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RE: RIN 1615-AC67; Public Comment on Proposed Rules on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers

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I. INTRODUCTION

The Catholic Legal Immigration Network, Inc. (CLINIC)¹ submits these comments in response to this Notice of Proposed Rulemaking (NPRM) because we are very concerned about many of the changes the proposed rules would make to the U.S. protection system. Over the past four years, the immigration system in general, and the asylum system in particular, have come under unprecedented attack by the executive branch.² We appreciate that the current administration is acknowledging the problems faced by asylum seekers who are forced to wait for years to have their claims adjudicated, but overall we have grave concerns that the “streamlined” procedure for asylum seekers who go through expedited removal will gut due process protections for the most vulnerable. As discussed below, we urge you to withdraw or substantially revise this proposed rule.

Embracing the Gospel value of welcoming the stranger, CLINIC has promoted the dignity and protected the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs since its founding in 1988. CLINIC’s network, originally comprised of 17 programs, has now increased to more than 400 diocesan and community-based programs in 48 states and the District of Columbia. CLINIC is the largest nationwide network of nonprofit immigration programs. CLINIC and its affiliates advocate for the just and humane treatment of noncitizens through direct representation, pro bono referrals, and engagement with policy makers. CLINIC provides direct representation and *pro bono* referrals through several projects: 1) the Board of Immigration Appeals (BIA) Pro Bono Project, 2) the Formerly Separated Families Project, 3) the Remote Motions to Reopen Project, and 4) *Estamos Unidos*, a project serving U.S. asylum seekers who have been forced to wait in Ciudad Juarez, Mexico. CLINIC also provides training and mentoring on asylum-related issues as well as direct representation before the BIA, federal district courts, and the federal courts of appeals.

While the proposed rule offers some positive changes, overall CLINIC opposes the proposed rule because it would strip asylum seekers of critical due process rights, most importantly the right to a full hearing before an immigration judge (IJ). CLINIC cannot support a proposed rule that would allow asylum seekers to be returned to harm’s way without ever having a true day in court. Furthermore, throughout the proposed rule, as discussed in detail below, the agencies largely continue the tone of the prior administration, treating asylum seekers as though they are a problem to be addressed, rather than human beings who are seeking protection. The agencies appear to feel constrained to temper any positive changes for asylum seekers with tough actions that will constrain their rights. We hope that this administration will set a different tone and take a different approach in future rulemaking, an approach that welcomes immigrants and respects their basic humanity and rights to fair processes in our immigration system. On this year’s World Refugee Day, Pope Francis called upon us “to think no longer in terms of ‘them’ and ‘those’, but only ‘us’” and he notes that “the highest price is being paid by those who most easily become

¹ Victoria Neilson, Defending Vulnerable Populations (DVP) Managing Attorney is the primary author of these comments. Michelle Mendez, DVP Director, and Bradley Jenkins, Federal Litigation attorney, also contributed sections.

² See National Immigrant Justice Center, *A Timeline of the Trump Administration’s Efforts to End Asylum*, (Last updated Jan. 2021), <https://immigrantjustice.org/sites/default/files/content-type/issue/documents/2021-01/01-11-2021-asylumtimeline.pdf>. [Hereinafter “NIJC, *Trump Efforts to End Asylum*.”]

viewed as others: foreigners, migrants, the marginalized, those living on the existential peripheries.”³ We call upon the administration to similarly stop seeing asylum seekers as “others”⁴ and reform the U.S. asylum system in a way that is truly fair, truly just, and truly welcoming.

II. WHILE THE PROPOSED RULE WOULD MAKE A FEW POSITIVE CHANGES, CLINIC OPPOSES MOST OF THE PROPOSED RULE BECAUSE IT DENIES ASYLUM SEEKERS CRITICAL DUE PROCESS RIGHTS

CLINIC appreciates that the administration is seeking to address the extraordinary backlog in the immigration court creatively, however we cannot support any proposed change that would deprive asylum seekers of critical due process rights that are afforded under the Immigration and Nationality Act (INA). While CLINIC supports changes that would allow the notes from the asylum officer’s credible fear interview to serve as the asylum application, we adamantly oppose changes that would deny asylum seekers the right to a full hearing before the immigration court.

A. CLINIC Supports the General Idea that Asylum Officers Could Be Authorized to Hear Asylum Cases Following Credible Fear Interviews, but Only if Asylum Seekers Are Still Afforded the Protections of Being Placed into INA § 240 Removal Proceedings if Their Cases Are Not Granted by the Asylum Office

CLINIC agrees, in theory, that many asylum seekers could benefit from having their application heard in the first instance in a nonadversarial setting by an asylum officer—as is currently the case for those seeking asylum affirmatively.⁵ However, we strongly object to the proposed rule as written because, as discussed below, it would deny asylum seekers⁶ the right to a full immigration court hearing before potentially being ordered removed and returned to the country from which they have fled.

CLINIC calls upon the agencies to reimagine the framing of the proposed rule. Rather than seeing the rule as enabling the Executive Office for Immigration Review (EOIR) to dispose of cases without a hearing, the agencies should revise the rule to enable asylum officers to quickly grant cases that are clearly grantable. Cases that involve complex facts, complex application of the law, expert witnesses, or potential bars, should continue to be referred to immigration judges for full INA § 240 proceedings following a positive Credible Fear Interview (CFI). However, asylum officers could be empowered by regulation to grant cases in a follow up interview, when it seems probable, based on facts elicited through the CFI, that the asylum seeker will prevail. This structure

³ Pope Francis, *Towards An Ever Wider “We”* (Sep. 26, 2021), <https://migrants-refugees.va/world-day-of-migrants-refugees/>.

⁴ We acknowledge and appreciate that the preamble to the NPRM uses the word “noncitizen” rather than “alien” to describe people seeking asylum in the United States. We call on the administration to change the term “alien” in all regulations it publishes as well as any legislation that is passed.

⁵ While we support nonadversarial interviews, in particular for vulnerable populations, we note that the proposed rule does not include any safeguards for asylum seekers with mental health issues. By way of contrast, EOIR procedures do include some safeguards for people who are mentally ill. See CLINIC, *Representing Noncitizens with Mental Illness* (May 12, 2020), <https://cliniclegal.org/resources/removal-proceedings/representing-noncitizens-mental-illness>.

⁶ This comment uses the term “asylum seekers” to mean noncitizens applying for asylum, withholding of removal under INA § 241(b)(3), and/or protection under the Convention Against Torture (CAT). There are some instances where the comment specifically addresses withholding and CAT separately from asylum below.

would more closely parallel the existing role of asylum officers in the affirmative asylum system in which asylum officers do not order asylum seekers removed, but rather refer cases that are not clearly grantable to the immigration court for full adjudication.⁷

Instead, unfortunately, by its own terms, the purpose of this proposed rule is not to expedite the *granting* of asylum applications but to eliminate the rights of asylum seekers who go through the CFI process from receiving full hearings before the immigration court. If published in their current form, the proposed rules would create an extensive new asylum office system which would still only hear a small percentage of the overall backlog of cases in immigration court and before the asylum office. Indeed the preamble to the NPRM only estimates that this proposed rule will reduce the number of cases EOIR hears by *15 percent*, stating “Another benefit is that EOIR would not see the cases in which USCIS grants asylum, which we estimate as at least a 15 percent reduction in their overall credible fear workload.”⁸ If the agencies only envision the asylum office granting 15 percent of the cases before it—a number that is significantly lower than EOIR’s asylum grant rate—then the outcome of this rule would not be to provide asylum seekers a benefit through nonadversarial interviews, but rather to deny cases with fewer procedural protections. Moreover, unlike the EOIR, which is funded by congressional appropriations, this new asylum office system would be part of the United States Citizenship and Immigration Services (USCIS), a fee-funded agency. As a result, applicants for all other USCIS benefits would have to pay for this new adjudication system.

The concept of asylum officers adjudicating cases after asylum seekers pass a CFI interview is not new. The 2013 bipartisan Comprehensive Immigration Reform bill also included language that would have empowered asylum officers to make merits decisions on asylum applications after passing CFIs.⁹ Under that proposed legislation, an asylum officer would have been authorized to grant asylum following a CFI. Section 235(b)(1)(B)(ii) of the INA would have been amended to add to the sentence the italicized text:

If the officer determines at the time of the interview that an alien had a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum *by an asylum officer. The asylum officer, after conducting a nonadversarial asylum interview and seeking supervisory review, may grant asylum to the alien under section 208 or refer the case to a designee of the Attorney General, for a de novo asylum determination, for relief under the Convention Against Torture and Other Cruel,*

⁷ This is how retired immigration judge Jeffrey Chase describes the current system, “The current system itself recognizes this; it is why asylum officers are limited to granting clearly meritorious cases, and must refer the rest to courts better equipped to delve into the intricacies of a highly complex field of law.” Jeffrey S. Chase, *The Need For Full-Fledged Asylum Hearings*, Opinions/Analysis on Immigration Law (Oct. 6, 2021), <https://www.jeffreyschase.com/blog/2021/10/6/the-need-for-full-fledged-asylum-hearings>. [Hereinafter Chase, “Need for Full-Fledged Asylum Hearings”].

⁸ 86 Fed. Reg. 46925.

⁹ See Border Security, Economic Opportunity, and Immigration Modernization Act § 3404 (S. 744), (Apr. 16, 2013).

Inhuman or Degrading Treatment or Punishment, done at New York December 10, 1984, or for protection under 17 section 241(b)(3).¹⁰

The regulations could use similar language. Rather than begin a new adjudication with a different officer, likely in a different part of the country,¹¹ the officer who has already conducted the CFI could, after determining there is a significant possibility that the noncitizen could establish eligibility for asylum, allow more time for the asylum seeker to gather evidence, confer with counsel, and recover from their journey to the United States. The officer could then follow up with the applicant about any areas of concern, probe for further details where necessary, and if satisfied that the applicant has established eligibility for asylum grant asylum. If the officer does not find that the applicant has met their burden to establish asylum eligibility, believes that the applicant may not qualify for asylum because of a bar, or may be eligible for withholding or CAT, then the applicant would be placed into removal proceedings under INA § 240. Or, USCIS could schedule a follow up interview with a different officer in the final destination of the asylum seeker, allowing them more time to prepare and gather evidence.

Changing the focus of the asylum officer's role in this way—to grant those cases that do not involve complex issues and should clearly be granted—would serve one of the primary stated purposes of the NPRM by reducing the overall number of asylum cases referred to EOIR. Cases where the asylum applicant can quickly establish asylum eligibility could be granted expeditiously by asylum officers in a nonadversarial setting without clogging the immigration court docket. However, cases that involve more complex issues, where the adversarial process may better draw out information,¹² or where the applicant will need expert testimony, would continue to be referred to the immigration court. Likewise, asylum officers would continue to refer cases where the applicant could be eligible for withholding or CAT.¹³ This procedure would allow asylum officers to serve a humanitarian role rather than being forced to introduce derogatory evidence in some cases and to issue orders of removal, roles that have traditionally been played by Immigration and Customs Enforcement (ICE) and the IJ in immigration court.

It appears that the system envisioned in this NPRM has been created, in part, in response to a policy paper written by former government officials at the Migration Policy Institute (MPI) titled *The U.S. Asylum System in Crisis: Charting a Way Forward*.¹⁴ That policy paper suggests that the government could decrease the immigration court backlog caused, in part, by recently

¹⁰ *Id.*

¹¹ CLINIC is also concerned that if asylum seekers must attend interviews at asylum offices rather than be referred to immigration court, that getting to the interviews may create a hardship for asylum seekers. There are currently only ten asylum offices nation-wide, see <https://egov.uscis.gov/office-locator/#/asy> while there are 69 immigration courts. <https://www.justice.gov/eoir/eoir-immigration-court-listing>. As a result of the COVID-19 pandemic, asylum officers have generally not been conducting circuit ride cases, meaning that asylum seekers must travel long distances to attend interviews at regional asylum offices if interviews are scheduled at all.

¹² Retired IJ Jeffrey Chase describes the critical role of the adversarial process. “I will also state from experience that critical “Eureka” moments arise unexpectedly in the course of hearing testimony. A question from counsel, or sometimes from the judge, will elicit an answer that unexpectedly gives rise to a new line of questioning, or even a legal theory of the case.” See Chase, “Need for Full-Fledged Asylum Hearings” *supra* note 7.

¹³ As discussed below, CLINIC does not object in theory to asylum officers being authorized to grant withholding or CAT, but has concerns about the conflicting roles an asylum officer would have to play in those cases.

¹⁴ MPI, *The U.S. Asylum System in Crisis: Charting a Way Forward* (2018), <https://www.migrationpolicy.org/sites/default/files/publications/MPI-AsylumSystemInCrisis-Final.pdf>.

arrived asylum seekers, advising that such cases should “remain with the Asylum Division for full asylum merits adjudication. Although doing this would add to the Asylum Division workload, much of the background information and other fact-finding will have already been done during the credible-fear stage.”¹⁵ However, the MPI report does not explain how referring the asylum case to a different asylum officer would create efficiencies. In fact, it critiques the current system for being “needlessly duplicative” and for having to “begin anew” before an IJ, when, under the NPRM, a new, higher level asylum officer would likewise begin anew with the file. Moreover, the MPI paper claims that having an asylum officer conduct the hearing would save resources since an asylum interview is nonadversarial and thus involves one government official, whereas immigration court proceedings involve both a government-employed IJ and an ICE attorney. However, the MPI report also acknowledges that all asylum decisions are currently reviewed by a supervisor, thus also involving two government employees.

Finally, and perhaps most significantly, nothing in the MPI report suggests that asylum seekers whose cases are not granted by asylum officers should no longer have a right to a full hearing in immigration court. Instead the report explicitly states, “Applicants denied asylum by the Asylum Division would still be able to raise their claims in subsequent removal proceedings before an immigration judge.”¹⁶ The anti-immigrant group, Center for Immigration Studies (CIS), has strongly critiqued the MPI plan, in part because asylum seekers whose claims are denied after the initial asylum office merits interview would get a second opportunity to present their claims before the immigration court;¹⁷ under the proposed rule the agencies have eliminated the opportunity for asylum seekers to present their claims in court.

The preamble to the NPRM cites other studies, including one by the Department of Homeland Security (DHS) Homeland Security Advisory Council (HSAC) which has suggestions which are similar to those in the MPI study.¹⁸ The proposed rule rejects the approach suggested by HSAC stating:

The Departments acknowledge that the above recommendations assumed that individuals denied asylum by a USCIS asylum officer would be issued an NTA [Notice to Appear] and placed into section 240 removal proceedings before an IJ, where the noncitizen would have a second, full evidentiary hearing on the asylum application with a different decision-maker. This proposed rule would not adopt that approach, as the Departments determined it was unnecessary, duplicative, and inefficient. Instead, as noted in the previous section, this proposed rule would establish a new process that would require the IJ to conduct a de novo review of a denied application for protection when such review is requested, but *it would not provide the noncitizen with a second full evidentiary hearing to present the claim.*¹⁹

¹⁵ *Id.* at 26.

¹⁶ *Id.*

¹⁷ Andrew Arthur, Center for Immigrant Studies, *Biden Considering Bad Asylum Plan for Illegal Migrants* (Apr. 3, 2021), <https://cis.org/Arthur/Biden-Considering-Bad-Asylum-Plan-Illegal-Migrants>.

¹⁸ 86 Fed. Reg. 46918.

¹⁹ *Id.* [Emphasis added].

If the NPRM retained asylum seekers' rights to full merits hearings in immigration court, CLINIC would fully support the proposed changes to allow asylum officers to grant cases and thereby remove them from the stream of new cases being referred to EOIR. This change would reduce the EOIR backlog (or at least slow its growth) while safeguarding the rights of vulnerable asylum seekers. People of faith have consistently stood by the principle that all immigrants, especially the most vulnerable among us, including asylum seekers, deserve an immigration system that is fair and humane. As Pope Francis has said, "I ask leaders and legislators and the entire international community to confront the reality of those who have been displaced by force, with effective projects and new approaches in order to protect their dignity, to improve the quality of their life and to face the challenges that are emerging from modern forms of persecution, oppression and slavery."²⁰ While we applaud the agencies for thinking creatively about how to address agency backlogs, CLINIC cannot support a proposed rule that would allow asylum seekers to be returned to harm's way without ever having a true day in court. CLINIC agrees with Pope Francis that the most vulnerable among us need greater protections and opportunities, including the right to a full and fair hearing before an immigration judge.

1. One of the Premises Underlying this Rulemaking—that Asylum Office Interviews Are More Efficient—Is Fundamentally Flawed

One stated reason for the proposed rule is efficiency. While the changes purport to reduce the EOIR backlog,²¹ there is no proof that the proposed system would be more efficient or cheaper than the current system. According to the proposed rule's preamble, the asylum offices currently have a backlog of 400,000 cases.²² The preamble states, "In proposing this rule, the Departments seek to avoid simply shifting work from a resource-challenged EOIR to a similarly resource-challenged USCIS Asylum Division. DHS seeks to fully resource the USCIS Asylum Division to handle their present workloads and this new workload prior to the USCIS full takeover of the adjudication of protection claims that follow a positive credible fear determination."²³ But the NPRM does not explain how, given the asylum office's inability to keep up with affirmative asylum applications, it is in any way better positioned to adjudicate cases expeditiously than the immigration court is. Further, the preamble states that "As of the final drafting of this proposed rule, DHS believes that through FY 2022 new staff positions can be funded with existing resources, which would support a minimum processing level of 50,000 annual family-unit cases."²⁴ The NPRM does not explain how moving existing funding from adjudicating the existing caseload of 400,000 cases to this new proposed workforce would affect the affirmative asylum backlog, but it would be logical to assume that that backlog will grow even more if the asylum office reallocates existing funding to cases adjudicated under the proposed rule. CLINIC cannot support a system that would leave asylum seekers, already waiting years to have their affirmative asylum

²⁰ Pope Francis, *Address to Participants in the Plenary of the Pontifical Council for the Pastoral Care of Migrants and Itinerant People*, (May 24, 2013), http://w2.vatican.va/content/francesco/en/speeches/2013/may/documents/papa-francesco_20130524_migranti-itineranti.html.

²¹ According to the NPRM preamble, roughly 610,000 pending cases before EOIR are asylum claims. 86 Fed. Reg. 46908.

²² 86 Fed. Reg. 46921.

²³ *Id.*

²⁴ 86 Fed. Reg. 46937.

applications heard, to wait indefinitely for their interviews and believes USCIS should be putting resources into adjudicating backlogged cases rather than creating a new system that will only hear the cases of recent entrants.

The preamble to the NPRM states that the average processing time for an immigration court case is 3.75 years, but it does not give a comparable average wait time for asylum office interviews.²⁵ The preamble also notes that the overall number of immigration court cases has grown by nearly 500,000 cases since the end of 2018,²⁶ but it does not take into account the dramatic changes to EOIR and ICE practice under the Trump administration that added to the growth of the backlog. The NPRM seems to solely blame asylum seekers at the border for a rise in EOIR cases when the elimination of prosecutorial discretion for ICE officers and attorneys, as well as the elimination of sensible docket management tools for IJs, such as administrative closure, were clearly significant factors in growing the backlog.²⁷ The Biden administration has already taken steps to address these factors²⁸ and should assess their impact on the EOIR backlog before radically restructuring the asylum adjudication system, and reducing the rights of asylum seekers. Moreover, the preamble notes that 220,000 cases in the EOIR system originated through CFIs,²⁹ meaning that EOIR cases that originated from CFIs account for fewer than 16 percent of the overall EOIR caseload and calling into question the entire premise of this proposed rulemaking. The 800 *additional* asylum officers that would be hired above and beyond the current corps of asylum officers, would exceed the current total number of 555 IJs,³⁰ even though they would be addressing only a small subset of cases that currently get referred to immigration court.

Furthermore, hiring an entirely new cadre of officers to only hear cases of recent arrivals, will do nothing to address this years-long backlog at the asylum office and may even lead to its further growth. Indeed, while the NPRM states that the proposed rule will address the EOIR backlog, it does not discuss at all how the proposed rule will affect the enormous backlog before the asylum office.³¹ The preamble explains that cases referred to the asylum office under the proposed rule “would be adjudicated in a separate queue, apart from adjudications made with respect to affirmative asylum applications filed directly with USCIS.”³² The NPRM does not acknowledge that existing asylum offices do not have space to add hundreds of newly hired officers. Nor does it address the possibility of experienced asylum officers applying for these newly created, higher paying jobs, and how the departure of experienced asylum officers and

²⁵ 86 Fed. Reg. 46909.

²⁶ 86 Fed. Reg. 46908.

²⁷ See Aaron Reichlin-Melnick, *New Data Disproves Trump Administration’s Push to End Administrative Closure*, Immigration Impact (Sep. 16, 2020), <https://immigrationimpact.com/2020/09/16/administrative-closure-regulation/#.YV7NXtrMLIU>.

²⁸ See e.g., *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (AG 2021) (restoring administration closure authority to immigration judges); see also Alejandro Mayorkas, *Guidelines for Enforcement of Civil Immigration Law* (Sep. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>, (allowing ICE to exercise prosecutorial discretion).

²⁹ 86 Fed. Reg. 46910, n. 28.

³⁰ 86 Fed. Reg. 46923.

³¹ The preamble to the rule correctly notes “A system that takes years to reach a result is simply not a functional one.” 86 Fed. Reg. 46907. Unfortunately, there are asylum seekers in the affirmative backlog who have been waiting for interviews for over five years, and with the Last In, First Out system in place, there may literally be no end in sight for them to ever have their cases heard.

³² 86 Fed. Reg. 46911.

supervisors, from the affirmative asylum system would impact the affirmative backlog. Instead, the agencies seem to assume that asylum office interviews provide efficiencies over immigration court proceedings, when the existence of the asylum office backlog itself belies this assumption.

Under current asylum office procedures, asylum officers generally conduct only two asylum interviews per day, and generally conduct no interviews on Fridays. Asylum officers take notes during interviews, draft decisions, and have full review of all decisions by supervisors. By way of contrast, IJs often conduct multiple hearings per day. If both sides waive appeal of the IJ decision, there is no further review or investment of government adjudication resources after the hearing.

Asylum interviews often drag on for hours, sometimes lasting six hours or longer for a single interview. Having an officer who is not intimately familiar with the facts of the case, draw out the narrative from the asylum seeker, rather than allowing the representative to do so through direct examination, is inherently inefficient. If the asylum seeker's counsel is permitted to ask the questions, then the interview or hearing is more likely to occur faster and to follow a logical sequence. Immigration courts have long favored pro bono representation for noncitizens because having counsel on the cases speeds them up. Indeed, the INA requires that noncitizens in removal proceedings be provided a list of legal service providers.³³ While one reason for that efficiency is that the IJ does not have to explain the law to counsel, it should also be recognized that the adversarial system exists, in part, because it is the best way to get information out.

The preamble to the proposed rule acknowledges that with the greater responsibility of the asylum officers conducting this new hearing or interview, the officers will need to have a higher employment grade of at least GS-13 and that their supervisors reviewing their decisions would have to be graded at GS-14 or above.³⁴ Asylum offices have been plagued with extraordinary turnover rates. A 2015 USCIS Ombudsman Annual Report noted that "even as newly authorized officers are hired and trained, the departure of more seasoned officers compromises USCIS' capacity to efficiently meet its caseload and reduce the affirmative asylum backlog."³⁵ The Report further states that one asylum office only retained its officers for 14 months on average.³⁶ The NPRM does not address how asylum offices will be capable of taking on greater responsibilities while conducting massive hiring, given the challenges it has faced in retaining staff. Asylum officers who are qualified to conduct these newly created hearings would likely be well positioned to apply for IJ positions, which have higher salaries than those of GS-13 employees.³⁷

Acknowledging the difficulty of creating this new system, the preamble to the NPRM details a phased implementation of the new rule.³⁸ Part of this phased approach would be to first

³³ See INA § 239(b)(2).

³⁴ 86 Fed. Reg. 46932.

³⁵ Annual Report 2015, Citizenship and Immigration Services, Ombudsman at 61 (June 29, 2015), https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb_2015-annual-report-to-congress.pdf.

³⁶ *Id.*

³⁷ For example, in New York, the starting salary for an IJ is \$160,186 whereas, as the NPRM states, the base salary for a GS-13 employee is \$79,468. See Executive Office for Immigration Review 2020 Immigration Judge Pay Rates (Effective Jan. 2020), <https://www.justice.gov/eoir/page/file/1236526/download>; 86 Fed. Reg. 46932.

³⁸ 86 Fed. Reg. 46921-22.

try out the new system on families coming through the CFI process. CLINIC opposes singling out asylum-seeking families in this way. The Obama (adults with children docket), Trump (FAMU docket), and Biden (dedicated docket) administrations have each implemented expedited review systems within EOIR that have singled out and treated families seeking asylum differently from all other asylum seekers. A federal district court has found that this practice of expediting cases for a particular subset of respondents may violate their rights.³⁹

The preamble to the NPRM states that if an asylum seeker does not seek review beyond the asylum office hearing, the cases should be completed within 90 days.⁴⁰ CLINIC is concerned about this expedited timeline. Asylum seekers often arrive in the United States with limited financial resources, no ability to work, and must often focus on meeting daily needs. Under the proposed rule, they would have very little time to find counsel, find the ability to pay for counsel, work on preparing their case, and gathering evidence to support their case. This goal of 90-day case completion is unrealistic and could prejudice the rights of asylum seekers, especially given that they may never get another opportunity to present evidence beyond what they are able to gather before their asylum office interview.

The proposed rule would also not be cost-efficient. The preamble to the NPRM states that the government would have to spend at least⁴¹ \$180 million to implement the proposed program and adjudicate 75,000 cases.⁴² This number of cases represents a tiny percentage—just 5 percent—of the overall immigration court backlog of immigration court cases,⁴³ yet the cost would be \$180 million. By way of contrast, EOIR’s 2020 budget was \$673 million.⁴⁴ This expansion of asylum office duties would address only 5 percent of the overall immigration court backlog, but would require funding at 27 percent of EOIR’s overall budget. Or, looking at EOIR case completions, in 2019 EOIR completed 276,984 cases.⁴⁵ The proposed rule’s 75,000 annual case completions would be 27 percent of the this caseload, making the cost at the asylum office and at EOIR roughly equal. However, many, if not most, asylum office denials will result in further review by IJs, so the proposed rule would increase costs and the rule would not create financial efficiencies.⁴⁶ The

³⁹ *Las Americas Immigrant Advoc. Ctr. v. Trump*, 475 F. Supp. 3d 1194, 1216 (D. Or. 2020) (“Plaintiffs have at least sufficiently alleged that such [FAMU] docket management has practical consequence for parties or their attorneys.”).

⁴⁰ 86 Fed. Reg. 46938.

⁴¹ Elsewhere the preamble to the NPRM acknowledges that \$180 million is on the lowest end of the cost estimate spectrum and the high end cost is \$1 billion. 86 Fed. Reg. 46921. And in yet another section of the preamble, the agencies estimate that in “FY 2022, the implementation costs are expected to range between \$179.8 million and \$952.4 million with a primary cost estimate of \$438.2 million.” 86 Fed. Reg. 46933.

⁴² 86 Fed. Reg. 46921.

⁴³ According to TRAC, Immigration Court Backlog Tool (Aug. 2021), https://trac.syr.edu/phptools/immigration/court_backlog/, the immigration court backlog stood at 1,425,447 cases in August 2021. The 1.3 million figure cited in the NPRM preamble was as of April 2021. 86 Fed. Reg. 46909. Thus, in the four months during which the preamble was being drafted, the EOIR backlog grew by more than 100,000 cases—and by more cases than the 75,000 cases this rule is designed to address.

⁴⁴ Executive Office for Immigration Review (EOIR), FY 2020 Budget Request At A Glance, <https://www.justice.gov/jmd/page/file/1142486/download#:~:text=The%20FY%202020%20budget%20request,the%20nation's%20immigration%20court%20system.>

⁴⁵ Executive Office For Immigration Review, *Adjudication Statistics* (July 20, 2021), <https://www.justice.gov/eoir/page/file/1139176/download>. We are citing the 2019 number because the 2020 case completion number of 231,718 was likely anomalous because of court closures due to COVID.

⁴⁶ Purported cost savings to asylum seekers noted in the preamble to the NPRM also do not appear accurate. The preamble estimates that asylum seekers would save \$338.86 by not having to complete their I-589, but they will need

preamble to the NPRM itself says the overall conclusion of the agencies is that they cannot accurately estimate the benefits to the agencies,⁴⁷ stating, “USCIS has not made a one-to-one time- and cost-specific comparison between worktime actually spent on a case at EOIR and USCIS.”⁴⁸

2. *One of the Premises Underlying this Rulemaking—that Asylum Office Interviews Are Inherently Beneficial to Asylum Seekers —Is Fundamentally Flawed*

As discussed above, CLINIC agrees that allowing asylum officers to conduct a dispositive interview following a favorable CFI decision would be beneficial for some asylum seekers. Many asylum seekers have been traumatized and having the ability to tell their narrative in a non-adversarial setting may make it easier for them to describe past harm and future fears. However, CLINIC cannot support the proposed rule as written because it would deny asylum seekers the protections afforded by a full adversarial court hearing if the asylum officer denies the case. Asylum offices actually deny, or refer to immigration court, asylum at a higher rate overall than IJs.

In the past, EOIR separated statistics for asylum grant rates for those cases referred by the asylum offices versus cases filed defensively. The last year for which EOIR broke down statistics in this way was 2016. In that year, fully 83 percent of cases that had been denied by the asylum office were later granted by EOIR, following a full, adversarial hearing. The table from that report⁴⁹ is inserted here:

Immigration Court Affirmative Grant Rate			
	Grants	Denials	Grant Rate
FY 12	7,721	2,964	72%
FY 13	7,175	2,589	73%
FY 14	5,925	1,937	75%
FY 15	4,794	1,172	80%
FY 16	3,890	801	83%

According to TRAC at Syracuse University, during the Trump administration, the EOIR asylum denial rate climbed steeply, “from 54.6 percent during the last year of the Obama Administration in FY 2016” to 71.6 percent in FY 2020.⁵⁰ While denial rates were climbing in

to carefully review the CFI notes that become the asylum application and supplement that application. As a result there likely will not be an overall time saving. *See* 86 Fed. Reg. 46925, 46925. Likewise, the NPRM estimates a potential saving of \$377.32 per person on I-765s, presumably because asylum seekers could be granted asylum before they would qualify for an asylum pending EAD, but this figure does not account for the fact that most asylum seekers apply for EADs even after winning asylum as proof that they are authorized to work even though the EAD is not legally required to work. *See* 86 Fed. Reg. 46925-26.

⁴⁷ 86 Fed. Reg. 46929-32

⁴⁸ 86 Fed. Reg. 46925.

⁴⁹ *See* 2016 EOIR Statistical Yearbook, at K3 (Mar. 2017), <https://www.justice.gov/eoir/page/file/fysb16/download>.

⁵⁰ *See* TRAC, Asylum Denial Rates Continue to Climb, <https://trac.syr.edu/immigration/reports/630/>.

immigration court, grant rates in the asylum offices were significantly lower than in immigration court. The 2019 USCIS affirmative asylum grant rate for asylum seekers from countries most likely to be placed in expedited removal—Northern Triangle countries and Mexico—were 3.8 percent (Guatemala); 3.2 percent (El Salvador); 2.9 percent (Mexico); and 1.9 percent (Honduras).⁵¹ During the same period, the EOIR grant rate for asylum seekers from the same countries was significantly higher: 12.3 percent (El Salvador); 8.2 percent (Guatemala); 6.8 percent (Honduras); and 4.3 percent (Mexico).⁵² Of course, these grant rates may be particularly low given the Trump administration’s efforts to end asylum generally, and particularly for those fleeing Central America.⁵³ However, across both the Obama and the Trump administrations, it is clear that asylum seekers do not fare better overall before the asylum office.⁵⁴

While both USCIS and EOIR adjudicators are bound by federal court and agency appellate decisions, USCIS officers are uniquely susceptible to political pressure from the executive branch. Asylum officers are required to follow agency guidance documents whereas immigration judges enjoy greater independence, as they are directed by regulation to “exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.”⁵⁵

For example, under the Trump administration, Attorney General Jeff Sessions issued the precedential decision *Matter of A-B-*, 27 I&N Dec. 316 (AG 2018). The holding in *Matter of A-B-* was actually quite narrow—it overturned *Matter of A-R-C-G*, 26 I&N Dec. 338 (BIA 2014), purportedly because of concessions DHS made in recognizing the particular social group. In addition to the holding in that decision, the attorney general issued sweeping dicta, opining that “most” domestic violence and gang-related asylum cases would fail. In the immigration court setting, practitioners could explain the difference between the holding and dicta to IJs, arguing that the dicta had no legal effect. However, shortly after the *Matter of A-B-* decision, USCIS issued guidance to asylum officers, that highlighted dicta from the decision, and directed officers to apply the dicta in decision making.⁵⁶ While aspects of this guidance were enjoined in *Grace v.*

⁵¹ See DHS Office of Statistics, Annual Flow Report September 2020 - Refugees and Asylees: 2019, 8 (Sep. 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/refugee_and_asylee_2019.pdf.

⁵² *Id.*

⁵³ See NIJC, *Trump Efforts to End Asylum supra* note 2.

⁵⁴ One reason for this disparity may be that asylum officers do not see themselves as the final decision-makers in asylum cases. Rather, their role has been to grant the clearly grantable cases, and allow any cases with more complex issues to have those issues fully aired in an adversarial proceeding. CLINIC generally agrees with this approach which is why we support allowing asylum officers to grant clear-cut cases following a positive CFI, but we oppose the corresponding deprivation of full 240 removal proceedings for those whose claims are not granted by the asylum office.

⁵⁵ 8 CFR § 1003.10(b).

⁵⁶ See USCIS, *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-* (July 11, 2018, revoked June 16, 2021), <https://www.uscis.gov/sites/default/files/document/memos/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.PDF>. That Guidance included, in bold lettering, “**In general, in light of the [standards governing persecution by a non-government actor], claims based on membership in a putative particular social group defined by the members’ vulnerability to harm of domestic violence or gang violence committed by nongovernment actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution.**” *Grace v. Whitaker*, 344 F. Supp. 3d 96, 110 (D.D.C. 2018), *aff’d in part, rev’d in part and remanded*

Whitaker,⁵⁷ the agencies should not assume that all unlawful guidance will face court challenges, and should be wary of how future, anti-immigrant administrations will interpret the rules that this administration codifies.

B. 8 CFR §§ 208.2, 208.14, and 1003.48—The Proposed “Streamlined” Procedures Would Deny Asylum Seekers Critical Due Process Protections

Under the proposed rule, the agencies would interpret the phrase “further consideration of the asylum application” under INA § 235(b)(1)(B)(ii), to mean further consideration by an asylum officer rather than by an IJ. CLINIC does not object to this possibility, as discussed above, and acknowledges that some asylum seekers would benefit from being questioned in a non-adversarial interview. Fundamentally, however, CLINIC cannot support any proposed regulation in which asylum seekers who are not granted asylum by the asylum officer after the newly-established “asylum hearing,” will never get a full day in court. The preamble of the NPRM states that the intent of this dramatic change is for these proceedings “to be more streamlined than section 240 removal proceedings.”⁵⁸ Yet the preamble also acknowledges the importance of the procedural protections afforded by full section 240 proceedings, “To ensure that noncitizens have a full and fair opportunity to prepare for and receive review of their claims, the Departments propose that many of the procedural safeguards that apply in section 240 removal proceedings would apply to the IJ review proceedings as well.”⁵⁹ However, as discussed below, there is no “procedural safeguard” more fundamental than the adversarial hearing itself, which includes the right to present evidence, examine witnesses, and cross-examine witness provided under INA § 240(b)(4).⁶⁰ As written, this “streamlining” would allow immigration judges to rubber stamp asylum officer denials, without ever giving asylum seekers a day in court.

Under proposed 8 CFR § 208.14, if the asylum office denies the application for asylum, the asylum seeker must request “review” by the immigration judge. While 8 CFR § 1003.48(e) refers to the review by the IJ as “de novo,” that section states, “In reaching a decision in proceedings under this section, the immigration judge shall review the record created before the asylum officer, as well as the asylum officer’s decision.” The use of the phrase “de novo” appears to be misplaced. Under current procedures, if an asylum seeker is not granted asylum by the asylum office, and is referred to immigration court, the IJ holds a completely “new hearing and issues a decision that is independent of the decision made by USCIS”—which has always been called a de novo hearing in the asylum context.⁶¹ Under the proposed regulations, the IJ’s “de novo” review,

sub nom. *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020). [Emphasis in original.]. The Court enjoined portions of the Guidance, including this statement.

⁵⁷ *Id.*

⁵⁸ 86 Fed. Reg. 46919.

⁵⁹ 86 Fed. Reg. 46920. Notably, while the preamble discusses some procedural rights in these IJ review proceedings, including the right to change venue and the right to a continuance for good cause shown, it does not discuss administrative closure, which could allow certain crime or trafficking victims to pursue U or T visas before USCIS.

⁶⁰ CLINIC acknowledges that some vulnerable asylum seekers, including children and people with mental illness, may find it easier to explain their claim in a nonadversarial interview setting; we fully support this process, but only if the vulnerable person also has the right to a hearing with all of the protections under INA § 240 prior to being ordered removed.

⁶¹ Note, the USCIS asylum webpage says, “If your case is not approved and you do not have a legal immigration status, we will issue a Form I-862, Notice to Appear (NTA), and refer your case to an immigration judge at the Executive Office for Immigration Review (EOIR). The immigration judge conducts a ‘de novo’ hearing of the case.

would apparently mean that the judge would review the asylum officer's decision without giving it deference, but the IJ would not be required to conduct a new, hearing independent of the asylum office decision. CLINIC is very concerned that the IJ review of the asylum officer decision would become similar to IJ review of asylum officer CFI decisions which is also purportedly *de novo*⁶² but are often simply a rubber stamp of the asylum officer's decision.⁶³

If an asylum seeker, or DHS, wants to provide further testimony or evidence, they "must establish that the testimony or documentation is not duplicative of testimony or documentation already presented to the asylum officer, and that the testimony or documentation is necessary to ensure a sufficient factual record upon which to base a reasoned decision on the application or applications."⁶⁴ Thus, unless an asylum seeker "establishes," presumably through a motion that explains the need for further evidence, that further evidence is warranted, the IJ will function essentially as an appellate judge, based on a record created through a nonadversarial interview. Under this proposed system, an asylum seeker could be ordered removed without their counsel ever having the opportunity to conduct a direct examination and potentially without being able to call fact or expert witnesses. This extraordinary change in the role of attorneys or accredited representatives violates the asylum seeker's right to counsel as provided at INA § 292 by potentially removing counsel from playing any role before the immigration court while the IJ reviews the asylum office transcript. Moreover, the proposed rule is silent about whether an asylum seeker's motion to present further evidence would be considered applicant-caused delay for purposes of the Employment Authorization Document (EAD) clock. CLINIC urges the agencies to not penalize asylum seekers for moving to include further evidence that would be necessary to a fair adjudication of their claim.

Even in cases where the IJ does permit the asylum seeker to present further evidence, the asylum seeker's counsel will have to shoulder the added burden of making a motion explaining why the evidence is necessary and not duplicative, just to get an evidentiary hearing before the IJ. The preamble describes this added burden on the practitioner, "The Departments expect that an IJ may, in appropriate cases, require parties to submit prehearing statements or briefs concerning whether they will seek to introduce additional testimony or documentation and, if so, explaining why this testimony or documentation meets the standard at 8 CFR 1003.48(e)."⁶⁵ To make this motion, the asylum seeker's counsel will need to guess whether the existing factual record is "sufficient" for the IJ to "base a reasoned decision"⁶⁶ presumably before the representative has the opportunity to appear before the IJ.

This means that the judge conducts a new hearing and issues a decision that is independent of the decision made by USCIS." USCIS, Obtaining Asylum in the United States (Last updated/reviewed Sep. 16, 2021), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states>.

⁶² See 86 Fed. Reg. 46915.

⁶³ See Lauren Schusterman, A Suspended Death Sentence: Habeas Review of Expedited Removal Decisions, MICHIGAN LAW REVIEW, Vol. 118, Iss. 4, at 662 (2020), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=4987&context=mlr>. [hereinafter Schusterman, "Death Sentence."]

⁶⁴ Proposed 8 CFR § 1003.48(e)(1).

⁶⁵ 86 Fed. Reg. 46920.

⁶⁶ Proposed 8 CFR § 1003.48(e)(1).

From the wording of the proposed rule it seems that the agencies contemplate that in most cases where an asylum seeker requests review of an asylum office denial, the asylum seeker would not ever appear before the IJ because the IJ would simply review the record and issue a decision. The preamble to the proposed rule notes that “an IJ ordinarily would not conduct an evidentiary hearing on the noncitizen’s asylum application.”⁶⁷ This limitation on the ability to even appear before the IJ in court would be consistent with recent changes by EOIR that limit master calendar hearings through Case Flow Processing.⁶⁸ While this change would essentially give the IJ an appellate review role, the proposed rules provide no right for the asylum seeker’s counsel to provide briefing to the IJ to highlight any errors in the asylum officer’s decision.⁶⁹ Indeed, nothing in the proposed rule even requires the agencies to alert the asylum seeker or counsel that the case is being reviewed by an IJ.⁷⁰

If the asylum seeker wants to introduce further evidence or witnesses, they would have to move for an evidentiary hearing in any case where they wished to argue eligibility before an IJ. Again, given that a purported goal of this NPRM is to increase EOIR efficiency, the rule would have the opposite effect by requiring IJs to rule on motions regarding evidentiary hearings in most cases. Unless the asylum officer has made a facially erroneous error of law, the fact that the application was denied by the asylum office would mean that the representative would generally feel compelled to further supplement the record, adding additional motion practice to the representative’s workload and to the immigration court’s workload.

The IJ performance metrics that the attorney general created in January 2018, which remain in effect under the new administration, compound our concerns that IJs will have a disincentive to find a need for evidentiary hearings when asylum cases are denied.⁷¹ Under these metrics, to receive a satisfactory job performance, IJs are required to complete 700 cases per year, and they must complete 95 percent of individual hearings on the day that they are started in order to receive a satisfactory job performance.⁷² The performance metrics are deeply problematic, as they create financial incentives for immigration judges to prize speed over fairness because if they do not complete the cases quickly they could lose their jobs.⁷³ It would be more expeditious in most cases

⁶⁷ 86 Fed. Reg. 46919.

⁶⁸ Tracy Short, EOIR, *PM 21-18, Revised Case Flow Processing Before the Immigration Courts* (Apr. 2, 2021) <https://www.justice.gov/eoir/book/file/1382736/download>.

⁶⁹ 86 Fed. Reg. 46920. The preamble to the NPRM states, “the IJ generally would be able to complete the de novo review solely on the basis of the record before the asylum officer, taking into consideration any arguments raised by the noncitizen, or the noncitizen’s counsel, and DHS.” Yet there is no information about whether the IJ would issue a briefing schedule, whether the parties would appear before the IJ for a hearing, or whether it would be incumbent on the asylum seeker to convince the IJ that further legal argument is necessary in the case.

⁷⁰ The preamble explains, “USCIS would transcribe the asylum hearing recording and a copy of the transcript and the record developed at the hearing would be served on the applicant and filed with the immigration court. The hearing would be transcribed prior to the record being referred for review.” 86 Fed. Reg. 46919. However, the proposed rule does not specify any timeline for the IJ to schedule review, set a briefing schedule, or schedule a hearing.

⁷¹ James McHenry, DOJ, *Case Priorities and Immigration Court Measures* (Jan. 17, 2018), <https://www.justice.gov/eoir/page/file/1026721/download>.

⁷² *Id.*

⁷³ Judge A. Ashley Tabaddor, President National Association of Immigration Judges, *Testimony Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on “Strengthening and Reforming America’s Immigration Court System”* (Apr. 18, 2018), (“production quotas and time-based deadlines violate a fundamental canon of judicial ethics which requires a judge to recuse herself in any matter in which she has a financial interest that could be affected substantially by the outcome of the proceeding.”).

for IJs to deny motions for evidentiary hearings as “duplicative” of the interview before the asylum office than to schedule court time to hold a full evidentiary hearing on an asylum case.

Over 40 percent of IJs have been on the bench for fewer than five years.⁷⁴ Many of these immigration judges have backgrounds in criminal prosecution or the military⁷⁵ and need to learn the increasingly complex procedural and substantive immigration rules on the job. These relatively new IJs would be placed in a role of appellate review of decisions rendered by asylum officers who also will have been newly hired.⁷⁶ This combination of fewer due process rights in eliciting testimony by new asylum officer, with appellate type review by relatively new IJs, would not provide adequate protection to asylum seekers.

C. 8 CFR §§ 208.14(c)(5), and 1208.14(c)(5)—Asylum Office Denials of Asylum Applications Should Be Afforded Automatic IJ Review

Under proposed 8 CFR §§ 208.14(c)(5), and 1208.14(c)(5), if an asylum seeker’s application is denied by the asylum officer, it would be incumbent upon the asylum seeker to file a notice affirmatively requesting IJ review of the decision. CLINIC believes that, if the agencies retain this proposed rule, at a minimum, IJ review of the asylum officer decision should be the default, and asylum seekers could, instead, choose to opt out of IJ review by filing a notice accepting the asylum officer’s decision as final. Affirmative asylum seekers’ applications are automatically referred to immigration court if the applicant’s case is denied; having two different mechanisms will create confusion for asylum seekers, potentially for the asylum office itself, and will result in fewer rights for those who go through the CFI process than for others. CLINIC is particularly concerned about the effect of placing the burden of seeking IJ review onto the asylum seeker on those who are pro se, or have fallen victim to notarios. Moreover, to the extent that the proposed rule is intended to promote efficiency, forcing asylum seekers to file requests for IJ review will likely lead to appeals based on missed deadlines and misunderstanding this requirement, tying up IJ and BIA resources on decision-making about the new procedure when those resources would be better spent on substantive adjudication.

D. 8 CFR §§ 208.3, 1208.3(a)(2)—CLINIC Supports the Concept that the Credible Fear Interview Counts as the Asylum Application for One Year Filing Deadline and Employment Authorization Document Purposes, Though We Have Concerns About Implementation

⁷⁴ EOIR, *Executive Office for Immigration Review Announces Investiture of 20 New Immigration Judges, Resulting in a 70 Percent Expansion of the Immigration Judge Corps Since 2017* (Oct. 9, 2020), (214 out of 520 immigration judges have been hired since January 20, 2017).

⁷⁵ See Nolan Rappaport, *No Experience Required: US Hiring Immigration Judges Who Don't Have any Immigration Law Experience*, THE HILL, Feb. 3, 2020, <https://thehill.com/opinion/immigration/481152-us-hiring-immigration-judges-who-dont-have-any-immigration-law-experience>; Innovation Law Lab and Southern Poverty Law Center, *The Attorney General’s Judges How the U.S. Immigration Courts Became a Deportation Tool*, at 22 (June 2019) https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf (“Roughly three-fourths of immigration judges hired by the Trump administration have prosecutorial experience, and many previously worked for ICE as trial attorneys who represented the government in removal proceedings.”).

⁷⁶ The NPRM would require asylum officers conducting these new post-CFI asylum “hearings” to be at the GS-13 level of the federal pay scale. The NPRM acknowledges that currently, 92 percent of asylum officers are at the GS-12 or below level, so the proposed rule would require massive hiring of new staff. 86 Fed. Reg. 46932.

Under the proposed rule, the asylum officer's notes, following the CFI would be converted into the asylum seeker's application. CLINIC has seen many asylum seekers miss their one year filing deadline after being apprehended at the border because they did not understand that they had to file an additional application form or because they were not aware of the one year filing deadline. In other cases, DHS delays in filing the Notice to Appear with the court, and asylum office refusal to take jurisdiction over cases where the computer system shows that the asylum seeker is in removal proceedings, have led to Catch-22 situations for asylum seekers who are unable to file for asylum affirmatively or defensively. The challenges in filing the asylum application have also adversely impacted asylum seekers' ability to obtain employment authorization since the EAD asylum clock does not begin to run until the asylum application is properly filed.⁷⁷

We are concerned, however, about how this new system would work in practice. CFIs generally take place within days of an asylum seeker's arrival at the border. Asylum seekers are often exhausted, disoriented, detained, and have not had the opportunity to consult with counsel prior to their interview. We are concerned that the notes taken by the asylum officer may leave out significant portions of the asylum seeker's narrative, or may contain inaccurate information, either because of poor interpretation, misunderstanding by the asylum officer, inability by the asylum seeker to discuss sensitive issues in this fraught setting, or failure for the asylum seeker to carefully review the asylum officer's notes following the interview. While the proposed rule would allow asylum seekers to "amend, correct, or supplement the information collected during the expedited removal process,"⁷⁸ we are concerned that if the corrected or amended application differs from the asylum officer's CFI notes, that the asylum officer conducting the merits hearing may draw an adverse credibility inference. We recommend that the proposed rule add language cautioning asylum officers to take into account the unique circumstances of the CFI in evaluating any discrepancies between the CFI notes and the amended asylum application.

We are also concerned about the time constraints in amending or supplementing the asylum application that would be codified in the rule. Asylum seekers would be required to submit their amended or supplemented application 7 days in advance of an interview, or 10 days if mailed.⁷⁹ Given the remote locations of many asylum offices, most asylum seeker will probably mail supplemental application materials. Under current policy, asylum seekers often receive asylum interview notices just three weeks before the interview is scheduled, which, with ever-increasing delays in U.S. postal service delivery,⁸⁰ may give asylum seekers only a few days to supplement their applications. If the proposed rule will include this temporal filing requirement, then the rule should impose a requirement on USCIS that asylum seekers receive at least six weeks' notice prior to the merits interview.

⁷⁷ See USCIS, Form I-765, Application for Employment Authorization, 2 (Aug. 25, 2020), <https://www.uscis.gov/sites/default/files/document/forms/i-765instr.pdf>.

⁷⁸ Proposed 8 CFR §§ 208.3(a)(2), 1208.3(a)(2).

⁷⁹ The proposed rule does allow for the possibility of filing the amended application after the deadlines but only at the discretion of the asylum officer. Under 8 CFR § 208.9(e), asylum seekers who file affirmatively would be required to submit supporting evidence 14 days prior to their interview. This deadline is likewise unfeasible unless the proposed rule codifies a minimum length of time of at least six weeks between receipt of the interview notice and the interview date.

⁸⁰ Lindsay Schnell, *USPS Mail Delivery Is About to Get Permanently Slower and Temporarily More Expensive*, Sep. 28, 201, USA TODAY, <https://www.usatoday.com/story/news/nation/2021/09/28/usps-delivery-get-slower-more-expensive-during-holidays/5893001001/>.

E. 8 CFR § 208.3—CLINIC Supports the Elimination of Needless Biometric Collection

Section 208.3 of the proposed rule would allow the asylum office to rely on biometric information captured during the expedited removal process rather than requiring asylum seekers to report to an Application Support Center (ASC) for new fingerprinting. CLINIC strongly supports the proposed change because it will prevent asylum seekers from having to take time off from work, or find childcare to report for biometrics that are duplicative. This proposed change will also save the government time and money by not requiring government personnel or contractors to capture biometric data that DHS has already collected. Finally, by eliminating the further biometric collection requirement, asylum seekers are not at risk for adverse consequences, including stopping the asylum EAD clock, that flow from failure to appear at an ASC appointment.

F. 8 CFR § 208.9—The Proposed Asylum Interview Procedure Does Not Allow an Adequate Role for Counsel

Under the proposed rule, the “asylum officer shall conduct the interview or hearing in a nonadversarial manner.”⁸¹ While the proposed rule states that the asylum seeker “may have counsel or a representative present,” the role of counsel is greatly curtailed compared to counsel’s role in immigration court proceedings. Under proposed 8 CFR § 208.9(d), counsel’s role would be codified under a section labeled “*Completion of the interview or hearing.*” [emphasis in original.] Once the asylum officer has completed the interview with the applicant, then 8 CFR § 208.9(d)(1) provides that “The applicant or the applicant’s representative will have an opportunity to make a statement or comment on the evidence presented. The representative will also have the opportunity to ask follow-up questions.” The proposed rule thus contemplates that the new asylum interview procedure would be very similar to the existing procedure for affirmative asylum applications, which, without the guarantee of a full hearing, is deeply problematic.

First, unlike in the context of an affirmative asylum application, if the asylum seeker subject to these new procedures does not succeed after the interview, they are not placed in INA § 240 proceedings. Therefore, the interview in which counsel may not play a significant role, may be the only substantive adjudication of the asylum seeker’s claim. We strongly believe that prior to potentially removing an asylum seeker, that applicant should have the right to have their claim fully tested in an adversarial court proceeding. Asylum seekers who are placed into INA § 240 proceedings—currently every asylum seeker who passes a CFI, who applies affirmatively and is referred to court, or who applies for asylum defensively—is afforded rights under the statute. These rights are specified at INA § 240(b)(4)(B) which states “the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government.” The proposed rule does not offer similar procedural protections for the asylum seeker to examine evidence or cross-examine any witnesses. At a minimum, if the agencies do not withdraw this proposed rulemaking, they must clarify that counsel can participate meaningfully in asylum office proceedings.

⁸¹ Proposed 8 CFR § 208.9(b).

Second, as asylum law has become more complicated, it is often critical for asylum seekers to present expert evidence on topics such as country conditions, cognizability of particular social groups, viability of internal relocation, and effects of trauma on memory and demeanor. While the proposed rule states that asylum seekers may “may present witnesses, and may submit affidavits of witnesses and other evidence,”⁸² it appears from the language of the proposed rule that it is the asylum officer who would question these witnesses rather than the asylum seeker’s counsel. An asylum officer who will have had limited time to review the often voluminous case file before the interview will not be as familiar with the facts of the case as the asylum seeker’s counsel. While the purported goal of the proposed rule is to increase efficiency in the asylum adjudication system,⁸³ it would be more efficient for the asylum seeker’s counsel to ask questions since counsel will be more familiar with the facts and with what needs to be proven. Therefore, if the agencies do not withdraw this rule, we suggest, at a minimum that this section of the proposed rule be amended to read “The representative will also have the opportunity to ask follow-up questions *during the interview or hearing*” rather than at the interview’s conclusion. It is essential to the asylum seeker’s rights that their counsel have an opportunity to meaningful participate in proceedings.

G. 8 CFR § 208.9(f)(2)—The Proposed Rule Does Not Adequately Account for Inefficiencies and Cost Associated with Creating Written Transcripts of Asylum Interviews

Under current asylum office procedures, officers take notes while conducting the asylum interview. After the conclusion of the interview, the officer writes up their notes as well as a draft decision, and a supervising asylum officer must review the notes and the decision. Under the proposed rule, asylum interviews conducted after a CFI referral, will be recorded and, if the decision is reviewed by the immigration court, the government must create a transcript of the proceedings. It appears from the preamble to the proposed rule that USCIS intends to continue having supervisors review decisions.⁸⁴ It is unclear, however, how a supervisor could review the record, other than listening to the full, multi-hour digital recording, until a transcript is created prior to supervisor review. In the context of appeals to the BIA, it generally takes at least several weeks to generate a hearing transcript.⁸⁵ The proposed rule does not explain whether supervisors would no longer review the decisions under this new procedure, or whether the asylum office would have asylum seekers wait substantially longer periods of time to receive a decision (allowing for the supervisor to review the decision after a transcript is available), or whether the asylum officer would have to take notes during the interview even though the interview is being recorded. The agencies should clarify these issues which will substantially affect the due process rights of the asylum seeker as well as the purported efficiency considerations of the rule.

⁸² See proposed 8 CFR § 208.9(b).

⁸³ 86 Fed. Reg. 46907. (“The aim of this rule is to begin replacing the current system, within the confines of the law, with a better and more efficient one that will adjudicate protection claims fairly and expeditiously.”)

⁸⁴ See 86 Fed. Reg. 46932 (stating the need to hire “higher graded field adjudicators and supervisors to implement the provisions of this proposed rule”).

⁸⁵ Anecdotally, BIA appeals records are sometimes available within a few weeks for detained cases. Non-detained cases take considerably longer, often close to two years.

H. 8 CFR §§ 208.10; 1003.1(b)(15); 1003.48(f) —The Proposed Rule Does Not Include Adequate Protections for Asylum Seekers Who Missed Their Interviews or Have Other Grounds to Reopen

The proposed rule would allow for an asylum officer to issue an order of removal if a noncitizen fails to appear at an interview before the asylum office. CLINIC opposes the addition of an in absentia removal order as a consequence for failing to appear at an interview before an asylum officer because the rule lacks adequate protections for asylum seekers who intended to appear at the interview, but were unable to appear and would like to pursue their asylum claim. In fact, this proposed rule offers fewer protections for asylum seekers than provided by the regulations governing in absentia removal hearings before an IJ in three key ways.

First, in removal proceedings, an IJ issues the removal order “if the Service establishes by clear, unequivocal, and convincing evidence” that the respondent is removable and received written notice of the time and place of proceedings and written notice of the consequences of failure to appear.⁸⁶ While the IJ and DHS serve two distinct roles during an in absentia removal hearing in immigration court, the proposed rule requires the asylum officer to act as both the adjudicator and the prosecutor when it comes to issuing the removal order; the asylum officer would submit and/or analyze evidence of inadmissibility obtained pursuant to INA § 235(b)(1)(A)(i) and the asylum officer would then issue the removal order. The proposed regulation does not contemplate safeguards to ensure that the asylum officer has provided the required evidence of inadmissibility and correctly issued the removal order.

Second, in removal proceedings, a noncitizen with an in absentia order of removal may be able to seek rescission of the removal order and reopening of using several arguments pursuant to INA § 240(b)(5)(C). The noncitizen could establish that DHS failed to meet its burden to prove removability by “clear, unequivocal, and convincing evidence.” The noncitizen could also argue that they did not actually fail to appear and that they instead arrived late.⁸⁷ The noncitizen could also rely on two statutory arguments: (1) that they did not receive proper notice of the hearing and (2) that exceptional circumstances caused them to miss the hearing.⁸⁸ However, this proposed rule seeks to establish a removal order framework within a new asylum adjudication system without including a process through which the noncitizen would seek rescission and reopening. Yet as the Migrant Protection Protocols (MPP) have taught us, recently arrived asylum seekers, especially those who are unrepresented, are uniquely vulnerable to receiving in absentia removal orders.⁸⁹

⁸⁶ 8 CFR § 1003.26.

⁸⁷ *Perez v. Mukasey*, 516 F.3d 770 (9th Cir. 2008) (respondent arrived two hours late due to car failure while IJ still in courtroom); Frida Solis Valero, A204-965-006 (BIA Jan. 9, 2020) (unpublished), [scribd.com/document/447695494/Frida-Solis-Valero-A204-965-006-BIA-Jan-9-2020?secret_password=IPYtyFK7UkHBQEIRCTzO](https://www.scribd.com/document/447695494/Frida-Solis-Valero-A204-965-006-BIA-Jan-9-2020?secret_password=IPYtyFK7UkHBQEIRCTzO) (stating that the respondent’s late arrival did not constitute a failure to appear because the IJ was still on the bench when she arrived); Sukhdev Singh, A209-154-612 (BIA Aug. 25, 2017) (unpublished), [scribd.com/document/360077856/Sukhdev-Singh-A209-154-612-BIA-Aug-25-2017](https://www.scribd.com/document/360077856/Sukhdev-Singh-A209-154-612-BIA-Aug-25-2017); Mingyue Hu, A205-625-592 (BIA May 19, 2017) (unpublished), [scribd.com/document/351904150/Mingyue-Hu-A205-625-592-BIA-May-19-2017](https://www.scribd.com/document/351904150/Mingyue-Hu-A205-625-592-BIA-May-19-2017).

⁸⁸ INA § 240(a)(5)(C). (Exceptional circumstances also includes detention in federal or state custody and the failure to appear was not the respondent’s fault.)

⁸⁹ CLINIC, *FOIA Disclosures on In Absentia Removal Numbers Based on Legal Representation* (Mar. 27, 2020), <https://cliniclegal.org/resources/freedom-information-act/foia-disclosures-absentia-removal-numbers-based-legal>. These disclosures show that unrepresented respondents are far more likely to receive in absentia removal orders. Those

The agencies cannot seek to reduce backlogs by increasing in absentia removal orders with no independent oversight and no opportunity for seeking rescission and reopening.

Third, in removal proceedings, children under 14 years of age are protected by a regulation that requires specific instructions for service of a Notice to Appear. In such cases, DHS's service of the NTA "shall be made upon the person with whom . . . the minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend."⁹⁰ If a child will be residing with a parent in the United States, the BIA has interpreted the regulations to require "service on the parents, whenever possible, in addition to service that may be made on an accompanying adult or more distant relative."⁹¹ This regulation and BIA case law recognize that children are inherently vulnerable and require heightened notice safeguards to ensure that they have proper notice of the removal proceedings. The proposed rule does not include a similar provision for children under 14 or any other vulnerable group.

The proposed rule seems predicated on belief that asylum seekers are fugitives and are therefore not deserving of safeguards. Indeed, historically, each administration has either perpetuated or insufficiently combatted the myth that those who fail to appear for a hearing and, now, an interview, do so because they are fugitives. Reports such as CLINIC and ASAP's "Denied a Day in Court: The Government's Use of In Absentia Removal Orders Against Families Seeking Asylum" demonstrate that when asylum seekers do not attend a scheduled hearing there is often good cause, including that an unauthorized practitioner of law defrauded them or someone trafficked or abused them.⁹² CLINIC's Remote Motions to Reopen Project also proves through every motion to rescind and reopen that our clients are victims of a complex immigration system that they were unable to navigate pro se or with incompetent counsel. Furthermore, a recent Congressional Research Service In Focus report noted that different methodologies exist for measuring in absentia removal order rates and that there is a lack of consensus on which method is most reliable.⁹³ Yet each administration continues to rely on in absentia rates to push for increased detention and, now, this proposed rule which would increase in absentia removal orders without any adequate protections for asylum seekers. CLINIC therefore urges the agencies to not allow asylum officers to issue in absentia removal orders, and that, if an asylum seeker fails to appear for an interview, the case be referred to immigration court where DHS would have to meet its burden of proof before an IJ could issue an in absentia removal order.

Furthermore, the proposed rule does not contain any process for moving to reopen in the non-in absentia context. The proposed rule contemplates that the asylum officer who denies asylum will issue a removal order and that the only mechanism to vacate that would be through a

in MPP have abysmally low rates of legal representation with only 3120 receiving representation out of 46,979 asylum seekers in the program in 2019, TRAC, MPP Data, <https://trac.syr.edu/phptools/immigration/mpp/>.

⁹⁰ 8 CFR § 103.8(c)(2)(ii). And, in removal proceedings, if DHS violated 8 CFR § 103.8(c)(2)(ii) and the child received an in absentia removal order as a result, the child could seek rescission and reopening to offer a notice-based argument.

⁹¹ *Matter of Mejia-Andino*, 23 I&N Dec. 533, 536 (BIA 2002).

⁹² See CLINIC and ASAP, *Denied a Day in Court: The Government's Use of In Absentia Removal Orders Against Families Seeking Asylum* (2019), <https://cliniclegal.org/resources/removal-proceedings/denied-day-court-governments-use-absentia-removal-orders-against>.

⁹³ Congressional Research Service, *At What Rate Do Noncitizens Appear for Their Removal Hearings? Measuring In Absentia Removal Order Rates* (Aug. 5, 2021), https://www.everycrsreport.com/files/2021-08-05_IF11892_49e4960ab80ce1d2322fa67a15056f1ce455ddb1.pdf.

grant of asylum by the IJ or by a motion to be placed into regular 240 removal proceedings *before* there is a merits hearing. The proposed rule states, “An applicant may file only one such a motion, and the motion must be filed before the immigration judge issues a decision under paragraph (e) of this section.”⁹⁴ It is therefore unclear, if an asylum seeker is not physically removed following a removal order under this new procedure, whether there would be any opportunity for the asylum seeker to move to reopen in the future. CLINIC urges the agencies to ensure that all noncitizens have access to vital motion to reopen protections.⁹⁵

I. 8 CFR § 208.14, 1208.14(c)(5)—The Proposed Rule Does Not Adequately Detail What the Asylum Officer’s Written Decision Must Include

Under current asylum office practice, when a noncitizen’s case is not granted by the asylum office and is referred to immigration court, the asylum seeker receives a cursory decision sheet explaining that they have been referred to immigration court, and generally including a generic description checked off of a list as a reason for the referral, such as “material inconsistencies” or “missed one year filing deadline.” The proposed rule 8 CFR § 208.14 (c)(5) states that an asylum seeker whose case is heard by the asylum office after a CFI “will be provided a written notice of the decision,” but the rule does not specify what that notice of decision must include. CLINIC suggests that, if the proposed rule is not fully withdrawn, it should contain clarifying language such as the asylum seeker “will be provided a written notice of the decision, *fully explaining the reasons for the decisions, including but not limited to, a review of the facts, a finding regarding the applicant’s credibility, and whether or not the applicant meets the elements of each form of relief for which the applicant applied.*” Since it will be incumbent on the asylum seeker to request review of the asylum office decision by the immigration court, the asylum seeker must fully understand why the claim was denied. Likewise, since the IJ will be reviewing the decision and the transcript, it is imperative that the IJ fully understand the reasoning of the asylum officer in denying the applicant’s claims.

J. 8 CFR §§ 208.16-17—Asylum Officers Should Not Adjudicate Withholding of Removal and Convention Against Torture Claims Unless Denials Result in Full Section 240 Proceedings

The United States is precluded under international law from returning those who would be persecuted or tortured to the country of feared harm. CLINIC reasserts all of the reasons stated above in the context of asylum seekers whose cases are denied by the asylum office needing full immigration court proceedings here. In the context of withholding and CAT, those concerns are magnified even further because those forms of relief are mandatory and require the asylum seeker to meet a higher evidentiary standard. It is more likely that the noncitizen would require expert testimony and it is possible that there may be complex criminal or persecutor bars involved in the case. These complex issues should be decided in a full adversarial proceeding, with the protections guaranteed under INA § 240(b)(4)(B). CLINIC agrees that asylum officers could grant clearly grantable withholding or CAT cases. For example, some applicants will be precluded from asylum

⁹⁴ Proposed 8 § CFR 1003.48(d).

⁹⁵ See *Kucana v. Holder*, 558 U.S. 233, 250 (2010) (“The motion to reopen is an ‘important safeguard’ intended ‘to ensure a proper and lawful disposition’ of immigration proceedings.” [internal citation omitted].)

because a prior order of removal has been reinstated but have a clear case of past persecution. Other applicants may have a clear case of feared torture but lack a nexus to a protected characteristic. However, CLINIC strongly opposes the possibility of a noncitizen being returned to a country where they fear persecution or torture without a full adversarial hearing. Likewise, in cases where the asylum seeker is barred from asylum due to criminal, persecutor, or security bars, the cases should be heard by IJs.

CLINIC believes that asylum officers serve a primarily humanitarian role. If there is derogatory information, the asylum officer would have to simultaneously play the role of prosecutor, introducing the negative evidence, and adjudicator, evaluating the negative evidence. This dual role would necessarily make it more difficult for the asylum officer to render an impartial decision in the case.

K. 8 CFR § 208.30(e)(2)—CLINIC Supports the Proposed Rule’s Codification of the “Significant Possibility” Standard and Urges Further Protections for Asylum Seekers

The proposed rule correctly rejects changes to the credible fear standard that the prior administration codified in the “Global Asylum Rules.”⁹⁶ In that “Global” rule, also dubbed the “Death to Asylum Rule,” the agencies unlawfully sought to elevate the CFI standard to “a substantial and realistic possibility of succeeding.”⁹⁷ The proposed rule correctly recodifies the “significant possibility” standard in compliance with INA § 235(b)(1)(B). It would also ensure that noncitizens being screened for statutory withholding of removal or CAT protection need only meet the “significant possibility” standard for those forms of relief. Likewise, CLINIC strongly supports the return to prior CFI practice, where noncitizens seeking protection are not screened for potential bars while undergoing the CFI process.⁹⁸

CLINIC suggests that the proposed rule add language clarifying that to comply with the deliberately low “significant possibility” standard, asylum officers and reviewing IJs should be required to apply the law of the circuit most favorable to the asylum seeker. Prior to the Trump administration, this standard was used by asylum officers conducting CFIs. The D.C. District Court found that changes in agency guidance requiring the application of circuit court precedent based on the geographic location of the CFI, despite the fact that the merits hearing could be heard in another circuit, to be arbitrary and capricious. The court determined that doing so “could lead to the exact harm that Congress sought to avoid” by making the significant possibility standard intentionally low.⁹⁹ While the agencies are revising this section of the Code of Federal Regulations, they should take this opportunity to add regulatory language that ensures that asylum officers apply the language of the most favorable circuit. We suggest that the proposed rule add language similar to language from the asylum office 2017 Credible Fear Lesson Plan, “*Where there is disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue; or the claim otherwise raises an unresolved issue of law, . . . generally the interpretation most*

⁹⁶ See 8 CFR § 208.20; 8 CFR § 1208.20, currently enjoined pursuant to *Pangea Legal Servs. v. U.S. Dep’t of Homeland Sec.*, 512 F. Supp. 3d 966 (N.D. Cal. 2021).

⁹⁷ *Id.*

⁹⁸ See 86 Fed. Reg. 46914.

⁹⁹ *Grace v. Whitaker*, 344 F. Supp. 3d 96, 140 (D.D.C. 2018), *aff’d in part, rev’d in part and remanded sub nom. Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020)

favorable to the applicant is used when determining whether the applicant meets the credible fear standard.”¹⁰⁰ As discussed above, CLINIC calls upon the agencies to use the rulemaking process to insure that asylum seekers’ rights are respected, not restricted.

L. 8 CFR § 208.30(d)—CLINIC Strongly Supports the Proposed Rule’s Clarification that CFIs Must Be Performed by USCIS Asylum Officers and Urges Further Protections for Asylum Seekers

Asylum law is one of the most complex areas of the incredibly complicated subject of immigration law. Courts have said that, other than tax law, no law is more complex than immigration law.¹⁰¹ As discussed throughout this comment, CFIs are a vital stopgap to prevent asylum seekers from being removed to countries of feared harm without the process of a full hearing.

It is therefore imperative that CFIs only be performed by government officials who believe that the United States should honor its international and domestic legal obligations towards those fleeing persecution and torture, and that those officials have the background and training needed to make these critical assessments. Under the previous administration, certain CBP officers were assigned to conduct CFIs. While this practice was eventually enjoined by the District Court of the District of Columbia,¹⁰² countless asylum seekers who might have prevailed on their claims were turned away by CBP officers while the procedure was in effect.

We strongly support language in the proposed rules that would require CFIs to be performed by “USCIS asylum officers.” We suggest that the proposed regulation go further than it does and specify the educational background and degree of training required for USCIS officers to perform CFIs, the minimum GS grade required, as well as language that clarifies that CBP officers and other law enforcement agency officers be explicitly prohibited from conducting CFIs.

M. 8 CFR § 208.30(g)—The Proposed Rule’s Elimination of Requests for Reconsideration Would Send Vulnerable Asylum Seekers into Harm’s Way

The proposed rule would eliminate the ability of asylum seekers to file a request for reconsideration if a negative CFI determination is upheld by an IJ. Asylum seekers often arrive in the United States disoriented, exhausted, and traumatized after a long and dangerous journey to the border. CFIs are generally conducted while the asylum seeker remains detained and often without the asylum seeker having spoken with counsel to gain any understanding of the U.S. immigration system. Practitioners who work at the border and in detention centers, have found in many cases that asylum seekers are only able to meet with counsel after their CFIs have been denied by an asylum officer and the denial has been affirmed by an IJ. In other instances, asylum seekers are only able to talk about some of the worst harm that they suffered once more time has

¹⁰⁰ USCIS Asylum Office Training Module, *Credible Fear of Persecution and Torture Determinations* at 17 (Feb. 13, 2017).

¹⁰¹ See *Castro-O’Ryan v. U.S. Dep’t of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (“With only a small degree of hyperbole, the immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’ A lawyer is often the only person who could thread the labyrinth.”) (citation omitted).

¹⁰² See *A.B.-B. v. Morgan*, No. 20-CV-846 (RJL), 2020 WL 5107548, at *1 (D.D.C. Aug. 31, 2020).

elapsed. In some cases, asylum seekers have had to proceed with CFIs in Spanish when they are not fully fluent because their primary language is an indigenous language. Allowing asylum seekers to request further consideration by the asylum office after erroneous denials of their credible fear claims has prevented many bona fide asylum seekers from being returned to harm's way.¹⁰³ While the NPRM states that the IJ review of the asylum officer's CFI decision is sufficient, in reality, this IJ review often serves as a rubber stamp to the asylum officer's decision.¹⁰⁴ While the preamble to the NPRM states that multiple requests for reconsideration have "highlighted the need to ensure that the IJ review process, rather than reconsideration by USCIS, serves as the safeguard against erroneous negative screening determinations by an asylum officer,"¹⁰⁵ they fail to explain how asylum seekers are safeguarded against cursory IJ review, given that there is no appeal from an IJ's CFI denial affirmance.

The preamble to the NPRM states that it intends to remove the possibility of RFRs to increase efficiency, stating that some RFRs are resubmitted, sometimes many times, "without additional information."¹⁰⁶ However, it should be easy for an asylum officer to quickly review an RFR to ascertain whether it has merit or not, and quickly deny RFRs that are submitted with no new information. The expedited removal system already includes a grave risk of harm, that asylum seekers whose ability to obtain a full hearing is based on a cursory border review. The RFR process allows asylum seekers to provide further evidence in those cases where there would otherwise be a miscarriage of justice, returning the asylum seeker to harm based on a poorly conducted initial interview, or based on an asylum seeker's inability to immediately articulate their case clearly. CLINIC feels strongly that the U.S. government should not prize efficiency over its legal and moral obligations to protect asylum seekers from being returned to harm.

N. 8 CFR § 235.3—CLINIC Supports Even Broader Criteria for Release on Parole

CLINIC supports the proposed rule's expansion of parole criteria to include when "detention is unavailable or impracticable (including situations in which continued detention would unduly impact the health or safety of individuals with special vulnerabilities)."¹⁰⁷ CLINIC agrees that the current version of this regulatory language which only allows for parole "to meet a medical emergency or . . . for a legitimate law enforcement objective" is too narrow and strongly supports DHS including noncitizens whose safety is at risk and noncitizens who have special vulnerabilities, including mental health issues, or being LGBTQ, as being more broadly eligible for release from detention. However, CLINIC believes that the standard for the parole of asylum seekers who have passed a CFI should also be modified to provide for a presumption of parole. Asylum seekers do not pose a threat to public safety or flight risks and are by definition vulnerable. Thus, the proposed rule should be modified to place the burden on DHS to demonstrate by clear and convincing evidence, a need to detain anyone who has passed a CFI. Moreover, the rule should

¹⁰³ For a detailed report on the critical role requests for reconsideration have played in the asylum process see Human Rights First, *Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture* (Sep. 2021) <https://www.humanrightsfirst.org/resource/biden-administration-move-eliminate-requests-reconsideration-would-endanger-asylum-seekers>.

¹⁰⁴ See Schusterman, "Death Sentence," *supra* note 63 at 662. ("As of June 2018, IJs affirmed the negative determination in 85.3 percent of cases, up from 67.3 percent just a year prior.")

¹⁰⁵ 86 Fed. Reg. 46915.

¹⁰⁶ *Id.*

¹⁰⁷ Proposed 8 CFR § 235.3(b)(2)(iii), (b)(4)(ii).

make clear that this standard applies to *all* asylum seekers who pass a CFI, regardless of matter of entry, and regardless of whether they are referred for removal proceedings or the proposed asylum office interview procedure.

Further, CLINIC believes that asylum seekers should not be placed into expedited removal, and we object to the preamble's justification for improving parole criteria which is stated as "eliminat[ing] that barrier to placing families into expedited removal."¹⁰⁸ Citing *Matter of E-R-M- & L-R-M-*, 25 I&N 520, 523 (BIA 2011), the preamble acknowledges that DHS retains the authority to place asylum seekers arriving at the border or ports of entry into full INA § 240 proceedings rather than expedited removal, or to remove those placed into expedited removal from that process and into full 240 proceedings.¹⁰⁹ We call upon the administration to reduce the use of expedited removal rather than expand it, and to exempt asylum seekers from expedited removal entirely.¹¹⁰

To the extent that DHS does employ expedited removal for asylum seekers, we are concerned that future administrations that believe that all noncitizens in the United States without lawful status are an enforcement priority, could read the proposed rule to foreclose any ability for those who passed CFIs to be released from detention. For example, under the Trump administration, Attorney General Barr found that anyone who has passed a CFI is not eligible for bond, but only for parole.¹¹¹ While that opinion was vacated by the Court of Appeals for the Ninth Circuit, the Supreme Court has granted certiorari and vacated the Ninth Circuit opinion, leaving the issue of whether or not bond is available to those who have gone through expedited removal unresolved.¹¹² CLINIC strongly believes that asylum seekers should not be subject to detention without the possibility of bond, and we have concerns that future administrations could erroneously interpret the proposed rule to eliminate bond options for those who went through CFI since they would no longer be in section 240 proceedings. While we appreciate the potential expanded flexibility in releasing on parole those who pass CFIs, we again fear that parole is subject entirely to discretion and affords fewer due process rights than a bond hearing before an IJ. A different administration could change its enforcement priorities, and local ICE offices exercise discretion very prejudicially to asylum seekers. CLINIC fears that an anti-immigrant administration could interpret this rule to require any asylum seeker who has gone through the CFI process to remain detained throughout their full merits proceeding and limit parole to extremely narrow circumstances. These concerns regarding prolonged detention are another reason CLINIC believes it is imperative that the agencies revise the proposed rule to place asylum seekers who do not succeed before the asylum office into full INA § 240 proceedings.

¹⁰⁸ 86 Fed. Reg. 46910.

¹⁰⁹ 86 Fed. Reg. 46911.

¹¹⁰ See, Dr. Yael Schacher, *Refugees International, Addressing the Legacy of Expedited Removal: Border Procedures and Alternatives for Reform* at 24 (May 2021), <https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/60aed211ae956b032f242e94/1622069777656/Expedited+Removal+Brief+Schacher+FINAL.pdf>. ("Over the course of some 25 years, the United States has been unable to devise a sustainable approach to expedited removal that guarantees fairness and proves efficient.")

¹¹¹ *Matter of M-S-*, 27 I&N Dec. 509 (AG 2019).

¹¹² *Padilla v. Immigr. & Customs Enf't*, 953 F.3d 1134 (9th Cir. 2020), cert. granted, judgment vacated, 141 S. Ct. 1041 (2021).

O. 8 CFR § 253.3(b)(iv)(2)—The Proposed Rule Would Punitively Amend Existing Rules and Prevent Parolees from Obtaining Employment Authorization

With very little explanation or justification, the proposed rule would eliminate noncitizens released on parole from obtaining employment authorization under proposed 8 CFR § 274a.12(c)(11). While the preamble to the proposed rule highlights the benefits of potentially faster EADs for asylum seekers in several places,¹¹³ it does not explain why providing EADs to those granted parole is not also beneficial to individuals and to the economy. At the same time that the agencies seek to broaden the ability to parole noncitizens who are especially vulnerable, they seek to deny them any ability to support themselves. CLINIC strongly believes that vulnerable noncitizens should be permitted to work and support themselves, and that allowing them to seek employment authorization at the earliest opportunity supports the NPRM’s stated interest in promoting “human dignity.”¹¹⁴ CLINIC incorporates by reference our comments on the 2020 USCIS rule restricting access to EADs for asylum seekers, which explains our belief in asylum seekers’ rights to seek employment authorization.¹¹⁵

As with other aspects of the NPRM, it appears that the administration is seeking to be tough on immigration as a trade-off for implementing some changes it sees as positive to immigrants. The prior administration did not include any immigrant-positive measures while it was systematically dismantling the U.S. asylum system¹¹⁶ and there is no reason for this administration to include measures restricting noncitizens’ rights, without any justification, as part of this rulemaking.

P. 8 CFR § 1003.48—The Proposed Rule Should Not Force Those Granted Withholding or CAT Protection to Choose Between Safety and Family Unity

Under proposed 8 CFR § 1003.48(a), on any case where the asylum officer denies asylum but grants withholding or CAT protection, the IJ must review the protection that was granted in addition to the application that was denied. If the agencies do not withdraw the proposed rule entirely, they should remove this provision.

The preamble to the NPRM states:

In these mixed cases, the Departments believe it is appropriate, where the applicant has requested review of an asylum officer’s decision, to permit IJs to review not only the denial but also the grant, because DHS could present documentation or testimony before the IJ that is admissible under 8 CFR 1003.48(e) and that indicates that the applicant does not qualify for any of the relief or protection at issue. The Departments seek comment on whether the IJ should have the authority to review all decisions of the asylum officer in this manner.¹¹⁷

¹¹³ 86 Fed. Reg. 46938.

¹¹⁴ See, *inter alia*, 86 Fed. Reg. 46923.

¹¹⁵ See CLINIC, CLINIC Comment Asylum Employment Authorization Document (EAD) (Jan. 22, 2020), <https://cliniclegal.org/resources/removal-proceedings/defensive-asylum/clinic-comment-asylum-employment-authorization>.

¹¹⁶ See NIJC, *Trump Efforts to End Asylum supra* note 2.

¹¹⁷ 86 Fed. Reg. 46920.

This procedure is internally inconsistent and unfairly prejudices the noncitizen. Under the proposed rule, the noncitizen is required to affirmatively file a notice with the immigration court to have the decision reviewed by an IJ. It would not be arbitrary and capricious to the noncitizen for DHS to obtain automatic review of a withholding or CAT grant when noncitizens do not obtain automatic review of denials. Moreover, in the U.S. civil litigation system, there must be a live controversy between two parties. In this circumstance one DHS sub-agency, USCIS, will have granted a benefit which another DHS sub-agency, ICE would then be assumed to argue was wrongly granted. It is irrational for DHS to argue before EOIR that DHS has erred in its decision making.

Furthermore, one of the primary stated purposes of the proposed rule is to address the EOIR backlog.¹¹⁸ Yet this section of the proposed rule requires IJs to revisit portions of the asylum officer decision that neither party has requested the IJ to review. It is “inefficient” to require IJ review of issues that neither party seeks to litigate. Instead, it seems that the purpose of this section of the proposed rule is to deter asylum seekers from requesting IJ review of asylum denials if they are granted any other relief. USCIS should not use deterrence to prevent asylum seekers from exercising their rights, particularly when the stakes are as high as potential permanent family separation.¹¹⁹

Individuals granted withholding of removal under INA § 241(b)(3) or CAT protection live in a constant state of limbo. They cannot travel internationally; they cannot work if their EAD expires; they can never become residents or citizens; and, perhaps most importantly, they can never petition for family members to join them in the United States. With no ability to travel abroad and no ability to petition for relatives, these statutes often lead to de facto, permanent family separation. Given the very significant challenges of living with these forms of protection, it is reasonable to assume that asylum seekers would request IJ review of asylum denials to try to secure a more stable status with greater rights. There is simply no reason for the proposed rule to require IJs to review other grants of humanitarian protection because an asylum seeker wishes review of the asylum denial. This provision of the proposed rule leaves those granted withholding or CAT the Hobson’s choice of potentially being removed to their country of feared harm or potentially never seeing family members again.

Q. 8 CFR § 1003.48(d)—Asylum Seekers Should Not Be Placed in Asylum-Only Proceedings

Under the proposed rule, the default is to deny the asylum seeker the protections of INA § 240 removal proceedings. Instead, if the asylum seeker is potentially eligible for other relief, it would be incumbent upon the asylum seeker to move to have the case placed into regular section 240 proceedings rather than asylum-only proceedings. In many cases, noncitizens who have gone

¹¹⁸ See 86 Fed. Reg. 46918.

¹¹⁹ Philip Bump, *Here Are The Administration Officials Who Have Said That Family Separation Is Meant as a Deterrent*, THE WASHINGTON POST, <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/>. See also *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (finding the use of mass deterrence as a justification for actions in individual cases to be likely unlawful.).

through credible fear proceedings will only apply for asylum and related relief. It is difficult to understand what benefit the agencies get from this new system. However, for asylum seekers who may become eligible for other relief, for example, while the case is on appeal, they would apparently never be able to seek that other relief since the noncitizen would have to move to have the case placed on a regular court docket at the earliest opportunity.¹²⁰ The preamble provides no justification for this punitive change in opportunity to seek relief for asylum seekers who have gone through CFI proceedings.

Proposed 8 CFR § 1003.48(d) would give asylum seekers who request review before an IJ the opportunity to move to vacate the USCIS removal order so that they can pursue other relief before the immigration court. This process again places an unnecessary burden on the asylum seeker, as well as on the asylum seeker's counsel. While the purported reason behind this proposed rule is to streamline procedures and reduce the EOIR backlog, this rule would require IJs to adjudicate motions simply to give the asylum seeker their day in court. It would also impose a new burden on counsel for asylum seekers.

Instead of creating these additional workloads as a result of denying asylum seekers the right to have their cases heard in section 240 removal proceedings, the agencies should amend the proposed rule and have the asylum office refer those whose cases are not granted after the initial asylum office hearing, to regular INA § 240 proceedings. Under current expedited removal rules, the vast majority of asylum seekers who have recently crossed the border and passed a CFI, will only be seeking asylum and related relief anyway. However, it is possible that an anti-immigrant administration could seek to expand expedited removal, as we witnessed under the Trump administration.¹²¹ If another administration seeks to expand expedited removal, people who have been in the United States for up to two years (or longer if they cannot demonstrate the length of their residence) may be placed in expedited removal and pass a CFI. For people who have been in the United States for a longer period of time, it is more likely that other avenues of relief may be available, such as family-based immigration or U visas. Restricting possible procedural protections for everyone who has passed a CFI is needlessly punitive and counter to the NPRM goal of promoting “human dignity,”¹²² a goal that is mentioned seven times throughout the preamble.

When Congress passed the Illegal Immigration Reform and Immigration Responsibility Act, expedited removal already substantially curtailed the rights of asylum seekers at the border, who were no longer eligible for full exclusion proceedings. Congress engaged in substantial debate over these changes, as well as the appropriate legal standard for CFIs. Senator Orrin Hatch R-Utah, stated, “The standard adopted in the conference report is intended to be a low screening standard for admission *into the usual full asylum process*.”¹²³ Likewise, Rep. Smith R-Texas said, “While genuine refugees are still offered important protections, abuse of the system will be largely curtailed through a new system which allows specially trained asylum officers at ports of entry to determine if refugee seekers have a credible fear of persecution. If they do, then *they can go*

¹²⁰ See proposed 8 CFR § 1003.48(d).

¹²¹ See Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019).

¹²² See, *inter alia*, 86 Fed. Reg. 46923.

¹²³ H.R. Rep. No. 104-469, at 158 (1996) [emphasis added].

through the normal process of establishing their claim.”¹²⁴ Thus, even while Congress was debating imposing new and sweeping restrictions at the border, it did not contemplate giving asylum seekers who passed their CFIs less due process than any other asylum seeker. Restricting access to full immigration court proceedings would be a dramatic change, well beyond what was contemplated by Congress.

Furthermore, over the past decade, CBP and ICE have applied different rules and exercised discretion in different ways at different ports of entry, under different guidance, and based on availability of detention space. As a result, some asylum seekers who have presented themselves at ports of entry or who have been apprehended near the border, have been placed into expedited removal, whereas others have been served an NTA and released, while yet others have been released without being served any papers.¹²⁵ It would be unfairly arbitrary that some asylum seekers would be eligible for a full adversarial hearing before an immigration judge at which they could apply for any form of relief, while others would not, based solely on how CBP chose to process people on a given day.

R. 8 CFR § 1208.3(a)(2)—The Proposed Rule Should Remove Language Regarding an Asylum Application Fee

Asylum applications should never require a fee.¹²⁶ Seeking safety from persecution is a fundamental human right and asylum seekers should not be required to pay to exercise this right. This section of the proposed rule adds language explaining that the immigration court can reject an asylum application if proof of payment of the fee, if required, is not submitted.

The United States has a moral imperative to accept asylum seekers as well as obligations under domestic and international laws. As a signatory to the 1967 Protocol of the 1951 Convention Relating to the Status of Refugees, the United States has an obligation to accept asylum seekers who seek protection. Further, through the Refugee Act, the United States has domestic legal responsibility to asylum seekers. Originally drafted in 1980, the Refugee Act establishes the core principles of asylum adjudications in line with U.S. treaty obligations. The Refugee Act has been amended but never has Congress required a fee for an asylum application. Refusing asylum applicants for the inability to pay would effectively cause the United States to abrogate its treaty obligations and would violate the basic intent of the 1980 Refugee Act. In fact, the vast majority of countries that are signatories to the 1951 Convention and/or 1967 Protocol do not charge a fee

¹²⁴ Immigration Control and Financial Responsibility Act of 1996; Congressional Record Vol. 142, No. 59, (May 2, 1996) [emphasis added] <https://www.congress.gov/congressional-record/1996/5/2/senate-section/article/s4592-1?q=%7B%22search%22%3A%22%5C%22credible+fear%5C%22+immigration+reform+and%22%7D&s=2&r=3>.

¹²⁵ See CLINIC, Orders at the Border (Webinar) (Sep. 29, 2021), <https://cliniclegal.org/training/archive/orders-border>.

¹²⁶ See CLINIC, Catholic Partners Join in Submitting Comment in Opposition to USCIS’ Proposed Fee Schedule (Dec. 19, 2019), <https://cliniclegal.org/resources/federal-administrative-advocacy/catholic-partners-join-submitting-comment-opposition>. [Hereinafter CLINIC, “Catholic Partners USCIS Fee Schedule”].

for an asylum application.¹²⁷ If the agencies were to charge a fee, the United States would be joining the list of three fee-charging countries which includes Iran.¹²⁸

USCIS recently attempted to raise application fees and to require a fee for asylum seekers for the first time. That proposed rule is currently enjoined. *See Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520 (N.D. Cal. 2020). Even if USCIS intends to issue a new rulemaking on USCIS fees, it should not require a fee for asylum applications. Moreover, if this administration concludes that it is wrong to charge a fee for asylum applications, it should not leave open that possibility for future administrations by explicitly, and unnecessarily, including the possibility of an asylum application fee in this proposed rule. In fact, it appears that Congress did not anticipate that there would be fees for asylum application. Section 286(m) of the INA explicitly notes that fees for naturalization and similar services can be set at a rate to cover both their own adjudication and “the costs of similar services provided without charge to asylum applicants or other immigrants.” This section of the proposed rule is one of several throughout the rulemaking where this administration opens the door for a future, anti-immigrant administration to impose new measures that would harm asylum seekers.

S. The Cost of Asylum Adjudications Should Not Be Borne by Noncitizens

The proposed rule would require a dramatic increase in USCIS fees. The NPRM preamble estimates that it would require adding 800-2,305 new personnel at USCIS, to handle an estimated 75,000 cases through this newly created system.¹²⁹ Unlike EOIR, USCIS is a fee-funded agency, not an agency funded through congressional appropriations. As a result, the preamble estimates that USCIS would have to increase *all* USCIS fees by 13-26 percent, in addition to any other increases, just to pay for this expansion of the asylum office.¹³⁰ Significantly, the preamble to the proposed rule announces this extraordinary fee increase following several pages of data analysis regarding the proposed rule yet provides no analysis whatsoever of how it arrived at these figures. Nor does it analyze the implications of shifting much of the cost of adjudicating humanitarian applications from general tax appropriations to noncitizens seeking other benefits from USCIS.

CLINIC strongly objects to raising fees on USCIS applications and we incorporate herein our comment on the USCIS Fee Schedule.¹³¹ As we stated in that comment, “Immigration benefits must remain accessible to applicants and petitioners of all socioeconomic strata. Catholic social teaching emphasizes the value of economic freedom, for the economy must exist for the benefit of the human, not vice versa.”¹³² Noncitizens should not be forced to pay the bill for this increased

¹²⁷ See Global Legal Research Center, Law Library Of Congress, *Fees Charged For Asylum Applications By States Parties To The 1951 Refugee Convention* (2017), <https://stuff.coffeecode.net/www.loc.gov/law/help/asylum-application-fees/asylum-application-fees.pdf>.

¹²⁸ U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. at 62319. The other countries are Fiji and Australia.

¹²⁹ 86 Fed. Reg. 46921, 46933

¹³⁰ 86 Fed. Reg. 46937.

¹³¹ See CLINIC, “Catholic Partners USCIS Fee Schedule” *supra* note 126.

¹³² *Id.* at 5, citing U.S. Conference Of Catholic Bishops, *Seven Themes of Catholic Social Teaching*, (2005), www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/seven-themes-of-catholic-social-teaching.cfm.

USCIS work force, and to the extent the proposed rule would clearly result in higher fees on all noncitizens, we oppose it, and support keeping adjudications within EOIR.

T. The Proposed Rule Does Not Provide Adequate Appellate Protections for Asylum Seekers

The preamble to the NPRM states the departments' intention that a noncitizen who receives an adverse decision on their asylum application from the BIA will be able to seek judicial review to the same extent as those currently placed in removal proceedings.¹³³ CLINIC agrees with this foundational principle: that the availability of judicial review in asylum cases is a critical safeguard ensuring the proper functioning of the asylum system.

CLINIC is concerned, however, that the basic architecture of the proposed rule could result in inadvertently depriving every asylum seeker subjected to the proposed rule of any judicial review of their asylum application. The proposed rule's most fundamental characteristic—that asylum seekers remain subject to expedited removal under INA § 235(b)(1) unless and until they are granted asylum—could potentially be held to trigger the INA's jurisdiction-stripping provision relating to expedited removal.¹³⁴ The INA provides that:

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and section 1361 and 1651 of such title, no court shall have jurisdiction to review—

- (i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title¹³⁵

CLINIC is gravely concerned that some courts might view a challenge to the denial of an individual asylum application under the proposed rule, which affirms an expedited order of removal under INA § 235(b)(1) [8 U.S.C. § 1225(b)(1)] and denies asylum, withholding, and CAT protection, as asking the court “to review . . . any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal under 8 U.S.C. § 1225(b)(1).”

CLINIC acknowledges that the departments' contrary view that INA § 242(a)(2)(A) “most naturally is read to encompass only the orders expressly described” in § 235(b)(1), *i.e.* expedited removal orders where no intention to apply for asylum is expressed or where the applicant is found

¹³³ See 86 Fed. Reg. at 46,921 (“And, as with BIA decisions in removal proceedings, the noncitizen may seek judicial review before the appropriate circuit court of appeals.”).

¹³⁴ CLINIC is less concerned that the expedited removal language of 8 U.S.C. 1252(a)(1)—which excludes “an order of removal *without a hearing* pursuant to section 1225(b)(1) of this title” from the INA's judicial review provisions—affects asylum seekers. *Cf.* 86 Fed. Reg. at 46,921 n.59 (noting that the process provided by the proposed rule would likely constitute a “hearing” for such purposes). However, the limitation on judicial review set forth at 8 U.S.C. § 1252(a)(2)(A) might be read as a separate bar to review (and one that is broader in scope). See *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .”).

¹³⁵ INA § 242(a)(2)(A).

not to have a credible fear.¹³⁶ However, as relevant here, the statute only authorizes two processes for the issuance of a removal order: (1) an expedited removal order under INA § 235(b)(1) (over which judicial review is barred), and (2) a removal order entered in proceedings under INA § 240 (which the NPRM expressly proposes not to use). Indeed, the departments claim that INA § 235(b)(1) provides the statutory authority for its proposal to provide further consideration of an asylum application outside of removal proceedings.¹³⁷ The departments' simultaneous assertion that INA § 235(b)(1) provides the authority to create the proposed procedures while at the same time stating that an order of removal issued pursuant to those procedures is not "an order of removal pursuant to section INA § 235(b)(1)" could raise questions about the availability of judicial review.

CLINIC is concerned that this potential flaw in the proposed rule's design could lead to the elimination of judicial review for all asylum applicants subject to the proposed rule. Federal courts have an obligation to assure themselves of jurisdiction, even when the issue is not otherwise suggested by the parties.¹³⁸ Moreover, even if the current administration is committed to interpreting the proposed rule as allowing for judicial review, CLINIC is concerned that a future, anti-immigrant administration could advise counsel at ICE and the Department of Justice (DOJ) to mistakenly interpret the rule more narrowly. Therefore, despite the government's assurances to the contrary, the design proposed in the NPRM may lead federal courts to determine that they do not have jurisdiction to review orders issued under the proposed rule. The possibility that the proposed rule could inadvertently deprive asylum seekers of judicial review is another reason to ensure that those not granted the relief they seek by the asylum officer after passing a credible fear screen will be referred to INA § 240 proceedings.

Even if there is no jurisdictional hurdle to federal appellate review, it is unclear what the federal courts will review. For decades, U.S. courts of appeals have reviewed Records of Proceedings (ROP) that include full hearing transcripts in front of IJs. While immigration court hearings are administrative and therefore less formal than federal district court hearings, immigration court proceedings include many of the procedural norms of any other court hearing—direct examination, cross-examination, fact and expert witnesses, and closing arguments. Under the proposed rule, the courts of appeals would review a written decision of the BIA, which has reviewed an IJ's review of an asylum officer's decision. While the ROP would presumably include a transcript of the asylum office interview, that transcript would be two levels removed from the review the federal court provides, and would not be in the formal format that judges are accustomed to reviewing.

U. The Proposed Rule Does Not Adequately Analyze Its Effect on Small Entities

As discussed at length above, the proposed rule would significantly alter asylum practice. For example, the timeframe for submitting evidence in advance of asylum interviews would be codified without specifying how much notice asylum seekers' counsel must be given before an interview. Under current asylum office scheduling practice, counsel would often only have days

¹³⁶ 86 Fed. Reg. 46921 n.59.

¹³⁷ 86 Fed. Reg. at 46,917.

¹³⁸ See, e.g. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)).

to amend the asylum officer's CFI notes and create a new asylum application, as well as to put together required evidence before the deadlines in the rule. Likewise, immigration attorneys and accredited representatives would face greater burdens in representing asylum seekers in court. In most cases that are not granted by the asylum office, counsel would have to file a motion simply to be allowed to supplement an application, add evidence to the record, or take testimony before the immigration court. If counsel believes the asylum seeker may be eligible for relief in addition to asylum, withholding, or CAT, they would similarly have to file motions early on in the case. These changes would create a significant diversion of resources for counsel simply to assert their clients' rights to have a full hearing as contemplated under the INA.

Non-profit attorneys and other practitioners who practice at the border will also be profoundly affected by these rule changes. Already, practitioners have to explain the multiple paths that an asylum seeker's application may take. Practitioners must explain to those on the Mexican side of the border that they are likely ineligible to enter the country under Title 42, that they may be subject to metering, or that they may be forced to remain in Mexico under the Migrant Protection Protocols (MPP). Some small number of people may be allowed into the United States or may not be immediately expelled or removed if they are apprehended after entering without inspection. The proposed rule would create even more confusion and place even greater burdens on practitioners to explain the different paths that an asylum case may take. If an asylum seeker is put into expedited removal and passes a CFI, their subsequent "hearing" before an asylum officer may be the only opportunity they have to present their case to an adjudicator, whereas those who are paroled into the United States without being placed in expedited removal would be placed into section 240 removal proceedings. These different processes will also require practitioners to explain the one year filing deadline for asylum in different ways—some recent border crossers will have their applications submitted by the asylum officer whereas those not put through expedited removal will still bear the responsibility of filing within one year. Practitioners will need to ensure that prospective clients or even those attending "Know Your Rights" presentations understand these complex differences, which will place an added burden on the small entities where they are employed.

CLINIC's *Estamos Unidos* project has witnessed that individuals who have been paroled under the wind down of MPP continue to be confused on what their next steps are in their asylum process. There is confusion about their obligations and procedural processes given that the majority of them are unrepresented. *Estamos Unidos* regularly receives calls from individuals who were served by the project in Ciudad Juarez, trying to understand what they need to do next to pursue their asylum claims. Some are frustrated because they thought that the fact that the U.S government let them into the country meant that they received asylum. Others have received their new Notice to Appear and need representation or need assistance filing asylum application or EAD applications. Given the constant changes with immigration policy there is also confusion regarding changes to MPP that no longer affect them. Some hear news at the border regarding MPP and think that it still applies to them, some even ask if they need to return to Mexico to finish their process, after having been paroled into the United States.

Estamos Unidos has also seen that since Title 42 is not uniformly applied across the border it results in some individuals being processed and released at the border with various postures. Releases on own recognizance, humanitarian parole, orders of supervision and at times even

releases without any documentation. These varied forms of processing asylum seekers into the United States create confusion among asylum seekers who do not understand the next step in their case. Even practitioners often do not understand the procedural posture or prospective clients' cases and give them incorrect information because they do not fully understand what procedure CBP employed at the border.

The preamble to the NPRM does acknowledge, "There could be familiarization costs associated with this proposed rule; for example, if attorneys representing the asylum client reviewed the rule, the cost would be about \$69.05 per hour."¹³⁹ There is no explanation as to how the agencies determined that the cost to practitioners would be \$69.05 per hour. Nor does the NPRM describe how many additional hours it will take for practitioners to familiarize themselves and explain the procedural changes to clients.

These changes would dramatically affect how small law offices, both private attorneys and non-profit organizations, would be able to accept cases, manage their dockets, and, in some instances, charge fees. Most private attorneys bill their clients based on flat fees¹⁴⁰ and virtually all non-profit legal service providers that charge a nominal fee, do so on a flat-fee basis.¹⁴¹ As a result, as immigration procedures become more complicated, immigration practitioners either lose money or charge higher fees. Charging more in fees means that representation will be cost-prohibitive and more respondents would likely be forced to proceed *pro se*.

The NPRM erroneously states, "The proposed rule does not directly regulate small entities and is not expected to have a direct effect on small entities."¹⁴² But, as described above, the proposed rule would substantially change the way that small entities—law offices run by immigration attorneys and non-profits that employ fully accredited representatives¹⁴³—are able to conduct their business in that most asylum cases that are not granted by the asylum office will require counsel to engage in extensive motion practice simply to get a day in court. Moreover, as discussed above, given the current, exceptionally high denial rate of asylum applications at the asylum office for applicants from countries likely to be placed in expedited removal, counsel is more likely to have to prepare for two proceedings, one before the asylum office and one before the immigration court, than under current procedures where counsel's role is to prepare clients who have passed CFIs for a single individual hearing before the immigration court.

In another recent proposed rulemaking, EOIR, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative, Closure, DOJ did acknowledge that changes

¹³⁹ 86 Fed. Reg. 46924.

¹⁴⁰ See American Immigration Lawyers Association, The 2016 AILA Marketplace Study, at 18 (Sept. 8, 2016), AILA Doc. No. 16040816, (Available only to AILA members; on file with CLINIC and available by request).

¹⁴¹ Even non-profit organizations, like those in CLINIC's network, that provide legal services for free to indigent clients often have numerical deliverables for funders, meaning that as each case becomes more complex, the organization can take on fewer cases, jeopardizing their ongoing funding.

¹⁴² 86 Fed. Reg. 46938.

¹⁴³ Note that those seeking to become accredited representatives or renew their accreditation under the DOJ Recognition & Accreditation Program will also spend additional time completing Form EOIR-31, Request for New Recognition, Renewal of Recognition, Extension of Recognition of a Non-Profit Religious, Charitable, Social Service, or Similar Organization, should DOJ proceed with revising the form pursuant to its Justice Department's Information Collection. Indeed, the combined effect of all the recent proposed changes is best characterized as "death by a thousand cuts" to recognized non-profit religious, charitable, social service, or similar organization agencies.

to immigration court procedures affect immigration practitioners, though it erroneously concluded that there would be no economic impact. In that NPRM, EOIR, stated that that rule “will not economically impact representatives of aliens in immigration proceedings. It does not limit the fees they may charge, or the number of cases a representative may ethically accept under the rules of professional responsibility.”¹⁴⁴ It is irrational that in one NPRM EOIR acknowledges the effect of changes to immigration court procedure on those who earn their livelihood by practicing before the courts but in another NPRM that changes immigration court procedures the agency does not even acknowledge the rule’s potential effect.¹⁴⁵ Because the agencies have not performed the required analysis of how the proposed rule would affect small entities it should be withdrawn and, if it is reissued, it must contain this analysis.

III. CONCLUSION

CLINIC believes that the asylum system is in need of reform and applauds the administration for acknowledging the suffering caused by backlogs in adjudicating asylum applications. We agree that allowing asylum officers to approve straightforward asylum cases following CFIs would speed up some cases and avoid the need to add cases to the overburdened EOIR system.

However, we cannot support the proposed rule as currently written. We are deeply troubled that this administration would propose a rule that gives asylum seekers fewer rights than those contemplated by Congress when it created expedited removal in 1996. Allowing the government to remove those who have passed CFIs without ever giving them a full hearing in court under section 240 of the INA would be the most significant abrogation of asylum seekers’ procedural rights in 25 years. “When Congress directs an agency to establish a procedure, it can be assumed that Congress intends that procedure to be a fair one.”¹⁴⁶ These changes, which would leave asylum seekers vulnerable to politicized USCIS guidance, and minimal immigration court review, would leave asylum seekers without a fair procedure.

We encourage the administration to change its approach to asylum seekers and to welcome them into our community. While the preamble to the rule cites “human dignity” seven times as a justification for this rule, we do not believe that a rule that prevents asylum seekers from having a day in court promotes their human dignity. Instead of seeing those seeking safety from our country as a problem to be addressed, we encourage the administration to see an opportunity to truly welcome those among us who are most vulnerable. As Pope Francis has said, “thousands of persons are led to travel [here] in search of a better life for themselves and for their loved ones, in search of greater opportunities . . . We must not be taken aback by their numbers, but rather view them as persons, seeing their faces and listening to their stories, trying to respond as best we can to their situation. To respond in a way which is always humane, just and fraternal.”¹⁴⁷ CLINIC

¹⁴⁴ 85 Fed. Reg. 52491, 52509 (Proposed Aug. 26, 2020).

¹⁴⁵ It is also worth noting that the faster timeframes and inflexible proposed rules on extensions and continuances would have a much greater negative impact on immigrants’ attorneys who primarily work in small practices, than on DHS which is a sprawling agency with thousands of attorneys who could more easily transfer cases internally to meet deadlines.

¹⁴⁶ *De Belbruno v. Ashcroft*, 362 F.3d 272, 280-81 (4th Cir. 2004) (internal quotations omitted).

¹⁴⁷ *Transcript: Read the Speech Pope Francis Gave to Congress*, TIME, Sept. 24, 2015, <https://time.com/4048176/pope-francis-us-visit-congress-transcript/>.

likewise believes that the most vulnerable deserve compassion, fairness and due process in the adjudication of their claims for relief. In this vein, CLINIC urges the agencies to withdraw this proposed rule or substantially rewrite it as discussed in detail above.

Thank you for your consideration of these comments. Please do not hesitate to contact Lisa Parisio, Director of Advocacy, at lparisio@cliniclegal.org, with any questions or concerns about our recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Anna Gallagher". The signature is written in a cursive, flowing style.

Anna Gallagher
Executive Director