

September 28, 2026

Via Federal e-Rulemaking Portal, <https://www.regulations.gov>

Mr. Brett Lassen
Chief, Asylum Division
U.S. Citizenship and Immigration Services
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: CIS No. 2851-26; DHS Docket No. USCIS-2026-0199 (RIN 1615-AD18)
Affirmative Asylum Referrals Without Interview

Dear Mr. Lassen:

The [Center for Gender & Refugee Studies](https://cgrs.uclawsf.edu) ("CGRS") submits this comment opposing in the strongest possible terms the Interim Final Rule *Affirmative Asylum Referrals Without Interview*, 91 Fed. Reg. 47,101 (July 28, 2026) ("Rule"). The Rule is inconsistent with the United States' obligations under international law. It is also unlawful under the Administrative Procedure Act ("APA") because it was issued without observance of procedure required by law, is contrary to law, and is arbitrary and capricious.

We include the following outline to guide your review.

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1. USCIS, Interviewing – Introduction to the Non-Adversarial Interview Lesson Plan
2. USCIS, RAIO Directorate Officer Training Manual
3. EOIR, New Immigration Judge Training
4. USCIS, Discretion Lesson Plan

5. USCIS, Interviewing Survivors of Torture and Other Severe Trauma Lesson Plan
6. USCIS, Gender-Related Claims Lesson Plan
7. USCIS, Children's Claims Lesson Plan
8. Letter from Rep. Marcus McGarvey, et al. to Joseph B. Edlow (Aug. 14, 2026)

I. EXPERTISE OF THE CENTER FOR GENDER & REFUGEE STUDIES

The Center for Gender & Refugee Studies (“CGRS”) was founded in 1999 by Professor Karen Musalo¹ following her groundbreaking legal victory in *Matter of Kasinga*² to advocate for asylum seekers fleeing gender-based violence. CGRS protects the fundamental human rights of refugee women, children, LGBTQ+ individuals, and others who flee persecution and torture in their home countries. CGRS is an internationally respected resource, renowned for our knowledge of the law and ability to combine sophisticated legal strategies with policy advocacy and human rights interventions.

We take the lead on emerging issues, participate as counsel or *amicus curiae* in impact litigation to advance the rights of asylum seekers,³ produce an extensive library of litigation support materials, maintain an unsurpassed database of asylum records and decisions, and work in coalitions with refugee, immigrant, LGBTQ+,

¹ Bank of America Foundation Chair in International Law; Professor & Director, Center for Gender & Refugee Studies (“CGRS”), University of California College of the Law, San Francisco.

² 21 I&N Dec. 357 (BIA 1996).

³ See, e.g., *U.T. v. Blanche*, 2026 WL 2824333 (D.D.C. Sept. 21, 2026) (challenging rule providing the structure for asylum cooperative agreements, which enable the removal of asylum seekers to designated countries without an opportunity to pursue their claims in the United States; class certification granted); *Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Mullin*, 174 F.4th 81 (D.C. Cir. 2026), *cert. pending*, No. 26-239 (filed Aug. 24, 2026) (challenging Proclamation 10888 and related guidance suspending processing of asylum seekers at the southern border who enter without inspection) (“RAICES”); *E.Q. v. DHS*, 835 F.Supp.3d 221 (Apr. 8, 2026) (challenging rule that requires asylum officers conducting initial fear screenings to make complicated determinations about applicability of mandatory bars that would render individuals ineligible for asylum; motion to dismiss denied in part); *Las Americas Immigr. Advoc. Ctr. v. DHS*, 783 F.Supp.3d 200 (D.D.C. May 2025) (granting in part and denying in part plaintiffs’ motion for summary judgment and defendants’ cross-motion for summary judgment in challenge to “Securing the Border” rule), appeal docketed, No. 25-5313 (D.C. Cir., Sept. 2, 2025); *Al Otro Lado and Haitian Bridge Alliance v. Trump*, 2026 WL 897318 (S.D. Cal. Mar. 30, 2026) (challenging Proclamation 10888 and related guidance suspending entry of asylum seekers at ports along the southern border and cancelling scheduled CBP One appointments; class certification granted); *East Bay Sanctuary Covenant v. Trump*, 2026 WL 1256873 (N.D. Cal. May 7, 2026) (reaffirming grant of summary judgment to plaintiffs in challenge to “Circumvention of Lawful Pathways” rule), appeal docketed, No. 26-4982 (9th Cir., Aug. 4, 2026); *Immigr. Def. Law Ctr. v. Mayorkas*, No. CV 20-9893 JGBSHKX, 2023 WL 3149243, 18-19 (C.D. Cal., Mar. 15, 2023) (granting in part and denying in part defendants’ motion to dismiss challenge to implementation of MPP 1.0 and granting plaintiffs’ motion for class certification); *Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966 (N.D. Cal. 2021) (preliminarily enjoining the “Global Asylum” rule).

children's, and women's rights networks.⁴ On August 19, 2026, legal services providers represented by CGRS and partner organizations sued the Department of Homeland Security ("DHS") and U.S. Citizenship and Immigration Services ("USCIS") alleging the Rule violates the APA.⁵

Since our founding, we have engaged in international human rights fact-finding and analysis, with a strong emphasis on El Salvador, Guatemala, Haiti, Honduras, and Mexico, to address the underlying causes of forced migration that produce refugees, including climate change and environmental disasters.⁶

We have particular subject matter expertise in the affirmative asylum process at USCIS, having successfully represented refugees seeking protection through the Asylum Division and its predecessor entities since our inception. In addition to our own docket of cases before the Asylum Division, CGRS has provided technical assistance in over 17,000 affirmative asylum cases. We provide training and mentorship on practice before USCIS in asylum claims. Hundreds of advocates have attended our trainings on affirmative asylum, on top of other trainings that CGRS provides to thousands of attorneys across the country each year, all of whom are representing asylum seekers at various stages of the legal process and therefore must be kept fully aware of DHS policies and practices.

As a critical part of our mission, CGRS serves as a resource to decision makers to promote laws and public policies that recognize the legitimate protection claims of those fleeing persecution and torture. Our goal is to ensure that the U.S. framework of law and policy respects the rights of refugees and aligns with international law.

It is in furtherance of our mission that we submit this comment urging that the Rule be rescinded in its entirety.

⁴ See, e.g., the [Welcome With Dignity](#) and [No Turning Back](#) campaigns.

⁵ Immigration Equality, et al. v. Mullin, et al., No. 1:26-cv-02921 (D.D.C. filed Aug. 19, 2026).

⁶ See, e.g., CGRS, [The IACtHR's Advisory Opinion on the Climate Emergency: An Important Step for the Protection of Climate-Displaced Individuals](#) (2025); [The Chile Declaration and Plan of Action 2024-2034: A Blueprint for Addressing Climate and Disaster-Related Displacement in the Americas](#) (2025); [Precluding Protection: Findings from Interviews with Haitian Asylum Seekers in Central and Southern Mexico](#) (2024); ["Manifesting" Fear at the Border: Lessons from Title 42 Expulsions](#) (2024).

II. THE RULE IS INCONSISTENT WITH INTERNATIONAL LAW

A. The Rule Is Inconsistent with U.S. Treaty Obligations

The Rule is inconsistent with the international legal obligations of the United States. These are found in part in the 1967 Protocol Relating to the Status of Refugees (“Refugee Protocol”).⁷ The United States acceded to the Refugee Protocol in 1968 with no relevant declarations or reservations. By doing so, the United States undertook to apply all substantive articles of the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”).⁸ These treaties have been implemented in domestic law in the Refugee Act of 1980, other subsequent legislation, and accompanying regulations.

Article 33(1) of the Refugee Convention prohibits the expulsion or return of a refugee to any country where their life or freedom would be threatened for reasons of race, religion, nationality, membership of a particular social group, or political opinion. As explained below, the Rule will lead to erroneous asylum office and immigration court denials of asylum, resulting in the removal of refugees to persecution.

B. The Rule is Inconsistent with UNHCR Guidance and Falls Short of Best Practices

The Refugee Convention does not prescribe a certain procedure but imposes an obligation of result: the protection of the people defined in the treaty from forced return to harm. Decades of practice in the United States and in other States party to

⁷ 606 U.N.T.S. 267 (entry into force 4 Oct. 1967).

⁸ 189 U.N.T.S. 137 (entry into force 22 Apr. 1954).

the Convention, longstanding⁹ authoritative guidance¹⁰ from the Office of the United Nations High Commissioner for Refugees (“UNHCR”), UNHCR’s own practice in carrying out refugee status determinations (“RSD”),¹¹ and basic minimum principles of due process require that the applicant have an opportunity to explain their claim in person to a competent official.

By allowing referrals based on a mere paper review of the record, the Rule fails to meet even basic due process standards, notably the right to be heard. UNHCR advises that the right to be heard requires that an applicant should have the opportunity to present their claim in person, and that a refugee claim should not be determined in the first instance based on a paper review alone.¹² UNHCR’s standards for its own staff when they conduct refugee status determinations make this even more clear:

4.3.1 The Applicant’s Right to an Individual RSD Interview

All Applicants undergoing individual RSD procedures must have the opportunity to present their claims in person in an RSD Interview with a

⁹ As far back as 1977, United Nations High Commissioner for Refugees’ (“UNHCR”) Executive Committee, of which the United States was and is a member, recommended basic procedural requirements including providing the applicant with a competent interpreter, Executive Committee of the High Commissioner’s Programme (“ExCom”), Conclusion No. 8 (XXVIII): Determination of Refugee Status 12 Oct. 1977, (E) (iii) <https://www.refworld.org/policy/exconc/excom/1977/42839>. The provision of a competent interpreter is essential to the right to be heard, as well as the ability of refugees to bring themselves to the attention of the authorities and to participate in the interview. Similarly, UNHCR’s Handbook, originally published in 1979, states that at least one interview is required in order to determine if someone is a refugee, UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/1P/4/ENG/REV. 4, April 2019, paras. 199-200 <https://www.refworld.org/policy/legalguidance/unhcr/2019/123881>.

¹⁰ See generally UNHCR, Strategic Approach to Strengthening National Asylum Systems, Oct. 2025, <https://www.refworld.org/policy/strategy/unhcr/2025/150734> and UNHCR, Effective processing of asylum applications: Practical considerations and practices, March 2022, <https://www.refworld.org/policy/opguidance/unhcr/2022/124059>. (hereinafter UNHCR Effective processing).

¹¹ UNHCR, UNHCR Refugee Status Determinations (“RSD”) Procedural Standards Unit 4: Adjudication of Refugee Status Claims, 26 Aug. 2020, <https://www.refworld.org/policy/legalguidance/unhcr/2020/123192>. (hereinafter UNHCR RSD Procedural Standards).

¹² UNHCR Effective processing, *supra* note 10, para. 25.

qualified Eligibility Officer. As a general rule, a refugee status claim should not be determined in the first instance on the basis of a paper review alone.

As the Applicant's own testimony is often the primary if not the only source of relevant information available, an individual RSD interview is essential to establish the facts of the claim.¹³

Allowing for referrals without an interview based on paper review alone will make mistaken decisions more likely, setting the applicant on the road to *refoulement*. If DHS was confident that a paper review was a sufficient basis for accurate decisions, the rule would provide for grants without an interview. In fact, international legal standards recognize that a positive decision on refugee status may be taken without an interview.¹⁴

C. The Rule Raises Additional Due Process Concerns

Referral to immigration court does not cure the due process defects of this Rule. Such a referral no longer guarantees a hearing, as the Department of Justice ("DOJ") has increasingly curtailed due process rights in immigration courts including the right to be heard.

This Rule mirrors the immigration courts' resort to pretermission as a due-process deficient attempt to "manage" their own backlog. In both instances, the agencies responsible for the consideration and adjudication of asylum claims are foreclosing asylum seekers' ability to fully present the merits of their claims to the competent authorities. They are cutting off critical steps in the adjudication process—a non-adversarial interview with an asylum officer or a merits hearing before an immigration judge ("IJ")—to speed up the resolution of cases with no concern for the quality of decision making. As the Rule acknowledges, DHS is now shifting a significant portion of its asylum backlog to DOJ. It is entirely predictable that DOJ will respond with an even greater use of pretermission, thus denying even more applicants their right to be heard. Indeed, the Rule itself acknowledges that affirmative asylum applicants referred to the immigration court without interview may have their applications pretermitted without the opportunity for a hearing on the merits of their claim. Rule at 47,107 n. 22.

¹³ UNHCR RSD Procedural Standards, *supra* note 11, section 4.3.1.

¹⁴ UNHCR Effective processing, *supra* note 10, para. 25; UNHCR RSD Procedural Standards, *supra* note 11, section 4.3.1.

Despite this foreseeable consequence, nothing in the Rule requires DOJ to conduct a full merits hearing for an applicant who is referred without an interview, even though DHS and DOJ could easily have engaged in joint rulemaking and accounted for this serious deficiency. This will result in mistaken decisions by both DHS and DOJ in sequence that will result in the return of people to persecution or torture, without affording them any meaningful opportunity to explain their claims before either agency. The Rule will also result in a waste of government resources, by having both DHS and DOJ conduct duplicative paper reviews of the file, while almost entirely eliminating the possibility that either review is accurate or correct.

Even if the applicant receives a hearing in immigration court, serious due process issues persist, because a non-adversarial interview as conducted by the asylum office is widely acknowledged as the best way to elicit the elements of the claim.¹⁵ In contrast, the adversarial, intimidating, and unequal nature of immigration court proceedings, with a DOJ judge and DHS attorney but no appointed counsel for the respondent, is far less likely to arrive at the truth of the claim.

Immigration court is also much less efficient, since it requires the involvement of two government attorneys—the DOJ immigration judge and the DHS trial attorney—in every case, rather than just one official, as at the asylum office. The Rule perversely funnels even more applicants for asylum into the venue that is most resource-intensive, less fair, and less likely to arrive at an accurate decision.

For these reasons, the Rule is inconsistent with U.S. obligations under international law.

III. THE RULE IS UNLAWFUL UNDER THE APA BECAUSE IT WAS ISSUED WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW

A. Introduction

Agency actions taken without observance of procedure required by law are also unlawful and must be set aside.¹⁶ The APA generally requires agencies to publish notices of proposed rulemaking in the Federal Register; to provide interested persons an opportunity to participate in the rulemaking by submitting written data,

¹⁵ UNHCR RSD Procedural Standards, *supra* note 11, section 4.3.6, noting that such an interview “create[s] an environment of trust and respect in which the Applicant will have the best opportunity to remember and tell his/her story as truthfully and completely as possible.”

¹⁶ 5 U.S.C. § 706(2)(D).

views, or arguments; and to consider relevant matters presented.¹⁷ Here, DHS published the Rule as an interim final rule, effective upon publication, without issuing a notice of proposed rulemaking.

DHS asserts that the Rule is exempt from notice-and-comment rulemaking under the APA, because it is a rule of agency organization, procedure, or practice, and because it involves the foreign affairs function of the United States. Rule at 47,115-16. However, the Rule does not meet the requirements of these exemptions and thus is subject to the APA's notice-and-comment requirements.

Additionally, DHS failed to issue a proper Family Policymaking Assessment as required by the Treasury and General Government Appropriations Act, 1999.¹⁸

Because DHS failed to issue a notice of proposed rulemaking, depriving interested persons of the opportunity to participate in the rulemaking by having the agency consider data, views, or arguments submitted prior to implementation, and failed to properly analyze the impact of the Rule on family well-being as required under the Treasury and General Government Appropriations Act, 1999, the Rule was issued without observance of procedure required by law.

B. The Rule is Not a Procedural Rule

A matter relating to agency organization, procedure, or practice ("procedural rule") is excepted from the APA's notice-and-comment requirements.¹⁹ The APA's general requirement that agencies publish substantive rules at least 30 days before their effective date does not apply to procedural rules.²⁰ A procedural rule does not itself alter the rights and interests of parties (that is, does not impose new substantive burdens), and the exception for procedural rules must be construed narrowly.²¹

The Rule significantly affects hundreds of thousands of people within affirmative asylum applications pending before USCIS who will be substantially burdened by the Rule's impacts on their core rights and interests as described in detail in sections IV and V below. On top of that, the Rule by its own terms removes the right to an asylum interview previously guaranteed under DHS regulations. Rule at

¹⁷ 5 U.S.C. § 553(b) and (c).

¹⁸ Pub. L. 105-277, 112 Stat. 2681 (1998).

¹⁹ 5 U.S.C. § 553(b)(B).

²⁰ 5 U.S.C. § 553(d).

²¹ Elec. Privacy Info. Ctr. v. DHS, 653 F.3d 1, 5-6 (D.C. Cir. 2011) (internal citation omitted).

47,102, 47,103, 47,105, 47,108, 47,110, and 47,111 n. 40. Therefore, it does not qualify as a procedural rule.

C. The Rule is Not a Rule Involving the Foreign Affairs Function of the United States

The Rule improperly relies on the exception to normal rulemaking involving a “foreign affairs function of the United States.”²² Rule at 47,116. To be covered by the foreign affairs function exception, a rule must clearly and directly involve activities or actions characteristic to the conduct of international relations.²³ This exception comes with a “high bar.”²⁴ In particular, courts have warned against “[t]he dangers of an expansive reading of the foreign affairs exception” in the immigration context, where inevitable “incidental foreign affairs effects” would “eliminate[] public participation in this entire area of administrative law.”²⁵

DHS cannot meet that high bar here, as the potential effects on international relations that it puts forward are unsupported by reasoned analysis and entirely reliant on a conclusory determination by the Secretary of State. Rule at 47,116. The determination cited, if accepted, would appear to foreclose public participation in *any* immigration-related rulemaking through exactly the type of expansive reading of the foreign affairs exception courts have forbidden.

DHS does not claim the Rule clearly and directly involves activities or actions characteristic to the conduct of foreign affairs. It does not, for example, state that the Rule is intended to implement an international agreement between the United States and a sovereign foreign state. Nor can it do so in good faith, as the Rule’s focus is on the administration of asylum adjudications conducted by federal executive agencies among parties subject to and exercising the jurisdiction of those agencies.²⁶ DHS therefore cannot rely on the foreign affairs exception to forgo notice-and-comment rulemaking.

²² 5 U.S.C. § 553(a)(1).

²³ *Cap. Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25, 53 (D.D.C. 2020); *E.B. v. U.S. Dep’t of State*, 583 F. Supp. 3d 58, 65 (D.D.C. 2022).

²⁴ *Id.* at 55.

²⁵ *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010).

²⁶ *See also* Plaintiffs’ Reply Memorandum of Law in Support of Motion for Stay of Effective Date of Administrative Action at 12, *Immigration Equality*, No. 1:26-cv-02921 (D.D.C. Sept. 22, 2026). (“The IFR involves one main legal shift—it removes the regulatory right to an asylum interview before USCIS—and makes collateral changes to implement that shift. That shift applies solely to people who applied

D. DHS Failed to Assess the Impact of the Rule on Family Well-Being

Federal agencies must issue a Family Policymaking Assessment for any rule that may affect family well-being *before* implementing such a rule.²⁷ This assessment must weigh a number of factors, at least four of which are relevant to the Rule, yet were not given any consideration. These factors are whether an agency action (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; or (4) affects disposable income or poverty of families and children. Rule at 47,126-27.

Agencies must provide an adequate rationale for implementing any action that may negatively impact family well-being. Rule at 47,127. However, DHS implausibly states that it has “no data” indicating the Rule has any impact on family well-being and on this basis determines that the Rule “does not negatively affect family well-being and does not have any impact on the autonomy and integrity of the family as an institution.” Rule at 47,127.

This determination is flawed for two reasons. First, DHS *is* in possession of data that would enable it to reasonably ascertain the negative impacts of the Rule on family well-being. Form I-589, Application for Asylum and for Withholding of Removal, requires asylum applicants to disclose the identity, nationality, location, and, if in the United States, current immigration status of their spouse and children, if any. DHS could have examined pending asylum applications to estimate the scale of the impacts on asylum applicants’ spouses and children, should such applicants be summarily placed into removal proceedings as contemplated by the Rule.

As explained further in section V below, the Rule will lead to the increased arrest and detention of asylum applicants pending the conclusion of their removal proceedings and a higher risk of return to persecution. These outcomes will result in the forced separation of mixed-status families, implicating at least the four Family Policymaking Assessment factors listed above. The Rule impacts the stability and safety of the family, particularly in terms of marital commitment, due to the forced separation of spouses.

for asylum from within the United States (not those physically entering or exiting the country), and the direct consequence of that change is to force applicants into immigration court (not to deny them status or remove them).”).

²⁷ Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, § 653(c), 112 Stat. 2681 (1998).

For similar reasons, the Rule also impacts the authority of parents in the education, nurture, and supervision of their children, since parents who are detained or removed are not meaningfully available to exercise their parental authority. Children forced to relocate with removed parents may also experience significant disruptions to their education and other aspects of well-being. In addition, the Rule's effects harm the family's ability to perform its functions, again due to the increased risk of detention, removal, and return to persecution.

Through these mechanisms, the Rule also affects disposable income or poverty of families and children, since detained people cannot work to support their families and are at great risk of impoverishment, and those removed generally find significantly less favorable economic conditions than they did in the United States, independent of any threat of persecution. In the case of mixed status families, U.S. citizen spouses and children forced to relocate with deported family members will suffer impoverishment, compounded by the lack of opportunities and economic mobility in refugee-producing countries. Furthermore, some people who proceed *pro se* in the non-adversarial affirmative asylum process will retain an attorney to face adversarial removal proceedings in immigration court, which may force them to absorb substantial costs, exacerbating economic precarity.

DHS could have examined data in its possession and that to which it has or easily could have access, such as data from the DOJ Executive Office for Immigration Review ("EOIR"), to at least attempt a good-faith assessment of the impact to the families of applicants expected to be detained or removed more precipitously under the Rule. CGRS requests that DHS examine asylum applications pending before USCIS to determine how many individuals with asylum seeking family members could face the impacts to family well-being detailed above and produce the data supporting this determination, as described above.

The second reason that DHS's determination that the Rule does not negatively affect family well-being is flawed is that if DHS had engaged in notice-and-comment rulemaking before promulgating the Rule, commenters would have provided additional relevant information, and DHS could have engaged in a proper analysis of the criteria it is required to consider. Had it done so, DHS would have concluded that the Rule has significant negative impacts on family well-being. Even now, in issuing the Rule, DHS declined to specifically solicit comments on the Rule's impacts on family well-being, unlike its requests regarding other aspects of the Rule. Rule at 47,111-12 and 47,115. As promulgated, DHS fails to provide any rationale, let alone an adequate one, for issuing the Rule despite these harmful impacts.

Because the Rule was promulgated without notice and the opportunity to comment prior to implementation, and because DHS failed to conduct the required Family Policymaking Assessment, the Rule was issued without observance of procedure required by law.

IV. THE RULE IS UNLAWFUL UNDER THE APA BECAUSE IT IS CONTRARY TO LAW

Agency actions found to be not in accordance with law are unlawful and must be set aside.²⁸ The Rule fails to meet the requirements of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”)²⁹ and the Immigration and Nationality Act (“INA”).

A. The Rule Is Not in Accordance with the TVPRA

The TVPRA provides for special permanent protections, including asylum, for at-risk children.³⁰ It amended the INA to ensure that USCIS asylum officers, who were already required by statute to be professionally trained in country conditions, asylum law, and interviewing techniques,³¹ decide the asylum cases of unaccompanied children in the first instance.³² Additionally, regulations in force when the TVPRA was passed (which continue to apply) required asylum officers to receive special training in international human rights law, non-adversarial interviewing techniques, and other relevant national and international refugee laws and principles.³³ The TVPRA also exempts unaccompanied children from two of the INA’s three exceptions to the right to apply for asylum.³⁴ It further provides that the asylum applications of unaccompanied children

shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children’s cases.³⁵

²⁸ 5 U.S.C. § 706(2)(A).

²⁹ Pub. L. 110-457, 122 Stat. 5044 (2008).

³⁰ Pub. L. 110-457, § 235(d) and (e), 122 Stat. at 5080-81 (2008).

³¹ INA § 235(b)(1)(E)(i), 8 U.S.C. § 1225(b)(1)(E)(i).

³² INA § 208(b)(3)(C), 8 U.S.C. § 1158(b)(3)(C).

³³ 8 CFR 208.1(b). *See also* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8487 (Feb. 19, 1999).

³⁴ INA § 208(a)(2)(E), 8 U.S.C. § 1158(a)(2)(E).

³⁵ Pub. L. 110-457, § 235(d)(8), 122 Stat. at 5081 (2008).

The TVPRA also requires DHS personnel who have substantive contact with unaccompanied children to be trained to identify children for whom asylum may be appropriate.³⁶

This statutory scheme indicates that Congress expected unaccompanied children seeking asylum to have their cases decided through a non-adversarial process by an asylum officer specially trained to conduct interviews with asylum applicants. DHS has stated in its training materials that asylum officers are expected to be alert to any possible concerns regarding vulnerability of applicants to trafficking or other forms of coercion by another party present at the interview, showing the importance of the asylum interview as a means of detecting trafficking or other child safety concerns.³⁷

Asylum officers continue to receive specialized training in international human rights and international refugee law; U.S. asylum law; asylum procedures and operations instructions; conditions in asylum applicants' countries of origin; interviewing techniques; cross-cultural communication; interviewing survivors of torture and other severe trauma; children's claims; gender-related claims; asylum case analysis and decision-writing; and quality control, among other topics.³⁸ According to DHS, the training asylum officers receive is extensive and is designed

³⁶ Pub. L. 110-457, § 235(e), 122 Stat. at 5081 (2008).

³⁷ See USCIS, Interviewing – Introduction to the Non-Adversarial Interview Lesson Plan, 17-23 (Dec. 13, 2024), <https://tinyurl.com/22adcfne>.

³⁸ See USCIS, Asylum Division Officer Training Programs, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-division-training-programs> (last visited Sept. 10, 2026) (“All Asylum Officers are required to attend and complete the Asylum Officer Basic Training Course [AOBTC], which is a national training course that is specific to asylum adjudications...The training course includes topics such as international refugee law and the U.S. Asylum Program’s role in world-wide refugee protection, U.S. asylum law and its interpretation by the Board of Immigration Appeals and federal appellate courts, interviewing techniques, researching country of origin information, and decision-making/writing. Separate training sessions address interviewing survivors of torture, identifying possible cases of victims of trafficking, handling cases of children, and handling claims that may be specific to women.”); USCIS, Refugee, Asylum and International Operations (“RAIO”) Directorate Officer Training Manual, <https://tinyurl.com/yjy6p6b7> (last visited Sept. 10, 2026); and Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18142 (Mar. 29, 2022) (“Asylum officers receive extensive training in substantive law and procedure, nonadversarial interview techniques and record development, decision writing, research skills, working with interpreters, and interviewing vulnerable individuals, including children; lesbian, gay, bisexual, transgender, queer, and intersex (‘LGBTQI’) persons; survivors of gender-based violence; and survivors of torture and trauma.”).

to enable them to conduct non-adversarial interviews in a fair and sensitive manner.³⁹ By contrast, IJs do not receive such specialized training on asylum and related issues and are provided only a 12-day training course to learn the full breadth of immigration law and procedural issues IJs must confront.⁴⁰

In line with UNHCR guidance (see section II.C above), DHS has agreed that it is well established that a non-adversarial approach in which the interviewer builds rapport is the most effective interview style for eliciting credible information.⁴¹ In light of the central role an applicant's testimony generally plays in establishing their eligibility for asylum,⁴² Congress recognized that asylum officers are clearly better suited than IJs to deciding the asylum claims of unaccompanied children in the first instance.

Conducting a non-adversarial interview in a trauma-informed, child-appropriate manner is an indispensable part of the process Congress intended to provide unaccompanied children applying for asylum under the TVPRA. Applying the Rule to unaccompanied children is therefore not in accordance with the TVPRA.

B. The Rule Is Not in Accordance with the INA's Guarantee of an Interview or Hearing

In the absence of exceptional circumstances, the initial interview or hearing on an asylum application must commence within 45 days of filing.⁴³ Yet, DHS implausibly reads this clear statutory requirement as a mere aspirational timeframe for an interview or hearing that it claims is entirely within the government's discretion to offer or refuse to offer. Rule at 47,107. This interpretation fails for several reasons.

First, nowhere in the INA does Congress authorize DHS (or DOJ) to forgo interviews or hearings on asylum claims. Even in the context of expedited removal, in which Congress authorized the government to remove certain noncitizens "without further hearing or review," DHS is required to conduct an interview to determine if

³⁹ See, e.g., 87 Fed. Reg. 18078, 18090 and 18142 (Mar. 29, 2022).

⁴⁰ See EOIR, New Immigration Judge Training, <https://drive.google.com/file/d/1UFR-HUj-SU9wHy5d7fQ0qEEcN7KOKA-/view> (last visited Sept. 10, 2026).

⁴¹ See USCIS, Interviewing—Introduction to the Non-Adversarial Interview, p. 14 (Dec. 13, 2024), <https://tinyurl.com/22adcfne>.

⁴² INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii).

⁴³ INA § 208(d)(5)(A)(ii), 8 U.S.C. § 1158(d)(5)(A)(ii).

a person who has expressed an intent to apply for asylum has a credible fear of persecution in their home country.⁴⁴

Second, the asylum statute commands the Attorney General (and through operation of the Homeland Security Act of 2002,⁴⁵ the Secretary of Homeland Security) to establish procedures for considering asylum applications.⁴⁶ It also requires those procedures to provide that “*the* initial interview or hearing on the asylum application” occur within the specified timeframe (emphasis added).⁴⁷ The use of the definite article in this phrase indicates Congress’ intent that the procedures established for considering asylum claims include an interview or hearing. However, to achieve its preferred reading of the INA’s requirements, DHS must insert into the statutory text the words “if offered” to modify “interview or hearing.” Rule at 47,107. No agency is permitted to so alter the laws enacted by Congress.

Third, in 1996, when Congress added the statutory language requiring that the asylum interview or hearing begin within 45 days of filing, it did so with the understanding that procedures established for considering asylum applications since the Refugee Act of 1980 had always included an interview or hearing.⁴⁸ It therefore assumed that the asylum procedures would continue to provide applicants with an interview or hearing, codified that assumption, and specified the general timeframe within which the interview or hearing was to take place. Congress also in tandem instructed DOJ to double the number of asylum officers in the next fiscal year, a recognition of the need to ensure the mandate to complete initial interviews within the specified timeframe could actually be carried out.⁴⁹

Fourth, nothing in the INA permits the agency with initial jurisdiction over an asylum application—DHS for affirmative asylum applicants and DOJ for applicants in standard removal proceedings⁵⁰—to forgo the “initial interview or hearing”

⁴⁴ INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii).

⁴⁵ Pub. L. 107-296, 116 Stat. 2131 (2002).

⁴⁶ INA § 208(d)(1), 8 U.S.C. § 1558(d)(1).

⁴⁷ INA § 208(d)(5)(A)(ii), 8 U.S.C. § 1158(d)(5)(A)(ii).

⁴⁸ See Refugee and Asylum Procedures, 45 Fed. Reg. 37392, 37394 (June 2, 1980) (requiring that asylum applicants “be examined in person by an immigration officer or immigration judge prior to the adjudication of the asylum application”).

⁴⁹ Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, §§ 604, 605, 110 Stat. 3009 (1996).

⁵⁰ 8 CFR 208.2 (a) and (b). See also Homeland Security Act of 2002, Pub. L. 107-296, § 415(b)(3), 116 Stat. 2131, 2196 (2002) and INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A).

provided for in the asylum statute and transfer jurisdiction to the other agency for adjudication. It is implausible that Congress would specify a timeframe within which an initial interview or hearing on asylum application must commence but permit the agency with initial jurisdiction to shirk its duty to conduct the interview or hearing at all.

Fifth, DHS obliquely acknowledges, in light of EOIR policies and Board of Immigration Appeals (“BIA”) decisions permitting the pretermission of asylum applications without a hearing, the possibility that affirmative asylum applicants referred to the immigration court under the Rule could receive neither an interview nor a hearing. Rule at 47,107 n. 22. Such an outcome defies the clearly expressed intent of Congress that the procedure for consideration of asylum applications include an interview or hearing.

Finally, we note that 69 Members of Congress have submitted a letter in opposition to the Rule.⁵¹

For these reasons, the Rule is not in accordance with the INA’s guarantee of an interview or hearing for asylum applicants.

C. The Rule Is Not in Accordance with the INA’s Requirement to Consider the Discretionary Component of Asylum After an Applicant Demonstrates Eligibility for Asylum

The Rule permits an asylum officer to refer an affirmative asylum applicant to the immigration court without conducting an interview if the officer determines the applicant does not merit a grant of asylum as a matter of discretion. It permits the asylum officer to make such a referral without making determinations on any other aspect of asylum eligibility.⁵² However, the wording and structure of the asylum statute preclude DHS from doing so.⁵³ The INA provides that the Secretary of Homeland Security or the Attorney General may grant asylum to a noncitizen who

⁵¹ Letter from Rep. Marcus McGarvey, et al. to Joseph B. Edlow (Aug. 14, 2026), available at <https://mcgarvey.house.gov/imo/media/doc/081526mcgarveyletterasylumprocess.pdf>.

⁵² 8 CFR 208.9(a)(2).

⁵³ See *RAICES*, 174 F.4th at 107-108 (“[T]he INA does not support categorical, *ex ante* denial of asylum with no consideration of what the would-be applicant may face if removed . . . To start, the INA makes clear that the Executive’s discretionary authority to deny asylum must be exercised on an ‘individualized’ basis . . . The individualized approach long adhered to by the Executive Branch in exercising this discretionary authority powerfully reinforces Plaintiffs’ reading of the statute to require asylum decisions based on individual circumstances.”).

has properly applied if the Secretary or Attorney General determines the noncitizen is a refugee.⁵⁴

Nowhere does the statute permit DHS to shirk its duty to determine whether a person who has properly applied for asylum is a refugee. That duty attaches when a person has “applied for asylum in accordance with the requirements and procedures established by the Secretary[.]”⁵⁵ In other words, the government may not exercise its discretion to decide whether to grant asylum to an applicant until it has determined the applicant is a refugee. DHS’s reading of the statute, on the other hand, would allow the agency to functionally foreclose the congressionally-guaranteed right to apply for asylum by determining *a priori* not to grant asylum—with no regard for whether an applicant (or class of applicants) is a refugee.⁵⁶

In support of this interpretation DHS cites its own training materials and two Supreme Court cases. Rule at 47,114 n. 57. The training materials make the assertion repeated in the Rule—that AOs are legally permitted to adjudicate a claim through the negative exercise of discretion without first considering an applicant’s substantive eligibility—as a caveat to the agency’s policy that asylum officers should generally determine statutory eligibility before addressing the exercise of discretion.⁵⁷ They go on to state that eligibility for a particular immigration benefit is, by itself, a strong positive factor to be weighed in the exercise of discretion.⁵⁸ In this respect, the training materials correctly recognize that discretion cannot be properly exercised while studiously ignoring a critical factor to be considered in the discretionary analysis.

However, the materials also cite the Supreme Court cases DHS relies upon in the Rule for the proposition that it is legally permitted to deny an asylum application as a matter of discretion without making a determination on the person’s substantive eligibility.⁵⁹ Both cases, however, are inapposite. First, neither involved the referral of an affirmative asylum case to the immigration court on the basis of discretion in the absence of a substantive eligibility determination.

⁵⁴ INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A).

⁵⁵ INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A).

⁵⁶ INA § 208(a)(1), 8 U.S.C. § 1158(a)(1).

⁵⁷ USCIS, Discretion Lesson Plan, 12 (Jan. 27, 2025),

https://web.archive.org/web/20260812191652/https://www.uscis.gov/sites/default/files/document/form/Discretion_LP_RAIO.pdf.

⁵⁸ *Id.* at 13.

⁵⁹ *INS v. Abudu*, 485 U.S. 94, 105 (1988); *INS v. Bagamasbad*, 429 U.S. 24, 26 (1976).

Second, while one of the cases did involve an asylum claim, its holding focused on the BIA's authority to deny a motion to reopen the proceedings of a person who was provided and specifically declined the opportunity to have a defensive asylum application considered by the immigration court.⁶⁰ That holding should not be extended to people who have already affirmatively applied for asylum in accordance with the requirements and procedures established the Secretary.

The other case DHS cites concerned adjustment of status, not asylum,⁶¹ and therefore did not implicate the international treaties and associated protection obligations the asylum statute was specifically enacted to codify.⁶² The discretionary component of asylum must be interpreted in furtherance of Congress' object in enacting the asylum statute—the protection of refugees. These considerations were absent from the Supreme Court's analysis that DHS cites in support of its flawed, dangerously expansive interpretation of its discretionary authority with respect to asylum.

The Rule is therefore not in accordance with the INA's requirement for the agency with initial jurisdiction over a properly filed asylum application to assess substantive eligibility prior to reaching the discretionary analysis.

V. THE RULE IS UNLAWFUL UNDER THE APA BECAUSE IT IS ARBITRARY AND CAPRICIOUS

A. Introduction

An agency rule is arbitrary and capricious if the agency has entirely failed to consider an important aspect of the problem.⁶³ An agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives, although this duty extends only to significant and viable alternatives.⁶⁴ Furthermore, an agency must provide a reasoned explanation for its action; and an agency enacting a policy change must acknowledge the change, must demonstrate the change is permissible under the relevant statute

⁶⁰ *INS v. Abudu*, 485 U.S. at 111.

⁶¹ *INS v. Bagamasbad*, 429 U.S. at 24.

⁶² *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

⁶³ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *See also* *Texas v. United States Environmental Protection Agency*, 132 F.4th 808 (5th Cir. 2025) (internal citations omitted), *withdrawn by* *Texas v. United States EPA*, 2026 WL 687198 (Mar. 9, 2026), *substituted, reinstated by, in part, and remanded by* *Texas v. United States EPA*, 026 WL 710552 (Mar. 13, 2026).

⁶⁴ *See City of Brookings Mun. Telephone Co. v. F.C.C.*, 822 F.2d 1153, 1169 (D.C. Cir. 1987).

and that there are good reasons for it, and, when the prior policy has engendered serious reliance interests that must be taken into account, must provide a more detailed justification for the change than what would suffice for a new policy.⁶⁵

The Rule must be set aside under the APA as arbitrary and capricious because DHS ignored serious reliance interests. In each instance of doing so as detailed below, the agency increased the likelihood that refugees will be unlawfully returned to persecution. This, along with the increased likelihood of arrest and detention of people referred for removal proceedings, will result in the separation of families and loss of caregivers.

The Rule is also arbitrary and capricious because DHS failed to consider responsible alternatives to the Rule. Furthermore, it failed to articulate satisfactory explanations for promulgating the Rule, failed to demonstrate there are good reasons for it, and failed to provide sufficiently detailed justifications for the Rule's changes to existing policies.

B. DHS Has Ignored Serious Reliance Interests

1. The Rule Does Not Adequately Account for the Reliance Interests of Refugees Eligible to Apply for Affirmative Asylum in Receiving a Non-Adversarial Interview from an Asylum Officer

Any noncitizen who is physically present in the United States and is not in removal proceedings may apply for "affirmative" asylum through USCIS.⁶⁶ A person who properly applies may be granted asylum if USCIS determines they are a refugee.⁶⁷ An asylum applicant has the burden of proof to demonstrate they meet the legal definition of "refugee."⁶⁸ Congress has also specifically provided that an asylum applicant's credible testimony alone—without corroboration—may be sufficient to sustain the applicant's burden of proof.⁶⁹ In fact, an applicant's credible testimony is the *only* form of evidence Congress has determined may do so.

⁶⁵ FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

⁶⁶ INA § 208(a)(1), 8 U.S.C. § 1158(a)(1); 8 CFR 208.2(a)(1). This right to apply for asylum is subject to three exceptions. INA § 208(a)(2), 8 U.S.C. § 1158(a)(2).

⁶⁷ INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A). This authority is subject to six exceptions known as "mandatory bars." INA § 208(b)(2), 8 U.S.C. § 1158(b)(2).

⁶⁸ INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).

⁶⁹ INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii).

DHS has correctly stated that it is well-established that a non-adversarial approach in which the interviewer builds rapport is the most effective interview style for eliciting credible information.⁷⁰ Refugees who are eligible to apply for affirmative asylum have a critical interest in ensuring that the record reflects all relevant credible information about their asylum claims, so that they are properly recognized as refugees and not returned to the threat of persecution. Given the centrality Congress assigned to an applicant's credible testimony in meeting their burden of proof, refugees have critical interests in maintaining access to the process that is the most effective means of eliciting credible testimony. A non-adversarial interview is the only opportunity an asylum applicant before USCIS has to present the evidence typically accorded the most probative weight in the adjudication of any asylum claim: the applicant's own testimony.

DHS training materials emphasize that evaluating the credibility of an applicant's oral testimony is fundamental to the evaluation of eligibility and, in many cases, is the determining factor.⁷¹ If credible testimony is "fundamental to" or "the determining factor" for asylum eligibility, then depriving refugees of the opportunity to present their claims in the setting proven to be most effective for eliciting such testimony substantially burdens them by diminishing the likelihood they will be recognized as refugees at all, since the adversarial setting of the immigration court is less effective at eliciting credible information. Further, given the possibility of pretermission by the IJ, even this inferior opportunity for eliciting credible information through testimony may be foreclosed.

Yet, DHS blithely dismisses potential concerns about affirmative asylum applicants being summarily deprived of the opportunity to present the only form of evidence Congress has specifically provided can be sufficient to meet the burden of proof. It diminishes refugees' significant reliance interests in access to a non-adversarial interview with a trained asylum officer as mere "personal interests" related to an applicant's level of comfort in sharing sensitive elements of a claim. Rule at 47,116. As explained above, the interests are not simply personal ones related to an applicant's comfort: they are significant legal interests with life-or-death implications.

⁷⁰ See USCIS, Interviewing—Introduction to the Non-Adversarial Interview, p. 14 (Dec. 13, 2024), <https://tinyurl.com/22adcfne>.

⁷¹ USCIS, RAIO Directorate Officer Training Manual at 105.

In a complete *non-sequitur* purporting to recognize “potential reliance interests,” DHS references the expansive bases on which the Rule may be applied and also the categories of people to which it legally cannot be applied. Rule at 47,117. DHS then mentions as mitigating measures the ability to supplement the asylum application with additional evidence and the possibility that USCIS may in its discretion issue Requests for Evidence. Yet, neither of these measures would afford applicants the opportunity to submit the only form of evidence sufficient on its own to meet their burden of proof: their testimony. DHS makes no attempt to account for this critical shortcoming and summarily references its belief that the Rule will reduce administrative burdens while enhancing efficiency, national security, and public safety. Rule at 47,117. The lack of detail in DHS’s justification for its change in policy in light of refugees’ serious reliance interests on the agency’s longstanding policy to provide affirmative asylum applicants a non-adversarial interview fails to meet the APA’s standards.

Additionally, many refugees are survivors of torture and other severe trauma, either because of the events giving rise to their claims to asylum or harm suffered during flight en route to the United States. According to DHS training materials, being questioned in a particular manner may trigger symptoms of Post-Traumatic Stress Disorder because this can remind the survivor of the individuals who harmed them.⁷² These symptoms impact the applicant’s ability to present their claim and may include avoidance discussing particular events, difficulty remembering events, and use of defensive techniques such as denial, minimization, and dissociation.⁷³ Asylum officers receive extensive training in interviewing survivors of torture and other severe trauma.

In light of these considerations, it is clear that a non-adversarial interview by a specially trained asylum officer, rather than an adversarial immigration court hearing, is the most effective way to elicit reliable information concerning a survivor’s asylum claim. Refugees who are survivors of torture or other severe trauma therefore have particularly serious reliance interests in maintaining access to a non-adversarial interview in the affirmative asylum process. The Rule entirely ignores these reliance interests, in violation of the APA.

⁷² USCIS, Interviewing Survivors of Torture and Other Severe Trauma Lesson Plan, 22 (Dec. 13, 2024), [https://www.uscis.gov/sites/default/files/document/foia/Interviewing -
_Survivors_of_Torture_LP_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Survivors_of_Torture_LP_RAIO.pdf).

⁷³ *Id.* at 22-23.

2. The Rule Ignores the Reliance Interests of People Without Attorneys Who are Eligible to Apply for Affirmative Asylum in Receiving a Non-Adversarial Interview from an Asylum Officer

The Rule also ignores that *pro se* applicants will have particular difficulty preparing asylum applications in sufficient detail to survive summary referral following a paper-only review. This difficulty is due in part to the inherent complexity of asylum law⁷⁴ and the high likelihood that an unrepresented applicant “may not possess the legal knowledge to fully appreciate which facts are relevant.”⁷⁵ Furthermore, the 12-page Form I-589 itself presents its own complications. In addition to its four pages of biographical questions, the Form I-589 includes an additional five pages of questions requiring detailed narrative responses regarding everything from past and feared future persecution and torture, to government action or inaction in the applicant’s country of origin, potential bars to asylum, and the underlying legal theories of the claim.⁷⁶

For *pro se* applicants, trying to understand and respond to narrative questions relating to the elements of asylum is difficult enough. Asking them to provide in the application the level of relevant detail that would otherwise be elicited by a professionally trained asylum officer over the course of a potentially hours-long non-adversarial interview will make it next to impossible for these applicants to qualify for asylum before USCIS. DHS entirely fails to account for the serious reliance interests of people who are eligible to apply for asylum affirmatively but lack legal representation in maintaining access to the non-adversarial interview process.

3. The Rule Ignores the Reliance Interests of Non-English Speakers Eligible to Apply for Affirmative Asylum in Receiving a Non-Adversarial Interview from an Asylum Officer

The Rule completely ignores the barriers non-English speakers will have preparing asylum applications in sufficient detail to survive summary referral following a

⁷⁴ Asylum is an area of law that courts have called “labyrinthine,” “second only to the Internal Revenue Code in complexity,” and “a maze of hyper-technical statutes and regulations that engender . . . confusion for the Government and petitioners alike.” See *Filja v. Gonzales*, 447 F.3d 241, 253 (3d Cir. 2006); *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (internal quotation marks omitted); *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003).

⁷⁵ *Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000).

⁷⁶ See USCIS, Form I-589, Application for Asylum and for Withholding of Removal (July 28, 2026), <https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf>.

paper-only review. In fact, the majority of people applying for asylum communicate through an interpreter because they do not communicate in English. Being sufficiently literate in English, able to understand complex English-language instructions and questions, and capable of writing out a complicated narrative in English is even less likely for asylum applicants.

Nowhere in the Rule does DHS acknowledge that people who do not understand English have an interest in maintaining access to a non-adversarial asylum interview process that includes safeguards to enable meaningful language access as a matter of fundamental fairness. These safeguards include a requirement that applicants provide a competent interpreter of their choosing for the interview before the asylum officer.⁷⁷ This practice enables applicants to choose an interpreter likely to be fluent in their particular dialect, familiar with the context of their country of origin, and with whom they are able to share highly sensitive information of the most personal nature.

Going through the process of providing, through a translator, on the asylum application the same level of relevant detail that would be elicited (again, by a professionally trained asylum officer) during a lengthy non-adversarial interview through an interpreter, will represent an insurmountable barrier to many non-English speakers. Many may turn to artificial intelligence for assistance and risk unknowingly submitting inaccurate or incomplete information, with all the potential attendant negative consequences. DHS entirely fails to acknowledge the serious reliance interests of non-English speakers in maintaining access to a non-adversarial interview before an asylum officer, let alone provide a sufficiently detailed explanation for its change in policy.

4. The Rule Ignores the Reliance Interests of Survivors of Gender-Based Violence Eligible to Apply for Affirmative Asylum in Receiving a Non-Adversarial Interview from an Asylum Officer

The Rule ignores the reliance interests of survivors of gender-based violence in presenting their asylum claims in a non-adversarial interview before USCIS rather than in an adversarial immigration court setting. DHS training materials state that cultural differences and norms governing women's behavior, as well as the effects of trauma, may present special difficulties in evaluating credibility of female asylum

⁷⁷ 8 CFR 208.9(g)(1).

applicants.⁷⁸ These materials also emphasize to asylum officers the importance of creating an environment that allows applicants whose claims include gender-related issues to freely discuss the elements and details of their claims.⁷⁹ They discuss factors that may inhibit the ability of survivors of gender-based violence to testify freely and provide officers guidance on interviewing techniques designed to mitigate those factors and help ensure survivors are able to fully present the relevant facts of their asylum claims.⁸⁰ The extensive specialized training asylum officers receive in interviewing applicants with gender-related claims and lesbian, gay, bisexual, transgender, and intersex (LGBTI+) claims⁸¹ reflects the government's proper recognition that a non-adversarial interview is the most effective means of eliciting reliable information from survivors of gender-based violence. Yet, the Rule completely ignores the serious reliance interests refugee survivors have in maintaining access to a non-adversarial interview before an asylum officer, providing no explanation for its change in policy with respect to these applicants.

5. The Rule Ignores the Reliance Interests of Children Eligible to Apply for Affirmative Asylum in Receiving a Non-Adversarial Interview from an Asylum Officer

As detailed above in section IV.A, conducting a non-adversarial interview in a trauma-informed, child-appropriate manner is an indispensable part of the process Congress intended to provide unaccompanied children applying for asylum under the TVPRA. It has also been part of the continuous practice of USCIS in assuming initial jurisdiction over these applications.

DHS training materials also recognize that it is in a child applicant's best interests to be interviewed by an official who has specialized training in children's claims, which USCIS provides to its asylum officers.⁸² These materials note that child applicants may be less forthcoming than adults and may hesitate to talk about past experiences in order not to relive their trauma. The materials further detail procedures USCIS has designed with children's behavior and cognitive ability in

⁷⁸ USCIS, Gender-Related Claims Lesson Plan, 25 (May 16, 2013), <https://www.aila.org/library/uscis-guidance-raio-officers-gender-related-claims>.

⁷⁹ *Id.*

⁸⁰ *Id.* at 25-28.

⁸¹ See USCIS, RAIO Directorate Officer Training Manual at 318-388.

⁸² USCIS, Children's Claims Lesson Plan, 25 (Dec. 6, 2024), https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf.

mind to help officers interact more meaningfully with children during an interview.⁸³

As such, child asylum applicants, particularly unaccompanied children, have serious reliance interests in maintaining access to a non-adversarial interview before an asylum officer. Yet, the Rule completely ignores these reliance interests, and DHS offers no explanation for its change in policy with respect to child asylum applicants.

6. The Rule Ignores the Liberty Interests of Asylum Applicants Whom DHS Will Detain After Summary Referral to EOIR

A person who has been placed into removal proceedings before the immigration court is subject to arrest and detention pending a decision on removal.⁸⁴ The Rule therefore increases the likelihood of arrest and detention for affirmative asylum applicants who would have been granted asylum by USCIS if given the opportunity to provide testimony in a non-adversarial interview before an asylum officer but will instead be referred to the immigration court without an interview. See Rule at 47,103 (“USCIS also acknowledges the possibility that some applications may be referred under this rule that USCIS could have granted.”).

This concern is particularly salient in light of USCIS’s practice of facilitating arrests by U.S. Immigration and Customs Enforcement at asylum field offices. While DHS acknowledges that affirmative applicants to whom USCIS could have granted asylum but instead refers to the immigration court could experience “increased wait times and slower case resolution,” Rule at 47,104, affirmative asylum applicants also have serious reliance interests in being free from a forced deprivation of liberty as they pursue their cases to resolution. The Rule ignores these reliance interests, in violation of the APA. DHS also completely fails to acknowledge or explain its change in policy with respect to affirmative asylum applicants who are more likely to be arrested and detained through the application of the Rule.

C. DHS Failed to Consider Responsible Alternatives

According to DHS, the purpose of the Rule is to reduce the affirmative asylum backlog, improve efficiency of operations, safeguard national security and public safety, and ensure consistency with agency priorities. Rule at 47,102. An agency has

⁸³ USCIS, Children’s Claims Lesson Plan at 26 ff.

⁸⁴ INA § 236(a), 8 U.S.C. § 1226(a).

a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of significant and viable alternatives.⁸⁵ DHS failed to meaningfully consider responsible, less disruptive alternatives to achieve the Rule's stated goals, in violation of the APA.

1. DHS Failed to Consider Granting Affirmative Asylum Applications Without an Interview

DHS could have proposed measures to grant affirmative asylum applications without an interview. Doing so would help achieve the agency's goals of backlog reduction and increased efficiency. While credible testimony alone may be sufficient to meet an asylum applicant's burden of proof, non-testimonial evidence offered in support of an asylum claim may also be sufficient—without credible testimony—to meet an applicant's burden of proof.⁸⁶ Authorizing asylum officers to grant asylum to applicants who meet their burden of proof with the non-testimonial evidence submitted in support of their asylum applications would help accomplish DHS's stated goals without the harmful effects of the Rule as promulgated. Yet, there is no indication that DHS considered this alternative, and the Rule provides no explanation for rejecting it.

2. DHS Failed to Consider Official Recognition of Patterns or Practices of Persecution in Refugee-Producing Countries

An asylum applicant need not prove they would be singled out for persecution if there is a pattern or practice in the applicant's country of origin of persecution of a group of persons similarly situated to the applicant on account of a protected ground.⁸⁷ DHS could have considered leveraging its substantial country of origin information resources to identify such patterns or practices of persecution in refugee-producing countries. This would dispense with the need for asylum officers to elicit testimony about the likelihood of persecution on account of a protected ground, where applicants can prove their identity, nationality, and inclusion in the group being targeted in the pattern or practice of persecution. Doing so would save substantial interview resources and would also facilitate USCIS's ability to grant

⁸⁵ See *City of Brookings Mun. Telephone Co. v. F.C.C.*, 822 F.2d 1153, 1169 (D.C. Cir. 1987).

⁸⁶ See *Ilunga v. Holder*, 777 F.3d 199, 213 (4th Cir. 2015). See also *Matter of J-R-R-A-*, 26 I&N Dec. 609, 615 (BIA 2015).

⁸⁷ 8 CFR 208.13(b)(2)(iii).

asylum without interviews, as proposed above. Yet, there is no indication that DHS considered this alternative, and the Rule provides no explanation for rejecting it.

3. DHS Failed to Consider Streamlining Measures Modeled on USCIS's Successful Processing of OAW Asylum Claims

DHS could have learned from the successful measures USCIS implemented to efficiently process the asylum applications of Afghans paroled into the United States under Operation Allies Welcome (“OAW”) in response to the Afghanistan Supplemental Appropriations Act of 2022⁸⁸ and a 2023 settlement agreement.⁸⁹ These processes included the systemic use of objective, professionally researched country conditions information to identify widespread patterns and practices of persecution⁹⁰ in Afghanistan that would generally give rise to asylum eligibility for individuals associated with the targets of the persecution—especially those at risk because of their affiliation with the United States. For example, Afghan women, in particular, face well-documented threats of severe gender-based violence, along with a host of formal and informal economic and legal restrictions so severe as to amount to a near-complete exclusion from public life. They are in serious danger of religious persecution, as well as being targets for reprisal due to their roles as lawyers, judges, civil servants, journalists, and civil society actors under the prior government. In addition to country conditions information, streamlining adjudication tools also included providing asylum officers with examples of factual and legal determinations specific to Afghans.⁹¹ These tools enabled asylum officers to focus their resources on thorough background, identity, and security vetting, rather than expending needless time hunting for duplicative evidence of the need for refugee protection.

To meet its goals of reducing the backlog, enhancing efficiency, and safeguarding national security, DHS could have expanded these innovations to other populations of asylum applicants with a high likelihood of being recognized as refugees under a proper application of the law. The scaling of such efficiency measures would also

⁸⁸ Pub. L. 117-43, § 2502(c), 135 Stat. 344 (2021) (generally requiring USCIS to interview certain Afghan asylum applicants within 45 days of receiving the application and adjudicate their applications within 150 days).

⁸⁹ Ahmed v. U.S. Dept. of Homeland Security, No. 4:23-cv-01892-JST (N.D. Cal. Sept. 11, 2023).

⁹⁰ See 8 C.F.R. 208.13(b)(2)(iii).

⁹¹ See DHS Office of Inspector General, “USCIS Has Generally Met Statutory Requirements to Adjudicate Asylum Applications from Paroled Afghan Evacuees,” OIG-23-40 (Aug. 18, 2023), <https://www.oig.dhs.gov/sites/default/files/assets/2023-08/OIG-23-40-Aug23.pdf>.

help to ensure those with clear protection needs do not face unnecessary delay in having their status as refugees officially recognized. Yet, there is no indication that DHS considered this alternative, and the Rule provides no explanation for rejecting it.

4. DHS Failed to Consider Redesignating and Extending TPS for People from Refugee-Producing Countries

Hundreds of thousands of people from refugee-producing countries previously protected under Temporary Protected Status (“TPS”) designations are losing this protection, along with their lawful status, due to DHS’s determination to terminate TPS en masse, regardless of the actual conditions in the affected countries.⁹² Many of these people will need to seek protection by applying for asylum with USCIS, resulting in an influx of affirmative applications that may not have been filed absent the TPS terminations. This entirely predictable exacerbation of USCIS’s asylum backlog could be avoided by redesignating and extending TPS, instead of terminating it. Yet, there is no indication that DHS considered this alternative, and the Rule provides no explanation for rejecting it.

5. DHS Failed to Consider Using Revenue from the New Asylum Filing Fee and Annual Asylum Fee to Increase Resources for Affirmative Asylum Backlog Reduction

Just three months before issuing the Rule, DHS promulgated an interim final rule implementing statutorily required fees, including an asylum application fee and annual asylum fee.⁹³ USCIS could have used that revenue to hire and train additional, well-qualified asylum officers to help reduce the backlog while ensuring full and fair consideration of claims. Yet, there is no indication that DHS considered this alternative, and the Rule provides no explanation for rejecting it.

Because DHS ignored serious reliance interests and failed to consider responsible alternatives, the Rule is arbitrary and capricious under the APA.

⁹² See National Immigration Forum, TPS Fact Sheet (Sept. 10, 2026), <https://forumtogether.org/wp-content/uploads/2026/09/Temporary-Protected-Status-Fact-Sheet-September-10-2026.pdf>.

⁹³ USCIS Immigration Fees and Related Procedures Required by H.R.1 Reconciliation Bill, 91 Fed. Reg. 22,952 (Apr. 29, 2026).

VI. CONCLUSION

For all of these reasons, DHS should rescind the Rule in its entirety. The Rule is contrary to international law; was issued without observance of procedure required by law; is not in accordance with law; and is arbitrary and capricious. It will cause predictable, major harm to particularly vulnerable asylum seekers such as children and survivors of gender-based violence—all due to DHS's desire to carry out mass deportation no matter the cost.

Thank you for the opportunity to submit comments on the Rule. Should you have any questions, please contact Matthew Joseph at josephmatt@uclawsf.edu.

Sincerely,

A handwritten signature in black ink, appearing to read 'Matthew Joseph', with a stylized, looping flourish at the end.

Matthew Joseph
Senior Policy Counsel