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Re: [Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and Convention Against Torture Protection Claims by Asylum Officers](#)
(03/29/2021)

Dear Chief Cutlip-Mason & Assistant Director Reid,

The National Immigrant Justice Center (NIJC) offers comments in response to the above-referenced Interim Final Rule (IFR) issued by the Department of Justice (DOJ)'s Executive Office of Immigration Review (EOIR) and the U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) (collectively, "the Departments").

NIJC's strong interest to proposed changes

NIJC is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding more than three decades ago, NIJC uniquely blends individual client advocacy with broad-based systemic change.

Headquartered in Chicago, NIJC provides legal services to more than 10,000 individuals each year, including many asylum seekers, torture survivors, and children who have entered the United States by crossing the U.S.-Mexico border. These individuals have overcome profound persecution and torture in their home countries and journeyed to the United States to find a better future.

Below, we (I) address improvements made by the Departments from the NPRM to the IFR and express concerns regarding unresolved issues regarding liberty interests of asylum seekers and due process protections; (II) express grave concerns that the Departments fail to promote fair and reasonable rules under the new timelines at all stages of review; (III) discuss how the IFR will effectively deprive many asylum seekers of work authorization.

I. The IFR includes some improvements from the NPRM; we commend those changes and urge the Departments to commit to further protections prior to implementation.

The Departments have made much needed changes to the Notice of Proposed Rulemaking (NPRM). These changes will avert some types of irreversible harm stemming from provisions in the prior NPRM or pre-existing regulations. We commend the Departments for these changes and urge them to use these protective measures and advance its humanitarian mandate in efficient and fair terms. In particular, we highlight and commend the following changes made:

- **Return to significant possibility screening standard and elimination of the review of bars during initial fear screenings:**¹ We applaud the IFR's changes to reflect the use of the significant-possibility screening standard in conformance with existing law. The Departments correctly point out that this return to the significant possibility standard is more efficient, conforms with the first two decades of expedited removal practice, and aligns with Congressional intent.² Similarly, the elimination of screening for asylum bars in these initial screenings removes unnecessary hurdles in the arduous path to protection under U.S. asylum law and reduces the possibility of highly prejudicial erroneous assessments that will infect a case for its duration. In particular, because asylum seekers routinely undergo their initial screening without the benefit of counsel, fairness requires reserving the often-technical considerations that are relevant to evaluating a potential bar to asylum for future consideration.
- **Permitting USCIS to reconsider negative fear determinations:** The IFR provides for one reconsideration by USCIS so long as it is either requested by the asylum seeker or initiated by USCIS no more than seven days after the Immigration Judge's (IJ) concurrence of a negative determination.³ NIJC has commented that reconsideration by USCIS is a critical guardrail for erroneous negative determinations, which result in the deportation and five-year bar on individuals in dire need of protection and an outright bar to asylum for any person who is erroneously removed and then subject to reinstatement if they flee to the United States a second time. NIJC also welcomes the Departments' treatment of an individual's silence, refusal, or failure to request IJ review as a request for

¹ See 8 C.F.R. § 208.30(e) and throughout.

² See Dep't of Homeland Sec. & Exec. Office for Immigration Review, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and Convention Against Torture Protection Claims by Asylum Officers* (Mar.29, 2022), 87 Fed. Reg. 18084, 18092.

³ See 8 C.F.R. § 1208.30(g).

review.⁴ This is more fair for all asylum seekers, including pro se individuals and individuals with little language access or literacy to navigate complex asylum procedures. NIJC notes, however, that the seven-day deadline for an individual to request reconsideration is unreasonably short, particularly for unrepresented individuals struggling to interpret USCIS’s preliminary finding in a language they may not understand. Furthermore, there is often a delay between issuance of an IJ decision and receipt by the asylum seeker and USCIS; this delay may leave little to no time for asylum seekers to avail themselves of the reconsideration option.

- **Correcting parole provisions at § 235.3(b)-(c):** The IFR makes two ministerial changes relating to parole that NIJC welcomes, but we urge the Departments to adopt greater safeguards when depriving arriving asylum seekers of their liberty.
 - First, the Departments fixed a drafting error that precluded parole consideration for individuals who passed fear screenings.⁵ We alerted DHS to this error in our comment and commend the Departments for the correction.
 - Second, the NPRM proposed to permit parole of individuals prior to their fear screenings “only when DHS determines, in the exercise of discretion, that parole is required to meet a medical emergency, for a legitimate law enforcement objective, or because detention is unavailable or impracticable (including situations in which continued detention would unduly impact the health or safety of individuals with special vulnerabilities).”⁶ NIJC raised serious concerns regarding the proposal to weigh unavailable/impracticable detention bedspace as a trigger for parole consideration and proposed safeguards to bring the U.S. in compliance with international standards against the presumed detention of asylum seekers.⁷ We appreciate the elimination of those proposals from the IFR and return to the standard articulated under § 212.5(b).
 - But these corrections are insufficient. In a failed opportunity to better protect the rights of asylum seekers, the IFR left in place the already-problematic current regulatory scheme relating to the availability of parole, which prompted consideration of public interest but gives insufficient weight to factors relevant to individualized assessments, such as negative impact on an individual’s health,

⁴ 87 Fed. Reg. at 18094.

⁵ 87 Fed. Reg. at 18088 (explaining technical amendment).

⁶ See Dep’t of Homeland Sec. & Exec. Office for Immigration Review, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers* (Aug. 20, 2021) (hereinafter “NPRM”), 86 Fed. Reg. 46906, 46946 (8 C.F.R. § 235.3(b)(2)(iii)).

⁷ See generally UN High Comm’r for Refugees (UNHCR), *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), ¶ 2, available at <https://www.refworld.org/docid/503489533b8.html> (“In view of the hardship which it entails, and consistent with international refugee and human rights law and standards, detention of asylum-seekers should normally be avoided and be a measure of last resort. As seeking asylum is not an unlawful act, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed and subject to prompt review.”).

family separation, access to counsel, and meaningful participation in proceedings.⁸ The ongoing use of language adopted in 1997 fails to account for significant growth of immigration detention and the needs of present-day asylum seekers. The Departments should implement new guardrails to avert mass detention, especially as asylum seekers frequently await their Credible Fear Interview (CFI) for weeks or months in confinement. NIJC urges the Departments to consider incorporating these factors so that case-by-case parole reviews are meaningful and fair, and so that ongoing detention of asylum seekers for the entirety of their immigration process is the exception rather than the rule. This is particularly urgent given the serious due process concerns with the expedited procedure discussed in section II. As it stands, the IFR risks leaving countless asylum seekers in detention — a disastrous circumstance for anyone seeking the assistance of counsel while facing rushed deadlines and an array of procedural requirements.

- **Rescinding proposal that USCIS asylum officers (AOs) issue removal orders at § 208.16(c) and § 208.17(b):** The NPRM’s proposal to allow AOs to issue final removal orders obfuscated the non-adversarial purpose of AO reviews and created many problems relating to access to fair proceedings. NIJC commends the Departments for rolling back this proposal and leaving those powers to immigration judges (IJs). However, we remain concerned about the IFR’s expansion of review for AOs, encompassing eligibility determinations for withholding of removal and relief under the Convention Against Torture (CAT).
- **Withdrawing proposal to have asylum-and-withholding-only proceedings for the majority of asylum seekers in immigration court:** The IFR withdrew a proposal that aimed to resurrect enjoined asylum-and-withholding-only proceedings proposed under the prior administration.⁹ We welcome this revision. However, the Departments propose a new form of IJ review that would require respondents eligible for multiple forms of relief to face an additional procedural hurdle — while affirmatively seeking review of claims for non-fear-based protections, respondents would need to make a *prima facie* showing of eligibility for such relief before IJs permit them to proceed on their alternate forms of relief and exempt them from the expedited time frame this rule contemplates.¹⁰ As we discuss further in the next Section, this will severely limit respondents’ access to full proceedings under INA § 240 because IJs will face tremendous pressure to move cases speedily toward adjudication of fear-based claims. In turn, individuals would not benefit from IJs

⁸ See NIJC comment to NPRM at pp. 8-16, available at <https://www.regulations.gov/comment/USCIS-2021-0012-4849>.

⁹ See 87 Fed. Reg. at 18121.

¹⁰ 8 C.F.R. § 1240.17(k).

developing the record and exploring other forms of relief.

- **Improvements on the treatment of dependent spouses and children:** The Departments tried to address some concerns we and others flagged about preserving spouses and children’s ability to pursue their claim if the principal asylum seeker is not granted relief at the asylum office. Specifically, the IFR now requires AOs to elicit information pertinent to asylum, withholding and CAT for the dependent spouse and children and determine whether the dependent family members have a significant possibility of separate eligibility from the principal asylum seeker for fear based claims.¹¹ We welcome these changes and the Departments’ efforts to protect the rights of spouses and children.
- **Elimination of mixed case review proposal, lack of de novo review, truncated hearings that limit evidence submitted to the IJ, and other concerns under proposed § 1003.48:** We commend the Departments for doing away with proposals in the NPRM that posed a myriad of due process concerns for asylum seekers, including limitations on finality and appellate review, limitations on evidence accepted before the immigration court, and confusing proceedings where DHS trial attorneys may disturb asylum grants from USCIS. Along with former IJs,¹² NIJC raised significant alarm at those proposals in the NPRM. However, as we discuss further in the next section, we continue to have grave due process concerns with section 1240.17, newly crafted and introduced in this IFR.
- **Clarification that only USCIS can conduct CFIs under U.S. law (§ 208.30(d)):** It is well documented that CBP officers frequently violate the rights of asylum seekers.¹³ Although we outline ongoing concerns about CBP’s significant control as gatekeepers for access to CFIs in Section II.A.1. *infra*, we commend the Departments for stating the obvious — that CBP has neither the expertise nor the statutory right to conduct CFIs.¹⁴

These changes show attention to comments received in the NPRM period, as well as adjustments that reflect the Departments’ interest in improving proposed procedures. However, as we explain below, the Departments preserved key elements of the NPRM that undermine due process

¹¹ 8 C.F.R. § 208.9(b).

¹² See Comment Submitted by Round Table of Former Immigration Judges to NPRM, *available at* <https://www.regulations.gov/comment/USCIS-2021-0012-4874>.

¹³ See Josiah Heyman, Jeremy Slack, and Daniel E Martínez, *Why Border Patrol Agents and CBP Officers Should Not Serve as Asylum Officers* (2019) (citations omitted) (“11 percent of the 1,095 [surveyed recently deported] respondents who answered the question on physical abuse reported being hit, pushed, grabbed, or attacked physically while in US custody. Sixty-seven percent of the physical abuse reports were attributed to the Border Patrol. Twenty-three percent of the 1,092 respondents who answered the question reported being yelled at, threatened, or verbally abused while in US custody. Seventy-five percent of those verbal abuses reports were attributed to the Border Patrol”).

¹⁴ 87 Fed. Reg. 18136 (citing INA § 235(b)(1)(B)(i), 8 U.S.C. § 1225(b)(1)(B)(i)).

protections and introduced a plethora of rules and timelines that are deeply troubling.

II. The IFR raises a number of Due Process concerns for asylum seekers at every step of their claim.

The IFR introduces a new affirmative procedure that builds on the existing use of fear referrals and screenings in expedited removal. For asylum seekers, this new process would entail three phases: (A) apprehension and CFI, (B) asylum merits interview before USCIS, and (C) review before the immigration court. All three phases, as currently envisioned in the IFR, would impose significant obstacles to meaningful asylum access for large categories of asylum seekers, including individuals unable to obtain parole;¹⁵ pro se individuals; people with limited language access; and survivors of trauma.

A. Apprehension and CFIs: How the IFR's continued reliance on expedited removal will inevitably harm asylum seekers.

We continue to urge the Administration to reconsider its approach to asylum processing, which remains structured around the irreparably harmful expedited removal system. As we raised in our comment to the NPRM, expedited removal relies on two flawed processes: first, it requires CBP officers to ask questions designed to elicit a fear of return and accurately identify that fear as a potential basis for asylum, even though CBP has long been documented to routinely fail to perform these basic assessments;¹⁶ second, it requires asylum seekers to disclose intimate information about their fear and trauma to government officials, who they may perceive as hostile, usually without the presence of an attorney, while detained,¹⁷ with minimal language access, and often a very short time after arrival.¹⁸ NIJC has represented countless asylum seekers who were unable to present their claims because of these elements of expedited removal.

1. Routine failures by CBP agents to refer individuals for fear screenings, resulting in summary removal

Under expedited removal, CBP officers are gatekeepers to the asylum process. Historically, they

¹⁵ Despite the Departments' aspirations, they opt to leave the 1997 regulations largely intact, adopting the same standard for parole review that has created mass immigration detention. As mentioned in Section I, we call on the Departments to expand the factors for consideration so that individuals do not have to choose between life and liberty when presenting their asylum claims.

¹⁶ See Coalitional letter to DHS Secretary Mayorkas (Feb. 16, 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/letter_to_dhs_mayorkas_opposes_expedited_removal_process_for_asylum_seekers_at_the_border.pdf (calling on DHS Secretary to reject the use of expedited removal due to fundamental flaws including CBP failure to refer individuals who seek protection).

¹⁷ See e.g., U.S. Department of Homeland Security, *Detained Asylum Seekers: Fiscal Year 2014 Report to Congress* (Sept. 9, 2015) (indicating that 35,598 of 42,187 or 84 percent of credible fear applicants were detained in ICE custody).

¹⁸ See Complaint to Dep't of Homeland Sec. Office of Civil Rights and Civil Liberties (CRCL) calling for an investigation of the Houston Asylum Office's handling of CFIs (Apr. 27, 2021), available at https://nipnl.org/PDFs/2022_27April-CFI-complaint.pdf ("The Houston Asylum Office routinely fails to provide appropriate language interpreters to asylum seekers, forcing them to proceed with CFIs in languages in which they are not fluent. Asylum seekers have also agreed to move forward with CFIs in languages in which they lack fluency because they were unaware of their right to insist upon an interpreter in their primary language. Asylum Officers often pressure asylum seekers to go forward with interviews in their second or third-best language.").

have consistently failed to record expressions of fear and have thus failed to refer individuals for CFIs — frequently disparaging asylum seekers, baselessly claiming that individuals’ fear claims have no merit, and subjecting them to threats and abusive conditions rather than promptly referring them to AOs. In 2014, NIJC and other nonprofit organizations filed a complaint with DHS’ Office of Civil Rights and Civil Liberties as well as the Office of Inspector General.¹⁹ This complaint detailed the cases of nine complainants and observations of legal service providers pertinent to CBP’s failure to elicit or record individuals’ fear and refer them for CFIs.²⁰ The complaint documented a pattern of CBP’s failure to acknowledge asylum seekers’ fear when these individuals expressed them; coercive measures used by CBP to force these individuals to sign their own removal orders, permanently barring them from seeking asylum again; intimidation used to deter asylum seekers from presenting their claims, threatening them with detention and/or criminal charges; and failure to ask individuals if they have a fear of return, despite their statutory mandate.²¹

These systemic failures are not a relic of the past. In 2019, Congress expressed alarm that CBP personnel routinely fail to elicit expressions of fear from arriving refugees in contravention of the Refugee Convention,²² consistent with a prior finding of the DHS Office of Inspector General.²³ In 2021, Human Rights Watch published records obtained via the Freedom of Information Act that revealed over 160 USCIS officers’ internal reports regarding the treatment of asylum seekers in CBP custody, including blatant refusal to record expressions of fear²⁴ and CBP forcing asylum seekers to sign documents certifying their own removal via the threat of rape and jail.²⁵ Accountability for this conduct is elusive, even when abusive conduct is blatant and public, such as the graphic photographs depicting CBP officers violently rushing asylum seekers out of the

¹⁹ See Letter to Megan H. Mack, DHS Officer for Civil Rts. and Civil Liberties, and John Roth, DHS Inspector General, *Inadequate U.S. Customs and Border Protection (CBP) screening practices block individuals fleeing persecution from access to the asylum process* (Nov. 13, 2014), available at <https://immigrantjustice.org/press-releases/us-border-screening-errors-block-refugees-asylum-process>.

²⁰ See *id.* at 13-22.

²¹ *Id.*

²² See U.S. Congress, *Joint Explanatory Report to accompany H.R. 3931*, Dep’t of Homeland Sec. Appropriations Act, 116th Cong., 1st Sess., 116-180, (July 2019), at 23, available at <https://www.congress.gov/116/crpt/hrpt180/CRPT-116hrpt180.pdf> (“The Committee is concerned by reports of the prosecution for illegal entry and reentry of individuals who express a fear of return to their country of origin during processing by CBP. The Administration is reminded of the United States’ obligation under the 1951 Refugee Convention to refrain from punishing asylum seekers for the way in which they enter the country.”).

²³ See Office of Inspector General, *Streamline: Measuring Its Effect on Illegal Border Crossing*, (Wash., DC: U.S. Dep’t of Homeland Sec. (May 2015), at 2, available at <https://www.oig.dhs.gov/reports/2015-05/streamline-measuring-its-effect-illegal-border-crossing/oig15-95may15> (“Border Patrol’s practice of referring [individuals who express fear] to prosecution under [Operation] Streamline is inconsistent among Border Patrol sectors and may violate U.S. treaty obligations.”).

²⁴ See Human Rights Watch, *They Treat You Like You Are Worthless: Internal DHS Reports of Abuses by US Border Officials* (Oct. 21, 2021), available at <https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials> (sharing dozens of internal reports where DHS officials “prevent[] would-be asylum seekers from lodging claims or compelling them to sign papers they did not understand. One, for example, says the “applicant testified that she told the immigration officers that she was afraid to return. They wrote down that she said she was not. The applicant stated that the immigration officers did not tell her what she was signing when they typed in her signature.”).

²⁵ See Eileen Sullivan, ‘It Should Not Have Happened’: Asylum Officers Detail Migrants’ Accounts of Abuse, *The New York Times* (Oct. 21, 2021), available at <https://www.nytimes.com/2021/10/21/us/politics/asylum-migrants-abuse.html>.

U.S. in Del Rio, Texas.²⁶

2. Asylum seekers already face systemic barriers to present their claims in Credible Fear Interviews

The Departments' scheme presumes that CFIs are a reliable and fair vehicle for the screening of asylum seekers. This presumption stands in stark contrast to the experience of many of NIJC's clients, who would not have received protection but for layered efforts by large legal teams to obtain their fair day in court — a luxury not available to most asylum seekers.

NIJC client Iris experienced her CFI as a confusing and retraumatizing process that she underwent alone. She recalls: "When I first told my story, I thought that people wouldn't listen to me, that people wouldn't believe me. Ultimately, it was important that I had the opportunity to tell my story to a judge, as the environment in court was very different from that of the credible fear interview."²⁷ Other clients report asylum officers rushing them, failing to ask key follow-up questions, and/or failing to record their responses or guide them about the importance of the interview. Without NIJC's intervention, these clients would be removed to face the persecution and torture they fled. And yet, most asylum seekers proceed through the CFI without counsel who can challenge improper reliance on expedited removal screenings. By codifying this system further, the Departments favor speed over fairness and create a system where countless asylum seekers will never have their fair day in court.

Daniela's²⁸ CFI occurred with her five-year-old son who had entered the United States with her. The asylum officer required her son's presence at the interview, even though Daniela had previously presented evidence of sexual violence that led to her pregnancy with her son. During the interview, Daniela repeatedly limited her testimony regarding her prior rapes because of her discomfort discussing this information in front of her young son. Had Daniela's attorney not been present to direct the officer to an affidavit from Daniela that discussed her past harm in greater detail, significant aspects of her history would not have been disclosed.

Cristina²⁹ fled Honduras to escape domestic violence and was then kidnapped and sex-trafficked in Mexico by individuals connected to her hometown in Honduras. Her daughter, whose father was one of Cristina's traffickers, was born in Mexico. However, the asylum officer repeatedly failed to ask Cristina any questions about what had happened to her in Mexico, focusing all questions exclusively on Honduras. When

²⁶ See Felipe de la Hoz, *Biden Is Finally (Maybe!) Ending Title 42. But Trump's Cruel Border Policies Aren't Over*, The New Republic (Apr. 21, 2022), available at <https://newrepublic.com/article/166155/joe-biden-title-42-donald-trump-immigration-border> ("When the images of hat-wearing, horse-mounted agents of the state lashing scattering Black migrants with their reins began sparking outcry, the administration went into damage-control mode, with Homeland Security Secretary Ali Mayorkas promising a swift investigation that would "be completed in days—not weeks." Nearly seven months later, the results remain pending, though the agents have now been cleared of potential criminal charges.").

²⁷ See Jesse Franzblau, *"Now, my children can go outside and be safe": Iris' Story*, National Immigrant Justice Center (July 29, 2020), available at <https://immigrantjustice.org/staff/blog/now-my-children-can-go-outside-and-be-safe-iris-story>.

²⁸ Pseudonym used to protect confidentiality.

²⁹ Pseudonym used to protect confidentiality.

Cristina’s attorneys pressed the officer to ask Cristina about any harm in Mexico, the officer responded that he had already asked her to explain why she was afraid to return to Honduras. Only after the attorney continued pushing the officer did he finally ask her about Mexico, leading Cristina to disclose extensive information about the connections between the persecution in Mexico and her fears about harm in Honduras.

Without counsel (as most asylum seekers are during their CFI), Daniela or Cristina would almost certainly have received a negative finding, despite their strong legal claims to relief. Asylum seekers who have survived traumatic experiences, suffered gender-based violence, or identify as members of the LGBTQ community frequently are often unable to pass CFIs under the current system despite having viable claims. In NIJC’s experience, many asylum seekers, especially survivors of gender-based violence, simply do not know that the harm they experienced is pertinent under U.S. asylum law because their country of origin normalized or condoned this violence. Even when AOs are able to elicit more information about past harm, alarming reports persist of systematic failures to properly implement trauma-informed interview techniques.³⁰ The IFR would sanction and continue this systemic problem, despite the questionable reliability of these screenings already documented in federal court.³¹

B. The new Asylum Merits Interview: How the IFR’s procedures for the new USCIS Asylum Merits Interview will result in routine erroneous referrals to the immigration courts and deportation orders.

The IFR introduces an array of new deadlines that expedite the entire application process to the point of being often untenable, while also requiring USCIS asylum officers to render eligibility determinations in withholding and CAT, two new areas of immigration law riddled with complexity.

Asylum seekers are supposed to go through their CFI within days of their apprehension. During that brief window, in which asylum seekers are detained by default, finding legal representation and gathering evidence is difficult or impossible. From there, the IFR states that the Asylum Merits Interview must be scheduled within 21 to 45 days of an individual’s positive fear screening, which could mean that an asylum seeker’s merits adjudication could occur in their first month in the United States.³² Amidst this rapid timeline, some evidence is due 14 days prior to the interview while other evidence is due 7 to 10 days prior.³³ Following the interview, AOs may have as little as two weeks to render their decision.³⁴ This timeline would severely compromise the ability of asylum seekers to meaningfully present their claims.

³⁰ See Complaint *supra* n.18.

³¹ See *Jimenez Ferreira v. Lynch*, 831 F.3d 803 (7th Cir. 2016) (ruling that Dominican woman who fled to the United States to escape an abusive partner was wrongly denied protection because the Immigration Judge and Board of Immigration Appeals (BIA) placed too much weight on the notes USCIS officer took during the woman’s initial asylum screening interview); *Cuesta-Rojas v. Garland*, 991 F.3d 266 (1st Cir. 2021) (reversing adverse credibility finding, which rested at least in substantial part on asserted discrepancies between noncitizen’s credible fear interview account and his removal proceeding account).

³² 8 C.F.R. § 208.9(a).

³³ 8 C.F.R. §§ 208.4(b)(1); 208.9(e)(1).

³⁴ 8 C.F.R. § 208.9(e)(2).

Based on NIJC’s experience in working with asylum seekers who have recently arrived to the southern border, this timeline means that the vast majority will undergo their fear screening and their subsequent USCIS Asylum Merits interview without counsel. The IFR leaves individuals with as little as *one week* to retain counsel — an impossible feat even in areas of the country with the greatest possible access to attorneys with asylum expertise; and particularly unreasonable when accounting for the likelihood that asylum seekers will be detained for much, if not all, of this time. The Departments acknowledge the significant strain imposed by these timelines, but opt to rush people through these interviews anyway, without sufficient time to prepare.³⁵ USCIS can only deviate from the expedited interview scheduling of this IFR in the case of exigent circumstances, which the Departments define restrictively as interpreter issues, AO sickness, or the asylum office’s closure — i.e., none of which relate to asylum seekers’ needs to prepare or gather evidence.³⁶

Proceeding without an attorney will create cascading problems for asylum seekers. Asylum seekers face two confusing deadlines right before their interview: up to seven days before the interview,³⁷ asylum seekers have a window to correct any mistakes on their CFI, now converted into an asylum application; concurrently and up until 14 days before the interview, asylum seekers must submit any relevant evidence to support the merits of their asylum claim. The seven-day submission window for corrections of AO errors is critical, because these errors, misunderstandings, or even mistranslations, may all be consequential or determinative of credibility assessments and other legal determinations made by AOs and IJs. Missing this window could taint the entire proceeding for asylum seekers — something pro se applicants are largely unable to anticipate. Meanwhile, the 14-day track is key to an applicant’s ability to provide basic support for their claims, including coordinating the receipt and submission of evidence from their home country, supporting affidavits, country conditions evidence, and articulating the basis of their asylum claim under proper (extremely complex) legal precedent. Preparing this submission is onerous for experienced attorneys and can often take 100 hours or more, let alone unrepresented and often detained people with little understanding of the burden they bear under U.S. law. Rushing asylum seekers through these deadlines will compromise the search for counsel and compliance with these new requirements, even though the former is key to the latter.

This rushed timeline will also hinder NIJC and other legal service providers who endeavor to match asylum seekers with pro bono representation. It is only thanks to this model that NIJC is able to serve more than 800 asylum seekers at any given moment. But it often takes weeks or even months to place a case with pro bono counsel. The compressed timeline will also make the proper presentation of cases practically impossible. For example, NIJC and its pro bono teams frequently retain experts to provide evidence to support the legal claims to meet the asylum

³⁵ See 87 Fed. Reg. at 18143 (“While recognizing that affirmative asylum applicants often spend a greater amount of time preparing their asylum application in advance of filing and have more time inside the United States to procure and consult with counsel, the Departments also must consider that delaying the Asylum Merits interview for any considerable length of time to allow applicants in the Asylum Merits process a similar amount of time would undermine the basic purpose of this rule: To more expeditiously determine whether an individual is eligible or ineligible for asylum.”).

³⁶ 8 C.F.R. § 208.9(a)(1).

³⁷ 8 C.F.R. § 208.4(b)(2).

burden. NIJC also obtains forensic evaluations to serve as corroboration when a client presents with physical scars or other medical signs of torture. Similarly, NIJC regularly endeavors to present psychological evaluations, and corroborating evidence from the client's home country. Under the timelines imposed by the IFR, little of this evidence-collection will be possible. As such the IFR will impair NIJC's efforts to advance its mission of defending the legal rights of immigrants and asylum seekers.

Even asylum seekers with counsel will lack the full and fair opportunity to present their claim under these strenuous deadlines. In NIJC's experience, intakes for asylum seekers can take multiple conversations, which can last hours at a time, and in some cases must be spread out over time to limit retraumatization. In addition to this assessment, NIJC conducts conflict checks and assesses its capacity to provide representation in-house, refer for pro bono representation with training and ongoing guidance from NIJC attorneys, or refer asylum seekers to other service providers. If NIJC accepts a case in-house or via pro bono placement, merely gathering evidence and reviewing the CFI can take weeks to months, often requiring extensive research, contacting relatives and other witnesses in asylum seekers' home country, and developing the rapport and trust necessary for asylum seekers to share their full personal story. In cases where NIJC is able to place a case with pro bono counsel, it can take that legal team, which generally consists of non-immigration experts, weeks to build competency so that they can meaningfully begin their representation. This timeline will not be possible under the IFR.

Furthermore, the IFR's inclusion of withholding and CAT within the scope of AO review renders proper preparation and evidence submission even more critical. Making out a claim for relief under withholding or CAT requires meeting different burdens and establishing different legal elements than asylum, and some of these elements are not consistently applied across the country. In NIJC's experience, applying for withholding of removal and CAT while concurrently seeking asylum requires scrupulous review of circuit court and BIA precedent as well as an assessment of relevant regulations. Preparing these cases further requires counsel to assess the proper evidence required for meeting the requirements of each claim and to triage the importance of collecting that evidence on a particular timeline. The expedited time frame the IFR requires is not only untenable for asylum claims; it is prohibitive given the Departments' aim to expand AO's scope of review.

The consequences of truncated preparation and evidence submission are dire. Such expedited time frames may result in returning individuals to their persecutors or torturers and barring them from return for five years, with scant judicial review. It also poses organizational and even ethical issues for organizations like NIJC. Two of NIJC's key priority areas are (a) ensuring access to counsel in immigration proceedings, which includes providing high quality legal counsel and advocating for a guaranteed right to counsel and (b) defending, maintaining, and expanding access to asylum and related forms of relief. NIJC will not be able to ethically advance this mission without dramatically reducing the number of asylum seekers it is able to serve at any given time. These issues are also present for private attorneys because attorneys have ethical obligations to engage in zealous representation and to maintain a reasonable and workable caseload. These lawyerly obligations are all but impossible to satisfy while representing individuals subject to the IFR, which may dissuade attorneys from taking on this representation entirely.

Asylum seekers and legal service providers won't be alone in suffering adverse consequences of these rushed timelines; so will the Departments. The Departments presume that the AO's non adversarial review will decrease referrals to the immigration court under this rule.³⁸ This supposition presumes one of two scenarios: individuals promptly prevailing at the asylum office or declining review by the IJ. Historically, asylum seekers have had greater success before IJs than AOs.³⁹ The IFR is unlikely to reverse that tide under this rushed timeframe, which will inevitably limit evidence submitted without lessening the complex requirements of U.S. asylum law. And once a person is referred to an IJ following an on-the-merits denial from the AO, there will be new concerns introduced into the proceedings before the IJ (like improper credibility assessments and incorrect consideration of the asylum elements stemming from rushed or incomplete briefing) that will compromise those proceedings as well. In other words, even though the IFR will make the process more efficient for a small minority of applicants who are able to prevail quickly, it will prolong and complicate the system for most others, and will introduce additional complications that undermine access to a fair process for those in this majority.

Given these challenges, the Departments should, at a minimum, withdraw or expand on these rushed timelines. Even if the Departments withdrew these rushed timelines, we note that their plan to field claims through USCIS fails to incorporate essential improvements to the existing interview process in order to avert unnecessary referrals to IJs. The Departments emphasize their plan to proceed with a phased implementation "to hire new employees and spend additional funds to fully implement the new Asylum Merits process" and outline their plan to place individuals who pass fear screenings in 240 proceedings until USCIS has sufficient support for the full roll-out of this rule.⁴⁰ NIJC appreciates this cautionary approach, but notes that any implementation of this IFR (phased or in full) would require substantive changes to the asylum interview process to comport with due process requirements.⁴¹ In our comment on the NPRM, NIJC outlined several ways in which USCIS should improve its new merits interviews for asylum seekers to conform with the Departments' intent to uphold fairness:

- confirm that attorneys may elect to offer an opening statement and question their clients directly first, followed by the AO asking questions on narrow issues that require clarification;
- confirm that attorneys may offer a closing statement at the conclusion of the interview;
- require officers to review filings in advance of asylum interviews and train them to explore credibility without requiring asylum seekers to provide such a level of detail

³⁸ 87 Fed. Reg. at 18090 ("This IFR will help more effectively achieve many of the goals outlined in the Global Asylum rule — including improving efficiency, streamlining the adjudication of asylum, statutory withholding of removal, and CAT protection claims, and lessening the strain on the immigration courts — albeit with a different approach. This rule helps meet the goal of lessening the strain on the immigration courts by having USCIS asylum officers adjudicate asylum claims in the first instance, rather than IJs. As explained further in this rule, the Departments anticipate that the number of cases USCIS refers to EOIR for adjudication will decrease").

³⁹ See TRACImmigration, *Asylum Grant Rates Climb Under Biden* (Nov. 10, 2021), available at <https://trac.syr.edu/immigration/reports/667/> ("Historically, asylum seekers have had greater success in the Immigration Court for affirmative as compared with defensive asylum cases.").

⁴⁰ 87 Fed. Reg. at 18185 (declining to proceed with pilot and favoring phased implementation).

⁴¹ The IFR adds but one new safeguard to this new Asylum Merits Interview, the clarification that attorneys can question witnesses. See 8 C.F.R. § 208.9(d).

about torture and persecution that they experienced resulting in unnecessary retraumatization;⁴²

- train officers to detect indicia of incompetency that may adversely impact asylum seekers' ability to proceed,⁴³ especially in light of the adverse impact of trauma on memory;⁴⁴
- make referrals to IJs for full removal proceedings when presented with significant indicia of incompetency so that applicants can be assessed and potentially appointed a Qualified Representative;⁴⁵
- permit USCIS to appoint counsel in other cases where counsel is necessary to ensure fairness;
- permit asylum seekers and their counsel to record objections and make requests that the record reflect nonverbal activity (e.g. "Let the record reflect the application is showing a scar on her leg," or "Let the record reflect the applicant is crying.");
- create robust oversight and complaint mechanisms, including the option to elevate complaints to a supervisor during or immediately following the interview, so that asylum seekers have recourse when officers restrict their rights, do not provide appropriate language access services, or silence witnesses or counsel.

In sum, we call on the Departments not only to withdraw their proposed expedited timeframes, but to engage with NIJC and other stakeholders on specific measures to improve its AO interview procedures *prior* to launching the significant changes they contemplate. No asylum seeker should be better served in immigration court than in non-adversarial proceedings. USCIS should not presume that the existing interview process (layered with expedited timeframes) will be sufficient to comply with asylum seekers' rights under domestic law as well as international

⁴² This is particularly important as USCIS interviews often take many hours to a full work day. In NIJC's experience such long interviews do not permit asylum seekers to benefit from the non-adversarial setting of the affirmative process, as they would spend less time testifying in immigration court than before USCIS. NIJC would urge USCIS to refrain from such lengthy interviews that are bound to retraumatize applicants.

⁴³ Current USCIS procedures make clear that, unlike immigration judges, asylum officers are not trained to detect indicia of incompetency pursuant to *Matter of M-A-M*, 25 I&N Dec. 474 (BIA 2011). See USCIS, *Asylum Division Affirmative Asylum Procedures Manual* (AAPM) (May 2016), available at <https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf>, at II.J.12 (p.18) ("Asylum Office personnel are neither trained nor expected to evaluate an asylum applicant's mental or physical competency and shall not make any determinations to that effect."). This means that asylum seekers living with mental or physical disabilities have little to no remedy under the Rehabilitation Act and Due Process Clause to seek the accommodations they require. For example, section III.B.6. (p.38) of the AAPM largely prevents asylum officers from waiving the asylum seeker's presence or testimony, if no other witness is available. This would force mentally incompetent asylum seekers to testify and prevent other remedies, such as ascribing the same weight to a written declaration as sworn testimony of the asylum seeker or witnesses unable to appear, or proffer from counsel based on the written submission.

⁴⁴ See Saadi A, Hampton K, de Assis MV, Mishori R, Habbach H, et al., *Associations between memory loss and trauma in US asylum seekers: A retrospective review of medico-legal affidavits* (2021), PLOS ONE 16(3): e0247033, available at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0247033>.

⁴⁵ As noted in this section and n. 43 *supra*, USCIS does not have robust procedural safeguards to screen and process the claims of incompetent asylum seekers. Until USCIS can adopt stronger procedures and policies so these individuals can properly benefit from the affirmative process without compromising their rights under the Due Process Clause and the Rehabilitation Act, we recommend sending those claims to immigration judges.

treaty obligations to fair consideration of their claims.

C. Immigration Court Review: More untenable timeframes and procedural requirements will harm asylum seekers' right to fundamentally fair hearings.

The IFR introduces a wholly new procedure for immigration court review, which was not included in the original NPRM and therefore did not benefit from comments about it. Under the guise of “streamlined section 240 removal proceedings,”⁴⁶ the Departments propose rapid immigration court deadlines and procedures that will result in removal orders for many people with viable asylum claims. As we explain below, (1) the Departments fail to justify these new, unreasonably rushed timelines; (2) this new process will fail to safeguard the due process rights of unrepresented asylum seekers; (3) even represented asylum seekers will not have sufficient time to prepare and benefit from fair proceedings; (4) the IFR’s new procedural hurdles and timelines will harm respondents most, in the name of speed and efficiency; and (5) the discrete safeguards they propose are insufficient to avoid irreversible harm to asylum seekers.

1. The IFR’s expedited processing and deadline are unreasonable, do not actually achieve the purported purpose of balancing efficiency and fairness, and have not been sufficiently explained.

The stated “principal purpose” of the IFR is to increase “efficiency[] and “fairness of the process” by which people seek protection from persecution.⁴⁷ However, the IFR unreasonably imposes stringent deadlines on asylum seekers, even though the Departments are not positioned to accommodate those deadlines. Further the IFR relies on vague “caveat[s]” that “it will take time to fully implement the rule,” without providing meaningful guidance for stakeholders about how implementation will actually work, leaving asylum seekers, their attorneys, and the immigration systems at a loss for how to prepare to respond.⁴⁸

The timelines contemplated under this IFR are no less confusing and stringent for IJ proceedings than they are for AO interviews. The IFR requires the first master calendar hearing to occur 30 days after *service* of a notice to appear (NTA).⁴⁹ This change is problematic for asylum seekers, their attorneys, and the Departments.

First, there is frequently a substantial gap between when an NTA is served upon the respondent and when it is *filed* with EOIR. DHS has struggled mightily to issue NTAs that even have hearing dates on them, much less NTAs with hearing dates within 30 days.⁵⁰ In addition, the Departments have been unable to manage the scheduling of master calendar hearings for those individuals who are *already* in proceedings before EOIR, the result being ongoing cancellations

⁴⁶ 87 Fed. Reg. at 18097.

⁴⁷ 87 Fed. Reg. at 18089.

⁴⁸ 87 Fed. Reg. at 18089.

⁴⁹ 8 C.F.R. § 1240.17(b).

⁵⁰ See *Pereira v. Sessions*, 138 S.Ct. 2105, 2119 (2018) (government citing administrative burden of meeting threshold statutory requirements in serving NTA with time, date, and place of proceedings); *Niz Chavez v. Garland*, 141 S.Ct. 1474, 1484 (2021) (“The government admits that producing compliant notices has proved taxing over time.”).

and failures to address cases that are already on the immigration courts' dockets.⁵¹ The inevitable delay for existing cases will prejudice individuals who wish to move forward with their case as quickly as possible, including asylum seekers who want to reunite with family and applicants for cancellation of removal who risk becoming ineligible for that relief as their qualifying-relative children approach adulthood. Requiring hearings to be set within 30 days when EOIR is in no position to effectively manage its docket for people with existing cases is unreasonable in that it forces newly arrived asylum seekers to proceed on an unfeasibly fast timeline even though EOIR is in no position to accommodate that timeline. There are simply not enough adjudication resources for this timeline to be workable on EOIR's end.

Additionally, for cases directly impacted by the IFR, the Departments fail to consider how the gap between service and filing of NTAs, paired with the demanding timeline in this rule, would complicate the case-completion process. Asylum applicants cannot file materials with EOIR, including changes of address forms and notice of appearance by an attorney, until the NTA is served on the court. Delays in that process when accompanied by a short 30-day window will create a significant risk that attorneys and asylum seekers alike will not receive notice of hearings or be able to file requests to make changes to those hearings. These changes are likely to result in improper notice to respondents and unfair *in absentia* removal orders for failure to appear.

Second, once the NTA is filed, asylum seekers have two back-to-back hearings and only one month from their first master calendar hearing to prepare key elements of their claim (discussed further at section II.C.3. *infra*). Their second hearing could be their last, leaving asylum seekers without a merits hearing. These timelines and procedures undermine the Departments' stated purpose by forcing applicants for asylum, withholding of removal, and CAT protection to gather sufficient evidence — especially from foreign countries that must be translated — to meet their burden for their claims under unreasonably restrictive deadlines. Combined with the rushed timeline at the asylum office, the EOIR deadlines will be unworkable for many asylum speakers, who often have limited language access, are navigating proceedings *pro se*, need to gather significant evidence to support their cases, and may also be detained. In many cases, asylum seekers are forced to flee their home countries with little or no opportunity to plan for their departure. In practice, this means that many asylum seekers arrive in the United States with little or no supporting documentation. In order to obtain such evidence, asylum seekers must often coordinate with family or loved ones in their home country. Family or loved ones may then have to travel to remote locations or navigate bureaucratic procedures to obtain the documents or evidence requested. This is a practice that can take weeks or months. The timelines in the IFR fail to take into consideration the reality many asylum seekers are forced to navigate and will effectively preclude many individuals from accessing protection.

Third, even the stated goal of “operational efficiency” is unlikely to be achieved. It is virtually certain that the sort of rushed adjudication that will result from the timeline imposed by the IFR will result in adjudicative errors and deprivation of a fair opportunity to seek relief. Those errors will yield many more appeals, to the Board of Immigration Appeals and to the Circuit Courts. So

⁵¹ See e.g., Giulia McDonnell Nieto Del Rio, *Chaotic Reopening of Immigration Courts Make New York Immigrants Fear Deportations*, Documented (June 24, 2021), available at <https://documentedny.com/2021/06/24/chaotic-reopening-of-immigration-courts-make-new-york-immigrants-fear-deportations/>.

while it is true that, for some applicants, things will proceed more quickly, for many others they will just have to endure an appeal process that is already prolonged and subject to timeline concerns not addressed by the IFR. Even if operational efficiency could be a valid excuse for depriving asylum seekers of a fair chance at protection from persecution — a tradeoff that NIJC categorically rejects — the truth of this IFR is that it merely moves the delay to another part of the adjudication process. And it does so while imposing a timeline that will make it virtually impossible for many asylum seekers to access counsel, obtain evidence, and meaningfully advance their claims to protection. This is a trade that the Departments should not make.

Finally, there is no justification for these expedited timelines under the Immigration and Nationality Act (INA). First, the Rule sets individuals down a path of expedited adjudication even though the INA gives noncitizens one year from the date of their arrival in the United States to file their asylum applications.⁵² Congress adopted this one-year deadline after rejecting a 30-day deadline because it would be harmful to those “most deserving” of protection to impose an impossible timeline.⁵³ Congress established no deadline at all for withholding of removal or CAT applications, which are mandatory forms of protection.⁵⁴ One of the factors that makes the timelines in the IFR especially unreasonable is that, for all applicants subject to this IFR, they will have zero lead time before they are forced into this expedited track. Even though Congress gives them up to a year to file an application for asylum, they will be forced to apply and start defending their applications within days of entry. This is particularly troubling given the extensive record of evidence showing that even the one-year deadline already improperly precludes many asylum seekers from presenting their claims.⁵⁵ As stated above, NIJC urges the Departments to develop more efficient and predictable adjudication systems both at the asylum office and before the immigration courts. But it cannot do so while also depriving applicants of statutorily provided preparation time that would have allowed them to find counsel and gather documents to support their asylum applications.

Notably, the Departments previously attempted to limit the availability of extensions and longer filing timelines in a Trump-era Rule, “Procedures for Asylum and Withholding of Removal,” that was a companion to the Global Asylum Rule referred to in the IFR.⁵⁶ The IFR cites this Rule and the related injunction but fails to justify implementing case completion timelines and procedures that are similar to an already-enjoined rule and that are implementing the same statutory provisions. In particular, the rule enjoined by *NIJC v. EOIR* gave applicants just 180 days to complete their cases in front of IJs, and the parties in that litigation argued that the

⁵² See 8 U.S.C. § 1158(a)(2)(B).

⁵³ See Sen. Rep. 104-249, at 43 (1996) (explaining that “the persons most deserving of asylum status — those under threat of retaliation, those suffering physical or mental disability, especially when abuse resulting from torture — would most be hurt by the imposition of any filing deadline, and particularly so, if the deadline was thirty days”).

⁵⁴ See *id.* § 1231(b)(3); 8 C.F.R. §§ 1208.16-18; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 & n. 25 (1987).

⁵⁵ See Human Rights First, *Draconian Deadline: Asylum Filing Ban Denies Protection, Separates Families* (Sept. 30, 2021), available at <https://www.humanrightsfirst.org/resource/draconian-deadline-asylum-filing-ban-denies-protection-separates-families#:~:text=The%20one%2Dyear%2Dfiling%20deadline,States%2C%20with%20very%20limited%20exception> (“The filing deadline ban is a technical requirement that has blocked tens of thousands of bona fide refugees from asylum. By 2008, more than 53,400 asylum seekers had had their cases denied, rejected, or delayed due to the filing ban.”).

⁵⁶ See “Procedures for Asylum and Withholding of Removal,” 85 Fed. Reg. 81,698 (Dec. 16, 2020) enjoined by *NIJC et al. v. EOIR et al.*, No. 1:21-cv-00056-RBW (D.D.C. Jan. 14, 2021) appeal pending in *NIJC v. EOIR*, No. 21-5063 (D.C. Cir.).

timeline contemplated by that rule was contrary to law because it undermined the one-year filing deadline for asylum cases and because Congress clearly contemplated that it could take longer than 180 days for cases to be completed. The plaintiffs in that case also raised similar access to counsel and due process concerns that arise with this IFR. The Departments' statement in footnote 26 that the enjoined Rule is going to be replaced by separate rulemaking is not responsive to the fact that this IFR and that Rule do many of the same things. Instead, they punt to future rulemaking to address the necessary revisions to comply with the injunction.⁵⁷

Like the enjoined Trump rule, the IFR purports to rush asylum seekers through adjudication in between 45 and 180 days based on an overly strict reading of the INA.⁵⁸ The National Association of Immigration Judges previously explained that “the overwhelming numbers of applicants in 2020 make it impossible to meet the 180-day deadline while ensuring due process.”⁵⁹ Unlike the enjoined Trump rule, the Departments not only seek to have respondents go through their claim within 180 days, but expect them to do so while appearing between two separate agencies and meeting many critical deadlines in the interim.

Despite these many logistical and statutory conflicts, the Departments fail to address prior comments raising concerns about time frames, and instead impose a timeline that was largely absent from the initial IFR with the purported goal of “achieving a streamlined process.”⁶⁰ The IFR dodges the core of these concerns, instead rationalizing that only modest modifications or edits to the credible fear determination are envisioned. This explanation appears to gloss over each asylum seekers' right to meaningfully participate in their case.

2. Implementation of the IFR with its current expedited timeframes is not realistic for unrepresented respondents.

The master calendar hearing may be the only time that asylum seekers learn of their right to appear with counsel. Yet the IFR provides a mere 30 to 35 days after the master calendar hearing before an applicant must appear at a “status conference,”⁶¹ which could be outcome-determinative as to the scope or even occurrence of an asylum seekers' merits hearing. The Departments hinge the IFR's “efficiencies and timeline”⁶² on this newly created status conference where parties are to come fully prepared to narrow the issues at hand; however, this presumes equal negotiating parties — rather than pro se individuals facing trained ICE attorneys in a language and system few understand.

Generally, NIJC supports the use of status conferences as a means of resolving issues, eliminating disputes, or even reaching agreement on case outcomes prior to a merits hearing.

⁵⁷ 87 Fed. Reg. 18095 at n. 26.

⁵⁸ *See* 87 Fed. Reg. 18090 at n. 14 (citing INA § 208(d)(5)(A)(ii)–(iii), 8 U.S.C. § 1158(d)(5)(A)(ii)–(iii) to support the regulatory change that asylum interviews will occur within 45 days and that adjudication should be completed within 180 days).

⁵⁹ *See* National Association of Immigration Judges Comment to NPRM at 2 (Oct. 23, 2020), *available at* <https://www.regulations.gov/document?D=EOIR-2020-0005-1701>.

⁶⁰ 87 Fed. Reg. at 18144.

⁶¹ 8 C.F.R. § 1240.17(f)(2).

⁶² 87 Fed. Reg. at 18101.

However, the IFR incorrectly presumes that (a) asylum seekers will be able to obtain counsel in time to participate in these conferences or (b) that pro se individuals will be in a position to meaningfully negotiate effectively in these hearings. The reality is most legal service providers and private immigration attorneys have limited capacity to immediately commence preparation on a case. In NIJC's experience as a service provider of Legal Orientation Programs (LOP) for detained individuals, there is no guarantee that individuals will even have access to LOP services, let alone retain counsel, prior to their first court hearing.⁶³ NIJC and similar organizations would need to make significant deviations in existing work-flows to screen and offer representation to asylum seekers in a timely fashion to prepare for the status conference under the IFR. This would likely place us and other organizations in a position of choosing between helping those who have been waiting for our services (many of whom may remain detained because the Departments opted not to spell out public interest factors for their release) and those who we will need to serve immediately lest they be forced to proceed pro se on an unworkable timeline.

The reality is that presenting an asylum case has become exceedingly complicated, and changes in the law over the past several years have only increased that complexity. This complexity grows exponentially for asylum seekers who do not benefit from having an attorney by their side. The IFR imposes a timeline that would be viable *only if* presenting an asylum case were straight forward and did not require, for example, documentation to prove the "social distinction" of a particular social group, substantial corroboration to establish credibility, and either direct or circumstantial evidence to show that an individual's membership in a protected group was "one central reason" for the harm they faced. Ignoring the complexity of this law, while erecting new deadlines that make securing counsel near impossible, will all but ensure the unfair removal of pro se asylum seekers.

3. Even represented respondents are not guaranteed fair proceedings under this new rocket docket.

Asylum seekers who manage to secure counsel are not necessarily more likely to succeed in a status conference. Preparing for this conference would be a tall order for most experienced attorneys, as respondents are required to: plead to the charges against them; indicate whether they intend to testify before the court; identify any witnesses they intend to call provide additional supporting documentation; describe alleged errors or omissions in the AO's decision or the record of proceedings before USCIS; articulate or confirm any additional bases for asylum and related protection (whether or not they were presented to or developed before the AO); and state any additional requested forms of relief or protection. This new status conference concentrates and consolidates many issues that cannot be resolved on the relevant timeline. For example, the obligation to identify witnesses and provide supporting documentation will require applicants to find expert witnesses (whether medical providers or country conditions experts), secure declarations from them, and verify their availability on an unrealistic timeline. And the obligation to describe errors and omissions and identify additional avenues for relief will require (for those lucky enough to have counsel) that attorneys fully review the record and coordinate with the applicant within days or weeks of having come into contact with the client. In sum, the

⁶³ See 85 Fed. Reg. 81,716 (nearly one in four LOP participants do not receive any services until after their first master calendar hearing).

IFR requires asylum applicants to meet every requirement within one month of their very first court hearing, which is unreasonable in the best of circumstances.⁶⁴

For legal services providers such as NIJC who rely on the private bar to amplify their ability to provide services, these expedited case timelines and deadlines will undermine our ability to find pro bono attorneys willing and able to take on asylum representation cases. Even law firms and corporations with the most active asylum pro bono practices usually require at least a week simply to vet a case for consideration and run conflicts; additionally, pro bono attorneys are juggling their asylum caseload along with their caseload of paying clients. NIJC is already finding it increasingly difficult to find pro bono attorneys willing to provide asylum representation because of the varied and chaotic nature of immigration court proceedings; under these expedited timeframes our pro bono practice would be compromised, particularly if much of this work occurs while individuals remain detained at the Southern border.

NIJC would welcome predictable and reasonably faster timelines for the adjudication of asylum cases. In our experience, pro bono attorneys are more inclined to take cases that they know will be resolved at a date certain in the foreseeable future. The current system, which is rife with hearing cancellations and resets multiple years into the future does not do asylum seekers, their counsel, or organizations like NIJC any favors. But the IFR is not a viable solution to this problem. Instead, it takes a system with timelines that are far too slow and replaces it with one that is entirely too fast.

The Departments cannot sacrifice the fairness of these proceedings in the name of expediency and efficiency, and that is precisely what the IFR does. Immigration cases before EOIR took an average of 184 days to adjudicate in 1998, which steadily increased to an average of 533 days by 2019, according to Syracuse University’s nonprofit data research center “TRAC.”⁶⁵ Newly arrived asylum seekers are not responsible for that delay, and it is unreasonable and contrary to the United States’ international treaty obligations to place the onus of fixing this problem on their backs. When Congress adopted the one-year filing deadline for asylum cases, it did so after debating and rejecting a much shorter, 30-day deadline.⁶⁶ It rejected shorter timelines reasoning that “the persons most deserving of asylum status — those under threat of retaliation, those suffering physical or mental disability, especially when abuse resulting from torture — would most be hurt by the imposition of any filing deadline, and particularly so, if the deadline was thirty days.”⁶⁷ The timelines imposed by the IFR run contrary to both the spirit and the letter of the INA as presented by the one-year filing deadline for asylum cases.

4. These new deadlines and requirements create imbalanced proceedings that improperly penalize asylum seekers.

⁶⁴ Proceeding pro se does not exempt asylum seekers from most requirements of this new status conference, as only the last three elements are excluded. § 1240.17(f)(2)(i)(A)(2).

⁶⁵ See *Immigration Court Processing Time by Outcome*, TRAC Immigration, available at https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (select “Average Days” under “What to Tabulate”; “All” under “Outcome Type”; and “Entire US” under “Fiscal Year 2021”).

⁶⁶ Sen. Rep. 104-249, at 43 (1996).

⁶⁷ *Id.*

To further complicate the fairness concerns, the Departments are significantly more lenient when it comes to DHS's burden for status conferences than for applicants. They do require that DHS present their position on asylum seekers' claim so as to narrow the issue, but permit DHS to revise its position before or at the merits hearing⁶⁸ — a grace they do not afford respondents.⁶⁹ They also permit DHS to decline to participate in the proceedings altogether. While NIJC welcomes the requirement that DHS engage with cases earlier on in the process, and is particularly encouraged by the possibility of DHS stipulating to relief at the status hearing, the IFR does not do enough to require or incentivize meaningful participation in this process. At present, it is NIJC's experience that, because the burden is on the respondent to demonstrate eligibility for relief, DHS is generally disinclined to agree to anything prior to seeing an applicant's evidence. NIJC is concerned that, in the context of expedited timeframes and without any incentive to do something different, most DHS attorneys will continue to assert a blanket opposition, particularly when they are likely to face an institutional interest in simply deferring to the adverse decision of the asylum officer who completed the Merits Interview.

At every step, poor preparation and misunderstanding of the IFR's requirements will unlock a chain of consequences that penalize respondents. For example, a botched status conference can have serious consequences for asylum seekers, from truncating their claims for relief to obtaining an adverse decision without a merits hearing — a disturbing outcome that could afflict many pro se respondents who fail to understand procedural requirements during the status conference.⁷⁰ Improper or rushed pleadings and proffers can also result in admissions that raise credibility concerns that compromise the merits decision. These proceedings are rushed until the finish line, as the IFR requires IJs to issue oral decisions wherever possible, overlooking once more the inherent complexity of asylum, withholding, and CAT precedent.⁷¹

5. The IFR's safeguards are insufficient to protect respondents' due process rights.

The IFR does incorporate a few safeguards, but these will do little to mitigate due process concerns:

- The Departments require service of the USCIS record of proceeding, the AO's written decision, and the I-213 to the respondent by the master calendar date.⁷² We welcome this requirement, as seeking these records is frequently burdensome and time-consuming. However, the rushed nature of immigration court proceedings under this IFR will leave little time for respondents to benefit from this new discovery requirement, as they

⁶⁸ 8 C.F.R. § 1240.17(f)(2)(C).

⁶⁹ Respondents can merely supplement what they proffered in the status conference, as well as respond to DHS' statement up to 5 days before the merits hearing but no later than 25 days after the status conference — a confounding timeline since merits hearings are to occur 60 days after the status conference. *See* 8 C.F.R. §§ 1240.17(f)(3)(ii); 1240.17(f)(2).

⁷⁰ *See* 8 C.F.R. § 1240.17(f)(4)(i-ii) (permitting decision without merits hearing within 30 days of the status conference if DHS waives cross and neither respondent nor DHS want to present witnesses). NIJC welcomes the Departments' idea of permitting IJs to grant without needing a merits hearing, but we are troubled by the possibility that rushed IJs could dispense with merits hearings after ill-prepared respondents fail to meet the many demands of the status conference, such as presenting a witness list.

⁷¹ 8 C.F.R. § 1240.17(i).

⁷² 8 C.F.R. § 1240.17(c).

scramble to prepare for the extraordinarily substantive (and fast coming) status conference.

- The IFR broadens proceedings to permit review of non-fear-based claims. However, the Departments place the burden on respondents to request review of non-fear-based claims and then to proactively present a prima facie case in order to be exempted from the IFR's rushed timelines. Here as with other aspects of these expedited proceedings, the Departments overlook IJs' duty to develop the factual record to safeguard pro se respondents' right to fundamentally fair hearings.⁷³ Without an IJ's intervention, respondents may miss their opportunity to raise other forms of relief.
- The Departments abandon their flawed "mixed cases" proposal, but leave a significant loophole for DHS to invalidate USCIS eligibility determinations. Under 8 CFR § 1240.17(i)(2), IJs can give effect to the AO's eligibility determination for withholding or CAT if that determination is favorable, unless DHS presents new evidence that the respondent is in fact ineligible. Concerningly, DHS could disturb its own sub-agency's finding by offering even one new country-conditions article that runs counter to the evidence previously in the record. Such a scenario echoes the harmful mixed cases proposal in the NPRM.
- The Departments permit requesting continuances before the IJ, but permit those in two narrow circumstances. Most continuances are limited to a meager 10-day extension (unless the IJ determines that a longer period is "more efficient").⁷⁴ Exigent circumstances can warrant continuances or filing extensions, but they are limited to cases where the IJ has made a specific finding of exigent circumstances and the extension provided is the "shortest period feasible."⁷⁵ Like with the AO interview, the Departments reduce exigent circumstances to illness and governmental office closures and deliberately exclude respondents' need for adjournments to obtain evidence or prepare for their case to avert return to danger.⁷⁶ Alternatively under § 1240.17(h)(iii), the Departments afford respondents negligible relief from the 10-day extension but require finding that longer adjournments are necessary under a statute or the Constitution. These changes impose a significant increase in the burden on applicants seeking continuances from the good cause required under regular 240 proceedings and is inconsistent with the "good cause" standard that exists elsewhere in regulations and that is generally endorsed by courts.

⁷³ See *Arevalo Quintero v. Garland*, 998 F.3d 612, 622 (4th Cir. 2021) (joining "unanimous view among [circuit courts]" that IJs have duty to develop the factual record under the Fifth Amendment).

⁷⁴ 8 C.F.R. § 1240.17(h).

⁷⁵ This is particularly troubling given the echoes between these narrow exigent circumstances and the Departments' previously enjoined rule, that also adopted an exceedingly narrow definition of exceptional circumstances. See *supra* section II.C.1.

⁷⁶ Respondents seeking to salvage their claims after failing to meet the strenuous timelines here have a limited window for post-merits supplemental evidence, so long as they submit this evidence before judges' decision and prove that they could not have been reasonably obtained this evidence prior or if exclusion would violate the law or the Constitution. § 1240.17(g). Again, the threshold here is unreasonably high and will preclude most asylum seekers from benefiting from this safeguard.

Currently, IJs can grant continuances and adjournments “for good cause shown,” with no restriction based on the adjudicatory goal of deciding cases within 180 days.⁷⁷ The Departments’ narrow proposal for continuances will effectively keep respondents on a fast track to their removal, regardless of their pleas for more time to prepare their claim.

Importantly, the Departments recognize that these expedited timelines are untenable for many by including in the IFR a plan to exempt certain individuals.⁷⁸ NIJC welcomes exempting those individuals but urges the Departments not to implement these rushed deadlines for any asylum seeker; even the most resourceful, English-speaking, and represented asylum seekers would struggle to meet the intricate requirements and pace of this IFR.

III. The IFR creates new, harmful barriers for individuals to gain employment authorization while their asylum application is pending.

The IFR provides that the positive credible fear determination will be considered a complete asylum application for the purpose of requests for employment authorization.⁷⁹ As stated in NIJC’s previous comment,⁸⁰ NIJC supports removing the burden from the applicant of having to file a formal I-589 after completing the credible fear process. We also agree with the Departments’ interests in promoting expeditious access to work authorization. The ability to work lawfully is essential for basic survival and wellbeing during an often-challenging time of integration into a new community. The Departments seem to agree with this principle. They list “expeditiously beginning the waiting period for employment authorization” as one of the motivating purposes of the IFR.⁸¹ The IFR also references the positive effects of individuals receiving employment authorization earlier as a result of “efficiencies” introduced by the IFR.⁸²

But the rushed timeline introduced in this IFR effectively moots this proposal, suggesting that the Departments either did not consider important aspects of this issue or that they did not in fact intend to improve access to work authorization as the IFR suggests.

The timeline for most asylum cases subject to the IFR is as follows:

⁷⁷ See 8 C.F.R. §§ 1003.29, 1240.6.

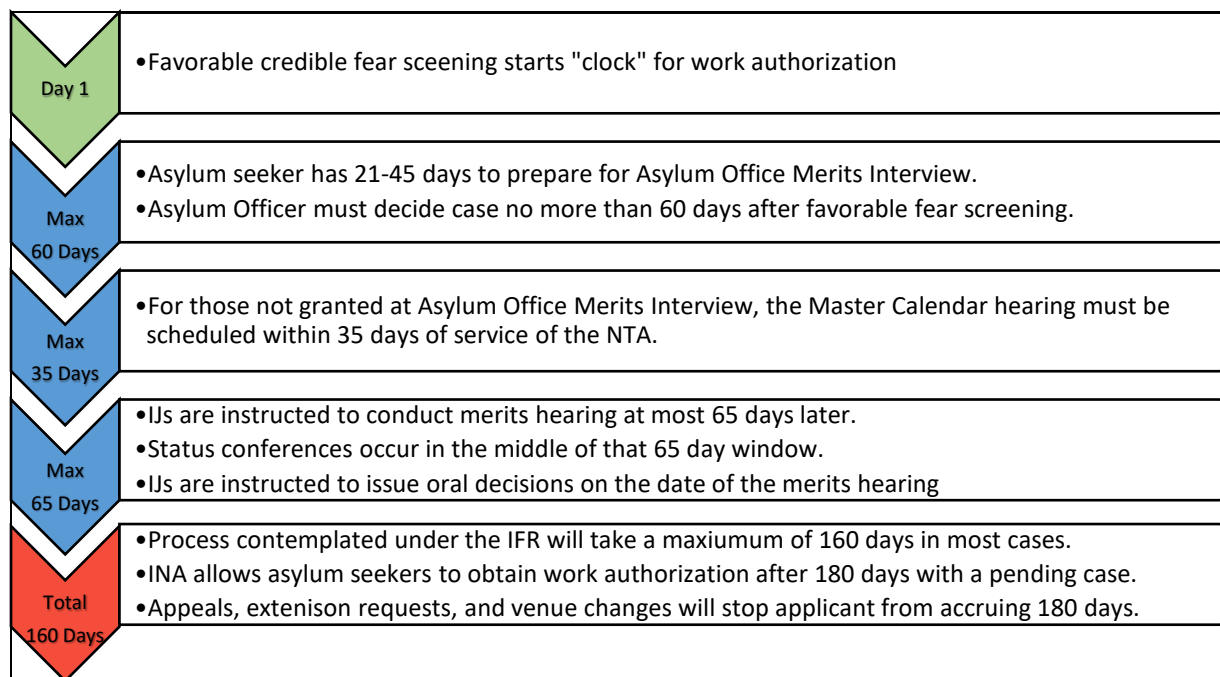
⁷⁸ 8 C.F.R. § 1240.17(k) (exempting from expedited timelines under § 1240.17(f-h) particular individuals: served their NTA while children, with indicia of incompetency, with prima facie cases for other forms of eligibility, whom IJs find removable to third countries before they express fear of removal to that country, who are not removable as charged, with rescinded removal orders).

⁷⁹ 87 Fed. Reg. at 18085.

⁸⁰ See NIJC comment to NPRM, *supra* n.8, at 30.

⁸¹ See NPRM, 86 Fed. Reg. 18096. See also *id.* at 46931-32 (analyzing benefits to labor market, companies, and taxation).

⁸² 87 Fed. Reg. at 18115; 18197 (table summarizing expected impacts of IFR, including the benefit of \$225.44 to individuals per workday, which would bring numerous positive contributions to the economy).



As this diagram demonstrates, cases that are completed on the timeline contemplated by the IFR will mostly be finished within 160 days (this will be the case when no continuances are granted, and that there is no delay between the AO decision and service of the NTA). For those who are granted asylum during that time, they will no longer need access to work authorization because asylees do not require work authorization.⁸³ For those who are denied by the IJ — a number that is likely to grow under the IFR’s crushing timeline — that denial will stop their EAD “clocks,” making them ineligible for work authorization for the duration of the appeal process which is likely to take a year or more.⁸⁴ In addition, the timelines set forth in the IFR are likely to result in numerous “applicant caused delays” in proceedings. These “delays” will be necessary to gather evidence and ensure a fair hearing, but they are also likely to stop the “clock” that governs eligibility for work authorization.⁸⁵

In other words, the Departments’ stated commitment to ensuring that asylum seekers can gain a livelihood is not borne out by the IFR because the expedited timeframes mean that nearly all asylum seekers who must seek immigration court review will be precluded from ever obtaining work authorization during their proceedings.

As submitted in our earlier comment,⁸⁶ the Departments should remedy this problem by enabling asylum seekers who are released on parole to seek EADs under (c)(11). Paroling asylum seekers

⁸³ See *USCIS Handbook for Employers*, Section 6.3, <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/60-evidence-of-status-for-certain-categories/63-refugees-and-asylees> (explaining that documentation demonstrating proof of asylee status is sufficient for unrestricted access to work, without the need for a separate work authorization).

⁸⁴ See *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81,588 at 81,619 (Dec. 16, 2020) (acknowledging a “323-day median case appeal time period” as of December 2020).

⁸⁵ 8 C.F.R. § 208.7(a)(2) (discussing applicant-caused delays).

⁸⁶ See NIJC Comment, *supra* n.8, at 34.

without affording them access to EADs will all but ensure they are impoverished throughout the asylum process, inevitably interfering with their capacity to see their claims through. The Departments should also engage in separate rulemaking that eliminates “applicant-caused delays” as barriers to work authorization and that enables applicants to seek work authorization in the first instance even during the appeal process.

In addition to depriving asylum seekers of the ability to provide for themselves and their families, precluding EAD eligibility during asylum processing has myriad other harmful consequences. Most asylum seekers cannot obtain any form of identification, such as a driver’s license, without first receiving their EAD.⁸⁷ Delaying the ability of asylum seekers to obtain an EAD, therefore, undermines access to numerous building blocks of stability, such as: accessing social benefits, opening a bank account, registering a child for school, driving children to school, or ensuring heating and electricity at home.

Conclusion

NIJC has three decades of experience providing legal services to asylum seekers. Based on this cumulative experience, we are deeply concerned about the new timelines and procedures this IFR pilots. Asylum seekers are in desperate need of a fair and reliable asylum process. Unfortunately, the process the Departments propose is rushed beyond justification and strips asylum seekers of the precious time they need to prepare their cases, retain counsel, and sustain themselves. NIJC calls on the Departments not to implement the IFR under the proposed timelines and consult with experts on the proper procedure to protect asylum seekers’ rights.

Thank you for providing this opportunity to comment: please do not hesitate to reach out to aerfani@heartlandalliance.org with any questions.

Respectfully,

National Immigrant Justice Center

⁸⁷ See *Casa de Maryland v. Wolf*, 486 F. Supp. 3d 928, 936 (D. Md. 2020), appeal dismissed sub nom. *Casa De Maryland v. Mayorkas*, 2021 WL 1923045 (4th Cir. 2021).