CGRS | Center for Gender & Refugee Studies

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Office of Strategy, Policy, and Plans
Department of Homeland Security

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Assistant Director
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Department of Justice

Re: *Securing the Border,* 89 FR 48710 (June 7, 2024), USCIS Docket No. USCIS-2024-0006 and *Presidential Proclamation,* 89 FR 48487 (June 3, 2024)

Dear Mr. Delgado and Ms. Reid:

The Center for Gender & Refugee Studies (CGRS) submits this comment in response to USCIS Docket No. USCIS-2024-0006 *Securing the Border* (June 7, 2024) (hereinafter "Interim Final Rule" or "Rule"). We include the following outline to guide your review.

TABLE OF CONTENTS

I. EXPERTISE OF THE CENTER FOR GENDER & REFUGEE STUDIES 4

II. THE DEPARTMENTS CANNOT JUSTIFY MAKING SUCH PROFOUND CHANGES TO THE ASYLUM SYSTEM BY MEANS OF A PRESIDENTIAL PROCLAMATION AND INTERIM FINAL RULE, WITH ONLY A TRUNCATED COMMENT PERIOD 5

A. The Foreign Affairs Exception Does Not Apply Given the Deleterious Impact in the Region of Sudden Unilateral Actions by the United States 6

B. The Good Cause Exception Does Not Apply Since Providing Notice Would Have Been Both Practicable and in the Public Interest 9

C. CGRS Has Not Had Time to Formulate a Comment Fully Responsive to the Scope of the Rule 12

III. THE INTERIM FINAL RULE MUST COMPLY WITH U.S. INTERNATIONAL LEGAL OBLIGATIONS NOT TO RETURN PEOPLE TO PERSECUTION OR TORTURE 14

IV. EMERGENCY BORDER CIRCUMSTANCES DO NOT JUSTIFY DENYING ACCESS TO PROTECTION 16

A. The Obligation of *Non-Refoulement* Is Absolute and Is Not Subject to Limitation Under Emergency Circumstances 16

B. The Definition of Emergency Border Circumstances Is Arbitrary 17

C. The Ostensibly Temporary Nature of the Emergency Is Illusory 18

D. U.S. Law Prohibits Restrictions on Access to Asylum Inconsistent with the Statute 18

E. Eliminating Access to Asylum While Simultaneously Placing Mandatory Forms of Humanitarian Protection Out of Reach Renders the Rule Illegal 19

F. Providing Exemptions and Exceptions to a Limited Number of Individuals and Groups Does Not Cure the Underlying Illegality of the Rule 20

G. Denying Access to Asylum Due to Emergency Border Circumstances Is a Ground of Exclusion that Impermissibly Adds to Article 1(F) of the Refugee Convention 21

H. The Unavailability of Asylum During Emergency Border Circumstances Constitutes a Penalty Which Is Prohibited by Article 31(1) of the Refugee Convention 22

I. The Application of the Rule to Asylum Seekers from Mexico Constitutes Direct *Refoulement* 22

V. REQUIRING ASYLUM SEEKERS TO MANIFEST FEAR IN ORDER TO ACCESS PROTECTION WILL LEAD TO *REFOULEMENT* 23

A. Procedures in Place Prior to the Rule 24

B. Asylum Seekers Must Be Given Information and Assistance During the Credible Fear Process to Effectuate Congressional Intent 25

C. Reliance on Manifestations of Fear to Avoid *Refoulement* Is Insufficient........... 28

VI. INCREASING THE CREDIBLE FEAR STANDARD TO REASONABLE PROBABILITY WILL REQUIRE ASYLUM SEEKERS TO PROVE THE MERITS OF THEIR CLAIMS, CONTRADICTING THE PURPOSE OF AN INITIAL SCREENING INTERVIEW AND PLACING MANDATORY FORMS OF HUMANITARIAN PROTECTION OUT OF REACH 31

A. International Standards Require a Lower Threshold in Preliminary Screenings 31

B. U.S. Law Requires a More Generous Standard Than Reasonable Probability .. 33

C. The Reduction in Time to Find an Attorney Prior to the Credible Fear Screening from 24 Hours to 4 Hours Impermissibly Restricts Asylum Seekers' Access to Counsel.. 42

VII. CONCLUSION 44

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, 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 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

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[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.*, *Las Americas Immigr. Advoc. Ctr. v. DHS,* No. 1:24-cv-01702 (D.D.C. filed June 12, 2024); *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); *East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. July 25, 2023), appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024); *Immigr. Def. Law Ctr. v. Mayorkas*, No. CV 20-9893 JGBSHKX, 2023 WL 3149243, 18-19 (C.D. Cal., Mar. 15, 2023) (granting in part and denying in part Defendants' motion to dismiss challenge to implementation of MPP 1.0 and granting Plaintiffs' motion for class certification); *Huisha-Huisha v. Mayorkas*, 642 F. Supp. 3d 1 (D.D.C. Nov. 15, 2022) (vacating and setting aside Title 42 policy as arbitrary and capricious), 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); *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 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); and *Matter of A-C-A-A-*, 28 I&N Dec. 351 (A.G. 2021).
[4] ***See, e.g.***, the Welcome With Dignity campaign.

the underlying causes of forced migration that produce refugees, including climate change and environmental disasters.[5]

We have particular expertise in expedited removal, one of the processes affected by this Interim Final Rule. Professor Musalo co-authored the first study on the implementation of expedited removal, as well as several follow-up reports.[6] A 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 DEPARTMENTS CANNOT JUSTIFY MAKING SUCH PROFOUND CHANGES TO THE ASYLUM SYSTEM BY MEANS OF A PRESIDENTIAL PROCLAMATION AND INTERIM FINAL RULE, WITH ONLY A TRUNCATED COMMENT PERIOD

The fundamental changes to the asylum system imposed by this Rule were announced in a Presidential Proclamation on June 3, 2024, and took effect almost immediately on June 4, 2024 at 9:01 pm along the California section of the border. The corresponding Interim Final Rule published June 7, 2024, provides only thirty days for public comment. The Departments cannot justify the sudden imposition of or limited time to comment on such a sweeping rule.

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[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) (hereinafter CGRS, Manifesting Fear), *attached*; 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) (hereinafter CGRS, Far From Safety), *attached*.

[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 (USCIRF), Report on Asylum Seekers in Expedited Removal (2005).

A. The Foreign Affairs Exception Does Not Apply Given the Deleterious Impact in the Region of Sudden Unilateral Actions by the United States

The Departments assert that the Rule is exempt from the notice-and-comment and delayed-effective-date requirements of the Administrative Procedure Act (APA) because it involves a foreign affairs function of the United States, and complying with the normal requirements could result in undesirable international consequences. Rule 48759.

1. Failure to comply with APA requirements undermines the Departments' stated goal of shared responsibility for managing migration in the region

The Departments stress that border management is based on the belief that "migration is a shared responsibility among all countries in the region." Rule 48759. Noting that the Los Angeles Declaration on Migration and Protection has been endorsed by 22 countries in the region, the Rule emphasizes that "under the umbrella of this framework the United States has been working closely with its foreign partners" to manage migration. Rule 48759-60.

However, the Rule is a unilateral action on the part of the United States. There is no indication in the Rule or Proclamation of a formal agreement between the United States and Mexico for its implementation. The impact on Mexico and other countries in the region is even worse because the Rule was put in place with immediate effect. Indicating that the new policy came as a surprise, Mexico's President Andrés Manuel López Obrador was quoted as saying *after* the Rule was published that he was seeking an agreement with President Biden where migrants deported following the new policy would be sent directly to their countries of origin, instead of being transferred to Mexico.[8] In a further sign that Mexico was attempting to respond to the Rule after the fact, President López Obrador said, "We're reaching an agreement so that if they make the decision to deport, they do so directly."[9]

Far from reflecting a "shared responsibility" approach, the Rule will instead exacerbate conditions for an even larger number of asylum seekers trapped in Mexico.[10] The Departments acknowledge that Mexico has seen a dramatic increase in asylum applications. Rule 48761-62. These "record-breaking numbers," Rule 48761, correlate with

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[8] Abel Alvarado *et al.*, "Mexico's President Seeks Agreement for US to Send Deportees Directly to Countries of Origin," CNN (June 5, 2024).

[9] Reuters, "Mexico Nearing Deal with US for Direct Deportations to Home Countries," (Jun 5, 2024).

[10] Human Rights First, Two Weeks of the Biden Border Proclamation and Asylum Shutdown, (June 2024), at 1 (hereinafter HRF, Two Weeks), *attached.*

an increase in draconian border policies during the Trump administration similar to the instant Rule. The Rule will likely further overload Mexico's asylum system.[11]

Furthermore, as recently as October 2023 during the Palenque Summit on Migration, Mexico and eleven other countries in the region asked that destination countries like the United States expand migration pathways[12] and conduct their migration policies in a way that responds to the reality of migration in the region.[13] This Rule stands in direct contradiction to such a regional approach, a concern expressed by the Inter-American Commission on Human Rights (IACHR), which responded to the Rule by noting that "addressing the causes and consequences of mass migration requires cross-border and regional cooperation" and urging U.S. authorities to reconsider this policy change.[14]

2. Failure to comply with APA rulemaking requirements only exacerbates undesirable international consequences

The Departments argue that without immediate implementation, there would have been "definitely undesirable international consequences." Rule 48759. These consequences are defined as "a surge to the border before the Departments could finalize the rule [.]" Rule 48761. The Departments thus equate undesirable "international" consequences with an increased number of asylum seekers arriving at our own southwest border. Worse, they ignore the impact of this policy on the human rights of the refugees themselves, not to mention on countries to our south who will bear the brunt of the Rule.

Several recent examples show that the undesirable international consequences of unilateral U.S. policy decisions fall most heavily on countries in the region, as well as on asylum seekers themselves, not on the Departments.

For example, the 2023 Circumvention of Lawful Pathways (Lawful Pathways) rule exacerbated the humanitarian crisis in Mexico by forcing more people into lengthy waits under dangerous conditions for a CBP One appointment.[15] The 2022 announcement of a humanitarian parole program for Venezuelans, which was paired with an expansion of Title

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[11] *See* CGRS, *Comment on the Circumvention of Lawful Pathways Proposed Rule* (Mar. 27, 2023), Comment ID USCIS-2022-0016-12612, Tracking Number lfr-q1e8-fya2 (hereinafter CGRS, *CLP Rule Comment*), at 42-48.

[12] Pedro Pablo Cortes, *"Países Latinoamericanos Prometen "Un Antes Y Después" Tras La Cumbre Migratoria De Mexico"* [Latin American Countries Promise "A Before And After" Following the Migration Summit in Mexico], Efe (Oct. 2023).

[13] Isain Mandujano, *"Cumbre De Palenque: Los 13 Puntos Que Acordaron Mandatarios Para Buscar Solucionar La Migración"* [Palenque Summit: The 13 Points Agreed Upon by Leaders to Address Migration], Proceso (Oct. 2023).

[14] Inter-American Commission on Human Rights, "United States: IACHR Expresses Concern Over New Measures Restricting the Right to Asylum" (June 13, 2024), *attached.*

[15] Human Rights First, Trapped, Preyed Upon, and Punished: One Year of the Biden Administration's Asylum Ban, (May 2024), at 3 (hereinafter HRF, Trapped), *attached.*

42 and included ineligibility for Venezuelans who crossed the Mexican or Panamanian borders irregularly as of that date,[16] left Venezuelans stranded en route and added to the strains on countries of transit.[17] As a result of increasing pressure from the United States, Mexico has stepped up its efforts to intercept and detain asylum seekers in transit.[18] As explained by one journalist:

> Mexico has become part of America's de facto border infrastructure. The result is that the migrant crisis that was once at the southern US border has been outsourced, over 2,000 miles away, to Tapachula. Mexican immigration officials detained over 444,000 migrants in 2022—a 30 percent increase from the year before. A report from September 2022 suggests that around 60,000 migrants are stranded in Tapachula.[19]

The Departments state that "when migrants anticipate major changes in border policy, there is the potential to ignite a rush to the border," so any advance notice would "undermine the principal goal of this entire effort" which is to reduce migratory flows to the U.S. border and throughout the region. Rule 48762. Yet, as the President noted in his Proclamation, "the factors that are driving the unprecedented movement of people in our hemisphere remain." Proclamation 48488. The Rule similarly acknowledges that the increase in migration at the southwest border "is consistent with global and regional trends." Rule 48722. As explained by the Departments:

> Current trends and historical data indicate that migration and displacement in the Western Hemisphere will continue to increase as a result of violence, persecution, poverty, human rights abuses, the impacts of climate change, and other factors. Rule 48726.

Further emphasizing the speculative nature of any potential increase in numbers as a result of the Departments giving the required notice, the Departments also acknowledge that numbers increased in December 2023 without any notice of a policy change, Rule 48724-25, and 48761. In addition, they point to the adaptability of smuggling networks, Rule 48726, and note that smuggling organizations are a multi-billion-dollar industry with online marketing campaigns to spread misinformation, Rule 48730.

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[16] Implementation of a Parole Process for Venezuelans, 87 Fed. Reg. 63507, 63515 (Oct. 19, 2022).

[17] R4V – Interagency Coordination Platform for Refugees and Migrants from Venezuela, "Special Situation Report – New U.S. Migration Process for Venezuelans – Focus: Colombia, Panama, Costa Rica and Mexico" (Oct. 30, 2022); Associated Press, "Venezuelans Stranded in Panama By U.S. Policy Change Return Home" (Oct. 27, 2022).

[18] Nicole Narea, "Migrants are Sewing Their Lips Shut to Protest the Policy That Stranded Them in Mexico," Vox (Feb. 17, 2022).

[19] Esther Honig, "How U.S. Policy Has Trapped Migrant Workers in an 'Open Air Prison' in Mexico," The Nation (Mar. 20, 2023).

Yet, the Departments fail to explain how providing advance notice to asylum seekers would have been effectuated in the first place. In the wake of implementation of the Lawful Pathways rule, researchers found that people seeking asylum at our southern border "overwhelmingly" did not know what the rule was or the penalties it imposed based on an individual's manner of entry into the United States.[20] CGRS staff have encountered similar lack of knowledge among current asylum seekers about the instant Rule since it took effect. The Departments also do not explain why advance notice would even have mattered when smugglers are spreading lies about how to get to the United States. Given the extremely compelling reasons that continue to force people to flee in search of safety, and the malign influence of smugglers regardless of what border policies may be in place, it is speculative at best to assert that giving advance notice would have resulted in a surge of people to the border.

B. The Good Cause Exception Does Not Apply Since Providing Notice Would Have Been Both Practicable and in the Public Interest

The Departments next assert that the Rule falls within the good cause exception to the APA's notice-and-comment and delayed-effective-date requirements because compliance would be both impracticable and contrary to the public interest. Rule 48762.

1. Providing notice was practicable

As noted in the Rule, findings of impracticability depend on the facts and the context. Rule 48762. Yet the Departments focus solely on reducing numbers at the border at all costs,[21] and avoiding a potential increase of asylum applicants, which, as pointed out above, is speculative in the first place. The Departments also fail entirely to consider that border management policies must comply with existing U.S. and international law designed to protect refugees. Instead, the Rule is forthright in presenting adherence to the law as a problem that the Departments feel they must overcome. For example, the Rule laments that:

> [Department of Homeland Security (DHS)]'s ability to manage this increase in encounters has been significantly challenged by the substantial number of noncitizens processed for expedited removal and expressing a fear of return or an intent to seek asylum; rather than being swiftly removed, these noncitizens are referred to an AO for a credible fear interview and can seek IJ review of an AO's

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[20] Human Rights First, Refugee Protection Travesty (July 2023), at 21 (hereinafter HRF, Travesty), *attached.*

[21] As the Rule stresses, "The **critical** need to **immediately** implement more effective border management measures is described **at length** in the Presidential Proclamation of June 3, 2024, Securing the Border, and in Section III.B of this preamble." Rule 48762 (emphasis added).

> negative credible fear determination, which requires additional time and resources. Rule 48762.

It is striking that this depiction of the problem is a description of the legally-required process, a decades-long feature of U.S. law that the Departments now treat as a bug.

As another example of its failure to situate the impracticability analysis in its proper context, the Rule frequently refers to U.S. policy as providing "real and perceived incentives" to migrate, Rule 48764, with little corresponding recognition of factors that force people to flee, regardless of how draconian U.S. border procedures may be.

2. Providing notice was in the public interest

Turning to the second prong of the good cause exception, the Departments assert that providing notice and delaying implementation would have been contrary to the public interest, again citing the possible increase in people coming to the border in anticipation of a policy change. Rule 48764. As noted above, the potential increase due to providing advance notice is speculative at best.

As further justification, the Departments point to smugglers who create a sense of urgency among migrants by overemphasizing the significance of recent or upcoming policy developments. Rule 48764. However, as noted above, the Departments also state that smugglers spread rumors and misrepresent facts, Rule 48764, which suggests that actual changes in policy are not needed for smugglers to drum up business. In invoking the negative role of smugglers, the Departments again fail to acknowledge the larger context that the more difficult it is to apply for asylum, the more likely it is that people will turn to smugglers in desperation to guide them through the labyrinth of obstacles before them.

The Departments' argument that asylum seekers from Mexico may have had "an additional perceived incentive" to "rush to the border" during a notice-and-comment period, Rule 48765, is particularly reprehensible. They thus acknowledge that, contrary even to the Lawful Pathways rule, direct *refoulement* of Mexican asylum seekers to their country of origin is a specific aim of the instant Rule.

The Departments' chief error here is a narrowly circumscribed view of the public interest, defined solely as reducing the number of people seeking asylum at the border. The Departments fail to acknowledge the public interest in complying with existing law and honoring our treaty commitments, particularly insofar as these international obligations

underpin the Departments' regional approach to migration as affirmed in the Los Angeles Declaration on Migration and Protection.[22]

If the Departments had allowed for a notice-and-comment period, they would have been able to consider the issues raised in this comment, and to comply with the directive of Executive Order 14010 to consult and plan 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.[23]

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 June 2024 when the Interim Final Rule was published.

The Departments' failure to follow the mandate of Executive Order 14010 is particularly troubling since many of the most knowledgeable stakeholders have made their desire to assist crystal clear. We note in particular that the United Nations High Commissioner for Refugees (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.[24]

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

[22] The Los Angeles Declaration states that the Refugee Convention and Protocol, CAT, and other international conventions "remain binding on the Parties to those conventions that endorse the Declaration" and reiterates "the importance and meaning of the principle of non-refoulement as a cornerstone of the international protection of refugees."

[23] 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).

[24] 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.[25]

Because the Departments seek to evade the APA's requirements, we assume that they will not at this point engage in consultation and planning as directed by Executive Order 14010. They should explain why not.

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

Even if the Departments were justified in proceeding with an Interim Final Rule, there is no reason to limit the public comment period to thirty days. The Departments state that they "seek and welcome post-promulgation comments," Rule 48759, yet offer no rationale at all for providing the public with such a brief period of time to formulate comments on a policy that is already in effect. We explain below why thirty days is insufficient for our Center.

1. Our Center has limited capacity to respond to the 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 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 unnecessarily brief comment period. We note in particular that because the Rule went into effect immediately, we had to devote time and resources to filing a legal challenge on June 12, 2024.[26]

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 Interim Final Rule,[27] working on our own or in coalition with other organizations to write and place op-ed pieces,[28] craft messaging guidance, and serve as a resource for interested members of Congress. All these necessary activities were doubled during the comment period by the immediately preceding publication of the Notice of Proposed Rulemaking on Application of Certain Mandatory Bars in Fear Screenings, also with a truncated 30-day comment period,[29] some of which ran concurrently with this comment period.

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[25] 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*.

[26] *Las Americas supra* n. 3.

[27] CGRS, "CGRS Denounces Executive Action Gutting Asylum at the Border" (June 4, 2024), *attached.*

[28] Karen Musalo, "Why Biden's New Border Plan Is a Terrible Idea," Los Angeles Times (June 6, 2024), *attached.*

[29] 89 Fed. Reg. 41347 (May 13, 2024).

These activities have taken time away from engaging in the kind of extensive research and analysis required for adequately commenting on this Interim Final Rule. We are thus unable to provide the kind of comprehensive and detailed comments on either this Interim Final Rule or the earlier Proposed Rule that they require.

2. The scope and complexity of the Interim Final Rule, and its interaction with the Lawful Pathways Rule, the Mandatory Bars Proposed Rule, and other recent policy changes require more than 30 days to address

The Rule makes three major changes to longstanding asylum law and procedures, each one of which necessitates rigorous scrutiny. The Rule's creation of novel legal concepts such as "emergency border circumstances" and "reasonable probability," along with its vast expansion of "manifestation of fear" far beyond any past or current usage, all require research and analysis to determine how they will operate in practice and whether they are consistent with domestic and international law.

In addition, it is necessary to consider the various intersections of this Interim Final Rule with other recent related developments including the May 2023 Lawful Pathways rule; the May 2024 Notice of Proposed Rulemaking on Application of Certain Mandatory Bars in Fear Screenings, as well as the contemporaneous announcements of revised guidance directing asylum officers to consider internal relocation when assessing claims of future persecution in all credible fear cases[30] and of a new policy and guidelines governing the use of classified information in immigration proceedings.[31]

We note that an additional source of difficulty and delay is the failure by DHS 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,[32] to which we have not yet received a response.

We can confidently state that fully assessing all of these rapidly changing legal and policy pronouncements requires more than thirty days, particularly given the overlapping comment periods in June and the need to promptly file a legal challenge to the instant Rule.

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[30] Department of Homeland Security (DHS), "DHS Announces Proposed Rule and Other Measures to Enhance Security, Streamline Processing" (May 9, 2024).
[31] DHS, "DHS Policy and Guidelines for the Use of Classified Information in Immigration Proceedings" (May 9, 2024).
[32] CGRS, "CGRS Seeks Transparency on Asylum Screening Guidance," (May 24, 2024), *attached*.

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

In any analysis of a 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)[33] and the 1984 Convention Against Torture (CAT).[34] 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).[35] 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.[36] 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."[37] 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.[38]

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."[39] 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."[40]

By becoming a state party to these treaties, we have agreed to carry out their terms in good faith.[41] Under the Refugee Protocol, the United States has additionally and specifically

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[33] 606 U.N.T.S. 267 (entry into force 4 Oct. 1967).
[34] 1465 U.N.T.S. 85 (entry into force 26 June 1987).
[35] 189 U.N.T.S. 137 (entry into force 22 April 1954).
[36] 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.
[37] 8 U.S.C. § 1231(b)(3)(4).
[38] 8 U.S.C. § 1158(b)(1)(A).
[39] 1984 Convention Against Torture (CAT), art. 3.
[40] 8 C.F.R. § 208.16(c)(2).
[41] Vienna Convention on the Law of Treaties, art. 26. 1155 U.N.T.S. 331 (entry into force 27 Jan. 1980).

undertaken to cooperate with UNHCR in the exercise of its functions and in particular to facilitate UNHCR's duty of supervising the application of the provisions of the Convention and Protocol.[42] 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.[43]

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 the Conclusions of UNHCR's Executive Committee,[44] the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*,[45] and other UNHCR guidelines and analyses. We comment below on specific aspects of the Interim Final 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. Where applicants are detained until a positive credible fear determination is made, there are predictable consequences for their ability to obtain their own counsel prior to their credible fear interview, particularly now that they will have only four hours in which to do so.[46] Accordingly, the Departments bear an even greater burden to ensure that border offi cials and asylum offiicers do not make mistakes that will lead to people erroneously being returned to persecution or torture, a risk acknowledged in the Rule. Rule 48767. This risk is heightened because the Rule rests on border officials recognizing and responding to an applicant's "manifestation" of a desire to seek asylum, and authorizes the application of a number of complex ineligibility determinations in the credible fear interview using a heightened screening standard.

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[42] 1967 Protocol Relating to the Status of Refugees, art. II.1.
[43] *INS v. Cardoza-Fonseca,* 480 U.S. 421, 426 (1987).
[44] UNHCR, *A Thematic Compilation of Executive Committee Conclusions* (7th Ed.) (June 2014).
[45] 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*.
[46] U.S. Immigration and Customs Enforcement (ICE), "Implementation Guidance for Noncitizens Described in Presidential Proclamation of June 3, 2023 *Securing the Border*, and Interim Final Rule, *Securing the Border"* (June 4, 2024), at 4 (hereinafter ICE Implementation Guidance).

IV. EMERGENCY BORDER CIRCUMSTANCES DO NOT JUSTIFY DENYING ACCESS TO PROTECTION

The Rule comprises three fundamental changes to U.S. asylum law and policy: first, the notion of "emergency border circumstances" as a trigger for making most applicants ineligible for asylum; second, the requirement that an applicant must "manifest" their desire to seek asylum in order to receive a credible fear interview; and third, the imposition of the "reasonable probability" threshold in credible fear interviews for those who are recognized as having manifested fear.

The Departments assert that the Rule is consistent with U.S. and international law, pointing to a complicated array of numerical setpoints, temporal limitations, and exceptions intended to differentiate it from various similar asylum restrictions already ruled unlawful by the courts.[47] However, as we explain below, any one of these changes, much less their combined impact, operates to end not only asylum but also withholding of removal and protection under CAT for all but a small minority of extremely lucky people. Such an outcome was not intended by Congress and is not countenanced by international law.

We address these changes in turn, beginning with the novel legal concept of "emergency border circumstances."

A. The Obligation of *Non-Refoulement* Is Absolute and Is Not Subject to Limitation Under Emergency Circumstances

Save for the limited circumstances set forth in the Refugee Convention, the obligation of *non-refoulement* is absolute.[48] Denying access to asylum is not permissible simply because many people are seeking it. If such an exception were allowed, there would be no rule of *non-refoulement* left. There are unfortunately many examples both historically and in the present day where large numbers of people are forced to flee.[49] As far back as 1981,

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[47] Rule 48735-36; *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023) (vacating Circumvention of Lawful Pathways rule), appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024); *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021) (affirming district court's vacatur of an earlier IFR eliminating asylum eligibility for individuals who crossed into the United States between ports of entry); *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2020) (enjoining IFR denying asylum to noncitizens arriving at the southern border unless they first applied for and were denied asylum in a transit country).

[48] Article 33(2) of the Convention provides that the benefit of *non-refoulement* may not "be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

[49] Looking at just the top five countries of origin, there are currently over 6.4 million refugees from Afghanistan, 6.4 million from Syria, 6.1 million from Venezuela, 6 million from Ukraine, and 1.5 million from Sudan. UNHCR, *Global Trends: Forced Displacement in 2023* at 18 (June 13, 2024) (hereinafter UNHCR, *Global Trends*), *attached.*

UNHCR's Executive Committee, of which the United States is a member, adopted a conclusion setting forth standards for dealing with such situations. These standards require that:

> 1. In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out below. […]
>
> 2. In all cases the fundamental principle of non-refoulement—including non-rejection at the frontier—must be scrupulously observed.[50]

Nor does any other kind of emergency situation justify such an extreme curtailment of the obligation of *non-refoulement* like that instituted in the Rule. Even in the unprecedented circumstances of the recent global pandemic, UNHCR warned that emergency border management measures must be non-discriminatory, necessary, proportionate, and reasonable to a legitimate aim.[51] Unlike the primary aim at the time of protecting public health, there is no legitimate aim in the current situation since the Departments' frequently stated primary goal is precisely to reduce the number of people able to access asylum procedures. As the Rule admits, "the principal goal of this entire effort" is to reduce migratory flows to the U.S. border and throughout the region. Rule 48762. And even though they attempt to minimize the impact, the Departments acknowledge that "some" applicants with "meritorious claims" will mistakenly be removed. Rule 48767.

B. The Definition of Emergency Border Circumstances Is Arbitrary

Even if emergency border circumstances were a justification for denying access to protection, the numerical parameters established by the Rule are arbitrary. Rather than starting with an assessment of need, looking at the number of asylum seekers and the capacities of other countries in the region, the Departments begin with the current level and allocation of resources in the United States and work backwards from there.

The Rule repeatedly invokes resource constraints as the reason to deny access to asylum, as though the United States were a small, poor, country. Yet Customs and Border Protection (CBP) is the nation's largest federal law enforcement agency,[52] and it has

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[50] UNHCR Executive Committee, *Conclusion No. 22 (XXXII) on the Protection of Asylum Seekers in Situations of Large-Scale Influx* (1981), *attached.*

[51] UNHCR, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response* (Mar. 16, 2020), para. 5, (hereinafter UNHCR, *Key Legal Considerations Covid-19) attached.*

[52] U.S. Customs and Border Protection (CBP), Stats and Summaries (last visited July 2, 2024).

seriously understated its processing capacity in the past.[53] It is also striking that, even though the Rule emphasizes the importance of shared responsibility and a regional approach to migration, there is no acknowledgment of the disproportionate refugee-hosting responsibilities already undertaken by other countries in the Americas.[54]

C. The Ostensibly Temporary Nature of the Emergency Is Illusory

The Rule is characterized as an "emergency" measure in response to unprecedented circumstances, Rule 48731 and 48743, yet it clearly will become the new normal for the United States. Observers note that the threshold for suspending the Rule, a fourteen-day period after a weekly average of 1500 encounters or less per day, has not been met since July 2020.[55] Since global displacement numbers have risen overall since July 2020, it is reasonable to assume the threshold for suspending the Rule will not be met in the foreseeable future.

Even if the number of encounters dropped to the level where the Rule could be suspended, the Departments could well issue a new Interim Final Rule to keep the procedure in place. This entire Rule is animated by the fear of a potential increase in number of border arrivals; if that is accepted as a justification for the Rule, it will never be lifted and the "emergency" will be permanent.

D. U.S. Law Prohibits Restrictions on Access to Asylum Inconsistent with the Statute

Domestic law reflects the understanding that the obligation of *non-refoulement* is absolute. The statute explicitly allows a noncitizen to apply for asylum regardless of whether they arrive at a port of entry or between ports and irrespective of their status.[56] It further specifies that any additional limitations and conditions on asylum eligibility must be "consistent" with the statute.[57] Limiting a noncitizen's access to asylum procedures outside an appointment made through the CBP One app and based on the number of other people also seeking asylum that same day or within the last three weeks is both arbitrary and inconsistent with Congressional intent in aligning U.S. law with the Refugee Protocol.

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[53] Elliot Spagat, "Holding-cell stats raise questions about Trump asylum policy," AP (Feb. 13, 2020).
[54] UNHCR, *Global Trends* at 2 (relative to their populations, the Caribbean island nations of Aruba and Curacao are in the top five countries in the world hosting the largest number of refugees), and at 18 (of the 6.1 million Venezuelans who have fled their country, 97% have remained in South America, notably Colombia, Peru, Ecuador, and Chile). *See also* CGRS, Far from Safety.
[55] Adam Isacson, "The Futility of 'Shutting Down Asylum' by Executive Action at the U.S.-Mexico Border," Washington Office on Latin America (June 4, 2024), *attached.*
[56] 8 U.S.C. § 1158(a)(1).
[57] 8 U.S.C. § 1158(b)(2)(C).

While the administration is clearly frustrated that Congress has not acted to "update" our asylum system, Proclamation 48488-89, this is not license for the Departments simply to implement their preferred policies without regard to the existing statute.

E. Eliminating Access to Asylum While Simultaneously Placing Mandatory Forms of Humanitarian Protection Out of Reach Renders the Rule Illegal

1. Access to asylum is not discretionary, even if U.S. law states that a grant of asylum is discretionary

The Departments insist that the Rule does not violate the Refugee Protocol because asylum is discretionary under U.S. law, pointing out that it is still possible for an applicant to access withholding of removal and protection under CAT. Rule 48736.

As a matter of U.S. law, a grant of asylum is discretionary once an applicant meets the refugee definition. This interpretation is entirely incorrect as a matter of international law because both recognition as a refugee and the protection of *non-refoulement* are mandatory for those who meet the refugee definition.[58] And even under U.S. law, the role of discretion in asylum adjudication is carefully circumscribed.

First, under U.S. law, the right to apply for asylum is not a matter of discretion. The United States must allow people to seek asylum, as explicitly provided for in 8 U.S.C. § 1158. The Rule violates the statutory provision by impermissibly eliminating the right to apply for asylum for almost all people who seek to do so during emergency border circumstances, aside from those who come to a port of entry with a pre-scheduled appointment obtained via the CBP One app.

Second, the determination of eligibility for asylum under U.S. law is not a matter of discretion. An applicant must meet the statutory definition of a refugee, which is a question of law and fact. In order to fulfill U.S. obligations under the Refugee Protocol, the

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[58] UNHCR, *Comment on the Circumvention of Lawful Pathways Proposed Rule* (Mar. 20, 2023), Comment ID USCIS-2022-0016-7428, Tracking Number lfg-bafv-u5sd, (hereinafter UNHCR, *CLP Rule Comment*) at 24-27.

Departments must make a good faith determination as to whether an applicant meets the refugee definition.[59]

Only then does discretion enter the picture, and that discretion is bound by specific factors. It is limited by the statute, which clearly states that any regulations must be consistent with the statute. The adjudicator's exercise of discretion is also limited by caselaw, which requires a weighing of both positive and negative factors and cannot be interpreted simply as a whimsical decision untethered from relevant factors.

2. Withholding of removal is not a substitute for asylum and is effectively unavailable under the Rule

The Departments assert that the United States meets its *non-refoulement* obligations under the Refugee Protocol by means of the U.S. legal category of withholding of removal. Rule 48736. This interpretation is incorrect as a matter of international law; withholding of removal is not equivalent to asylum both because it requires a much higher standard of proof and because it fails to convey fundamental rights guaranteed by the Protocol such as family unity.[60]

Even if withholding of removal were a legally sufficient means of fulfilling U.S. obligations under the Refugee Protocol, we explain below how the numerous obstacles created by the Rule, including the new requirement that applicants must manifest fear and the new reasonable probability standard in credible fear interviews, place this form of protection out of reach of all but a very few applicants.

F. Providing Exemptions and Exceptions to a Limited Number of Individuals and Groups Does Not Cure the Underlying Illegality of the Rule

Certain people are not subject to the Rule, including unaccompanied children, victims of a severe form of trafficking in persons, those who obtain an appointment using the CBP One

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[59] The Ninth Circuit has held that "[a]sylum is a two-step process, requiring the applicant first to establish his eligibility for asylum by demonstrating that he meets the statutory definition of a 'refugee,' and second to show that he is entitled to asylum as a matter of discretion." *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004). An immigration judge abuses his discretion when he conflates his discretionary determination of whether an applicant is entitled to asylum with his nondiscretionary determination concerning eligibility for asylum. See *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004). In exercising its discretion, the agency must consider both favorable and unfavorable factors, including the severity of the past persecution suffered. See *Kazlauskas v. INS,* 46 F.3d 902, 907 (9th Cir. 1995); see also *Gulla v. Gonzales*, 498 F.3d 911, 917–19 (9th Cir. 2007) (immigration judge abused his discretion by giving little weight to the fear of persecution, by ignoring strong family ties to the US, by relying on the use of fraudulent documents to reach the US, and by relying on the alleged circumvention of asylum and immigration procedures).
[60] UNHCR, *CLP Rule Comment*, 24–27.

app,[61] those permitted to enter based on the totality of the circumstances including urgent humanitarian interests at the time of entry, and those permitted to enter due to operational considerations at the time of entry. Rule 48769, referencing section 3(b) of the Presidential Proclamation.

Others may attempt to demonstrate by a preponderance of the evidence that exceptionally compelling circumstances exist such that the Rule should not apply to them, limited to an acute medical emergency; an imminent and extreme threat to life or safety; or satisfying the definition of a victim of a severe form of trafficking in persons. Rule 48769. As noted in the Rule, these are the same three circumstances encompassed by the Lawful Pathways rule; we accordingly reiterate the objections made in our comment on that rule when it was proposed and incorporate them into this comment.[62] We also note that additional, extremely limited, exceptions under the Lawful Pathways rule for people who appear at a port of entry but are unable to use the CBP One app, or who have been denied asylum in a third country, are not even available under the instant Rule.

These subjective and highly discretionary exceptions to the Rule are not sufficient for the United States to ensure refugees are not refouled. The complicated set of exceptions and exemptions will only contribute to confusion and disparate treatment, undermining the goal of orderly processing at the border and making asylum seekers even more vulnerable to smugglers portraying their services as indispensable.

G. Denying Access to Asylum Due to Emergency Border Circumstances Is a Ground of Exclusion that Impermissibly Adds to Article 1(F) of the Refugee Convention

When emergency border circumstances are invoked, applicants subject to the Rule will be ineligible for asylum, or to put it in international refugee law terms, will be excluded from that form of protection. Accordingly, the Rule violates the Refugee Convention, because the exclusion grounds in Article 1(F) are exhaustive.[63] Adding an additional ground of exclusion, even if subject to rebuttal in rare instances, is contrary to the Refugee Convention and risks erroneous return to persecution or torture, a risk the Departments acknowledge. Rule 48767.

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[61] We reiterate our objections to the CBP One app as the sole means of accessing asylum and incorporate them in this Comment. CGRS, *CLP Rule Comment*, 32-39.

[62] CGRS, *CLP Rule Comment*, 39–41.

[63] UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees,* HCR/GIP/03/05 (Sept. 4, 2003), para. 3, (hereinafter UNHCR *Exclusion Guidelines*), *attached.*

H. The Unavailability of Asylum During Emergency Border Circumstances Constitutes a Penalty Which Is Prohibited by Article 31(1) of the Refugee Convention

The Rule also runs afoul of Article 31(1) of the Refugee Convention, which prohibits the United States from imposing penalties on refugees "on account of their illegal entry or presence," where such refugees are coming directly from a territory where their life or freedom was threatened on Convention grounds, present themselves without delay to the authorities, and show good cause for their "illegal entry or presence." Despite the Departments' assertion to the contrary, Rule 48736, there is no doubt that denying access to asylum constitutes a penalty under the meaning of the Refugee Convention. Such a penalty need not be a criminal sanction. To the contrary, UNHCR explains that a penalty prohibited by Article 31 may include "any administrative sanction or procedural detriment."[64]

There is also no doubt that the Departments intend the presumption of ineligibility to be a penalty. The Rule specifically and repeatedly describes it as a "consequence" (*passim*) for asylum seekers failing to follow the new procedure.

I. The Application of the Rule to Asylum Seekers from Mexico Constitutes Direct *Refoulement*

Asylum seekers from Mexico are not subject to the Lawful Pathways rule. Rule 48738. That rule is premised in part on the notion that asylum seekers from countries other than Mexico can and should apply for asylum and receive protection in Mexico or some other country instead of traveling to the United States. We objected to the Lawful Pathways rule as a whole,[65] but it at least has the virtue of recognizing that Mexicans cannot be expected to apply for asylum in Mexico. This common-sense principle has now been abandoned by the Departments.

Mexicans are subject to this Rule, Rule 48738, even though they are fleeing directly from their country of feared persecution. The Rule is thus in direct contradiction to the U.S.'s responsibility to adjudicate claims made in this country[66] and undermines what has traditionally been U.S. global leadership in refugee protection, as well as its stated approach of shared responsibility in the region for managing migration.

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[64] UNHCR, *Legal Considerations on State Responsibilities for Persons Seeking International Protection in Transit Areas or "International" Zones at Airports* (Jan. 17, 2019), para. 8, *attached.*

[65] CGRS, *CLP Rule Comment*, 41-73.

[66] UNHCR, *Legal Considerations Regarding Access to Protection And A Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries* (Apr. 2018), para. 2, *attached.*

No explanation or justification is offered except expediency. The Rule simply notes that Mexicans are seeking asylum in the United States in increasing numbers, Rule 48738, so they must be stopped. The Departments fail to suggest what other options are even theoretically open to asylum seekers from Mexico. They do not acknowledge or take into account that refugees and asylum seekers from Mexico include people fleeing gang and cartel violence,[67] women and LGBTQ individuals escaping sexual and gender-based violence,[68] children fearing recruitment into cartels,[69] Indigenous people,[70] journalists,[71] and activists.[72]

CGRS's Technical Assistance Library includes a number of declarations authored by country conditions experts addressing common fact patterns seen in asylum cases from Mexico. Dr. Michele M. Stephens explains in her declaration that violence against women is endemic in many parts of the country, that police rarely intervene, and that violence against Indigenous women and girls is even more prevalent.[73] Similarly, Dr. Gail Roberta Mummert attests in her declaration to high levels of child abuse in Mexico, along with societal acceptance of this kind of mistreatment, the targeting of children by cartels and gangs, and the unwillingness of Mexican authorities to take action against child abuse.[74]

V. REQUIRING ASYLUM SEEKERS TO MANIFEST FEAR IN ORDER TO ACCESS PROTECTION WILL LEAD TO *REFOULEMENT*

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[67] Associated Press, "Mexican Activist Who Searched for Disappeared Brother Now Missing After Attack," The Guardian (Jan. 17, 2024); Mark Stevenson, "Hundreds Flee Drug Cartel Turf Battles in Rural Western Mexico," AP (June 16, 2023), *attached.*

[68] Lara Loaiza, "Mexico's Rising Femicides Linked to Organized Crime," InSight Crime (July 11, 2023); Gemma Kloppe-Santamaria & Julia Zulver, "Beyond Collateral Damage: Femicides, Disappearances, and New Trends in Gender-Based Violence in Mexico," Wilson Center (June 27, 2023); Richard Greene, "In Mexico, 53 Trans Women are Murdered Every Year," Rival Times (June 25, 2023), *attached.*

[69] Mark Stevenson, "In Mexico, Children as Young as 10 Recruited by Drug Cartels," AP (Oct. 14, 2021); Chris Dalby, "How Mexico's Cartels Use Video Games to Recruit Children," InSight Crime (Oct. 14, 2021), *attached.*

[70] Anjan Sundaram, "Indigenous Activists Are Risking Their Lives for Butterflies," Vox (Dec. 20, 2023); Mitzi Mayaul Fuentes Gomez, "Thousands of Mexican Indigenous People Flee Homes for Fear of Armed Attacks," La Prensa Latina (Nov. 5, 2021), *attached.*

[71] Mexico: Killings of Journalists Under State Protection Show Urgent Need to Strengthen Federal Mechanism, Amnesty International (Mar. 6, 2024), *attached.*

[72] Associated Press, "Mexican Activist Who Searched for Disappeared Brother Now Missing After Attack," The Guardian (Jan. 17, 2024), *attached.*

[73] Declaration of Dr. Michele M. Stephens, expert on gender-based violence in Mexico (Dec. 21, 2023), *attached.*

[74] Declaration of Gail Roberta Mummert, expert on family relations in Mexico (Apr. 23, 2024), *attached.*

Under the Rule, when emergency border circumstances have been declared, individuals in expedited removal will receive a credible fear screening interview only if they "manifest[] a fear of return, or express[] an intention to apply for asylum or protection, express[]a fear of persecution or torture, or express[] a fear of return to [their] country or the country of removal." Rule 48771. The Rule provides that a referring officer will document the expression or intention to apply for protection, and then provide the individual who has manifested fear with a written disclosure explaining the purpose of the referral and the credible fear interview process. *Id.*

Removing affirmative and individualized advisals of the right to apply for protection and requiring applicants to "manifest fear" to be able to avail themselves of the credible fear process represents a sharp break from prior practice by the Departments and is a seriously flawed approach. The Departments acknowledge the manifestation of fear and the reasonable probability standard create the risk that individuals with meritorious asylum claims will not be referred for credible fear interviews or removal proceedings. Rule 48744, 48767. Creating a standard that knowingly accepts a clear probability of violating *non-refoulement* violates the United States' international and domestic obligations and runs contrary to the statute. We urge the Departments in the strongest terms to retract their reliance on what is essentially a non-procedure that will inevitably screen out meritorious asylum seekers, in violation of international norms and U.S. law.

A. Procedures in Place Prior to the Rule

Prior to the implementation of the Rule, immigration officers were required to ask scripted questions of all individuals in expedited removal proceedings to determine if they should be referred to credible fear interviews. 8 C.F.R. § 235.3(b)(2)(i); Rule 48739. The script included advisals that individuals could ask for protection if they had a fear of removal or return. Rule 48739. Additionally, immigration officers asked four questions designed to elicit information about possible claims for protection-based relief.[75]

These affirmative notices and questions are an important method of providing notice to asylum seekers of the possibility of applying for relief and the procedure for doing so. A comprehensive 2005 study conducted by the bipartisan United States Commission on

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[75] Allen Keller, M.D., *et al.*, "Study on Asylum Seekers in Expedited Removal: Evaluation of Credible Fear Referral in Expedited Removal at Ports of Entry in the United States" (Feb. 2005) (hereinafter "USCIRF Expedited Removal Study"), at 60, nn. 52 & 53, *attached*. The four questions asked were:
(1) Why did you leave your home country or country of last residence;
(2) Do you have any fear or concern about being returned to your home country or being removed from the United States;
(3) Would you be harmed if you returned to your home country or country of last residence; and
(4) Do you have any questions or is there anything else you would like to add.

International Religious Freedom (USCIRF) found that noncitizens who were informed that they could apply for protection if they had a fear of returning home were seven times more likely to be referred for credible fear determinations.[76] Clearly, these procedures made a substantial difference in the ability of asylum seekers to access the United States asylum process. The Departments now suggest that asking individualized questions is too suggestive and prompts those without an intention to seek asylum to claim a fear of return, leading to a higher rate of referrals for individuals who are not ultimately granted relief. Rule 48743. However, this reasoning ignores the fact that the credible fear screening process was intended to serve as a low screening threshold, precisely to avoid screening out *bona fide* refugees. *See* Section IV, below.

Even with these procedures in place, however, the 2005 study documented, and the follow-up 2016 report confirmed, that immigration officers regularly failed to follow the process, thereby preventing *bona fide* asylum seekers from receiving referrals to credible fear interviews.[77] For example, in the 2005 study, researchers observed noncitizens who expressed a fear of return to an immigration officer, but nevertheless were denied a credible fear interview.[78] The 2016 report similarly contained reports by asylum seekers that even when they claimed a fear of return, their answers were not correctly reported and they were not referred for a credible fear interview.[79] Accordingly, even existing procedures show that affirmative advisals are helpful but inadequate to fully ensure fair processing of all asylum seekers. Removing affirmative advisals can be expected to drastically lower the number of applicants who will be referred to credible fear proceedings.

B. Asylum Seekers Must Be Given Information and Assistance During the Credible Fear Process to Effectuate Congressional Intent

As explained below, international guidance and the statute require applicants who "may be" eligible for asylum to be provided with information about making their claims; the Rule violates U.S. obligations in this regard.

1. States are required to provide access to a fair and efficient procedure that identifies refugees

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[76] USCIRF Expedited Removal Study at 60, n.54.

[77] Elizabeth Cassidy and Tiffany Lynch, Barriers to Protection: the Treatment of Asylum Seekers in Expedited Removal, United States Commission on International Religious Freedom (Aug. 2016), at 17–23 (hereinafter USCIRF Barriers) (summarizing shortcomings in immigration officers' implementation of the credible fear process in the 2005 USCIRF Expedited Removal Study).

[78] USCIRF Expedited Removal Study at 54.

[79] Cassidy and Lynch, USCIRF Barriers, at 20–21.

As explained earlier, as a state party to the Refugee Protocol, the United States must abide by the requirement of *non-refoulement* of protected classes of persons. There is no provision in the Convention authorizing a state to forego individualized assessment in favor of a blanket rejection of the requirement of *non-refoulement*. UNHCR and its Executive Committee have long emphasized that to fully carry out state obligations under the Refugee Convention, procedures must be not only efficient, but also fair, and affirmatively identify and provide guidance to applicants.[80] The Rule's reliance on manifestation of fear is inadequate to fulfill these basic requirements.

The United States has a duty to have in place procedures that will identify refugees in order to avoid *refoulement*.[81] This includes an affirmative obligation to elicit information from an applicant that could potentially establish refugee status.[82] Otherwise, the United States might breach its *non-refoulement* obligation by depriving a refugee of access to protection without knowing they are a refugee.[83]

Relying on asylum seekers to manifest fear or spontaneously declare their intention to apply for asylum does not align with Congressional intent, which was to ensure that asylum was available to all those with legitimate claims.[84]

2. Notice must be provided in a way that is reasonably tailored to inform applicants that they may apply for relief.

Noncitizens who may be eligible for a credible fear interview are required by statute to be provided information about that interview.[85] The Rule runs afoul of the statute by removing the procedures by which officers fill out Form I-867A or Form I-867B, or provide

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[80] ***See*, *e.g.,*** UNHCR Executive Committee, *Conclusion No. 8 (VIII) on Determination of Refugee Status*, (1977) (e)(ii) ("The applicant should receive the necessary guidance as to the procedure to be followed"), (e)(iv) ("The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned."), *attached*; UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures),* ¶¶ 4-5, U.N. Doc. EC/GC/01/12 (May 31, 2001) (hereinafter UNHCR, Asylum Processes), *attached.*
[81] UNHCR *Handbook* ¶ 189, ¶¶ 189-94.
[82] *See, e.g.,* UNHCR, *Key Legal Considerations COVID-19* ¶ 3 ("States have a duty vis-à-vis persons who have arrived at their borders[] to make independent inquiries as to the persons' need for international protection and to ensure they are not at risk of refoulement").
[83] ***See*** UNHCR, *Note on Determination of Refugee Status under International Instruments*, ¶ 5 (Aug. 24, 1977) ("[A]ny person is a refugee within the framework of a given instrument if he meets the criteria of the refugee definition in that instrument, whether he is formally recognized as a refugee or not.")
[84] *Cf. Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176, 1183 (W.D. Wash. 2018) (recounting Congressional history and determining that the Departments' failure to provide notice of the one-year asylum application period to applicants in custody violated Congressional intent to ensure availability of asylum to *bona fide* refugees).
[85] 8 U.S.C. § 1225(b)(1)(B)(iv).

individualized advisals on asylum and ask noncitizens questions related to whether they have a fear of return. Rule 48740.

In a footnote, the Departments acknowledge "an argument could be made" that 8 U.S.C. § 1225(b)(1)(B)(iv) requires information concerning the asylum interview to be provided not only to noncitizens who are eligible for a credible fear interview, but to the broader pool of noncitizens who "may be" eligible for an interview. Rule 48741. The text of the statute provides that immigration officers "shall provide information concerning the asylum interview described in this subparagraph to [noncitizens] *who may be eligible*." It is difficult to understand interpreting this text to encompass only those eligible and not also those who may be eligible.

The Departments insist they are actually providing information to the broader pool of noncitizens by using signs and videos. Rule 48741. Immigration Customs and Enforcement (ICE) Implementation Guidance reveals that ICE's plans to notify noncitizens of their right to apply for relief include posting signs around detention facilities and playing a video on a loop. Neither of these methods, in isolation or together, is sufficient to put noncitizens on notice of how they may assert a claim for protection.

According to the ICE Implementation Guidance, the signs will notify the reader to speak to an officer for a variety of reasons ranging from hunger and thirst to witnessing a crime, and including a fear of persecution or torture if removed from the United States. The signs will advise the reader that if they tell an officer, they "may" be referred to a medical professional, an asylum officer, or "other law enforcement processional."[86] There is no indication that there is a right to apply for asylum or other relief, or that failing to affirmatively request it will foreclose the opportunity to do so.

These signs are not adequate to alert the reader they will forfeit their right to seek relief if they do not manifest a fear of return. To begin with, the signs bury the information about fear-based protection among several other possible reasons why they should notify an officer. The terms "persecution" and "torture" are not further explained; CGRS's experience is that these terms and their specific legal meanings are often not readily understood, particularly by individuals with limited education or language proficiency. The signs also do not make clear that telling an immigration officer of a fear of return would trigger referral to an asylum officer for an interview, as opposed to a referral to some other "law enforcement professional" for an unclear purpose.

The ICE Implementation Guidance also explains that "in any location where it is possible to show to noncitizens a video," a video explaining that they should raise their concerns

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[86] ICE Implementation Guidance at 4.

should be played no less than once every two hours between 7:00 a.m. and 7:00 p.m. The video will not be shown in smaller facilities. Rule 48741.

The arbitrary limitation on the languages in which the signs and videos are available will prevent them from being accessible to many in custody. The Rule suggests the signs and videos will be posted in English, Spanish, Mandarin, and Hindi, Rule 48741 n.195, but the ICE Implementation Guidance says only that the signs must be posted in English and Spanish and mentions no additional languages. Either way, limiting language access to these four languages will clearly leave many without any way to understand the procedure they must follow to have their claims heard. Neither the Implementation Guidance nor the Rule explain how someone who cannot understand one of these four languages would know to seek out translations in the law library, as indicated in the Rule, or if all facilities even have a law library.

C. Reliance on Manifestations of Fear to Avoid *Refoulement* Is Insufficient

The Departments provide no reasoning to support their claim that the manifestation standard is "reasonably designed to identify meritorious claims," Rule 48744 & n.222, or that people who "indicate a fear of return on their own . . . are more likely to be urgently seeking protection." Rule 48743. The test wrongfully presumes that requesting relief or certain visibly detectable signs are proxies for a strong claim, and that all individuals with meritorious claims can and will approach an officer and spontaneously announce their fear and desire to apply for protection. There are other reasons that could explain why a person may or may not manifest fear. For example, smugglers may coach individuals to express their fear, while less-informed individuals with a very strong claim may not be aware of the need to make the request.

Many asylum seekers will not know they need to manifest fear or request asylum, and will not be able to do so. Individuals who reach CBP custody may have experienced trauma either in their home country or on their journey to the United States.[87] Trauma does not always present with consistent physical cues identified in the Rule's preamble such as shaking, crying, or signs of physical injury. Rule 48744.[88] The relevant United States Citizenship and Immigration Services (USCIS) Training Module explains that survivors of severe trauma may appear emotionally detached.[89] Relatedly, trauma survivors may find it

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[87] HRF, Trapped, at 7.
[88] ***See, e.g.,*** Stuart L. Lustig, MD, MPH, "Symptoms of Trauma Among Political Asylum Applicants: Don't Be Fooled," 31 Hastings Int'l & Comp. L. Rev. 725 (2008) (hereinafter "Symptoms of Trauma"), at 729–30, *attached*.
[89] Refugee, Asylum, and International Operations Directorate (RAIO) Officer Training, "Interviewing Survivors of Torture and Other Severe Trauma," (Dec. 20, 2019) at 19-22 (hereinafter "Interviewing Survivors of Torture").

extremely difficult to discuss painful events. Again, USCIS's own training materials explain that a trauma survivor may "do whatever necessary to avoid thinking about the events" due to the pain the memories evoke. Removing an affirmative, individualized explanation of the process makes it even harder for survivors to pursue protection for which they are entitled to apply. Some have had adverse experiences with law enforcement in their home countries or Mexico, which can compound the difficulty of requesting asylum from a uniformed United States immigration officer.[90]

1. Past experience dictates that relying on manifestation of fear will lead to *refoulement*

The Departments assure the public that the manifestation standard has been "long used" by the United States Coast Guard and was also used during the pendency of the Title 42 public health order as evidence of its merits. Rule 48744. However, the manifestation non-procedure has been roundly condemned in each of these settings because of the high probability of screening out *bona fide* refugees.

Also known as the "shout test," this standard was first designed by the United States to repel Haitians intercepted at sea in the 1980s and has operated as intended ever since, to keep refugees out and deny them safe haven,[91] even during times of extreme upheaval in Haiti.[92] The *New York Times* reported in December 2023 that of the 9,000 Haitians detained in the region near the Caribbean and the Straits of Florida between July 2021 and September 2023, the Coast Guard logged fewer than 300 claims of manifestations of fear from Haitians, even though it was a time of great upheaval and violence in Haiti.[93]

When the Title 42 policy was in place, the U.S. government again adopted the "shout test" in March 2022, when the U.S. Court of Appeals for the D.C. Circuit upheld a lower court ruling prohibiting the government from expelling families to places where they risked harm.[94] In response to the ruling, CBP issued guidance in May 2022 directing border

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[90] Refugee Protection Travesty at 6, 25 (documenting incidents of Mexican police abusing migrants in Mexico); Interviewing Survivors of Torture at 17 (noting that uniformed guards can trigger flashbacks for trauma survivors).
[91] *See* Seth Freed Wessler, "The Border Where Different Rules Apply," New York Times, (Dec. 6, 2023); *see also* CGRS, Manifesting Fear.
[92] Cheryl Little and Wendy Young, "Bush Administration Should Stop Turning Refugees Away," YaleGlobal Online (Mar. 9, 2004).
[93] Extension and Redesignation of Haiti for Temporary Protected Status, 89 Fed. Reg. 54484, 54487-91 (July 1, 2024).
[94] *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022).

officers to refer for screening any individuals who manifested a fear, verbally or nonverbally.[95]

CGRS and other organizations investigated implementation of the CBP guidance, interviewing at least 97 families expelled to cities along the U.S.–Mexico border. Researchers found that over half the families interviewed reported that they had verbally expressed a fear of return, and nearly three-quarters of the families reported having non-verbally expressed a fear. Yet, CBP did not refer a single one of these families for a fear screening as required under the guidance. Instead, families disclosed that CBP officers verbally abused them, telling them to "shut up," declaring they had "no right" to an interview, or completely ignoring their attempts to communicate.[96] This is unfortunately consistent with earlier reports of "outright skepticism, if not hostility, towards asylum claims" on the part of some CBP officers.[97]

2. Overworked government officials will not notice manifestations of fear or record them for referral to credible fear screening

The Rule relies on officers to carefully monitor asylum seekers for signs of fear and to duly record requests to seek asylum and refer applicants for a credible fear interview. But there is no reason to expect that this iteration of the shout test will achieve outcomes different from the Departments' attempts outlined above, which have resulted in extremely low numbers of referrals for credible fear interviews. Further, past studies have documented that immigration officials regularly fail to record asylum seekers' requests to apply for asylum or follow procedures designed to advise asylum seekers of their rights.[98]

Finally, the preamble itself raises questions as to how closely officers will be expected to monitor asylum seekers. The Departments note that the video explaining the importance of raising a fear of return with an officer will not be played at small facilities, but reason that immigration officers at such facilities have resources to be able to "devote a great deal of attention to observing individuals" to see if they manifest fear or need a translator or reading assistance. Rule 4874 & n.196. This suggests that the opposite is true at the larger facilities, *i.e.*, that officers at larger facilities will not have the time or wherewithal to scrutinize noncitizens for nonverbal signs of fear, and, in fact, expect the videos and signs to do a great deal of work for them. There is simply no way to harmonize this lack of process with the United States' obligations to identify protected persons on an

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[95] CBP Manifest Fear Memo, (May 21, 2022).
[96] CGRS, Manifesting Fear.
[97] USCIRF Barriers at 2.
[98] USCIRF Barriers at 19 (describing 2005 study findings regarding OFO officer failures to follow procedures as "alarming").

individualized basis and avoid *refoulement*, or to provide notice of the right to apply for asylum as required under domestic law.

VI. INCREASING THE CREDIBLE FEAR STANDARD TO REASONABLE PROBABILITY WILL REQUIRE ASYLUM SEEKERS TO PROVE THE MERITS OF THEIR CLAIMS, CONTRADICTING THE PURPOSE OF AN INITIAL SCREENING INTERVIEW AND PLACING MANDATORY FORMS OF HUMANITARIAN PROTECTION OUT OF REACH

The Departments previously took the position, in the Asylum Processing Rule, that bars to asylum eligibility should not be applied at the initial fear screening stage and that the "significant possibility" standard should be applied when screening for all protection claims, i.e., asylum, withholding of removal, and CAT protection.[99] In a stark reversal, the Lawful Pathways rule implements new asylum bars during preliminary screenings. If applicants are unable to rebut these bars, they are ineligible for asylum and screened for statutory withholding of removal and protection under the Convention Against Torture under the newly-heightened "reasonable possibility" standard at the credible fear interview stage.[100] Now, the Departments have put in place even greater restrictions to apply during the credible fear interview stage and, if these restrictions are found applicable, a still more stringent and nebulous legal standard of "reasonable probability." Rule 48745.

Alarmingly, in order to overcome the new restrictions, asylum seekers will need to prove by a "preponderance of the evidence" that they fall into one of the narrow exceptions or meet the requirement for exceptionally compelling circumstances, heightening the screening standard even further. Rule 48720, 48730. The Rule's procedures and standards conflict with international law, U.S. asylum law, and Congress's intent.

A. International Standards Require a Lower Threshold in Preliminary Screenings

International standards on preliminary screenings such as the credible fear interview mandate the application of a low threshold for applicants to be able to proceed to full

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[99] *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18078, 18080, 18084, 18091–92 (March 29, 2022); 8 C.F.R. §§ 208.30(b) and (e).
[100] 88 Fed. Reg. 31321.

adjudication of their claims. Only those applications that are "manifestly unfounded"—fraudulent, abusive, or unrelated to refugee status—should be screened out at this early stage.[101] The "significant possibility" standard the United States has been using since the inception of expedited removal, and the heightened "reasonable possibility" standard that has been in place since the implementation of the Lawful Pathways rule, are both inconsistent with international guidelines.[102] Raising the standard to a "reasonable probability" of persecution or torture brings the United States further out of line with its international obligations by making it much more likely that refugees will be returned to persecution or torture.

Further, the lack of procedural safeguards and accelerated timeline of the credible fear interview process make applying such a heightened standard particularly dangerous. UNHCR's *Exclusion Guidelines* make clear that complex decisions such as those involved in determining an individual's asylum eligibility are most appropriately made in the context of robust processes with fuller procedural safeguards.[103] Heightening the standard and requiring asylum applicants to prove their claim with a high level of "specificity," Rule 48746 imbues the credible fear process with the substantive expectations of a full asylum adjudication without any of the procedural safeguards. In fact, the new processes actually lessen the slim preexisting procedural protections by shortening the period of time in which individuals have to consult with an attorney prior to their interview from 24 hours to 4 hours.[104] Given the high stakes of these interviews and the potential for asylum seekers to be returned to persecution and death, it is particularly inappropriate under international standards to further heighten the standard that asylum seekers must meet.

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[101] UNHCR Executive Committee, *Conclusion No. 30 (XXXIV) The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, (Nov. 8, 1983), ¶ 97(2)(e), *attached.*

[102] When Congress created the "significant possibility" standard, it recognized that this standard exceeded the internationally-recognized "manifestly unfounded" standard, but nonetheless specified that the former was "intended to be a low screening standard for admission into the usual full asylum process." *See* 142 CONG. REC. S11491-02 (Sep. 27, 1996) (statement of Sen. Hatch); *see also* Brief for UNHCR as Amicus Curiae Supporting Plaintiffs-Appellees at 21-22, *E. Bay Sanctuary Covenant v. Barr,* 950 F.3d 1242 (9th Cir. 2020) (Nos. 19-16487, 19-16773) (stating that the higher bar required to demonstrate persecution for withholding of removal will result in refoulement of legitimate refugees under the Convention).

[103] *See* UNHCR *Exclusion Guidelines*, ¶ 31 ("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.")

[104] ICE Implementation Guidance.

B. U.S. Law Requires a More Generous Standard Than Reasonable Probability

1. Applying a heightened standard to asylum applicants violates the plain language of the statute and Congressional intent

The Rule presents a complex path for asylum seekers to walk, and one that will result in large numbers of those fleeing persecution being refouled. First, as discussed above, certain categories of people are not subject to the rule at all. These include people who crossed through a port of entry with a CBP One appointment, unaccompanied children, victims of severe forms of trafficking, and people who are determined not to be subject to the rule due to CBP's analysis of the totality of the circumstances or operational constraints. Rule 48769, referencing section 3(b) of the Presidential Proclamation.

However, it is difficult to fully understand how CBP will determine whether individuals are subject to the Rule, and how the Rule and Proclamation impact access to the ports of entry and other CBP conduct. Advocates have not been made aware of any mechanism by which individuals will be screened for application of the bar when they attempt to access a port of entry or after crossing between ports prior to a credible fear interview (which many individuals will be unable to access due to the manifestation of fear requirement discussed above). What this lack of apparent screening mechanism suggests, is that under the Rule, people without CBP One appointments, including Mexicans, cannot be processed at ports of entry and will be turned back to Mexico. For people who cannot wait indefinitely in Mexico for a CBP One appointment, the Rule effectively leaves people no other option but to cross between ports of entry and be required to pass the "shout test," whether or not they are intended to be subject to the Rule at all.

2. Maria's story: A victim of a severe form of trafficking who was subjected to the Rule despite being exempt and qualifying for an exception

The example of "Maria" illustrates the difficulties both of showing that an asylum seeker is not subject to the Rule, and that she has an exceptionally compelling circumstance. Maria is a victim of a severe form of trafficking in persons and fits into both categories. Rule 48733, n.172.

CGRS staff spoke to Maria while she was in an ICE detention facility. We learned that when she was a teenager in her South American home country, a man whom she considered to be a friend threatened her at gunpoint when she refused to have a sexual relationship with him. Maria found out that he had ties to drug traffickers and cartels operating in her home

country and in Mexico. Fearful, she remained at home to avoid him but after one month found her dog lying dead with its throat slit on the patio of her family home.

Soon afterward, the man encountered her away from her home and forced her into his car. He took her to his house, where he raped her and forced her to have sex with other men. He beat her several times, including hitting her on the head with the butt of his gun. He threatened to sell her to a Mexican cartel when he "got tired of her." After several months, Maria finally confided in a relative in the U.S. and fled her country to seek asylum.

When she arrived at the border, Maria turned herself in to Border Patrol officials. At this point, CBP should have made a determination that she was not subject to the Rule as a victim of a severe form of trafficking in persons. However, they did not ask her why she had fled her country or if she had ever been trafficked or forced to do anything against her will. Instead, Maria was processed for expedited removal, sent to ICE custody, and told she would be removed, without ever having an opportunity to explain why she had fled.

Maria tried to send messages on a tablet to ICE officers requesting a fear interview but her messages went unanswered, a clear example of a manifestation of fear not being recognized or responded to. Only through her relatives' persistence and advocacy was Maria able to connect with legal representation who helped make sure her requests for a fear interview were heard.

Maria is still waiting for her credible fear interview, where she will need to show that she has an exceptionally compelling circumstance by a preponderance of the evidence, even though as a survivor she should not be subject to the Rule at all. Maria likely meets the legal definition of a victim of a severe form of trafficking in persons because she was compelled through force and coercion into a sexual relationship against her will in exchange for a thing of value—namely, her life and freedom. Yet it is not at all clear that an asylum officer would find that she had met her burden of a preponderance of the evidence.

Maria's story is just one example of the confusion and trauma that the Rule is inflicting on vulnerable people.

3. The preponderance standard impermissibly heightens the standard applied in credible fear interviews, contrary to Congressional Intent

For individuals who do not fit within one of the enumerated categories or are otherwise forced to cross between ports of entry, the Rule applies, including the requirement to manifest fear, Rule 48739, which, as explained above, is an insufficient mechanism for protecting the rights of asylum seekers. If an asylum seeker does manifest fear and is referred for a fear screening, they are given a mere four-hour period in which to attempt to

find and consult with an attorney or other persons of their choosing.[105] In the fear screening itself, unless they can show by a preponderance of the evidence that they meet one of the exceptionally compelling circumstances such as an acute medical emergency or imminent fear of bodily harm, asylum seekers are deemed ineligible for asylum. Rule 48718. Individuals are then screened for statutory withholding of removal and protection under CAT using the new, heightened "reasonable probability" standard. Rule 48745.

Asylum seekers who are subject to the rule and successfully manifest fear are held to a particularly heightened standard because of the "preponderance of the evidence" standard that is applied to the question of whether an exception applies. This requirement necessarily heightens the overall standard at the credible fear stage.[106] That is, if an asylum seeker cannot prove to a relatively high standard that they can overcome the Rule's bar, they will be found not to have established a credible fear necessary for asylum, even if they would be able to demonstrate a significant possibility that they "could establish eligibility for asylum under section 1158."[107] Such a standard is insurmountable for most asylum seekers, who in turn are funneled into reasonable fear interviews and removed based not on the credibility of their fear but due to the application of an arbitrary and unlawful bar that bears no relationship to the merits of their claim. As discussed further below, the use of a preponderance of the evidence standard during credible fear screenings was specifically considered and rejected by Congress, and the Departments simply lack the authority to resurrect and implement that congressionally rejected onerous standard through regulation.[108]

For asylum seekers who are not able to establish an exception under this high "preponderance of the evidence" standard, the Rule denies them credible fear review under the statutorily required "significant possibility" standard. Instead, it treats individuals who do not meet one of the narrow exceptions as ineligible to apply for asylum at the time of entry and applies the heightened "reasonable probability" standard. This requires asylum seekers who may have otherwise meritorious asylum claims to prove these claims to a high degree of specificity, in detention and without access to counsel. The

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[105] ICE Implementation Guidance at 4.

[106] 8 C.F.R. § 208.13(a)(iii); 8 C.F.R. § 1208.33(a)(iii).

[107] 8 U.S.C. § 1225(b)(1)(B)(v) ("For purposes of this subparagraph, the term 'credible fear of persecution' means that there is a significant possibility, taking into account the credibility of the statements made by the [noncitizen] in support of the [noncitizen's] claim and such other facts as are known to the officer, that the [noncitizen] could establish eligibility for asylum under section 1158 of this title.").

[108] 142 Cong. Rec. S11491-92 (Sep. 27, 1996) (statement of Sen. Hatch) ("The conference report struck a compromise by rejecting the higher standard of credibility included in the House bill.").

Departments' assertion that this is permissible in order to expedite matters and weed out nonmeritorious claims is unsupportable.

Congress settled on the initial "significant possibility" standard to strike a balance between screening out nonmeritorious claims and curbing the likelihood of *refoulement*. When developing the expedited removal process, the U.S. House of Representatives proposed defining a "credible fear" as requiring both a "significant possibility" of establishing eligibility for asylum and a more stringent credibility requirement,[109] while the Senate proposed adopting the UNHCR screening standard which would reject only "manifestly unfounded"[110] claims. Ultimately, Congress reached a compromise and adopted the "significant possibility" standard without the requirement that asylum seekers also prove by a preponderance of the evidence that the statements they made in support of their claims were true.[111] In sum, the statutory credible fear definition, negotiated and adopted by Congress, is meant to be a low standard to screen out unfounded claims, not an ultimate determination of various eligibility criteria or applicability of bars. The Departments' efficiency concerns do not authorize them to adopt heightened standards that contravene the statute and Congress's intent.

At bottom, the Interim Final Rule turns the statutory credible fear process on its head. There can be no doubt that application of such an onerous standard of proof will result in improper denial of asylum and other relief and erroneous removal of individuals to persecution and torture.

4. Experience with application of the Lawful Pathways rule does not support the application of a heightened standard during initial screenings

The Departments assert that experience with the Lawful Pathways rule "has validated" the choice to use a higher screening standard during the credible fear process, as the application of the heightened "reasonable possibility" standard has resulted in a decrease in the number of individuals accessing full immigration court proceedings. Rule 48745–46. It is troubling to say the least that in its evaluation of effectiveness the Departments focus only on their ability to process "record numbers of noncitizens," resulting in a "significant decrease in the rate at which noncitizens receive positive credible fear determinations." Rule 48746. With its sole emphasis on speed and denial rates, the Departments fail entirely

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[109] Immigration in the National Interest Act of 1996, H.R. 2202, 104th Cong. (1996), at 60–61, (defining "credible fear" to require both a "significant possibility" of establishing asylum eligibility and a "more probable than not" credibility requirement).
[110] *See* 142 Cong. Rec. S11491-92 (Sep. 27, 1996) (statement of Sen. Hatch).
[111] *See id.*

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.[112] Further heightening the credible fear interview standard is inconsistent with the Departments' stated intent to "safeguard the rights of asylum seekers." Rule 48745. To the contrary, the experience of applying the Lawful Pathways rule should serve as a warning. It is not possible to safeguard rights while dramatically heightening the screening standard in a preliminary interview.

5. The assertion that the Rule is necessary to quickly screen out nonmeritorious claims is built on inconclusive data and a misapprehension of the factors that lead to denial of asylum claims

The Departments claim that raising screening standards is necessary to quickly eliminate nonmeritorious claims. Rule 48745-46. However, nowhere in the Rule do the Departments point to any correlation between manner of entry and the ultimate determination of asylum eligibility. That is because the manner in which asylum seekers enter the United States says nothing about the *bona fide* nature of their claims. Instead, the Departments rely on inconclusive and outdated data to suggest that a disparity between positive credible fear findings and the percentage of asylum grants in the same period means most asylum claims lack merit. Rule 48746. The data does not prove what the Departments suggest it does.

First, as acknowledged in the Lawful Pathways rule, the majority of cases with positive credible fear interview findings in the relevant period have not been fully adjudicated by the asylum office or immigration court.[113] Nevertheless, the Departments have not adjusted their statistics to reflect that. Notably, in 2018 and 2019, two years of the period the Departments cited (fiscal years 2014–2019), several now-defunct or enjoined Trump administration policies were in place—including the prior transit ban and the Migrant Protection Protocols (MPP)—which led to improper denials. That period was also marred by several now-vacated decisions from Trump administration Attorneys General which were frequently applied to preclude applicants with claims based on domestic violence or family membership from obtaining asylum.[114] However, the Departments consider none of this

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[112] HRF, Trapped.
[113] 88 Fed. Reg. 11716.
[114] *See Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) ("*A-B- I*"), and *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021) ("*A-B- II*"), vacated by *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021) ("*A-B- III*"); *see also Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) ("*L-E-A- II*"), vacated by *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021) ("*L-E-A- III*").

context when alleging that positive credible fear interview rates far exceeded asylum grant rates and that those disparities reflect that claims lack merit.

Additionally, asylum claims may be denied for reasons other than the merits, such as poor interpretation, lack of counsel, and other procedural barriers. This is due to the numerous obstacles faced by asylum seekers in presenting their claims and the complicated nature of the asylum requirements which have led to inconsistent adjudications at all procedural levels.

Lack of counsel significantly affects asylum outcomes. In fact, the ability to find counsel is one of, if not the, single biggest factor in whether an applicant will be successful in their claim. Those who are represented are nearly five times more likely to win their cases than their unrepresented counterparts.[115] Those subjected to MPP during the period the Departments cite faced significant obstacles to obtaining or meeting with counsel which interfered with their abilities to present their claims.[116]

Given the correlation between legal representation and grants of relief, it is essential that asylum seekers be given every opportunity to obtain counsel. However, under the Rule, asylum seekers are required to prove their eligibility to apply for asylum by a preponderance of the evidence, a standard far exceeding what is required in regular asylum proceedings, at the credible fear screening stage, where most asylum seekers are unrepresented.

Additionally, the lack of clarity and inconsistent application of legal standards to asylum claims can lead to denials of relief. This frequently arises in the context of claims involving persecution based on membership in a particular social group. President Biden has identified the need to clarify and simplify these standards and bring them into alignment with international refugee law through additional rulemaking.[117] However, the Departments have still not proposed a rule addressing this fundamental issue.[118] This is

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[115] *See* TRAC, "Record Number of Asylum Cases in FY 2019," (Jan. 8, 2020), *attached.*

[116] Of the 31,964 individuals in MPP removal proceedings as of May 2020, only 224 were represented (i.e., <1%). TRAC, "Details on MPP (Remain in Mexico) Deportation Proceedings by Hearing Location & Attendance, Representation, Nationality, Month & Year of NTA, Outcome, & Current Status"; American Bar Association, "ABA Testifies on 'Remain in Mexico' Policy" (Nov. 21, 2019); TRAC, "Access to Attorneys Difficult for Those Required to Remain in Mexico" (July 29, 2019), *attached*; Kate Morrissey, "Access to Attorneys May Be Additional Challenge for Asylum Seekers 'Remaining in Mexico,'" San Diego Tribune (Feb. 19, 2019).

[117] *See* Executive Order 14010.

[118] Fall 2023 Unified Agenda of Regulatory and Deregulatory Actions, Off. of Mgmt. & Budget, RIN 1125-AB13, *Clarifying Definitions and Analyses for Fair and Efficient Asylum and Other Protection Determinations*.

particularly harmful to *pro se* individuals who have neither the knowledge nor the resources to navigate the complexities of domestic asylum law and fully present their claims.

While the Departments claim that the rule is essential to "swiftly remove additional noncitizens whose claims are unlikely to succeed at the merits stage," they cannot provide any rational explanation for how barring claims based on manner of entry will screen out unmeritorious claims. Instead, the Rule hinges on rejection of claims on bases that have nothing to do with the merits of the underlying fear-of-return claims. And, as discussed below, the Departments' other stated goals are not addressed by their implementation of this punitive bar to asylum.

6. The Rule does not address the Departments' stated goals of reducing administrative backlogs and deterring "irregular" migration and will impermissibly result in *refoulement*

The Rule requires asylum officers and immigration judges to apply the emergency border circumstances limitations in cases of asylum seekers who may have entered during periods in which the emergency is in place. Rule 48732. This is required regardless of whether an individual was actually apprehended during a time period in which the restrictions were in place. Rule 48732. As discussed below, broad application of the Rule will create insurmountable evidentiary obstacles for individuals seeking protection, and place new burdens on asylum offices and immigration courts, leading to further backlogs and inefficiencies.

7. The Rule's provisions for application of the bar beyond the border and beyond the emergency period will create new burdens for asylum seekers and adjudicators

Requiring application of the Rule to individuals who apply affirmatively at the asylum office or who are put into immigration court proceedings without first having a credible fear interview will further complicate the already labyrinthine asylum process.

a. The Rule creates insurmountable evidentiary requirements for asylum seekers

Broad application of the Rule will create impossible evidentiary hurdles for asylum seekers. First, asylum seekers who entered the United States without inspection or arrived at a port of entry without an appointment during an emergency period will be required to prove by a preponderance of the evidence that they were not subject to the Rule, for example, that they were permitted to enter "based on the totality of the circumstances" or that they were

permitted to enter "due to operational considerations at the time of the entry or encounter."

If they fail that, then they will have to show that they met one of the exceptionally compelling circumstances *at the time of entry*. Because, due to existing backlogs, many of these cases will be adjudicated years after the date of entry, it is highly unlikely that applicants will be able to meet this burden. For example, absent concurrently issued medical documents, an applicant may not be able to show that it was more likely than not they *or a family member they were traveling with* were suffering from an "acute medical emergency" at the time they crossed the border. In transit and over time, evidence gets lost and relationships change, making the burden of proof insurmountable. It would be even more difficult to demonstrate that there was an immediate threat to their safety at the moment they crossed several years earlier.

Moreover, and as pointed out above, contrary to the Departments' implication that asylum seekers are sophisticated about the many nuanced requirements of U.S. asylum law and the various constantly changing border policies and will understand the policies in place at a given time, many of these individuals will have no idea about the emergency restrictions until well after they arrive in the United States. In fact, for many, particularly *pro se* individuals, the first time they will learn of the Rule and its evidentiary requirements will be when they arrive in court or at the asylum office, making it even more unlikely that they will have collected evidence to prove that they are not subject to the bar.

b. The Rule would create new burdens for asylum offices and immigration courts, increase backlogs, and lead to erroneous removal of individuals with meritorious claims

Additionally, despite its focus on efficiency and eliminating the backlogs at the asylum office and immigration courts, the Rule will further burden both venues by creating new requirements and heightened, confusing, and vague standards for determining asylum eligibility that have nothing to do with the refugee definition and/or the underlying merits of the claim.

The Rule's requirements will further slow adjudications of these cases, because adjudicators will be required to probe into a new set of facts to determine: 1) manner of entry; 2) whether the applicant was "deemed subject to the limitations of an emergency period" or if the rule does not apply, and, if deemed subject to the limitations of an emergency period, and 3) whether the applicant can satisfy any of the exceptionally compelling circumstances. In the case of *pro se* individuals, this will mean that adjudicators will have to carefully question unrepresented individuals about the details of their journeys

to the United States, their experiences, the experiences of family members they traveled with, and the conditions they faced in Mexico prior to entering the United States. Failure to develop the record would constitute a due process violation and could result in unnecessary, lengthy appeals.

Adjudicators will further have to decipher whether those conditions qualify as exceptionally compelling circumstances and may also have to establish familial relationship pursuant to the Interim Final Rule. It is particularly unclear how individuals and adjudicators will establish that someone was not subject to the rule due to CBP's determination of the totality of circumstances or operational constraints, and whether these individuals may end up in the long run having the Rule applied to them after not originally falling within the group to which the Rule was intended to apply. These determinations will be particularly complicated due to the lack of clear screening processes at the border with regard to whether individuals are subject to the Rule or may meet exceptions, as discussed above. In order to comport with due process, adjudicators will have to spend an inordinate amount of time delving into facts that are entirely unrelated to the applicant's need for protection at the time the case is being adjudicated.

For the asylum office, where officers must first consider the application and then determine withholding and CAT eligibility, the Interim Final Rule will drain resources that could otherwise be spent conducting asylum merits interviews. As the USCIS Ombudsman's 2022 annual report observed, the Asylum Office backlog "continues to be the consequence of the Asylum Division's credible and reasonable fear screening workloads," which "divert staff that would otherwise be assigned to the affirmative asylum caseload." The report concluded that the Asylum Office backlog could be significantly reduced if officers focused on full asylum adjudications, but that these adjudications "remain a collateral duty at most asylum offices" due to credible and reasonable fear screenings.[119] Lengthening credible fear interviews, as the Rule proposes, will therefore not reduce the backlog but will in fact exacerbate it.

Further, at the immigration court stage disagreements about the correctness of the application of the limitations and potentially compelling circumstances are likely to lead to motions to reconsider, interlocutory and post-decision appeals to the Board of Immigration Appeals, motions to reopen, and appeals to the federal courts. The Rule, therefore, will not, as the Departments suggest, lead to efficient adjudication, elimination of the backlog, and screening out of nonmeritorious claims. Quite the opposite, it will further burden the asylum offices and immigration courts by requiring lengthy inquiries into matters that have

[119] USCIS Ombudsman Annual Report (June 30, 2022), at 49–52.

no bearing on the underlying merits of the protection claim, and will result in individuals who have valid asylum claims being returned to danger based solely on their manner of entry. This burden will be increased even further by the confusion and difficulty for adjudicators in knowing which set of border restrictions to apply between the Lawful Pathways rule and this Rule, and by in some circumstances being required to parse through both before even reaching the substance of an applicant's claim.

If the Departments truly wish to address the backlogs at the asylum office and the immigration and federal courts, there are several alternative approaches that will not similarly eviscerate the right to seek asylum. For example, the Departments could hire more asylum officers, immigration judges, and support staff. DHS could exercise its discretion to place asylum seekers directly into immigration court proceedings and avoid the expedited removal process full stop. They could also, as long promised, issue regulations clarifying aspects of the refugee definition in order to simplify adjudication of claims.[120] They could exercise favorable discretion and decide not to waste limited administrative and judicial resources pursuing removal of individuals who are eligible for asylum or related protection, but instead stipulate to relief on the papers. All of these avenues are available and, unlike the Interim Final Rule, comport with domestic and international asylum law.

C. The Reduction in Time to Find an Attorney Prior to the Credible Fear Screening from 24 Hours to 4 Hours Impermissibly Restricts Asylum Seekers' Access to Counsel.

Along with this Rule, ICE issued Implementation Guidance on June 4, 2024. Among other provisions, the Implementation Guidance specifies that individuals who manifest fear shall be given a minimum of four hours to consult with an attorney prior to their credible fear interview.[121] This reduction in consultation time from 24 hours to four hours impermissibly restricts access to legal counsel, is arbitrary, and will result in the denial of meritorious claims, leading to asylum seekers being persecuted and tortured.

The statute provides that a noncitizen "who is eligible for [a credible fear] interview may consult with a person or persons of the [noncitizen's] choosing prior to the interview or any review thereof."[122] The statute and implementing regulations require meaningful access to

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[120] *See, e.g.,* Executive order 14010; Fall 2023 Unified Agenda of Regulatory and Deregulatory Actions, Off. of Mgmt. & Budget, RIN 1125-AB13, *Clarifying Definitions and Analyses for Fair and Efficient Asylum and Other Protection Determinations*; Fall 2023 Unified Agenda of Regulatory and Deregulatory Actions, Off. of Mgmt. & Budget, RIN 1125-AB25, *Asylum Eligibility; Persecutor Bar*.
[121] ICE Implementation Guidance at 4.
[122] 8 U.S.C. § 1225(b)(1)(B)(iv); see also 8 C.F.R. § 208.30(d)(4)

a consultation and time to prepare for the credible fear interview.[123] Giving asylum seekers, who are unfamiliar with the U.S. legal system and who enter CBP or ICE custody traumatized and confused, a mere four hours to consult with an attorney functionally denies them meaningful access to consultation and time to prepare for the credible fear interview. This lack of access is compounded by the fact that many asylum seekers are forced to undergo credible fear interviews while in CBP custody, in which access to counsel is made even more difficult due to restrictions on attorneys physically accessing these facilities and inability of asylum seekers to access phone lines.[124] Further, advocates have reported that attorneys have been required to obtain a physical signature from their client in order to appear in a credible fear interview, which makes the four-hour consultation period even more absurd; it is highly unlikely that many, if any, asylum seekers will be able to retain counsel to be present in their fear interview under these circumstances.[125]

Moreover, the decision to give asylum seekers a mere four-hour timeframe in which to consult and prepare for their case is arbitrary and is nowhere justified in the Implementation Guidance or the Rule itself. From the implementation of the expedited removal process in 1997 through 2023, asylum seekers were generally given a minimum of 48 hours in which to consult with an attorney or other person of their choosing prior to their credible fear interview.[126] In May 2023, concurrent with the implementation of the Lawful Pathways rule, the consultation and preparation period was shortened to 24 hours, which USCIS attempted to justify by the need to increase efficiency and the ability to manage increased numbers of arrivals to the southwest border.[127] Now, the consultation period is shortened even further, a decision not based on any evidence or reasoning presented in the Rule itself, nor in the Implementation Guidance. The decision to, literally overnight, reduce the consultation and preparation time for the credible fear interview to one-sixth of its previous length and one-twelfth of the length that was the standard for more than 25 years is arbitrary and must be rescinded.

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[123] 8 U.S.C. § 1225(b)(1)(B)(iv); 8 C.F.R. §§ 208.30(d)(2), (4).
[124] National Immigration Justice Center, Obstructed Legal Access: June 2023 Update, (June 30, 2023), *attached.*
[125] *See id.*
[126] Memorandum from John L. Lafferty, Asylum Div. Chief, U.S. Citizenship and Immigration Servs., through Ted H. Kim, Associate Dir., Refugee, Asylum and Int'l Operations Directorate, U.S. Citizenship and Immigration Servs., to Andrew Davidson, Acting Deputy Dir., U.S. Citizenship and Immigration Servs., *Scheduling of Credible Fear Interviews* (May 10, 2023). From July 2019 through March 2020, asylum seekers were given only 24 hours prior to their credible fear interview, but this policy was set aside as *ultra vires* in *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 37 (D.D.C. 2020).
[127] *Id.*

Finally, the use of the Implementation Guidance will result in the erroneous rejection of meritorious claims, leading to asylum seekers being returned to persecution, torture, and death. As noted above, access to counsel, a right provided by statute and regulation, significantly affects asylum outcomes. For example, 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.[128] This data indicates that depriving applicants of reasonable time to consult with an attorney and prepare for their credible interview will therefore result in meritorious claims that would have otherwise been referred to full immigration court proceedings or an Asylum Merits Interview being denied and these applicants being returned to grave harm or death, in contravention of both U.S. and international law.

VII. CONCLUSION

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 Departments to rescind the Interim Final Rule in its entirety.

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

Sincerely,

Kate Jastram
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Associate Director of Litigation

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[128] TRAC, "Outcomes of Immigration Court Proceedings," last updated Apr. 2024. *See also* TRAC, "Despite Efforts to Provide Pro Bono Representation, Growth Is Failing To Meet Exploding Demands," (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…"), *attached.*