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June 21, 2024

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U.S. Department of Homeland Security
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Submitted via https://www.regulations.gov

Re: RIN 1615-AC91; DHS Docket No. USCIS-2024-0005
Comment in Opposition to Notice of Proposed Rulemaking Entitled Application of Certain Mandatory Bars in Fear Screenings

Dear Director Delgado,

The Immigrant Legal Resource Center (ILRC) submits the following comment opposing the proposed rule issued by the Department of Homeland Security (DHS) on May 13, 2024, entitled "Application of Certain Mandatory Bars in Fear Screenings."

The ILRC is a national non-profit organization that works to advance immigrant rights through advocacy, educational materials, and legal trainings. Since 1979, the ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. We serve the individuals and community of organizations that are most impacted by this rule. The ILRC builds the capacity of immigration advocates to assist immigrants in their removal defense cases to provide more immigrants with a meaningful chance at justice. We support immigration legal service providers nationwide, serving hundreds of organizations and practitioners that work with immigrants. The ILRC provides technical assistance on immigration court procedure through our webinars and our Attorney of the Day service, in which we work with advocates on their specific cases and questions. As experts in the field, the ILRC publishes *Removal Defense: Defending Immigrants in Immigration Court*, a manual which provides a thorough guide to the immigration court process with practice tips. The ILRC also publishes *Essentials of Asylum Law*, a manual that provides an overview of asylum law for practitioners.

I. The comment period should be extended to sixty days

The comment period for this rule is set at thirty days instead of the customary sixty days and the Department has not provided sufficient explanation as to why the comment period has been shortened. We are dismayed to see that the administration has once again chosen to truncate the comment period for a complex rule weakening protections for asylum seekers at the

border. While the rule itself is not long, its complex interactions with other regulations and asylum processes warrant the full customary sixty-day comment period contemplated by federal law and policy. [1]

The reasoning for the shortened comment period provided in the rule is the Department's insistence that the rule be implemented as soon as possible, while also stating that the rule is short in length, is subject to several additional rules that have been opened for notice and comment recently, and its discretionary and discrete application. None of these reasons are adequate to deprive the public of a customary comment period. While the rule is short in length, the rules that the Department points to as previous opportunity for comment - most notably last year's Circumvention of Lawful Pathways Rule (CLP rule)[2] - are complex, long, and in some cases subject to current litigation, thereby complicating the proposed rule and necessitating a longer comment period.

Further still, this rule is a departure from long-standing precedent and the Biden administration's own statements in favor of mandatory bar screenings at later stages of the asylum process.[3] This change in policy and practice is abrupt and the agency should err on the side of providing more opportunity to comment than less. Given the importance and abruptness of the Biden administration's policy switch and the substantial potential of this change, the agency needs thoughtful, constructive comments from the public, which require a longer comment period.

Finally, a shorter comment period burdens those whose feedback is of the utmost importance to the promulgation of rules - those subject to the rules and the practitioners who represent them. The federal rulemaking process is notoriously opaque and confusing and a shorter comment period all but ensures that the only comments that the agency will receive will be from those who have the time and resources to devote to the quick turnaround. Practitioners who will represent those individuals subject to this rule will not have the same resources to devote to providing a meaningful comment, nor will those who have had experience in this system. Their feedback could be monumentally helpful to the agency in understanding the practical ramifications of such a rule and its implications for a future administration that may seek to weaponize its existence against asylum seekers.

As such, the agency should reconsider its justifications for a shorter comment period and extend the period to at least sixty days.

II. The Department has failed to provide adequate policy justifications for this rule

[1] Agencies must "afford the public a meaningful opportunity to comment on a proposed regulation and include a sixty-day comment period "in most cases." Exec. Order No. 12866, Regulatory Planning and Review (58 Fed. Reg. 51735; Oct. 4, 1993); Executive Order 13563 directs agencies to provide meaningful opportunity to comment and that the comment period should be at least sixty days. Exec. Order 13563, Improving Regulations and Regulatory Review (76 Fed. Reg. 3821; Jan, 21, 2011).

[2] It should be noted that the CLP rule also included a shortened, thirty-day comment period which restricted the ability of the public to provide full and adequate feedback.

[3] In March 2022, the Biden administration codified the long-standing practice that asylum officers did not apply mandatory bars at the credible or reasonable fear stage. *See, Procedures for Credible Fear Screening Consideration of Asylum, Withholding of Removal and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18078, 18219 (Mar, 29, 2022).

The ILRC's concerns regarding the proposed rule reflect many of the Department's own concerns expressed regarding the enjoined Trump-era Global Asylum Rule and that rule's application of asylum bars to the credible fear interview (CFI).[4] In 2021 and 2022, when confronted with the decision to implement bars at the preliminary stage, the Department correctly decided doing so was not only inefficient and contrary to Congressional intent, but would infringe on the due process rights of asylum seekers. The Department stated, "considerations of procedural fairness counsel against applying mandatory bars that entail extensive fact-finding during the credible fear screening process."[5] In the Asylum Processing Interim Final Rule (IFR), the Department also stated that "due to the intricacies of the fact-finding and legal analysis often required to apply mandatory bars, the Departments now believe that individuals found to have a credible fear of persecution generally should be afforded the additional time, procedural protections, and opportunity to further consult with counsel."[6] Determining whether an asylum bar applies to an individual applicant requires an intricate fact-finding legal analysis. Asylum seekers continue to need more procedural protections, not fewer.

Yet now, inexplicably, the Department has proposed to do a 180-degree policy change and aims to apply many of the same bars at a stage which it previously stated would be inefficient and contrary to due process principles. Acknowledging that the proposed rule is a significant departure from its prior position, the Department attempts to distinguish its reversal from the Trump administration's nearly identical policies by highlighting differences between the Global Asylum Rule and the proposed rule. The Department states the proposed rule, unlike the Global Asylum Rule, applies only certain mandatory bars and is discretionary, allowing the asylum officer to exercise "discretionary flexibility" to apply the bars depending on an asylum officer's assessment of the facts and circumstances of the case. However, the proposed rule does not provide guidelines about what evidence would be sufficient to flag a potential bar. The Department now states the process it previously found to be so problematic, may, in unspecified circumstances be an "appropriate use of resources."[7] Yet, the Department fails to cite evidence to support this claim. Instead, the Department cites the implementation of the troubled CLP rule to support its reversal. However, since its inception, the CLP rule has prevented asylum seekers with meritorious asylum claims from accessing the asylum system and forced vulnerable individuals to wait in dangerous and deadly conditions.[8] The Department is also currently appealing a federal court's ruling that the CLP rule is unlawful. These are not indicia of success.

III. The NPRM's proposed application of mandatory bars to asylum during fear screenings raises serious Fifth Amendment due process concerns and conflicts with the United States' non-refoulement obligations

A. The expedited removal process already raises a host of due process concerns

[4] Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18094 (Mar. 29, 2022) ("Asylum Processing IFR"); Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46906, 46914 (Aug. 20, 2021).
[5] Asylum Processing IFR at 18093.
[6] Asylum Processing IFR at 18094.
[7] 89 Fed. Reg. 41351.
[8] Human Rights First, *Trapped, Preyed Upon, and Punished: One Year of the Biden Administration Asylum Ban* (May 7, 2024), https://humanrightsfirst.org/library/trapped-preyed-upon-and-punished/

The Supreme Court has recognized that noncitizens who have physically entered the United States, even unlawfully, are "persons" under the Fifth Amendment's Due Process Clause.[9] As such, they are entitled to certain due process protections, including a right to a *meaningful* opportunity to be heard before deprivation of a liberty interest, such as removal from the country. In addition, the United States is a signatory to the United Nations 1967 Protocol, which expanded the rights of refugees established by the Convention Relating to the Status of Refugees ("1951 Convention"). The 1951 Convention and the 1967 Protocol require signatories to abide by the principle of non-refoulement, that is, not sending refugees to a place where they are at risk of persecution, or to a country which might send them to such a place. According to the 1951 Convention, "[t]he principle of nonrefoulement is so fundamental that no reservations or derogations may be made to it. It provides that no one shall expel or return ("*refouler*") a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom." The 1951 Convention and 1967 Protocol also require that signatories provide refugees with a legal status that will entitle them to comprehensive civic rights, and not punish refugees for entering the country without proper travel and immigration documents.

U.S. immigration law is often described as complex; and the subset of cases dealing with asylum law are among the most complicated in immigration law.[10] Specifically, the questions of whether an applicant has been convicted of a particularly serious crime or is subject to a terrorism-related bar have been described as among the most complex in immigration law.[11] Given the legal and factual complexity of cases, having counsel is vital to presenting arguments against removal and detention, as well as eligibility for relief.[12] Yet, available data indicates that on average, only

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[9] *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

[10] *See Padilla v. Kentucky*, 559 U.S. 356, 369 (2010) ("Immigration law can be complex, and it is a legal specialty of its own."); *Quintero v. Garland*, 998 F.3d 612, 632 (4th Cir. 2021) ("While U.S. immigration law is generally notorious for its esoteric nature, the law of asylum is one of the more complex areas thereof."); *Usubakunov v. Garland*, 16 F.4th 1299, 1300 (9th Cir. 2021) ("For decades, we have described United States immigration law as labyrinthine.") (internal citations omitted); *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate."); *Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004) ("It is no wonder we have observed with only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity" (internal quotation marks and citations omitted); *A.B.-B. v. Morgan*, 548 F. Supp. 3d 209, 220-21 (D.D.C. 2020) (finding that "[t]he legal framework surrounding the U.S. immigration, asylum, refugee, and non-refoulement adjudication process is complex, to say the least," and that two to five weeks of training was not enough for CBP agents "to appropriately apply the complex asylum laws and regulations" during CFIs).

[11] *See Ortiz v. I.N.S.*, 179 F.3d 1148, 1155 (9th Cir. 1999) (describing as "complex," the question of whether noncitizen was convicted of an aggravated felony, which would be a particularly serious crime for purposes of asylum eligibility); EOIR Immigration Law Advisor, *Tier III Terrorist Organizations: The Role of the Immigration Court in Making a Terrorist Determination* (Jul. 2016) ("A Tier III finding is a complex and intensively fact-specific inquiry into whether the actions under question constitute terrorist activities . . . . However, little case law exists to guide adjudicators in making this determination.").

[12] *See* American Immigration Council, *Special Report: Access to Counsel in Immigration Court* (Sept. 2016) (reporting that according to EOIR data, "detained immigrants with representation, when compared to their unrepresented counterparts, were ten-and-a-half times more likely to succeed . . . . [I]mmigrants who were released from detention and had a lawyer were five-and-a-half times more likely to have their cases terminated or be granted relief than their counterparts [those who were unrepresented]. Finally, . . . immigrants who were never detained were three-and-a-half times more likely to succeed.").

about one percent of individuals are represented during their CFI.[13] Moreover, CFIs and reasonable fear interviews (RFIs) take place during an expedited process, often while the applicant is not only unrepresented but also detained, and without access to legal and evidentiary resources.

Since its initiation in 1996, the expedited removal framework has been fraught with due process concerns and continues to result in the deportation of asylum seekers with viable asylum claims.[14] Individuals in expedited removal are frequently stripped of their due process rights in a detained setting without access to legal counsel or opportunities to obtain evidence to meaningfully support their claim. In recent years, the CFI process has undeniably become more difficult, partly due to harsher application of fear standards and partly due to policy changes.[15] Since the COVID-19 pandemic, CFI pass rates have drastically decreased from eighty-five percent to fifty-nine percent.[16] Under the higher standard imposed by the CLP rule, there was already a thirty-two percent drop in positive credible fear findings, with only fifty-three percent found to meet the standard.[17] The timeframe between initial referral and the interview has also drastically shortened. CFIs occur within thirteen days from referral of a case to USCIS, as compared to twenty-one days pre-pandemic.[18] "These screenings are usually done telephonically, while the person is detained. The interviews take about 1.5 to 4 hours."[19]

Another crucial part of understanding the context in which CFIs occur, is that "[m]any [asylum seekers] are so traumatized by the kinds of persecution and torture that they have undergone [that] they are psychologically unprepared to [participate in any legal process.]"[20] Noncitizens seeking asylum at a port-of-entry are not only experiencing the impacts of trauma caused by the persecution, mistreatment, and other negative conditions in their native country, they are also processing the traumas and hardships of their migration and eventual entry into the United States.[21] Additionally, applicants often do not have corroborating or rebuttal evidence in their possession at the time they enter the United States because they embarked on their journeys hastily and without long-term planning, such evidence would have been dangerous or impractical to travel with, or the evidence is not accessible to the applicant.[22]

B. The proposed rule goes even further in depriving asylum seekers of due process

The proposed rule not only expands an already problematic framework, but it fails to acknowledge the lack of legal counsel at the credible fear stage, in addition to other systemic issues such as language access and disability

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[13] *See* American Immigration Lawyers Association, Border Solutions *Policy Brief: The Asylum Credible Fear Standard* (Nov. 2023) (interpreting USCIS data).
[14] Refugees International, *Addressing the Legacy of Expedited Removal: Border Procedures and Alternatives for Reform* (May 13, 2021), https://www.refugeesinternational.org/reports-briefs/addressing-the-legacy-of-expedited-removal-border-procedures-and-alternatives-for-reform/
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* (quoting Senator Ted Kennedy).
[21] *See* World Health Organization, *Mental Health and Forced Displacement* (Aug. 2021).
[22] *See Salaam* v. INS, 229 F.3d 1234, 1239 (9th Cir. 2000); *Shah v. INS*, 220 F.3d 1062, 1070 (9th Cir. 2000).

accommodations. Nor does the proposed rule account for other barriers that affect a person's ability to present their claim, such as how trauma or competency concerns may manifest during the CFI and hinder an asylum seeker's ability to rebut a finding that they are subject to a mandatory bar.

Despite these precarious circumstances, the Department claims that asylum officers "can apply mandatory bars during fear screenings while ensuring a fair process."[23] To illustrate this, the NPRM uses as an example a noncitizen who has been convicted of "murder." According to the NPRM, in such a scenario, "it may be clear that the noncitizen is barred from asylum and withholding of removal for a conviction for a particularly serious crime . . . or because there are serious reasons to believe that the noncitizen committed a serious nonpolitical crime outside the United States."[24]

This overly simplified example does not reveal what, if any, evidence the asylum officer has in their possession to confirm that there is a "conviction," "in a country with a fair and independent judicial system," and that the conviction is for "murder."[25] For example, if the information was gained through an Interpol "Red Notice," it may not be reliable.[26] The definition of "conviction," whether a crime is an "aggravated felony" and therefore a "particularly serious crime," and whether the evidence indicating this information is reliable, are all matters that are legally and factually complex questions.[27] A recent noncitizen entrant, without legal representation, would not realistically be able to rebut the "evidence" relied on by the asylum officer to find that the noncitizen has been convicted of a particularly serious crime. The NPRM fails to address how such a scenario would play out with respect to a recently arrived asylum seeker who is potentially suffering from the impacts of trauma, and who is unrepresented and unaware of the relevant legal definitions and evidentiary standards applicable to their case – all within an expedited timeframe.

These concerns are only exacerbated by DHS's recently announced policy of allowing officers to use classified evidence in support of adjudications.[28] While the ILRC believes that the use of classified information in any immigration proceeding violates due process and the statutory right to examine and challenge evidence,[29] it will be even more dangerous when used at the fear screening stage, where most applicants have not had a chance to consult with counsel, gather their own evidence, or be advised on the law governing their claim.

Given each of these circumstances, it is difficult to imagine that a recent arrival or person facing reinstatement of removal (often after a recent immigration arrest), can adequately present evidence, and establish that despite an asylum officer's finding to the contrary, (1) "there is not a significant possibility that [the noncitizen] would be able

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[23] 89 Fed. Reg. 41354.
[24] *Id.*
[25] *See* INA §§ 101(a)(43)(A), 101(a)(48)(A).
[26] *See Gonzalez-Castillo v. Garland*, 47 F.4th 971 (9th Cir. 2022).
[27] *See Ortiz v. I.N.S.*, 179 F.3d 1148, 1155 (9th Cir. 1999).
[28] *See* DHS, Policy Memorandum from Secretary Mayorkas, *DHS Policy and Guidelines for the Use of Classified Information in Immigration Proceedings* (May 2024).
[29] *See* INA § 240(a)(4)(B).

to establish by a preponderance of the evidence that such bar(s) do not apply,"[30] or (2) "that no mandatory bar applies."[31]

In fact, DHS and the Department of Justice acknowledged the due process concerns of applying mandatory bars during the CFI process, in the Asylum Processing Rule published in March 2022. The Departments provided the following excellent explanation, in declining to implement the prior proposed rule of applying mandatory bars during the CFI process:

> [T]he Departments recognize that considerations of procedural fairness counsel against applying mandatory bars that entail extensive fact-finding during the credible fear screening process . . . . Upon review and reconsideration, due to the intricacies of the fact-finding and legal analysis often required to apply mandatory bars, the Departments now believe that individuals found to have a credible fear of persecution generally should be afforded the additional time, procedural protections, and opportunity to further consult with counsel that the Asylum Merits process or section 240 removal proceedings provide.
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> [T]o the extent consideration of mandatory bars in section 240 proceedings does result in delays to removal, the Departments believe in light of the public comments cited above that such delays do serve important purposes—particularly in cases with complicated facts—namely, ensuring that the procedures and forum for determining the applicability of mandatory bars appropriately account for the complexity of the inquiry and afford noncitizens potentially subject to the mandatory bars a reasonable and fair opportunity to contest their applicability. 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.[32]

The most recent NPRM inexplicably reaches the opposite conclusion without even a brief rationale for the complete reversal. As the March 2022 Asylum Processing IFR's preamble perfectly elucidated, the application of the mandatory bars during the CFI process simply cannot be reconciled with the Departments' duty to comply with Federal law and our treaty obligations, specifically, the commitment to non-refoulment. Yet, the proposed rule only focuses on the goal of "more swiftly remov[ing] certain noncitizens," while wholly ignoring the legitimate concerns it expressed just two years ago.[33] We urge the Departments to consider re-adopting their prior position, that allowing the mandatory bars to apply during the CFI and RFI processes would run counter to the government's duty to provide fair procedures to refugees under the Fifth Amendment and the United States' treaty obligations. The Department must return to its prior goals of doing more, not less, to remedy the systemic barriers to due process.

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[30] Proposed 8 CFR § 208.30(e)(5)(ii)(A).
[31] Proposed 8 C.F.R. § 208.31(c).
[32] Asylum Processing IFR at 18093-94.
[33] 89 Fed. Reg. 41347.

C. Asylum seekers will be deprived of a meaningful opportunity to submit evidence to overcome a finding that they are subject to a mandatory bar or could wrongfully be barred from asylum based on unreliable evidence

Asylum seekers will not have the opportunity to obtain and submit critical evidence to overcome the "indicia" that a statutory bar applies to them before the asylum officer, exercising their discretion to apply the bars, issues a negative fear determination. As explained further below, authoritarian regimes often use the power of arrest and prosecution to harass political dissidents, LGBTQIA+ individuals, religious minorities, and others who are considered enemies of the regime. These asylum seekers could be subject to mandatory bars to relief at the discretion of an asylum officer, and returned to the country where they are being persecuted based on evidence fabricated by those same persecutors. For example, there are published reports that authoritarian regimes use Interpol Red Notices to punish dissidents.[34] With no written guidance, there is a high risk that asylum seekers could be denied asylum at the discretion of an asylum officer based on a fallacious Interpol Notice or other equally unreliable evidence. To allow asylum officers to make these decisions at their own discretion in a non-adversarial proceeding with insufficient and possibly tainted evidence would be a gross miscarriage of justice. Given the vulnerability of the population seeking asylum and the potential danger associated with their refoulement to their home country should they be denied relief, the current protections must remain in place.

Even if the asylum officers were afforded the time and resources to complete such complex legal analyses at the credible fear or reasonable fear interview, they will lack the necessary evidence to determine whether a noncitizen falls under one of the statutory bars. Fear screenings usually occur forty-eight hours after a noncitizen is detained by DHS.[35] There will be no time to obtain and, if necessary, translate any evidentiary records. In fact, there will be no records, aside from whatever records, if any, are brought by the applicant themselves. Even if an applicant obtained any records before fleeing their home country, those records may have been lost, destroyed, or confiscated during the person's journey to the United States. Any records in the applicant's possession when apprehended by DHS would likely not be accessible to them during their initial period of detention. The asylum officers will have to rely solely on the applicant's testimony and on whatever background checks they are able to complete within this truncated period. Given the serious issues at stake, the adjudicator who determines whether a person falls under one of the statutory bars to asylum must have the necessary evidence to make that determination. A wrong conclusion based on inadequate evidence could lead to a person's death or serious harm if they are denied relief.

IV. The ILRC opposes the proposed changes to the asylum regulations allowing asylum officers discretion to apply the mandatory bars to asylum and withholding of removal in credible fear and reasonable fear screenings

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[34] *See*, Sam Meachman, *Weaponizing the Police: Interpol as a Tool of Authoritarianism*, Harvard International Review (Apr. 11, 2022), https://hir.harvard.edu/weaponizing-the-police-authoritarian-abuse-of-interpol/. (Dubious Red Notices have been issued by authoritarian regimes against dissidents. "An active Red Notice issued by the persecuting country can *doom* a dissident's application for political asylum in the United States. Most insidiously, targets of Red Notices must live with the constant fear that an accident of fate could land them back in an authoritarian country to be imprisoned.") (Emphasis in the original.)

[35] Form M 444, https://migrantcenter.org/wp-content/uploads/2022/07/M-444-1.pdf.

This Department has requested comment on whether asylum officers should be granted discretion to determine whether the statutory bars to asylum and withholding of removal apply at the CFI or RFI stage or at the eligibility stage under the CLP rule or at the eligibility stage for those subject to lawful pathways. The ILRC opposes this change for the reasons listed below.

First, there are no published guidelines or policy memos on how officers are to exercise their discretion. The only guidance given in the proposed rule is that the asylum officer is to consider a mandatory bar as part of the screening process if they believe that the inquiry will not delay case completion without concomitant mission benefits.

Second, we are concerned that this proposed regulation will result in arbitrary and capricious determinations by the asylum officers due to a lack of written policies guiding their determinations. The individual asylum officers may use different standards to determine whether to apply the mandatory bars to asylum in the fear screening process. They will be making these determinations under very stressful circumstances where they have little time to consider the bars thoughtfully and where available evidence will not have been thoroughly vetted. This process will result in a lack of uniformity in whether and how the bars are applied. More importantly, the discretionary nature of the rule will result in discriminatory application of the bars and that nationals of different countries might be subject to different standards.

Third, the determination of whether a statutory bar applies in the asylum or withholding context is a complex legal analysis that demands resolution in a proceeding that is not time-limited and where the noncitizen has access to counsel who can analyze and provide the Immigration Judge with legal arguments related to any potential bars. This process allows the Immigration Judge to make an informed legal decision. This decision is subject to review by the Board of Immigration Appeals, the federal circuit courts, and even the Supreme Court – providing additional protection for the rights of asylum seekers while not impeding the expedited removal process.

In the proposed regulations, the Department acknowledges that the number of people affected by this rule change is very small. The Department has stated that between two to four percent of asylum applicants would be subject to one of the mandatory bars at the CFI and that between ten to twenty percent of applicants would be subject to one or more of the mandatory bars at the RFI.[36] Given the serious consequences of an erroneous determination made at the asylum officer's discretion and given the small population this proposed rule would affect, we recommend that the Department continue its current policy of deferring the determination as to whether one of the mandatory bars applies to removal proceedings before an immigration judge. Such a small number of cases would have a negligible impact on the immigration court backlog, while simultaneously slowing the fear review process for the asylum officers. These decisions should not be left at the discretion of asylum officers – especially without a robust system in place to avoid errors that could result in the refoulement of an asylum seeker.

A. There are no published guidelines on how asylum officers are to exercise discretion

The only guidelines provided under the regulations is that the asylum officers would only consider a bar in those cases where "there is easily verifiable evidence available to the asylum officer that in their discretion warrants an

[36] 89 Fed. Reg. 41351-52.

inquiry into a bar, and the asylum officer is confident that they can consider the bar efficiently at the credible fear stage."[37] This guidance lacks sufficient detail on how the asylum officers are to provide their discretion.

B. Unclear guidance regarding the exercise of discretion will result in a lack of uniformity in the application of the statutory bars

The Department repeatedly reiterates the "discretionary" nature of this new rule and its application in the fear screening process. Rather than provide flexibility to asylum officers, the discretionary nature of the proposed rule will create confusion for both the asylum officers who will be applying it and the asylum seekers who will soon be subject to it. As it is written, the proposed rule provides little guidance to asylum officers as to when they should exercise their discretion to apply the bars. The only guidance provided indicates asylum officers should apply the bars when there is "evidence available" to trigger an inquiry regarding the bars and the asylum officer is "confident they can address the bar efficiently" in the fear screening process.[38] Explained further, under the proposed rule asylum officers are discouraged from applying the bars in a fear screening if they cannot do so in the time allotted for a credible fear or reasonable fear interview.[39] Without further guidance, it is easy to imagine some asylum officers choosing to always consider the mandatory bars and others to never consider them. This outcome will certainly result in inconsistent application of the mandatory bars among asylum officers across the country and create a general lack of uniformity.

Asylum seekers who are subject to the fear screening process have extremely limited access to legal counsel and very little time to obtain the necessary evidence that will allow them to establish that a potential bar does not apply. The most recent guidance from the administration reduces the amount of time that an asylum seeker has to secure legal counsel from twenty-four hours to just four hours during the fear interview stage.[40] This compounds these issues with additional confusion about whether the bars will be applied and create additional uncertainty for a particularly vulnerable population.

Inconsistent and non-uniform application of the bars in the fear screening process is not a solution. Nor, as the Department recognizes, would it be possible to require a thorough review of the mandatory bars in every fear screening. This additional screening would potentially add hours to each interview. Credible and reasonable fear interviews are intended to be quick, initial screenings under a lower standard than is required in a full asylum hearing. Adding a complex analysis of the bars to the screening process will likely bring the streamlined fear screening process to a halt. For this and all of the other reasons outlined in this comment, the analysis and application of the statutory bars should be deferred to a full adjudication of the asylum claim.

C. Unclear guidance regarding the exercise of discretion will result in the discriminatory application of the statutory bars

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[37] *Id.* at 41354.
[38] *Id.* at 41352.
[39] *Id.* at 41357.
[40] U.S. Immigration and Customs Enforcement, *Implementation Guidance for Noncitizens Described in Presidential Proclamation of June 3, 2024, Securing the Border and Interim Final Rule, Securing the Border*, 4 (Jun. 4, 2024) https://www.aila.org/aila-files/388D788F-87D6-4933-8921-E9A7AB1F6670/24060504.pdf?1717612621.

Giving asylum officers discretion to consider the statutory bars without further guidance will also likely result in the disparate application of the bars based on the gender, race or ethnicity, religion, country of origin, or other protected characteristics of the asylum seeker. The proposed rule allows an asylum officer to rely on mere "indicia" a mandatory bar applies. This opens the door to discriminatory application of the bars to individuals who are wrongly perceived as dangerous based on stereotypes or biases. The risk of an officer unknowingly engaging in such bias-based decision-making is even higher in a rushed screening.

V. The complicated process in the proposed rule creates an unworkable framework that violates the credible fear standard enshrined by Congress

A. The proposed rule would create a complicated screening process that further wastes agency resources

This proposed rule exists against an already complicated backdrop of new regulations and policies that apply to fear screenings. The CLP rule added an intricate new bar to asylum that is screened for during the CFI stage. At the time, the Departments justified the CLP rule's inclusion in fear screenings by characterizing the rule as a "single, stand-alone condition," that would be simpler to apply than "multiple, legally complicated bars."[41] Still, even then the Departments recognized that at times, the addition of this single bar to the CFI "may require significant additional time during the credible fear interview."[42]

These efforts to shoehorn complicated adjudications into the CFI process have been disastrous. Faced with the mandate to conduct increasingly complicated CFIs at the border, Asylum Office adjudications are at a near standstill. USCIS now routinely violates the Congressional deadline set for asylum adjudications in INA § 208(d)(5)(A). Afghan allies seeking asylum, many of whom had eligible relatives stranded in Afghanistan in hiding from persecutors, were forced to file a lawsuit because USCIS has systematically failed to timely adjudicate their applications.[43]

In an inexplicable reversal, the Department is now proposing to add these "legally complicated bars" to the CFI process after all. By the Departments' own estimation, it could add several hours to interviews, leading the CFI to potentially take up as much agency time and resources as a full adjudication on the merits. This does not save any agency resources. It merely frontloads them to make complex determinations about bars to asylum at the CFI stage, which may end up being relitigated all over again at the merits stage. Indeed, as the Departments pointed out two years ago, such a "complicated process requiring full evidence gathering and determinations to be made on possible bars to eligibility is incompatible with the function of the credible fear interview."[44]

The Department claims that the discretionary nature of the rule will fix this incompatibility. The Department envisions instances where there will be "easily verifiable evidence" that one of these bars apply. In support of this questionable claim, it points to the small percentage of cases where USCIS officers have "flagged" a potential bar.

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[41] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11744 (Feb. 2023).
[42] *Id.*
[43] *See Ahmed v. DHS*, case no. 4:23-CV-01892 (N.D. Cal.)
[44] Asylum Processing IFR, at 18135.

Therefore, it is unclear how such a small number of cases will significantly address the asylum officer backlog if the rule is only applied to those cases where a bar is applicable.

Relatedly, the rule fails to provide any meaningful safeguards to address and rectify errors in asylum officer discretion that may lead to false flags and erroneous denials. The Departments do not indicate the evidentiary basis for these asylum officer flags, nor do they indicate how many flagged cases were ultimately found to have triggered a bar to asylum – or which of those cases were found to meet an exception. In any case, making the factual determination that a bar to asylum applies is far more complex than "flagging" that one might exist. Even in cases that may present indicators of a bar, at such an early stage it is impossible to determine whether it applies and if so, whether the applicant could show an exception. Ignoring these concerns, the proposed rule instead places the burden on the asylum seeker while providing no answer to the litany of due process concerns raised in this, and previous, comments. There is an abundance of evidence demonstrating that streamlined removal procedures that purport to promote efficiency without sufficient consideration of due process do irreparable harm to those navigating the complex asylum system.[45]

The inevitable result will be wrongful denials of credible fear, adjudicator confusion in managing increasingly unwieldy CFI standards, and a massive waste of resources from an agency that is already struggling to carry out its basic functions.

B. The proposed rule contradicts the low screening standard that Congress intended for the CFI

An agency's action is arbitrary and capricious where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[46] Here, allowing the asylum officers to adjudicate whether an applicant is subject to the mandatory bars during expedited removal proceedings would vitiate Congressional intent. As the Department itself noted in 2021, the 104th Congress chose a screening standard for CFIs and RFIs that was intended to be a low screening standard for admission into the usual full asylum process.[47] Congress did so to ensure that the creation of expedited removal, a summary process in which someone is deported without the opportunity to see an immigration judge, would not undermine the asylum statute or the United States' non-refoulement obligations. The intentional creation of a low screening standard also accounts for the limited availability of evidence at the CFI stage, lack of access to counsel or time to prepare, and limited agency resources. In other words, Congress attempted to carefully calibrate the CFI standard to balance all of these factors.

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[45] *Addressing the Legacy of Expedited Removal: Border Procedures and Alternatives for Reform*, supra.
[46] *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).
[47] Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46909, 46914 (Aug. 20, 2021) to be codified at 8 C.F.R. pt. 208, 235, 1003, 1208, and 1235, https://www.federalregister.gov/documents/2021/08/20/2021-17779/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat#citation-35-p46914; *see also 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Senate Judiciary Committee Chairman Orrin Hatch).*

This careful calibration militates against the agency transforming the CFI into a complicated adjudication where the applicant is expected to mount a complex legal defense. Indeed, in their August 2021 proposed Asylum Processing Rule, the Departments recognized that the 2020 Security Bars rule's addition of bars to asylum to the credible fear process created a "complicated screening process that requires full evidence gathering and determinations to be made on possible bars to eligibility."[48] The Departments also recognized that returning to the practice of not adjudicating mandatory bars at the CFI stage better reflects Congress's intent to create a "low screening standard."[49] Now, the Department inexplicably proposes to reverse this policy and create an unworkable CFI scheme that contradicts congressional intent.

Under the framework that Congress laid out, an applicant can demonstrate credible fear by showing that they have a significant possibility that they could establish eligibility for asylum.[50] In recent years, the Departments have taken this straightforward congressional directive and made the CFI into a complicated adjudication that goes far beyond the showing of a "significant possibility." Already, asylum seekers who are subject to the CLP rule must show evidence that they meet one of the several enumerated exceptions or rebut the presumption of ineligibility by proving "exceptionally compelling circumstances."[51] Now the CFI might, subject to the whims of the interviewing officer, also require a showing that the bars for persecutors of others, particularly serious crimes, serious nonpolitical crimes, danger to U.S. security, and terrorism related provisions do not apply.

Each of these grounds involves a complex factual inquiry. Determining whether someone is a persecutor of others requires determining whether someone else suffered past persecution, often the central determination made at the merits stage of asylum claims. The particularly serious crime bar requires a close consideration of "all reliable information" concerning the specific facts of a case, not just the elements of the offense of conviction.[52] The bar for serious nonpolitical crimes likewise requires a complex determination, weighing the seriousness of an offense against its political nature.[53] The security and terrorism bars are equally difficult to determine at such an early stage. They too require a close examination of the facts, and DHS has created a patchwork of exceptions for many of them.

A CFI that forces an asylum seeker to potentially mount a complex legal defense showing that one or several bars to asylum do not apply cannot be said to be a threshold screening. Especially when coupled with the Departments' recent changes to the CFI process, this proposed rule violates the intent of Congress when it created the CFI.

VI. Conclusion

The Department previously, and correctly, found that the application of mandatory bars to fear screenings would waste agency resources and contradict Congress's intent when it created a "threshold screening" for asylum. The Department has failed to articulate an adequate policy justification for its complete reversal. Additionally, the

[48] Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46,906, 46,914 (Aug. 20 2021).
[49] *Id.*
[50] *See* INA § 235(b)(1)(B)(v).
[51] *See* 8 CFR 208.33.
[52] *See Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007).
[53] *See Matter of E-A-*, 26 I&N Dec. 1 (BIA 2012).

complexity and discretionary nature of the application of mandatory bars to fear screenings violates asylum seekers' due process rights. The issues that the asylum officers would be adjudicating, in a very truncated procedure, include whether a person has persecuted others; is subject to the particularly serious crime bar; committed a serious non-political crime outside of the United States, is a security risk to the United States; or are subject to the terrorism-related inadmissibility grounds. These complex decisions with potentially devastating consequences are better left to the immigration courts with appropriate appellate review by both the Board of Immigration Appeals and the circuit courts. As such, the Department should abandon the proposed rule and refrain from applying any of the mandatory bars to asylum at the fear screening stage.

We acknowledge and agree with the Department that the significant USCIS and EOIR backlogs are concerns that should be addressed to afford asylum seekers the opportunity to fully present their asylum claims in a timely manner. However, erecting barriers to asylum at the CFI stage is not the solution. Instead, agency resources should be dedicated to address the backlog in a humane manner that complies with Congressional intent and our federal and international obligations to ensure meaningful access to our asylum system. The Department was correct to previously decide against applying bars at the CFI stage and should return to that posture. Moving forward with this proposed rule will infringe upon the due process rights of asylum seekers and result in asylum seekers being returned to countries where they will suffer certain harm.

Sincerely,

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