



International Refugee
Assistance Project

June 12, 2024

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

Submitted via:

<https://www.regulations.gov>

Re: Comment on *Application of Certain Mandatory Bars in Fear Screenings*

RIN: 1615-AC91; DHS Docket No. USCIS-2024-0005

Dear Director Daniel Delgado:

The International Refugee Assistance Project (IRAP) respectfully submits this comment **in opposition** to the U.S. Department of Homeland Security (DHS) Notice of Proposed Rulemaking and Request for Comment on *Application of Certain Mandatory Bars in Fear Screenings*, DHS Docket No: USCIS-2024-0005, 89 Fed. Reg. 41347 (“the NPRM” or “the proposed rule”), published in the Federal Register on May 13, 2024.¹

IRAP urges the Department to withdraw the proposed rule in its entirety on account of:

- DHS’s **failure to provide adequate notice** by enacting simultaneous changes to the regulatory framework without explaining how they interact, impermissibly dividing the comment periods, and failing to explain how it plans to implement the rule;
- DHS’s **failure to explain the reversal of its own prior policy**, providing no rational basis for its conclusion that considering the applicability of the asylum bars at the fear screening stage is now beneficial and permissible because it is discretionary, when it was improper and inefficient in 2022; and
- DHS’s **failure to adequately explain the reasoning behind the proposed rule** and to establish a rational connection between the facts found and policy choices made, specifically with respect to the rule’s efficiency goals, impact on other government agencies, public safety, and risk of erroneous decisions.

¹ DHS, *Application of Certain Mandatory Bars in Fear Screenings*, 89 Fed. Reg. 41347, 41351 (11 May 2024), <https://www.govinfo.gov/content/pkg/FR-2024-05-13/pdf/2024-10390.pdf> [accessed 12 June 2024] [hereinafter “Proposed Rule”].



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Interest in the Proposed Rule

IRAP provides comprehensive legal services to refugees and displaced persons. **The proposed rule will adversely impact IRAP clients individually, IRAP's mission to expand access to protection, and IRAP's ability to continue to provide legal services to individuals encountered on the U.S. Southwest Border.**

Since our establishment, we have provided legal assistance to thousands of displaced persons seeking legal pathways from conflict zones to safe countries. IRAP provides pro bono legal representation, legal advice, and expert referrals to refugees all over the world.

IRAP's goal is to ensure that available services and legal protections reach those who are most in need. Our clients include LGBTI individuals, religious minorities subject to targeted violence, survivors of sexual and gender-based violence, children with medical emergencies for which local treatment is not available, and interpreters being targeted by the Islamic State, militias, and the Taliban in retaliation for their work with the United States and NATO. Our clients also include individuals who are seeking asylum in the United States and individuals in the United States who are seeking family reunification with members of their family still outside of the country.

Of particular relevance to the NPRM, IRAP partners with Derechos Humanos Integrales en Acción, A.C. (DHIA), a Mexican non-governmental organization, to provide services to migrants in Ciudad Juárez and elsewhere across Mexico who are seeking legal information and representation; IRAP has also worked with Las Américas Immigrant Advocacy Center (LAIAC) to provide credible fear interview (CFI) preparation to individuals in detention near the Southwestern border and with others in providing CFI preparation to individuals enrolled in the Family Expedited Removal Management (FERM) program. Through advising individuals seeking asylum about the CFI process and their longer-term goals of obtaining legal protection in the United States, IRAP has seen the ways in which many asylum seekers would be harmed – and *bona fide* claims denied – by the consideration of the applicability of bars to asylum without access to counsel or expert testimony at a fear screening stage.

DHS's Notice of Proposed Rulemaking

I. Proposed Changes under the NPRM

The Application of Certain Mandatory Bars in Fear Screenings rule proposes to afford asylum officers the discretion to consider during the credible and reasonable fear interview

stage² the applicability of the five national security and public safety mandatory bars to asylum, found at INA Section 208(b)(2)(A)(i) through (v).³ Until now, analysis of these bars has been reserved for the merits stage of adjudication rather than the preliminary protection screening stage, consistent with UNHCR Guidelines⁴ and U.S. law.⁵

The mandatory bars are relevant to asylum and withholding of removal, not to protection under the Convention Against Torture (CAT).⁶ As a result, and because most people afforded a fear interview will be ineligible for asylum based on the Circumvention of Lawful Pathways rule (CLP)⁷ and the Securing the Border Interim Final Rule (IFR), discussed below, **the primary impact of the NPRM will be on noncitizens' ability to pass a fear screening in order to pursue withholding of removal.**

The NPRM provides that asylum officers may consider the applicability of the mandatory bars in the context of reasonable fear screenings under 8 CFR 208.31(c) for individuals subject to final orders of removal or reinstatement of removal as well.⁸ The NPRM also provides that screenings may be conducted with respect to the "identified country or countries of removal,"⁹ meaning the screening may analyze the fear of persecution with respect to a country that is not the original country the noncitizen fled.

² In this comment, references to "credible fear interviews" include "reasonable fear interviews," unless inapplicable, consistent with the NPRM. References to "fear screenings" encompass both credible and reasonable fear, as appropriate.

³ The NPRM excludes the firm resettlement bar at Section 208(b)(2)(A)(vi) and the asylum ineligibility grounds found at Section 208(a)(2).

⁴ UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, <https://www.refworld.org/policy/legalguidance/unhcr/2003/en/14733> [accessed 12 June 2024] [hereinafter "UNHCR Guidelines"].

⁵ 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, 18109 (29 March 2022), <https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat> [accessed 12 June 2024]; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., § 302, 110 Stat. 3009-546, 579 (1996) (codified as amended at 8 U.S.C. § 1225(b)(1)(B)).

⁶ Proposed Rule at 41355.

⁷ DHS and DOJ, *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31 314 (11 May 2023) <https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways> [accessed 12 June 2024] [hereinafter CLP Rule].

⁸ Proposed Rule at 41351.

⁹ Proposed Rule at 41356.

If the officer opts to consider the applicability of the bars and concludes that the noncitizen does not establish by a preponderance of the evidence a significant possibility that a bar would not apply (in the asylum-eligible context) *or* a reasonable possibility of the same (in the withholding context) *and* concludes that the noncitizen is not able to establish a reasonable possibility of torture, then the officer may enter a negative fear of persecution determination, for which the noncitizen may seek immigration judge review.¹⁰

II. Purposes of the Proposed Changes under the NPRM

DHS asserts multiple purposes for the proposed changes under the NPRM: increasing efficiency and operational flexibility to rapidly remove noncitizens “who present national security or public safety threats,”¹¹ improving national security and public safety, reducing burdens on DHS and DOJ agencies, and promoting the CLP goals to deter land migration.¹²

DHS anticipates achieving these objectives by authorizing asylum officers to exercise their judgment to select when to consider the applicability of asylum bars at the fear screening stage in order to issue negative fear determinations on the basis of a bar, rather than to flag the potential bar for DHS Immigration and Customs Enforcement (ICE) to review and for Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) to adjudicate at a later stage of proceedings, as has been the practice until now.¹³

The proposed rule is meant to improve efficiency for other agencies, including ICE Office of the Principal Legal Advisor (OPLA), ICE Enforcement and Removal Operations (ERO), and EOIR by increasing asylum officers’ authority to dispose of cases where a bar could apply, before a noncitizen has the chance to proceed in their standard or expedited removal proceedings, thereby reducing the number of cases on each of the aforementioned agency’s dockets and, for ERO, the number of people to detain or monitor.

In sum, the purpose of the rule is to expeditiously remove as many people as possible “at the earliest stage possible” who will not ultimately prevail on their asylum, withholding, or CAT claim¹⁴; and to increase the ostensible deterrent effect and actual penalties for people who do not use the CBP One mobile application or other lawful pathway (aside from seeking asylum) to enter the United States.¹⁵

¹⁰ Proposed Rule at 41355-41357, 41349.

¹¹ Proposed Rule at 41352.

¹² Proposed Rule at 41351-52.

¹³ Proposed Rule at 41360.

¹⁴ Proposed Rule at 41351.

¹⁵ *Id.*

ARGUMENT

III. Outline of Argument

IRAP objects to the NPRM for the following reasons.

First, DHS has failed to provide adequate notice to the public, both due to the truncated, 30-day comment period and **due to DHS making other simultaneous changes to the regulatory infrastructure without explaining how these changes will interact.**

Second, DHS has failed to explain the reversal of its own prior policy on when the applicability of the asylum bars should be considered. DHS relies on the distinction between always considering the applicability of the bars and discretionarily considering the applicability of the bars – but fails to provide any rational basis to conclude that it is *possible* in practice to predict when consideration of the bars' applicability would be efficient, obviating the key potential difference between the past rule and present one.

Third, DHS has failed to adequately explain the reasoning behind the proposed rule, and there is no rational connection between the facts found and the policy choices made. There is no rational connection between DHS's factual estimates and analysis and its policy choices to increase efficiencies. DHS has failed to provide any rational basis for its conclusory statement that merely because the topic of some mandatory bars is security, the juncture at which the bars' applicability is considered has any bearing on U.S. security.

Fourth, DHS has failed to consider important factors and costs in proposing this rule, including that the rule will cause, and will increase the frequency of, erroneous decisions and refoulement. DHS fails to consider how the proposed rule interacts with other rules published during the 30-day comment period. DHS also fails to consider the impact of the rule on detention times and backlogs; family separation; and burdens on legal service provider organizations like IRAP.

Fifth, DHS has failed to consider reasonable alternatives to reduce burden on DOJ and DHS agencies.

Sixth, DHS has failed to consider serious reliance interests, including on legal services organizations like IRAP that prepare informational materials, employ internal protocols, and deliver client-facing services that are predicated on fear screenings retaining their core characteristic of being a preliminary screening that does not entail adjudication of legally and factually complex legal matters historically reserved for the merits stage.

IV. The agency failed to provide adequate notice to the public, both due to the truncated, 30-day comment period and due to DHS making other simultaneous changes to the regulatory infrastructure without explaining how these changes will interact.

On May 21, 2024, IRAP, along with nearly 80 immigrant rights organizations, urged DHS to provide a minimum 60-day public comment period, consistent with Executive Orders 12866 and 13564, given the significant departure of this NPRM to historical, long-standing practice; the major complexities of the rule's implementation, and the absence of a justification to shorten the comment period.¹⁶ IRAP disputes the proposed rule's rationale for the unreasonable truncated comment period: that the rule is "relatively short," that prior comment periods on other rules suffice for public comment on this one, and that DHS's interest in "operational flexibility" – for the sake of what DHS acknowledges is "a modest, unquantified reduction in strains on limited national resources" – outweighs the value in the standard comment period and renews these arguments.¹⁷

IRAP makes additional inadequate notice arguments here.

A. DHS has failed to provide adequate notice by changing the regulatory landscape during this 30-day comment period, without explaining – or affording an opportunity to comment on – the intersection of these new rules.

In announcing the NPRM and in the month since its publication, the Biden administration has issued several major and intersecting policy changes. The NPRM does not explain how these policies will interact, and a 30-day comment period does not provide the necessary time to analyze in full their implications. In announcing the NPRM, before its publication, DHS issued new policy and procedures on the use of classified information in immigration proceedings¹⁸ and revised guidance on internal

¹⁶ 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://cgrrs.uclawsf.edu/our-work/publications/request-provide-minimum-60-days-public-comment-responsetodepartment-homeland> [accessed 12 June 2024].

¹⁷ Proposed Rule at 41352, 41359.

¹⁸ DHS Policy and Guidelines for the Use of Classified Information in Immigration Proceedings (9 May 2024) <https://www.dhs.gov/publication/dhs-policy-and-guidelines-use-classified-information-immigration-proceedings> [accessed 12 June 2024].

relocation in asylum claims.¹⁹ Both of these policies will bear on the fear screenings in which the NPRM now affords officers discretion to consider the applicability of asylum bars. The use of classified information policy pertains directly to the evidence on which officers rely in assessing the bars' applicability.

Further, on May 31, 2024, DOJ directed the deployment of DOJ and DHS resources to the border to "increase federal immigration-related prosecutions in crucial border U.S. Attorneys' Offices."²⁰ This measure will likely divert DOJ and DHS resources away from other prosecutions nationally that otherwise could address public safety and national security matters, reinforcing the prospect that this cohort of Biden administration actions, including the NPRM, are not in fact guided by public safety or national security concerns but rather by an effort to increase penalties for people who seek protection at U.S. land borders.

The interaction between this prosecutorial policy and the NPRM in the context of other regulatory changes is significant and omitted from the NPRM. The Securing the Border IFR will likely result in an increase of removals, including removals to Mexico rather than countries of origin for certain nationalities. This increase in removals will in turn likely result in an increase in attempted re-entries to the United States, which could now be prosecuted as felony re-entry charges at a greater scale under the DOJ directive. It is in this context that the NPRM would afford officers' discretion to consider the applicability of the asylum bars in the reasonable fear screenings – without any analysis of the confluence of policy effects.

1. Presidential Proclamation and Interim Final Rule on Securing the Border

Most critically, the Securing the Border IFR, published four business days before the end of this NPRM's 30-day comment period, changes the regulatory landscape of this NPRM, and DHS has failed to explain how these policies will interact. On June 4, 2024, the White House issued a Presidential Proclamation on Securing the Border, signed on June 3, 2024,²¹ and an associated Securing the Border IFR, in effect as of June 5, 2024, and

¹⁹ DHS Announces Proposed Rule and Other Measures to Enhance Security, Streamline Asylum Processing (9 May 2024)

<https://www.dhs.gov/news/2024/05/09/dhs-announces-proposed-rule-and-other-measures-enhance-security-streamline-asylum> [accessed 12 June 2024].

²⁰ Justice Department Expands Efforts to Dismantle Human Smuggling Operations and Support Immigration Prosecutions (31 May 2024)

<https://www.justice.gov/opa/pr/justice-department-expands-efforts-dismantle-human-smuggling-operations-and-support> [accessed 12 June 2024].

²¹ The White House, A Proclamation on Securing the Border (4 June 2024)

<https://www.whitehouse.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border/> [accessed 12 June 2024].

published on June 7, 2024.²² The IFR suspends entry to the U.S. southwest land and southern coastal borders based on certain average total encounter numbers; eliminates access to asylum except in even narrower circumstances than under the CLP; raises the legal standard for withholding of removal and CAT protection; requires noncitizens to manifest fear to be screened for any protection; and reduces access to counsel.²³

Thus, under the policy in place at the close of the NPRM’s 30-day comment period, the vast majority of asylum seekers will never be screened for any form of protection. Those who surmount the proliferating hurdles to receive a fear screening will be eligible in almost all cases only for statutory withholding of removal or protection under CAT.²⁴ The legal standard to pass a fear interview to be permitted to apply for withholding of removal or CAT will be higher than ever, and asylum officers will have the new authority to consider the applicability of a mandatory bar as the basis of issuing a negative determination. Individuals who manage to obtain a fear interview will have virtually no access to legal advice or representation.²⁵ The NPRM fails to mention, let alone analyze and justify, this panoply of changes that now constitute the regulatory landscape in which the proposed rule would take effect.

2. The chasm between the CLP and IFR highlights the impermissibility of the NPRM failing to consider the impact of the IFR on the NPRM and of depriving commenters of the opportunity to analyze their interaction.

²² DHS, Securing the Border, 89 Fed. Reg. 18710 (June 7, 2024) <https://www.federalregister.gov/public-inspection/2024-12435/securing-the-border> [accessed 12 June 2024] [hereinafter “IFR”].

²³ IFR at 48711, 48718; “Scoop: the Biden administration is cutting the guaranteed time migrants to consult an attorney for their initial asylum screenings from at least 24 hours to 4 hours, per an internal email that went out to asylum officers tonight.” (4 June 2024) <https://x.com/Haleaziz/status/1798145351708516729> [accessed 12 June 2024].

²⁴ AILA, Policy Brief: Analysis of Proclamation and Interim Final Rule on “Securing the Border,” AILA Doc. No. 24060510 (5 June 2024) <https://www.aila.org/library/policy-brief-analysis-of-proclamation-and-interim-final-rule-on-securing-the-border> [accessed 12 June 2024] [hereinafter “Joint Analysis of Biden Border Proclamation”].

²⁵ ICE, Implementation Guidance for Noncitizens Described in Presidential Proclamation of June 3, 2024, *Securing the Border*, and Interim Final Rule, *Securing the Border* (4 June 2024) https://drive.google.com/file/d/1jedC-2TzM0wzDaKWy4F_y7niS1fFkbhj/view [accessed 12 June 2024].

The NPRM and IFR each only consider comments on the particular rule at hand – and the comment periods are impermissibly divided.²⁶ **Two policies that DHS has proposed essentially simultaneously require commenters to comment on them separately, with no opportunity to discuss their interaction. Further, commenters cannot know the final rule with respect to either one before they must comment on the other.**²⁷

The NPRM describes its interplay with the CLP. However, since June 5, 2024, the IFR, not the CLP, controls when the suspension on entry is in effect, which is expected to be indefinite based on recent border encounter numbers.²⁸ **Thus, the NPRM provides no analysis of the relevant governing standards and processes at the time that this comment is due and, absent a policy or legal change, at the time that the NPRM will go into effect.**

The NPRM's discussion of its interaction with the CLP underscores the problems with DHS's failure to analyze the NPRM's interaction with the IFR. The IFR now governs – and it establishes different exceptions, procedures, and legal standards than the CLP, rendering certain aspects of the NPRM unmoored from the new controlling policy framework.

First, the CLP applies a rebuttable presumption of asylum ineligibility to noncitizens encountered between ports of entry who do not meet an exception.²⁹ However, under the IFR, during the indefinite suspension on entry,³⁰ non-citizens who are not excepted from the suspension on entry are barred from asylum eligibility **without the exceptions or rebuttable presumption process afforded under the CLP.**³¹

²⁶ Proposed Rule at 41347 (“Written comments on the proposed rule must be submitted on or before June 12, 2024. . . . You may submit comments on the entirety of this proposed rule package, identified by DHS Docket No. USCIS–2024–0005, through the Federal eRulemaking Portal at <https://www.regulations.gov>.”); IFR at 48710 (“Comments must be submitted on or before July 8, 2024. . . . You may submit comments on this IFR, identified by USCIS Docket No. USCIS–2024–0006, through the Federal eRulemaking Portal: <https://www.regulations.gov>.”).

²⁷ Id.

²⁸ Seung Min Kim et al, Biden Rolls Out Asylum Restrictions, Months in the Making, to Help ‘Gain Control’ of the Border (5 June 2024), <https://apnews.com/article/biden-asylum-migration-immigration-mexico-border-dec5f83b468b5795479bf1f5e49799d5> [accessed 12 June 2024]; Adam Isacson, The Futility of “Shutting Down Asylum” by Executive Action at the U.S.-Mexico Border, Washington Office on Latin America (4 June 2024) <https://www.wola.org/analysis/futility-of-shutting-down-asylum-by-executive-action-us-mexico-border/> [accessed 12 June 2024].

²⁹ CLP Rule at 31314.

³⁰ DHS, Securing the Border: Presidential Proclamation and Rule: Border Status: Entry Suspended for Certain Noncitizens as of June 5, 2024, per Presidential Proclamation” (last updated 6 June 2024) <https://www.dhs.gov/immigrationlaws> [accessed 12 June 2024].

³¹ Joint Analysis of Biden Border Proclamation.

Second, under the IFR, unlike the CLP, to be provided a fear screening at all an officer must recognize that an individual has “manifested or expressed” a fear of return affirmatively. Officers will no longer ask protection questions as a matter of course. As a result, it is anticipated that most people will never be screened for fear of return.³²

Third, the IFR elevates the legal standard to qualify for withholding of removal or CAT from “reasonable possibility” to “reasonable probability,” which is the higher standard previously reserved for the merits stage of adjudication.³³ The IFR provides that this heightened “reasonable probability of persecution” standard is “defined to mean substantially more than a ‘reasonable possibility’ but somewhat less than more likely than not.”³⁴ This change in legal standard effected by the IFR raises the obvious question of whether the NPRM – whose legal standard of significant or reasonable “possibility” that a noncitizen could establish by a preponderance of the evidence that a given bar would not apply, which is consistent with the CLP legal standard – will now contain an incongruous standard with the IFR, or whether the proposed rule will change its proposed standard to conform to the IFR.

3. The controlling and superseded border policies with which the NPRM interacts are not settled, which the NPRM fails to explain, consider, or provide an opportunity for the public to comment on.

If the Presidential Proclamation’s suspension on entry is not in effect, if the individual meets a rare exception to it, or if the IFR is enjoined at a future date, then the CLP rule would return to being the primary policy context in which the NPRM is effected. Yet the CLP rule itself is the subject of litigation with a stay of the order blocking the CLP enabling it to be in effect during the appeal process.³⁵ If the CLP ceases to be in effect, or in such instances where noncitizens are excepted from the suspension on entry if it is in place *and* are excepted from the CLP or rebut the presumption under the CLP, the applicability of the NPRM would remain intact, absent some other change. The NPRM fails to analyze this scenario, in which asylum officers would be authorized to consider the applicability of the asylum bars in the context of far greater asylum eligibility than currently exists.

³² Id.

³³ Proposed Rule at 41355-56.

³⁴ IFR at 48718.

³⁵ National Immigrant Justice Center, *East Bay Sanctuary Covenant v. Biden* (4 August 2023) https://immigrantjustice.org/court_cases/east-bay-sanctuary-covenant-v-biden [accessed 12 June 2024]; National Immigrant Justice Center, *MA v. Mayorkas* (20 September 2023) https://immigrantjustice.org/court_cases/ma-v-mayorkas [accessed 12 June 2024].

The foregoing are non-exhaustive examples of DHS’s failure to provide adequate notice to the public of its proposed rule on account of the agency’s making simultaneous changes to the regulatory infrastructure without explaining how these changes will interact, made worse by the 30-day comment period impermissibly divided from the IFR’s comment period. In sum, at the time that the proposed rule goes into effect, it is in this labyrinthine legal and procedural context that only those individuals who successfully manifest fear will receive a fear screening – almost always to be considered only for withholding of removal or CAT protection, with newly elevated standards – and now will face the prospect of defending, almost always without access to counsel, against the applicability of the asylum bars, if the officer opts to consider it.³⁶ Further, it is in this new, evolving, and variegated context that officers will be expected to divine *ex ante*, without any guidance or realistic examples, in which cases the applicability of a potential asylum bar flag is *efficient and fair* to consider at the fear screening stage.

B. DHS has failed to provide a rational basis to believe that the abbreviated comment period is warranted on public safety grounds.

DHS asserts that the 30-day comment period is warranted to more expeditiously “provide an additional tool to more promptly remove noncitizens who pose public safety and national security risks.”³⁷ Yet not a single line in the NPRM describes the risks posed by noncitizens who pass their fear screenings while officers flag a potential bar. The NPRM does not provide any explanation for how the rule improves public safety. Instead, the NPRM makes an illogical leap from the question of when the applicability of the asylum bars are considered to the question of improvements in actual security.

CBP and ICE detention policies are the mechanism to account for these risks among those encountered at the U.S. Southwest Border.³⁸ The agencies employ measures to evaluate

³⁶ National Immigrant Justice Center, Biden Executive Action Further Eviscerates the Right to Seek Asylum: Frequently Asked Questions about the Latest Anti-Immigrant Policy (5 June 2024) <https://immigrantjustice.org/staff/blog/new-biden-executive-action-further-eviscerates-right-seek-asylum-frequently-asked> [accessed 12 June 2024].

³⁷ Proposed Rule at 41358.

³⁸ ICE, Detention Standards, <https://www.ice.gov/detain/detention-management> [accessed 12 June 2024] (“When a noncitizen is not subject to mandatory detention or is not deemed to be a public safety or flight risk, ICE exercises its discretion in making custody determinations to release noncitizens with conditions. These custody decisions are made on a case-by-case basis and after considering the totality of circumstances — primarily considering risk of flight, national security threat and risk to public safety.”) [hereinafter “ICE Detention Standards”].

public safety and national security risks in making custodial determinations apart from the outcome of a fear determinations, including where an asylum officer flags a potential bar.

C. DHS has failed to provide adequate notice given the complexity of the rule.

The “relatively short” page count of the NPRM does not render its contents straightforward, as the foregoing analyses demonstrate.³⁹ Moreover, the NPRM contains novel and unclear aspects that reinforce the inadequacy of a 30-day comment period. For example, the NPRM authorizes asylum officers to begin considering the applicability of the Asylum Eligibility and Public Health rule provisions under the proposed rule, as a dimension of a security bar analysis, whenever the proposed rule goes into effect – even though the Public Health rule otherwise may not go into effect until December 31, 2024.⁴⁰ These are amorphous, far-reaching policy changes without an adequate opportunity to analyze their impact.

D. DHS has failed to provide adequate notice because it does not explain how it plans to implement the rule.

DHS fails to provide adequate notice during this abbreviated comment period by failing to explain *how* officers will be able to predict when consideration of the asylum bars’ applicability would be efficient. Instead, the NPRM merely repeats the tautological assertion that the efficiency gain will occur because officers, perhaps through omniscience, will only consider the bars’ applicability where doing so would be efficient.

For example, the NPRM states repeatedly that officers should only consider the bars’ applicability when they are: “*confident that they can address that bar efficiently* at the credible fear or reasonable fear interview,”⁴¹ “*based on the individual facts and circumstances of an applicant’s case and based on information available to the asylum officer*,”⁴² “*in those cases for which doing so is likely to be an efficient and appropriate use of resources*,”⁴³ “*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,”⁴⁴ when “*the evidence in the record may be such that it would be more efficient to base a negative credible fear of persecution determination on a mandatory bar*,”⁴⁵ “*if*

³⁹ Proposed Rule at 41358.

⁴⁰ *Id.*

⁴¹ Proposed Rule at 41352.

⁴² Proposed Rule at 41354.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Proposed Rule at 41357.

*the evidence in the credible fear record is such that a USCIS AO could effectively and efficiently apply a mandatory bar,*⁴⁶ and “[w]here it is evident that a noncitizen in the credible fear process who is subject to the CLP rule and cannot show a reasonable possibility of persecution is subject to a mandatory bar to withholding of removal that would prevent that individual from ultimately being able to receive that form of relief from an immigration judge, but the noncitizen can nonetheless potentially establish a reasonable fear of persecution, it would be ineffective, inefficient, and thwart the underlying goals of the CLP rule to still allow that individual to be placed in regular INA 240 removal proceedings.”⁴⁷

Yet the NPRM never states what would constitute such “obvious” evidence, facts, circumstances, or information.⁴⁸ The NPRM never provides practical examples of fact patterns rendering the consideration of the bars’ applicability efficient. The NPRM never explains in principle how an officer could intuit that the consideration of the bars’ applicability would be efficient without taking the time to conduct the whole analysis.

Recall that the question is not “what facts, circumstances, information, or evidence could make an officer confident that a bar could apply,” but rather “what facts, circumstances, information, or evidence could make an officer confident both that a bar could apply *and* that there is not a significant possibility (or reasonable possibility or reasonable probability, if the NPRM is revised to conform with the IFR) that the applicant could show by a preponderance of the evidence that the bar does not apply.”⁴⁹ The NPRM omits any explanation or example of how officers could reach such a conclusion without engaging in a time-intensive inquiry on some of the most complex and disputed dimensions of asylum law that would obviate any ostensible efficiency gains.

Therefore, in the absence of any explanation or evidence of how officers would magically ensure the bars applicability are only considered where it would be efficient to do so, and given the reality of how convoluted (even subject to litigation) the rules are, DHS offers no rational basis to conclude that the discretionary consideration of the bars’ applicability would mitigate the inefficiencies the Department previously recognized attach to consideration of the bars’ applicability at the fear screening stage, as discussed below.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Proposed Rule at 41343 FN 29.

⁴⁹ Proposed Rule at 41354.

V. DHS has failed to explain the reversal of its own prior policy.

Just two years ago, DHS and DOJ concluded that “applying the mandatory bars during all credible fear screening interviews would make those credible fear screenings less efficient, which could jeopardize the ability to use expedited removal, undermine Congress’s intent that the expedited removal process be swift, and undermine procedural fairness.”⁵⁰ DHS now reverses course, distinguishing the NPRM solely on the basis that now officers will have discretion over when to consider the bars’ applicability.

The NPRM suggests that the reversal of its prior policy is reconcilable because the NPRM’s authorization of officers’ consideration of the bars’ applicability at the fear stage is “permissive.”⁵¹ Yet without explaining how officers could predict when consideration of the bars’ applicability would be efficient, DHS provides no rational basis to conclude that whenever an officer opts to consider the bars’ applicability, it would not cause the very inefficiencies DHS previously recognized. As DHS and DOJ stated in 2022: “Because of the complexity of the inquiry required to develop a sufficient record upon which to base a decision to apply certain mandatory bars, *such a decision is, in general and depending on the facts, most appropriately made in the context of a full merits interview or hearing, whether before an asylum officer or an IJ, and not in a screening context*” (emphasis added).⁵²

In the absence of any explanation of how officers could know when such consideration is efficient in practice – in the context of the cases that actually arise at the U.S. Southwest Border – there is no rational basis to conclude that the “permissive” consideration of the bars’ applicability at the fear stage will mitigate or avoid the inefficiencies DHS already acknowledged. Without a roadmap to identify the exception to the rule – or even evidence that such exceptions to the rule are knowable without engaging in a time-intensive inquiry – DHS attempts to explain its policy reversal through wishful thinking.

A. The NPRM provides no rational basis to conclude that it is possible for officers to divine when consideration of the bars’ applicability would be efficient.

⁵⁰ Proposed Rule at 41353; 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. 18093-94, 18134-35 (29 March 2022) <https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat> [hereinafter “Asylum Processing IFR”].

⁵¹ Proposed Rule at 41354.

⁵² Asylum Processing IFR at 18093.

The NPRM harps on the distinction between asylum officers being required to consider the bars at the fear screening stage, as proposed previously,⁵³ and being afforded the opportunity to do so at their discretion only in cases where they prophesy that such consideration would be fair and efficient before spending the time to delve into all the nuances of the case. But this is a distinction without a difference.

The NPRM provides no explanation as to *how* an officer would foretell which fear screenings – of the type that actually occur, of noncitizens of countries that are actually apprehended at the U.S. Southwest Border – that give rise to a bar flag are ones where it would be efficient to consider the application of the bar for purposes of potentially issuing a negative determination. The single example that the NPRM provides of when it *would* be efficient and fair for an officer to consider the bars' applicability – someone with a murder conviction and ten-year sentence from a country with a fair and independent judiciary – underscores that officers should *not* apply the bar in almost any case, and highlights the risk that if officers were to do so, it could easily result in an erroneous determination.

Since the only example provided in the entire NPRM is one which may or may not have ever arisen, and at the very least is thoroughly unrepresentative of when an officer might contemplate considering the bars, the NPRM effectively offers no guidance on or examples of when officers may in fact be able to consider the bars' applicability while conforming to efficiency and fairness requirements – and provides no rational basis to believe such a prediction is even possible in order to achieve the proposed rules ostensible goals.

B. DHS has failed to explain its reversal on the conclusion that ensuring compliance with domestic and international obligations is not an "inefficiency."

The instant NPRM is silent as to DHS's recognition in 2022 that failing to afford noncitizens the opportunity to challenge the application of asylum bars could result in erroneous determinations. In rescinding the prior, global consideration of the applicability of the asylum bars at the fear screening stage two years ago, DHS and DOJ did recognize this risk. The agencies stated: **"Adjudicatory resources designed to ensure that noncitizens are not refouled to persecution due to the erroneous application of a mandatory bar are not expended in vain. Rather, the expenditure of such resources helps keep the Departments in compliance with Federal law and international treaty obligations."**⁵⁴

⁵³ Id at 18084.

⁵⁴ Asylum Processing IFR at 18094.

Under the proposed rule, DHS thoroughly fails to account for this risk. The NPRM is silent with respect to the risk of erroneous decisions and their unlawful, potentially irreversible repercussions. Critically, Congress's purpose in incorporating the fear screening into the expedited removal authority was to mitigate the risk of unlawful refoulement.⁵⁵

C. DHS fails to consider the problems that a federal court highlighted in enjoining the Global Asylum Bar.

In enjoining the Global Asylum Bar, a federal court observed that the consideration of the applicability of asylum bars at the fear screening stage could result in wrongfully depriving asylum seekers of the right to seek protection.⁵⁶ In attempting to reinstate one dimension of the Global Asylum Bar through the NPRM, DHS fails to consider the obstacles to doing so and remaining in compliance with the law, as were raised by the federal court in *Pangea Legal Services v. U.S. Department of Homeland Security*.⁵⁷

In sum, DHS attempts to reverse course from two years ago by cabining the cases to which officers consider the asylum bars' applicability to the "right ones" – without providing any basis to believe that officers could routinely, accurately predict which cases fall in that narrow category. Further, DHS fails to address the reversal of its policy that avoiding erroneous determinations and potential refoulement in violation of the law is crucial and thus not a waste of resources at all. Finally, DHS fails to consider the issues raised in the Global Asylum Bar litigation in the proposed rule.

VI. DHS has failed to adequately explain the reasoning behind the rule, and there is no rational connection between the facts found and the policy choices made.

The proposed rule's stated purpose of improving efficiency, national security, and public safety are not reasonably related to the result of curtailing access to the asylum system and of returning people to situations of persecution. There is no rational connection between DHS's factual estimates and analysis and its policy choices to increase efficiencies. DHS has failed to provide any basis for its conclusory statement that merely because the subject of

⁵⁵ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., § 302, 110 Stat. 3009–546, 579 (1996) (codified as amended at 8 U.S.C. § 1225(b)(1)(B)); Asylum Processing IFR at 18093 (describing the proper purpose of a fear screening as "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").

⁵⁶ *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966, 969-70, 976 (N.D. Cal. 2021) (3:20-cv-09253 ECF No. 1).

⁵⁷ *Id.*

some mandatory bars is security, the juncture at which the bars' applicability is considered would have any bearing on public safety or national security.

A. DHS fails to establish that the rule would achieve its efficiency goals.

The proposed rule's absolute efficiency gains, if any, will be vastly outweighed by the significant *inefficiencies* that the rule will impose – to say nothing of the impermissibility of considering efficiency detached from U.S. legal obligations that may not be curtailed.

1. The NPRM does not purport to offer any significant efficiency benefits, and the "modest" anticipated benefits are likely overstated.

While fomenting a significant risk of systemic refoulement in contravention of domestic and international law, which is a wholly unconsidered cost in the proposed rule, the NPRM expressly does not purport to offer any significant efficiency benefits. DHS estimates that the proposed rule will concern a "relatively small" population and yield a "modest, unquantified reduction in strains on limited national resources."⁵⁸

DHS calculates the potential benefit of the proposed rule based on the positive credible and reasonable fear interviews in recent years that raised mandatory bar flags (aside from firm resettlement).⁵⁹ The number and percentage are small: two to four percent of credible fear cases between FY 2020 and FY 2024 to date and 10 to 21 percent of reasonable fear cases during those four and a half years raised a potential flag.⁶⁰ DHS's calculations amount to roughly 1,000 cases per year on average where officers have flagged potential asylum bars.⁶¹ Moreover, DHS expects the NPRM to apply only to a subset of these cases, since officers should only exercise discretion to consider the bars' applicability where they can somehow accurately foresee that doing so would be efficient.⁶²

⁵⁸ Proposed Rule at 41359.

⁵⁹ Proposed Rule at 41351-52.

⁶⁰ Id.

⁶¹ These percentages amount to an unknown subset of 346 to 1,497 credible fear cases per year and of 56 to 309 reasonable fear cases per year. Combining annual credible and reasonable fear case totals from recent years, DHS asserts that the number of cases that asylum officers might find raise mandatory bar flags is between 402 and 1,806 per year, or about 1,000 cases per year on average. Proposed Rule at 41351-52.

⁶² These calculations are not necessarily a useful predictor of the rate of fear screenings when the NPRM is in effect. Under the IFR, most people will be deprived of fear screenings altogether, and higher proportions of people may be subject to reasonable fear interviews given the likely increase in removals under the IFR. IFR at 48718. The IFR establishes a "shout test" wherein officers will not inquire as to fear of return in placing someone in expedited removal proceedings, and instead only provide fear interviews to noncitizens whom the officer feels sufficiently "manifests a fear of return,

DHS only predicts “modest, unquantified” benefits to the proposed rule, while the risk of refoulement in *every* case where the officer opts to consider the applicability of the bars at the fear screening stage remains unacceptably high.

2. The proposed application of the rule is irrational because based on the sole example provided in the NPRM, consideration of the asylum bars should almost never occur.

DHS and DOJ recognized just two years ago that consideration of the applicability of the bars at the fear screening stage would likely “increase credible fear interview and decision times.”⁶³ Now DHS attempts to reconcile its policy reversal by asserting that giving officers discretion to consider the bars’ applicability means officers will only consider the bars’ applicability in instances where doing so would be efficient in the moment and correspondingly, theoretically, efficient on net. As discussed in Section IV.D., DHS offers no rational basis to conclude that the discretionary consideration of the bars’ applicability would mitigate the inefficiencies that the Department previously recognized.

The only example provided in the NPRM of when it would be efficient and fair to consider the bars’ applicability at the fear screening stage is the hypothetical instance where the asylum seeker comes from a country with a fair and independent judiciary and has been sentenced to 10 years for a murder conviction.⁶⁴ In other words, by DHS’s own proposed rule, officers should *not* consider the applicability of the bars in at least 97 percent of all U.S. Southwest Border encounters – or in the remaining three percent of encounter cases involving nationals of the countries that lack a “fair and independent judicial system.”⁶⁵

expresses an intention to apply for asylum or protection, or expresses a fear of persecution or torture or a fear of return to his or her country or the country of removal.” Extensive studies demonstrate that in practice, when such a policy is in effect, very few of the people urgently seeking asylum and who affirmatively, unsolicited, express a fear of return are in fact afforded the fear screening that they are due. *See, e.g.*, Joint Analysis of Biden Border Proclamation; Human Rights First, Elimination of Fear Screening Referral Safeguards in Expedited Removal (30 January 2024) <https://humanrightsfirst.org/library/elimination-of-fear-screening-referral-safeguards-in-expedited-removal/> [accessed 12 June 2024]; Center for Gender and Refugee Studies, “Manifesting” Fear at the Border: Lessons from Title 42 Expulsions (30 January 2024) <https://cgrs.uclawsf.edu/our-work/publications/%E2%80%9Cmanifesting%E2%80%9D-fear-border-lessons-title-42-expulsions> [accessed 12 June 2024].

⁶³ Asylum Processing IFR.

⁶⁴ Proposed Rule at 41354.

⁶⁵ Washington Office on Latin America, Annual Border Patrol Migrant Encounters by Country at the U.S.-Mexico Border,

DHS recognizes implicitly that considering the bars' applicability where noncitizens have convictions – let alone an alleged criminal history without any conviction – from countries lacking fair and independent judicial systems would not only be inefficient but also would fail to ensure a “fair process,” further underscoring the irrationality of the proposed rule.⁶⁶

If the sole example the NPRM provides – of the “noncitizen ... convicted of murder and sentenced to ten or more years in prison in a country with a fair and independent judicial system” – is the standard for efficient and fair consideration of the bars' applicability, then the proposed rule would be obviated almost entirely.

Considering only those countries with adherence to the rule of law no weaker than the United States' adherence, which sits at 60 percent adherence, according to the World Justice Project Rule of Law Index,⁶⁷ officers would be considering the bars' applicability to single or double digit case numbers⁶⁸ over decades based on nationality alone, setting aside who has a murder – or any – conviction.⁶⁹

Critically, 97 percent of U.S. Southwest Border encounters between 2007 and March 2024 are from Mexico (49 percent), Guatemala (13 percent), Honduras (11 percent), El Salvador (six percent), Venezuela (four percent), and Cuba (three percent).⁷⁰ Looking at encounters data from 2024 only, 97 percent are from Mexico (30 percent), Guatemala (14 percent), Venezuela (11 percent), Ecuador (seven percent), Honduras (seven percent), and Colombia

https://i0.wp.com/borderoversight.org/wp-content/uploads/2024/04/wola_migration_charts.001-21.png?ssl=1 [accessed 12 June 2024] [hereinafter “WOLA Encounters by Country”].

⁶⁶ Proposed Rule at 41354.

⁶⁷ World Justice Project, Country Scored by Criminal Justice,

<https://worldjusticeproject.org/rule-of-law-index/global/2023/Criminal%20Justice/> [accessed 12 June 2024] [hereinafter “WJP Country Criminal Justice Score”].

⁶⁸ CBP, U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector,

<https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/USBORD~3.PDF> [accessed 12 June 2024] [hereinafter “CBP Nationwide Apprehensions”].

⁶⁹ The countries with a criminal justice-focused adherence to the rule of law index of 0.60 or higher – no worse than the United States' adherence, taking into account that the criminal system is “impartial” – are: Finland, Denmark, Norway, Sweden, Austria, Germany, Singapore, Japan, Estonia, Netherlands, New Zealand, Canada, Luxembourg, Australia, Ireland, Korea, Belgium, United Kingdom, Czechia, Hong Kong, Lithuania, Latvia, Cyprus, United Arab Emirates, Spain, Italy, Malta, France, and St. Vincent and the Grenadines. World Justice Project, Criminal Justice, <https://worldjusticeproject.org/rule-of-law-index/factors/2023/Criminal%20Justice/> [accessed 12 June 2024]; WJP Country Criminal Justice Score. The number of nationals of these countries encountered at U.S. borders between FY 2007 and FY 2020 are minimal. CBP Nationwide Apprehensions.

⁷⁰ WOLA Encounters by Country.

(seven percent).⁷¹ In other words, all but three percent of U.S. Southwest Border encounters are with noncitizens fleeing countries with some of the least fair or independent criminal systems in the world and the weakest adherence to the rule of law.

Mexico, the country of origin of nearly a third of noncitizens apprehended in 2024 and of nearly half of noncitizens apprehended FY 2007 to FY 2020, ranks among the top five worst countries globally for an impartial criminal legal system (138 out of 142).⁷² With the exception of Cuba, for whom no data is available in this index, all eight countries of origin that, cumulatively, account for 97 percent of U.S. Southwest Border apprehensions in 2024 and from FY 2007 to FY 2020 rank in the *lowest quarter of all countries in the world for adherence to the rule of law.*⁷³

3. Placing the meager anticipated efficiency gains in context underscores the lack of rational connection between facts found and DHS policy choices.

There is no rational connection between the facts found and policy choices made when the theoretical efficiency gains DHS pursues are considered in context. Even if it *were* efficient to consider the applicability of the bars in all 1,000 cases per year on average, using DHS's estimates,⁷⁴ which it is not – and even if the result of such consideration were to apply a bar and issue a negative fear determination in 100 percent of those cases, which would likely mean many errors and possible refoulement in violation of U.S. law, impermissible irrespective of any attendant efficiency gains – even then, the result of the proposed rule of preventing 1,000 people from continuing with their expedited removal cases demonstrates that this is not a rational policy to achieve DHS's objectives.

⁷¹ Id.

⁷² World Justice Project, Criminal Justice for Mexico, 2023, <https://worldjusticeproject.org/rule-of-law-index/country/2023/Mexico/Criminal%20Justice> [accessed 12 June 2024].

⁷³ World Justice Project, Rule of Law Index 2023, <https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIIndex2023.pdf> [accessed 12 June 2024]. This fact is unsurprisingly given the connection between corrupt and dysfunctional legal systems and the need to flee due to persecution.

⁷⁴ The 1,000 case per year estimate is calculated based on DHS numbers provided in the Proposed Rule. The agency provides that between 346 and 1,497 credible fear cases per year and between 56 to 309 reasonable fear cases per year between FY 2020 and FY 2024 to date have resulted in positive fear determinations with asylum bar flags. Combining these annual credible and reasonable fear case totals from recent years, DHS asserts that the number of cases that asylum officers might find raise mandatory bar flags is between 402 and 1,806 per year, or about 1,000 cases per year on average. Proposed Rule at 41351-52.

If, over the course of one year, 1,000 fewer cases are placed into the 2.4 million case EOIR backlog, that would amount to 0.04 percent of the backlog, or less than one-twentieth of one percent of the backlog. In contrast, in the first several years of the Biden administration, EOIR dismissed approximately 200,000 cases due to DHS failing to file paperwork alone, accounting for eight percent of the backlog.⁷⁵ DHS's policy choice to mitigate the burden on EOIR through the NPRM is irrational based on these facts.

Likewise, in terms of the impact of 1,000 negative fear determinations on ICE detention – even assuming all 1,000 people otherwise would have been detained during their proceedings, which overstates the percentage likely to be detained under standard policies – it would amount to about three percent of those presently detained.⁷⁶

As DHS seeks to expand its detention capacity, the effect of a 1,000 person reduction in detention needs will have even less effect. For example, on June 10, 2024, ICE announced changes to its detention capacity plans, including that the closure of the South Texas Family Residential Center in Dilley, Texas, alone “will enable ICE to reallocate funding to increase the overall detention bed capacity across the system by an estimated 1,600 beds.”⁷⁷

In other words, a single decision to reallocate existing detention network resources will have 1.5 times the effect that DHS anticipates the NPRM could possibly have – if in every single otherwise-positive fear determination case that raises an asylum bar flag the officer exercises discretion to consider the bar's applicability because doing so would be efficient, and in every single one of those cases, the officer issues a negative fear determination as a result, and in every single one of those cases, but for the issuance of the negative fear determination, the noncitizen would have been detained in their proceedings.

B. DHS provides no rational basis to believe the claim that the rule improves public safety or national security.

DHS asserts that the proposed rule is important for the purpose of removing “as quickly as possible” noncitizens to whom the bars apply “[g]iven the gravity of the offenses that

⁷⁵ Syracuse University Transactional Records Access Clearinghouse, 200,000 Immigration Court Cases Dismissed Because DHS Failed to File Paperwork (20 March 2024) <https://trac.syr.edu/reports/739/> [accessed 12 June 2024].

⁷⁶ Syracuse University Transactional Records Access Clearinghouse, Immigration Detention Quick Facts as of June 2, 2024, <https://trac.syr.edu/immigration/quickfacts/> [accessed 12 June 2024].

⁷⁷ ICE, ICE Announces Ongoing Work to Optimize Enforcement Resources (10 June 2024) <https://www.ice.gov/news/releases/ice-announces-ongoing-work-optimize-enforcement-resources> [accessed 12 June 2024].

trigger these bars.”⁷⁸ Yet the entire NPRM fails to provide any rational basis to believe that applying the bars would improve public safety or national security. DHS cites no association between the consideration of the bars’ applicability at the merits adjudication stage and any real-world harm. DHS simply asserts, “The public safety of the United States may be enhanced as some noncitizens who have engaged in certain criminal activity, persecuted others, or have been involved in terrorist activities are quickly removed from the country.”⁷⁹

This conclusory statement is wrong. Wholly independent of the NPRM, and not mentioned therein, DHS evaluates noncitizens who present public safety or flight risks before any custodial determination on release is made.⁸⁰ The purpose of the asylum bars is not to protect public safety, which other DHS detention and release protocols address. Rather, the rationale for the asylum bars is that:

“[C]ertain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose [of the bars] is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts.”⁸¹

DHS provides no rational basis to believe that removing people before they have an opportunity to contest the application of a bar to their case improves public safety or national security. Indeed, DHS does not even mention how the NPRM would intersect with the governing DHS custodial determinations protocols, which *is* how the Department addresses public safety and national security concerns. The NPRM does not mention any one-off instance, let alone trends, of public safety threats posed by asylum seekers who flagged a mandatory bar in passing their fear interview.

Furthermore, during the 30-day period since the publication of the NPRM and the end of the comment period, DOJ announced its intention to increase DOJ and DHS resources for immigration-related criminal prosecutions, presumably under 8 U.S.C. Section 1325 (illegal entry) and 1326 (illegal reentry). This measure diverts DOJ and DHS resources away from other prosecutions that could address public safety and national security matters, reinforcing the prospect that this cohort of Biden administration measures, including the

⁷⁸ Proposed Rule at 41351.

⁷⁹ *Id.*

⁸⁰ ICE Detention Standards.

⁸¹ UNHCR Guidelines.

NPRM, are not in fact guided by public safety or national security concerns but rather by an effort to increase penalties for people who seek protection at U.S. land borders.

DHS fails to reconcile its ostensible interest in improving public safety through the NPRM with its concurrent actions to divert federal resources from pursuing public safety efforts. As 70 former U.S. Attorneys stated in 2018 in the context of Trump's Zero Tolerance policy, which similarly relied upon an increase in Section 1325 and 1326 prosecutions, as Biden pursues with this May 2024 directive:

"It is a simple matter of fact that the time a Department attorney spends prosecuting misdemeanor illegal entry cases, may be time he or she does not spend investigating more significant crimes like a terrorist plot, a child human trafficking organization, an international drug cartel or a corrupt public official. Under your Zero Tolerance policy, firearms cases, violent crime cases, financial fraud cases, and cases involving public safety on Indian reservations all take a back seat to these lesser, weaker misdemeanor cases. In fact, requiring U.S. Attorneys to bring these misdemeanor cases in every instance detracts from your own stated priority to fight gangs and violent crime by groups such as MS-13.⁸²

The NPRM assertion without foundation that the rule advances public safety is yet another reason to conclude that the rule is not sufficiently reasoned or related to its purposes.

VII. DHS has failed to consider the impact and costs of the proposed rule.

DHS has failed to consider the impact and costs of the proposed rule, including that it will cause and will increase the frequency of erroneous decisions and refoulement; the deleterious impact on backlogs and detention times; the likely increase in family separation; and the additional burdens on legal service provider organizations.

A. The agency failed to adequately consider the likely increase in erroneous removals of bona fide refugees under the NPRM.

The United States has an affirmative duty to protect the right to seek asylum under domestic law and as signatory to the 1967 Refugee Protocol and the 1951 Convention

⁸² Former U.S. Attorneys, Bipartisan Group of Former United States Attorneys Call on Sessions to End Family Separation, (18 June 2018) <https://medium.com/@formerusattorneys/bipartisan-group-of-former-united-states-attorneys-call-on-sessions-to-end-child-detention-e129ae0df0cf> [accessed 12 June 2024].

Relating to the Status of Refugees.⁸³ These obligations prohibit refoulement, or the forcible return of refugees or asylees to a country or territory where their life would be endangered. It is precisely due to the grave consequences of erroneously denying an asylum, withholding, or CAT claim – at any stage – on account of an erroneous application of the mandatory bars that the UN High Commissioner for Refugees (UNHCR) exhorts States to “apply [the bars] with great caution and only after a full assessment of the individual circumstances of the case.”⁸⁴ The NPRM itself highlights the Supreme Court’s long recognition of the U.S. non-refoulement obligations.⁸⁵

DHS and DOJ have recognized the importance of ensuring the application of asylum bars is accurate. As the Departments wrote in 2022 in rescinding the rule to consider the bars’ application at the fear stage, “Adjudicatory resources designed to ensure that noncitizens are not refouled to persecution due to the erroneous application of a mandatory bar are not expended in vain. Rather, the expenditure of such resources helps keep the Departments in compliance with Federal law and international treaty obligations.”⁸⁶

In the instant proposed rule, **DHS fails to mention the possibility or harm of erroneous negative fear determinations based on the application of an asylum bar at this preliminary screening stage, without the opportunity to contest it or to obtain relevant evidence. This failure is an important factor, given the enshrining of the non-refoulement principle in U.S. law, that the NPRM fails to consider.** DHS acknowledges the *fact* of those procedural and evidentiary deprivations, but makes no reference to their consequence: U.S. government errors – with life-threatening consequences, in violation of domestic and international law – with no remedy.⁸⁷ The risk of refoulement in the context of erroneous negative fear determinations on account of the consideration and application of an asylum bar is heightened because the bars’ application will only be dispositive in such instances where the noncitizen otherwise *did* establish a credible or reasonable fear of persecution – even under the heightened IFR standards.⁸⁸

⁸³ 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (“Refugee Protocol”), incorporating Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (“Refugee Convention”). Refugee Act of 1980, Public Law 96–212, 94 Stat. 102 (“Refugee Act”).

⁸⁴ UNHCR Guidelines.

⁸⁵ Proposed Rule at 41348.

⁸⁶ Asylum Processing IFR.

⁸⁷ Proposed Rule at 41359.

⁸⁸ Proposed Rule at 41351

In short, the NPRM will inevitably result in higher numbers of improper negative fear determinations, based not on the merits of an applicant's claim of fear of return to their designated country, but on an officer's discretionary decision related to the security bars. As a screening interview is an inappropriate setting to make such complex determinations, the NPRM will inevitably result in the denial of meritorious asylum claims. When these asylum seekers are returned to their home country based on such adjudications, the United States will be in violation of the principle of non-refoulement. Under the NPRM's paradigm, forcible repatriation flights to territories facing pervasive instability and violence, like the recent May 16, 2024, flight to Haiti,⁸⁹ will become far more frequent.

B. The agency failed to consider that the NPRM will increase backlogs and detention times.

The agency failed to consider adequately, or even to consider at all, the inevitability that the proposed rule would increase detention times and delay adjudication of fear interviews in instances where officers consider the asylum bars' applicability by overcomplicating what is meant to be a preliminary process - in essence making the process more time consuming with no results to show for it, all under a false flag of efficiency.

Currently, asylum officers must adjudicate CFIs and RFIs based on their assessment on the merits of the underlying claim for protection: whether the individual has the required likelihood of showing to a judge at a later date that they have a well-founded fear of persecution, or past persecution, on account of a protected ground. The proposed rule introduces the new complications of evaluating – discretionarily – whether an individual has that past persecution or well-founded fear *and* whether that individual has committed a particularly serious crime outside the United States, has committed an aggravated felony, has terrorist-related inadmissibility grounds, or has persecuted others.

1. Consideration of the applicability of asylum bars is necessarily a time-intensive inquiry into complex legal and factual matters.

Determining whether any one of these bars alone applies to a given applicant's circumstances is extremely complex, with cases that raise such issues frequently reaching

⁸⁹ “[T]he United States government forcibly repatriated a group of Haitians despite political violence and catastrophic conditions in Haiti. This was the second deportation flight since April, following a pause on such flights due to the crisis in Haiti.” IRAP Condemns Continued U.S. Deportation Flights to Haiti (16 May 2024)

<https://refugeerights.org/news-resources/irap-condemns-continued-u-s-deportation-flights-to-haiti> [accessed 12 June 2024].

the circuit courts of appeal and the Supreme Court.⁹⁰ Some of the bars to asylum have complex exemptions or waivers available. It is unclear how an asylum officer at the fear screening stage could possibly make such determinations efficiently and accurately. Any effort to do so – at least without engaging in a cursory process risking erroneous results – would delay the CFI process, and therefore the expedited removal process, by getting asylum officers and applicants alike bogged down in complex legal and factual issues.

For example, whether an individual is subject to the **persecutor bar** is a multi-layered, complex inquiry. First, an individual is subject to the bar not merely for having engaged in violence but instead for engaging in violence specifically on account of a protected ground of their victim⁹¹ – introducing essentially a duplicate, parallel inquiry to the individual's own fear screening, and potentially doubling the adjudicator's workload in that single interview.

However, even if an asylum officer determines that an individual engaged in persecution, it is unclear under the law whether there is an exception to the persecutor bar for individuals forced to engage in persecution under duress.⁹² Individuals subject to the duress bar but alleging that they only engaged in persecution of others under duress can therefore request that a final decision of their asylum claim be held until *Matter of Negusie* is resolved. It is unclear what the benefit of engaging in such a legally complex and ultimately unresolved field of inquiry is at the fear screening stage, prolonging the process but not changing the ultimate result when the law itself is unresolved on such a critical question.

Similarly, whether or not an asylum-seeker has committed a **particularly serious crime** is a complex legal and fact-specific question that is ill-suited to resolution at the fear screening state. There is abundant circuit court case law on the complex legal inquiring surrounding even the seemingly simple question of whether a crime constitutes an

⁹⁰ Merle Kahn and Marco Tueros del Barco, Immigrant Legal Resource Center, "Particularly Serious Crime" Bars to Asylum and Withholding (December 2023) https://www.ilrc.org/sites/default/files/2023-12/Particularly%20Serious%20Crimes%20Advisory_Dec%202023.pdf [accessed 12 June 2023].

⁹¹ INA 208(b)(2)(A)(i).

⁹² See *Negusie v. Holder*, 555 U.S. 511 (2009) (remanding the question of whether there is a duress exemption to the persecutor bar to the BIA) with *Matter of Negusie*, 27 I&N Dec. 347, 368 (BIA 2018) (holding there is a duress exemption to the bar), *vacated by Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020) (holding there is no duress exemption to the bar), *vacated by Matter of Negusie*, 28 I&N Dec. 399 (A.G. 2021) (vacating the prior decision, certifying but not answering the question of whether a duress exemption to the persecutor bar exists).

aggravated felony for immigration purposes.⁹³ In addition, even crimes that are not aggravated felonies for immigration purposes may qualify as particularly serious crimes.⁹⁴

Often even an attorney or an immigration judge cannot conclude whether an individual's criminal history rises to the level of a particularly serious crime without detailed review of the final criminal records and legal analysis. How, in a fear screening context, without underlying conviction records and where in many cases neither the applicant nor the asylum officer making this determination will be an attorney, is an officer to engage in such complex analysis? It seems likely that such analysis will frequently result in uncertainty, again meaning that the expedited removal and fear screening processes have been slowed down with no tangible result other than an increase in backlogs and wait times.

The refugee and asylum officers' basic training guides have acknowledged the extreme complexity of the **Terrorism-Related Grounds of Inadmissibility (TRIG bars)**. One version of the guide stated in an "instructor note":

Section 212(a)(3)(B) [the section detailing TRIG bars] is an extremely complex portion of the INA. The actual grounds of inadmissibility are found at 212(a)(3)(B)(i) but the definition of "engage in terrorist activity" in section 212(a)(3)(B)(iv) contains many of the primary activities that bring an applicant within TRIG.⁹⁵

To expect asylum officers to adjudicate these claims, and applicants to defend against such allegations, in the abbreviated and often unrepresented context of the fear screening, with little to no record or evidence available in most cases, is to invite error and delay as adjudicators wrestle with complex legal matters instead of basic questions about an individual's *prima facie* eligibility for asylum.

The discretionary application of the bars alone raises questions about due process and potentially prejudicial application of the bars. Even once an adjudicator has decided to consider the bars, administering them with a barely existent record and almost certainly no access to counsel further invites the intrusion of bias into the system.

⁹³ See, e.g., *Flores v. U.S. Att'y Gen.*, 856 F.3d 280 (3d Cir. 2017) (holding the categorical analysis is required when considering whether a crime is an aggravated felony for immigration purposes and therefore a particularly serious crime for purposes of the asylum bar).

⁹⁴ See *Nethagani v. Mukasey*, 532 F.3d 150 (2d Cir. 2008).

⁹⁵ USCIS Basic Terrorist-Related Inadmissibility Grounds (TRIG) Instructor Guide (June 2012) <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2014/07/USCIS-Officer-Academy-TRIG-Instructor-Guide-Jun.-2012.pdf> [accessed 12 June 2024].

In addition, in order to even decipher the facts necessary to come to legal conclusions about these bars, asylum officers will have to ask new questions in the fear screening to uncover information currently irrelevant to the fear screening stage, thereby lengthening the process. Following the fear screening, the officer will be required to make difficult legal analysis which, done properly, would likely require at least several additional hours. Therefore, adding these requirements to the fear screening stage will prolong the process, contribute to lengthening the backlog, and thereby potentially prolong detention – which is particularly inhumane coming at the conclusion of a long, dangerous journey to the United States border, when asylum-seekers are often suffering from acute effects of trauma as well as physical ailments such as severe dehydration.⁹⁶

2. The consideration of the applicability of asylum bars at the fear screening stage will increase burdens on EOIR, OPLA, CBP, and ICE and will increase detention times for noncitizens seeking protection, undermining the goals of the NPRM.

Furthermore, when asylum officers inevitably issue a higher number of fallible negative fear determinations based on the NPRM, there will necessarily be an increased number of applicants seeking an Immigration Judge review of their negative fear determinations. While these hearing are intended to take place within seven days of a negative fear

⁹⁶ Physicians for Human Rights et al., “Endless Nightmare”: Torture and Inhuman Treatment in Solitary Confinement in U.S. Immigration Detention (February 2024) <https://phr.org/wp-content/uploads/2024/02/PHR-REPORT-ICE-Solitary-Confinement-2024.pdf> [accessed 12 June 2024]; Senator Elizabeth Warren, Letter: Warren, Senators Urge Closure of Inhumane Immigration Detention Centers (15 May 2024) <https://www.warren.senate.gov/newsroom/press-releases/warren-senators-urge-closure-of-inhumane-immigration-detention-centers> [accessed 12 June 2024]; National Immigrant Justice Center, Beyond Repair: ICE’s Abusive Detention Inspection and Oversight System (November 2023) <https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2023-11/NIJC-Policy-brief-ICE-detention-inspections-November2023.pdf> [accessed 12 June 2024]; Human Rights Watch, “They Treat You Like You Are Worthless”: Internal DHS Reports of Abuses by US Border Officials (21 October 2021) <https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials> [accessed 12 June 2024].

determination,⁹⁷ practitioners frequently see this proscribed timeline openly disregarded. Awaiting a hearing date will, again, unnecessarily prolong time spent in detention.

Detention in any setting is by definition a deprivation of liberty. However, in certain cases at least some portion of the detention would likely take place in CBP custody. Conditions for migrants in CBP detention facilities have been broadly documented and dangerous. Even though the 2009 CBP Security Policy and Procedures Handbook describes CBP holding cells as small concrete rooms “not designed for sleeping,”⁹⁸ people are regularly held in these facilities sometimes for several nights – a period that will only increase under the NPRM due to the need for increased screening and decision-making time as detailed above.

CBP has admitted to the limitations of its detention facilities and, in 2015, issued its National Standards on Transport, Escort, Detention and Search (TEDS), which determined that detention in CBP facilities should “generally” last no longer than 72 hours, and that “every effort must be made to hold detainees for the least amount of time required for their processing.”⁹⁹

IRAP staff have observed that migrants being paroled into the United States can remain in CBP custody for 24 hours, and sometimes even longer. A DHS Office of Inspector General (OIG) investigation in 2022 focused on El Paso Border Patrol facilities found that 87 percent of people detained from October to November 2021 spent longer than 72 hours in Border

⁹⁷ 8 CFR § 1003.42(e); DHS Office of Inspector General, Final Report: Results of July 2023 Unannounced Inspections of CBP Holding Facilities in the Rio Grande Valley Area (15 March 2024) <https://www.oig.dhs.gov/sites/default/files/assets/2024-03/OIG-24-20-Mar24.pdf> [accessed 12 June 2024]; U.S. Government Accountability Office: Southwest Border: CBP Oversees Short-Term Custody Standards, but Border Patrol Could Better Monitor Care of At-Risk Individuals (September 2022) <https://www.gao.gov/assets/730/723136.pdf> [accessed 12 June 2024]; Matt Hoffman, Report Finds Migrants Held Too Long in San Diego CBP Detention Centers, KPBS (21 November 2023) <https://www.kpbs.org/news/border-immigration/2023/11/21/report-finds-migrants-held-too-long-in-san-diego-cbp-detention-centers> [accessed 12 June 2024].

⁹⁸ CBP Security and Procedures Handbook, HB 1400-02B (13 August 2009) <https://info.publicintelligence.net/CBP-SecurityHandbook.pdf> [accessed 12 June 2024].

⁹⁹ CBP National Standards on Transport, Escort, Detention, and Search (October 2015) <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf> [accessed 12 June 2024].

Patrol custody.¹⁰⁰ The CLP also caused lengthier detention periods – for “more than 10 days” and up to “30 days.”¹⁰¹

It is widely reported that CBP facilities are unfit for long-term detention due to unsanitary conditions, extremely low temperatures, lack of proper food, and other suboptimal conditions.¹⁰² People detained there, including people with medical needs following harrowing journeys and the elderly, are forced to sleep on the floor or concrete furniture without mats or sufficient covers.¹⁰³ Furthermore, CBP facilities are often unsanitary, and it has been reported that detainees have limited to no access to showers and personal hygiene supplies while in custody.¹⁰⁴

Even DHS has recognized that CBP’s treatment of people in its custody may be punitive and inhumane. In 2019, OIG learned as part of their investigations into conditions at CBP facilities in Texas that some detainees had been held in these facilities in “standing-room only conditions for days or weeks.” In July 2021, OIG issued a memorandum describing how CBP consistently failed to show that it conducted required medical screenings or consistent welfare checks to detainees.¹⁰⁵ The Freedom of Information Act (FOIA) documents obtained

¹⁰⁰ El Paso Sector Border Patrol Struggled With Prolonged Detention and Consistent Compliance with TEDS Standards, Department of Homeland Security, Office of the Inspector General, OIG-22-57, August 9, 2022 (<https://www.oig.dhs.gov/sites/default/files/assets/2022-08/OIG-22-57-Aug22.pdf>).

¹⁰¹ Priscilla Alvarez, Adult Migrants Are Held in Border Facilities Too Long Amid Biden Administration Policy Changes, Sources Say, CNN (18 July 2023) <https://www.cnn.com/2023/07/18/politics/migrants-border-facilities-biden-policies/index.html> [accessed 12 June 2024].

¹⁰² Human Rights Watch, In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells (28 February 2018) <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells> [accessed 12 June 2024] Hannah Critchfield, “Border Patrol Burritos are Making People Sick, Doctors Say,” *Phoenix New Times* (14 January 2020) <https://www.phoenixnewtimes.com/news/burritos-border-patrol-ice-migrants-sick-asylum-arizona-casa-alitas-11425176> [accessed 12 June 2024].

¹⁰³ Brief for the American Immigration Council and the American Immigration Lawyers Association as Amici Curiae at 4-5, *Las Americas Immigrant Advocacy Center, et al v. Chad Wolf, et al*, 507 F.Supp.3d 1 (D.D.C. 2020).

¹⁰⁴ Guillermo Cantor, *Hieleras* (Iceboxes) in the Rio Grande Valley Sector,” American Immigration Council (December 2015) https://www.americanimmigrationcouncil.org/sites/default/files/research/hieleras_iceboxes_in_the_rio_grande_valley_sector.pdf [accessed 12 June 2024].

¹⁰⁵ DHS Office of Inspector General, CBP Needs to Strengthen its Oversight and Policy to Better Care for Migrants Needing Medical Attention, (20 July 2021) <https://www.oig.dhs.gov/sites/default/files/assets/2021-07/OIG-21-48-Jul21.pdf> [accessed 12 June 2024].

by Human Rights Watch in 2021 identified over 160 misconduct and abuse incidents against asylum applicants at the hands of officers, particularly CBP officers and agents.¹⁰⁶

Lack of access to counsel in CBP custody and other detention facilities will pose a serious barrier to fair asylum processing under the proposed rule, which introduces even more complex legal questions into the CFI/RFI process. IRAP's clients frequently report that they do not receive or understand information about their rights in detention and that they receive documents without explanation that they do not understand.

IRAP has consistently heard reports of the difficulty connecting with counsel while detained in CBP custody or ICE facilities since the end of Title 42. IRAP has itself experienced difficulties connecting with detained clients to offer representation in the CFI process. Without access to counsel or proper legal information, even those who should qualify for asylum under the CLP and IFR and are not subject to the bars under the NPRM will often not be able to access such relief. Because of the lack of access to counsel at CBP facilities, asylum seekers with credible fears of persecution and who lawfully should not be subject to the bars to asylum are likely to be deported to danger due to erroneous information being provided by Border Patrol officers and lack of sufficient and accessible screening of their vulnerabilities.¹⁰⁷

We are concerned that implementation of the NPRM would increase detention time in CBP facilities beyond 72 hours. The conditions in CBP facilities lead to sleep deprivation, poor health, and further traumatization that directly affect the ability of asylum seekers to meaningfully assert their rights. Instead of addressing the underlying suboptimal conditions of these facilities, the NPRM increases the complications, and almost certainly the delays, for those undergoing fear screenings in CBP custody.

Even for those detained in ICE custody pending the outcomes of their CFIs or RFIs, conditions remain abhorrent. For example, at the Otay Mesa detention facility in California, where IRAP is aware that individuals who enter with CBP One appointments are sometimes detained pending final CFI determinations, the DHS's own Inspector General has cited violations such as failure to respond timely to misconduct grievances, failure to provide

¹⁰⁶ Human Rights Watch, 'They Treat You Like You Are Worthless': Internal DHS Reports of Abuses by US Border Officials (21 October 2021) <https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials> [accessed 12 June 2024].

¹⁰⁷ National Immigrant Justice Center, Obstructed Legal Access: June 2023 Update (20 June 2023) <https://immigrantjustice.org/staff/blog/obstructed-legal-access-june-2023-update> [accessed 12 June 2024].

access to recreation for individuals detained in segregated facilities, and – especially relevant here – failure to provide legal calls, legal materials, and access to the law library to individuals detained there.¹⁰⁸

The proposed rule will also apply to families in the Family Expedited Removal Management (FERM) program.¹⁰⁹ Families in this program undergo credible fear interviews without access to counsel in almost all cases. Most of these families are already subject to the CLP and, as of June 5, 2024, may be subject to the IFR and will likely be found ineligible for asylum. This proposed rule increases the obstacles to prevailing on cognizable, if complex, asylum claims. Moreover, considering the applicability of the asylum bars in FERM fear screenings could give rise to avoidable and wrongful family separation or the removal of children in order to prevent their separation from their parents in instances where officers flag a potential bar as to a parent's case and not the child's, as discussed below.

C. The agency failed to adequately consider the potential for implementation of the NPRM to lead to increased family separation.

While the Biden administration to date generally has refrained as a matter of express policy from separating minor children from their biological or adoptive parents, although separations are the predictable consequences of other policies in effect, the expedited removal process as it stands frequently results in the separation of migrant families. Adult children, spouses, siblings, grandparents, cousins, and the like, who enter the United States together and are placed in expedited removal are processed and detained separately. The NPRM, as discussed above, may result in asylum seekers spending increased time in detention, prolonging these separations to weeks and months at a time.

¹⁰⁸ DHS Office of Inspector General, Violations of ICE Detention Standards at Otay Mesa Detention Center (14 September 2021) <https://www.oig.dhs.gov/sites/default/files/assets/2021-09/OIG-21-61-Sep21.pdf> [accessed 12 June 2024]; see also Freedom for Immigrants, Mental Health Abuse at Otay Mesa (8 March 2022) <https://www.freedomforimmigrants.org/otay-mesa-detention-center> [accessed 12 June 2024]; ABC 10 News San Diego, Migrant Held in Solitary Confinement for 759 Days at Otay Mesa Detention Center (19 February 2024) <https://www.10news.com/migrant-held-in-solitary-confinement-for-759-days-at-otay-mesa-detention-center> [accessed 12 June 2024].

¹⁰⁹ National Immigrant Justice Center, Policy Brief: ICE's Family Expedited Removal Management (FERM) Program Puts Families at Risk (31 August 2023) <https://immigrantjustice.org/research-items/policy-brief-ices-family-expedited-removal-management-ferm-program-puts-families> [accessed 12 June 2024]. Families in the FERM program are permitted to reside in certain locations subject to intensive restrictions and monitoring, frequently including ankle monitors and strict restrictions on movement including a nighttime "home curfew."

Due to these separations, family members often see disparate outcomes in their initial fear screening interviews. When one family member is issued a negative fear determination, the expedited removal system quickly effectuates their removal, while other family members may be given the opportunity to proceed with an asylum claim. These outcomes can result in the potentially permanent separation of families. As discussed above, the NPRM will result in increased numbers of negative fear determinations. Higher numbers of negative fear determinations will result in high numbers of permanent separations of families. The NPRM omits any mention of this likely consequence and thus fails to justify this risk.

D. The agency failed to adequately consider the additional burdens the NPRM would impose on organizations providing direct services, like IRAP.

Under the NPRM and IFR, asylum seekers who manage to obtain fear interviews will now be expected to testify not only to the basis of their legal claim, as complicated by the IFR and CLP, but also to the applicability of the mandatory bars if the officer decides to consider them. Organizations like IRAP dedicate substantial time and resources to preparing clients for their fear screening interviews. Additional resources, at a mass scale, will need to be expended to ensure asylum seekers understand the NPRM – and its intersection with the IFR and CLP – and are ready to properly testify to questions regarding security bars.

The extreme timelines of the expedited removal process, limited access to evidence, extreme trauma and harm from the migration journey and conditions in Mexico directly preceding entry to the United States, and the rapidly evolving legal landscape already make the services that IRAP provides onerous and complex. Adding an entirely new and exceedingly convoluted legal scheme to the substance of what IRAP prepares clients to face in fear screenings compounds these burdens unreasonably. Doing so will directly limit the number of individuals organizations like IRAP can assist.

In addition, due to the likelihood of erroneous negative determinations as discussed above, staff at organizations providing direct services to applicants in the expedited removal process will need to dedicate additional time to preparing and representing clients in the Immigration Judge review of their negative fear determination, as well as filing Requests for Reconsideration (RFR) to USCIS.

While a credible fear determination is typically made based solely on the asylum seeker's

testimony, and an asylum officer has an affirmative duty to elicit testimony,¹¹⁰ the introduction of an additional barrier to a positive credible fear determination will likely necessitate advocates assisting applicants in finding corroborating evidence in addition to their testimony even at the fear screening stage.

As discussed above, bar determinations are highly fact-specific inquiries that regularly necessitate detailed briefing at the merits stage of an asylum case. Some cases may even require the testimony of an expert witness or the gathering of detailed, difficult to acquire evidence, to best understand the nuances of an asylum seeker's claim. Notably, even ICE OPLA has "certain designated attorneys specializing in such cases" "involving potential bars to relief or protection such as terrorism-related inadmissibility grounds or assistance in the persecution of others," since these bars-implicating cases "entail special reporting requirements."¹¹¹ Just as it is unreasonable to expect asylum officers to properly – and efficiently – contemplate the applicability of such bars in the context of fear interviews, it is correspondingly unreasonable to expect advocacy organizations like IRAP to be able to adequately prepare individuals to preserve the best chance of their proceeding to the merits stage to defend their case without extreme burdens in individual cases.

Attempting to eliminate meritorious cases at the screening stage based on a potential bar will force applicants to gather evidence to support their testimony in an impossibly short timeframe, further exhausting organizational resources.

VIII. DHS has failed to consider reasonable alternatives.

DHS has failed to consider reasonable alternatives. To speed removal of high enforcement priorities and reduce the EOIR backlog and the burden on OPLA and ERO, DHS fails to consider policies to exercise its discretion to not prosecute non-priority cases at a greater scale than presently occurs. To reduce the burden on DHS to detain people, DHS fails to consider not detaining people who present no public safety, national security, or flight risk.

IX. DHS has failed to consider serious reliance interests.

DHS has failed to consider serious reliance interests, including on legal services organizations like IRAP that prepare informational materials, employ internal protocols,

¹¹⁰ USCIS, RAIO Directorate - Officer Training: Interviewing - Eliciting Testimony Training Module (20 December 2019)

https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Eliciting_Testimony_LP_RAIO.pdf [accessed 12 June 2024].

¹¹¹ Proposed Rule at 41352.



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and deliver client-facing services that are predicated on credible and reasonable fear interviews retaining their core characteristic of being a preliminary screening that does not entail adjudication of legally and factually complex legal matters historically reserved for the merits stage.

IRAP staff and pro bono attorneys provide preparation for Credible Fear Interviews to clients. When the agency changes course as it has in this NPRM, IRAP must digest the proposed changes, train its own staff on the changes, and train pro bono volunteers on the changes in order to continue assisting clients. IRAP also provides legal information online in an effort to provide individuals without attorneys with access to accurate legal information to inform their decisions. Changes such as those imagined in the NPRM require IRAP to remove previously published legal information (in multiple languages), rewrite and re-translate that information, and again post that information online and in other formats to provide accurate information to people seeking refuge in the United States.

X. Conclusion

IRAP urges DHS to withdraw the NPRM in its entirety. IRAP welcomes the opportunity to discuss this Comment with you further.

Sincerely,

A handwritten signature in black ink, appearing to read "Hannah Flamm", followed by a horizontal line extending to the right.

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A handwritten signature in black ink, appearing to read "Laurie Ball Cooper", written in a cursive style.

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