Center for Gender & Refugee Studies

June 12, 2024

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Daniel Delgado
Director for Immigration Policy
Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security

Re: *Application of Certain Mandatory Bars in Fear Screenings,* 89 Fed. Reg. 41347 (May 13, 2024), DHS Docket No. USCIS-2024-0005

Dear Mr. Delgado:

The Center for Gender & Refugee Studies (CGRS) submits this comment in response to DHS Docket No. USCIS-2024-0005 *Application of Certain Mandatory Bars in Fear Screenings* (May 13, 2024) (hereinafter "Proposed Rule" or "Rule"). We include the following outline to guide your review.

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I. EXPERTISE OF THE CENTER FOR GENDER & REFUGEE STUDIES

CGRS was founded in 1999 by Professor Karen Musalo[1] following her groundbreaking legal victory in *Matter of Kasinga*[2] to meet the needs of 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 for gender-based, as well as other bases for asylum, 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+, children's, and women's rights

[1] Bank of America Foundation Chair in International Law; Professor & Director, Center for Gender & Refugee Studies, University of California College of the Law, San Francisco.

[2] 21 I&N Dec. 357 (BIA 1996).

[3] *See, e.g.*, *Immigrant Def. Law Ctr. v. Mayorkas*, No. CV209893JGBSHKX, 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); *Huisha-Huisha v. Mayorkas*, 642 F. Supp. 3d 1 (D.D.C. Nov. 15, 2022), cert. and stay granted sub nom. *Arizona v. Mayorkas*, 143 S. Ct. 478, 214 L. Ed. 2d 312 (2022), and vacated, No. 22-5325, 2023 WL 5921335 (D.C. Cir. Sept. 7, 2023) (vacating and setting aside Title 42 policy as arbitrary and capricious); *Al Otro Lado v. Mayorkas*, 619 F. Supp. 3d 1029 (S.D. Cal. Aug. 5, 2022) (declaring unlawful Defendants' refusal to provide inspection or asylum processing to noncitizens who have not been admitted or paroled and who are in the process of arriving in the United States at Class A ports of entry), appeal docketed, No. 22-55988 (9th Cir. Oct. 25, 2022); *Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966 (N.D. Cal. 2021) (preliminarily enjoining the Global Asylum rule); *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), vacated and remanded sub nom. *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842 (2021), and vacated as moot sub nom.; *Innovation Law Lab v. Mayorkas*, 5 F.4th 1099 (9th Cir. 2021); *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020); *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. July 2, 2018); *U.T. v. Barr*, 1:20-cv-00116-EGS (D.D.C.); *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021); *Matter of A-C-A-A-*, 28 I&N Dec. 351 (A.G. 2021); *East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023), appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024); and *Al Otro Lado v. Mayorkas,* No. 3:23-cv-01367-AGS-BLM (S.D. Cal., Oct. 13, 2023), appeal docketed, No. 23-3396 (9th Cir. Nov. 7, 2023).

networks.[4] Since our founding, we have also engaged in international human rights work 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.[5]

We have particular expertise in the subject matter of this Proposed Rule. Professor Musalo was co-author of the first study on the implementation of expedited removal, as well as several follow-up reports.[6] The co-drafter of this comment, Kate Jastram, was one of three experts appointed by the United States Commission on International Religious Freedom for its Congressionally-authorized report on asylum seekers in expedited removal.[7]

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 asylum claims of those fleeing persecution and torture. Our goal is to create a U.S. framework of law and policy that respects the rights of refugees and aligns with international law. It is in furtherance of our mission that we submit this comment.

II. THE COMMENT PERIOD OF 30 DAYS IS INADEQUATE GIVEN THE IMPORTANCE OF THE RULE AND THE PROFOUND CHANGES IT MAKES TO ASYLUM LAW AND PROCEDURE

Before turning to the substance of the Proposed Rule, we register our strong objection that, due to the failure of the Department to allow the usual period for comments, we have had insufficient time to analyze its provisions fully, to engage in meaningful research, and to consult with other stakeholders including the United Nations High Commissioner for

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[4] *See, e.g.*, the Welcome With Dignity campaign.

[5] *See, e.g.*, Center for Gender & Refugee Studies (CGRS), *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); *Honduras: Climate Change, Human Rights Violations, and Forced Displacement* (2023); *Far from Safety: Dangers and Limits to Protection for Asylum Seekers Transiting Through Latin America* (2023).

[6] Karen Musalo *et al*., "Report on the First Year of Implementation of Expedited Removal," *Markkula Center for Applied Ethics* (1998). *See also,* Musalo *et al*., "Report on the Second Year of Implementation of Expedited Removal," *Center for Human Rights and International Justice* (May 1999); Musalo *et al*., "Report on the First Three Years of Expedited Removal" (2000); Musalo *et al.*, "Evaluation of the General Accounting Office's Second Report on Expedited Removal," *Center for Human Rights and International Justice* (Oct. 2000).

[7] U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* (2005).

Refugees (UNHCR), the American Federation of Government Employees (AFGE) Local 1924, groups working to assist asylum seekers on both sides of the U.S.–Mexico border, and refugee-led organizations.

As explained more fully below, the Department did not justify allowing only a limited time for comment; the rule-making process did not follow Executive Order 14010's mandate to consult with affected organizations on restoring and enhancing asylum processing at the border;[8] and our organization did not have sufficient time to prepare this comment.

A. The Department Failed to Issue the Notice of Proposed Rulemaking in a Timely Manner

The Department states that it provided only a 30-day comment period because it seeks to finalize the rule "as quickly as possible." Rule 41358. However, it gives no reason for a shortened comment period beyond a desire to expand operational flexibility. Rule 41358. The administration has been in office for over three years and has engaged in substantial notice-and-comment rulemaking on various aspects of asylum and border procedures yet offers no explanation of why it could not have proposed this Rule earlier. The Department's asserted "interest" in rapidly reversing long-established procedures merely for the sake of flexibility does not outweigh the public interest in commenting on such a change or asylum seekers' interest in a fair process. It is in no way a justification for such an abbreviated comment period.

[8] Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, Sec. 4(i) (Feb. 2, 2021) (hereinafter Executive Order 14010).

B. The Department Appears Not to Have Engaged in Consultation and Planning Directed by Executive Order 14010 Prior to Publishing the Notice of Proposed Rulemaking, and the Truncated Comment Period Indicates that the Department Will Not Now Engage in Such Consultation and Planning

In Executive Order 14010, the president mandated that federal departments "shall promptly begin consultation and planning with international and non-governmental organizations to develop policies and procedures for the safe and orderly processing of asylum claims at United States land borders."[9]

CGRS is not aware of any such consultation or planning at any point in the more than three years between February 2021, when Executive Order 14010 was issued, and May 2024, when the Proposed Rule was published.

The Departments' failure to follow the mandate of Executive Order 14010 is particularly troublesome since many of the most knowledgeable stakeholders have made their desire to assist crystal clear. We note in particular that UNHCR has repeatedly emphasized that it:

> remain[s] committed to supporting the United States in much-needed broader reform efforts, including to improve the fairness, quality, and efficiency of its border management and asylum systems.[10]

The High Commissioner for Refugees himself, in a June 2024 speech at Georgetown University, elaborated that:

> We have much to offer when it comes to building national asylum systems that are both fair and efficient. It is no secret that we have serious concerns about restrictive measures applied – and seemingly and worryingly under consideration – by the United States and also by other governments. There are principled and practical ways to eliminate inefficiencies and address backlogs through innovative tools such as differentiated case processing and accelerated procedures. Asylum applications do not need to be assessed in chronological order, which often leaves people waiting for years to have their case heard. Instead, UNHCR can help states develop

[9] *Id.*

[10] United Nations High Commissioner for Refugees (UNHCR), "UNHCR expresses concern over new asylum restrictions in the United States" (June 4, 2024), *attached*.

> tailored procedures and better targeting of resources. The result is less pressure on national systems which also means less backlogs.[11]

Similarly, the president of AFGE Local 1924 has indicated that asylum officers have not had a role in crafting this Rule, observing that:

> [W]hile the impact cannot be fully assessed until a final rule is issued and implementation guidance is distributed, his members are already questioning how realistic it is to take on more responsibilities during initial screenings.[12]

Because the Department is prioritizing the prompt issuance of the final rule, we assume that it will not at this point engage in consultation and planning as directed by Executive Order 14010. It should explain why not.

For all these reasons, as well as the additional reasons specific to our Center set forth below, CGRS joined 77 other organizations in seeking an extension of time to comment on the Proposed Rule.[13] To date, we have not received a response to this request, which we incorporate in this comment and attach.

C. CGRS Has Not Had Sufficient Time to Formulate a Comment Fully Responsive to the Scope of the Proposed Rule

In addition to the reasons for seeking a minimum of 60 days to comment as outlined in the organizational sign-on letter referenced above, we note two additional reasons that make it impossible for our Center to comment as comprehensively as we would like to in this short period of time: our capacity limitations, and the scope and complexity of the Rule as well as its interaction with other sudden recent changes to asylum procedures.

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[11] UNHCR, "In Pursuit of the Possible: Addressing population flows in the Americas," Remarks by Filippo Grandi, United Nations High Commissioner for Refugees at Georgetown University, Washington, DC (June 3, 2024), *attached*.

[12] Eric Katz, "Is Biden's new immigration rule doomed without more staffing?," *Government Executive* (May 13, 2024), *attached*.

[13] CGRS, Request to Provide a Minimum of 60 Days for Public Comment in Response to the Department of Homeland Security (DHS) Notice of Proposed Rulemaking (NPRM): Application of Certain Mandatory Bars in Fear Screenings (May 21, 2024), *attached*.

1. Our Center has limited capacity to respond to the Proposed Rule

CGRS is based at the University of California College of the Law, San Francisco. Like many law school centers, and most of the civil society organizations that might want to comment on this Rule, we must raise nearly all of our own funding from outside sources. Accordingly, we have only a limited number of staff who regularly work at or beyond capacity. The principal drafters of this comment have had numerous other responsibilities during the brief comment period.

In addition, as a key founding member of the #WelcomeWithDignity campaign, we have devoted many hours to increasing general public education and awareness of the Proposed Rule, by working on our own or in coalition with other organizations to write and place op-ed pieces,[14] organize press conferences,[15] craft messaging guidance, set up a click-to-comment portal,[16] serve as a resource for interested members of Congress, and submit a request for additional time to comment. All of these necessary activities were doubled during the comment period by the presidential proclamation[17] and publication of the Interim Final Rule on Securing the Border,[18] also with a truncated 30-day comment period. All have taken time away from engaging in the kind of extensive research and analysis required for commenting on this Proposed Rule. We are thus unable to provide the kind of comprehensive and detailed comments on either this Proposed Rule or the Interim Final Rule that they require.

2. The scope and complexity of the Rule, and its interaction with the Circumvention of Lawful Pathways rule, as well as contemporaneously announced policy changes, and the subsequent Interim Final Rule on Securing the Border, require more than 30 days to address

Contrary to the Department's assertion that the Rule "relates to a discrete topic," Rule 41358, it actually covers five different existing mandatory bars, Rule 41355. In addition, it includes a potentially vast expansion to the interpretation of one of the bars, implementation of which is currently delayed until Dec. 31, 2024. Rule 41358. As we discuss below, each one of these bars has its own legal definition and factual elements. Some are

[14] Karen Musalo, "Why Biden's new border plan is a terrible idea," *Los Angeles Times* (June 6, 2024).
[15] Led by Congressman Greg Casar (June 4, 2024).
[16] *See Add Your Comment: Don't Make the Asylum Process More Complicated*.
[17] The White House, *A Proclamation on Securing the Border* (June 4, 2024).
[18] *Securing the Border,* 89 FR 48710 (June 7, 2024).

based on language in the Refugee Protocol so that international guidance may be available[19] and others are entirely a creation of U.S. law. Each one of the five existing bars has been subject to litigation, and not all elements of the five bars are clear or easy to interpret.

On top of this analysis, it is also necessary to investigate the various intersections of this Proposed Rule with other developments: the May 2023 Circumvention of Lawful Pathways rule; the contemporaneous announcements on May 9, 2024 of revised guidance directing asylum officers to consider internal relocation when assessing claims of future persecution in all credible fear cases[20] and of a new policy and guidelines governing the use of classified information in immigration proceedings;[21] and the June 7, 2024 Interim Final Rule on Securing the Border.

An additional source of difficulty and delay is the Department's failure to make the revised internal relocation guidance available to the public. In order to assess this change in procedure, we were forced to take additional time to file a Freedom of Information Act request for the guidance.[22]

We can confidently state that fully assessing all of these rapidly changing legal and policy pronouncements requires more than 30 days, particularly now that two comment periods are running concurrently.

III. THE PROPOSED RULE MUST COMPLY WITH U.S. INTERNATIONAL LEGAL OBLIGATIONS NOT TO RETURN PEOPLE TO PERSECUTION OR TORTURE

In any analysis of a Proposed Rule, we begin with the relevant international legal obligations with which the United States must comply. These are found in the 1967 Protocol Relating to the Status of Refugees (Refugee Protocol)[23] and the 1984 Convention

[19] *See, e.g.,* UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (Sept. 4, 2003) (hereinafter UNHCR *Exclusion Guidelines*), *attached*.
[20] Department of Homeland Security (DHS), "DHS Announces Proposed Rule and Other Measures to Enhance Security, Streamline Processing" (May 9, 2024).
[21] DHS, DHS Policy and Guidelines for the Use of Classified Information in Immigration Proceedings (May 9, 2024).
[22] CGRS, "CGRS Seeks Transparency on Asylum Screening Guidance" (May 24, 2024), *attached*.
[23] 606 U.N.T.S. 267 (entry into force 4 Oct. 1967).

Against Torture (CAT).[24] 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 (Convention).[25] The United States ratified CAT in 1994 with no relevant reservations, declarations, or understandings. These treaties have been implemented in domestic law in the Refugee Act of 1980 and the Foreign Affairs Reform and Restructuring Act of 1998, other subsequent legislation, and accompanying regulations.

Under the Refugee Protocol, the United States is prohibited from returning refugees to territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.[26] The corresponding provision in U.S. law incorporates the treaty obligation, stating that the Attorney General "may not remove" a person to a country if the Attorney General determines that the person's "life or freedom would be threatened in that country because of the [person's] race, religion, nationality, membership in a particular social group, or political opinion."[27] Additionally, U.S. law incorporates nearly verbatim the definition of a refugee found in the Refugee Protocol, and provides that a person meeting that definition may in the exercise of discretion be granted asylum.[28]

Under CAT, the United States shall not "expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture."[29] The corresponding regulation again incorporates the treaty obligation, providing that a person will be eligible for protection under CAT if they establish "that it is more likely than not that [they] would be tortured if removed to the proposed country of removal."[30]

By becoming a state party to these treaties, we have agreed to carry out their terms in good faith.[31] Under the Refugee Protocol, the United States has additionally and specifically undertaken to cooperate with UNHCR in the exercise of its functions and in particular to

[24] 1465 U.N.T.S. 85 (entry into force 26 June 1987).
[25] 189 U.N.T.S. 137 (entry into force 22 April 1954).
[26] 1951 Convention Relating to the Status of Refugees, art. 33, binding on the United States by means of U.S. accession to the 1967 Protocol Relating to the Status of Refugees, art. I.1.
[27] 8 U.S.C. § 1231(b)(3)(4).
[28] 8 U.S.C. § 1158(b)(1)(A).
[29] 1984 Convention Against Torture (CAT), art. 3.
[30] 8 C.F.R. § 208.16(c)(2).
[31] Vienna Convention on the Law of Treaties, art. 26. 1155 U.N.T.S. 331 (entry into force 27 Jan. 1980).

facilitate UNHCR's duty of supervising the application of the provisions of the Convention and Protocol.[32] Furthermore, drawing on an abundance of legislative history, the Supreme Court has explicitly recognized that in enacting the Refugee Act of 1980, Congress intended to bring U.S. law into conformance with international law.[33]

In relevant part, these treaties require the United States to achieve a specified result—the *non-refoulement* of the persons protected. This, in turn, requires the United States to be able to identify those who fall within the protected classes described in the treaties: persons who fear return to persecution or torture.

International law generally leaves the precise method of fulfilling treaty obligations—in this case, adherence to the requirement of *non-refoulement*—to individual States, given differences in their legal frameworks and administrative structures. Nevertheless, authoritative guidance on the procedures and criteria by which the United States may identify the beneficiaries of these treaty protections is found in Conclusions of the UNHCR Executive Committee, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*,[34] and other UNHCR guidelines and analyses. We comment below on specific aspects of the Proposed Rule in light of its compliance, or lack thereof, with international and domestic law.

As a final overarching observation, we note that the United States does not provide counsel at government expense to people seeking asylum. Applicants are detained at least until a positive credible fear determination is made, with predictable consequences for their ability to obtain their own counsel. Accordingly, the Department bears an even greater burden to ensure that asylum officers do not make mistakes that will lead to people erroneously being returned to persecution or torture. This risk is heightened because the Proposed Rule authorizes the application of a number of complex exclusion determinations in the credible fear interview.

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[32] 1967 Protocol Relating to the Status of Refugees, art. II.1.
[33] *INS v. Cardoza-Fonseca,* 480 U.S. 421, 426 (1987).
[34] 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 (Apr. 2019) (hereinafter "UNHCR *Handbook*"), *attached*.

IV. THE FOUR REASONS GIVEN BY THE DEPARTMENT FOR ITS COMPLETE ABOUT-FACE IN PROCEDURE DO NOT JUSTIFY THE GREATLY INCREASED RISK OF *REFOULEMENT*

With this Proposed Rule, the Department reverses its March 2022 assessment that consideration of mandatory bars in credible fear screenings would increase interview and decision times, that a fact-intensive inquiry requiring complex legal analysis is more appropriate for a full adjudication process, that due process and fairness considerations counsel against applying these bars in credible fear screenings, and that not applying the bars at the credible fear stage both preserves the efficiency Congress intended and helps ensure a fair process. Rule 41350.

The Department's 2022 decision not to apply mandatory bars in credible fear screenings was correct for the reasons it cited and was also consistent with UNHCR guidelines. UNHCR counsels:

> Given the grave consequences of exclusion, it is essential that rigorous procedural **safeguards** are built into the exclusion determination procedure. Exclusion decisions should in principle be dealt with in the context of the **regular refugee status determination procedure** and not in either admissibility or accelerated procedures, so that a full factual and legal assessment of the case can be made.[35]

Now, however, the Department rejects its own analysis from just two years ago, as well as UNHCR's advice. To attempt to justify why it has "refined its prior position," Rule 41354, the Department provides four reasons. These reasons are:

> "First, the Department has determined that the permissive consideration of the mandatory bars in the manner proposed by this rule does not conflict with these prior rulemakings and is clearly distinguishable. Most notably, this rule does not propose to require the consideration of the mandatory bars in all interviews [.]" Rule 41354.
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> "Second, …the Department has had many uninterrupted months of experience applying the rebuttable presumption, providing a more consistent baseline of determinations for evaluation about adding consideration of other mandatory bars during screening interviews." Rule 41354.

[35] UNHCR *Exclusion Guidelines*, *supra* n. 19 at para. 31 (emphasis in original).

> "Third, the Department believes that the proposal would not be inconsistent with prior statements regarding congressional intent. …The proposal here would not create any such [complicated] process as AOs would only consider a bar in those cases where there is easily verifiable evidence available to the AO that in their discretion warrants an inquiry into a bar, and the AO is confident that they can consider that bar efficiently at the credible fear stage." Rule 41354.
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> "Fourth, the Department believes AOs can apply mandatory bars during fear screenings while ensuring a fair process. As noted previously, there are cases where the applicability of a bar is clear and there is not a significant possibility that the applicant could show the bar does not apply [.]" Rule 41354.

We address these reasons in turn.

A. Allowing for Permissive Consideration of the Bars Does Not Distinguish This Rule from Prior Rulemaking Rejected by the Department

The Department asserts that permitting rather than requiring asylum officers to consider mandatory bars in credible fear screenings sets this Rule apart from a 2020 rule that was enjoined before taking effect. Rule 41350. This is a distinction without a difference in terms of the Department's four stated reasons outlined above for rejecting consideration of bars in credible fear screenings. And because consideration of bars will now be discretionary, the Proposed Rule has the added disadvantage of enabling disparate treatment which might easily become discriminatory.

First, this Rule will most certainly increase the time spent interviewing and writing up a decision for those asylum officers who choose to consider a bar in any given credible or reasonable fear interview, and for their supervisors. The Department fails to explain how it will handle the scheduling of interviews without knowing in advance whether additional time must be allocated for inquiry into a bar. Nor does it acknowledge that this unpredictable factor of needing additional time for certain interviews will have a negative impact on the asylum backlog by slowing things down in a manner impossible to predict from day to day.

Second, in terms of the inappropriate use of a credible fear interview to conduct intensive fact-finding and complex legal analysis, the Department now suggests that such consideration will occur "only in those cases for which doing so is likely to be an efficient and appropriate use of resources." Rule 41354. The Department does not explain how such

an assessment could be made in any individual's case without prejudging the outcome. Because the burden of proof is on the applicant to show that the bar does not apply, the asylum officer cannot know in advance what evidence or explanation the applicant might have, or how long it will take to elicit it.

The hypothetical example given in the Rule, of an applicant convicted of murder and sentenced to ten or more years in prison in a country with a fair and independent judicial system, Rule 41354, serves only to demonstrate the dangers of the Department's assumption that foreign legal records are always reliable.

A real-world example is provided by our client Aida Andrade, a survivor of domestic violence, who was the subject of an INTERPOL Red Notice. The notice itself was legitimate in that it was issued by INTERPOL. However, it was issued due to corruption in Ms. Andrade's home country of El Salvador. Her abuser may have exploited his connections with local police to file false criminal charges against her and have the notice issued. Or his own connections to gang members, which he wielded to intimidate her, led her to be targeted. Ms. Andrade was not even aware the Red Notice existed, and could never have met her burden of proof in a credible fear interview to show that the serious non-political crime bar did not apply. In fact, she had to find an attorney and retain an expert witness to analyze deficiencies in the notice before she could win her asylum case. Her attorneys then had to go through a time-consuming process of having the INTERPOL notice voided to prevent its ongoing harm.[36]

To the extent that an asylum officer relies on an INTERPOL publication as indicating that an applicant "appears" to be subject to a bar (in credible or reasonable fear interviews) or even that such a publication is "evidence" that the noncitizen may be subject to a bar (in a Circumvention of Lawful Pathways rule interview), Rule 41360-61, such reliance is entirely unwarranted. INTERPOL publications are widely known to be unreliable, in part because they are subject to abuse by persecutory or corrupt governments. The Ninth Circuit and others have found that Red Notices are unreliable and alone may not be sufficient to prove a serious non-political crime was committed.[37]

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[36] CGRS, "Biden Rule Would Return Refugees to Harm, Increase Inefficiencies" (May 9, 2024), *attached.*

[37] *Gonzalez-Castillo v. Garland*, 47 F.4th 971, 978 (9th Cir. 2022) (finding Red Notice implicating petitioner in an unnamed crime related to "terrorist organizations" unreliable, and observing that "it does not appear to us that a Red Notice alone is ordinarily sufficient to establish probable cause that

The Department is well aware of this lack of reliability. See accompanying Submission by Dr. Theodore R. Bromund, an expert on INTERPOL, on *The Unreliability of Red Notices as a Bar to Asylum,* which we incorporate in this comment and attach. Dr. Bromund's submission discusses ICE Directive 15006.1 (August 15, 2023), which provides agency-wide guidance on the use of INTERPOL Red Notices and Wanted Person Diffusions. The guidance requires ICE personnel to follow at least eight steps before relying on Red Notices or Wanted Person Diffusions. The Proposed Rule is silent as to whether similar rules will be required of asylum officers. If similar guidance *is not* given to asylum officers, there will be no question that the resulting screening interview is profoundly unfair. If similar guidance *is* given to asylum officers, there will be no question that considering a bar at this stage is not an efficient or appropriate use of their time.

The Department's example of the applicant convicted of murder also points to the absurdity of assuming that an asylum officer can make an overall assessment during the course of a screening interview on the quality of a foreign country's judicial system. It also fails entirely to note that even in a judicial system that is largely fair, the applicant may have been a victim of selective prosecution or some other abuse of process.[38]

Third, the due process and fairness concerns identified by the Department in March 2022 remain for the unlucky applicants who will be forced to defend against the application of bars in their credible fear interviews. It is no cure for their plight to say that not all others will be subjected to the same violations of due process and fundamental fairness.

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a crime has occurred."); *see also, e.g.*, *Barahona v. Garland*, 993 F.3d 1024 (8th Cir. 2021) (holding Red Notice alone was insufficient probable cause that petitioner, a man from El Salvador who was framed by MS-13 for gun possession, committed alleged crime and was affiliated with MS-13, particularly where petitioner submitted a statement from a Salvadoran attorney attesting that the charges were dropped); *Radiowala v. Att'y Gen. United States*, 930 F.3d 577, 580 n.1 (3d Cir. 2019) ("Congress has not seen fit to prescribe that an Interpol Red Notice alone is an independent basis for removal…Relatedly, the Department of Justice's view is that, by itself, a Red Notice is not a sufficient basis for arresting someone, for its issuance often falls short of what the Fourth Amendment requires."); *Hernandez Lara v. Barr*, 962 F.3d 45, 48 n.3 (1st Cir. 2020) ("In the United States, an INTERPOL Red Notice alone is not a sufficient basis to arrest the 'subject' of the notice 'because it does not meet the requirements for arrest under the 4th Amendment to the Constitution.'" (citation omitted)).

[38] UNHCR *Handbook*, para. 59 ("[I]t may not be the law but its application that is discriminatory.").

Fourth, the selective application of the bars does not preserve efficiency as Congress intended or help ensure a fair process. Instead, the Rule will contribute to inefficiency and exacerbate scheduling delays by requiring extra time that is not normally allocated for an interview and decision. The process will become more unfair for those subjected to consideration of bars because they will not have notice or an opportunity to prepare their defense to a potential bar, and because other similarly situated applicants will not be required to do so.

Fifth, the Department asserts that giving asylum officers discretion at the earliest possible stage to consider a mandatory bar will "create systematic efficiencies while simultaneously protecting legal rights." Rule 41351. The Department provides no indication for when such discretion will properly be exercised except for a reference to "cases in which there is easily verifiable evidence" that the applicant could be subject to a bar. Rule 41351. However, the actual language of the regulation is far more expansive, stating that an asylum officer may consider a bar when the applicant "appears" to be subject to it. Rule 41360-61. In the case of interviews under the Circumvention of Lawful Pathways rule, the Rule states that a bar may be considered if there is "evidence" that the applicant is subject to it. Rule 41361.This unqualified reference to "evidence" does not serve to circumscribe the asylum officer's unfettered discretion, particularly since the limiting language in Section III of the Rule of "easily verifiable evidence," Rule 41351, does not appear in the regulatory language.

With no safeguards, individual asylum officers could use this authority for impermissible reasons based on racial, religious or other discrimination. For example, an applicant from a Muslim-majority country could "appear" to be subject to a terrorism-related bar, or the tattoo on a young man from a Central American country could be seen as "evidence" that he is subject to the serious non-political crime bar. A different asylum officer might not consider a bar in either one of these examples. We assume that the Department will provide some kind of guidance to asylum officers as to when they should exercise their discretion to consider bars, but it is hard to imagine that it will not rely on unwarranted confidence in foreign legal records and/or on racial, religious, or national profiling.

B. Experience with Application of the Circumvention of Lawful Pathways Rule Does Not Support Adding Consideration of Other Mandatory Bars During Screening

The Department asserts that after "months" of experience applying the rebuttable presumption of asylum ineligibility under the Circumvention of Lawful Pathways rule, it is better placed to evaluate the addition of other bars in initial screenings. Rule 41354. On

this basis, it has concluded that the presumption of asylum ineligibility can be applied "effectively" such that asylum officers should now have additional discretion to apply other mandatory bars. Rule 41354.

It is troubling to say the least that in its evaluation of effectiveness the Department focuses only on its ability to move applicants through the process "quicker than ever before." Rule 41354. With its sole emphasis on speed, the Department fails entirely to address issues of fairness or to acknowledge very serious errors amounting to *refoulement* that have been documented as a result of the Lawful Pathways rule.[39] Consideration of additional bars is inconsistent with the Department's stated goal of creating "systematic efficiencies while simultaneously protecting legal rights." Rule 41351. To the contrary, the experience of applying the Lawful Pathways rule should serve as a red flag. It is not possible to protect legal rights while allowing for consideration of multiple complex legal standards and detailed factual inquiries in a preliminary interview.

We note also that the Department stresses that only a small number of applicants will be affected, Rule 41351. This seems to be an effort to portray the Rule as not particularly consequential. If that is the case, we query how it will help with efficiency since the Department will have to issue guidance to asylum officers, prepare training materials, conduct training, and devote supervisory time to implementing this Rule, supposedly for a very few applicants. This leads us to question whether the Rule will in fact be applied to many applicants, especially since the regulatory language is so broad.

C. The Rule is Inconsistent with the Department's Prior Statements Regarding Congressional Intent

In asserting that the Rule comports with Congressional intent that credible fear screenings employ a generous standard lower than that required for asylum eligibility, the Department again relies on the fiction of "easily verifiable evidence." Rule 41354. We again object to the erroneous assumption that foreign legal records, which may facially be "easily verifiable," are always correct and are never issued in error or indeed as part of a pretextual prosecution.

[39] Human Rights First, *Trapped, Preyed Upon, and Punished: One Year of the Biden Administration Asylum Ban* at 23-25 (May 2024) (hereinafter HRF *Trapped*) (citing government's own data showing that applicants subject to the Lawful Pathways rule are more than three times as likely to fail their initial screening and providing several specific examples of such individuals), *attached*.

We note that for the purpose of affirmative interviews, asylum officers are trained to analyze multiple factors, including those set forth by the Board of Immigration Appeals (BIA), to aid in identifying motive where an applicant has been prosecuted.[40] Such a rigorous analysis necessarily takes time to do properly, both because the officer must ask many detailed questions and because they must then research and analyze country-specific information. This is exactly the kind of complex legal barrier that Congress did not want to include in credible fear screenings.

There is not a single situation of evidence that might appear to be "easily verifiable" where the asylum officer should be "confident that they can consider that bar efficiently." Rule 41354. The Department knows better and should not cling to the false notion that this new discretionary power will be limited only to so-called easily verifiable evidence.

In this context, we again note the Department's singular focus on speed without an equal regard for fairness. This is reflected throughout, including in the characterization of the Rule as an "additional avenue[ ] through which to deliver swift decisions and consequences for irregular migration." Rule 41353. We reiterate that seeking asylum is legal under both domestic and international law. It is not in any way "irregular" and should not be subject to "consequences," particularly when such consequences take the form of unfair proceedings.

D. The Department Cannot Apply Mandatory Bars During Fear Screenings While Ensuring a Fair Process

The Department asserts that it can ensure a fair process, again pointing to cases where "the applicability of the bar is clear." Rule 41354. This suggests that the Department intends to pre-judge cases, presumably on the basis of an untested foreign legal record or some type of discriminatory profiling based on race, religion, or country of origin. To state the obvious, an asylum officer cannot determine in advance whether a bar applies. It requires a careful and rigorous analysis. Training materials for asylum officers on applying the bars in affirmative interviews are lengthy and detailed.[41] They include a procedural requirement

[40] USCIS RAIO Training Module, *Nexus and the Protected Grounds* at 16 (July 24, 2023) (Citing *Matter of S-P-,* 21 I&N Dec. 486 (BIA 1996) for five areas of inquiry and adding another four general issues to consider).

[41] USCIS RAIO Training Module, *National Security* (Oct. 26, 2015); USCIS RAIO Training Module, *Analyzing the Persecutor Bar* (April 14, 2015); Asylum Officer Lesson Plan, *Mandatory Bars to Asylum* (May 9, 2013). We are aware that the documents cited may have been updated, as it is difficult to find current publicly available training materials, but we are confident that numerous lengthy and detailed training materials on the mandatory bars do exist.

that when questioning an applicant about a potential bar the asylum officer must employ a more detailed and time-intensive "Question-and-Answer style" of taking interview notes.[42] These exacting requirements cannot be met during fear screenings.

V. APPLYING LEGALLY AND FACTUALLY COMPLEX MANDATORY BARS AT THE INITIAL SCREENING STAGE WILL LEAD TO *REFOULEMENT*

The Department simply lists the five mandatory bars covered by the Rule. Nowhere does the Department acknowledge that each one of these bars is exceedingly complex and requires the application of detailed, multi-step tests that the Executive Office for Immigration Review (EOIR) often gets wrong even after full merits hearings and an administrative appeal.[43] It is because of such complexity that UNHCR warns that exclusion decisions should not be dealt with in accelerated procedures such as expedited removal, so that a full factual and legal assessment of the case can be made.[44]

We provide below a brief discussion of some of the difficulties that even federal courts of appeals have found in evaluating agency application of the bars. As explained below, judicial review is an essential safeguard to prevent erroneous return of asylum seekers to persecution and torture.

A. Persecutor Bar[45]

The persecutor of others bar requires a detailed factual inquiry into whether the applicant "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." Before applying this bar, an adjudicator must grapple with whether the applicant's actions constitute "ordering, inciting, assisting," or "participating" in persecution,

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[42] Asylum Officer Lesson Plan, *Interviewing Part II: Note-taking* at 6-7 (Aug. 10, 2009) (explaining that the Asylum Procedures Manual requires question and answer format interview notes for questioning on bars such as the ones at issue in this NPRM). We are aware that the document cited may have been updated, as it is difficult to find current publicly available training materials, but we are confident that asylum officers are still required to do special notetaking when bars are under consideration in affirmative interviews.

[43] The Department implicitly acknowledges the complexity of these bars by arguing that the Rule might provide efficiencies for ICE Office of Legal Advisor (OPLA) because such cases are "assigned to certain designated attorneys specializing in such cases, entail special reporting requirements, and coordination with OPLA headquarters divisions." Rule 41352.

[44] UNHCR *Exclusion Guidelines*, *supra* n. 19 at para. 31.

[45] INA § 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i); INA § 241(b)(3)(B)(i), 8 U.S.C. § 1231(b)(3)(B)(i).

whether they had the requisite knowledge that their conduct would result in the persecution of others, or whether the harm alleged bore any nexus to a protected ground.[46] The adjudicator must also determine whether any defenses to the bar are implicated, such as self-defense, or whether mitigating factors, like trying to help the purported target, that counsel against applying the bar are present.[47] These determinations require intensive factual investigation and the application of complex legal analyses that the credible fear screening process is not equipped to handle.

Case after case demonstrates that even after a full and fair proceeding, immigration judges and the BIA fail to properly apply the persecutor bar or weigh the evidence.[48] There is thus

[46] *See, e.g.*, *Doe v. Gonzales*, 484 F.3d 445, 447 (7th Cir. 2007) (finding no nexus to a protected ground for the murders of witnesses to a crime as the motivation for the killings was to cover up a crime); *Balachova v. Mukasey*, 547 F.3d 374, 385 (2d Cir. 2008) (holding that Petitioner's failure to prevent persecution of others while he was handcuffed did not give rise to the bar and finding that the agency erred by failing to consider whether the persecutors' criminal conduct was on account of a protected ground).

[47] *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004); *see also Miranda Alvarado v. Gonzales*, 449 F.3d 915, 926, 929, 933 (9th Cir. 2006); *Miranda Alvarado*, 449 F.3d at 931 ("[I]njury inflicted by opposing political or other groups on each other during a civil conflict will not necessarily equate to persecution on account of one of the INA's protected grounds."); *Yan Yan Lin v. Holder*, 584 F.3d 75, 81 (2d Cir. 2009) (redemptive acts may be relevant to the applicant's culpability and the court must consider the record as a whole).

[48] *See, e.g.*, *Kumar v. Holder*, 728 F.3d 993 (9th Cir. 2013) (holding the agency misapplied the required analysis which considers: level of personal involvement, whether the actions purposefully assisted in persecution, and any extenuating circumstances, and remanding for consideration whether the work of a police officer is integral to the actual torture occurring inside the facility, not just the functioning of the facility as a whole); *Diaz-Zanatta v. Holder*, 558 F.3d 450 (6th Cir. 2009) (vacating and remanding where the agency failed to analyze whether there was any connection between Peruvian intelligence officer's action or inaction and persecution and whether petitioner had knowledge of the persecution during the relevant time); *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 22 (1st Cir. 2007) (vacating the agency's decision that petitioner's personal knowledge did not matter where the effect of his actions resulted in persecution, holding that proof of scienter—i.e. some level of knowledge of culpable conduct on the part of the petitioner—was required in order to apply the bar and that the agency erred by failing to assess petitioner's lack of culpable knowledge); *Xu Sheng Gao*, 500 F.3d at 99–101 ("[C]ourts must take care to distinguish between 'genuine assistance in persecution and inconsequential association with persecutors.'…'In other words, simply being a member…during the pertinent period of persecution is not enough to trigger the statutory prohibitions on asylum and withholding of removal. Rather, for the statutory bars…to apply, the record must reveal that the [noncitizen] *actually* assisted or otherwise participated in the persecution of another[.]'" (quoting *Singh v. Gonzales*, 417 F.3d 736, 739–40 (7th Cir. 2005))).

no basis to support the Department's assertion that the bar can be fairly applied by asylum officers, at the border, in a matter of hours or minutes.

The application of this bar raises concerns that asylum officers will rely on generalized country conditions information or biases when reaching their conclusions. Courts have found it is insufficient to point to the general "pattern and practice" of persecution by a group as proof that the applicant participated in the persecution.[49] But we are aware of cases where asylum officers and immigration judges have relied on country reports alone to conclude that applicants who served in their home country's military during civil upheaval assisted in the persecution of others on account of their dissenting political opinion. At a minimum, the Rule raises serious concerns that asylum officers, who will be conducting their assessments under severe time constraints and with limited information, will over-apply the bars and fail to properly assess the various factors that might or might not justify application of the bar.

It is particularly unjust to apply the persecutor bar in an initial fear screening, given the unsettled nature of the law on the fundamental question of whether there is an exception for duress. After litigation spanning decades, the BIA in 2018 recognized a duress exception.[50] This decision was overruled by Attorney General Barr in 2020, who found there was no duress exception.[51] Attorney General Garland certified that decision to himself in 2021.[52] His certification automatically stayed the BIA's decision but did not vacate or stay his predecessor's opinion.

Despite the passage of over two and half years since certification, the Attorney General has not yet issued his decision. In the meantime, the Departments of Justice and Homeland Security have stated that they will engage in rulemaking on the persecutor bar to address "duress, lack of knowledge, and general principles."[53] It is particularly confounding that the Department would include the persecutor bar in this Proposed Rule since by its own regulatory agenda it acknowledges that guidance is needed even on "general principles" regarding the bar.

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[49] *See, e.g.*, *Xu Sheng Gao v. U.S. Att'y Gen.*, 500 F.3d 93, 100–101 (2d Cir. 2007).
[50] *Matter of Negusie*, 27 I&N Dec. 347 (BIA 2018) ("*Negusie I").*
[51] *Matter of Negusie,* 28 I&N Dec. 120 (AG 2020) ("*Negusie II*").
[52] *Matter of Negusie*, 28 I&N Dec. 399 (AG 2021) ("*Negusie III*").
[53] Fall 2023 Unified Agenda of Regulatory and Deregulatory Actions, Off. of Mgmt. & Budget, RIN 1125-AB25, *Asylum Eligibility; Persecutor Bar*.

We urge the DHS to work with the Department of Justice to propose a rule that would serve to vacate *Negusie II,* which incorrectly holds that adjudicators may not consider duress as an exception to the persecutor of others bar to asylum and withholding of removal, and reinstate *Negusie I,* which accepts duress as an exception to the persecutor bar. *Negusie I* sets forth a rigorous five-part test for assessing claims of duress based on a close reading of legislative history, the Refugee Protocol, international criminal law, guidance from UNHCR, and comparative jurisprudence.[54] Absent such clarification of an essential element of the bar, there is no circumstance in which application of this bar could be done fairly or in an efficient manner.

B. Particularly Serious Crime Bar[55]

Like the persecutor bar, the particularly serious crime (PSC) bar requires fact-intensive inquiries and the application of complicated legal tests. As the Department acknowledged in the Asylum Processing Interim Final Rule, what constitutes a PSC is "not statutorily defined in detail."[56] While the Department gives the example of a murder conviction with a sentence of ten or more years, Rule 41354, most PSCs are not so easily identified and instead require adjudicators to enter the quagmire of the categorical and modified categorical approaches, and failing that, further fact-intensive inquiries that often lead to inconsistent and incorrect results.

Aggravated felonies are categorically PSCs. However, adjudicators must engage with complex multi-tiered tests—the categorical and modified categorical approaches—to determine whether a state criminal conviction is an aggravated felony under the Act.[57] This involves comparing the state criminal statute to the corresponding federal statute. But PSCs are not limited to aggravated felonies. For non-aggravated felonies, adjudicators look to whether the elements of the crime "potentially bring it within the ambit" of a PSC and, if

[54] "[A]t a minimum, the applicant must establish by a preponderance of the evidence that he (1) acted under an immediate threat of death or serious bodily injury to himself or others; (2) reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) had no reasonable opportunity to escape or otherwise frustrate the threat; (4) did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others." *Negusie I*, 27 I&N Dec. at 363.
[55] INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii); INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii).
[56] 87 Fed. Reg. at 18093.
[57] 8 U.S.C. § 1101(a)(43).

so, the nature of the conviction, the underlying facts and circumstances, the sentence imposed, and the type and circumstances of the crime to determine if they trigger the bar for asylum or statutory or CAT withholding.[58] Because of the complex nature of these tests, even after full merits hearings EOIR repeatedly misapplies this bar.

Just this year, in *Annor v. Garland*, the Fourth Circuit vacated the agency's application of the PSC bar to a man convicted of conspiracy to commit money laundering because the immigration judge applied the wrong legal test for determining whether the crime qualified as a PSC and the BIA analyzed the wrong crime.[59] In another case, *Dor v. Garland*, the First Circuit remanded where the immigration judge applied the wrong test, and the BIA listed the correct factors but failed to apply them to the facts or conduct the appropriate depth of analysis.[60] The Court expressed particular dismay that the BIA relied on a police officer's assertion that petitioner possessed a "large amount" of marijuana when the actual 25-gram figure was available in the same police report, when the BIA's own precedent reasoned that 30 grams is a "small amount" of marijuana.[61] These cases and others[62] illustrate that even after full merits hearings adjudicators too often get the analysis wrong. Requiring asylum seekers to prove a negative by a preponderance of the evidence and asylum officers to conduct such legally complex inquiries will inexorably lead to wrong ineligibility findings.

Given the demonstrated danger of error in these types of determinations, the degree of legal precision necessary, the necessity of the parties having a full opportunity to present and review the facts to reach the correct result, and the critical role judicial review plays in ensuring the bar is not improperly applied, it is impossible to conclude that asylum officers will be able to apply the PSC bar fairly in fear screenings. This is particularly true given that the regulations authorize asylum officers to apply the bar based on the mere *appearance*

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[58] *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982).
[59] *Annor v. Garland*, 95 F.4th 820 (4th Cir. 2024).
[60] *Dor v. Garland*, 46 F.4th 38 (1st Cir. 2022).
[61] *Id.* at 49 (citing *Matter of Castro Rodriguez*, 25 I&N Dec. 698, 703 (BIA 2012) ("30 grams or less may, in general, serve as a useful guidepost in determining whether an amount is 'small'"); *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (recognizing that the BIA has used 30 grams as a guide to determine whether an amount of marijuana is small)).
[62] *See, e.g.*, *Flores v. U.S. Att'y Gen*., 856 F.3d 280, 292–96, 297 (3d Cir. 2017) (vacating the agency's application of the bar, applying the categorical approach to conclude petitioner's Florida conviction is not a PSC under the Act, and finding petitioner eligible for withholding of removal); *Ojo v. Garland*, 25 F.4th 152 (2d Cir. 2022) (vacating and remanding where the IJ failed to apply step one of the *N-A-M-* framework, and both the IJ and BIA mischaracterized wire fraud as a crime against persons rather than a property crime).

that it might be implicated.[63] The extraordinarily low and vague standard will undoubtedly lead to broad application of this, and the other bars, without the necessary legal or factual analysis.

The Department's efficiency justifications, too, defy common sense. Having to first assess whether the crime elements fit into one of the statutory aggravated felonies, then assess whether they fall into the ambit of a PSC, and then closely analyze the actual circumstances of the criminal conduct, including, among other matters, the applicant's mental health at the time of the offense,[64] is simply too complex and time-consuming a process for a fear screening and is rife with potential for error. Thus, the proposed application of the bar at the initial screening stage presents the danger that, like the immigration judges and BIA members discussed above, asylum officers tasked with screening for the bar will take shortcuts and apply the bar without completing the analysis or reviewing all the relevant facts.

The Department's protestation that an asylum officer may in their discretion decline to apply the bar if it is too complex, does nothing to ameliorate the danger that a mandatory bar will be misapplied, that its application will be affirmed without the applicant ever having a meaningful opportunity to rebut it, and that the asylum seeker will then have no recourse to prevent their return to persecution. Not to mention that the rule does not specify at what point the asylum officer can make a complexity determination; if it comes later on in the process, it is hard to see how this makes the process any more efficient.

C. Serious Non-political Crime Bar

This bar is even more obscure than the PSC bar. "Serious non-political crime" is not statutorily defined and no criminal charge, arrest, or conviction is required for its application. The adjudicator need only have "serious reasons to believe" that the applicant has committed a serious non-political crime, i.e. probable cause.[65] Such probable cause

[63] 8 C.F.R. §§ 208.309(c), 208.31(e)(5)(ii).
[64] *See Matter of B-Z-R-*, 28 I&N Dec. 563, 567 (A.G. 2022) (overruling *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014) and reasoning that "immigration adjudicators may consider a respondent's mental health in determining whether a respondent, 'having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.'" (internal citations omitted)).
[65] *Matter of E-A-*, 26 I&N Dec. 1, 3 (BIA 2012).

could be based on the applicant's own statements, country conditions reports, news articles, foreign indictments, police reports, or warrants for arrest, among other sources.[66]

It is particularly troubling that the Rule does not indicate any parameters on the types of evidence asylum officers may use. The preamble states that "indicia of a mandatory bar" can suffice to trigger the application of these bars, Rule 41352, and the regulatory language requires only that an asylum seeker "appear" to be subject to the bar—something significantly less stringent than the fair probability standard required by this bar.[67]

Even if the bar is implicated, the analysis does not end there. Adjudicators must also determine whether the crime is political in nature. And if so, they must further consider whether the applicant meets an exception. For example, if the crime would be juvenile delinquency in the United States, it is not a "crime" for purposes of the Immigration and Nationality Act (INA).[68]

As with the persecutor bar, the adjudicator should also look to the totality of the circumstances to determine whether there are mitigating circumstances, such as self-defense, that diminish the seriousness.[69] This bar, too, is an extraordinarily fact-dependent inquiry that simply cannot be adequately developed or rebutted in the context of an initial screening interview.[70] Even assuming an applicant affirmatively requests immigration judge review of a negative fear finding, there is virtually no chance they will be able to marshal evidence necessary to prove the bar should not be applied to them.

Under the Rule, asylum seekers facing allegations that they are subject to the serious non-political crime bar will be expected to prove otherwise in an extraordinarily short timeline without benefit of counsel. In addition to the case of our client Ms. Andrade, discussed

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[66] *See, e.g.*, *Silva-Pereira v. Lynch*, 827 F.3d 1176, 1190 (9th Cir. 2016) (applying the bar based on a Guatemalan indictment); *Khouzam v. Ashcroft*, 361 F.3d 161, 166 (2d Cir. 2004) (applying the bar based on an Egyptian police report and warrant for arrest).
[67] 8 C.F.R. §§ 208.30(e)(5)(ii), 208.31(c).
[68] *Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 137 (BIA 1981); *Matter of De La Nues*, 18 I&N Dec. 140, 142 (BIA 1981). There are arguably coercion and duress defenses.
[69] *Berhane v. Holder*, 606 F.3d 819, 825 (6th Cir. 2010) ("A theory of self defense…may diminish the criminal nature of the actions, which weighs in the balance. The [BIA] must address the point in the first instance."); *E-A-*, 26 I&N Dec. at 7 n.6 ("The analysis of the criminal nature of the applicant's conduct could be different if the facts indicated that he was acting in self-defense by, for example, fighting back when beaten by police during a political demonstration.").
[70] *Id.* at 3 (application of the bar must be assessed on a "case-by-case basis considering the facts and circumstances presented").

above, the following BIA decision underscores both the Department's erroneous reliance on INTERPOL Red Notices and the critical role legal representatives play in ensuring due process and preventing *refoulement*.

Jessica Barahona-Martinez was the victim of significant police abuse in El Salvador on account of her sexual orientation. She spent 10 months in detention before being acquitted of a false aggravated extortion charge, after which she fled to seek safety in the United States. Unbeknownst to her, the Salvadoran government sought to retry her for the same offense while she was already in the United States, leading to the issuance of a Salvadoran warrant and INTERPOL Red Notice. Ms. Barahona-Martinez was detained for over six years while DHS vigorously opposed her application for asylum, relying on the warrant and Red Notice to argue that she was disqualified under the serious non-political crime bar.

When she finally obtained pro bono counsel to challenge the Red Notice, the INTERPOL Commission deleted the Notice in a record three weeks, reflecting the significant flaws of the underlying Notice as well as its own failure to screen against abuses by the Salvadoran government. Once notified of the deletion of the Red Notice, the BIA reopened her immigration case and affirmed her grant of asylum.[71] Ms. Barahona-Martinez's case illustrates both the unreliability of Red Notices and DHS's pattern of broad assertions of the crime bar, even in cases like hers where there was a documented history of the country of origin abusing INTERPOL publications against asylum seekers. Clearly, she would not have had a chance if this bar had been considered in a credible fear screening.

D. Terrorism-Related Bars[72]

The terrorism bar is one of the most sweeping and complex bars, and, like the other mandatory bars, its applicability is highly dependent on individual facts and circumstances. At least one court of appeals has held that DHS has the burden to provide "particularized" evidence sufficient to "raise the inference that each element of the [terrorism] bar applies" in the applicant's case.[73] Because the bar incorporates several terrorism-related inadmissibility grounds, the "terrorism bar" is less a bar in its own right and more an umbrella term for nine distinct terrorism-related bars, each capturing a different kind of activity or status.

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[71] *In Re Jessica Barahona-Martinez*, AXXX-XXX-604 (BIA Apr. 12, 2024).
[72] INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v); INA § 241(b)(3)(B)(iv), 8 U.S.C. § 1231(b)(3)(B)(iv).
[73] *Budiono v. Lynch*, 837 F.3d 1042, 1048–49 (9th Cir. 2016).

Thus, under the Rule, asylum officers will have to engage in detailed analyses to determine if the asylum seeker knowingly engaged in terrorist activity, including by providing material support; incited, endorsed, or persuaded others to endorse terrorist activity; is a representative or member of a terrorist organization; received military-type training from a terrorist organization; or is the spouse or child of someone who falls under the terrorism bar. Underlying many of these potential types of terrorist activity, there are additional analyses; for example, whether the applicant gave material support to a terrorist organization under the INA[74] and whether any defenses are indicated.[75] The "breathtaking scope"[76] of the terrorism-related bars, alone, requires considered adjudication in the context of a full INA § 240 proceeding, where both parties have sufficient time to investigate and prepare their case, and are afforded an opportunity to present witnesses and other evidence.

DHS cannot shift its burden to the applicant, as the Proposed Rule suggests,[77] merely by introducing "generalized" evidence that the group in question was violent.[78] Rather, for the terrorism bars, courts have demanded that, before the burden shifts to the applicant, the government provide "particularized" evidence sufficient to raise the inference that *each*

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[74] 8 U.S.C. § 1182(a)(3)(B)(vi)(III); *see also, e.g.*, *Budiono*, 837 F.3d at 1050 (rejecting group as a Tier III organization where there was no evidence the group "used weapons against [its] targets" and "the evidence only raises the inference that [it] physically beat such individuals").

[75] *See, e.g.*, *See McAllister v. U.S. Att'y Gen.*, 444 F.3d 178, 186–87 (3d Cir. 2006) (explaining that "an 8-year-old child who brings a baseball bat to school to protect himself from bullies" and "a woman who protects herself, in the course of a domestic violence attack, with standard kitchen cooking utensils" have both "acted in self-defense, which negates the 'unlawful' element" of terrorist activity).

[76] *Matter of S-K-*, 23 I&N Dec. 936, 948 (BIA 2006) (Osuna, Board Member, concurring) ("[T]he statutory language is breathtaking in its scope.").

[77] 8 C.F.R. § 208.30(e)(5)(ii) (allowing consideration of mandatory bars if the noncitizen "appears" to be subject to one or more bar) and 8 C.F.R. § 208.30(e)(5)(ii)(A) (requiring a significant possibility that the applicant could prove by a preponderance of the evidence that they are not subject to the bar); 8 C.F.R. § 208.31(c) (shifting the burden to the asylum seeker to prove a bar doesn't apply if the noncitizen "*appears* to be subject to one or more of the mandatory bars to being granted withholding of removal under the Act contained in section 241(b)(3)(B) of the Act and *the [noncitizen] fails to show* that there is a reasonable possibility that no mandatory bar applies, if the asylum officer considers such bars." (emphasis added)); 8 C.F.R. § 208.30(b)(2)(i) ("[I]f there is evidence that the alien is subject to one or more of the mandatory bars to being granted withholding of removal under the Act contained in section 241(b)(3)(B) of the Act, the asylum officer may consider the applicability of such bar(s).").

[78] *Budiono*, 837 F.3d at 1048–49 (noting that DHS failed to introduce evidence indicating that the group in question was engaged in one of the "terrorist activities" enumerated in the statute, and that petitioner actually knew of the terrorist activity when he provided material support to the group).

element of the bar applies in the applicant's case.[79] Thus, the low bar set forth in the Proposed Rule, i.e. the "appearance" that the bar applies, and the burden shifting the Rule suggests is contrary to law.[80] And because the mere hours between an asylum seeker's entry into the United States and the credible fear interview cannot provide adequate time for asylum officers to verify their allegations, applying this bar during a fear screening interview raises other concerns.

DHS has falsely labeled noncitizens as terrorists and barred them from protection in the United States. For example, these provisions have been used against Iraqi and Afghan interpreters who face persecution because they assisted U.S. troops.[81] We are also aware of the terrorism bar arising in recent cases of young men and boys who fled from Central American countries that have pronounced gang activity, such as El Salvador, Guatemala, and Honduras. After fleeing extortion, physical harm, and death threats from gangs like MS-13 and Barrio 18, these asylum seekers were then accused of providing material support to their persecutors whom ICE characterized as terrorist organizations. This new trend raises serious concerns that young people fleeing Central American gang violence will be singled out for investigation under this bar and denied asylum at the border without any meaningful opportunity to raise a defense.

A related example that will undoubtedly result in profiling based on nationality, gender, age, and physical characteristics at the border, and the wrongful application of this bar,[82] is El Salvador President Bukele's "State of Exception." This sweeping gang crackdown has resulted in the wrongful arrests and torture of thousands of innocent people,[83] who now have criminal records and the stigma of gang affiliation. We are already aware of cases where young people from El Salvador have fled due to suffering State of Exception abuses and have still had to rebut allegations of terrorism and the serious non-political crime bar. Absent a fair opportunity to retain counsel and collect and present evidence, asylum seekers fleeing this gross violation of human rights face being summarily denied protection at the border and returned to further state-sanctioned persecution and torture.

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[79] *Id.*

[80] 8 C.F.R. §§ 208.30(e)(5)(ii) & (ii)(A); 8 C.F.R. § 208.31(c); 8 C.F.R. § 208.30(b)(2)(i).

[81] *See, e.g.*, *Ndudzi v. Garland*, No. 20-60782, 2022 WL 9185369 (5th Cir. July 22, 2022); Karen DeYoung, "Stalwart Service for U.S. in Iraq Is Not Enough to Gain Green Card," *The Washington Post* (Mar. 23, 2008).

[82] And also likely the serious non-political crime bar, *supra*.

[83] Amna Nawaz, et al., "Thousands of innocent people jailed in El Salvador's gang crackdown," *PBS News Hour* (Feb. 13, 2024).

E. Security Bar[84]

The security bar was intended to provide only a narrow exception to the United States' *non-refoulement* obligations, and has therefore typically been applied only where an asylum seeker has been found to be subject to the terrorism bar or to support violence towards the United States.[85] Like many of the bars previously discussed, the national security bar requires "reasonable grounds" to believe that the asylum seeker is a security risk, i.e. the probable cause standard.[86] However, under the Proposed Rule, the bar could be applied if there is a mere "appearance" or "indicia" that the applicant may be a national security risk. Clearly, this extraordinarily weak standard will permit the Department to remove "otherwise-eligible asylees who do not present genuine security threats to the United States," contrary to Congress's intent.[87] This is particularly true, given that, like the other bars, accurate application of the security bar requires detailed factual and legal analyses that asylum officers will not have the time, information, or resources to delve into during the course of an initial screening interview.

This alarming proposal is made even more shocking by the Department's statement that, should this Rule be finalized and the Security Bars and Processing rule[88] goes into effect, asylum officers will also be authorized to apply that rule, as well. Rule 41358. It is worth recalling that the Security Bars and Processing rule makes an unprecedented and unwarranted change to the definition of the national security bar by including asylum seekers whose entry poses a significant public health risk as defined in the rule, essentially by traveling through a country where there is a communicable disease. Worse, the rule would allow the bar to be applied not only to individuals, but to classes of individuals such as those fleeing a specific country.

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[84] INA § 208(b)(2)(A)(iv), 8 U.S.C. § 1158(b)(2)(A)(iv); INA § 241(b)(3)(B)(iv), 8 U.S.C. § 1231(b)(3)(B)(iv).
[85] *Yusupov v. Atty Gen.*, 518 F.3d 185, 203 (5th Cir. 2008); *Matter of A-H-*, 23 I&N Dec. 774, 788 (AG 2005) ("[T]he phrase 'danger to the security of the United States' is best understood to mean a risk to the Nation's defense, foreign relations, or economic interests."); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003).
[86] *A-H-*, 23 I&N Dec. at 788–89; *Mirza v. Garland*, 996 F.3d 747, 750–52 (5th Cir. 2021); *Malkandi v. Holder*, 576 F.3d 906, 915 (9th Cir. 2009); *Yusupov*, 650 F.3d at 980–81 (holding there was no probable cause to believe that petitioners would be a danger to the United States when the BIA failed to identify any links to a specific terrorist organization or to connect petitioners' actions to any risk of harm).
[87] *See Hernandez v. Sessions*, 884 F.3d 107, 113 (2d Cir. 2018) (Droney, J., concurring).
[88] 85 Fed. Reg. 84160; *see also* 87 Fed. Reg. 79789 (delaying effective date until Dec. 31, 2024).

The interaction between these two rules raises two troubling concerns:

First, applying the Security Bars Rule at the threshold screening stage—as this rule would allow—is particularly illogical and illegal. The statutory exception to asylum and withholding of removal define "danger" in the present tense: whether the noncitizen is, presently, a danger to the United States.[89] Credible fear screenings are a mechanism for assessing the likelihood that the applicant can establish eligibility for asylum at the ultimate hearing: by statute, the term "credible fear of persecution" is defined as "a significant possibility…that the [applicant] could establish asylum eligibility" after a full hearing.[90] Thus, it would be arbitrary and violate the expedited removal statute to deny credible fear based on an applicant's symptoms of, or risk of infection with, a covered communicable disease at the time of the screening interview, given that the applicant would no longer present a risk of infection months or years later, when the ultimate asylum hearing is held. In other words, there is always a significant possibility that the person would not present a danger as defined in the regulation at the full hearing. Therefore, applying the bar to deny someone at the screening stage would run contrary to the statute.

Second, the government ended the COVID-19-related public health emergency and terminated Title 42, 88 Fed. Reg. 31,314, 31,319 (May 16, 2023), since the last time the agencies extended the Security Bars Rule's effective date. Given this development, reviving a mechanism to deny asylum seekers protection at the threshold screening stage based on COVID-19 concerns is particularly illogical and arbitrary.

The administration has been correct to delay the implementation of such a radical rule that would eviscerate the entire asylum system and should promptly rescind it. Instead, we are appalled to see that the Proposed Rule appears to be signaling implementation of the earlier rule by specifying that it will be encompassed in this new procedure. We reiterate all the objections we made in our comment on the earlier rule and incorporate them in this comment.[91]

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[89] 8 U.S.C § 1158(b)(2)(A)(iv); 8 U.S.C § 1231(b)(3)(B)(iv).

[90] 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added).

[91] *See* CGRS's Comment on Security Bars and Processing (July 9, 2020); RIN 1615-AC57/USCIS Docket No. 2020-0013; RIN 1125-AB08/A.G. Order No. 4747-2020, Comment ID uscis-2020-0013-1241 (posted Aug. 7, 2020), *attached*.

VI. THE PROPOSED RULE INEXPLICABLY DEPARTS FROM PRIOR PRACTICE AND DEPRIVES ASYLUM SEEKERS OF DUE PROCESS PROTECTIONS NECESSARY TO PREVENT *REFOULEMENT*

As an overarching observation, we note the Rule's repeated emphasis on efficiency necessarily comes at the expense of procedural safeguards critical to avoiding the risk of *refoulement*. The Department acknowledges that asylum seekers subject to the Rule will lose key protections. First, they will not be afforded the opportunity to gather additional evidence during the period of time between the fear screening and the merits immigration judge hearing to show that the mandatory bar in question should not be applied in their case. Second, they will be stripped of critical due process protections such as the opportunity to contest the application of the mandatory bars in a full INA § 240 merits hearing before an immigration judge. And, finally, they will not have the ability to seek appellate review of an immigration judge's decision that a bar applies which, as described above, provides a critical bulwark. Rule 41359.

The Rule fails to provide any reasonable justification for centering expeditiousness of removal over accuracy. As discussed above, the Department's reasons for reversing course from its 2022 position on consideration of bars in fear screenings are disingenuous at best. We explain below some of the due process protections that will be lost under this Rule.

A. The Rule Would Force Asylum Seekers to Defend Allegations While Detained and Without Counsel or Any Meaningful Opportunity to Collect or Present Exculpatory Evidence and Rebut the Allegations Against Them

The purpose of credible fear screenings is to ensure that people with potentially meritorious claims will not be removed without having an opportunity to present those claims, i.e., to minimize the risk of *refoulement*. That is why complex and opaque legal questions such as the application of mandatory bars have not historically been applied in that initial screening process, where asylum seekers are almost always unrepresented by counsel and lack access to records and resources that might assist them in rebutting allegations raised by the Department.

1. No access to counsel

For numerous reasons, many asylum seekers are unable to obtain counsel to assist them in navigating 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."[92] For these *pro se* individuals, who "may not possess the legal knowledge to fully appreciate which facts are relevant,"[93] trying to understand and respond to questions relating to complicated statutory bars or collect evidence to counter allegations against them will be next to impossible.

Detention makes it even more difficult to obtain counsel, in part because detained asylum seekers in expedited removal cannot locate counsel in the short period between arrival and their fear interview,[94] and in part because of the limited number of lawyers near border areas or remote detention centers.[95] Access to counsel, a right provided by statute and regulation, significantly affects asylum outcomes. Therefore, even in the context of full INA § 240 proceedings, the ability to find counsel is one of, if not the, single biggest factor in

[92] *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).

[93] *Jacinto*, 208 F.3d at 733; *see also, e.g.*, *id.* at 733–734 (holding that when an applicant appears *pro se* due process requires that the immigration judge adequately explain the hearing procedures to the applicant, including what they must prove to establish their basis for relief, and "fully develop the record" by "scrupulously and conscientiously prob[ing] into, inquir[ing] of, and explor[ing] for all the relevant facts" (quoting *Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir. 1985))); *Yang v. McElroy*, 277 F.3d 158, 162 & n.3 (2d Cir. 2002) (affirming an IJ's duty to develop the record especially where noncitizen is unrepresented by counsel (citing *Jacinto*, 208 F.3d at 732–33)); *United States v. Copeland*, 376 F.3d 61, 71, 75 (2d Cir. 2004) (holding that due process requires that IJs develop the administrative record and accurately explain the law to *pro se* applicants)*see also Mohamed v. U.S. Att'y Gen.*, 705 F. App'x 108, 114 (3d Cir. 2017) (agreeing that an immigration judge must "elicit on the record those facts upon which she relies" and that "'full examination of an applicant [is] an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself'" (quoting *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989))).

[94] Since the publication of this Proposed Rule, DHS has published its Securing the Border interim final rule, 89 Fed. Reg. 48710, and implemented new guidance and procedures that shorten the consultation period for asylum seekers subject to that Rule to a mere four hours. *See* ICE Daniel A. Bible Memorandum: "Implementation Guidance for Noncitizens Described in Presidential Proclamation for June 3, 2024, *Securing the* Border, and Interim Final Rule, *Securing the Border*," at 4 (June 4, 2024), *attached*. As noted *supra* the truncated comment period for this Rule is insufficient, and it is impossible for the public to decipher how it will interact with the Administration's recent rulemaking and guidance.

[95] Eagly and Shafer, "Access to Counsel in Immigration Court," *American Immigration Counsel*, at 6, 11–12 (Sept. 2016), *attached*.

whether an applicant will be successful in their claim.[96] In fiscal year 2019, only 25% of applicants without an attorney received asylum or other relief.[97] In contrast, those who were represented were more than twice as likely to win their cases than their unrepresented counterparts, with a grant rate of just under 60%.[98]

The few detained individuals who are able against all odds to find an attorney still have difficulty proving their claims from detention. For example, they face hurdles to communication with their attorneys because they must rely on the detention facility's telephones, which are not always available, or wait for the attorney to visit during the limited periods when visitation is allowed. [99] Additionally, due to limitations on communication, detained applicants often find it difficult to collect necessary evidence for their case from the United States, and more critically, from abroad.[100]

The Department is well aware that very few applicants can read English with sufficient comprehension to understand the contents of any documentary evidence implicating a bar that might be provided to them. Fewer still have knowledge of the law detailed enough to grasp the legal significance of facts elicited or omitted during their fear screening. Therefore, any meaningful opportunity to counter a mandatory bar's application presupposes immediate access to both competent interpretation and qualified legal counsel, which applicants will have to find for themselves. It bears repeating that if the applicant is detained, finding such assistance, particularly on short notice, is nearly impossible. Given that the Department is currently shuffling applicants through the credible fear process within hours of arriving at the border, almost all asylum seekers are being forced to proceed without even a conversation with an attorney.

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[96] In fiscal year 2023, just 15% of unrepresented applicants in negative credible fear review proceedings had their initial negative credible fear determination vacated. For those who were represented, 35% were granted vacatur of their initial negative fear outcome, more than twice the rate of those without representation. TRAC, *Outcomes of Immigration Court Proceedings,* TRAC, last updated Apr. 2024. *See also* TRAC, "Despite Efforts to Provide Pro Bono Representation, Growth Is Failing To Meet Exploding Demands," *TRAC* (May 2023) ("As of the end of April 2023, over three out of four persons ordered removed this fiscal year by Immigration Judges had no representation…").

[97] *See* TRAC, *Asylum Decisions*, TRAC, last updated Apr. 2024*, attached*.

[98] *Id*.

[99] Eagly and Shafer, *supra* n.95, at 6.

[100] *Id.*

2. No opportunity to rebut mandatory bars

As discussed above, DHS has repeatedly relied upon foreign sources of information when raising bars against people seeking protection. Red Notices and other unreliable sources of information have been used to support the application of four of the five bars the Department proposes to apply at the border. Asylum officers tasked with applying these bars during fear screening interviews will lack the time and resources to implement the procedures set forth in the ICE directive. Indeed, by justifying the Rule, in part, because it would relieve ICE attorneys of the investigations they must engage in to raise the bars in immigration court, the Department implicitly admits that additional time and investigation may be necessary to *actually* prove that an asylum seeker is subject to the bars. Rule 41352.[101] That is, under the Rule, the bars will be administered at the border with evidence that would be insufficient to survive immigration court scrutiny.

Additionally, there is danger that changing political priorities will influence the agency to single out specific groups for increased scrutiny. In its 2020 White Paper, AFGE Local 1924 pointed out that under the Trump administration "political appointees and senior leaders in USCIS and RAIO repeatedly pushed for the creation, promotion, and dissemination of county of origin information (COI) that was biased, misleading, unreliable, and/or factually inaccurate in order to improperly influence or pressure [asylum] officers to reach negative adjudicatory decisions."[102]

The Department's recent policy and guidance for the use of classified information in immigration proceedings encourages DHS to use classified information in immigration proceedings that it does not disclose to the applicant. The guidance, which was issued just four days before the Proposed Rule, increases the possibility that asylum seekers will be excluded, without legal representation, hours after arriving in the United States, based on secret information that they will not be able to examine or rebut.[103]

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[101] "Requiring AOs to continue proceedings for a noncitizen with an otherwise positive credible or reasonable fear where the evidence would be sufficient to apply a mandatory bar at the credible or reasonable fear stage therefore introduces the possibility that OPLA resources will be unnecessarily expended in further developing the record for immigration court hearings."

[102] American Federation of Government Employees Local 1924, *Union White Paper: Rebuilding the USCIS Refugee, Asylum, and International Operations (RAIO) Directorate* (Nov. 23, 2020), at 5-6, *attached.*

[103] *See* U.S. Dept. of Homeland Security Sec. Alejandro N. Mayorkas, "Memorandum: DHS Policy and Guidelines for the Use of Classified Information in Immigration Proceedings" (May 9, 2024).

We note that the recent policy and guidance is also inconsistent with UNHCR's approach. In dealing with this type of information, UNHCR advises:

> Exclusion should not be based on **sensitive evidence** that cannot be challenged by the individual concerned. Exceptionally, anonymous evidence (where the source is concealed) may be relied upon but only where this is absolutely necessary to protect the safety of witnesses and the asylum-seeker's ability to challenge the substance of the evidence is not substantially prejudiced. Secret evidence or evidence considered in camera (where the substance is also concealed) should not be relied upon to exclude. Where national security interests are at stake, these may be protected by introducing procedural safeguards which also respect the asylum-seeker's due process rights.[104]

These factors underscore the need to withhold application of the bar until applicants have a meaningful opportunity to examine the evidence against them, gather rebuttal evidence, and present their claims in full INA § 240 proceedings, with the attendant procedural protections.[105] Nevertheless, the Department boasts that under the Rule people seeking protection who face allegations that they are subject to a mandatory bar will be denied that right. Rule 41359. Making this all the more troubling is that the Department does not indicate whether an asylum seeker who is subjected to one of the bars under this Rule could seek protection again, this time armed with evidence rebutting the bar, and have the opportunity to overcome the finding of ineligibility.

B. DHS Ignores Data That Prove Immigration Judge Review of Complex Asylum Issues is Necessary to Mitigate the Risk of *Refoulement*

Notably, DHS does not consider the well-documented errors asylum officers frequently make. Given the number of obstacles facing a person seeking asylum in expedited removal—such as detention, short processing times, language difficulties, and almost certainly no meaningful access to counsel—the danger of the applicant not being able to present a defense to the mandatory bars is too great.[106] Indeed, government data show

[104] UNHCR *Exclusion Guidelines, supra* n. 19 at para. 36 (emphasis in original).
[105] INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1).
[106] This is especially true given that, as a result of the Circumvention of Lawful Pathways Rule, asylum seekers no longer receive automatic review of the asylum officer's negative credibility finding. 8 C.F.R. § 208.33(c)(2)(v)(C) (2023).

that almost a quarter of asylum officers' negative credible fear determinations have been overturned by immigration judges this year alone.[107]

Significant as it is, this figure likely obscures the depth of the problem. Limited immigration judge review of the negative fear decision is insufficient. Detained and without counsel, many asylum seekers will not understand the importance of asking for such review, let alone their right to do so. Even for those who obtain immigration judge review, hearings are often cursory, and some asylum seekers are prohibited from speaking, submitting evidence, or having their attorney (in the rare case that they have one) speak on their behalf.[108]

Even when the asylum office considers the entirety of the merits of a claim in full asylum interviews, it often errs. Government data analyzed by Syracuse University's Transactional Records Access Clearinghouse (TRAC) shows that a shocking 74% of asylum cases referred from the asylum office were subsequently granted protection by an immigration court judge in Fiscal Year (FY) 2023.[109] Given the alarmingly high level of error asylum seekers currently experience at the credible fear and asylum office interview stages, there can be no doubt that those numbers will increase significantly when asylum officers are tasked with applying mandatory bars and asylum seekers are faced with an almost insurmountable burden of proof at the initial screening stage. Yet, the Department fails to consider any of these stark realities.

C. The Rule Precludes Judicial Review of Asylum Officers' Bars Application, a Necessary Safeguard

Perhaps one of the most troubling aspects of the Proposed Rule is its foreclosure of judicial review. Currently, bars applied in the context of asylum interviews or immigration court hearings are subject to review, but fear screenings are unreviewable. If the Rule goes into effect asylum officers will have unfettered discretion to level the mandatory bars against unrepresented noncitizens and those decisions will be completely insulated from review outside of the Departments. Given the shockingly high levels of well-documented asylum

[107] Government data analyzed by Syracuse University's Transactional Records Access Clearinghouse (TRAC) shows that in fiscal year 2023 alone immigration judges overturned 19% of the asylum office's negative credible fear determinations and in 2024 so far, immigration judges have overturned 22% of negative credible fear determinations. *See* TRAC, *Outcomes of Immigration Court Proceedings*, TRAC, last updated Apr. 2024.
[108] HRF *Trapped, supra* n. 39 at 24.
[109] *See* TRAC, *Asylum Decisions*, TRAC, last updated Apr. 2024.

officer error, stripping judicial review from the complex question of whether a mandatory bar applies is unjustifiable. As discussed *supra,* EOIR also often misapplies the bars, further highlighting the need for judicial review.

We urge the Department to rescind the Rule and ensure that individuals who have a credible fear of persecution are afforded a fair opportunity to rebut the bars and seek protection in full INA § 240 proceedings that can be appealed to the federal courts.

VII. CONCLUSION

The supposed balancing of interests suggested by the Rule is illusory, as it assumes that an adequate inquiry can and will be made into potential bars. Asylum officers do not have sufficient time in the limited span of a fear screening to engage in complex fact-finding and sophisticated legal analysis. Even if an adequate amount of time were available, the applicant will not be in a position to understand the significance of questions related to the many eligibility bars, or to explain their situation fully (moreover, undermining any supposed efficiency "benefit" of the Rule). The Rule distorts the purpose of a preliminary screening beyond all recognition and attempts to subvert the procedures set out by Congress.

For the foregoing reasons, and in the interest of justice and compliance with the United States' domestic and international *non-refoulement* obligations, we urge the Department to withdraw the Proposed Rule in its entirety.

We appreciate the opportunity, although unnecessarily truncated, to submit this comment on the Proposed Rule. Should you have any questions, please contact Kate Jastram at jastramkate@uclawsf.edu or 415-636-8454.

Sincerely,

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