age, V.H. felt more like a girl than a boy, but did not fully understand her transgender identity at the time. When V.H. was still very young, her mother left to the United States and she was left to care for her younger siblings. When she was about twelve, she got her first job doing makeup for beauty pageant candidates. This gave her the opportunity to meet other LGBTQ people and realize she was not alone. One night in 2018, V.H. was targeted, detained, and attacked by four members of the national police while she was walking home from work. The officers called her gay slurs while they hit her and brought her to a secluded area where they raped her. The officers threatened to harm her further if she reported the rape and left her on the ground near a river. V.H. needed medical attention for her injuries after the attack, including stitches on her hand. V.H. was also diagnosed with HIV shortly thereafter, which she believes was a result of the rape. V.H.’s case is pending.

Oasis client, Eduardo, is a 38-year-old gay, HIV-positive man from Guatemala. Because of his sexual orientation he was threatened, insulted, sexually assaulted, and raped, beginning at a young age, including being raped by a neighbor when Eduardo was in his teens. He was harassed by the police for showing signs of affection to a boyfriend. He also had serious issues obtaining HIV medication. He began taking medication as soon as he was diagnosed with HIV, however, when he went to refill his medication, he was often given different kinds of medication because the medication he was prescribed had run out. On one occasion, he was given expired medication. In 2021, after being threatened because of his LGBTQ status, he finally fled Guatemala and won asylum in the U.S.

## Honduras

Honduras is one of the most dangerous countries in the world for LGBTQ people, and violence against the community is pervasive and extreme.<sup>112</sup> Queer and transgender people are routinely targeted because of their gender identity and sexual orientation and are extorted, savagely beaten, raped, and murdered at alarming rates.<sup>113</sup> Such persecution is sanctioned, and often perpetrated, by Honduran police and security forces without recourse or justice.<sup>114</sup>

Brutal murders of LGBTQ people are common.<sup>115</sup> For example, “[d]ata collected by human rights organizations show that Honduras has the highest rate of murders of transgender and other gender diverse people in the world.”<sup>116</sup> According to a report from the Immigration and Refugee Board of Canada, “sexual minorities have been killed in a ‘very dehumanizing manner’ and in ‘very savage’

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<sup>112</sup> See generally, e.g., Immigration Equality, Honduras 2020 LGBTQ Index and Exhibits, <https://immigratonequality-CountryConditions-Honduras> (collecting citations and sources); see also Astraea Lesbian Foundation For Justice, Honduras LGBTI Landscape Analysis of Political, Economic & Social Conditions (2016), at 4, 8, [https://s3.amazonaws.com/astraea.production/app/asset/uploads/2016/03/Astraea.Honduras.PRINT\\_.16.pdf](https://s3.amazonaws.com/astraea.production/app/asset/uploads/2016/03/Astraea.Honduras.PRINT_.16.pdf), (“Honduras has the highest per capita homicide rate in the world...LGBTI people, particularly human rights advocates, are among those most at risk”); IACHR, Annual Report (2021).

<sup>113</sup> E.g., *id.*; IACHR, Situation of Human Rights in Honduras, ¶¶ 130-141, <http://www.oas.org/en/iachr/reports/pdfs/Honduras-en-2015.pdf> (describing violence and mistreatment)(“these killings are motivated by hatred and by prejudice toward sexual diversity”).

<sup>114</sup> E.g., Human Rights Watch, Honduras Events of 2021, <https://www.hrw.org/world-report/2022/country-chapters/honduras#e81181> (LGBTQ people are subject to violence and extortion “from gangs, the national civil police and military police, and members of the public.”); PBI Honduras, 2019 News PBI Honduras (Dec. 2019) (“PBI Honduras”), at 22-23, [https://pbi-honduras.org/sites/pbi-honduras.org/files/publications/Boletin%20noticias\\_ENGB.pdf](https://pbi-honduras.org/sites/pbi-honduras.org/files/publications/Boletin%20noticias_ENGB.pdf), (UN Special Rapporteur Michael Forst, states “that he was very worried about ‘the high number of violent killings and attacks against LGBT people, the prevailing lack of accountability and almost total impunity,’” “In Honduras, impunity rates are higher than 90%, and in the case of attacks against the LGBTIQ + community, this percentage exceeds 95%”); PBI Honduras, “2019 News PBI Honduras” (Dec. 2019), [https://pbi-honduras.org/sites/pbi-honduras.org/files/publications/Boletin%20noticias\\_ENGB.pdf](https://pbi-honduras.org/sites/pbi-honduras.org/files/publications/Boletin%20noticias_ENGB.pdf)

<sup>115</sup> E.g., PBI Honduras at 22 (“From 2008 until the beginning of 2018, at least 295 LGBTIQ+ people were killed in Honduras; and at least 11 of them were recognized as human rights defenders. [...] LGBTIQ+ organizations frequently report that the perpetrators are members of the state security forces. This situation does not seem to have improved during 2019”); Human Rights Watch, “Amidst Violence, Hondurans March for Pride” (Sept. 9, 2019), <https://www.hrw.org/news/2019/09/09/amidst-violence-hondurans-march-pride> (“in 2018, 25 LGBT people were killed: 16 gay men, 5 trans people, and 4 lesbian women. And the situation appears to be worsening: the number of killings tallied between January and August of 2019 – 13 gay men”); Human Rights Council, *Situation of human rights in Honduras: Report of the United Nations High Commissioner for Human Rights, A/HRC/43/3/Add.2* (Apr. 2, 2020) (“Canada Report”), at 13, <https://undocs.org/en/A/HRC/43/3/Add.2> (“In the course of 2019 at least 31 lesbian, gay transgender, bisexual and intersex persons were killed.”); Lavers, “Journalist who condemned anti-LGBTQ violence, corruption in Honduras murdered,” Washington Blade (Sept. 29, 2020), <https://www.washingtonblade.com/2020/09/29/journalist-who-condemned-anti-lgbtq-violence-corruption-in-honduras-murdered/> (“A journalist in Honduras who publicly condemned anti-LGBTQ violence has been killed,” “Santi Carvajal, a trans woman who hosted a program on a television station in Puerto Cortés, a city on Honduras’ Caribbean coast, was shot to death in July 2019.”); 2022 Honduras Country Reports at 19-20.

<sup>116</sup> E.g., Frances Robles, They Call it Social Cleansing: Court May Force Honduras to Better Protect Trans People, N.Y. TIMES (Apr. 29, 2021), <https://www.nytimes.com/2021/04/29/world/americas/honduras-transgender-rights.html> (there is a “pattern in all of these cases: They are all shot in the head,” and “there [are] no autopsies and no investigations; see also, e.g., 2019 Human Rights Report, *supra*, at 19; Astraea Lesbian Foundation for Justice, *supra*; HUMAN RIGHTS WATCH, NOT WORTH A PENNY, *supra*).

ways in their homes and in public spaces, including being stoned to death and mutilated.”<sup>117</sup> The particularly gruesome manner in which many LGBTQ people are murdered “indicates they were targeted due to their gender identity.”<sup>118</sup> For example:

- “Sherlyn Montoya, a transwoman, was killed and found dead in Tegucigalpa .... Sources indicate that Sherlyn Montoya was an LGBTI human rights [activist]...[and] that her body was found wrapped in sacks and that it showed signs of torture and strangulation.”<sup>119</sup>
- “In one case documented by Human Rights Watch in June 2019, a transgender woman was killed and mutilated near San Pedro Sula in an apparent hate crime.”<sup>120</sup>
- “Rene Martínez, a vocal LGBTI leader ... was found dead in his home on June 3, 2017 after having been reported missing. His body showed clear signs of torture and indications that he was strangled to death.”<sup>121</sup>
- “Eduardo O., a gay man from Honduras, said he fled the country shortly after gang members beat his romantic partner to death. Gang members had previously threatened to kill Eduardo. Then in June 2021, the same gang members attacked him and his partner while they were together. While Eduardo was able to escape, he said, his partner could not. He said he reported his partner’s murder to the police, who did not investigate.”<sup>122</sup>

This violence has continued unabated, with the government unwilling to intervene. Impunity is a problem.<sup>123</sup> Indeed, “no one has ever been convicted of a hate crime against LGBT people” in Honduras.<sup>124</sup> Notably, the Tenth Circuit recently recognized that “acts of violence are so widespread that any reasonable adjudicator would find a pattern or practice of persecution against transgender women in Honduras.” *Aguilar v. Garland*, 29 F.4th 1208, 1213 (10th Cir. 2022) (collecting sources), <https://casetext.com/case/gonzalez-aguilar-v-garland-1>.

In addition to murder, LGBTI Hondurans are subject to a host of bias motivated violence and abuse, including, rape and sexual assault, arbitrary arrest, robbery, beatings, extortion, and severe discrimination and harassment.<sup>125</sup> People living with HIV also face persistent discrimination and abuse,

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<sup>117</sup>Excerpt of Research Directorate, Immigration and Refugee Board of Canada, Honduras: Information Gathering Mission Report (Feb. 2018) (“Canada Report”), at 60, <https://irb-cisr.gc.ca/en/country-information/research/Pages/Honduras-2018P1.aspx#h-chap3>.

<sup>118</sup> *Velasquez-Banegas v. Lynch*, 846 F.3d 258 (7th Cir. 2017), at 265, <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D01-19/C:15-2619;J:Posner;aut:T:fnOp:N:1898108;S:0>

<sup>119</sup> Canada report at 60.

<sup>120</sup> Human Rights Watch, “Honduras: Events of 2019” (2020), at 4, <https://www.hrw.org/world-report/2020/country-chapters/honduras>.

<sup>121</sup> Latin America Working Group Educ. Fund, *Left in the Dark: Violence Against Women and LGBTI Persons in Honduras and El Salvador* (Mar. 7, 2018), at 4-5, <https://www.lawg.org/left-in-the-dark-violence-against-women-and-lgbti-persons-in-honduras-and-el-salvador/>

<sup>122</sup> Human Rights Watch, *US: LGBT Asylum Seekers in Danger at the Border* (May 31, 2022), at 5, <https://www.hrw.org/news/2022/05/31/us-lgbt-asylum-seekers-danger-border>.

<sup>123</sup> 2022 Honduras Country Report at 19-20.

<sup>124</sup> Philippa H. Stewart & Neela Ghoshal, *LGBT People Flee Violence in El Salvador, Guatemala, Honduras*, Human Rights Watch (Oct. 7, 2020), <https://www.hrw.org/news/2020/10/07/interview-lgbt-people-flee-violence-el-salvador-guatemala-honduras>.

<sup>125</sup> *See, e.g.*, Human Rights Watch, “Honduras: Events of 2021” (2022), [https://www.hrw.org/sites/default/files/media\\_2022/01/World%20Report%202022%20web%20pdf\\_0.pdf](https://www.hrw.org/sites/default/files/media_2022/01/World%20Report%202022%20web%20pdf_0.pdf)

including forced sterilization of HIV positive women, exclusion from many jobs given that a negative HIV test is often required, and deficient medical care or denial of HIV care altogether.<sup>126</sup>

These conditions have been widely reported and documented by governmental, regional and international human rights organizations, media outlets, and activists.<sup>127</sup> The U.S. Government has long recognized the dire conditions faced by the LGBTQ community in Honduras. The 2021 State Department Human Rights Report noted that “[s]ignificant human rights issues included ... threats and violence against ... lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons” and that “discrimination against LGBTQI+ persons persisted, as did physical violence....” Including “17 violent deaths of LGBTQI+ persons as of August [2021].”<sup>128</sup>

Despite some progressive reforms, the violence and abuse shows no sign of abating and recent reports indicate that it has actually increased.<sup>129</sup> In 2020, for example, the Department of State noted “an increase in the number of killings of LGBTI [Hondurans] during...” 2019.<sup>130</sup> Similarly, the COVID-19 pandemic “intensified the violence against” LGBTQ individuals.<sup>131</sup> Indeed, Honduras was one of just three countries observed “where violence against LGBTQ people increased during the pandemic year of 2020 in comparison to 2019.”<sup>132</sup> And at least 45 LGBTQ individuals were murdered in Honduras in 2022—making that, according to one report, the deadliest year for LGBTQ people in Honduras since 1994.<sup>133</sup>

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“No Safe Place” Amnesty International, 7 (Nov. 2017) <https://www.unhcr.org/en-us/5a2ee5a14.pdf> (“According to UNHCR, 88 percent of LGBTI asylum seekers and refugees from the Northern Triangle interviewed in the context of a study reported having suffered sexual and gender-based violence in their countries of origin.”); I Knew I Had to Get Out to Survive’ – Violence Drives LGBT Central Americans North, Linda Farthing, WORLD POLITICS REVIEW, May 13, 2019, <https://www.worldpoliticsreview.com/articles/27840/i-knew-i-had-to-get-out-to-survive-violence-drives-lgbt-central-americans-north> (LGBTI activists in Honduras face “relentless scrutiny, persecution, arbitrary arrests, attacks, robberies and sexual assault”).

<sup>126</sup> 2019 Honduras Country report at 20, 24; *Velasquez-Banegas v. Lynch*, 846 F.3d 258 (7th Cir. 2017), at 259-261, <http://mediamedia.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D01-19/C:15-2619:J:Posner:aut:T:fnOp:N:1898108:S:0> ; Excerpt of The Glob. Fund, “Baseline Assessment - Honduras: Scaling up Programs to Reduce Human Rights-Related Barriers to HIV Services” (Nov. 2018), at 26-34, [https://www.theglobalfund.org/media/8150/crg\\_humanrightsbaselineassessmenthonduras\\_report\\_en.pdf?u=637319004306270000](https://www.theglobalfund.org/media/8150/crg_humanrightsbaselineassessmenthonduras_report_en.pdf?u=637319004306270000); see also generally Immigration Equality Honduras 2020 HIV Index and Exhibits, <https://immigrationequality.sharepoint.com/sites/Legal-CountryConditions/Shared%20Documents/Forms/AllItems.aspx?ga=1&id=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FHonduras%2FHonduras%202020%20HIV%20Index%20and%20Exhibits%2Epdf&parent=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FHonduras>

<sup>127</sup> See generally Immigration Equality Honduras LGBTQ Index and Exhibits.

<sup>128</sup> Honduras Human Rights Report 2021 at 20; see also 2022 Honduras Human Rights Report at 19.

<sup>129</sup> Honduras Human Rights Report 2021 at 20 (despite some progressive reforms “discrimination against LGBTQI+ persons persisted, as did physical violence....”).

<sup>130</sup> Bureau of Democracy, Hum. Rts., & Lab., U.S. Dep’t of State, Honduras 2019 Human Rights Report, 19, <https://www.state.gov/wp-content/uploads/2020/02/HONDURAS-2019-HUMAN-RIGHTS-REPORT.pdf> (hereinafter “2019 Human Rights Report”).

<sup>131</sup> Honduras Project, Under lockdown in Honduras, trans women face a double violation of their rights, <https://pbi-honduras.org/news/2020-05/under-lockdown-honduras-trans-women-face-double-violation-their-rights>

<sup>132</sup> Laura Valentina Cortés Sierra, The Mortal Danger of Being Trans in Latin America, WORLD CRUNCH (Nov. 3, 2021), <https://worldcrunch.com/lgbtq-plus/trans-rights-latin-america>.

<sup>133</sup> Amelian Zerón, El estado de excepción no ha frenado las muertes violentas, Reportar Sin Miedo (Jan. 14, 2023), <https://reportarsinmiedo.org/2023/01/14/el-estado-de-excepcion-no-ha-frenado-las-muertes-violentas/>.

Attempts to address the systemic abuse have not resulted in meaningful change. In 2021, the Interamerican Court of Human Rights held the State of Honduras responsible for the death of an LGBTQ woman.<sup>134</sup> As a result, the court ordered Honduras to train security forces to investigate anti-LGBT violence and to adopt a process for allowing transgender individuals to change the gender listed on their identity documents.<sup>135</sup> Instead of implementing these changes, however, then-President Juan Orlando Hernandez called those who defended the rights of the LGBTQ community “enemies of independence.”<sup>136</sup> Then, Honduras proceeded to amend its constitution to reinforce a longstanding ban on marriage equality by requiring a 75-percent supermajority to overturn the prohibition.<sup>137</sup> The result has been “complete devastation for LGBT communities,” who are sure to “continue to face violence.”<sup>138</sup>

The conditions for LGBTQ people in Honduras are grave. But, as the U.S. government has recognized, LGBTQ *refugees* in Honduras are at particular risk.<sup>139</sup> Because of their refugee status, they are especially vulnerable to sexual exploitation and abuse from criminal organizations.<sup>140</sup>

Brutal violence, and extreme mistreatment and stigmatization drive LGBTQ/H people to flee for safety. Commenter organizations serve many LGBTQ Honduran asylum seekers, for example, Immigration Equality has represented almost 150 LGBTQ/H people from Honduras who fled persecution to seek asylum in the U.S. Immigration Equality has maintained a 99% success rate in obtaining relief in adjudicated Honduran cases. That is because the situation for LGBTQ/H Hondurans is dire, and they easily meet the definition of refugee and qualify for asylum. For example:

Immigration Equality client N.B. is a lesbian from Honduras. Growing up, everyone assumed her brother was gay and bullied N.B. for it. She used to hang out with her brother and his friends in the underground gay scene, where she witnessed violence against LGBTQ individuals and the people who try to help them. In fact, she saw a group of men kill a bouncer for trying to intervene as they were attacking an LGBTQ patron. While N.B. was in college, her brother was forced to leave Honduras when the police prevented emergency services from assisting him, and instead, threatened to kill him for being gay. While in college, N.B. was arrested when the police caught her kissing another woman. Later, N.B. was at a party when four men drugged and raped her “to cure” her of her sexual orientation. When N.B. and her now-wife moved in together, they faced constant abuse from neighbors and members of society. N.B. fled Honduras out of fear for her life and was granted asylum in the U.S. She now is happily married to her wife and has been reunited with her gay brother, who was also granted asylum.

M.R. is a gay man from Honduras. Ever since he was a child, M.R. experienced violence and abuse from his family because of his sexual orientation. In 2016, M.R. started receiving death threats from men in his community, saying that he would be killed because he was gay. M.R. reported these threats to the police, but the police did not take any action to protect him. As a result, M.R. fled to another part of the country. But in 2019, when M.R. and his partner came back to M.R.’s hometown for a visit, they were beaten and raped by the people who had sent

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<sup>134</sup> Cortés Sierra, *supra*.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Suyapa Portillo, In Honduras, the Right Is Permanently Locking in Its Abortion Ban, JACOBIN (Mar. 1, 2021), <https://jacobin.com/2021/03/honduras-abortion-ban-constitutional-amendment>

<sup>138</sup> *Id.*

<sup>139</sup> 2022 Honduras Country Report at 11.

<sup>140</sup> *Id.*



M.R. the death threats. Later that year, M.R. and his partner began receiving extortion threats from a criminal gang in another part of the country because of their LGBTQ status. M.R. reported these threats to the police, but the police once again failed to act. Shortly after, M.R. and his partner were targeted, beaten, and raped by the criminal gang that was extorting them because they were gay. During the attack, the gang members taunted them with homophobic slurs. M.R. and his partner left Honduras immediately after the attack and came to the United States to ask for asylum. M.R.'s partner won asylum; M.R.'s case is pending.

Veronica is a transgender woman from Honduras who suffered horrific persecution on account of her gender identity and because she was perceived as gay man. Veronica knew from a very young age that she is a woman and at ten, told her parents this. Her family rejected her and threw her out of the house. Veronica was taken in by her friend's mother, who forced her into sex work. As a sex worker, Veronica was beaten and raped by a uniformed police officer. When Veronica told her friend's mother about the rape, instead of mercy and compassion, her friend's mother told her to "act like a man". At school, Veronica was bullied and abused. Once, her classmates tied her up and beat her in the face with belt buckles. Veronica moved to a different part of Honduras, where she was attacked and beaten by a police officer. Knowing that she would not be safe anywhere in Honduras, Veronica traveled through Guatemala and Mexico, and crossed the U.S. border. Once in the U.S., Veronica was finally able to access gender affirming care. Veronica was granted asylum in 2020. She has since applied for a green card.

Maria is a bisexual woman from Honduras who is living with HIV. Maria first started dating women in high school, but hid her same sex relationships out of fear. Maria became pregnant, and through pre-natal testing learned that she was HIV-positive. As a result, her pregnancy was closely monitored. Maria frequently had to leave work early for medical check-ups. Her employers became suspicious, bribed the medical facility, and discovered her HIV status. They became extremely hostile towards Maria, who was demoted, physically segregated, and socially and professionally ostracized. Maria filed a complaint with the Ministry of Labor and Ministry of Human Rights alleging discrimination. Not only was her complaint ignored, but her employer found out about the complaint and retaliated with violence. The employer had Maria kidnapped into a van and beaten, even though she was visibly pregnant. The beating was so severe that Maria began to bleed from her vagina. The attackers told her that if she didn't stop making complaints, they would further hurt her, her child, and her family. They then threw Maria out of the van. Maria went to the police, who told her to file a complaint with the ministry of Labor, since it was an employment issue. Later, Maria was staying with her great uncle. Men came up to the house and started asking for Maria. He claimed not to know her and was shot dead for protecting her. Maria's family blamed her for the murder of her great uncle. Maria fled to the U.S. and was granted asylum. Since then, she has applied to become a lawful permanent resident and has petitioned for her son to come to the U.S. on derivative asylum status.

### **El Salvador**

El Salvador is extremely dangerous for LGBTQ people.<sup>141</sup> Queer and trans individuals have been "threatened, murdered, forcibly disappeared[,] or forcibly displaced across international borders

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<sup>141</sup> See generally, e.g., Immigration Equality, El Salvador 2022 LGBTQ Index and Exhibits, <https://immigrationequality.sharepoint.com/sites/Legal-CountryConditions/Shared%20Documents/Forms/AllItems.aspx?ga=1&id=%2Fsites%2FLegal%2DCountryConditio>

to save their lives.”<sup>142</sup> “Hate crimes, assaults, acts of discrimination, exclusion, denial of services, stigma and marginalization remain the reality for Salvadoran LGBTI persons, who face high poverty rates, low level of education, murders and low life expectancy beyond 33 years of age.”<sup>143</sup>

For decades, reports from news outlets, governmental organizations, and human rights groups have documented the routine, savage violence against queer and trans people.<sup>144</sup> The atrocities show no signs of abating. From 1993 to 2017, over 600 LGBTQ people were murdered in El Salvador, and the main perpetrators were police officers, military soldiers, and gang members.<sup>145</sup> In 2014, former human rights ombudsman, David Morales, and former U.N. resident coordinator for El Salvador, Roberto Valent, denounced a string of killings of LGBTQ people in the country, noting a 400% increase in hate crimes in the previous decade and highlighting the evidence of torture of LGBTQ people.<sup>146</sup>

Between December 2014 and March 2017 alone, there were at least 109 LGBTQ murders recorded in El Salvador; only 12 of which went to trial, and none of which resulted in a conviction.<sup>147</sup> “The Attorney General’s office in El Salvador released statistics in January 2020 indicating it had tabulated 692 cases of violence against LGBT and intersex people in five years.”<sup>148</sup> The actual numbers are likely higher since underreporting is an issue.<sup>149</sup> Significantly, the government also recognized violations and violence at the hands of security officials, specifically acknowledging that LGBTQ people are subject to “widespread discrimination...[and multiple forms of violence, including acts of torture, inhuman or degrading treatment, excessive use of force, illegal and arbitrary arrests and other

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[ns%2FShared%20Documents%2FEI%20Salvador%2FEI%20Salvador%202022%20LGBTQ%20Index%20and%20Exhibits%2Epdf&parent=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FEI%20Salvador](#) (collecting citations and sources); 2022 El Salvador Country Report at 27-28, [https://www.state.gov/wp-content/uploads/2023/02/415610\\_EL-SALVADOR-2022-HUMAN-RIGHTS-REPORT.pdf](https://www.state.gov/wp-content/uploads/2023/02/415610_EL-SALVADOR-2022-HUMAN-RIGHTS-REPORT.pdf); 2021 El Salvador Country Report, at 1, 33-32, [https://www.state.gov/wp-content/uploads/2022/02/313615\\_EL-SALVADOR-2021-HUMAN-RIGHTS-REPORT.pdf](https://www.state.gov/wp-content/uploads/2022/02/313615_EL-SALVADOR-2021-HUMAN-RIGHTS-REPORT.pdf); 2020 El Salvador Country Report, at 1-2, 25-26, <https://www.state.gov/wp-content/uploads/2021/10/EL-SALVADOR-2020-HUMAN-RIGHTS-REPORT.pdf>; 2019 El Salvador Country Report, at 1, 22-23, <https://www.state.gov/wp-content/uploads/2020/02/EL-SALVADOR-2019-HUMAN-RIGHTS-REPORT.pdf>.

<sup>142</sup> Inter-American Commission on Human Rights, Situation of Human Rights in El Salvador (Oct. 14, 2021), at 97, [2021\\_ElSalvador-EN.pdf \(oas.org\)](https://www.oas.org/en/iachr/media_center/PReleases/2021/065.asp)

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Georgetown Law Human Rights Institute, Uniformed Injustice: State Violence Against LGBT People in El Salvador, 65 (April 23, 2017), <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/2017-HRI-Report-Uniformed-Injustice.pdf>.

<sup>146</sup> HUMAN RIGHTS FIRST, Bias-Motivated Violence Against LGBT People in El Salvador, Issue Brief, 2–3, [https://humanrightsfirst.org/wp-content/uploads/2022/10/El-Salvador-Brief-ENG\\_0.pdf](https://humanrightsfirst.org/wp-content/uploads/2022/10/El-Salvador-Brief-ENG_0.pdf)

<sup>147</sup> Reuters, Pressure Mounts for El Salvador to Investigate Wave of LGBT Killings (Nov. 21, 2019), <https://www.reuters.com/article/us-el-salvador-lgbt-murder-trfn/pressure-mounts-for-el-salvador-to-investigate-wave-of-lgbt-killings-idUSKBN1XW01G>.

<sup>148</sup> Human Rights Watch, Everyday I Live in Fear, Violence and Discrimination Against LGBT People in El Salvador, Guatemala, and Honduras, and Obstacles to Asylum in the United States (Oct. 7, 2020) (“2020 HRW El Salvador Report”), at 27-28, <https://www.hrw.org/report/2020/10/07/every-day-i-live-fear/violence-and-discrimination-against-lgbt-people-el-salvador>; Human Rights Watch, El Salvador Events of 2021 (2022) (“2022 HRW El Salvador Report”), at 5, <https://www.hrw.org/world-report/2022/country-chapters/el-salvador> (“692 cases of violence against LGBT and intersex people from January 2015 to June 2019”).

<sup>149</sup> *E.g.*, OAS, IACHR Expresses Concern over Recent Violent Attacks against LGBTI People in the Americas (Mar. 14, 2019), at 2, [https://www.oas.org/en/iachr/media\\_center/PReleases/2019/065.asp](https://www.oas.org/en/iachr/media_center/PReleases/2019/065.asp).

forms of abuse, much of it committed by public security agents.”<sup>150</sup> Tragically, the government is either unwilling or unable to protect the LGBTQ community from such harm.

Indeed, LGBTQ Salvadorans live in constant fear because they are targeted for violence and abuse.<sup>151</sup> Murders of LGBT people are often marked by a level of brutality that reveals the hate and dehumanization motivating the crimes. These homicides are characterized by signs of torture, including severe beating, dismemberment, multiple stab wounds, and multiple gunshots.<sup>152</sup> For example:

- Anahy Rivas, a 27-year-old transwoman, was killed after being [stabbed] and dragged behind a car.<sup>153</sup>
- Jade Diaz, a transwoman who disappeared ...was assaulted prior to her killing. Her body was found submerged in a river.<sup>154</sup>
- Between October 2019 and March 2020, at least seven transgender women and one gay man were murdered in El Salvador. Several cases bore clear indications of being anti-LGBT hate crimes.<sup>155</sup>
- “Victoria Pineda ...was found naked in Ahuachapán with her face disfigured and covered in logs and a car tire. [She was believed to be] ‘crucified,’ with the tire symbolizing a crown of thorns and the logs the wooden crossbar. Tita Andrade, another transgender woman, was found 90% burned in La Unión. Such symbolic and brutal murders are often committed against groups like the LGBT community accused of ‘moral crimes.’”<sup>156</sup>

The IACHR has voiced concern about “violent incidents against LGBTI people entailing extreme viciousness and cruelty,” as well as “the fact that such attacks are significantly underreported,” noting that “[v]iolence against LGBTI people in the Americas is often not reported to authorities or covered by the media, which leads to invisibilization.”<sup>157</sup>

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<sup>150</sup> 2020 HRW El Salvador Report at 27-28.

<sup>151</sup> 2022 HRW El Salvador Report at 5; see also Uniformed Injustice, at 29.

<sup>152</sup> *Id.*; see also OAS (Organization of American States), Press Release, IACHR Expresses Concern over Recent Violent Attacks against LGBTI People in the Americas (Mar. 14, 2019) (“OAS Press Release”), at 2, [https://www.oas.org/en/iachr/media\\_center/PReleases/2019/065.asp](https://www.oas.org/en/iachr/media_center/PReleases/2019/065.asp) (reporting on murders, the “first of the victims died in hospital from multiple injuries. The second victim was attacked with a machete and also died in hospital as a result of this.”)

<sup>153</sup> 2019 El Salvador Country Report at 22-23; IACHR, Situation of Human Rights in El Salvador at 9; Ernesto Valle, Washington Blade, Anti-LGBTQ Hate Crimes in El Salvador on the Rise (Nov. 24, 2019), <https://www.washingtonblade.com/2019/11/24/anti-lgbtq-hate-crimes-in-el-salvador-on-the-rise/>.

<sup>154</sup> *Id.*

<sup>155</sup> Human Rights Watch, “I’m Lucky to Still be Alive” Violence and Discrimination Against LGBT People in El Salvador (2021) (“HRW, I’m Lucky to Still be Alive”), at 30 [https://www.hrw.org/sites/default/files/media\\_2021/03/%E2%80%9CI%E2%80%99m%20Lucky%20to%20Still%20Be%20Alive%E2%80%9D.pdf](https://www.hrw.org/sites/default/files/media_2021/03/%E2%80%9CI%E2%80%99m%20Lucky%20to%20Still%20Be%20Alive%E2%80%9D.pdf); see also REUTERS, ‘Terrorized at home’, Central America’s LGBT people to flee for their lives: report (Nov. 27, 2017), <https://www.reuters.com/article/us-latam-lgbt-rights/terrorized-at-home-central-americas-lgbt-people-to-flee-for-their-lives-report-idUSKBN1DR28Q>.

<sup>156</sup> Human Rights Watch, Christian Gonzalez Cabrera, Justice for LGBT Salvadorans Requires Reckoning with Hate (Apr. 11, 2020), at 1-2, <https://www.hrw.org/news/2020/04/11/justice-lgbt-salvadorans-requires-reckoning-hate>.

<sup>157</sup> OAS Press Release at 1.

Trans and queer people also are often the targets of sexual violence. According to UNHCR, “88 percent of LGBTI asylum seekers and refugees from the Northern Triangle interviewed in the context of a study reported having suffered sexual and gender-based violence in their countries of origin.”<sup>158</sup>

Queer and trans people are particularly vulnerable to powerful gangs who control entire city neighborhoods and “specifically target LGBT people, killing, assaulting, threatening or extorting them” because of “personal anti-LGBT animus” and “to assert social control or dominance; or because gangs recognize that LGBT people, particularly those who live in poverty, may have weak social support systems to protect them.”<sup>159</sup> Gangs also sexually abuse and rape LGBTQ people killing, disappearing, or displacing those who resist.<sup>160</sup>

At hospitals and healthcare facilities where LGBTQ people seek help, they are mistreated, discriminated against, and denied service because of their sexual orientation and gender identity.<sup>161</sup> “HIV discrimination is widespread.”<sup>162</sup>

As the U.S. has recognized, rather than protecting the LGBTQ community, government actors actively perpetuate the torture and abuse of LGBTQ people.<sup>163</sup> According to the most recent State Department Human Rights Report, “public officials, including police, engaged in violence and discrimination against LGBTQI+ persons” and “the [National Civilian Police] and officials from the Attorney General’s Office harassed transgender and gay individuals who reported cases of violence against LGBTQI+ persons, including by conducting unnecessary and invasive strip searches.”<sup>164</sup> Salvadoran police officers and military soldiers perpetrate the violence and have raped, beaten, stalked, arbitrarily detained, extorted, intimidated, and threatened LGBTQ people.<sup>165</sup> “Interviews with over 50 [LGBTQ] victims, NGO leaders and government officials revealed that violence from the police and military follow general patterns.”<sup>166</sup> When a LGBTQ person’s sexual orientation or gender identity is readily apparent, police officers and soldiers initiate violence against them.<sup>167</sup> For others, officers and

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<sup>158</sup> Amnesty International, *No Safe Place: Salvadorans, Guatemalans and Hondurans Seeking Asylum in Mexico Based on Their Sexual Orientation and/or Gender Identity* (Nov. 2017), at 7, <https://www.amnestyusa.org/wp-content/uploads/2017/11/No-Safe-Place-Briefing-ENG-1.pdf>.

<sup>159</sup> HRW, “I’m Lucky to Still be Alive” at 40.

<sup>160</sup> See 2022 HRW *El Salvador Report* at 2.

<sup>161</sup> *Uniformed Injustice*, at 30.

<sup>162</sup> 2021 EL Salvador Country Report at 33; see also Immigration Equality, *El Salvador 2022 HIV Index and Exhibits*, <https://immigrationequality.sharepoint.com/sites/Legal-CountryConditions/Shared%20Documents/Forms/AllItems.aspx?ga=1&id=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FEI%20Salvador%2FEI%20Salvador%202022%20HIV%20Index%20and%20Exhibits%2Epdf&parent=%2Fsites%2FLegal%2DCountryConditions%2FShared%20Documents%2FEI%20Salvador>.

<sup>163</sup> *E.g.*, 2021 El Salvador Country Reports at 1 (“Significant human rights issues included credible reports of . . . crimes involving violence by security forces against lesbian, gay, bisexual, transgender, queer, and intersex individuals”) and 33 (“Police and gangs continue to commit acts of violence against LGBTQI+ individuals. These actions were tolerated by the government, and perpetrators were rarely prosecuted.”); see also 2020 El Salvador Country Reports at 1, 25-26 (similar); 2019 El Salvador Country Reports at 1, 22-23 (similar).

<sup>164</sup> 2021 El Salvador Country Report at 34.

<sup>165</sup> *E.g.*, *Uniformed Injustice*, at 10; 2022 HRW *El Salvador Report* at 2.

<sup>166</sup> Washington Blade, *Uniformed Injustice: Police and Military Target LGBT Salvadorans* (April 20, 2017), <https://www.washingtonblade.com/2017/04/20/uniformed-injustice-police-military-target-lgbt-salvadorans/>.

<sup>167</sup> *Uniformed Injustice* at 10.

soldiers escalate routine encounters, such as identification checks, into violent ones, once they learn of an LGBTQ persons' identity.<sup>168</sup>

In one such violent attack, Alex Peña, a transgender man who police believed to be a lesbian, was beaten extensively by Salvadoran police after an LGBTQ Pride Parade.<sup>169</sup> More than seven officers beat and kicked Mr. Peña unconscious.<sup>170</sup> While they beat him, the officers called him a lesbian, and put him in a headlock.<sup>171</sup> Mr. Peña suffered a fractured eye-socket and jaw and struggled to eat solid foods for more than a month.<sup>172</sup>

Queer and trans people are especially targeted for sexual violence by law enforcement and authorities.<sup>173</sup> For example, one LGBTQ individual reported being raped four times by four different soldiers, one of whom held her at gunpoint.<sup>174</sup>

When LGBTQ Salvadorans report violence and abuse and seek protection from law enforcement, they face significant obstacles, including further violations of their rights.<sup>175</sup> For example, Ambar Alfaro, an LGBTQ activist, reported a crime to a police officer, and the “police officer locked himself in a room with her, demanded oral sex, and, upon her refusal, proceeded to masturbate in front of her.”<sup>176</sup>

Police officers use coercive mechanisms to discourage LGBTQ people from filing complaints, and even when they file complaints, police officers refuse to accept them.<sup>177</sup> Police officers often extort, threaten, ridicule, and commit violence against queer and trans individuals who report violations of their rights.<sup>178</sup> Perhaps not surprisingly, a majority of Salvadoran police officers polled believe that “[LGBTQ] people d[o] not have the same rights as others.”<sup>179</sup> As the State Department has reported, violence against the LGBTQ community by Salvadoran police and gangs is tolerated by the government, and perpetrators are rarely prosecuted.<sup>180</sup>

The Salvadoran government is willfully blind to violence and other crimes against the LGBTQ community, including murder.<sup>181</sup> Impunity is such a problem that the U.N. Human Rights Committee

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<sup>168</sup> *Id.* at 10.

<sup>169</sup> *Id.* at 32.

<sup>170</sup> *Id.*; Nina Lakhani, LGBT in El Salvador: Beatings, intolerance, death (Aug. 12, 2015), <https://www.aljazeera.com/indepth/features/2015/08/lgbt-el-salvador-beatings-intolerance-death-150805075132892.html>.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Uniformed Injustice at 51.

<sup>174</sup> Washington Blade, Uniformed Injustice: Police and Military Target LGBT Salvadorans (April 20, 2017), <https://www.washingtonblade.com/2017/04/20/uniformed-injustice-police-military-target-lgbt-salvadorans/>.

<sup>175</sup> Uniformed Injustice at 57.

<sup>176</sup> Washington Blade, Uniformed Injustice: Police and Military Target LGBT Salvadorans (April 20, 2017), <https://www.washingtonblade.com/2017/04/20/uniformed-injustice-police-military-target-lgbt-salvadorans/>.

<sup>177</sup> Uniformed Injustice at 57.

<sup>178</sup> *Id.* at 57–58.

<sup>179</sup> Amnesty International, No Safe Place: Salvadorans, Guatemalans and Hondurans seeking asylum in Mexico based on their sexual orientation and/or gender identity, 15 (November 2017), <https://www.amnesty.org/download/Documents/AMR0172582017ENGLISH.PDF>.

<sup>180</sup> 2021 El Salvador Country Report at 33.

<sup>181</sup> *Id.*

expressed that it is “alarmed by the high number of threats, attacks and killings, including by State agents, aimed at [LGBTQ] persons . . . as well as by the high level of impunity for such crimes.”<sup>182</sup>

“El Salvador does not have comprehensive civil non-discrimination legislation that covers discrimination on the basis of sexual orientation and gender identity, nor a legal gender recognition procedure for transgender people.”<sup>183</sup> Moreover, according to a U.N. Human Rights Committee report, laws that do endeavor to protect LGBTQ people from discrimination are not enforced.<sup>184</sup> Indeed, “lack of action on the part of the judicial system to investigate hate crimes has created a widespread feeling of anxiety among El Salvador’s LGBTI activists.” Notably, LGBTQ activists routinely face death threats, extortion and violence.<sup>185</sup>

Moreover, the State Department has noted that the Salvadoran government only provides “some” assistance to refugees and asylum seekers, further noting that it is “often difficult in gang-controlled neighborhoods.”<sup>186</sup> And while the law technically provides for the granting of asylum or refugee status, the government has established a system that “has major regulatory and operational gaps.”<sup>187</sup> Furthermore, the “legal framework requires persons with international protection needs to file their claim within five days of entering the country; the criteria for case decisions is unclear; and the appeals process is decided by the same government entity that issues the initial decision.”<sup>188</sup>

Consistent with these country conditions, Immigration Equality has observed from its clients the horrific nature of the abuse and violence against LGBTQ people in El Salvador. Immigration Equality represented over one hundred queer and trans asylum seekers from the country through its pro bono program, maintaining a 100% success rate with adjudicated cases. Many of Immigration Equality’s clients have suffered persecution, including physical and sexual violence because of their LGBTQ status. For example:

Maria is a transgender woman from El Salvador. She faced intense abuse at school from her classmates and was raped twice by her cousin who perceived her gender identity as something that needed to be “cured.” He physically assaulted her and threatened to kill her if she told anyone. Another cousin also tried to rape her calling her a “faggot.” Her family, in an attempt “to fix” her, forced her to take psychiatric medications and forced her to have sex with female sex workers. At 15, she fled El Salvador and entered the U.S. between ports of entry. She was later granted asylum.

Rosibel is a lesbian from El Salvador who fled homophobic abuse. Rosibel was harassed, threatened, bullied, and beaten by family members, students, and teachers in El Salvador because of her sexual orientation. She survived an attempted rape by her uncle who wanted to teach her what it was like to “be with a man.” She was afraid to report the incident to the police

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<sup>182</sup> See United Nations, Human Rights Committee, Concluding Observations on the seventh periodic report of El Salvador, ¶ 9 (May 9, 2018) (“UNHRC 2018”), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsrNEHisprpIVrkwdn%2B9ifTOn66tnHrMbPX2BHHsl8X8wU8OgP6Kv90FUKEVd8cFf8mJOIhgTM%2FEAJPsikEi9Wc3hsA%2FndMI5RqKTglioZJhH>.

<sup>183</sup> 2022 HRW El Salvador Report at 6.

<sup>184</sup> See UNHRC 2018 ¶ 9.

<sup>185</sup> 2021 El Salvador Country Report at 34; 2020 El Salvador Country Report at 25; IACHR, Situation of Human Rights in El Salvador at 98.

<sup>186</sup> 2021 EL Salvador Country Report at 19.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

because she believed that they would not help her and might harm her further because they are notoriously homophobic. Her uncle then tried to force her into prostitution to cure her of her sexual orientation. Rosibel fled to the U.S. for safety. Her asylum case is pending.

Sandy is a transgender woman from El Salvador. She was bullied in school on account of her gender identity and was publicly reprimanded for dressing as a woman. By the age of 14, neighbors, strangers, and gang members alike threatened to harm, rape, or kill her because of it. Between the ages of 16 and 21, a gang member Sandy's neighborhood raped her on four occasions. At university, in another transphobic attack, Sandy was brutalized by four strangers who repeatedly called her a "faggot" and punched her in the face, splitting her lip open. Before they left, the attackers told Sandy that they knew where she went to school and that next time, they would kill her for being a "fag." Sandy never reported any of these assaults or threats to law enforcement as she knew the police would not help her. She only called the police twice while living in El Salvador. On the first occasion, Sandy was working as a sex worker, one of the few jobs available to transgender people in El Salvador, when a car drove by and shot live ammunition at the group of transgender sex workers she was standing with. When the police arrived, the officers told the victims that it was their fault they were shot at because they are transgender women. On the second occasion, a customer held Sandy at gunpoint and stole her wallet and money. Because Sandy had not "bought" police protection by paying bribes or having sex with police officers, the police refused to take a report. Sandy fled to the U.S. Her case is currently pending.

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As the conditions described above demonstrate, LGBTQ people from the most common transit countries – like Mexico, Guatemala, El Salvador, and Honduras – are in grave danger. For queer and trans *refugees* in these countries, conditions are worse. In addition to anti-LGBTQ violence and discrimination, they face additional barriers and mistreatment because of their refugee status, lack of support network, and inability to access critical resources.

Indeed, as described above, LGBTQ individuals who have sought refuge in these countries have not been successful in obtaining asylum and/or faced further persecution and abuse. Clients of commenters have reported similar abuse when trying to access humanitarian relief in transit countries before making their way to the U.S. For example:

As described in greater detail in the introduction, Oasis client Brayan fled Nicaragua after a lifetime of abuse for being gay. Brayan first went to Guatemala and applied for asylum there. At the refugee house where he was offered shelter, one of the male housekeepers raped him. He was insulted on the streets and every single job he was able to find for being gay. Brayan fled Guatemala before receiving a decision on his asylum case because of the abuse and never feeling safe. In Guatemala Brayan heard stories on the news about gay people being beaten and killed. He followed a Guatemalan LGBTQ news page on social media where he saw a video posted that showed the police beating up a gay couple in their house. After reaching Mexico, Brayan was kidnapped while riding on a bus by an armed group and held hostage for over three months. He was raped several times by one of the men who was guarding him who insulted him for being gay. Brayan's friend in Guatemala paid a ransom for him to be released and he was able to cross into the U.S. where he has now applied for asylum.

Oasis client C.O. is a bisexual man from Ghana who presented at the border and entered the U.S. from Tijuana. C.O. grew up in a conservative Muslim family and as same-sex relationships

are illegal in Ghana, tried to keep his sexual orientation a secret from family and community. After rumors surfaced about C.O.'s orientation, a person reported that he was living in a house with his partner. Members of the community stormed the house with sticks and pipes, dragged C.O. and his partner out in the street naked and brutally assaulted them, threatening to kill them because they were gay. C.O. suffered extensive bleeding and bruising to his eye and leg. The police arrived and stopped the assault but, bruised and bleeding, C.O. was taken to the police station and detained. The police refused to provide medical treatment, stating that what C.O. had done was illegal and that he would need to pay "bail" to be released. C.O. sought treatment at a clinic and then fled to his mother's house in Accra where she helped him recover. Shortly thereafter, C.O. fled to Equatorial Guinea where he lived for approximately 3 years, and where he was also subject to attacks on account of his sexual orientation. He fled again, flying first to Brazil. In Brazil, C.O. asked someone he understood to be an immigration officer for asylum. C.O. was informed that he would not be given asylum and was not provided with a reason. He was not even allowed to fill out paperwork to formally request asylum. After that, he understood that his stay in Brazil could only be temporary and so he left, ultimately seeking asylum in the U.S.

Immigration Equality client M.M. is a gay man who fled Venezuela for Ecuador due to threats and extortion from police because of his sexual orientation. He received lawful permanent residence in Ecuador, and lived there for five years, but experienced pervasive hostility and discrimination on account of his Venezuelan nationality in addition to his sexual orientation. While he believed that Ecuador was not as dangerous as Venezuela for gay men, he could not live openly and safely there. He experienced housing and employment discrimination, along with threats of violence. On one occasion, M.M. and his brother reported violent threats made against them in a Facebook post. The police refused to help.

Additional examples of the danger faced by LGBTQ refugees in Mexico are included in Section IV.b.ii above.

In sum, it is immoral, illegal and impractical for the Departments to encourage or expect, let alone require, LGBTQ/H refugees to seek asylum in transit countries where they are unsafe, and to out themselves to governments with a long history of anti-LGBTQ/H violence.

#### **iv. Parole Programs Are Not a Substitute for a Functioning Asylum System**

The presumption would not apply to individuals who travel to the United States on a DHS authorized parole program. But just as seeking asylum in a transit country is not a viable option for LGBTQ/H people, neither is relying on the DHS parole programs for most people. These parole programs are only available to the nationals of Ukraine, Venezuela, Nicaragua, Cuba, and Haiti. Consequently, this exception is narrow, benefitting only certain people. For example, this option is not available to asylum seekers from El Salvador, Guatemala, and Honduras, which, as explained above, have documented histories of horrific persecution against LGBTQ/H people. Furthermore, several DHS officials have reportedly stated that parole programs will not be made available to asylum seekers from Central America.<sup>189</sup> As such, this exception to the presumption will not cover LGBTQ/H people in the

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<sup>189</sup> Julia Ainsley, Rights Groups Threaten to Sue Biden Administration Over Plan to Block Migrants with What Groups Call a Trump-Era Tactic, NBC NEWS, Feb. 20, 2023, <https://www.nbcnews.com/politics/immigration/biden-block-migrants-trump-era-stephen-miller-tactic-rcna71282>.



abovementioned or other countries, limiting the number of pathways LGBTQ/H individuals have to seek asylum, contrary to governing law.

Furthermore, access to the parole process is limited even for the nationals in the countries where this process exists. For instance, the CHNV programs require that a noncitizen have a valid passport and purchase a plane ticket and travel to an air POE within the United States.<sup>190</sup> The programs further require a noncitizen to have a sponsor in the United States, who must demonstrate “sufficient financial resources to receive, maintain, and support the individual(s)” for the duration of the parole period.<sup>191</sup> In short, to participate in these programs, a person must have significant economic resources. This excludes low-income and impoverished LGBTQ/H asylum seekers. The vast majority of the clients represented by the commenter organizations would be ineligible for the DHNV parole programs.

Additionally, since they have significant processing times, the parole programs are a poor option for asylum seekers who face immediate danger and must flee right away. For example, Immigration Equality worked with Alexander, a gay man from Nicaragua who was arrested by the Nicaraguan police due to his political opinion and sexual orientation. In prison, Alexander suffered repeated rape and torture. Miraculously, he managed to escape. He fled Nicaragua the next day; eventually, he won asylum in the United States. Alexander would not have been able to partake in the parole program because his life was in immediate danger and he did not have time to wait. Similarly, Silvia, a transgender TLC client, faced persecution in her country of origin. She struggled financially, but was able to scrape by with a piñata business. One night, two gang members approached her and told her that she had to put drugs in the piñatas, smuggle those drugs into a prison, and engage in sex acts with gang members in prison. She refused. The following night Silvia looked out her window and saw men approaching her house with sticks and guns. She knew they were coming for her. She was able to jump out a back window and escape. She left for the U.S. the following day. She could not have waited for a parole program.

Furthermore, since the CHNV programs require a valid, unexpired passport, people who are directly persecuted by their governments might not be able to apply for a passport and participate. Applying for a passport necessitates approaching the persecutor government for this service.

Receiving a travel authorization to come to an air POE is also not a guarantee that a person will be able to access asylum. Upon arriving at a POE, a CBP officer must approve the parole and give permission to enter.<sup>192</sup> CBP officers’ decisions are not subject to review.<sup>193</sup> So, if a CBP officer wrongfully denies parole, an asylum seeker cannot challenge that decision. An asylum seeker might go through the application process and expend their limited resources, only to be denied entry at an air POE and returned to danger. Moreover, CHNV applicants can be “denied advanced authorization to travel as well as parole,” if they do not “pass national security and public safety vetting.”<sup>194</sup> However, many nations convict LGBTQ people for morality crimes and generally prosecute LGBTQ people to punish them for their sexual orientation and gender identity through pretextual arrests and punishments that are not legitimate. Additionally, Venezuela, Haiti, Nicaragua, and Cuba are rife with political violence and government oppression of dissidents. For instance, many of Immigration Equality’s

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<sup>190</sup> USCIS, Processes for Cubans, Haitians, Nicaraguans, and Venezuelans, Last Updated Feb. 22, 2023, (USCIS CHNV), <https://www.uscis.gov/CHNV>.

<sup>191</sup> USCIS CHNV.

<sup>192</sup> 87 FR at 63516; 88 FR at 1253; 88 FR at 1276; and 88 FR at 1264.

<sup>193</sup> 87 FR at 63516; 88 FR at 1253; 88 FR at 1276; and 88 FR at 1264.

<sup>194</sup> USCIS CHNV.

Cuban clients have been arrested and detained because of their sexual orientation and political activity. Where such arrests, charges, and convictions are used as tools of persecution in many countries rather than as legitimate prevention of crime, we have serious concerns about how parole adjudicators will treat those “criminal” histories out of context.

Lastly, CHNV parole programs have a monthly cap, limiting how many people can enter the United States each month. Initially, the monthly cap for Venezuelans was set at 24,000. However, according to the DHS the “[d]emand for the Venezuela process has far exceeded the 24,000 limit . . . . In just two months of operation, DHS received thousands of applications . . . .” As a result, DHS increased the monthly limit to 30,000.<sup>195</sup> But the 30,000 cap now collectively applies to Venezuelans, Haitians, Cubans, and Nicaraguans.<sup>196</sup> Given that the applications from *just* Venezuelan nationals prompted the DHS to expand the monthly cap, the combined demand from all four countries will surely far exceed the 30,000 person limit. Logically, this will result in backlogs and delays in the application processing. People who must flee quickly, will be forced to travel to the southwest border, regardless of parole program availability.<sup>197</sup>

Consequently, while we support parole programs as another avenue of relief for the individuals who can participate in them, many people fleeing persecution will be excluded from this process and will be forced to seek asylum through other means.

**c. Rebutting the Presumption Will Be Impossible for Many Bona Fide LGBTQ/H Asylum Seekers**

Individuals who do not pursue the three pathways described above will be subject to a presumption of asylum ineligibility. The proposed rule provides a framework for rebutting the presumption, but this framework is devoid of meaningful safeguards and protections for asylum seekers. Moreover, the rule imposes several high burdens that will make rebutting the presumption impossible for many, if not the majority, of LGBTQ/H asylum seekers with bona fide claims. As a result, LGBTQ/H people will be illegally denied access to asylum and refouled.

**i. Per Se Grounds**

The proposed rule states that noncitizens can rebut the presumption by demonstrating exceptionally compelling circumstances by a preponderance of the evidence. These circumstances must exist at the time of entry into the United States, and must relate to the noncitizen or a family member with whom they travel.<sup>198</sup> The rule sets forth several *per se* grounds for rebuttal, which also must be proven by a preponderance of the evidence and must exist at the time of entry. These grounds include demonstrating that a noncitizen or their family member: 1) faces an acute medical emergency; 2) faces an extreme and imminent threat to their life or safety, such as an imminent threat of rape, kidnapping, torture or murder; or 3) is a victim of a severe form of trafficking, as defined in 8 CFR § 214.11.<sup>199</sup> An

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<sup>195</sup> 88 FR at 1280.

<sup>196</sup> *Id.*

<sup>197</sup> In explaining its decision to expand the numerical cap from 24,000 to 30,000, DHS recognizes that reaching the numerical limit would likely result in irregular entries, showing it understands that having an accessible, lawful pathway diminishes people’s need to resort to crossing between POEs. 88 FR at 1280.

<sup>198</sup> NPRM at 11723.

<sup>199</sup> *Id.*

extreme and imminent threat to life or safety is defined as not including generalized threats of violence.<sup>200</sup>

### 1. Acute Medical Emergency

Asylum seekers can rebut the presumption if they show by a preponderance of the evidence that they, or a member of their family, face an acute medical emergency at the time of entry into the United States. The NPRM further explains that “[a]cute medical emergencies would include situations in which someone faces a life-threatening medical emergency or faces acute and grave medical needs that cannot be adequately addressed outside of the United States.”<sup>201</sup> While we agree that the U.S. government should consider the medical needs of refugees, this provision is limited to a very narrow range of circumstances which may exclude serious, but non-life-threatening medical needs, or where a medical need is life threatening, but not imminently so. This raises serious medical and humanitarian concerns. In particular, commenters are concerned about how people living with HIV will be assessed under this provision.

As an initial matter, the officers reviewing the evidence are not medical professionals equipped with the requisite expertise to determine whether something is or is not a medical emergency or a grave medical need, especially when knowledge of medical care in Mexico is relevant to the analysis. Moreover, when assessing needs of people living with HIV, an immigration officer may not view someone without active symptoms of HIV as meeting the criteria for rebuttal. However, both for the individual and for the public health, it is critically important that HIV positive asylum seekers have access to treatment and care that is comprehensive and well managed.

Indeed, positive clinical outcomes and viral suppression are dependent on consistent adherence to an antiretroviral therapy regime (“ART”).<sup>202</sup> Interruptions can lead to negative health outcomes and drug resistance.<sup>203</sup> In theory, HIV medication should be readily available in Mexico. However, in reality, refugees along the southern border encounter many barriers to access that negatively impact health. Moreover, unsanitary conditions and poor nutrition exacerbate risks.<sup>204</sup>

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> See, e.g., generally, The Ontario HIV Treatment Network, Impact of Nonadherence to Antiretroviral Therapy (ART) on Population-Level Health Outcomes; Nonadherence and Mortality; Nonadherence and Acquired HIV Drug Resistance, (Last Accessed, Mar. 27, 2023), <https://www.ohrn.on.ca/rapid-response-impact-of-nonadherence-to-antiretroviral-therapy-art-on-population-level-health-outcomes/>; HIV Treatment Adherence, HIVInfo, (Last Reviewed, Aug. 12, 2021), <https://hivinfo.nih.gov/understanding-hiv/fact-sheets/hiv-treatment-adherence>; Mark J. Atkinson and Jeffrey J. Petrozino, An Evidence-Based Review of Treatment-Related Determinations of Patients’ Nonadherence to HIV Medications, (Nov. 20, 2009), [https://www.liebertpub.com/doi/10.1089/apc.2009.0024?url\\_ver=Z39.88-2003&rft\\_id=ori%3Arid%3Aacrossref.org&rft\\_dat=cr\\_pub++0pubmed](https://www.liebertpub.com/doi/10.1089/apc.2009.0024?url_ver=Z39.88-2003&rft_id=ori%3Arid%3Aacrossref.org&rft_dat=cr_pub++0pubmed).

<sup>203</sup> *Id.*

<sup>204</sup> For many in make-shift refugee camps along the southern border, the conditions are particularly bad. For instance, in Reynosa’s Camp Rio, LAGG staff have witnessed egregious conditions including large lot strewn with human feces, toilet paper, and menstrual products piled up next tents, with run off feeding directly into the river where people bathe, wash their clothes, and clean their dishes; See also Christa Cook, Rio Camp WASH Assessment, Solidarity Engineering (January 31, 2023), <https://storymaps.arcgis.com/stories/d2aa2dc809c1459b8e4c90ec80ea232b>; See also Border Report, Bathroom crisis for migrants at makeshift camp in Matamoros, Mexico (Dec. 28, 2022), <https://www.borderreport.com/news/top-stories/bathroom-crisis-for-migrants-at-makeshift-camp-in-matamoros-mexico/> (reporting on unsanitary conditions).

Commenting organizations have observed the difficulties firsthand. For example, in 2021 and 2022, staff at TLC tried to help dozens of Jamaican refugees living with HIV in Tijuana obtain ART, but none were successful. In fact, one client named Sarah went without medication for over 9 months awaiting entry into the United States. She lost nearly 20 pounds and developed opportunistic infections and other secondary medical issues. In addition, she developed severe depression necessitating psychiatric intervention. Eventually, she was forced to enter the U.S. without inspection where she is currently pursuing her asylum claim.

Even Mexican nationals who are asylum seekers face barriers in accessing ART in Mexico. For instance, the SFDP reported that, in 2022, several Mexican clients were unable to access ART. The individuals were asylum seekers who were awaiting entry to the U.S. and had left their Mexican states of residence. However, ART was not available outside of their states of residence. Two of the transgender asylum seekers had to return to their Mexican states of residence to obtain ART, increasing their risk of persecution.

Commenting organizations also have concerns about the proof that will be required for HIV-positive refugees, and others, to rebut the presumption. For instance, in the HIV context, asylum seekers may or may not have proof of their HIV diagnosis. They also may not have access to other medical documentation or medical records, if DHS personnel requires such evidence to determine if the health condition is “acute.” Further, HIV-positive people are persecuted for being HIV-positive and face tremendous safety risks in disclosing that fact in Mexico. For instance, L4GG staff have spoken with migrants in Mexico that have been denied care, lost their jobs, and experienced discrimination, persecution, and further ostracization based on HIV-status. Therefore, seeking care to help document HIV in order to overcome the presumption could expose them to risk.

Commenters also have concerns about how this exemption might be applied to family members. For example, the non-profit organization Each Step Home recently shared a story with Immigration Equality about an HIV-positive woman and her young son. While waiting in Mexico, the mother began the process of applying for humanitarian parole in the hopes that her son could live with a family member in the U.S. However, the woman died due to HIV-related complications before the process was completed. CBP stopped processing the application stating that since the mother passed away, the medical emergency no longer existed, and therefore, there was no basis for relief. A similar situation could play out under the presumption.

## **2. Extreme and Imminent Threat to Life or Safety**

The proposed rule also grants a per se exemption for people who face such an imminent and extreme threat to their life or safety that they cannot wait for an opportunity to present themselves at a POE without putting their life or well-being at extreme risk. The proposed rule lists four examples of the types of threats that would qualify under this exemption – murder, kidnapping, rape, and torture – and emphasizes that a generalized threat of violence is not enough.

This exemption is not only too narrow to protect many *bona fide* asylum seekers, but also ignores the reality that particularly vulnerable individuals like LGBTQ refugees face in Mexico. As summarized above, Mexico is an extremely dangerous country in which to be LGBTQ. Between 2013 and 2018, Mexico recorded an average of 6.5 homicides of LGBTQ community members a month,

with the numbers only increasing over time.<sup>205</sup> In 2019, at least 117 lesbian, gay, bisexual and trans people were violently murdered in Mexico.<sup>206</sup> These numbers were collected solely from news reports about LGBTQ deaths, so it can be reasonably assumed that the actual rate of violent deaths of LGBTQ community members is much higher as not every murder is covered by the news.<sup>207</sup>

This exception to the proposed rule forces LGBTQ and HIV-positive people to put themselves in grave danger in order to avoid a negative presumption since the danger must be “imminent” and not just present or extremely likely. LGBTQ migrants employ different strategies to keep themselves safe in a hostile environment like Mexico, including hiding their identities and trying to pass as cisgender and straight. A bright line rule such as this exception ignores the lived reality of LGBTQ refugees, whose lives are in constant danger in Mexico, but who may hide their fundamentally protected identity, pay extortion payments, and take every other precaution necessary in order to keep themselves out of harm’s way. It cannot be the position of the United States to expect someone either (a) to stay in hiding all day, every day, and be ineligible for asylum, or (b) express their authentic identity and subject themselves to “imminent” danger of rape, torture, or murder to be deemed eligible *to apply* for protection.

The proposed rule makes no mention of what specific proof or evidence is required to show eligibility for this exception. In any event, LGBTQ survivors of violence will not necessarily have the proof, language, or support needed to explain what imminent danger they face, leading to the denial of bona fide asylum claims and the refolement of individuals facing extreme persecution. Even under the current asylum system, CBP officers are wrongly turning away LGBTQ individuals in extreme danger.

For example, Human Rights First has documented situations where even though an LGBTQ asylum seeker faced extreme danger, they were turned away at the border because DHS did not believe the danger to be extreme or imminent enough.<sup>208</sup> In October 2022, a transgender woman from southern Mexico who suffered violence and discrimination based on her gender and sexual orientation, including multiple rapes, was denied entry even though she reported that one of her assailants was continuing to threaten to kill her. An indigenous transgender woman from Mexico and her partner were turned away from entering the United States after fleeing death threats based on their race, gender, and sexual orientation by a criminal group who “disappeared” the woman’s gay cousin and warned her not to look for him. The woman recounted how she was harassed every day of her life and was afraid to go outside. In October 2022, a Mexican lesbian woman who had suffered multiple attacks in her hometown due to her sexual orientation, including being kidnapped, raped, and threatened with death by police officers was turned away from asylum protection by the San Ysidro port of entry. In the same month, a gay man from southern Mexico who had suffered beatings, sexual assaults, and an attempted kidnapping in his hometown due to his sexual orientation, and who reported that his nephew had recently been murdered as a way to intimidate him, was nonetheless turned away from the El Paso port of entry.

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<sup>205</sup> Mexico sees deadliest year for LGBT+ people in five years, REUTERS, May 15, 2020, <https://news.trust.org/item/20200515195934-guohu/>; Infobae, *Violence in Mexico: 117 members of the LGBT community were murdered in 2019*, 15 May 2020, <https://www.infobae.com/america/mexico/2020/05/15/violencia-en-mexico-asesinaron-a-117-integrantes-de-la-comunidad-lgbt-en-2019>.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Human Rights First, Human Rights Stain, Public Health Farce, (Dec. 2022), <https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf>

Human Rights First has also documented situations where LGBTQ asylum seekers attempted to seek protection in the United States, were turned away, and then experienced grave harm based on their sexual orientation and gender identity.<sup>209</sup> In October 2022, a Guatemalan lesbian trans woman was violently raped by Mexican police officers in Piedras Negras soon after CBP officers turned her away from protection at the Eagle Pass port of entry. In November 2022, a gay Venezuelan man was sexually assaulted and robbed in the public plaza where he had been sleeping in Ciudad Juarez after being denied entry to the U.S. to seek asylum.

Even though CBP is already turning away people in mortal danger, the NPRM increases the burden on the same asylum seekers to prove that they are in “imminent” danger of serious bodily harm. This is cruel and illegal. And, as the country conditions for Mexico show, while the likelihood of harm against LGBTQ individuals is very high over time, the risk each individual faces on a daily basis can be unpredictable. This proposed exception will dramatically increase human rights abuses, resulting in an asylum seeker not being able to rebut the presumption of imminent danger during their CFI, but being attacked the very next day for being LGBTQ.

## **ii. Exceptionally Compelling Circumstances Exemption**

Lastly, the proposed rule provides a general catch-all category that can be used to rebut the presumption. To that end, the proposed rule instructs asylum officers to consider other exceptionally compelling circumstances, in addition to the per se rebuttal grounds. The exceptionally compelling circumstances must be shown by a preponderance of the evidence. However, the rule does not provide clarity on what constitutes such circumstances.

While it is important to have a catch-all provision, the high preponderance of the evidence standard will make this provision inaccessible to many asylum seekers and will result in unfair denials. For example, two asylum officers might have differing opinions on what is and is not exceptionally compelling. This will lead to confusion and result in an uneven application of the rule, where asylum seekers with similar circumstances might receive different outcomes.

## **V. Removal Proceedings Are Already Severely Flawed, and the NPRM Would Exacerbate These Deficiencies by Overcomplicating the Current Process and Removing Critical Safeguards**

According to the proposed rule, the presumption inquiry seemingly will most frequently take place during a CFI screening.<sup>210</sup> An asylum officer will first determine whether an asylum seeker is covered by, and can rebut, the presumption.<sup>211</sup> If the presumption is rebutted or does not apply, the asylum officer will proceed with a regular credible fear screening to determine whether there is a significant possibility that an asylum seeker can show at a full merits hearing that they are eligible for asylum.<sup>212</sup> If the presumption is not rebutted, the fear screening will proceed under the reasonable possibility of persecution standard, which is higher than significant possibility.<sup>213</sup>

If an asylum applicant passes the CFI under the significant possibility standard, they will be able to apply for asylum, withholding of removal, and protection under CAT. If an asylum applicant

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<sup>209</sup> *Id.*

<sup>210</sup> NPRM at 11724.

<sup>211</sup> *Id.*

<sup>212</sup> NPRM at 11725.

<sup>213</sup> NPRM at 11724-25.

does not rebut the presumption but passes the CFI under the reasonable possibility standard, they too will be placed in 240 removal proceedings, “[d]uring the course of [which] the noncitizen would be able to apply for asylum, statutory withholding of removal, and protection under CAT . . . .”<sup>214</sup> The immigration judge will be able to review de novo the presumption’s applicability on eligibility for asylum.<sup>215</sup>

If the asylum seeker receives a negative CFI determination, the asylum officer would inquire whether an asylum seeker wishes to seek an IJ review of the decision.<sup>216</sup> This is a departure from the present practice, where asylum seekers are not required to affirmatively request an IJ review. If the asylum seeker does not affirmatively request review, they will be deported. The asylum seeker will also be deported if they ask for the IJ review and the IJ determines that: 1) the asylum seeker is covered by the presumption, did not rebut it, and did not show reasonable possibility of persecution or torture; OR 2) the presumption does not apply/was rebutted and the asylum seeker did not show significant possibility of qualifying for asylum, withholding, or CAT.<sup>217</sup> If the IJ overturns negative CFI determination, the asylum seeker will either be placed in section 240 removal proceedings or referred for an asylum merits interview.<sup>218</sup>

USCIS would have sua sponte discretion to reconsider negative CFI determinations.<sup>219</sup>

**a. The NPRM Imposes a Heightened Screening Standard on Asylum Seekers in Violation of Congressional Intent**

The proposed rule impermissibly changes the CFI screening standard by raising the threshold of what asylum seekers need to show. This is illegal and will result in refoolment. The current CFI process is a threshold assessment of an asylum eligibility. It is not intended to be a demanding standard to meet. The INA defines the credible fear standard as “a significant possibility . . . that the alien **could** establish eligibility for asylum...” 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added). In a recent ruling, the United States District Court for the District of Columbia emphasized that Congress used the word “could” in the credible fear definition to convey that, “a possibility, rather than certainty [of persecution] suffices at the credible fear stage of the asylum-eligibility process.”<sup>220</sup>

Congress also made clear its intent to keep the screening standard low. The Judiciary Committee report to the House version of the bill explained that:

Under this system, there should be no danger that an alien with a genuine asylum claim will be returned to persecution. The initial screening . . . will focus on two questions: is the alien telling the truth; and *does the alien have some characteristic that would qualify the alien as a refugee.*<sup>221</sup> (emphasis added).

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<sup>214</sup> NPRM at 11725.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> NPRM at 11725-26.

<sup>219</sup> NPRM at 11726.

<sup>220</sup> *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 41 (D.D.C. 2020).

<sup>221</sup> 142 Cong. Rec. 25347 (1996).

Senator Hatch further stated that, “the conference report struck a compromise by rejecting the higher standard of credibility included in the House bill. The standard adopted in the conference report is intended to be a low screening standard for admission into the usual full asylum process.”<sup>222</sup>

Furthermore, for asylum, an applicant has to show there is only a reasonable possibility they will experience persecution, which the Supreme Court has indicated may be as low as a 10% chance of harm.<sup>223</sup> As the court rulings mentioned above state, the CFI standard is intentionally lower than the reasonable possibility standard that has to be met for asylum eligibility. It therefore follows that CFI’s significant possibility standard is less than 10%, setting a very low threshold for the finding of credible fear.

The proposed rule impermissibly alters this legal framework. An asylum seeker will not be screened under the significant possibility standard, unless they first rebut the presumption. However, in order to rebut the presumption, an asylum seeker must show by a preponderance of the evidence (or more than a 50 percent chance) that they present some type of exceptionally compelling circumstances. In other words, if the proposed rule goes into effect, the access to a lower – less than 10% screening standard – would be conditioned on passing a much higher – 50+% - screening standard.

In addition to requiring that an asylum seeker meets a 50+% evidentiary rebuttal standard, the rebuttal grounds themselves are formulated in a way that leaves them open to misinterpretation. This risks a very narrow application of the grounds, which in turn will make the new standard even harder to overcome. For example, in case of an “imminent danger to life and safety” per se ground, an asylum officer could interpret the word “imminent” narrowly, to mean something instantaneous. Such an interpretation would prevent some asylum seekers from rebutting the presumption, even though they are facing tangible, severe, and impending danger in Mexico, if these threats are not sufficiently “imminent” to the asylum officer’s narrow analysis.

The presumption’s requirement that the exceptionally compelling circumstances must be present “at the time of entry,” also risks making the standard higher. Again, an asylum officer can incorrectly interpret the time of entry narrowly to require that the circumstances exist precisely at the time of entry, and not a moment sooner. Such narrow interpretations will result in refolement of asylum seekers with bona fide claims. And, the proposed rule puts no safeguards in place to prevent this from happening. Despite its claims to the contrary, the proposed rule, as written, prioritizes quick processing over accuracy, fairness, and wellbeing of asylum seekers, who put their trust and their lives in the hands of our asylum system.<sup>224</sup>

Furthermore, the proposed rule baselessly conditions access to the significant possibility screening (and subsequent asylum eligibility) on an inquiry that is completely unrelated to the factors relevant in asylum determination. The current CFI screening inquires whether an asylum seeker possess a protected characteristic, such as sexual orientation or gender identity, and fears persecution by their government or individuals the government is unable or unwilling to control on the basis of that characteristic. The rebuttable presumption focuses on a set of conditions that existed in Mexico at the time of entry. These conditions are not congruent with asylum factors considered during a CFI. They do not examine whether an asylum seeker has “some characteristic that would qualify [them] as a refugee.” They are nothing more than an additional set of burdens imposed on vulnerable asylum

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<sup>222</sup> H.R. Rep. No. 104-469, at 158 (1996).

<sup>223</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

<sup>224</sup> NPRM 11704 *passim*.



seekers without proper reasoning or justification. The purpose of the presumption appears to be to deny asylum to otherwise statutorily eligible applicants. That is not legal.

If an asylum seeker cannot rebut the presumption, their fear of persecution will be evaluated under the reasonable possibility standard, typically used for withholding of removal or CAT claims. The reasonable possibility standard is used to screen claims of people who are ineligible for asylum due to, for example, prior removal/departure from the United States or because of certain criminal histories in the United States.<sup>225</sup> According to the proposed rule, “fewer [individuals] with non-meritorious claims would be placed into section 240 proceedings if the ‘reasonable possibility’ of persecution or torture standard is applied than if the lower ‘significant possibility’ of establishing eligibility for the underlying protection standard is applied.”<sup>226</sup> The proposed rule fails to justify or support this reasoning. The NPRM’s true result will be to illegally deny asylum to otherwise statutorily eligible applicants.

The proposed rule baselessly assumes that the presumption will somehow screen out non-meritorious asylum claims. But as was already explained, the presumption inquiry has no bearing or connection to the asylum inquiry and considers an entirely different set of facts. Why then, would failing to rebut the presumption indicate anything of value about the strength of a person’s asylum claim? The proposed rule tries to draw a connection where there is none. The NPRM engages in faulty logic, claiming that the reasonable possibility standard is justified because the individuals screened under it would be ineligible for asylum anyway due to the presumption.<sup>227</sup> But again, the presumption does not explore factors relevant to asylum. Someone can be eligible for asylum and still fail to rebut the presumption.

Baselessly subjecting asylum seekers to a reasonable fear screening will hurt bona fide applicants. This happened to Ines, an Immigration Equality client. She is a lesbian woman from Cuba. A Cuban police officer detained and physically assaulted Ines on the bases of her sexual orientation and political opinion. On a different occasion, another Cuban police officer physically assaulted Ines because she is a lesbian and threatened her with arrest. When Ines sought asylum in the United States, the unlawful 8 C.F.R. § 208.13(c)(4) (“transit bar”) was in effect. As a result, Ines was deemed not eligible for a CFI. She was given an RFI instead. An asylum officer found that Ines did not have reasonable fear of persecution under the RFI’s heightened standard. However, given that the travel ban was lifted and, thus, Ines was wrongfully given an RFI instead of a CFI, Immigration Equality worked for almost a year to get the negative determination overturned. The efforts were successful and Ines was placed in removal proceedings. Without attorney’s assistance, Ines might have never gotten the chance to present her asylum case, all because she was illegally processed under a higher screening standard.

TLC also had a client who was impacted by the transit ban. The client, a Guatemalan transgender woman, had her merits asylum hearing a few days after the transit ban went into effect. The woman transited through Mexico, but she did not request asylum there because it was unsafe for her. The woman won withholding of removal, but she was denied asylum due to the transit ban. If the proposed rule goes into effect, other people with strong asylum claims might only receive limited

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<sup>225</sup> USCIS, Questions and Answers: Reasonable Fear Screenings, Last Updated Jun. 18, 2013, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-reasonable-fear-screenings>.

<sup>226</sup> NPRM at 11742.

<sup>227</sup> NPRM at 11746.

protection in the form of withholding of removal, if they do not rebut the presumption. Withholding of removal does not confer many important benefits, such as a path to citizenship, that asylum does.

In short, the NPRM will not efficiently ensure the Departments' goal of screening out non-meritorious claims. It will, however, ensure that bona fide asylum seekers are refouled to their countries of persecution.

**b. The NPRM Will Burden Asylum Officers, Who Already Struggle to Accurately Administer CFIs; Detained Asylum Seekers with Bona Fide Claims Will Be Unfairly Denied Protection**

Raising the CFI standard, like the NPRM purports to do, is also troubling because the current expedited removal process is already remarkably flawed. The proposed rule will inflict further damage to the process and remove the few safeguards asylum seekers have to protect themselves.

The CFI screening process, for example, fails asylum seekers due to the flaws in implementation, even in its current form.<sup>228</sup> Many asylum officers also systemically fail to correctly assess meritorious LGBTQ/H (and other) asylum claims. During many CFI screenings, asylum officers misapply or fail to apply the existing asylum law, ignore relevant portions of asylum seekers' testimony that support their claims, fail to perform pattern and practice analysis and consider country conditions, fail to ask relevant follow-up questions and develop the record, and fail to take accurate notes. Some asylum officers also lack LGBTQ competency and can be hostile and belligerent toward asylum seekers.

Even the best trained and most effective asylum officers have limited time for CFIs and cannot engage in a comprehensive inquiry like the proposed rule would require, much less assess the underlying claim. For instance, at one detention facility, asylum officers reportedly limit CFIs to only 30 minutes, force asylum seekers to give yes/no answers, and cut off testimony when asylum seekers try to provide details.<sup>229</sup> Asylum seekers throughout different detention facilities report being interrupted and cut off by the asylum officers, and thus being unable to fully express their claims.<sup>230</sup> These conditions would make it impossible for anyone to rebut the proposed presumption. The following examples illustrate the abovementioned problems:

Enrique is a gay asylum seeker from Colombia who fled homophobic persecution. He was not represented during his CFI. An asylum officer erroneously denied his CFI. In the CFI notes, the asylum officer referred to Enrique's city of residence, Ibague, as "evil gay." The asylum officer also indicated that the interpreter refused to take the Interpreter's Oath. However, the asylum officer did not contact a different interpreter for the CFI. While Enrique testified that he was harmed twice, the asylum officer only asked him about one incident, thus failing to conduct a

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<sup>228</sup> CRCL Complaint, Systemic Deficiencies at the Houston Asylum Office in Assessment of Credible and Reasonable Fear Cause Harm and Irreversible Damage to Asylum Seekers, (Apr. 27, 2022), (CRCL Complaint, CFI and RFI Deficiencies) [https://immigrationequality.org/wp-content/uploads/2022/04/2022\\_27April-CFI-complaint-1.pdf](https://immigrationequality.org/wp-content/uploads/2022/04/2022_27April-CFI-complaint-1.pdf); Human Rights First, Pretense of Protection, Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies, (Aug. 3, 2022) (Pretense of Protection) at 16-19, <https://humanrightsfirst.org/library/pretense-of-protection-biden-administration-and-congress-should-avoid-exacerbating-expedited-removal-deficiencies>.

<sup>229</sup> Alex Mensing, Asylum Seekers Denied Basic Due Process and Access to Asylum at Torrance County Detention Facility, INNOVATION L. LAB., Feb. 1, 2023, <https://innovationlawlab.org/press-release/asylum-seekers-denied-basic-due-process-and-access-to-asylum-at-torrance-county-detention>.

<sup>230</sup> CRCL Complaint, CFI and RFI Deficiencies; Pretense at Protection at 16-19.

full inquiry about the persecution Enrique experienced. The asylum officer then wrongly concluded that Enrique did not experience persecution. Further, the officer erroneously concluded that Enrique could not establish that he experienced harm on the basis of his sexual orientation, disregarding Enrique's testimony in the record that he lived with a male partner, and that other people could learn about his sexual orientation from social media posts and from his physical appearance. The asylum officer did not once reference country conditions in the fear of future persecution analysis. Had the officer done so, he would have realized that Colombia has a pervasive pattern and practice of severe violence against LGBTQ people.

Fernando is a gay, HIV-positive asylum seeker from Venezuela. Enrique was not represented at his CFI, and an asylum officer wrongfully issued a negative determination. At the CFI, Fernando testified that he was at an LGBTQ party. Unknown assailants attacked people at the party and physically assaulted Fernando. Fernando's attackers directly told him they were assaulting him because he was gay. Fernando also testified that Venezuelan police officers threatened to out Fernando to his family if he did not pay them. Despite this, the asylum officer erroneously concluded there was no nexus between Fernando's sexual orientation and the persecution he experienced. Although HIV status can constitute a particular social group, the asylum officer only asked a couple of cursory questions about Fernando's fear of persecution due to his HIV status. As a result, the asylum officer failed to elicit important information that supported Fernando's fear of persecution on the basis of his HIV status. Fernando felt that the asylum officer was hurrying him through the interview, and he did not feel like he had sufficient opportunity to tell the officer important details about his claim.

Oumar is an asylum seeker from Senegal. He was not represented during his CFI. At the CFI, Oumar testified that a homophobic mob attacked him and his friends on an assumption that they were gay. Oumar and his friends tried to defend themselves. The police arrested people who were being attacked but not the instigators. Oumar further testified that same-sex relationships are criminalized in Senegal. The individuals who attacked Oumar took his photograph and spread it on social media, including to anti-gay groups. Oumar fled Senegal. The asylum officer incorrectly issued a negative CFI determination, claiming that Oumar was unable to demonstrate his friends were arrested for being gay, despite Oumar's testimony that being gay is illegal in Senegal and that none of the attackers were arrested. The asylum officer also failed to reference Senegal country conditions.

Luis is a gay, HIV-positive refugee from Central America. During Luis's RFI, the asylum officer acted in a grossly inappropriate manner. The asylum officer stated that Luis "sounded like a regular guy" and "didn't sound gay." The officer further claimed that LGBTQ organizations coach people to falsely say they are gay in order to receive asylum and that LGBTQ claims are "bullshit." The officer kept the fact that Luis is HIV-positive out of his notes and mischaracterized Luis's testimony about history of childhood sexual abuse due to his sexual orientation. The asylum officer wrongfully denied Luis RFI.

Veronica is a transgender woman from Cuba and Mexico. She experienced persecution in both countries. In Cuba, Veronica was arrested and physically assaulted by the police due to her LGBTQ status. In Mexico, she was abducted and raped by a criminal gang. When Veronica tried reporting the attack to the Mexican police, the police officer called her a homophobic slur and refused to help. Veronica came to the United States to seek asylum, and she was placed in immigration detention. Veronica's CFI was conducted over the phone, while she was in her

prison cell, surrounded by detained men. As a result, she was scared to discuss the persecution she experienced on the basis of her sexual orientation and transgender identity with the asylum officer. Because she could not openly discuss her experiences as a transgender woman, Veronica failed her CFI.

The abovementioned issues are further exacerbated for asylum seekers who are rare-language speakers, where USCIS struggles to provide timely and accurate interpretation.<sup>231</sup> Furthermore, the CFIs take place in ICE custody, which has a long and documented history of abuses against LGBTQ/H people.<sup>232</sup> Many asylum seekers suffer from severe trauma that results from their persecution, harrowing experiences coming to the United States, and in some cases because of their detention by ICE. This trauma and other mental health problems typically do not receive adequate medical attention in ICE custody.<sup>233</sup> The asylum seekers are then required to undergo CFIs, largely pro se, and relive their painful experiences. Combined, these factors sometimes result in negative CFIs for meritorious claims under the current asylum system.

The proposed rule takes this flawed process, and adds an additional inquiry to it in the form of a rebuttable presumption of ineligibility. As shown above, some asylum officers already struggle to perform even the standard significant/reasonable possibility analysis. If the proposed rule goes into effect, they will be forced to perform a complicated, fact-intensive, and demanding rebuttable presumption analysis on top of it. This will lead to slower adjudications, additional mistakes, denials of valid claims, additional work for asylum officers and immigration judges who will have to review the negative decisions, and additional burdens for asylum seekers who will have to challenge negative decisions – including fear *and* presumption analysis - in court. This will also burden the attorneys and non-profit organizations that provide services to asylum seekers in this posture.

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<sup>231</sup> CRCL Complaint, CFI and RFI Deficiencies; Pretense at Protection at 13-16.

<sup>232</sup> Immigr. Equality et. al., *The Abuse of Transgender and HIV-Positive People in Detention*, (Jun. 16, 2021) (Trans and HIV-Positive Detention), <https://immigrationequality.org/wp-content/uploads/2021/06/Ltr-to-DHS-and-ICE-re-Abuse-of-Trans-and-HIV-Positive-People.pdf>; Transgender L. Ctr. et. al., *Letter from Transgender Law Center et al., to Dr. Stewart Smith Assistant Director for ICE Health Service Corp. et al* (Sept. 25, 2019), (TLC Letter to ICE), <http://transgenderlawcenter.org/wp-content/uploads/2019/09/Complaint-on-LGBTQ-PLHIV-DHS.pdf>; ACLU et. al., *Detention Conditions Impacting the Safety and Well-Being of LGBTQ Immigrants in the Otero County Processing Center*, (Mar. 25, 2019) (Otero Conditions), [https://www.aclu-nm.org/sites/default/files/field\\_documents/advance\\_copy\\_of\\_3.25.2019\\_las\\_americanas\\_santa\\_fe\\_dreamers\\_project\\_ac\\_lu-nm\\_letter\\_to\\_dhs\\_re\\_otero.pdf](https://www.aclu-nm.org/sites/default/files/field_documents/advance_copy_of_3.25.2019_las_americanas_santa_fe_dreamers_project_ac_lu-nm_letter_to_dhs_re_otero.pdf); Santa Fe Dreamers Project et al., *Letter to ICE Interim Field Office Director Dianne Witte* (Mar. 26, 2020), (Santa Fe Dreamers Letter to ICE), <https://www.washingtonblade.com/content/files/2020/03/March262020WinnConditionsLetter.pdf>; Immigr. Equality, *Complaint to Office of Civil Rights and Civil Liberties Re HIV Care in Detention Facilities* (Mar. 23, 2020) (CRCL HIV Care Complaint), <https://immigrationequality.org/wp-content/uploads/2020/09/Complaint-to-Office-of-Civil-Rights-and-Civil-Liberties-Re-HIV-Care-in-Detention-Facilities.pdf>.

<sup>233</sup> Nat'l. Immigrant Just. Ctr., *Request for Investigation into Inadequate Mental Health Services, Treatment, and Accommodations, Including Improper Use of Solitary Confinement, in ICE Detention*, (Jun. 2, 2022) (CRCL Mental Health Complaint), [https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2022-06/CRCL-complaint-mental-health-care-immigration-detention\\_June-2022\\_public.pdf](https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2022-06/CRCL-complaint-mental-health-care-immigration-detention_June-2022_public.pdf).

**c. The NPRM Forces Asylum Seekers to Affirmatively Request IJ Review, Thus Limiting Access to This Important Safeguard**

The proposed rule further penalizes asylum seekers with valid claims by requiring them to affirmatively request that an immigration judge review a negative CFI determination. The IJ review is one of the core rights that asylum seekers have and is required by statute.<sup>234</sup> In reversing the Trump administration regulation, the Departments explained that “treating any refusal or failure to elect review as a request for IJ review, rather than as a declination of such review, is fairer and better accounts for the range of explanations for a noncitizen's failure to seek review.”<sup>235</sup> Despite the Departments’ conclusion less than a year ago, they now seek to deprive asylum seekers of the right to immigration court review where it is not affirmatively requested.

The proposed rule also disregards that the majority of asylum seekers are going through the CFI proceedings pro se.<sup>236</sup> They do not have a complete and comprehensive understanding of the immigration law. They might not understand the significance of requesting an IJ review or be afraid to ask for one. Furthermore, they might still be traumatized from past persecution, arduous journeys to the United States, and punitive detention conditions.

An IJ review is an important safeguard. It provides an opportunity to correct asylum officers’ mistakes and ensure access to asylum for people with meritorious claims. Placing the burden on asylum seekers to request review will hurt people with valid claims. The IJ review helped to reverse negative fear determinations of Luis and Veronica, whose cases were described in the previous section. Luis’s asylum officer displayed a shocking lack of LGBTQ competency and was hostile towards him. Veronica did not have sufficient privacy during her CFI, which prevented her from sharing important aspects of her asylum claim. Both Luis and Veronica were represented by counsel at the IJ review, and both had the negative CFI determinations overturned. In short, Luis’s and Veronica’s cases show that IJ review can be a lifeline for many asylum seekers with bona fide claims. Impeding asylum seekers’ access to this process is short-sighted and reckless. It shows a fundamental misunderstanding of the on-the-ground realities asylum seekers face.

At the same time, the proposed rule’s insistence that IJ review (for those who affirmatively request it) is a sufficient safeguard against the wrongful denials, once the presumption is implemented, is also poorly thought out.<sup>237</sup> Even in its current form, the IJ review often fails pro se applicants. The burdens placed on unrepresented individuals are simply too difficult to overcome. For example, asylum seekers do not always receive the CFI record prior to the IJ review, so they are unable to point out asylum officers’ mistakes. Furthermore, when they do receive the CFI record, it is English only, so detained non-English speakers have no practicable way to understand what the record actually says. And even when asylum seekers do speak English, they often lack the legal knowledge to analyze asylum officers’ mistakes. Consequently, individuals with clearly erroneous CFIs can still be denied

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<sup>234</sup> I.N.A. §235(b)(1).

<sup>235</sup> 87 FR at 18094.

<sup>236</sup> Pretense of Protection at 21; *See also* Human Rights First, Rushed Timelines, Inadequate Access to Legal Representation Impede Meaningful Opportunity to Seek Asylum Under New Asylum Processing Rule, (Oct. 21, 2022), <https://humanrightsfirst.org/library/rushed-timelines-inadequate-access-to-legal-representation-impede-meaningful-opportunity-to-seek-asylum-under-new-asylum-processing-rule> (stating that under the asylum processing rule, 99.1 percent of asylum seekers are unrepresented during their CFIs).

<sup>237</sup> NPRM at 11730, stating that the proposed rule “would provide important built-in safeguards. . . .if [asylum seekers] receive a negative credible fear determination, they would be able to elect to have that determination swiftly reviewed by an IJ.”

relief during the IJ review. This happened to several LGBTQ/H asylum seekers described above. Enrique, whose CFI was rife with mistakes, including referring to his hometown of Ibaque, Colombia, as “evil gay,” was not represented during the IJ review and still had the negative CFI finding upheld by an IJ. Similarly, the asylum officers who conducted Fernando’s and Oumar’s CFIs made a number of clear legal mistakes. Nevertheless, the IJs upheld these negative determinations. Fernando and Oumar did not have counsel during the IJ review.

As such, for many unrepresented asylum seekers under the current asylum system, the IJ review does not lead to a meaningful reconsideration. Furthermore, the short timelines of the expedited removal proceedings provide very little opportunity for asylum seekers to find an attorney. Without an attorney, many asylum seekers with meritorious claims do not receive due process and receive wrongful IJ review denials. The NPRM proposes to increase the burden on asylum seekers while decreasing their access to review. Doing so will only increase the instances of inappropriate and illegal denials of bona fide claims.

**d. The NPRM Would Eliminate Asylum Seekers’ Ability to Request USCIS Reconsideration of Negative CFI Decisions, Depriving Them of This Important Safeguard**

Moreover, the proposed rule attempts to entirely eliminate asylum seekers’ longstanding right to submit requests to USCIS to reconsider erroneous negative credible fear determinations if they are barred under the rule. This safeguard has, for decades, shielded many asylum seekers from deportation to persecution and torture.<sup>238</sup> According to data provided in the asylum processing rule, between FY 2019 to FY 2021, USCIS reconsideration of erroneous negative credible fear determinations saved at least 569 asylum seekers from deportation to persecution or torture.

Under the recently implemented asylum processing rule,<sup>239</sup> the agencies imposed severe limitations on asylum seekers’ ability to submit requests for reconsideration of negative credible fear determinations, setting an unworkable seven-day deadline for submitting a request for reconsideration (following immigration judge review, which must happen within seven days of the fear determination) and limiting asylum seekers to a single request. Advocates and attorneys have condemned these new restrictions, which have barred asylum seekers issued erroneous negative credible fear determinations from obtaining reconsideration due to draconian temporal and numerical restrictions.<sup>240</sup> UNHCR has opposed elimination of this safeguard and warned that it may increase the risk of refoulement.<sup>241</sup>

The USCIS reconsideration gave Fernando an opportunity to seek asylum in the United States. Fernando is a gay, HIV-positive asylum seeker. Fernando's asylum officer made a number of mistakes, and an IJ erroneously upheld the asylum officer’s decision. With an attorney’s help, Fernando submitted a USCIS request for reconsideration, which was granted. Fernando’s request was submitted several months after the IJ review. Fernando had his CFI before the asylum processing rule went into

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<sup>238</sup> Human Rights First, Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture, (Oct. 1, 2021), <https://humanrightsfirst.org/library/biden-administration-move-to-eliminate-requests-for-reconsideration-would-endanger-asylum-seekers-deport-them-to-persecution-and-torture>.

<sup>239</sup> 87 FR 18078.

<sup>240</sup> Pretense of Protection.

<sup>241</sup> UNHCR, Comment Submitted by United Nations High Commissioner for Refugees (UNHCR), (Jun. 1, 2022), <https://www.regulations.gov/comment/USCIS-2021-0012-5305>.

effect. Therefore, the seven-day deadline did not apply to him. The proposed rule and the asylum processing rule would have left Fernando with no path for relief, despite his meritorious claim.

Ines is another asylum seeker, who greatly benefited from USCIS review. Her case was described in Section V.a. Ines was initially prevented from seeking asylum due to the Trump-era transit bar that the federal courts found illegal. Because of the bar, Ines was given an RFI, instead of a CFI. She received a negative RFI determination. After the asylum bar was struck down, Ines's counsel had to petition USCIS twice for reconsideration and file administrative complaints on her behalf. After months of advocacy, USCIS finally rescinded its negative RFI determination, and Ines was placed in removal proceedings. She is currently pursuing her case.

Unlike Fernando and Ines, the asylum processing rule applied to Enrique and resulted in his unjust deportation. As was explained above, Enrique's CFI was filled with egregious legal and factual errors. The interviewing asylum officer displayed a complete lack of LGBTQ cultural competency, ignorance of asylum law, and ignorance of USCIS's guidelines and policy pertaining to interviewing techniques and CFI adjudications. The asylum officer wrongfully denied Enrique's CFI, and the IJ wrongfully affirmed. Enrique was unrepresented in both of these proceedings. Enrique was not able to find counsel within the 7 day-deadline imposed by the asylum processing rule, and could not file his request for reconsideration by the time the deadline expired. USCIS denied Enrique's request because it was past the deadline. He was deported to Colombia where he faces grave harm.

Rather than fully restoring the right to request reconsideration, the Departments now seek to eliminate it completely. It is highly questionable whether USCIS would ever exercise its *sua sponte* authority to reopen a case. Ines's situation provides a good example of this. She was impacted by a rule that several federal courts found illegal. It was a clear-cut case, based on a legal issue. Yet, USCIS was initially unwilling to reconsider it. If someone like Ines has to struggle to get USCIS to change a wrongful decision, it is logical to assume that would be true for other applicants.

#### **e. The NPRM Excludes LGBTQ Families**

Under the NPRM, if a principal asylum applicant is eligible for withholding of removal and would be granted asylum but for the rebuttable presumption, *and* an accompanying spouse or child does not independently qualify for asylum, the presumption of asylum ineligibility does not apply. Presumably then, the principal applicant would be granted asylum, as would their derivatives. This exception purports to value family unity. However, the NPRM does not recognize parent-child relationships for LGBTQ families who lack access to the systems that would allow them to legally bind their families together. Marriage equality, and LGBTQ-inclusive family protections generally accessible in the United States, should be presumed unavailable in almost every nation from which LGBTQ people flee due to persecution. Even in nations where marriage may be technically legal, accessing that legal protection may not be available to people fleeing persecution. As such, LGBTQ asylum seekers with *de facto* spouses and/or who are *de facto* parents will not be recognized as family by the NPRM, and thus will be subjected to the presumption despite those relationships. As written, the families of principal applicants who are denied asylum, but granted withholding of removal, will be ordered removed and deported.

### **VI. The Espoused Justification for the NPRM is Deeply Flawed**

The proposed rule offers several justifications for why it is needed. Primarily, the Departments argue that they expect a significant increase in daily border crossings once Title 42 ends. The Departments state that they do not have capacity to manage the border unless asylum seekers participate

in one of the three pathways laid out in the proposed rule. The Departments further claim that the presumption is necessary to deter asylum seekers from crossing between POEs. They claim that without the deterrent component, border crossings will be too burdensome to manage. Further, the NPRM states that individuals with non-meritorious asylum claims remain in the system for years, slowing down the processing. If the Departments lack capacity to process asylum claims in a timely manner, they should increase their capacity, not preemptively deny meritorious claims.

Next, the Departments claim that a significant portion of asylum seekers do not have viable asylum claims. They assert that the NPRM's presumption of ineligibility will allow the Departments to accurately distinguish between meritorious and non-meritorious claims. They further assert that, for the most part, asylum seekers with meritorious claims would not be crossing between ports. There is no basis or support for these wildly illogical assumptions. Some of the world's most desperate and deserving refugees are exactly the people that the NPRM would automatically exclude from protection. There is no correlation between the restrictions created, and the potential merit of a person's asylum claim.

**a. The NPRM Will Heavily Burden NGOs, as Opposed to Helping Them**

The government's justification that the proposed rule will help relieve pressure on NGO partners caused by the "increased encounters of noncitizens at the Southwest Border" is deeply flawed. As NGOs who work with migrants and asylum seekers both at the border and in the interior of the United States, we strongly dispute this reasoning and justification. This proposed rule will place even more strain on non-profits and other NGOs working on behalf of this population, as it injects uncertainty into established legal processes and will subsequently require more resources, training, and time to be devoted to the legal representation of asylum seekers caught under this new rule.

The regulations represent a profound change to existing law and as a result, a significant amount of our collective staff time and resources will have to be devoted to changing how we conduct client intakes, make case acceptance decisions, counsel clients about the merits of their asylum case, and train our pro bono volunteers and the wider legal community. We will have to make fundamental changes – which will take more time and resources – in how we present our clients' cases and how we advocate for them in front of CBP, ICE, USCIS, and EOIR.

Due to this new rule, we will have to significantly retrain our staff on how to determine whether someone is eligible for asylum and how to advise potential clients about the strengths and weaknesses of their asylum case so that they can make an informed decision about whether to apply. Collectively, we work with hundreds of pro bono attorneys and law students. These volunteers work with clients to prepare their asylum applications and represent clients in credible and reasonable fear interviews and asylum adjudications in front of CBP, ICE, USCIS, and EOIR. We also conduct trainings for the wider legal community on asylum law and representing LGBTQ asylum seekers. We also distribute resources to the wider legal community to aid in the representation of LGBTQ asylum seekers, including country condition research, case materials, and guides about asylum law, which we make available to lawyers around the country who are representing LGBTQ asylum seekers. Due to this new rule, our staff will have to devote time and organizational resources to retraining our volunteers, revise the trainings we give, and revamp the resources and guides we distribute.

Furthermore, in addition to the above, NGOs working at the border – like TLC and L4GG – already struggle to meet the needs of LGBTQ/H refugees desperate to find safety. The proposed rule will compound the problem by adding additional work to already overburdened legal providers, currently struggling to facilitate CBP One appointments for individuals seeking Title 42 exemptions,



along with all of their regular work. In addition, NGOs will have to divert resources to *educate* asylum seekers on the rule so that desperate LGBTQ/H refugees understand the consequences of crossing between ports of entry, even if it is to avoid persecution or to access critical HIV care.

As the very NGOs the proposed rule seeks to support, we resoundingly reject the assertion that the rule will aid our work. This proposed rule will instead cause additional strain to be put on NGOs serving and supporting asylum seekers at the border and within the interior of the United States, and be a significant detriment to our missions and work.

**b. The NPRM Recognizes That Asylum Grants Would Go Down Once It Is Implemented**

The Departments admit that the proposed rule “would likely decrease the number of asylum grants.”<sup>242</sup> This means that asylum seekers, including LGBTQ/H people, with meritorious claims, whose lives are in danger, would be denied protection and forced to return to persecution. Simultaneously, the proposed rule claims it will be able to effectively sort between meritorious and non-meritorious asylum claims, so that bona fide asylum seekers will not be harmed.<sup>243</sup> The proposed rule contradicts itself. The number of asylum *grants* is directly tied to the number of valid asylum *claims*. If the number of grants goes down, it would mean that the number of *valid* claims also went down. Meaning, the proposed rule cannot accurately distinguish between meritorious and non-meritorious claims, and meritorious claims will be denied as a result of the proposed rule going into effect. This is refolement.

**c. The NPRM’s Stated Objective of Eliminating Non-Meritorious Asylum Claims Is Not Fulfilled by the Rule’s Reliance on “Lawful Pathways” and Deterrence**

The proposed rule justifies impeding asylum access by stating that it needs a carrot-and-stick approach to border management, where “lawful pathways” to immigration are combined with deterrent measures.<sup>244</sup> The proposed rule disingenuously characterizes crossing between POEs to seek asylum as unlawful. This is incorrect and contradicted by the INA, which clearly states that a person may seek asylum in the United States *regardless of the manner of entry*.<sup>245</sup> Applying for asylum between POEs is a lawful pathway. The proposed rule attempts to deter lawful behavior that for many asylum seekers is the only viable option for accessing protection.

Moreover, the proposed rule fails to explain why the deterrence component is necessary to successful border management. The rule cites the United for Ukraine (“U4U”) parole program as a success story that significantly reduced border crossings by Ukrainian nationals. “The U4U process also sharply reduced the flows of Ukrainian citizens to Mexico and to the SWB, and channeled them instead into a lawful process.”<sup>246</sup> In a footnote, the proposed rule explains that the “encounters of Ukrainian nationals fell from an average of 875 per day the week before the announcement of U4U on April 21, 2022, to an average of 10 per day the week of May 10.”<sup>247</sup> The rule further states that “The Departments anticipate that the rebuttable presumption proposed by this rule, particularly in light of the innovative steps the United States Government and other governments are taking to provide other

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<sup>242</sup> NPRM at 11748.

<sup>243</sup> NPRM at 11746.

<sup>244</sup> NPRM at 11729.

<sup>245</sup> INA § 208(a)(1).

<sup>246</sup> NPRM at 11729.

<sup>247</sup> NPRM at 11729 n.193.

safe, lawful, and orderly pathways, would – as evidenced by the success of the Venezuela process and U4U – incentivize migrants to seek protection through such lawful pathways.”<sup>248</sup>

However, U4U does not have a forceful deterrent component. The “How to Be Considered for Parole Under Uniting for Ukraine” section of the USCIS website states that “Ukrainians who present at U.S. land port of entry without a valid visa or without pre-authorization to travel to the United States through United for Ukraine *may* be denied entry and referred to apply through this process.” (emphasis added).<sup>249</sup> There is a vast difference between the highly punitive nature of the presumption of ineligibility and U4U’s cautionary advice that Ukrainian citizens “*may*” be denied entry. Despite U4U’s less punitive approach, the Departments’ own data shows they have been successful in dramatically reducing irregular flows of Ukrainian citizens. U4U shows that asylum seekers do not need to be punished and presumed to be ineligible in order to participate in favored immigration pathways.

The agencies similarly found that CHNV parole programs helped to reduce the number of irregular entries. Unlike U4U, these programs have a deterrence component that penalizes irregular entries. However, the Departments appear to miss the obvious commonality between U4U and CHNV: these programs provide more orderly processes for asylum seekers to follow. Having access to a viable, safer, and quicker migration pathway incentivizes people to use that pathway. No one would undertake a perilous journey to the United States, attempt a dangerous crossing between POEs, and risk being detained for months, if they could bypass those dangers through a safer and more orderly immigration pathway. Asylum seekers resort to irregular crossings because they are in serious danger and are desperate, and because there are no other alternatives available to them. Therefore, the Departments’ reasoning that the deterrence is necessary is flawed and will needlessly harm asylum seekers.

The proposed rule also claims that the rebuttable presumption is necessary to:

increase asylum processing efficiency by increasing to some degree the percentage of meritorious asylum claims that are considered. It rests in part on the understanding that many individuals who avail themselves of the credible fear process do not have meritorious claims, and that those who would circumvent orderly procedures and forgo readily available options may be less likely to have a well-founded fear of persecution than those individuals who do avail themselves of an available lawful opportunity.<sup>250</sup>

The proposed rule provides no facts or other support for this assertion. The reality is that people with bona fide claims often have to cross between POEs because they are in immediate danger, and because they oftentimes have no other way to access asylum. However, the heightened burden and the numerous deficiencies in the expedited removal process, described above, will refool these bona fide asylum seekers. For example, Immigration Equality has worked with numerous LGBTQ/H asylum seekers who entered between POEs and subsequently won protection in the United States:

Hugo is a gay man from Guatemala, who entered without inspection. As a child, Hugo was gender nonconforming. This made him a target of sexual abuse by his 20-year-old cousin from the time Hugo was three years old until the time he turned eight. As an adult, Hugo was a victim of an attempted murder, when a man screamed homophobic slurs at him and pushed him under a bus. Fortunately, Hugo was able to escape with his life. However, when Hugo went to make

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<sup>248</sup> NPRM at 11729.

<sup>249</sup> USCIS, “Uniting for Ukraine,” (Last Updated Feb. 22, 2023), <https://www.uscis.gov/ukraine>.

<sup>250</sup> NPRM at 11737.

a police report the officer told Hugo he deserved the attack because he was gay and refused to take the report. Hugo won withholding of removal. He was not eligible for asylum due to the 2019 asylum transit bar.

Jessica is a trans woman from Honduras, who has suffered horrific violence as a result of her gender identity. Her father physically and mentally abused her because of her feminine mannerisms. As soon as she came of age, Jessica moved away to a big city with the hopes of establishing herself and creating much needed space from her family. Unfortunately, she could not find peace. She was a victim of additional attacks, including incidents of sexual violence. Since she was not safe in Honduras, Jessica fled to the United States. She entered without inspection and eventually won asylum.

Alexander is a gay man from Nicaragua. Alexander suffered persecution, both, for his political opinion and sexual orientation. He participated in protests, where he was met with police brutality. He was later arrested by the Nicaraguan police. In custody, police officers repeatedly raped and tortured Alexander. However, he was able to escape and flee Nicaragua. Alexander entered the United States without inspection. He later won asylum.

Immigration Equality has assisted other individuals with strong asylum claims, who entered without inspection, but who have not yet completed the asylum process. Some of these individuals include an HIV-positive gay man from Kenya who experienced sexual abuse and torture due to his sexual orientation; a gay man from Brazil who suffered several instances of physical violence due to his sexual orientation; and a bisexual woman from Jamaica who suffered various physical assaults, including a stabbing because of her sexual orientation.

For all these reasons, the presumption will not have the desired effect of increasing asylum efficiency by sorting out non-meritorious claims. If the rule goes into effect LGBTQ/H asylum seekers, like the ones described above, might never be able to access asylum as promised by our laws.

#### **d. The NPRM Is Not an Effective Border Management Tool**

The agencies state that after Title 42 ends, they expect a large surge in border crossings, totaling between 11,000-13,000 individual encounters per day, absent policy changes.<sup>251</sup> The proposed rule notes that “these encounters, which are expected to be composed in significant part of Venezuelan, Nicaraguan, and Cuban nationals, are best addressed through the application of immediate consequences for unlawful entry, alongside the provision of lawful pathways, such as the CBP One app and recently announced parole process.”<sup>252</sup>

In the same breath, the agencies claim that Venezuela, Nicaragua, and Cuba programs have been successful at reducing encounters of these nationals. According to the proposed rule, “In the week leading up to the October 12, 2022 [Venezuelan parole] announcement, the United States was encountering approximately 1,100 Venezuelans between ports of entry at its SWB every day; numbers fell sharply within weeks and averaged 67 Venezuelans per day the week ending November 29, 2022, and 28 per day the week ending January 22, 2023.”<sup>253</sup> Similarly, the “encounters of *Cubans*, Haitians, and *Nicaraguans* (“CHNs”) between ports of entry on the SWB declined from 928 on the day of the [parole programs] announcement (January 5, 2023) to just 92 on January 22 – a decline of 92

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<sup>251</sup> NPRM at 11731.

<sup>252</sup> NPRM at 11731.

<sup>253</sup> NPRM at 11711.

percent.”<sup>254</sup> (emphasis added). What is not clear, is how many refugees were persecuted, tortured, or killed while they were forced to wait on the possibility of parole.

The proposed rule also states that “CBP expects to process multiple times more individuals on average per day using CBP One. . . . Notably, however, the level of resources required to expand port of entry processing in this way would only be feasible if, as DHS projects, encounters at the border are driven down by the application of a consequence . . . .”<sup>255</sup> While the efforts to expand processing at POEs are welcomed, the Departments again fail to explain why they think a deterrence mechanism is necessary to reduce irregular encounters. As the U4U demonstrated, such mechanism is not needed. Furthermore, currently the CBP One app fails to facilitate efficient processing. The CBP One appointments fill within minutes, leaving thousands of asylum seekers stranded in Mexico for indeterminate periods of time, facing extreme danger and living in squalor. The Departments fail to consider how the dangerous conditions in Mexico might push asylum seekers towards crossing between ports. The deterrence mechanism in the form of presumption will not work under these circumstances because escaping life-threatening conditions in Mexico is necessary for asylum seekers. Expanding POE processing could possibly alleviate appointment shortages and the amount of time people will have to stay in Mexico, but these fixes will not happen overnight.<sup>256</sup> In the meantime, the overreliance on CBP One will replicate unsafe and inhumane conditions that existed when metering was in place.<sup>257</sup>

At the same time, many asylum seekers who cannot get a CBP One appointment and are forced to cross between POEs will be deported due to the presumption. The Departments should expand access to the asylum process through the CBP One app. However, they should not punish asylum seekers for not using the app. The purported safeguard that allows people to present at POEs without a CBP One appointment if they show by a preponderance of the evidence that the app was not useable is inadequate. Preponderance of the evidence is a standard that many asylum seekers with bona fide claims may not be able to meet.

Already, under restrictive border policies, refugees struggle to access the asylum system, even with attorney assistance. For instance, under Title 42, CBP has discretion to approve humanitarian parole requests at POEs. BBP filed over 80 parole requests in 2021 on behalf of LGBTQ migrants seeking exemptions. BBP emphasized individuals with HIV who did not have access to medication in Mexico, Black migrants, and LGBT migrants who are most vulnerable Mexico. Of those approximately 80 requests, only two were approved. The same issues might continue if the proposed rule goes into effect. Only this time, the DHS officials will be deciding whether someone has shown by a preponderance of the evidence that they could not use CBP One.

If LGBTQ/H asylum seekers cannot secure a CBP One appointment they will be in extreme danger. This was the case for Immigration Equality client, Eduardo. He is a gay, HIV-positive man from Cuba who was persecuted on account of his sexual orientation, HIV-status, and political opinion. He arrived at the southern border to apply for asylum but was forced to wait in Mexico pursuant to the metering policy. While in Mexico, Eduardo ran out of his HIV-medication and the Mexican authorities refused to renew his supply of the medication. Desperate and scared for his life, Eduardo asked for

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<sup>254</sup> NPRM at 11706.

<sup>255</sup> NPRM at 11729.

<sup>256</sup> Arelis R. Hernandez, Desperate Migrants Seeking Asylum Face a New Hurdle: Technology, WASH. POST, Mar. 11, 2023, <https://www.washingtonpost.com/nation/2023/03/11/asylum-seekers-mexico-border-app/>.

<sup>257</sup> Human Rights First, U.S. Policies and Practices Subjecting LGBTQ Asylum Seekers to Human Rights Violations, Arbitrary Detention in Often Life-Threatening Conditions, and Denials of and Delays in Refugee Protection,” (Aug. 22, 2022), [https://humanrightsfirst.org/wp-content/uploads/2022/09/HRF\\_Submission\\_IE\\_LGBTQ.pdf](https://humanrightsfirst.org/wp-content/uploads/2022/09/HRF_Submission_IE_LGBTQ.pdf).

assistance from a man who introduced himself as an attorney specializing in humanitarian visas to the United States. Eduardo obtained a visa from this “attorney,” so he could enter the United States to apply for asylum and access HIV-medication. The visa turned out to be fake. However, Eduardo had genuine fear for his life and a strong asylum claim. Fortunately, Eduardo secured counsel in the United States and won asylum. However, many other vulnerable people might not be so lucky.

e. **The NPRM Assumes That Significant Portion of Asylum Claims Are Non-Meritorious Without Considering Relevant Underlying Facts**

The Departments explain they are willing to eliminate the significant possibility standard for asylum seekers who do not rebut the presumption because “screening out more non-meritorious claims means fewer additional cases that would result in a denial years down the road . . . .”<sup>258</sup> The proposed rule notes that “among cases referred and completed since 2013, significantly fewer than 20 percent of people found to have a credible fear were ultimately granted asylum from EOIR.”<sup>259</sup>

However, the proposed rule fails to look at factors, unrelated to the merits of asylum claim, that might lead to low asylum grants for people who pass CFIs. For instance, the majority of asylum seekers are unrepresented in front of the EOIR during the asylum proceedings.<sup>260</sup> Yet, having counsel increases tenfold the chances that a person will win their case.<sup>261</sup> Furthermore, many asylum seekers have to complete their cases while they are detained by ICE. Close to 80 percent of people in ICE custody do not have counsel.<sup>262</sup> As was previously explained, detained people experience severe abuses in custody, including LGBTQ discrimination, lack of adequate medical care, lack of adequate psychological care, and significant structural barriers that prevent them from preparing their asylum cases.<sup>263</sup> Under these conditions, asylum seekers with bona fide claims might still be denied asylum, for reasons unconnected to the merits of the claim.

Additionally, some immigration judges have been found to misapply immigration law and engage in unprofessional and hostile conduct toward asylum seekers.<sup>264</sup> Many immigration judges have asylum denial rates of 90% or higher.<sup>265</sup> As one report by the Southern Poverty Law Center (SPLC) notes, the disparate grant rates among immigration judges should be a subject of scrutiny.<sup>266</sup> Certain regions, such as Atlanta, Georgia, Charlotte, North Carolina, and El Paso, Texas have become what SPLC describes as “asylum free zones,” and evidence the fact that some immigration judges are failing

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<sup>258</sup> NPRM at 11746.

<sup>259</sup> NPRM at 11716.

<sup>260</sup> Am. Immigr. Council, What Does Legal Representation Look Like in Immigration Courts Across the Country?, IMMIGR. IMPACT, Aug. 23, 2022, <https://immigrationimpact.com/2022/08/23/legal-representation-immigration-courts-across-country>.

<sup>261</sup> ACLU, No Fighting Chance, ICE’s Denial of Access to Counsel in U.S. Immigration Detention Centers, (2022) (No Fighting Chance) at 10 (2022), <https://www.aclu.org/report/no-fighting-chance-ices-denial-access-counsel-us-immigration-detention-centers>.

<sup>262</sup> No Fighting Chance at 10.

<sup>263</sup> Trans and HIV-Positive Detention; TLC Letter to ICE; Otero Conditions; Santa Fe Dreamers Letter to ICE; CRCL HIV Care Complaint; CRCL Mental Health Care Complaint.

<sup>264</sup> SPLC and Innovation L. Lab, The Attorney General’s Judges, How the U.S. Immigration Courts Became a Deportation Tool, (Jun. 25, 2019) (AG’s Judges) at 12-26, [https://www.splcenter.org/sites/default/files/com\\_policyreport\\_the\\_attorney\\_generals\\_judges\\_final.pdf](https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf).

<sup>265</sup> TRAC Immigration, TRAC Judge-by-Judge Asylum Decisions in Immigration Courts FY 2017-2022, SYRACUSE U., Last Accessed Mar. 22, 2023, <https://trac.syr.edu/immigration/reports/judge2022>.

<sup>266</sup> AG’s Judges at 12.

in their duties.<sup>267</sup> As a result, many asylum seekers with meritorious claims lose simply because they were assigned to a judge predetermined to deny almost every case.

Some of these judges lack LGBTQ competency or exhibit prejudice toward LGBTQ asylum seekers. For example, one practitioner reported that an IJ did not believe a person can be gay if they have a child with another person of a different sex.<sup>268</sup> Other reports state that IJs have mis-gendered respondents.<sup>269</sup> In remanding a case based on one IJ's improper stereotyping of an LGBTQ applicant, the Tenth Circuit Court noted that "The IJ's reliance on his own views of the appearance, dress, and affect of a homosexual led to his [improper] conclusion that Razkane would not be identified as a homosexual."<sup>270</sup> In a different case, the Ninth Circuit remarked that "in denying [the protection seeker's] application for CAT relief, [the IJ] ironically exhibit[ed] some of the same misconceptions about the transgender community that Avendano-Hernandez faced in her home country. The IJ failed to recognize the difference between gender identity and sexual orientation, refusing to allow the use of female pronouns because she considered Avendano-Hernandez to be 'still male,' even though Avendano-Hernandez dresses as a woman, takes female hormones, and has identified as woman for over a decade."<sup>271</sup> The above-mentioned examples involve LGBTQ individuals who had counsel and therefore were able to appeal their cases to circuit courts. However, as was explained, a majority of asylum seekers do not have lawyers. Many LGBTQ people like Razkane and Avendano-Hernandez do not prevail in their claims because they do not have access to counsel, and not because they lack bona fide asylum claims.

Lastly, the proposed rule does not appear to differentiate between asylum cases that were denied on the merits and in absentia removal orders. However, between FY 2008 and FY 2018, a total of 316,089 IJ decisions were in absentia removal orders, as opposed to 614,182 IJ decisions that were not in absentia.<sup>272</sup> As such, there are a significant number of cases that are not resolved on the merits. Because an in absentia removal order does not indicate whether or not the underlying claim is meritorious, many negative EOIR outcomes the proposed rule uses for its justification cannot be easily attributed to the strength or weakness of an asylum claim.

In short, the proposed rule cannot reach reliable conclusions about the merits of the underlying claims simply by looking at how many claims were denied. Due to the flaws in the immigration system, asylum seekers with bona fide claims often lose at an asylum hearing. An efficient and fair system would focus on addressing these flaws rather than creating new ones.

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Razkane v. Holder*, 562 F.3d 1283, 1288 (10th Cir. 2009).

<sup>271</sup> *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1075 (9th Cir. 2015).

<sup>272</sup> Am. Immigr. Council, *Measuring In Absentia Removal in Immigration Court*, American Immigration Council, (Jan. 28, 2021), at 8,

[https://www.americanimmigrationcouncil.org/sites/default/files/research/measuring\\_in\\_absentia\\_in\\_immigration\\_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/measuring_in_absentia_in_immigration_court.pdf)

**VII. Conclusion**

For the foregoing reasons, we urge the Departments to withdraw the NPRM in its entirety.

Sincerely,

Immigration Equality  
Oasis Legal Services  
Lawyers for Good Government  
Transgender Law Center  
Black LGBTQIA+ Migrant Project  
The Council for Global Equality  
Familia: Trans Queer Liberation Movement  
The Human Rights Campaign  
Lambda Legal  
Mijente  
Santa Fe Dreamers Project  
The TransLatin@ Coalition  
Whitman-Walker Health  
The Young Center for Immigrant Children's Rights