

June 1, 2023

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The “Circumvention of Lawful Pathways” Rule Leaves Indigenous Peoples with No Pathway to Seek Asylum

The undersigned 143 non-Indigenous allies write this solidarity letter to support Indigenous Peoples’ concerns about the exclusion of Indigenous Peoples from “lawful pathways” to seek asylum under recent changes to U.S. asylum processes. As allies, we uplift the needs, barriers, and recommendations already identified by Indigenous Peoples at the frontlines in the advancement of their human rights.

This exclusion comes at a time when the number of Indigenous migrants who have left their homelands, and are now on the U.S.-Mexico border has grown due to the systemic oppression, poverty, and climate injustices they experience in their respective countries.¹ In countries like Guatemala, state sponsored violence and imposed development resulting in conflicts over lands, territories and goods of the earth, are just some of the root drivers of Indigenous expulsion.² Recent tragedies, including the fire at a migrant detention facility³ in Ciudad Juarez and the deaths of children⁴ in U.S. government custody underscore the toll of anti-immigrant border policies on Indigenous Peoples today. However, the full scope of these human rights violations

¹ Erasure of Indigenous identities is commonplace at the U.S.-Mexico border as the Department of Homeland Security (DHS) fails to capture Indigenous identity and language in its demographic profiles of the migrants it encounters. This failure has been one of the key concerns expressed by Indigenous Peoples of the diaspora. The failing makes capturing total migration numbers of Indigenous Peoples to the United States difficult. Using country of origin as a proxy, Guatemala, a country with high levels of Indigenous representation, has seen a dramatic rise of migration to the United States in the past decade. Migration from Guatemala was up by 44 percent in 2020 from 2013 numbers. *See* Migration Pol’y Ctr. & Asociación Pop No’j, Migration from Huehuetenango in Guatemala’s Western Highlands 3 (Mar. 2022), https://www.migrationpolicy.org/sites/default/files/publications/mpi-huehuetenango-report-eng_final.pdf.

² Statement from the Int’l Mayan League at the UN Permanent Forum on Indigenous Issues specific to the intersection of climate injustice, forced displacement and Indigenous migration, Juanita Cabrera Lopez, Emil Keme & Lorena Brady (Apr. 19, 2023), https://issuu.com/mayanleague.org/docs/unpfii_statement_extractivism_climate_injustice_st.

³ *See He Dreamed of New York, But His Life Ended in the Juárez Fire*, EL PASO MATTERS, Apr. 17, 2023, <https://elpasomatters.org/2023/04/17/he-dreamed-of-new-york-but-his-life-ended-in-the-juarez-fire/>; Prensa Comunitaria (@prensacomunitaria), Twitter (Apr. 3, 2023 12:54 PM), <https://twitter.com/PrensaComunitar/status/1642978844553478145>.

⁴ A count of deaths of Indigenous children in October 2019 by the International Mayan League found that six Indigenous children died in DHS custody or had been killed at the southern border by U.S. government officials. *See* Nat’l Cong. of Am. Indians Res. #ABQ-19-012 (Oct. 2019), <https://www.ncai.org/ABQ-19-012.pdf>; Int’l Mayan League, Open letter from the International Mayan League on the first anniversary of the death of Jakelin Caal Maquin (Dec. 9, 2019), <https://mayanlanguageimmigrationlawinfo.wordpress.com/2019/12/08/open-letter-from-the-international-mayan-league-on-the-first-anniversary-of-the-death-of-jakelin-caal-maquin/>.

are not understood or quantified because of the erasure of Indigenous Peoples identities, lack of disaggregated data, and misclassification of Indigenous Peoples as Latine or Hispanic.⁵

The Biden Administration has taken drastic steps to change asylum processes and limit access to lawfully apply for asylum at the border. In an April 27, 2023 Fact Sheet,⁶ Secretary Mayorkas claimed that the Administration would be expanding “lawful pathways” to seek asylum while simultaneously imposing “consequences” on asylum seekers who do not use those pathways. This artificial dichotomy is demeaning to all and fails to recognize the desperation that causes noncitizens to flee to the United States. Clearly, when there is access to feasible lawful pathways, most noncitizens will use them, but creating lawful pathways that are only open to a tiny percentage of (primarily wealthier)⁷ noncitizens and then punishing those who are unable to use the pathways for which they do not qualify is disingenuous at best. As discussed below, the rule will have an especially catastrophic effect on Indigenous Peoples, a population for whom access to asylum is already significantly hindered.

Under the “Circumvention of Lawful Pathways” or Asylum Ban rule, which was published on May 16, 2023, anyone who enters the United States between ports of entry or presents at a port of entry without a visa or a pre-scheduled appointment, will be barred from asylum, unless they can prove they applied for asylum in another country during their transit to the border, and they were denied or meet other narrow exceptions.⁸ Those who make Customs and Border Protection (CBP) appointments with a smartphone app called CBP One, or who enter by airplane through a parole program will be exempt from the rule. However, the Administration has failed to consider the near-complete lack of access to those lawful pathways for Indigenous Peoples.

Indigenous Peoples Are Shut Out of CBP One

Most asylum seekers approaching the U.S.-Mexico border must now attempt to make an advance appointment with the CBP One app. Critics have called⁹ the app a high-tech version of border

⁵ Patrisia Gonzalez, Juanita Cabrera Lopez, Lorena Brady & Rachel Starks, Indigenous Peoples’ Right to Exist, Self Determination, Language and Due Process in Immigration 6 (2020), <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=7670&file=EnglishTranslation>.

⁶ U.S. Dep’t of Homeland Sec., Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration (Apr. 27, 2023), <https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration>.

⁷ To qualify for the very limited parole pathways discussed below, noncitizens must have a financial sponsor in the United States and be able to afford the fees for a valid passport and for airfare from their country to the United States. Many asylum seekers have no U.S. sponsor, are unable to seek a passport for financial reasons and/or reasons related to their persecution, and cannot afford airfare. As discussed below, the CBP One app also favors wealthier asylum seekers. Moreover, those programs are limited to citizens of Cuba, Haiti, Nicaragua, and Venezuela.

⁸ Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023), <https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways>; Hundreds of immigration legal service and advocacy organizations, including many of the signatories of this letter, submitted public comments urging the Biden administration to abandon this misguided rule.

⁹ See Letter from Sen. Edward Markey to Alejandro Mayorkas, Sec’y, U.S. Dep’t of Homeland Sec. (Feb. 21, 2023), https://www.markey.senate.gov/imo/media/doc/senator_markey_letter_to_dhs_on_cbp_one_app_-_february_2023.pdf.

metering,¹⁰ in that the vast majority of asylum seekers attempting to enter at the U.S.-Mexico border will be forced to wait in Mexico based on an arbitrary system. Metering has been found unlawful by a federal district court.¹¹

The current version of the CBP One app which asylum seekers must use to avoid the Asylum Ban, is available only in English, Spanish, and Haitian Creole. It will be impossible for Indigenous Peoples without fluency in those languages to navigate CBP One. Furthermore, due to racism, discrimination, structural inequality, and colonialism in the countries they have fled, half of Indigenous children living in Guatemala are not able to access education.¹² As a result, many Indigenous Peoples are unable to read and write in any language,¹³ which makes navigating CBP One impossible.

In addition to the language and literacy barriers posed by CBP One, use of the app also creates a wealth barrier. Indigenous Peoples are more likely to live in debilitating poverty¹⁴ than their non-Indigenous counterparts,¹⁵ putting technology out of reach for most.¹⁶ With smartphones costing several hundred dollars, for many Indigenous People, it is simply not possible to purchase a smartphone and pay monthly service fees. Even those individuals or families who are able to purchase a smartphone may not possess a phone capable of successfully running the CBP One app or be able to afford data for the smartphone at the border.

¹⁰ Am. Immig. Council, *Metering and Asylum Turnbacks* (Mar. 8, 2021), <https://www.americanimmigrationcouncil.org/research/metering-and-asylum-turnbacks>.

¹¹ *Al Otro Lado v. Mayorkas*, No. 3:17-cv-02366-BAS-KSC (S.D. Cal. Sept. 2, 2021) (granting partial summary judgment).

¹² See Report of the Special Rapporteur on the rights of Indigenous peoples on her visit to Guatemala (2018) U.N.Doc. A/HRC/39/17/Add.3, para. 92, <https://digitallibrary.un.org/record/1640555?ln=en#record-files-collapse-header>.

¹³ In Mexico, 64.6 percent of Indigenous women are not able to read or write. See Indigenous Work Group for Int'l Affairs, *The Indigenous World Yearbook 2022* 426 (2022), <https://tinyurl.com/96c8398z>. See also Patrisia Gonzalez, Juanita Cabrera Lopez, Lorena Brady & Rachel Starks, *Indigenous Peoples' Right to Exist, Self Determination, Language and Due Process in Immigration 5* (2020), <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=7670&file=EnglishTranslation> (“Many Indigenous peoples in Guatemala are monolingual and only speak their Indigenous language. They do not read or speak any Spanish, let alone English”); Migration Pol’y Ctr. & Asociación Pop No’j, *Migration from Huehuetenango in Guatemala’s Western Highlands 3* (Mar. 2022), https://www.migrationpolicy.org/sites/default/files/publications/mpi-huehuetenango-report-eng_final.pdf (“Nearly half of Indigenous adult women and about one-quarter of Indigenous adult men cannot read or write”).

¹⁴ Letter from Juanita Cabrera Lopez, Exec. Dir. Int’l Mayan League, to Francisco Cali Tzay, Special Rap. on the rights of Indigenous peoples, Re: Human rights situation of indigenous peoples living in urban areas the case of D.C. (Mar. 15, 2022), https://issuu.com/mayanleague.org/docs/hr_urban_areas_submission_final.

¹⁵ In Guatemala, 75 percent of Indigenous People live in poverty compared to 36 percent of non-Indigenous people. See Indigenous Work Group for Int’l Affairs, *The Indigenous World Yearbook 2023* 378 (2023), <https://tinyurl.com/3rc9x2wa> [hereinafter, “Indigenous World 2023”]. See also Migration Pol’y Ctr. & Asociación Pop No’j, *Migration from Huehuetenango in Guatemala’s Western Highlands 13* (Mar. 2022), https://www.migrationpolicy.org/sites/default/files/publications/mpi-huehuetenango-report-eng_final.pdf (“[In Huehuetenango] [a]lmost three-quarters (73 percent) of the population lives in poverty”).

¹⁶ Simona Beltrami, *World Food Programme, In Guatemala, Indigenous is ingenious when it comes to climate change* (Aug. 8, 2022), <https://www.wfp.org/stories/guatemala-indigenous-ingenious-when-it-comes-climate-change> (“With poverty averaging at 79 percent among Guatemala’s Indigenous people – and 40 percent living in extreme poverty – communities have little or no access to technology and resources”).

The text of the Asylum Ban rule does ostensibly create an exception to the asylum ban for those who can “demonstrate[e] by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to [a] language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.”¹⁷

There is no explanation in the language of the rule, however, about how Indigenous Peoples can access CBP ports of entry to explain that they are exempt from the rule. On recent calls, CBP officials have stated that it should be possible for those without CBP One appointments to present themselves at ports of entry, but they were unable to provide any information on how people could do so as a practical matter. CBP officials have also stressed on recent calls that those with CBP One appointments would be first priority for processing. Thus, it is likely Indigenous Peoples will be left with the choice of waiting in long lines, which may never move forward, to present at ports of entry or entering without inspection—and being subject to the Asylum Ban.

Furthermore, USCIS officials have explained on calls that Asylum Officers will determine during fear-based interviews whether asylum seekers meet the inability-to-use CBP One exception. However, it is not clear whether they have received any training on the specific vulnerabilities of Indigenous Peoples and the unique issues that Indigenous asylum seekers face. These officials have indicated that asylum seekers will bear a heavy burden of proving that, even if unable to communicate in a CBP One language or read or write, the asylum seeker must prove why they were unable to find third party assistance to use the CBP One app while in Mexico, raising concerns that Indigenous Peoples will be even more vulnerable to extortion and abuse by criminals as they are forced to interact with third parties to try to access the app.

Those who are subject to the Asylum Ban will be placed in expedited removal, where they will face a presumption of ineligibility for asylum unless they applied for asylum in a third country through which they transited on their way to the United States and were denied.¹⁸ Individuals who cannot make that showing will have to prove a higher risk of harm than the ordinary “significant possibility” standard to be placed into immigration court proceedings. The proposal that Indigenous Peoples must seek asylum in countries like Mexico, which have their own history of anti-Indigenous abuse, is discriminatory on its face and simply designed to exclude them from the U.S. asylum process.¹⁹ During fear interviews, Indigenous Peoples are often not provided appropriate interpretation in their primary language.²⁰ These problems will only be

¹⁷ Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31450 (May 16, 2023), <https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways> (to be codified at 8 CFR §§ 208, 1003, 1208).

¹⁸ *Id.* at 31318.

¹⁹ See generally Int'l Mayan League, Comment on the Proposed Rule by the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) on Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023 (Mar. 27, 2023), https://issuu.com/mayanleague.org/docs/mayanleague_comment_on_the_proposed_asylum_ban_202.

²⁰ See generally Blake Gentry, O'odham Niok? In Indigenous Languages, U.S. “Jurisprudence” Means Nothing, 37 *Chicana/o-Latina/o L. Rev.* 29, 36–38, 40–41 (2020), https://escholarship.org/content/qt2495r4h7/qt2495r4h7_noSplash_dc9425521e9c34d55e266a485d244a2f.pdf?t=qa_d9mj; Katie Becker, Respond: Crisis Translation, Respond Crisis Translation Volunteer, Katie Becker Shares Their

compounded by the added layer of attempting to prove one of the narrow exceptions to the Asylum Ban during the interview.

Indigenous Peoples Are Largely Shut Out of the Parole Pathways

The Biden Administration has opened new parole pathways for citizens of Cuba, Haiti, Nicaragua, and Venezuela.²¹ However, other than Nicaragua, these countries have relatively low numbers of Indigenous Peoples residing there.²² By way of contrast, Indigenous Peoples make up a large portion of the Guatemalan population, with estimates of Indigeneity ranging from nearly half of Guatemalans,²³ to Indigenous Peoples' own estimates of closer to 85 percent;²⁴ over a quarter of people living in Peru are Indigenous;²⁵ and a fifth of people in Mexico are Indigenous.²⁶

While the April Mayorkas Fact Sheet indicates that there will be some further expansion of parole programs to those who live in Guatemala, Honduras, El Salvador, and Colombia, this parole program will only be available to those who already have an approved family-based immigration application filed on their behalf in the United States. For individuals and families fleeing their countries for safety, there is no lawful pathway available from these countries through parole.

Conclusion

Given the historic damage that colonialism has wrought on Indigenous Peoples and the historical role of foreign intervention by the United States, the United States should take an expansive protection approach to Indigenous Peoples who are often fleeing harm brought on by systemic racial discrimination, displacement, and genocide in the countries in which they reside. As stated by Indigenous Peoples themselves, the United States should work with Indigenous Peoples and their representatives to combat the roots of the problems that force them to migrate.

Until Indigenous Peoples can live safely in their own homelands, we echo the calls made by Indigenous Peoples and their respective institutions upon the Administration to ensure that the rights of Indigenous Peoples are not further violated at the border,²⁷ including calls for the

Theory on the Intersection Between Language and Asylum (Jan. 6, 2022), <https://respondcrisistranslation.org/en/news/kbecker-2022-0106>.

²¹ See U.S. Dep't of Homeland Sec., Processes for Cubans, Haitians, Nicaraguans, and Venezuelans, <https://www.uscis.gov/CHNV> (last updated May 1, 2023).

²² Indigenous Peoples make up 8.9 percent of the Nicaraguan population and 2.8 percent of the Venezuelan population. See Indigenous World 2023, *supra* note 15 at 405, 446. Indigenous World does not have chapters on Haiti or Cuba, though Indigenous Peoples live in both countries.

²³ *Id.* at 378.

²⁴ María Longo, *Tres argumentos del Consejo del Pueblo Maya para rechazar los resultados del Censo*, PRENSA LIBRE, Sept. 26, 2019, <https://www.prensalibre.com/ciudades/quetzaltenango/tres-argumentos-del-consejo-del-pueblo-maya-para-rechazar-los-resultados-del-censo/>.

²⁵ Indigenous World 2023, *supra* note 15 at 426.

²⁶ *Id.* at 425.

²⁷ Indigenous Peoples have raised concerns through open letters, letters to the President's Interagency Task Force on the Reunification of Families, letters directed to DHS, and provided formal comments on the proposed asylum ban, and procedures for credible fear screening, amongst others.

Administration to engage in a process to implement the National Congress of American Indians Resolution #ABQ-19-012, *Calling to Protect and Advance the Human Rights of Indigenous Peoples Migration to the U.S.* Specifically, the U.S. government should create “an Indigenous Language Advisory Commission, comprised of tribal and Indigenous language and cultural experts, to establish an intake process to count Indigenous Peoples, develop Indigenous language resources, [and] develop required trainings for all Department of Homeland Security (DHS), Department of Justice (DOJ), and Department of Health and Human Services personnel on Indigenous Peoples’ human rights.” Indigenous Peoples should not be subject to the Asylum Ban for failure to seek asylum in a transit country, given the mistreatment of Indigenous Peoples by the governments of many transit countries.²⁸ Indigenous Peoples must be exempted from the CBP One app, and there must be a clear process in place to allow them to present themselves and self-identity as an Indigenous person at Ports of Entry to access the full asylum system. We uplift the call of Indigenous Peoples requesting that DHS invest in language interpretation services for Indigenous migrants.²⁹ Finally, if the Administration is going to rely on parole as a means of entry for asylum seekers, it must make parole readily available to the most vulnerable and not just those with the financial means and U.S. connections to qualify.

Please feel free to contact Victoria Neilson victoria@nipnlg.org or Ann Garcia ann@nipnlg.org if there is further information we can provide or if you would like to discuss these issues further.

Sincerely,

Al Otro Lado

Alida Yath

Americans for Immigrant Justice

Andrea Victoria Saldivar

Another Gulf Is Possible Collaborative

Arise Immigration Services

Arkansas Immigrant Defense

Ascend Justice

Asociación Colectivo Vida Digna

Asylum Program of Arizona

Asylum Seeker Advocacy Project (ASAP)

Ayuda

Boston University Immigrants’ Rights and Human Trafficking Program

Campesina Womb Justice

Capital Area Immigrants’ Rights (CAIR) Coalition

²⁸ Press Release, Int’l Mayan League, The illegal asylum ban violates Indigenous Peoples’ Human Rights (May 11, 2023), https://issuu.com/mayanleague.org/docs/the_illegal_asylum_ban_violates_indigenous_peoples.

²⁹ See *id.*; Nat’l Cong. of Am. Indians Res. #ABQ-19-012 (Oct. 2019), <https://www.ncai.org/ABQ-19-012.pdf>.

CASA
Center for Victims of Torture
Central American Disruption
Central American Refugee Center (CARECEN-NY)
Centreville Immigratiion Forum
Chacón Center for Immigrant Justice at MD Carey Law School
Chicago Volunteer Legal Services
Church World Service
Delsoz Ubuntu US Immigration PLLP
Denevich and Associates
Detroit Mercy Law
Diego's Chocolate
Diocesan Migrant and Refugee Services Inc
Eileen's Free Bodega
Entre Hermanos
Equal Justice Center
First Focus on Children
Florence Immigrant & Refugee Rights Project
Fordham Law School Feerick Center for Social Justice
Global Social Work, LLC
Guatemalan-Maya Center
Haitian Bridge Alliance
Harvard Immigration and Refugee Clinical Program
HIAS
Homegirls Press
Human Rights First
Humanitarian Immigration Law Clinic, Elon Law
Immigrant & Refugee Services, Catholic Charities Community Services, New York
Immigrant Defenders Law Center
Immigrant Legal Advocacy Project
Immigrant Legal Center
Immigration Equality
Immigration Hub
Immigration Law & Justice Network
Independent Contract Interpreter
Indu Law Group, PC

Indigenous Research Center of the Americas
Innovation Law Lab
Interfaith Welcome Coalition - San Antonio
International Refugee Assistance Project (IRAP)
Jewish Activists for Immigration Justice of Western MA
JLW Immigration Law Group
Just Neighbors
Justice Action Center
Justice Center of Southeast Massachusetts
Justice for Migrant Families WNY
Justice in Motion
Kentucky Coalition for Immigrant and Refugee Rights
Kids in Need of Defense (KIND)
Kitsap Immigrants Assistance Center
La Union del Pueblo Entero
Langley Park Civic Association, Inc.
Las Americas Immigrant Advocacy Center
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Law Office of Patavee Vanadilok, P.C.
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Lawyers for Good Government
Lutheran Immigration and Refugee Service
Lutheran Social Services of the National Capital Area (LSSNCA)
MarksVerde Law, LLC
Michigan Immigrant Rights Center
Mid-South Immigration Advocates, Inc.
Mobilization for Justice, Inc.
Muslim Advocates
National Employment Law Project
National Immigration Project (NIPNLG)
National Lawyers Guild-San Francisco Bay Area chapter
National Network for Immigrant and Refugee Rights (NNIRR)

Native American and Indigenous Alliance at George Mason University
Native American Law Student Association, University of Arizona, James E. Rogers College of
Law
Network in Solidarity with the People of Guatemala
New Jersey Consortium for Immigrant Children
New York Justice for Our Neighbors, Inc.
New York Legal Assistance Group (NYLAG)
NorCal Resist
North Carolina Immigration Law & Justice Center
Northwest Immigrant Rights Project
Oasis Legal Services
Ohio Immigrant Alliance
Parker, Butte, Lane, P.C.
Pathways Immigration Law
Pedro Arrupe Jesuit Institute
Phoenix Legal Action Network
Plattsburgh Cares
Puerto Rican Nation
Refugee Council USA
Rian Immigrant Center
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S.K. Burt Law, P.A.
Safe Harbor Clinic, Brooklyn Law School
Sanctuary for Families
Shamanic Sun
Smith Immigration Law, PLC
South Bronx United
Southern Poverty Law Center
Stephanie Collins
Strangers No Longer (Michigan)
Student Clinic for Immigrant Justice
Sunrise Movement Miami
Survivors of Torture, International
Tahirih Justice Center

Tennessee Justice for Our Neighbors
The Advocates for Human Rights
The Law Office of Jose Pertierra
The Legal Aid Society (NYC)
The LGBT Asylum Project
The Waters Connect Us
Thirteen Eagle
Time Machine Creative Industries
TPS-DED AAC
UN Office of the Future
Unitarian Universalist Refugee & Immigrant Services & Education
Unitarian Universalists for Social Justice
United We Dream
UnLocal
Voces Unidas (RGV)
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