UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
DEPARTMENT OF JUSTICE
Executive Office for Immigration Review

Procedures for Credible Fear Screening	**)**	
and Consideration of Asylum, Withholding	**)**	**DHS Docket No.**
Of Removal, and CAT Protection Claims	**)**	**USCIS-2021-0012**
By Asylum Officers	**)**	

COMMENTS OF THE ADVOCATES FOR HUMAN RIGHTS

The Advocates for Human Rights ("AHR") submits these comments in response to the "Notice of Proposed Rulemaking," 86 FR 46906 (August 20, 2021), issued in the above-captioned docket ("NOPR"). In the NOPR, the Department of Justice ("DOJ") and the Department of Homeland Security ("DHS," and collectively "the Departments") propose "to amend the regulations governing the determination of certain protection claims raised by individuals subject to expedited removal and found to have a credible fear of persecution or torture" by having their "claims for asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (''INA'' or ''the Act'') (''statutory withholding of removal''), or protection under . . . Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT') initially adjudicated by an asylum officer within U.S. Citizenship and Immigration Services ('USCIS')." *Id.* at 46906/1.

Under international standards, asylum adjudications must be conducted in a fair and efficient process which guarantees that those seeking protection have a realistic opportunity to

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have their claims developed, heard in full, and fairly decided.[1] The proposed rule seeks to revise the process for requesting asylum in expedited credible fear removal proceedings ("CFI") to increase fairness and efficiency. Overall, the rule seeks what many hope—and international law requires—of our asylum system: a way to ensure procedures are expeditiously processed while guaranteeing fairness and due process. Yet, because the current statutory expedited removal requirements do not comply with international standards, simply making regulatory changes within that statutory structure will not address the inherent problems in the statutory process. As a result, an overriding objective of the NOPR should be to ensure that the proposed regulatory approach not intentionally or unintentionally cause *additional* violations of international standards. In addition, AHR encourages the Departments to review each step of the proposed process in light of those standards, and work with Congress to amend the statutory expedited removal procedures to meet international standards.

In this regard, the U.S. Commission on International Religious Freedom ("USCIRF" or "the Commission") conducted an extensive 2005 study of the statutory expedited removal process created by the 1997 Illegal Immigration and Immigrant Responsibility Act (IIRAIRA), as well as changes wrought by the creation of Homeland Security. The Commission documented that "some procedures" in place to protect asylum seekers "were applied with reasonable consistency, but compliance with others varied significantly. Most procedures lacked effective quality assurance measures to ensure that they were consistently followed." [2] The Commission also "identified

[1] UNHCR Handbook ¶ 190
[2] USCRIF Report (2005) p. 4 at https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf

problems other than inconsistent practices," particularly with regard to detention.[3] Moreover, it noted that "that asylum seekers without a lawyer had a much lower chance of being granted asylum (2 percent) than those with an attorney (25 percent)."[4] And, it found that the process is rife with opportunity for miscommunications that can result in improper denials: "By the end of the process . . . unreliable and/or incomplete documentation from CBP and USCIS is susceptible to being misinterpreted by the ICE Trial attorney, misapplied by the Immigration Judge, and may ultimately result in the denial of the asylum-seeker's claim."[5]

The Advocates for Human Rights, like many who work directly with people fleeing persecution and torture, have long waited for the Departments to consider the recommendations first made by USCIRF in 2005. We agree that "[a]sylum officers are already trained and authorized to adjudicate asylum claims; therefore, they should be permitted to grant asylum at the time of the credible fear interview for those asylum seekers in Expedited Removal who are able to establish that they meet the criteria at that early juncture."[6] But we strongly oppose the Departments' proposals to extend authority to the Asylum Office to order removal, impinge on meaningful appeal and due process, and to limit the record to the summary captured during interviews where representation rates are low, barriers posed by trauma, misunderstanding, and fear are high, and no reliable transcript is created.

Under the proposed rule, the CFI procedure would be changed such that a person who had a positive credible fear finding would then be referred to an asylum officer. After the asylum interview, a positive finding by the asylum officer would entitle the asylum applicant to "asylum,

[3] *Id.*
[4] *Id.*
[5] *Id*. at 5.
[6] *Id.* at 66.

withholding of removal, or protection under CAT, as appropriate," while an applicant with a negative finding could "seek prompt, de novo review with an immigration judge (''IJ'') in the DOJ Executive Office for Immigration Review (''EOIR''), with appeal available to the Board of Immigration Appeals (''BIA'')." 86 FR at 46906/1. In essence, the proposed rule tries to improve fairness in the current problematic system by moving positive CFIs to the asylum office rather than the immigration courts, but, unfortunately, still retaining—and, in some cases, appearing to expand—the many unfair (and violative of international standards) portions that plague the current process.

The stated purpose of the proposed rule is to simultaneously "increase both the efficiency and the procedural fairness of the expedited removal process for individuals who have been found to have a credible fear of persecution or torture." *Id*. at 46909/2. The Advocates is particularly concerned that the proposed rule may result in a shrinking funnel through which opportunities to present one's claim for protection are winnowed down at successive review stages. Such winnowing imperils not only the applicants, but also the United States' ability to meet international obligations. Moving these cases to a less adversarial setting—the AO rather than EOIR—is welcome; however, for the reasons outlined herein, much more must be done to guarantee human rights protections in this process. Unfortunately, due to the issues highlighted throughout these comments—and because the proposed rule rests on the fundamentally inadequate statutory expedited removal process—the proposed rule risks accomplishing neither of its purported fairness or efficiency goals. To the extent that the rule cannot be promulgated to better protections and not exacerbate the harms of expedited removal, the Departments should consider withdrawing it.

I. About the Organization Commenting

The Advocates for Human Rights is a nonprofit, nongovernmental organization headquartered in Minneapolis, Minnesota. Founded in 1983, The Advocates for Human Rights' mission is to implement international human rights standards to promote civil society and reinforce the rule of law. Holding Special Consultative Status at the United Nations, AHR regularly engages UN human rights mechanisms. AHR has provided free legal representation to asylum seekers, trafficking victims, and people in immigration court proceedings for nearly four decades, working with more than 10,000 cases to assess, advise, and represent in asylum proceedings. In addition to legal representation, AHR also works with women's and LGBTI human rights defenders worldwide to document persecution, repression, and death at the hands of state and non-state actors on account of their identities, and to train and support those activists as they advocate for accountability and safety.

AHR is a global expert in women's human rights, particularly in the area of domestic violence, and partners with women's human rights defenders to document threats to life and freedom faced by women due to government failure to protect people from human rights abuses. We have worked in Central and Eastern Europe, the former Soviet Union, the Caucasus, Central Asia, Mongolia, Morocco, Nepal, Mexico, Haiti, and the United States. At the request of government officials, embassies, and NGOs, we help draft laws that promote the safety of women. We have provided commentary on new and proposed domestic violence laws in nearly 30 countries. We have worked with host country partners to document violations of women's human rights, including domestic violence. We train police, prosecutors, lawyers, and judges to implement both new and existing laws on domestic violence. In addition, our Stop Violence Against Women website serves as a forum for information, advocacy, and change, and, working

with the UN, we developed the Legislation and Justice sections of the UN Women's Virtual Knowledge Center to End Violence Against Women.

II. The Proposed Rule Must Be Revised to Meet International Standards for Asylum Adjudications

a. The Convention imposes affirmative, broad obligations to ensure a fair, safe and trauma-informed process to claim protection

The UN Convention on Refugees and the 1967 Protocol thereto prescribe clear standards, which the U.S. has agreed to uphold through passage of the 1980 Refugee Act. The Convention provides Guidelines and standards that Congress clearly stated that its intention in passing the Refugee Act was for the U.S. to comply with the Refugee Convention. Any derogation, therefore, leaves the U.S. in conflict with both our international obligations and Congressional intent.

The overarching goal of the Convention is nonrefoulement—ensuring that no one is returned to a country in which they face persecution or torture. Under international law, countries have the sovereign power to regulate the entry of non-nationals to their territory, but must also ensure protections of human rights to those in their jurisdictions, including people at national frontier.[7] This obligation is owed to all people claiming a credible fear of torture or persecution upon return, including in the context of pre-screening or expeditious procedures.[8] Indeed, UNHCR recommends that "expeditious procedures" be reserved only for persons whose claims are manifestly unfounded or abusive, defined as clearly fraudulent or not related to the criteria

[7] *See generally UNHCR, Key Legal Considerations on Access to Territory for Persons in Need of International Protections in the Context of the COVID-10 Response (Mar. 16, 2020), [hereinafter Key Legal Considerations], https://www.refworld.org/docid/5e7132834.html.*Key Legal Considerations ¶¶ 1, 2 and 3. Non-refoulement is a central principle of the right to seek asylum; it prohibits any State conduct that leads to the 'return in any manner whatsoever' to an unsafe foreign territory , including rejection at the frontier or nonadmission to the territory.

[8] *See id.* ¶ 3.

contained in the Refugee Convention. International and U.S. laws require an independent inquiry into the need for protection whenever a person indicates that they may be at risk or have such a fear, or if there is any other reason to suspect that the person may fear return to the country of origin or another place. Countries may not evade this responsibility by requiring the person to articulate the need for protection in some specific manner. Rather, the person must be provided access to relevant information about how to make a claim for protection in a language the person can understand.[9] International standards on screening indicate that only those claims that are manifestly unfounded or clearly fraudulent or unrelated to the criteria for granting refugee status should be expeditiously screened out.[10]

The Departments must also follow the UNHCR guidance regarding trauma-informed procedures to reflect "an understanding of the applicant's particular difficulties and needs.," and include essential guarantees and basic requirements. UNHCR Handbook, ¶ 190. These procedures must satisfy certain basic requirements, including: the applicant be given guidance on the procedure itself; the applicant be given the necessary facilities, including a competent interpreter, for submitting his case; and the applicant should have ability to appeal. (UNHCR Exec. Comm)

b. Difficulty with compliance is not a sufficient basis for serious derogations of Convention obligations

A major justification for making the change in the proposed regulation is that existing process, set in 1997, "does not adequately address the need to adjudicate in a timely manner the rapidly increasing number of asylum claims raised by individuals arriving in the United States."

[9] *Id.* ¶ 1-4.

[10] UNHCR Executive Committee 34th session, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30*, ¶ 97(2)(e), U.N.G.A. Doc. No. 12A (A/38/12/Add.1) (1983), [hereinafter ExCom (1983)], https://www.refworld.org/docid/3ae68c630.html. See also UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures). EC/GC/01/12, ¶¶ 4-5 (May 31, 2001).

86 FR at 46908/1. The Advocates does recognize that the U.S. is confronting issues that may require a different approach to comply with Convention obligations. We also note that the process set in 1997 fell far short of international standards and, therefore, cannot be used as a base level of what the process should be. The UNHCR Guidelines provide effective, safe and realistic procedures and safeguards that meet the Departments' fairness and efficiency goals. The Advocates underscores the importance of following UNHCR guidelines to ensure our policies provide an adequate level of protections to those seeking asylum protection based on credible fear.

For example, the Centers for Disease Control and Prevention's ("CDC) March 2020 Order ("Title 42 Order") requiring that the return of "all covered noncitizens as rapidly as possible—and with the least amount of time spent in congregate setting as is feasible—to the country from which they entered the United States, to their country of origin, or to another location as practicable and appropriate," *id.* at 46909, does not offer a valid justification for ongoing policy of rapid removals, which violate the rights of people to seek asylum and protection. . Serious questions undercut the supposed public health rationale for the Title 42 Order. *See* https://www.publichealth.columbia.edu/sites/default/files/public_health_recommendations_for_processing_families_children_and_adults_seeking_asylum_or_other_protection_at_the_border_dec2020_0.pdf . As explained there, a number of health experts objected to the Order as lacking a public health basis, but, rather, as motivated by political interests seeking to minimize the number of non-citizens entering the country. In contrast to the CDC Order, "[t]he U.N. Refugee Agency (UNHCR) explained in its March 2020 legal guidance on the COVID-19 response that State entry measures should not prevent people from seeking asylum from persecution and that States may not deny entry to people at risk of refoulement. In November 2020, it warned that 'measures

restricting access to asylum must not be allowed to become entrenched under the guise of public health.' The public health consensus is clear: there is 'no public health rationale' to bar or discriminate against asylum seekers or migrants based on immigration status." *Id*.[11]

Additionally, the NOPR suggests that the lag time caused by the current backlog of asylum decisions may be a factor in the increased border crossings. *See* 86 FR at 46909/2-3 ("it may take years before the individual's protection claim is first adjudicated by an IJ. The ability to stay in the United States for years waiting for an initial decision may motivate unauthorized border crossings by individuals who otherwise would not have sought to enter the United States and who lack a meritorious protection claim."). Nothing is proffered to support this speculation, and AHR disputes gross generalizations about abuse of the right to seek asylum. While AHR sees asylum claims denied because our current asylum laws are too narrow to accommodate very real claims for protection, because of the increasingly unrealistic evidentiary burdens placed on asylum applicants, or because inaccurate or incomplete statements taken by arresting border officials later are held against people, our experience has been that only a tiny fraction of applications are not based on a credible fear of persecution, torture, or human rights violations.

The Departments' premise is belied by the fact that only a very small number of asylum cases ultimately are deemed frivolous. The jump from 11,000 credible fear referrals in 2011 to over 105,000 in 2019 cited by the Departments, 86 FR at 46908/3, may more credibly be attributed

[11] The Title 42 Order is currently being reassessed. *See Flores v. Garland*, 3 F.4th 1145, 1149 (9th Cir. 2021)("in February 2021, the CDC issued a notice 'temporarily except[ing] ... unaccompanied noncitizen children' from expulsion under Title 42. CDC, Notice of Temporary Exception from Expulsion of Unaccompanied Noncitizen Children Encountered in the United States Pending Forthcoming Public Health Determination (Feb. 11, 2021). The notice stated that CDC was 'in the process of reassessing' the Title 42 Order and that the temporary exception for unaccompanied minors would 'remain in effect until CDC has completed its public health assessment and published any notice or modified Order.' *Id*. After the CDC notice, the government filed a status report with this Court stating that 'CDC does not currently have a date by which it anticipates [its] reassessment will be complete.'").

to the well-documented sharp deterioration of human rights conditions in neighboring countries. Unfounded speculation does not amount to substantial evidence needed to support the rule change.

In short, AHR urges the Departments to compare any final regulation with the UNHCR guidelines and comments by experts on compliance with the Refugee Convention to ensure the final regulation comports with Congressional intent to bring the U.S. in compliance with the Refugee Convention obligations.

III. Procedures Must Ensure Due Process

As all international human rights obligations are interrelated, the U.S. must not simply follow obligations under the Refugee Convention, but must also ensure due process and civil rights of applicants are protected.[12] Therefore, procedures to adjudicate individuals' claims for protection must incorporate due process safeguard to protect against nonrefoulement.[13] It is generally recognized that fair and efficient asylum procedures are an essential element in the full and inclusive application of the 1951 Convention. Notwithstanding the Departments' considerable leeway to design procedures for adjudicating refugee status, those procedures must include, at a minimum, essential due process guarantees.[14]

While "accelerated procedures"[15] are allowable in some instances under the Convention, they must be promulgated to minimize the risk of refoulement while providing full due process, including the rights of an asylum-seeker to receive adequate information and to appeal a negative

[12] *See, generally,* International Convention on Civil and Political Rights (1976).
[13] Article 33(1) of the 1951 Convention codifies the fundamental principle of non-refoulement, which refers to the obligation of States not to expel or return (refouler) a person to territories where his or her life or liberty would be threatened. *See* Black's Law Dictionary 1157 (9th ed. 2009). *See also* UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, (Jan. 26, 2007), http://www.unhcr.org/refworld/docid/45f17a1a4.html.
[14] UNHCR Handbook, ¶¶ 189-192.
[15] NB: expedited removal has repeatedly been cited by the UNHCR as violating standards

fear determination, to minimize the risk of a flawed decision.[16] Moreover, appropriate procedures for determining who is or is not entitled to asylum must take account of the challenges asylum seekers face in presenting their claims, as outlined *infra*.[17]

a. The Proposed Screening Process Must Be Redesigned to Ensure Greater Due Process Protections

The proposed rule seeks to "return the credible fear screening process regulations to the simpler screening process that was in place for expedited removal's first two decades of implementation." 86 FR at 46914/2. On one hand, this represents a marked improvement over the Global Asylum and Security Bar rules by eliminating "the applicability of a significantly expanded list of mandatory bars during credible fear screenings and mandating a negative credible fear finding should any of the bars be determined to apply to the noncitizen at that initial stage," and by restoring the lower significant possibility screening standard in place of the higher reasonable possibility of persecution or torture standard." 86 FR at 46914/1-2.

On the other hand, it fails to address the underlying, serious due process concerns with the existing expedited removal system and CFI procedures. The credible fear screening process offers minimal, if not non-existent, protection for the applicant. The screening process largely takes place shortly after an applicant had arrived in the United States. Generally speaking, besides language barriers, unfamiliarity with the substantive or procedural elements involved and the lack of counsel effectively mean the applicant might be unaware of or otherwise unable to provide all the necessary elements to demonstrate a significant possibility that his/her credibility claims are valid. Add to this the physical and mental impact of recently completing an escape from harm and journey to

[16] 67

[17] Handbook 189-90

the U.S.—often through dangerous and difficult terrain or with additional exploitation. The proposed process alleges to addresses some of these failings but does so in a way that exacerbates the conditions and consequences attendant to any missteps and makes little realistic effort in trying to avoid or to correct them. The final rule must, therefore, be revised and redesigned to ensure the screening process addresses challenges faced by asylum seekers, provides robust due process protections, and fulfils international and statutory nonrefoulement obligations. Simply put, the proposed rule's design is flawed; it seeks to streamline where it should seek to ensure that everyone who is eligible for protection against refoulement receives that protection.

Under the proposed rules, the asylum officer conducting the credible fear interview will "advise the noncitizen of the consequences of filing a frivolous asylum application and capture the noncitizen's relevant information through testimony provided under oath." 86 FR at 46916/2. It is unclear why the officer could not also advise at that time about the right to counsel and the necessary elements to support a credible fear showing.[18] During or after the CFI, the officer will "create a summary of the material facts presented by the noncitizen during the interview, read the summary back to the noncitizen, and allow the noncitizen to correct any errors." *Id.*

This procedure is fraught with peril, particularly for *pro se* individuals but even for those who secure legal representation. The Departments do not clarify or apparently even consider how an applicant will know which facts are material to ensure a full record. The proposed procedure would require people to listen to an oral summary and identify and correct any errors or omissions on the spot. This oral review apparently is to occur at the close of the interview. The proposed

[18] Giving notice would be consistent with the proposed rule "that the noncitizen would be entitled to be represented, at no expense to the Government, by counsel of the noncitizen's choosing who is authorized to practice in such proceedings." 86 FR at 46919/1.

process allows no time for rest or reflection by the individual, who has just faced the grueling task of detailing episodes of persecution, torture, loss of family, and other traumatic events. It makes use of the same interpreter present during the interview, making it unlikely that interpretation errors or communication gaps will be revealed. The Departments ignore the power differential between the government agent and the individual asylum seeker and instead pretend that asylum seekers, who are facing an adjudicator with the power to decide whether they live in safety or are deported to persecution, will feel empowered to point out errors. This poses particular harm to the most vulnerable of asylum seekers, including people with disabilities or illnesses that impede their ability to understand the process or to make themselves understood. That the procedure will result in an incomplete or even incorrect record in some cases is without doubt, given our experience with the records created under the current expedited removal process. At best, the errors and omissions in the record will pose an enormous hurdle for the asylum seeker to overcome in a future hearing. At worst, they will result in deportation to persecution or torture. All these issues raise the specter that the effort to expedite the process for efficiency will result in a loss of accuracy and completeness and in the violation of U.S. obligations to protect against refoulement.

Notwithstanding, the rule goes a step further by proposing to make this summary the asylum application and record for the asylum interview. And, if denied at the asylum office, any appeal to the immigration court is not guaranteed to offer an opportunity to present other evidence or correct the record. For *pro se* applicants who are unlikely to understand the process or have access to resources to correct and supplement the record—and litigate if such a request is denied—this will present a significant threat to fairly presenting and adjudicating their cases. While we do welcome the suggestion that a CFI may serve for purposes of meeting the one-year bar and starting

the clock for employment authorization, an applicant must continually have the opportunity—and be guided and informed of such—to amend and supplement the application without fear of negative inferences. A more robust ability to correct and supplement the record for the applicant, particularly as shortcomings could be the basis for a frivolous asylum application finding, is required in any final version of the proposed rule.

The Departments also remove the opportunity to request reconsideration at the asylum office level, even for technical fixes. The NOPR claims this is necessary for efficiency due to prior incidents of multiple reconsideration requests relying on the same evidence. *See* proposed § 208.30(g)(1)(i) *and* 86 FR at 46915/2 (transferring jurisdiction to IJ "is necessary to ensure that requests for reconsideration to USCIS do not obstruct the streamlined process that Congress intended"). But those incidents could, instead, reflect that the applicant did not receive an adequate opportunity to present evidence during the credible fear screening, which was generally short, occurred during detention, did not involve counsel, and otherwise was not conducive to a full development of the facts.

Providing a more robust procedure to develop the applicant's case could substantially reduce this risk as well as the risk of an error or omission requiring IJ resources—or, even appellate processing—to correct. The proposed procedure would allow an applicant or representative "to make a statement or comment on the evidence presented . . . [or] to ask follow-up questions" only upon "completion of the interview or hearing before an asylum officer." 86 FR at 46492, proposed § 208.9(d)(1). Such limitations are insufficient to protect the due process rights of asylum seekers. There is no reason to restrict the opportunity to correct the record *at any stage* of the process, particularly given the lack of guarantee for government-appointed counsel results in a significant

number of applicants navigating the process alone with limited educational, mental health and/or language skills. The procedure must give the applicant and representative time to review the screening summary in comparison with the hearing transcript, which would improve the completeness and accuracy of the interview/hearing.[19] Rather than obstructing the process, those changes would improve its streamlining.

As such, AHR encourages the Departments to revise the proposed regulation to ensure the screening process allows sufficient opportunity to present a claim in a way that considers vulnerabilities of the applicant and special needs of pro se applicants. We specifically oppose elimination of the reconsideration option because it violates due process standards and risks violating nonrefoulement protections. In many cases, asylum seekers are unable to make a credible fear presentation in the context of the asylum officer hearing due to many obstacles, *e.g.*, trauma, concern about reprisal, language barriers, educational levels, lack of access to documentation, lack of counsel—which may be overcome after the person has an opportunity to meet with an attorney, speak to family outside of detention, and simply have a moment to regain mental and physical health. The proposed rule seems to be unconcerned about these difficulties given that the proposed

[19] Proposed § 208.3(a)(2) allows an applicant to "subsequently amend, correct, or supplement the information collected during the expedited removal process, including the process that concluded with a positive fear determination," within specified deadlines before an asylum hearing. 86 FR at 46941. While "the officer's notes from the interview and basis for the determination" are included when an applicant is given a copy of the application for asylum, 46916/3, it is unclear whether the applicant can amend, correct, or supplement those notes. Also, it appears that an applicant may not amend, correct, or supplement family information under the rule. *See* § 208.3(a)(2)("The applicant's spouse and children may be included in the request for asylum only if they were included in the credible fear determination pursuant to § 208.30(c), or also presently have an application for asylum pending…."). The interests of fairness, accuracy, and efficiency would be prompted by allowing an applicant to amend, correct, or supplement *all* the information collected and noted during the interview process prior to the asylum hearing.

rule seems to view the whole point of the screening process to be "more efficient and streamlined," despite the fact that IJ review has been the point at which protection is afforded in expedited removal proceedings. *See* 86 FR at 46915/2 (noting IJ review "serves as the check to ensure that individuals who have a credible fear are not returned based on erroneous screening information").

Ensuring opportunities for safeguards at screening and review or reconsideration are, thus, essential. A more efficient approach for reducing errors would inform the applicant at the outset of screening what evidence is needed to support a claim and the right to retain counsel of their choosing[20] as well as better and more timely opportunities to present or to question evidence during the hearing.

b. The Proposed Failure to Appear Rule Violates Due Process and Brings the U.S. Out of Compliance with International Obligations

The Departments further "propose that the 'failure to appear' rule at 8 CFR 208.10 be revised to allow for an order of removal to be issued when the noncitizen fails to appear for a biometrics appointment or the scheduled hearing with the asylum officer" *id*. at 46919/1-2. The proposed rule, § 208.10, states in relevant part:

> a) Failure to appear for an asylum interview or hearing, or for a biometrics services appointment. (1) The failure to appear for an asylum interview or hearing, or for a biometrics services appointment, may result in one or more of the following actions: * * *
>
> (v) For individuals whose case is retained by USCIS for consideration of their application for asylum after a positive credible fear determination pursuant to § 208.30(f) or 8 CFR 1003.42 or 1208.30, issuance of an order of removal based on the inadmissibility determination of the immigration officer under section 235(b)(1)(A)(i) of the Act.

[20] AHR has long advocated that applicants have the right to counsel even if they cannot afford one, and urges the Departments to seek authorization and funding to make this a reality.

86 FR at 46942/3.[21]

The "scheduled hearing" refers to the non-adversarial procedures before "USCIS asylum officers to adjudicate in the first instance the protection claims of individuals who receive positive credible fear determinations under the expedited removal framework in section 235(b)(1) of the INA." *Id.* at 46910/2 (hereinafter "further consideration hearing"). Although the NOPR states that these hearings "for further consideration of asylum application by asylum officers would provide protections similar to those provided in section 240 removal proceedings," 46919/2 *and* 46920/3, the proposed failure to appear rule gives broader discretion to asylum officers and less protection to noncitizens than is provided under the existing failure to appear rule in § 240 proceedings or allowable under domestic and international law. Moreover, the proposed rule provides authority to issue such an order for failing to appear for biometrics appointments—a standard appointment for which notices routinely get lost or misunderstood, especially for pro se applicants—without incorporating the limited safeguards required for in absentia orders of removal by immigration judges. The proposed rule, therefore, is a bridge too far with insufficient safeguards.

Issuing an in absentia order, or ordering removal for failure to appear, carries heavy impacts. It involves exile—for asylum seekers, to face persecution and harm—and triggers significant procedural bars. When an in absentia order is entered by an immigration judge, the law provides some basic protections on what must be determined before an order is entered as well as paths for rescinding such. The instant rule, while providing the power, does not clarify the

[21] When failure to appear can be applied in a case requiring an interpreter may depend on the officer's discretion. *See* proposed § 208.9(g)(1)(applicant's failure to supply interpreter "may be considered a failure to appear"); *but see* proposed § 208.9(g)(2) (asylum officer shall arrange for interpreter if applicant cannot proceed effectively in English). *See also* existing § 208(h)(1)(ii)-(iii)(same, albeit for interviews between September 23, 2020 and September 20, 2021).

protections—either due to an oversight in failing to incorporate them by reference or create them anew. This is a crucial protection given the change to the proposed system could result in inadvertent failures to appear. Notices often get lost or undelivered, particularly in the case of people in expedited removal due to the rapid pace of the proceedings and general lack of stability or know-how to sufficiently obtain a physical address. This, paired with the Departments' failure to provide electronic notifications or timely database updates, is a recipe for inadvertent failures to appear. Notwithstanding, the rule fails to incorporate required protections.

Proposed (and existing) Section 208.10 includes several sanctions for failure to appear, but for applicants in a further consideration hearing, issuance of a removal order appears to be the only option under the proposed rule. To be sure, the asylum officer would retain broad discretion under the "may result in" language to issue or not the removal order in these circumstances, but the final rule should be revised to ensure that all safeguards and due process protections are mandatory rather than discretionary. *See* § 208.10(a)(1)(i)-(iv)(sanctions available in other proceedings).

For example, an immigration judge's discretion is limited by 8 U.S.C. § 1229(b)(7), which does not allow an order of removal in absentia if an applicant can show the failure was "because of exceptional circumstances." Such circumstances are defined as ones "beyond the control of the alien" and include "serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances." § 1229a(e)(1). Any final rule must, therefore, include either directly or by reference, the same or higher protections as one would receive in immigration court proceedings in order to ensure the U.S. does not fall out of compliance with our international obligations by improperly ordering removal of bona fide refugees.

The final rule must also ensure due process protections by establishing clear and fair notice procedures before any removal order is allowed. Under the current procedure, "DHS [must] establish by clear, unequivocal, and convincing evidence that written notice of the hearing was served on the applicant." The Departments must include a similar requirement in proposed § 208.10. As proposed, § 208.30(f) requires that, in a positive credible fear application, "the asylum officer will so inform the alien and issue the alien a record of the positive credible fear determination, including copies of the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based." 86 FR at 46945. There appears to be no requirement that the asylum officer issue a notice of a further consideration hearing that would be comparable to the existing § 208.30(f) under which the officer will "issue a Form I–862, Notice to Appear, for full consideration of the asylum and withholding of removal claim in proceedings under section 240 of the Act."). 86 FR at 46909/2 (quoting existing regulation). *Compare also* 46915/2 (after *negative* credible fear finding, "DHS will inform the individual that the IJ review will include an opportunity for the individual to be heard and questioned"). The elements of the notice to appear for a § 240 hearing are set forth in 8 U.S.C. § 1229, and are quite detailed in order to ensure due process protections, including the applicant's right to obtain counsel (§ 119(a)(1)(E)). The Departments must bring any final rule in-line with proper notice procedures to ensure fairer proceedings for applicants as required under the Convention.

c. <u>The Immigration Judge Review Process Must Be More Comprehensive</u>

The NOPR proposes that "the IJ would not have authority to consider issues related to a noncitizen's removability or a noncitizen's eligibility for any other relief from removal." 86 FR at 46919/3. This limitation compromises fairness and protections for assumed efficiency, leaving the

U.S. out of compliance with our obligations while also opening numerous inefficiencies that invite more litigation and appeals. It seems a wasteful approach to restrict IJ decision making, particularly given their training to adjudicate all manner of cases, for these new proposed proceedings. Moreover, in at least some cases, the IJ may, based on their expertise and experience, determine that an asylum applicant is not removable or even already a citizen. But, the rule appears to foreclose the IJ from ruling on such grounds. In addition, the proposal does not address whether this change would shift the current burden on DHS to establish removability in immigration court proceedings. A more efficient approach would allow an IJ decide the entire matter in front of them without being forced to ignore or exclude other information that would show removal is unwarranted.

In this regard, the approach set out in proposed § 1003.48(d), which would allow an applicant to file a single motion to vacate an asylum officer's order of removal based on a showing that the applicant "is prima facie eligible for a form of relief or protection under the Act that *cannot be considered* in proceedings under this section" (emphasis added) would be neither efficient nor fair. Rather than a process that requires the applicant to identify other grounds of immigration eligibility beyond the three enumerated in § 1003.48(a), the asylum officer and then IJ could simply inquire about all possible grounds during their respective hearings. If an applicant answered that one ground or another applied, the applicant would still bear the burden of persuasion "to show that he or she is prima facie eligible for a [specific] form of relief." 46 FR at 46920/3. It would also assure the issue is addressed "before the IJ issues a decision on the applications for asylum and related protection." *Id.* Such an approach would not only be efficient and fair, but also

would be consistent with international standards requiring heightened care for vulnerable people like asylum applicants.

d. Procedures Must Ensure an Opportunity to Appeal and Present One's Case

International standards generally include the right to a formal reconsideration of a decision; specific to asylum seekers, the UNHCR Guidelines require that an applicant for asylum be given a reasonable time to appeal for a formal reconsideration of the decision.[22]

In a § 240 proceeding, the applicant has "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," on other than national security matters. 8 U.S.C. § 1229(b)(4)(B). The proposed rule appears to limit those opportunities to providing "additional testimony and documentation, but [only if] the party [establishes] that the testimony or documentation is not duplicative of testimony or documentation already presented to the asylum officer, and that the testimony and documentation is necessary to ensure a sufficient factual record upon to base a reasoned decision." 86 FR at 46947, proposed § 1003.48(e)(1).

The Departments attempt to justify this change as being more efficient: "an approach requiring a full evidentiary hearing before an IJ after an asylum officer's denial would lead to inefficiencies without adding additional value or procedural protections." *Id*. at 46918/2; *see* 46920/2 (same). This suggestion, however, ignores the crucial procedural protections provided in review proceedings that often give rise to cost savings in the long term. The Departments' justification rests on the premise that "the asylum officer will have developed and considered the noncitizen's claim fully, including by taking testimony and accepting evidence, during the

[22] UNHCR Handbook ¶ 192.

nonadversarial proceeding." *Id.* Leaving an applicant's due process protections to the assurance that an asylum officer will adequately develop the record falls far short of due process standards. This is particularly true given the further consideration hearings in the proposed rule restrict the applicant's comments and questioning until the end. Additionally, such a restriction on IJ review along with the restrictions on accepting new evidence is particularly pernicious when considering the myriad challenges related to language, lack of counsel, educational differences, and trauma that impede asylum applicants' ability to develop a full claim. Additional proceedings and the taking of evidence throughout the process are a crucial safeguard as applicants gain the ability to present their case with more time, resources and access to support.

The rule not only fails to improve fairness; it will also be inefficient. The discretionary evidentiary limitation in IJ review proceeding will likely engender considerable litigation about what is or is not duplicative as well as when a sufficient factual record has been developed. *See id.* at 46920/2 (expecting parties will have to submit prehearing briefs why standard is met). At a minimum, it transforms the statutory language allowing the applicant to choose what evidence (including cross) is needed into a judge's discretionary choice about what can or cannot be presented. These concerns cannot be swept away by a conclusory statement that the statutory hearing procedures offer no value or protection and, therefore, can be cast aside for efficiency.

A more pernicious discretionary option in the proposed rule allows the IJ to review not only the negative asylum finding for which review has been sought, but also a *positive* asylum finding related to "applications for asylum under section 208 of the Act, withholding of removal under section 241(b)(3) of the Act, and withholding or deferral of removal under the Convention Against Torture" for which no review has been sought. *See p*roposed § 1003.48(a) ("Where an

asylum officer grants one application but denies another, the immigration judge has the authority to review both the denial and the grant.") *and* § 1003.48(e)(2)(describing what orders can issue). It is unclear how an applicant becomes aware that this result is a possibility, as no notice of it is required under proposed § 208.30(f), and that subsection considers either a request or a refusal to seek review of a negative credible fear finding as a request for review, thereby putting all applications into play. Moreover, such an option undermines the Departments' argument that the procedure serves efficiency goals, as a more efficient process would not require review of granted cases, which can and will be reviewed upon the asylee's application for permanent residence.

This appears to go against the normal review procedure where a party's choice of what to seek review cabins the scope of review. Beyond that, the final rule must make accommodations for vulnerable respondent who may not know to introduce, and the judge entertain, any additional evidence on an application that the asylum officer grants. While restrictions on review may appear to add some efficiencies, the Departments ignore the inefficiencies added by requiring yet another review to determine which of the asylum officer's or the IJ's ruling is the correct one.

e. Procedures Must Not Improperly Shift the Financial Burden to Migrants and Harm Asylum Seekers in Other Jurisdictions

The NOPR proposes to address increasing numbers and backlogs at the border "by transferring the initial responsibility for adjudicating asylum and related protection claims made by noncitizens encountered at or near the border from IJs in EOIR to asylum officers in USCIS." *Id.* (footnote omitted). The Departments' pose a false premise, however, by formulating the resource question as a zero-sum game between the IJs and the AOs. The Departments seek to shift the deck chairs on the *Titanic* that is our chronically underfunded immigration adjudications infrastructure. While we recognize that this is a rulemaking, not the appropriations process, we

suggest that the Department of Homeland Security, in particular, could make substantial improvements in efficiency and backlog reduction by directing some of the billions of dollars spent on detention contracts and militarized border technology.

AHR appreciates the Departments' stated intention of improving fairness and efficiency, but is concerned that the proposed changes, without careful consideration and revision, will result in two additional unacceptable harms. First, we fear the changes will result in improperly shifting the financial burden of immigration adjudications from the government—through appropriations to DOJ/EOIR—to other migrants—through USCIS' budget, which is statutorily mandated to be funded by application fees. Second, we note that the rule as written makes no clear accommodations to ensure asylum office resources will not be diverted from non-border asylum offices, which are also experiencing serious lags in adjudication times.

The NOPR seems to downplay, if not ignore, this concern by focusing on a possible reduction in the IJs' workload by the proposed transfer of authority. *See* 86 FR at 46937/2 ("every case granted relief or protection by USCIS would constitute a direct reduction in new cases that EOIR would have to adjudicate. . . . [and] will enable EOIR to focus its resources on addressing existing pending cases and reducing the growth of the overall pending caseload."). Be that as it may, every case heard by asylum officers will take time away from their not inconsequential pending caseload and the NPRM does not clarify—other than through a staged hiring—how the workload will be shared or impact local offices.

Because these cases will shift to asylum officers, the Departments believe the change is justified as a cost savings as it will "constitute a direct reduction in new cases that EOIR would have to adjudicate." *Id.* at 46937/2. The Advocates notes that such simple comparisons ignore the

fact that EOIR will still be required to expend resources to adjudicate cases which are appealed to an IJ. Moreover, the financial analysis does not appear to consider any increased costs associated with adjudicating additional appeals and litigation that will result from the potential due process violations involved in the proposed system. Thus, a more nuanced financial analysis is required before any conclusions on the costs savings or expenses of the proposed changes can be made.

The shift will also certainly not result in a cost savings for USCIS as the number of asylum officers will need to increase to staff the new responsibilities. *See id.* at 46933/2 ("USCIS plans to hire between 794 and 4,647 total new positions, with a primary estimate of 2,035 total new positions"). While the proposed asylum officers' new responsibilities and new hiring will begin in FY 2022, it will "be implemented in phases, as the necessary staffing and resources are put into place." *Id.* at 46922/2. Putting aside that "the effect of budgeting constraints and variations" may make implementation of this plan problematic at anything above a minimum processing level, *id.* at 46937/1, it does not seem that the Departments considered the alternative of increased EOIR judge staffing, as the current, albeit increased, size of the IJ corps is not commensurate with the increased number of cases. *See* 86 FR at 46908/3 (even though "the corps of IJs has more than doubled since 2014, . . . the number of pending cases has more than tripled in that same period").

The NOPR claims that it wants "to avoid simply shifting work from a resource-challenged EOIR to a similarly resource-challenged USCIS Asylum Division," and it proposes to avoid this by "fully resource[ing] the USCIS Asylum Division" to handle the present and new workload. *Id.* at 46921 n. 60. But this does not address the larger question: how does the cost-benefit of fully resourcing the new workload of 50,000-300,000 cases annually, 86 FR at 46937/1-2, compare to the cost-benefit of adding more EOIR judges to reduce the "pending caseload of approximately

1.3 million cases with approximately 610,000 pending asylum applications." *Id.* at 46908/3. Alternatively, would the costs for staffing the new asylum corps produce greater benefits if the new officers were assigned to help reduce the existing backlog of "over 400,000 pending affirmative asylum applications awaiting interview or adjudication." *Id.* at 46921 n. 60. Whatever the allure of a shiny, new streamlined process, it must be balanced against the hard reality that the existing process is overwhelmed.

In any event, AHR is concerned that the NPRM improperly shifts the financial burden of the immigration system to other immigration applicants rather than the U.S. government seeking to enforce expedited removals. Since USCIS, unlike EOIR, is legislatively required to fund much of its work through application fees, the costs of staffing and support for adjudications under the NPRM would result in increased application fees at USCIS, which are already higher than the vast majority of applicants can afford. The projected increase of 13%-26%, "attributable to the implementation of the asylum officer portions of the proposed rule only" and not counting other increases for "any changes in the IEFA non-premium budget," *id.* at 46937/2, constitutes a substantial increase that will exacerbate the already difficult, if not dire, financial situation that most asylum applicants face. While some immigration applicants may be able to shoulder this burden, many cannot. For example, AHR works with trafficking survivors whose applications are processed by USCIS. Such applicants are required to pay filing fees for waivers of inadmissibility, green card applications, and other related applications unless they can obtain a fee waiver—an impossible task during resistant administrations. Thus, the cost shifting of the proposed rule will not only improperly shift costs away from the government, but it will do so in ways that harm other vulnerable groups we have also agreed to protect through the Palermo Protocol and the

Trafficking Victims Protection Act, for example. The rulemaking, by shifting these credible fear proceedings from IJs to asylum officers, moves them from funding through appropriations to funding through fees. This does more than shift the source of funding, it also avoids having Congress consider through the appropriations process whether these changes are consistent with the INA's intent about how these matters should be handled.

A separate concern is that, especially in the early stages of implementation, the tendency could be to shift experienced asylum officers away from their existing caseloads into this new role or to training, thus slowing down resolution of the officers' existing caseloads even more or shifting local asylum office case adjudications to the less experienced new hires. The Advocates knows first-hand how much additional, unnecessary trauma is caused to asylum applicants who must await interviews and then long delays in receiving decisions. Understaffing and diverting resources—especially diverting experienced officers—from local asylum offices to staff the new CFI process will exacerbate these harms to our clients. For example, one of our clients waited three years for an interview. After finally receiving the interview, he was then forced to wait two years for a decision. During this time, her children remained in home country. The stress of not knowing her future, not being able to reunite with her children, and continually having to renew her work permit, exacerbated the serious depression, anxiety and mental health-related illnesses she suffered. The Departments, therefore, must be extremely careful to ensure any changes to the asylum system for border processing does not have unintended impacts on asylum seekers and other vulnerable immigration applicants internally.

In short, simply concluding that the change will reduce EOIR's workload does not show that the Departments fully considered all the appropriate factors in determining how to make the entire process, including pending matters, more efficient.

f. Applicants Should Have an Opportunity to Opt-Out of Review by an IJ but Should Not Be Required to Affirmatively Request Such

To improve the due process and human rights protections in the inherently violative expedited removal procedure, AHR encourages the Departments to consider opportunities for inserting and increasing safeguards. For example, the Departments should ensure that any denied CFI or AO hearing does not require an applicant to affirmatively request IJ review. Rather, all denials should automatically trigger review unless the applicant opts-out. An opt-out structure ensures pro se applicants or others unfamiliar with the process are not improperly refouled by failing to request review. While the proposed rule does continue to require applicants be advised of the option for review upon a denial, this is insufficient as it does not provide adequate opportunity to ensure such advisals and the gravity of options are understood by applicants. A far more protective and fair procedure would automatically provide IJ review while allowing applicants who may not wish to remain detained or have other reasons to opt-out to do so. While this procedure will require some additional expenditures and time to the Departments due to an increase in cases reviewed, the investment in doing so is necessary to ensure fairness and uphold human rights.

IV. Procedures Must Not Result in Arbitrary Detention

The Advocates is further concerned that the proposed rule does not do enough to prevent arbitrary detention. The INA improperly allows arbitrary detention through its mandatory

detention provisions, which apply to people in expedited removal proceedings. The proposed rule does promise to make parole in CFI proceedings more available, but this is insufficient.

Under international law, detention of asylum-seekers should be used only as an option of last resort.[23] If detention is used, it must not be arbitrary. Detention is considered arbitrary where, inter alia, the decision to detain is not based an individual's particular circumstances, proportionate to a legitimate purpose, and prescribed by law.[24] Mandatory detention is always arbitrary because it is not based on an individualized examination and often is not proportionate to a legitimate purpose.[25] Any decision to detain must also be subject to independent, periodic review.[26] Furthermore, detention must also uphold other international standards, including non-discrimination.[27] And, an individual must always have an opportunity to challenge their detention on these grounds.[28]

Special protections for asylum seekers should also be included to ensure our compliance with international law. UNHCR's Executive Committee, of which the United States is a member, has noting at the outset that detention should normally be avoided.[29] If necessary, detention should be imposed only to verify identity, to determine the elements of the claim, to deal with cases where asylum seekers have destroyed documents in order to mislead the authorities in the country of

[23] UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*
and Alternatives to Detention, ¶ 2 (2012), https://www.refworld.org/docid/503489533b8.html [hereinafter Detention Guidelines].
[24] Detention Guidelines at ¶ 18.
[25] *Id.* at ¶ 20.
[26] *Id.* at ¶¶ 47(iii) and 47(iv).
[27] *Id.* at ¶ 43.
[28] *Id.*
[29] UNHCR Executive Committee Conclusion No. 44 (1986) on Detention of Refugees and Asylum Seekers, para. (b).

asylum, or to protect national security or public order. Refugees may not to be penalized for their illegal entry or presence.

The intent to "broaden the circumstances in which individuals making a fear claim during the expedited removal process could be considered for parole," 46 FR at 46926/1, is laudable, but insufficient. The expanded grounds for parole—"where detention is unavailable or impracticable"—must be based on objective standards, rather than being granted as an exercise of discretion on a case-by-case basis, as now proposed. *Id.* The proposed rule should comply with international standards by clarifying that an asylum applicant should not be detained except only as an option of last resort and requiring period review as well as the least restrictive means necessary. The proposed rule should further clearly and narrowly define "last resort" to ensure asylum seekers are not arbitrarily detained. Detailing clear and consistent provisions for parole and detention, rather than broad assertions of increasing use of parole authority, will be more efficient than case-by-case determinations, and possibly lead to expedited parole decisions, which would be especially important in the case of families subject to expedited removal proceedings.

V. Conclusion

In conclusion, The Advocates encourages the Departments to promulgate a rule that complies with international standards. If no regulatory option will allow compliance, the Departments should withdraw the instant proposal and work toward a legislative response that undoes the harms of expedited removal. Our international obligations are clear in regards to the rights of people seeking safety from harm: access due process of law through fair legal proceedings—whether in court or through other proceedings as outlined in the proposed rule—and freedom from arbitrary detention. To the extent that the proposed rule threatens these rights or

does not clearly and unequivocally protect them, the rule must be amended before finalization. Failing to do so not only will bring the U.S. out of compliance with our international and domestic obligations, but will also result in inefficiencies through litigation and prolonged appeals.

We remain available for additional information as needed.

Respectfully Submitted,

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