

**DEPARTMENT OF HOMELAND SECURITY****8 CFR Part 208**

RIN 1615-AC44

**DEPARTMENT OF JUSTICE****Executive Office for Immigration Review****8 CFR Part 1208**

[EOIR Docket No. 19-0111; Dir. Order 06-2021]

RIN 1125-AA91

**Asylum Eligibility and Procedural Modifications**

**AGENCY:** Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** On July 16, 2019, the Department of Justice and the Department of Homeland Security (“DOJ,” “DHS,” or, collectively, “the Departments”) published an interim final rule (“IFR”) governing asylum claims in the context of aliens who enter or attempt to enter the United States across the southern land border between the United States and Mexico (“southern land border”) after failing to apply for protection from persecution or torture while in a third country through which they transited en route to the United States. This final rule responds to comments received on the IFR and makes minor changes to regulations implemented or affected by the IFR for clarity and correction of typographical errors.

**DATES:** This rule is effective on January 19, 2021.

**FOR FURTHER INFORMATION CONTACT:** Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041, telephone (703) 305-0289 (not a toll-free call).

**SUPPLEMENTARY INFORMATION:****I. Purpose and Summary of the Interim Final Rule**

On July 16, 2019, the Departments published an IFR governing asylum claims in the context of aliens who enter or attempt to enter the United States across the southern land border after failing to apply for protection from persecution or torture while in any one of the third countries through which

they transited en route to the United States. Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019).

**A. Purpose of the Interim Final Rule<sup>1</sup>**

The IFR sought to address the large number of meritless asylum claims that aliens are filing with the Departments. See 84 FR at 33830–31. Such claims place an extraordinary strain on the Nation’s immigration system, undermine many of the humanitarian purposes of asylum, exacerbate the humanitarian crisis of human smuggling, and affect the United States’ ongoing diplomatic negotiations with foreign countries.

The IFR sought to mitigate the strain on the country’s immigration system by more efficiently identifying aliens who are misusing the asylum system as a tool to enter and remain in the United States as opposed to those legitimately seeking urgent protection from persecution or torture. Aliens who transited through another country where protection was available, and yet did not seek protection, may fall within that category.

The IFR also furthered the humanitarian purposes of asylum by prioritizing individuals who are unable to obtain protection from persecution elsewhere and individuals who are victims of a “severe form of trafficking in persons” as defined by 8 CFR 214.11, many of whom do not volitionally transit through a third country to reach the United States. By deterring meritless asylum claims and barring from asylum those individuals whose primary purpose is to make the journey to the United States rather than to seek protection, or those who could have obtained protection in a another country, the Departments sought to ensure that those refugees who have no alternative to U.S.-based asylum relief or have been subjected to an extreme form of human trafficking are able to obtain relief more quickly. 84 FR at 33831.

Additionally, the Departments sought to curtail the humanitarian crisis created by human smugglers bringing men, women, and children across the southern land border. By reducing the incentive for aliens without an urgent or genuine need for asylum to cross the border—in the hope of a lengthy asylum process that will enable them to remain in the United States for years, typically

free from detention and with work authorization, despite their statutory ineligibility for relief—the rule aimed to reduce human smuggling and its tragic effects. *Id.*

Finally, the Departments published the IFR to better position the United States in its negotiations with foreign countries on migration issues. The United States is engaged in ongoing diplomatic negotiations with Mexico and various Central American countries regarding migration issues in general, the control of the flow of aliens into the United States (such as through continued implementation of the Migrant Protection Protocols (“MPP”)), and the urgent need to address the humanitarian and security crisis along the southern land border.<sup>2</sup> Those ongoing discussions relate to negotiations with foreign countries with a goal of forging bilateral and multilateral agreements in which other countries will join the United States distributing the mass migration burden among cooperative countries. The purpose of the international agreements is to allocate responsibility between the United States and third countries whereby one country or the other will assume responsibility for adjudicating the claims of aliens who fear removal to their home countries. Addressing the eligibility for asylum of aliens who enter or attempt to enter the United States after failing to seek protection in at least one third country through which they transited en route to the United States will better position the United States in the full range of these negotiations.

**B. Legal Authority for the Interim Final Rule**

The Departments issued the IFR pursuant to section 208(b)(2)(C) of the Immigration and Nationality Act (“INA” or “the Act”), 8 U.S.C. 1158(b)(2)(C), and sections 103(a)(1), (a)(3), and (g) of the Act, 8 U.S.C. 1103(a)(1), (a)(3), and (g). See 84 FR at 33831–32.

**C. Summary of Regulatory Changes Made by the Interim Final Rule<sup>3</sup>**

The IFR revised 8 CFR 208.13 and 208.30 in Chapter I of title 8 of the Code of Federal Regulations (“CFR”) and 1208.13, and 1208.30 in Chapter V of title 8 of the CFR.

The IFR revised 8 CFR 208.13(c) and 8 CFR 1208.13(c) to add a new mandatory bar to eligibility for asylum

<sup>2</sup> Current Asylum Cooperative Agreements are discussed *infra* at note 13.

<sup>3</sup> The Departments reaffirm the explanation of the regulatory changes as published in the preamble to the IFR. 84 FR at 33835–40. A summary of the discussion in the IFR is further contained in Section I of this preamble.

<sup>1</sup> The Departments adopt and incorporate herein the background and discussion of the purposes of the rule as published in the preamble to the IFR at 84 FR at 33830–35. Section I of the preamble of this rule also contains a summary of the IFR preamble discussion.

for an alien who enters or attempts to enter the United States across the southern land border after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States. 8 CFR 208.13(c)(4), 1208.13(c)(4). The bar contains exceptions to its applicability for three categories of aliens: (1) Aliens who demonstrate that they applied for protection from persecution or torture in at least one of the countries through which they transited en route to the United States, other than their country of citizenship, nationality, or last lawful habitual residence, and that they received a final judgment denying protection in such country; (2) aliens who demonstrate that they satisfy the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11; and (3) aliens who have transited en route to the United States through only a country or countries that, at the time of transit, were not parties to the 1951 Convention on the Status of Refugees ("Refugee Convention" or "1951 Convention"), the 1967 Protocol Relating to the Status of Refugees ("Refugee Protocol" or "1967 Protocol"), or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT" or "Convention Against Torture"). 8 CFR 208.13(c)(4), 1208.13(c)(4) (proposed).

The IFR also added the new limit on asylum eligibility in the process for screening aliens who are subject to expedited removal under section 235(b)(1) of the Act, 8 U.S.C. 1225(b)(1), 8 CFR 208.30(e) (proposed). Pursuant to the IFR, DHS asylum officers were required to determine whether an alien who has expressed a fear of persecution or torture, or who has indicated an intention to apply for asylum, was ineligible for asylum due to a failure to apply for protection in a third country through which he or she transited. See 8 CFR 208.30(e)(2) (proposed).

Under that process, if the asylum officer determined that the alien is ineligible for asylum due to the bar at 8 CFR 208.13(c)(4), the asylum officer would nevertheless consider whether the alien had a reasonable fear of persecution or torture for purposes of potential consideration by an immigration judge of withholding of removal and deferral of removal claims under section 241(b)(3) of the Act and 8 CFR 208.16 and 208.17. See 8 CFR 208.30(e)(3) (proposed). If the asylum officer had determined that an alien subject to the bar had established a reasonable fear of persecution or torture, DHS would have then referred the alien

to an immigration judge for more comprehensive removal proceedings under section 240 of the Act, 8 U.S.C. 1229a. 8 CFR 208.30(e)(5)(i) (proposed). However, if the alien had failed to establish a reasonable fear of persecution or torture, the asylum officer would have provided the alien with a written notice of decision regarding both the application of the bar and the lack of reasonable fear. 8 CFR 208.30(e)(5)(iii) (proposed). The asylum officer's findings then would have been subject to immigration judge review under 8 CFR 208.30(g) and 8 CFR 1208.30(g), applying a reasonable possibility, not significant possibility, standard. *Id.*

Under the IFR's provisions, the immigration judge's review of an asylum officer's application of the third-country-transit bar and accompanying negative "reasonable fear" finding, first would have been reviewed de novo in regard to the determination that the alien is ineligible for asylum as stated in 8 CFR 208.13(c)(4). 8 CFR 1003.42(d)(3), 1208.30(g)(2) (proposed). If the immigration judge had agreed with the asylum officer's assessment that the bar at 8 CFR 208.13(c)(4) or 1208.13(c)(4) had applied, the immigration judge then would have proceeded to review the asylum officer's negative reasonable fear finding. 8 CFR 1208.30(g)(2) (proposed). If the immigration judge instead had disagreed with the asylum officer's application of the third-country-transit bar and concluded the alien is not ineligible for asylum, the immigration judge would have vacated the asylum officer's determination. *Id.* DHS then would have commenced removal proceedings against the alien under section 240 of the Act, 8 U.S.C. 1229a, in which the alien could have filed an application for asylum and withholding of removal. *Id.*

#### D. Procedural Validity of the Interim Final Rule

The U.S. District Court for the District of Columbia vacated the IFR on the ground that, in the court's view, the Departments failed to demonstrate sufficient "good cause" or foreign policy reasons for foregoing notice-and-comment rulemaking. *Capital Area Immigrants' Rights Coal. v. Trump ("CAIR II")*, --- F. Supp. 3d ---, 2020 WL 3542481 (D.D.C. June 30, 2020). The Supreme Court, however, recently held that an IFR containing all Administrative Procedure Act ("APA")-required elements of a notice of proposed rulemaking ("NPRM"), as provided in 5 U.S.C. 553(b)-(d), satisfies the APA's procedural requirements. *Little Sisters of the Poor Saints Peter*

*and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384-86 (2020) ("*Little Sisters*"). The Court found that an IFR's publication as an IFR rather than an NPRM did not invalidate the final rule; rather, the Court focused on whether "fair notice" was provided to the public. *Id.* at 2385 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007)).

Here, the IFR contained all APA-required elements of an NPRM: a reference to legal authority, as required by 5 U.S.C. 553(b)(2) (84 FR at 33832-34); a description of the terms and substance of the rule, as required by 5 U.S.C. 553(b)(3) (84 FR at 33835-38); and a request for public comment, as required by 5 U.S.C. 553(c) (84 FR at 33830). In addition, this final rule provides a statement of the rule's purpose and basis, as required by 5 U.S.C. 553(c). Further, this final rule is hereby published 30 days prior to its effective date as required by 5 U.S.C. 553(d) and reiterated by the Court in *Little Sisters*. See 140 S. Ct. at 2386.<sup>4</sup> Accordingly, this rulemaking provides the requisite notice and comment, and this final rule is procedurally sound. The Departments are now issuing this final rule to address the numerous comments received in response to the invitation publicly noticed in the IFR, and to ensure clarity regarding how the IFR interacts with the joint rule signed by the Attorney General and the Acting Secretary of DHS [hereinafter "Intervening Joint Final Rule"].<sup>5</sup>

#### II. Revisions to the Interim Final Rule in This Final Rule

Following careful review of the IFR and the public comments received in response, this final rule makes the following changes, pursuant to the Departments' authority under section 208(b)(2)(C) of the Act, 8 U.S.C.

<sup>4</sup> Although the IFR was not published with a 30-day delay in its effective date, and although the IFR has been and will remain in effect until this final rule's effective date, that fact does not change whether this rulemaking complies with 5 U.S.C. 553, as the same was true of the IFR and final rule at issue in *Little Sisters*. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 FR 47792 (Oct. 13, 2017) (publishing the IFR at issue in *Little Sisters* with an effective date of October 6, 2017); Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 FR 57536 (Nov. 15, 2018) (publishing the final rule at issue in *Little Sisters* with an effective date of January 14, 2019).

<sup>5</sup> On December 2, 2020, the Departments signed a joint final rule [hereinafter "Intervening Joint Final Rule"] that made various amendments to the regulatory text as amended in the IFR previous to this rulemaking. Upon publication of the Intervening Joint Final Rule, certain amendments published in the IFR are no longer necessary.

1158(b)(2)(C), and finalizes this regulatory action. This final rule makes no additional changes to the IFR beyond the changes described below.

*A. Amendments to 8 CFR 208.13(c)(4)(i), (iii) and 1208.13(c)(4)(i), (iii)*

The IFR provided that an alien who enters, attempts to enter, or arrives in the United States across the southern land border after transiting through at least one country outside of the alien's home country while en route to the United States will not be found ineligible for asylum if (1) the alien demonstrates that he or she applied for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States and the alien received a final judgment denying the alien protection in such country, (2) the alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11(a), or (3) if the only countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the Refugee Convention or the Refugee Protocol.

The final rule removes the references to torture and to the CAT in subparagraphs (i) and (iii) in deference to the concept that whether an alien has applied for protection from torture and whether a country through which an alien transits en route to the U.S. is a party to the CAT may not have a direct correlation to the immigration benefit of asylum, a grant of which is based on persecution or a well-founded fear of persecution on account of a protected ground.

The final rule also changes the word "countries" in 8 CFR 208.13(c)(4)(iii) and 1208.13(c)(4)(iii) to the phrase "country or countries" to avoid confusion regarding situations in which an alien transits through only one country. No substantive change from the IFR is intended by this clarification.

*B. Amendment to 8 CFR 208.30(e)(5)(iii)*

As published in the IFR, 8 CFR 208.30(e)(5)(iii) included a statement that the scope of review for proceedings before an immigration judge that involve an alien who an asylum officer has determined (1) is ineligible for asylum due to the third-country-transit bar at 8 CFR 208.13(c)(4) but (2) has a reasonable fear of persecution or torture is "limited to a determination of whether the alien is eligible for withholding or deferral of removal." See 8 CFR 208.30(e)(5)(iii). In addition, the

same paragraph stated these aliens would be placed in section 240 removal proceedings "for consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the Convention Against Torture." See *id.* The Intervening Joint Final Rule amended this section, however, and no further clarifying amendments in this section and by this final rule are necessary.

*C. Amendments to 8 CFR 208.30(e)(5)(i)*

In 8 CFR 208.30(e)(5)(i), the Departments would have revised the introductory language to correct a typographical error in the IFR by removing the reference to "paragraph (e)(5)(i)" in 8 CFR 208.30(e)(5)(i) and to reflect the publication of the interim final rule Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 FR 63994 (Nov. 19, 2019) ("ACA IFR"), which provides separate procedures in 8 CFR 208.30(e)(7) for certain aliens subject to bilateral or multilateral agreements pursuant to section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A).<sup>6</sup> The Intervening Joint Final Rule, however, amended this section to make those corrections, and no further clarifying amendments by this final rule are necessary.

*D. Amendments to 8 CFR 1003.42*

The IFR made edits to 8 CFR 1003.42 to account for the addition of the third-country-transit bar in immigration judge reviews of credible-fear determinations. The Intervening Joint Final Rule amended this section and no further clarifying amendments by this final rule are necessary.

*E. Typographical Corrections*

The Departments have also made a non-substantive amendment to cross-references in regulations implicated by the IFR to change the reference in 8 CFR 1208.13(c)(4) from 8 CFR 208.15 to 8 CFR 1208.15 because section 1208.13 is in Chapter V of 8 CFR, which governs

<sup>6</sup>The ACA IFR modified title 8 of the CFR to provide for the implementation of "Asylum Cooperative Agreements," which are authorized by section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A) and implemented by regulation primarily at 8 CFR 208.30(e)(6)–(7). Commenters alternately used the phrase "safe third country" to describe these agreements reached under section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A), likely because the section of the U.S. Code related to such agreements is labelled the "[s]afe third country" exception. We have retained the "safe third country" phrasing when summarizing those comments.

EOIR, and not Chapter I, which governs DHS.<sup>7</sup>

**III. Public Comments on the Interim Final Rule**

*A. Summary of Public Comments*

On July 16, 2019, DHS and DOJ jointly published the IFR in EOIR Docket No. 19–0504. The comment period associated with the IFR closed on August 15, 2019, with 1,847 comments received.<sup>8</sup> Individual or anonymous commenters submitted the vast majority of comments. These commenters were divided between commenters supporting the rule and commenters opposing the rule. Of the 1,847 comments, 50 were submitted by organizations, including non-government organizations, legal advocacy groups, non-profit organizations, and religious organizations. One of these organizations submitted a comment that provided support for the rule, while the other organizations expressed opposition to the rule.

*B. Comments Expressing Support*

*Comment:* The Departments received a significant number of comments in support of the IFR. The majority of these commenters voiced general support for the IFR and urged others to support the rule as well. The commenters described a "flood" or "avalanche" of immigrants at the southern land border and urged support for the IFR as a tool to deal with a "crisis." Commenters described the IFR as helping to close "loopholes" in the asylum process. Some commenters urged asylum applicants to apply from their home country.

*Response:* The Departments note the general support for the rule. The rule is designed neither to require nor allow applicants for asylum under U.S. law to apply in their home countries, but rather to generally require that an alien first apply under a third country's laws outside the alien's country of citizenship, nationality, or last lawful

<sup>7</sup>The Intervening Joint Final Rule amended the cross-reference in the IFR from "8 CFR 1208.30(g)(2)" to "8 CFR 1208.30(g)." Further, the Intervening Joint Final Rule amended 8 CFR 1208.30(g)(1)(ii) to include specific cross references that were excluded from the IFR. No additional changes are necessary in this rulemaking.

<sup>8</sup>The Departments reviewed all comments that were submitted in response to the rule. However, EOIR did not post 114 of the comments to *regulations.gov* for public inspection. Of these comments, 1 included obscenities, 1 included an image of an unidentified minor child, 2 included potential incitements to violence, 23 were duplicates of another comment submitted by the same commenter, and 87 were non-substantive comments of either "this is a test" or "please write your comment here" and did not indicate either support for or disagreement with the rule.

habitual residence through which the alien transited en route to the United States.

*Comment:* Commenters also indicated their support for the Administration's immigration policies more generally. A significant number of commenters demanded that the government build a border wall. Many commenters urged the government to secure or completely close the southern land border in order to prevent drug smuggling and human trafficking, enhance national security, and prevent illegal immigration. Likewise, commenters called for general reform of asylum laws in order to prevent asylum abuse. Some commenters advocated eliminating asylum altogether. Other commenters were concerned about immigrants using public services and urged the government to focus resources on American citizens. Commenters encouraged the enforcement of existing immigration laws and requested pressure on Congress to address broader immigration reform.

*Response:* The Departments note the support for enforcing the Nation's immigration laws. The Departments, however, did not intend for the rule to address the myriad asylum and immigration issues covered in these comments. For example, this rule does not address building a border wall, the availability of public benefits to aliens, or whether Congress should enact comprehensive immigration reform. This rule is limited to the asylum application process at the southern land border and aims to (1) further the humanitarian purposes of asylum by more expeditiously providing relief to trafficking victims and individuals who are unable to obtain protection from persecution or torture elsewhere, and (2) deter meritless asylum claims.

The Departments also strongly oppose eliminating asylum (which, in any event, would require the enactment of legislation by Congress). As stated in the Refugee Act of 1980, it is "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands" through, among other tools, the asylum process. Pub. L. 96–212, sec. 101(a), Mar. 17, 1980, 94 Stat. 102 ("Refugee Act"). The Departments remain committed to ensuring that those asylees who most urgently need relief from persecution are able to obtain it in a timely manner.

*Comment:* The Departments also received comments supporting the IFR as a means to help alleviate "the extraordinary strain placed on the nation's immigration system by the unprecedented surge in meritless

asylum claims at the southern land border since 2013" and "the consequent caseload backlogs caused by the record numbers of asylum applications being filed." One organization also expressed support for the rule as a means to "curtail the humanitarian crisis created by smugglers trafficking women, children, and entire family units." The same organization suggested that the Departments amend the phrase, "shall be found ineligible for asylum, unless" in interim final regulations 8 CFR 208.13(c)(4) and 1208.13(c)(4) to read "shall be presumptively ineligible for asylum in the exercise of discretion, unless."

*Response:* The Departments note the support for the IFR. The Departments disagree with the suggested change to the regulatory text. The rule is intended to serve as a bar to asylum eligibility for those aliens described at 8 CFR 208.13(c)(4) and 1208.13(c)(4), not a bar that an immigration judge or asylum officer may waive as a matter of discretion. The use of a bar promotes uniform application and is consistent with existing statutory bars in section 208(b)(2)(A) of the Act, 8 U.S.C. 1158(b)(2)(A), and those instituted by regulation pursuant to 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C).

### C. Comments Expressing Opposition

#### 1. General Opposition to the Interim Final Rule and Assertions That the Departments Have Exceeded Their Legal Authority

*Comment:* The Departments received several comments expressing general opposition to the IFR. Some commenters expressed opposition to the IFR without further explanation. Others asserted that the IFR conflicts with the Act, without citing specific provisions, and others opined that the Departments lack the authority to promulgate the IFR. One commenter stated broad disbelief that anyone could support the IFR.

*Response:* Because these particular comments failed to articulate specific reasoning underlying expressions of general opposition, DHS and DOJ are unable to provide a more detailed response.

The Departments were well within their legal authority, however, when promulgating the IFR.<sup>9</sup> Congress, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), vested the Departments with broad authority to establish conditions

or limitations on asylum. Public Law 104–208, Div. C, Sept. 30, 1996, 110 Stat. 3009, 3009–546. In fact, as the Supreme Court has recognized, "a major objective of IIRIRA was to protect the Executive's discretion from undue interference." *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1966 (2020) (alteration and quotation marks omitted). Congress created three categories of aliens who are barred from applying for asylum and adopted six other mandatory bars to asylum eligibility. IIRIRA, sec. 604(a), 110 Stat. at 3009–690 to 694 (codified at sections 208(a)(2)(A)–(C), (b)(2)(A)(i)–(vi) of the Act, 8 U.S.C. 1158(a)(2)(A)–(C), and (b)(2)(A)(i)–(vi)). These bars include the asylum cooperative agreement bar to applying for asylum and the firm resettlement bar to asylum eligibility. *Id.* The statutory list is not exhaustive. Instead, Congress, in IIRIRA, further expressly authorized the Attorney General to expound upon two bars to asylum eligibility—the bars for "particularly serious crimes" and "serious nonpolitical offenses." INA 208(b)(2)(B)(ii), 8 U.S.C. 1158(b)(2)(B)(ii). Congress also vested the Attorney General with the ability to establish by regulation "any other conditions or limitations on the consideration of an application for asylum," so long as those limitations are "not inconsistent with this chapter." INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C).<sup>10</sup>

As the Tenth Circuit has recognized, "[t]his delegation of authority means that Congress was prepared to accept administrative dilution of the asylum guarantee in § 1158(a)(1)" that aliens generally may file asylum applications, given that "the statute clearly empowers" the Attorney General and the Secretary to "adopt[ ] further limitations" on eligibility to apply for or receive asylum. *R–S–C v. Sessions*, 869 F.3d 1176, 1187 & n.9 (10th Cir. 2017). In authorizing "additional limitations

<sup>10</sup> The Homeland Security Act of 2002 ("HSA"), Public Law 107–296, Nov. 25, 2002, 116 Stat. 2135, as amended, transferred many immigration-related functions to a newly created DHS headed by the Secretary of Homeland Security ("the Secretary"). The HSA charges the Secretary with "the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." INA 103(a)(1), 8 U.S.C. 1103(a)(1). Further, the HSA authorizes the Secretary to take all actions "necessary for carrying out" the Act. INA 103(a)(3), 8 U.S.C. 1103(a)(3). The HSA nonetheless preserves authority over certain immigration adjudications for EOIR, which is part of DOJ and, thus, subject to the direction and regulation of the Attorney General. See INA 103(g), 8 U.S.C. 1103(g); 6 U.S.C. 521. Accordingly, the Secretary along with the Attorney General may establish limitations and conditions on asylum eligibility under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C).

<sup>9</sup> This section addresses general assertions that the Departments lacked the legal authority to issue the IFR. Section III.C.2 of this preamble addresses comments and responses regarding the IFR's relation to specific provisions of the Act.

and conditions” by regulation, the statute gives the Attorney General and the Secretary broad authority in determining what the “limitations and conditions” should be. The Act instructs only that additional limitations on eligibility are to be established “by regulation,” and must be “consistent with” the rest of section 208 of the Act, 8 U.S.C. 1158. *See* INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B).

The Attorney General has previously invoked section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C), to limit eligibility for asylum based on a “fundamental change in circumstances” and on the ability of an applicant to safely relocate internally within a country. *See* Asylum Procedures, 65 FR 76121, 76133–36 (Dec. 6, 2000) (codified at 8 CFR 208.13(b)(1)(i)(A), (B)).<sup>11</sup> The courts in applying these limitations have not questioned the Attorney General’s authority to impose them. *See, e.g., Afriyie v. Holder*, 613 F.3d 924, 934–36 (9th Cir. 2010) (discussing the allocation of the burden of proof regarding the reasonability of relocation); *Uruci v. Holder*, 558 F.3d 14, 19–20 (1st Cir. 2009) (explaining that a Department of State country report may demonstrate a “fundamental change in circumstances” sufficient to rebut the presumption of well-founded fear of persecution). The courts have also viewed section 208(b)(2)(C) as conferring broad authority, *see R–S–C*, 869 F.3d at 1187, and have suggested that ineligibility based on fraud would be authorized under it, *Nijjar v. Holder*, 689 F.3d 1077, 1082 (9th Cir. 2012) (noting that fraud could be “one of the ‘additional limitations . . . under which an alien shall be ineligible for asylum’ that the Attorney General is authorized to establish by regulation”).

Regarding the comment that questions any support for the IFR, a long-held principle of administrative law is that an agency, within its congressionally delegated policymaking responsibilities, may “properly rely upon the incumbent administration’s view of wise policy to inform its judgments.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). Accordingly, an agency may make policy choices that Congress either inadvertently or intentionally left to be resolved by the agency charged with administration of the statute, given the current realities faced by the agency. *See id.* at 865–66. Specifically in the immigration context,

Congress has expressly fortified the Executive’s broad discretion to make policy decisions on immigration matters without interference. As the Supreme Court recognized, a “major objective of IIRIRA” was to protect the Executive’s discretion to oversee immigration matters from “undue interference by the courts; indeed, that can fairly be said to be the theme of the legislation.” *Thuraissigiam*, 140 S. Ct. at 1965 (alteration and quotation marks omitted).<sup>12</sup> The current situation at the southern land border, specifically the sharp increase of encounters with aliens at the border, subsequent requests for asylum relief, and the large number of meritless, fraudulent, or non-urgent asylum claims that are straining the Nation’s immigration system, prompted the Departments to promulgate this rule. *See* 84 FR at 33830–31. As the Supreme Court noted in *Thuraissigiam*, the past decade has seen a 1,883 percent increase in credible-fear claims, with about 50 percent of those applicants found to have a credible fear never applying for asylum. 140 S. Ct. at 1967–68. Moreover, fraudulent asylum claims can be “difficult to detect,” given the expedited nature of the screening process and the large caseload. *Id.* The Court noted a study in which 58 percent of randomly selected asylum applications contained indicators of possible fraud, with 12 percent of those cases ultimately determined to be fraudulent. *Id.* at 1967 n.10.

The current statutory framework accordingly leaves the Attorney General (and, after the HSA, the Secretary too) significant discretion to adopt additional bars to asylum eligibility. As further explained above, Congress specifically delegated authority to the Attorney General and the Secretary to “establish additional limitations and conditions . . . under which an alien shall be ineligible for asylum.” INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C).

In *Thuraissigiam*, the Supreme Court recognized, in the context of the

credible-fear process, that restrictions on Executive discretion to respond to strains on the immigration system and abuses of the system could “increase the burdens currently overwhelming our immigration system.” *Thuraissigiam*, 140 S. Ct. at 1966 (quotation marks omitted). While *Thuraissigiam* ruled in the context of judicial review of credible-fear findings, the Supreme Court acknowledged that such burdens would exist “[e]ven without the added step of judicial review.” *Id.* The Court recognized that “[t]he majority of [credible-fear claims] have proved to be meritless.” *Id.* at 1967. The Court also stated, as noted above, that detection of fraudulent asylum claims is difficult, further noting that while all applications with indicators are not fraudulent, characteristics of such fraud are frequent and require more agency resources. *See id.* at 1967 & n.10. In light of these reasons, a right to judicial review that prolonged what was intended to be an expedited process could pose “significant consequences for the immigration system.” *Id.* at 1967. The Court stated that, in fact, the expedited process “would augment the burdens on that system” rather than alleviate them, as intended by Congress, because “[o]nce a fear is asserted, the process would no longer be expedited.” *Id.*

Similarly, in the asylum context, the significant backlog in asylum cases, the need to prioritize meritorious applications, and the vast numbers of aliens attempting to enter at the southern land border all threaten to overwhelm the immigration system. As the Supreme Court recognized, over “[t]he past decade” about 50 percent of aliens who were “found to have a credible fear . . . did not pursue asylum,” and, in 2019, “a grant of asylum followed a finding of credible fear just 15% of the time.” *Id.* at 1966–67. Because aliens are only required to meet a “low bar” for placement in the extensive proceedings associated with asylum claims, *see id.*, it is imperative that the Departments establish clear criteria ensuring that such proceedings are for those who have meritorious claims or urgently require asylum protection in the United States, and such measures are consistent with the Act in order to avoid overwhelming the immigration system.

Through the publication of the IFR, the Departments have properly exercised their congressionally delegated authority. Such policymaking is well within the confines of permissible agency action.

<sup>11</sup> DOJ duplicated 8 CFR 208.13 in its entirety at 8 CFR 1208.13 following the codification of EOIR’s regulations in Chapter V of 8 CFR. Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824 (Feb. 28, 2003).

<sup>12</sup> The Ninth Circuit recently concluded that the Attorney General’s discretion to limit eligibility for asylum was narrower than the discretion to grant or deny asylum to aliens who are eligible for such relief. *See E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 848 (9th Cir. 2020), *pet. for reh’g en banc pending* (filed Oct. 5, 2020). Specifically, the court determined that the Attorney General’s discretion to limit asylum eligibility “must be consistent with the core principle” of section 208 of the Act, 8 U.S.C. 1158. *Id.* The Departments agree that their actions limiting eligibility must be “consistent with” section 208 of the Act, 8 U.S.C. 1158, and they promulgated the IFR with the understanding that doing so was indeed consistent with that section. *See* 84 FR at 33834. To the extent that the Ninth Circuit disagrees with the Departments’ position on this matter, the Departments have provided additional reasoning and evidence in this final rule to address such concerns.

2. Interim Final Rule and the Act  
a. Asylum Cooperative Agreements

*Comment:* Commenters, including a number of organizations and individual commenters, raised concerns that the IFR is inconsistent with the Act's safe-third-country bar to applying for asylum. *See* INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A) (providing that an alien is ineligible to apply for U.S. asylum and may be removed, pursuant to a bilateral or multilateral agreement, to pursue his or her protection claims in a country, other than the country of the alien's nationality or last habitual residence, in which (1) "the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion," and where (2) "the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection"). Some commenters argued that Congress intended for the safe-third-country bar (or the safe-third-country bar coupled with the firm resettlement bar at section 208(b)(2)(A)(vi) of the Act, 8 U.S.C. 1158(b)(2)(A)(vi)), to be the sole means by which an alien may be denied asylum based on a relationship with a third country. Commenters also stated that the IFR renders the safe-third-country bar superfluous because the rule bars individuals from applying for asylum regardless of whether the country was a signatory to a safe-third-country agreement. Relatedly, commenters were concerned that the IFR is inconsistent with the Act because the IFR does not require the United States to have a bilateral or multilateral agreement with a third country and instead focuses on whether the country is a party to specified international accords. *See* 8 CFR 208.13(c)(4)(iii), 1208.13(c)(4)(iii). Commenters were also concerned that the IFR does not adequately consider or require an individualized determination as to whether a third country is "safe" for asylum seekers or has an adequate system for granting protection against persecution and torture. Some commenters stated that the United States must ensure that no person faces persecution in a third country and that people have access to a robust asylum system in a third country when seeking protection.

*Response:* This rule is consistent with, and complementary to, the Act's provision authorizing Asylum Cooperative Agreements with third countries. *See* INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A) ("the ACA bar"); 84 FR at 33834. The ACA bar operates as a bar

to aliens who are covered by such an agreement; such aliens would be barred from applying for asylum in the U.S. pursuant to section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A).<sup>13</sup> Under the Act, the United States has statutory authority to negotiate agreements with third countries. Moreover, nothing in the Act requires that an alien have first traveled through, or sought protection, in that third country for the bar to apply. Rather, the ACA bar authorizes removal of covered aliens to a third country that has agreed to share responsibility with the United States for considering such aliens' claims for asylum or equivalent temporary protection. The authority to remove aliens under an Asylum Cooperative Agreement is limited to only those countries with which the United States has an agreement and that provide "access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection," INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A)—a requirement absent from this third-country-transit rule or the statutory provision pursuant to which it is promulgated. As stated previously, the third country to which an alien may be removed under the ACA bar in section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A) need not be a country

<sup>13</sup> Since the enactment of the statutory provision authorizing such agreements in IIRIRA in 1996, the United States has signed agreements with Honduras, El Salvador, Guatemala, and Canada. *See* Agreement Between the Government of the United States of America and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims, 85 FR 25462 (May 1, 2020); DHS, *Joint Statement Between the U.S. Government and the Government of El Salvador* (Sept. 20, 2019), <https://www.dhs.gov/news/2019/09/20/joint-statement-between-us-government-and-government-el-salvador> (last visited Dec. 10, 2020); Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims, 84 FR 64095 (Nov. 20, 2019) ("U.S.-Guatemala ACA"); Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, U.S.-Can., State Dep't No. 05-35, Dec. 5, 2002, 2004 WL 3269854. The Government has previously promulgated regulations implementing the agreement with Canada, *see* 8 CFR 208.30(e)(6), and the Government promulgated an IFR in November 2019 establishing procedures for carrying out the remaining agreements and any future agreements. *See* 84 FR at 63994. Not all of these agreements are currently in force, however, because the agreement with El Salvador has yet to become effective. Also, in the case of Canada, a Canadian court held that the U.S.-Canada agreement violates certain provisions of Canada's Constitution but suspended the declaration of invalidity until January 22, 2021. *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2020 F.C. 770 (Fed. Ct.), *appeal pending* (Fed. Ct. App.). On October 26, 2020, Canada's Federal Court of Appeal granted a stay of the lower court's decision pending a final determination of the Canadian Government's appeal. 2020 FCA 181 (Fed. Ct. App. Oct. 26, 2020).

through which the alien transited en route to the United States.

In addition, the ACA bar creates a bar to applying for asylum in the United States—unlike this third-country-transit rule, which creates a bar to asylum eligibility for aliens who have applied for such relief in the United States. The ACA bar to applying for protection serves a different purpose from creating a bar to eligibility for protection. The ACA bar involves no determination about the merits of an alien's underlying asylum claim, instead providing a mechanism for an alien's protection claims to be considered fully by a third country that has satisfied the criteria under section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A), and agreed to help share responsibility with the United States to provide relief to aliens needing protection.

Nothing in the Act suggests that Congress intended for the ACA bar at section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A), or the ACA bar coupled with the Act's firm resettlement bar at section 208(b)(2)(A)(vi) of the Act, 8 U.S.C. 1158(b)(2)(A)(vi), to prevent the Departments from establishing limitations on asylum eligibility based on an alien's travel through, or relationship with, a third country. As discussed above in Section III.C.1 of this preamble, Congress provided the Attorney General (and, now, the Secretary) with authority to implement additional conditions and limitations on asylum eligibility at the same time that Congress enacted the ACA bar. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). Congress thus authorized the Attorney General and the Secretary to establish conditions and limitations on asylum eligibility in addition to, for example, the ACA bar and firm resettlement bar.

Further, an alien's failure to seek such protection in a third country has long been recognized as a factor that could be considered in terms of whether to deny asylum as a matter of discretion, independent of the ACA or firm resettlement bars. *See Matter of Pula*, 19 I&N Dec. 467, 473-74 (BIA 1987), *superseded in part on other grounds as stated in Andriasian v. INS*, 180 F.3d 1033, 1043-44 & n.17 (9th Cir. 1999).

The rule thereby complements, rather than conflicts with, section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A). The ACA bar is designed "to prevent forum-shopping by asylum seekers, and to promote the orderly handling of asylum claims." *See United States v. Malenge*, 294 F. App'x 642, 645 (2d Cir. 2008) (discussing the purpose of the agreement between the United States and Canada pursuant to section 208(a)(2)(A) of the Act, 8 U.S.C.

1158(a)(2)(A)). This rule likewise aims to prevent aliens from “forum-shopping . . . after transiting through one or more third countries where [an alien] could have sought protection, but did not.” 84 FR at 33834.

Further, the rule is not inconsistent with the Act merely because it addresses, at a high level of generality, a subject matter similar to the ACA bar (*i.e.*, the availability of asylum for aliens who may be able to obtain protection in a third country). To read the existing exceptions for the availability of asylum as occupying the entire field of permissible exceptions on the same or related topics would render meaningless the Act’s express grant of authority to the Attorney General and Secretary to establish additional limitations on asylum eligibility. *See* INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); *see also* *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (1994) (observing that a statute should be construed so that “no clause, sentence, or word shall be superfluous, void, or insignificant” (quotation marks omitted)); *Stone v. INS*, 514 U.S. 386, 397 (1995) (“When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”). One district court considering the legality of the IFR has already expressed strong doubts about such an argument because it would place too great a restriction on the Attorney General’s and Secretary’s authority. *See* *Capital Area Immigrants’ Rights Coal. v. Trump* (“*CAIR I*”), --- F. Supp. 3d ---, 2019 WL 3436501, at \*3 (D.D.C. July 24, 2019), ECF No. 28 (explaining in an oral ruling that “the plaintiffs are reading too strict a limitation on to the Attorney General’s authority” and expressing strong doubts regarding the argument that “anytime the Attorney General enacts a limitation that covers the same concern as one of those addressed by the statutory bars, it’s necessarily inconsistent” with the Act).<sup>14</sup> The Supreme Court has likewise

rejected a similar argument: In *Trump v. Hawaii*, the Court determined that the Act’s provisions regarding the entry of aliens “did not implicitly foreclose the Executive from imposing tighter restrictions,” even in circumstances in which those restrictions concerned a subject “similar” to the one that Congress “already touch[ed] on in the INA.” 138 S. Ct. 2392, 2411–12 (2018). Thus, by the same reasoning, Congress’s statutory command that certain aliens are ineligible to apply for asylum does not deprive the Attorney General and Secretary of authority, by regulation, to deny asylum eligibility for certain other aliens whose circumstances may—in a general sense—be “similar.”

The Departments emphasize that the rule is consistent with, yet distinct from, the ACA bar. The rule is distinguishable because it provides for a tailored determination of whether an alien passed through a country where he or she could have applied for relief, but did not do so. The rule is consistent with the Act’s ACA bar because, among the other reasons detailed above, the rule’s denial of asylum where relief could have been pursued in a transit country is entirely consistent with the ACA bar’s objective to help ease the strain on the overburdened immigration system. *See* 84 FR at 63996. Thus, far from conflicting with the ACA bar, this rule complements it, reaching additional classes of aliens who have requested asylum, expressed a fear of return, or claimed a fear of persecution or torture when being apprehended or encountered by DHS.

Regarding comments that the IFR does not adequately consider whether a third country is “safe” for asylum seekers, the Departments note that 8 CFR 208.13(c)(4)(iii) and 1208.13(c)(4)(iii) apply only if an alien has transited through a third country that is a party to one of the specified international conventions that establish non-refoulement obligations. By becoming a party to those treaties, the third countries in which an alien may be required to apply for protection under this rule are obligated, based on the treaties they have joined, to provide protection from removal of an individual to country where his or her life or freedom would be threatened on account of a protected ground.<sup>15</sup> Aliens

Government’s decision to file a petition for writ of certiorari and, if such writ is filed, the Supreme Court’s disposition. *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019). To the extent that these decisions conflict, the Departments believe that the decision in *CAIR I* is more persuasive.

<sup>15</sup> For example, a third country that is party to the 1951 Convention provides protection to refugees consistent with its non-refoulement obligations

who choose not to apply for relief within such a country because— notwithstanding the country’s obligations under international conventions—because of their concerns about that country’s safety, their fear of persecution or torture in the transit country, the inability of the transit country to offer them protection, or other concerns may be considered for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding of removal or deferral of removal under the CAT regulations, in the United States.

*Comment:* Some commenters noted that the United States has entered into only one “safe third country agreement,” an agreement with Canada.<sup>16</sup> Commenters further observed that neither Mexico nor Guatemala has entered into safe-third-country agreements with the United States.<sup>17</sup> One commenter emphasized that the legality of the United States’ safe-third-country agreement with Guatemala is unclear. Other commenters argued that, under the Act, it is not enough that the United States has entered into a safe-third-country agreement; the third country must offer applicants a full and fair procedure.

*Response:* As previously noted, this rule is promulgated pursuant to the authority provided under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C), which authorizes the placement of “‘additional limitations and conditions . . . under which an alien shall be ineligible for asylum’ established by a regulation that is ‘consistent with’ section 208 of the INA.” 84 FR at 33832. This rule is not intended to implement an Asylum Cooperative Agreement under section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A). Any discussion of the legality or sufficiency of the Asylum Cooperative Agreement between the United States and Guatemala, or any other country, is beyond the scope of this rulemaking.

#### b. Firm Resettlement

*Comment:* Numerous commenters expressed concern that the IFR conflicts

under Article 33.1 of the 1951 Convention. *See* 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176 (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

<sup>16</sup> These comments were submitted before the United States signed the previously mentioned agreements with Honduras and El Salvador.

<sup>17</sup> These comments were submitted before the United States implemented the U.S.-Guatemala ACA. *See* 84 FR 64095.

<sup>14</sup> The Departments acknowledge that the district court in the *CAIR* litigation later vacated the IFR in ruling on cross motions for summary judgment. *See* “*CAIR II*,” --- F. Supp. 3d ---, 2020 WL 3542481. The court, however, addressed only the plaintiffs’ procedural claim under the APA and did not discuss the claim that the IFR is contrary to the INA. *See id.* at \*5 (holding that “Defendants unlawfully promulgated the rule without complying with the APA’s notice-and-comment requirements,” and thus the court “need not reach Plaintiffs’ other claims concerning the validity of the rule”). The Departments also acknowledge that the Ninth Circuit has concluded that the IFR is not consistent with the ACA bar. *See E. Bay Sanctuary Covenant*, 964 F.3d at 846–49. The Ninth Circuit’s preliminary injunction remains stayed pending the court’s decision on the Government’s petition for rehearing en banc and, if that petition is denied, the

with the firm resettlement bar to asylum eligibility because the rule precludes eligibility for asylum for aliens who have passed through a third country even if they have not been offered permanent status in that third country. See INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi) (providing for the firm resettlement bar, which renders an applicant who “was firmly resettled in another country prior to arriving in the United States” ineligible for asylum). Commenters argued that Congress intended that an alien have a more significant relationship with a third country—*i.e.*, be firmly resettled in that country rather than be merely transiting through the country—to be rendered ineligible for asylum.

Some commenters also opposed the IFR because it does not account for whether an alien is eligible for permanent legal status in the third country and because it does not account for the risk of harm that an alien might face in the third country.

*Response:* The Departments reiterate the explanation in the IFR that it is consistent with the firm resettlement bar under section 208(b)(2)(A)(vi) of the Act, 8 U.S.C. 1158(b)(2)(A)(vi). 84 FR at 33834.<sup>18</sup> The rule is distinct from the firm resettlement bar. While both the rule and the firm resettlement bar seek to reduce forum-shopping by aliens, compare 84 FR at 33834, with INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi), this transit rule is not linked to, and takes a different approach from, the firm resettlement bar. The rule does not entirely eliminate asylum eligibility based on an alien’s stay in another country. Rather, under the rule, aliens remain eligible for asylum so long as they applied for and were denied protection in the relevant third country. See 8 CFR 208.13(c)(4)(iii), 1208.13(c)(4)(iii).

The existence of the firm resettlement bar should not be interpreted as an implicit foreclosure of additional limitations on asylum eligibility for aliens who have travelled through other countries. The Supreme Court, as explained above, has already rejected a similar approach to reading the Act. See *Trump*, 138 S. Ct. at 2411–12 (noting that the Act’s explicit statutory provisions “did not implicitly foreclose

<sup>18</sup> The Departments note that the Ninth Circuit recently held that the IFR was inconsistent with section 208 of the INA, 8 U.S.C. 1158, including the firm resettlement bar in section 208(b)(2)(A)(vi) of the Act, 8 U.S.C. 1158(b)(2)(A)(vi). *E. Bay Sanctuary Covenant*, 964 F.3d at 846–49; see also *Barr*, 140 S. Ct. 3 (staying preliminary injunction regarding the IFR). The Departments, however, have addressed the Ninth Circuit’s concerns by further explaining in this final rule how the transit bar is consistent with section 208 of the Act, 8 U.S.C. 1158.

the Executive from imposing tighter restrictions” in “similar” areas). Further, the firm resettlement bar and this final rule operate in distinctly different manners. The firm resettlement bar merely prohibits the Executive from granting asylum to aliens who have firmly resettled in a third country prior to arriving in the United States. That bar does not require that those aliens who have not firmly resettled should be eligible for or be granted asylum. As a discretionary form of relief, no alien, even if qualified for it, is entitled to it. *Thuraissigiam*, 140 S. Ct. at 1965 n.4 (“A grant of asylum enables an alien to enter the country, but even if an applicant qualifies, an actual grant of asylum is discretionary.”). Thus, any decision on eligibility for such aliens remains committed to the discretion of the Attorney General and the Secretary either through their rulemaking authority, see INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), or through the general requirement that an alien demonstrate that he or she merits a favorable exercise of discretion, see INA 208(b)(1), 8 U.S.C. 1158(b)(1). The rule constitutes an exercise of this discretion that supplies a rule of decision for aliens who fall outside the scope of the firm resettlement bar. Put differently, Congress mandated that certain aliens should be excluded from asylum eligibility in order to prevent forum-shopping by asylum seekers. But Congress left to the Attorney General (and, after the HSA, the Secretary) to promulgate additional rules regarding asylum eligibility—such as this final rule—that might also deter forum-shopping. The rule accordingly does not conflict with the firm resettlement bar’s prohibition on granting asylum to certain aliens. See, e.g., *Cheney R. Co., Inc. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) (“[T]he contrast between Congress’s mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, *i.e.*, to leave the question to agency discretion.”).

Moreover, the rule reasonably complements the firm resettlement bar. That bar, as noted above, categorically denies eligibility to aliens who have “firmly resettled” in a different country because those aliens do not need the protections afforded to asylees in this country. The Departments have concluded that aliens who do not even apply for asylum in a third country are similarly unlikely to warrant the protections associated with asylum. The firm resettlement bar and the rule thus complement one another by denying

eligibility to those aliens who are least likely to need asylum, and there accordingly is no inconsistency between the two provisions. Both provisions, in other words, advance the overall goal of the asylum statute by focusing relief on applicants who have “nowhere else to turn.” *Sall v. Gonzales*, 437 F.3d 229, 233 (2d Cir. 2006). Both bars also are reasonably aimed at “‘encourag[ing]’ other nations ‘to provide assistance and resettlement.’” *Pao Yang v. INS*, 79 F.3d 932, 939 (9th Cir. 1996) (quoting section 101 of the Refugee Act).

*Comment:* Some commenters stated that the IFR effectively writes the firm resettlement bar out of the Act because it sets forth a categorical bar to asylum for passing through a third country, thus negating any need to make a determination on whether an alien has firmly resettled. Some commenters stated that the United States must be able to guarantee permanent protection in a third country in order to determine that an alien has firmly resettled there. Commenters also expressed concern that the rule conflicts with the individualized analysis required by the definition of “firm resettlement” in the regulations. See 8 CFR 208.15, 1208.15.

*Response:* This rule does not overwrite the firm resettlement bar. The rule addresses a different set of aliens: It applies to those aliens who could have sought protection, but who did not do so, in a third country through which they transited en route to seek asylum at the southern land border of the United States. The firm resettlement bar, in contrast, applies to aliens who have received an offer of permanent status or resettlement in a third country before arriving in the United States. See INA 208(a)(2)(A)(vi), 8 U.S.C. 1158(a)(2)(A)(vi); 8 CFR 208.15, 1208.15 (2019) (defining “firm resettlement” to include circumstances in which an alien, prior to arriving in the United States, “entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement”).<sup>19</sup> The

<sup>19</sup> The Departments published an NPRM that, inter alia, proposed amending the definition of firm resettlement, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020), which has recently been finalized, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed on December 2, 2020. The new definition refers to receipt or eligibility for permanent legal immigration status or non-permanent but indefinitely renewable legal immigration status, rather than an offer of permanent resident status. *Id.* It also refers to aliens who have spent at least a year in a third country, regardless of whether such status was available. *Id.*



different focus of these bars consequently means that not all aliens covered by one bar are necessarily covered by the other, contrary to the contention that this rule overrides the statutory firm resettlement bar. For example, the firm resettlement bar retains effect for any alien not covered by the third country transit bar, such as aliens who have sought protection in any third country in transit to the United States but who have been denied such protection, and all persons subject to specific forms of human trafficking. An alien could transit numerous countries en route to the United States, be denied protection in one country, and obtain firm resettlement in another, then only later attempt to obtain relief in the United States. In such cases, it would be firm resettlement, not third country transit, which would bar eligibility for asylum.

Similarly, this rule limits forum-shopping by certain aliens outside the scope of the firm resettlement bar. For example, travelers spending less than a year in a third country en route to the United States without receipt or eligibility for permanent legal immigration status or non-permanent but indefinitely renewable legal immigration status<sup>20</sup> from that third country or another would not fall under the statutory firm resettlement bar, but they would be ineligible for asylum under this rule—unless they had applied for, and been denied asylum eligibility, in any of the third countries through which they transited to reach the U.S. border. This rule thus bars individuals who have not been firmly resettled. Despite the somewhat different classes of aliens encompassed within each bar—one statutory and one a regulatory exercise of statutorily granted authority—both bars are consistent in their purpose. As explained in the IFR, both bars do important work to prevent forum-shopping, helping to ensure that the U.S. asylum process and immigration court system are available to those aliens who are in greatest need of assistance, not aliens who are merely “seeking to choose among a number of safe countries.” 84 FR at 33834.

*Comment:* Commenters stated that the IFR is overbroad because, even where an

That amendment, however, does not alter the point expressed in this final rule that the firm resettlement bar addresses a different set of aliens than those subject to this rule. To the contrary, that amendment—which addresses situations involving renunciation of citizenship and the Migrant Protection Protocols, neither of which are involved in the application of this rule—further crystallizes the distinctiveness of this rule from the firm resettlement bar.

<sup>20</sup> See note 20, supra.

alien has received an offer to remain in a third country, he or she may not be found to have firmly resettled if the alien can demonstrate that his or her entry into the transit country was a necessary consequence of flight from persecution, that he or she remained only long enough to arrange onward travel and did not establish significant ties, or that his or her conditions of residence were so restricted that he or she was not in fact resettled.

*Response:* As explained above, the rule is distinct from the firm resettlement bar. The rule is not designed to address aliens who have firmly resettled or developed significant ties elsewhere. Instead, it is designed to identify applicants who are most in need because they have no other country of refuge, and to curtail the ability of aliens to use the asylum process as an end-run around the immigration system. It is reasonable to expect that an alien who is fleeing persecution will seek protection in the first country where it is available, as opposed to waiting until arrival in the United States.<sup>21</sup>

#### c. Whether or Not at a Port of Entry

*Comment:* Numerous comments expressed the view that the IFR conflicts with section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1), which states that “[a]ny alien who . . . arrives in the United States (whether or not at a designated port of arrival . . .) . . . may apply for asylum.” Some commenters stated that, because any non-Mexican asylum seekers coming to the southern land border necessarily transited through another country, the rule undermines the “whether or not at a designated port of arrival” language of the INA. Commenters also expressed concern that the IFR contravenes the INA’s language that “anyone physically present in the United States” may apply for asylum.

*Response:* The rule is consistent with section 208(a)(1) of the Act, 8 U.S.C

<sup>21</sup> The Ninth Circuit cast doubt on the reasonableness of this expectation in light of potentially unsafe conditions in Mexico. See *E. Bay Sanctuary Covenant*, 964 F.3d at 859 (Miller, J., concurring in part) (“The key factual premise of [the Departments’] reasoning is that asylum in Mexico (or Guatemala) is indeed an ‘available’ opportunity, so that legitimate asylum seekers can reasonably be expected to apply for protection there. But that premise is contradicted by the agencies’ own record.”). As explained more fully below, the Departments have considered the Ninth Circuit’s opinion, have consulted additional sources of evidence, and have concluded again that Mexico and other countries are indeed capable of safely providing refuge for asylum seekers, thus substantiating the “key factual premise” for one of the Departments’ rationales in promulgating the rule.

1158(a)(1), which provides that aliens present or arriving in the United States, regardless of whether they are at a port of entry, may apply for asylum “in accordance with this section.” Section 208(b) of the Act, 8 U.S.C. 1158(b), then establishes conditions for granting asylum and states that the Attorney General (and, now, the Secretary) “may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section.”

This rule does not bar any alien who expresses a fear of persecution from applying for asylum, and, in accordance with section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1), aliens impacted by the IFR may apply for asylum whether or not they are at a port of entry. The rule provides, however, that those who apply for asylum after travelling through a third country without first applying for, and being denied, protection in that third country (except for trafficking victims and aliens whose travel is only through countries that are not party to the relevant treaties) are ineligible to receive asylum. This rule’s asylum eligibility bar is based on an alien declining to apply for asylum in one of the first countries in which such relief may have been available, prior to reaching the southern land border—thereby undermining the purported urgency of the alien’s need for relief.

For clarity, the Departments note that this rule applies to all aliens who enter, attempt to enter, or arrive in the United States across the southern land border on or after July 16, 2019. These three terms, as explained more fully below, require physical presence in the United States, and, as a result, any aliens who did not physically enter the United States before July 16, 2019, are subject to this rule. This includes, for example, aliens who may have approached the U.S. border but were subject to metering by DHS at a land border port of entry and did not physically cross the border into the United States before July 16, 2019.<sup>22</sup>

<sup>22</sup> The Departments note that this result is different from the district court’s reasoning in granting a preliminary injunction in *Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848, 875–76 (S.D. Cal. 2019), which included aliens who approached a U.S. port of entry but were not immediately permitted to cross the border as within the class of aliens who had “attempted to enter or arrived in” the United States. See *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1199–1205 (S.D. Cal. 2019). The district court’s interpretation is contrary to the Departments’ intent, as explained below. The Departments also note that, even if aliens subject to metering prior to July 16, 2019, were exempt from this rule, they would nevertheless become subject to the rule upon any

As an initial matter, the terms “entry” and “arrive” require physical presence in the United States. For example, the term “entry,” which has a longstanding definition in immigration law, generally requires physical presence in the United States free from official restraint, after inspection and admission at a port of entry or intentional evasion at or outside of a port of entry. *See Matter of Patel*, 20 I&N Dec. 368, 370 (BIA 1991) (citing, inter alia, *Matter of Pierre*, 14 I&N Dec. 467, 468 (BIA 1973)). Similarly, although the U.S. Code does not define the term “arrival” (or “arrive”), the term is consistently accompanied by the phrase “in the United States.” *See, e.g.*, INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B). Specifically, section 208(a) of the Act, 8 U.S.C. 1158(a), states that an alien who “arrives in” the United States may seek asylum. The present tense phrase “arrives in” thus speaks to actual, ongoing arrival in the United States, not some potential arrival in the future. Similarly, the term “arriving alien” is defined by regulation as “an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means”—all of which require the alien to be physically present in the port of entry. *See* 8 CFR 1.2, 1001.1(q). An alien cannot be an “applicant for admission” unless he is “present in the United States” or “arrives in the United States,” INA 235(a)(1), 8 U.S.C. 1225(a)(1), and he cannot be “at a port-of-entry” unless he is in the United States, *see, e.g., United States v. Aldana*, 878 F.3d 877, 882 (9th Cir. 2017) (explaining that ports of entry are physical facilities in U.S. territory); *see also* 8 CFR 235.1(a), 1235.1(a) (application to lawfully enter “shall be made . . . at a U.S. port-of-entry when the port is open for inspection”). Consistent with this reasoning, an immigration officer’s duty to refer an alien “who is arriving in the United States” for a credible-fear interview does not attach until the “officer determines that an alien . . . is inadmissible” on certain grounds, INA

subsequent entry into the United States. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1017 (9th Cir. 2020) (Bress, J., dissenting) (“Even so, the Third Country Transit Rule plainly applies to the plaintiffs in this case, so that enjoining it as to them was legal error. The Third Country Transit Rule applies to ‘any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019.’ 8 CFR 208.13(c)(4). When plaintiffs reach this country, they will be entering or arriving in the United States after that date; the Rule thus plainly covers them.”).

235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii); the officer cannot determine that an alien is inadmissible on certain grounds until he inspects the alien, *see* INA 235(a)(3), 8 U.S.C. 1225(a)(3); and the officer’s duty to inspect the alien does not attach until the alien “arrives in” the United States, INA 235(a)(1), 8 U.S.C. 1225(a)(1). For these reasons, this rule’s references to the terms “arrival” and “arrive”—like the references to “entry”—require physical presence in the United States.<sup>23</sup>

Next, the Departments intended, and continue to intend, for the phrase “attempt to enter” to encompass only those who are physically present in the United States. Aliens whom U.S. Customs and Border Protection (“CBP”) encounter at the physical border line of the United States and Mexico, who have not crossed the border line at the time of that encounter, have therefore not attempted to enter. This interpretation, while perhaps counterintuitive in light of a colloquial understanding of the word “attempt,” is nonetheless consistent with case law in the immigration context that has equated an “attempt” to enter the United States with the actual crossing of the border. *See, e.g., United States v. Corrales-Beltran*, 192 F.3d 1311, 1319–20 (9th Cir. 1999) (“The attempt is in itself a substantive offense. It is the act of crossing the boundary line into the United States. It is not an attempt to commit an independently described offense, in the sense in which the word ‘attempt’ is ordinarily used in criminal law. It is the actual re-entry into the United States.”) (quoting *Mills v. United States*, 273 F. 625, 627 (9th Cir. 1921)). This interpretation of the word “attempt” in the context of attempting “to enter” is also consistent with the above-described meaning of the term “entry.” Because “entry” requires more than mere physical presence, *see Matter of Patel*, 20 I&N Dec. at 370, an alien can physically cross the border of the United States and still be merely “attempting” to enter the United States because, for example, he or she has not yet obtained freedom from official restraint.

For these reasons, the Departments reiterate that “entry,” “attempted entry,” and “arrival” require the alien to

<sup>23</sup> For example, in order to be inspected and processed, an application for admission must be physically present in the United States. *See* INA 235(a)(1), 8 U.S.C. 1225(a)(1) (applying to an alien who arrives “in” the United States). Additionally, in order to be processed for expedited removal, an alien must also first be present in the United States. *See* INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i) (requiring removal “from the United States” of “an alien . . . who is arriving in the United States”).

be physically present in the United States, whether at a land border port of entry or elsewhere within the United States, and the Departments do not intend for this rule to apply extraterritorially to aliens who are not in the United States in any capacity. Therefore, the rule applies to aliens who, for example, were subject to metering before July 16, 2019, and, as a result, had not entered, attempted to enter, or arrived in the United States by that time.

This rule establishes an additional condition, pursuant to the Attorney General’s and the Secretary’s authority at section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C), to establish additional limitations and conditions on asylum eligibility<sup>24</sup> for asylum applicants at the southern land border who travel through a third country. Those particular applicants must apply for, and be denied, protection in a third country of transit in order to maintain eligibility for asylum in the United States at the southern land border. Thus, the rule is consistent with the language of the statute. Additionally, as noted in the IFR, the new bar established by the regulation does not modify an alien’s eligibility for withholding or deferral of removal proceedings, neither of which is a discretionary form of relief or protection. 84 FR at 33830.

Moreover, “even if” an alien satisfies all governing requirements, “an actual grant of asylum is discretionary.” *Thuraissigiam*, 140 S. Ct. at 1965 n.4; *see* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999) (explaining that the “decision whether asylum should be granted to an eligible alien is committed to the Attorney General’s discretion”).

*Comment:* One commenter expressed concern that the IFR contradicts its own statutory authority because “arriving at the Southern Border does not constitute an exception [to asylum eligibility] on the statute and, as such, the rule contradicts its own authority.”

*Response:* The Departments do not believe that the rule contradicts its own statutory authority. As noted in the IFR and explained above in Section III.C.1 of this preamble, the Act authorizes the Attorney General and the Secretary to establish further limitations and conditions on asylum eligibility beyond those expressly stated in the Act itself. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); 84 FR at 33832. Further, the

<sup>24</sup> The authority to set additional limitations and conditions at section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C), is discussed further in preceding Section III.C.1.

comment mischaracterizes the substance of this rule, which does not bar asylum eligibility on the basis of an alien having arrived at the southern land border. Rather, this rule's asylum eligibility bar is based on an alien declining to apply for asylum in one of the first countries in which such relief may have been available, prior to reaching the southern land border—thereby undermining the purported urgency of the alien's need for relief.

#### d. Alleged Categorical Ban

*Comment:* Numerous commenters expressed concern that the IFR would impose a “sweeping and categorical” ban on asylum. Commenters also expressed concern that the IFR conflicts with the specific circumstances in the INA under which applicants can be denied asylum because the rule presents a categorical bar to eligibility that does not leave room for individualized determinations.

*Response:* The Departments would not characterize this rule as a categorical ban on asylum eligibility because the rule does not deny eligibility to every asylum applicant who presents himself or herself at the southern land border. Rather, the rule applies to a subset of aliens—those who pass through a third country or third countries en route to the United States and who do not seek protection in those countries before seeking protection in the United States. Those individuals who apply for such protection and are denied will not be barred from eligibility for asylum as a result of this rule once they reach the United States. Similarly, aliens who are victims of a severe form of trafficking in persons will not be barred from asylum eligibility resulting from their travel through a third country. Therefore, although the rule bars asylum eligibility for a certain subset of aliens reaching the southern land border, the rule does not ban asylum at the border.

Further, as explained above in Section III.C.1, it is well within the Departments' authority to establish new “limitations and conditions” on asylum eligibility that are “consistent with” the asylum statute. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). For example, in 2000, Attorney General Janet Reno, relying on her authority under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C), limited asylum eligibility based on a well-founded fear of future persecution when there is “a fundamental change in circumstances” or the ability of an alien to reasonably relocate within the alien's country of nationality or last habitual residence, even where that alien had established he or she had suffered past persecution.

See 65 FR at 76127; 8 CFR 208.13(b)(1)(i)–(ii), 1208.13(b)(1)(i)–(ii).

#### e. Credible Fear

*Comment:* One commenter expressed concern that the IFR predetermines the outcome of the credible-fear determination process for all affected asylum seekers subject to expedited removal. The commenter stated that the rule would require the asylum officer to apply the higher “reasonable fear” standard and that the Act requires that all noncitizens subject to expedited removal who express a fear of return be processed for a credible-fear screening except in circumstances defined in the Act.

*Response:* The Departments do not believe that the rule is inconsistent with expedited removal. As previously stated by the Departments, this rule does not change the standard as to whether an alien has demonstrated a credible fear of persecution for purposes of asylum (a significant possibility of eligibility for asylum), although the rule expands the scope of the inquiry in the process. 84 FR at 33835–37. Credible-fear screenings for aliens subject to expedited removal are a determination of whether “there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.” INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). As discussed above, section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C), authorizes the Departments to establish additional limitations and conditions on asylum eligibility by regulation, and the Departments promulgated the IFR pursuant to this authority. See 84 FR at 33833–34. The Act does not limit the credible-fear screening process to consideration of only those bars explicitly stated in the Act to the exclusion of any additional bars that the Departments established under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C). In fact, it makes little sense to require an asylum officer to determine that an alien otherwise has a significant possibility of eligibility for asylum if the alien is in fact barred from eligibility for asylum in the first place.

#### 3. U.S. Obligations Under International Law

*Comment:* Numerous commenters raised concerns that the IFR violates the United States' obligations under international law. These comments cited the 1948 Universal Declaration of Human Rights (“UDHR”), the Refugee

Convention, the Refugee Protocol, the International Covenant on Civil and Political Rights (“ICCPR”), the CAT, the Convention on the Rights of the Child (“CRC”), and customary international law.

Commenters were concerned that the IFR violates the United States' non-refoulement obligations under international law, which the commenters generally explained as prohibiting the return of asylum seekers to a country where their lives or freedom would be threatened on account of a protected ground. Specifically, commenters were concerned that the IFR would act as a categorical bar to asylum and, therefore, that asylum seekers would only be able to apply for withholding of removal or protection under the CAT regulations—claims that require higher standards of proof. The commenters feared that, as a result, this more searching standard would lead to a higher likelihood of refoulement of persons with otherwise legitimate asylum claims.

Similarly, other commenters stated that requiring asylum seekers to first apply for asylum in Mexico would effectively result in refoulement because Mexico does not have adequate asylum procedures. The commenters asserted that Mexico lacks adequate procedures, claiming, *e.g.*, that the “asylum system in Mexico is overwhelmed, and applicants face long delays and unfair procedures. In addition, conditions may not be safe for many asylum seekers who are at risk of experiencing violence while living in Mexico and awaiting adjudication of their claims.” Likewise, the commenters' assertions related to purported dangerous conditions in Mexico result in the commenters' views that returning asylum seekers to Mexico would be considered a violation of the United States' non-refoulement obligations.

Several commenters pointed to statements or guidance issued by the United Nations High Commissioner for Refugees (“UNHCR”). For example, several organizations cited generally UNHCR's statement of belief that “the rule excessively curtails the right to apply for asylum, jeopardizes the right to protection from refoulement, significantly raises the burden of proof on asylum seekers beyond the international legal standard, sharply curtails basic rights and freedoms of those who manage to meet it, and is not in line with international obligations.” UNHCR, *UNHCR Deeply Concerned About New U.S. Asylum Restrictions*, <https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply->

*concerned-new-asylum-restrictions.html* (last visited Dec. 10, 2020).

Others pointed to UNHCR guidance interpreting the Refugee Convention and the Refugee Protocol as providing that asylum seekers are not required to apply for protection in the first country where protection is available. For example, one commenter stated that “neither the 1951 Convention nor the 1967 Protocol require[s] refugees to apply for protection in the first country available, nor do they require refugees to be returned to a country that was crossed in transit.” The commenter further averred that “UNHCR has stated that asylum should not be refused only on the basis that it could have been sought in another country, and it has made clear that an asylum seeker should not be required to seek protection in a country in which he or she has not established any relevant links.”

Another organization was concerned that the IFR prevents asylum seekers from receiving a fair, full, and adequate trial or legal process, as required by the UDHR, the ICCPR, and the CRC.

*Response:* As explained in the IFR, this rule is consistent with U.S. obligations under the Refugee Protocol, which incorporates Articles 2 through 34 of the Refugee Convention, as well as U.S. obligations under Article 3 of the CAT. These treaties are not directly enforceable in U.S. law, but some of their obligations have been implemented by domestic legislation and implementing regulations. *See INS v. Stevic*, 467 U.S. 407, 428 & n.22 (1984); *Al-Fara v. Gonzales*, 404 F.3d 733, 743 (3d Cir. 2005) (“The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.”); Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”), Public Law 105–277, sec. 2242(b), Oct. 21, 1998, 112 Stat. 2681, 2631–822 (8 U.S.C. 1231 note); 8 CFR 208.16(b)–(c), 208.17, and 208.18; 1208.16(b)–(c), 1208.17 and 1208.18.

The United States has implemented the non-refoulement provisions of Article 33.1 of the Refugee Convention through the withholding of removal provisions at section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), rather than through the asylum provisions at section 208 of the Act, 8 U.S.C. 1158. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 429, 440–41 (1987); *Matter of C–T–L*, 25 I&N Dec. 341, 342–43 (BIA 2010). The Supreme Court has explained that asylum “does not correspond to Article 33 of the Convention, but instead corresponds to Article 34,” which provides that contracting States “shall as far as possible facilitate the

assimilation and naturalization of refugees.” *Cardoza-Fonseca*, 480 U.S. at 441 (quotation marks omitted). Article 34 “is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible.” *Id.* Because the rule does not affect statutory withholding of removal or protection under the CAT regulations, the rule is consistent with U.S. non-refoulement obligations under the 1967 Protocol (incorporating, inter alia, Article 33 of the Refugee Convention) and the CAT. *See R–S–C*, 869 F.3d at 1188 n.11 (explaining that “the Refugee Convention’s non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General’s withholding-only rule”); *Cazun v. U.S. Att’y Gen.*, 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia v. Lynch*, 813 F.3d 240, 241 (5th Cir. 2016).

The commenters are correct that neither the Refugee Convention nor the Refugee Protocol requires refugees to apply for protection in the first country available, but that observation is irrelevant to the legality of the rule. As explained above, the United States implements its non-refoulement obligations under the Refugee Protocol and the CAT through statutory withholding of removal and regulatory CAT protection. Because the rule bars asylum eligibility, and does not affect eligibility for statutory withholding of removal or withholding or deferral of removal under the CAT regulations, it does not conflict with U.S. obligations under the Refugee Protocol or the CAT.

Commenters are further incorrect that Mexico does not provide adequate asylum procedures or a sufficiently safe environment for asylum seekers.

First, regarding conditions in Mexico for asylum seekers who wait or pass through there, the anecdotal stories detailing violence in the country are generalized and may not necessarily indicate the presence of the kind of persecution that asylum was designed to address. Relatedly, the U.S. Ambassador to Mexico has explained that reports on localized violence in particular areas of Mexico do not indicate security conditions in the country as a whole. *See Memorandum for the Attorney General and the Acting Secretary of Homeland Security*, from Christopher Landau, United States Ambassador to Mexico, *Re: Mexico Refugee System 4* (Aug. 31, 2020) (“Landau Memorandum”). Mexico spans nearly 7,600,000 square miles, and the Ambassador explained that discussions about conditions in Mexico oftentimes

conflate the perils that refugees might face traversing across dangerous parts of Mexico en route to the United States with the ability to seek protection in a safe place in Mexico.<sup>25</sup> *Id.*

Additionally, UNHCR has documented a notable increase in asylum and refugee claims filed in Mexico—even during the ongoing COVID–19 pandemic—which strongly suggests that Mexico is an appropriate option for seeking refuge for those genuinely fleeing persecution. *See, e.g., UNHCR, Despite Pandemic Restrictions, People Fleeing Violence and Persecution Continue to Seek Asylum in Mexico*, <https://www.unhcr.org/en-us/news/briefing/2020/4/5ea7dc144/despite-pandemic-restrictions-people-fleeing-violence-persecution-continue.html> (last visited Dec. 10, 2020) (“While a number of countries throughout Latin America and the rest of the world have closed their borders and restricted movement to contain the spread of coronavirus, Mexico has continued to register new asylum claims from people fleeing brutal violence and persecution, helping them find safety.”). Asylum and refugee claims filed in Mexico increased 33 percent in the first 3 months of 2020 compared to the same period in 2019, averaging almost 6,000 per month. *Id.*

These numbers align with historical trends of increasing asylum claims in Mexico annually. Asylum claims filed in Mexico rose by more than 103 percent in 2018 over the previous year. UNHCR, *Fact Sheet: Mexico 1* (Apr. 2019), <https://reporting.unhcr.org/sites/default/files/UNHCR%20Factsheet%20Mexico%20-%20April%202019.pdf> (last visited Dec. 11, 2020). In 2019 specifically, Mexico reports having received 70,609 refugee applications, which places Mexico eighth in the world for receipt of refugee

<sup>25</sup> The Departments also note various media outlets and writers have opined on living in or retiring to Mexico, which further suggests that the quality of life, including safe living conditions, continues to improve. *See, e.g., Kathleen Peddicord, The Best Places to Retire in Mexico*, U.S. News & World Report (Apr. 30, 2019), <https://money.usnews.com/money/retirement/baby-boomers/articles/the-best-places-to-retire-in-mexico>; *see also* Liz Flynn, *20 Best Places to Live in Mexico*, Money Inc., <https://moneyinc.com/best-places-to-live-in-mexico/>. In 2019, U.S. citizens traveled to Mexico almost 40 million times. *See* National Travel and Tourism Office, International Trade Administration, U.S. Dep’t of Commerce, U.S. Citizen Travel to International Regions (2019). The U.S. Embassy in Mexico City estimates there are more than 1.5 million U.S. citizens living in Mexico. *See* Wendy Fry, *Americans Make Up Mexico’s Largest Demographic of Immigrants*, San Diego Union Tribune (June 17, 2019). The Departments suggest that it strains credulity that so many Americans would move to Mexico if it were as unsafe as commenters alleged.

applications. See Landau Memorandum at 3. Overall, “[a]sylum requests have doubled in Mexico each year since 2015.” Congressional Research Serv., *Mexico’s Immigration Control Efforts 2* (Feb. 19, 2020), <https://fas.org/sgp/crs/row/IF10215.pdf> (last visited Dec. 11, 2020). Moreover, some private organizations acknowledge that asylum claims in Mexico have recently “skyrocket[ed],” that “Mexico has adopted a broader refugee definition than the U.S. and grants a higher percentage of asylum applications,” and that “Mexico may offer better options for certain refugees who cannot find international protection in the U.S.,” including for those “who are deciding where to seek asylum [i.e., between Mexico and the United States].” Asylum Access, *Mexican Asylum System for U.S. Immigration Lawyers FAQ* (Nov. 2019), <https://asylumaccess.org/wp-content/uploads/2019/11/Mexican-Asylum-FAQ-for-US-Immigration-Lawyers.pdf> (last visited Dec. 11, 2020).

Over the past decade, Mexico has substantially reformed its immigration and refugee laws, and in 2020, it more than doubled the budget for the Comisión Mexicana de Ayuda a Refugiados (“COMAR”), the specialized federal agency that handles refugee and asylum issues. See Landau Memorandum at 2–3. The Mexican Constitution was amended in 2016 to include the specific right to asylum, see Mex. Const. art. 11, paragraph 2 (providing in Spanish that every person has the right to seek and receive asylum and that recognition of refugee status and the granting of political asylum will be carried out in accordance with international treaties). Further, the grounds for seeking and obtaining refugee status under Mexican law are broader than the grounds under United States law. Individuals in Mexico may seek refugee status as a result of persecution in their home countries on the basis of race, religion, nationality, gender, membership in a social group, or political opinion. Compare 2011 Law for Refugees, Complementary Protection, and Political Asylum (“LRCPPA”), art. 13(I), with INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i). However, individuals in Mexico may also seek refugee status based on generalized violence and violation of human rights. *Id.* art. 13(II). Prospective refugees may apply at one of seven COMAR offices in the country within 30 days of entry into Mexico, with that time period subject to extension for good cause. See Landau Memorandum at 2. Prospective refugees may choose to apply for refugee status in any state,

and, as a result, two-thirds of refugee applications are filed in Chiapas, a state that routinely ranks amongst the safest Mexican States. *Id.* at 4. Prospective refugees receive a work permit so that they are legally eligible to work and access public health services while their cases are pending, and Mexican law requires COMAR to process applications within 90 days. *Id.* at 2.

Accordingly, the available data and other evidence simply do not support the conclusion that Mexico cannot be a safe and appropriate destination for individuals to seek asylum when they are fleeing from persecution.

Finally, just as violence may occur in parts of the United States but individuals fleeing persecution may still consider the country relatively “safe” when compared to their countries of origin, localized episodes of violence in Mexico may not necessarily mean the country, as a whole, is unsafe for individuals fleeing persecution. In other words, the presence of local or regional crime exists in all countries, even those generally considered “safe,” but the presence of local or regional crime does not necessarily render those countries so dangerous that individuals fleeing persecution could not take refuge anywhere in the country.<sup>26</sup>

Further, the United States is not required to grant asylum to all applicants, and, as discussed above, asylum is ultimately discretionary. Thus, regardless of the general safety in Mexico, asylum claims remain subject to discretion. Moreover, over the years, the vast majority of asylum claims have been unsuccessful and unmeritorious under U.S. asylum law. See EOIR, *Adjudication Statistics: Asylum Decision Rates* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1248491/download>; see also Thuraissigiam, 140 S. Ct. at 1966–67 (quoting various EOIR

statistics demonstrating that “[t]he majority [of credible fear claims] have proved to be meritless” and explaining that fraudulent asylum claims are difficult to detect).

A person seeking asylum for a reason supported by law (such as a fear of persecution) does not require a specific destination; he or she requires only a destination that provides refuge. Policy considerations accordingly support promulgation of a bar to asylum to reduce the number of those aliens who wish to use the asylum system to live (and potentially work) in the United States in particular, rather than as a way to avoid persecution in general. The Departments have concluded that the large number of ultimately denied asylum claims, as referenced above, is evidence that many aliens are seeking to use the asylum system for reasons other than seeking refuge from persecution on account of a protected ground. This final rule thus bars those aliens who—by neglecting to seek protection in countries in which they could have done so had they been legitimately fleeing persecution—are likely to be the sorts of aliens attempting to improperly use the system, thereby reducing the incidence of abuse of the asylum system.

Comments concerning statements or guidance from UNHCR are misplaced. First, UNHCR’s interpretations of or recommendations regarding the Refugee Convention and Refugee Protocol are “not binding on the Attorney General, the [Board of Immigration Appeals (‘BIA’)], or United States courts.” *Aguirre-Aguirre*, 526 U.S. at 427. “Indeed, [UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status] itself disclaims such force, explaining that ‘the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.’” *Id.* at 427–28, quoting *Cardoza-Fonseca*, 480 U.S. 14 439 n. 22.

To the extent such guidance “may be a useful interpretative aid,” *id.* at 427, it does not govern how a Contracting State may exercise its prerogative to allow for asylum in its sole discretion.

Second, UNHCR has recognized that refugees may be required to seek protection in other countries. In guidance issued in April 2018, UNHCR affirmed that “refugees do not have an unfettered right to choose their ‘asylum country,’” and that, even if their “intentions . . . ought to be taken into account,” they “may be returned or transferred to a state where they had found, could have found or, pursuant to a formal agreement, can find

<sup>26</sup> Per the United Nations Office on Drugs and Crime Chart on Victims of Intentional Homicide, the murder rate in Mexico of 29.1/100,000 in 2018 was lower than that in American cities such as St. Louis, Baltimore, Detroit, New Orleans, and Baton Rouge. See Fed. Bureau of Investigation, *2018: Crime in the United States* (2018), <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-8/table-8.xls/view>. More recently, the murder rate in Baltimore, America’s deadliest large city, was twice that of Mexico. Sean Kennedy, *‘The Wire’ is Finished, but Baltimore Still Bleeds*, *The Wall St. J.*, <https://www.wsj.com/articles/the-wire-is-finished-but-baltimore-still-bleeds-1158119104> (last visited Dec. 10, 2020); see also Landau Memorandum at 4 (“Security conditions vary widely among (and within) the 32 Mexican States. Many reports of violence that reach the United States are often based on localized violence in particular areas of Mexico, and do not reflect conditions across the country as a whole—that would be like seizing upon crime statistics from particular metropolitan areas in the United States, such as the South Side of Chicago or Baltimore, and extrapolating them to the entire United States.”).

international protection.” UNHCR, *Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries*, at 1 available at <https://www.refworld.org/pdfid/5acb33ad4.pdf> (last visited Dec. 10, 2020). UNHCR explained that “[t]he 1951 Convention relating to the Status of Refugees and its 1967 Protocol do not prohibit such return or transfer.” *Id.* Additionally, UNHCR has acknowledged the legitimacy of the “safe third country concept” through which nations may deny protection “in cases where a person could have or can find protection in a third state either in relation to a specific individual case or pursuant to a formal bi- or multilateral agreement between states on the transfer of asylum-seekers.” *Id.*

Comments arguing that the rule violates ICCPR, the UDHR, and the CRC are also incorrect. First, the ICCPR does not impose a non-refoulement obligation on state parties. The UDHR is a non-binding human rights instrument, not an international agreement, and thus it does not impose legal obligations on the United States. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 734–35 (2004) (“[T]he [UDHR] does not of its own force impose obligations as a matter of international law.”). Similarly, the United States has neither ratified the CRC nor implemented its provisions in domestic law, and accordingly it does not give rise to legal obligations for the United States. See *Martinez-Lopez v. Gonzales*, 454 F.3d 500, 502 (5th Cir. 2006) (“The United States has not ratified the CRC, and, accordingly, the treaty cannot give rise to an individually enforceable right.”). In addition, this rule does not implicate the two optional protocols of the CRC to which the United States is a party: (1) The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and (2) the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. See United Nations, Treaty Collection, *Convention on the Rights of the Child*, available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en) (last visited Dec. 10, 2020); UNHCR, *Country Profile for United States of America*, available at <http://indicators.ohchr.org/> (last visited Dec. 10, 2020).

To the extent that some commenters make blanket assertions that the rule violates customary international law or is inconsistent with other non-binding

international instruments, the commenters ignore the fact that the rule leaves the requirements for an ultimate grant of statutory withholding of removal or withholding or deferral of removal pursuant to the CAT regulations unchanged, and that aliens who choose not to apply for relief within a country that is a party to the relevant treaties through which they transit en route to the United States may still be considered for such protection.

*Comment:* Three commenters cited examples of countries that are parties to the 1951 Convention, 1967 Protocol, or the CAT, yet nonetheless persecute individuals, according to allegations by the commenters. For example, one group stated that some countries that are parties to one or more of the relevant treaties punish expressions of atheism by death.

*Response:* The rule does not require an asylum seeker to apply for protection in every country he or she crosses; it requires the individual to apply in at least one of the countries. Consequently, because the rule applies to aliens crossing the southern land border, 8 CFR 208.13(c)(4) and 1208.13(c)(4), Mexico will necessarily be at least one of the transit countries. In other words, non-Mexican nationals crossing the southern land border must pass through Mexico. As explained in the IFR, Mexico is a party to the Refugee Convention, the Refugee Protocol, and the CAT, and it has an independent asylum system that provides protections to asylum applicants. 84 FR at 33839–40. Further, Mexico has endorsed the 1984 Cartagena Declaration on Refugees and the non-binding 2018 Global Compact on Refugees. See Landau Memorandum at 1. Commenters did not generally allege that Mexico persecutes individuals notwithstanding its treaty obligations—and certainly did not allege that Mexico punishes atheists by death. Consequently, commenters’ concerns about anecdotes in individual countries that are neither transit countries themselves nor the sole country of transit are inapposite to the focus of the rule. Further, as noted above, aliens who choose not to apply for relief within a country that is a party to the relevant treaties and through which they transit en route to the United States may be considered for withholding of removal or deferral of removal in the United States.

*Comment:* One group expressed concern that if an individual applies for and is denied asylum in a third country, the person will likely be returned to his or her home country and not be allowed to continue on to the United States. The group further opined that countries may

deny valid asylum claims because they do not wish to absorb more migrants.

*Response:* The Departments appreciate the commenting group’s concern that individuals with valid asylum claims should receive protection. The Departments believe the rule will provide such protection. The 1951 Convention and the 1967 Protocol incorporate the principle of non-refoulement—*i.e.*, that countries cannot return individuals to countries where they more likely than not would be persecuted on account of a protected ground (with certain exceptions for individuals who fall within an exclusion or cessation ground). In other words, a third country, which, under the rule must be a party to the Refugee Convention or Refugee Protocol, cannot return an alien to his or her home country if doing so would violate the third country’s non-refoulement obligations. The third country, however, may return the alien to his or her home country following a determination that the alien is not eligible for non-refoulement protection in that country.

Finally, aliens who apply for and are denied protection in these countries are not barred from asylum eligibility under this rule.

#### 4. Violates the Refugee Act

*Comment:* At least one commenter stated that the IFR violates the Refugee Act. The commenter argued that the rule conflicts with the non-refoulement principles of the Refugee Act because it will “inevitably return refugees to the countries where they will be persecuted.”

*Response:* The rule does not violate the non-refoulement provisions of the Refugee Act, which were codified at former section 243(h) of the Act, 8 U.S.C. 1253(h) (currently codified at section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3)). Refugee Act, sec. 203(e); see also *Stevic*, 467 U.S. at 421–22. As stated above, the United States has implemented its non-refoulement obligations under the Refugee Protocol and the CAT through the withholding of removal provisions at section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), and the CAT regulations.<sup>27</sup> See *Cardoza-Fonseca*, 480 U.S. at 440–41; FARRA, sec. 2242; 8 CFR 208.16(b)–(c), 208.17,

<sup>27</sup> The Departments further note that the U.S. Mission in Mexico is “unaware of any pattern or practice of deporting prospective refugees to their countries of origin while their applications remain pending.” Landau Memorandum at 5. To the contrary, as explained by the U.S. Ambassador to Mexico, “Mexico introduced ‘complementary protection’ in 2011 precisely to provide protection from refoulement for individuals who may face danger in their home countries but do not satisfy the legal requirements for refugee status.” *Id.*

208.18, 1208.16(b)–(c), 1208.17 and 1208.18. The rule does not affect the withholding of removal process or standards. See INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 208.16–.18, 1208.16–.18. In general, an alien who can demonstrate that he or she would more likely than not face persecution on account of a protected ground or torture would qualify for withholding or deferral of removal. Asylum under the immigration laws, on the other hand, is a discretionary form of relief subject to regulation and limitations by the Attorney General and the Secretary. See INA 208(b)(2)(C) and (d)(1), 8 U.S.C. 1158(b)(2)(C) and (d)(1); *Thuraissigiam*, 140 S. Ct. at 1965 n.4; see also *Garcia v. Sessions*, 856 F.3d 27, 40 (1st Cir. 2017) (discussing the distinction between asylum and withholding of removal and explaining that “withholding of removal has long been understood to be a mandatory protection that must be given to certain qualifying aliens, while asylum has never been so understood”).

##### 5. Violates Trafficking Victims Protection Reauthorization Act of 2008

*Comment:* Some commenters argued that the IFR violates the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), Public Law 110–457, Dec. 23, 2008, 122 Stat. 5044. These commenters noted that Congress has provided special protections for unaccompanied alien children (“UAC”)<sup>28</sup> that are designed to humanely treat and protect UAC due to their particular vulnerability to the risk of trafficking or other exploitations. For example, as most relevant to the rule, commenters noted that UAC have a statutory right to present their asylum applications to an asylum officer in a non-adversarial setting in the first instance. See TVPRA sec. 235(d)(7)(B) (codified at section 208(b)(3)(C) of the Act, 8 U.S.C. 1158(b)(3)(C)). In addition, the TVPRA exempted UAC from the ACA bar to asylum and the one-year filing deadline for applying for asylum. See TVPRA sec. 235(d)(7)(A) (codified at section 208(a)(2)(E) of the Act, 8 U.S.C. 1158(a)(2)(E)). According to commenters, the IFR violates the protections provided by the TVPRA because it deems UAC ineligible for asylum if they transited through a third country and, in effect, removes the

procedural protections implemented by the TVPRA. By barring asylum eligibility for UAC who transit through third countries without seeking asylum there, commenters argued, the IFR will effectively require asylum officers to automatically refer UAC to the immigration courts to pursue withholding of removal or protection under the CAT regulations. As a result, the commenters asserted, the IFR in practice would nullify the non-adversarial process that Congress specifically designed for UAC under the TVPRA by placing the UAC in adversarial immigration court proceedings.

*Response:* This rule does not violate the TVPRA. As the commenters stated, the TVPRA enacted multiple procedures and protections specific to UAC that do not apply to other similarly situated asylum applicants. Congress, however, did not exempt UAC from all bars to asylum eligibility. As a result, UAC, like all asylum seekers, (1) may not apply for asylum if they previously applied for asylum and their application was denied (INA 208(a)(2)(C), 8 U.S.C. 1158(a)(2)(C)), and (2) are ineligible for asylum if they are subject to any of the mandatory bars at section 208(b)(2)(A)(i)–(vi) of the Act, 8 U.S.C. 1158(b)(2)(A)(i)–(vi), or if they are subject to any additional bars implemented pursuant to the Attorney General’s and the Secretary’s authority to establish additional limitations on asylum eligibility by regulation, INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C).

DHS and DOJ implement this rule pursuant to the authority at section 208(b)(2)(C) of the Act. It is a valid restriction on asylum eligibility for all asylum applicants, including UAC. And this rule does not alter asylum officers’ jurisdiction over asylum applications from UAC. See INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C). If UAC who are apprehended at the southern land border are placed in removal proceedings under section 240 of the Act and raise asylum claims, the immigration judges will refer the claims to asylum officers pursuant to the TVPRA, consistent with the asylum statute and procedures in place prior to the promulgation of this rule. See INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C). Those asylum officers will determine whether the UAC are barred from eligibility for asylum on the basis of this rule. This rule does not affect any other procedure or protection implemented by the TVPRA.

Further, one district court has already indicated in an oral ruling from the bench that the IFR is likely consistent with the TVPRA. In *CAIR I*, discussed

previously in Section III.C.2, the plaintiffs challenged the IFR in part on the grounds that it constituted a violation of the TVPRA’s substantive protections for UAC. Complaint at 43–45, *CAIR I*, --- F. Supp. 3d ---, 2019 WL 3436501, ECF No. 1. In denying the plaintiffs’ request for a temporary restraining order, the court explained that it had “strong doubt as to plaintiffs’ claims relating to the TVPRA,” in part because “the Attorney General has long exercised broad discretion to determine which applicants should be granted asylum.” *Id.* at \*3.<sup>29</sup>

Finally, the Departments note that, for UAC who are barred from asylum eligibility under this rule due to travel through a third country but who may still be eligible for withholding of removal under section 241 of the Act, 8 U.S.C. 1231, or protection under the CAT regulations, the Departments are cognizant of the “special circumstances” often presented by UAC. Nevertheless, the INA does not require special protections for UAC beyond those already contained in the statute, and the INA does not require the provision of additional, extra-statutory protections—and certainly not beyond those which already exist. See, e.g., EOIR, *Operating Policies and Procedures Memorandum 17–03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-03/download>. Like all aliens subject to the rule, UAC have the opportunity to apply for protection in one or more countries prior to their arrival in the United States. Further, UAC who are old enough to travel independently across hundreds or thousands of miles to the United States can logically also be expected to seek refuge in one of the countries transited if the UAC are genuinely seeking protection. UAC who are not old enough to travel independently necessarily must travel with adults, and again, there is no reason that adults cannot apply for protection in any country offering refuge if the adults and the UAC are genuinely seeking protection.<sup>30</sup> In short, the

<sup>29</sup> As with the claim that the IFR is contrary to the INA, the court in *CAIR II* did not discuss the claim that the IFR is contrary to the TVPRA. See *CAIR II*, --- F. Supp. 3d ---, 2020 WL 3542481, at \*1.

<sup>30</sup> The Departments recognize that smugglers may be able to charge higher fees to bring UAC to the United States than to other countries because of the perceived desirability of residing in the United States compared to other countries and, thus, that the rule may also act as a deterrent to child smuggling to the United States. The potential for reduced smuggling of children into the United

<sup>28</sup> UAC are children who have no lawful immigration status in the United States; who have not attained 18 years of age; and who have no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody. 6 U.S.C. 279(g)(2).

Departments have not overlooked the special circumstances of UAC in crafting this rule, but those circumstances are insufficiently compelling to warrant a special exception for UAC from the rule's application.

#### 6. Due Process

*Comment:* Multiple organizations expressed concerns that the IFR violates the Fifth Amendment Due Process Clause because it allegedly establishes a predetermined outcome of the expedited removal process and presents a categorical bar on asylum for immigrants who enter the United States through the southern land border after transiting through a third country, effectively denying asylum seekers the right to be meaningfully heard on their asylum claims. One commenter further expressed that asylum seekers should have the right to appeal a credible-fear denial to an immigration judge. One commenter stated that it is inappropriate for the Departments to reduce the amount of process provided to asylum applicants in order to decrease the backlog of cases pending before EOIR. One commenter stated that it was unclear how the IFR would lessen the burden on immigration judges to timely and efficiently review claims in compliance with due process requirements because the rule required every affected applicant to file additional evidentiary material.

*Response:* The rule does not violate the Fifth Amendment Due Process Clause.<sup>31</sup> Like the other limitations on asylum set forth in the INA, the rule does not establish a predetermined outcome for the expedited removal process, and, as stated above, the rule is consistent with those limitations in the

States, however, works in favor of the rule, not against it.

<sup>31</sup> Courts have held that aliens do not have a cognizable substantive due process interest in the receipt of asylum because asylum is a discretionary form of relief. See, e.g., *Yuen Jin v. Mukasey*, 538 F.3d 143, 157 (2d Cir. 2008) (holding that “an alien who has already filed one asylum application, been adjudicated removable and ordered deported, and who has nevertheless remained in the country illegally for several years, does not have a liberty or property interest in a discretionary grant of asylum”); *Ticoalu v. Gonzales*, 472 F.3d 8, 11 (1st Cir. 2006) (“Due process rights do not accrue to discretionary forms of relief, . . . and asylum is a discretionary form of relief.”); *Mudric v. U.S. Att’y Gen.*, 469 F.3d 94, 99 (3d Cir. 2006) (holding that an eight-year delay in processing the petitioner’s asylum application was not a constitutional violation because the petitioner “had no due process entitlement to the wholly discretionary benefits of which he and his mother were allegedly deprived”); cf. *Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003) (“Since discretionary relief is a privilege created by Congress, denial of such relief cannot violate a substantive interest protected by the Due Process clause.”).

rest of section 208 of the Act, 8 U.S.C. 1158. The Departments note that, under the rule, not every immigrant who enters the United States via the southern land border after transiting through a third country is ineligible for asylum in the United States, and the Departments provide a screening process to determine which asylum applicants are, and are not, subject to the regulatory third-country-transit bar. The rule applies to bar asylum eligibility for only those asylum seekers who transited through third countries without seeking protection in at least one of those countries.

As previously stated by the Departments, one purpose of the rule is to ameliorate undue strains on the existing immigration system by deterring meritless or non-urgent asylum claims. See 84 FR at 33839; see also *Thuraissigiam*, 140 S. Ct. at 1967. The Departments had established this rule to more effectively separate out non-meritorious or non-urgent claims so that meritorious claims will be adjudicated more quickly and, in the process, the backlog would be reduced.

In addition, the rule provides several procedural protections to ensure that meritorious claims receive a full and fair hearing before an immigration judge and that the bar impacts only aliens properly within the scope of the limitations in 8 CFR 208.13(c)(4), 1208.13(c)(4). Aliens who are subject to the third-country-transit bar, 8 CFR 208.13(c)(4), 1208.13(c)(4), and who clear the reasonable-fear screening standard will be placed in proceedings before an immigration judge, just as aliens who clear the credible-fear standard would be. See 84 FR at 33838; see also Intervening Joint Final Rule. In those proceedings, the alien will have the opportunity to raise whether the asylum officer incorrectly identified the alien as subject to the bar to asylum. If an immigration judge determines that the asylum officer’s determination was incorrect, the alien will be able to apply for asylum, withholding of removal, and protection under the CAT regulations. See Intervening Joint Final Rule. Such aliens can appeal the immigration judge’s decision in these proceedings to the BIA and then seek review from a Federal court of appeals. *Id.*; see also 8 CFR 1003.1(b)(9); INA 242, 8 U.S.C. 1252. The Departments note that the standard established in the IFR helped ensure—in contrast to commenters’ concerns—that the outcome of the process delineated in the rule is not predetermined and that aliens potentially subject to the bar receive the full and fair hearing required by the Due Process Clause. Following public

comment periods on the NPRM that introduced this rule and on the Intervening Joint Final Rule, the Departments published the Intervening Joint Final Rule to codify the Departments’ view that aliens with negative fear determinations that an Immigration Judge has vacated are better placed in the more limited asylum-and-withholding-only proceedings. See 8 CFR 1208.31(g). No additional changes are necessary in this publication.

*Comment:* Two groups predicted that the IFR will reduce *pro bono* legal representation available to applicants for asylum. The commenters predicted that lawyers will be required to spend additional time on each case because lawyers will need to brief issues related to the rule, file separate applications for spouses and children who will not receive derivative asylum, and take more time to present statutory withholding and CAT claims than they would for asylum claims. The groups argued that these requirements will reduce the number of clients each *pro bono* lawyer will be able to represent.

*Response:* The Departments respectfully disagree with these predictions. First, the commenters assume that individuals will not apply for asylum in other countries and thus will be barred by the rule from receiving protection. Many individuals may apply for, and may receive, asylum elsewhere, which would reduce the burden on the immigration system and lead to fewer individuals requiring legal representation. Also, to the extent the rule deters frivolous asylum claims, *pro bono* attorneys will be able to devote their time to the fewer, meritorious claims remaining.

#### 7. Specific Populations

##### a. Adults

*Comment:* Several commenters raised concerns that the IFR could have a disproportionate impact on certain adults alleged to be particularly vulnerable, such as victims of domestic and gender-based violence; lesbian, gay, bisexual, and transgender (“LGBT”)<sup>32</sup> individuals; children; mothers; and women.

Commenters stated that these individuals may be unable to effectively recount to asylum adjudicators the harms that they have suffered unless they feel safe and secure, which, according to the commenters, would not be possible in Mexico, Guatemala, or

<sup>32</sup> Commenters alternatively used the terms LGBTQ, which refers to lesbian, gay, bisexual, transgender, and queer/questioning; LGBTQI, which further includes intersex; and LGBTQ+. For consistency, this final rule uses the acronym LGBT.



many countries that are parties to the relevant treaties. Commenters further explained that these populations face harm in Mexico, Central America, and other regions of the world, and alleged as a result that the United States cannot expect them to seek relief in third countries where they are equally at risk of harm as in their home countries. In other words, according to these commenters, the rule violates international and Federal law because it creates a bar to asylum without considering whether the country or countries through which an alien has transited would provide an individual with a procedure that provides a level of protection similar to the U.S. system. Commenters noted that other countries may not recognize certain harms as persecution for the purposes of asylum, though the same harms may qualify as persecution under the United States' asylum laws.

Regarding LGBT individuals specifically, commenters highlighted examples of discrimination and violence in Mexico and Central America. Multiple commenters stated that the United States has implicitly recognized the vulnerability of LGBT individuals by, as of July 2019, not returning LGBT individuals to Mexico under the MPP. *See* Anna Giaritelli, *LGBT Asylum-Seekers Exempt from 'Remain in Mexico' Policy and Can Stay in US*, Washington Examiner, <https://www.washingtonexaminer.com/news/lgbt-asylum-seekers-exempt-from-remain-in-mexico-policy-and-can-stay-in-us> (last visited Dec. 10, 2020) (noting that a U.S. official said that the United States was not returning LGBT individuals to Mexico because "that population would be at greater risk of personal harm if forced to remain in [Mexico]").

Regarding children, including unaccompanied children specifically,<sup>33</sup> commenters explained that children are frequently targeted by gangs and cartels for recruitment or for sexual violence. Such violence against children, according to commenters, is often underreported or not investigated, and child welfare programs in El Salvador, Guatemala, Honduras, and Mexico are allegedly underfunded and inaccessible.

*Response:* This rule is a rule of equal application that does not bar any particular classes of asylum applicants from seeking relief due to the nature of the harm the applicant has suffered or the applicant's particular race, religion, nationality, political opinion, or

particular social group membership.<sup>34</sup> DHS and DOJ further note that an alien may still seek protection in a third country even if that country has not previously recognized certain harms as persecution, or certain classes of victims as a qualifying particular social group. As noted in the IFR, asylum laws may evolve over time to respond to contemporary circumstances. 84 FR at 33840 (explaining that European states in 1990 adopted the Dublin Regulation, which came into force in 1997, as a response to a mass fleeing of refugees and economic migrants fleeing communism at the end of the Cold War); *see also Matter of A-B-*, 27 I&N Dec. 316, 318–19 (A.G. 2018) (summarizing the development of BIA case law regarding the interpretation of "particular social group"). And if an alien receives a final judgment denying protection in the third country, then the alien may present proof of such judgment and remain eligible to seek asylum in the United States. *See* 8 CFR 208.13(c)(4)(i), 1208.13(c)(4)(i).

Many of the comments questioning the safety of Mexico, Guatemala, and other countries focused on criminals who target aliens in transit who are perceived to be vulnerable. To the extent individuals are targets of crime by non-governmental actors, the Departments encourage them to seek aid from the government in the country in which the individuals have been targeted, rather than taking a long, perilous journey to the United States that would put them at risk of further victimization. To the extent commenters are concerned about the safety of the third countries that an alien may transit en route to the United States, the Departments note that if an alien believes that he or she would likely be subject to persecution on account of a protected ground or torture in the country that he or she transits en route to the United States, he or she may seek withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding of removal or deferral of removal under the CAT regulations to avoid the possibility of being returned to that country. *See* 84 FR at 33834. Thus, despite the assertions of commenters, the Departments disagree that the rule leaves such aliens without

<sup>34</sup> Nevertheless, the ability to seek the relief of asylum does not necessarily mean that an alien's claim will qualify for asylum, as, for example, not all alleged particular social groups are cognizable. *See, e.g., Matter of L-E-A-*, 27 I&N Dec. 581, 589 (A.G. 2019) (providing that a particular social group must "share[] a common immutable characteristic, [be] defined with particularity, and [be] socially distinct" (citing *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237–38 (BIA 2014))).

any possible protection in the United States. Further, as previously noted, statistics detailing violence in Mexico are generalized and may not necessarily indicate the presence of the kind of persecution that asylum was designed to address.<sup>35</sup> Concentrated episodes of violence in Mexico do not mean the country, as a whole, is unsafe for individuals fleeing persecution.<sup>36</sup> Indeed, recognition of a similar concept is already reflected in other areas of the immigration regulations: Asylum applications are to be denied if the applicant could "avoid future persecution by relocating to another part of the applicant's country," and, under the circumstances, it would "be reasonable to expect the applicant to do so." 8 CFR 208.13(b)(1)(i)(B), 1208.13(b)(1)(i)(B).

Mexico is a large nation that is made up of 32 states, which span approximately 760,000 square miles, and it has a population of approximately 130 million people. Landau Memorandum at 4. As recognized by the United States ambassador to Mexico, security conditions may vary widely both across

<sup>35</sup> The majority of publicly available data and statistics regarding violent crime in Mexico are generalized and not categorized by motive. A recent case study exploring crime patterns in Mexico City noted "in this regard, there has been no relevant evidence that provides a good measure of short-term trends for a selected range of crimes experienced by individuals, including those reported to the police." C.A. Pina Garcia, *Exploring Crime Patterns in Mexico City*, J. of Big Data 3 (2019), available at <https://journalofbigdata.springeropen.com/track/pdf/10.1186/s40537-019-0228-x> (last visited Dec. 10, 2020). Similarly, the U.S. Department of State's Overseas Security Advisory Council recommends that analysis of crime data from Mexico should "use any reported national crimes statistics for trend analyses and not as statistical representation." U.S. Dep't of State, *Mexico 2020 Crime & Safety Report: Hermosillo*, June 24, 2020, available at <https://www.osac.gov/Content/Report/35043cbd-64a6-4e2e-b650-19027e7900a8> (last visited Dec. 11, 2020). Another recent case study from Mexico noted that "institutions do not generate sufficient data and statistical information. In many cases, data is not disaggregated by sex or type of crime, and there is no existing information over the number of murders, cause of death or progress in the investigations." *Católicas por el Derecho a Decidir & Comisión Mexicana de Derechos Humanos y Promoción de los Derechos Humanos, Femicide and Impunity in Mexico: A Context of Structural and Generalized Violence*, available at [https://www.ecoi.net/en/file/local/1085985/1930\\_1343058124\\_cddandcmdpdh-forthesession-mexico-cedaw52.pdf](https://www.ecoi.net/en/file/local/1085985/1930_1343058124_cddandcmdpdh-forthesession-mexico-cedaw52.pdf) (last visited Dec. 10, 2020).

<sup>36</sup> Based on these considerations and others, as explained in this final rule, the Departments disagree with the Ninth Circuit's conclusion that the Departments failed to consider evidence demonstrating that Mexico is not a safe option for asylum seekers, thereby "fail[ing] to consider an important aspect of the problem." *E. Bay Sanctuary Covenant*, 964 F.3d at 850–51 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) [hereinafter *Motor Vehicle Mfrs.*]).

<sup>33</sup> Comments regarding unaccompanied alien children are discussed further in section III.C.7.b. below.

and within Mexico. *Id.* Reports of violence often refer to localized violence and “do not reflect conditions across the county as a whole.” *Id.* Nearly all applications for protection in Mexico are presented in Chiapas, Mexico City, Veracruz, Tabasco, or Nuevo Leon, which “generally rank well on security issues based on Mexican government crime statistics,” and none of which are the subject of a U.S. Department of State “Level 4” (Do Not Travel) advisory. *Id.* Furthermore, “[t]he United States Mission in Mexico is not aware of any pattern of violence targeted at potential refugees awaiting adjudication of their applications.” *Id.* at 5.

Frequently, discussions about conditions in Mexico conflate the perils that refugees might face traversing dangerous parts of Mexico en route to the United States with the ability to seek protection in a safe place in Mexico. *Id.* For example, Chiapas, Mexico’s southernmost state along the border with Guatemala, “routinely ranks among the safest Mexican States by all metrics.”<sup>37</sup> *Id.* at 4. Notably, in Mexico, refugees have the right to seek protection in any state in which they are present. *Id.* For all these reasons, the Departments disagree with those commenters asserting that Mexico cannot provide safe refuge for any asylum seekers.

Finally, DHS has no policy of categorically exempting LGBT individuals from the MPP. DHS has set forth categories of aliens who are not amenable to the MPP, and the LGBT community is not one of those categories. See CBP, *Guiding Principles for Migrant Protection Protocols*, Jan. 28, 2019, available at <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>. The decision to place amenable aliens in the MPP is made by immigration officers in the exercise of their prosecutorial discretion.

*Comment:* One commenter claimed that the rule will force immigrants “into the shadows” and thus discourage them from reporting crimes.

*Response:* The comment does not explain the basis for its assertion. It seems to assume that individuals who are barred from obtaining asylum will not apply for alternative forms of

protection such as withholding or deferral of removal and instead opt to remain illegally in the United States. Further, the Departments note the potential availability of U nonimmigrant status for certain victims of crime. See INA 101(a)(15)(U), 214(p), 8 U.S.C. 1101(a)(15)(U), 1184(p). The Departments believe that all victims of crime should come forward, and the Departments support policies to encourage the reporting of crime. The Departments decline, however, to reject sound legal policy in other areas of the law based on conjecture that some may respond by violating the law or declining to report crime.

#### b. Accompanied and Unaccompanied Alien Children

*Comment:* Many commenters expressed concern over the effect that the IFR would have on children, both accompanied and unaccompanied. Commenters stated that the IFR is inconsistent with the Act because Congress explicitly exempted UAC from the safe-third-country bar. INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E). Commenters stated that, by exempting unaccompanied children from the safe-third-country provision, Congress indicated its intent not to limit asylum eligibility for UAC in general—in contrast to the present rule. Other commenters stated that, even if the substance of this rule is consistent with the safe-third-country provision, the IFR does not adequately explain why the Departments omitted an exemption for UAC.

Commenters also stated that the IFR will prevent many children from applying for asylum since children have no control over where their families take them or where their families decide to apply for asylum.

*Response:* The Departments believe that the rule is consistent with the Act with respect to UAC. As explained in the IFR, the Departments recognize that UAC are exempt from two of the three statutory bars to applying for asylum: The ACA bar and the one-year filing deadline. INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E). However, Congress declined to exempt UAC from other limitations on asylum applications and from asylum eligibility bars. For example, Congress did not exempt UAC from the bar on filing successive applications for asylum (INA 208(a)(2)(C), 8 U.S.C. 1158(a)(2)(C)), the various bars to asylum eligibility in section 208(b)(2)(A) of the Act, 8 U.S.C. 1158(b)(2)(A), or the bars, like this one, established pursuant to the Departments’ authorities under section

208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C).

Further, UAC, like others subject to the third-country-transit bar at 8 CFR 208.13(c)(4) and 1208.13(c)(4), still will be considered for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), and for protection under the CAT regulations.

In addition, this rule may encourage families with children and UAC to avoid making a long, arduous, and extremely dangerous journey that brings with it a great risk of harm that could be avoided if they were to more readily avail themselves of legal protection from persecution or torture in a third country closer to the family’s or child’s country of origin. Further, Chiapas and others may represent safe places to settle in Mexico that would not require any refugees, including children and families, to traverse across dangerous parts of the country. *Cf.* Landau Memorandum at 4–5. The numbers of family units and UAC migrating to the United States have grown. In Fiscal Year 2019, more than 60 percent of persons unlawfully crossing the southern land border were family units or UAC, whereas these classes of individuals made up less than 50 percent of such crossings in Fiscal Year 2018. Compare CBP, *Southwest Border Migration FY 2019*, Nov. 14, 2019, available at <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>, with CBP, *Southwest Border Migration FY 2018*, Nov. 19, 2018, available at <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018>; see also Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 FR 44392, 44404 (Aug. 23, 2019) (reflecting significant increases in the number of family units apprehended at the southwest border since FY 2013). Also, in Fiscal Year 2019, CBP apprehended 430,546 family units from El Salvador, Guatemala, and Honduras at the southern land border, up from 103,509 such apprehensions in Fiscal Year 2018. Compare CBP, *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, Nov. 14, 2019, available at <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2019>, with CBP, *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2018*, Nov. 9, 2018, available at <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions>. The Departments note that families with children and UAC would be able to seek protection in the countries through which they transit, as the rule would only bar asylum for individuals who

<sup>37</sup> As noted, *supra*, living conditions in Mexico overall are also improving, and the United Nation’s *Human Development Report* recently characterized Mexico as a country with “high human development” based off of the likelihood of having: a long and healthy life, access to knowledge and a decent standard of living. United Nations, *Human Development Report: Mexico* at 301, 2019, available at <http://hdr.undp.org/sites/default/files/hdr2019.pdf> (last visited Dec. 11, 2020).

pass through countries that are parties to the Refugee Convention or Refugee Protocol. Even if they do not seek such protection, there are still forms of protection available to them in the United States through withholding of removal under the Act and withholding or deferral of removal under the CAT regulations. As stated above, the rule does not deprive them of all possible protections in the United States.

The rule does not violate the TVPRA because asylum officers retain initial jurisdiction over a UAC's asylum application. This rule simply adds an additional bar for asylum officers to apply during their adjudication of a UAC's asylum application.

Finally, as discussed above, the Departments note that UAC who are barred from asylum eligibility under this rule due to travel through a third country may still be eligible for withholding of removal under section 241 of the Act, 8 U.S.C. 1231, or protection under the CAT regulations. The Departments are cognizant of the circumstances often presented by UAC, as observed in section III.C.5, but the INA does not require special protections for UAC beyond those already contained in the statute or the provision of additional, extra-statutory protections. Moreover, the Departments already account for the circumstances of UAC, particularly in immigration proceedings. *See, e.g., EOIR, Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children*, Dec. 20, 2017, available at <https://www.justice.gov/eoir/file/oppm17-03/download>. Like all aliens subject to the rule, UAC have the opportunity to apply for protection in multiple countries prior to their arrival in the United States. Further, a UAC who is old enough to travel independently across hundreds or thousands of miles to the United States can logically also be expected to seek refuge in one of the countries transited if the UAC is genuinely seeking protection. A UAC who is not old enough to travel independently necessarily must travel with an adult, and again, there is no reason that an adult cannot apply for protection in any country offering refuge if the adult and the UAC are genuinely seeking protection. In short, the Departments have not overlooked the special circumstances of UAC in crafting this rule, but those circumstances are insufficiently compelling to warrant a special exception for UAC from the rule's application.

## 8. Policy Considerations

### a. Nation's Core Values

*Comment:* Many commenters expressed opposition to the IFR because they claimed that its provisions depart from the core principles of the United States. Commenters remarked that the United States has historically welcomed those fleeing persecution and violence, and they claimed that the provision of protection and the securing of human rights for all people are core principles of the Nation.

Similarly, some commenters stated that extending compassion to those in need is a core American value. Other commenters stated that immigration and diversity are themselves core principles of the United States. Still other commenters discussed American values in the context of providing humanitarian aid and leadership associated with these issues. Commenters also stated that the opportunity to flee one's country and seek safety in another is a fundamental right protected by the United States. Commenters suggested that these core principles are memorialized in Senate reports, the inscription on the Statue of Liberty, the Declaration of Independence, the United States Code, and other various sources.

Other comments were brief but asserted that the policy was "un-American," "contrary to our nation's core values," and "un-Christian."

*Response:* Congress has expressly authorized the Departments to limit asylum eligibility. The United States' non-refoulement obligations are reflected in the withholding provisions of the Act and the CAT regulations. Asylum remains available to aliens who have nowhere else to turn. For all the reasons discussed in the IFR and elsewhere in this final rule, the Departments believe this approach is sound, prudent policy that is warranted by the conditions at the southern land border and is consistent with the asylum statute.

The rule has several objectives. First, it seeks to disincentivize aliens with meritless and non-urgent asylum claims from seeking entry to the United States. *See* 84 FR at 33831. The rule also seeks to reduce misuse of the global system of refugee protection, since aliens who traveled through a country that is obligated to provide non-refoulement protection as a party to the Refugee Convention or Refugee Protocol, but did not seek such protection, may have meritless claims and thus may be misusing the system. *Id.* Meritless or non-urgent claims undermine the humanitarian purposes of asylum,

frustrate negotiations with other countries, and encourage heinous practices such as human smuggling and other abuses. *Id.* Accordingly, the rule also seeks to curb the practice of human smuggling and its tragic effects and to bolster negotiations on migration issues between the United States and foreign nations. *Id.* Finally, the rule makes a policy decision to direct relief toward those aliens who were unable to receive protection elsewhere and toward aliens subject to "severe forms of trafficking in persons," defined at 8 CFR 214.11, so that those aliens are able to obtain asylum in the United States more quickly. Consequently, the rule bars asylum eligibility for aliens who might have been able to obtain protection in another country but who chose not to see such protection. *Id.*

DHS and DOJ believe that the rule upholds the ultimate objectives of the commenters in the following ways. First, the rule facilitates effective processing of asylum claims so that aliens with the most urgent claims—those subject to extreme forms of human trafficking and those whose claims were denied in third countries—may be more quickly processed. The rule also decreases the incentive for human smuggling and other dangerous methods used to cross the border by tying the success of an alien's asylum claim more closely to the merits of the underlying claim. Under this rule, only people with a legitimate need for asylum, unable to claim it elsewhere, will have the incentive to enter the United States to raise an asylum claim. Second, the rule encourages aliens fleeing persecution and violence to apply for asylum at the first available opportunity. Truly vulnerable aliens will accordingly be more likely to obtain protection from persecution, in the U.S. or a third country, sooner than in the absence of this final rule.

DHS and DOJ remain vigilant in all efforts to ensure that aliens who face dire circumstances may seek protection. Notwithstanding the assistance that the United States provides to numerous countries across the globe, including Mexico, Guatemala, El Salvador, and Honduras, the U.S. government is committed to making the asylum process for aliens at the southern land border more effective. Currently, the immigration system faces severe strain, and asylum claims often take years to fully process. *See* 84 FR at 33831. This kind of system is ineffective for all parties involved, draining government resources to process and adjudicate these claims and prolonging final resolutions for aliens seeking protection. *Id.* This rule seeks to ameliorate this

strain and inefficiency in order to assist aliens who most need our help.

#### b. Humanitarian Purposes of Asylum

*Comment:* Many comments invoked policy considerations, stating that the IFR is inhumane and contradicts the humanitarian purposes of asylum relief. Various commenters emphasized the humanitarian aspects of asylum in the United States—welcoming aliens and providing them with relief, protection, shelter, and other resources—and noted that those aspects of asylum distinguish the United States from other countries. Commenters argued that, without eligibility for asylum and the resources that follow, aliens would face uncertainty, financial burdens, stress, and violence. Leaving aliens to deal with such realities in the wake of the rule is inhumane, commenters claimed.

Commenters also voiced concern that the IFR is inhumane because it allegedly prevents aliens who face violence and persecution from seeking protection, thereby subjecting them to continued violence in their home countries, or, alternatively, to violence in a third country in which they would have to apply for asylum under this rule. Specifically referencing Guatemala, Honduras, and El Salvador, commenters stated that aliens from those countries who are seeking asylum are often fleeing violence, if not death. One commenter stated that demand for drugs from countries like the United States fuels much of the violence in those countries.

Commenters also alleged that the IFR has inhumane effects, including separating families, neglecting children, and subjecting women to abuse. One commenter stated that the IFR would lead to displaced aliens who are in neither their home country nor their preferred country.

Overall, commenters were opposed to the IFR because they claimed it is antithetical to the purpose of asylum itself, as legitimate claims could be procedurally denied based on the fact that the alien had failed to apply for protection in a third country of transit. Some commenters urged humanitarian immigration reform, while most asked the Departments to withdraw the rule altogether.

*Response:* DHS and DOJ disagree that the rule is antithetical to the humanitarian purposes of asylum. In contrast, this rule seeks to address the humanitarian crisis at the southern border and more effectively address the situation of aliens who urgently need protection, including those who are victims of severe trafficking and refugees who have no other option.

The United States' immigration system has experienced extreme strain over the past decade, and there are questions about the prevalence of fraudulent claims. *See* 84 FR at 33830–31. Despite the tripling of cases referred to DOJ for adjudication, which could take years to resolve, immigration judges grant only a small percentage of asylum requests adjudicated each year. *Id.* Further, the number of new cases has increased an average of 34 percent each year since Fiscal Year 2016, with a higher than 70 percent increase from Fiscal Year 2018 through Fiscal Year 2019. EOIR, *Adjudication Statistics: New Cases and Total Completions*, Oct. 13, 2020, available at <https://www.justice.gov/eoir/page/file/1060841/download>. There is no evidence that the record number of cases referred each year will slow in the future. In addition, the U.S. government continues to encounter massive human smuggling and its tragic effects. 84 FR at 33831.

Through this rule, the Departments seek to provide humanitarian aid effectively for those aliens who need it the most. Thus, with limited exceptions, this rule limits asylum relief to those aliens who have no other option for relief and aliens who experience extreme forms of human trafficking, defined at 8 CFR 214.11. *Id.*

Mexico is a party to, and has ratified the 1951 Refugee Convention, the 1967 Refugee Protocol, and the CAT. *See* Landau Memorandum at 1. Additionally, Mexico is a signatory to, and has incorporated into its law, the 1984 Cartagena Declaration on Refugees. *Id.* Over the past decade, as explained previously, Mexico has substantially reformed its immigration and refugee laws, and in 2020, it more than doubled the budget for COMAR.<sup>38</sup> *Id.* at 2–3. The Mexican Constitution was amended in

<sup>38</sup> This budget increase is especially noteworthy in light of concerns raised by immigration-related organizations and others that COMAR lacks sufficient resources. *See, e.g.,* Congressional Research Serv., *Mexico's Immigration Control Efforts* 2, Feb. 19, 2020, available at <https://fas.org/sgp/crs/row/IF10215.pdf> (last visited Dec. 11, 2020) (noting that some experts have asserted that “COMAR reportedly does not have sufficient budget or staff”); Asylum Access, *Mexican Asylum System for U.S. Immigration Lawyers FAQ*, Nov. 2019, available at <https://asylumaccess.org/wp-content/uploads/2019/11/Mexican-Asylum-FAQ-for-US-Immigration-Lawyers.pdf> (last visited Dec. 11, 2020) (asserting that, although Mexico has seen a “substantial increase in refugees seeking asylum,” the Mexican government “has not provided a commensurate budgetary increase to process the applications”). These reports from 2019 and early 2020 necessarily do not take into account the effects of the recent doubling of COMAR's budget. For this reason and others, the Departments consider the more recent description of the Mexican asylum system from the Ambassador of Mexico to be a more persuasive indication of conditions for those seeking refuge in the country.

2016 to include the specific right to asylum. *Id.* at 2. Further, the grounds for seeking and obtaining refugee status under Mexican law are broader than the grounds under United States law. *Id.* Individuals in Mexico may seek refugee status not only as a result of persecution in their home countries on the basis of race, religion, nationality, gender, membership in a particular social group, or political opinion, but also on the basis of generalized violence or widespread violation of human rights. *See id.*; *see also* 2011 LRCPPA, arts. 13(I), 13(II). Prospective refugees may apply at any COMAR office in the country within 30 days of entry into Mexico, subject to extension for good cause. Landau Memorandum at 2. Because prospective refugees may choose any state to apply for refugee status, two-thirds of refugee applications are filed in Chiapas, which is one of Mexico's safest states. *Id.* at 4. And if conditions in a particular state happen to change, Mexico allows for the transfer of an asylum application from one state to another. *See id.* at 2. Further, prospective refugees are legally eligible to work and access public health services during the pendency of their cases, with COMAR under a legal obligation to process applications within 90 days. *Id.* The United States Ambassador to Mexico recently disputed allegations that Mexico improperly returns prospective refugees to their countries of origin, stating that he has received “repeated assurances [from] senior Mexican officials” that they recognize their obligation to offer protection to refugees. *Id.* at 5. In short, because Mexico is a party to international agreements regarding the treatment of refugees and has recently expanded its capacity to process asylum claims, aliens who truly need urgent protection may apply in Mexico upon arrival in that country, thereby hastening the process to ultimately obtain asylum relief. *See* 84 FR at 33839–40; *see also* UNHCR, *Universal Periodic Review 3rd Cycle, 31st Session: Mexico, National Report 2*, 10–12 (2018), available at <https://www.ohchr.org/EN/HRBodies/UPR/Pages/MXindex.aspx> (last visited Dec. 10, 2020) (describing the protocols and “protection mechanisms” that Mexico has developed for asylum seekers and others, including measures specifically designed to ensure protection for children, provision of health care, and prevention of violence); *see also* UNHCR, *Fact Sheet: Mexico* (Apr. 2019), available at <https://reporting.unhcr.org/sites/default/files/UNHCR%20Factsheet%20Mexico%20-%20April%202019.pdf>

(last visited Dec. 11, 2020) (describing how Mexico has been transforming “its migration policy from a policy guided by security and control, to an approach which places greater emphasis on human rights, protection and regional cooperation”); *id.* (“Mexico has made important commitments to significantly increase its staff and activities to support the work of the Mexican authorities in processing an increased number of asylum claims and ensure protection of its Persons of Concern”). Importantly, aliens who are ineligible for asylum in light of this rule may still apply for withholding of removal under the Act and withholding or deferral of removal under the CAT regulations in the United States. 84 FR at 33839–40. By decreasing the incentive for filing meritless claims and focusing relief on aliens who are unable to obtain protection elsewhere, DHS and DOJ seek to more effectively and more quickly provide humanitarian aid. *Id.* at 33839.

Also through this rule, DHS and DOJ sought to curb the humanitarian crisis of human smuggling. *See id.* at 33830. The likelihood of a lengthy asylum process, throughout which asylum applicants may remain in the United States (typically free from detention and with work authorization) often incentivizes human smugglers and men, women, and children with non-urgent asylum claims to make the dangerous journey across the southern land border. *Id.* at 33831. By directing relief to aliens who legitimately fear persecution and to aliens with the most urgent asylum claims, the rule aims to reduce the incentives for those aliens who lack a legitimate fear of persecution and those aliens with non-urgent claims to engage in dangerous efforts to reach the United States, thereby reducing the humanitarian crisis. *Id.* at 33840.

As previously stated, one overarching purpose of the rule is assisting in the resolution of the humanitarian crisis at the border. *See id.* at 33830; *Thuraissigiam*, 140 S. Ct. at 1967 (noting the drastic increase in credible-fear claims at the border over the past decade, and that, in 2019, only 15 percent of those found to have a credible fear received asylum). Accordingly, DHS and DOJ do not encourage the exacerbation of such circumstances; rather, this rule seeks to aid those populations by encouraging them to apply for asylum in the first safe country they encounter in order to most quickly obtain assistance and protection from those circumstances from which they fled, and by processing claims for those who most desperately need help.

Accordingly, in contrast to the concerns raised in the comments, this

rule works to more effectively and quickly provide humanitarian aid to aliens who most need it and reduce the humanitarian crisis of human smuggling.

#### c. Failure To Address Root Causes of Migration

*Comment:* Several commenters remarked that the IFR fails to address the root cause of requests for asylum—widespread violence from which aliens must flee. Many of those commenters accordingly opposed the rule and asked that the U.S. government consider addressing the root causes of migration instead. Those commenters stated that the United States, historically a global leader on such issues, is uniquely positioned to address the violence and other extreme circumstances that prompt aliens to migrate. Some commenters concluded that the IFR fails to stop the flow of migrants because the causes remained unaddressed.

Some comments offered suggestions on how the United States could address the violence in Central America and Mexico: Expanding and investing in programming for families, assisting Mexico and other countries in expanding their capacities to process asylum claims, and bolstering protections for those aliens in the United States.

*Response:* DHS and DOJ acknowledge the violence and crime that many individuals face and appreciate the suggestions from commenters regarding ways in which the United States may assist countries with high levels of violence and aliens fleeing such violence. The United States, through coordination and work among numerous agencies such as DOJ, DHS, the Department of State, and the United States Agency for International Development, provides robust assistance to individuals in need across the globe. *See generally* U.S. Dep’t of State, *Foreign Assistance*, <https://www.foreignassistance.gov>. The Departments’ efforts to limit asylum eligibility to aliens in most need of asylum is complementary to these efforts.

Further, the question of improving internal conditions in foreign countries is beyond the scope of this rulemaking. This rule addresses one component of the Nation’s immigration system— asylum relief—by reducing the current strain on the system so that meritorious asylum claims may be more effectively processed. *See* 84 FR at 33829–30. The rule does so by discouraging misuse of the asylum system, since aliens who travel through a country where protection was available but declined to

seek protection may have meritless claims. *Id.* Such meritless claims undermine the humanitarian purposes of asylum, and encourage heinous practices such as human smuggling. Accordingly, the rule furthers policies likely to reduce the practice of human smuggling and its tragic effects. *Id.* Finally, the rule makes a policy decision to direct relief to aliens who were unable to receive protection elsewhere and aliens subject to “severe forms of trafficking in persons,” defined at 8 CFR 214.11, enabling such aliens to more quickly obtain asylum relief in the United States because the number of asylum applicants referred to an immigration judge for consideration of their application is likely to better align with EOIR’s adjudicatory capacity.<sup>39</sup> Instituting procedures that better align the availability of asylum with those applicants most in need of protection will help ensure those applicants have access to relief, and the benefits that flow from a grant of asylum,<sup>40</sup> in a timely manner. Consequently, the rule bars aliens from being eligible for asylum who could have obtained protection in another country. *Id.*

Based on these considerations, the Departments believe that the rule does address some causes of migration, such as the incentives for aliens with non-meritorious or non-urgent claims to migrate. *Id.* at 33841, 33831. The rule aims to reduce these causes so that the United States may more effectively process claims for those with a genuine need, and the rule encourages those fleeing persecution to secure protection at the first available opportunity. *See id.* at 33839. Further, the rule continues the

<sup>39</sup>In recent years, the large influx of asylum applications filed with the immigration court system has outpaced EOIR’s adjudicatory capacity. For example, in Fiscal Year 2019, EOIR received a record number of asylum applications (213,798), but issued final decisions in less than half the total number received (91,270). *See* EOIR, *Adjudication Statistics: Total Asylum Applications*, Oct. 13, 2020, available at <https://www.justice.gov/eoir/page/file/1106366/download>; EOIR, *Adjudication Statistics: Asylum Decision Rates*, Oct. 13, 2020, available at <https://www.justice.gov/eoir/page/file/1248491/download>.

<sup>40</sup>Asylum, once granted, creates a path to lawful permanent resident status and U.S. citizenship and affords a variety of other benefits. *See, e.g.*, INA 208(c)(1)(A), (C), 8 U.S.C. 1158(c)(1)(A), (C) (asylees cannot be removed subject to certain exceptions and can travel abroad with prior consent); INA 208(b)(3), 8 U.S.C. 1158(b)(3) (allowing derivative asylum for an asylee’s spouse and unmarried children); INA 209(b), 8 U.S.C. 1159(b), 8 CFR 209.2 (allowing the Attorney General or the Secretary to adjust the status of an asylee to that of a lawful permanent resident); 8 U.S.C. 1612(a)(2)(A) (asylees are eligible for certain Federal means-tested benefits on a preferential basis compared to most legal permanent residents); INA 316(a), 8 U.S.C. 1427(a) (describing requirements for the naturalization of lawful permanent residents).

provision of asylum relief for certain aliens who are victims of human trafficking or aliens who were not granted protection after applying for asylum in a third country. *Id.* at 33840. Importantly, the rule also seeks to assist in negotiations with Mexico and other countries in order to adopt a more widespread effort to address issues related to migration, security, and humanitarian aid, including many of the issues identified in these comments. *Id.* In this way, the United States continues to lead international efforts to address these issues.

The government continues to evaluate and assess ways to address these challenges, and this rule is one way through which the U.S. government is addressing the current challenges to the asylum process.

#### d. Rule Will Encourage Illegal Border Crossings

*Comment:* Many comments claimed that the IFR encourages border crossing without inspection, including human smuggling and the use of clandestine, dangerous routes. Comments claimed that the IFR effectively eliminated asylum relief at the border, thereby incentivizing border crossing without inspection. Several comments particularly disagreed with the rule's statement that human smuggling created the current humanitarian crisis. The comments asserted, rather, that the practice of human smuggling was a consequence of the crisis, not a cause. The comments expressed that aliens resort to human smuggling in order to flee violence and persecution, which contradicts the rule's assertion that aliens resort to human smuggling because it is widely available. Further, some comments claimed that the rule's additional legal requirements incentivize human smuggling because aliens who are not able to pass the high threshold of "reasonable fear" review will risk crossing the border with smugglers rather than be returned to their countries.

Commenters asserted that increased smuggling fees and increased death rates at the border demonstrate that people fleeing violence will risk their lives to reach safety, despite efforts such as the IFR that aim to deter border crossings. As a result, the commenters claimed, the IFR further exposes such aliens to increased danger.

*Response:* DHS and DOJ disagree that the rule encourages border crossing without inspection through means such as human smuggling and the choice of more clandestine, dangerous routes. The Departments promulgated the rule in part to reduce the incentives to cross

without inspection in an effort to reduce such practices.

As explained in the IFR, the U.S. government continues to encounter human smuggling and its tragic effects. *See* 84 FR at 33830–31. Accordingly, this rule seeks to curb the humanitarian crisis of human smuggling. *Id.* at 33830. The likelihood of a lengthy asylum process, throughout which asylum applicants may remain in the United States free from detention and with work authorization, incentivizes aliens with meritless asylum claims to make the dangerous journey across the southern land border, often through the use of human smugglers. *Id.* at 33831. By focusing on the most urgent asylum claims, the rule aims to reduce the incentive for those with non-urgent claims to engage in risky efforts to evade inspection like the use of human smugglers or the use of dangerous routes to travel to the United States—thereby reducing the humanitarian crisis. *Id.* at 33840.

The IFR's statement that it "seeks to curtail the humanitarian crisis created by human smugglers bringing men, women, and children across the southern land border," *id.* at 33840, refers to the particular crisis of human smuggling and the associated consequences. The smuggling industry is largely financially motivated, and courts have recognized that U.S. immigration policy influences smuggling activity. *See id.* at 33841; *see also E. Bay Sanctuary Covenant*, 354 F. Supp. 3d at 1115 ("Reviewing this [news article] with deference to the agencies' views, it at least supports the inference that smugglers might similarly communicate the Rule's potential relevant change in U.S. immigration policy, albeit in non-technical terms."). Further, the Departments believe that, once migrants learn of these changes to the United States' asylum regulations, the incentive to come to the United States may be reduced, which in turn would decrease the demand for human smuggling. The rule's focus on ensuring that meritorious asylum claims are more efficiently considered within the United States, by incentivizing individuals able to do so to apply for relief in other countries, will reduce the incentive for unlawful smuggling and evasion of the asylum system and, thus, help alleviate this humanitarian crisis. *See* 84 FR at 33831.

The Departments also note that the rule does not eliminate asylum relief at the border, as some commenters have claimed. *See id.* The Departments determined that aliens denied protection in a third country and victims of trafficking in persons, defined

at 8 CFR 214.11, have the most urgent asylum claims, and the United States may more effectively process such claims in accordance with the provisions of the rule. *See id.* Far from eliminating asylum relief, the Departments seek to provide protection more effectively to those who most urgently need it.

In contrast to the concerns raised in the comments claiming that the IFR causes or exacerbates these dangerous practices, promulgation of this rule reflects the Departments' commitment to curbing the practices of human smuggling and other dangerous methods for crossing the border without inspection.

*Comment:* One comment briefly expressed concern that the IFR would create more incentives for human smugglers to "find ways to get individuals through the border undetected, thereby increasing the number of individuals who have not received a background check." The comment did not expressly state the reasoning underlying its concern with individuals who have bypassed background checks.

*Response:* The Departments response to comments about increased incentives for human smuggling, above, address this comment's concern. The Departments agree on the importance of background checks, as they protect the safety and security of the United States. The Departments disagree with the commenter's prediction, however. The Departments expect that the rule will lead to fewer individuals illegally crossing the border and thus lead to fewer people residing in the U.S. without a background check.

#### e. Disparate Impact on the Poor and Those Who Cannot Travel by Air or Sea

*Comment:* Three commenters argued that the IFR discriminates against aliens who do not have the money to travel by air or sea (and thereby avoid crossing the southern land border) or aliens who are forced to flee suddenly and cannot wait for travel documents or a plane or boat reservation. One of the commenters asserted that this demonstrates that the Departments wish to eliminate the availability of asylum.

*Response:* The Departments recognize that the rule does not impact aliens arriving by sea or air. However, as previously noted, this rule is intended to deal specifically with the crisis at the southern land border. If, as in the past, a crisis arises related to aliens arriving by sea or air, the Departments can reevaluate the scope of the rule's

application.<sup>41</sup> *Cf. City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989) (permitting agencies to exercise discretion in addressing policy challenges, which could include an incremental “step” approach).

The rule does not seek to penalize any asylum seeker based on wealth or exigent circumstances. In the past, U.S. asylum policy has impacted migrants traveling by land, air and sea, affecting individuals using a variety of methods to travel to the United States without regard to resources.<sup>42</sup> As the Departments explained in the IFR, 84 FR at 33829, the rule is aimed at addressing the crisis of aliens crossing the southern land border at historically high rates, which has in turn led to a historic backlog of asylum claims. The rule does not address the northern border because the United States and Canada operate on a shared framework of a cooperative agreement to process asylum claims. *See* 8 CFR 208.30(e)(6). The rule targets those who cross over the southern land border because, with the exception of Mexican nationals, these individuals necessarily transit through a third country en route to the United States.

The Departments believe this approach is reasonable because, as explained previously, Mexico is a party to the relevant treaties and, as explained in the Landau Memorandum, Mexico has taken adequate steps to provide protection to asylum seekers. Thus, aliens passing through Mexico will necessarily have a chance to seek protection. Individuals travelling by air or sea, in contrast, may pass through no other countries at all en route to the United States, and hence might lack such an opportunity. Individuals traveling by air or sea may have boarded a vessel from their home country and arrived directly in the United States without a stopover, and thus without an opportunity to apply for protection, in a third country. Thus, the Departments applied this rule to the southern land border not to discriminate against or harm people who lack the means to arrive by air or sea, but to ensure that the rule applies to those aliens who will in fact have an opportunity to seek protection in a third country.

<sup>41</sup> The United States, for example, has previously taken steps expressly designed to address migration by sea. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 160–61 (1993) (describing President Reagan’s suspension of entry for certain undocumented aliens from the high seas).

<sup>42</sup> *See Haitian Ctrs. Council, Inc.*, 509 U.S. at 161, 163 (describing the effects of President Reagan’s suspension).

#### f. Bad Motives—Racist Intent

*Comment:* Many comments in opposition to the IFR claimed that it was motivated by racial animus, alleged that it has discriminatory effects, or included a discussion of both. Most comments stated that the rule reflected racist, xenophobic, or prejudiced attitudes, and other comments argued that the IFR impermissibly discriminates on the basis of race.

Commenters alleged, for example, that the IFR demonstrated “blatant racism,” “naked xenophobia,” and “thinly veiled white nationalism,” and accordingly described the rule as “immoral,” “disgusting,” “abhorrent,” and “sicken[ing].” Another comment specifically claimed that the IFR’s exclusive application to aliens at the southern land border violated equal protection principles under the Fifth Amendment by discriminating based on race, ethnicity, and national origin, rendering the rule unconstitutional. That same comment also claimed that the IFR would more heavily affect certain racial or ethnic groups than others, which courts consider when examining discriminatory purpose. Further, pointing to various statements and policies from the Administration, the comment alleged racial animus and a violation of the Constitution, leading the commenter to request the withdrawal of the IFR.

Other commenters raised concerns with the alleged discriminatory effect of the IFR, explaining that it would have a disproportionately negative impact on people of color, particularly refugees from countries in Central America and Africa, and inherently discriminate against individuals who migrate through the southern land border, thereby effectively denying protection to asylum seekers from El Salvador, Guatemala, and Honduras.

*Response:* The rule is neither motivated by racial animus nor promulgated with discriminatory intent. As explained in the IFR, 84 FR at 33829, the Departments promulgated the IFR in light of the following considerations. First, in order to reduce the immense strain on the immigration system as a whole, the IFR sought to disincentivize aliens with meritless asylum claims from seeking entry to the United States. *See id.* at 33830. The IFR sought to reduce misuse of the system, since aliens who travel through a country where protection is available, but who did not seek such protection, may have meritless claims and be misusing the system. *Id.* The IFR also sought to curb the practice of human smuggling and its tragic effects and to bolster negotiations

on migration issues between the United States and foreign nations. *Id.* Finally, the rule made a policy choice to direct relief to aliens who are unable to receive protection elsewhere and aliens who are subject to “severe forms of trafficking in persons,” defined at 8 CFR 214.11, so that those aliens are able to obtain asylum relief in the United States more quickly. Consequently, the rule bars from eligibility for asylum those aliens who could have obtained protection in another country because they passed through countries that are obligated to provide protections to those facing persecution as party to the 1951 Refugee Convention or 1967 Protocol, but did not seek such protection. *Id.*

None of these considerations is racially motivated, nor do these considerations constitute discriminatory purposes. Although the rule may impact, to a greater extent, groups specifically described in the comments, application of the rule relates to the geographic location and particular nature of the humanitarian crisis at the southern land border. As indicated previously, if a crisis arises related to aliens arriving by sea or air, the Departments can reconsider the scope of the rule’s application. The Departments do not promulgate the rule with a discriminatory purpose.

#### 9. Statutory Withholding of Removal and Protection Under the CAT Regulations in Lieu of Asylum

*Comment:* Twenty-one organizations argued that it is not sufficient that individuals affected by the IFR may still apply for statutory withholding of removal or protection under the CAT regulations. These groups raised concerns that applicants will be subject to the higher burden of proof applicable to requests for withholding of removal under the Act and withholding or deferral of removal under the CAT regulations, and they expressed concern that applicants would lose access to benefits available to asylees but not to recipients of statutory withholding or protection under the CAT regulations.

Sixteen organizations noted that, to prevail on a claim for statutory withholding or CAT protection, an applicant must meet a higher burden of proof than that needed to prevail on a claim for asylum—a “clear probability” of persecution or torture for withholding and CAT claims versus a “reasonable possibility” of persecution for asylum claims. For example, one commenter contended that “withholding of removal and relief under the Convention [A]gainst Torture, which the rule clarifies will still be available for those subject to this new asylum bar, are not

adequate substitutes for asylum,” because “withholding of removal requires asylum-seekers to meet a more stringent standard of proof to establish their eligibility for this relief.”<sup>43</sup> Another commenter raised concerns that some aliens might be denied protection due to the higher burden of proof, stating that “[s]ubstituting the different procedural standards of protection from removal or withholding of removal for the existing procedural standards of asylum will not produce equivalent or better results. Instead, this change would result in the exclusion of many victims of serious persecution . . . from having a meaningful opportunity to present their cases and seek safety in the United States.”

*Response:* To the extent commenters predict that certain individuals will wrongly be denied protection in the United States due to the rule, the Departments disagree. The Departments believe that it is vital that eligible persons be protected from removal to countries where they would likely face persecution on account of a protected ground or torture. The rule is consistent with that goal. Many commenters ignore the possibility that some individuals will obtain protection in countries other than the United States, and they ignore the benefits this result could entail. For example, numerous commenters stated that the long journey to the United States can inflict trauma on individuals who are fleeing persecution or torture. To the extent the rule results in individuals with meritorious claims obtaining protection sooner and with a shorter journey, it should help mitigate such trauma. Finally, it was Congress’s deliberate decision to establish a requirement that an alien show that it is more likely than not that his or her “life or freedom would be threatened” for statutory withholding of removal, INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A), which is a standard designed to meet U.S. obligations under the Refugee Protocol.<sup>44</sup> See *Cardoza-Fonseca*, 480 U.S. at 440–41; *Stevic*, 467 U.S. at 428 (“[I]t seems clear that Congress understood that refugee status alone did

not require withholding of deportation, but rather, the alien had to satisfy the [‘more likely than not’] standard under § 243(h)[.]”). Commenters should address Congress regarding a change to this statutory standard.

*Comment:* Numerous commenters noted that an asylee’s spouse and unmarried children under the age of 21 receive derivative relief, a benefit missing from statutory withholding and CAT protection. One commenter argued that this distinction “means the difference between being reunited with one’s immediate family and living alone in a foreign country,” and means that “new U.S. residents are deprived of a key factor in their eventual social and economic integration into, and independence in, the United States.” Another commenter raised concerns that this could lead to family separations: “One of the most damaging consequences of extending only withholding of removal or CAT protection to refugees is the potential for permanent family separation . . . [A]n immigration judge may grant protection to a refugee parent but order a child deported.”

*Response:* Those commenters who asserted that the rule will lead to family separations rely on several assumptions. First, they assume that individuals will choose to travel to the United States even when asylum relief may be unavailable if they have not first sought protection in a third country. Commenters offered no support for this assumption and did not consider the potential for individuals to apply for, and potentially receive, relief from a third country through which they transit prior to reaching the United States. In fact, the number of individuals applying for asylum in Mexico and other countries has increased in recent years. See 84 FR 33839–40. Second, commenters assumed that a third country will not grant individuals asylum and that applicants will not choose to stay in a third country. If the third country denies asylum, those individuals would not be subject to this rule’s bar.

Finally, Congress reached the policy determination in enacting the INA and other immigration statutes over the years to decline to provide derivative relief for family members in the withholding- and deferral-of-removal contexts. Congress could update that policy if desired. Notably, however, the lack of derivative relief for family members outside of the asylum context does not impact the merits of the underlying question whether a particular applicant warrants the discretionary relief of asylum. See

*Thuraissigiam*, 140 S. Ct. at 1965 n.4. Indeed, Congress knew that, by giving the Attorney General and the Secretary authority to promulgate additional limitations on eligibility for asylum, certain aliens other than those barred by statute would not be eligible to receive the secondary benefits associated with asylum, such as derivative asylum for family members. See *R–S–C*, 869 F.3d at 1187 (observing that the INA’s “delegation of authority means that Congress was prepared to accept administrative dilution of the asylum guarantee in § 1158(a)(1)”). Congress has nonetheless declined to provide such benefits to aliens eligible only for withholding or deferral of removal, and commenters’ concerns are accordingly best addressed to Congress.

*Comment:* Seven commenters complained that recipients of statutory withholding or CAT protection have no path to lawful permanent resident status or citizenship. Three of these groups also noted that these alternative forms of protection do not guarantee that individuals may remain permanently in the United States. Instead, DHS may remove recipients to another safe country. For example, one commenter complained that this “[l]imited and uncertain legal status further complicates an already challenging but near-universal early goal of treatment for torture and trauma survivors: restoring a sense of safety.”

*Response:* Courts have rejected arguments that the Refugee Protocol, as implemented, requires that every qualified refugee receive asylum. For example, the Supreme Court has made clear that Article 34 of the Refugee Convention, which concerns the assimilation and naturalization of refugees, is precatory and not mandatory, and, accordingly, does not mandate that all refugees be granted asylum. See *Cardoza-Fonseca*, 480 U.S. at 441. Section 208 of the INA reflects that Article 34 is precatory and not mandatory, and accordingly does not provide that all refugees shall receive asylum. See *id.*; see also *R–S–C*, 869 F.3d at 1188; *Mejia v. Sessions*, 866 F.3d 573, 588 (4th Cir. 2017); *Cazun*, 856 F.3d at 257 & n.16; *Garcia*, 856 F.3d at 42; *Ramirez-Mejia*, 813 F.3d at 241. As noted above, Congress has also recognized the precatory nature of Article 34 by imposing various statutory exceptions and by authorizing the creation of new bars to asylum eligibility through regulation.

Congress may revisit its decision to decline to provide derivative benefits to family members seeking protection other than asylum. But the consequences of other forms of

<sup>43</sup> Unlike asylum, withholding of removal is a form of protection from removal, not relief.

<sup>44</sup> Article 33.1 of the Refugee Convention states that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership or a particular social group or political opinion.” 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176. In 1968, the United States acceded to the Refugee Protocol, which bound parties to comply with the substantive provisions of Articles 2 through 34 of the Convention with respect to refugees. See *Cardoza-Fonseca*, 480 U.S. at 429.



protection such as withholding or deferral of removal does not impact the underlying merits of an applicant's asylum claim.

*Comment:* Two groups raised concerns that individuals denied asylum will lose access to numerous welfare and public assistance benefits. Groups also stated that recipients of statutory withholding and CAT protection face “significant barriers to education and work” compared to asylees and, “unlike asylum, refugees who secure withholding of removal must apply annually for work authorization.” Finally, two groups raised concerns that recipients of withholding and CAT protection do not have the same freedom to travel outside of the United States as asylees.

*Response:* These comments ignore the ample public benefits available to recipients of statutory withholding. Specifically, recipients of statutory withholding are eligible for Supplemental Security Income (“SSI”), the Supplemental Nutrition Assistance Program (“SNAP,” more commonly known as food stamps), and Medicaid for the first seven years after their applications are granted,<sup>45</sup> and for Temporary Assistance to Needy Families (“TANF”) during the first five years after their applications are granted.<sup>46</sup> Aliens other than asylees are also eligible for other benefits, such as benefits administered by the Office of Refugee Resettlement at the Department of Health and Human Services. *See, e.g.,* Office of Refugee Resettlement, *What We Do* (Dec. 5, 2019), <https://www.acf.hhs.gov/orr/about/what-we-do> (describing how the office provides rehabilitative, social, and legal services to certain aliens “regardless of immigration status”). Further, the provision of Federal benefits to certain individuals is a policy determination within the purview of Congress, which made the deliberate decision to limit some of these benefits to asylees. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104–193, tit. IV, secs. 401–03, 431, Aug. 22, 1996, 110 Stat. 2105, 2261–67, 2274 (codified at 8 U.S.C. 1611–13, 1641).

Finally, to the extent commenters raised concerns that recipients of statutory withholding and CAT protection must apply annually for work authorization and lack the freedom to

travel outside of the United States generally afforded to asylees, neither of these benefits is mandated by U.S. law.

#### *D. Public Comments on Regulatory Requirements*

##### 1. Administrative Procedure Act

###### a. Notice and Comment Requirements

*Comment:* A significant number of comments stated that the Departments violated the APA because the Departments did not provide the public with notice and an opportunity to comment on the IFR before its implementation and because the rule was not published 30 days before its effective date. *See generally* 5 U.S.C. 553(b)–(d). Commenters asserted that, without notice and comment, they were unable to provide evidence that the rule is unlawful and that it will have numerous harmful effects.

Commenters stated that the Departments' reliance on the good cause exception and foreign affairs exemption to notice-and-comment rulemaking was improper. *See* 84 FR at 33840–42. Discussing the good cause exception, the commenters asserted that the Departments did not provide sufficient evidence that notice-and-comment rulemaking would result in a surge of asylum applicants. Regarding the foreign affairs exemption, the commenters stated that the Departments did not provide evidence that notice and comment rulemaking would negatively affect negotiations with the governments of Mexico, Guatemala, Honduras, or El Salvador. The commenters stated that, in fact, the IFR would have the opposite effect. According to one commenter, “[s]trong-arming other nations, which are unprepared to deal with massive influxes of asylum seekers and who have institutional challenges of their own, into accepting returned asylum seekers will harm the United States' diplomatic relationships with those countries, and contribute to further destabilization of the region.”

*Response:* As explained above, the IFR complied with the APA's notice-and-comment requirements, as recently considered by the Supreme Court in *Little Sisters*, 140 S. Ct. 2367. The Court held that an IFR followed by a final rule that satisfies the APA's notice and comment requirements, 5 U.S.C. 553(b)–(d), is procedurally valid. *See id.* The Departments' IFR complied with APA requirements, including providing notice and an opportunity for the public to comment. Subsequently, given this final rule, the rulemaking is procedurally valid, despite the fact that an NPRM was not issued and that

reviewing courts have held that the Departments' invocation of the good cause and foreign affairs exceptions to notice and comment was improper.<sup>47</sup> *Compare CAIR I*, 2020 WL 3542481, at \*13–19 (holding that the Departments could not rely on the exception and exemption), with *Little Sisters*, 140 S. Ct. at 2386 n.14 (“Because we conclude that the IFRs' request for comment satisfies the APA's rulemaking requirements, we need not reach respondents' additional argument that the Departments lacked good cause to promulgate the 2017 IFRs.”).

###### b. Arbitrary and Capricious

*Comment:* Commenters stated that the Departments' determinations underlying the IFR are arbitrary and capricious because the Departments failed to examine relevant data, adequately explain the policy change, or consider the significant impacts of the rule on asylum seekers and the community at large. Commenters argued that the Departments did not provide an adequate explanation for the assertion that an alien's failure to seek protection in a third country relates to the probability that an asylum claim may be meritless. Commenters pointed to Federal appellate cases that held that applicants do not need to apply in the first country where asylum is available and that asylum applicants can have secondary motives for choosing to come to the United States that do not affect their asylum eligibility, such as relatives or friends in the United States who can help them as they pursue their claims. Further, the commenters asserted that the rule does not take into account the many reasons that asylum seekers might not apply for asylum in third countries such as Mexico or Guatemala, which, according to the commenters, feature dangerous conditions and lack asylum

<sup>47</sup> The Departments acknowledge that the Supreme Court in *Little Sisters* did suggest that publishing a final rule after an IFR might not satisfy the APA if the IFR “failed to air the relevant issues with sufficient detail for [the public] to understand the Departments' position.” 140 S. Ct. at 2384–85. The Departments do not believe that the circumstances of this rule's promulgation indicate such a failed understanding. Many commenters may have disagreed with the Departments' positions regarding the IFR, but the commenters nevertheless understood the substance of the Departments' position. Moreover, the fact that the Departments have now considered over 1,800 comments associated with the IFR—many of them detailed comments from organizations with a significant interest in asylum eligibility—before finalizing the rule suggests that there has been no prejudice in relying on the good cause exception and the foreign affairs exemption to publish the IFR without first providing for a comment period. *See id.* at 2385 (recognizing that the rule of prejudicial error applies to claims under the APA).

<sup>45</sup> 8 U.S.C. 1612(a)(1), (a)(2)(A)(iii), (a)(3) (SSI and SNAP); 8 U.S.C. 1612(b)(1), (b)(2)(A)(i)(III), (b)(3)(C) (Medicaid).

<sup>46</sup> 8 U.S.C. 1612(b)(1), (b)(2)(A)(ii)(III), (b)(3)(A)–(B) (TANF and Social Security Block Grant); 8 U.S.C. 1622(a), (b)(1)(C); 1621(c) (state public assistance).

infrastructure to process a significant amount of claims.

Commenters also criticized the rule's reliance on *Matter of Pula*, 19 I&N Dec. 467. Commenters noted that although the BIA stated that an alien's transit through third countries may be a negative discretionary factor depending on the factual circumstances, the BIA also has explained that the danger of persecution in the applicant's home country "should generally outweigh all but the most egregious adverse factors." *Matter of Pula*, 19 I&N Dec. at 474.

Likewise, some commenters asserted that the IFR's claim to advance humanitarian objectives is pre-textual because there is no plausible set of circumstances under which a rule prohibiting the vast majority of asylum seekers from obtaining asylum will serve the humanitarian purposes of asylum. In particular, some commenters asserted that, because transiting through a third country does not establish that an asylum claim is meritless, the rule will prohibit otherwise successful asylum claims.

Commenters stated that the IFR did not provide evidence of how it will lower human smuggling and trafficking by reducing incentives, nor how it will affect the dire conditions that currently exist at the border. Further, the commenters stated that the IFR inadequately explained how it will reduce the administrative burden in immigration courts, since, under the rule, the courts will still adjudicate claims for withholding of removal and protection under the CAT regulations, as well as appeals of these asylum denials. In addition, commenters stated that the need to reduce the burden on immigration courts by implementing the IFR is exaggerated because DOJ has added a significant number of immigration judges and the largest increase in pending cases has come from the Attorney General's decision that immigration judges did not have the authority to grant administrative closure. See *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018). Commenters also stated that the IFR does not cite any evidence supporting the contention that many asylum seekers are economic migrants seeking to exploit U.S. asylum law.

Next, commenters stated that the Departments provided misleading or inaccurate statistics in the IFR, asserting that denied asylum claims are not necessarily meritless; that the large majority of applicants appear for their hearings, particularly when represented by counsel; and that those affected by the IFR are granted asylum in ratios similar to asylum applicants as a whole.

Other commenters stated that the Departments conflated meritless applications with denied applications, for which factors such as access to counsel and the particular immigration judge presiding over the case have major effects on the outcome.

*Response:* The Departments believe that the determinations underlying the IFR are well-founded. Arbitrary and capricious review is limited and "highly deferential, presuming the agency action to be valid. . . ." *Sacora v. Thomas*, 628 F.3d 1059, 1068 (9th Cir. 2010), citing *Crickon v. Thomas*, 579 F.3d 978, 982 (9th Cir. 2009) (internal quotation marks omitted). It is "reasonable for the [agency] to rely on its experience" to arrive at its conclusions, even if those conclusions are not supported with "empirical research." *Id.* at 1069. The agency need only articulate "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs.*, 463 U.S. at 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 1568, 168 (1962).

Considering the unprecedented increase of asylum applications and the backlog of pending cases, the Departments concluded that the IFR was necessary and well-founded. See EOIR, *Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1106366/download> (demonstrating the increased receipt of asylum applications between Fiscal Years 2008 and 2019); see also EOIR, *Adjudication Statistics: Pending Cases* (Oct. 7, 2019), <https://www.justice.gov/eoir/page/file/1060836/download> (demonstrating the increased pending caseload between Fiscal Years 2008 and 2019). Further, the period between the issuance of *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), which *Matter of Castro-Tum* overturned, and the issuance of *Matter of Castro-Tum* coincided with a 127 percent increase in pending cases, despite relatively low numbers of new case receipts in several of the intervening years. Compare EOIR, *Active and Inactive Pending Cases Between February 1, 2012 and May 17, 2018* (Jan. 30, 2019), <https://www.justice.gov/eoir/page/file/1296536/download>, with EOIR, *New Cases and Total Completions* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1139176/download>. In contrast, more recent increases to the pending caseload and the increased burden on the immigration courts have been driven by record numbers of new cases filed; this increase, is driven by continued influxes of illegal immigration, which is one of the primary issues the rule attempts to combat. See EOIR, *Pending*

*Cases, New Cases, and Total Completions* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1242166/download>. In short, higher levels of illegal immigration—and not any decision by the Attorney General—have increased the burden on immigration courts, and it is appropriate for the Departments to consider that burden in promulgating this rule.

Although commenters expressed various opinions regarding factors that may reduce or exacerbate the burden on immigration courts, the Departments ultimately believe that this final rule, together with other regulatory and policy efforts, best addresses the dramatic increase in asylum applications and the pending caseload currently experienced by the immigration courts.

The Departments promulgated the IFR based on several considerations, including: (1) The need to reduce the incentive for aliens with meritless or non-urgent asylum claims to seek entry to the United States, thereby relieving stress on immigration enforcement and adjudicatory authorities; (2) the policy decision to direct relief to individuals who are unable to obtain protection from persecution elsewhere and individuals who are victims of a severe form of trafficking in persons, ensuring that these individuals can obtain relief more quickly; (3) the need to curtail human smuggling; (4) a desire to strengthen the United States' negotiating power regarding migration issues in general and regarding related measures employed to control the flow of aliens in the United States; and (5) the urgent need to address the humanitarian and security crisis along the southern land border between the United States and Mexico. 84 FR at 33831, 33840, 33842.

The IFR is reasonably related to each of these considerations and is, therefore, not arbitrary and capricious.<sup>48</sup> As the

<sup>48</sup>The Departments note that the Ninth Circuit determined the rule to be arbitrary and capricious for three reasons. First, the court credited assertions from plaintiffs over contrary assertions from the Departments that aliens in Mexico have no safe options for asylum. See *E. Bay Sanctuary Covenant*, 964 F.3d at 849–50. Second, the court found that the rule assumes, without justification, that aliens who wait to apply for asylum in the United States after traveling through intervening countries where they could have obtained protection are not credible. *Id.* at 852. Third, the court held that the rule failed to exempt UAC, though such exemption is not required by statute. *Id.* at 853–54. The Departments disagree with the Ninth Circuit on all three counts and understand the rule to be consistent with the provisions of section 208 of the Act, 8 U.S.C. 1158. Moreover, the court appears to have misunderstood the rule to some extent, as nothing in the rule relates to the credibility of an alien's claim; instead, the rule takes the logical—and uncontroverted—position that an individual

IFR explains, aliens with non-meritorious or non-urgent asylum claims will have less incentive to seek entry to the United States. *Id.* at 33840. Thus, there will be less incentive to rely on human smuggling if aliens cannot take advantage of lengthy delays in adjudicating their asylum claims in order to reside and work legally in the United States. *Id.* Fewer incentives to

who is in genuine fear for his or her well-being will take refuge at the first available opportunity and that a failure to do so necessarily raises questions about the persuasiveness of the claim. Just as a criminal defendant's subjective belief that an alternative to committing a crime is unavailable or undesirable will not support a necessity defense, *United States v. Perdomo-Espana*, 522 F.3d 983, 988 (9th Cir. 2008), an alien's subjective belief that refuge in another country is unavailable or less desirable than settling in the United States does not support the persuasiveness of that alien's asylum claim. Similarly, the Department disagrees with the court's conclusion that Mexico is not a safe country for any alien—as contradicted by the rising number of asylum claims filed in that country in recent years, which would be profoundly and inexplicably irrational behavior if applicants did not perceive it to be a potential safe country—or that pointing to crime in certain parts of Mexico means that the country as a whole is unsafe, any more than local crime rates or individual reports of crime in the United States mean that the entire United States is unsafe. *Cf. Cece v. Holder*, 733 F.3d 662, 679 (7th Cir. 2013) (Easterbrook, J. dissenting) (“Crime may be rampant in Albania, but it is common in the United States too. People are forced into prostitution in Chicago . . . Must Canada grant asylum to young women who fear prostitution in the United States, or who dread the risk of violence in or near public-housing projects?”). Further, the Departments disagree that every regulation restricting asylum eligibility must necessarily exempt UAC solely because they are UAC and even though such exemption is not required or contemplated by statute. Nevertheless, to the extent that the Ninth Circuit disagrees with the Departments' position on this matter, the Departments have provided additional reasoning and evidence in this rulemaking to address such concerns. For example, the Landau Memorandum extensively discusses how conditions in Mexico are adequate to ensure that the country is in fact a safe option for asylum seekers. Further, the fact that Mexico is indeed a safe option helps substantiate the Departments' conclusion that those aliens who nonetheless decline to apply for asylum in Mexico are likely travelling to the U.S. for reasons unrelated to a legitimate fear of persecution. *See E. Bay Sanctuary Covenant*, 964 F.3d at 859 (Miller, J., concurring in part) (observing that the “key factual premise” for the Departments' conclusion is that Mexico is safe enough “that legitimate asylum seekers can reasonably be expected to apply for protection there”). Finally, the Departments have discussed elsewhere in this final rule their consideration of the unique issues or special circumstances raised by UAC. They also note that Mexico has taken steps to ensure safe treatment of migrant children. *See, e.g., U.N. Human Rights Council, Universal Periodic Review 3rd Cycle, 31st Session: Mexico, National Report 10–11* (2018), <https://www.ohchr.org/EN/HRBodies/UPR/Pages/MXindex.aspx> (last visited Dec. 10, 2020) (describing Mexico's adoption of protocols to care for “unaccompanied or separated child and adolescent migrants”). The Departments have accordingly concluded that encouraging UAC to apply for asylum in Mexico through the promulgation of this rule will not jeopardize the wellbeing of UAC in a way that would warrant exempting UAC from the rule's scope.

seek entry illegally will relieve stress on the adjudicatory authorities of both DHS and DOJ and on border enforcement. *See* 84 FR at 33831, 33840–41. Likewise, by ensuring that adjudicators are able to focus on the claims of aliens who have not been able to obtain relief in a third country, the rule focuses on the class of aliens who have no other country to turn to, making it easier for those adjudicators to fulfill the humanitarian nature of asylum relief. *Id.*; *accord Tchitchui v. Holder*, 657 F.3d 132, 137 (2d Cir. 2011) (explaining that the “core regulatory purpose of asylum . . . is not to provide [aliens] with a broader choice of safe homelands, but rather, to protect refugees with nowhere else to turn” (internal quotation marks omitted)).

Further, by limiting eligibility for asylum to aliens who transit Mexico and Central America without first seeking relief in one of the countries transited, the U.S. government is in a better position to negotiate a formal and lasting resolution to the humanitarian and security crisis along the southern land border with those countries. 84 FR at 33831, 33842. This shifts the responsibility to consider such claims to other countries within the region that are able to provide fair adjudications of requests for asylum. For example, Mexico's status as a party to international agreements regarding refugee claims and its efforts to build its asylum system and robust procedures regarding such relief; and, as discussed above, the statistics regarding the influx of claims in that country, all support the conclusion that asylum in Mexico is a feasible alternative to relief in the United States. *See id.* at 33839; *see also, e.g., UNHCR, Universal Periodic Review 3rd Cycle, 31st Session: Mexico, National Report 10–12* (2018), <https://www.ohchr.org/EN/HRBodies/UPR/Pages/MXindex.aspx>; Landau Memorandum at 2–5. And, as previously explained, the presence of dangerous conditions in some parts of a country does not necessarily render the entire country unsafe and does not necessarily indicate the presence of the kind of persecution that asylum relief was designed to address. Concentrated episodes of violence do not mean a country, as a whole, is unsafe for individuals fleeing persecution. Regardless of living conditions, the United States is not required to grant asylum to applicants with claims that are not premised on a legitimate fear of persecution.

For example, in a large country like Mexico, which span nearly 760,000 square miles and has a population of approximately 130 million people, security conditions may vary widely

both across and within the 32 Mexican states. U.S. Dep't of State, U.S. Embassy and Consulates in Mexico, Memorandum from Christopher Landau, U.S. Ambassador to Mexico, on Mexico's Refugee System (Aug. 31, 2020). Reports of violence often refer to localized violence and “do not reflect conditions across the county as a whole.” *Id.* Nearly all applications for protection in Mexico are presented in either Chiapas, Mexico City, Veracruz, Tabasco, or Nuevo Leon, which “generally rank well on security issues based on Mexican government crime statistics,” and none of which are the subject of a U.S. Department of State “Level 4” (Do Not Travel) advisory. *Id.* Furthermore, “[t]he United States Mission in Mexico is not aware of any pattern of violence targeted at potential refugees awaiting adjudication of their applications.” *Id.*

The Ambassador specified that discussions about conditions in Mexico often conflate the perils that refugees might face traversing across dangerous parts of Mexico en route to the United States with the ability to seek protection in a safe place in Mexico. *Id.* For example, Chiapas, Mexico's southernmost state along the border with Guatemala, “routinely ranks among the safest Mexican States by all metrics.” *Id.* Notably, in Mexico, refugees have the right to seek protection in any state in which they are present. *Id.*

In response to commenters' concerns related to Federal appellate cases holding that applicants need not apply in the first country where asylum is available and that asylum applicants can have secondary motives for choosing to come to the United States that do not affect their asylum eligibility,<sup>49</sup> the Departments note that those cases reflect the regulatory framework for the ACA and firm resettlement bars (INA 208(a)(2) and (b)(2)(A)(vi), 8 U.S.C. 1158(a)(2) and (b)(2)(A)(vi); 8 CFR 208.15 and 208.30(e)(6)–(7), 1208.15 and 1208.30(e)(6)–(7)) prior to the IFR, which did not include such a requirement. This rule modifies the regulatory framework pursuant to authority granted by Congress, so there is no tension between those cases and this rule, and removes references to

<sup>49</sup> *See, e.g., Tandia v. Gonzales*, 437 F.3d 245, 249 (2d Cir. 2006) (“[The applicant's] stay in France would therefore be relevant only to a finding that he had ‘firmly resettled’ in a third country before arriving in the United States.”); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 & n.7 (9th Cir. 2004) (consideration of time in a third country is relevant only in determining whether alien was firmly resettled); *Andriasian*, 180 F.3d at 1047 (similar).

those amendments made in the Intervening Joint Final Rule.

In addition to the policies articulated above, the rule advances several other policy goals consistent with the asylum statute, including focusing relief on applicants who have nowhere else to turn and encouraging other countries to provide protection. The rule relies on the judgment that a “decision not to apply for protection at the first available opportunity, and instead wait for the more preferred destination of the United States, raises questions about the validity and urgency of the alien’s claim and may mean that the claim is less likely to be successful.” 84 FR at 33839. The Departments believe these determinations are reasonable because immigration law has long supported factoring into the denial of asylum the fact that the applicant could have sought, but failed to seek, protection in a third country while in transit to the United States. *See Matter of Pula*, 19 I&N Dec. at 473–74; *see also Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004) (“The firm resettlement bar looks to whether permanent refuge was offered, not whether permanent status was ultimately obtained. Refugees may not flee to the United States and receive asylum after having unilaterally rejected safe haven in other nations in which they established significant ties along the way.”) (emphasis in original); *Haloci v. Att’y Gen.*, 266 F. App’x 145, 147 (3d Cir. 2008) (“In addition, the IJ found that Haloci’s failure to seek asylum in Turkey or Holland, along with his admission that he had never considered any final destination other than the United States, further undercut his alleged fear. The record supports the IJ’s findings.”); *Farbakhsh v. INS*, 20 F.3d 877, 882 (8th Cir. 1994) (“We also hold that the Board did not abuse its discretion in denying petitioner’s application for asylum. Petitioner passed through several countries (Turkey, Italy, Spain, Portugal, Canada) en route to the United States; in Spain and Canada orderly refugee procedures were in fact available to him. He had applied for refugee status in Spain, and Canada had granted him temporary resident status and one year to apply for asylum.”). This rule establishes that an alien who failed to request asylum in a country where it was available is not eligible for asylum in the United States. Further, even though the Board in *Pula* indicated that a range of factors is relevant to evaluating discretionary

asylum relief under the general statutory asylum provision, the Act also authorizes the establishment of additional limitations to asylum eligibility by regulation—beyond those embedded in the statute. *See* INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C).<sup>50</sup> This rule uses that authority to establish one of the factors specified as relevant in *Pula* as the foundation of a new asylum bar. This rule’s focus on the third-country-transit factor, considered as just one of many factors in *Pula*, is justified, as explained above, by the increased numbers and changed nature of asylum claims in recent years.

*Comment:* Several commenters asserted that the IFR will not alleviate the strain on the Nation’s immigration system. Some commentators argued that immigration judges will have more work as a result of the rule because they will have to inquire whether the applicant satisfied the rule. Others predicted that immigration judges will adjudicate the same number of cases because individuals barred from asylum eligibility will instead apply for statutory withholding or protection under the CAT regulations. One commenter opined that the backlog of immigration cases is caused by the Administration’s own policies, such as “zero tolerance,” and the solution is to less vigorously enforce immigration laws.

*Response:* The Departments disagree with these predictions. The commenters assume that individuals will not apply for asylum in other countries. Many individuals may apply for, and may receive, asylum elsewhere, which would reduce the burden on the immigration system. Also, if the rule deters meritless or frivolous applications, it will reduce the burden on the immigration system.

In addition, the interim final rule would reduce the burden on the immigration system even if every alien who would have applied for asylum under the regulations in place prior to the IFR continues to seek statutory withholding of removal or protection under the CAT regulations under the provisions of the IFR. Following

<sup>50</sup> To this end, the Departments published an NPRM that, inter alia, proposed establishing additional factors for consideration when determining whether an alien merits the relief of asylum as a matter of discretion, 85 FR 36264, which has recently been finalized, *Procedures for Asylum and Withholding of Removal: Credible Fear and Reasonable Fear Review*, signed on December 2, 2020.

publication of the Intervening Joint Final Rule, the claims of those individuals who are subject to the third-country-transit bar would initially be reviewed to determine whether the individuals have a reasonable possibility of persecution or torture, rather than a credible fear. 8 CFR 208.30(e)(5)(iii). Reasonable-fear review is a higher threshold than the “credible fear” standard that would have previously applied. *Compare* 8 CFR 208.30(e)(2) (providing that an alien has a credible fear if the alien establishes a “significant possibility” of persecution or torture), *with* 8 CFR 208.31(c) (providing that an alien has a reasonable fear if the alien establishes a “reasonable possibility” of persecution or torture). As discussed in the Intervening Joint Final Rule, the Departments believe that fewer non-meritorious claims will be referred to an immigration judge for adjudication due to the higher standard applicable in reasonable-fear reviews, increasing efficiencies both for the immigration courts and for aliens who are eligible for protection. Notably, however, this final rule does not include those changes due to the Intervening Joint Final Rule.

The Departments disagree with suggestions to stop or to reduce enforcement of immigration laws as a means of reducing the strain on the Nation’s immigration system. The solution is not to ignore the rule of law but to find ways to promote compliance with the law and to increase the efficiency of the Nation’s immigration system.

*Comment:* One group asserted that the rule seeks to deter asylum claims, and that this is not a legally permissible basis for a rule.

*Response:* The Departments encourage those facing persecution or torture to seek protection. The rule does not seek to deter any such individual from applying for or receiving protection—in fact, it encourages them to seek protection at the first available opportunity. The rule seeks to deter those who would abuse the immigration system by filing meritless, frivolous, or non-urgent asylum claims as a means to obtain immigration benefits to which they would not otherwise be entitled.

*Comment:* Some commenters challenged the Departments’ statistics indicating that many asylum applicants do not appear for their immigration court hearings and that immigration judges deny most asylum claims.

*Response:* The Departments reiterate the statistics and analysis provided in the IFR. *See id.* Some comments may be based on erroneous readings of the data. For example, one commenter cited the DHS Annual Flow Report on Refugees and Asylees from 2017 as showing that 92 percent of asylum applicants obtain lawful permanent resident status. DHS, *Annual Flow Report: Refugees and Asylees: 2017* (Mar. 2019), [https://www.dhs.gov/sites/default/files/publications/Refugees\\_Asylees\\_2017.pdf](https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf). The report, however, concerns adjustment rates for individuals who are already granted affirmative asylum, not applicants for asylum. *Id.* at 9.

## 2. Executive Order 13132

*Comment:* One commenter stated that the IFR will harm the States because: (1) The States' economies are aided by asylees and asylum seekers, (2) harm caused to asylum seekers will result in increased demand on State health programs and resources, (3) organizations in the States will have to divert their resources, and (4) the IFR harms States' interest in family unity. As a result, the commenter stated, DHS and DOJ failed to analyze these impacts or appropriately consult with the States prior to the rule's implementation.

*Response:* The rule does not have federalism implications because it does not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. DHS and DOJ do not purport to directly regulate who may receive State benefits or how the States or organizations within the States allocate resources for the public. To the extent the commenter alleges that the rule will have a financial impact on the States, such assertion is purely speculative. Finally, any choice by the States to increase public assistance payments to aliens affected by the rule is a policy choice by States, not a result compelled by the rule.

## 3. Paperwork Reduction Act

*Comment:* One commenter stated that the IFR will impact the number of respondents who fill out the Form I-589, Application for Asylum and for Withholding of Removal, annually and that, as a result, DHS and DOJ should clarify the status of the I-589 information collection under the Paperwork Reduction Act. The commenter asserted that the rule will likely decrease the number of respondents who submit the I-589, although the commenter also noted that

recent increases in the volume of aliens seeking asylum at the border may in fact increase the number of respondents who submit an I-589.

*Response:* As stated in the IFR, the rule does not propose any new, or revisions to existing, "collections of information" as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320. 84 FR at 33843.

Further, the Departments find that it is not possible to estimate the impact of the rule on the volume of respondents who submit a Form I-589 annually. The Form I-589 is used jointly by DHS and DOJ to adjudicate applications for asylum, statutory withholding of removal, and protection under the CAT regulations. While fewer aliens may be eligible for asylum following a credible-fear finding due to the rule, aliens subject to the bar may still apply for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding or deferral of removal under the CAT regulations, if an asylum officer or immigration judge finds that they have a reasonable fear of persecution or torture. Such aliens would still submit the same Form I-589 that they would have submitted for the purpose of applying for asylum before the enactment of the rule. In addition, as explained in the IFR, the United States has experienced a significant increase in the number of aliens encountered at the southern land border in recent years, which results in a larger total pool of possible asylum applicants. 84 FR at 33838. *Compare* CBP, *Southwest Border Migration FY2019* (Nov. 14, 2019), <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019> (reporting 851,508 apprehensions at the southern land border for Fiscal Year 2019), *with* CBP, *Southwest Border Migration FY2017* (Dec. 15, 2017), <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017> (reporting the following total apprehensions along the southern land border: 479,371 in Fiscal Year 2014; 331,333 in Fiscal Year 2015; 408,870 in Fiscal Year 2016; and 303,916 in Fiscal Year 2017).

The Departments have not proposed any further amendments to the information collection to the IFR as reviewed under Office of Management and Budget ("OMB") Control Number 1615-0067. *See* OMB, Office of Info. & Regulatory Affairs, [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201905-1615-002](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201905-1615-002).

## IV. Regulatory Review Requirements

### A. Administrative Procedure Act

This final rule is being published with a 30-day delay in the effective date as required by the APA. 5 U.S.C. 553(d).

### B. Regulatory Flexibility Act

The Departments have reviewed this final rule in accordance with the Regulatory Flexibility Act ("RFA") (5 U.S.C. 601 *et seq.*) and have determined that this rule will not have a significant economic impact on a substantial number of small entities. The rule will not regulate "small entities" as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible for asylum, and only individuals are eligible for asylum or are otherwise placed in immigration proceedings.

Further, although some organizational commenters (whose organizations might qualify as "small entities") asserted that the rule would affect their operations, an RFA analysis is not required when a rule has only incidental effects on small entities, rather than directly regulating those entities. *See, e.g., Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327, 342-43 (D.C. Cir. 1985) ("[W]e conclude that an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule. . . . Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy." ).<sup>51</sup> Neither the IFR nor this final rule regulates immigration-related organizations in any way; those organizations can continue to accept clients, provide legal advice, and expend their resources however they see fit. The rule neither

<sup>51</sup> *See also Cement Kiln Recycling Coal v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) ("The statute requires that the agency conduct the relevant analysis or certify 'no impact' for those small businesses that are 'subject to' the regulation, that is, those to which the regulation 'will apply'. . . . The rule will doubtless have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected." (citing *Mid-Tex*, 773 F.2d 327 at 343)); *White Eagle Co-op Ass'n v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009) ("[S]mall entities directly regulated by the proposed [rulemaking]—whose conduct is circumscribed or mandated—may bring a challenge to the RFA analysis or certification of an agency. . . . However, when the regulation reaches small entities only indirectly, they do not have standing to bring an RFA challenge.").

compels them nor entitles them to undertake any particular course of conduct. Thus, because this rule does not regulate small entities themselves, the Departments reaffirm their conclusion that no RFA analysis is necessary.

*C. Unfunded Mandates Reform Act of 1995*

This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year, and it will not significantly or uniquely affect small governments. See 2 U.S.C. 1532. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*D. Congressional Review Act*

This final rule is not a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804. This rule will not result in “an annual effect on the economy of \$100 million or more”;<sup>52</sup> a “major increase in costs or prices”; or “significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.” *Id.*

*E. Executive Order 12866, Executive Order 13563, and Executive Order 13771 (Regulatory Planning and Review)*

This final rule is not subject to Executive Order 12866 because OMB determined that it implicates a foreign affairs function of the United States related to ongoing bilateral and multilateral discussions with the potential to impact a set of specified international relationships and agreements. For similar reasons, this rule is not a “regulation” as defined in Executive Order 13771, and the rule is therefore not subject to that order.

*F. Executive Order 13132 (Federalism)*

This final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, this rule does not have sufficient federalism implications to

warrant the preparation of a federalism summary impact statement.

*G. Executive Order 12988 (Civil Justice Reform)*

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

*H. Paperwork Reduction Act*

This final rule does not propose new, or revisions to existing, “collection[s] of information” as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320.

*I. Signature*

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

**List of Subjects**

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

**Regulatory Amendments**

**DEPARTMENT OF HOMELAND SECURITY**

Accordingly, for the reasons set forth in the preamble, the interim final rule’s amendments to 8 CFR 208.13 as published July 16, 2019, at 84 FR 33829 are adopted as final with the following changes:

**PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL**

■ 1. The authority citation for part 208 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229; 8 CFR part 2.

■ 2. In § 208.13, revise paragraphs (c)(4)(i) and (iii) to read as follows:

**§ 208.13 Establishing asylum eligibility.**

- \* \* \* \*
- (c) \* \* \*
- (4) \* \* \*

(i) The alien demonstrates that he or she applied for protection from persecution in at least one country outside the alien’s country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States and the alien received a final judgment denying the alien protection in such country.

\* \* \* \*

(iii) The only country or countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees.

\* \* \* \*

**DEPARTMENT OF JUSTICE**

Accordingly, for the reasons set forth in the preamble, and by the authority vested in the Director, Executive Office for Immigration Review, by the Attorney General Order Number 4910–2020, the interim final rule’s amendments to section 1208.13 as published July 16, 2019, at 84 FR 33829 are adopted as final with the following changes:

**PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL**

■ 3. The authority citation for part 1208 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229.

■ 4. In § 1208.13, revise paragraphs (c)(4), (c)(4)(i), and (c)(4)(iii) to read as follows:

**§ 1208.13 Establishing asylum eligibility.**

\* \* \* \*

(c) \* \* \*

(4) *Additional limitation on eligibility for asylum.* Notwithstanding the provisions of § 1208.15, any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien’s country of citizenship, nationality, or last lawful habitual residence en route to the United States, shall be found ineligible for asylum unless

(i) The alien demonstrates that he or she applied for protection from persecution in at least one country outside the alien’s country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States and the alien received a final

<sup>52</sup> Unlike the Unfunded Mandates Reform Act of 1995, see 2 U.S.C. 1532(a), the Congressional Review Act does not specifically require adjustments for inflation, see 5 U.S.C. 804.

judgment denying the alien protection in such country.

\* \* \* \* \*

(iii) The only country or countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the 1951 United Nations Convention

relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees.

\* \* \* \* \*

Approved:  
**Chad R. Mizelle,**  
*Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.*

Approved:  
**James R. McHenry III,**  
*Director, Executive Office for Immigration Review, Department of Justice.*

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