NATIONAL IMMIGRANT JUSTICE CENTER

PO Box 818
Chicago, IL 60690

P (312) 660-1370
F (312) 660-1505
immigrantjustice.org

June 4, 2023

Submitted via *https://www.regulations.gov/commenton/USCIS-2024-0005-0001*

Daniel Delgado, Director for Immigration Policy
Border and Immigration Policy,
Office of Strategy, Policy, and Plans,
U.S. Department of Homeland Security
Washington, D.C. 20528

RE: Comments in Opposition to the Notice of Proposed Rulemaking entitled *Application of Certain Mandatory Bars in Fear Screenings;* RIN: 1615-AC91; DHS Docket No. USCIS-2024-0005

Dear Director Delgado:

The National Immigrant Justice Center (NIJC or "we") submits the following comments to the Department of Homeland Security's (DHS) U.S. Citizenship and Immigration Services (USCIS) in response and opposition to the above-referenced Notice of Proposed Rulemaking (NPRM or "the Proposed Rule") issued by the Departments on May 13, 2024. NIJC calls on DHS to withdraw the Proposed Rule in its entirety and ensure that a full and fair asylum system is made accessible to all those who seek refuge in the United States.

NIJC's strong interest in DHS' proposed changes

NIJC is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding more than three decades ago, NIJC uniquely blends individual client representation with advocacy for broad-based systemic change.

Headquartered in Chicago, NIJC provides legal services through our staff and pro bono network to more than 10,000 individuals each year, including more than 800 asylum seekers, many of whom have entered the United States by crossing the U.S.-Mexico border. These individuals have survived persecution and torture in their home countries and many dangers throughout their journey to seek safety in the United States.

NIJC's clients include indigent, Black, Brown, Indigenous, and LGBTQ+ asylum seekers who frequently have no avenue to seek safety but to approach the United States at the U.S.-Mexico border. In addition to our own direct representation, NIJC provides pro se support to asylum

seekers and engages a number of law firms and corporations providing pro bono representation to asylum seekers. Our experience working directly with clients and advising asylum applicants makes it clear that the vast majority of asylum seekers lack the linguistic and legal skills to navigate the U.S. asylum system alone. Though they are eager to find counsel, they often lack the financial resources to hire attorneys for purposes of pursuing asylum.

The Proposed Rule's changes are all but certain to adversely impact the asylum seekers NIJC seeks to serve. Many asylum seekers will not be able to pass initial credible fear screenings and will be removed from the United States before they have an opportunity to secure pro bono counsel from NIJC or another similarly situated organization.

Even when NIJC and our pro bono partners are able to successfully obtain the Convention Against Torture (CAT) protection for impacted clients who are otherwise barred from asylum eligibility because of the Rule's new procedures, the Proposed Rule will impose an additional burden on our resources: Individuals who receive CAT protection have a removal order and must apply annually for work authorization. The result is that many clients will continue to need our services in perpetuity. Additionally, because CAT does not allow for derivative protection for family members, NIJC will need to file stand-alone asylum requests for clients' children and spouses in order to preserve their rights to access protection. This need to continue serving existing clients and their families will detract from our ability to serve other asylum seekers because we will have to divert resources away from taking on new clients toward providing ongoing services. This diversion of resources will frustrate NIJC's mission, which, in part, is to serve as many individuals as possible while establishing and defending the legal rights of immigrants regardless of their background.

The Proposed Rule separately frustrates another key component of NIJC's mission, which is to transform the immigration system into one that affords equal opportunity for all. By applying complicated legal bars to asylum in an initial screening interview, the Proposed Rule will have a disparate impact on some of the most vulnerable among the already vulnerable population of asylum seekers. This change runs directly contrary to NIJC's mission.

COMMENTS ON THIS PROPOSED RULE

Despite claims that the Proposed Rule is narrow and will impact a small number of people, DHS proposes significant changes to asylum processing. With this NPRM, DHS proposes to "allow" asylum officers to "quickly screen out"[1] some individuals or families seeking asylum via the application of five bars (codified at 8 U.S.C. § 1158(b)(2)(A)(i-v)) during credible fear interviews (CFI) and reasonable fear interviews (RFIs). DHS purports not to "mandate" the application of these bars, instead permitting USCIS asylum officers (AO) to apply them for the express purpose of denying individuals or families access to Section 240 proceedings under the Immigration and Nationality Act (INA).[2] DHS nonetheless claims the current CFI process "would remain the same," though AOs have *never* been permitted to apply these bars during the screening process since its creation over a quarter century ago.

These changes significantly alter the expedited removal screening process created by Congress over twenty-five years ago, disqualify many people from asylum eligibility, and will further choke access to permanent protection for asylum seeking adults, children, and families. Our comments below review these substantive changes.

As further discussed below, 1) NIJC renews its objection to the comment period; 2) DHS failed to provide reasonable justification for this change; 3) this Proposed Rule would not increase efficient adjudications; 4) this Proposed Rule would undermine fairness, violate domestic and international obligations not to return asylum seekers to harm, and lead to family separations.

NIJC urges the Departments to withdraw this Proposed Rule in its entirety and instead adopt humane and workable solutions to the humanitarian and operational challenges at the border. These solutions include increasing processing capacity at ports of entry and civil society actors providing respite services; strengthening communication and cooperation between civil society, state and local governments, and federal agencies; ending the incarceration and surveillance of asylum seekers; and providing legal representation and needed social services to people newly arriving to seek asylum.[3]

---

[1] U.S. Dep't of Homeland Security (DHS), *Application of Certain Mandatory Bars in Fear Screenings*, 89 Fed. Reg. 41347, 41351 (May 11, 2024).

[2] 89 Fed. Reg. at 41356.

[3] For a more detailed discussion of these policy recommendations, see National Immigrant Justice Center (NIJC), Solutions for a Humane Border Policy (Jan. 17, 2023), https://immigrantjustice.org/staff/blog/solutions-humane-border-policy; NIJC, *Humane Solutions That Work: 10 Ways the Biden Administration Should Reshape Immigration Policy* (February 21, 2024), https://immigrantjustice.org/staff/blog/humane-solutions-work-10-ways-biden-administration-should-reshape-immigration-policy.

1) **NIJC renews its objection to this truncated comment period.**

NIJC joined nearly 80 immigrant rights, advocacy, and legal services organizations asking DHS to expand the comment date to a minimum of at least 60 days.[4] By only providing a 30-day comment period, DHS fails to follow binding Executive Orders[5] and the Administrative Procedure Act[6] (APA) in affording stakeholders a meaningful opportunity to comment on the Proposed Rule. As stated in the objection by NIJC with other legal service providers, 60-day timeframes are the floor, not the ceiling in executive rulemaking.[7]

To date, DHS has refused to extend the comment period, opting to plow forward with a third or half of the usual allotted timeframe for comments. As we explain below, DHS does not reasonably justify this rushed comment period.

The NPRM contains three primary arguments to justify this truncated comment period. DHS argues (1) this proposed rule is a "discrete topic" that is "relatively short and would not dictate a widescale change in practice;"[8] that (2) there have been "multiple recent rounds of notice-and-comment on this topic;"[9] and that (3) "DHS also has an interest in swiftly finalizing this change, thereby expanding operational flexibility…. to swiftly and predictably impose consequences on those without a legal basis to remain."[10] We address each argument below.

---

[4] Center for Gender & Refugee Studies, *Re: Request to Provide a Minimum of 60 days for Public Comment in Response to the Department of Homeland Security (DHS) Notice of Proposed Rulemaking (NPRM): Application of Certain Mandatory Bars in Fear Screenings; DHS Docket No. USCIS-2024-0005* (May 21, 2024), https://cgrs.uclawsf.edu/our-work/publications/request-provide-minimum-60-days-public-comment-response-department-homeland.

[5] Two Executive Orders instruct agencies that, "[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment . . . . with a comment period that should generally be at least 60 days." Exec. Order 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, § 2(b) (Jan. 18, 2011) (emphasis added); see also Exec. Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51735, § 6(a) (Sept. 30, 1993) ("[I]n most cases [rulemaking] should include a comment period of not less than 60 days.").

[6] *Becerra v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1176 (N.D. Cal. 2019) (quoting *Prometheus Radio Proj. v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011)) ("90 days is the 'usual' amount of time allotted for a comment period.").

[7] *Id*.

[8] 89 Fed. Reg. at 41358.

[9] *Id*.

[10] *Id*.

a) *This Proposed Rule may be "relatively short," but its consequences are vast and intricate, particularly when considered in combination with other concurrent policy changes.*

First, the NPRM layers new processes on top of the rule enacted last year, "Circumvention of Lawful Pathways"[11] (referred to here as the CLP Asylum Ban), which impacts the vast majority of asylum seekers seeking to enter the United States via the southern border. Though a court has found the CLP Asylum Ban unlawful,[12] that rule remains in effect as litigation challenging it is ongoing. In addition, on the same day that the Department published this NPRM, it announced (but failed to make publicly available) new guidelines for application of a different element of the asylum statute—the provision that makes asylum applicants ineligible for asylum if internal relocation within their home country is reasonable—applicable in the CFI process.[13] Then, just days later, the Department of Justice announced a change in case-processing timelines for asylum cases involving "recent arrivals."[14] Each of these changes purports to be in service of the same end goal: the expeditious removal of asylum seekers.

Yet, the Department does not appear to be considering whether the changes in this underlying NPRM are actually necessary given these numerous other developments that are designed to achieve the same end results. In particular, it is unclear whether the changes in the NPRM will have *any* of the efficiency gains used to justify its changes given that the vast majority of asylum seekers are *already* barred from asylum by the CLP Asylum Ban. In other words, this proposed rule is not necessary to achieve the Department's desired results, particularly given the steep odds asylum seekers already face under the CLP Asylum Ban's presumption of asylum ineligibility, which has already tripled chances for negative screenings.[15]

Instead, the changes in the NPRM will only make already-complex screening interviews even

---

[11] DHS and Department of Justice Executive Office of Immigration Review (EOIR), *Circumvention of Lawful Pathways*, 88 Fed. Reg. 11704 (Feb. 23, 2023).

[12] *East. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023), appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024).

[13] DHS, *DHS Announces Proposed Rule and Other Measures to Enhance Security, Streamline Asylum Processing*, (May 9, 2024) https://www.dhs.gov/news/2024/05/09/dhs-announces-proposed-rule-and-other-measures-enhance-security-streamline-asylum; Center for Gender & Refugee Studies, *CGRS Seeks Transparency on Asylum Screening Guidance* (May 24, 2024), https://cgrs.uclawsf.edu/news/cgrs-seeks-transparency-asylum-screening-guidance.

[14] *See* DHS and DOJ Announce "Recent Arrivals" Docket Process for More Efficient Immigration Hearings, https://www.dhs.gov/news/2024/05/16/dhs-and-doj-announce-recent-arrivals-docket-process-more-efficient-immigration

[15] Rebecca Gendelman, "Correcting the Record: The Reality of U.S. Asylum Process and Outcomes," *Human Rights First* (Nov. 3, 2023), https://humanrightsfirst.org/library/correcting-the-record-the-reality-of-u-s-asylum-process-and-outcomes/.

more complicated, and it imposes those complexities at a moment when asylum applicants are unlikely to be represented by counsel. Specifically, the NPRM provides USCIS AOs with the option to impose these additional barriers on asylum seekers already subject to the CLP Asylum Ban. For individuals subject to the CLP Asylum Ban, they may need to build an evidentiary record against both the onerous provisions of the CLP Asylum Ban *and* the five mandatory bars. And on top of that, they may also have to demonstrate a fear of return not only to their home countries, but also to Mexico.[16] This would require complex preparation and counseling for individuals and families to merely have a chance to pursue asylum and avoid immediate removal. And for many, particularly as a result of the Department's Enhanced Expedited Removal program, all of this screening will occur as soon as one day after their entry into the United States.[17]

Those who are not found to be subject to the CLP Asylum Ban would still face formidable barriers were this Proposed Rule to become final. Each of these five bars, where applicable, have an extensive body of case law interpreting their definition and application, and each require fact-intensive inquiry, making their discretionary application particularly punishing for people without counsel.[18] As we discuss further in Sections 3) and 4), applying these bars during initial screenings would undermine basic principles of fairness. Calling this NPRM short or discrete poorly masks the complexity at hand, and the many permutations asylum seekers and their advocates would have to consider were DHS to adopt this Proposed Rule.

b) Prior comment periods do not alleviate DHS' responsibility to afford reasonable time for stakeholder input.

DHS references five rules since 2000 that purportedly addressed the inclusion of 8 U.S.C. § 1158(b)(2)(A)(i-v) bars in CFI and RFI proceedings. DHS willfully ignores that these prior administrative records involved seismic changes to asylum processing far beyond the scope of this NPRM, or involved direct rescission of the application of these bars. Such a record should compel DHS to lengthen, not shorten, the comment period here.

i. <u>The 2000 INS & EOIR rule</u>

In 1997, DHS' predecessor the Immigration and Naturalization Services (INS) and EOIR put

---

[16] *M.A. v. Mayorkas*, No. 1:23-cv-01843, E.C.F. No. 19 (July 10, 2023, D.D.C.).

[17] DHS, *Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration* (Apr. 27, 2023), https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration.

[18] See *infra* Section 3(a).

forward a proposed rule that implemented the greatest change to asylum law since the Refugee Act of 1980 and an entirely new system of asylum processing with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The INS and EOIR were under a statutory deadline to implement IIRIRA. The INS and EOIR reflected on the "breadth and complexity" of the changes needed to be responsive to the new law.[19] Stakeholders also faced for the first time an entirely new regulatory framework in expedited processing. The INS and EOIR proceeded to issue an interim rule that same year and an additional proposed rule in 1998 on the narrow question of past persecution, before issuing the final rule in 2000.[20]

The question whether to apply the 8 U.S.C. § 1158(b)(2)(A)(i-v) bars in CFI and RFI proceedings was one among many the 2000 INS and EOIR final rule considered in this new asylum processing. DHS argues here that this policy was adopted "without explanation."[21] However, the INS and EOIR final rule references adopting this policy in response to stakeholder comments; their failure to transcribe those comments does not mean they lacked justification.[22] Within that same section, the INS and EOIR agreed with commenters that the standard for credible fear interviews should be low[23] so asylum seekers could present their full claims to the immigration judge. This decision did not suggest leniency for individuals or families subject to these bars; it merely postponed the strenuous burdens they would face to a forum (INA § 240 proceedings) where there are more robust procedural safeguards and access to counsel outside of the accelerated posture of expedited removal.

ii. The Global Asylum Bar and the Security Bars Rule.

Twenty years went by before the inclusion of these bars were the subject of regulations again.[24] During the last month of the Trump administration in 2020, DHS and EOIR jointly required the application of these bars in two separate rules—one, the "Global Asylum Bar,"[25] made a myriad

---

[19] Immigration and Naturalization Service (INS) and EOIR, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 444-01, 444 (January 3, 1997).

[20] 62 Fed. Reg. at 444.

[21] 89 Fed. Reg. at 41350.

[22] 65 Fed. Reg. at 76129 ("there were also suggestions that such a referral should be made regardless of any apparent statutory ineligibility under section 208(a)(2) or 208(b)(2)(A) of the Act. The Department has adopted that suggestion and has so amended the regulation.").

[23] *See* INS and EOIR, *Asylum Procedures*, 65 Fed. Reg. 76121, 76129 (Dec. 6, 2000) (noting that the INS "does not disagree that it is a threshold or low standard" in response to comments).

[24] 89 Fed. Reg. at 41350.

[25] DHS and EOIR, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (Dec. 11, 2020) ("Global Asylum Bar").

of other drastic changes to asylum proceedings, while the other, the "Security Bars Rule,"[26] focused on the national security bar and public health. As a result of legal challenges, neither Rule ever took effect.[27] Like the 2000 INS and EOIR rule, the Global Asylum Bar had significantly broader implications than the instant rule—forcing stakeholders to review the implications for extensive changes to asylum processing.

Both also only included 30-day comment periods, despite overwhelming stakeholder objections that these regulatory changes required careful review by impacted communities and their advocates.[28] Stakeholders were not alone in airing concern regarding the truncated comment period; the federal court who enjoined the Global Asylum Bar did so as well.[29]

iii. The Asylum Processing Interim Final Rule (IFR)

In 2022, DHS and EOIR rescinded the portion of the 2020 Global Asylum Bar that applied the 8 U.S.C. § 1158(b)(2)(A)(i-v) bars in CFI and RFI proceedings.[30] This rule most directly and substantively addressed the application of these bars in expedited removal proceedings. As we discuss in Section 2(a) *infra*, DHS and EOIR provided a reasonable explanation for their rescission—unlike DHS here. Shortening the comment period given DHS' reversal of its own position is unreasonable.

---

[26] DHS and EOIR, *Security Bars and Processing*, 85 Fed. Reg. 84160 (Dec. 23, 2020).

[27] *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966 (N.D. Cal. 2021) (enjoining the Global Asylum Bar). *Security Bars and Processing; Delay of Effective Date*, 87 Fed. Reg. 79789, 79790 (Dec. 28, 2022) ("The Security Bars rule relies upon the regulatory framework that was established in the Global Asylum final rule in applying bars to asylum eligibility and withholding of removal during credible fear screenings for noncitizens in the expedited removal process.").

[28] *See Request to Provide a Minimum of 60 days for Public Comment in Response to the Department of Homeland Security United States Citizenship and Immigration Services and Department of Justice Executive Office for Immigration Review Joint Notice of Proposed Rulemaking*, June 18, 2020, https://www.tahirih.org/wp-content/uploads/2020/06/Request-for-Extension-of-Asylum-Rule-Comment-Period-from-502-organizations.pdf. The Departments failed to respond to this overwhelming call for an extension of the time period for these comments. *See also Letter Requesting Extension of Public Comment Period for Proposed Rule Making Fundamental Changes to Asylum Processing and the Immigration System*, WOMEN'S REFUGEE COMMISSION (Aug. 6, 2020), *available at* https://www.womensrefugeecommission.org/research-resources/letter-requesting-extension-of-public-comment-period-for-proposed-rule-making-fundamental-changes-to-asylum-processing-and-the-immigration-system/.

[29] *Pangea*, 512 F. Supp. 3d at 970 ("The government did not say in the rulemaking process why such a truncated comment period was warranted, and counsel for the government at the injunction hearing could not provide one."). Although there is no separate injunction on the Security Bars Rule, DHS and EOIR have recognized that the Security Bars Rule cannot operate while the *Pangea* injunction remains intact.

[30] DHS and EOIR, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18078, 18134 (Mar. 29, 2022) (''Asylum Processing IFR'').

iv. The CLP Asylum Ban

Though listed by DHS as one of the prior comment periods, the 2023 CLP Asylum Ban did *not* concern the application of 8 U.S.C. § 1158(b)(2)(A)(i-v) bars in CFI and RFI proceedings. In fact, DHS and EOIR contrasted their new rebuttable presumption of asylum ineligibility with the mandatory bars under 8 U.S.C. § 1158(b)(2)(A), which they qualified as more complex and requiring deeper factual inquiry than is feasible within hours or days of a noncitizen's entry.[31] A truncated comment defies logic here, too. With this NPRM, DHS changes its position and seeks to apply these bars in expedited removal—though their complexity and the factual inquiry they demand has presumably not changed. Importantly, this NPRM will interact with the CLP Asylum Ban and other changes in policies in complex and potentially unforeseen ways. This comment period is the first opportunity to assess that interaction, and 30 days to do so is insufficient.

In sum, prior comment periods either included a discussion of the bars within numerous vast regulatory changes to asylum processing (the 2000 INS and EOIR rule, the Global Asylum and Security Bars Rules, the CLP Asylum Ban) or they included a rescission or change in DHS' position (the Asylum Processing IFR, the CLP Asylum Ban). These prior comment periods do not justify shortening the instant comment period.

c) DHS' interest in gaining "operational flexibility" is no justification to deprive stakeholders from a meaningful opportunity to comment under the APA.

DHS purports to provide its AOs with an "additional tool" to more promptly remove asylum seekers, despite grave due process implications.[32] There are four reasons this is misguided.

First, DHS hinges this tool on "global trends of historic migration" leading to higher numbers of asylum seekers apprehended at the southern border.[33] In the same breath, DHS cautions that this proposed change in expedited screenings would impact a "relatively small" population, yielding a "modest, unquantified reduction" in resources DHS uses to detain asylum seekers for "lengthy

---

[31] 88 Fed. Reg. at 31390-91 ("[T]he Departments believe that the rebuttable presumption of ineligibility under this rule is less complex than the mandatory bars provided in section 208(b)(2)(A) of the INA, 8 U.S.C. 1158(b)(2)(A) . . . Also, most of the facts relevant to the applicability of, exceptions to, and means of rebutting the presumption involve circumstances at or near the time of the noncitizen's entry. Because credible fear interviews occur near the time of entry when the events and circumstances giving rise to the presumption's exceptions and rebuttal grounds occur, the Departments believe noncitizens will have a sufficient opportunity to provide testimony regarding such events and circumstances while they are fresh in noncitizens' minds.").

[32] 89 Fed. Reg. at 41358. *See* Section 4(a) *infra* for a review of due process concerns.

[33] 89 Fed. Reg. at 41358.

periods of time" while they await adjudication of the merits of their claim.[34] These conflicting statements illuminate the fallacy in DHS's reasoning: how would expediting the removal of this relatively small population materially impact DHS in the midst of global increases in migration?[35] DHS skirts this question, while presuming that these hasty assessments would enhance national security.[36]

This dubious reasoning further justifies a more robust comment period. This proposal directly implicates U.S. compliance with binding international law, over two decades of restraint from applying these bars in expedited removal proceedings, and the due process rights of asylum seekers. Adding a tool in DHS' (already sizable)[37] deportation toolbox—with little to no material impact on DHS resources and a questionable tie to "security"—cannot justify accelerating the comment period, given these grave implications.

Second, DHS is not alone in noting historic rates in global migration. The United Nations High Commissioner for Refugees (UNHCR) has also noted the unprecedented rates of global displacement—though, unlike DHS, UNHCR has recognized that lower income nations host far greater numbers of asylum seekers than the United States and other affluent nations.[38] But the number of refugees fleeing conflict globally does not impact or change states' responsibilities to ensure legal protection. Notably, UNHCR has not changed its guidelines against summarily removing individuals without a "full factual and legal assessment of the case that can be made."[39] DHS should heed this warning and not conflate threshold screenings with merits

---

[34] 89 Fed. Reg. at 41359.

[35] It is also worth noting that DHS always has discretion to release individuals to pursue their asylum applications while living the in the safety of their homes and communities. *See* 8 USC § 1182(d)(5) (providing broadly the authority to parole individuals on a case-by-case basis for humanitarian reasons or if otherwise in the public interest).

[36] DHS, *DHS Announces Proposed Rule and Other Measures to Enhance Security, Streamline Asylum Processing*, (May 9, 2024) https://www.dhs.gov/news/2024/05/09/dhs-announces-proposed-rule-and-other-measures-enhance-security-streamline-asylum ("Even though the number of migrants who are subject to these bars is small, this rule would enable DHS to more quickly remove those who are subject to the bars and pose a risk to our national security or public safety.").

[37] DHS was appropriated $5.1 billion in FY2024 for Enforcement and Removal Operations within Immigration and Customs Enforcement, a significant jump from the $4.2 funded in FY2023. *See Explanatory Statement Regarding H.R. 2882, Further Consolidated Appropriations Act, 2024,* Congressional Record, Vol. 170 No. 51 – Book II (Mar. 22, 2024), https://www.congress.gov/118/crec/2024/03/22/170/51/CREC-2024-03-22-bk2.pdf.

[38] UN News, *UNHCR calls for concerted action as forced displacement hits new high of 110 million* (June 13, 2023), https://news.un.org/en/story/2023/06/1137652 ("The 46 least developed nations, account for less than 1.3 per cent of global gross domestic product, yet they hosted more than 20 per cent of all refugees, UNHCR said.")

[39] UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 5: Application of the

reviews, given the grave risks of wrongful returns. Ample comment time is critical to ensuring that the agency can re-assess.

Third, it is worth noting that DHS only focuses on itself in noting the impacts of global displacement as justification for a shorter comment period. Stakeholders, too, are impacted by historic displacement rates and layered anti-asylum rulemaking—and perhaps more committed than DHS to avoiding the wrongful return of asylum seekers to harm. In Chicago where NIJC is headquartered, only one in four asylum seekers has counsel as of December 2023.[40] Rates of representation across the nation have plummeted from 65% to 30% due to the sheer increase of people in need of protection, lack of coordination and funding of representation, as well as increasing challenges posed by DHS and EOIR's policies.[41] Given this additional strain on legal service and advocacy organizations, a shortened comment period is particularly inappropriate.

Lastly, all agencies strive for operational flexibility and face unique challenges that require additional tools. But that is no excuse to bypass the APA. If every agency acted as DHS does here, there would be scant meaning for the premise that most comment periods should provide a *minimum* of 60 days so that stakeholders can meaningfully respond.

In closing, DHS provides no sound explanation for shortening this comment period. In the NPRM, DHS overlooks the complexity at hand, ignores key nuances in prior comment periods, and appears poised to finalize this NPRM prematurely to deport individuals faster. Meanwhile, DHS minimizes the unique threat this Proposed Rule poses to asylum access and the impact of this truncated period on stakeholders.

2) DHS did not provide a reasonable justification for this Proposed Rule.

The APA states that a court must "hold unlawful and set aside" agency action that is "arbitrary,

---

Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, https://www.refworld.org/policy/legalguidance/unhcr/2003/en/14733 [accessed 27 May 2024] at ¶ 31 ("Given the grave consequences of exclusion, it is essential that rigorous procedural safeguards are built into the exclusion determination procedure. Exclusion decisions should in principle be dealt with in the context of the regular refugee status determination procedure and not in either admissibility or accelerated procedures, so that a full factual and legal assessment of the case can be made.").

[40] Stephen Franklin and Katrina Pham, "Life in legal limbo: navigating Chicago's immigration court alone," Injustice Watch (May 15, 2024) https://www.injusticewatch.org/civil-courts/immigration/2024/immigration-court-federal-backlog-attorney-shortages-new-arrivals/?utm_source=TMP-Newsletter&utm_campaign=6f0637fca2-EMAIL_CAMPAIGN_2024_05_21_10_57&utm_medium=email&utm_term=0_5e02cdad9d-6f0637fca2-%5BLIST_EMAIL_ID%5D ("Only one out of four immigrants had a lawyer among the 211,096 persons whose cases were backlogged in Chicago as of December 2023. . .").

[41] TRACImmigration, *Too Few Immigration Attorneys: Average Representation Rates Fall from 65% To 30%*, https://trac.syr.edu/reports/736/.

capricious, [or] an abuse of discretion, or otherwise not in accordance with law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;. . . (D) without observance of procedure required by law . . .” or “(E) unsupported by substantial evidence.”[42] Courts will invalidate agency determinations that fail to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”[43]

Here, DHS a) reverses course on its own rescission despite no changed circumstances or law; b) misrepresents Congress’ expressed statutory framework for expedited screenings; c) distorts congressional intent; d) prioritizes politics over reasoned rulemaking; e) wrongly implies that the federal court that enjoined the Global Asylum Bar did not speak to the harm that rule would cause to people seeking asylum; and f) fails to consider stakeholders’ interests in a reliable and lawful system for CFIs and RFIs.

a) With this Proposed Rule, DHS reverses course on its own measured decision from two years prior.

In 2022, DHS and EOIR decided not to apply asylum bars at CFIs and RFIs. This decision was prompted by President Biden’s executive order mandating DHS and EOIR review of regulations from the Trump era in order to “restore and strengthen our own asylum system, which has been badly damaged by policies enacted over the last 4 years that contravened our values and caused needless human suffering.”[44] Over one year into this review, DHS and EOIR issued the Asylum Processing IFR rescinding the portion of the Global Asylum Bar that applied 8 U.S.C. § 1158(b)(2)(A)(i-v) bars in CFI and RFI proceedings.

DHS and EOIR reasoned that applying these bars in expedited removal would make proceedings “less efficient” and “undermin[e] congressional intent that the expedited removal process be truly expeditious.”[45] To justify their position, the Departments noted that “the complexity of the inquiry required to develop a sufficient record upon which to base a decision to apply a mandatory bar” made such inquiry “most appropriately made in the context of a full merits hearing. . . and not in a screening context.”[46] They also noted that the bars raised due process

---

[42] 5 U.S.C. § 706(2).

[43] *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (citation omitted).

[44] Executive Order 14010 of February 2, 2021, *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*, 86 Fed. Reg. 8267, 8268.

[45] 87 Fed. Reg. at 18134.

[46] *Id.*

concerns, raising the need for individuals to have more time, procedural guardrails, and access to counsel—i.e., make their claims beyond the rushed posture of expedited removal screenings.[47]

DHS struggles to justify reversing course on such a measured position. Though it claims to "refine[]" its prior position, the NPRM is nothing short of a reversal. Suddenly, the very same legal questions that were "complex" are now straightforward, and efficiency and due process concerns have disappeared from DHS' narrative even though screenings have only become *more* challenging for AOs and asylum seekers in the interim due to the CLP Asylum Bar.[48] DHS argues that permitting rather than mandating the application of these bars makes all the difference—allowing AOs to deny claims that are clearly barred under the INA. DHS particularly focuses on a small caveat of the Asylum Processing IFR, which states that complexity forecloses the application of the bars "in general and depending on the facts."[49] However, DHS ignores the context and analysis in the paragraph preceding this caveat, which states:

> Presently, asylum officers ask questions related to all mandatory bars to develop the record sufficiently and identify potential bars but, since mandatory bars are not currently being applied in the credible fear determination, the record does not need to be developed to the level of detail that would be necessary if the issue of a mandatory bar was outcome-determinative for the credible fear determination. *If a mandatory bar were to become outcome determinative, it would be necessary to develop the record sufficiently to make a decision about the mandatory bar such that, depending on the facts, the interview would go beyond its congressionally intended purpose as a screening for potential eligibility for asylum or related protection—and a fail-safe to minimize the risk of refoulement—and would instead become a decision on the relief or protection itself*. The level of detailed testimony necessary in some cases to make such a decision would require asylum officers to spend significantly more time developing the record during the interview and

---

[47] *Id.* at 18134-35 ("Due to the intricacies of fact finding and legal analysis required to make a determination on the applicability of any mandatory bars, individuals found to have a credible fear of persecution should be afforded the additional time, procedural protections, and opportunity to further consult with counsel that the Asylum Merits process or section 240 proceedings provide. In light of the need to preserve the efficiency Congress intended in making credible fear screening part of the expedited removal process and to ensure due process for those individuals found to have a significant possibility of establishing eligibility for asylum or statutory withholding of removal but for the potential applicability of a mandatory bar, the Departments have determined that these goals can be accomplished by returning to the historical practice of not applying mandatory bars at the credible fear screening stage.").

[48] 89 Fed. Reg. at 41354.

[49] 89 Fed. Reg. at 41354 (citing 87 Fed. Reg. at 18093).

conducting additional research following the interview.[50]

In other words, DHS is missing the forest for the trees: spotting obviously barred claims requires factual development that would merge preliminary screenings in expedited removal with merits adjudications, though neither AOs nor asylum seekers have the resources for this merger.[51] Leaving this merger to the discretion of individual AOs does not alleviate the concern that CFIs and RFIs are *not* the proper fora for the reliable application of these bars. If these preliminary screenings are intended to act as a "fail-safe" to avoid wrongful removals as Congress intended, they should be just that—preliminary, not merits-based.

DHS claims to task AOs with selective factual and legal development, "only in those cases for which doing so is likely to be an efficient and appropriate use of resources."[52] But this logic is also questionable. On the one hand, DHS suggests it is not disturbing longstanding AO practice by requiring them to elicit information about the applicability of mandatory bars—claiming that "[u]nder this NPRM, the current credible fear process would remain the same."[53] On the other hand, DHS expects AOs to judiciously conduct this inquiry only in cases where they foresee the bars will preclude asylum eligibility on the merits. Current practice requires AOs to simply make note of facts that may bear relevance in the future; the NPRM would require AOs to, somehow, foresee that a claim is barred before they elicit facts and conduct legal research.

This change is especially troubling because it forecloses judicial review of the bars' application for the first time. When bars are applied in affirmative asylum cases or proceedings in immigration court, the noncitizen has a right to judicial review under 8 U.S.C. § 1252—but judicial review of CFI determinations is, of course, not available. In other words, DHS has not only placed novel discretionary authority in the hands of asylum officers; it has also completely insulated that authority from review by actors outside the executive branch on questions of extraordinary complexity, as discussed below. And it has done so without a shred of evidence that asylum officers can properly apply the complex bars in the extremely compressed timeframe of a CFI.

---

[50] 87 Fed. Reg. at 18093 (emphasis added).

[51] *See infra* Section 3 for more.

[52] 89 Fed. Reg. at 41354.

[53] 89 Fed. Reg. at 41356. *See also id.* (describing current procedure: "AOs ask noncitizens questions about the mandatory bars to asylum and withholding of removal during credible fear interviews for the benefit of the record and, as appropriate, may record information related to a bar potentially applying in an adverse memorandum to the file for immigration enforcement personnel to reference where it may be relevant for their use."); 87 Fed. Reg. at 18093 (DHS and EOIR assuring commenter that "asylum officers are trained to gather and analyze information to determine the applicability of mandatory bars in affirmative asylum adjudications, and they are instructed to assess whether certain bars may apply in the credible fear screening context.").

DHS also argues that it (and EOIR) merely failed to see the efficiency gain of this discretionary application of the bars two years prior and claims, without explanation, that "applying certain bars at the credible fear *stage can be an efficient and appropriate use of resources in a larger class of cases* than the Asylum Processing IFR appreciated."[54] In other words, DHS trusts AOs to apply these bars with a selective eye that can reliably assess future ineligibility, while somehow yielding "large" results for DHS as a whole. Following this contorted logic is challenging, to say the least. Neither the proposed regulations nor the preamble make clear how AOs can reliably execute DHS' plan without wasting resources or making unwarranted negative findings.

b) DHS lacks statutory basis for this Proposed Rule.

Unlike the Asylum Processing IFR which grounded its position in domestic and international law, this NPRM is timid in its statutory grounding of its now-contrary position. In footnote nine of the Proposed Rule, DHS states that because the expedited removal statute requires the AO to determine whether a person "could" establish eligibility for asylum, that language authorizes the AO to make an *ultimate* determination on whether or not someone is in fact barred from asylum by the application of one of these the bars named in the NPRM. But nothing in the expedited removal statute mentions bars to asylum at all and instead instructs the agency to make a positive credible fear finding whenever asylum seekers demonstrate a "significant possibility" that they "could" be eligible for asylum. 8 U.S.C. § 1225(b)(1)(B)(v).

The NPRM does make reference to this statutory language and instruct that the AO "shall issue a negative credible fear finding . . . if the [AO] determines there is not a significant possibility that the alien would be able to establish by a preponderance of the evidence that such bar(s) do not apply."[55] But despite incorporating the "significant possibility" language of 8 U.S.C. § 1225 into its structure, CFIs—particularly when they occur within 24 hours of entry into the United States and in CBP custody—do not allow for a person to produce the evidence that would be needed to make such a demonstration. As such, there is no meaningful way to comply with the statutory mandate of the "significant possibility" standard, which is meant as a low screening standard while imposing ultimate bars to asylum in the context of these rushed interviews.[56]

The Trump administration notably made the same argument about the significance of the word

---

[54] 89 Fed. Reg. at 41354 (emphasis added).

[55] Proposed 8 C.F.R. § 208.30(e)(5)(ii)(A).

[56] *See, e.g.*, *Grace v. Barr*, 965 F.3d 883, 902 (D.C. Cir. 2020).

"could" in the expedited removal statute in the Global Asylum Bar, which is now enjoined.[57] Nevertheless, DHS and EOIR proceeded to rescind the application of asylum bars in preliminary screenings. The statute has not changed, and yet DHS breathes new air into the Trump Administration's rationale. But as DHS concedes, the statute is silent as to the bars at hand in expedited removal proceedings (INA § 235). DHS claims to act within its discretion and expects deference on its interpretation even though it is unmoored from the statutory text.[58]

Moreover, the bars that the NPRM proposes incorporating into the CFI process are bars to being "granted" asylum, *see* 8 U.S.C. § 1158(b), and are distinct from the bars contained in 8 U.S.C. § 1158(a), which preclude certain individuals from "applying" for asylum. The significant possibility standard for CFIs asks whether the applicant "could establish *eligibility* for asylum." *Id.* § 1225(b)(1)(B)(v) (emphasis added). Applying the "significant possibility" standard to a bar to *relief* has the effect of barring an asylum seeker from the opportunity to "apply" for asylum, an approach that is inconsistent with the statutory text.

DHS has failed to put forth a reasonable interpretation of how these changes square with the statutory text, and instead has departed from its position for the past 24 years, reiterated and elaborated upon just two years ago.

It is irrational to imagine that Congress intentionally set a low bar for screenings—or as a court previously put it, a "fraction" of a 10% chance of persecution[59]—while simultaneously enabling AOs to apply the entire, complex test for asylum eligibility at these threshold screenings instead of at the merits stage. The clear purpose of the statute DHS cites is to define the standard for credible fear screenings as a "significant possibility" of asylum eligibility.

---

[57] 85 Fed. Reg. at 80296 (citations omitted) ("Moreover, the statute requires asylum officers to determine whether "the alien could establish eligibility for asylum under section 1158 of this title whether ''the alien could establish eligibility for asylum under section 1158 of this title,'' which would by extension include the application of the bars listed in section 1158 that are a part of this rule.").

[58] 89 Fed. Reg. at 41351 n.9. DHS' reading of which bars apply in CFIs and which do not is selective under the NPRM as well. Under proposed § 208.30(e)(5)(ii), DHS is choosing to exclude 8 U.S.C. § 1158(a)(2) and 8 U.S.C. § 1158(b)(2)(A)(vi) bars, though these are also part of merits assessments for asylum at 8 U.S.C. § 1158, as referenced in 8 U.S.C. § 1225(b)(1)(B)(v). This indicates that they understand that the entire asylum test is not statutorily folded into CFI proceedings, which in turns makes their choice to selectively apply the bars at issue in this NPRM more questionable.

[59] *Grace v. Whitaker*, 344 F. Supp. 3d 96, 127 (D.D.C. 2018) (quoting *Cardoza-Fonseca*, 480 U.S. at 431-32, *aff'd in part, rev'd in part and remanded sub nom. Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020)) ("to prevail at a credible fear interview, the alien need only show a 'significant possibility' of a one in ten chance of persecution, i.e., a fraction of ten percent.").

c) This NPRM distorts congressional intent.

As DHS and EOIR recognized in 2022, Congress intended to impose a low screening threshold to avoid the risk that people would be erroneously screened out of their chance to seek asylum. With this NPRM, DHS turns this reasoning on its head. Under the Trump administration, a federal court recognized that the Congressional record is unambiguous on this question.[60] The House Judiciary Committee Report accompanying that House version of IIRIRA stressed that the credible fear standard was "lower than the 'well-founded fear' standard needed to ultimately be granted asylum in the U.S."[61] As a dozen U.S. Senators recently reminded DHS and EOIR during the comment period to the CLP Asylum Ban:

> Congress was fully aware that there would be a gap between the number of people determined to have a credible fear of persecution and the number ultimately determined to have a well-founded fear. Rather than being motivated in 1996 to keep that gap as small as possible, Congress—even as it was granting the Executive the enormously consequential expedited removal authority—focused on ensuring that noncitizens whose claims for asylum at the screening stage would be permitted to have their claims considered further.[62]

Nonetheless, DHS now asks to short-circuit asylum seekers' access to merits, while claiming the Proposed Rule is "not inconsistent" with congressional intent.[63] The changes the NPRM proposes are incompatible with Congress' intent to safeguard review of asylum eligibility.[64]

d) Politics, not compliance with domestic and international law, drive this NPRM.

This NPRM was issued in the midst of a dramatic shift in the Biden administration towards

---

[60] *See Grace v. Whitaker,* 344 F. Supp. 3d 96, 104 (D.D.C. 2018) (citing H.R. REP. No. 104-469, pt. 1, at 158 (1996)) ("[T]here should be no danger that [a noncitizen] with a genuine asylum claim will be returned to persecution.").

[61] H.R. Rep. No. 104-469, pt. 1, at 158.

[62] Senators Menendez, Padilla, Markey, Merkley, Sanders, Booker, Warren, Murray, Wyden, Cardin, Luján, and Hirono, *Re: Comment on the Proposed Rule by the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) on Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023* (Mar. 29, 2023), at 3, https://www.regulations.gov/comment/USCIS-2022-0016-12291.

[63] 89 Fed. Reg. at 41352 ("AOs would only consider a bar in those cases where there is easily verifiable evidence available to the AO that in their discretion warrants an inquiry into a bar, and the AO is confident that they can consider that bar efficiently at the credible fear stage.").

[64] Senator Hatch, a principal sponsor of the bill, stated: "The [significant possibility] standard . . . is intended to be a low screening standard for admission into the usual full asylum process." 142 Cong. Rec. 25,347 (1996).

increasingly anti-asylum policies. Despite campaigning and promising to reverse course on numerous anti-asylum policies enacted by the Trump administration,[65] for more than a year the administration has done the opposite. Since January 2023,[66] President Biden and DHS have turned to expedited removal to dramatically curb access to asylum—shortening the time period for asylum seekers to consult an attorney,[67] jailing them in CBP custody instead of ICE custody while subjecting them to screenings,[68] subjecting them to the CLP Asylum Ban, and now proposing to apply asylum bars during those screenings under this NPRM.

And even after issuing this NPRM, the administration has announced additional changes, including the increased prosecution of people entering between ports of entry, many of whom are asylum seekers,[69] and an expedited docket to ensure that asylum seekers are deported quickly.[70] And, on June 4, 2024, the Biden administration took the most drastic action of all: Relying on INA § 212(f) President Biden issued a proclamation that effectively forecloses asylum access at the southern border for the vast majority of asylum seekers who enter the United States between ports of entry.[71] Not only is this latest maneuver illegal in itself because it violates 8 U.S.C. §

---

[65] Carlos Martinez, "Biden promised to fix our asylum process. He hasn't," *San Francisco Chronicle* (July 17, 2023), https://www.sfchronicle.com/opinion/openforum/article/biden-trump-asylum-18195473.php.

[66] The White House, *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions* (Jan. 5, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/; DHS, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.

[67] DHS, *Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration* (Apr. 27, 2023), https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration.

[68] *Id.*

[69] *NIJC condemns new federal push to further criminalize migration at the border* (May 31, 2024), https://immigrantjustice.org/press-releases/nijc-condemns-new-federal-push-further-criminalize-migration-border; Jesse Franzblau, "Five Ways that Immigration Prosecutions are Ineffective and Deadly," *NIJC* (July 19, 2022), https://immigrantjustice.org/staff/blog/five-ways-immigration-prosecutions-are-ineffective-and-deadly; Jesse Franzblau, "Report | A Legacy of Injustice: The U.S. Criminalization of Migration," NIJC (July 23, 2020), https://immigrantjustice.org/research-items/report-legacy-injustice-us-criminalization-migration.

[70] DHS, *DHS and DOJ Announce "Recent Arrivals" Docket Process for More Efficient Immigration Hearings* (May 16, 2024), https://www.dhs.gov/news/2024/05/16/dhs-and-doj-announce-recent-arrivals-docket-process-more-efficient-immigration.

[71] *See* Joseph R. Biden Jr., "A Proclamation on Securing the Border," *The White House* (June 4, 2024), https://www.whitehouse.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border/. This proclamation is issued eight days before the comment period closes. This proclamation is also accompanied by an IFR from DHS and EOIR published three business days before the comment period for this NPRM closes. *See* DHS & EOIR, *Securing the Border*, 8 CFR Part 1208 [A.G. Order No. 5943-2024] RIN 1125-AB32 (to be

1158(a)'s promise that "any" noncitizen can seek asylum regardless of their manner of entry into the United States, but it makes the need for this Proposed Rule all the more puzzling. Like the Trump administration before it, the Biden Administration is now throwing proverbial spaghetti at the border, imposing numerous intersecting and overlapping policies—most, if not all of which are illegal—at a perceived "problem" posed by asylum seekers.

The fact that this change and the other proposals and policies originate with the Trump administration, is not irrelevant to the propriety of this Proposed Rule. President Trump issued these policies alongside blatantly racist and xenophobic rhetoric toward asylum seekers and migrants.[72] Though the current administration has refrained from using such brazen language, the policies it is invoking cannot be separated from those improper motives.

Another indication of this political shift is the haste with which DHS is changing its position without coordinating a joint rule with the Executive Office for Immigration Review (EOIR). All prior rulemaking that touched on the asylum bars were joint DHS (or INS) and EOIR rules. This is the first time that DHS is proceeding alone, prompting DHS to nudge EOIR that it "may wish to clarify the procedures immigration judges will follow in reviewing DHS screenings" if DHS finalizes this Proposed Rule.[73] Making claims of efficiency gains and consistency without coordination with its sister agency betrays a lack of preparedness and needed coordination for the final promulgation of this Rule.

e) The court that enjoined the Global Asylum Bar forewarned that DHS failed to consider the problems that are relevant to the substance of the Proposed Rule.

Upon issuance of the Global Asylum Bar, legal service providers requested that courts block the regulation. They did so on numerous grounds and challenged the substantive provisions of the Global Asylum Bar as a whole, which involved the application of mandatory bars at the initial screening stage.[74] In considering their claim, the court made key findings that went to the

---

published June 7, 2024), https://www.federalregister.gov/public-inspection/2024-12435/securing-the-border. As such, NIJC is unable to assess the interaction between this new policy and the NPRM, though such analysis would be necessary to comment substantively on the impact of this rule on asylum seekers and other stakeholders.

[72] *See, e.g.*, David Leonhardt and Ian Prasad Philbrick, "Donald Trump's Racism: The Definitive List, Updated," *The New York Times* (Jan. 15, 2018), https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html.

[73] 89 Fed. Reg. at 41355 n.37.

[74] See Complaint for Declaratory and Injunctive Relief, *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966 (N.D. Cal. 2021) (3:20-cv-09253 ECF No. 1) at 84 (¶ 295 "Considered as a whole, the Proposed Rule will result in denial of protection to a majority of applicants with meritorious claims, leading to significant danger of

substance of the Global Asylum Bar and its impact on asylum seekers.

The court recognized the rule would make "sweeping changes to the United States' asylum system" and discussed many circumstances in which asylum seekers could be barred from asylum under the Global Asylum Bar.[75] When required to weigh irreparable harm to the organizational plaintiffs for the purpose of the injunctive relief analysis, the court assessed that at-risk asylum seekers would be returned to harm if the Global Asylum Bar went into effect.[76] These findings were essential to the court's final holding. Although DHS seeks to resurrect one aspect of the Global Asylum Bar by applying asylum bars in the CFI and RFI stage, DHS fails to consider the high stakes of such a proposal.

f) The Proposed Change Fails to Consider Settled Reliance Interests

"When an agency changes course … it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'"[77] Here, DHS proposes to alter a key aspect of CFI and RFI proceedings for the first time since their inception nearly a quarter century ago. This is no small change. It would dramatically disrupt the system Congress designed under INA § 240 and that legal service providers, private practitioners, and applicants utilize daily. In doing so, DHS would unlawfully disturb the settled reliance interest of various stakeholders.

For example, NIJC staff and volunteers develop and implement trainings, *pro se* assistance, and workshop materials, all suited to assist asylum seekers navigate full removal proceedings *after* they have received a positive credible fear finding. In addition to providing counsel to asylum seekers in the Midwest, NIJC has a program in San Diego, California, designed to assist asylum seekers in expedited removal. On a more limited basis, NIJC also provides direct representation to asylum seekers and separated families at the border in Texas and in other areas around the country. Through years of litigation, NIJC has garnered extensive experience and expertise in

---

refoulement, which "occurs when a government returns [noncitizens] to a country where their lives or liberty will be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion."); *id.* at 100 (¶ 378: "The Rule as a whole exceeds Defendants' statutory authority and is not in accordance with law because it restricts the availability of asylum in excess of Defendants' authority and in contravention of the Refugee Act, and the non-refoulment obligations it codifies. "); *id*. at 98 (¶ 359 on the rule targeting bona fide refugees and violating domestic and international law as it "broadens asylum bars... and eliminate opportunities for the applicant to make her case").

[75] 512 F. Supp. 3d at 969-70.

[76] *Id*. at 976.

[77] *See D.H.S. v. Regents of the Uni. Of C.A.*, 591 U.S. ____ (slip op., at 23) (2020) (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. ____, ____ (slip op., at 9) (2016)).

litigating asylum claims based on persecution on account of gender, LGBTQ+ status, and gang violence. NIJC has hired and trained a large number of attorneys, who in turn provide consistent support, subject-matter expertise, and training for thousands of pro bono counsel and public defenders.

Because NIJC's model is primarily designed to assist asylum seekers *after* they reach full removal proceedings, NIJC has a reliance interest in ensuring that people with asylum claims are actually able to clear that screening hurdle. Not only was that process what Congress designed to protect those fleeing harm on the basis of protected grounds, it is what organizations like NIJC and others rely on to administer our pro bono legal services models. The Proposed Rule will not only undermine years of NIJC advocacy under U.S. and international law; it will also compromise the provision of life-saving services to asylum seekers. Under the APA, DHS must consider detrimental reliance on the part of applicants and service organizations alike before they make such a dramatic change to expedited removal processing.

3) This Proposed Rule would not increase efficient adjudications.

DHS' claims of efficiency play a central role in this NPRM. However, DHS a) overlooks the complexity of the bars it seeks to apply in CFIs and RFIs; b) tasks AOs with duties reserved for merits adjudicators; and c) presents data that itself foreshadows the impact of this rule on DHS' operations.

a) The complexity of the five bars requires extensive factual development and legal analysis that would lengthen CFIs and RFIs.

In order to exercise "discretion," AOs have to be on the lookout for bars and elicit facts suggesting an applicants may fall within one of the five bars referenced in the NPRM, steps not currently systematically taken in the credible fear process. There is good reason for this: many of the bars to asylum are fact-intensive and others require complex legal analysis.

A representative for USCIS AOs has already voiced concern about the NPRM and its impact on the time and resources that will be drawn from AOs who conduct CFIs and RFIs. Michael Knowles, the president of the American Federation of Government Employees local that represents USCIS employees in the Washington area recently commented on the NPRM: "You're asking us to do something that is very complex where the stakes are very high, in a screening situation where people are being held at temporary holding [centers]. . . We're under pressure to quickly make our screening determinations in 24 hours or 48 hours at the most. Now

you're adding more lines of inquiry. That's inevitably going to mean a longer interview."[78] Knowles further added: "You're creating a lot more work that's not going to have a big impact," Knowles said. "We're already understaffed and you're having to do more steps in the procedure, which could slow it down."[79]

Over the past year, NIJC has seen most of our asylum clients languish in the asylum backlog, as USCIS AOs were detailed to conduct CFIs and RFIs. Were this Proposed Rule to become final, it would undoubtedly worsen the status quo—draining more time and resources from already strained AOs. This outcome is inevitable given the complexity of the bars USCIS proposes to insert into the screening process. Instead of imposing additional burdens on AOs who are performing border interviews, DHS should focus its attention on adjudicating the cases that are long pending with no clear timeline for resolution.

i. The persecutor bar (8 U.S.C. § 1158(b)(2)(A)(i)

The "persecutor" bar to asylum should not be applied in screening interviews because it involves both complex factual inquiries and unsettled legal questions. For example, for over two decades, an asylum seeker from Eritrea, Daniel Girmai Negusie, has sought protection in the United States, only to face the persecutor bar. Forcibly conscripted into the Eritrean military, he had a credible fear interview followed by a merits hearing before the immigration judge. The judge concluded that the persecutor bar applied, even though the acts that gave rise to the application of this bar were part of his claim of persecution. The question arose as to whether a duress exception applies and would serve as a defense against application of the persecutor bar against Mr. Negusie. This ultimate question remains unresolved. Courts have continuously wrestled with this matter, with multiple appeals, remands, and certifications involving the Board of Immigration Appeals (BIA), the Fifth Circuit Court of Appeals, and the Supreme Court.[80] As of 2021, key questions of fact and law remained as to whether international treaty obligations required the consideration of duress in determinations involving the persecutor bar,[81] or as to whether the failure to recognize the duress exception unfairly harms bona fide asylum seekers, among other issues.[82] Later that same year, Attorney General (AG) Garland certified the case to

---

[78] Eric Katz, "Is Biden's new immigration rule doomed without more staffing?," *Government Executive* (May 13, 2024), https://www.govexec.com/management/2024/05/bidens-new-immigration-rule-doomed-without-more-staffing/396521/.

[79] *Id.*

[80] *Negusie v. Holder*, 555 U.S. 511 (2009).

[81] https://law.duke.edu/news/pdf/Negusie-International-Scholars-Amicus.pdf.

[82] https://www.tahirih.org/wp-content/uploads/2021/08/Negusie-v.-Garland_CGRS-Non-Profits-Clinics-Amicus-Brief_2021.08.05_FINALATTACHMENTS.pdf.

himself. The case remains pending the AG's decision as of this comment period.

Caselaw surrounding how the persecutor ought to be applied is therefore unsettled and tremendously complex. DHS offers no explanation of how AOs can be expected to discern and apply a bar in the CFI and RFI contexts that the agency itself remains unable to meaningfully define and explain. Doing so would require extensive factual development, parsing out whether facts that may go to a person's past persecution, their acts as a persecutor, or both as well a legal assessment of expectations and defenses to the bar. It would require AOs to make prompt assessments of whether the duress exception applies—a question the Supreme Court, federal courts of appeals, the BIA, and AG Garland have yet to answer. The result is inevitably erroneous applications of the bar, rooted in poor factual development and rushed legal analysis—two avoidable byproducts of a preliminary, low-bar screening that confuses its role for merits adjudications.

NIJC has firsthand experience with the complexity of this issue. NIJC client Reina[83] served as a police officer in Venezuela based on her passion to uphold law and justice. However, when her commanders ordered her to arrest protestors criticizing the Nicolas Maduro regime, Reina refused. Her commanders reprimanded her and issued complaints for her refusal to participate in arrests—and sometimes torture—of political dissidents. Reina resigned from the police and began joining protests against the Maduro government, until she too was arrested, detained, and tortured. Although Reina never herself participated in acts that would constitute persecution, her story demonstrates the highly fact-specific inquiry requiring time, rapport building, and legal analysis. Had this rule been adopted at the time of her entry, an AO could have hastily and improperly exercised discretion in applying the persecutor bar based on Reina's association with the Venezuelan authorities. Given the accelerated posture of expedited removal and her lack of representation at the time of her CFI, Reina could see a summary affirmation from the immigration court, resulting in her removal back to her torturers.

AOs *should* err on the side of deferring these questions to the merits stage, rather than resolving them in during the expedited removal setting. The persecutor bar and its complex history illustrates this much.

ii. The particularly serious crime bar (8 U.S.C. § 1158(b)(2)(A)(ii))

The particularly serious crime bar is likewise legally and factually complex and thus inappropriate for inclusion in border interviews. First, as DHS and EOIR noted in the Asylum

[83] Throughout this comment, we refer to clients via pseudonym to protect their identity and confidentiality.

Processing IFR, particularly serious crime is "not statutorily defined in detail." [84] And, the bar is different for asylum and withholding, making its application in both CFIs and RFIs additionally confusing for AOs who are assigned to do both types of adjudications. *Compare* 8 U.S.C. § 1158(b)(2)(A)(ii) *with* 8 U.S.C. § 1231(b)(3)(B). Even though each definition makes reference to the "aggravated felony" provision of the INA, deciding whether an offense is an "aggravated felony" is itself a complex inquiry, requiring application of the categorical approach, an issue that is often litigated in circuit courts and even the Supreme Court.[85]

On top of that, "adjudicators can also designate an offense a particularly serious crimes through case-by-case adjudication," a factor that the Asylum Processing IFR referred to as "the kind of fact-intensive inquiry requiring complex legal analysis that would be more appropriate in a full adjudication before an asylum officer or in INA § 240 proceedings with the availability of judicial review than in credible fear screenings." [86]

For example, NIJC recently represented Teddy Birhanu in a petition to the United States Supreme Court, on the question whether a person's mental health could be an ameliorating factor for purposes of determining if an applicant had been convicted of a particularly serious crime.[87] Before that case, the BIA barred consideration of such factors, but now consideration of a person's mental health is required.[88] The complexity of this assessment is not resolved, though. In fact, NIJC is currently aware of numerous circumstances where the BIA has limited the scope of this analysis, leaving important legal questions about the application of the particularly serious crime bar unsettled and thus inappropriate for consideration in a threshold border interview where the wrong decision will be insulated from judicial review.

Requiring asylum seekers to meet their factual burden and also conduct such legally complex inquiries will dooms the vast majority of individuals subjected to this bar if it is applied during a

---

[84] 87 Fed. Reg. at 18093.

[85] *See, e.g. Moncrieffe v. Holder*, 569 U.S. 184 (2013).

[86] 87 Fed. Reg. at 18093.

[87] *See Birhanu v. Garland*, 142 S. Ct. 2862 (2022) (granting the petition, vacating the circuit court decision and remanding the case).

[88] *See Matter of B-Z-R-*, 28 I. & N. Dec. 563, 567 (A.G. 2022) (overruling *Matter of G-G-S-,* 26 I. & N. Dec. 339 (BIA 2014) and reasoning that "immigration adjudicators may consider a respondent's mental health in determining whether a respondent, 'having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.'" (internal citations omitted)).

border interview.[89]

iii. The serious nonpolitical crime bar (8 U.S.C. § 1158(b)(2)(A)(iii)

The serious nonpolitical crime bar is not defined in the INA and does not require an arrest or conviction. Instead, past conduct, or testimony of past conduct, can suffice in triggering this bar. In fact, the BIA has defined the threshold trigger for this bar at the level of probable cause.[90] Adjudicators evaluate the application of this bar "on a case-by-case basis considering the facts and circumstances presented."[91] As a result, the application of this bar is legally and factually intensive and contingent on the reliability of the available evidence. Additionally, because this bar applies to conduct in an asylum applicant's home country the availability of evidence and the reliability of that evidence will be subject to the circumstances of hundreds of different legal systems from around the world.

Even when this bar is applied in full removal proceedings, courts and DHS have wrestled with the evidence that suffices to trigger this bar. DHS has relied on questionable data received by foreign governments, including Interpol Red Notices, to apply the serious nonpolitical crime bar.[92] The BIA has sanctioned the use of these Red Notices, while the Eight Circuit has held that these notices are insufficient to warrant application of the bar.[93] Last year, Immigration and Customs Enforcement (ICE) issued a directive also noting that a Red Notice "conveys no legal authority to arrest, detain, or remove a person" and should be "sparingly" and "not exclusively" used.[94]

NIJC client Camilo, for example, fled to the United States from El Salvador after police

---

[89] Additionally, there is no indication that application of the particularly serious crime bar *at border interviews* will have any meaningful impact on border interview efficiency. As the incorporation of the aggravated felony definition into the particularly serious crime bar makes clear, the particularly serious crime provision applies in circumstance where an individual has a conviction *inside* the United States. Most people undergoing a CFI will not have been present in the United States previously and thus are unlikely to have been convicted of a particularly serious crime. Instead, this particular bar is only likely to be applicable in the RFI context, which already applies to a much narrower subset of individuals. Accordingly, while NIJC maintains that *no* bars to asylum should be assessed during screening interviews, application of this is particularly misplaced in that context. If the Department moves forward with this Proposed Rule, it should—at minimum—remove application of this bar from the factors to be considered.

[90] *Matter of E-A-*, 26 I. & N. Dec. 1, 3 (BIA 2012).

[91] Matter of E-A-, 26 I. & N. Dec. at 3.

[92] Jesse Franzblau, *Caught in the Web: The Role of Transnational Data Sharing in the U.S. Immigration System*, Nat'l Immigrant Justice Center (Dec. 13, 2022), at 12-13 https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2022-12/NIJC_Policy_Brief_Foreign_data_sharing_December-2022.pdf.

[93] *Matter of W-E-R-B-*, 27 I&N Dec. 795 (BIA 2020); *Barahona v. Garland*, 993 F.3d 1024 (8th Cir. 2021).

[94] *ICE Directive 15006.1: INTERPOL Red Notices and Wanted Person Diffusions* (Aug. 15, 2023) https://www.ice.gov/doclib/foia/dro_policy_memos/15006.1_InterpolRedNoticesWpDiffusions.pdf.

repeatedly threatened to harm him if he refused to falsely testify against gang members. He was detained upon arrival at the U.S. border, and during his time in detention learned that the Salvadoran police had followed through on their threats and levied unfounded charges against him. Those allegations were part of the persecution Camilo fled, but they became the basis for prolonged detention in the United States while he pursued asylum. A thorough investigation and inquiry by Camilo's legal team produced the evidence necessary to prove his innocence of the charges brought against him, but that investigation required substantial time and resources, including the retention of a private investigator in El Salvador to obtain documents from that country. Had this rule been in place when Camilo arrived at the border, he almost certainly would have been swiftly deported because of these baseless charges, without any opportunity to contest his removal back to harm.

Similarly, NIJC has represented dozens of women detained by ICE during the Zero Tolerance policy of the prior administration, These women were separated from their children and refused reunification even after the court ordered an end to family separation due to false allegations of criminal activity in their home countries. One of these women, Dolia, was the victim of severe gang violence. Because she was forced into a relationship with a gang member, Salvadoran police placed her in a gang database. Only after significant advocacy by her legal team was she released from ICE custody and reunified with her son. When her asylum claim finally reached merits adjudication, ICE stipulated to her asylum eligibility. Had she been subjected to a CFI where an AO had the discretion to apply this bar, she likely would have been summary removed to harm.

Akin to the persecutor bar, the serious nonpolitical crime bar is often used against individuals who are themselves victims of violence. Individuals coerced into a gang or trafficked by criminal groups could find themselves subject to this bar, with their testimony of past persecution suddenly used against them.[95] Nevertheless, the question of whether there is a duress defense to the serious nonpolitical crime bar is also unsettled.[96]

---

[95] *See* Hannah Dreier, "Trust and consequences: The government required him to see a therapist. He thought his words would be confidential. Now, the traumatized migrant may be deported," *The Washington Post* (Feb. 15, 2020), https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/ (detained asylum seeker's testimony and confidence to clinician used against him in bond and asylum case, asserting dangerousness and bar to asylum).

[96] David Baluarte, Refugees Under Duress: International Law and the Serious Nonpolitical Crime Bar, 9 Belmont L. Rev. 406 (2022), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1733&context=wlufac; Hannah Dreier, To stay or to go? Amid coronavirus outbreaks, migrants face the starkest of choices: Risking their lives in U.S. detention or returning home to the dangers they fled, *The Washington Post* (Dec. 26, 2020), https://www.washingtonpost.com/nation/2020/12/26/immigration-detention-covid-deportation/ (reporting on asylum

For example, NIJC client Antoni, a transgender man, fled Honduras after gang members violently raped him on several occasions. After one of these gang rapes, group members put a gun to Antoni's head and demanded that he allow the gang to stash drugs at his house or face further sexual violence. Antoni arrived at the U.S. border seeking protection from the gang; had this bar been applied based on his prior, coerced involvement with drug trafficking, Antoni would have been deported back to the same sexual violence he fled—effectively punishing him for surviving his persecution and seeking protection.

Expecting asylum seekers to meet the burden requisite to overcome this bar within hours or days of their entry would lead to countless removals of bona fide refugees. For AOs, applying this bar could require extensive factual development and review of evidence—further delaying findings.

iv. The security bar (8 U.S.C. § 1158(b)(2)(A)(iv))

As the Third Circuit has explained, the phrase "danger to the security of the United States" originates in the Refugee Protocol and was incorporated in the Refugee Act.[97] There is unanimous agreement (among foreign courts, international law experts, and Congress' legislative history) that this bar was conceived as a narrow exception to *non-refoulement* obligations.[98] Because Congress intended to protect asylum seekers "to the fullest extent of our Nation's international obligations,"[99] this bar has been typically applied in cases where an asylum seeker is alleged to support terrorism or violent acts towards the United States.[100] After all, "'danger to the security of the United States' includes an inherent seriousness requirement."[101]

Given this high bar, Congress did not intend to allow DHS to improperly subject asylum seekers to this bar and remove "otherwise-eligible asylees who do not present genuine security threats to

---

seeker Kevin Euceda, coerced into gang involvement but persistently denied relief due to the application of the serious nonpolitical crime asylum bar: "Gang members slept in Kevin's bed, tortured rivals on the patio, and put him to work selling drugs, he would later say in sworn testimony that was found credible by an immigration judge and also accepted by the government. One night, the leaders forced him to watch as they murdered his cousin for refusing to join the gang. Eventually, in 2017, they told Kevin he had to kill a stranger to prove his loyalty, and he fled to the United States to seek asylum.").

[97] *Yusupov v. Atty Gen.*, 518 F.3d 185, 203 (5th Cir. 2008).

[98] *Id*.

[99] *Id.*

[100] *See Yusupov*, 518 F.3d at 196 n.19; *Malkandi v. Holder*, 576 F.3d 906 (9th Cir. 2009) (alleged links to terrorist groups); *Matter of A–H–*, 23 I. & N. Dec. 774, 788 (AG 2005) (respondent was leader-in-exile in armed terrorist group that persecuted others); *Hernandez v. Sessions*, 884 F.3d 107, 112 (2d Cir. 2018) ("Congress is free to decide that an alien who provided material support to a terrorist organization, even if under duress, is a danger to the security of the United States.") (citations omitted).

[101] *See Yusupov*, 518 F.3d at 204; see also n. 34 (""Danger" inherently requires a heightened level of risk").

the United States."[102] Importantly, "the plain language and structure of the [Refugee] Protocol demonstrate that a state may expel only asylees who present true security threats to the United States."[103] As with the other bars, though, obtaining the necessary factual predicate information to apply this bar in a border screening context will be impossible, and if an AO makes a decision to apply the bar, an individual will be unable to muster evidence to rebut its application, and there will be no opportunity to appeal such a decision.

NIJC client Carla is a domestic violence survivor and lesbian from El Salvador. While in El Salvador, Carla was falsely accused of extortion by her ex-partner, who had gang ties. She was jailed for three years and never saw a judge. Finally, she was released and able to flee to the United States with her child—only to be separated at the border based on her criminal record in El Salvador. She was labeled a security risk and had to fight before the Board of Immigration Appeals until she won asylum, though she committed no crime and suffered egregious due process violations. Were this NPRM in place, Carla's separation from her child could have been permanent, as she would have been unjustly deported to El Salvador.

Expecting AOs to assess within the scope of an interview whether an individual poses a "true security threat" to the United States is deeply concerning. Akin to the other bars, this bar requires a factual and legal analysis that would substantively lengthen the time and resources AOs spend. The risk that they would misapply this bar is also great, forcing asylum seekers to attempt re-entry as DHS returns them to danger. DHS has suggested that the Security Bars Rule could apply if both this NPRM is finalized and the Security Bars Rule goes into effect. This raises an alarming prospect would automate the wrongful removal of asylum seekers, as mere passage through a country with a communicable disease could suffice to nullify an individual's chance to seek life-saving protection.[104]

v. The terrorism bar 8 U.S.C. § 1158(b)(2)(A)(v)

The terrorism bar that DHS intends to apply in the CFI and RFI stage has a history of wrongfully labeling individuals as terrorists and barring them from protection in the United States. These

[102] *See Hernandez v. Sessions*, 884 F.3d 107, 113 (2d Cir. 2018) (Droney, J., concurring).

[103] *Id*. (referencing *Swarna v. Al–Awadi*, 622 F.3d 123, 132 (2d Cir. 2010)).

[104] For more concerns on the Security Bars Rule, see NIJC's comment at https://www.regulations.gov/comment/USCIS-2020-0013-1345.

provisions have been used against Afghan[105] and Iraqi interpreters[106] who have risked their lives in support of U.S. troops.

This bar has also been a vehicle for family separation. NIJC client Mariana is an Angolan mother who entered the U.S. in April 2019 with her two children (seven and five years old). She was separated from her children because the U.S. government asserted that her participation in church-based peaceful demonstrations rendered her a member of a terrorist organization because a government opposition group was involved in similar protests. It was not until her case reached the Court of Appeals for the Fifth Circuit that she was fully cleared of these false allegations.[107] Had an AO been authorized to find her ineligible for asylum at the CFI stage, she would have been deported to face harm and permanently separated from her children.[108]

These cases are proof that applying the terrorism bar at the CFI and RFI stage neither comply with domestic and international refugee law, nor comport with U.S. national security interests.

b) If implemented, this Rule would confuse the role of AOs with final adjudicators.

A hallmark of the inefficiency in this proposal is that DHS seeks to selectively task AOs with the role of final adjudicators. This was already attempted under Trump's Global Asylum Bar, and met with strenuous opposition by the AOs' union:

> "[R]equiring asylum officers . . . to consider the applicability of any bars to withholding of removal, is inappropriate and beyond the scope of the screening function. Such considerations are properly left to an immigration judge to explore in a full merits hearing. Moreover, adding these requirements will necessarily cause asylum officers to spend even more time on these claims. Requiring officers to consider the applicability of bars to withholding of removal further compounds this result. These outcomes ensure that the expedited removal process will be further

---

[105] Kevin Sief, "Alleged terrorism ties foil some Afghan interpreters' U.S. visa hopes," *The Washington Post* (Feb. 2, 2013), https://www.washingtonpost.com/world/asia_pacific/alleged-terrorism-ties-foil-some-afghan-interpreters-us-visa-hopes/2013/02/01/3d4b80fc-6704-11e2-889b-f23c246aa446_story.html.

[106] Karen DeYoung, "Stalwart Service for U.S. in Iraq Is Not Enough to Gain Green Card," *The Washington Post* (Mar. 23, 2008), https://www.washingtonpost.com/wp-dyn/content/article/2008/03/22/AR2008032202228.html.

[107] *Ndudzi v. Garland*, No. 20-60782, 2022 WL 9185369 (5th Cir. July 22, 2022).

[108] NIJC, *Statement of the National Immigrant Justice Center (NIJC) U.S. House Judiciary Committee Hearing Oversight of Family Separation and U.S. Customs and Border Protection Short-Term Custody under the Trump Administration*, (July 25, 2019) https://docs.house.gov/meetings/JU/JU00/20190725/109852/HHRG-116-JU00-20190725-SD014.pdf.

complicated and delayed."[109]

DHS purports to avoid these outcomes by rendering the application of the bars at the CFI / RFI stage discretionary rather than mandatory. The difference is negligible and in fact non-existent for the individuals for whom the AOs opt to exercise their discretion by applying the rules. Inviting, rather than requiring, AOs to infringe on the role of merits adjudicators while conducting preliminary screenings is still "inappropriate and beyond the scope of the screening function."[110] As the prior section demonstrated, AOs would need to conduct extensive factual and legal inquiry to apply the bars—a task that would undoubtedly delay the completion of their finding due to the complex character of these bars.

This was not the role Congress envisioned for AOs in expedited removal. Ascribing this role now, via regulation, would subvert the entire scheme Congress erected in contrasting low-threshold fear screenings from merits review.

c) It is unclear what efficiency DHS would gain given its own projections.

Finally, the NPRM would not increase efficiency because, as DHS projects, relatively small numbers of people would be impacted if AOs applied the Proposed Rule as intended.[111] The NPRM lists percentages of individuals currently assessed to potentially trigger an inadmissibility bar. This percentage hovers at 2.5% of credible fear interviews, and 10% of (the much smaller pool of) reasonable fear interviews for Fiscal Year 2024.[112]

In these cases, DHS did not conduct a full factual and legal analysis. Assuming this analysis would further diminish the number of impacted individuals, so would AOs' discretion. After all, AOs already face great pressure to make findings with few resources. Were this NPRM to become final—under DHS' vision for the narrow use of this rule—there is legitimate doubt that it would increase efficiency for its ranks.

Given the small numeric impact of the proposed rule for efficiency, the Department should give greater weight to the adverse fairness considerations that the Rule would impose in the few cases

---

[109] National Citizen and Immigration Services Council 119, *Re: Comments on Joint Notice of Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264 (June 15, 2020) Department of Homeland Security (RIN 1615–AC42); Department of Justice, Executive Office for Immigration (EOIR Docket No. 18–0002; A.G. Order No. 4714–2020; RIN 1125–AA94)*, Regulations.gov (Aug. 18, 2020), 27, https://www.regulations.gov/comment/EOIR-2020-0003-6096.

[110] *Id*.

[111] 89 Fed. Reg. at 41351.

[112] *Id.*

where it were applied. The drastic implication of the Proposed Rule in those few cases should be balanced against, and outweigh, the minimal benefits that the Rule would have.

4) The Proposed Rule would compound fairness concerns, return asylum seekers to their persecutors, and lead to family separations.

Years of anti-asylum policies have already eroded access to asylum for too many. This Proposed Rule a) would layer further, unnecessary restrictions on people's ability to present their claim under expedited removal; b) return asylum seekers to harm in violation of domestic and international law; and c) lead to family separations and grave harm to children and their families.

a) The Proposed Rule builds on the already flawed expedited screening process.

It is no secret that expedited removal rushes asylum seekers through CFIs in circumstances that undermine basic principles of fairness. Expedited removal requires asylum seekers to disclose intimate information about their fear and trauma to government officials, usually without the presence of an attorney, while detained,[113] with minimal language access,[114] and often within a very short time of their arrival. Courts have questioned the reliability and disproportionate weight the Departments have afforded CFIs in the past, reversing adverse rulings and removal orders on the basis of unreliable information obtained in a CFI.[115] Yet, DHS proposes to further restrict access to asylum by placing even greater emphasis on these already unreliable

---

[113] *See e.g.*, U.S. Department of Homeland Security, *Detained Asylum Seekers: Fiscal Year 2014 Report to Congress* (Sept. 9, 2015) (indicating that 35,598 of 42,187 or 84 percent of credible fear applicants were detained in ICE custody).

[114] *See* Complaint to Dep't of Homeland Sec. Office of Civil Rights and Civil Liberties (CRCL) calling for an investigation of the Houston Asylum Office's handling of CFIs (Apr. 27, 2021), *available at* https://nipnlg.org/PDFs/2022_27April-CFI-complaint.pdf ("The Houston Asylum Office routinely fails to provide appropriate language interpreters to asylum seekers, forcing them to proceed with CFIs in languages in which they are not fluent. Asylum seekers have also agreed to move forward with CFIs in languages in which they lack fluency because they were unaware of their right to insist upon an interpreter in their primary language. Asylum Officers often pressure asylum seekers to go forward with interviews in their second or third-best language.").

[115] *See, e.g., Ndudzi v. Garland*, No. 20-60782, 2022 WL 9185369, at *3 (5th Cir. 2022) (criticizing the BIA for "accept[ing] as true the CFI notes' unsworn, non-verbatim statements while ignoring evidence to the contrary"); *Jimenez Ferreira v. Lynch*, 831 F.3d 803 (7th Cir. 2016) (ruling that Dominican woman who fled to the United States to escape an abusive partner was wrongly denied protection because the immigration judge and Board of Immigration Appeals (BIA) placed too much weight on the notes USCIS officer took during the woman's initial asylum screening interview); *Cuesta-Rojas v. Garland*, 991 F.3d 266 (1st Cir. 2021) (reversing adverse credibility finding, which rested at least in substantial part on asserted discrepancies between noncitizen's credible fear interview account and his removal proceeding account); *Paramasamy v. Ashcroft,* 295 F.3d 1047, 1052-53 (9th Cir. 2002) (ruling that failure to disclose sexual abuse at a CFI could not be considered an inconsistency given the nature and timing of CFI interviews).

screenings.

Here, an "indicia of a mandatory bar" can suffice under the NPRM to trigger the application of these bars—without asylum seekers understanding any implication on the burden or risk they face, without the procedural safeguards built into 240 proceedings, and without sufficient time for an applicant to gather evidence that a bar should not apply.[116] Should this Proposed Rule become final, the low screening standard that Congress envisioned for CFIs would be a distant memory.

The Biden and Trump administrations have already distanced CFIs from Congress' threshold framing. NIJC recently represented Adam*, an asylum seeker from South America who underwent a 5.5-hour CFI, taking place over two days while he was in ICE detention. USCIS issued a negative CFI determination, which an immigration judge later reversed. Adam described his experience as follows:

> "There were communication struggles with the interpreter on the first day of my interview. He would tell me to continue explaining and then cut me off after only one or two words. The asylum officer jumped topics a lot making it difficult for me to finish saying what I was trying to communicate in short sentences while doing my best to answer the next question he posed. I explained to the officer that my family received several threatening phone calls. It's my understanding that the CFI transcript says just one phone call. During my interview I explained that my family is still being threatened, but I didn't have the opportunity to explain more. I felt rushed by the interviewer, who sounded irritated and commented the interview was taking a long time. I was also very stressed due to my extended separation from my son."

Even where there are organizations such as NIJC or other attorneys ready and willing to consult with asylum seekers prior to CFI, access to counsel is often severely compromised. When NIJC's legal teams attempted to provide meaningful representation to people in threshold fear interviews in detention in the context of DHS' current program conducting CFIs in Customs and Border Protection, we confronted systemic obstruction of access to counsel at every turn.[117]

---

[116] 89 Fed. Reg. 41352; *Arevalo Quintero v. Garland*-, 998 F.3d 612, 622-23, (4th Cir. 2021) (regarding immigration judges' duty to develop the record).

[117] NIJC, *Obstructed Legal Access: NIJC's Findings From 3 Weeks of Telephonic Legal Consultations in CBP Custody* (May 25, 2023), https://immigrantjustice.org/staff/blog/obstructed-legal-access-nijcs-findings-3-weeks-telephonic-legal-consultations-cbp; NIJC, *Obstructed Legal Access: June 2023 Update* (June 20, 2023),

i. DHS' plan to apply the bars to individuals already subject to the CLP Asylum Ban is plain cruelty.

It is deeply troubling that DHS proposes to apply this Proposed Rule to individuals and families subject to the CLP Asylum Ban. DHS touts the CLP Asylum Ban as working "effectively" and "help[ing] [DHS] increase significantly their capacity to screen noncitizens."[118] What DHS labels as effective, human rights monitors have described causing immeasurable human suffering. This includes:

- Asylum seekers waiting up to eight months for appointments to cross the border and suffering horrific harms in Mexico;[119]
- Black, Indigenous, LGBTQI+, HIV+, and other vulnerable people facing tremendous barriers to access asylum at the border, due to the limitations imposed by the CBP One app;[120] and
- Dramatic increases in odds of wrongful removals, with individuals three times more likely to be ordered deported to their countries of feared persecution or to Mexico due to the CLP Asylum Ban. Human Rights First's reporting on these wrongful removals includes the examples of a transgender woman from Venezuela fleeing anti-LGBTQI+ abuses, a victim of political persecution from Senegal, an illiterate man from Nicaragua fearing torture by Nicaraguan authorities, a Chinese pro-democracy dissident, and a victim of religious persecution from Egypt.[121]

Empowering AOs to apply the bars to further thwart these asylum seekers from accessing

---

https://immigrantjustice.org/staff/blog/obstructed-legal-access-june-2023-update; NIJC, *Government Obstruction Forces NIJC to Discontinue Legal Consultations for People Facing Asylum Screenings in CBP Detention* (Aug. 1, 2023), https://immigrantjustice.org/press-releases/government-obstruction-forces-nijc-discontinue-legal-consultations-people-facing.

[118] 89 Fed. Reg. at 41354.

[119] Stephanie Leutert and Caitlyn Yates, *Asylum Processing at the U.S.-Mexico Border: May 2024*, 3, https://www.strausscenter.org/publications/asylum-processing-at-the-u-s-mexico-border-may-2024/; *id*. at 7 ("In one case, kidnappers captured a family and demanded more than US$1,000 per person after confirming that the family had CBP One appointments."); Christina Asencio, "Trapped, Preyed Upon, and Punished," *Human Rights First* (May 7, 2024), 4, https://humanrightsfirst.org/wp-content/uploads/2024/05/Asylum-Ban-One-Year-Report_final-formatted_5.13.24.pdf ("Human Rights First has tracked reports of over 2,500 survivors of kidnapping, torture, rape, enforced disappearance, extortion, and other violent attacks against asylum seekers and migrants stranded in Mexico since the asylum ban took effect. As detailed below, and in our October 2023 report, this violence has risen sharply since the asylum ban was initiated.").

[120] *See* Asencio, *supra* n. 119, at 12.

[121] *See* Asencio, *supra* n. 119, at 24-26.

protection defies basic principles of fairness.[122] Individuals and families subject to the CLP Asylum Ban and this Proposed Rule, were it to become final, would face nearly insurmountable barriers to present their asylum claim.

ii. Finalizing this rule would disparately penalize some asylum seekers based on their race, nationality, religion, or LGBTQ or disability status.

The client examples we have cited across Section 3(a) have overwhelmingly included Black and Brown asylum seekers, whom DHS officials wrongfully perceived as security risks or dangers. This rule hinges on the discretion of DHS officers to decide when to apply security and conduct-based bars to asylum eligibility at the CFI / RFI stage, and when not to. Leaving this decision to DHS personnel who are forced into rushed decision making —while asylum seekers are deprived of support, representation, or freedom—raises a significant risk of biased and unjust outcomes. Indeed, DHS officials are not immune to race-based, nationality-based, or religion-based bias when it comes to categorizing certain individuals as dangers or terrorists.[123]

Furthermore, this bar would disparately punish individuals who are wrongfully criminalized by their governments. This includes LGBTQ asylum seekers wrongfully charged, arrested, or convicted due to anti-LGBTQ animus in their home country. For example, NIJC client Marcus was repeatedly raped by gang members, then forced to transport drugs for that gang in his anus. The gang chose him as their victim because of his sexual orientation. Because the people of his country, including the police, are violently homophobic, reporting such abuse was not an option for him. He was prosecuted and convicted for the role he played in the drug transportation. While the activities that led to his prosecution were part of the persecution he experienced, that was not evident on the face of the conviction itself.

In another case, NIJC worked with Donovan, a Jamaican man whose sexual orientation was discovered by some neighbors. Seizing on the homophobic trope that gay men are sexual predators, these neighbors threatened to accuse him of molesting their children unless he paid them a bribe. He fled to the United States, and those neighbors made good on their threat. Their accusations were published in a newspaper, which the police read, and created a criminal charge against him—all in absentia. The police published a Red Notice, and only after advocacy from multiple lawyers, was that Red Notice successfully challenged.

The Proposed Rule would also prejudice individuals from certain countries where improper (and even sham) prosecutions are levied against citizens to repress opposition. For example, the

---

[122] 89 Fed. Reg. at 41357.

[123] Katie Welch, *Race, Ethnicity, and the War on Terror*, Oxford Research Encyclopedias, Criminology and Criminal Justice (July 29, 2019), https://doi.org/10.1093/acrefore/9780190264079.013.335.

Salvadoran police frequently arrest people to meet quotas and crush dissent. Bukele's attacks have not spared the media. Former Salvadoran police officer Marvin Reyes narrowly escaped arrest by the Salvadoran authorities for denouncing a pattern of arbitrary detentions; he reflected on El Salvador's use of arrests: "This is a clear political persecution of dissident voices that point out aspects of corruption, of crimes being committed by public security institutions. They can invent anything, they can take you to jail, and from there you can come out dead."[124] Were this NPRM to become final, wrongfully arrested Salvadorans could systematically be barred from asylum during their fear screenings, returning them to the same repressive government they sought to escape.

A similar outcome could befall individuals with certain mental illnesses, depending on their countries of origin. NIJC has represented numerous clients from countries where people with pronounced mental health conditions face arrest, persecution, and physical abuse because of bias in these countries against people with mental health conditions. If clients with these conditions seek asylum after having been jailed for their mental health conditions in their home countries, the Proposed Rule would create an inappropriate risk that these arrests could be wrongly used as the basis for making a negative credible or reasonable fear finding. With this Proposed Rule, DHS puts its thumb on a scale that already tips in favor of rushed removal as it layers additional bars on a fundamentally flawed system. It remains unclear how EOIR would interact with this Proposed Rule, were it to become final—infusing even more confusion into an already precarious process for impacted asylum seekers.

b) Were this Proposed Rule to become final, the risk of refoulement cannot be overstated.

As the Supreme Court recognized over 30 years ago, "[i]f one thing is clear from the legislative history . . . of the [Refugee Act], it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Refugee Protocol] to which the United States acceded in 1968."[125] Under the Refugee Protocol, the U.S. may not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social

---

[124] Zedryk Raziel, "Bukele's state of emergency as an instrument to crush dissention," *El País International* (Oct. 10, 2023), https://english.elpais.com/international/2023-10-10/bukeles-state-of-emergency-as-an-instrument-to-crush-dissention.html.

[125] *INS v. Cardoza-Fonseca*, 40 U.S. 421, 436-37 (1987); *see also INS v. Stevic*, 467 U.S. 407, 426 n.20 (1984) (With the Refugee Act, Congress intended to make "U.S. statutory law clearly reflect[ ] our legal obligations under international agreements."); *see also Sale v. Haitian Centers Council,* 509 U.S. 155, 178 (1993) ("[T]he history of the [Refugee Act] does disclose a general intent to conform our law to Article 33 of the [Refugee Protocol]").

group or political opinion."[126] Indeed, Congress adopted essentially identical language to that contained in Article 33 of the Refugee Protocol.

However, the NPRM would permit AOs to violate the *non-refoulement* mandate, so long as an "indicia" of the five bars is present. As we explained, the five bars DHS proposes to apply in CFIs and RFIs are factually and legally complex. Asylum seekers already subject to the CLP Asylum Ban would face layered, invisible burdens without the support they need to meet their burden, and many would have to do so within just one day of their entry into the United States while detained in CBP custody with zero access to legal representation. As stated in Section 3(a), this is particularly concerning as the findings for the bars frequently overlap with an individual's account of their persecution—and the law remains vague or unclear as to what defenses they could assert. Nonetheless, DHS make passing references to the U.S. obligations not to refoule individuals under international law[127] and offers no substantive review of the risks of this proposal to return people to harm in violation of this legal obligation.

c) This Proposed Rule could lead to family separations, harming already vulnerable children and their families.

Two years ago, NIJC urged DHS to reckon with the fact that family separation is endemic to U.S. immigration policy unless and until DHS takes urgent steps to center family unity in all its programs and policies.[128] This NPRM illustrates that DHS did not heed that warning. Though expedited removal impacts parents and their children, DHS makes no reference of the implications of improper applications of the five bars on family unity. This omission is staggering, though not unusual for an agency that has continuously prioritized punishment over fairness for children and adults alike.

Under the Biden administration, NIJC represented Felipe and his mother Victoria, who were separated for over six months while Felipe was 10 years old. Victoria and Felipe had come to seek asylum in the United States. However, DHS officials separated them based on false allegations that Victoria was associated with armed groups in their country. It took half a year of advocacy from multiple NIJC attorneys, a complaint with DHS' Civil Rights and Civil Liberties, a public campaign, strenuous advocacy with DHS headquarters, and a deep-dive press story for

---

[126] Convention Relating to the Status of Refugees art. 33, cl. 1, Jul. 28, 1951, 189 U.N.T.S. 137.

[127] 89 Fed. Reg. at 41348, 41356.

[128] NIJC, *Re: Recommendations To Support the Work of the Interagency Task Force on the Reunification of Families ("Notice"); Docket No. DHS-2021-0051* (Jan. 19, 2022), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2022-01/Family-separation-policies-NIJC-comment-2022-01-19.pdf.

this family to reunite—though not before Felipe "celebrated" his 11th birthday alone in federal custody.[129]

This rule would layer even more harms on families such as Felipe's. If CBP had not separated them already, USCIS could—by applying the serious nonpolitical crime, terrorism or security bars on Victoria as a principal asylum applicant during the family's CFI. The unfounded character of these allegations would matter little so long as AOs could rely on some "indicia" that the bar applies. Suddenly, Victoria's AO would erect an invisible barrier: she would now have to surmount the presumption of guilt the AO applies to her, in a foreign legal system and language. Predictably, Victoria would fail to persuade the AO not to apply any of the aforementioned bars to her case, leading to a negative finding. Felipe would either face expedited removal with his mother, or have to prepare his own asylum claim—with his key witness, his mother, detained or deported. DHS justifies this unconscionable outcome by recording that Victoria posed a "public safety and national security risk[]" and did not have a meritorious asylum claim—all based on unreliable evidence Victoria could have vigorously disputed had she been transferred, as Congress would require, to 240 proceedings.[130]

Felipe and Victoria's fate under the NPRM would not be an anomaly. NIJC has represented many more parents and children who have faced forced separations over unfounded allegations. Above in this comment and below are a few examples:

- NIJC client Claudia fled her home country with her three-year-old son after surviving physical and sexual violence at the hands of gang members. When she entered the United States in 2019, immigration officials separated her from her child on the basis of allegations of a criminal history shared by the government of her country of origin. Claudia was finally released from government custody and reunited with her child only after her NIJC attorneys obtained proof obtained by a lawyer in her home country that the charges against her were bogus, and she was a victim of crime, not a perpetrator. Had this new rule been in place when Maria arrived, she would have been swiftly deported back to harm, without any opportunity to obtain the evidence she needed to ensure hers and her child's safety here in the United States.

---

[129] NIJC, *RE: Request for investigation into separation of tender age child from his mother and father during border processing* (Sept. 29, 2022), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2022-11/CRCL-Complaint-Request-Investigation-Family-Separation-Redacted-2022-11-18.pdf; Anna-Catherine Brigida and John Washington, *Biden is still separating immigrant kids from their families*, Texas Observer (Nov. 21, 2022), https://www.texasobserver.org/the-biden-administration-is-still-separating-kids-from-their-families/; Jesse Franzblau, *Biden Administration Must Stop Family Separations, Starting with Reuniting 11-Year-Old Felipe and His Parents*, NIJC (Nov. 21, 2022), https://immigrantjustice.org/staff/blog/biden-administration-must-stop-family-separations-starting-reuniting-11-year-old-felipe.

[130] 89 Fed. Reg. at 41358.

- Esperanza is a single mother from Central American who was falsely accused of gang affiliation after police interrogated her about gang members who had run through her yard. Though she did not know the gang members and had no useful information to share with the police, they filed criminal charges against her. Before she became aware of the charges, she was beaten severely by gang members who believed she had reported them to the authorities. She fled to the United States with her young son, from whom she was separated at the border. U.S. officials discovered the baseless criminal charges against her in El Salvador. It was not until NIJC attorneys worked with a lawyer in El Salvador to clear her name that she was able to reunify with her son and proceed with her asylum claim outside of detention.

- NIJC represented Angela, a Salvadoran woman who was forced into a relationship with a gang member who required that she carry drugs for him, under threat of death to her and her young daughter. When she asked Salvadoran officials for help, they filed criminal charges against her. After serving a criminal sentence for crimes she was coerced into committing, she fled to the United States because the gang intended to punish her for disclosing their activity. At the border, she was separated from her daughter because of the Salvadoran criminal conviction. She was only able to fight her case for asylum because her NIJC attorneys worked with her attorney in El Salvador to explain her record.

Many years of family separation should have taught DHS not to neglect the impact of its policies and regulations on children. Nevertheless, this NPRM ignores this impact and layers more harm on already vulnerable families.

Conclusion

Despite DHS' representation, this Proposed Rule would constitute a foundational shift in the U.S. asylum system, breaking with decades of reasoned restraint not to apply complex asylum bars during initial screenings. NIJC urges the Departments to withdraw this Proposed Rule and comply with domestic and international obligations to afford every individual and family access to asylum without exception.

Thank you for your consideration of this comment and the numerous forthcoming exhibits attached to it, which NIJC incorporates by reference throughout. Please do not hesitate to contact Azadeh Erfani for further information.

/s/
Azadeh Erfani
Senior Policy Analyst
On behalf of the National Immigrant Justice Center
aerfani@immigrantjustice.org