



International Refugee  
Assistance Project

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Submitted via: <https://www.regulations.gov>

**Re: Comment on *Securing the Border Interim Final Rule***

RIN: 1125-AB32; 1615-AC92; USCIS Docket No. USCIS-2024-0006;  
A.G. Order No. 5943-2024; 89 FR 48710

Dear Mr. Delgado and Ms. Reid:

The International Refugee Assistance Project (IRAP) respectfully submits this comment **in opposition** to the U.S. Department of Homeland Security (DHS) and Executive Office for Immigration Review (EOIR) Interim Final Rule on *Securing the Border*, USCIS Docket No. USCIS-2024-0006; A.G. Order No. 5943-2024, 89 Fed. Reg. 48710 (“the interim final rule,” “the rule,” or “IFR”), published in the Federal Register on June 7, 2024.<sup>1</sup>

IRAP urges the Departments to withdraw the IFR in its entirety because:

- **The IFR fails to provide adequate notice** by issuing an IFR without meeting the foreign affairs or good cause exceptions to the notice-and-comment and delayed-effective-date requirements, among other reasons;
- **The IFR considers factors Congress did not intend, fails to consider important factors and aspects of the rule’s consequences, and provides explanations counter to evidence;** and
- **The IFR is not in accordance with law and exceeds statutory jurisdiction,** because the law requires access to asylum irrespective of the manner of entry and prohibits *refoulement*, among other reasons.

The Departments should **not** apply the IFR to those found not to have a significant possibility of eligibility for asylum under the rule Application of Certain Mandatory Bars in Fear Screenings, 89 FR 41347 (13 May 2024), if it is finalized.

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<sup>1</sup> DHS and EOIR, *Securing the Border*, 89 Fed. Reg. 48710 (7 June 2024), <https://www.federalregister.gov/documents/2024/06/07/2024-12435/securing-the-border> [accessed 19 June 2024] [hereinafter “IFR”].



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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. Southern Border.**

Since IRAP’s establishment, it has 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 IFR, 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 U.S. Southwest 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, in contravention of the law – by the implementation of restrictions established by the IFR.

## DHS’s Notice of Interim Final Rule

### I. [Proposed Changes under the IFR](#)

The Presidential Proclamation on Securing the Border, signed on June 3, 2024, announced “emergency border circumstances,” defined as “situations in which high levels of encounters at the southern border exceed DHS’s capacity to deliver timely consequences

to most individuals who cross irregularly . . . and cannot establish a legal basis to remain in the United States.”<sup>2</sup> The IFR responds to the Proclamation’s directive to address these circumstances by: suspending entry to the U.S. southwest land and southern coastal borders based on certain average total encounter numbers; eliminating access to asylum except in exceedingly narrow circumstances; raising the legal standard for eligibility to pursue withholding of removal and protection under the Convention Against Torture (CAT); and requiring noncitizens to manifest fear – and relying upon officers to honor noncitizens’ manifestation of fear – in order for them to be screened for any form of protection.<sup>3</sup>

## **II. Purposes of the Proposed Changes under the IFR**

The purported primary purpose of the IFR is migration management, namely to restrict access to legal protection to a degree that enables DHS to remove expeditiously enough people encountered at the U.S. southern border so as to deter asylum seekers from trying to come to the United States.<sup>4</sup> The rule aims to enable DHS to “place into expedited removal the majority of noncitizens who are amenable to such processing.”<sup>5</sup>

The IFR is focused on deterring migration by removing people from the United States before they have an opportunity to pursue relief in a backlogged process. The rule is predicated on the proposition that the deterrent effect of U.S. border and immigration systems – or lack thereof – shape migration patterns.<sup>6</sup> The IFR mentions “consequences” – as in “strengthen consequences for unlawful or unauthorized entry” – 85 times.

Attendant purposes of the rule are: “reductions in strains on limited Federal Government immigration processing and enforcement resources; preservation of the Departments’ continued ability to safely, humanely, and effectively enforce and administer the immigration laws; and a reduction in the role of exploitative TCOs and smugglers.”<sup>7</sup>

## **ARGUMENT**

### **III. Outline of Argument**

IRAP objects to the IFR for the following reasons.

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<sup>2</sup> IFR at 48711.

<sup>3</sup> IFR at 48718.

<sup>4</sup> IFR at 48714-15.

<sup>5</sup> IFR at 48715.

<sup>6</sup> IFR at 48713.

<sup>7</sup> IFR at 48767.

**First, DHS and EOIR have failed to provide adequate notice to the public** by issuing an IFR without meeting the foreign affairs or good cause exceptions to the notice-and-comment and delayed-effective-date requirements.<sup>8</sup> The Departments also impermissibly make simultaneous changes to the regulatory infrastructure without sufficiently explaining how these changes will interact.<sup>9</sup>

**Second, the Departments failed to consider important factors and various aspects of the rule's consequences, and provide explanations counter to the evidence before them**, including the breach of U.S. obligations to avoid *refoulement*, the costs of requiring the use of the CBP One application to access legal protection in the United States, and the incentive structure surrounding officers whose individual attention to manifestations of fear is now dispositive of most asylum seekers' access to protection.

**Third, the IFR is contrary to law and exceeds statutory jurisdiction.** Specifically, the IFR violates international treaty obligations and the Immigration and Nationality Act (INA) and Administrative Procedure Act (APA) by: barring noncitizens from seeking asylum based on their manner of entry; applying the manifestation of fear "shout" test; elevating the screening standard in CFIs; and failing to conform to obligations to avoid *refoulement*.<sup>10</sup>

**Fourth, DHS and EOIR have 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 access to asylum, at least with the exceptions established under the Circumvention of Lawful Pathways (CLP)<sup>11</sup> rule, and on access to clients in custody.

#### **IV. DHS and EOIR failed to provide adequate notice to the public or to comply with the Administrative Procedure Act.**

DHS and EOIR assert that their failure to comply with the standard APA requirements – (1) to provide "notice of proposed rule making" and "an opportunity to participate in the rule making"; and (2) to publish a substantive rule "not less than 30 days before its effective date" – is permissible on account of the rule involving a "foreign affairs function of the

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<sup>8</sup> IFR at 48759-66.

<sup>9</sup> IFR at 48739, 48745, 48756.

<sup>10</sup> IFR at 48718.

<sup>11</sup> Circumvention of Lawful Pathways Rule, 88 FR 31314 (16 May 2023), <https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways> [accessed 8 July 2024] [hereinafter "CLP"].

United States” and on account of “good cause” established by the impracticability of the delays associated with standard notice-and-comment procedure.<sup>12</sup>

Yet the Departments’ own data cited in the IFR undermine these arguments. Absent establishing either of these exceptions, the Departments should have issued the IFR as a Notice of Proposed Rulemaking.

Further, the 30-day comment period is inadequate and deprives the public of a substantive opportunity to comment.<sup>13</sup> The Departments also fail to provide adequate notice to the public by making simultaneous changes to the regulatory infrastructure without adequately explaining the interaction of these changes and without affording an opportunity to comment.

**A. DHS and EOIR have failed to provide adequate notice by issuing an immediately-effective IFR without establishing the foreign affairs or good cause exceptions to standard notice-and-comment procedure.**

The Departments meet neither the foreign affairs nor good cause exceptions to standard rule-making requirements. The IFR’s recognition that the highest-ever border encounter numbers occurred in December 2023, six months before the IFR, and the recognition that during 2024, encounter numbers have been below average, give lie to the sudden emergency in June 2024 justifying depriving the public of even an abbreviated notice-and-comment period.<sup>14</sup>

**With respect to the foreign affairs exception**, the IFR asserts that because the United States’ “border management strategy is predicated on the belief that migration is a shared responsibility among all countries in the region,” and because of “the particular challenges facing the United States and its regional partners at this moment,” the issuance of the IFR without standard rule-making process is necessary for “the United States [to] continue to lead the way in responding to . . . migratory flows,” to “send an important message to the region that the United States is prepared to . . . respond to ongoing migratory challenges,” and to avoid a “surge to the border before the Departments could finalize the rule, which would adversely impact the United States’ foreign policy priorities” of reducing migration generally and migration surges specifically.<sup>15</sup>

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<sup>12</sup> IFR at 48759-66.

<sup>13</sup> 5 U.S.C. § 533(c).

<sup>14</sup> IFR at 48712-14, 48724-25.

<sup>15</sup> IFR at 48759-62.

Yet the IFR itself recognizes the predictable futility of such deterrence-based policies, which in turn undermines the validity of obstructing the notice-and-comment opportunity for an ephemeral gain – if any. The IFR acknowledges that despite expanding lawful pathways and improving DHS and EOIR processing speeds in recent years, “the border security and immigration systems have not been able to keep pace with the number of individuals arriving at the southern border.”<sup>16</sup> With respect to the CLP – in effect for the last year and itself a drastic curtailment of asylum access – the IFR recognizes that: “Despite the expanded ability to impose consequences at the SWB through the Circumvention of Lawful Pathways rule and complementary measures, which led to the highest numbers of returns and removals in more than a decade, *encounter levels have remained elevated well above historical levels*, with December 2023 logging the highest monthly total on record” (emphasis added).<sup>17</sup> The IFR further further acknowledges that, regardless of U.S. enforcement measures, “[c]urrent trends and historical data indicate that migration and displacement in the Western Hemisphere *will continue to increase* as a result of violence, persecution, poverty, human rights abuses, the impacts of climate change, and other factors” (emphasis added).<sup>18</sup>

Despite the evidence before it, the IFR mimics and amplifies the CLP restrictions, elevating standards and narrowing exceptions, instituting more severe policies of the same nature of those that have already failed to deter migration – while causing grave harm in violation of the law. The Departments fail to establish that the IFR establishes a valid foreign affairs exception to standard notice-and-comment procedure because the evidence demonstrates that migration rates will continue to rise even if the United States delivers “swift consequences” en masse. A policy that violates the law – and that is so likely to fail in its objective – cannot justify deviating from standard rule-making procedure.

**With respect to the good cause exception**, the Departments argue that standard rule-making requirements are “impracticable” because delayed implementation of the IFR (1) would cause “significant public harm” and (2) would be “contrary to the public interest” because any notice would “incentivize even more irregular migration by those seeking to enter the United States before the rule would take effect.”<sup>19</sup> The Departments assert that the inability to “deliver timely decisions and timely consequences” ultimately “inspires more people to make the dangerous journey north,” which results in more people being placed

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<sup>16</sup> IFR at 48712-13.

<sup>17</sup> IFR at 48713.

<sup>18</sup> IFR at 48726.

<sup>19</sup> IFR at 48762-63.

in removal proceedings, where significant backlogs exist, which in turn further incentivizes migration by affording the “expectation of a lengthy stay in the United States.”<sup>20</sup>

In other words, according to the Departments, the “public harm” lies in the risk to asylum seekers during the “dangerous journey”<sup>21</sup> to the United States and, to a lesser extent, in the growth of “[s]mugglers and transnational criminal organizations,”<sup>22</sup> the risk to the “safety and security of . . . the U.S. communities through which many . . . migrants transit.”<sup>23</sup> The “public interest” lies in discouraging people from seeking protection in the United States.

Yet the ostensible concern for the welfare of people seeking protection in the United States is not the real reason the Departments have implemented the IFR without following standard rule-making procedure, and accepting “contrived” reasons for rule-making defeats its purpose.<sup>24</sup> It defies logic that a policy motivated by protecting the well-being of individuals who (otherwise would) risk their lives to seek safety in the United States would be designed to send those very people back to the danger that they fled, as quickly as possible without any meaningful process.<sup>25</sup>

In effect, the Departments attempt to construe the public interest as sacrificing some individuals to *refoulement* for the larger cause of sending the message to everyone else not to bother trying to make it to the United States. But this logic fails for multiple reasons. First, adequate process to prevent *refoulement* is due to all people.<sup>26</sup> Second, the IFR itself recognizes that migration is increasing – and will continue to increase – due to powerful and unprecedented push factors, no matter the chances of one’s expected success at entering the United States.<sup>27</sup> Third, the IFR’s core assumption – that not seeking safety in the United States protects the welfare of people who otherwise would undertake that dangerous journey – is unsubstantiated and false. The IFR provides no basis for its underlying assumption that the *relative* risk of seeking safety by land in the United States is

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<sup>20</sup> IFR at 48763, 48732.

<sup>21</sup> IFR at 48762, 48764.

<sup>22</sup> IFR at 48714

<sup>23</sup> IFR at 48715.

<sup>24</sup> *Department of Commerce v. New York*, 588 U.S. \_\_\_\_ (2019) (slip op. at 28).

<sup>25</sup> IFR at 48744, 48767 (“As discussed in this preamble, the rule’s manifestation of fear and reasonable probability standards may also engender a risk that some noncitizens with meritorious claims may not be referred for credible fear interviews or to removal proceedings to seek protection. In these cases, there may be costs to noncitizens that result from their removal.”).

<sup>26</sup> Protocol Relating to the Status of Refugees art. 1, § 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

<sup>27</sup> IFR at 48726.

greater than the risk of remaining in one's country of origin. In fact, ample evidence supports that remaining in countries of origin and countries of persecution constitutes greater threats to people's life and welfare.<sup>28</sup>

In sum, the Departments have failed to meet their burden to demonstrate that either exception applies, as it must to issue a rule without complying with its statutory notice-and-comment obligations.

**B. DHS and EOIR have failed to provide adequate notice by changing the regulatory landscape without explaining – or affording an opportunity to comment on – the intersection of these new rules.**

The Departments published the IFR four business days before the end of the truncated, 30-day comment period on the Application of Certain Mandatory Bars in Fear Screenings Notice of Proposed Rulemaking.<sup>29</sup> The Departments fail to explain how these policies will interact and fail to provide an opportunity for the public to analyze or comment on them.

In the month preceding the IFR publication, DHS and DOJ issued a number of other policy changes as well, reinforcing the magnitude of the problem of not affording a full analysis of the changes and their interaction before the IFR went into effect. DHS issued new policy and procedures on the use of classified information in immigration proceedings and revised guidance on internal relocation in asylum claims.<sup>30</sup> DOJ directed the deployment of

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<sup>28</sup> Washington Office on Latin America, Annual Border Patrol Migrant Encounters by Country at the U.S.-Mexico Border, [https://i0.wp.com/borderoversight.org/wp-content/uploads/2024/04/wola\\_migration\\_charts.001-21.png?ssl=1](https://i0.wp.com/borderoversight.org/wp-content/uploads/2024/04/wola_migration_charts.001-21.png?ssl=1) [accessed 12 June 2024]; Juliana Manjarrés and Christopher Newton, InSight Crime's 2023 Homicide Round-Up, 21 February 2024, <https://insightcrime.org/news/insight-crime-2023-homicide-round-up/> [accessed 8 July 2024].

<sup>29</sup> DHS, Application of Certain Mandatory Bars in Fear Screenings, 89 FR 41347 (13 May 2024), <https://www.federalregister.gov/documents/2024/05/13/2024-10390/application-of-certain-mandatory-bars-in-fear-screenings> [accessed 8 July 2024] [hereinafter "Asylum Bars NPRM"].

<sup>30</sup> 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]. 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].



DOJ and DHS resources to the border to “increase federal immigration-related prosecutions in crucial border U.S. Attorneys’ Offices.”<sup>31</sup>

All of these measures interact: the consideration of the applicability of some mandatory asylum bars compounds the obstacles some noncitizens will face to accessing the ability to apply for withholding of removal and, in rare circumstances, asylum. The use of classified information could be applied at the fear screening stage, exacerbating obstacles noncitizens (who make it that far in the process) face in knowing and contesting evidence used against them. The IFR is expected to result in increased removals, including removals to Mexico rather than countries of origin for certain nationalities.<sup>32</sup> This increase in removals will 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.

The IFR lacks any analysis of the confluence of these policy effects, merely noting in a footnote that the IFR’s “reasonable probability” standard would still apply even if the asylum bars rule is finalized as drafted<sup>33</sup>; noting the recent “changed course” on when to apply these bars<sup>34</sup>; noting that DHS is “concurrently soliciting comment” on the asylum bars NPRM<sup>35</sup>; and “request[ing] comment on whether to expressly expand this provision to also apply to those who are found not to have a significant possibility of eligibility for asylum because they are barred from asylum due to a mandatory bar to asylum eligibility if the rule Application of Certain Mandatory Bars in Fear Screenings, 89 FR 41347 (May 13, 2024), is finalized.”<sup>36</sup> Further, commenters cannot know the final rule with respect to either the asylum bars NPRM or the IFR before they must comment on the other.<sup>37</sup>

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.

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<sup>31</sup> 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].

<sup>32</sup> IFR at 48760.

<sup>33</sup> IFR at 48739.

<sup>34</sup> IFR at 48739.

<sup>35</sup> IFR at 48745.

<sup>36</sup> IFR at 48756.

<sup>37</sup> Id.

First, the CLP applies a rebuttable presumption of asylum ineligibility to noncitizens encountered between ports of entry who do not meet an exception.<sup>38</sup> However, under the IFR, during the indefinite suspension on entry,<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup>

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.<sup>42</sup> 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.”<sup>43</sup> 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.

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<sup>38</sup> CLP at 31314.

<sup>39</sup> 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].

<sup>40</sup> 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]

<sup>41</sup> Id.

<sup>42</sup> Asylum Bars NPRM at 41355-56.

<sup>43</sup> IFR at 48718.

**V. The Departments fail to consider important factors and various aspects of the rule's consequences and provide explanations counter to the evidence before them,**

**A. The Departments fail to consider the disparate and discriminatory impact of the IFR's effective requirement to use the CBP One application.**

The IFR fails to consider its predictably disparate impact on various communities of special concern seeking protection in the United States. Through more than a year of providing not only legal services to individuals seeking to enter the United States but also logistical support to people, often desperately, attempting to use the CBP One mobile application, IRAP has seen the many ways in which the reliance on a technology-based solution has disparate, negative impacts on some of the individuals most in need of asylum.

**1. The reliance on a mobile application prevents individuals without phone and internet access from accessing asylum in the United States.**

The Rule continues the United States' more-than-year-long reliance on a mobile application that requires both a mobile telephone and internet access. Many refugees are fleeing without access to a telephone, and IRAP frequently works with clients staying in shelters or tent encampments in Mexico with limited access to mobile phones and/or internet. In addition, even among IRAP's clients with phone and internet access, we have frequently heard reports of trouble sustaining an internet connection strong enough to complete the required steps of the process, including the facial scan.

**2. The reliance on CBP One excludes from asylum protections individuals who are not literate in English, Spanish, or Haitian Creole or those who are not technologically literate.**

IRAP has periodically tried to get appointments for clients unable to use the CBP One application for a variety of reasons. Efforts to contact port authorities have gone unanswered, and IRAP has heard similar reports from others operating in this space. Because there is no alternative to the CBP One Mobile application to schedule appointments, it is now a requirement that individuals seeking asylum at the southern border be able to read in English, Spanish or Haitian Creole. Those who are unable to read in one of those three languages are excluded from the appointment system – and under this rule, that means they are also excluded from asylum.



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Even individuals who are literate in a language other than English, Spanish, or Haitian Creole are unable to access the application since it is not available in other languages. This has a disparate impact on indigenous migrants who speak non-Spanish languages and are therefore excluded from accessing asylum in the United States. It also has a disparate impact on other migrants speaking languages other than these three, including Black migrants from African countries and Muslim migrants from countries such as Afghanistan or Iran, who speak languages such as French, Swahili, Dari, Farsi, Pashto, and many others not available in the app.

Moreover, in addition to requiring literal literacy in one of these three languages, the IFR also conditions access to asylum on technological literacy in being able to navigate the mobile application. IRAP frequently serves individuals in Ciudad Juarez who are struggling to navigate the application despite knowing how to read in Spanish or Haitian Creole, and we and other service providers are able to provide direct logistical support in navigating the mobile application to only a small percentage of the individuals in Ciudad Juarez seeking to access asylum in the United States.

**3. Conditioning access to asylum on the ability to navigate a mobile application will have a disproportionate impact on migrants with disabilities, especially those unable to see well enough to use it.**

IRAP frequently serves individuals in vulnerable situations, including individuals with disabilities. Requiring individuals to navigate a mobile application that does not include any features to make it accessible to those who cannot see necessarily excludes individuals who are blind from seeking asylum in the United States. As a result, this rule has a disparate impact on individuals with disabilities and prevents them from accessing asylum in the United States based on their disabilities.

The disparate impacts of this Rule are especially concerning because they are present without any remedy. While IRAP objected and continues to object strongly to the May 2023 Circumvention of Lawful Pathways Rule, at least that rule provided the opportunity for individuals who managed to present at ports of entry without appointments to show why they could not use the CBP One App to schedule an appointment. While in practice IRAP has heard reports of many people who should qualify for those exceptions, such as those unable to read in English, Spanish or Haitian Creole, being nevertheless found ineligible for asylum in the CFI process under CLP, at least those exceptions existed in the law as written.

The IFR provides no opportunity whatsoever for those suffering the disparate impacts outlined here to escape the rule's pernicious effects – the previously available exceptions to the CLP are obliterated in this IFR – with the only exceptions under the IFR being for survivors of severe forms of human trafficking, those with imminent medical emergencies, and those under imminent threat of severe harm in Mexico. These exceptions are not designed to mitigate the disparate effects outlined herein, and the Rule has not offered justification for deviating from the existence of such exceptions.

**B. The Departments fail to consider that all prior, comparable, illegal restrictions have failed to accomplish the IFR's stated goals, rendering the rule devoid of a rational basis to conclude that the IFR's policies will be successful.**

The IFR recounts that all prior measures to restrict access to asylum or entry to the United States as a vehicle to deter migration have failed.<sup>44</sup> The IFR further acknowledges that, regardless of U.S. enforcement measures, “[c]urrent trends and historical data indicate that migration and displacement in the Western Hemisphere will continue to increase as a result of violence, persecution, poverty, human rights abuses, the impacts of climate change, and other factors.”<sup>45</sup> Yet the IFR nonetheless asserts without foundation that this time it will be different.

The IFR provides no adequate explanation for the expectation that it will achieve its stated objective of drastically reducing the number of border encounters. The Departments assert that under the IFR, they will be able to place into “expedited removal more than 70 percent of the individuals who are not quickly repatriated” compared to the present 40 percent.<sup>46</sup> Yet the rule fails to account for the likelihood that many of those noncitizens it “swiftly” removes will in fact be *refouled*.

Studies have shown that any change in border policies trigger a short-term drop in encounters, regardless of the intent of the policy change.<sup>47</sup> For example, “[m]igration fell . . . when Title 42 began and every time it was expanded; it also fell after Title 42 ended.”<sup>48</sup> These lower numbers do not last long, however. “In the case of Title 42, migration numbers

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<sup>44</sup> IFR at 48712-13.

<sup>45</sup> IFR at 48726.

<sup>46</sup> IFR at 48752.

<sup>47</sup> Adam Isacson, “The Futility of ‘Shutting Down Asylum’ by Executive Action at the U.S.-Mexico Border, 4 June 2024,

<https://www.wola.org/analysis/futility-of-shutting-down-asylum-by-executive-action-us-mexico-border/> [accessed 8 July 2024].

<sup>48</sup> *Id.*

not only recovered, they spiked to historic levels.”<sup>49</sup> In fact, rapid exclusions may actually lead to an increased number of repeat crossings.

Deterrence policies also lead to increased violence and death at the U.S. southern border. Cutting off access to safe venues to seek asylum means individuals are using riskier and more dangerous methods to cross, feeding an already thriving underground market of human smuggling. “Pushed back to Mexico, criminal groups and corrupt state officials systematically target migrants for kidnapping and violence.”<sup>50</sup> Increased death tolls follow. “Former Border Patrol officials . . . told Human Rights Watch that the number of people they found dead immediately spiked when the US government began funneling migrants into more dangerous crossings. Predictably, continued border deterrence has driven the death toll higher in the US-Mexico borderlands.”<sup>51</sup>

**C. The Departments fail to analyze to what extent migration patterns are shaped by U.S. immigration enforcement system incentive structures relative to other factors, such as the many reasons people are forced to flee their homes.**

The IFR states in the preamble: “Current trends and historical data indicate that migration and displacement in the Western Hemisphere will continue to increase as a result of violence, persecution, poverty, human rights abuses, the impacts of climate change, and other factors.”<sup>52</sup> Yet beyond this brief mention, the IFR fails to engage with these “push factors” accounting in significant part for migration patterns.

The IFR assumes, without foundation, that the perceived incentives, responsive to U.S. enforcement measures, single-handedly shape migration patterns. In fact, ample U.S. government and academic analyses demonstrate that U.S. enforcement measures are only one of several factors informing patterns of migration.<sup>53</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> Human Rights Watch, “US: Border Deterrence Leads to Deaths, Disappearances: Biden Administration Should Address Loss of Life,” 26 June 2024, <https://www.hrw.org/news/2024/06/26/us-border-deterrence-leads-deaths-disappearances> [accessed 8 July 2024].

<sup>51</sup> *Id.*

<sup>52</sup> IFR at 48726.

<sup>53</sup> Congressional Research Service, “International Migration Trends in the Western Hemisphere,” 15 July 2022, <https://crsreports.congress.gov/product/pdf/R/R47182/2> [accessed 8 July 2024]; Congressional Research Service, “Central American Migration: Root Causes and U.S. Policy,” 30 November 2023, <https://sgp.fas.org/crs/row/IF11151.pdf> [accessed 8 July 2024]; Ariel G. Ruiz Soto et al., “Charting a New Regional Course of Action: The Complex Motivations and Costs of Central American Migration,” Migration Policy Institute et al.,

## **D. The agency failed to adequately consider health and security threats the IFR would pose to migrants and asylum seekers**

Suspending asylum access at the U.S. southern border traps migrants and asylum seekers in Mexico, exposing them to targeted violence, environmental hazards, and other dangers. Without other options to seek protection, displaced people who cannot safely wait in Mexico to attempt dangerous crossings between ports, where record-breaking heat in U.S. borderlands creates additional hazards.

U.S. policies that restrict asylum access at ports of entry leave migrants and asylum seekers stranded in dangerous Mexican border cities where they often lack sufficient access to housing and essential resources. Under the CLP, wait times for CBP One appointments exceeded six months,<sup>54</sup> leaving migrants and asylum seekers to wait in makeshift tent encampments, where they are exposed to extreme heat and other adverse climate impacts.<sup>55</sup> By imposing additional restrictions on asylum access, the IFR is likely to significantly increase CBP One appointment waiting times, prolonging the time people seeking protection must survive in precarious living conditions.<sup>56</sup> Record-breaking temperatures and severe weather conditions pose life-threatening risks, especially for those without proper shelter or access to water.<sup>57</sup>

The risk of targeted violence against migrants and asylum seekers stranded in Mexico is well-documented: advocates have tracked thousands of incidents of kidnappings, torture, sexual assaults, and extortion suffered by migrants and asylum seekers stranded in Mexico

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[https://www.migrationpolicy.org/sites/default/files/publications/mpi-wfp-mit\\_migration-motivations-costs\\_final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/mpi-wfp-mit_migration-motivations-costs_final.pdf) [accessed 8 July 2024].

<sup>54</sup> Christina Asencio, *Trapped, Preyed Upon, and Punished*, Human Rights First, May 2024, at 4, [https://humanrightsfirst.org/wp-content/uploads/2024/05/Asylum-Ban-One-Year-Report\\_final-formatted\\_5.13.24.pdf](https://humanrightsfirst.org/wp-content/uploads/2024/05/Asylum-Ban-One-Year-Report_final-formatted_5.13.24.pdf) [accessed 8 July 2024].

<sup>55</sup> Ángel Domínguez, *INM realiza redada contra migrantes en Matamoros*, Tamaulipas, Milenio, 28 December 2023, <https://www.milenio.com/estados/migrantes-varados-matamoros-tamaulipas-denuncian-redada-inm>; Ari Sawyer, *"We Couldn't Wait:" Digital Metering at the US-Mexico Border*, Human Rights Watch, 1 May 2024, <https://www.hrw.org/report/2024/05/01/we-couldnt-wait/digital-metering-us-mexico-border>.

<sup>56</sup> Human Rights First, *Two Weeks of the Biden Border Proclamation and Asylum Shutdown*, June 2024, <https://humanrightsfirst.org/wp-content/uploads/2024/06/Two-Weeks-of-the-Biden-Border-Proclamation-Asylum-Shutdown.pdf> [accessed 8 July 2024].

<sup>57</sup> Julia Neusner and Ama Francis, *Public Health and Human Health Implications of Climate Mobility*, Columbia Sabin Center for Climate Change Law, June 2024, [https://scholarship.law.columbia.edu/sabin\\_climate\\_change/227/](https://scholarship.law.columbia.edu/sabin_climate_change/227/).

due to the CLP and Title 42--other Biden administration policies that strand people seeking protection in Mexico by limiting asylum access at ports of entry.<sup>58</sup> Doctors Without Borders reported a 70 percent increase in sexual violence against migrants in Reynosa and Matamoros during the last months of 2023, alongside a surge in kidnappings.<sup>59</sup>

Many who cannot safely wait in Mexico have little to no access to processing at U.S. ports of entry, often driving them to undertake irregular crossings to save their lives.<sup>60</sup> IRAP has also encountered many individuals who, despite many dangers to themselves and their families, wish to enter the U.S. “the right way” but misunderstand various common crossings and the act of turning oneself in as being regular entries.

The U.S. southern border is experiencing a surge in heat-related fatalities and injuries, exacerbated by rising temperatures.<sup>61</sup> Heat exposure has become the most common cause of death for people crossing the U.S.-Mexico border in recent years, followed by drownings.<sup>62</sup> In September 2023, the International Organization for Migration (IOM) declared the U.S.-Mexico border “the deadliest land route for migrants worldwide on record” as borderlands regions saw unprecedentedly high temperatures.<sup>63</sup> During the summer of 2023, certain border regions experienced an unprecedented heat dome, with

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<sup>58</sup> Asencio, *Trapped* (previously cited) at 7.

<sup>59</sup> Doctors Without Borders, *17 Days in Captivity Along the US-Mexico Border*, February 2024, <https://www.doctorswithoutborders.org/latest/17-days-captivity-along-us-mexico-border> [accessed 8 July 2024].

<sup>60</sup> Julia Neusner & Kennji Kizuka, *Two Years of Suffering: Biden Administration Continues Use of Discredited Title 42 Order to Flout Refugee Law*, Human Rights First, 1, 4-5, 17 March 2022, <https://humanrightsfirst.org/library/two-years-of-suffering-biden-administration-continues-use-of-discredited-title-42-order-to-flout-refugee-law/> [accessed 8 July 2024].

<sup>61</sup> Camilo Montoya-Galvez, *At Least 853 Migrants Died Crossing the U.S.-Mexico Border in Past 12 Months — a Record High*, CBS, 28 October 2022, <https://www.cbsnews.com/news/migrant-deaths-crossing-us-mexico-border-2022-record-high/> [accessed 8 July 2024].

<sup>62</sup> Camilo Montoya-Galvez, *Crossings Along U.S.-Mexico Border Jump as Migrants Defy Extreme Heat and Asylum Restrictions*, CBS, 28 October 2022, <https://www.cbsnews.com/news/migrant-deaths-crossing-us-mexico-border-2022-record-high/> [accessed 8 July 2024].

<sup>63</sup> See Emiliano Rodriguez Mega and Simon Romero, *Mexico is Reeling from Soaring Temperatures, Too*, 29 June 2023, <https://www.nytimes.com/2023/06/29/world/americas/mexico-heat-wave.html> [accessed 8 July 2024].



temperatures exceeding triple digits for over a week<sup>64</sup>; temperatures over the course of 2024 are expected to rise even higher.<sup>65</sup>

## **VI. The IFR is contrary to law and exceeds statutory authority.**

The IFR violates U.S. obligations under international law, the INA, and the APA by: barring noncitizens from seeking asylum based on their manner of entry; applying the manifestation of fear test; elevating the screening standard in CFIs to “reasonable probability”; effectively eliminating any meaningful consultation period in custody; and failing to ensure due process to conform to U.S. obligations to avoid *refoulement*.<sup>66</sup>

Most prominently, the Protocol Relating to the Status of Refugees, incorporating provisions under the 1951 Convention Relating to the Status of Refugees, to which the United States acceded in 1968, prohibits *refoulement*.<sup>67</sup> While the IFR claims to incorporate exceptions to the suspension on entry to take into account U.S. *non-refoulement* obligations, in practice the IFR causes *refoulement* by failing to maintain long-standing and necessary procedures to ensure people with *bona fide* refugee claims are referred for a fear screening, by elevating the standard to pass such a screening, and by requiring Mexicans to remain in the country of persecution while seeking a CBP One appointment, among other reasons.

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<sup>64</sup> See Gina Jiménez, *Extreme Heat is Already Straining the Mexican Power Grid*, Inside Climate News, 29 June 2023, <https://insideclimatenews.org/news/29062023/extreme-heat-is-already-straining-the-mexican-power-grid/> [accessed 8 July 2024].

<sup>65</sup> Zeke Hausfather, *State of the Climate: 2024 off to a record-warm start*, Carbon Brief, 23 April 2024, <https://www.carbonbrief.org/state-of-the-climate-2024-off-to-a-record-warm-start/> [accessed 8 July 2024].

<sup>66</sup> IFR at 48718. The IFR has a single-minded focus on reducing the number of people referred for fear screenings and reducing aggregate processing times, which had the predictable effect of leading implementing agencies to identify and eliminate obstacles to faster processing. For example, ICE issued implementation guidance for the Proclamation and IFR that restricts to four hours the window for statutorily required consultation. 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](https://drive.google.com/file/d/1jedC-2TzM0wzDaKWy4F_y7niS1fFkbhj/view) [accessed 8 July 2024] [hereinafter “ICE IFR Implementation Guidance”].

<sup>67</sup> Protocol Relating to the Status of Refugees, adopted 16 December 1966, <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-relating-status-refugees> [accessed 8 July 2024]; Convention and Protocol Relating to the Status of Refugees, 28 July 1951, <https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees> [accessed 8 July 2024]; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987); *INS v. Stevic*, 467 U.S. 407, 421, 427 (1984).

**A. The IFR misconstrues BIA decisions for the propositions that the United States' best interests and a noncitizen's manner of entry may justify curtailing asylum eligibility without any meaningful, individualized determination.**

The IFR defines the United States' "best interests" and justifies curtailing individuals' access to asylum based on aggregate circumstances at the U.S. southern border – rather than on an individualized inquiry, as each BIA decision on which the IFR relies does and as the law requires. The IFR asserts that the rule is proper because, like the one-year filing deadline and other restrictions on asylum eligibility, the IFR "further[s] systemic efficiency by limiting asylum in certain situations where the strains on the immigration system are at their peak."<sup>68</sup> However, the fact that both the one-year filing deadline and the IFR share a goal of efficiency in the asylum system obscures crucial differences: among other things, a one-year filing deadline connects to an individual's actions and an individualized inquiry, whereas total border encounter numbers connect to neither.<sup>69</sup>

The IFR cites to *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978) for the proposition that "the ultimate consideration when determining whether someone warrants a grant of relief as a matter of discretion is whether granting relief 'appears in the best interests of th[e] country'."<sup>70</sup> Setting aside the fact that *Marin* concerns a legal permanent resident at risk of deportation due to criminal history, an entirely different procedural posture, *Marin* stands for the opposite proposition than the IFR's pursuit of distilling a complex inquiry into a single question of the United States' "best interests." *Marin* expressly states that an "immigration judge *must balance the adverse factors* evidencing an alien's undesirability as a permanent resident *with the social and humane considerations presented* in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country" (emphasis added).<sup>71</sup> In *Marin*, the BIA explains that there must be an individualized inquiry considering many relevant facts emanating from the individual noncitizen's conduct to draw an ultimate conclusion on whether granting a waiver supports or undermines the best interests of the United States. The IFR thus relies affords no legal authority for its approach to obliterate the individualized inquiry.

Likewise, in *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987) – another bizarre source of authority for the IFR which concerns an individual who entered the United States on

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<sup>68</sup> IFR at 48736.

<sup>69</sup> IFR at 48736-37.

<sup>70</sup> IFR at 48737.

<sup>71</sup> *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978), <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/17/2666.pdf>.

fraudulent documents – the “circumvention of orderly refugee procedures” in question, deemed to be “relevant to whether a favorable exercise of discretion is warranted,” still forms part of an individualized inquiry evaluating actions within the noncitizen’s control (i.e., whether to employ fraudulent documents or not).<sup>72</sup> Moreover, *Pula* states: “we agree with the applicant that *Matter of Salim, supra*, places too much emphasis on the circumvention of orderly refugee procedures. This circumvention can be a serious adverse factor, but it should not be considered in such a way that the practical effect is to deny relief in virtually all cases.”<sup>73</sup> To “deny relief in virtually all cases” is precisely what the IFR does – in reliance on *Pula*, which incontrovertibly stands for the opposite proposition.

The irony of citing *Matter of Marin* and *Matter of Pula* in support of the IFR cannot be overstated. In both cases, the BIA discusses extensively the numerous favorable and countervailing factors that must be considered in affording a waiver or denying asylum. Neither the “best interests” of the United States nor the “manner of entry” is dispositive of the outcome in either case. Moreover, the extensive analysis discussed by the BIA – following a full adjudication by an immigration judge – drives home the complexity of legal and factual issues that noncitizens to whom the suspension on entry applies will never have the opportunity to put forth before being removed – and possibly *refouled*.

## **B. To bar noncitizens from seeking asylum based on their manner of entry is contrary to law.**

The IFR violates the plain language of 8 U.S.C. §1158(a)(1). A federal court already has held that asylum prohibitions similar to those articulated by the IFR contradict the plain language of the INA. In *East Bay III*, the court found that the CLP impermissibly banned all migrants who arrive at the southern border and who do not first obtain a CBP One appointment from asylum eligibility.<sup>74</sup>

Congress explicitly authorized individuals to apply for asylum upon arrival in the United States regardless of where and how they entered the United States. Any regulations

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<sup>72</sup> *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987), <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3033.pdf>.

<sup>73</sup> *Id.*

<sup>74</sup> *East Bay Sanctuary Covenant v. Biden*, 18-cv-06810-JST at 15-19 (N.D. Ca. Jul. 25, 2023) (citing *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 669-670 (9th Cir. 2020) (“The Rule requires migrants to enter the United States at ports of entry in order to preserve their eligibility for asylum. It is effectively a categorical ban on migrants who use a method of entry explicitly authorized by Congress in section 1158(a).”).

prohibiting asylum access to individuals who do not enter at a designated port of entry is in direct violation of the plain language of 1158(a)(1) as well as the legislative history.<sup>75</sup>

The Departments assert that the IFR is distinguishable from *East Bay III* and thus permissible because the IFR only applies during emergency circumstances.<sup>76</sup> But this argument is unavailing; the IFR still contravenes the plain text of section 1158(a)(1).<sup>77</sup> Furthermore, the IFR's stated conditions for lifting the emergency circumstances are unlikely to ever be realized as border apprehensions have not been so low since 2020.<sup>78</sup> This IFR may be for "emergency circumstances" but it is functionally a permanent rule.<sup>79</sup>

The Departments also argue that the IFR is substantially different from prior asylum restrictions found unlawful by the courts because the IFR contains exceptions to the prohibition on asylum.<sup>80</sup> Yet the existence of such exceptions does not change the requirement that any bar to asylum eligibility be consistent with the statute.<sup>81</sup> Even with exceptions, the IFR impermissibly prohibits asylum applications made by individuals based on the manner of their entry into the United States, contradicting section 1158(a)(1).

Further, the Departments argue that their restrictions on access to asylum are permissible because: the INA grants the Attorney General the ability to issue additional conditions under which asylum may be limited; the Attorney General has broad discretion to deny asylum; manner of entry is a permissible consideration in discretionary determinations;

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<sup>75</sup> *Id.* at 15-19; *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 669-670 (9th Cir. 2020).

<sup>76</sup> IFR at 48735 ("The Departments regard this rule as substantially different than the rule the Ninth Circuit deemed invalid in *East Bay III*. The Proclamation and limitation on asylum eligibility at issue here differ significantly from the prior categorical bar on "manner of entry" because they do not treat the manner of entry as dispositive in determining eligibility. Rather, the limitation at issue here turns on whether—during emergency border circumstances described in the Proclamation and this rule—an individual has followed the lawful, safe, and orderly pathways that the United States Government has established during these emergency situations when it is essential that noncitizens use such pathways to ensure the United States Government's ability to manage the border.").

<sup>77</sup> *East Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 844 (N.D. Cal. 2018); *East Bay Sanctuary Covenant v. Trump*, No. 18-7274 (Feb. 28, 2020) (slip op. at 40).

<sup>78</sup> Adam Isacson, *The Futility of "Shutting Down Asylum" by Executive Action at the U.S.-Mexico Border*, Washington Office on Latin America, June 4, 2024 available at: <https://www.wola.org/analysis/futility-of-shutting-down-asylum-by-executive-action-us-mexico-border/>.

<sup>79</sup> IFR 48715, 48730-31.

<sup>80</sup> IFR at 48735.

<sup>81</sup> *East Bay Sanctuary Covenant v. Biden*, 18-cv-06810-JST at 15-19 (N.D. Ca. Jul. 25, 2023).

and the Departments disagree with prior court rulings finding similar asylum bans unlawful.<sup>82</sup> These arguments are unavailing as well.

The INA permits the Attorney General “by regulation [to] establish additional limitations and conditions consistent with this section, under which a [noncitizen] shall be ineligible for asylum under paragraph (1).”<sup>83</sup> Explicit in this statutory language is a restriction on the types of limitations and conditions on asylum eligibility that the Attorney General may establish. Namely, they must be consistent with the statutory language of section 1158.<sup>84</sup>

The Departments argue that the IFR is consistent with section 1158(a) because Congress already included statutory bars to asylum designed to promote “systemic efficiency” such as the prohibition on asylum for individuals who filed applications more than one year after their arrival in the United States and prohibiting individuals from filing successive asylum applications.<sup>85</sup> The Departments argue that the purpose of prohibiting asylum applications from individuals who do not meet an exception to the suspension on entry is also designed to promote systemic efficiency during “emergency” border circumstances, and so this IFR is also permitted under the statute. *Id.* Yet a temporal cut-off is not in conflict with the permission to seek asylum irrespective of manner of entry, whereas the IFR is.

Legislative history also supports the unavoidable conclusion that the statute was purposely written to ensure access to asylum irrespective of manner of entry.<sup>86</sup> To interpret the statute and regulations as permitting the Attorney General nonetheless to restrict asylum based on manner of entry is nonsensical.

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<sup>82</sup> IFR at 48735-38.

<sup>83</sup> 8 U.S.C. §1158(b)(2)(C).

<sup>84</sup> *Id.*

<sup>85</sup> IFR at 48736.

<sup>86</sup> Brief of Yael Schacher and Refugees International as Amicus Curiae in Support of Plaintiffs at 7, *Immigrant Defenders vs. Wolf*, No. 2:20-cv-09893 (C.D. Cal. Nov. 20, 2020), [https://www.splcenter.org/sites/default/files/documents/2020.11.20\\_77\\_mtn\\_for\\_leave\\_to\\_participate\\_as\\_amici\\_curiae.pdf](https://www.splcenter.org/sites/default/files/documents/2020.11.20_77_mtn_for_leave_to_participate_as_amici_curiae.pdf) (“It was this language from the House bill authored by Rep. Holtzman, rather than the version in the Senate bill, that was enacted as Section 208 of the INA—‘The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien’s status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101 (a) (42) (A).’ . . . Crucially, reference to availability of asylum at the land border was missing from the Senate bill version of the asylum provision. In adopting the House version in conference, Congress expressed a clear preference.” (internal citations omitted)) [accessed 8 July 2024].

The government further attempts to justify the IFR because the Attorney General has broad discretion to deny asylum based on whether granting relief is in the best interest of the country.<sup>87</sup> According to the government's reasoning, the IFR is permissible as an exercise of discretion both because the government has determined that greater efficiency is in the best interest of the United States and because manner of entry is a permissible consideration in discretionary determinations.<sup>88</sup> The Departments' analysis is wrong.

First, the Departments conflate the Attorney General's discretionary authority to grant or deny asylum with the Attorney General's ability to promulgate additional restrictions or conditions on asylum eligibility "consistent with" section 1158. The IFR is not an exercise of discretion, but rather an additional blanket restriction on asylum eligibility based on manner of entry. The Attorney General has broad discretion to deny asylum applications, but only when an individual is actually eligible for asylum and when the basis for denial is consistent with the law.<sup>89</sup> The IFR creates restrictions on asylum eligibility, which is not the same as denying asylum in an exercise of discretion.

Second, the Attorney General may not exercise discretion in a manner inconsistent with the law. As discussed above, the Departments rely on the BIA's decision in *Matter of Pula* to argue that manner of entry or "the circumvention of orderly refugee procedures" is a relevant factor in discretionary determinations.<sup>90</sup> However, this is a misinterpretation of the holding of *Matter of Pula*. While the BIA held that manner of entry may be considered as a factor in discretionary determinations, the BIA concluded that this factor must be considered in light of the totality of the circumstances and not given so much weight as to effectively deny asylum in all cases.<sup>91</sup> Yet that is precisely what the IFR does: it effectively bars asylum in all cases where applicants did not first obtain a CBP One appointment. Therefore, the IFR directly contravenes the BIA's decision in *Matter of Pula*.

Lastly, the Departments invoke the President's authority to suspend the entry of noncitizens when the President finds that their entry would be detrimental to the United States.<sup>92</sup> However, this authority is not unlimited. As previously discussed, section 1158(a)(1) guarantees access to asylum for individuals arriving at the southern border.

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<sup>87</sup> IFR at 48737 (citing *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978)).

<sup>88</sup> *Id.* (citing *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987)).

<sup>89</sup> *INS v. Cardoza-Fonseca*, 489 U.S. 421, 443 (1987).

<sup>90</sup> IFR at 48737.

<sup>91</sup> *Matter of Pula*, 19 I&N Dec. at 473.

<sup>92</sup> 8 U.S.C. §1182(f).

### C. The manifestation of fear test is incompatible with the law and will result in *refoulement*.

The goal of the IFR is to reduce the number of people who receive fear screenings by making fear screenings **harder** to access. The administration provides no reason to think that the new barriers to fear screenings will only affect people with frivolous claims, which would be contrary to common sense. Thus, the IFR will result in impermissible *refoulement*.

Furthermore, the IFR provides no explanation for how officers would accurately detect fear, despite globalized assertions of officers' extensive training and skill – and an assertion that officers will refer for fear screening any ambiguous instances of manifesting fear.<sup>93</sup> These assurances are unpersuasive. The overarching thrust of the IFR is to reduce the number of people afforded fear screenings and to save time at every opportunity. Officers may face immense pressure *not* to refer for fear screenings.

In other contexts, USCIS itself recognizes the complexity of determining cognizable claims based on the challenges in detecting manifestations of (relevant) fear. For example, for those who successfully obtain a fear interview, USCIS has recognized in its credible fear interview training module:

“The applicant's willingness and ability to provide those descriptions [of the main points of the claim] may be directly related to the asylum officer's skill at placing the applicant at ease and eliciting all the information necessary to make a proper decision. An asylum officer should be cognizant of the fact that an applicant's ability to provide such descriptions may be impacted by the context and nature of the credible fear screening process.”<sup>94</sup>

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<sup>93</sup> IFR at 48744 (“DHS acknowledges that, in some cases, these behaviors may reflect circumstances other than a fear of return—for instance, a noncitizen who has just arrived at the border may be physically tired, cold, hungry, and disoriented, which may present similarly to manifestation of fear. In such cases, DHS immigration officers will use their expertise and training to determine whether the noncitizen is manifesting a fear. If there is any doubt, however, immigration officers will be instructed to err on the side of caution and refer the noncitizen to an AO for a credible fear interview.”)

<sup>94</sup> Refugee, Asylum, and International Operations Directorate Officer Training, Asylum Division Officer Training Course, “Lesson Plan Overview: Credible Fear of Persecution and Torture Determinations,” 13 February 2017, pp. 18-19

<https://www.aila.org/aila-files/E581DEC2-8160-481A-A2E4-927695AA7E92/17022435.pdf?1697589496> [accessed 8 July 2024].

In other words, USCIS recognizes that many people – absent a sense of safety – will not “manifest” their fear – even with posters telling them to do so. In the past, as in this training manual, USCIS has recognized that an officer not posing questions *well* may fail to elicit a viable fear claim; under the IFR, the Departments now assert without foundation that not asking questions *at all* can somehow suffice.

#### **D. Eliminating a meaningful opportunity for consultation is contrary to law.**

The purpose of the IFR is to reduce border encounters and processing times to enable DHS to process the majority of people encountered into expedited removal as a deterrent measure.<sup>95</sup> One of the mechanisms to reduce processing times is to reduce the statutorily required consultation period, a measure that ICE adopted in its implementation guidance to the IFR.<sup>96</sup> A four-hour window for consultation – and the manner in which ICE is implementing it – is so inadequate as to violate the statutory requirement of affording a consultation opportunity. Functionally, a four-hour consultation period often will amount to no consultation opportunity at all.

The INA provides that a noncitizen “who is eligible for [a credible fear] interview may consult with a person or persons of the [noncitizen’s] choosing prior to the interview or any review thereof.”<sup>97</sup> The four-hour window means in many cases it will be impossible for noncitizens to access counsel, if that is whom they seek to consult. Migrants in custody already face several practical and functional hurdles when trying to get access to legal counsel including: knowing how to contact a lawyer, having family or friends who can call a lawyer know where they are being detained; having access to a phone while in custody; having access to a phone for enough time to have a meaningful consultation; having access to writing implements to record counsel’s contact information, and being given enough information about the credible fear process to understand what the process is.<sup>98</sup>

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<sup>95</sup> IFR at 48715.

<sup>96</sup> ICE IFR Implementation Guidance at 4.

<sup>97</sup> 8 U.S.C. §1225(b)(1)(B)(iv); see also 8 C.F.R. §208.30(d)(4).

<sup>98</sup> NIJC, *Obstructed Legal Access: NIJC’s Findings from 3 Weeks of Telephonic Legal Consultations in CBP Custody*, 25 May 2023, <https://immigrantjustice.org/staff/blog/obstructed-legal-access-nijcs-findings-3-weeks-telephonic-legal-consultations-cbp> [hereinafter “Obstructed Legal Access”]; Kel Smith-Holbourn, *Stays in CBP Custody are Getting Longer Due to ‘Phone booth Asylum’ Policy*, Immigration Impact, 21 July 2023, <https://immigrationimpact.com/2023/07/21/cbp-custody-phone-booth-asylum-policy/> [accessed 8 July 2024]; AILA, *Concerns Regarding Conducting Credible Fear Interviews in CBP Custody*, 30 June 2023, <https://www.aila.org/library/letter-highlighting-concerns-regarding-conducting> [accessed 8 July 2024]; Americans for Immigrant Justice, *Letter to the Biden Administration: Immediately Stop Conducting Credible Fear Interviews in CBP Custody*, 5 June 2023,



A report on these barriers by the National Immigrant Justice Center highlights certain affirmative efforts by CBP officers to obstruct access to counsel for migrants in custody by failing to notify attorneys of scheduled fear interviews or reviews before immigration judges and requiring wet signatures of notices of entry of appearance from migrants in custody who rarely have access to the materials needed to furnish such signatures.<sup>99</sup> Shortening the timeline in which migrants may consult an attorney prior to their interviews will exacerbate these already severe obstacles.

In addition to violating the statutory consultation requirement, the four-hour consultation period will lead to greater rates of *refoulement*. The opportunity to consult – especially with an attorney – may be crucial to equipping noncitizens with the information they need to properly understand CFI proceedings and express their fear of persecution to an interviewing officer. Thus, depriving people in practice of the chance to consult will likely result in many individuals with viable claims never having the chance to articulate them, risking their return and possible *refoulement*.<sup>100</sup>

Further, these four hours are often allotted before or after typical business hours. DHS has stated the window can occur at any time between 7:00 a.m. and 7:00 p.m., any day of the week.<sup>101</sup> As IRAP can attest based on its direct experiences and staffing, legal service providers do not have the sufficient resources to have attorneys on standby twelve hours a day, seven days a week to help meet the need for services.

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<https://aijustice.org/2023/06/05/the-biden-administration-must-immediately-stop-conducting-credible-fear-interviews-in-cbp-custody/> [accessed 8 July 2024].

<sup>99</sup> Obstructed Legal Access; NIJC, *The Biden Administration Continues to Thwart Access to Counsel for People Seeking Asylum*, June 2023,

<https://immigrantjustice.org/staff/blog/obstructed-legal-access-june-2023-update> [accessed 8 July 2024].

<sup>100</sup> NIJC, *The Biden Administration Continues to Thwart Access to Counsel for People Seeking Asylum*, 20

June 2023, <https://immigrantjustice.org/staff/blog/obstructed-legal-access-june-2023-update>

[accessed 8 July 2024]; *Democratic lawmakers slam the lack of attorney access for asylum-seekers in Border Patrol custody*, PBS News, 1 August 2023,

<https://www.pbs.org/newshour/politics/democratic-lawmakers-slam-the-lack-of-attorney-access-for-asylum-seekers-in-border-patrol-custody> (noting that the percentage of asylum seekers who passed fear screening interviews fell from 77 percent to 60 percent after the fast-track screening process was implemented) [accessed 8 July 2024]; Eileen Sullivan, *Lawyers Say Helping Asylum Seekers in Border Custody Is Nearly Impossible*, New York Times, 22 July 2023

<https://www.nytimes.com/2023/07/22/us/politics/biden-asylum-policies-border.html> (reporting that the percentage of migrants who passed fear interviews after rapid-processing took effect dropped from 74 percent to 30 percent) [accessed 8 July 2024].

<sup>101</sup> *Id.*

In addition, explaining the complexities and logistics of the expedited removal process and preparing an individual for a determinative interview on traumatic subjects could easily exceed the allotted four-hour window. In IRAP's experience, the time needed for interview preparation is even longer when interpretation is required.

**E. The Departments failed to consider adequately that the IFR will increase the risk of refoulement.**

The IFR explicitly recognizes that it will result in an increase in *refoulement*, despite U.S. obligations to prevent it: "As discussed in this preamble, the rule's manifestation of fear and reasonable probability standards may also engender a risk that *some noncitizens with meritorious claims may not be referred for credible fear interviews* or to removal proceedings to seek protection. In these cases, there may be costs to noncitizens that result from their removal" (emphasis added).<sup>102</sup>

The IFR also changes documentation policy to eviscerate the ability to know the extent of *refoulement* and to afford a legal remedy for it. Namely, until the IFR, DHS has used the Form I-867A, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the INA and Form I-867B, Jurat for Record of Sworn Statement in Proceedings under Section 235(b)(1) to ensure individuals are aware of the opportunity to seek protection and to record responses to inquiries as to fear of return or harm if returned.<sup>103</sup> By eliminating the requirement to use these forms and not replacing them with any other form of documentation, the Departments institute a policy that they admit will result in missed viable claims and *refoulement* but also that will make it impossible to have any record of the individual cases – or total extent of the problem – where fear was or would have been manifested and instead the individual was removed.<sup>104</sup>

The Departments seek to reduce the rate of people who claim fear in order to address operational challenges, not because they have concluded that a higher proportion of claims

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<sup>102</sup> IFR at 48767. *See also* IFR at 48750 ("The Departments acknowledge that, despite the protections preserved by the rule and the available exceptions, the provisions adopted by this rule will result in the denial of some asylum claims that otherwise may have been granted and, as with all screening mechanisms, there is some risk that a case that might otherwise warrant protection might not proceed to a merits adjudication. However, in light of the emergency circumstances facing the Departments and addressed in the Proclamation and this rule, the Departments believe these measures are appropriate and necessary.").

<sup>103</sup> IFR at 48739.

<sup>104</sup> IFR at 48739-40.



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are frivolous. If they succeed in reducing the numbers of people referred for fear screenings, it is very likely that more people will be *refouled*.

## **VII. The departments fail to consider serious reliance interests.**

DHS and EOIR have 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 access to asylum, at least with the exceptions established under the CLP, and on access to clients in custody.

IRAP staff and pro bono attorneys provide CFI preparation to clients. When the Departments change course as in this IFR, 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 effectuated by the IFR 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.

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 IFR – and its intersection with other recently implemented policy changes.

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. Doing so will directly limit the number of individuals organizations like IRAP can assist.

In addition, due to the likelihood of erroneous negative determinations, 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 challenges to erroneous negative decisions.

Legal services like those provided by IRAP will only become increasingly vital with the enforcement of policies like the “shout test” and the higher screening standards for those

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individuals who are unable to meet the exceptions stated in the IFR. For IRAP, and similarly situated legal service providers, there will certainly be an increased burden on capacity, as additional resources will need to be expended by IRAP to ensure that every client is up-to-date on current border policies and properly prepared. At a minimum, each legal counseling session will need to cover far more material, including that asylum seekers must now affirmatively claim fear; the meaning of the IFR and potential exceptions to it; and more in-depth preparation for underlying claims of fear should they be evaluated under the higher standards. With the likely increase in the number of negative determinations, IRAP and organizations like IRAP will need to dedicate significant resources to representing clients in their immigration Judge review hearings and potential Requests for Reconsideration to USCIS.

## VIII. Conclusion

IRAP strongly opposes the IFR as it is illegal, inhumane, and discriminatory for all of the foregoing reasons. It violates the existing statutory framework and mandate of the agencies to protect and provide a fair asylum process. It will deny access to protection to many of the most vulnerable and send refugees back to places of persecution and torture.

IRAP urges the administration to withdraw the IFR. Instead, the administration must devote resources to humane asylum processing and just adjudications. IRAP welcomes the opportunity to discuss this Comment with you further.

Sincerely,



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