



EAST BAY
SANCTUARY COVENANT

17 March 2023

RE: Comments in Opposition to the Joint Notice of Proposed Rulemaking entitled *Circumvention of Lawful Pathways*; [RIN: 1125-AB26 / 1615-AC83](#) / Docket No: USCIS 2022-0016 / A.G. Order No. 5605-2023

Dear Assistant Director Reid and Acting Director Delgado:

On behalf of my organization, East Bay Sanctuary Covenant (hereinafter EBSC), I am submitting the following comments to the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), and the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR) (“the agencies”) in response and opposition to the above-referenced Notice of Proposed Rulemaking (“NPRM” or “the Rule”) issued by the agencies on February 23, 2023. EBSC strongly opposes the Proposed Rule, which will prevent asylum seekers from accessing protection they merit under domestic and international law and result in the return of many refugees to countries where they will be persecuted.

EBSC urges EOIR and DHS to withdraw the Rule in its entirety and ensure that a full and fair asylum system is made accessible to all those who seek refuge in the United States.

EBSC was the lead plaintiff in the successful suits against the previous administration’s rules which unconstitutionally restricted asylum to non-citizens who entered without inspection or who transited through a third country before arriving at our southern border (EBSC v. Trump and EBSC v. Barr). The Proposed Rule merely repackages those same restrictions and suffers from the same legal flaws. The departments emphasize that one principal reason for this Rule is to ensure the safety of non-citizens who must run a gauntlet of danger in order to reach the southern border. While EBSC supports this goal, the Proposed Rule does nothing to protect asylum seekers from these harms in route and, in fact, would force people to prolong their stays in dangerous conditions in hopes of remaining eligible to seek asylum in the U.S.

EBSC has a large and successful affirmative asylum program. Since its inception in 1992, more than 4,000 of our cases have been approved by the Asylum Office and EOIR. Of adjudicated cases, 98% have resulted in asylum grants. Approximately 75% of our clients enter without inspection at the southern border. One third of those clients are Mexican, and about half of our remaining clients are Central American and must transit through Mexico to seek asylum at the Southern Border. Some also transit through other Central American countries. These non-Mexican individuals would be subject to the Rule unless they try and fail to secure asylum in one of the transit countries or are lucky enough to secure a CBP One appointment. We anticipate that many individuals in our client population would be subject to the Rule and unable to overcome the rebuttable presumption, which would be devastating to our affirmative asylum practice.



Rebuttable Presumption of Ineligibility for Asylum

Under the Proposed Rule, asylum seekers arriving at the U.S. southern border who did not request and receive a denial of asylum in a transit country, including those who enter without inspection and/or did not obtain an appointment to present at the border using a mobile phone application known as “CBP One,” must overcome a rebuttable presumption of ineligibility for asylum. This third country will nearly always include Mexico. (For the sake of brevity, I will limit my arguments to Mexico, although the situation is nearly identical in many Central American countries.) The Executive Summary of the Proposed Rule discusses Mexico’s “notable strides in strengthening access to international protection through its Mexican Refugee Assistance Commission (“COMAR”). This Pollyannaish view of the country conditions in Mexico is contradicted by decisions from the DHS Asylum Office, by DOJ EOIR, and by the U.S. Department of State.

In 2022, EBSC filed 174 affirmative asylum cases, including 54 LGBT cases and 9 Domestic Violence cases from Mexico. We fully expect that 99% will be granted because of the pervasive homophobia and misogyny in Mexico—not to mention corruption at all levels—and our past experience at the Asylum Office. Of the two EBSC cases that received decisions in 2023, both were for Mexican nationals and both were granted asylum. In 2022, of the 36 EBSC cases that were adjudicated, 13 were approvals of Mexican cases. In addition, another client who is a gay activist from Guatemala fled to Mexico where he received a Humanitarian Visa. However, due to the pervasive homophobia in Mexico, he fled to the United States and was granted asylum in 2022.

The U.S. Department of State’s 2021 Country Report on Human Rights Practices for Mexico [the most recent available report] reflects the realities that migrants in Mexico face. The Executive Summary states: “Significant human rights issues included credible reports of: unlawful or arbitrary killings by police, military, and other governmental officials; forced disappearance by government agents; torture and degrading treatment by security forces; harsh and life-threatening prison conditions; arbitrary arrest or detention; restrictions on free expression and media, including violence against journalists; acts of corruption; insufficient investigation of and accountability for gender-based violence, including but not limited to domestic and intimate partner violence; crimes involving violence or threats of violence targeting persons with disabilities; and crimes involving violence or threats of violence targeting lesbian, gay, bisexual, transgender, queer, and intersex persons.

“Impunity and extremely low rates of prosecution remained a problem for all crimes, including human rights abuses and corruption. There were reports some government agents were complicit with international organized criminal gangs, and prosecution and conviction rates were low for these abuses.”

The Proposed Rule’s assumption that Mexico can offer safe haven to refugees when it cannot guarantee safety for its own citizens is not grounded in reality. In fact, the Executive Summary to the Proposed Rule states that refugees and immigrants transiting through Mexico run great risks of violence. According to the 2021 State Department Report, **Abuse of Migrants and Refugees**: “The press, international organizations, and NGOs reported targeting and victimization of migrants by criminal groups and in some cases by police, immigration officers, and customs



officials, including at land borders and airports. There were numerous instances of criminal armed groups extorting, threatening, or kidnapping asylum seekers and other migrants. In many parts of the country, human smuggling organizations wielded significant power, and media alleged frequent collusion among local authorities. There were credible reports of sexual assaults against migrants, particularly women, while migrating in and through the country.”

I am attaching a copy of the index to our last-submitted Country Conditions Report for LGBT+ applicants from Mexico.

While the Mexican authorities have made a few efforts to protect the LGBT+ community, the reality on the ground is that they are unable or unwilling to control much of the population in that regard. “Mexico is to be lauded for its efforts. But it is well recognized that a country’s laws are not always reflective of actual country conditions. It is not unusual that a country’s “de jure commitments to LGBTI protection do not align with the de facto reality of whether the State is able and willing to provide protection.” Brief for UNHCR as Amicus Curiae at 4. And we have recently recognized that Mexico has experienced “an increase in violence against gay, lesbian, and transgender individuals during the years in which greater legal protections have been extended to these communities.” [Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1071 \(9th Cir. 2017\)](#) (en banc).

In sum, the rule’s rationale that it is reasonable to expect individuals to seek asylum in third countries is not supported by the record.

Additionally, the Rule is arbitrary and capricious because it imposes conditions on non-citizens’ access to asylum that has nothing to do with the merits of their asylum claim. It merely puts up bureaucratic hurdles that many of EBSC’s clients could not overcome. EBSC frequently represents clients with few economic resources, many of whom are marginally literate at best. We anticipate that many of them will not be able to navigate the CPB One app, and there is no rebuttal available for people with educational, mental, or psychological disabilities or who are unable to secure a timely appointment. We anticipate that many of our clients will be unable to safely wait in dangerous border regions in order to secure an appointment and many of them will be forced to enter without inspection.

The Proposed Rule violates U.S. obligations under international law and makes a sham of the INA which states that any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival, irrespective of such alien’s status) may apply for asylum. In clear violation of this guarantee, it would make those who enter without inspection ineligible unless they meet very narrow grounds for rebutting the bar.

The Proposed Rule does permit Withholding of Removal and/or CAT for those who cannot rebut the presumption of ineligibility for asylum. However, the standard for Withholding and CAT is much higher and the remedies weaker. The applicant will have no permanent status in the U.S. and cannot petition for family members. In addition, this form of relief is only available in removal proceedings where EBSC rarely practices.



For the above-stated reasons, EBSC strongly opposes the Proposed Rule. EBSC’s core mission is to assist and protect non-U.S. citizens present in the country, while the Proposed Rule violates the rights of non-citizens to justice and protection. We urge the departments not to finalize the Proposed Rule and to instead rescind the prior administration’s asylum bans without replacing them with a new one.

Please contact me for any additional information you might require.

Sincerely,

Michael Smith
Director, Refugee Rights Program
East Bay Sanctuary Covenant
510-540-5296, ext. 102
mike@eastbaysanctuary.org

MEXICO: Country Conditions Documents: LGBT

- A. Married women are murdered in Juarez City**, El Closet LGBT – January 18, 2022, available at <https://elclosetlgbt.com/closetnews/matrimonio-de-mujeres-es-asesinado-en-cd-juarez/> [included with English translation]

“This lesbian couple lived in El Paso, Texas, with their three children, now orphans... Nohemí and Julissa were between 25 and 30 years old according to some publications on social networks, and they had been married since the summer of 2021. Their murder is also one of the many attacks that people from the LGBT+ community have suffered in recent days in Mexico, among trans-femicides, attempts at trans-femicide, homophobic and lesbophobic attacks in public spaces, etc.”

- B. Mexico sees deadliest year for LGBT+ people in five years**, Thompson Reuters Foundation, May 15, 2020, available at: <https://www.reuters.com/article/us-mexico-lgbt-murders-trfn/mexico-sees-deadliest-year-for-lgbt-people-in-five-years-idUSKBN22R37Y>

“Mexico is seeing a surge of extreme violence toward LGBT+ people in its deadliest year in half a decade, a leading rights group said on Friday, citing cases of victims brutally stabbed and brazenly killed in public. In 2019, 117 lesbian, gay, bi and trans people were killed in Mexico, up almost a third compared with 2018 and the highest number since 2015, according to LGBT+ advocacy group Letra S.

Overall in Mexico, last year was the deadliest on record, but the increase among the gay and trans community was more severe, said Alejandro Brito, Letra S director. “We’ve documented that victims are subjected to multiple forms of violence, before or even after they were murdered,” Brito said. “There is a cruelty towards the victims,” he told



the Thomson Reuters Foundation. Victims have been found handcuffed, stabbed repeatedly and in public places, he said. A lesbian woman was killed while out one night with her girlfriend in the city of Cuernavaca, and the bodies of several murdered trans women were found on the streets.

Amid widespread gang violence and drug trafficking groups in Mexico, more than 34,500 homicide victims were reported last year, according to official data. But while the number of murder victims was up 2.5% in 2019, the number of gay and trans people killed was 27% higher than in 2018, said Letra S. More than half the victims were transgender women, while nearly a third were gay men. At least 441 LGBT+ people were murdered in Mexico between 2015 and 2019, the group said...

The violence “is specifically directed at LGBT people,” he said. “The greater visibility ... has led macho groups, fundamentalist sectors to reject this public presence of gays, lesbians and trans people.” Gay and trans people still face societal prejudice in the predominantly Catholic country where religious groups frequently criticize LGBT+ rights. In a 2017 government survey, about a third of Mexicans said they would not rent out a room to a gay or trans person. Lawmakers welcomed the data for highlighting the often underreported violence faced by LGBT+ people in Mexico. “Hate crimes due to homophobia and transphobia are generally made invisible,” said Patricia Mercado, a senator with the opposition Citizens’ Movement party. “We have to continue working to prevent all forms of discrimination that can lead to a hate crime.” The data on murders was based on news reports of LGBT+ killings, but the actual number could be much higher, according to Letra S.

C. Gay Couple Attacked in Rosarito, One Stoned to Death, Punto Norte, January 21, 2019, available at: <https://puntonorte.info/atacan-a-pareja-gay-en-rosarito-muere-uno-a-pedradas/> [Included with English translation]

“A man was murdered in the Municipality of Playas de Rosarito after being attacked with his partner by stones inside his home... The police managed to find out that the man and his partner, with whom he lived, were attacked by several people on Sunday night but have no further knowledge about the murderers.”

D. Murder of 3 gay activists shocks the LGBTI community, El Debate, June 18, 2018, available at: <https://www.debate.com.mx/mexico/guerrero-activistas-gay-muertos-taxco-tiro-de-gracia-carretera-20180618-0084.html> [Included with English translation]

“The gay community of Taxco is in mourning, three young activists for the LGBTI-Taxco Diversity, were located with the “coup de grace” (stroke of mercy) on the Zacapalco-Rancho Viejo road of this silver city... At the beginning of the month the state Gay Pride march was held in Chilpancingo in its 17th edition, where they demanded to clarify the 49 crimes for homophobia that had been registered in Guerrero since 2015 until that date.”



- E. Subjects Beat and Kill Homosexual**, El Orbe, May 28, 2018, available at: <https://elorbe.com/rojas/2018/05/28/sujetos-golpean-y-matan-a-homosexual.html> [Included with English translation]

“A group of homophobic subjects caused terror and panic in the Bicentennial Park, since at approximately 05:00 in the morning they beat and threw two homosexual people out of a vehicle... one of these people died due to the seriousness of his injuries, while the other person is torn between life and death.”

- F. Murder of a Youth for Being Gay**, Diario de Yucatan, May 27, 2018, available at: <http://yucatan.com.mx/mexico/matan-joven-gay> [Included with English translation]

“Witnesses claim that the aggressor accused his victim of his alleged homosexuality. After several minutes, David pulled out a white weapon and stabbed his schoolmate in the chest... The victim was transferred to the University Hospital where he died. Local media indicated that the knife pierced Marlon's liver, causing him a severe hemorrhage... A video surveillance camera captured images that capture the outside of Conalep, in which Marlon Iván crosses the street with his hands on his abdomen and falls badly wounded on the opposite sidewalk.”

- G. Murder of Our Gay Beauty of the Elopa Municipality, Sinaloa**, Excelsior, May 25, 2018, available at: <https://www.excelsior.com.mx/nacional/asesinan-a-nuestra-belleza-gay-del-municipio-de-elota-sinaloa/1241202> [Included with English translation]

“The person crowned Our World Beauty 2018, a gay beauty contest held this year in the municipality of Elota, south of the state of Sinaloa, was shot dead in Culiacán. The body was abandoned by a dirt road behind the International Airport of Culiacán, and still alive was transferred to receive medical attention in a hospital, however, he lost his life hours after entering.

The victim called himself Yamileth Quintero, of 23 years of age, and was wearing women's clothes at the time of the attack.”

- H. Gay couple attacked in Puerto Vallarta**, Mexico News Daily, March 27, 2018, available at: <https://mexiconewsdaily.com/news/gay-couple-attacked-in-puerto-vallarta/>

“A gunman fired on a gay couple Saturday in Puerto Vallarta, Jalisco, wounding one of the two men. Carl Blea, a Palm Springs, California, real estate agent and former U.S. Navy officer, was shot once in the back of his leg at around 2:30am while walking hand in hand with his husband, Marc Lange, near Lázaro Cárdenas Park in the resort city's old town area.

‘This was not a robbery went bad. It was a hate crime as Carl Blea and I were walking hand in hand. We never spoke to the man who shot us. He yelled at us and then pulled out a gun and shot at us,’ he wrote. ‘We told three different sets of police officials the same story. There were no witnesses, the street was empty,’ he continued.



At least one local media outlet reported that the incident was an attempted robbery and that the men had engaged in a struggle with the perpetrator of the crime. But speaking to the newspaper the *Desert Sun* from a Vallarta hospital Sunday, Lange rejected the report, calling the attack 'a random act of hatred' and reiterating that 'we never uttered a word [to the gunman].'

'There is nothing in the local newspaper or news warning people of this incident. Please share with anyone who is there,' Lange pleaded. The gunman remains at large.

The Pacific coast city is a popular destination for gay tourists and Lange expressed concern that police were covering up what really happened in order to avoid damaging the tourism sector. Violence against the gay, lesbian, bisexual and transsexual (LGBT) community in Mexico is not uncommon. In a report published in May last year, news website *Pink News* said that at least 202 LGBT people were killed in Mexico between 2014 and 2016.

I. Mexico: Situation of sexual minorities, including in Mexico City; protection and support services offered by the state and civil society (2015-July 2017),

Canada: Immigration and Refugee Board of Canada, 16 February 2018, available at: <http://www.refworld.org/docid/5ad5c5d24.html> [accessed 5 November 2018]

The website of the Attorney General's Office (Procuraduría General de la República, PGR) cites the President of the National Council for the Prevention of Discrimination (Consejo Nacional para Prevenir y Eliminar la Discriminación, CONAPRED) [1] as stating that in Mexico, [translation] "discrimination on the basis of sexual orientation and gender identity continues to be a structural phenomenon with extensive social roots" (Mexico 17 May 2017).

The UN Special Rapporteur on Extrajudicial or Arbitrary Executions noted "the alarming pattern of grotesque homicides of lesbian, gay, bisexual and transgender individuals and the broad impunity for these crimes, sometimes with the suspected complicity of investigative authorities" (UN 6 May 2016, para. 62). According to the CEAV and Fundación Arcoiris report, trans women and homosexuals represent the group most affected by motivated physical assaults (Mexico and Fundación Arcoiris 11 Apr. 2016, 4).

According to the *US Country Reports 2016*, "[c]ivil society groups claimed police routinely subjected LGBTI persons to mistreatment while in custody" (US 3 Mar. 2017, 27). The CEAV and Fundación Arcoiris report indicates that at least one out of 10 people surveyed has been detained and that abuse during detention was evident, including physical violence, arbitrary detention and due process violations (Mexico and Fundación Arcoiris 11 Apr. 2016, 4).



- J. More than 200 members of LGBT community killed in Mexico over three-year period**, Al Dia News, May 18, 2017, available at: <http://aldianews.com/articles/politics/more-200-members-lgbt-community-killed-mexico-over-three-year-period/48171>

“At least 202 murders of members of the lesbian, gay, bisexual and transgender (LGBT) community occurred between 2014 and 2016 in Mexico... Of the 202 LGBT murder victims, at least 33 (16 percent) showed signs of torture and 15 bore evidence of sexual violence, the report said... The state with the highest number of these murders was the Gulf coast state of Veracruz with 22, followed by the central state of Mexico and Chihuahua with 15 and 14, respectively.”

- K. Mexico’s Struggle for Equality**, The Harvard Political Review, October 27, 2016, available at: <http://harvardpolitics.com/world/mexicos-struggle-for-equality/>

“As Nieto has pushed marriage equality, many members of his largely socially-conservative Institutional Revolutionary Party have abandoned him, effectively putting Nieto’s L.G.B.T. rights agenda on hold. Exacerbating this is the fact that a substantial part of Mexico’s population is socially conservative, in part due to historical ties to the Catholic Church, which continues to play a prominent role in Mexican culture. While the Catholic Church’s stance on same-sex marriage has somewhat varied from country to country, in Mexico it is one of the most outspoken opponents of the measure.”

“Equality advocates continue to push the Mexican president to take real action to solve the problems underlying the movements that filled Mexico this September: discrimination and narrow-mindedness. “There’s much more to do in order to fight homophobia in Mexico, and we are working on it,” Villaneuva says.”

