Center for Gender & Refugee Studies

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Re: *Request for Comments: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers,* 85 Fed. Reg. 46906 (August 20, 2021)

U.S. Citizenship and Immigration Services, DHS Docket No. USCIS-2021-0012

Dear Ms. Strano and Ms. Reid:

The Center for Gender & Refugee Studies (CGRS) submits this comment in response to DHS Docket No. USCIS-2021-0012, *Request for Comments: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers (August 19, 2020)* (hereinafter, Proposed Rule or Rule). We include the following outline to guide your review.

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I. INTRODUCTION

The present comment relates to the Joint Notice of Proposed Rulemaking by the Department of Justice (DOJ) and the Department of Homeland Security (DHS). The Rule would create a new system for adjudication of applications for asylum, withholding of removal under Immigration and Nationality Act (INA) Section 241(b)(3), and protection under the Convention Against Torture (CAT) arising from expedited removal. The amendments would have an impact on expedited removal credible fear screenings, asylum office adjudication, secondary consideration in the immigration courts, detention practices, and ability to obtain counsel. As noted in the Background, there is nearly universal agreement that the U.S. asylum system is in "desperate need" of reform. Rule 46907. We concur. However, while some provisions of the Rule on their own may seem a step forward, viewed as a whole the Rule entrenches a deeply flawed system that does not further its protection aims.

As experts in asylum law, we focus our comment on the Rule's compliance with the international legal obligations of the United States. For the reasons set forth below, CGRS urges DOJ and DHS to withdraw this Rule. We urge you to follow the Executive Order on safe and orderly processing of asylum seekers,[1] and begin again with extensive and good faith consultations with experts including the Office of the United Nations High Commissioner for Refugees (UNHCR), CGRS, and the American Federation of Government Employees (AFGE) Local 1924. It is our expert opinion that the Rule in its current form will lead to refugees who are fleeing a range of abhorrent persecution that has long been recognized as meriting protection being returned to extremely violent countries where they could be abused, sexually assaulted, or otherwise harmed, tortured, or killed.

II. EXPERTISE OF THE CENTER FOR GENDER & REFUGEE STUDIES

CGRS was founded in 1999 by Professor Karen Musalo[2] following her groundbreaking legal victory in *Matter of Kasinga*[3] to meet the needs of asylum seekers fleeing gender-based violence. CGRS protects the fundamental human rights of refugee women, children, LGBTQ

[1] 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 on Asylum).

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

[3] 21 I&N Dec. 357 (BIA 1996).

individuals, and others who flee persecution and torture in their home countries. CGRS is an internationally respected resource for gender, as well as other bases for asylum, renowned for our knowledge of the law and ability to combine sophisticated legal strategies with policy advocacy and human rights interventions. We take the lead on emerging issues, participate as counsel or amicus curiae in impact litigation to advance the rights of asylum seekers,[4] 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.[5] Since our founding, we have also engaged in international human rights work with a strong emphasis on El Salvador, Guatemala, Haiti, Honduras, and Mexico to address the underlying causes of forced migration that produce refugees—namely, violence and persecution committed with impunity when governments fail to protect their citizens.[6]

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, with particular expertise on women, children and LGBTQ refugees. Our goal is to create a U.S. framework of law and policy that responds to the rights of these groups and aligns with international law. It is in furtherance of our mission that we submit this comment.

III. THE PROPOSED RULE MUST COMPLY WITH U.S. INTERNATIONAL LEGAL OBLIGATIONS

A. The United States Is Prohibited from Returning People to Persecution or Torture

The relevant international legal obligations with which the United States must comply are found in the 1967 Protocol Relating to the Status of Refugees (Refugee Protocol)[7] and the

[4] *See, e.g.*, *Huisha-Huisha v. Mayorkas*, --- F.Supp.3d ----, 2021 WL 4206688 (D.D.C. Sept. 16, 2021); *Pangea Legal Servs. v. DHS*, No. 20-cv-09253, 2021 WL 75756 (N.D.Cal. Jan. 8, 2021) (*preliminarily enjoining the Global Asylum rule*); *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *vacated as moot and remanded* No.3:19-cv-00807-RS (N.D. Cal.); *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020); *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. Jul. 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).
[5] *See, e.g.*, the Welcome With Dignity campaign.
[6] *See, e.g.*, Musalo, *El Salvador: Root Causes and Just Asylum Policy Responses,* 18 HASTINGS RACE & POVERTY L.J. (2021); Center for Gender & Refugee Studies, Haitian Bridge Alliance, and IMUMI, *A Journey of Hope: Haitian Women's Migration to Tapachula, Mexico* (2021).
[7] 606 U.N.T.S. 267 (entry into force 4 Oct. 1967).

1984 CAT.[8] 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.[9] 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 persons 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.[10] 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."[11] 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.[12]

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."[13] The corresponding regulation again incorporates the treaty obligation, providing that a person will be eligible for protection under CAT if he or she establishes "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal."[14]

By becoming a state party to these treaties, we have undertaken to carry out their terms in good faith.[15] Under the Refugee Protocol, the United States has additionally and specifically undertaken to cooperate with UNHCR in the exercise of its functions and in particular to facilitate its duty of supervising the application of the provisions of the Convention and

[8] 1465 U.N.T.S. 85 (entry into force 26 June 1987).
[9] 189 U.N.T.S. 137 (entry into force 22 April 1954).
[10] 1951 Convention Relating to the Status of Refugees, art. 33, binding on the United States by means of U.S. accession to the Refugee Protocol, art. I.1.
[11] 8 U.S.C. § 1231(b)(3)(4).
[12] 8 U.S.C. § 1158(b)(1)(A).
[13] CAT, art. 3.
[14] 8 C.F.R. § 208.16(c)(2).
[15] Vienna Convention on the Law of Treaties, art. 26. 1155 U.N.T.S. 331 (entry into force 27 Jan. 1980).

Protocol.[16] 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.[17]

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, guidance on the procedures and criteria by which the United States may identify the beneficiaries of these treaty protections is found in Conclusions of the UNHCR Executive Committee, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*,[18] and other UNHCR guidelines.

In particular, we draw the Departments' attention to the necessity of meaningful access to counsel. UNHCR's Executive Committee, of which United States is a member, has agreed that a person seeking asylum "should be *given* the necessary facilities … for submitting his case to the authorities" (emphasis added).[19] There can be no doubt that in a legal and procedural landscape as complicated as that of the United States, a truly fair and efficient asylum system requires that all applicants have competent representation at government expense. We realize that establishing such a system is largely outside the purview of this Rule, but as the Departments revise the Rule, we urge them to make every effort to maximize access to counsel. As we note below, the role foreseen for asylum officers of creating the asylum application during the credible fear interview falls far short of this goal.

Similarly, the detention of asylum seekers—in addition to all its other grave harms—poses a major obstacle to access to counsel, as we point out below. In our view, people seeking

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[16] 1967 Protocol Relating to the Status of Refugees, art. II.1.
[17] *INS v. Cardoza-Fonseca,* 480 U.S. 421, 426 (1987).
[18] 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,* April 2019, HCR/1P/4/ENG/REV. 4 (hereinafter *Handbook*).
[19] UNHCR Executive Committee Conclusion No. 8 (XXVIII) – 1977, Determination of Refugee Status, (e)(iv); *see also,* UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12 (hereinafter *Fair and Efficient Procedures*), para. 50(g) "At all stages of the procedure [ ] asylum-seekers should receive guidance and advice on the procedure and have access to legal counsel."

asylum should never been detained.[20] While people seeking asylum are in detention, the Departments must make every effort to ensure that they are able to obtain legal advice and representation.

To the extent that asylum seekers lack access to counsel at government expense, and to the extent that they are detained while pursuing their claims, the Departments bear an even greater burden to ensure that asylum officers and immigration judges do not make mistakes that will lead to people erroneously being returned to persecution or torture. While we analyze this Rule from the perspective of whether the proposed changes to established procedures will provide adequate safeguards against *refoulement*, our fundamental position is that the system as a whole suffers from several fatal flaws that undermine protections and flout treaty obligations.

B. The Departments Should Consult with UNHCR, CGRS, the Asylum Officers Union, and Other Experts

The previous administration essentially destroyed our asylum system by implementing a variety of mechanisms to deny people seeking asylum access to our territory and/or procedures, and by overturning previously accepted legal interpretations not only of procedural requirements but of the refugee definition itself. As a result of this lawless behavior, we understand that the current administration faces enormous challenges in dealing not only with longstanding issues but also the more recent devastation. As we avail ourselves of the right to submit a comment on this Proposed Rule, we also express our disappointment that the Departments did not consult with us and other experts prior to publishing the Notice of Proposed Rulemaking. Because it is our expert opinion that this Proposed Rule should be withdrawn and substantially revised, we respectfully request that before any further steps are taken to finalize this Proposed Rule, such consultations take place.

We remind the Departments that in response to a rule proposed by the previous administration, UNHCR emphasized that it is prepared "to offer the technical assistance we have acquired around the world to support the United States in finding solutions to the challenges it faces today in maintaining an asylum system that is safe, fair and humane."[21]

Similarly, the asylum officers' union, American Federation of Government Employees (AFGE) Local 1924, has observed that the current administration "must make sure that the

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[20] UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012.

[21] *Statement by UN High Commissioner for Refugees Filippo Grandi on U.S. asylum changes*, July 9, 2020.

individuals tasked with implementing policy have a voice in crafting new regulations and that RAIO [Refugee, Asylum and International Operations Directorate] staff (and the Union that represents them) play an integral role in helping to formulate policies as the individuals most knowledgeable about on the ground operations."[22]

Finally, we note that by Executive Order, the President has mandated that federal Departments "shall promptly begin consultation and planning with international and non-governmental organizations to develop policies and procedures for the safe and orderly processing of asylum claims at United States land borders."[23]

If the Departments choose not to engage in such consultation and planning with UNHCR, CGRS, AFGE Local 1924, and other experts, we request an explanation of why not.

C. The Departments' Reliance on Expedited Removal is Mistaken

We begin by noting that the Proposed Rule is premised on continued reliance on expedited removal. Expedited removal has been subject since its inception to criticism for its due process deficiencies which result in an unacceptable risk of *refoulement*.[24] These critiques include the comprehensive, multi-year, congressionally mandated study published in 2005 by the United States Commission on International Religious Freedom,[25] one of whose authors is also an author of this comment. More recently, CGRS[26] and numerous other civil society organizations[27] have urged the administration not to resume use of expedited removal unless and until its serious flaws have been addressed.

We note, for example, that although the Rule foresees its application to noncitizens encountered at or near the border or ports of entry, Rule 46911, there remains a risk that the scope of expedited removal could be expanded to its statutory limits at any time by this or a subsequent administration.

Nevertheless, since the Proposed Rule makes changes to the credible fear process, we comment on those changes.

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[22] American Federation of Government Employees Local 1924, *Union White Paper: Rebuilding the USCIS Refugee, Asylum, and International Operations (RAIO) Directorate* (hereinafter *Union White Paper*), Nov. 23, 2020, p. 11.
[23] See Executive Order, *supra*, n.1.
[24] Musalo, *Expedited Removal*, 28 HUM.RTS. 12 (2001).
[25] U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* (2005).
[26] CGRS, *Asylum Priorities for the Next Presidential Term* (Nov. 2020).
[27] CGRS et al., *Do Expedited Asylum Screenings and Adjudications at the Border Work?* (May 2021).

IV. WHILE THE PROPOSED RULE MAY ENHANCE PROTECTION IN SOME RESPECTS, AS A WHOLE, ITS CHANGES TO THE CREDIBLE FEAR INTERVIEW AND ASYLUM OFFICE HEARING STAGES WILL RESULT IN VIOLATIONS OF U.S. TREATY OBLIGATIONS

A. Some Proposed Changes to Credible Fear Procedures are Positive

We note with appreciation that the Proposed Rule rolls back some of the harmful credible fear policies promulgated by the previous administration. Rule 46914.

1. Clarification of standard

The Rule affirms that the "significant possibility" standard will be used to assess all fear of return claims. Rule 46944–45. We point out that this formulation is still more rigorous than UNHCR's recommended standard for accelerated procedures, that of claims which are clearly abusive or manifestly unfounded.[28] Nevertheless, we recognize that returning to the significant possibility standard is an important step in the right direction, away from the practice of the previous administration. However, we note that AFGE Local 1924 calls attention to the "shifting standards for credible fear and reasonable fear interviews" over the past several years and recommends "a comprehensive assessment of changes to training and guidance documents and necessary corresponding corrective actions [to] ensure that asylum is brought back into compliance with U.S. and international law."[29] We urge the Departments to make the legal standard as expressed in this Rule crystal clear to asylum officers and their supervisors, as well as to immigration judges, to guide their review.

2. No consideration of bars

In a similarly positive stance, the Rule clarifies that mandatory bars to asylum or withholding of removal will not be considered at the credible fear stage. Rule 46945. This is appropriate given the limited nature of the credible fear interview, which is not suited for the complicated legal and factual issues that arise with exclusion from refugee status. Furthermore, this aspect of the Rule is consistent with UNHCR guidance, which specifies that exclusion decisions should not be dealt with in accelerated procedures such as expedited removal, so that a full factual and legal assessment of the case can be made.[30]

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[28] UNHCR, *Fair and Efficient Procedures*, paras. 25–27.

[29] *Union White Paper,* p. 8.

[30] UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees,* 4 Sept. 2003, HCR/GIP/03/05, para. 31; *see also*

3. Asylum Officers not CBP

Another positive element of the Rule is its clarification that asylum officers, not Customs and Border Protection (CBP) employees, will conduct credible fear interviews. Rule 46944. This serves the goals of both efficiency and fairness by permitting only those DHS officials who are fully trained and housed in a component dedicated to the assessment of requests for protection to conduct the credible fear interviews. As pointed out by AFGE Local 1924, USCIS should not be training CPB officers to conduct protection screenings. Doing so under the previous administration led to "significantly higher denial rates, delays, and inefficiencies."[31]

4. Supervisory review

The Rule correctly retains the requirement of supervisory review of all credible fear determinations before they can become final. Rule 46915. Supervisory review serves several critical functions. It helps assure consistency in outcomes. It provides a vital ongoing training function for asylum officers, by giving feedback in real time on every single case, every day. It also functions as one element of procedural protection among the many that are necessary.

5. Immigration Judge review

The Rule reinstates the presumption that not answering the question as to whether the noncitizen wants review by an immigration judge of a negative credible fear determination will be treated as a request for such review. Rule 46945. This assures that review will take place unless the noncitizen affirmatively refuses it, and correctly makes immigration judge review the default procedure**.** Given the number of obstacles facing a person seeking asylum in expedited removal—detention, short processing times, language difficulties, almost certainly no meaningful access to counsel—the danger of the applicant failing to realize the importance of immigration judge review is too great. This is especially so since review by an immigration judge is currently a key procedural protection to ensure that any mistaken negative credible fear determinations are corrected, and under another provision of the Rule would be the only such protection.

UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 Sept. 2003, para. 99.

[31] *Union White Paper*, pp. 2–3.

6. Record of negative findings

The Rule helpfully expands the record that the asylum officer is required to provide following a negative credible fear finding to include copies of the asylum officer's summary of material facts and other materials upon which determination was based. Rule 46945. An expanded record will help clarify the basis for the negative credible fear finding; allow counsel, if any, to understand the issues with the case; and should guide the immigration judge review.

7. One-year filing deadline and employment authorization

A major contribution of the Rule, and one that should be retained when it is revised, is that service of the positive credible fear record is treated as the date of filing for asylum for the purposes of the one-year filing deadline, and for starting the clock for employment authorization. Rule 46916, 46941.

Under current procedures, it is well recognized that some applicants will not timely file for perfectly legitimate and understandable reasons, some of which are captured by the one-year bar's statutory exceptions of changed circumstances or extraordinary circumstances. The Rule promotes efficiency by eliminating the need to consider whether the exceptions apply, and if so, whether the application was filed within a reasonable period thereafter—neither of which has anything to do with the merits of the case. Both the asylum officer and the immigration judge—if the case ends up in immigration court—will be able to engage directly with the substance of the claim without wasting time on gathering facts and conducting legal analysis on the one-year bar and its exceptions.

This aspect of the Rule is also consistent with Congressional intent in enacting the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Congress created the one-year filing deadline in order to address concerns that a noncitizen who did not file for asylum for a long period of time, perhaps not even until placed in removal proceedings, likely did not even intend to apply for asylum until necessary to do so as a defense against removal.[32] While we believe Congress was mistaken in 1996 in its assumptions about the motivations of late-filing applicants, it is quite clear that this Rule addresses IIRIRA's concerns. Indeed, a noncitizen who has been found to have a credible fear of persecution shortly after being placed in expedited removal has expressed an intention to seek protection.

[32] Musalo and Rice, *The Implementation of the One-Year Bar to Asylum*, 31 Hastings Int'l & Comp.L.Rev. 693, 695 (2008).

As for starting the clock for employment authorization sooner, Rule 46942, we commend this step but continue to express our concern that any waiting period is too long. Delaying employment authorization places people seeking asylum in an extremely vulnerable position, prey to unscrupulous employers, and unable to pursue their claim for protection while living with dignity.

8. Non-adversarial interviews

Finally, we commend the Departments for taking a long overdue step toward determining a greater number of claims for protection in an initial non-adversarial interview. Rule 46941. It will provide a faster route to protection for those with readily approvable cases in a less traumatizing environment and will slow the increase in the immigration court's backlog. However, many details of the plan are troubling. It is to these we now turn.

B. The Procedural Changes at the Credible Fear Interview Stage Pose an Unacceptable Risk of *Refoulement*

1. The credible fear record will be the asylum application

The Rule states that the credible fear record shall be considered a complete asylum application. Rule 46941. Very little additional information is provided about this important change. Nothing is said in the Rule about revising the I-870 Record of Determination/Credible Fear Worksheet to reflect its new function as the asylum application.

If additional facts will be gathered during the credible fear interview, the Rule is silent on how the asylum officer will be guided in obtaining the information necessary for a full asylum application. It simply asserts that the record would contain "sufficient information" to be considered an application. Rule 46916. The Rule provides that protection claims arising in this new procedure under expedited removal will be adjudicated on the basis of the credible fear record, while other asylum claims will be adjudicated on the basis of Form I-589. Rule 46941. The Departments should provide guidance for both asylum officers and legal counsel who may be preparing applicants for credible fear interviews on what will be required, in order to ensure transparency and a fair process. The Departments should also explain how the use of different forms for the same adjudication is not disadvantageous to one group of applicants or the other, and how it will not create confusion or inefficiencies within the asylum office.

The Rule also fails to address how the asylum officer conducting the credible fear interview will have sufficient time to elicit all the information needed for a full asylum application.

Without making any reference to the time needed for this task, the Rule states that the Departments "believe that the screening would provide sufficient information upon which to conduct a full asylum interview." Rule 46916. To the best of our knowledge, an asylum officer is normally scheduled to conduct three or four credible fear interviews, or two affirmative interviews on the merits, per eight-hour workday. It is highly unlikely that with the additional burden of creating the asylum application during the credible fear interview, officers will be able to do so at the rate of four, or even two, such interviews per day.

We say this with the conviction of long experience representing applicants for asylum; additionally, one of the authors of this comment has served as an asylum officer and has conducted both credible fear interviews and affirmative interviews. Even the most expert immigration attorneys spend hours and hours, often over a period of weeks or months, to put together an asylum application that comports with the extremely complicated, ever-changing, interpretations of many aspects of asylum law, as well as the onerous requirements for credibility and corroboration.[33] The person helping to prepare the asylum application—whether attorney or asylum officer—must be able to build trust with the applicant, explain the law, ascertain the facts of the case including and especially those pieces of information that the applicant may not realize are important to mention, determine what documentary or witness evidence may be available and seek to obtain it, arrange for translation of documents, ascertain whether a medical and/or psycho-social evaluation or other expert testimony is necessary and seek to obtain it. All this takes time, far more than the few hours that the asylum officer will be able to dedicate to the task.

Given the extremely time-intensive nature of preparing an asylum application, it is not realistic to think that an asylum officer handling several credible fear interviews each day will be able to elicit enough relevant information to constitute an asylum application. It is not fair to the asylum officer to give them that responsibility without the means to carry it out,[34] and it is not fair to the person seeking asylum whose credible fear record will not adequately represent their full claim to asylum. Asylum officers will inevitably miss parts of the story, and such mistakes will inevitably lead to the return of refugees to persecution or torture—either because the asylum officer fails to find even credible fear, or because the

[33] We note that the asylum standard does not and should not require such an excessive and unrealistic level of detail and documentation/corroboration, but in practice, this is what is required. Any serious attempt to make adjudications more timely and efficient must begin with revising standards to reflect appropriate legal and evidentiary burdens.

[34] Much like immigration judges, whose concerns about unrealistic case completion quotas and their relationship to performance evaluations are well-known, asylum officers' performance reviews are also based on their productivity. *Union White Paper*, p. 9.

officer fails to create a full asylum application for later adjudication.[35] The ability to supplement the record before the asylum office hearing (discussed below) is not sufficient to allay these concerns over an entirely unrealistic process at the credible fear stage.

We propose instead that the government fund legal representation programs so that all asylum seekers have competent counsel, and the asylum office can focus on its area of expertise, which is adjudication. Until such representation is fully available to all asylum seekers, we urge the Departments to make every effort to ensure access to counsel and legal orientation programs.

2. Conflict of interest between creating and adjudicating the asylum application

Relatedly, having the asylum officer prepare the asylum application gives rise to an inherent conflict of interest between two very different roles. The person preparing the asylum application is not simply a scribe who writes down whatever the applicant says. Rather, in addition to investing the time and possessing the skill set described above, the person preparing the application must be a zealous advocate for the applicant, which may include arguing for a novel interpretation of the law. The person adjudicating the application is bound by Attorney General and Board of Immigration Appeals precedent as well as all RAIO guidance; must critically evaluate credibility and all the factual elements of the claim; and must do so in the context of "extreme vetting," a wholly disproportionate and unwarranted over-emphasis on fraud detection and national security in matters of refugee protection.[36]

3. The Rule's incentive structure will favor negative credible fearing findings

This conflict of interest is exacerbated by the Rule's strong incentive to make a negative credible fear determination. If an asylum officer determines that the applicant does not have a credible fear, then there is no need to conduct an even lengthier interview to elicit sufficient additional information to constitute the asylum claim. It will be faster and easier in any given case for even the most conscientious asylum officer not to make a positive credible fear finding. The Rule must be revised so that incentives promote neutral decision-

[35] We strongly caution DHS against recreating the pressures placed on asylum officers during the previous administration, when illegal policies forced them to play an active role in the *refoulement* of refugees, to the personal and professional detriment of individual officers and to the Asylum Corps as a whole. *See Union White Paper,* pp. 1–6.

[36] The Fraud Detection and National Security (FDNS) Directorate's role "has grown beyond its original designation as a support service to adjudicators to become a leading voice in the direction and mission of the RAIO Directorate…. [A] determination of how FDNS should be utilized going forward is crucial to the realignment of RAIO's mission." *Union White Paper,* p. 3.

making based on objective evidence in the record and correct application of U.S. and international law.[37]

4. Elimination of possibility for reconsideration of a negative credible fear finding

Under the Rule, the Asylum Office will no longer be able to reconsider a negative credible fear finding once it has been upheld by an immigration judge. Rule 46945. The change is presented as necessary for efficiency, yet the Departments offer only the unsupported assertions that "in recent years" "growing numbers of meritless reconsideration requests [ ] have strained agency resources and resulted in significant delays" and that in "many" cases such reconsideration requests are "resubmitted numerous times without additional information, resulting in additional delays." Rule 46915. Since the Departments apparently have data on the number of requests for reconsideration over time, this information should be made public in order to better assess the need for this drastic diminution in the limited procedural protections available in expedited removal.[38] In our own practice over the years, we have successfully sought reconsideration for clients who eventually won protection.[39] Were it not for our intervention, they would have been unlawfully refouled due to deficiencies in their initial credible fear determination including inadequate interpretation and lack of counsel.

[37] *Union White Paper*, pp. 8–9.
[38] The Rule provides the number of positive and negative outcomes for credible fear screenings for FY 2016 through FY 2020, Rule 46926–27.
[39] One such example from our practice was featured in Human Rights First, *Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture* (Sept. 2021), p. 4.

Request for Evidence: We request the following data for the period from 2011 to date:

- Total number of credible fear interviews conducted, including how many were determined to be positive and how many negative.
- Of the negative credible fear determinations, we request the number that were reversed and the number that were upheld by an immigration judge.
- Of negative credible fear determinations upheld by an immigration judge, we request the number of requests for reconsideration.
- Of requests for reconsideration, we request the number granted and the number not granted.
- Of requests for reconsideration that DHS granted, we request the number found to be positive, and the number found to be negative.
- Of the requests for reconsideration found to be negative, we request the number of requests for reconsideration that were resubmitted.
- Of resubmitted requests for reconsideration, we request the number of those with and those without additional information, and the number found to be positive and negative in each category.
- We request that these figures be disaggregated by gender, age, nationality, place and manner of entry into the United States, year, and the legal bases on which the request for reconsideration was determined to be positive or negative.

We also request explanation of how the Departments determined that a reconsideration request lacked merit. We seek to learn whether it is simply that the outcome was still negative or whether recognition was given to the chaotic nature of credible fear determinations over the past several years, given the frequent changes in law and policy (see Rule 46909–11) which have led to a lack of confidence in the Departments' ability to get this vital decision correct even after three or more tries. Finally, we request that, given the inevitability of human error in even the most well-run system, what number of requests for reconsideration the Departments consider to be optimal, and what factors are used to make such an assessment.

It is critical to have detailed information on the numbers underlying this provision of the Rule, considering that it eliminates an important check on erroneous credible fear determinations. Errors in the credible fear process are inevitable, particularly given the extreme time pressures under which both asylum officers and immigration judges work. Since there is no appellate review, the possibility for reconsideration by the Asylum Office is an important safeguard to ensure that a person seeking asylum is not mistakenly returned to persecution or torture.

5. Eliminating reconsideration by the Asylum Office is unnecessary

We note finally that this provision of the Rule is totally unnecessary. Requests for reconsideration after an immigration judge upholds a negative credible fear finding are by

regulation discretionary on the part of Asylum Office.[40] With only the unsupported assertions contained in the Rule, the Departments have not shown why they must eliminate this possibility altogether. If the Asylum Office is truly burdened with requests for reconsideration, it would be better to reflect on the significance of such requests, i.e., that they reveal flaws in the credible fear process. By completely eliminating the possibility of reconsideration, the Departments are simply covering up problems rather the addressing the root of the issue.

C. The Procedural Changes at the Asylum Office Hearing Stage Pose an Unacceptable Risk of *Refoulement*

1. Credible fear records are often incomplete or incorrect

As outlined in the Rule and discussed above, the positive credible fear determination record will form the asylum application. However, even under current procedures where the interview is used only for the credible fear determination, these records are often perfunctory, and can be incomplete, inaccurately paraphrased, or contain incorrect information. These flaws lead to credibility issues for applicants as they move through the adjudication process, which this Rule will only exacerbate.

Credible fear interviews, even ones that result in a positive determination, are far from an ideal method to determine even the basic elements of an asylum claim. Applicants are detained, usually exhausted, and may be suffering from multiple physical or psychological stresses due to the dangers that caused them to flee, the arduous nature of their journey to the border, and the harsh conditions that await them in immigration detention. Credible fear interviews are generally conducted by telephone with the assistance of an interpreter, both of whom are faceless and essentially anonymous to the applicant. For their part, asylum officers are under heavy time pressures to conduct a set number of interviews per day regardless of how complex an applicant's claim may be. Under these circumstances, it is entirely predictable that the record will be incomplete at best.

2. Asylum hearing officers will likely use credible fear records to make adverse credibility findings

Despite the shortcomings of the credible fear record, it is nevertheless well-documented that immigration judges often accept the record as reliable and use it to make adverse

[40] 8 C.F.R. § 208.30(g)(2)(i) ("DHS, however, *may* reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge.") (emphasis added).

credibility determinations if an individual's testimony in court differs in any way from what appears in the asylum officer's notes. This is so even when the applicant is merely telling additional parts of their story that were not covered during the credible fear interview, not changing their story.[41] It is highly likely that asylum officers conducting the merits hearing will similarly place undue reliance on the credible fear record in making their credibility determination, to the detriment of the applicant. Furthermore, if the credible fear record is the asylum application, any errors or omissions in the record caused by the asylum officer could lead not only to erroneous denials of protection but also to the applicant being permanently barred from eligibility for any immigration benefits whatsoever. Rule 46916.

3. The safeguards set forth in the Rule are entirely insufficient to cure the inherent defects of the new process

a. Opportunities to amend or correct the record are inadequate

Applicants will be able to amend, correct, or supplement the information collected during the expedited removal process, including the positive credible fear determination, up to seven days prior to the scheduled asylum office hearing, and can file documents postmarked no later than ten days before the scheduled asylum office hearing. Rule 46941.

We object to the Rule's provision that the asylum officer retains total discretion over whether or not to accept any amendments or supplements after the seven/ten-day deadline, depending on method of submission, or whether to entertain a request for a "brief extension of time" to submit additional evidence. Rule 46941. The lack of clear guidelines for requesting an extension or the ability to supplement the record out of time will likely lead to arbitrary outcomes. We note again the time constraints under which asylum officers work. Our concern is that agency pressure to keep to a predetermined schedule will override the applicants' right to present their claims. In contrast, we note that in immigration court, applicants have a right to file a request or motion to continue and have it considered under settled legal standards.[42]

Given the due process deficiencies under which credible fear interviews take place, outlined above, the Rule should make clear that the credible fear record is at best a preliminary draft of an asylum application and provide guidance for those relying on them when evaluating a claim on the merits. As written now, the Rule decrees that the credible

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[41] Jastram and Hartsough, *A-File and Record of Proceeding Analysis of Expedited Removal*, in U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* (2005).

[42] *See Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009).

fear record "is" the asylum application and places the responsibility on the applicant to correct and complete it. This shifts the burden to the party least likely to be able to meet it and introduces another level of procedural unfairness to a process already stacked against the applicant.

b. Opportunities to amend or correct the record would be meaningful only if applicants have access to competent interpretation and qualified legal counsel

The Departments are well aware that very few applicants can read English with sufficient comprehension to understand the contents of the credible fear record that will be provided to them. Fewer still have knowledge of the law detailed enough to grasp the legal significance of facts included or omitted from the initial interview. Therefore**,** any meaningful opportunity to amend, correct, or supplement the credible fear record presupposes immediate access to both competent interpretation and qualified legal counsel**,** which applicants will have to find for themselves. It bears repeating that if the applicant is detained, finding such assistance, particularly on short notice, is nearly impossible.

c. Language access issues are not addressed in the Rule, and will exacerbate its procedural deficiencies

Systemic harms, particularly spoken language access (accurate interpreters and the applicant's ability to hear the interpretation) in credible fear interviews, are exacerbated under the Rule because of the singular importance of the interview and the government's new role in creating the asylum application. These harms are particularly disadvantageous to survivors of gender-based violence, gang brutality, or any other claim based on the particular social group ground, given the complicated nature of the legal standard. We know from extensive experience in representing clients that it is extremely difficult to explain the particular social group ground to a lay person, even with a very skilled interpreter, much less elicit the detailed and nuanced information that is required to formulate a legally cognizable group.[43]

[43] We are aware that the Executive Order on Asylum, Sec. 4(c)(ii), tasks the Departments with drafting a proposed regulation on the meaning of particular social group. We take this opportunity to emphasize that a return to the standard set forth in *Matter of Acosta,* 19 I.&N. Dec. 211 (BIA 1985) will greatly increase efficiency as well as fairness by eliminating the unnecessary requirements to establish "social distinction" and "particularity." *See* Legomsky and Musalo, *Asylum and the Three Little Words that Can Spell Life or Death*, Just Security, May 28, 2021.

d. The timeline may be too rushed to allow for mistakes to be corrected

The timeline between service of the credible fear record and the asylum office hearing is unclear. If too close in time, applicants will not be able to identify problems with the record or, as noted, find an attorney to help them. Nor will they be able to collect evidence to support their claims, particularly if detained. In many cases, errors or omissions in the credible fear record will not come to the applicant's, or the asylum officer's, attention until the asylum office hearing. This will create inefficiencies by requiring the asylum officer to elicit the new information, question the applicant as to why the new information was not timely submitted, test for credibility by allowing the applicant to explain all discrepancies between the credible fear record and the new information, and then (presumably) write up a complicated and detailed assessment of either a positive or a negative credibility determination. Returning to our observation above about putting asylum officers in a dual role of both preparing and adjudicating asylum claims, we are concerned that there will be a natural tendency on the part of the asylum hearing officer to believe a fellow asylum officer's credible fear record over the applicant's new information. The cumbersome nature of this process and the likelihood of error will increase the chances that protection will be mistakenly denied.

e. Asylum office hearings will lack the basic procedural protections found in immigration court

Contrary to the Rule's assertion that protections will be "similar" to those in Section 240 proceedings, Rule 46919, there are a number of important ways in which asylum office hearings will lack the basic procedural protections found in immigration court. Until now, the relative informality of the asylum office interview was offset by the knowledge that applicants whose cases are referred to immigration court will have a second chance in a more structured proceeding under INA Section 240. The immigration courts are far from a model of due process and reasoned adjudication; expert commentators, not least the immigration judges themselves, have suggested major reforms.[44] Nevertheless, at least in theory, immigration judges must abide by certain basic procedural rights that provide a modicum of protection to the applicant and that the Rule fails to require for the asylum office hearing. As discussed below, these failures are exacerbated by the severely truncated review that the Rule assigns to the immigration courts: lack of automatic referral

[44] Center for Gender & Refugee Studies and Human Rights First, *Swift Action to Improve Fairness and Enable Timely Asylum Hearings in Immigration Courts*, April 6, 2021; *see also* National Association of Immigration Judges, *An Article I Immigration Court – Why Now is the Time to Act: A Summary of Salient Facts and Arguments*, Feb. 20, 2021.

following denial of any or all forms of protection, and a novel form of limited review conducted by the immigration judge, which falls far short of a Section 240 hearing.

We note the following procedural pitfalls, any one of which makes it more likely that applicants will not have a fair chance to present their claims. First, failure to appear for an asylum office hearing will result in an order of removal *in absentia.* Rule 46942. The Rule provides no mechanism for requesting postponement, aside from the discretionary "brief extension of time," Rule 46941, or for requesting a change of venue. Nor is there a requirement that the asylum office issue notice of the *in absentia* order, Rule 46942. Such notice is an important procedural safeguard, especially for those whose failure to appeal was due to exceptional circumstances such as a medical emergency or USCIS's failure to timely process an address change. Nor does the Rule provide a mechanism for filing a motion to rescind the *in absentia* order.

At the hearing, applicants who are fortunate enough to have counsel will not have the benefit of their counsel being able to frame and present the case. The Rule provides only that at the completion of the hearing, counsel may make a statement, comment on the evidence, or ask follow-up questions. Rule 46942. And although the Rule empowers the asylum officer to "present evidence" it does not say that the applicant, or counsel, may examine or challenge such evidence. Rule 46942.

Before turning to the role foreseen for the immigration courts, we close with a final caution regarding the Asylum Office that the Rule fails to address: its limited operational readiness due to the ongoing consequences of harms inflicted by the previous administration.[45] Morale is poor, many positions are open, and officers will soon be forced back into complicity with illegal policies such as the Migrant Protection Protocols.[46] The Rule foresees that this depleted and demoralized institution will take on a major new role in fulfilling U.S. treaty obligations, without any indication of how DHS plans to restore its integrity and professionalism. While the Rule indicates that hiring has begun for the new GS-13 level officers who will carry out the new procedures, Rule 46932–33, it is not simply a question of having a certain number of staff in place. Serious consideration must be given to how they are selected, trained, supervised, supported, and led. We strongly urge DHS to involve the asylum officers union as well as other experts before proceeding with this scheme.

[45] See *Union White Paper.*

[46] Miroff, *Biden administration says it's ready to restore 'Remain in Mexico' along border next month*, Washington Post, Oct. 15, 2021.

V. THE PROPOSED RULE'S INSUFFICIENT PAROLE PROVISIONS WILL LEAD TO ABUSES AND DENY ASYLUM SEEKERS A MEANINGFUL OPPORTUNITY TO OBTAIN COUNSEL OR BUILD THEIR CASE

Though we welcome the expansion of the grounds for parole and the elimination of the mandatory detention language from 8 C.F.R. § 208.30(g)(1)(i) (2019),[47] the Rule does not go far enough to expand the use of parole for and eliminate prolonged detention of asylum seekers. Rule 46913–14, 46945.

The Rule adds a new ground for parole of asylum seekers in expedited removal proceedings when "detention is unavailable or impracticable (including situations in which continued detention would unduly impact the health or safety of individuals with special vulnerabilities)." Rule 46946. However, it simultaneously reduces the grounds for parole available to the asylum seekers who will be subject to the proposed procedures because the broad "public interest" and humanitarian grounds that are currently applicable to asylum seekers who pass their credible fear interviews and are placed in INA § 240 proceedings would not apply to asylum seekers placed in Section 235 proceedings under the Rule.[48] The Rule therefore eliminates the "public interest" and humanitarian parole grounds for this class of noncitizens seeking protection.[49] Because the Rule is intended to channel more people into 235 proceedings, the Rule will lead to mass detention of asylum seekers who cannot demonstrate that parole is required "to meet a medical emergency," "for a legitimate law enforcement objective," or because "detention is unavailable or impracticable (including situations in which continued detention would unduly impact the health or safety of individuals with special vulnerabilities)." Rule 46946.

Moreover, even if an asylum seeker meets one of the enumerated grounds for parole, the Rule provides DHS discretion to continue to detain asylum seekers while their claims are processed. The Rule thus provides excessive discretion to individual officers. DHS/ICE has a poor track record on parole, and according to its own records more often than not continues to incarcerate individuals who should be granted parole after they pass their

[47] The currently enjoined Global Asylum Rule amended this section to add a requirement that DHS "arrange for detention" of the noncitizen following a request for review or a refusal to request or decline review, of a negative credible fear finding by the immigration judge. 8 C.F.R. § 208.30(g)(1)(i) (2019), *preliminarily enjoined by Pangea Legal Servs. v. DHS*, No. 20-cv-09253, 2021 WL 75756 (N.D. Cal. Jan. 8, 2021); *cf.* 8 C.F.R. § 208.30(g)(1)(i) (proposed).
[48] 8 C.F.R §§ 212.5(b), 235.5(c).
[49] *Id.*; *see also* 8 C.F.R § 235.5(c)(iii) (proposed).

credible fear interviews.[50] By eliminating the "public interest" grounds for parole, the Rule will exacerbate the problem of prolonged detention. Moreover, this or future administrations could weaponize the new ground for parole that makes release from detention contingent on lack of bedspace to justify further investment in detention centers and contracts with private prison companies. These facilities receive virtually no oversight and have proven track records of mistreating and endangering detainees held in substandard and dangerous conditions for profit.[51]

The "Global Asylum Rule" issued by the previous administration added a mandatory detention provision to 8 C.F.R. 208.30(g)(1)(i) requiring DHS to "arrange for detention" of noncitizens who seek immigration judge review of DHS's negative credible fear finding.[52] While the proposed Rule correctly dispenses with that requirement it does nothing to address long-term detention, including detention following a credible fear interview or the problems that arise from it. Rule 46945. Prolonged detention constitutes a grave human rights violation. As the Departments are aware, there are no regulations or enforceable standards governing detention conditions and prolonged detention remains a serious problem due to inhumane conditions, lack of access to counsel, inconsistent parole release practices, and exorbitant cost to the taxpayer (among other things).[53]

Detention makes it more difficult to obtain counsel, in part because detained asylum seekers are denied the opportunity to earn money with which to pay counsel and in part because of the limited number of lawyers near border areas or remote detention centers.[54] Access to counsel, a right provided by statute and regulation, significantly affects asylum outcomes. Therefore, the ability to find counsel is one of, if not the, single biggest factor in whether an applicant will be successful in their claim. However, according to a 2016 report from the American Immigration Council only 37% of respondents in immigration court proceedings are represented by counsel, and that number drops to only 14% for detained

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[50] "Immigration and Customs Enforcement Records Received Through FOIA Confirm Need for Increased Oversight of Agency's Arbitrary and Unfair Parole Decisions for Asylum Seekers," *Human Rights Watch* (Sept. 23, 2021); *see also Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. Jul. 2, 2018).
[51] *See, e.g.*, "US should end use of private 'for profit' detention centres, urge human rights experts," *UN News* (Feb. 4, 2021); "U.S. New Report Shines Spotlight on Abuses and Growth in Immigrant Detention Under Trump," *Human Rights Watch* (Apr. 30, 2020).
[52] 8 C.F.R. § 208.30(g)(1)(i) (2019), *preliminarily enjoined by Pangea Legal Servs. v. DHS*, No. 20-cv-09253, 2021 WL 75756 (N.D. Cal. Jan. 8, 2021).
[53] *See, e.g.*, Tahir, "'Black hole' of medical records contributes to deaths, mistreatment at the border," *POLITICO* (Dec. 19, 2019).
[54] Eagly and Shafer, "Access to Counsel in Immigration Court," *American Immigration Counsel*, at 6, 11–12 (Sept. 2016).

respondents.[55] In fiscal year 2019, only 33% of applicants with an attorney received asylum or other relief,[56] however those who are represented are nearly five times more likely to win their cases than their unrepresented counterparts.[57]

The few detained individuals who are able against all odds to find an attorney still have difficulty proving their claims from detention. For example, they face hurdles to communication with their attorneys because[58] they must rely on the detention facility's telephones, which are not always available, or wait for the attorney to visit during the limited periods when visitation is allowed.[59] Additionally, due to limitations on communication, detained applicants often find it difficult to collect necessary evidence for their case from the United States, and more critically, from abroad.[60]

Given the limitations put on the grounds for parole, the Rule could easily result in a scenario where large numbers of noncitizens fleeing persecution and torture in their countries of origin are placed in detention. They would then be shuffled *pro se* through the entire asylum process—credible fear interview, to asylum hearing, to immigration court review—without ever having a meaningful opportunity to find an attorney or gather evidence for their case. We therefore urge the Departments to restore Section 240 proceedings to individuals who pass their credible fear interviews, so that they can have greater opportunity to reasonably build their cases before the Asylum Office and the immigration court outside of detention. At a minimum, it is critical that the Rule be amended to include the parole grounds currently afforded to asylum seekers who have a credible fear.[61]

[55] *Id.* at 4.
[56] *See* TRAC: Record Number of Asylum Cases in FY 2019.
[57] *Id.* at 2–3.
[58] Eagly and Shafer, *supra* n.55, at 6.
[59] *Id.*
[60] *Id.*
[61] 8 C.F.R § 212.5(b).

VI. THE PROPOSED RULE WILL DISCOURAGE ASYLUM SEEKERS FROM REQUESTING REVIEW OF THE ASYLUM OFFICE'S DECISION AND WILL LEAD TO ERRONEOUS REMOVAL AND FAMILY SEPARATION

A. The Rule Creates Confusion Surrounding the Path to Immigration Court Review That Will Deny Applicants' Their Day in Court

The Rule abandons the practice of automatic referral to the immigration court in cases where the asylum office does not grant relief. Instead, it sets up a new procedure in which the applicant must *affirmatively* request review within 30 days of the decision or be presumed to have waived immigration judge review. In contrast, for affirmative cases, the asylum office will continue automatic referral, thereby creating a two-track procedure depending on how an individual entered the system. In so doing, the Rule creates a strong likelihood that applicants will be denied their right to consideration by the immigration judge. Rule 46948. Many *pro se* applicants will not understand that they must *request* review by the immigration judge and must do so within 30-days of the denial.

By creating two different paths to immigration court following asylum office consideration, the Rule will sow confusion in immigrant communities. This will lead many asylum seekers governed by the Rule to mistakenly believe that—like their neighbor who filed affirmatively with USCIS—their case will be automatically referred to the immigration court. To ensure that asylum seekers are not denied their day in court, at a minimum, the presumption should be reversed and provide that unless the asylum seeker affirmatively states that they do *not* wish to have the denial of their asylum claim reviewed by an immigration judge a request for review will be presumed and the case will be referred to the immigration court.

B. The Rule Places the Immigration Judge in a Quasi-prosecutorial Role and Undermines Efficiency by Encouraging Immigration Judges to Revisit Grants of Protection That are Not in Dispute

The Rule authorizes the immigration judge to review both grants and denials of relief by the Asylum Office. For example, if the asylum officer denied asylum but granted withholding or CAT, the immigration judge could review all three decisions. Such a procedure is flawed in several key respects. Rule 46946.

First, applicants will be dissuaded from seeking review of an asylum denial for fear of having a grant of withholding or CAT protection overturned. As such, the Rule will place asylum seekers in the impossible position of choosing between safety and reunification with their children and/or spouses who are in their country of origin or facing removal from the United States. Rule 46920–21, 46946. This is simply unconscionable.

Second, the Departments' justification for allowing the immigration judge to revisit issues that have already been resolved—that DHS should be able to challenge the Asylum Office's determination of eligibility—ignores the fact that USCIS asylum officers and ICE attorneys both represent DHS. The Rule sets up a framework in which DHS could grant withholding through an asylum officer and then challenge its own position later through an ICE attorney in order to discourage appeals of its asylum denials. Rule 46921. The Rule therefore runs counter to the notion that DHS should seek justice, rather than "removals at any cost"[62] and will discourage cooperation between the parties to narrow the issues or stipulate to relief which will result in unnecessary court battles and further delay.[63]

Finally, it encourages immigration judges to make findings on complex legal and factual issues that are not in dispute, which is not only outside the proper role of a neutral arbitrator but will also create a drain on the parties' and the immigration courts' resources and cause further delay. This unnecessary requirement is squarely at odds with the Departments' stated goal of increasing efficiency and eliminating the immigration court's growing backlog.[64] Rule 46907, 46918.

We urge the Departments to implement automatic referral of all USCIS asylum denials to the immigration court which would eliminate confusion, and be more efficient and easier to implement than the proposed procedure. Moreover, immigration judges should under no circumstances be permitted to revisit grants of withholding of removal or CAT protection unless DHS can demonstrate the relief should be terminated.

VII. THE PROPOSED RULE "STREAMLINES" IMMIGRATION JUDGE REVIEW OF THE ASYLUM OFFICE'S DECISION BUT CREATES SERIOUS DUE PROCESS DEFICIENCIES

As an overarching observation, we note the Rule's repeated emphasis on efficiency necessarily comes at the expense of procedural safeguards critical to avoiding the risk of *refoulement*. While an efficient asylum process is beneficial to both applicants and the

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[62] *See Matter of S-M-J-*, 21 I&N Dec. 722, 727 (BIA 1997) ("Immigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done.").

[63] *Cf. The Immigration Court Practice Manual*, EOIR, Rule 4.18 (Dec. 30, 2020); *see also* James McHenry III, *EOIR Practices Related to the COVID-19 Outbreak,* EOIR (June 11, 2020) ("Parties are encouraged to resolve cases through written pleadings, stipulations, and joint motions.").

[64] *Matter of A-C-A-A-,* 28 I&N Dec.351, 352 (AG 2021) ("This traditional approach [of accepting stipulations of issues not in dispute] helps ensure efficient adjudication by focusing the immigration courts' limited resources on the issues that the parties actually contest rather than those on which they agree.").

government, it must also be fair. UNHCR has advised that "fair and efficient procedures are an essential element in the full and inclusive application of the Convention."[65] However, the Rule, as written, would actually delay rather than speed up adjudications thereby not only prolonging the process but also undermining protection.

A. The Rule Eliminates Due Process Protections in Contravention of Congressional Intent and the U.S. Constitution and Will Result in the Erroneous Removal of Applicants Eligible for Relief

By eliminating full *de novo* review of the asylum office's adverse decisions in INA § 240 proceedings, the Rule strips asylum seekers of the statutory due process protections that Section mandates.[66] Rule 46943. Under the current framework, asylum seekers who are found to have a credible fear of persecution or torture are placed in full Section 240 proceedings before an immigration judge where they are accorded the attendant statutory rights to testify and present and examine evidence and witnesses.[67] The Rule acknowledges that the U.S. Commission on International Freedom and all other experts who recommended that asylum officers have jurisdiction over expedited removal cases assumed that Section 240 proceedings would follow. Rule 46918. Although the Departments assert that such an approach would be "unnecessary, duplicative, and inefficient" the procedures established by the Rule will actually lead to greater inefficiencies while threatening the fairness of the process.

In Section 240 proceedings, immigration judges have an obligation to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the [noncitizen] and any witnesses."[68] None of those rights or obligations is mandated under the proposed scheme. Instead, the Rule creates a presumption against holding immigration court hearings and against the presentation of evidence or testimony, thereby encouraging immigration judges to pretermit claims by rubberstamping asylum denials issued by the Asylum Office without ever even meeting the person whose fate they will seal. Rule 46947.

As an initial matter, the proposed framework runs afoul of the U.S. Constitution, and thwarts Congress's intent to provide asylum seekers who have passed a credible fear interview with the procedural safeguards codified in Section 240 and to align domestic

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[65] UNHCR, *Fair and Efficient Procedures)*, para. 5.
[66] Though the Rule characterizes the immigration judge's review as "de novo," the presumptions against holding hearings or considering new evidence reduce review to a paper-shuffling exercise. Rule 46906, 46911, 46947.
[67] INA § 240(b)(4)(B)–(C), 8 U.S.C. § 1229a(b)(4)(B)–(C); *cf.* INA § 235, 8 U.S.C. § 1225.
[68] INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1).

asylum law with international standards.[69] The Fifth Amendment guarantees due process in removal proceedings which includes the right to a full and fair hearing, including an opportunity to testify and present evidence as codified in INA § 240.[70] When Congress created the credible fear screening process it made clear its intent that those who pass the credible fear threshold be entitled to "a full—full—asylum hearing"[71] in the "usual full asylum process"[72] under Section 240[73] and that they "get a full hearing without any question."[74] Additionally, the protections afforded to applicants in Section 240 comport with UNHCR guidance emphasizing that the role of the asylum adjudicator is to "ensure that the applicant presents his case as fully as possible and with all available evidence."[75]

By eliminating the important procedural protections set forth in Section 240, the Rule diminishes the significance of the immigration court review safeguard Congress intended and would place the United States out of step with its international obligations. In order to

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[69] *See Cardoza–Fonseca*, 480 U.S. at 438–39 n.22; *Matter of S-P-*, 21 I&N Dec. 486, 492 (BIA 1996) (recognizing Congress's intent to conform U.S. asylum law to United Nations standards); *see also* Section III.A, *supra*.

[70] *See, e.g.*, *Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000) (holding that Fifth Amendment guarantees due process and that "[a]s a result [a noncitizen] who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf" (citing 8 U.S.C. § 1229a(b)(4))).

[71] 104 Cong. Rec. S4457, S4461 (Sen. Simpson (R-WY), "A specially trained asylum officer will hear his or her case, and if the alien is found to have a 'credible fear of persecution,' he or she will be provided a full--full--asylum hearing.").

[72] H.R. Rep. No. 104-469, at 158 (Sen. Hatch (R-UT), "The conference report struck a compromise by rejecting the higher standard of credibility included in the House bill. The standard adopted in the conference report is intended to be a low screening standard for admission into the usual full asylum process.").

[73] House and Senate Conference Report, H.R. Rep. No. 104-828, at 209 ("If the officer finds that the alien has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum under normal non-expedited removal proceedings.").

[74] 104 Cong. Rec. S4457, S4492 (Sen. Leahy (D-VT), "If they have credible fear, they get a full hearing without any question.").

[75] UNHCR *Handbook*, paras. 196, 205(b)(i) (emphasis added); *see e.g.*, *Jacinto v. INS*, 208 F.3d 725, 732 (9th Cir. 2000) (observing that 8 U.S.C. § 1229a(b)(1) implements the duties of an immigration judge as described in the UNHCR *Handbook*) (citations omitted); *see also, e.g. Mohammed v. Gonzales*, 400 F.3d 785, 797–98 (9th Cir. 2005) (observing that the position of UNHCR "provides significant guidance for issues of refugee law" (citing *Cardoza-Fonseca*, 480 U.S. at 439–40)); *Chanco v. INS*, 82 F.3d 298, 301 n.2 (9th Cir. 1996) (acknowledging the UNHCR *Handbook*'s usefulness in construing U.S. obligations as a party to the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6557, "which Congress relied on in enacting United States refugee law" (citing *Cardoza-Fonseca*, 480 U.S. at 437–39)).

meet those obligations the Departments should revise the Rule to include referral full 240 proceedings.

B. The Rule Creates a Presumption Against a Full Immigration Court Hearing and New Evidence and Encourages Immigration Judges Pretermit Cases on the Asylum Office Record Alone

As discussed below, the Rule will deny applicants the constitutionally required opportunity to present their cases before the immigration judge and result in the erroneous return of individuals to persecution and torture. For asylum seekers, who often suffer from trauma that interferes with their ability to disclose past traumatic events, full immigration court hearings in front of a neutral arbitrator are a necessary safeguard against erroneous adverse credibility findings. And for those who are not represented by counsel, which constitutes the majority of asylum seekers, a full and fair hearing is necessary to ensure that information critical to their claims is discovered and considered. However, the Rule's twin presumptions against additional factfinding threaten to leave immigration judges, who face performance metrics that require them to adjudicate 700 cases per year,[76] with little incentive to develop the record or to consider additional evidence where the statutory requirements that they do so no longer apply. Rule 46947.

1. The Rule's presumption against taking testimony undermines the immigration judge's role as factfinder and will result in the erroneous removal of traumatized and *pro se* asylum seekers

The Rule encourages immigration judges to move cases along quickly by abdicating their duty to develop the record and delegating that duty to an arm of DHS.[77] Specifically, the Rule's preamble proclaims that "an IJ ordinarily *would not* conduct an evidentiary hearing on the noncitizen's asylum application" and that "the Departments expect that the IJ generally would be able to complete the de novo review *solely on the basis of the record before the asylum officer,* taking into consideration any arguments raised by the noncitizen, or the noncitizen's counsel, and DHS." Rule 46919–20 (emphasis added). The right to a full and fair hearing, including a reasonable opportunity to present evidence and the requirement that immigration judges scrupulously probe into the relevant facts of their

[76] *See*, Catholic Legal Immigration Network, Inc. (CLINIC), "DOJ Requires Immigration Judges to Meet Quotas," (Apr. 27, 2018).

[77] *See, e.g.*, *Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009) (holding that where the immigration judge "delegates his duties to develop the record in an unrepresented alien's case to the government attorney, the IJ creates an unfair conflict of interest on the government and deprives the alien of development of the record, thereby violating due process").

case, is critical for asylum seekers who may face persecution, torture and/or death if erroneously removed.[78] Such safeguards are necessary to prevent wrongful deportations especially in the case of *pro se* individuals, who constitute the majority of asylum seekers, because applicants who have appeared without counsel at any of the proposed procedural stages—at the credible fear interview, the asylum office stage, or before the immigration court—"may not possess the legal knowledge to fully appreciate which facts are relevant."[79] And without a full hearing before the immigration judge that comports with due process important evidentiary stones may go unturned.

For example, the Second Circuit's recent decision in *Hernandez-Chacon v. Barr*, 948 F.3d 94 (2nd Cir. 2020) demonstrates how live testimony can illuminate previously unknown bases for protection. In that case, the Court found that a woman's resistance to rape by a gang member could constitute a political opinion based on a single sentence uttered during testimony at her immigration court hearing that was not in her written application.[80] When asked why she resisted she stated, "Because I had every right to."[81] Based on that one sentence the Court concluded that the petitioner's resistance transcended "mere self-protection" and reflected a political opinion because she was taking a stand against the gang's authority.[82]

The Rule also fails to consider that asylum seekers are almost invariably survivors of trauma and may not be able to disclose all relevant facts to the asylum officer or even their own counsel. Despite the paramount importance of testimony, the effect of trauma on a noncitizen's ability to recount the factual bases for relief further shows the need to preserve the right to testify before the immigration judge. This is especially so when an

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[78] 8 U.S.C. §§ 1229a(b)(1), (4).

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

[80] *Id.* at 104.

[81] *Id.* at 97.

[82] *Id.* at 104.

unrepresented individual does not know what facts may be important to share and lacks the assistance of trusted counsel familiar with their personal story. Trauma survivors commonly use avoidance as a coping mechanism[83] and may be reluctant to discuss details of their abuse because reliving it is painful or recounting the trauma triggers shame.[84] This phenomenon, too, can mean that applicants reveal certain details or events only later in the asylum process, such as during questioning by an immigration judge.[85] Moreover, because the majority of asylum seekers lack the resources to obtain counsel and must proceed unrepresented, a full inquiry by the immigration judge is critical to ensure that those *pro se* applicants are not wrongfully returned to danger in violation of the United States' nonrefoulement obligations.[86]

Trauma is also associated with memory loss, which may hinder an applicant's ability to recount all relevant details.[87] Conversely, memories may improve over time, as the mind begins to process the traumatic experience. For example, it is common for asylum seekers to disclose only limited information about their past persecution in early statements to border and asylum officers, or in their initial applications for asylum, and then to provide greater detail when questioned by an immigration judge.[88] This is because the more applicants revisit their stories of persecution or torture—a painful process—the more they may be able to counteract the subconscious suppression of these memories.[89] As a result, "it is not unusual to find a victim or witness who at first is unable to fully describe what happened, but is able to later provide much richer and coherent reports."[90] Thus, the

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[83] *See* Treatment Improvement Protocol 57, Trauma-Informed Care in Behavioral Health Services, U.S. Dep't of Health and Human Servs., Substance Abuse and Mental Health Services Administration 61, 73 (2014).

[84] *See* Epstein & Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. Pa. L. Rev. 399, 410-11 (2019); Gangsei & Deutsch, *Psychological evaluation of asylum seekers as a therapeutic process*, 17 Torture 79, 80 (2007) ("[S]urvivors frequently bear the burden of guilt and shame, which makes it too painful and humiliating to tell the outside world about the torture.").

[85] Mosley, *Re-Victimization and the Asylum Process: Jimenez Ferreira v. Lynch: Re-Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility*, 36 L. & Ineq. 315, 326-27 (2018).

[86] *Jacinto*, 208 F.3d at 733 ("[A] full exploration of all the facts is critical to correctly determine whether the [noncitizen] does indeed face persecution in their homeland.").

[87] *See, e.g.*, Saadi et al. (2021) Associations between memory loss and trauma in US asylum seekers: A retrospective review of medico-legal affidavits, PLOS ONE 16(3): e0247033, at 8–9.

[88] *Id.*

[89] *See* Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 Geo. Immigr. L.J. 367, 389 (2003).

[90] Davis & Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. Air L. & Com. 1421, 1456 (2001).

opportunity to testify both before the asylum officer and the immigration judge is necessary to ensure discovery of all relevant facts.

Moreover, despite the well-documented effects of trauma on memory and disclosure, adjudicators frequently rely on earlier omissions or perceived inconsistencies to find applicants incredible, as we noted above. Yet the Rule authorizes, indeed encourages, immigration judges to make credibility findings and frivolousness determinations based solely on the record produced by the asylum office without ever personally observing the applicant's testimony—including their demeanor and responsiveness—in violation of the U.S. Constitution. Rule 46916, 46919–20. "It is well established that live testimony is critical to credibility determinations,"[91] and, as the Ninth Circuit held in *Oshodi v. Holder*, 729 F.3d 883, 885 (9th Cir. 2013), limiting an asylum seeker's testimony to events that are not duplicative of the facts set forth in the written application violates the U.S. Constitution. Nevertheless, the Rule seeks to do just that. In order to comport with due process, it is critical that immigration judges be required to provide applicants with ample opportunity to present their case, including the chance to explain any perceived omissions or inconsistencies, before making findings regarding credibility.[92] Absent a hearing, the asylum seekers will be denied those rights.

In sum, when adjudicating fear-of-return cases, which are literally a question of life and death, every effort must be made to ensure that asylum seekers are given a full opportunity to present their claims before an immigration judge—this includes the right to testify. We therefore urge the Departments to retain Section 240 proceedings.

2. The Rule's presumption against allowing new evidence violates due process and places additional burdens on the parties and the immigration courts that will reduce efficiency

To facilitate administrative "streamlining" the Rule places restrictions on the circumstances in which the asylum seeker may present new evidence before the immigration judge, that will certainly lead to *refoulement* of applicants eligible for asylum, statutory withholding, and CAT protection. Rule 46906, 46919, 46947. Currently, asylum applicants in immigration court may submit evidence in support of their claims for protection so long as it is

[91] *Oshodi v. Holder*, 729 F.3d 883, 885 (9th Cir. 2013) (en banc).

[92] *See, e.g.*, *Oshodi v. Holder*, 729 F.3d at 889; *see also Tawadrus v. Ashcroft*, 364 F.3d 1099, 1105–06 & n.7 (9th Cir. 2004) (holding the *pro se* applicant was denied due process when, among other things, he was not provided with an opportunity to explain "perceived inconsistencies" in his testimony "leading to the IJ's adverse credibility determination" and lacked expertise to know to question the reliability of dubious government evidence).

"probative and fundamentally fair."[93] Under the Rule, however, if an asylum seeker wishes to present evidence to the immigration court, they "must establish that the testimony or documentation is *not duplicative* of testimony or documentation already presented to the asylum officer, *and* that the testimony or documentation *is necessary* to ensure a sufficient factual record upon which to base a reasoned decision on the application or applications."[94] Rule 46918, 46920 (emphasis added).

Thus, under the Rule, immigration judges may only entertain evidence that is both nonduplicative and necessary. Rule 46918, 46920, 46947. At first glance this might seem harmless. However, evidence that might be considered duplicative may in fact be critical to ensuring that an asylum seeker is not erroneously denied protection. For example, immigration judges often give full weight to Department of State Country Reports and may give only limited weight to contradictory evidence, such as reports from other sources such as NGOs or country experts that corroborate an applicant's risk of persecution or torture.[95] In this common scenario, filing several reports from different sources that similarly rebut the State Department's conclusions, while duplicative in a strict sense, can be necessary to making a successful claim.[96] Under the Proposed Rule, however, immigration judges can exclude this evidence prior to the hearing merely because it is facially duplicative without ever reaching the question of whether it is necessary.

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[93] *See Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995) (holding the "sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair").

[94] 8 C.F.R. § 1003.48(e)(1) (proposed).

[95] *See* EOIR, *Evidentiary Challenges: Admissibility, Weight, Reliability, and Impeachment v. Rebuttal Evidence*, Executive Office for Immigration Review Legal Training Program (2018) (EOIR Training Materials) at 9 (quoting *Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012) (holding that the BIA is entitled to "accord greater weight" to State Department reports in the record than to countervailing documentary evidence)); *id.* at 21 (suggesting that State Department Reports should be afforded more weight than NGO-prepared reports, as "[s]ources such as the United States State Department are the 'most appropriate and perhaps the best resource . . . to obtain information on political situations in foreign nations'" (quoting *Kassa v. Ashcroft*, 83 F. App'x 601, 602 (5th Cir. 2003) (internal quotations omitted))).

[96] *See Hang Chen v. Holder,* 675 F.3d 100, 108 (1st Cir. 2012) (recognizing that "while the BIA may 'rely on the State Department's country reports as proof of country conditions described therein, … it must also consider evidence in the record that contradicts the State Department's descriptions and conclusions'"); *Lin v. Holder*, 656 F.3d 605, 609 (7th Cir. 2011) (noting that the Seventh Circuit has "repeatedly condemned … over-reliance on generalized statements of country conditions" found in State Department reports); *see also See Chen v. U.S. I.N.S.,* 359 F.3d 121, 130 (2d Cir. 2004) (observing that the government's foreign policy objectives may influence the information presented in the reports, rather than presenting unbiased factual information (citing Sloss, *Hard-Nosed Idealism and U.S. Human Rights Policy,* 46 ST. LOUIS U. L.J. 431, 432 (2002))).

This aspect of the Rule is particularly troubling in light of recent criticism of the country conditions information available to the asylum officers who will be tasked with making the record the immigration judge will review. In its White Paper, AFGE Local 1924 pointed out that under the previous administration "political appointees and senior leaders in UCSIS and RAIO repeatedly pushed for the creation, promotion, and dissemination of county of origin information (COI) that was biased, misleading, unreliable, and/or factually inaccurate in order to improperly influence or pressure [asylum] officers to reach negative adjudicatory decisions."[97] If applicants are, as the Rule sets forth, denied a full and fair opportunity to present evidence that challenges the COI underlying the asylum officer's denial of relief or protection, immigration judges may rubberstamp decisions that are based on inaccurate information resulting from impermissible political considerations.[98]

Additionally, the Rule contains no standards for what constitutes "duplication" or "necessity" which causes additional due process issues and delay. Rule 46911, 46918, 46947. By inventing a presumption against certain types of undefined evidence, the Rule creates confusion where none previously existed. The adjudicator is given no guidance on how to determine the line between duplicative or unnecessary testimony, on the one hand, and new information that could assist the court in reaching its decision. As such, the Rule will lead to further delay as the question of what evidence is admissible is litigated by the parties (in most cases now, admissibility is not contested), and will result in inconsistent outcomes from courtroom to courtroom. This works against the Departments' stated goals of expediting adjudication of asylum claims and eliminating the immigration court backlog and would certainly lead to inconsistent decision-making if implemented by adjudicators. Rule 46907, 46918. Furthermore, it makes judicial review of the determination to exclude the evidence virtually impossible.

At bottom, elimination of full 240 hearings before the immigration judge and the presumption against consideration of evidence from outside the Asylum Office's record will lead to unlawful and inconsistent decisions and erroneous removals. The Departments'

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[97] *Union White Paper*, pp. 5–6; *see also*, Asylum Research Centre (ARC), *Comparative Analysis of U.S. State Department's Country Reports on Human Rights Practices 2016-2020* (2021) (analyzing certain countries and themes to show that State Department reports are inconsistent with the situation on the ground as documented by other sources).

[98] Further, the Rule does not make clear that the USCIS would be required to disclose the COI it relied upon. Asylum officers routinely rely on COI without disclosing its source to asylum seekers or their counsel. At a minimum, "[a]ll research products of the RAIO Research Unit should be made available to the public, for the purpose of transparency and accountability, and to ensure compliance with refugee and asylum laws that are foundational to RAIO programs." *Union White Paper*, p. 9. And applicants should be given an opportunity to rebut that information before their case is adjudicated.

sole justification for this change is to reduce the immigration court's backlog by expediting asylum claims, but it will do just the opposite. Moreover, even if the Rule would increase efficiency, which it will not, the reduction of the backlog and case completion goals cannot and should not take precedence over just and accurate administration of the laws. To comport with due process and minimize the risk of *refoulement*, the Rule should prohibit pretermission by immigration judges based solely on the asylum record and should instead specify a presumption of admissibility of new evidence and eliminate the requirement that the parties must file motions to supplement the record.

C. The Rule's Prohibition on Immigration Judge Consideration of Alternative Relief and Reconsideration of Inadmissibility Determinations Violates Due Process and Will Result in Erroneous Removals to Persecution or Torture

The Rule's limitation on the scope of the immigration court review process to consideration of applications for asylum, statutory withholding of removal, and CAT protection raises several due process and practical concerns. Rule 46919–20, 46946. The Rule sets up an onerous procedure for seeking all available relief. Under the Rule the immigration judge is prohibited from considering whether the applicant is indeed removable in the first place, thereby cutting off critical lines of inquiry. Moreover, applicants must file motions demonstrating their *prima facie* eligibility for other relief and even if they establish such eligibility, the immigration judge may deny the motion in the exercise of discretion. Rule 46946. This will prove to be particularly devastating for *pro se* individuals who often lack the legal knowledge and expertise to identify other forms of relief let alone determine whether they are eligible. Additionally, even if the immigration judge does grant the motion and vacate the 235 proceedings, then DHS must decide whether to reissue a notice to appear and begin the process all over again. Thus, under the proposed Rule neither due process nor efficiency will be served.

As discussed above, for myriad reasons many asylum seekers are unable to obtain counsel to assist them in navigating an area of law that courts have called "labyrinthine," "second only to the Internal Revenue Code in complexity," and "a maze of hyper-technical statutes and regulations that engender . . . confusion for the Government and petitioners alike."[99] For these *pro se* individuals an immigration judge's questioning, about, for example, family ties or criminal victimization in the United States, may be the only way that eligibility for other relief may come to light. Nevertheless, under the Proposed Rule the immigration

[99] *See Filja v. Gonzales*, 447 F.3d 241, 253 (3d Cir. 2006); *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (internal quotation marks omitted); *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003).

judge has no affirmative duty to screen for eligibility for other relief, and in fact, given the Rule's presumption against holding an evidentiary hearing and eliciting testimony at all, the Rule discourages immigration judges from doing so. Rule 46919–21. This runs counter to the commonly understood duty of immigration judges to probe for relevant facts and advise unrepresented applicants of any apparently available relief that becomes apparent from those facts.[100] Requiring *pro se* applicants to affirmatively file a motion demonstrating *prima facie* eligibility for other relief will lead to due process violations by denying applicants the right to seek relief for which they may be eligible.

For the same reasons, the Rule's prohibition on immigration court consideration of the question of removability threatens to result in the denial of due process and wrongful removals. Rule 46919, 46947. For example, CGRS is aware of several instances where immigration judges properly probed for facts and discovered that the individual facing removal was in fact a U.S. citizen. However, if immigration judges are not permitted to make a ruling on admissibility or removability, there is no incentive for them to inquire to determine if the applicant before them has undiscovered legal status. In order to ensure that people are not removed by mistake and to avoid unnecessary immigration hearings for those who indeed are not removable, immigration judges should be permitted to inquire and make determinations regarding removability.

Moreover, even where an applicant presents evidence of their *prima facie* eligibility for other relief, the Rule permits the immigration judge to deny the motion to vacate the Section 235 proceedings at their virtual unfettered *discretion*. Rule 46920, 46947 (emphasis added). This means, for instance, that where an applicant has an approved Special Juvenile Immigrant Visa and no bars to adjustment of status, an immigration judge could still force the applicant to continue in the limited asylum-, withholding-, and CAT-only proceedings through to the issuance of a final order, thereby denying the applicant the opportunity to timely seek other available relief. Under these circumstances, the only recourse would be to file a motion to reconsider or reopen or challenge the denial as an abuse of discretion— a near impossible burden— to the Board of Immigration Appeals through either an interlocutory appeal or as part of any appeal of an order of removal. These are not sufficient safeguards given that many of the asylum seekers who will find themselves in

[100] *See C.J.L.G. v. Barr*, 923 F.3d 622, 627 (9th Cir. 2019) (en banc) ("The apparent eligibility standard of 8 C.F.R. § 1240.11(a)(2) is triggered whenever the facts before the IJ raise a reasonable possibility that the petitioner may be eligible for relief." (internal quotation marks and citations omitted)); *see also Moran-Enriquez v. I.N.S.*, 884 F.2d 420, 423 (9th Cir. 1989) (observing that "where the [noncitizen's] eligibility for relief is suggested, but not clearly disclosed, by the record . . . it is the IJ's expert attention to the facts of a particular alien's case can make the difference between pursuing an available avenue of relief and missing it altogether").

this process lack the resources and/or legal knowledge to bring repeated challenges to the agency's decisions.[101] As a result, under this framework not only will the immigration courts, the BIA, and the judiciary be burdened with the adjudication of additional motions and appeals, but noncitizens with available relief are likely to be wrongfully removed. This runs counter to the Departments' stated purpose of streamlining and afoul of their due process obligations. Rule 46920.

The goals of efficiency weigh against the proposed procedure in another way. The Rule creates a new and onerous procedure for consideration of alternative relief, requiring affirmative motions (and presumably allowing time for the government to file opposition motions) before the immigration judge makes a determination. Rule 46947. If the immigration judge decides in the exercise of discretion to grant the motion they must then issue an order vacating the underlying order of removal, at which point the case returns to DHS to decide in its discretion whether to initiate INA § 240 proceedings and begin the immigration court process anew. Id. If the immigration judge denies the motion litigants may presumably file a motion to reconsider with the immigration court and/or an interlocutory appeal to the BIA. Thus, far from streamlining the process, the Rule proposes to further complicate and delay it. *Id.*

To preserve fairness and avoid erroneous removals and protracted litigation we ask that the Departments simplify the process by placing applicants denied by the Asylum Office into full 240 proceedings.

D. Efficiency and Justice Are Better Served by Referring Asylum Office Denials to Full Section 240 Proceedings

Finally, we urge the Departments to dispense with the proposed 235 asylum-, withholding-, and CAT-only proceedings and its presumptions against holding hearings or admitting new evidence and testimony. The interests of justice, fairness, efficiency, and the United States' *non-refoulement* obligations under the Refugee Protocol and CAT, will only be served if asylum seekers are given meaningful *de novo* review before the immigration judge, including a full and fair hearing with the procedural protections set forth in Section 240, as guaranteed by the Fifth Amendment of the U.S. Constitution.

The Rule, as drafted, will further burden the immigration courts and create delays in adjudication of the merits due to prolonged disputes about supplementing the asylum office's likely skeletal record or *prima facie* eligibility for alternative relief. Under the Rule

[101] Eagly and Shafer, *supra* n.55, at 4, 6, 11–12.

litigants will have to engage in extensive motions practice which is likely to include motions to file additional evidence, motions to vacate the INA Section 235 asylum-, withholding-, and CAT-only proceedings to pursue other relief, and the inevitable cross-motions, motions to reconsider, interlocutory appeals to the BIA, motions to reopen, and appeals to the federal courts. Additionally, as discussed above, it is administratively inefficient and outside the purview of the immigration courts to require secondary review of issues not in dispute, including grants of relief or protection by the DHS's sub-agency the USCIS Asylum Office (i.e. one of the parties). Thus, not only will the proposed procedures produce greater delay in adjudication of claims, increase the immigration court backlog, and undermine the finality of cases, they also skew in favor of removal over accuracy and undermine the very purpose of immigration court de novo review.

Instead of implementing the unfair, confusing, complicated, costly, inefficient, and unnecessary new procedures proposed in the Rule, a simpler and more efficient approach would be to have Asylum Office denials automatically referred to Section 240 proceedings with all the attendant due process protections. In those proceedings the immigration judge could consider issues in dispute, including (if challenged) the removability determination, any denials of relief or protection by the Asylum Office, and any other relief for which the applicant may be eligible. This would "streamline" the process by eliminating consideration of any undisputed issues, such as grants of statutory withholding or CAT protection by the Asylum Office, and avoiding prolonged and unnecessary motions practice disputing whether applicants may submit evidence or pursue alternative relief. Critically, issuing the agency's orders in Section 240 proceedings would also eradicate any questions or concerns about the critical safeguard of judicial review of the agency's order(s) and avoid protracted potential future litigation about the federal courts' jurisdiction over these cases. Moreover, and most importantly, this approach would preserve the constitutionally required procedural safeguards necessary to prevent erroneous removal of those eligible for relief or protection and keep the United States in compliance with its international obligations under the Refugee Protocol and CAT.

VIII. CONCLUSION

The Rule fails in its laudable goal of creating a "better and more efficient [asylum system] that will adjudicate protection claims fairly and expeditiously." Rule 46907. We urge the Departments to withdraw this Rule in its entirety and begin again. We strongly urge consultations with UNHCR, CGRS, AFGE Local 1924 and other experts. While we support the

effort to amend U.S. asylum procedures, changes must be based on the effective implementation of our protection obligations under U.S. and international law.

As noted above, this new procedure is based on a deeply flawed system of expedited removal and will be implemented without government appointed counsel and with excessive reliance on detention. Under these circumstances, the Departments are even more challenged to ensure that procedures are fair, and that efficiency concerns do not overshadow the requirements of protection. The Proposed Rule errs by doing away with international, constitutional, and statutory procedural protections in a largely misguided attempt at efficiency. As written, it will establish a system that is neither efficient nor fair.

Thank you for the opportunity to submit comments on the Proposed Rule. Should you have any questions, please contact Kate Jastram at jastramkate@uchastings.edu or 415-636-8454.

Sincerely,

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