

***SENT VIA ELECTRONIC MAIL***

Daniel Delgado  
Director for Immigration Policy  
Office of Strategy, Policy, and Plans  
United States Department of Homeland Security

cc: Alejandro Mayorkas, Secretary, United States Department of Homeland Security  
Ur Jaddou, Director, United States Citizenship and Immigration Services

May 21, 2024

**Re: Request to Provide a Minimum of 60 days for Public Comment in Response to the Department of Homeland Security (DHS) Notice of Proposed Rulemaking (NPRM): Application of Certain Mandatory Bars in Fear Screenings; DHS Docket No. USCIS-2024-0005**

Dear Director Delgado,

By notice issued on May 13, 2024, the Department of Homeland Security (DHS) has proposed a new rule governing fear screenings by asylum officers (AOs) and establishing an atypical, abbreviated thirty-day comment period. For the reasons discussed below, the undersigned 78 immigrant rights, advocacy, and legal services organizations ask DHS to expand the comment date to a minimum of at least sixty (60) days.

As President Biden recognized upon taking office, Executive Order 12866 governs the regulatory process and requires agencies to “afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.” Executive Order 13563 likewise directs agencies to “...afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.” Indeed, 60 days is the minimum, with some courts referencing 90 days as the “usual” length period for comments.<sup>1</sup>

Further, the Department of Health and Human Services notes on its website, “[f]ederal agencies typically invite public comments on RFIs, ANPRMs, NPRMs, Direct Final Rules, and Interim Final Rules. *In most cases, the comment period is 60 days.*” (emphasis added), <https://www.hhs.gov/sites/default/files/regulations/rulemaking-tool-kit.pdf>. In this proposed regulation, DHS has set *its* proposed comment period at half the typical amount, 30 days, but has not offered a meaningful explanation for the truncated comment period, saying only that it wants to issue a final rule “as quickly as possible”—the same objective of every agency in every

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<sup>1</sup> See <https://www.federalregister.gov/documents/2021/01/26/2021-01866/modernizing-regulatory-review>.

rulemaking proceeding. Rather, there are a number of important reasons to extend the comment period.

First, as the preamble to the proposed rule points out: “Historically, AOs have not considered the applicability of mandatory bars to asylum or statutory withholding of removal when determining whether a noncitizen could establish eligibility for asylum or other forms of protection during the initial screening interview.” 89 FR 41247 at 41350. Indeed, only two years ago, DHS expressly codified this very policy, recognizing the dangers of such complicated determinations in an accelerated process. *Id.* (citing, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 FR 18078, 18219 (Mar. 29, 2022)). Where, as here, the agency is proposing an abrupt 180-degree departure from longstanding and very recently reaffirmed policy, interested parties should be given a reasonable period to address the proposed rule’s ramifications. For stakeholders, such as the undersigned organizations, the additional time is critical to the development of thoughtful and constructive comments, including the development of alternatives for the agency to consider. The need for more time takes on added importance where one risk of the proposal is that mistaken decisions by AOs given expanded authority in expedited proceedings may have irreversible and catastrophic consequences for asylum applicants returned to countries where they may be persecuted or tortured.

Second, the shortened time period does not take into account the complexities associated with the proposed rule’s implementation. By its terms, the proposed rule takes as its starting point the “Lawful Pathways” rule<sup>2</sup> now in effect. 89 FR at 41353. But that rule itself is subject to ongoing legal challenges. Commenting parties should be given the time to sort through the ramifications of the proposed rule should the Legal Pathways rule be overturned or modified as a result of those legal challenges.

Third, there is simply no urgency supporting a truncated comment period. DHS acknowledges that the comment period is shorter than usual. It then states that it has adopted the shortened 30-day comment period solely “because it seeks to finalize the proposed rule, as appropriate, as quickly as possible to provide an additional tool to more promptly remove noncitizens who pose public safety and national security risks.” 89 FR at 41258. But this is not a reason to truncate the normal comment period. Agencies will always want to issue final rules “as quickly as possible,” as will parties supporting a proposed rule. Wanting to act quickly cannot be a justification for shortening the comment period.<sup>3</sup>

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<sup>2</sup> *Circumvention of Lawful Pathways*, 88 FR 31314 (May 16, 2023).

<sup>3</sup> DHS’s explanation for its limited comment period contrasts sharply with its explanation for adopting a shortened comment period for adoption of the *Lawful Pathways* rule on which its proposed rule is partially predicated. *That* rule, *Circumvention of Lawful Pathways*, 88 FR 31314 (May 16, 2023), was preceded by a proposed rule that allowed interested parties only a 33-day comment period “because they seek to be in a position to finalize the proposed rule, as appropriate, before the Title 42 public health Order is lifted.” 88 FR 11704, 11708 (Feb. 23, 2023). No such exigency exists here.

As importantly, the proposed rule itself is designed not to increase public safety, but to reduce the *costs* associated with how DHS proposes to protect that safety. As DHS acknowledges, it is already the case that “ICE ERO may detain some [potentially dangerous] noncitizens to whom this rule might apply during the immigration court process, following a credible or reasonable fear determination.” 89 FR at 41253. Rather, it is clear that the purposes of the proposed rule are to expedite the removal of persons potentially barred from seeking asylum—“to deliver swift decisions” (89 FR 41253) and to reduce the costs associated with keeping them in custody—because their detention will “tax limited resources” (*Id.*), “comes at a cost to taxpayers and reduces availability of beds for other high-priority populations and noncitizens subject to mandatory detention.” *Id.* The cases in which the proposed rule would apply, moreover, “are limited to cases that would have otherwise been found to have a positive credible or reasonable fear of persecution.” 89 FR at 41359. By DHS’s own account, that number “is likely to be relatively small.” *Id.* For the relatively small number of asylum applicants who would be affected by the rule, there is self-evidently no material impact on DHS if the comment period is extended by a mere thirty days. Moreover, DHS provided no information regarding any urgent security threats to justify the reduced timeframe.

Finally, when agencies propose to repeal an existing rule, they have a heavier burden to justify a comment period shorter than the comment period that preceded the adoption of the rule to be repealed. *California v. Dept. of Interior*, 381 F. Supp. 3d 1153, 1177 (N.D. Cal 2019), citing *North Carolina Growers’ Ass’n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4<sup>th</sup> Cir. 2012). DHS’s 2022 rule, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 FR 18078, 18219 (Mar. 29, 2022) was an interim rule that gave interested parties more than sixty days to comment. And the proposed rule that preceded the interim rule was issued on October 19, 2021, again with a sixty-day comment period. DHS has not explained why a shorter comment period is appropriate for a proposal to repeal the existing rule.

For the reasons stated above, the following interested organizations request at least a 30-day extension of the comment period for the proposed rule.

Respectfully submitted,

#WelcomeWithDignity  
Acacia Center for Justice  
African Advocacy Network  
African Communities Together (ACT)  
African Human Rights Coalition  
Al Otro Lado  
Alianza Americas  
American Friends Service Committee  
American Immigration Council  
American Immigration Lawyers Association

API Legal Outreach  
Asian Americans Advancing Justice | AAJC  
Ayuda  
CASA  
Catholic Legal Immigration Network, Inc.  
Center for Gender & Refugee Studies (CGRS)  
Center for Victims of Torture  
Central American Resource Center - CARECEN- of California  
Central American Resource Center of Northern California - CARECEN SF  
Centro Legal de la Raza  
Church World Service  
Coalition for Humane Immigrant Rights (CHIRLA)  
Coalition for Humane Immigrant Rights (CHIRLA)  
Communities United for Status & Protection (CUSP)  
Community Legal Services in East Palo Alto (CLSEPA)  
Comunidad SOL-Ohio  
Council on American-Islamic Relations, California  
Dolores Street Community Services  
Esperanza Immigrant Rights Project, CCLA Inc.  
Florence Immigrant & Refugee Rights Project  
Florence Immigrant & Refugee Rights Project  
Florida Immigrant Coalition  
Florida Legal Services, Inc.  
Freedom Network USA  
Global Refuge  
Haitian Bridge Alliance  
HIAS  
Hope Border Institute  
Human Rights First  
Immigrant Defenders Law Center  
Immigration Center for Women and Children  
Immigration Equality  
Immigration Hub  
Immigration Law & Justice Network  
International Refugee Assistance Project (IRAP)  
Jesuit Refugee Service/USA  
Just Neighbors  
Justice Action Center  
Justice At Last  
Justice For Our Neighbors North Central Texas  
Kids in Need of Defense  
La Raza Centro Legal - San Francisco  
Las Americas Immigrant Advocacy Center

Lawyers' Committee for Civil Rights of the San Francisco Bay Area  
Make the Road Nevada  
MomsRising/MamásConPoder  
National Education Association  
National Immigrant Justice Center  
National Immigration Law Center (NILC)  
National Partnership for New Americans  
National Partnership for New Americans  
Oasis Legal Services  
Oxfam America  
Public Counsel  
Refugees International  
Save the Children  
SCIJ  
SPLC Action Fund  
Tahirih Justice Center  
Texas Civil Rights Project  
The Advocates for Human Rights  
The Black Alliance for Just Immigration (BAJI)  
U.S. Committee for Refugees and Immigrants (USCRI)  
Union for Reform Judaism  
Washington Office on Latin America (WOLA)  
Wind of the Spirit Immigrant Resource Center  
Women's Refugee Commission  
Young Center for Immigrant Children's Rights