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Submitted via https://www.regulations.gov
RE: RIN 1125-AB32/1615-AC92AC; DHS Docket No. USCIS-2024-0006; A.G. Order 5943-2024
Comment in Opposition to Interim Final Rule Entitled Securing the Border

Dear Assistant Director Reid and Assistant Secretary Delgado,

The Immigrant Legal Resource Center (ILRC) submits the following comment opposing the interim final rule (IFR) issued by the Department of Justice (DOJ) and the Department of Homeland Security (DHS) on June 7, 2024, entitled "Securing the Border."

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, including immigrants who are seeking asylum, withholding of removal, and protection under the Convention Against Torture. The ILRC provides support on these forms of relief through our in-person trainings, webinars, and case strategy calls with various non-profit and regional collaboratives. We also provide technical assistance through 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. It is our work and resulting expertise in this area that informs our comment opposing this interim final rule in its entirety. We ask that the Departments rescind it in full.

I. The Issuance of the Rule as an Interim Final Rule Is Unlawful as It Violates the Clear Language and Intent of the Administrative Procedure Act

The Administrative Procedure Act (APA) strongly favors the publication of proposed rules with time for the public to review and comment. "In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decision-making require that agency decisions be made only after affording interested persons notice and an opportunity to comment."[1] The notice and comment requirements are only exempted in specific, narrow circumstances, including where a foreign affairs function of the United States is involved, or when the agency for good cause finds that notice and public procedures are impracticable, unnecessary, or contrary to the public interest.[2] The text of the IFR invokes the emergency procedures of APA, stating that the DHS and DOJ are justified in publishing the IFR without opportunity for public comment prior to the rule taking effect. The explanation proffered by the Departments for setting aside regular notice and comment is not sufficient to warrant an exception in either case. The publication of this rule as an IFR violates the notions of fairness and informed decision-making Congress intended in the APA.

A. The Interim Final Rule does not fall under the foreign affairs exception under the APA

First, this IFR does not fall under the foreign affairs exception to the APA. The foreign affairs exception only applies where "the public rulemaking provisions should provoke definitely undesirable international consequences. . ." Otherwise, the exception "would become distended if applied to [Immigration and Naturalization Service] actions generally, even though immigration matters typically implicate foreign affairs."[3] The Second Circuit has noted that "it would be problematic if incidental foreign affairs effects eliminated public participation in this entire area of administrative law."[4] In other words, this exception applies where the international consequence is obvious or the agency has explained the need for immediate implementation of a final rule. Examples of the foreign affairs exception include a rule responding to the attacks of September 11, 2001,[5] a rule responding to the Iranian hostage crisis,[6] and a rule regarding stricter import restrictions that would provoke immediate response from foreign manufacturers.[7] The current IFR is far afield from prior justifications under this exception.

We recognize that the management of asylum-seeker flow at the southern border is inextricably tied to foreign affairs. Yet the Biden administration has invoked emergency measures for this rule while declining to do so with other rules concerning the processing and return of migrants at the southern border. This justification also falls flat considering the number of rules that are promulgated through full notice and comment rulemaking by other agencies that are also linked to matters involving foreign affairs. Furthermore, DHS regularly publishes rules for

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[1] *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).
[2] 5 USC § 553(b)(B), (d)(3).
[3] *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir 1980) *cited with approval East Bay Sanctuary Covenant*, 993 F.3d at 676 (internal citations omitted).
[4] *City of N.Y. v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010); *Rajah v. Mukasey*, 554 F.3d 427, 437 (2d Cir. 2008).
[5] *Rajah*, 544 F.3d at 437.
[6] *Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981).
[7] *Am. Ass'n of Exps. & Imps. - Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985).

notice and comment – even with a shortened comment period – that concern materially the same matters as the IFR at issue. The Circumvention of Lawful Pathways (CLP) proposed rule was published on February 23, 2023, with a thirty-day comment period.[8] The Application of Certain Mandatory Bars in Fear Screening rule[9] –for which the preamble specifically noted a short comment period was appropriate given the overlapping subject matter[10] – was also published as a proposed rule with a notice and comment period. Both rules concern the same population and processes that the government seeks to regulate with this IFR. The selective application of the foreign affairs exception undermines the Departments' argument that an IFR is appropriate in this context, but not in others where the subjects are materially similar.

B. This Interim Final Rule does not fall under the good cause exception to the minimum of thirty days' notice required for all regulations under the APA

Aside from the foreign affairs exception, the APA provides exceptions from notice and comment rulemaking if good cause exists to do so.[11] For example, good cause exists where the delay would do real harm to life, property, or public safety.[12] This exception is "narrowly construed and only reluctantly countenanced."[13] The good cause exception "authorizes departures from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission."[14] The notice and comment provisions would become a nullity if the agency could simply dispense with them at will.

The Departments contend that the IFR falls under the "good cause" provisions of the APA – namely that notice and comment is "impracticable" and "contrary to public interest.[15] In support of this claim, the Departments claim that the IFR is necessary due to the need to "immediately implement more effective border management" and lists a number of factors exacerbated by a lack of resources and funding. The Departments claim that the reason for an IFR is the anticipated "surge" in border encounters if the rule was not set to go into effect immediately, which would create an emergency. These claims are insufficient to warrant an exception to APA notice and comment procedures.

The Departments maintain that notice and comment is "impracticable" due to the increased number of border encounters, and that waiting for regular order notice and comment would exacerbate the emergency the country is experiencing. While the number of border encounters undoubtedly varies, CBP's own data shows predictable trends in encounters over the course of the last four fiscal years.[16] Data for the present fiscal year show a spike in encounters in December 2023, that trends with similar spikes in 2022 and 2021, followed by an overall decline in the first half of 2024. Simply put, while the degree of encounter fluctuation differs, the pattern is not unusual.

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[8] Circumvention of Lawful Pathways Proposed Rule, 88 Fed. Reg. 11704.
[9] Application of Certain Mandatory Bars in Fear Screening, 89 Fed. Reg. 41347.
[10] *Id.* at 41358.
[11] 5 U.S.C. § 553(b)(B).
[12] *East Bay Sanctuary Covenant v. Trump,* 932 F.3d 742, 777 (9th Cir. 2018).
[13] *Ibid.*
[14] *Riverbend Farms, Inc v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992) *cited with approval California v. Azar*, 911 F.3d 558, 575-76 (9th Cir. 2018).
[15] 5 U.S.C. § 553(b)(B), (d)(3).
[16] U.S. Customs and Border Protection, *Southwest Land Border Encounters*, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.

Furthermore, these trends do not predict an influx within the next few months, and there is likely more than enough time to provide a notice and comment period for this rule. Even if the data suggested that an "emergency" was truly imminent, the Departments had time to act and provide a notice and comment period for this rule had they promulgated it earlier in the year, rather than announcing the measure in June and having it go into effect mere hours later.

Additionally, the Departments' contention that an emergency will develop if notice and comment is provided – they proffer that there will be a rush on the border in the time between the administration announcing its intentions and a delayed effective date – is not supported by facts (i.e., trends in the publicly available CBP data). The Departments cannot have it both ways, claiming that the IFR is justified as an emergency while simultaneously arguing that entry trends are predictable and that they know what will happen. If that were the case, the Departments could have proposed a rule with a full comment period earlier. As such, providing the public the chance to review and comment on this rule is appropriate.

As to the second assertion that notice and comment would be contrary to the public interest, the Departments claim that anything short of immediate implementation of the IFR will result in an increase in border encounters and overwhelm agency resources. However, this claim is based on conjecture and assumptions that recent increases are solely in response to previous changes to border processing. While "internal [g]overnment sources" are cited,[17] unless the Departments affirmatively asked each individual whether they were motivated to cross the border sooner based on soon-to-be implemented U.S. policy, there is no empirical evidence that these changes were based on the opportunity afforded the public to respond to those changes. It is entirely possible that increased numbers are the result of regular ebb and flow of migration or that other factors outside of the United States contributed to the increase.

Finally, the reason that courts have interpreted exceptions to notice and comment procedures narrowly is because the APA greatly favors notice to the public. The Departments contend that in its expertise, public harm will ensue if time is taken to publish a proposed rule and collect comments in the form of further strained resources along the Southern border. However, the Departments fail to account for the harm to another sector of the public affected by the rule – namely asylum seekers, and organizations and practitioners who serve them – a sector that should not be denied their right to provide comment on the monumental change to asylum processing and policy that the IFR provides.

With a change as significant as this one, the public should have been allowed to provide comment and have those comments considered as required by the APA such that the interests of the public could be represented in full.

[17] Securing the Border, 89 Fed. Reg. 48710, 48764 (Jun. 7, 2024).

II. The Rule Contravenes the Statutory Language of the Immigration and Nationality Act (INA) and Court Rulings

Despite the agency's attempt to distinguish the IFR from previously prohibited rules, the IFR functionally creates a categorical bar to asylum at the southern border and fundamentally re-shapes the credible fear process, in violation of Sections 208 and 235 of the INA.

A. The IFR violates the plain text of INA § 208

First, INA § 208(a)(1) provides that "any [noncitizen] who is physically present in the United States or who arrives in the United States *(whether or not at a designated port of arrival . . .)*, *irrespective of such noncitizen's status*, may apply for asylum . . . ." (emphasis added). With limited exceptions, the IFR excludes noncitizens from asylum merely because they enter without inspection between ports of entry, or at ports but without a CBP One appointment.[18] By its plain language, this categorical ban rests entirely on manner and location of entry, in direct contradiction with the clear instructions of Section 208(a)(1). The preamble to the IFR revives the argument, already struck down in two federal court cases,[19] that being allowed to "apply" for asylum is not the same as being "eligible" for it, and therefore the IFR does not violate this language. This cannot be a reasonable interpretation. Being allowed to apply for asylum necessarily implies at least a possibility of eligibility, but the IFR eliminates that possibility for practically everyone seeking asylum at the southern border. Congress explicitly excluded manner of entry as a restriction to asylum and the IFR's attempt to claim otherwise is inconsistent with INA § 208(a)(1).[20]

Second, the IFR runs afoul of Section 208(b)(2)(C), which sets forth the statutory bars to asylum. Other than the filing deadline, existing limitations on asylum eligibility generally fall into two categories: limitations based on threats to public safety or national security; and limitations based on the availability of an alternative safe haven (together, "the statutory bars").[21] Beyond these statutory bars, Section 208(b)(2)(C) allows the executive to create "additional limitations and conditions" on asylum eligibility, "*consistent with this section*." (Emphasis added.) Courts have observed that, across both categories, the existing statutory bars all contain an element of individualized analysis: either the noncitizen is considered a threat due to specific facts or circumstances having to do with the individual applicant, or there has been some specific assessment that a safe alternative exists for their resettlement.[22] Limitations that do not conform with either of these categories, particularly general bans, have consistently been struck down as beyond the scope of Section 208.

This categorical bar based on manner of entry does not purport to make an individualized assessment of the noncitizen's danger or threat to U.S. security, nor does it involve any assessment of whether an alternative safe haven exists. Rather, the Departments assert that the rule is justified because it incentivizes noncitizens to use

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[18] 89 Fed. Reg. at 48718.
[19] *East Bay Sanctuary Covenant v. Barr*, 994 F.3d 962, 976-77 (9th Cir. 2020) (en banc) (*East Bay III*) (vacating TCT); *East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1053-54 (N.D. Cal. 2023) (appeal pending) (*East Bay IV*) (vacating CLP rule).
[20] *See generally* INA § 208.
[21] *See* INA § 208(b)(2)(A).
[22] *See, e.g.*, *East Bay III*, 994 F.3d 962, 976-77.

"lawful pathways" to enter the United States.[23] The Departments do not even assert that the IFR falls within either of the existing categories of statutory bars to asylum. Therefore, the IFR cannot reasonably be "consistent with" Section 208. Previous attempts to create new categories of asylum bars have been enjoined or vacated by federal courts after being found to be inconsistent with Section 208.[24]

The Departments also assert that the IFR is substantially different than previous rules because it does not "treat the manner of entry as dispositive in determining eligibility" for asylum[25] and has exceptions for noncitizens in "exceptionally compelling circumstances." The agencies argue that these exceptions, coupled with the fact that the ban only applies during "emergency border circumstances," make the ban sufficiently individualized to distinguish itself from previous rules.[26] But, as with previous travel bans, in practice it will be nearly impossible for noncitizens to overcome the ban.[27] Despite the Departments' assertions to the contrary, the IFR merely recycles previous bans related to manner of entry, which have all been invalidated as *ultra vires* of Section 208.

B. The IFR violates the plain text of INA § 235

The IFR also violates the plain text of INA § 235, which sets forth a clear process for credible fear screenings at the border. The existing fear-screening process is already extremely flawed and fails to protect due process rights and meaningful access to asylum. With the IFR, the Departments propose upending even this existing framework and replacing it with one of their own design, inconsistent with the plain language of the statute and clear Congressional intent. The Departments justify this "systemic efficiency" model by stating that, between 2014 and 2019, fewer than twenty-five percent of asylum seekers who entered at the southwest border and received a positive credible fear interview (CFI), and whose cases were completed, were granted protection or relief.[28] This statistic is misleading because the Departments fail to note that concluded cases accounted for fewer than fifty percent of fear-based claims pending before the Executive Office for Immigration Review (EOIR) during this period, and there are many reasons why cases processed more quickly may be more likely to result in a denial. For example, the data does not report the percentage of asylum seekers who were represented by counsel, yet we know that legal representation increases one's chances of winning asylum five-fold.[29] The data also do not tell us how many of these asylum seekers were detained during their court case—a condition that both speeds up adjudication and decreases the likelihood of success due to lack of access to resources and legal counsel.[30] In short, the IFR runs afoul of Section 235

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[23] 89 Fed. Reg. 48723.
[24] *See, e.g.*, *East Bay III*, 994 F.3d at 988 (vacating TCT as categorical bar based on manner of entry); *East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1053-54 (N.D. Cal. 2023) (appeal pending) (*East Bay IV*) (vacating CLP as categorical bar based on manner of entry); *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 501 F. Supp. 3d 792, 810-11 (N.D. Cal. 2020) (vacating Trump-era criminal bars as exceeding the scope of extant "particularly serious crime bar" and therefore beyond authority of Section 208).
[25] 89 FR at 48735.
[26] *Id.*
[27] *See, e.g.*, *East Bay IV*, 683 F. Supp. 3d at 1042.
[28] 89 Fed. Reg. at 48746 (citing OHSS Enforcement Lifecycle Dataset as of December 31, 2023).
[29] Transactional Records Access Clearinghouse, Immigration Reports, *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, Nov. 28, 2017, https://trac.syr.edu/immigration/reports/491.
[30] Transactional Records Access Clearinghouse, Immigration Reports, *Speeding Up the Asylum Process Leads to Mixed Results*, Nov. 29, 2022, https://trac.syr.edu/reports/703.

by prioritizing speed over accuracy, placing countless asylum seekers at risk of *refoulement* to dangerous conditions in their countries of origin.

The IFR also violates Section 235 by imposing a standard other than the standard set forth in the statute. Section 235 requires that any individual who indicates an intention to apply for asylum or a fear of persecution "shall" be referred for an interview to determine if they have a "credible fear of persecution" (in the case of a CFI), and defines "credible fear" as a "significant possibility . . . that the [noncitizen] could establish eligibility for asylum under [Section 208]."[31] The statute does not allow for application of any standard of proof in the CFI other than "significant possibility," a low standard that requires showing only "a fraction of ten percent" that the asylum seeker will suffer persecution in their home country.[32]

Yet under the IFR, to avoid automatic asylum ineligibility during emergency periods, asylum applicants undergoing CFIs must show there is a significant possibility that they could establish "exceptionally compelling circumstances" by a *preponderance of the evidence*.[33] While the proposed rule retains the significant possibility language, it essentially creates a higher standard for applicants who are subject to the ban. The "preponderance of the evidence" standard is manifestly higher than "significant possibility," requiring a showing that the claim is "probably" or "more likely than not" true.[34] The CFI stage has long been limited to reviewing only the applicant's credible fear; indeed, the Departments have acknowledged in their own previous rulemaking that considering any eligibility bars at the CFI stage is overly complicated and likely to result in due process violations.[35] Applying this heightened standard of proof to any aspect of the CFI process violates the plain language of INA § 235, which mandates only the "significant possibility" standard.

The Departments acknowledge that they have changed course regarding application of "bars and conditions and limitations on asylum eligibility" during CFIs, due to the complexities of these bars and due process concerns.[36] The Departments now justify this change because they have already been enforcing similar restrictions "effectively" through the CLP rule.[37] But the Departments' support for this assertion comes only from border statistics showing a roughly thirty percent decrease in positive CFIs since the CLP rule took effect.[38] This statistic reveals nothing about the accuracy of these CFI determinations, whether adjudicators are applying the standard correctly, or the impact of decreased access to counsel at this stage.[39] In any case, being able to "effectively" enforce an asylum ban that a court has already vacated as unlawful is hardly a justification for doubling down on that enforcement.[40]

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[31] INA § 235(b)(1)(B)(5).
[32] *See Grace v. Whitaker*, 344 F. Supp. 3d 96, 127 (D.D.C. 2018) *aff'd in part, reversed on other grounds*, *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020).
[33] 8 CFR § 208.35(a)(2)(i) (proposed).
[34] *See, e.g.*, 1 USCIS-PM E.4(B).
[35] *See* 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)
[36] *See* 89 Fed. Reg. at 48739 (citing CLP NPRM, 87 Fed. Reg. at 18135).
[37] *Id.* at 48746.
[38] *Id.*
[39] *See id.* at 48723 (noting the CLP rule's reduction of time to consult with legal counsel before a CFI from forty-eight hours to twenty-four hours).
[40] *See East Bay IV*, 683 F. Supp. 3d at 1053-54.

The IFR repackages and recycles policies that have been struck down time and again in recent years. Despite attempts to reframe these policies or assert new legal justifications, the Departments still impose yet another categorical ban on asylum that is completely untethered from the asylum statute.

C. The "shout test" and subsequent "reasonable probability" screening contradict the statutory framework for expedited removal and violate U.S. non-refoulement obligations

The IFR also creates arbitrary changes to the expedited removal process which deeply curtail a noncitizen's ability to enter the asylum process and get screened for internationally mandated protections from harm.

First, in order to seek these protections, noncitizens must "manifest[] a fear of return," meaning CBP agents will no longer ask noncitizens if they have a fear of return nor will CBP agents provide individualized advisals.[41] This dramatic departure for current policies will result in the unlawful rejection of those fleeing persecution without proper screening. There are obvious concerns with requiring noncitizens to manifest a fear of return absent advisals and proper questioning in language, including that noncitizens may not manifest their fear of return in the way that CBP officials require or accept; there may be language differences between the officer and noncitizen causing misunderstandings; and individuals may be disoriented, hungry, have mental incompetency concerns, trauma symptoms, or other health issues when they encounter officers charged with identifying a person's manifestation of fear. Some asylum seekers, including those from the most vulnerable groups most at risk of harm if they return, may be afraid to articulate their claim of fear in front of other detainees. The effect of this "shout test" is that many noncitizens with genuine fear of return based on protected grounds will be wrongfully removed. The implementation of the "shout test" not only wrongfully places the burden on the applicant but contradicts long standing policy that CBP agents question individuals about their fear of return.

The Departments defend their decision to place the burden on vulnerable asylum seekers by stating that agents will be given "information on how to apply the manifestation standard" and that signs and videos will be shown explaining how noncitizens can claim fear in the languages most often spoken by migrants.[42] These meager attempts to ameliorate the departure from individualized questioning and advisals have already fallen short. Practitioners report that a young woman who manifested her fear of gender-based violence and was pregnant in her third trimester (ostensibly falling into the "exceptionally compelling circumstance" of "a medical emergency") was turned away after a CBP officer stated he didn't speak Spanish well. Others have reported that those who claimed fear were summarily sent back with no pretense of screening to identify if they fell into any of the exceptions, or if they could claim any other protections under withholding of removal or CAT. The "shout test" is merely a stratagem to give the Departments plausible deniability as they carry out a policy of mass *refoulement* completely untethered from their statutory and treaty obligations.

Second, even if a noncitizen were able to manifest a fear of return and were given a reasonable fear interview, they must now meet a heightened standard of "reasonable probability of persecution" to pass the screening for

[41] 89 Fed. Reg. at 48718
[42] *Id*. at 48741-42.

withholding of removal and CAT protection.[43] The rule defines "reasonable probability," as "substantially more than a reasonable possibility, but somewhat less than more likely than not."[44] The imposition of the "reasonable probability" standard for screenings for withholding of removal or CAT eligibility lacks an adequate explanation. Just in the last two years as part of the Asylum Processing rule, the Departments themselves took the opposite approach, finding that the "significant possibility" standard was "preferable for multiple reasons . . . including because it aligned with Congress's intent that a low screening threshold standard apply."[45] The Departments further cited to the executive's own policy on asylum as further support for imposing the significant possibility standard for all parts of the CFI, including the withholding of removal and CAT screening. Moreover, the Departments found no evidence "that this approach resulted in more successful screening out of non-meritorious claims while ensuring the United States complied with its non-*refoulement* obligations."[46] The Departments fail to provide an adequate explanation for their reversal from the position taken two years earlier. This change raises the border screening standard substantially, nearly to a burden of proof that is required at a merits hearing before an immigration judge.

Moreover, as the agencies have heightened the standard, they have further curtailed the ability to consult with an attorney. A leaked Immigration and Customs Enforcement memo shows that the time given to noncitizens to find an attorney for their credible fear interview under this new rule has been reduced from twenty-four to four hours. Just last year, migrants had forty-eight hours to seek legal counsel.[47] Noncitizens were already struggling to find counsel during credible fear interviews according to 2022 DHS data, which showed that 99.1% of noncitizens were unrepresented in their CFIs.[48] However, in 2022, asylum seekers were only required to pass the standard established by Congress, that they had a "significant possibility" that they could establish an asylum claim. Now noncitizens are faced with a higher standard and an even narrower opportunity to consult with counsel. This heightened standard will inevitably result in a large increase in erroneous negative fear findings and an increase in the number of noncitizens who are returned to situations of persecution and torture in violation of our treaty obligations.

Last, adding a myriad of new standards into the screening process will result in inconsistent application of our asylum law and related protections and further gum up an already broken system. Creating a new system of arbitrary legal standards for immediate implementation as a means to greater efficiencies at the border is disingenuous. To implement the new rubric accurately and consistently would take time with each individual and substantial legal training for field officers. This would exacerbate border backlogs and stymie the need for quick screening to determine who might have a legitimate claim. The only way these restrictions and arbitrary standards create efficiencies at the border is through quick, wrongful removal of those that merit further opportunity to present their claim.

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[43] *Id.* at 48718.
[44] *Id*. at 46746.
[45] 88 Fed. Reg. 11,745-46.
[46] Asylum Processing IFR, 87 Fed. Reg. 18,092 (Mar. 29, 2022).
[47] Hamed Aleaziz, *A New Hurdle for Asylum Seekers: 4 Hours to Find a Lawyer*, The New York Times, Jun. 5, 2024, https://www.nytimes.com/2024/06/05/us/politics/biden-asylum-restrictions-laywer.html
[48] Human Rights First, *Rushed Timelines, Inadequate Access to Legal Representation Impede Meaningful Opportunity to Seek Asylum Under New Asylum Processing Rule*, Oct. 2022, https://humanrightsfirst.org/wp-content/uploads/2022/10/AsylumProcessingRuleFactSheet10.21.2022.pdf

Withholding of removal and relief under the Convention Against Torture (CAT) are mandatory forms relief, meaning that where an applicant meets all of the requirements, they must be granted protection from being returned to a country where they fear harm or torture.[49] Using the rulemaking process to invent a new "reasonable probability" standard for screenings for withholding of removal or CAT eligibility lacks an adequate explanation. The resulting framework also violates the statutory framework for withholding and CAT protection and violates the non-*refoulement* obligation.

III. The Rule Will Deprive Asylum Seekers of an Opportunity to Make their Claim

In addition to the violations of statute as described above, ILRC opposes this rule because in practice it will deprive noncitizens of their right to apply for asylum, despite the Departments' assurances that this rule will not "affect" that right.[50] The IFR creates a blanket bar for almost all adult noncitizens, except for those lucky enough to secure an appointment through the CBP One app, which suffers from noted flaws, and places an unlawful cap on the number of people who can seek asylum. Additionally, the narrow exception that this rule offers for those who can show "exceptionally compelling circumstances," by a "preponderance of the evidence" is an unachievable standard for many noncitizens even if they have experienced such circumstances.[51] This limited exception, combined with the heightened standard for withholding of removal and CAT screenings deprives noncitizens of their right to claim asylum and other legally mandated protections.

A. The IFR effectively bars asylum by conditioning access to the asylum process on the use of the CBP One app

The ILRC strongly opposes the conditioning of asylum access on scheduling technology, namely the CBP One app. The app is deeply flawed, unreliable, difficult to access, available in only a few languages, and raises a host of privacy and data security concerns.[52] The past year of CBP One has shown that it has undermined refugee protections by forcing vulnerable children and adults to wait up to six months for appointments while they forego food and other necessities to pay for cellular data. Many refugees who are waiting for appointments are subject to robbery, extortion, sexual assaults, and kidnappings.[53] The CBP One app is inaccessible to many asylum seekers. Users report frequent crashes and those who have been able to access the app report only a very small number of available appointments that are taken quickly. Those traveling with multiple family members who must input their information in a short timeframe are especially affected. The Proclamation nonetheless bans from asylum those who are unable to use the CBP One app even though it is still mostly inaccessible to the vast majority of asylum seekers.

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[49] 8 U.S.C. § 1231; 8 CFR § 1208

[50] 89 FR at 48717

[51] 8 CFR § 208.35(a)(2)(i) (proposed).

[52] Raul Pinto, *CBP One Is Riddled with Flaws That Make the App Inaccessible to Many Asylum Seekers*, Immigration Impact, American Immigration Lawyers Association (Feb. 28, 2023)

[53] Human Rights First, *Refugee Protection Travesty*, 30-35, Jul. 2023, https://humanrightsfirst.org/wp-content/uploads/2023/07/Refugee-Protection-Travesty_Asylum-Ban-Report_July-2023-1.pdf (reporting from interviews from various families waiting for CBP interviews).

B. The enumerated exceptions are inadequate and will be illusory in practice

The IFR outlines certain exceptions to the Proclamation's ban on asylum, however, the structure of such exceptions makes them illusory in practice. The "exceptionally compelling circumstances," including showing that the applicant was unable to access the CBP One app to schedule an appointment, must be demonstrated by the applicant by a preponderance of the evidence, an unduly high evidentiary standard, both for the CFI and for the asylum merits stage. As discussed in the previous section of this comment, this standard is inconsistent with the "significant possibility" standard that Congress established for credible fear interviews to protect one's right to apply for asylum. At the asylum merits stage, exceptions may have to be proven years after the underlying compelling circumstances have occurred. Additionally, the Departments fail to provide sufficient guidance as to how someone can properly document and prove that it was impossible to access the CBP One app. The "imminent and extreme threat to life and safety" exception is a standard that is apparently higher even than the statutory standard for withholding of removal, which itself is much stricter than asylum. There are reports of women without CBP One appointments turned away by CBP officials after their accounts of being sexual assaulted and raped in Mexico were not found to fall into an exception; this includes at least one woman whose rapist still pursued her.[54] The Departments also explicitly state that generalized threats of violence will not satisfy the safety exception. The Departments falsely tout these exceptions as distinguishing this asylum ban from the ones that came before it, but for most asylum seekers, these exceptions remain illusory.

Applying bars on asylum in one border region and singling out individuals based on manner of entry not only contravenes the INA, it also results in arbitrary access to asylum and related protections from persecution and torture. An otherwise similarly situated refugee who seeks entry at a different border, or with luck secures a CBP one appointment, benefits from an entirely different level of access to our country's protections and legal process. This arbitrary treatment under our rules and procedures belies the intentions of our asylum system. While we do not confer protection on all those seeking refuge, the Departments should at a minimum dole out protection in a fair and consistent manner.

C. The ILRC supports the adoption of a non-discretionary family unity provision for the Asylum Merits Interview process

The Departments specifically requested comments as to whether it should adopt a non-discretionary family unity provision for the Asylum Merits Interview process.[55] The ILRC supports the adoption of such a policy. The family unity provision alleviates some of the harm resulting from the Departments' barring access to asylum in the CLP rule and forcing asylum seekers to apply for less generous forms of relief – withholding of removal and CAT relief – that do not allow for derivative status for family members.

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[54] *Id*. at 7-8 ("CBP officers at ports of entry have unlawfully turned away asylum seekers without appointments or left them stranded "waiting" at risk for weeks or longer. For example, … a Mexican Indigenous woman who had been repeatedly raped and impregnated in Matamoros, and whose rapist was looking for her, was turned away by CBP…" "Mexican authorities also blocked a Venezuelan woman who had suffered a heart attack at the port from accessing the port of entry in Matamoros, a Honduran woman who had been raped in Matamoros and continued to receive threats, and survivors of kidnapping, torture and rape who are at risk of continued harm in Reynosa.")

[55] 89 Fed. Reg. 48733

The family unity provision fails to protect many families and does little to redress the general harm inflicted by the CLP rule, but for some eligible families it offers much-needed relief. If the Departments insist on retaining the unlawful CLP policy, they should ensure that the family unity provision is available in all of its applications.

IV. Conclusion

This IFR is the latest in an onslaught of executive actions that seek to strip the rights of asylum seekers to discourage migration and construct barriers to migrants' legal right to seek asylum in the United States. Unsatisfied with the statutory framework enacted by Congress, the Departments once again seek to invent their own policy. These policies lack an adequate justification and violate the APA. They also directly contradict the asylum and expedited removal statutory provisions that clearly delineate the process that the Departments must follow when encountering asylum seekers at the U.S. border. The statutory framework is especially important here, as it includes important parts of U.S. non-*refoulement* obligations. The Departments' decision to ignore Congress and invent a set of harsher expedited removal policies also violates the U.S. treaty obligation of non-*refoulement*.

As with the CLP rule and other recent policies, this IFR will be tremendously harmful to asylum seekers and their families. At the same time, it will not achieve any of the Departments' stated objectives. The measures the Biden Administration have taken prior to the IFR implementation have not accomplished the goal of lowering border encounters. In our comment opposing the CLP rule, the ILRC warned the Departments that such a policy would fail to achieve the desired results at the border. Sure enough, the CLP failed to do so, and we are faced with yet another rule creating a bar to asylum. Rather than admit failure and change tactics, the Departments are once again doubling down. We urge them to reconsider.

Sincerely,

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