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Submitted via: <https://www.regulations.gov>.

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U.S. Department of Homeland Security
Washington, D.C. 20528

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Re: Comment in Opposition to the Interim Final Rule entitled Securing the Border; USCIS Docket No. USCIS–2024–0006; RIN 1615–AC92; A.G. Order No. 5943–2024; RIN 1125–AB32

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 LGBTQ¹ or are living with HIV. We write in strong opposition to the Department of Homeland Security (“DHS”) and the Executive Office for Immigration Review’s (“EOIR,” collectively with DHS, the “Departments”) Interim Final Rule (“IFR” or “Rule”) referenced above and urge the Departments to rescind the IFR in its entirety.²

I. Introduction

The IFR guts the U.S. asylum system by establishing another discriminatory process that applies a heightened asylum standard to refugees at the southern border. Although similar to the Departments’ Circumvention of Lawful Pathways (“CLP Rule”) asylum ban, the IFR has fewer exceptions, an even higher screening standard, and applies to Mexican refugees who will now be trapped in their country of origin with their persecutors unable to flee without the risk of penalty. Under the IFR, bona fide asylum seekers who are unable to obtain and wait for an appointment through the CBP One mobile application – unless they meet one of the very limited exceptions – will be presumed ineligible for asylum regardless of the merits of their claim.

The IFR will subject LGBTQ/H refugees to grave harm, either because it will result in the wrongful denial of meritorious queer and trans asylum claims, or because LGBTQ/H refugees will put their lives in danger trying to comply with the IFR’s illegal requirements. LGBTQ/H asylum seekers

¹ We use “LGBTQ” and “queer and trans” as umbrella terms for people with diverse sexual orientations or gender identities, including people who identify as gay, lesbian, bisexual, transgender, queer, intersex, asexual, non-binary, and gender non-conforming. We refer collectively to LGBTQ people and people living with HIV as “LGBTQ/H.”

² 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.

are routinely sexually assaulted, beaten, and kidnapped in Mexico, especially in the border region. Yet, under the IFR, queer and trans asylum seekers are required to wait patiently in danger for a CBP One appointment or risk losing their opportunity to apply for asylum. The exceptions to the ban for refugees who can prove “an extreme and imminent threat to life or safety” are insufficient. First, they create an illegal additional evidentiary burden higher than asylum requires. Second, they ignore the reality that violence faced by LGBTQ/H people in Mexico is probable, but unpredictable, and so under the IFR refugees are incentivized to wait until they are brutalized (or *further* brutalized) before seeking protection.

For queer and trans refugees, asylum is a critical lifeline. LGBTQ/H people are persecuted around the globe for being who they are. Asylum seekers do not want to cross the border with traffickers, or through deadly corridors. But they often have no other choice in order to keep themselves safe. This reality is why the Immigration and Nationality Act (“INA”) preserves the right to seek asylum regardless of manner of entry. Punishing the most vulnerable refugees – LGBTQ/H, 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 CBP One app – undermines the fundamental right to asylum, violating the letter and spirit of the law.

The IFR also violates the promises made by President Biden to “Protect[] Vulnerable LGBTQ/HI+ Refugees and Asylum Seekers”³ and “restore and strengthen our own asylum system.”⁴ 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. The IFR blatantly contravenes these promises and condemns LGBTQ/H asylum seekers to further harm.⁵ For this reason, and those discussed below, we urge the Departments to withdraw the IFR in its entirety.

II. Commenting Organizations

Immigration Equality

Immigration Equality is a national organization that advocates for LGBTQ/H immigrants. For almost 30 years, Immigration Equality has 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 700 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

³ [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.

⁴ [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.

⁵ 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.

asylum claims related to sexual orientation or gender identity, and has provided training on the adjudication of LGBTQ/H asylum cases to asylum officers within the Department of Homeland Security.

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 Latine. 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. Through movement lawyering and advocacy, Oasis seeks to empower LGBTQ+ immigrants and spotlight their unique needs and resilience.

The Black LGBTQIA+ Migrant Project

The Black LGBTQIA+ Migrant Project (BLMP) envisions a world without forced migration, where no one is forced to give up their homeland and 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 Organizing, Base-Building, Strategic Communications, and Long-Term Viability and Sustainability. We are led by a directly impacted steering committee and staff, and operate organizing networks in regions throughout the United States, while connecting to the fight for liberation in our home countries.

Council for Global Equality

The Council for Global Equality is a Washington, D.C.-based coalition of 38 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.

Equality California

Equality California brings the voices of LGBTQ+ people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ+ people. We advance civil rights and social justice by inspiring, advocating, and mobilizing through an inclusive movement that works tirelessly on behalf of those we serve.

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 LGBTQ+ immigrants by serving as counsel of record or *amicus curiae* in litigation involving the rights of LGBTQ+ 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, 512 F. Supp. 3d 966 (N.D. Cal. 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.

Lawyers for Good Government

Lawyers for Good Government (L4GG) is a high-impact nonprofit mobilizing the legal community to support individuals and communities historically excluded from the "American dream." Our flagship Project Corazon defends the human rights of asylum seekers at the border and throughout their process of seeking safety, particularly LGBTQ+ individuals who face severe discrimination and danger. In April 2024, Project Corazon launched an LGBTQ+ Asylum Clinic in New York City, providing critical legal education, work permit assistance, asylum application support, and holistic remedies to address their unique challenges. This clinic exemplifies L4GG's commitment to empowering marginalized communities through specialized legal services, advocacy and power-building.

National Center for Lesbian Rights

National Center for Lesbian Rights (NCLR) is a national, feminist legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, legislation, policy, and public education. We are currently involved in active litigation against transgender healthcare and sports bans across the country. For 30 years, NCLR's Immigration and Asylum Program has provided free legal assistance to thousands of LGBTQIA+

immigrants nationwide while simultaneously working to address larger barriers faced by same gender couples, trans people, and HIV+ individuals. NCLR remains at the epicenter of national policy discussions, pushing for inclusion of LGBTQIA+ immigrants, and their families today.

National Immigrant Justice Center

NIJC is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. Headquartered in Chicago, NIJC provides legal services to more than 10,000 individuals each year, including many asylum seekers, torture survivors, and unaccompanied children who have entered the United States by crossing the U.S.-Mexico border. NIJC's legal services team includes the LGBTQ Immigrant Rights Initiative (LGBTQ Project), which provides legal services through in-house and pro bono representation to detained and nondetained LGB/Queer/Trans people as well as those living with HIV/AIDS. The LGBTQ Project's work largely focuses on litigating protection-based claims across the country, advocating for detention release, and defending detained transgender people from deportation. Many of these individuals have overcome unimaginable persecution and torture in their home countries and journeyed to the United States in hopes of finding a better future. Since its founding more than three decades ago, NIJC uniquely blends individual client advocacy with broad-based systemic change, including policy reform, impact litigation, and public education.

National LGBTQ Task Force Action Fund

Rainbow Railroad

Rainbow Railroad is a global not-for-profit organization that helps at-risk LGBTQI+ people get to safety worldwide. Based in the United States and Canada, we're an organization that helps LGBTQI+ people facing persecution based on their sexual orientation, gender identity and sex characteristics. In a time when there are more displaced people than ever, LGBTQI+ people are uniquely vulnerable due to systemic, state-enabled homophobia and transphobia. These factors either displace them in their own country or prevent them from escaping harm. As a result of Rainbow Railroad, more LGBTQI+ individuals can access lives free from persecution, and ultimately, we envision a world where LGBTQI+ people can live lives of their choosing, free from persecution. Since our founding, we've helped more than 13,000 LGBTQI+ individuals find safety through emergency relocation, crisis response, cash assistance, and other forms of assistance.

The Transgender Law Center and the Border Butterflies Project

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.

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 IFR

The changes made by the IFR should have been proposed in a Notice of Proposed Rulemaking, and the IFR's effective date before final publication in the Federal Register is wholly inappropriate considering the significant changes it makes. In addition, the Departments have provided an insufficient 30-day timeframe to respond to an IFR that will make dramatic changes to the asylum system, denying access to protection for many of the most vulnerable LGBTQ/H refugees that commenting organizations serve. Given the scope of the IFR, this truncated comment period fails to serve its intended purpose, and thus violates the Administrative Procedure Act.

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 refoulment of vulnerable refugees.

Signatory organizations include non-profits that serve LGBTQ/H immigrants (either through direct services, advocacy, or both). Our organizations are stretched thin 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 their experiences with the CBP One application, and experiences in Mexico while awaiting entry into the U.S. to apply for asylum. We also would have been able to gather additional information on how the new heightened screening standard will impact our communities. This information is critically important for the Departments to consider in determining the impact, legality, and feasibility of the IFR 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.

IV. The IFR Is Unlawful and Will Result in LGBTQ/H People Being Seriously Harmed and Returned to Countries of Persecution

Under the IFR, during “emergency border circumstances,” anyone who crosses without authorization (or potentially even presents themselves at a Port of Entry along the southern border, unless they present with a CBP One appointment or through another process approved by the Secretary), will be ineligible for asylum unless they meet certain limited exceptions. In order to establish an exception, an individual can demonstrate, by a preponderance of the evidence, there were “exceptionally compelling circumstances” that excepted them from the ban. “Exceptionally compelling circumstances” are described as including 1) an acute medical emergency, 2) an “imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder,” or 3) being a “victim of a severe form of trafficking in persons.”¹

a. The IFR Violates, and Is Inconsistent with, U.S. and International Law

The IFR 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 IFR, which conditions access to asylum on manner of entry, 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.⁶ The IFR attempts to unlawfully circumvent the credible fear screening standard established by Congress, which was intended to be a low screening threshold.⁷ 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 IFR attempts to eviscerate this standard by first requiring asylum seekers to prove an exception to the rule (that has no bearing on the underlying merits of the asylum claim) by a preponderance of evidence, and then requiring those who cannot prove the exception to meet a higher fear standard before being permitted to seek protection. This provision is inconsistent with U.S. law.

The IFR 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 Departments 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

⁶ 8 U.S.C. § 1225.

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

of a path to naturalization. Moreover, the IFR will lead to the refoulement of asylum seekers and will trap Mexican refugees in their country of persecution in violation of the Refugee Convention and Protocol.

In short, the proposed asylum ban violates key provisions of U.S. law and treaty commitments.

V. **The Rule Forces Vulnerable Refugees, Including Mexican Nationals, to Wait in Dangerous Conditions in Mexico in Order to Be Eligible for Asylum**

As commenting organizations explained in our comment opposing this Administration’s CLP Rule, and as describe in greater detail below, conditions in Mexico are extremely dangerous for LGBTQ/H people.⁸ The Departments are well aware of this fact given that asylum officers and Immigration Judges regularly grant relief to Mexican LGBTQ/H asylum seekers on the grounds that their fear of persecution in Mexico on account of their LGBTQ/H status is well founded.

By conditioning access to asylum on waiting for many months to access and secure a limited, lottery-based CBP One appointment, the Departments are penalizing and punishing the most vulnerable refugees – like those who are unable to access or use the technology or those who are in serious danger in Mexico based on their LGBTQ/H status. While the CLP Rule at least exempted Mexican nationals from its restrictions and allowed for an exception for people unable to use the CBP One application due to language barriers, illiteracy, or technical difficulties, this Rule does not. This fact alone makes the Rule illegal; not only will it force LGBTQ/H asylum seekers who are not Mexican to wait many months in dangerous conditions for a chance to seek protection in the United States, it will also force Mexican LGBTQ/H individuals to wait in their *country of origin* for an appointment, essentially trapping them in dangerous conditions with their persecutors. This is tantamount to refoulment.

While the IFR should be rescinded in full for all the reasons we outline in this comment, to the extent the Rule continues in force, it must: 1) include an exception for all asylum seekers whether they present at ports of entry or cross irregularly, who do not speak a language in which the CBP One app is provided, are unable to use the application due to illiteracy, disabilities, lack of resources or other difficulties, fail to secure appointments after multiple attempts, or did not know about the application’s existence, 2) ensure exceptions for “acute medical emergencies” and “imminent threats to life and safety” are broad enough to include the medical risks and harms reported by LGBTQ/H asylum seekers while waiting in Mexico, and 3) ensure equal access to asylum at ports of entry, including by providing that people seeking asylum must be permitted to present at a port of entry without delay, including when they do not have a CBP One appointment.

a. **Conditions for LGBTQ/H People in Mexico**

Country conditions show that Mexico is an extremely dangerous place for LGBTQ/H people. Homophobia and transphobia are prevalent across the country, including in major urban areas such as Mexico City and Guadalajara.⁹ LGBTQ/H community members are 9 times more likely to suffer

⁸ Author’s 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, https://immigrationequality.org/wp-content/uploads/2023/03/LGBTQ_Comment_NPRM-3_27_23.pdf

⁹ Research Directorate, Immigration and Refugee Board of Canada, Mexico: Societal Norms on Gender Identity Expressions, Including in Indigenous Communities (May 25, 2018) at 2, available at <https://www.refworld.org/docid/5b9bdb404.html>.

violence in Mexico than non-LGBTQ/H people¹⁰ and Mexico ranks second globally behind Brazil for the number of hate crimes committed against the LGBTQ/H community.¹¹

i. There is a pattern and practice of systematic violence against LGBTQ/H people in Mexico.

Human rights organizations, governments, and international bodies have recognized the violently dangerous conditions that LGBTQ/H positive people face in Mexico.¹² In the first two weeks of 2024 alone, three transgender woman were murdered, including Samantha Gomez Fonseca, a human rights activist and politician.¹³ In 2022, 87 LGBTQ people, 48 of whom were transgender, were murdered in violence motivated by the victim's sexual identity, according to civil society groups.¹⁴ 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 were murdered in Mexico between the years 2014 and 2021 and the predominant feature such homicides have in common is the "cruelty with which they are committed."¹⁵ 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.¹⁶ 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.¹⁷ Daily reports in Mexican newspapers of the murder of LGBTQ/H community members show how common the violence is against the population and how it is carried out with relative impunity.¹⁸ These include stories of transgender women being shot and murdered in the street¹⁹ in full view of passersby, the bodies of transgender women²⁰ and gay men²¹ being dumped in public places with signs of torture and sexual abuse, and the significant numbers of LGBTQ people who are murdered in their own home.²² A lesbian couple working as journalists were murdered by

¹⁰ La Jornada, *LGBT community, nine times more exposed to violence*, 8 December 2019, available at: <https://www.jornada.com.mx/2019/12/08/politica/013n2pol>.

¹¹ Excelsior, *The Rise of Homophobia in Mexico Continues*, 17 May 2019, available at: <https://radioformulaqr.com/noticias/sigue-a-la-alza-la-homofobia-en-mexico/>.

¹² Letra S, *Violent Deaths of LGBTI People in Mexico, 2021 update*, May 2022, available at: <https://sinviolencia.lgbt/muertes-violentas-de-personas-lgbt-en-mexico-2021/>; Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *Mexico Country Reports On Human Rights Practices For 2023* (April 22, 2024).

¹³ CBS News, *Politician among at least 3 transgender people killed in Mexico already this month as wave of slayings spur protests*, January 16, 2024, available at: <https://www.cbsnews.com/news/transgender-politician-samantha-gomez-fonseca-killed-mexico-wave-of-murders-protests-lgbtq/>.

¹⁴ Id.

¹⁵ Letra S, *supra*.

¹⁶ Id.

¹⁷ Human Rights Council, United Nations, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions in follow-up to his mission to Mexico* (May 6, 2016), available at <https://www.refworld.org/docid/57616b6e4.html>.

¹⁸ See Oasis Legal Services' *Country Conditions Index for Mexico* and cited articles: <https://drive.google.com/drive/folders/1KPiZFifP-DyWwCgiP5yu85pJ9JvAQ5Uk?usp=sharing>

¹⁹ El Universal, *Impunity in hate crimes in the country*, 2 February 2018, available at: <http://www.eluniversal.com.mx/nacion/sociedad/impunidad-en-crmenes-de-odio-en-el-pais>.

²⁰ Desastre MX, *They torture and murder a trans woman in Colima*, 18 June 2018, available: <http://desastre.mx/mexico/torturan-y-asesinan-a-mujer-trans-en-colima/>.

²¹ Aristegui Noticias, *They kill a university student; "hate crime": UACM*, 24 February 2018, available at: <https://aristeguinoticias.com/2402/mexico/asesinan-a-universitario-crimen-de-odio-uacm/>.

²² San Diego Lesbian, Gay, Bisexual, Transgender News, *Openly gay teacher in Mexico found murdered in home*, San Diego Lesbian, Gay, Bisexual, Transgender News, 5 February 2019, available at:

armed men in their vehicle.²³ In another case, a trans woman, was found murdered with her body handcuffed, blindfolded, and marked with other signs of brutal gang violence.²⁴ Northern border states in Mexico are especially brutal. There was a case from Chihuahua where a lesbian couple was found dismembered and their bodies scattered in plastic bags along the highway.²⁵ The state of Veracruz, as well as Baja California, have reported similar crimes.²⁶ Specific examples of assassinations of LGBTQ people include:

- In 2018, a transgender woman was found dead on the streets of the city of Manzanillo, Colima. According to the news reports, the woman's hands were tied and her body showed signs of having been tortured.²⁷
- In 2018, Charly, a 25-year old transgender woman, was murdered at her place of work located in the municipality of Tehuacán, Puebla. The woman suffered violence and torture before being killed as a result of 15 stab wounds; also, according to local media reports, her body was mutilated.²⁸
- In 2017, a transgender woman was beaten to death in a bar in the state of Puebla. No witnesses came forward to testify about who committed the murder even though the bar was full of people.²⁹
- 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 firearm, one was strangled, one was killed with a knife, and one was hit in the head with a rock.³⁰
- In 2019, an openly gay teacher was found murdered at his home in the state of Puebla. His neighbors found his body which had sustained multiple stab wounds.³¹
- 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 nothing to arrest the perpetrator.³²

<https://sdlgbt.com/news/2019/02/05/openly-gay-teacher-mexico-found-murdered-home>; Cultural Survival, *Zapotec Advocate for Muxe and LGBTQ Rights Murdered in Mexico*, 1 March 2019, available at:

<https://www.culturalsurvival.org/news/zapotec-advocate-muxe-and-lgbtq-rights-murdered-mexico>.

²³ Sin Violencia LGBTI, *Being LGBTI+ in the most violent region of the world: the situation of homicides of lesbian, gay bisexual and trans persons in Latin America and the Caribbean in 2022*, August 2023, available at:

<https://sinviolencia.lgbt/informe-2022-ser-lgbti-en-la-region-mas-violenta-del-mundo/> (last visited July 2, 2024)

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ Desastre MX, *They torture and murder a trans woman in Colima*, *supra*

²⁸ Desastre MX, *They torture, mutilate, and kill a transgender woman in Puebla*, 22 March 2018, available at:

<http://desastre.mx/mexico/torturan-mutilan-y-asesinan-a-mujer-transgenero-en-puebla/>.

²⁹ Desastre MX, *Trans woman was beaten to death in a bar in Puebla*, Desastre 10 July 2017, available at:

<http://desastre.mx/mexico/mujer-trans-fue-asesinada-a-golpes-en-un-bar-de-puebla/>

³⁰ Televisa News, *Hate Crimes: transsexuals of Mexico*, 22 June 2017, available at:

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

³¹ San Diego Lesbian, Gay, Bisexual, Transgender News, *Openly gay teacher in Mexico found murdered in home*, San Diego Lesbian, Gay, Bisexual, Transgender News, 5 February 2019, available at:

<https://sdlgbt.com/news/2019/02/05/openly-gay-teacher-mexico-found-murdered-home>

³² Cultura Colectiva, *In plain sight of the Carnival of Veracruz, man beats 'youtuber' from the LGBT+ community*, 26 February 2019, available at: <https://news.culturacolectiva.com/mexico/en-pleno-carnaval-de-veracruz-hombre-golpea-a-youtuber-de-comunidad-lgbt/>

- In 2020, Elizabeth Montano, a transgender doctor who worked at the Mexican Social Security Institute, had been reported missing for nearly 10 days, authorities said, before her body was found near the town of Tres Marias, some 50 kilometers south of Mexico City.³³

For LGBTQ people, there are few constitutional or practical safeguards set in place to protect them.³⁴ In 2011, Mexico formally amended their constitution to prohibit discrimination against people with certain “sexual preferences”³⁵ but did not capture sexual orientation accurately, leaving many LGBTQ people feeling invisible in official and legal discourse.³⁶ Despite the government touting this as progress, extreme conditions of violence towards LGBTQ people have actually increased in some places following progressive reforms.³⁷ The brutality of attacks on gay and transgender people in Mexico, a nation marked by its ‘macho’ and highly religious culture, are meant to send a message to LGBTQ people that they are not welcome in society.³⁸ Last year, one of the most recognizable LGBTQ figures in Mexico, Ociel Baena, was violently murdered.³⁹ This year, transgender activist and politician Samantha Gómez Fonseca was shot multiple times and slain inside a car in Mexico City. Discrimination towards LGBTQ people at the highest level often reflects wider sentiments from the overall population.

ii. The high levels of violence against LGBTQ/H human rights activists in Mexico

Mexican LGBTQ/H human rights defenders also face increased levels of violence and mistreatment. On July 15, 2023, Ulises Nava Juárez, LGBTQ rights defender and head of the Department of Sexual Diversity at the Autonomous University of Guerrero, was murdered by assailants as he left the National Congress of Strategic Litigation for the Defense of Rainbow Quotas, in Aguascalientes.⁴⁰ As of July 31, 2023, the UN Office of the High Commissioner for Human Rights documented two killings already for the year of LGBTQ/H human rights activists.⁴¹ In 2021, 8 LGBTQ human rights defenders were murdered in Mexico.⁴² 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

³³ Reuters, Death of trans doctor in Mexico sparks new fears over LGBT+ violence (June 19, 2020), available at <https://www.reuters.com/article/us-mexico-lgbt-killing-trfn/deathof-trans-doctor-in-mexico-sparks-new-fears-over-lgbt-violence-idUSKBN23Q363>

³⁴ Ana Laura Gamboa Muñoz, Shanik Amira David George, Discrimination, Violence and Institutional Inefficiency: Human Rights of LGBT+ People in the State of Puebla 2015-2021, August 2022, available at: <https://repositorio.iberopuebla.mx/handle/20.500.11777/5724>, preceded by English translation (last visited July 2, 2024)

³⁵ Id.

³⁶ Id.

³⁷ See *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015)

³⁸ CBS News/Associated Press, *Politician among at least 3 transgender people killed in Mexico already this month as wave of slayings spur protests*, January 16, 2024, available at: <https://www.cbsnews.com/news/transgender-politician-samantha-gomez-fonseca-killed-mexico-wave-of-murders-protests-lgbtq/> (last visited July 3, 2024)

³⁹ Kathryn Armstrong, BBC News, Mexico: Murder suspected in non-binary magistrate Jesús Ociel Baena's death, November 14, 2023, available at: <https://www.bbc.com/news/world-latin-america-67422661>.

⁴⁰ Mexico Country Reports 2023.

⁴¹ Id.

⁴² Televisa News, *Hate Crimes: transsexuals of Mexico*, *supra*

usually related to efforts to promote recognition of their rights.”⁴³ 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.”⁴⁴ 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 lesbian, gay, bisexual, transgender or intersex rights activism of the victims usually taken into account. Moreover, the authorities often denigrate victims in an attempt to trivialize attacks.⁴⁵

iii. Mexican police and other government actors often commit or acquiesce in violence against LGBTQ individuals, resulting in broad impunity for these acts.

The Mexican police not only fail to investigate crimes committed against LGBTQ/H people⁴⁶ but are frequently the perpetrators of the violence.⁴⁷ 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.”⁴⁸ The country reports also note that “civil society groups claimed police routinely subjected LGBTQI+ persons to mistreatment while in custody.”⁴⁹ Due to high levels of corruption and overall dysfunction in Mexico’s government, activists state that “it’s very likely that cases [of violence against LGBTQ/H individuals] will end in impunity.”⁵⁰

Currently, only 13 states in Mexico have bias enhancements, or hate crime charges, for crimes motivated by a victim’s sexual orientation.⁵¹ Failing to classify crimes against LGBTQ individuals as hate crimes makes it difficult to quantify the violence against the LGBTQ community. Adding to this difficulty is the fact that Mexican police are often reluctant to investigate murders of transgender

⁴³ U.N. Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders on his mission to Mexico*, 12 February 2018, at 10, available at:

<https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/CountryVisits.aspx>

⁴⁴ Cultural Survival, *Zapotec Advocate for Muxe and LGBTQ Rights Murdered in Mexico*, 1 March 2019, available at:

<https://www.culturalsurvival.org/news/zapotec-advocate-muxe-and-lgbtq-rights-murdered-mexico>

⁴⁵ General Assembly of the United Nations, Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights defenders on his Mission to Mexico* (Feb. 12, 2018) at 14, available at

<https://undocs.org/A/HRC/37/51/Add.2>.

⁴⁶ Plumas Atomicas, *Mexico and the growing hate crimes against LGBT+ community*, 17 May 2019, available at:

<https://plumasatomicas.com/lgbt/crimenes-de-odio-por-homofobia-contra-comunidad-lgbt-en-mexico/>

⁴⁷ Posta, *Lesbian couple report aggression in Zuazua*, 11 March 2018, available at: <http://www.posta.com.mx/nuevo-leon/denuncian-agresion-pareja-lesbica-en-zuazua>

⁴⁸ Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, *Mexico Country Reports On Human Rights Practices For 2023* (April 22, 2024); Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, *Mexico Country Reports On Human Rights Practices For 2022* (March 20, 2023).

⁴⁹ Id.

⁵⁰ The Associated Press, *Wave of transgender slayings in Mexico spurs anger and protests by LGBTQ community*, 16 January 2024, available at:

<https://www.nbcnews.com/nbc-out/out-news/wave-transgender-slayings-mexico-spurs-anger-protests-lgbtq-community-rcna134075>

⁵¹ Riley, John, *Gay man tortured and killed in Cancún after revealing he was living with HIV*, 07 July 2021, available at: <https://www.metroweekly.com/2021/07/gay-man-tortured-and-killed-in-cancun-after-revealing-he-was-living-with-hiv/>

women as hate crimes.⁵² Regardless of these difficulties, the number of registered hate crimes against the LGBTQ community in Mexico is staggering. 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.⁵³ According to a report by the Mexican Comisión Ejecutiva de Atención a Víctimas (CEAV) and Fundación Arcoiris, a Mexican organization that advocates the rights of LGBT 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:

- In 2018 in the city of Monterrey, 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 they were released the next day, the lawyer's wallet, cell phone, and watch had gone missing.⁵⁴
- In 2018, 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 filed. Although both women filed a complaint with the mayor and the police chief, no investigation was done, and the police officers accused remain in their jobs.⁵⁵
- In 2018, 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.⁵⁶
- In 2018, a young transgender woman named Daniela was attacked by police for using a public bathroom at a fair in the state of Puebla. The police forcibly removed Daniela from the bathroom and beat her in front of other fairgoers.⁵⁷

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 "corrective" rape and other

⁵² Resendiz, Julian, *LGBT activists stage play to protest murder of transgender woman*, 03 September 2020, available at: <https://www.ktsm.com/news/lgbt-activists-stage-play-to-protest-murder-of-transgender-woman/>

⁵³ Megapolis, *Only 10% of hate crimes in Mexico are resolved*, 20 August 2017, available at: <https://megalopolismx.com/noticia/25795/apenas-10--de-crimenes-de-odio-en-mexico-se-esclarecen>

⁵⁴ Letra S, *Monterrey police assault gay lawyer and his partner*, 9 April 2018, available at: <http://www.letraese.org.mx/policia-de-monterrey-agrede-a-abogado-gay-y-su-pareja/>

⁵⁵ Posta, *Lesbian couple report aggression in Zuazua*, 11 March 2018, available at: <http://www.posta.com.mx/nuevo-leon/denuncian-agresion-pareja-lesbica-en-zuazua>

⁵⁶ Telesur, *Mexican Mayor Jorge Zermeno Prosecuting Trans People for Causing 'Moral Damages'*, 15 March 2018, available at: <https://www.telesurtv.net/english/news/A-Mayor-in-Mexico-is-Forcing-Trans-People-to-Carry-Health-IDs-20180315-0003.html>

⁵⁷ Desastre MX, *They denounce aggression of 5 police officers towards a transgender woman for using the bathroom in the Fair of Puebla*, 17 April 2018, available at: <http://desastre.mx/mexico/denuncian-agresion-de-5-policias-a-mujer-transgenero-por-usar-el-bano-en-la-feria-de-puebla/>

forms of sexual abuse by men and gay men are physically abused and beaten in order to make them more masculine.⁵⁸ A 2019 CNDH poll found that more than 50% of the LGBTQ community members surveyed reported being targeted with hate speech and physical aggression within the past 12 months.⁵⁹ A 2016 study carried out by Fundación Arcoíris, surveyed members of the LGBTQ community in Mexico and found that 62% of trans women, 51% of trans men, 35% of men, 23% of women and more than 28% of 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%).⁶⁰

iv. People Living with HIV in Mexico Often Lack Meaningful Access to Medication and Treatment, Especially If They Are Refugees

It is critically important for individuals, and for the public health more generally, that HIV-positive people 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”).⁶¹ Interruptions can lead to negative health outcomes and drug resistance.⁶²

In theory, HIV medication should be readily available in Mexico. However, that is often not the case, especially for refugees. As an initial matter, there have been several recent setbacks in Mexico’s HIV care programs. For example, in 2019, it was reported that the Mexican government changed how it purchases medications from manufacturers which led to an inundation of expired and outdated antiretrovirals.⁶³ Many of the antiretroviral drugs were found to be obsolete, last used in the 1980s before those medications were proven to be ineffective.⁶⁴ Further, the Mexican government cut funding to civil society organizations providing HIV care, leaving many without access to testing and medication.⁶⁵

HIV-positive refugees, especially those along the U.S.- Mexico border, encounter additional barriers that negatively impact health. For example, as set forth in author’s comment on the CLP Rule, in 2021 and 2022, staff at the Transgender Law Center tried to help dozens of Jamaican

⁵⁸ Id. at 4.

⁵⁹ 2022 Mexico Country Report

⁶⁰ Austrian Centre for Country of Origin & Asylum Research and Documentation, Austrian Red Cross, Mexico Sexual Orientation and Gender Identity (SOGI), COI Compilation (May 31, 2017) at 26, available at <http://www.refworld.org/pdfid/5937f12d4.pdf>

⁶¹ 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.ohtn.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. Petroszino, An Evidence-Based Review of Treatment-Related Determinations of Patients’ Nonadherence to HIV Medications, (Nov. 20, 2009), <https://www.liebertpub.com/doi/full/10.1089/apc.2009.0024>

⁶² Id.

⁶³ Reuters, Thousands feared at risk after Mexico reforms HIV+ regime, <https://www.reuters.com/article/world/thousands-feared-at-risk-after-mexico-reforms-hiv-regime-idUSKCN1RT1FB/> (April 17, 2019); Mitu, *Mexico Admits That Hundreds Of HIV-Positive Mexicans Were Being Treated With Obsolete And Ineffective Medications*, January 21, 2021, available at: <https://web.archive.org/web/20211021021109/https://wearemitu.com/wearemitu/things-that-matter/hundreds-of-mexicans-being-treated-for-hiv-were-being-given-obsolete-medications-from-the-1980s/> (archived February 12, 2024; last visited July 2, 2024)

⁶⁴ Id.

⁶⁵ Id.

refugees living with HIV in Tijuana obtain ART, but none were successful. In fact, one client 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 to pursue her asylum claim.

Even Mexican nationals who are asylum seekers face barriers in accessing ART in Mexico. For instance, the Santa Fe Dreamers Project 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.

b. Both USCIS and EOIR Acknowledge How Dangerous Country Conditions Are for LGBTQ Mexicans

The absurdity of the inclusion of Mexican asylum seekers, including LGBTQ/H people, is magnified by the positive decisions routinely made by USCIS and EOIR in asylum cases for LGBTQ/H Mexicans. Commenting organizations represent numerous asylum seekers from Mexico who are granted asylum in the United States by USCIS and EOIR based on persecution on account of their gender identity, sexual orientation, and/or HIV positive status. For example, Oasis has represented 431 clients from Mexico in the past 7 years who have been granted asylum by USCIS or EOIR with a 100% rate of success. Immigration Equality has represented over 140 LGBTQ/H Mexican asylum seekers over the past decade and has also maintained a near 100% success rate in adjudicated cases. Through their decisions in individual cases that grant asylum to LGBTQ/H individuals from Mexico, USCIS and EOIR acknowledge how dangerous it is for queer and trans people in Mexico but in complete contradiction of this are also promulgating rulemaking that does not carve out any exception for Mexican asylum seekers in its restrictions on asylum.

In February 2024, USCIS granted asylum to Marcelo⁶⁶, a client of Oasis from Mexico, who was insulted and physically abused by his family members for being gay. He was sexually abused and raped by several different people as a child and young adult. In his community the local police officers, including the police commander, insulted and threatened him for being gay. Marcelo reported this abuse to the local public ministry in charge of the police but nothing happened and the abuse didn't stop. The police commander continued to threaten him until Marcelo was forced to flee to the United States.

In January 2024, USCIS granted asylum to Arturo, a client of Oasis from Guadalajara, Mexico. Arturo was severely beaten as a child by his father for being effeminate and showing an interest in feminine clothes and activities. Arturo was raped as a child and his rapist insulted him using homophobic slurs. He was terrorized in school by his classmates who pulled out his hair and sliced his leg open with a broken bottle. He fled Mexico after an older friend who was transgender was tortured and murdered.

In December 2023, Emanuel, an Oasis client from Monterrey, Mexico was granted asylum by USCIS. As a gay man living in Mexico, Emanuel was physically and sexually assaulted numerous times. After a group of men spewing homophobic insults attacked Emanuel and his partner, they tried to seek help from the police. Instead of providing protection, the police insulted Emanuel and his

⁶⁶ 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.

partner, calling them faggots, made them get inside their police car, drove them to an unfamiliar part of town, and pushed them out of the moving car threatening them that this is what people like them deserve.

In November 2023, Ignacio, an Oasis client from Hidalgo, Mexico was granted asylum by USCIS. Ignacio survived multiple rapes and beatings in Mexico for being gay. He was abused by his partner in Mexico over the course of many years and sought help from the police in Acapulco and Mexico City. The police, instead of doing anything to protect him or arresting his abusive partner, told Ignacio that gay men don't know how to protect themselves so it was better that Ignacio be with a woman.

In July 2023, Alexandra, an Immigration Equality client, was granted asylum by EOIR. Given the strength of her claims, the substantive portion of her hearing lasted less than 30 minutes. Alexandra is a transgender woman from Mexico. In Mexico, she was kidnapped and held captive for several months by gang members because of her gender identity after she was spotted wearing women's clothing at a fundraiser she was organizing for children with leukemia. During captivity, she was tortured and repeatedly raped by multiple men. They stripped her naked and hung her from the ceiling while they tormented her, beating her with wooden paddles, slicing her with a knife, shaving off her long hair, and cutting her earlobes with metal scissors for wearing earrings. She was able to escape, although she was grazed by two bullets as she ran. Although she feared retaliation, she eventually reported the kidnapping and rape to the police. Instead of helping her, they mocked and made fun of her. Hours after she made the report, her house was ransacked. She believes that the police told gang members that she had reported them and that they came looking for her. She fled to the United States and asked for asylum. Her injuries were so severe from the rapes that she had to undergo multiple rectal surgeries in an effort to repair the damage.

In almost every single month since Oasis opened in May 2017, USCIS and/or EOIR has granted asylum to at least one client from Mexico, illustrating the continued danger in Mexico to LGBTQ/H community members that has only increased as violence throughout the country has increased.⁶⁷ Significantly, not all of these clients actually experienced persecution in Mexico as they had come to the United States as young children and instead were granted asylum solely due to the strength of their well-founded fear of persecution, supported by the horrific country conditions for LGBTQ/H individuals in the country.

c. Firsthand Accounts of Harm Suffered in Mexico by LGBTQ/H Mexican Nationals and Refugees Waiting to Enter the U.S. and Request Asylum are Plentiful

The documented cases of violence towards LGBTQ/H Mexicans are numerous. These stories only emphasize the horrific violence that the LGBTQ/H community is subjected to in Mexico:

- 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 fellow officers beat her on several occasions while calling her lesbian slurs. Mirna fled from

⁶⁷ See ACLED, Mexico: Confronting Deadly Political and Criminal Power Struggles in an Election Year, January 17, 2024, available at: <https://acleddata.com/conflict-watchlist-2024/mexico/>.

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 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 the classmates Miguel hit him in 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.

For LGBTQ/H migrants passing through Mexico on their way to the United States, the situation is equally as dangerous or even worse because of overlapping vulnerabilities such as lack of legal status in Mexico, inability to speak Spanish, and racism.⁶⁸ According to a 2017 study by the United Nations High Commissioner for Refugees, two thirds of the LGBTQ/H refugees from Central America who were surveyed had suffered sexual and gender-based violence in Mexico.⁶⁹ 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.⁷⁰ Carlos was brutally attacked and raped outside of the shelter, but could not report the attack to Mexican authorities for fear of being deported or bringing more abuse upon himself.⁷¹

Human Rights First has also documented the multitude of harm faced by LGBTQ/H refugees who have been stuck in Mexico waiting to receive CBP One appointments since the CLP Rule went into effect in May 2023:⁷²

- A lesbian migrant couple was sexually assaulted in Reynosa in September 2023 while waiting to secure a CBP One appointment to approach the U.S. port of entry to seek asylum. After surviving the sexual assault, the women feared for their lives as they remained trapped in

⁶⁸ Amnesty International, *Mexico/Central America: Authorities turning their backs on LGBTI refugees*, 27 November 2017, available at: <https://www.amnesty.org/en/latest/news/2017/11/mexico-central-america-authorities-turning-their-backs-on-lgbti-refugees/>

⁶⁹ Id.

⁷⁰ 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, available at <https://www.refworld.org/docid/5a1c28f54.html>

⁷¹ Id at 21.

⁷² Human Rights First, U.S. Asylum Bans Strand LGBTQI+ Refugees in Danger and Risk Return to Persecution, June 2024, available at: https://humanrightsfirst.org/wp-content/uploads/2024/06/Factsheet_Asylum-Bans-Strand-LGBTQI-Refugees_final-formatted.pdf.

Reynosa, unable to access the U.S. port of entry to seek asylum without a CBP One appointment.

- A Venezuelan seven-year-old child who identifies as LGBTQ was kidnapped for three weeks along with his mother while waiting in Reynosa to seek asylum in the U.S in September 2023. The child was drugged and survived sexual violence during their three weeks of captivity. After payment of their ransom and release, the mother and child sought protection at a migrant shelter where the child survived an attempted sexual assault, as recounted to a humanitarian aid worker.
- A Colombian LGBTQ woman fleeing sexual violence and persecution by Colombian authorities on account of her sexual orientation as well as internal displacement by armed groups was sexually assaulted by a female Mexican state police officer in a bus bathroom en route to Northern Mexico. After searching all the Colombians on the bus, the police officer ordered the Colombian LGBTQ woman into the bus bathroom where the officer stripped off her clothing, sexually assaulted her, and then robbed her of her money. Afterward, upon arriving at a bus station in Sonora, the woman survived an attempted kidnapping.
- A Ghanaian gay man who fled persecution on account of his sexuality in Ghana was beaten, tased, and robbed after being targeted by Mexican immigration authorities while on a bus headed to the border.

The experiences of commenters' own clients, like the examples provided below, further illustrate the harm the LGBTQ refugee community faces in Mexico:

- Jerome is a 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 were 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/H 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.
- 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 applied for asylum.

d. This Rule in Combination with the CLP Rule Is Unworkable and Will Result in Bona Fide LGBTQ/H Asylum Seekers Being Seriously Harmed and Denied Protection

Both this IFR and the CLP Rule provide for the same narrow exceptions to their bans on asylum eligibility: if an individual can demonstrate, by a preponderance of the evidence, there were “exceptionally compelling circumstances” that except them from the bans.⁷³ In both Rules, “exceptionally compelling circumstances” are described as including 1) an acute medical emergency, 2) an “imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder,” or 3) being a “victim of a severe form of trafficking in persons.”⁷⁴ The IFR is specific that its “exceptionally compelling circumstances” exception “mirrors” the rebuttal circumstance used in the CLP Rule, is adopted for the same reasons set out in the Notice of Proposed Rulemaking (NPRM) for the CLP Rule, and is intended to apply to the same circumstances.⁷⁵

In responding to comments submitted in opposition to the CLP Rule NPRM, the Departments seemed to imply that generalized country conditions alone were not enough to show an “imminent and

⁷³ IFR at 48754.

⁷⁴ Id.

⁷⁵ Id. at 48733.

extreme threat to life or safety” and that “membership in a particularly vulnerable group (e.g., LGBT or HIV-positive people)” is also not enough, even in combination with evidence of particularly dangerous conditions specific to the vulnerable group, to rebut application of the Rule.⁷⁶ Put another way, commentary on the CLP Rule suggests that the exceedingly dangerous conditions for LGBTQ/H people in Mexico outlined in Section V above are insufficient on their own to meet an exception from either Rule’s restrictions on asylum.

This creates an unworkable and confounding situation for Mexican LGBTQ/H asylum seekers. USCIS routinely finds that country conditions are bad enough in Mexico for LGBTQ/H individuals that they do not need to make a showing of past persecution to be granted asylum.⁷⁷ But under this Rule, Mexican LGBTQ/H people who are still in Mexico must wait for many months *in their country of persecution* in order to be able to apply for asylum. If the Rule’s exceptions are to indeed “mirror” the rebuttal circumstances of the CLP Rule, it is profoundly unfair and dangerous for the Rule to apply to Mexican nationals. The Rule ignores what is fundamental about asylum and our laws that govern it; if a person has a bona fide asylum claim, they are *de facto* in imminent danger in their country of feared harm. The very meaning of asylum is that the asylum seeker cannot wait in their country for relief; the danger is so great that they must flee, even if it means using irregular pathways. For Mexican nationals, including LGBTQ/H Mexicans, this Rule will create a system where they must make a showing of their entire asylum case at the border under conditions of duress and without representation, in order to be referred to a credible fear screening and be safe from expedited removal. This conundrum is in contradiction of the Rule’s stated purpose to “substantially improve the Departments’ ability to deliver timely decisions and consequences to noncitizens who lack a lawful basis to remain.”⁷⁸ Instead, for Mexican nationals, Asylum Officers will need to conduct full asylum interviews at the border in order to make a complete and fair decision about whether the asylum seeker was facing an “imminent and extreme threat to life or safety.”

Through its application to Mexican nationals and its reliance on the CLP Rule’s reasoning and definitions of the exceptions, Mexican LGBTQ/H asylum seekers will be stuck in harmful and dangerous situations without any access to protection besides waiting for months for a CBP One appointment.

VI. Requiring Asylum Seekers to “Manifest” a Fear Ignores History and Eliminates Protection for LGBTQ/H Asylum Seekers Conditioned to Keep their LGBTQ Status Hidden for Their Own Protection

The Rule eliminates two important protections for asylum seekers that will put the United States afoul of our obligations under the international Refugee Convention to ensure bona fide refugees are not deported back to harm.⁷⁹ By ending the use of Form I-867A and Form I-867B by immigration officers when migrants are in immigration custody, the Rule terminates the obligation of U.S. immigration officers to specifically advise migrants of their ability to apply for asylum in the United

⁷⁶ 8 CFR Part 208 at 31393 (May 16, 2023)

⁷⁷ Since 2022, Oasis has had at least 5 clients granted asylum by USCIS who experienced no past persecution in Mexico. Their cases were granted on a well-founded fear of being an LGBTQ person in Mexico alone.

⁷⁸ IFR at 48715.

⁷⁹ Convention and Protocol relating to the Status of Refugees, July 28, 1951, and January 31, 1967, 189 U.N.T.S. 150, Article 33, available at: <https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees>.

States and affirmatively ask migrants if they are afraid to return to their country of origin.⁸⁰ The Rule explicitly states that it is no longer required for immigration officers to provide “individualized advisals on asylum or ask the noncitizen questions related to whether they have a fear.”⁸¹ Instead, migrants will now be required to “manifest a fear of return, express an intention to apply for asylum, express a fear of persecution or torture, or express a fear of return to the noncitizen’s country or country of removal” in order to be referred to a credible fear interview.⁸²

History and an understanding of why asylum seekers flee and seek safety in the U.S. tells us that two things happen when an affirmative fear screening is converted into a so-called “shout test” where asylum seekers are expected to spontaneously exclaim their fear of return. The first is that the shout test does not prevent non-refoulement because immigration officers either misunderstand expressions of fear or willfully ignore them. We have only to look back to 2022, when under a court order, CBP officers began to use a shout test, rather than affirmative questions, for members of family units subject to expulsion under Title 42 in connection with a court order preventing their return to persecution or torture. Between June and October 2022, 97 families were interviewed after they had been expelled trying to cross into the United States at various parts of the Southern Border, including Tijuana, Ciudad Juarez, and Reynosa.⁸³ Of the 97 families, over half (51 families) reported to interviewers that they had verbally expressed a fear of return to the immigration officer they came into contact with.⁸⁴ Nearly three-quarters of the families (73) reported that they had expressed a non-verbal fear in line with CBP’s own guidelines of what non-verbal expression of fear could look like.⁸⁵ Of the 73 families who reported expressing a verbal or non-verbal fear, none of them were referred by CBP to a credible fear interview.⁸⁶ Instead, the interviewees reported being verbally harassed by CBP officers who told them things like they had “no right” to an interview and ignored their attempts to vocalize a fear.⁸⁷

A “shout test” is also used when the U.S. Coast Guard encounters migrants, specifically Haitian nationals, at sea who are attempting to enter the U.S. The one year there is data for – 2005 – showed that a mere .005% of Haitians encountered at sea received a credible fear interview.⁸⁸ This number is far lower than the historical rate of CFIs given compared to the number of migrants encountered at land borders since 1996 when the expedited removal procedures were statutorily created.⁸⁹

Second, the shout test, instead of filtering out bona fide asylum seekers and protecting them from removal, puts the most vulnerable people at the most risk of being returned to harm. Vulnerable asylum seekers, including LGBTQ/H people, survivors of sexual violence, people who do not speak

⁸⁰ IFR at 48740

⁸¹ Id.

⁸² Id.

⁸³ Center for Gender and Refugee Studies, “Manifesting” Fear At the Border: Lessons from Title 42 Expulsions, January 30, 2024, available at: <https://cgrs.uclawsf.edu/our-work/publications/%E2%80%9Cmanifesting%E2%80%9D-fear-border-lessons-title-42-expulsions>

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Human Rights First, Elimination of Fear Screening Referral Safeguards in Expedited Removal, January 2024, available at: https://humanrightsfirst.org/wp-content/uploads/2024/02/2024.HRF_Fact_Sheet.Shout-formatted.pdf

⁸⁹ For example, in 2017, 21% of CBP encounters resulted in a CFI being given. See Office of Homeland Security Statistics, Department of Homeland Security, Credible Fear Cases Completed and Referrals for Credible Fear Interview, available at: <https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview>

English, people who have experienced political oppression, and survivors of trauma and torture are the most affected by this change even though they are the ones who our asylum system is designed to protect. Many asylum seekers, especially those fleeing homophobic, transphobic, and/or gender-based violence, may not know they can ask for asylum based on their past experiences of violence and persecution because of the commonly held belief that asylum is for people who have experienced political oppression. Political dissidents who are seeking asylum because of their political opinion and experiences with state oppression, very often have a fear and mistrust of government officials which will lead them to not trust vocalizing their fear to an immigration officer unless directly asked. Asylum seekers who do not speak English will be unable to adequately communicate a fear to the immigration officer because of language barriers.

The significant harm the shout test will have on LGBTQ/H asylum seekers is illustrative of why it is wrong and illegal. Having to “manifest a fear” related to their LGBTQ/H identity goes against everything an LGBTQ/H asylum seeker has learned to do to keep themselves safe. In their countries of origin and the places they have journeyed through to reach the United States, being a visible member of the LGBTQ/H community leads to violence, harm, and even death. As organizations who represent LGBTQ/H asylum seekers and immigrants, we see the terrible mental and physical impacts of this violence on our clients and see time and time again that it is only after our clients reach safety in the U.S. and begin to build community and find support systems, that they are then able to be vocal, open, and visible with their LGBTQ/H identities. In a detention setting, being held with other migrants and potential deportees, an LGBTQ/H asylum seeker will not be able to safely express their fear of returning without exposing themselves to more harm, including during any continued detention in the U.S. (where studies, interviews, and research show LGBTQ/H asylum seekers endure torture, sexual violence, and abusive treatment)⁹⁰ and if returned to their countries of origin.

Although the Rule says that the manifestation of fear “can be expressed verbally, non-verbally, or physically” and goes on to give examples like “noises or sounds without any words ... [or] behaviors, with or without sound, such as shaking, crying, or signs of abuse,” it is absurd to rely on the subjective ideas of individual immigration officials of what non-verbal or physical manifestations of fear look like instead of just asking the three simple questions contained in the Form I-867B.⁹¹ Fear and trauma do not manifest exactly the same way for everyone who experiences them and this is especially true for LGBTQ/H asylum seekers who have been conditioned by years of abuse and mistreatment to stay hidden and protect themselves through invisibility. As experts on LGBTQ/H forced migration explain:

“The cumulative effect of social and family anti-LGBT abuse creates potent psychological obstacles to seeking help on a SOGI [sexual orientation and/or gender

⁹⁰ See Immigration Equality, National Immigrant Justice Center, and Human Rights First, “No Human Being Should Be Held There” The Mistreatment of LGBTQ and HIV-Positive People in U.S. Federal Immigration Jails, June 2024, available at: <https://immigrationequality.org/wp-content/uploads/2024/06/No-Human-Being-Should-Be-Held-There-THE-MISTREATMENT-OF-LGBTQ-AND-HIV-POSITIVE-PEOPLE-IN-U.S.-FEDERAL-IMMIGRATION-JAILS.pdf>; Minero LP, Domínguez S Jr, Budge SL, Salcedo B, Latinx trans immigrants' survival of torture in U.S. detention: A qualitative investigation of the psychological impact of abuse and mistreatment, *International Journal of Transgender Health*, v.23(1-2); 2022 (July 19, 2021), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9045414/>

⁹¹ Q: Why did you leave your home country or country of last residence?

Q: Do you have any fear or concern about being returned to your home country or being removed from the United States?

Q: Would you be harmed if you are returned to your home country or country of last residence?

identity] basis. LGBT forced migrants experience considerable shame and fear when disclosing their sexual orientation and gender identity, especially in recounting the instances of traumatic violence directed at their sexuality. For many LGBT forced migrants, the notion that they would receive help from governmental authorities on the grounds that they have suffered persecution based on SOGI is difficult to grasp until they have been outside their country of origin for an extended period. Complex PTSD makes it difficult for forced migrants to recount a history of traumatic events and it may take many years for the shame and fear to diminish sufficiently to allow a forced migrant to be able to seek help.”⁹²

It is not reasonable then to expect LGBTQ/H asylum seekers to be able to “shout out” a fear of returning to their countries of origin, even if explaining the reason behind the fear is not expected or required. As Drs. Shidlo and Ahola explain, many LGBTQ/H asylum seekers are psychologically prevented from seeking help because of trauma experienced due to their LGBTQ/H identities and this includes being able to make a spontaneous statement of fear to an immigration officer. When you add in the extra layers of timing or when the “shout” is expected to happen (at the end of an oftentimes harrowing journey to reach the U.S. border during which more abuse and trauma has most likely occurred) and a lack of confidentiality (due to detention conditions and the Rule’s removal of any individualized screening or asylum advisal) it becomes clear that very few LGBTQ/H asylum seekers will be able to access a credible fear interview and subsequent protection in the United States if this shout test is allowed to go into effect. Instead LGBTQ/H asylum seekers will be sent back to conditions of significant harm, danger, and violence without a single question being asked of them.

For all of these reasons, the shout test is woefully insufficient to protect against the return of bona fide asylum seekers to persecution or torture, especially for vulnerable groups such as LGBTQ/H asylum seekers. By putting the onus on asylum seekers to “manifest” a fear to law enforcement officers within hours of being detained and while still in a detention setting, this Rule profoundly misunderstands the nature of trauma, the effects of persecution, and the realities of asylum seekers and what they are escaping from. The probability and risk that bona fide asylum seekers, especially bona fide LGBTQ/H asylum seekers, will be returned to danger is unacceptably high under the shout test. The elimination of a required affirmative fear screening and individualized asylum advisals for asylum seekers under the pretense of efficiency goes against this Administration’s stated commitment to protect LGBTQ/H asylum seekers and refugees.

VII. The IFR Illegally Creates a New, Higher Protection Screening Standard that Will Result in LGBTQ/H People with Bona Fide Asylum Claims Being Refouled

Asylum seekers subject to expedited removal who express a fear of return must be referred for a preliminary fear screening conducted by an Asylum Officer. Given the circumstances of flight for refugees escaping violence, as well as the conditions under which screening interviews take place, Congress set the standard for asylum screening interviews or Credible Fear Interviews (“CFIs”)

⁹² Shidlo, Ariel; Ahola, Joanne, *Forced Migration Review*, Issue 42 (2013), 9-11, at 10, available at: <https://ora.ox.ac.uk/objects/uuid:04c63cce-3c12-4310-b6f5-48ada2506114/files/m7f5877d072c0170987aaf13b907d78d0>

deliberately low. The INA defines the CFI standard as “a significant possibility . . . that the alien **could** establish eligibility for asylum. . . .”⁹³ 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.”⁹⁴ As the Judiciary Committee report to the House version of the bill explained, this was intentional to ensure that “there should be no danger that an alien with a genuine asylum claim will be returned to persecution.”⁹⁵ 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.”⁹⁶ The report also noted that the initial screening should “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*”⁹⁷

By law, anyone determined to have a credible fear of persecution cannot be deported without a full hearing on their asylum claim. However, under the CLP Rule enacted in May 2023, and now under the IFR, refugees subject to these rules that cannot establish an exemption or exception, will now have to pass higher screening standards in order to have an opportunity to apply for protection. And even if they pass this higher standard, they will only be eligible for withholding of removal and Convention Against Torture (CAT) relief, even if they would otherwise qualify for asylum.

More specifically, under the IFR, asylum seekers must first demonstrate a “significant possibility that [they] would be able to establish by a preponderance of the evidence that they were not subject to the rule’s limitation on asylum eligibility or that they will be able to establish by a preponderance of the evidence exceptionally compelling circumstances.” Notably, this inquiry is completely unrelated to the underlying merits of the applicant’s asylum claim. In other words, LGBTQ/H asylum seekers who qualify for asylum will be denied an opportunity to apply for protection simply because of the way they entered the country. Only if they overcome this barrier — which will be impossible for many LGBTQ/H asylum seekers given the challenges outlined throughout this comment — can they then be screened under the “significant possibility” standard. Otherwise, they will be subjected to a brand new, more stringent “reasonable *probability*” screening standard which is defined as “substantially more than a reasonable possibility,” (the heightened standard currently applied in the CLP Rule context), but “somewhat less than more likely than not,” i.e., 51% chance of harm.

Raising the standard, especially given the conditions under which screening interviews generally take place, is unlawful and will result in bona fide LGBTQ/H refugees being returned to harm. Asylum screening interviews are usually performed in immigration detention in Customs and Border Protection (“CBP”) custody where LGBTQ/H asylum seekers face high levels of mistreatment.⁹⁸ The vast majority of refugees have no access to an attorney in order to understand the

⁹³ 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added).

⁹⁴ *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 41 (D.D.C. 2020).

⁹⁵ 142 Cong. Rec. 25347 (1996).

⁹⁶ H.R. Rep. No. 104-469, at 158 (1996).

⁹⁷ 142 Cong. Rec. 25347 (1996).

⁹⁸ Immigration Equality, National Immigrant Justice Center, and Human Rights First, “No Human Being Should Be Held There” The Mistreatment of LGBTQ and HIV-Positive People in U.S. Federal Immigration Jails, June 2024, available at: <https://immigrationequality.org/wp-content/uploads/2024/06/No-Human-Being-Should-Be-Held-There-THE-MISTREATMENT-OF-LGBTQ-AND-HIV-POSITIVE-PEOPLE-IN-U.S.-FEDERAL-IMMIGRATION-JAILS.pdf> (“LGBTQ Detention Report”)

process before their CFI takes place, which is usually held with an immigration officer over the phone through an interpreter, sometimes just days after the asylum seeker arrives in the U.S.⁹⁹

Many LGBTQ/H asylum seekers – two-thirds of whom face sexual violence and other severe mistreatment on the journey to the U.S. according to one study¹⁰⁰ -- have serious health issues resulting from the journey that are untreated. Prescription medications are routinely confiscated by CBP, and refugees, including people with well controlled HIV are then forced to go without treatment for days or weeks, and sometimes even months.¹⁰¹ Many queer asylum seekers are still reeling from the psychological impact of persecution in their home country which often includes, beatings, sexual assault, forced conversion therapy, “corrective” rape, the murder and suicide of other LGBTQ/H friends and partners, and a lifetime of homophobic abuse and rejection from family and communities. These traumas are compounded by inhumane detention conditions.¹⁰²

There are other factors that can also impact an LGBTQ/H refugee’s ability to tell their story during a screening interview that author organizations regularly encounter -- like the fear of disclosing LGBTQ/H status to government officials when an applicant suffered homophobic abuse at the hands of the authorities in their home country, insufficient privacy in detention facilities leading to homophobic and transphobic abuse by staff and other detained people, and lack of LGBTQ/H competency or other errors among immigration officers.¹⁰³ At the asylum screening stage, asylum seekers do not have the opportunity to present documentary evidence, expert opinions, or witnesses. That is why, recognizing these circumstances, Congress intentionally established the credible fear standard as a low bar.

Even under the more generous CFI standards, LGBTQ/H refugees with strong claims sometimes fail screening interviews. Author organizations have successfully gotten negative CFIs reversed in this context, with LGBTQ/H clients going on to win their asylum cases. Similarly, under previous regulations that unlawfully heightened the fear screening standards, LGBTQ/H refugees with bona fide claims for asylum have failed the higher screening standard, even though they would have passed the legally mandated CFI standard. For example, Ines is an Immigration Equality client who is a lesbian woman from Cuba. A Cuban police officer detained and physically assaulted Ines on the basis

⁹⁹ See, e.g., [Obstructed Legal Access: NIJC’s Findings From 3 Weeks of Telephonic Legal Consultations in CBP Custody | National Immigrant Justice Center](#)

¹⁰⁰ Amnesty International, *Mexico/Central America: Authorities turning their backs on LGBTI refugees*, 27 November 2017, available at: <https://www.amnesty.org/en/latest/news/2017/11/mexico-central-america-authorities-turning-their-backs-on-lgbti-refugees/>

¹⁰¹ See, e.g., LGBTQ Detention Report at 22-23; Immigration Equality to Assistant Director for ICE Health Services Corps Dr. Stewart D. Smith et al., Re: HIV-Positive Asylum Seekers Who Receive Grossly Negligent Medical Care in Immigration Detention and Are Particularly Vulnerable to COVID-19 Must Be Released Immediately. March 23, 2020. <https://immigrationequality.org/wp-content/uploads/2020/09/Complaint-to-Office-of-Civil-Rights-and-Civil-Liberties-Re-HIV-Care-in-Detention-Facilities.pdf>

¹⁰² See, e.g., LGBTQ Detention Report.

¹⁰³ See e.g., 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; Human Rights First, Pretense of Protection, Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies, (Aug. 3, 2022) at 16-19, <https://humanrightsfirst.org/library/pretense-of-protection-biden-administration-and-congress-should-avoid-exacerbating-expedited-removal-deficiencies/>; 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-releases/asylum-seekers-denied-basic-due-process-and-access-to-asylum-at-torrance-county-detention-facility/>

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 a reasonable fear interview (“RFI”) instead under the heightened “reasonable possibility” screening standard. 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 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 substantial amounts attorney’s assistance, Ines would never have gotten the chance to present her asylum case.

Identifying and advocating for clients who have been wrongfully denied at the fear interview stage has gotten progressively more difficult because asylum seekers in detention have such limited access to counsel and many are rushed through expedited removal processing. Although people are entitled to request an Immigration Judge review of their negative credible fear decision, these reviews are often cursory, with some asylum seekers prohibited from speaking, submitting evidence, or having their attorney speak on their behalf. Additionally, the ability of asylum seekers to request reconsideration of negative fear determinations with USCIS has been severely curtailed under recent regulation and this restriction is also included in the IFR.¹⁰⁴

Further, forcing asylum officers and immigration judges to apply three distinct legal standards based on manner of entry and the application of conflicting asylum bans is likely to lead to legal errors and places further strains on an already overburdened system and asylum officers where the asylum backlog is in the millions. Already, asylum officers are diverted to conducting increasingly complicated fear screenings rather than adjudicating the merits of pending asylum cases. The changes also overburden attorneys trying to prepare clients for fear interviews during brief consultations, who will likely find it impossible to explain these complex rules and legal standards.

In short, this is an unlawful attempt to circumvent the CFI standard and the number of erroneous denials will skyrocket under the new higher standard. LGBTQ/H refugees who would normally qualify for asylum will instead be returned to countries of persecution.

VIII. Under the IFR, LGBTQ/H Refugees Will be Left in Perpetual Limbo and Queer Families Will Be Separated.

LGBTQ/H refugees who would otherwise qualify for asylum, but are only eligible for withholding of removal and CAT relief under the IFR, will be left in perpetual limbo. This jeopardizes the long-term stability and integration of this already marginalized group. More specifically, LGBTQ/H refugees who are awarded withholding of removal or CAT relief will be denied the path to legal residence, stability, and citizenship that they would be entitled to through a grant of asylum. They will be unable to access certain benefits and will face barriers in obtaining and renewing their employment authorization. Moreover, they will be deprived to the ability to reunite with their families because, unlike asylum, withholding of removal and CAT do not enable refugees to bring their families to safety.

Author organizations have witnessed the devastating impact this can have on LGBTQ/H refugees firsthand. For example, Immigration Equality client Alexander was kidnapped, beaten, and

¹⁰⁴ Interim Final Rule at 48,770.

sexually assaulted in his country of origin because he is bisexual. He fled to the United States to ask for protection, but that meant leaving his child in Alexander's country of origin where his safety was threatened by Alexander's persecutors. On the border, Alexander expressed fear of return to a CBP officer. However, the officer failed to record that fear, so Alexander was deported to his country of persecution without speaking with an asylum officer. Scared for his life, Alexander re-entered the United States. This time, he was able to have his case heard. As a result of the prior wrongful removal, Alexander was barred from applying for asylum. However, he won withholding of removal, under the more likely than not standard showing that Alexander would have easily won asylum had he been permitted to apply for it. Since Alexander only received a limited form of protection, he does not have a path to U.S. citizenship and the stability it provides. Moreover, unlike an asylee, Alexander cannot bring his child to the United States. Due to the limitations of the withholding of removal status, this family separation is likely permanent as Alexander cannot even secure a refugee travel document to meet his son in a third country and his son cannot come to the U.S.

Notably, the family unity provisions of the IFR are also insufficient to protect LGBTQ/H families. Under the IFR, if the principal applicant is found eligible for withholding of removal or CAT protection and has a spouse and/or minor children who would be eligible for derivative asylum status but for the imposition of the rule, the principal applicant can be awarded asylum. While this provision is purportedly to promote the important interests of family unity, it will exclude many LGBTQ/H families as queer families often lack access to systems in their countries of nationality that allow them to legally formalize and recognize spousal and parent-child relationships. Marriage equality, and LGBTQ/H-inclusive family protections generally accessible in the United States, are unavailable in most nations from which LGBTQ/H people flee persecution. Even in nations where marriage may be technically legal, accessing that legal protection may not be available to people fleeing persecution. As such, many LGBTQ/H asylum seekers with life partners and/or who are parents to their partner's children, will not be recognized as family under the IFR. Thus, the families of LGBTQ/H principal applicants who are subject to the IFR and granted lesser forms of relief will have no legal pathway to come to the United States and if they try, may be ordered removed and deported, permanently tearing LGBTQ/H families apart.

IX. Conclusion

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

Sincerely,

Immigration Equality
Oasis Legal Services
The Black LGBTQIA+ Migrant Project
Border Butterflies Project
Council for Global Equality
Equality California
Familia: Trans Queer Liberation Movement
The Human Rights Campaign
Lambda Legal Defense and Education Fund, Inc.
National Immigrant Justice Center
Lawyers for Good Government
National Center for Lesbian Rights

National LGBTQ Task Force Action Fund
Rainbow Railroad
The Transgender Law Center
Young Center for Immigrant Children's Rights