Center for Gender & Refugee Studies

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Rena Cutlip-Mason
Chief, Division of Humanitarian Affairs
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20588-0009

Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Re: *Request for Comments: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers,* 87 Fed. Reg. 18078 (March 29, 2022)

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

Dear Ms. Cutlip-Mason 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* (March 29, 2022) (hereinafter, Interim Final Rule, Rule, or IFR). We include the following outline to guide your review.

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I. INTRODUCTION

This comment responds to the Joint Interim Final Rule published by the Department of Justice (DOJ) and the Department of Homeland Security (DHS). The Rule creates 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) for individuals subject to expedited removal.

The amendments will have an impact on credible fear screenings, asylum office adjudication, secondary consideration in the immigration courts, detention practices, and ability to obtain counsel. As noted in the Background to the related Notice of Proposed Rulemaking (NPRM), there is nearly universal agreement that the U.S. asylum system is in "desperate need" of reform. 85 Fed. Reg. 46906 (August 20, 2020).[1] We concur, and we applaud attempts to improve the asylum system.

We appreciate the opportunity to comment on the Interim Final Rule. We submitted a comment[2] on the NPRM, attached as Appendix I. We are pleased to see that a number of our recommendations were incorporated into the IFR.[3] The IFR has many positive elements that were either retained from the NPRM or were improved after the Departments' review of comments. However, many of the problematic aspects of the NPRM remain, and a major new element of highly unrealistic timelines has been introduced. This comment discusses both the positive and the negative elements at each stage of the process – credible fear screenings, asylum office adjudication, parole, and immigration court hearings.

We are keenly aware that reform of the U.S. asylum system is long overdue, and we commend the Departments for promulgating this Rule. However, on balance, we remain concerned that the new timelines and other procedural shortcuts at the both the asylum office and in immigration court will render the right to counsel all but meaningless. Asylum and related claims for protection have complex legal standards and onerous evidentiary burdens, and any changes making it even more difficult for applicants to obtain legal representation will undermine both the fairness and the efficiency that the Departments seek.

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[1] "The preamble discussion in the NPRM, including the detailed presentation of the need for reforming the system for processing asylum and related protection claims at the Southwest border, is generally adopted by reference in this IFR." Rule 18079.

[2] Comment submitted by Center for Gender & Refugee Studies (Oct. 19, 2021), Comment ID USCIS-2021-0012-5047, Tracking Number kuy-re3p-g7f3.

[3] The Departments note the IFR makes 23 changes from the NPRM, "many of which were recommended or prompted by commenters." Rule 18081.

As experts in asylum law, we focus our comment on the Rule's compliance with the domestic and international legal obligations of the United States. For the reasons set forth below, CGRS urges DOJ and DHS to make further improvements to the Rule to ensure that people seeking asylum are not rushed through a process with a high risk of mistaken decisions resulting in *refoulement.* It is our expert opinion that the Rule in its current form, particularly with such unreasonable and impractical timelines, 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[4] following her groundbreaking legal victory in *Matter of Kasinga*[5] to meet the needs of asylum seekers fleeing gender-based violence. CGRS protects the fundamental human rights of refugee women, children, LGBTQ+ individuals, and others who flee persecution and torture in their home countries. CGRS is an internationally respected resource for gender, 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,[6] 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.[7] 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.[8]

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[4] Bank of America Foundation Chair in International Law; Professor & Director, Center for Gender & Refugee Studies, University of California Hastings College of the Law.
[5] 21 I&N Dec. 357 (BIA 1996).
[6] *See, e.g.*, *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022); *Pangea Legal Servs. v. DHS*, 512 F.Supp.3d 966 (N.D. Cal. 2021); *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).
[7] *See, e.g.*, the Welcome With Dignity campaign.
[8] *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).

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 respects the rights of these individuals and aligns with international law. It is in furtherance of our mission that we submit this comment.

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

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

As explained more fully in our NPRM comment,[9] 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)[10] and the 1984 CAT.[11]

We note the Departments' conclusory response that the Rule does not violate U.S. or international law. Rule 18118. We reiterate that procedures comply with our legal obligations only insofar as they allow the United States to achieve the results required by the treaties, the *non-refoulement* of protected persons. Simply stating that the new procedures will not violate U.S. or international law does not make it so. The Departments' assertion fails to take into account the IFR's newly-created timelines and the predictable realities of implementation, which will undermine the ability of the United States to meet its legal obligations.

One key element of asylum adjudication procedures that comply with international law is legal representation. Under the Rule's timelines, asylum seekers who need legal representation to navigate the notoriously complex U.S. system will not have the time or resources to find such assistance. We turn to the importance of representation, which the Rule acknowledges repeatedly, yet places every obstacle in the way of applicants actually obtaining counsel.

[9] *See* Appendix I.
[10] 606 U.N.T.S. 267 (entry into force 4 Oct. 1967).
[11] 1465 U.N.T.S. 85 (entry into force 26 June 1987).

B. Legal Representation is Necessary to Ensure U.S. Compliance with the Obligation of *Non-refoulement*

We understand that provision of government-funded counsel is outside the scope of the IFR. Nevertheless, the Departments have explained that this rulemaking is "one part of a multifaceted whole-of-government approach to … ensuring that the U.S. asylum system is fair, orderly and humane." Rule 18111.

The arguments we made in our NPRM comment regarding the necessity of meaningful access to counsel are even more salient in light of the draconian timelines established in the Rule. There can be no doubt that in a legal and procedural landscape as complicated as that of U.S. immigration law, a truly fair and efficient asylum system requires that all applicants have competent representation at government expense where necessary. In addition to the sources of guidance cited in our NPRM comment regarding the importance of government-funded counsel for those who would not otherwise be able to secure legal representation, we draw the Departments' attention to a new (March 2022) UNHCR publication recommending practical considerations and practices to all governments to aid in their effective processing of asylum applications:

> **Providing accessible, reliable, and high-quality government-funded legal aid and legal representation are instrumental in establishing fair and transparent asylum procedures.** Provision of legal aid and legal representation can go a long way in strengthening the quality of asylum decision-making and can contribute to the efficiency of the [refugee status determination] process, as it can strengthen an applicant's understanding of the process, lower the number of appeals and subsequent applications (re-opening), **and shorten adjudication timelines** (emphasis added).[12]

The Departments' observation that UNHCR's guidance is "not binding," Rule 18119, fails to grasp the essential point in three important ways. First, it overlooks the binding nature of the underlying obligation of *non-refoulement.* Second, it ignores the requirement that the United States cooperate with UNHCR in the exercise of its protection mandate, in particular by facilitating UNHCR's duty to supervise the application of the Protocol.[13] Third, it entirely disregards the value of choosing to employ best practices as identified by UNHCR based on

[12] UNHCR, *Effective processing of asylum applications: Practical considerations and practices*, March 2022 (hereinafter *Effective processing),* para. 29. We note that UNHCR made similar recommendations to the U.S. government in its comment on the related NPRM. Comment submitted by United Nations High Commissioner for Refugees (UNHCR) (Oct. 19, 2021), Comment ID USCIS-2021-0012-5192, Tracking Number kuy-xxkh-p1eb.

[13] Refugee Protocol, Art. II(1).

its deep expertise and decades of experience, and its consistently expressed willingness to work with the U.S. government.[14]

As the Departments consider comments on the IFR, we urge them to make every effort to maximize access to counsel given the current realities of our asylum system. The lack of government-funded counsel puts additional onus on both DHS and DOJ to ensure that adjudicators have sufficient time and resources to make correct decisions. As we noted previously, asylum officers' new role in creating the asylum application during the credible fear interview falls far short of this goal. The new timelines set forth in the IFR make it even less likely that applicants will be able to obtain counsel and should be rejected for that and other reasons outlined below.

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, absent compelling reasons, people seeking asylum should never be detained.[15] 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, an effort made much more difficult because of the Rule's timelines.

To the extent that asylum seekers lack access to counsel, 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. The procedures outlined in this Rule do not meet that burden.

C. The Departments Should Engage in Meaningful Consultations with UNHCR, CGRS, the Asylum Officers Union, and Other Experts on the Newly Added Issue of Timelines

We are disappointed that the Departments did not consult with us and other experts including UNHCR; the asylum officers' union, American Federation of Government Employees (AFGE) Local 1924; and the Roundtable of Former Immigration Judges on the addition of deadlines prior to publishing the IFR. Because it is our expert opinion that this element of the IFR should be withdrawn and substantially revised, we respectfully request that before any further steps are taken to implement the IFR, such consultations take place.

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[14] *See supra* fn. 12, UNHCR Comment; *see also* *Statement by UN High Commissioner for Refugees Filippo Grandi on U.S. asylum changes*, July 9, 2020.

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

In response to a similar request for expert consultations in our comment on the NPRM, the Departments pointed to the comment periods for the NPRM and IFR, their engagement with non-governmental and intergovernmental organizations for training purposes, and public engagement sessions with stakeholders. Rule 18184. However, these are not substitutes for substantive working meetings with experts for three reasons. First, a comment period for an IFR, by definition, indicates that the Departments will begin implementation before they have reviewed the comments submitted. This is particularly damaging in this case, with the IFR's addition of timelines that bear no relationship to operational realities and appear to have been invented by people with little practical experience on the ground.

Second, outside organizations involved in training are not involved in policy and planning, so their work cannot be characterized as any sort of consultation on the subject matter of this IFR. Finally, as an organization that participates in stakeholder engagement meetings, we are keenly aware that such meetings are infrequently scheduled and last one hour at most. Stakeholder engagement meetings always have a lengthy list of agenda items, and no one issue gets more than a few minutes' time. We remind the Departments that the president has mandated them to undertake consultation and planning with international and non-governmental organizations.[16]

D. The Departments' Reliance on Expedited Removal is Mistaken

We note again that the Rule is premised on continued reliance on expedited removal. Expedited removal has been subject to criticism since its inception for its due process deficiencies which result in an unacceptable risk of *refoulement*.[17] These critiques include the comprehensive, multi-year, congressionally mandated study published in 2005 by the United States Commission on International Religious Freedom (USCIRF),[18] one of whose authors is also an author of this comment. More recently, CGRS[19] and numerous other civil society organizations[20] have urged the administration not to resume the use of expedited removal unless and until its serious flaws have been addressed.

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[16] See *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*, Feb. 2, 2021, Sec. 4(a)(i).
[17] Musalo, *Expedited Removal*, 28 HUM.RTS. 12 (2001).
[18] U.S. Commission on International Religious Freedom (USCIRF), *Report on Asylum Seekers in Expedited Removal* (2005) (hereafter referred to as the Study).
[19] CGRS, *Asylum Priorities for the Next Presidential Term* (Nov. 2020).
[20] CGRS et al., *Do Expedited Asylum Screenings and Adjudications at the Border Work?* (May 2021).

The Departments express their disagreement with commenters' "assertions" regarding due process concerns in expedited removal. Rule 18129. The Departments are, or should be, aware that the USCIRF study was based on extensive first-hand direct observation at ports of entry, detention facilities, and asylum offices conducted by a multidisciplinary team of experts appointed by a bipartisan federal agency. The study's documented findings cannot be dismissed as mere assertions.[21]

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

IV. MANY ELEMENTS OF THE RULE ARE POSITIVE

A. Positive Changes Retained from the Notice of Proposed Rulemaking

In our comment on the NPRM, we noted with approval several changes designed to roll back some of the harmful credible fear policies promulgated by the previous administration. We are pleased to see that these positive changes have been retained in the IFR. We list them below and refer the Departments to our comment on the NRPM for further explanation of our support for these changes, as well as certain cautions and reservations we expressed.

1. Clarification that the "significant possibility" standard will be used. 8 C.F.R. §§ 208.30(b) and (e).
2. No consideration of bars at the credible fear stage. 8 C.F.R. § 208.30 (e)(5).
3. Asylum Officers will conduct credible fear interviews. Rule 18136, 18141-42.

[21] *See* USCIRF's Expedited Removal Study: In 2003 and 2004, USCIRF conducted a major research study, as authorized by the International Religious Freedom Act of 1998 (IRFA), to examine whether asylum seekers subject to Expedited Removal are being detained under inappropriate conditions and whether they are being returned to countries where they might face persecution. Specifically, IRFA authorized USCIRF to appoint experts to examine whether immigration officers, in exercising Expedited Removal authority over aliens who may be eligible for asylum, were:

1. improperly encouraging withdrawals of applications for admission;
2. incorrectly failing to refer such aliens for credible fear determinations;
3. incorrectly removing such aliens to countries where they may face persecution; or
4. improperly detaining such aliens, or detaining them under inappropriate conditions.

USCIRF released its findings in the 2005 Study, *see supra* at 9, n.18. The Study identified serious flaws that place asylum seekers at risk of being returned to countries where they may face persecution and being mistreated while in detention

4. Supervisory asylum officers will review all credible fear determinations. 8 C.F.R. §**§ 208.14**(b) and (c) and 1208.14.

5. Immigration judges will review all negative credible fear determinations unless an applicant affirmatively refuses such review. 8 C.F.R. § 208.30(g).

6. The record of negative credible fear findings will include the asylum officer's summary of material facts and other materials on which the determination was based. 8 C.F.R. § 208.30(g)(1).

7. Service of the positive credible fear determination will be treated as the date of filing, 8 C.F.R. § 208.3(a)(2), for purposes of the one-year filing deadline, 8 C.F.R. § 208.4 (a), and for starting the employment authorization clock 8 C.F.R. § 208.7.

8. Ensuring that a greater number of applicants will benefit from having a non-adversarial interview before referral to an immigration judge, 8 C.F.R. §§ 208.2(a)(1)(ii), 208.30(f), 1208.2, and 1208.30(g), including for withholding of removal and CAT claims, 8 C.F.R. § 208.9(b).

B. The Provision on Requests for Reconsideration was Improved but is Still Insufficient

1. Improvement from NPRM

We objected strongly to the provision in the NPRM eliminating the possibility of any request for reconsideration of a negative credible fear finding. We noted that DHS had not provided sufficient information to justify the claim that such elimination was necessary for efficiency and pointed to our own experience in successfully seeking reconsideration for clients who eventually won protection.

It is a positive change that one request for reconsideration is provided for in the IFR, 8 C.F.R. § 208.30(g)(1)(i), yet we object to the unrealistic requirement that it must occur within seven days of the immigration judge's concurrence with the negative credible fear determination, and to the limitation that there may be only one such request.

2. Problems with time and numerical limitations in the IFR

A seven-day deadline for requesting reconsideration is both unrealistic and unnecessary. At this point in the credible fear process, nearly all applicants are detained, making it extremely difficult for them to find counsel to help them formulate a request for reconsideration or even to learn that such a request is possible, particularly since, as DHS notes, this is an informal, ad hoc process. Rule 18095. The seven-day deadline is so

unrealistic as to make the possibility illusory. DHS has provided no evidence to show that efficiency concerns would be undermined if such requests were allowed until the time of removal. The deadline is also unnecessary, as the asylum office retains complete discretion as to whether to reconsider a negative credible fear determination.[22]

The limitation to just one request for reconsideration is unnecessary for the same reason. At a minimum, an additional request for reconsideration should be considered when the applicant had no counsel or ineffective counsel for the initial request. The Departments must also take into account the wholly unwarranted burden placed on many applicants by both the asylum office and reviewing immigration judges when corroborative evidence is required in the context of credible fear determinations and requests for reconsideration. As explained below, this occurs, for example, when applicants have physical or mental disabilities.

We offer the following case examples to illustrate just how unreasonable and dangerous the IFR's time and numerical limitations are. These examples were shared with CGRS by legal services providers at the South Texas Family Residential Center.

3. Examples of positive credible fear determinations on second Request for Reconsideration

Example 1

A legal service provider represented a Guatemalan woman in detention suffering from post-traumatic stress disorder (PTSD) who was too traumatized at her interview to reveal that her husband had been murdered and that she had received death threats from his killers. Her personal documents, which included a death certificate and other documentation attesting to her husband's violent death, were confiscated by ICE when she was detained. She repeatedly requested, individually and through counsel, that this essential evidence be returned to her, but ICE did not respond. Her negative credible fear determination was affirmed by an immigration judge.

Her first request for reconsideration—promptly submitted within seven days—was denied, because she was unable to corroborate these newly-disclosed claims with evidence. When ICE finally complied with the request for her documents, 13 days after her negative credible fear determination was affirmed by the immigration judge, she submitted a second request for reconsideration attaching these documents, which was then granted. Had she

[22] 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).

only been allowed to submit a request for reconsideration within the first seven days, or had she been denied the ability to submit a second request containing the key evidence that had been sitting in ICE's possession, she would have been deported back to harm.

Example 2
A legal service provider represented a young Guatemalan single mother in detention with her infant son. She sought asylum after suffering severe sexual, physical, and psychological torture from a powerful narco-boss who kidnapped her as a teenager and whose violence was so severe, she fled with a broken bone. She was unable to access counsel in advance of her credible fear interview which was conducted by a male asylum officer while her son was severely ill—he was hospitalized only a few days later. She was unrepresented during the immigration judge review and her negative determination was affirmed.

She was able to secure counsel for her request for reconsideration only after she was transferred to a different ICE detention facility where a *pro bono* service provider accepted cases. As a result of the transfer, difficulty accessing counsel in detention, and limited capacity of *pro bono* service providers, her first request for reconsideration could be filed no earlier than 18 days after her immigration judge review. Her initial request presented new information that she was unable to share in her credible fear interview due to severe mental health conditions and trauma. However, it was denied. A second request was filed after her counsel spent additional time coordinating an evaluation and review of her medical records with a psychologist who diagnosed her with anxiety, depression, and PTSD. The evaluation explained how her trauma significantly impeded her ability to meaningfully participate in proceedings and share all the important details in her case. The second request for reconsideration, which included this corroborating medical evidence, was granted.

Example 3
A legal service provider represented an Ecuadorian mother who sought asylum with minor children after fleeing severe beatings, death threats, and rape from her husband. Because her credible fear interview was conducted while she was in detention, in the presence of her young children, and by a male asylum officer, she was uncomfortable disclosing all the violence she suffered.

An initial request for reconsideration providing newly available information was denied. A subsequent request was granted by USCIS after counsel submitted extensive corroborating evidence of harm, including a psychological evaluation concluding that the applicant had a neurocognitive disorder due to a Traumatic Brain Injury, PTSD, and General Anxiety Disorder which substantiated the harm she suffered and the reasons it was difficult for her to testify and recall information. Additionally, counsel asserted that prior asylum officers

failed to investigate or interview the minor's son claim to suffering torture at the hands of his father.

Example 4
A legal service provider represented two family units in expedited removal proceedings fleeing the same exact persecutor and harm. One family received a positive credible fear determination while the other received a negative determination that was affirmed by an immigration judge.

An initial request for reconsideration asserting legal error in the asylum officer's initial decision was denied. A subsequent request was granted, again after counsel was able to collect corroborating evidence of the applicant's medical condition/disability. The second request asserted that conflicting decisions in the cases of these applicants with identical facts was arbitrary and capricious, and notified USCIS that the applicant was denied necessary accommodations to participate in her credible fear interview due to a diagnosed medical condition that impacted her neurological functioning. The second request was submitted more than seven days following immigration judge review as counsel had to spend time assisting the applicant in compiling evidence of her neurological condition while detained.

4. Examples of factors making a seven-day time limit unrealistic

Need for Counsel
Legal service providers at the South Texas Family Residential Center report that, in their experience, *pro se* requests for reconsideration are almost always denied. They report that they have assisted applicants in submitting *pro se* requests, but that any time new information is provided or procedural errors are asserted, USCIS' standard practice is to require significant corroborating evidence before any meaningful review of the underlying credible fear record occurs.

Disability Discrimination & Failure to Provide Accommodations Requests for Reconsideration
Legal service providers at the South Texas Family Residential Center report that they have often submitted requests for reconsideration based on discrimination against individuals with disabilities who were not afforded the accommodations necessary to allow their meaningful participation in expedited removal proceedings. These individuals cannot always self-identify or explain their physical or mental disabilities to an asylum officer or request meaningful accommodations as required by the Rehabilitation Act and the Americans with Disabilities Act. For example, one legal service provider filed a request on behalf of an applicant who had severe PTSD from a kidnapping, false imprisonment, and

repeated rape and sexual abuse as a child. As a result, she experienced extreme dissociation that prevented her from recalling and testifying at her credible fear interview. This individual's disability was acknowledged, and accommodations were provided only after counsel submitted medical records and a psychological evaluation that resulted in the grant of her request.

The same legal service providers advise that they cannot request medical records or coordinate psychological evaluations within seven days, particularly if applicants are detained. Yet, in practice, this is often the level of proof USCIS requires to provide accommodations for individuals with disabilities or reconsider credible fear determinations when disability discrimination claims are made.

Requests for Reconsideration Based on Change of Law

Legal service providers at the South Texas Family Residential Center have submitted numerous requests for reconsideration past the seven-day deadline when there have been changes of law that impact asylum claims or expedited removal proceedings. They have had numerous requests granted in the past few years due to court decisions that have changed what is legally required in expedited removal proceedings. These include enjoinder of the safe third country transit bar,[23] which directly impacted the standards being applied in credible fear determinations; the *Kiakombua* decision, which rescinded the USCIS April 2019 Credible Fear Lesson Plan;[24] and changes to legal interpretations which directly impact whether someone has a "significant possibility" of establishing eligibility for asylum, such as the Attorney General's vacatur of *Matter of A-B- I & II* and *Matter of L-E-A- II*.[25]

5. Inadequacy of DHS data to justify time and numerical limitation in IFR

In our NPRM comment, we requested data to better assess the wisdom of eliminating requests for reconsideration and appreciate DHS's efforts to provide the extremely limited information available. Rule 18132. Yet even with the IFR's revision to allow one request for reconsideration, we are concerned by how little evidence there is to support such a drastic limitation of this vital procedural protection**.**

[23] *See, e.g.*, *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F.Supp.3d 25 (D.D.C. June 30, 2020); *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020).
[24] *Kiakombua v. Wolf*, 498 F. Supp. 3d 1 (D.D.C. Oct. 31, 2020).
[25] *Matter of A-B-*, 28 I&N 307 (A.G. 2021) (vacating *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) ("*A-B- I*"), and *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021) ("*A-B- II*")); *Matter of L-E-A-*, 28 I&N 304 (A.G. 2021) (vacating *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) ("*L-E-A- II*")).

DHS acknowledges that it does not have comprehensive, official, standardized data on requests for reconsideration, and that some asylum offices do not even track initial requests, much less multiple ones. Rule 18132-33. The evidence for eliminating multiple requests is admittedly "anecdota[l]." Rule 18133. This admission makes it all the more startling to read that requests for reconsideration are a burdensome and "increasingly significant" portion of the work, Rule 18132, since DHS's own evidence does not back up that assertion.

Far from supporting the IFR's limitations on requests for reconsideration, the information provided instead shows just how critical such requests are. By DHS's own statistics for fiscal years 2019-2021, between seven and fifteen percent of all requests for reconsideration of a negative credible fear determination were changed to a positive determination. Rule 18132. This represents well over five hundred asylum seekers in just three years who would otherwise have been subject to mistaken *refoulement,* absent the safeguard of requests for reconsideration. The true number of cases where the initial credible fear determination was mistakenly determined to be negative is actually much higher because only a small percentage of people (varying from twenty-seven to under eleven percent) receiving a negative credible fear determination even requested reconsideration, and because not all asylum offices track this information.

DHS simply does not have the information necessary to justify limiting the time or number of requests for reconsideration. If, after better data is available, DHS finds it is truly burdened with requests for reconsideration, it would be better to reflect on the obvious significance of such requests, i.e., that they reveal flaws in the credible fear process. By limiting the possibility of reconsideration to the point where it is not realistically available, DHS is simply covering up problems rather the addressing the root of the issue.

V. MANY PROBLEMATIC ELEMENTS OF THE PROPOSED RULE WERE RETAINED IN THE INTERIM FINAL RULE

A. 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, 8 C.F.R. § 208.3(a)(2)

We reiterate the concerns and questions raised in our NPRM comment, which were largely unaddressed in the IFR. These include the lack of information about the important change from use of Form I-589 to Form I-870 for applicants falling under the Rule, and the new role of the asylum officer in creating the asylum application. We remain uncertain how asylum

officers will be guided in undertaking an extremely demanding new responsibility. We continue to be concerned that time constraints will require even the most experienced and best-intentioned asylum officers to cut corners to meet scheduling requirements.

We renew our proposal that the government fund legal representation programs so that all asylum seekers have competent counsel, allowing the asylum office to 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. There is an inherent conflict of interest between creating and adjudicating the asylum application

The Departments disagreed with our arguments on this point, Rule 18137, but appear not to have understood the crux of the issue. We noted that preparation of an asylum application requires zealous advocacy, a role different than that of neutral adjudicator. The Departments responded that any statements made by the applicant, including any arguments for a novel interpretation of the law, become part of the application. Rule 18137. Applicants for asylum are generally not conversant with the complexities of U.S. immigration law, and certainly cannot be expected to advance any arguments for a novel interpretation of the law. This underscores yet again the importance of access to counsel, as the Departments' response confirms that asylum officers will merely be recording what an applicant says and will later adjudicate on the basis of that inadequate record.

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

The Departments mentioned but did not meaningfully respond to our concerns, simply stating that nothing in the Rule pressures or incentivizes negative credible fear findings. Rule 18138. This response fails to address the obvious reality that it will take much more time and work on the part of the asylum officer if the applicant is found to have a credible fear. The Departments' reluctance to acknowledge the asylum office's new role as gatekeeper for its own workload causes us even greater concern that the asylum office will fail to exercise neutral decision-making.

B. The Procedural Changes at the Asylum Office Merits Interview Stage Pose an Unacceptable Risk of *Refoulement*

1. Credible fear records are often incomplete or incorrect

We reiterate our concern about the incomplete and/or incorrect nature of many credible fear records, and discuss the Rule's provisions for amending, correcting, or supplementing the record below.

2. Asylum hearing officers may rely on credible fear records to make adverse credibility findings

The IFR noted this concern in the context of immigration court hearings. Rule 18161, but did not address it. We recommend that all adjudicators be trained on the limits of credible fear records and instructed that adverse credibility findings may not be based merely on changes or additions to the record.

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 and may lead to confusion

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 interview (ten days if sent by mail).[26] However, the Rule also provides that applicants must submit any documentary evidence at least fourteen days in advance of the interview.[27]

We note two problems with these provisions. First, taken together, they are confusing. How will the asylum office distinguish between documentary evidence which must be submitted fourteen days in advance, and evidence to supplement the credible fear record, which must be submitted seven (or ten) days in advance? The Rule clearly envisages that the supplemental information may be in documentary form as it provides for "documents submitted by mail."[28] We recommend eliminating the fourteen-day requirement entirely to avoid inconsistent decision-making on what constitutes documentary evidence as opposed to a document amending, correcting, or supplementing the record.

[26] 8 C.F.R. § 208.4(b)(2).
[27] 8 C.F.R. § 208.9(e)(1).
[28] 8 C.F.R. § 208.4(b)(2).

Second, all the pre-merits interview deadlines imposed (fourteen, ten, or seven days) are far too short. We realize that the Departments are attempting to strike the "best possible balance" between fairness and efficiency, Rule 18144, but they have badly miscalculated. With the IFR's provision that asylum merits interviews will take place within 21 to 45 days after service of the positive credible fear determination, the result is that an applicant may well have to submit "documentary evidence" just one week after service of the positive credible fear record. Allowing such a short period of time makes a mockery of any claim that the Rule is attempting to find the best possible balance between speed and fairness.

We reiterate our concern over the complete discretion afforded to the asylum office in accepting late-filed amendments, corrections, supplements, or other documentary evidence. 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.

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

The Departments noted our concern in this regard, but their response was simply to state that applicants will be provided a contact list of free or low-cost legal services. Rule 18145. This does not address our concern: a list is not a lawyer. The stakes are too high to give people less than a week to review and correct the record and/or try to locate an attorney and an interpreter to assist them in doing so. While the Departments state that they do not expect "word-by-word, line-by-line" review of the record, Rule 18144, they also emphasize that this is "documented testimony provided under oath," Rule 18146. They cannot have it both ways.

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

The Rule discusses language access issues only in the context of interpretation of the asylum merits interview. Rule 18151. While this is an important issue, we note that applicants also need legal advice and representation in their own language both before and after the credible fear interview and the asylum merits interview, particularly because of the government's new role in creating the asylum application.

4. Newly-imposed timelines are unrealistic and unreasonable

Although the timeline between service of the positive credible fear determination and the asylum merits interview was not specified in the NPRM, we expressed our concerns about the inefficiencies and unfairness of allowing too short a period. Now that the Rule has clarified the adjudicatory timelines, we offer these additional comments. Rule 18154.

The Rule provides that, absent exigent circumstances, the asylum merits interview shall take place between 21 and 45 days after service of the positive credible fear determination.[29] We are frankly astonished not only by the timeline imposed, but also by the obtuse justifications provided for it. We repeat our understanding of the Departments' need to balance fairness and efficiency, and we are entirely supportive of that goal. However, this timeline bears no relationship to the realities on the ground.

First, it is beside the point that the statute sets forth a 45-day period within which to hold an asylum interview, since the same Congress that established that timeline has neither seen fit to allocate funds to allow it to be met nor engaged in oversight with the Department on its decades-long inability to reach that goal. More to the point, the statute also requires that the Departments not return refugees to persecution or danger. It equally allows applicants one year to file their asylum applications, with more time permitted if certain exceptions are met. If the Departments wish to engage in selective adherence to the statute, the fundamental obligation of *non-refoulement* must take precedence over an arbitrary and unenforced timeline.

Second, it is equally inapposite for the Departments to argue that the 21-day period "mirrors the time frame provided to applicants in the affirmative asylum process, where asylum interviews are generally scheduled, and interview notices are mailed to applicants, 21 days in advance of the asylum interview date." Rule 18188. Such a comparison is meaningless since applicants in the affirmative process control their own filing deadline and can familiarize themselves with the process, seek legal representation, and assemble supporting evidence before submitting the application (up to one year after their arrival or even longer where an exception is met), not afterward.

Third, the Rule disingenuously states that it "does not change an asylum applicant's ability to hire legal counsel or acquire pro bono services, nor does it prevent a legal service provider from offering its services." Rule 18213.

[29] 8 C.F.R. § 208.9(a)(1).

Given the time constraints imposed by the IFR, applicants will find it particularly difficult to obtain counsel willing and able to provide representation at the credible fear or asylum merits interviews, thus adding to inefficiency in the process by creating more work for asylum officers in developing and understanding the claim. Any errors made at the asylum office level due to haste and lack of legal representation will cause further inefficiencies downstream in immigration court as judges must deal with a needlessly convoluted record and assess new or corrected information. We discuss below the Departments' failure to consider the substantial obstacles that asylum seekers regularly encounter in identifying and retaining counsel, obstacles which are now exacerbated by the newly-imposed timelines.

VI. WHILE THE RULE REINSTATES SOME DUE PROCESS PROTECTIONS, THE NEWLY-IMPOSED ABBREVIATED TIMELINES IN THE "STREAMLINED" SECTION 240 PROCEEDINGS WILL PREVENT ASYLUM SEEKERS FROM FULLY PRESENTING THEIR CASES AND LEAD TO ERRONEOUS REMOVAL TO PERSECUTION AND TORTURE

A. Some Changes to the Rule's Immigration Court Procedures are Positive but Still Need Refinement

1. Automatic referral of asylum denials and limiting immigration judge review to denials of relief or protection

We welcome the Departments' implementation of automatic referral of all USCIS asylum denials to the immigration court, which will eliminate confusion and is more efficient and easier to implement than the NPRM's proposed 30-day affirmative request procedure.[30] Rule 18221–223. We are gratified that the Departments reconsidered and eliminated that procedure and adopted the traditional automatic referral process that the asylum office already uses.

Further, CGRS is thankful that the Departments rescinded the NPRM provision that permitted immigration judges to revisit grants of withholding of removal or CAT protection. Rule 18083, 18224; *cf.* NPRM 46920–21, 46946. By limiting immigration judge review to denials of relief or protection unless DHS can demonstrate through new, individualized evidence that the relief should be terminated,[31] the Rule sets up a more efficient system under which immigration judges will adjudicate only those issues in dispute rather than requiring the parties to relitigate settled matters. Rule 18083, 18224. Additionally, taken together with the automatic asylum office referral provision under the Rule, asylum

[30] 8 C.F.R. §§ 1208.14(c), 1240.17(a)–(b).
[31] 8 C.F.R. § 1240.17(i)(B).

applicants will no longer be discouraged from seeking review of asylum officers' denials due to the risk of having grants of withholding or CAT protection revoked by the immigration court. Instead, applicants will now be entitled to de novo consideration of referred asylum office denials which have historically overwhelmingly resulted in grants of relief by immigration judges,[32] without jeopardizing a grant of withholding or CAT protection.

2. Service of complete asylum office record, including transcript

Similarly, CGRS welcomes the Rule's requirement that DHS serve the complete asylum office record, including a verbatim transcript of the asylum merits interview on the applicant.[33] Rule 18082, 18223–224. However, the short 30-day timeline between service of the record and the status conference is insufficient to provide asylum seekers, who by and large are not fluent in English, a meaningful opportunity to review, correct, and respond to that record. [34]

Moreover, as discussed in greater detail below, the Rule's streamlining provisions will impede applicants' ability to locate and retain counsel, or at least competent interpretation, which in turn will prevent them from identifying factual and legal errors in the asylum office's decision. As such, we urge the Departments to eliminate the onerous docketing timelines, or at a minimum, provide that applicants may seek at least two 90-day continuances for "good cause" between the master calendar hearing and the status conference as due process requires. Finally, due to the potentially adverse effects of mistakes in interpretation during the asylum merits interview, including their impact on credibility and eligibility determinations, CGRS recommends that in addition to the verbatim transcript of the interview, the Departments provide the parties access to the audio recording so that applicants and their legal representatives can review it and timely raise any challenges to interpretation.

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[32] Government data analyzed by Syracuse University's Transactional Records Access Clearinghouse (TRAC) shows that 68% of asylum cases referred from the asylum office were subsequently granted protection by an immigration court judge in Fiscal Year (FY) 2021. *See* Wright, Cora, "Erroneous Asylum Office Referrals Delay Refugee Protection, Add to Backlogs," *Human Rights First* (April 19, 2022). Comparatively, the national average of claims granted by USCIS asylum offices in fiscal year 2020 was only 28%, according to a recent analysis of government records. "USCIS Records Reveal Systemic Disparities in Asylum Decisions," *Human Rights First* (May 2022), p. 2.

[33] 8 C.F.R. §§ 208.9(f)(2), 1240.17(f)(1).

[34] 8 C.F.R. §§ 1240.17(f)(1)–(2).

3. Reinstatement of INA § 240 Proceedings and the elimination of presumption against hearings or additional evidence

CGRS appreciates that the Rule reinstates Section 240 proceedings and its attendant due process protections as Congress intended and the U.S. Constitution requires.[35] As we noted in our NPRM comment, the right to present one's claims for relief and protection requires that applicants be afforded a full and fair hearing at which they can testify, present evidence and witnesses, and review and challenge evidence and witnesses presented by the government.[36] Though we are glad the Departments recognize the need to sustain those protections, as discussed in detail in the comment below, concerns remain that the Rule's new docketing and evidentiary submission timelines will interfere with access to counsel and applicants' ability to meaningfully present their cases by prioritizing speed over accuracy and justice.[37]

4. Procedures encourage narrowing of issues and stipulations to relief and protection

Finally, CGRS praises the Rule for creating procedures to efficiently narrow the issues in dispute and resolve cases without going to trial where the parties stipulate to relief, or the immigration judge intends to grant and DHS either chooses to waive cross-examination or fails to timely challenge the claims for relief.[38] Rule 18224–225. The status conference is a useful procedural tool in the immigration court context, and CGRS welcomes the Rule's requirement that DHS indicate whether it intends to rest on the record, waive cross-examination, participate in the case, waive appeal if the immigration judge decides to grant, state its position on each ground claimed, state which elements it is contesting and facts it is disputing and why, identify witnesses, provide any non-rebuttal or non-impeachment evidence, and state whether background checks are complete.[39] Rule 18224.

However, as noted above, the 30-day period between the master calendar hearing and the status conference is simply not enough time for an applicant to obtain counsel or review

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[35] 8 C.F.R. § 1240.17; *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, 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))); 104 Cong. Rec. S4457, S4492 (Sen. Leahy (D-VT), "If they have credible fear, they get a full hearing without any question."); *cf.* NPRM 46906, 46911, 46947.

[36] 8 U.S.C. § 1229a(b)(4)(B).

[37] 8 C.F.R. §§ 1240.17(f), (g)(2), (h).

[38] 8 C.F.R. §§ 1240.17(f)(2), (f)(4)(ii).

[39] 8 C.F.R. § 1240.17(f)(2)(B)(ii).

and identify errors or omissions in the asylum office record, let alone identify additional evidence or witnesses to corroborate their claims. We therefore urge the Departments to rescind the Rule's arbitrary, expedited timelines and instead permit immigration judges to manage their dockets in accordance with due process and adjudicate continuance and extension requests pursuant to the "good cause" standard on an individualized basis.

B. The Rule's New Immigration Court "Streamlining" Provisions Will Deny Asylum Seekers Their Constitutional and Statutory Rights to a Full and Fair Hearing

As an overarching observation, we note the Rule's repeated emphasis on speed 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 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."[40] However, efficiency and speed are not synonymous. Efficiency requires that applicants be afforded sufficient opportunity to exercise their rights to obtain counsel and present evidence so that the adjudicator can make conclusions based upon a complete record.

The Rule sets up a series of short, arbitrary timelines and restrictions on continuances in an attempt to conclude case adjudication within 90 days but fails to account for individual circumstances of applicants seeking asylum.[41] Rule 18224–226. The Rule's preamble cautions that immigration judges should conduct fact-based inquiries in adjudicating motions to continue or extend the filing deadlines and consider, among other things, the individual circumstances of the moving applicant. Rule 18103–105. However, by narrowly limiting the permissible length of delays and codifying new, restrictive continuance and filing extension standards[42] that applicants must clear, the Rule will impermissibly interfere with the right to a full and fair hearing, including the right to counsel and the right to present evidence. Rule 18225. The Rule's prioritization of prompt adjudication will deprive asylum seekers of those rights, leading to inaccurate adjudication of life-and-death claims. Moreover, the Rule will cause many noncitizens with currently pending cases who are not subject to the Rule to have to wait even longer for their day in court so that room can be made on the docket to accommodate the streamlined matters. Furthermore, the restrictions on continuances and filing extensions will necessarily result in increased

[40] UNHCR, *Fair and Efficient Procedures*, para. 5.
[41] 8 C.F.R. §§ 1240.17(f), (g)(2), (h)(2).
[42] 8 C.F.R. §§ 1240.17(g)(2), (h)(2).

motions practice and appeals that may delay rather than speed up adjudications, thereby prolonging the process and undermining protection.

1. The truncated timelines and heightened continuance standards will prevent applicants from obtaining counsel

Access to counsel, a due process right provided statute, and regulation, and emphasized in all international guidance, 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. For example, in fiscal year 2019, only 33% of applicants with an attorney received asylum or other relief.[43] However, those who are represented are nearly five times more likely to win their cases than their unrepresented counterparts.[44] Given the correlation between legal representation and grants of relief, it is essential that asylum seekers be given every opportunity to obtain counsel. Though the Departments acknowledge that legal representation facilitates fair and efficient proceedings,[45] the Rule nevertheless sets up numerous barriers to that basic right.[46] Rule 18224–225.

First, the Departments acknowledge that because most individuals subject to the Rule will be rushed through proceedings in as little as 90 days, they will be ineligible for work authorization and therefore an income, but the Rule fails to address that the opportunity to work can be a critical factor in accessing counsel. Rule 18115, 18127–128. It further impedes asylum seekers' ability to retain counsel by prohibiting parole from serving as an independent basis for work authorization.[47] The Rule's requirement that the agencies provide *pro se* individuals with a list of free legal service providers fails to cure these deficiencies,[48] because the limited number of pro bono legal service providers simply cannot bear the burden of representing all of the asylum seekers who will be covered by the Rule. Rule 18119. In fact, as we point out below, the timelines imposed by the Rule will make it even less likely that applicants will be able to find pro bono representation. As discussed in section VI.B.4, *infra*, this problem is further exacerbated for applicants who are

[43] *See* TRAC: Record Number of Asylum Cases in FY 2019.
[44] *Id.* at 2–3.
[45] Rule 18161 n.80 (citing DM 22–01: Encouraging and Facilitating Pro Bono Legal Services (Nov. 5, 2021) ("Competent legal representation provides the court with a clearer record and can save hearing time through more focused testimony and evidence, which in turn allows the judge to make better-informed and more expeditious rulings.")).
[46] 8 C.F.R. §§ 1240.17(f), (g)(2), (h)(2).
[47] 8 C.F.R. § 235.3(b)(4)(ii).
[48] 8 C.F.R. § 1240.17(f)(1) (citing 8 C.F.R. § 1240.10(a)).

detained during proceedings in locations where there are few, if any, immigration attorneys.

Second, the onerous nature of the Rule's streamlining provisions, including the restrictive nature of the continuance and filing extension standards, disincentivizes attorneys who might otherwise consider taking on cases governed by the Rule, and threatens to further narrow the already limited pool of qualified immigration counsel available to noncitizens.[49] Rule 18224–225. Other adjudicating bodies, cognizant of attorneys' competing demands, have recognized that getting the right result outweighs speedy resolution of the case, and have, accordingly, outlined generous briefing schedules and extensions so that attorneys have sufficient time to competently represent their clients before the courts.[50] The Rule's streamlining procedures, however, ignore the practicalities of representation by arbitrarily shortening timelines and replacing the existing continuance and extension request procedures with limited 10-day extensions and heightened adjudication standards.[51]

The Departments fail to consider the realities of immigration court representation. Before accepting cases, attorneys must assess whether they can vigorously and diligently represent the applicant under the Rule's stringent, expedited timelines. Competent immigration court representation is extremely time consuming. For example, data collected by CGRS demonstrates that attorneys can easily expend 100 or more hours on case preparation for a single client.[52] At a minimum, this includes conducting a client intake to assess the bases for their claim(s), reviewing the asylum office record, obtaining and reviewing Freedom of Information Act (FOIA) responses and other official records domestically and from abroad, several hours-long appointments with the client to develop a declaration setting forth the grounds for relief or protection under a complex legal scheme, identifying and obtaining relevant documentary evidence and translating foreign language documents, in addition to dozens of hours spent conducting country conditions and legal research, drafting legal arguments, and preparing witnesses to testify.

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[49] 8 C.F.R. §§ 1240.17(f), (g)(2), (h)(2).

[50] *See* FRAP 31-2.2. Extensions of Time for Filing Briefs; U.S. Court of Appeals for Veterans Claims Rules of Practice and Procedure Rule 26: Computation and Extension of Time (the court may extend any deadline (except for filing a Notice of Appeal) for good cause by 45 days, and beyond 45 days in extraordinary circumstances); NLRB Guide to Board Procedures Rule 3.3(f) (all filing deadlines can be extended for a "reasonable period" except deadlines for filing EAJA applications and reply briefs).

[51] 8 C.F.R. §§ 1240.17(f), (g)(2), (h)(2).

[52] The data points discussed in this paragraph are based on time CGRS spent preparing asylum claims for immigration court and data collected from non-profit legal services organizations, such as Colectivo Legal Accesible Razonable y Organizado (CLARO); *see also*, *infra* at 27.

Data from immigration legal services nonprofits demonstrates that attorneys cannot reasonably prepare cases for immigration court within the time the Rule allots.
For example, San Jose, California legal services nonprofit, Colectivo Legal Accesible Razonable y Organizado (CLARO), reported to CGRS that on average CLARO attorneys spent a minimum of 99.25 hours preparing asylum cases for immigration court, including: Two to three hours for intake, signing contract, and opening the case; 1 hour to request and review FOIA; 4 hours to fill out I-589; 6 hours including drive time to attend master calendar hearing, appearance, and give pleadings; .5 hours for biometrics request and follow up with client; a minimum of 6 hours drafting the initial declaration (varies widely based on client's history and level of trauma); 4.25 hours revising declaration after getting witness statements and proof; 1.25-8 hours obtaining/drafting witness declarations (varies based on number of witnesses and complexity of statements); 1.5 hours identifying evidence needed and communicating that to clients who then required a minimum of one to two months or up to six months or a year to obtain the evidence from abroad; 1.25 hours reviewing evidence and, if necessary, requesting additional proof; 1 hour organizing and sending evidence for translation; 5 hours reviewing translated evidence and preparing packet for filing; typically three to four months to obtain a psychological evaluation and another 2.5 hours reviewing that evaluation; 21.5 hours conducting country conditions research and drafting the annotated table of contents; 2.5 hours conducting legal research and analysis of the case (probably understated and done during other steps); 14 hours drafting the brief, pre-hearing statement, witness lists, and related motions; 6.5 hours preparing documents for filing with DHS & EOIR; .5 hours communicating with DHS counsel; 18 hours of preparation for merits hearing including testimony preparation with client and witnesses.

Comparatively, CGRS recently spent 389 hours preparing an asylum case for a survivor of twenty years of domestic and child abuse, including traumatic childhood sexual assaults. Specifically, counsel spent 30 hours identifying, selecting, and finalizing country conditions reports from two experts, and preparing those experts to testify; 41 hours identifying, selecting, and finalizing reports from a psychological evaluator and two medical experts, and preparing those witnesses for testimony; 84 hours developing legal theory, conducting legal research, drafting, and finalizing the prehearing brief; 67 hours interviewing and preparing the client for testimony during a total of 37 meetings; 56 hours drafting the client's declaration and making corrections to the prior-filed I-589 asylum application; 44 hours conducting outreach, interviewing, finalizing, and coordinating mailings with four in-country lay witnesses; 9 hours finalizing country conditions selection; 37 hours preparing the annotated table of contents, documentary filings, and attendant motions; and an additional 21 hours of hearing preparation.

Depending on the case, counsel may also need to identify and retain experts or obtain forensic medical or psychological evaluations of the applicant, which can often take three to four months due to the competing obligations and deadlines of field experts and evaluators and frequently requires significant financial resources. Like their legal counterparts, pro bono medical professionals also have limited capacity. The Medical School at the University of California San Francisco operates a free clinic offering forensic evaluations to asylum seekers but can accept at most twelve clients each month.[53] Moreover, most immigration attorneys have multiple clients with their own hearings and filing deadlines. The Rule accounts for none of these practicalities.

Additionally, by requiring attorneys to identify errors or omissions in the asylum office record and identify evidence and witnesses only 30 days after service of the asylum merits interview record, the Rule places further burdens on counsel.[54] While the government is required to respond to FOIA requests within 20 business days, in practice CGRS has found FOIA responses typically take *at least* 30 to 60 days, and it is arguably unethical to proceed without a full picture of the applicant's procedural history. Given the short time in which counsel will have to review the asylum office record, obtain and review FOIA responses and other official records, develop declarations, obtain documentary evidence, and identify and retain expert witnesses, the Rule raises serious concerns that attorneys will find it necessary to decline to take cases covered by the Rule because the procedural requirements make it impossible for them to provide competent representation. Consequently, the Rule will functionally deny asylum applicants the right to legal representation, with the grim result that they will be denied protection for which they are eligible.

Based on these practical considerations, we recommend that the Department remove the timelines and instead allow immigration judges to manage their own dockets case-by-case, in accordance with existing principles of fairness and due process. These principles include the "good cause" standard for continuances to find counsel and the principle set forth in *Matter of Hashmi*, 24 I&N Dec. 785, 793–94 (BIA 2009), that an immigration judge's case completion goal is *not* a proper factor in deciding a continuance request. At a minimum, the Rule should be amended to allow more reasonable timelines, including a presumption of at least two 90-day continuances to obtain counsel before scheduling a status conference and more generous timelines in which to submit additional evidence after the status conference. Without these changes, individuals subject to the Rule will effectively be

[53] Private email from UC San Francisco Health and Human Rights Initiative, 20 May 2022, on file with the authors.
[54] 8 C.F.R. § 1240.17(f)(2)(i).

denied the right to counsel and are likely to be erroneously removed to persecution or torture in violation of the United States' domestic and international obligations.

2. The Rule's focus on speedy case completion will prevent traumatized asylum seekers from meaningfully presenting their cases

As discussed above, we welcome some of the Departments' efforts to address fairness concerns raised by the NPRM, including reinstating the "relevant, probative, and fundamentally fair" evidentiary standard and eliminating the presumption against holding hearings. *See, e.g.*, Rule 18102. However, while the Rule "eliminat[es] the [NPRM's] restrictions on the evidence applicants may submit before IJs," Rule 18115, it simultaneously raises new barriers to presenting claims and supporting evidence in the form of impracticable deadlines and limitations on continuances and extensions.[55] Rule 18224–225.

Though the Rule carves out exceptions to the streamlined proceedings for certain "vulnerable populations," including incompetent individuals, *see, e.g.*, Rule 18107, 18161,[56] it fails to meaningfully address the reality 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. Trauma survivors commonly use avoidance as a coping mechanism[57] and may be reluctant to discuss details of their abuse because reliving it is painful or recounting the trauma triggers shame.[58] This phenomenon, too, can mean that applicants reveal certain details or events only later in the asylum process.[59] While the Rule acknowledges commenters' concerns about the effects of trauma on the ability to present their cases, it does nothing to address those concerns but instead repeatedly prioritizes speed over accuracy, citing "administrative efficiency." *See, e.g.*, Rule 18120, 18142–143.

Notably absent from the Rule's continuance framework is any consideration that trauma is also associated with memory loss, which may hinder an applicant's ability to recount all

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[55] 8 C.F.R. §§ 1240.17(f), (g)(2), (h)(2).
[56] Citing *Matter of M-A-M-,* 25 I&N Dec. at 479-83.
[57] *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).
[58] *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.").
[59] 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).

relevant details,[60] and that, 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 in immigration court.[61] 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.[62] 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."[63] Thus, in order to ensure discovery of all relevant facts, applicants must be afforded sufficient time to secure trusted counsel and to develop and present their cases. By forcing immigration judges to place increasingly severe requirements on continuance and filing extension requests as time passes,[64] the Rule forecloses that opportunity. Rule 18225.

Additionally, while it is true that an applicant's credible and persuasive testimony alone may be sufficient to meet their burden,[65] as a matter of practice immigration judges almost invariably expect and require applicants to corroborate their claims. This is particularly true in cases where applicants claim a fear of persecution on account of membership in a particular social group. In such cases, immigration judges frequently demand documentary proof of laws or government programs tailored to the social group asserted or other objective evidence that the group meets the Board of Immigration Appeals' burdensome particularity and social distinction requirements. *See Matter of M-E-V-G-*, 26 I&N Dec. 227, 244 (BIA 2014) ("However, a successful case will require evidence that members of the proposed particular social group share a common immutable characteristic, that the group is sufficiently particular, and that it is set apart within the society in some significant way. Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as 'distinct' or 'other' in a particular society."); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). Without counsel and a meaningful opportunity to research and collect this evidence, asylum seekers fleeing a wide range of harms are likely to face a

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[60] *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.
[61] *Id.*
[62] *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).
[63] Davis & Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. Air L. & Com. 1421, 1456 (2001).
[64] 8 C.F.R. §§ 1240.17(g), (h)(1)–(2).
[65] INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii); *see also* Rule 18129.

tribunal hostile to their claims and be denied relief based on a failure to prove social group cognizability.

Further, the Rule will deny applicants the opportunity to provide objective evidence relevant to the remaining elements of their claims. For example, CGRS is aware of many instances when immigration judges have determined that an applicant's testimony regarding why they believed their home government would not protect them from persecution was insufficient to prove that the applicant's home government would be unwilling or unable to protect them or control their persecutor(s). Thus, it is critical that asylum seekers be informed, either at the time of the asylum office referral or at the commencement of immigration court proceedings, that they may be required to corroborate the elements of their claim(s) and that they be given a reasonable time to collect that corroboration. The Rule provides for neither.

As explained above, successful asylum claims often demand many months of preparation. Obtaining a psychological evaluation or a country conditions expert's report—both of which often mean the difference between winning and losing protection—can take several months. And attorneys report that gathering affidavits and official documents from abroad can take anywhere from two to six months, after which they must be reviewed and translated, which requires additional time and resources.[66] The amount of time it takes to identify and gather evidence may vary depending on the complexity of the case and logistical factors such as communication barriers and lack of access to technology; while for one applicant a speedy timeline may suffice, for many it will not. But the Rule's one-size-fits-all approach to scheduling cases and adjudicating continuances and extensions does not consider these practical realities.

Moreover, 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."[67] Due to the complicated nature of proceedings and legal standards governing asylum, withholding of removal, and CAT protection, these *pro se* individuals will have difficulty understanding what to submit, let alone how to obtain necessary corroborating evidence. The Rule further exacerbates this confusion by creating new hurdles to submission of evidence, including restrictive limitations on continuances and filing extensions, and bewildering adjudication standards that will effectively prevent unrepresented asylum

[66] *See supra* at p. 27 (Case Preparation Data).
[67] *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).

seekers from presenting any evidence that may delay proceedings. Rule 18223–225. In order to comport with due process, it is essential that immigration judges be required to provide applicants with ample opportunity to obtain counsel, collect corroborative evidence, and present their cases, including the chance to explain any perceived omissions or inconsistencies, before making findings regarding credibility or eligibility for relief or protection.[68] Absent sufficient time to review and respond to the asylum office record and identify and obtain necessary evidence and witnesses, asylum seekers will be denied those fundamental 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—including the right to counsel and to present probative evidence in a fundamentally fair proceeding. The Rule's emphasis on "prompt completion" fails to reckon with the grave consequences faced by asylum seekers who are denied those rights. Rule 18113, 18223–225. We therefore urge the Departments to dispense with the arbitrary procedural deadlines and heightened standards for continuances and extensions set forth in the streamlined provisions of new 8 C.F.R. §§ 1240.17(f), (g), and (h), and require immigration judges to apply the "good cause" standard for adjudicating continuances and extensions on a case-by-case basis.

3. The rule continues to encourage immigration judges to deny cases based on the asylum office record alone

Additionally, while CGRS applauds the Rule's provision that permits immigration judges to grant asylum on the asylum office record alone in cases where DHS either declines to cross-examine or raises no challenges to the relief claimed, we are troubled by the provision permitting immigration judges to deny relief without a hearing if the applicant does not affirmatively challenge the asylum office's decision or assert that they wish to testify and present evidence.[69] Rule 18224–225. The latter provision threatens to deny *pro se* applicants—who may not fully comprehend the importance of contesting the asylum office decision or presenting testimony—the constitutionally required opportunity to present their cases before the immigration judge and result in their erroneous return to

[68] *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 question the reliability of dubious government evidence).
[69] 8 C.F.R. §§ 1240.17(f)(2), (4).

persecution or torture.[70] Moreover, the Rule's preamble suggests that immigration judges may merely rubberstamp the asylum office's asylum denials, stating that "EOIR can then use the rationale of the USCIS determination in a streamlined section 240 removal proceeding." Rule 18085. By encouraging immigration judges to forego their statutory obligation to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the [noncitizen] and any witnesses," the Rule incentivizes them to deny asylum seekers their right to de novo review and a full and fair hearing in favor of rapid case completion.[71]

Full immigration court hearings in front of a neutral arbitrator are a necessary safeguard against erroneous adverse credibility findings for asylum seekers, who often suffer from trauma that interferes with their ability to disclose past traumatic events. And for the majority of asylum applicants, who are not represented by counsel, a full and fair hearing is necessary to ensure that information critical to their claims is discovered and considered before a decision is rendered. Anything less is the equivalent of conducting "death penalty cases in a traffic court setting."[72]

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 cases before them, is critical for asylum seekers who may face persecution, torture and/or death if erroneously removed.[73] 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."[74]

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[70] *See, e.g.*, *Colmenar v. I.N.S.*, 210 F.3d at 971 (recognizing the Fifth Amendment right to a full and fair hearing in immigration court proceedings).

[71] INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1).

[72] Gutierrez, Gabe, "Immigration judges decide who gets into the U.S. They say they're overworked and under political pressure," NBC News, (June 13, 2021) (quoting former San Francisco Immigration Judge Dana Leigh Marks), *available at* https://www.nbcnews.com/politics/immigration/immigration-judges-decide-who-gets-u-s-they-say-they-n1270460.

[73] 8 U.S.C. §§ 1229a(b)(1), (4).

[74] *Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000); *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

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. Additionally, as discussed above, 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 unrepresented individual does not know what facts may be important to share and lacks the assistance of trusted counsel familiar with their personal story. Thus, further questioning by the immigration judge on the elements of the asylum claim may be necessary to determine whether the asylum office's denial was made in error and/or whether there are undiscovered grounds for protection.

Moreover, it should be noted that despite the well-documented effects of trauma on memory and disclosure, DHS routinely uses credible fear interview notes or asylum office records to impugn applicants' veracity, and, in turn, adjudicators frequently rely on earlier omissions or perceived inconsistencies to find applicants incredible or make frivolousness determinations. Thus, due process requires not only that applicants be permitted sufficient time to review and correct the asylum office record, but also that immigration judges provide asylum seekers the opportunity to explain any perceived omissions or inconsistencies before making findings regarding credibility or eligibility for relief or protection.[75]

In sum, 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

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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))).

[75] *See, e.g.*, *Oshodi v. Holder*, 729 F.3d at 889; *Nkenglefac v. Garland*, ---F.4th----, 2022 WL1559701, at *5 (5th Cir. May 18, 2022) (holding the agency erred as a matter of law by basing its adverse credibility finding on alleged inconsistencies between the applicant's testimony and statements contained in his border statement and credible fear interview notes, where the petitioner was denied an "opportunity to explain any apparent inconsistencies or dispute the accuracy of the records in question, or cross examine the individuals who prepared the interview summaries, much less object to their introduction, or offer views on weight to be given to the evidence").

that those *pro se* applicants are not wrongfully returned to danger in violation of the United States' nonrefoulement obligations.[76]

4. The Rule creates additional barriers to counsel and justice for detained asylum seekers

CGRS welcomes the Rule's expansion of the humanitarian and public interest parole provisions to asylum seekers during the credible fear interview and asylum merits interview stages, and the Departments' acknowledgement that "continued detention of a noncitizen who has been found not to be a flight risk or a danger to the community is not in the public interest."[77] Rule 18108. 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, inconsistent parole release practices, and exorbitant cost to the taxpayer (among other things).[78] However, the Rule does not go far enough to expand the use of parole for, and eliminate prolonged detention of, asylum seekers. Concerns remain that many individuals covered by the Rule will be detained during the entirety of their proceedings and will be unable to meaningfully present their claims under the Rule's stringent timelines. Rule 18123–125.

With detention come barriers to accessing counsel and collecting supporting evidence. CGRS fears that the Rule could be implemented such that all procedural steps—credible fear interview, asylum merits interview, and immigration judge review—could take place while applicants are detained, or worse, take place entirely within ICE detention facilities. *See, e.g.*, Rule 18119 (stating "DHS and DOJ will remain flexible in how they use DHS facilities"). The Rule's implementation of extraordinarily abbreviated timelines at both the asylum office and immigration court stages further exacerbates these concerns because they will deny applicants adequate time to obtain legal representation or supplement the credible fear interview record prior to their asylum merits interview and/or status conference if referred to the immigration court. For those who are detained, accessing counsel will be even more difficult—in part because detained asylum seekers are denied the opportunity to earn money with which to pay counsel and in part because of the

[76] *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.").
[77] 8 C.F.R. §§ 235.3(c), 212.5(b).
[78] *See, e.g.*, Tahir, "'Black hole' of medical records contributes to deaths, mistreatment at the border," *POLITICO* (Dec. 19, 2019).

limited number of lawyers near border areas or remote detention centers.[79] Indeed, 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 respondents.[80] And as discussed above in Section VI.B.1, the direct correlation between representation by counsel and case outcomes requires that the Departments make every attempt to facilitate greater access to counsel. The Rule does the opposite.

The few detained individuals who are able against all odds to find attorneys still have difficulty proving their claims from detention. For example, they face hurdles to communication with their attorneys because they must rely on the detention facility's telephones, which are not always available, or wait for the attorney to visit during the limited periods when visitation is allowed.[81] Additionally, due to limitations on communication, detained applicants often find it difficult to collect necessary evidence for their cases from places in the United States, and more critically, from abroad.[82] The Rule's limited parole provisions and expedited timelines do not account for these practical obstacles faced by detained asylum seekers in presenting their claims.

On the whole, the Rule's streamlining provisions increase the likelihood that large numbers of noncitizens fleeing persecution or torture in their countries of origin will be placed in detention and shuffled *pro se* through the entire expedited asylum process—credible fear interview, to asylum merits interview, 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 remove the truncated docketing deadlines and limitations on continuances and extensions and restore regular Section 240 proceedings for individuals referred by the asylum office, so that they can have a reasonable opportunity to build their cases before the immigration court. At a minimum, it is critical that the Rule be amended to include lengthier continuances to retain counsel and collect corroborative evidence under the "good cause" standard.

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[79] Eagly and Shafer, "Access to Counsel in Immigration Court," *American Immigration Council*, at 6, 11–12 (Sept. 2016).
[80] *Id.* at 4.
[81] Eagly and Shafer, *supra*, n.79, at 6.
[82] *Id.*

C. Efficiency and Justice Are Better Served by Referring Asylum Office Denials to Regular Section 240 Proceedings and Requiring Immigration Judges to Apply the "Good Cause" Standard and Principles of Due Process When Adjudicating Continuances

Finally, we urge the Departments to dispense with the proposed streamlined proceedings and presumptions against granting reasonable continuances. 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 a reasonable amount of time to obtain counsel and a meaningful opportunity to collect and present evidence, testimony, and witnesses as guaranteed by the statute and the Fifth Amendment of the U.S. Constitution.

The Rule, as drafted, will neither vindicate those rights nor ease the burden on the immigration courts. Instead, it will create delays in adjudication of the merits due to prolonged disputes about continuances and filing extensions needed to obtain counsel or supplement the asylum office's likely skeletal record. Under the Rule litigants will have to engage in extensive motions practice, which is likely to include motions to continue to obtain counsel and/or obtain and file additional evidence or expert witness declarations, and the inevitable cross-motions, motions to reconsider, interlocutory appeals to the BIA, motions to reopen, and appeals to the federal courts.

Additionally, existing backlogs will be further expanded as cases currently pending in regular 240 proceedings that have been languishing for years are rescheduled and delayed in order to make room on the docket for these new expedited cases. It neither makes sense, nor is it fair, to give one asylum applicant several months or years to find counsel, locate witnesses and experts, and generally build their case while forcing another through the process in a matter of days or weeks. Not only will the new procedures produce greater delay in adjudication of claims, increase the immigration court backlogs, and undermine the finality of cases, they also favor removal over accuracy and undermine the very purpose of immigration judge review.

Instead of implementing the unfair, confusing, complicated, costly, inefficient, and unnecessary new timelines and adjudication procedures proposed in the Rule, a simpler and more efficient approach would be to have asylum office denials referred to regular Section 240 proceedings and allow immigration judges to manage their dockets and adjudicate requests for continuances or extensions consistent with the "good cause" standard and due process. In those proceedings, the immigration judge could consider the individual circumstances of the applicants before them case-by-case and schedule hearings accordingly without unnecessarily delaying pending cases that have been prepared and are

ready to be heard. This would "streamline" the process by avoiding prolonged and unnecessary motions practice disputing whether applicants need more than the allotted 30 days to obtain counsel, review and correct the asylum office record, and identify and retain witnesses and compile supporting evidence. Moreover, and most importantly, this approach would preserve meaningful access to 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.

VII. CONCLUSION

The Rule fails in its laudable purpose "to simultaneously increase the promptness, efficiency, and fairness of the process." Rule 18089. We urge the Departments to revise the highly unrealistic and unreasonable timelines at both the asylum office and immigration court stage. We strongly urge meaningful consultations with UNHCR, CGRS, AFGE Local 1924 and other experts with first-hand knowledge of asylum representation and adjudication before the Rule is implemented. 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 any viable opportunity to obtain counsel, without government appointed counsel where needed, and with excessive reliance on detention. Under these circumstances, the Departments face an even greater burden to ensure that procedures are fair, and that efficiency concerns do not overshadow the requirements of protection. The Interim Final Rule errs by imposing draconian timelines that will eviscerate 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 Interim Final Rule. Should you have any questions, please contact Kate Jastram at jastramkate@uchastings.edu or 415-636-8454.

Sincerely,

Kate Jastram
Director of Policy & Advocacy

Anne Peterson
Senior Staff Attorney

Appendix I

Center for Gender & Refugee Studies

October 19, 2021

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

Andria Strano
Acting Chief, Division of Humanitarian Affairs
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20588-0009

Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

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

[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,

Kate Jastram
Director of Policy & Advocacy

Anne Peterson
Senior Staff Attorney